

**CRACKING OPEN THE GOLDEN DOOR:
A PROPOSED AMENDMENT TO EXTEND REFUGEE STATUS TO
SPOUSES WHO HAVE BEEN PERSECUTED BY CHINA'S
ONE-CHILD POLICY**

SEAN MASSON

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INTRODUCTION

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

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

Faced with the terrible choice between country and family, many Chinese nationals flee to the United States and apply for political asylum instead of suffering brutal persecution for violating China’s infamous one-child policy.⁶ Since the 1996 amendment⁷ to the Immigration and Naturalization Act,⁸ the definition of refugee⁹ has

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

² *See* ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 94–95 (1990).

³ *Id.*

⁴ 8 U.S.C. § 1101(a)(42)(A) (2000).

⁵ Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 42–45 (1983).

⁶ *See infra* Part I.A. The one-child policy generally restricts Chinese families from having more than one-child in order to control the country’s rapidly growing population. *See, e.g.*, STEVEN W. MOSHER, *A MOTHER’S ORDEAL: ONE WOMAN’S FIGHT AGAINST CHINA’S ONE-CHILD POLICY* (1993).

⁷ Illegal Immigrant Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, § 601(a)(1), 110 Stat. 3009–689 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2000)).

⁸ 8 U.S.C. § 1101(a)(42)(A).

been broadened to include those people forced to undergo abortion or sterilization as a result of violating the one-child policy. The administrative agency tasked with interpreting the 1996 amendment extended refugee protection to legally married spouses of one-child policy victims.¹⁰ However, the circuit courts have been at odds with each other regarding this issue¹¹—leaving both married and unmarried partners of direct victims uncertain of whether they will receive asylum protection.

This Article proposes an amendment extending asylum protection to both the legally and traditionally married spouses of direct victims of China’s coercive family planning programs. Part I briefly describes the current state of the immigration and asylum laws passed by Congress in response to China’s “one-child” policy. Part II then analyzes why the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 should be amended to explicitly grant asylum to both the direct victims of China’s coercive family planning programs and their spouses. In Part III, a proposed amendment is proffered. Finally, Part IV confronts the opposition to such an amendment—namely, that if it should be amended at all, it should only include the legally married spouses of direct victims, and that no politician or judge would want to go near this issue for fear of the political fallout.

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

¹⁰ *In re S-L-L-*, 24 I. & N. Dec. 1, 4 (BIA 2006).

¹¹ *See infra* Part I.B.

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

A. China's One-Child Policy

During the 1950s, the Chinese government sought to increase its work force by encouraging its citizens to have large families.¹² Chairman Mao even went so far as to call birth control a “bourgeois plot to visit bloodless genocide upon the Chinese people”¹³ and encouraged the people of China to have large families with the slogan: “the more babies the more glorious are their mothers.”¹⁴ But after twenty years, the Chinese government realized the dire consequences that would ultimately result from such encouragement. After a perceived failure at reducing birthrates,¹⁵ the Chinese government unleashed the now infamous “one-child policy”¹⁶ in an effort to stem the

¹² Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 560 (1996) (noting that this program was one of the major causes of the explosion in China's population.)

¹³ MOSHER, *supra* note 6, at 56; *see also* Peter Goodspeed, 'Fewer Children—Fewer Burdens': Severe Birth Control Measures Aim to Curb Demands of Swelling Population, Still Another 64,000 Babies Born Daily, TORONTO STAR, Jan. 11, 1991, at B1.

¹⁴ Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 147, 148 (1996).

¹⁵ The “later, longer, fewer” program sought to “encourage later marriages, longer intervals between births, and fewer children.” Zhang, *supra* note 12, at 561. The result after ten years was a drop in the average fertility rate from 5.9 to 2.9 children per woman. Therese Hesketh et al., *The Effect of China's One-Child Family Policy After 25 Years*, 353 NEW ENG. J. MED. 1171, 1172 (2005).

¹⁶ *See* Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 621, 623 (1996). “Chinese leaders have stressed that the one-child policy is just that—a policy, not a law to be enforced throughout China without regard to local conditions. Guidelines issued at the central level are to be adapted to the specific conditions in each province and local area.” L.M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Right to Informed Choice?*, 19 FORDHAM INT'L L.J. 611, 638 n.117 (1995) (quoting Karen Hardee-Cleaveland & Judith Banister, *Fertility Policy and Implementation in China, 1986–88*, 14 POPULATION & DEV. REV. 245, 252 (1988)).

tide. This policy, codified in Chinese law, only permits married couples to have children.¹⁷ The core of the one-child policy consists of regulations that restrict “family size, late marriage and childbearing, and the spacing of children (in cases in which second children are permitted).”¹⁸ According to the Chinese government, the one-child policy has prevented between 250 and 350 million births.¹⁹

Still in effect today, violations of the one-child family policy result in horrendous punishments, including forced abortions,²⁰ imprisonment,²¹ fatal beatings,²² extreme

¹⁷ See generally Population and Family Planning Law of the People’s Republic of China (Order of the President No.63) (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2001, effective Sept. 1, 2002), available at http://english.gov.cn/laws/2005-10/11/content_75954.htm. “Citizens have the right to reproduction as well as the obligation to practise [sic] family planning according to law. Both husband and wife bear equal responsibility for family planning.” *Id.* at art. 17 (emphasis added).

¹⁸ Hesketh et al., *supra* note 15, at 1171. The one-child policy is strictly enforced in urban areas that contain approximately thirty percent of the population. *Id.* The most common exception in which a couple is permitted to have a second child is limited to those couples in rural areas whose first child was either a girl or disabled—taking into account “both the demands of farm labor and the traditional preference for boys.” U.S. Dep’t. of State, 1999 Country Reports on Human Rights Practices: China (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.htm>. Other exceptions are made for ethnic minorities in remote areas. *Id.* Or in rare cases, such as the May 12, 2008 earthquake which killed approximately 10,000 schoolchildren, affected families are exempted from the one-child policy. Andrew Jacobs, *One-Child Policy Lifted for Quake Victims’ Parents*, N.Y. TIMES, May 27, 2008, at A8.

These exceptions are not enough—barely making a dent in the problem. To put it in perspective, even with only thirty percent of China’s population being subject to the brutal one-child policy, it still affects roughly 390 million people. See *infra* note 31 and accompanying text. That is almost 85 million more people than the entire United States population. See U.S. Census Bureau, Population Division, U.S. and World Population Clocks, <http://www.census.gov/population/www/popclockus.html> (last visited Feb. 11, 2009) (estimating the United States’ population to be approximately 305 million).

¹⁹ *Id.* at 1172 (finding that since the one-child family policy’s inception the total fertility rate fell from 2.9 to 1.7 children per woman). Ironically, this reduction in the birthrate is less than that under the more benign “later, longer, fewer” program. Compare *id.* with *supra* note 15 and accompanying text.

²⁰ See Karen Y. Crabbs, Note, *United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Line When Granting Political Asylum?*, 7

economic sanctions,²³ and even infanticide.²⁴ Alternatively, a woman may be allowed to carry the baby to term, after which either she or her spouse is forcibly sterilized.²⁵ While the Chinese government “officially” condemns the use of these brutal methods, the decentralized nature of enforcement has resulted in the widely publicized punishment of forcible abortion and sterilization.²⁶ While enforcement of the policy does appear to be relaxing in some areas,²⁷ as was noted by a retired China analyst with the United States

FLA. J. INT’L L. 249, 260–61 (1992) (describing specific instances of forced abortions by the Chinese government).

²¹ See *Ma v. Ashcroft*, 361 F.3d 553, 555 (9th Cir. 2004) (describing an instance of imprisonment).

²² Hannah Beech, *Enemies of the State?*, TIME, Sept. 19, 2005, at 58, 61 (describing instances of villagers being beaten to death).

²³ These sanctions can include, *inter alia*, fines equaling several years’ worth of wages or the loss of a job. U.S. Bureau of Citizenship and Immigration Services, *China: Information on Treatment of Returning Peasants and Workers Who Violated the One-child Family Planning Policy While Abroad*, June 12 2002 [hereinafter “*Treatment of Returning Peasants*”], available at <http://www.unhcr.org/refworld/docid/414ee9014.html>.

²⁴ Harry Wu, *Controlling China: The U.S. Congress Should Not Fund State-Mandated Abortions*, NAT’L REV. ONLINE, July 9, 2004, <http://www.nationalreview.com/comment/wu200407090919.asp>.

²⁵ “Sterilization, one of the principal forms of birth control, may also be performed when parents suffer from alleged ‘genetic disorders,’ a practice justified by the eugenic objective of ‘improving the quality of the population.’” Nicole M. Skalla, Note, *China’s One-Child Policy: Illegal Children and the Family Planning Law*, 30 Brook. J. Int’l L. 329, 336 n. 45 (2004) (quoting Patrick Goodenough, *China’s Gender Imbalance Stems from ‘Family Planning’ Policy*, CNS NEWS, Apr. 6, 2001.)

²⁶ See Zhang, *supra* note 12, at 569–70 (noting reports of forced procedures occurring in “remote, rural areas”). *But see* Cleo J. Kung, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of “Refugee”*, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1297–98 (2000) (arguing that forced abortions and sterilizations are the exception rather than the norm, and that such procedures are perpetrated by corrupt local officials rather than attributable to China’s national policy).

²⁷ See Hesketh et al., *supra* note 15, at 1171; accord U.S. Dep’t of State, Bureau of East Asian and Pacific Affairs, Background Note: China (Oct. 2008), <http://www.state.gov/r/pa/ei/bgn/18902.htm> (lasted visited Nov. 15, 2008) [hereinafter “Background Note: China”] (noting that there may be an “allowance for a second child under certain circumstances, especially in rural areas”). *But see Treatment of Returning*

Census Bureau, “it’s not policy [that is relaxing], it’s weakness in the administrative structure.”²⁸ Despite any official condemnation, violations of the policy continue to be severely punished.²⁹ Currently, the Chinese government has no intention of discontinuing the one-child policy³⁰ as it is struggling to meet its goal of keeping the population below 1.4 billion by 2010.³¹

B. *The Circuit Courts’ Application of the IIRIRA*

1. The IIRIRA

Congress’ abhorrence of the draconian one-child family policy resulted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).³² In particular, section 601(a) of the IIRIRA amended the definition of “refugee” in 8 U.S.C. § 1101(a)(42) by adding,

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a

Peasants, *supra* note 23 (“There was some evidence that the Chinese government was relaxing this policy. For example, in most major cities, parents with no siblings may have two children.”).

²⁸ *Treatment of Returning Peasants*, *supra* note 23.

²⁹ See Jim Abrams, *Abuse of One-Child Program Decried*, TORONTO STAR, Dec. 19, 2004, at B9. In one county in China, it is alleged that at least seven thousand people were forced to undergo sterilizations between March and July 2005. See Beech, *supra* note 22, at 61.

³⁰ Jim Yardley, *China Sticking With One-Child Policy*, N.Y. TIMES, Mar. 11, 2008, at A4 (reporting that China’s top population official said “the country’s one-child-per-couple family planning policy would not change for at least another decade”).

³¹ The State Department estimates the official number to be “just over 1.3 billion” with an estimated growth rate of about 0.6%, and current projections being that the population will peak at around 1.6 billion by 2050. Background Note: China, *supra* note 27.

³² Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in various sections of 8, 18, and 28 U.S.C.).

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.³³

This formed the cornerstone of today's immigration and asylum policy for Chinese asylum seekers. It has also turned into a touchstone for the serious divide among the various Circuit Courts of Appeals.

B. *The Current State of Section 601(a)*

As it stands now, there are three different standards used to determine a spouse's eligibility for asylum under section 601(a): 1. Either officially or traditionally married spouses are eligible;³⁴ 2. Only legally married spouses are eligible;³⁵ or 3. No spouses are eligible.³⁶ The other circuits that had this particular issue before them either "acknowledge[d] but [did] not weigh in on the question"³⁷ or simply dispatched the cases on credibility issues.³⁸ With several circuits yet to weigh in, there is a distinct possibility that no true majority will be attained. Alternatively, it could be that one of the remaining circuits devises yet another standard to apply when determining a spouse's eligibility under section 601(a) —further splitting the circuits. Before any of this occurs, either the Supreme Court or Congress should rise to the occasion and settle the dispute.

³³ § 601(a)(a)(1), 110 Stat. at 3009-689 (codified at 8 U.S.C. § 1101(a)(42)(B) (2000)).

³⁴ *See, e.g.,* Zhang v. Gonzales, 434 F.3d 993 (7th Cir. 2006); Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004).

³⁵ *See, e.g.,* Yi Qiang Yang v. United States A.G., 494 F.3d 1311 (11th Cir. 2007); Zhang v. Ashcroft, 395 F.3d 531, 532 (5th Cir. 2004); Chen v. Ashcroft, 381 F.3d 221 (3d Cir. 2004).

³⁶ *See* Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184 (2d Cir. 2005), *reh'g after remand*, 494 F.3d 296 (2d Cir. 2007).

³⁷ Xue Xiang Chen v. Gonzales, 418 F.3d 110, 111 (1st Cir. 2005).

³⁸ *See, e.g.,* Xunsheng Li v. Mukasey, 2008 U.S. App. LEXIS 25200 (10th Cir. Dec. 12, 2008); Chen Lin-Jian v. Gonzales, 489 F.3d 182 (4th Cir. 2007).

II. CONGRESSIONAL INTENT BEHIND THE IIRIRA

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

The IIRIRA was passed because Congress understood that China's coercive family planning programs are a terrible violation of human rights.³⁹ The legislative history behind the IIRIRA, including debates over China's program, does not reveal an intention to limit asylum protection to direct victims only. Rather, Congress' intention was to remedy the violation of a person's basic right to procreate, which is recognized in both U.S. law⁴⁰ and international law.⁴¹ The father of a forcibly aborted child has had his

³⁹ Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations, 105th Cong. 5 (1998) (statement of Rep. Lantos) (“[F]orced abortion and forced sterilization before long will be looked upon as barbaric practices of an age gone by”); 142 CONG. REC. H6008 (daily ed. Mar. 21, 1996) (statement of Rep. Smith) (“[O]ne of the most gruesome human rights violations in the history of the world [is] forced abortion.”); 141 CONG. REC. H7294 (daily ed. July 20, 1995) (statement of Rep. Ros-Lehtinen) (“[W]e know that [forced abortions] violate every known standard of human rights since God made Man.”); 141 CONG. REC. H7293 (daily ed. July 20, 1995) (statement of Rep. Woolsey) (“I believe that the time has come to quit coddling the tyrants in Beijing. It is time to say to the Chinese Government that . . . forced abortions . . . [are] not tolerable.”); 141 CONG. REC. H7291 (daily ed. July 20, 1995) (statement of Rep. Wolf) (“China's strict one-child-per-family policy has resulted in gross violations of human rights, including forced abortion and sterilization.”); 141 CONG. REC. H7290 (daily ed. July 20, 1995) (statement of Rep. Lantos) (“The Chinese Government enforces sickening and draconian birth control policies of forced sterilization and forced abortions.”); 140 CONG. REC. S327–28 (daily ed. Jan. 28, 1994) (statement of Sen. Helms) (comparing China's one-child family policy to the actions of Nazi Germany under Hitler).

⁴⁰ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that the right to procreate is “one of the basic civil rights of man”); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the right to have children is a special liberty protected by the Due Process Clause); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 463 (1985) (commenting that eugenic marriage and sterilization laws, “extinguished for the retarded . . . the right to marry and procreate.”); *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977) (“the right of procreation without state interference has long been recognized as ‘one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.’” (quoting *Skinner*, 316 U.S. at 541)).

⁴¹ See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 921 n.2 (BIA June 4, 1997) (Rosenberg, Board Member, concurring) (recognizing that the fundamental right to procreate is

basic right to procreate violated as much as the mother of a forcibly aborted child.⁴² As was noted by the Ninth Circuit, the mother's suffering, due to a forced abortion, is "imputed" to the father.⁴³

Concurrently, as the age limits on marriage are a key element of China's one-child policy,⁴⁴ asylum should not be denied to those who would have otherwise qualified except for the fact that they were unable to marry under the very rules from which they are seeking asylum.⁴⁵ The argument that China's age limits on marriage are acceptable because other countries have younger age limits on marriage misses the point

reflected in international human rights standards such as the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102). The concurring opinion from Board Member Rosenberg listed several international sources that proclaim basic civil rights, including the right to procreate. *See id.* (citing Universal Declaration of Human Rights art. 16(1), G.A. Res. 217A, at 71, 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (approved by the United States Senate on Apr. 2, 1992)).

⁴² *See Qu v. Gonzales*, 399 F.3d 1195, 1202 n.8 (9th Cir. 2005) (noting that forcible abortion, like sterilization, should be view as continuing persecution because of the "irremediable and ongoing suffering of being permanently denied the existence of a son or daughter").

⁴³ *See Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1245 (9th Cir. 2005).

⁴⁴ *See Ma*, 361 F.3d at 559–60 (citing Circular Notice on Obligations of Departments Directly under the Municipality in Implementing Fujian Province Planned Birth Regulations (stating that the policy against early marriages should be strictly enforced in order to prevent early births); Fuzhou City's Enforcement of the 'Fujian Province Family Planning Regulations' (stating that "[i]t is strictly forbidden to get married and give birth underage"); 1999 China Country Report (stating that unmarried women are prohibited from having children); Family Planning Office, Change Receipt for Out-Of-Plan Birth Fee (fine receipt, which among other things, includes a box to fine individuals for early marriages and births); Hearing on China's Planned Birth Policy Before the House International Relations Comm., Subcomm. on Int'l Operations and Human Rights, 105th Cong. (1998) (statement of Zhou Shiu Yon, Victim) (witness stating that because she could not obtain a marriage certificate or a birth permit on account of her early marriage, her pregnancy was illegal and officials sought her out to perform abortion procedures)).

⁴⁵ *See id.* at 559 ("The BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy . . . contravenes the [IIRIRA] and leads to absurd and wholly unacceptable results.").

completely.⁴⁶ The reasons behind the age limits on marriage illuminate the distinction. The general reason for age limits in marriage is to protect young children from being thrown into marriage situations before they are physically and mentally ready.⁴⁷ China's marriage restrictions have nothing to do with protecting children; rather, the goal of these restrictions is to assist in the enforcement of China's one-child family policy.⁴⁸

The legislative history behind section 601(a) shows that "couples with unauthorized children" were meant to be eligible.⁴⁹ If Congress had wanted to restrict the statute to direct victims only, the congressional record would have indicated that. But when the issue was discussed, the emphasis was on doing something for more than just direct victims of China's one-child policy.⁵⁰ In earlier congressional discussions on extending asylum protection to victims of China's coercive family planning programs, the envisioned solution was to help those affected by the population control program and

⁴⁶ See *Chen*, 381 F.3d at 230.

⁴⁷ See *id.* at 230 n.5 (citing Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 1763A(xvii), art. 2, U.N. GAOR, 17th Sess., Supp. No. 17, Annex, U.N. Doc. A/RES/17/1763 (Nov. 7, 1962)); *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (noting that age restrictions on marriage "prevent[] unstable marriages among those lacking the capacity to act in their own best interests").

⁴⁸ See *Ma*, 361 F.3d at 559–60.

⁴⁹ H.R. REP. NO. 104-469, pt. 1, at 174 (1996).

⁵⁰ *Id.* ("The United States should not deny protection to persons subjected to such treatment."); 135 CONG. REC. H7949 (daily ed. Nov. 2, 1989) (statement of Rep. Smith) ("[T]his outrageous persecution of the family cries out for compassion Asylum for those fleeing this tyranny . . . is the minimum that we can provide."); 135 CONG. REC. H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Morrison) ("[P]eople who are faced with that kind of persecution are entitled to refugee or asylum status here in the United States."); 135 CONG. REC. H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley) ("This amendment is about . . . human rights, not just forced abortion and sterilization. The plain fact of the matter is that the U.S. Government should not be in the position of 'aiding and abetting' the Chinese Government in its attempt to force the Chinese people to undergo mandatory sterilization.").

not just the direct victim of a forced abortion or sterilization.⁵¹ Yet the only explicit mention to a class beyond direct victims was made specifically to married couples.⁵² This surely appears to limit the scope of section 601(a). Thus, if Congress intended to protect married couples who attempted procreate but could not because of China's one-child policy, and if a couple's only option to be married was via a traditional ceremony because the one-child policy's limits on marriage denied them an official marriage in an attempt to coercively control the population, than it stands to reason that only officially and traditionally married spouses should be eligible to receive asylum protection.⁵³

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

Affording asylum protection to spouses furthers another of Congress's goals in passing the IIRIRA: preserving the family unit. Family unification has historically been a priority for the United States, as is evidenced by the INA⁵⁴ and U.S. immigration policy.⁵⁵ A review of the number of immigrants entering the United States and the means

⁵¹ 135 CONG. REC. S16286 (daily ed. Nov. 20, 1989) (statement of Sen. Kohl) (“This measure will provide . . . valuable protection for Chinese nationals fleeing that nation’s coercive ‘one couple, one child’ family planning policies.”); 135 CONG. REC. S8353 (daily ed. July 20, 1989) (statement of Sen. DeConcini) (“[W]e certainly have the duty not to return a family threatened with persecution because of [China’s one-child family] policy.”).

⁵² 142 CONG. REC. S10114 (daily ed. Sept. 10, 1996) (statement of Sen. Coats) (“We must help married couples to stay together when times are difficult”); 142 CONG. REC. H2598 (daily ed. Mar. 21, 1996) (statement of Rep. Goodlatte) (“Young married couples with young children, they need to be able to come here more quickly . . .”).

⁵³ *See Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004); *see also Junshao Zhang v. Gonzales*, 434 F.3d 993, 995 (7th Cir. 2006).

⁵⁴ Public Law No. 82-414, 66 Stat. 163 at 182–187 (codified as amended at 8 U.S.C. §§ 1101–1537 (2000)).

⁵⁵ *See, e.g., Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (stating that deporting husbands who illegally entered the U.S. to join their wives would be “contrary to one of the central purposes of the immigration laws—family reunification”); *Kaho v. Ilchert*, 765 F.2d 877, 879 n.1 (9th Cir.1985) (recognizing that one of the Act’s basic objectives is to reunite families); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (noting

by which they secure residency will reveal a common conclusion: United States immigration is oriented toward family.⁵⁶ The quota given to the various means of acquiring residency immediately expose the family unity as a main priority.⁵⁷ Notably, immediate relatives are completely exempt from any quantitative limits.⁵⁸ But more importantly, the definition of “immediate relatives” includes spouses.⁵⁹

Section 601(a) currently provides asylum protection to direct victims of persecution from China’s coercive family planning policies, but that protection remains incomplete if victims are afforded asylum without their spouses.⁶⁰ This is because the presence of a spouse allows victims to establish themselves more quickly in our society by facilitating the integration process.⁶¹ It has even been noted that family reunification is the only way to restore a persecution victim’s dignity.⁶²

The priority given to spouses protects and preserves the family as the fundamental unit of society, restores basic dignity to the victim, and provides protection for children.⁶³

that the Act’s preference system was “primarily designed to further the objective of reuniting families”).

⁵⁶ For a historical account of the emphasis upon family on U.S. immigration, see John Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, 21 CORNELL INT’L L.J. 1, 7–25 (1988); John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 255–58 (1988).

⁵⁷ Immigration and Nationality Act § 201, 8 U.S.C. § 1151(a)(1)(3) (1994); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 131–210 (2d ed. 1997) (discussing the family, employment, and diversity basis for immigration).

⁵⁸ 8 U.S.C. § 1151(b).

⁵⁹ *Id.* § 1151(b)(2)(A)(i). For a discussion of the qualitative restrictions on residency for the spouses of United States citizens, *see id.* §§ 1154, 1186(a).

⁶⁰ Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 940 (2005).

⁶¹ *Id.*

⁶² *Id.*

⁶³ U.N. High Comm’r for Refugees, Annual Tripartite Consultations on Resettlement, Background Note for the Agenda Item: Family Reunification in the Context of

As articulated by the United Nations High Commissioner for Refugees, “refugees and other persons in need of international protection who have no other country than the country of asylum or resettlement to lead a normal family life together should be entitled to family reunion in the country of asylum or resettlement.”⁶⁴ The Ninth Circuit recognized in *Ma* that the long-established principle of keeping families together is an important part of the analysis of a spouse’s eligibility under the IIRIRA.⁶⁵ There, the court noted that following the BIA’s construction of section 601(a) in *C-Y- Z*—which excluded from asylum those prevented from marrying by China’s restrictive marriage laws—would lead to “absurd results” and “the break-up of the family unit.”⁶⁶

The unification of couples and families is often assumed to have a beneficial effect on a refugee.⁶⁷ A reunited family helps a refugee integrate into the adopted country more quickly.⁶⁸ Family members are also critical for healing the refugees who are accepted because they were persecuted in their home countries.⁶⁹ Moreover, they contribute to the reduction of crime and tend to increase the economic productivity of the asylum seeker.⁷⁰

Resettlement and Integration, Protecting the Family: Challenges in Implementing Policy in the Resettlement Context, at 1–2 (June 21, 2001) [hereinafter Protecting the Family], available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b30baa04>.

⁶⁴ *Id.* at 2.

⁶⁵ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

⁶⁶ *Id.*

⁶⁷ Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 285 (2003).

⁶⁸ See Protecting the Family, *supra* note 63, at 1–2.

⁶⁹ See *id.* at 2, 12.

⁷⁰ Demleitner, *supra* note 67, at 285.

Reuniting families also benefits the adopted country. Granting asylum to spouses assures that less of the money earned in the adopted country is sent back to the family still in the country of origin.⁷¹ The economic benefits of this clear. It will fill the coffers of the adopted country as the reunited family spends their money on buying products or making investments in their adopted country.⁷² Therefore, allowing family to be reunified is not “a mere exercise of state generosity, but rather a crucial aspect of integrating and stabilizing migrant populations.”⁷³

III. THE PROPOSED AMENDMENT

Section 601(a) should be amended to include legally married spouses, as well as those spouses whose traditional marriages are not recognized by the Chinese government because the couples did not meet the strict age requirements of the family planning policies.⁷⁴ Extending protection to legally married spouses is not particularly controversial. This is because it is the only standard that has been universally accepted by the circuit courts that have directly decided the issue.⁷⁵ It is also the position that has

⁷¹ See, *id.* (citing Kerala Monitor, Encourage Expats to Bring Their Families—GCC Study (June 2, 2003), <http://www.keralamonitor.com/expatsgulf.html>).

⁷² See Amy Waldman, *Gulf Bounty Is Drying Up in Southern India*, N.Y. TIMES, Feb. 24, 2003, at A3 (reporting on how this transfer in funds has changed life in the adopted countries).

⁷³ Demleitner, *supra* note 67, at 286.

⁷⁴ This is essentially the position taken by the courts in *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) and *Junshao Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006). For the purpose of consistency and clarity in this Article, the term “spouse” only refers to legally married or traditionally married individuals. Similarly, the term “unmarried partner” refers to individuals who are simply dating or engaged.

⁷⁵ See *supra* notes 34–35 and accompanying text. Prior the Second Circuit’s decision in *Lin II*, it too extended asylum protection to married spouse under section 601(a). See *Zhang v. INS*, 386 F.3d 66, 71–72 (2d Cir. 2004).

been consistently espoused by the BIA.⁷⁶ Conversely, of the circuits to have adjudicated the issue of whether to extend asylum protection to unmarried partners—such as boyfriends or fiancées—none have chosen to do so.⁷⁷ Neither has the BIA.⁷⁸

With these two ends of the spectrum serving as a baseline, this Article proposes an amendment that strikes a compromise. Admittedly, this is a more conservative approach compared to ones that suggest the IIRIRA be extended to include spouses *and* unmarried partners of direct victims of China’s coercive family planning policies.⁷⁹ This approach is suggested for practical reasons, not ideological ones. While those suggestions are certainly sympathetic and idealistic, they fail to account for the practical difficulties in extending the IIRIRA to all those who are harmed by coercive family planning policies. Further, since the goal is to provide greater protection to those who have been persecuted, the amendment proposed in this Article has a greater chance than a

⁷⁶ See *In re S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006); *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997).

⁷⁷ See, e.g., *Lian v. AG of the United States*, 228 Fed. Appx. 188, 193 (3d Cir. 2007) (“Boyfriends of women subjected to involuntary abortions are not eligible for asylum.”); *Chen v. Gonzales*, 457 F.3d 670, 674 (7th Cir. 2006) (“[N]o court yet has recognized an unmarried male partner . . . as a “refugee” under § 1101(a)(42)’s forced abortion and sterilization provisions.”); *Jiu Shu Wang v. United States AG*, 152 Fed. Appx. 761, 767 (11th Cir. 2005) (noting that asylum protection based on forced abortion or sterilization “has not been imputed beyond a marital relationship”); *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (holding that a “live-in girlfriend” is not a recognized relationship for purposes of extending asylum protection and noting that “merely impregnating one’s girlfriend is not alone an act of ‘resistance’”).

⁷⁸ *In re S-L-L-*, 24 I. & N. Dec. 1, 19 (“We do not find convincing reasons to extend the nexus and level of harm attributed to a husband who was opposed to his wife’s forced abortion to a boyfriend or fiancé.”).

⁷⁹ See, e.g., Megan C. Dempsey, Note, *A Misplaced Bright-Line Rule: Coercive Population Control in China and Asylum for Unmarried Partners*, 92 IOWA L. REV. 213, 234-35 (2006) (criticizing the BIA’s limiting of refugee status to married couples); Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 FORDHAM L. REV. 2153 (2007) (recommending that the IIRIRA be amended to include unmarried partners).

more idealistic one of actually being adopted by Congress. This is because it is less likely to meet the strong resistance or bureaucratic roadblocks a more expansive amendment would.⁸⁰ Also, this solution is particularly fitting as it comports with Congress' dual intent to protect both individual victims and couples who have persecuted and to preserve the family unit.⁸¹

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

For purposes of determinations under this Act, a person, ***or the married spouse, or if unable to be married because of a coercive population control program, then the spouse married in a traditional or religious ceremony, of a person***, who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted⁸²

IV. OBSTACLES TO THE PROPOSED AMENDMENT

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

This objection to extending asylum protection to traditionally married spouses is fairly compelling. As was mentioned above, it is the only standard that has been

⁸⁰ See George D. Brown, *Counterrevolution?—National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 968 (2005) (“The political difficulties that are obvious in trying to pass any such broad statute inevitably lead toward attempts at the narrow one . . .”).

⁸¹ See *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (citing H.R. REP. NO. 104–469(I), at 174 (1996), the court stated that “Congress’s goal in passing [section 601(a) was] to provide relief for ‘couples’ [who have been] persecuted on account of an ‘unauthorized’ pregnancy and to keep families together”).

⁸² § 601(a)(a)(1), 110 Stat. at 3009–689 (codified at 8 U.S.C. § 1101(a)(42)(B) (2000)). The additional language in bold and italics is the proposed amendment. Furthermore, as this is a proposed amendment to a federal statute, the term “spouse” must be interpreted according to the Defense of Marriage Act’s definition of spouse. See *infra* notes 210–12 and accompanying text.

universally accepted by the circuit courts and the BIA.⁸³ The BIA has stated that the marriage requirement “is a practical and manageable approach which takes into account the language and purpose of the statutory definition in light of the general principles of asylum law.”⁸⁴ Because of the strong desire to have administrative feasibility and uniformity in U.S. immigration law,⁸⁵ extending section 601(a) to married spouses only may resonate with Congress or the Supreme Court.

But despite this strong desire, mere administrative or judicial convenience should not outweigh Congress’ intent to protect other victims of China’s coercive family planning programs.⁸⁶ Furthermore, only extending per se asylum protection to married spouses would go against Congress’ goal of preserving the family unit.⁸⁷ The definition of a family in the United States has changed considerably over the past forty years.⁸⁸ It should no longer be assumed that a family only includes a legally married mother and father.⁸⁹ In fact, the departure of the traditional, nuclear family has become progressively

⁸³ See *supra* notes 34–35, 41–42 and accompanying text.

⁸⁴ *In re S-L-L-*, 24 I. & N. Dec. 1 at *21 (BIA 2006).

⁸⁵ *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 316 (2d Cir. 2007) (Katzman, J., concurring) (stating that “it would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law” and describing uniformity as “especially desirable in cases such as these”)

⁸⁶ See *supra* Part II.A.

⁸⁷ See *supra* Part II.B.

⁸⁸ In 1968, eighty-five percent of children lived in households where the parents were married and living under one roof. See U.S. Census Bureau, *America’s Families and Living Arrangements: Historical Time Series*, at 1 tbl.CH-1 (2006), available at <http://www.census.gov/population/socdemo/hh-fam/ch1.pdf>. In 1978, that number decreased to seventy-seven percent, and in 1988 the number decreased again to seventy-three percent. *Id.* By 2004, only sixty-eight percent of children lived in households where the parents were married and living under one roof. *Id.*

⁸⁹ In 2004, there were 1,953,000 unmarried partners living together with children under the age of eighteen. *Id.* at 1 tbl.UC-1. This constituted a rise of about 700,000 couples in similar conditions from 1996. *Id.*

more accepted in the United States.⁹⁰ While some courts continue to deny parental rights and family status to non-nuclear families,⁹¹ other courts have begun to recognize the notion of “functional families.”⁹²

The notion of dedication, caring and self-sacrifice in functional families, championed by *Braschi v. Stahl Associates*,⁹³ in what was effectively a common law marriage has been completely ignored by the BIA.⁹⁴ In restricting the presumption of persecution to couples who are “actually committed to a marital relationship,”⁹⁵ the BIA

⁹⁰ See *More Firms Covering Domestic Partners*, BOSTON GLOBE, Oct. 21, 2001, at G2 (reporting that many companies are changing the coverage of their health plans to include unmarried couples); Grace Schneider, *Families Are Changing: Indiana Sees Sharp Rise in Single-Parent Households*, COURIER-J. (Louisville, KY), May 17, 2001, at 1A (reporting that many organizations are changing their focus to help children born out-of-wedlock).

⁹¹ See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (denying visitation rights to former same-sex partner because she was neither the child’s adoptive nor biological parent).

⁹² The seminal case adopting a functional definition of the family was *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989). There, the New York Court of Appeals found that a same-sex couple, living together as life partners for more than ten years, should be regarded as a “family” for purposes of New York’s rent control statute. *Id.* at 214. The court refused to allow a strict definition of “family” to defeat the protective purpose of the New York rent control system as a whole. *See id.* at 212. Instead, it noted that the term family “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.” *Id.* at 211. The court concluded that an objective examination of the parties’ relationship—based upon the “totality of the relationship, as evidenced by the dedication, caring and self-sacrifice of the parties”—should control. *Id.* at 213 For further cases adopting a functional definition of family, see *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (holding that visitation of a non-biological parent could be in the best interests of a child, if there is a “parent-like relationship with the child and . . . a significant triggering event [that] justifies state intervention in the child’s relationship with a biological or adoptive parent”). *See also* *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (granting visitation rights to same-sex partner who was a de facto parent); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (holding that former same-sex partner could sue for visitation rights by standing in loco parentis).

⁹³ 543 N.E.2d at 213.

⁹⁴ *See In re S-L-L-*, 24 I. & N. 1 (BIA 2006).

⁹⁵ *Id.* at 12.

neglected to take into account those couples who are committed to a marital relationship but cannot obtain an officially legal one because of Chinese family planning policies. Admittedly, this precise issue was not before the BIA in *In re S-L-L*.⁹⁶ The case does, however, imply that the concern is not with the intent of the relationship, but rather with whether the relationship conformed to legal proscriptions. Moreover, this reasoning leaves a gap in the law and is simply out of touch with the modern world.⁹⁷ The United States recognizes functional families, not just legal ones.⁹⁸ Parents are equally persecuted partners because they commit to a familial relationship, not because their relationship is sanctioned by the state.

B. Amending Section 601(a) Has Serious Implications Beyond Asylum Law

A spouse's eligibility for asylum under section 601(a) raises two hotly debated issues: the definition of marriage and U.S. immigration policy. The very fact that even attempting to address the prospect of spousal eligibility raises these issues may itself be the biggest obstacle to remedying it. The elephant in the room, so to speak, is that both

⁹⁶ *Id.* at 4–11 (determining whether section 601(a) should be extended to legally married spouses and whether it should be extended boyfriends, fiancées, or unmarried partners). The BIA, however, did not reach the issue of whether it should be extended to traditionally married spouses. *See also id.* at 4 n.3 (“No issue was raised . . . regarding the legality of the marriage.”).

⁹⁷ *See generally* Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1 (2004) (discussing the modern recognition of parental rights of biological fathers, nonbiological fathers, married, and unmarried men); *see also* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125 (2006) (“Unwed fathers . . . are no longer categorically disregarded by the law.”).

⁹⁸ This definition of family underlies arguments in favor of same-sex marriage, assisted reproduction, and same-sex or single parent adoption. *See, e.g.,* Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006).

the Supreme Court and Congress have nothing to gain—and alternatively, much to lose—by weighing in.

1. The Definition of Marriage

With the Supreme Court’s denial of certiorari to the applicants in the *Lin II*⁹⁹ and *Yi Qiang Yang v. Mukasey*,¹⁰⁰ it appears that the Court is unwilling to settle the dispute over whom, if anyone other than direct victims should be eligible for asylum under section 601(a). It seems likely that the Court views the issue presented by *Ma, Chen*, and *Lin II* as a political question¹⁰¹ where it was better to employ the “passive virtue[] . . . of ‘not doing’ [by] disposing of a case while avoiding judgment.”¹⁰² As has been noted, “[w]hen the Court is deciding a question of constitutional law or international law (and, to a somewhat lesser degree, when it is interpreting a statute), its decisions have an importance and an impact which go far beyond a mere determination of the rights and duties of the litigants in the instant case.”¹⁰³

In the wake of both the U.S. Supreme Court’s decision in *Lawrence v. Texas*¹⁰⁴ and the Supreme Judicial Court of Massachusetts’ ruling in *Goodridge v. Department of*

⁹⁹ *Zhen Hua Dong v. DOJ*, 128 S. Ct. 2472 (2008).

¹⁰⁰ *Yi Qiang Yang v. Mukasey*, 128 S. Ct. 2466 (2008)

¹⁰¹ For more thorough discussions of the political question doctrine, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183–98 (2d ed. 1962); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 124–45 (1989); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); LEARNED HAND, *THE BILL OF RIGHTS* 15–30 (1958); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597 (1976).

¹⁰² BICKEL, *supra* note 101, at 188.

¹⁰³ Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 524 (1966).

¹⁰⁴ *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas law prohibiting homosexual sodomy was unconstitutional).

Public Health,¹⁰⁵ the question of same-sex marriage has fueled unending cultural debate, influenced political campaigns, emboldened citizens to engage in civil disobedience, and led to calls for state and federal legislators to amend their constitutions.¹⁰⁶ With the sharp divisions surrounding the issue of same-sex marriage and the Court's reluctance to address it,¹⁰⁷ it may be that both the Court and Congress want to avoid making any decision dealing with the definition of marriage or spouse.

However, as the IIRIRA is a federal law, and the proposed amendment would include the words "marriage" and "spouse,"¹⁰⁸ the Defense of Marriage Act ("DOMA")¹⁰⁹ would be implicated. Under DOMA, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."¹¹⁰ For better or worse, this controversial language is quite clear and remains constitutional ten years after its passage.¹¹¹ Consequently, if Congress granted asylum to the spouses of

¹⁰⁵ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003) (holding that a Massachusetts licensing statute that prohibited same-sex couples from marrying violated the Massachusetts Constitution).

¹⁰⁶ See William Raspberry, *Reasons for Marriage*, WASH. POST, Feb. 23, 2004, at A21 (noting that "gay and lesbian couples lining up for marriage licenses" are "all over the news").

¹⁰⁷ RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 86–89 (2006) (characterizing same-sex marriage as a political question).

¹⁰⁸ See *supra* note 82 and accompanying text.

¹⁰⁹ Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 2, § 3, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

¹¹⁰ 1 U.S.C. § 7 (2000).

¹¹¹ See *Smelt v. Orange County*, 447 F.3d 673, 686 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006) (ruling by the Ninth Circuit that a couple lacked standing to challenge DOMA's constitutionality); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1302, 1309 (M.D. Fla. 2005) (upholding the constitutionality of DOMA against challenges brought under the Full Faith and Credit, Equal Protection, and Due Process Clauses of the U.S. Constitution); *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004) (finding that

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

2. U.S. Immigration policy

Congress's reluctance to address the problem with the current version of section 601(a) is further complicated when it is connected with the highly charged issue of immigration into the United States.¹¹² Congress has been unable to enact any comprehensive immigration reform.¹¹³ Furthermore, the Senate's reluctance to pass anything at all to fix the immigration system is evidenced by the failure of the Development, Relief, and Education for Alien Minors ("DREAM") Act.¹¹⁴ The current economic crisis, national security, and the wars in Iraq and Afghanistan are taking priority on the domestic agenda. This, and hardening divisions between the enforcement-

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

¹¹² For examples of the issues surrounding immigration reform, see Patricia Smith, *The Great Immigration Debate*, N.Y. TIMES UPFRONT, May 8, 2006, at 8 (discussing the two common approaches to fixing the immigration system—the 700-mile fence along the southern border of the United States and the guest-worker program); Stephen Dinan, *President Touts Alien Citizenship*, WASH. TIMES, Oct. 7, 2006, at A3 (discussing controversy surrounding reform plans granting U.S. citizenship to some illegal aliens). See generally Ediberto Román, *Alien Invasion?*, 45 HOUSTON L. REV. 841 (2008) (discussing the issues surrounding the "mass invasion" of illegal immigrants).

¹¹³ See, e.g., Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006). Although the bill ultimately failed in the Senate, some of its less contentious pieces have resurfaced as Congress attempts to deal with concerns of illegal immigration and national security. See Julia Preston, *In Increments, Senate Revisits Immigration Bill*, N.Y. TIMES, Aug. 3, 2007, at A1

¹¹⁴ See Preston, *supra* note 113, at A1. For a fuller discussion of the DREAM Act, see Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2087–90 (2008).

only camp and the proponents of legalization, leaves little support for enacting any kind of immigration reform.

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

Granting refugee status to legally and traditionally married spouses may help decrease illegal immigration by allowing for a more individualized investigation into the authenticity of family relationships. Frequently, after a refugee has secured asylum, an attempt—whether legally or illegally—will be made to reunite with their families.¹¹⁵ Since asylum seekers have an incentive to migrate to where they already have a social network of friends and family,¹¹⁶ in theory, illegal immigration increases as authentic families are not able to unify through legal means. Conversely, more families would likely be lawfully unified through the proposed amendment than not. Additionally, the proposed amendment will prevent, or at least decrease, the illegal immigration of those

¹¹⁵ See Demleitner *supra* note 67, at 285.

¹¹⁶ See CAROLINE B. BRETTELL, *Theorizing Migration in Anthropology*, in MIGRATION THEORY 107 (Caroline B. Brettell & James F. Follifield eds., 2000); Monique Lee Hawthorne, Comment, *Family Unity in Immigration Law: Broadening the Scope of “Family”*, 11 LEWIS & CLARK L. REV. 809, 819, 821 (2007) (arguing that “the scope of the word ‘family’ as used in our immigration policy should be changed to include different culturally relevant models of ‘family’”).

spouses of the direct victim of coercive family planning programs who are unable to obtain asylum protection under the current legislation.

CONCLUSION

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