

STANDING IN HER SHOES:
RECOGNIZING THE PERSECUTION SUFFERED BY SPOUSES
OF PERSONS WHO UNDERGO FORCED ABORTION OR
STERILIZATION UNDER CHINA'S COERCIVE POPULATION
CONTROL POLICY

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INTRODUCTION

Horrible accounts of steep fines, arrest, late-term abortions, and sterilization have emerged in China since the late 1970s as those who defy the country's notorious one-child policy are subjected to flagrant violations of human rights and widespread persecution.¹ Family-planning officials regulate a couple's decision to bear children and frequently employ violent and coercive measures to ensure compliance with laws governing childbirth.² As a result of this family-planning policy, many Chinese nationals have fled to the United States since the late 1980s with the hope that they will be granted political asylum.³ More individuals seeking asylum arrive from China than any other country.⁴ Data gathered by Syracuse University shows that between the years 2000 and 2005, 35,000 out of 157,000 total asylum seekers were Chinese.⁵ The State Department estimates that approximately half of all Chinese asylum claims concern the country's population control policy.⁶ Prior to 1996, most victims of China's population control policy were turned away. Punishment suffered under China's policy was viewed not as persecution, but merely as an

1. 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, 229, 234 (2007); see also *Ma v. Ashcroft*, 361 F.3d 553, 555-56 (9th Cir. 2004).

2. See Jordan, *supra* note 1, at 234.

3. 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, 73 (1995).

4. Joseph Goldstein, *Liberty's Lamp is Dimmed by 2nd Circuit*, N.Y. SUN, July 17, 2007.

5. *Id.*

6. Michelle Chen, *Leaving One-Child Behind: Chinese Immigrants Seek Asylum in America from China's One-Child Policy*, LEGAL AFF., Nov.-Dec. 2005, at 8, 9.

incentive for limiting family size.⁷ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was signed into law in 1996, reversing this stance on the persecutory nature of China's coercive population control policy.⁸ Section 601 of the IIRIRA expanded the definition of refugee to include individuals forced to abort a pregnancy or undergo sterilization.⁹

Several court decisions made in the span of a decade have greatly impacted the meaning of section 601. Although there was initial concern that section 601 was inherently biased toward female applicants who are more likely than their male counterparts to be forcibly sterilized, this concern was dispelled by a 1997 decision by the Board of Immigration Appeals (BIA).¹⁰ In *Matter of C-Y-Z*, the BIA held that the spouse of a person forced to undergo an abortion or sterilization would be deemed by that fact alone to have suffered persecution on account of political opinion.¹¹ The federal courts deferred to the BIA's decision in *C-Y-Z* for more than a decade, providing sanctuary to victims of forced abortion or sterilization and their spouses.¹² However, in 2007, the Second Circuit overturned *C-Y-Z* in *Lin v. U.S. Department of Justice*, holding that section 601 does not extend automatic refugee status to spouses or unmarried partners of those that are expressly protected by the statute.¹³

This decision prompted New York Representative Vito Fossella to introduce House Resolution (H.R.) 3552, which would have amended the meaning of "refugee" as defined in section 601 to include the spouse of an individual who has been forced to abort a pregnancy or undergo sterilization.¹⁴ While some critics oppose any expansion of the protection currently offered by section 601, others would like to see Congress further broaden the protection that this bill proposed by extending it to unmarried fathers as well. Although the bill ultimately failed, H.R. 3552 was an imperative step in the right direction. It recognized that persecution is not limited to physical harm and sought to place a husband's suffering on the same level as that of his wife, despite the fact that he is not the one that physically undergoes these procedures.

This article examines the progression of asylum law in the United States as it relates to those affected by China's coercive population control policy. Part I provides an overview of the one-child policy in China, including an examination of the methods of enforcement and their detrimental impact. Part II explores the initial obstacles to gaining asylum for those who fled China in

7. See *Matter of Chang*, 20 I. & N. Dec. 38, 43-44 (B.I.A. 1989).

8. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 601, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2006)).

9. *Id.*

10. Jordan, *supra* note 1, at 240, 242.

11. *Matter of C-Y-Z*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997).

12. See Goldstein, *supra* note 4.

13. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 299 (2d Cir. 2007).

14. H.R. 3552, 110th Cong. (1st sess. 2007).

the late 1980s and early 1990s and the changes ushered in by section 601 of the IIRIRA. This section also analyzes a number of cases that have interpreted section 601 and demonstrates that while initially this amendment was interpreted quite broadly, several cases have significantly narrowed its scope. Part III carefully scrutinizes H.R. 3552, the bill that was proposed in response to the holding in *Lin v. U.S. Department of Justice*, which effectively denied per se asylum for the spouse of an individual who has been forced to undergo an abortion or sterilization.¹⁵ This section addresses and dispels much of the criticism of H.R. 3552, while acknowledging a significant weakness in its failure to extend asylum to unmarried partners.

I. CHINA'S POPULATION CONTROL POLICY

China promoted population growth during the 1950s, 1960s, and early 1970s to support enhanced production and expansion of the socialist state.¹⁶ However, by the late 1970s it was evident that rapid population growth would be a serious detriment to the quality of life in China.¹⁷ In an attempt to avoid an eventual shortage of food, housing, employment, and medical care for its huge population, China began to promote later marriage, longer intervals between births, and fewer children per family.¹⁸ Despite these efforts, population goals were not being met.

In response to this dilemma, China implemented its stricter "one-couple, one-child" policy in 1979.¹⁹ Current Chinese law dictates that individuals should marry at a late age and that one couple shall bear only one child, with some exceptions for minorities and those living in rural, sparsely populated areas.²⁰ Additionally, all spouses must use contraception, which the government provides for free.²¹ The Chinese government delegates implementation of the policy to various levels of government to ensure that family planning guidelines are followed.²²

A. Enforcement of the Population Control Policy

While the laws that govern China's population control policy may seem reasonable given its population problems, as applied, they are dangerous to Chinese society.²³ Local government officials are given strict quotas as to the

15. *Lin*, 494 F.3d at 299.

16. Hannah A. Saona, Comment, *The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift and China's Family Planning Practices*, 13 PAC. RIM L. & POL'Y J. 229, 236 (2004).

17. *Id.*

18. *See id.*

19. *Id.*

20. Law on Population and Family Planning (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), art. 18.

21. *Id.* art. 20-21.

22. *Id.* art. 18.

23. Jordan, *supra* note 1, at 234.

amount of children that can be born in a region.²⁴ Consequently, officials may go beyond ethical boundaries to ensure that these quotas are met in order to avoid the high fines and punishment that may be imposed upon them if they are not.²⁵ The result is a "pattern of official coercion and brutality in the name of birth control."²⁶

The government utilizes several methods to enforce its population policy ranging from social pressure and economic incentives to coerced abortion and sterilization.²⁷ Those who follow the law may receive monetary payments, medical or educational benefits, and even land.²⁸ Alternatively, there are disincentives in the form of extreme financial penalties that may range from ten to fifty percent of the annual household income, harassment, and penalization of entire villages where couples do not act in compliance with the policy.²⁹ If officials are unable to find a woman who has violated the law, it is common practice to detain her entire family to encourage her to turn herself in to authorities.³⁰

Unfortunately, these are not the most severe measures that the Chinese government has undertaken. It is illegal in almost every Chinese province for unmarried couples to bear a child, and nearly twenty percent of these provinces require married women to receive government permission before becoming pregnant for the first time.³¹ Given the shortage of available permits, it is not uncommon for married couples to wait at least one year before obtaining authorization to conceive.³² To ensure compliance with the policy, local government officials monitor all women who are of childbearing age, often going so far as to track menstrual cycles.³³ If a woman becomes pregnant out-of-wedlock, without a "birth-allowed certificate," or is known to be carrying a second child without government consent, she may be compelled to abort the "unauthorized" pregnancy.³⁴

24. *Id.*

25. *Id.*

26. Michael Weisskopf, *Shanghai's Curse: Too Many Fight for Too Little; Tough Birth Control Policy Shakes Chinese Society*, WASH. POST, Jan. 6, 1985, at A1.

27. Amy Hampton, Comment, *Population Control in China: Sacrificing Human Rights for the Greater Good?*, 11 TULSA J. COMP. & INT'L L. 321, 333-34 (2003).

28. *Id.* at 333.

29. *Id.* at 333-34.

30. *Id.* at 335.

31. Kyle R. Rabkin, Comment, *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, 970-71 (2007).

32. *Id.* at 970.

33. Tara A. Gellman, Note, *The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, the UNFPA and Family Planning in the P.R.C.*, 17 N.Y.L. SCH. J. HUM. RTS. 1063, 1066-67 (2001).

34. Hampton, *supra* note 27, at 331.

Because persuasion generally fails to achieve compliance with China's population control policy, local officials often resort to coercion.³⁵ There are accounts of "abortion roundups," during which sleeping women are handcuffed and delivered by the truckload to twenty-four-hour abortion clinics.³⁶ The government maintains that abortions are voluntary as long as the women "walk to the clinics on their own legs."³⁷ Once there, doctors will do whatever is necessary to terminate the fetus, regardless of the stage of pregnancy.³⁸ Many abortions are performed in the last trimester, some as late as the ninth month.³⁶ According to Xu Fangling, a Chinese birth control official, "[i]t's more humane to kill children before they are born than to bring them into a society of too many people."³⁹

Sterilization is another common method used to enforce the policy.⁴⁰ The procedure often accompanies a forced abortion resulting from an unauthorized pregnancy.⁴¹ Between 1979 and 1984, 31 million women and 9.3 million men were sterilized, which represents almost one-third of all married couples in China.⁴² Alternatively, an intrauterine device (IUD) may be implanted following a birth or abortion to prevent further pregnancies, often without informing the woman or seeking her consent.⁴³ Removal of the device may result in imprisonment for the crime of "illegal IUD removal."⁴⁴ Although the use of these methods may run counter to official policy, Chinese officials have admitted that forced abortions and sterilizations do occur,⁴⁵ and they have failed to punish those who utilize these brutal means of enforcement.⁴⁶

35. John S. Aird, former Senior Research Specialist on China, U.S. Bureau of the Census, *Population Control in China: Human Rights and U.S. Reactions to the Chinese Family Planning Program*, Testimony Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations, 104th Cong. (1st Sess. 1995) [hereinafter *Testimony*].

36. 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, 258 (1992); see also Michael Weisskopf, *One Couple, One Child: Second of Three Articles, Abortion Policy Tears at China's Society*, WASH. POST, Jan. 7, 1985, at A1.

37. Hampton, *supra* note 27, at 336.

38. Crabbs, *supra* note 36, at 258.

39. Weisskopf, *supra* note 36.

40. Hampton, *supra* note 27, at 337.

41. *Id.*

42. Weisskopf, *supra* note 36.

43. Crabbs, *supra* note 36, at 258-59.

44. *Id.* at 260.

45. Lazarus, *supra* note 3, at 68.

46. Weisskopf, *supra* note 36.

B. Impact of the Population Control Policy

Women generally bear the brunt of China's population control policy.⁴⁷ Not only is it they who undergo forced abortions, but they also comprise a much larger percentage of those subjected to forced sterilization.⁴⁸ This is partially due to the fact that in some parts of China there is a common belief that vasectomies render men weak.⁴⁹ Furthermore, it is traditionally the wife who is seen as being primarily responsible for using effective birth control and adhering to the strict one-child limit.⁵⁰ The impact of these procedures can be devastating. IUDs have been known to cause excessive bleeding, weight loss, fatigue, and anxiety.⁵¹ Physical side effects that may accompany a forced abortion generally pale in comparison to the intense emotional reactions that result.⁵² The State Department has reported that approximately 500 Chinese women commit suicide each day due, in part, to China's coercive population control policy.⁵³ According to the Department's 2004 Country Reports on Human Rights Practices, in June 2004 a Chinese woman was injured when she jumped out of an operating room window in an attempt to avoid sterilization.⁵⁴

An account from Chen Yun Fie, a native of China, further exemplifies the impact of China's population control policy on women.⁵⁵ In 1995, Chen shared her story of persecution before the House of Representatives Subcommittee on International Operations and Human Rights.⁵⁶ After Chen gave birth to a second child, she was encouraged to undergo sterilization but was able to avoid doing so.⁵⁷ When she became pregnant again, she sought a medical student to perform an abortion in order to avoid subsequent sterilization and as a result became very ill with a serious infection.⁵⁸ On her way home she found a

47. 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, 1312 (2000).

48. See Weisskopf, *supra* note 36.

49. Kung, *supra* note 47.

50. Kristi M. Deans, Comment, *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, 356 (2006).

51. Deans, *supra* note 50, at 356.

52. See *id.* at 357.

53. U.S. Dep't of State, Country Reports on Human Rights Practices, China (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm> (stating that this rate is approximately five times the global average among women. "Many observers believe that violence against women and girls, discrimination in education and employment, the traditional preference for male children, the country's birth limitation policies, and other societal factors contributed to the especially high female suicide rate.").

54. U.S. Dep't of State, Country Reports on Human Rights Practices, China (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm> [hereinafter *Country Reports*].

55. See Hampton, *supra* note 27, at 338.

56. *Id.*

57. *Id.*

58. *Id.*

newborn baby girl in the street and decided to take the child in when no one else was willing to care for her.⁵⁹ Because she now had three children, Chen had to flee from her home in order to avoid being sterilized.⁶⁰ Unfortunately, when she returned seven years later, government officials were waiting and forced her to undergo sterilization.⁶¹

Although these procedures are performed most frequently on women, a man also experiences a great loss when his wife is forced to abort their child or undergo sterilization. In fact, in many cases an entire family feels the impact of China's population control policy.⁶² It can be emotionally traumatic to witness a parent or a spouse experience physical and psychological suffering.⁶³ Furthermore, because forced sterilization can cause an individual to be too weak to work, financial burdens may fall to other family members.⁶⁴ These financial burdens can be quite serious, given the harsh consequences that may result from violation of China's one-child policy.⁶⁵ If families fail to pay the steep fines that typically accompany noncompliance, they may face threats of eviction, government intrusion into their home, and confiscation or destruction of their personal property.⁶⁶

Additionally, local enforcement mechanisms place many families in extraordinarily difficult situations. A woman who must flee to protect the life of her unborn child risks exposing her family to punishment by local government officials, who have been known to hold and even physically abuse the relatives of a woman until she submits to an abortion or sterilization.⁶⁷ One Chinese woman committed suicide in 2004 following the detention of her family in "population schools," which are facilities designed to reeducate those who violate family planning guidelines.⁶⁸ The strain from these acts of persecution has forced some Chinese nationals to confront the difficult choice between their country and reproductive freedom.⁶⁹

II. DEVELOPMENT OF ASYLUM LAW IN THE UNITED STATES

Facing China's coercive population control policy, many individuals began fleeing to the United States with the hope that they would be granted asylum.⁷⁰ However, the road was littered with obstacles. The United States was

59. *Id.*

60. *Id.* at 338-39.

61. *Id.* at 339.

62. Deans, *supra* note 50, at 353.

63. See *Matter of C-Y-Z*, 21 I. & N. Dec. 915, 926 (B.I.A. 1997) (Rosenberg, B.I.A. Member, concurring).

64. Deans, *supra* note 50, at 353.

65. Hampton, *supra* note 27, at 333-34.

66. Deans, *supra* note 50, at 353.

67. *Id.*; Hampton, *supra* note 27, at 335.

68. *Country Reports*, *supra* note 54.

69. See Jordan, *supra* note 1, at 235.

70. *Id.*

not prepared to deal with this "new breed of persecution."⁷¹ Therefore, there was a long period of time when it was unclear whether the coercive measures carried out under China's population control policy fit into the established scheme for granting asylum to refugees.⁷² Following nearly a decade of political crossfire, an amendment to the Immigration and Nationality Act (INA) broadened the definition of refugee to include those who are forced to undergo an abortion or sterilization.⁷³ While it has provided much needed relief for many Chinese refugees, there has also been considerable disagreement concerning the scope of the law in terms of who should be protected.

A. Section 101 of the INA Prior to 1996

The INA was amended in 1982, offering refuge to immigrants seeking to escape persecution.⁷⁴ Section 101(a)(42)(A) of the INA defines "refugee" as follows: "any person who is outside any country of such person's nationality . . . 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."⁷⁵ However, since Chinese refugees did not begin seeking asylum in the United States until the late 1980s, the potentially persecutory effects of a coercive population control policy were not contemplated in the initial definition.⁷⁶ Therefore, the circumstances of refugees who were fleeing China because of its family planning policy did not fit neatly into any of the five categories enumerated in Section 101(a)(42)(A).⁷⁷ As a result, being forced to abort a pregnancy or undergo sterilization was not recognized as grounds for asylum in the United States until nearly a decade after the first refugees sought asylum.⁷⁸

In 1989, the Board of Immigration Appeals (BIA) greatly limited the ability of Chinese immigrants to gain asylum with its decision in *Matter of Chang*.⁷⁹ Chang, who had two children with his wife, argued that he had a well-founded fear of persecution because if he returned to China he would be forcibly sterilized due to his membership in a social group that opposed China's population control policy.⁸⁰ The court held that the policy was not persecutory on its face and that an individual seeking asylum must demonstrate that the policy was selectively, or more severely, applied based on one of the five

71. *Id.*

72. *Id.*

73. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 601, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2006)).

74. *Testimony*, *supra* note 35.

75. 8 U.S.C. § 1101(a)(42)(A).

76. *See Lazarus*, *supra* note 3, at 73.

77. *Id.*

78. *See IIRIRA* § 601.

79. *Lazarus*, *supra* note 3, at 73-74.

80. *Matter of Chang*, 20 I. & N. Dec. 38, 39 (B.I.A. 1989).

elements listed in Section 101(a)(42)(A) of the INA.⁸¹ By placing all of its focus on China's population control policy as written, the court failed to recognize its realities.⁸² The prevalence of forced abortions and sterilizations as methods of enforcement was much greater and the Chinese government was much more to blame than the United States imagined.⁸³

The BIA decision in *Chang* was met with great criticism and immediate attempts to overrule it, but continual setbacks impeded the process for more than six years.⁸⁴ Congress proposed the Emergency Chinese Immigration Relief Act in 1989, which would have provided for careful consideration of asylum applicants who expressed fear of persecution under China's population control policy.⁸⁵ However, President George H.W. Bush vetoed the bill.⁸⁶ Despite strong legislative support and his own agreement with the overall goal of the Act, the President believed that he could "accomplish the laudable objective of Congress" by executive action, thereby preserving his ability to manage foreign policy.⁸⁷ An Executive Order issued shortly before his term ended would have produced virtually the same results as the 1989 Act, but because it did not appear in the INS publication of the 1990 asylum regulations, federal courts continued to disagree as to whether *Chang* was good law.⁸⁸ While the Clinton administration initially supported the BIA's decision in *Chang*, it changed its position in 1994.⁸⁹ In 1996, Congress finally passed legislation that resolved the long-standing inconsistencies resulting from the aftermath of *Chang*.⁹⁰

B. Section 601 of the IIRIRA

On September 30, 1996, President Clinton signed into law the IIRIRA, overruling the BIA's holding in *Chang*.⁹¹ Section 601 expanded the definition of refugee, adding the following sentence to the end of section 101(a)(42) of the INA:

For purposes of determination under this Act, a person who has been forced to abort a pregnancy or 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

81. *Id.* at 43-44.

82. Jordan, *supra* note 1, at 241.

83. *Id.*

84. *Id.* at 239.

85. Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong., § 3(a) (1989).

86. Lazarus, *supra* note 3, at 77.

87. *Id.*

88. Jordan, *supra* note 1, at 239.

89. *Id.*

90. *Id.*

91. *Id.* at 240.

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.⁹²

From the outset there was concern that section 601 was gender-biased.⁹³ Critics argued that it would be easier for females who had undergone a forced abortion to claim asylum under this amended definition than it would be for the father of an aborted child.⁹⁴ The courts wasted very little time in addressing this issue and attempted to eliminate the possibility that section 601 would protect men less than women.⁹⁵

1. Judicial Interpretation of Section 601

The BIA broadly interpreted the scope of section 601 with its 1997 decision in *Matter of C-Y-Z*, holding that a male asylum applicant could "stand in the shoes" of his wife to establish eligibility on the basis of her forced abortion or sterilization.⁹⁶ The court concluded that forcible application of China's coercive population control policy to a man's wife constituted past persecution that would allow him to make a "bona fide and non-frivolous" claim based on harm that had impacted her more intimately than him.⁹⁷ While some criticized the court for providing little reasoning for this broad statutory interpretation,⁹⁸ others heralded the BIA for its "attempt to ensure that men and women [were] afforded equal protection under the amended asylum statute, despite ambiguity in the statute."⁹⁹

The court expanded on the principles it established in *C-Y-Z* in *Matter of Y-T-L*, where it held that coerced sterilization is a "permanent and continuing act of persecution that [deprives] a couple of the natural fruits of conjugal life."¹⁰⁰ In doing so, the court departed from a longstanding principle of refugee law: the "prospective view" of harm.¹⁰¹ An asylum application is typically denied where there is evidence of a "fundamental change in circumstances,"

92. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 601, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. §1101(a)(42)(B) (2006)).

93. Jordan, *supra* note 1, at 240.

94. *Id.*

95. *Id.* at 242.

96. *Matter of C-Y-Z*, 21 I. & N. Dec 915, 918 (B.I.A. 1997).

97. *Id.*

98. David A. Martin, *Major Developments in Asylum Law over the Past Year: A Year of Dialogue Between Courts and Agencies*, 84 NO. 35 INTERPRETER RELEASES REP. 2069, 2073-74 (2007).

99. Jordan, *supra* note 1, at 242.

100. *Matter of Y-T-L*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003).

101. Martin, *supra* note 98, at 2073.

causing there to no longer be a "well founded fear of persecution."¹⁰² Prior to *Y-T-L*, it was unclear whether sterilization could be considered a change in circumstances.¹⁰³ However, in *Y-T-L* the BIA concluded that only changed country conditions could rebut the presumption of a well-founded fear once persecution has been established.¹⁰⁴ Sterilization itself cannot constitute a change in circumstances that would warrant a denial of asylum.¹⁰⁵

2. Narrowing the Doctrine of *C-Y-Z*

It was not long before resistance to the court's broad interpretation of section 601 began to develop.¹⁰⁶ This opposition was stimulated in large part by the high number of asylum applicants from China.¹⁰⁷ Originally, the IIRIRA placed a cap of 1,000 on the number of refugee and asylum applications that would be admitted each year in order to ease concerns that the amendment would encourage a huge influx of Chinese asylum seekers.¹⁰⁸ However, the REAL ID Act of 2005 removed this cap on the number of individuals who could be granted asylum under section 601.¹⁰⁹ Additionally, resistance was motivated in part by fear that the law would be misused to further illegal immigration.¹¹⁰

Whatever the reasons for this growing criticism, the court responded by reigning in the decision of *C-Y-Z*. In *Matter of J-H-S*, the court held that the simple fact of the birth of a second child does not require a finding that the person faces persecution on return to China.¹¹¹ Evidence concerning the country's population control policy showed considerable variation in enforcement among regions and localities.¹¹² As a result, an asylum applicant must provide proof of the details of the population control policy that are relevant to his or her case.¹¹³ In a further sign of narrowing the doctrine, the court in *Matter of T-Z* held that not all forms of economic pressure exerted by the government in an attempt to promote smaller families rise to the level of coercion.¹¹⁴ The economic deprivation must amount to persecution, which

102. Sara E. Stewart, Case Note, *Lin v. United States Department 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, 176 (2007) (quoting 8 C.F.R. § 1208.13(b)(1)(2006)).

103. See *Matter of Y-T-L*, 23 I. & N. Dec. 601 (B.I.A. 2003).

104. *Id.* at 604.

105. *Id.* at 605.

106. Martin, *supra* note 98, at 2074.

107. Jordan, *supra* note 1, at 240.

108. *Id.*

109. *Id.* at 246.

110. Kung, *supra* note 47, at 1274.

111. *Matter of J-H-S*, 24 I. & N. Dec. 196, 201 (B.I.A. 2007).

112. *Id.* at 199.

113. *Id.* at 201.

114. *Matter of T-Z*, 24 I. & N. Dec. 163, 169 (B.I.A. 2007).

requires a showing of harm that is of a "severe nature."¹¹⁵ Although these cases may have limited the reach of *C-Y-Z*, it was a Second Circuit decision in June of 2007 that delivered the most damaging blow.¹¹⁶

3. *Lin v. U.S. Department of Justice*

Ten years after the BIA first announced that asylum would be extended to the spouse of a woman forced to undergo an abortion or sterilization, a "deeply divided"¹¹⁷ Second Circuit held that section 601 of the IIRIRA is unambiguous and does not extend automatic refugee status to spouses or unmarried partners of those individuals that are expressly protected under the statute.¹¹⁸ The Second Circuit, which had deferred to the BIA decision in *C-Y-Z* in prior cases, stated, "[t]o the extent that deference implicit in these cases can be read to say that deference is due, they are overruled."¹¹⁹ The Second Circuit was the first federal circuit to deny asylum to spouses as a matter of law,¹²⁰ but not the last.¹²¹ Recently, in *Zheng v. Attorney General*, the Third Circuit adopted the reasoning of the Second Circuit in *Lin*, overruling a previous case in which it had upheld the BIA's decision in *C-Y-Z*.¹²² These decisions to overrule *C-Y-Z* have created a split among the circuits with the rulings of the Second and Third Circuits differing from that of four others.¹²³

According to the majority in *Lin*, the language of the statute could not be clearer in its reference to "a person" rather than a couple.¹²⁴ Under this holding, a person has been forced to abort a pregnancy or undergo involuntary sterilization only if they have "physically undergone" the procedure.¹²⁵ The majority opined that if Congress had intended to extend protection to the spouse or partner of someone who has been physically subjected to such a procedure, it could have said so explicitly.¹²⁶ The court further explained that failing to follow the plain language of the law for ten years did not require it to do so indefinitely.¹²⁷

In order to qualify for asylum under *Lin*, a spouse or partner of a woman who has been forced to undergo an abortion or sterilization must demonstrate

115. *Id.* at 173.

116. *See Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 309 (2d Cir. 2007).

117. Goldstein, *supra* note 4.

118. *See Lin*, 494 F.3d at 309.

119. *Id.* at 305.

120. Goldstein, *supra* note 4.

121. *See Zheng v. Att'y Gen. of the U.S.*, No. 07-2135, 2009 WL 398257, at *8-9 (3d Cir. 2009).

122. *Id.*

123. *See id.* (adopting the reasoning of the Second Circuit in overruling *C-Y-Z*); Goldstein, *supra* note 4 (stating that at that time the Second Circuit's decision to overrule *C-Y-Z* was in opposition to the rulings of five other circuits).

124. *Lin*, 494 F.3d at 305.

125. *Id.*

126. *Id.*

127. *Id.* at 310.

that he has engaged in “other resistance” to a coercive population control policy and that he would be subjected to persecution for this resistance.¹²⁸ The phrase “other resistance” is ambiguous and leaves room for the BIA’s “reasonable interpretation.”¹²⁹ However, “other resistance” does not include the woman undergoing an abortion or sterilization or her resistance to the policy.¹³⁰ While this evidence is not irrelevant to the determination, standing alone it will not result in an automatic grant of asylum for a husband or partner.¹³¹

Supporters of the broad interpretation expounded in *C-Y-Z* argue that the Second Circuit’s decision constitutes “a severe narrowing of who is meant to be protected.”¹³² Those who oppose it have expressed hope that the holding will stimulate intercourt dialogue and more widespread reconsideration of the BIA’s decisions in *C-Y-Z* and *Y-T-L*.¹³³ Indeed, with the recent holding in *Zheng* it seems that the hopes of those in the latter group may have come to fruition. Regardless of the disagreement over whether these holdings are correct, it is clear that many Chinese immigrants will find it more difficult to obtain asylum as a result. If a case of this nature goes to the United States Supreme Court, a decision favoring the rulings of the Second and Third Circuits could impact many more asylum seekers. This has prompted swift legislative action.

III. H.R. 3552

As a result of the Second Circuit decision in *Lin*, former New York Representative Vito Fossella introduced a bill in the House of Representatives on September 17, 2007.¹³⁴ The legislation proposed by Fossella, House Resolution (H.R.) 3552, would have “amend[ed] the Immigration and Nationality Act to include within the definition of ‘refugee’ spouses of persons who have been forced to abort a pregnancy or undergo involuntary

128. *Id.* at 309-10; *see also* 8 U.S.C. § 1158(b)(3)(A) (2006) (stating that “[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” Derivative asylum under § 1158(b)(3)(A) is only available where the victimized spouse has already been granted asylum. Thus, it is in those situations where a spouse precedes his significant other in traveling to the U.S. that he or she would need to demonstrate “other resistance”).

129. *Lin*, 494 F.3d at 312.

130. *Id.* at 313.

131. *Id.*

132. Goldstein, *supra* note 4 (quoting New York Law School professor and immigration expert, Lenni Benson).

133. Martin, *supra* note 98, at 2076 (arguing that Section 601 of the IIRIRA was intended to make those truly harmed or threatened by coercive population control policies eligible for asylum. The goal was to equalize treatment with other types of persecution, not to bestow special privileges on this class of individuals. According to Martin, the BIA departed from this path of equality in *C-Y-Z* and *Y-T-L*).

134. H.R. 3552, 110th Cong. (1st Sess. 2007).

sterilization.”¹³⁵ Fossella was prompted to draft this legislation when only one day after the Second Circuit’s decision in *Lin* an immigration judge in Manhattan was forced to order the removal of a Chinese refugee.¹³⁶ Jiang Meijiao’s rejected asylum claim was based on the fact that her husband was the victim of forced sterilization after attempts to sterilize her failed because of complications resulting from giving birth.¹³⁷

Although the bill did not ultimately pass,¹³⁸ this proposed legislation is significant in its recognition that an individual may be persecuted through the coerced abortion or sterilization of a spouse. Regarding the motivation behind the bill, Representative Fossella stated:

I think it’s self-evident that China has a barbaric policy of forced sterilization and abortion, and I think it brutalizes not just the person forced to undergo it but also the spouse.¹³⁹

This legislation will help provide safety and a new beginning . . . [It] recognizes the extreme physical and emotional trauma caused by China’s policy of forced abortions and sterilizations on parents. I believe Congress has a responsibility to do the right thing and help families who have already suffered so greatly.¹⁴⁰

Despite his impassioned statement and noble aspirations, not everyone agreed with the Representative’s assertion that his bill would accomplish “the right thing.”

A. Criticism of H.R. 3552

1. Abuse of the Law

Fossella’s proposed legislation flew in the face of those who oppose extending the protection offered by section 601 of the IIRIRA. Some have argued that Section 601 “facilitated a dramatic rise in the number of Chinese migrants smuggled into the U.S.”¹⁴¹ These individuals suggest that when the amendment extended the definition of refugee in 1996, it created a safety net which has allowed smugglers to assure Chinese immigrants that if apprehended

135. *Id.*

136. Press Release, Former Representative Vito Fossella, Representative Fossella Introduces Legislation to Help the Victims of China’s Barbaric Forced Sterilization Policy (Sept. 17, 2007) (U.S. Fed. News) [hereinafter Fossella, Press Release].

137. *Id.* at 3.

138. GovTrack.us, H.R. 3552, 110th Congress (2007), <http://www.govtrack.us/congress/bill.xpd?bill=h110-3552> (last visited Apr. 25, 2009).

139. Joseph Goldstein, *Fossella Wants More Asylum for Chinese*, N.Y. SUN, Sept. 13, 2007.

140. Fossella, Press Release, *supra* note 136.

141. Kung, *supra* note 47, at 1305.

on arrival, they can claim asylum.¹⁴² Proponents of repealing section 601 contend that the law grants prima facie asylum eligibility to many Chinese who are migrating for economic reasons and are not truly refugees.¹⁴³ Thus, some believe that extending the definition of refugee will inundate the BIA with additional cases of those who will fabricate stories to meet the broader criteria.¹⁴⁴

The logic of this argument is unpersuasive. During debate on section 601, Representative Christopher H. Smith wisely pointed out that individuals who are willing to lie in order to receive asylum would change their story to fit whatever laws are in place to regulate it.¹⁴⁵ "Problems of proof are inherent to immigration proceedings of all kinds; fraud is not a persuasive rationale for denying asylum to a particular class of Chinese asylum applicants."¹⁴⁶ Furthermore, it may be considerably more difficult to obtain asylum based on China's coercive population control policy than these opponents suggest. While the REAL ID Act of 2005 removed numerical limits on grants of asylum based on claims of forced abortion or sterilization, other provisions set forth in section 101 of the Act will make it harder for new applicants to prove their claims.¹⁴⁷ In fact, in *Qui v. Ashcroft*, the Second Circuit actually criticized the BIA's standard of proof as being so high that it allowed administrative decision makers to reject whichever applicants they happened to disfavor.¹⁴⁸

Not only does the Act codify case law placing the burden of proof on the asylum-seeker to demonstrate that he or she meets the definition of refugee under section 601, but it also requires an applicant to provide either corroborating evidence or "cogent reasons behind the lack of such evidence"¹⁴⁹ if an immigration judge finds that such information is necessary to determine that the claim is credible.¹⁵⁰ While this assessment of credibility can be difficult, Congress believed that the assessment in cases based on coercive family planning policies was no more complex than in asylum cases based on other factual circumstances.¹⁵¹ Therefore, Congress reduced the risk of fraud by

142. *Id.* at 1295.

143. *Id.*

144. 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, 374 (2007) (citing 142 CONG. REC. H2643 (daily ed. Mar. 21, 1996) (statement of Rep. Smith)).

145. Rabkin, *supra* note 31, at 975 (citing 142 CONG. REC. H11, 067 (daily ed. Sept. 25, 1996) (comments of Rep. Smith)).

146. 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, 2186 (2007).

147. Jordan, *supra* note 1, at 246.

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

149. Nortick, *supra* note 146, at 2185.

150. Jordan, *supra* note 1, at 246.

151. Rabkin, *supra* note 31, at 975.

requiring the same burden of proof for section 601 asylum-seekers as for those seeking asylum under other conditions.¹⁵²

Any asylum policy has some potential for abuse, as there will always be individuals who are willing to fabricate claims of persecution. However, this does not mean that we should ignore the immense benefits that have resulted from section 601, the long-standing reliance thereon, and the importance of extending protection to *all* of those who have credible claims of persecution.¹⁵³ Concerns with credibility may be addressed through careful "case-by-case adjudication," but should not result in "wholesale denial."¹⁵⁴ There is evidence that individuals whose claims are denied may face fines and torture at "re-education camps" upon their return to China.¹⁵⁵ Therefore, our laws should be broad enough to grant asylum to those individuals who can present credible accounts of the suffering they have endured at the hands of the Chinese government.¹⁵⁶

2. Family Abandonment

The majority in *Lin* expressed concern that extending the definition of refugee to include a spouse would motivate husbands to leave their wives behind in China.¹⁵⁷ They feared that the policy would create an incentive for married men to travel to the United States with no intention of sending for their wives or children after obtaining asylum.¹⁵⁸ However, in a concurring opinion written by Judge Robert A. Katzmann, several justices agreed that it is likely that most husbands would find it advantageous to come with their wives when it is possible because "doing so will buttress the credibility of their claims."¹⁵⁹ Unfortunately, this is not always a viable option. Families rarely travel as a cohesive unit given the high costs and dangerous risks of traveling to the U.S. through the services of a smuggler, which are often utilized due to the bureaucratic hurdles that individuals face in obtaining the legal documents needed to leave China.¹⁶⁰

While it might seem logical that the wife and mother of the family would be the first to flee from China considering she is typically the one who has

152. *Id.*

153. See *Matter of S-L-L*, 24 I. & N. Dec. 1, 13-14 (B.I.A. 2006). B.I.A. Member Roger A. Pauley states that were the issue presented for the first time, he would agree that whether the spouse of an individual forced to undergo an abortion or sterilization has been persecuted should depend on an individualized assessment of whether he was persecuted on account of "other resistance" to a coercive population control policy but that he would not now overrule *Matter of C-Y-Z* given its "almost universal acceptance" and "the extensive degree of reliance thereon."

154. Berman, *supra* note 144, at 374.

155. *Id.* at 375.

156. *Id.*

157. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 312 (2d Cir. 2007).

158. *Id.*

159. *Id.* at 325.

160. Kung, *supra* note 47, at 1279.

suffered from “egregious physical persecution,” this is simply not the custom.¹⁶¹ Generally, the husband and father forges the way for his family, who will follow once he has established a home and the ability to support them.¹⁶² It seems unfair to punish Chinese men who, in preceding their families, are following the cultural practice of multitudes of refugees who have fled poor living conditions in Ireland, Germany, Russia, and Central America throughout history.¹⁶³ Conformity with cultural and historical norms in treading a path for one’s family should not bear on the merits of a male applicant’s asylum claim.¹⁶⁴

3. Focus on Marital Status

While some critics likely believed that H.R. 3552 would be an unwarranted and unwise extension of section 601, others will argue that any legislation of this nature must go further and provide equal protection to all victims of China’s coercive population control policy. None of the federal courts have gone so far as to extend per se asylum to unmarried fathers.¹⁶⁵ In the same vein, H.R. 3552 emphasized the institution of marriage, which is “paramount and overrides countervailing hardships faced by [certain] plaintiffs.”¹⁶⁶ This bill was consistent with the opinion of the courts that boyfriends, fiancés, and other unmarried partners are not comparable to husbands 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.”¹⁶⁷

Courts have upheld this bright-line rule against extending per se protection to unmarried partners because concluding otherwise would force them to make difficult distinctions between unmarried men who have a truly close and intimate relationship with the woman forced to abort their child and the men

161. *Matter of C-Y-Z*, 21 I. & N. Dec. 915, 927 (B.I.A. 1997).

162. *Id.*

163. *Id.*

164. *Id.*

165. See Meredith M. Snyder, Note, *For Better or Worse: A Discussion of the BIA’s C-Y-Z Decision and Its Legacy for Refugees of China’s One-Child Policy*, 84 WASH. U. L. REV. 1541, 1551-53 (2006) (indicating that the Seventh and Ninth Circuits have granted asylum to those married in a traditional ceremony that is not legally recognized by the Chinese government). In *Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 555-56 (9th Cir. 2004), the applicant and his partner wanted to marry but were prohibited from doing so by the government due to their ages. However, they proceeded to marry and Ma’s wife later became pregnant. *Id.* When the authorities learned that Ma’s wife was pregnant they forcibly aborted the pregnancy and fined the couple. *Id.* at 556. While the BIA rule stated only that “legally” married spouses were eligible for asylum, the Ninth Circuit reasoned that basing eligibility on the Chinese government’s determination of “legality” would legitimize and support its coercive laws. *Id.* at 558-59.

166. Cyrus D. Mehta, *Judge Alito on Immigration Law*, IMMIGR. MONTHLY, Dec. 2005, available at <http://www.ilw.com/articles/2005,1230-IM.pdf>.

167. Nortick, *supra* note 146, at 2181.

who do not.¹⁶⁸ However, this argument fails to address the fact that the entire judicial process of granting asylum typically relies on a difficult determination of credibility made by an immigration judge.¹⁶⁹ A refugee who is seeking asylum in the United States can rarely offer more than her word as to the persecution that she has experienced, yet courts have been willing to judge the credibility of her claim, as challenging as it may be.¹⁷⁰ Why, then, are they so unwilling to scrutinize the relationship that exists between two unmarried partners?

"Marital status is a convenient but faulty substitute for accurate fact-finding regarding persecution."¹⁷¹ We cannot continue to correlate the extent of the harm a couple suffers following a forced abortion or sterilization with their marital status.¹⁷² The legal status of a relationship may be one way for a man to establish persecution, but it should not be the sole determinative factor.¹⁷³ While restricting eligibility to married couples may be an expedient way to resolve claims of asylum, efficiency should never take precedence over legitimate pain and suffering. To avoid arbitrarily denying relief to those who may deserve a grant of asylum, immigration judges should examine the intimacy of a relationship, rather than a document, to determine if the spouse, though not physically harmed, nonetheless suffered persecution.¹⁷⁴ In evaluating an asylum applicant's claim of persecution, these judges are frequently required to perform a searching inquiry into the background of the individual in order to evaluate the veracity of this claim.¹⁷⁵ A more detailed probe of an unmarried man's relationship with the woman directly targeted by the persecution, though not easy, would not add significantly to this existing burden.

The argument that a marital relationship is necessary to ensure that the asylum applicant and the victim have a close connection reflects an outdated view of the family.¹⁷⁶ Divergence from the traditional family model has gained increasing acceptance in the United States, as Americans acknowledge that a family does not always consist of a married mother and father.¹⁷⁷ Through its imposition of a duty to pay child support, the law recognizes the responsibility of a father who is not married to the mother of his child, yet fails to appreciate any stake this same man has in the life of an unborn child conceived with a woman to whom he is not married.¹⁷⁸ "An individual's rights and

168. Mehta, *supra* note 166.

169. Rabkin, *supra* note 31, at 975.

170. Nortick, *supra* note 146, at 2185.

171. *Id.* at 2154.

172. *Id.*

173. *Id.*

174. *Id.*

175. See Rabkin, *supra* note 31, at 975.

176. Berman, *supra* note 144, at 371.

177. *Id.*

178. *Id.* at 372.

responsibilities as a father should be acknowledged and respected, [regardless] of whether he is or has been married to the mother of the child.”¹⁷⁹ It seems grossly unfair to hold that the pain and suffering of unmarried victims of forced abortion are less important than the pain suffered by a married couple.¹⁸⁰

Perhaps most troubling is the fact that many of those seeking asylum are unmarried only because of China’s legal restrictions against marriage,¹⁸¹ which prevent women and men from marrying before the ages of 20 and 22, respectively.¹⁸² It is difficult to understand how this involuntary legal status would diminish the pain that an individual feels at the forced sterilization of his partner or the loss of a child.¹⁸³ Furthermore, this prohibition against marriage constitutes an integral part of China’s population control policy,¹⁸⁴ and, as such, should not be validated by the courts.

Additionally, the marital status of a person should not be determinative because Congress’s original intent was to grant relief for the violation of a person’s basic right to procreate, which exists regardless of marital status.¹⁸⁵ In its Memorandum discussing the IIRIRA, the INS General Counsel specifically stated that in determining whether to grant asylum, immigration judges should consider “the degree of trauma, both emotional and physical.”¹⁸⁶ Furthermore, the legislative history of the IIRIRA reveals no intention for asylum to be limited to married couples. In debates concerning China’s family planning policy, the word “couple” was repeated, while “spouse” and “married couple” were not used.¹⁸⁷ Had Congress intended to limit the statute to married couples, it is logical to assume that words to that effect would have been used in the congressional report.¹⁸⁸ Instead, the emphasis of the congressional discussions centered largely on the idea that something should be done for all victims impacted by China’s population control policy, not just the physical victims of a forced abortion or sterilization.¹⁸⁹

179. *Id.*

180. *Id.*

181. Rabkin, *supra* note 31, at 992.

182. *Ma v. Ashcroft*, 361 F.3d 553, 555 (9th Cir. 2004).

183. Rabkin, *supra* note 31, at 992.

184. *Ma*, 361 F.3d at 559.

185. Berman, *supra* note 144, at 368-69.

186. *Id.* at 370.

187. *Id.* at 369 (citing H.R. REP. NO. 104-469, pt. 1, at 174 (1996)).

188. *Id.*

189. *Id.* at 369-70.

B. The Pressing Need for H.R. 3552

1. Reexamining the Aim and Impact of China's Coercive Population Control Policy

Despite the fact that H.R. 3552, as proposed, would have failed to extend protection to the unmarried partner of a woman who has been forced to abort a pregnancy or undergo sterilization,¹⁹⁰ it is an important and necessary step in the right direction. H.R. 3552 would have provided equal protection for both men and women, recognizing a man's stake in the pregnancy or fertility of his wife and placing his suffering on the same level as hers. In the interest of equity, it must be recognized that the harm resulting from the enforcement of a population control policy impacts both spouses at whom it is directed when it is clear that they both opposed such measures.

To suggest that only the woman who underwent a forced abortion or sterilization was persecuted is to ignore that in China this government action is explicitly directed against both husband and wife for violating the country's population control policy.¹⁹¹ This argument was advanced in Judge Sonia Sotomayor's concurring opinion in *Lin*, where she expressed that "[t]he harm [of the policy] is clearly directed at the couple who dared to continue an unauthorized pregnancy in hopes of enlarging the family unit."¹⁹²

As we have seen, enforcement mechanisms utilized by local officials frequently target others in addition to the woman herself. The Chinese government often administers its population control policy by persecuting an entire family when one of its members acts in violation.¹⁹³ Families that have exceeded their birth limit are persecuted for this violation through the forced sterilization of one parent as well as economic deprivation, stigmatization, and constant governmental intrusion into their private lives.¹⁹⁴ A family may struggle to survive in the face of these consequences. Taking all of this into account, it is difficult to understand how the practical implications of China's coercive population control policy weigh any less heavily on a husband and father.

When one spouse is subjected to forced abortion or sterilization, it "naturally and predictably has a profound impact on both parties to the marriage."¹⁹⁵ The forced abortion or sterilization of a woman "deprive[s] a couple of the natural fruits of conjugal life": a child who might have been born to them.¹⁹⁶ In most cases, the forced abortion or sterilization of one spouse will

190. H.R. 3552, 110th Cong. (1st Sess. 2007).

191. *Chen v. Att'y Gen. of the U.S.*, 491 F.3d 100, 108 (3d Cir. 2007).

192. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 299 (2d Cir. 2007).

193. Deans, *supra* note 50, at 353.

194. *Id.*

195. *Chen*, 491 F.3d at 107-08.

196. *Id.* at 108.

directly affect the reproductive capacity of the other.¹⁹⁷ Additionally, a husband may suffer "emotional and sympathetic harm" when his spouse is mistreated and his shared reproductive rights are infringed upon in such an obtrusive manner.¹⁹⁸ Some suggest that an individual may be persecuted simply by witnessing the physical harm of someone with whom he or she has an intimate relationship.¹⁹⁹ Given the realities of the impact of China's coercive population control policy, how can the U.S. in good faith continue to deny that "one has suffered harm or injury sufficiently severe to constitute persecution when one's spouse is forced to undergo an abortion or sterilization?"²⁰⁰

2. Recognizing the Right to Procreate

The right to bear children is internationally regarded as one of the most cherished human rights.²⁰¹ In a concurring opinion in *C-Y-Z*, Board Member Lory D. Rosenberg stated, "The right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally."²⁰² Indeed, international law recognizes reproductive rights that guarantee all individuals "the right to decide freely and responsibly the number, spacing, and timing of their children" and "the right to make decisions concerning reproduction free of discrimination, coercion, and violence."²⁰³ Giving birth is a basic human right that should not be denied for any political, economic, or cultural reasons.²⁰⁴

A fundamental right to procreate has long been accepted within American jurisprudence. One of the earliest cases in the United States recognizing this right was *Skinner v. Oklahoma ex rel. Williams*, in which the defendant claimed that Oklahoma's Criminal Sterilization Act violated the Equal Protection Clause of the Fourteenth Amendment.²⁰⁵ The Court held that reproduction is "one of the basic civil rights of man" and deemed involuntary sterilization a particularly egregious infringement on this fundamental right.²⁰⁶ In *Guo Chun Di v. Carroll*, the court held that there is little doubt that the phrase "political opinion," as defined in § 101(a)(42) of the INA, encompasses an individual's

197. *Id.*

198. *Id.*

199. Deans, *supra* note 50, at 366; *see also Matter of C-Y-Z*, 21 I. & N. Dec. 915, 927 (B.I.A. 1997).

200. *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 326 (2d Cir. 2007).

201. Rabkin, *supra* note 31, at 965.

202. *Matter of C-Y-Z*, 21 I. & N. Dec. at 921.

203. Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L. J. 881, 891 (2000) (citing the UNITED NATIONS, PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, para. 7.3, U.N. Doc. A/CONF. 171/13, U.N. Sales No. E. 95.XIII.18.CI Annex (1994)).

204. Hampton, *supra* note 27, at 343.

205. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 536-37 (1942).

206. *Id.* at 541.

views regarding procreation.²⁰⁷ As a right protected under the Bill of Rights, reproductive freedom is analogous to other fundamental rights that are well recognized as legitimate grounds for a grant of asylum based on persecution resulting from political opinion, such as the freedom of religion and freedom of speech.²⁰⁸

Reproductive self-determination is a human right that is not exclusive to women, despite the fact that it is women who generally experience the direct effect of China's population control policy. For both men and women, denial of the choice to remain fertile or procreate constitutes persecution on the basis of political opinion.²⁰⁹ This choice should be protected under U.S. asylum laws to the same extent as other fundamental rights and without regard to gender. According to Rosenberg, the denial of reproductive rights provides the basis for granting asylum to both the person directly victimized and their spouse or partner when both are fleeing coercive family planning policies.²¹⁰

V. CONCLUSION

While overpopulation represents a legitimate concern in China, it does not justify the violation of basic human rights that occurs when an individual or one's spouse is forced to undergo an abortion or sterilization. Extending asylum law in the United States to protect the spouse of an individual facing this type of persecution is a difficult decision that requires one to balance the negative consequences that could result against the importance of granting asylum to those who present credible claims of persecution under China's coercive population control policy. Concerns about an overflow of immigration into the United States and abuse of the system should always be taken into account in the formulation of new asylum law. However, the arguments advanced by those who would oppose expanding the protection offered by section 601 fail to present compelling reasons for the continued disregard of the persecution suffered by a man whose wife is forced to abort their child or undergo sterilization.

In weighing the importance of legislation like H.R. 3552, policymakers should carefully consider whether failure to take action could be seen as implicitly consenting to the continued violation of the human rights of thousands of Chinese citizens. The U.S. cannot continue to stand by and observe this gross indifference to the fundamental right of reproductive freedom for Chinese men. A change in U.S. policy would not bring an end to the imposition of excessive fines, forced sterilization, or late-term abortions that are a reality for many couples in China. However, it would recognize the far-reaching impact of the country's coercive population control policy and in

207. *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 872 (E.D. Va. 1994).

208. *Id.*

209. Stewart, *supra* note 102, at 189.

210. Rabkin, *supra* note 31, at 991.

doing so, would provide a safe-haven for men and women who have suffered from this type of egregious persecution.

