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NOTE

IIRIRA, SECTION 601(a): AN AMBIGUOUS, PROBLEMATIC, YET FOUNDATIONAL PROVISION FOR IMMIGRATION LAW—CAN IT BE FIXED?

Caleb A. Sweazey[†]

ABSTRACT

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the “IIRIRA”) provides a standard that defines unlawful human presence in the United States and establishes the consequences faced for such unlawful presence. Title VI, Section 601(a) of the IIRIRA (“Section 601(a)”) grants asylum to people who have undergone a forced abortion or sterilization, or been threatened with the procedure, in their native country. Section 601(a) is problematic because it does not clearly identify how far, or even whether, the granting of asylum extends to relatives of the victim of a forced abortion or forced sterilization. Furthermore, Section 601(a) does not address the union of marriage; therefore, the section does not provide a definition or requirements for a victim’s partner to be considered a husband or spouse. Additionally, the lack of clarity in Section 601(a)(2) concerning the required Attorney General’s report for such grants of asylum is problematic. These deficiencies have caused immigration officials to apply Section 601(a) inconsistently and a split among the federal appellate circuits. This division and inconsistency undercuts the purpose of United States immigration, which is to provide specific standards to all judicial circuits and officials within the United States in order to bring about the consistent and equitable application of immigration law.

This Note’s proposed solution to this division within jurisprudence is to adopt an amendment to Section 601(a). The amendment would clarify which relatives of a victim should be granted asylum and would

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particularize the Attorney General's required report even further. An amendment to Section 601(a) is the best solution to the problem, because even though the IIRIRA has not achieved a solution to all immigration problems, the Act has established foundational tenets on which to build, particularly in the area of asylum for victims of forced abortions and forced sterilizations. Asylum under the amendment to Section 601(a) would extend only to the legal husband and children of the victim of a forced abortion or forced sterilization. This requirement and specification concerning relatives would prevent falsification and fraud in the application process. Such an amendment also would require that the Attorney General's report contain documented evidence that each approved applicant underwent a forced abortion or forced sterilization that was coercive, and it would establish criteria for required approval of asylum applications. These changes would clarify the confusion within jurisprudence concerning the application of Section 601(a) and would prevent ad hoc decision making by both the Attorney General and other officials in the determination and approval process concerning asylum applications.

I. INTRODUCTION

The Illegal Immigration Reform and Immigrant Responsibility Act (the "IIRIRA" or "Act") provided a critical component of immigration reform when it was signed into law by President Bill Clinton in 1996.¹ The IIRIRA provides a standard that defines unlawful human presence in the United States; the Act also establishes the consequences faced by a person that is unlawfully present in the United States.² However, the IIRIRA contains an unclear, and thus problematic, provision in Title VI, Section 601(a) of the Act ("Section 601(a)").³ Section 601(a) grants asylum to people who have undergone a forced abortion or sterilization, or have been threatened with either procedure, in their native country.⁴

There are two major problems with Section 601(a) of the IIRIRA as it is written. First, Section 601(a) does not clearly identify how far, or even whether, the granting of asylum extends to relatives of the victim of a

1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 [hereinafter IIRIRA] (codified as amended at 8 U.S.C. § 1101 (2006)).

2. *Id.*

3. IIRIRA § 601(a) (codified at 8 U.S.C. § 1101(a)(42)).

4. *Id.*

forced abortion or forced sterilization (“victim”).⁵ Debate exists as to how closely related one must be to the victim in order to gain asylum under Section 601(a). This debate stems from the fact that Section 601(a) does not address the union of marriage.⁶ The lack of any definition or requirements for a victim’s partner to qualify as a husband or spouse opens up the possibility that any partner of a victim could gain asylum due to the victim’s experiences. This ambiguity extends to the debate as to which family members of a victim may gain asylum. Due to this lack of a standard, there has been an inconsistent application of Section 601(a) by immigration officials, as well as a circuit split among appellate courts.⁷ It is necessary to amend Section 601(a) of the IIRIRA to provide asylum to the immediate family members of a victim under the laws of the victim’s home country.⁸ These immediate family members shall only include the legal husband and the children of a victim, because non-spousal partners are often not readily and unmistakably identifiable under the laws of the victim’s home country.⁹

The second problem is the ineffectiveness concerning the requirement for a report from the Attorney General in Section 601(a)(2).¹⁰ For example, one potential problem created by Section 601(a)¹¹ is the possibility that a foreign woman could undergo a voluntary abortion or sterilization and later claim that the procedure was coercive in the hope of gaining legal residence in the United States. Such a problem exists because Section 601(a)(2) only requires the Attorney General report to describe how many aliens have been admitted, to identify the aliens’ country of origin, and to estimate the numbers and origins of aliens that probably will gain asylum in the next two fiscal years.¹² These minimal reporting requirements are not specific enough to ensure the investigation and prevention of the fraudulent scenario previously described. Each of these deficiencies creates confusion in the application of this important section of the IIRIRA, and thus undercuts the

5. *Id.*

6. *See infra* text accompanying note 45.

7. *See infra* Part III.

8. *See infra* Part IV and proposed amendment to § 601(a) at text accompanying note 183.

9. *See infra* Part IV and proposed amendment to § 601(a) at text accompanying note 183.

10. *See infra* text accompanying note 45.

11. IIRIRA § 601(a).

12. *See infra* text accompanying note 45.

purpose of the entire Act.¹³ Therefore, the required Attorney General's report must contain documented evidence that the abortion or sterilization was coercive.¹⁴

In addition to addressing the two ambiguities mentioned above, the amendment should require that a candidate for asylum provide evidence that she is not exempt from the forced family planning policies of her native country in any way.¹⁵ The goal behind the IIRIRA, and thus United States immigration policy, is and ought to be to provide specific standards that require the government, courts, and officials to grant asylum to certain oppressed individuals without unnecessarily providing the opportunity to foreign individuals to take advantage of the system. However, the ambiguities in the wording of the IIRIRA have undercut that goal, as seen in the confusion and disagreement in judicial application of the statute.

This Note focuses on the current version of Section 601(a), the problematic effects that the section has had on the legal system, and proposes a solution to the problems of Section 601(a). The ambiguities in Section 601(a) have caused a split in authority among the circuits concerning whether asylum under the Section only extends to the husband of a victim who has suffered a forced abortion or forced sterilization, or rather not only to a husband but also to an unmarried partner of such a victim.¹⁶ Although the majority of circuits hold that asylum only extends to the husbands of victims, a growing minority of circuits have held that asylum also extends to the partners of victims.¹⁷ Additionally, some circuits have expressed doubt as to whether asylum should automatically extend to any relative of a victim at all.¹⁸ Therefore, this Note's proposed solution to the division within IIRIRA jurisprudence is to adopt an amendment to Section 601(a) in order to clarify which relatives of a victim should be granted asylum and to particularize the requirements of the Attorney General's report even further.¹⁹ An amendment to Section 601(a) is the best solution to the problem because, even though the IIRIRA has not achieved a solution to all immigration problems, it has established foundational

13. *See infra* Part III.

14. *See infra* Part IV and proposed amendment to § 601(a) at text accompanying note 183.

15. *See infra* Part IV and proposed amendment to § 601(a) at text accompanying note 183.

16. *See infra* Part III.

17. *See infra* Part III.B.2.a.

18. *See infra* Part III.B.2.b.

19. *See infra* Part IV.

tenets upon which to build, particularly in the area of asylum for victims of forced abortions and forced sterilizations.²⁰ The proposed amendment to Section 601(a) would have three provisions: (1) it would only extend asylum to the legal husband and children of the victim of a forced abortion or forced sterilization; (2) it would require that the Attorney General's report contain documented evidence that each approved applicant underwent a forced abortion or forced sterilization; and (3) it would establish criteria for required approval of asylum applications.

II. BACKGROUND

A person who looks to the United States for asylum—for a safe place to live—must overcome significant barriers before such protection will be granted.²¹ The Immigration and Nationality Act of 1952 (the “INA”) is a foundational statute concerning asylum law, and was enacted prior to the IIRIRA.²² The INA requires that an asylum applicant establish a well-founded fear of persecution.²³ In order for a fear of persecution to be well-founded, an applicant must demonstrate that he or she was persecuted on account of “race, religion, nationality, membership in a particular social group, or political opinion.”²⁴ This requirement in the INA laid the foundation and provided a major reference point for the provisions in the IIRIRA, specifically in Section 601. Despite its lengthy statutory elements and requirements, the INA contained ambiguous language that gave substantial discretion to courts in determinations concerning asylum applications.²⁵ Despite the identification of such terms as “persecution,” “well-founded fears,” and the five grounds that are protected from such persecution, the standards set forth in the INA lacked sufficient clarity. As a result, courts had to determine exactly what persecution means, identify the fears that are well-founded, and recognize actions that qualify as persecution when

20. See *infra* Part IV.

21. Immigration and Nationality Act of 1952 § 208(b)(1)(B)(i), Pub. L. No. 104-208, 110 Stat. 3009 [hereinafter INA] (codified as amended at 8 U.S.C. § 1158 (2006)).

22. *Id.*

23. *Id.*

24. *Id.*; see *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007); see also *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

25. Andy Rottman, Comment, *The Rocky Path from Section 601 of the IIRIRA to Issue-Specific Asylum Legislation Protecting the Parents of FGM-Vulnerable Children*, 80 U. COLO. L. REV. 533, 542 (2009).

those actions were based on one of the five protected grounds.²⁶ Because this ambiguity extends from the earlier INA to the latter IIRIRA, legislative clarity in this area is necessary to prevent judicial confusion, judicial standard-setting, and judicial activism. The next three sections will set out these ambiguities that started in the INA and continued through the enactment of the IIRIRA, to highlight the provisions ripe for legislation.

A. IIRIRA Requirement #1: Persecution

According to the INA, any application for asylum must involve the important element of persecution.²⁷ Although the courts adhere to various definitions of persecution, the Ninth Circuit adequately defined persecution as “the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.”²⁸ To be considered, any asylum applicant must therefore show that the *alleged harm* that he or she faces is persecution.²⁹ Courts may artfully define persecution, but immigration officials must remember that such definitions are *judicial* constructions. Thus, courts are not limited to a statutory definition of persecution, but rather are free to define persecution as they see fit. This lack of a legislative standard allows courts and government officials to approve and deny asylum applications essentially at will.

B. IIRIRA Requirement #2: Well Founded Fear of the Alleged Persecution

In addition, even if the applicant meets this persecution standard, the applicant must also show a well-founded fear of the alleged persecution.³⁰ This well-founded fear requirement contains subjective and objective components.³¹ The subjective component requires the asylum applicant actually experience a fear of persecution and such fear must be genuine.³² The objective component of the well-founded fear element requires that the

26. *Id.*

27. INA § 208(b)(1)(B)(i) (2006).

28. Ghaly v. Immigration & Naturalization Serv., 58 F.3d 1425, 1431 (9th Cir. 1995); *see also* Rottman, *supra* note 25, at 542.

29. INA § 208(b)(1)(B)(i).

30. *Id.*; *see also* Rottman, *supra* note 25, at 542.

31. Rodriguez-Rivera v. U.S. Dep’t of Immigration & Naturalization, 848 F.2d 998, 1001 (9th Cir. 1988).

32. *Id.* at 1002.

applicant's fears of persecution be reasonable.³³ This objective component requires the applicant to show that there is a "clear probability" . . . of persecution," meaning that it is more likely than not that the applicant's life or freedom is threatened.³⁴ The Board of Immigration Appeals (the "BIA") has held that to prove a well-founded fear of persecution, an applicant must prove that a "persecutor seeks to overcome [a belief] by means of punishment of some sort, [that] the persecutor is already aware, or could easily become aware" that the applicant holds that belief, and that the persecutor wants to punish holders of the belief and is capable of punishing holders of the belief.³⁵ Like the definition of persecution, these requirements for a well-founded fear of persecution are problematic because they are not legislatively created and thus not generally applicable to all circuits.

C. IIRIRA Requirement #3: Proper Reason for the Persecution Suffered

Finally, the applicant bears the burden of proving that the persecution suffered, or the well-founded fear of persecution, was "on account of race, religion, nationality, membership in a particular social group, or political opinion."³⁶ Generally, "this means that there must be some nexus between the persecution and the protected category."³⁷ On its face, this requirement does not provide asylum to victims of forced abortion or forced sterilization. Rather, this element of the asylum application requires a court to engage in a difficult analysis and determination of "the exact motive or motives for which harm has been inflicted."³⁸ In addition to the court, the Attorney General may grant asylum at his or her discretion.³⁹ Further, even if the applicant meets all of the elements, the adjudicator may still find reason to deny the application for asylum.⁴⁰ Although this does not usually occur, the power placed in the hands of adjudicators due to the lack of legislative direction and standards, illuminates the precarious position that

33. *Id.* at 1002.

34. *Cardoza-Fonseca v. U.S. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985).

35. *In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987).

36. INA § 101(a)(42) (codified as amended at 8 U.S.C. § 1101 (2006)).

37. *See Rottman*, *supra* note 25, at 543.

38. *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996).

39. *In re A-H-*, 23 I. & N. Dec. 774, 780 (A.G. 2005) (decided by Attorney General Ashcroft).

40. *Id.* at 780.

asylum applicants occupy.⁴¹ As stated previously, these categories are ambiguous and flexible, and they give courts and the Attorney General too much freedom and too little concrete direction in granting asylum.⁴² Also, no provision exists to protect the victims of forced abortions or forced sterilizations, and therefore courts that analyze such provisions are not required to provide such protection.

D. The IIRIRA Fills In the Gaps of the INA

The IIRIRA⁴³ was a response to both controversial case law and calls for statutory clarity concerning the legal requirements for foreigners seeking asylum in the United States. The Act sought to clarify the ambiguities and confusion in asylum law by restricting the overall availability of asylum and by expanding the protected category of political opinion, as seen in Section 601(a).⁴⁴ According to Section 601(a) of the Act:

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

(2) Not later than 90 days after the end of each fiscal year, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the number and countries of origin of aliens *granted refugee status or asylum* under determinations pursuant to the amendment made by paragraph (1). Each such report shall also contain projections regarding the number and countries of origin of aliens that are

41. See Rottman, *supra* note 25, at 543.

42. *Id.* at 542-43.

43. IIRIRA § 601(a).

44. *Id.*; see also Rottman, *supra* note 25, at 547-48.

likely to be granted refugee status or asylum for the subsequent 2 fiscal years.⁴⁵

Section 601(a) grants asylum to people who have undergone a forced abortion or sterilization, have been persecuted for refusing such a procedure, or have been threatened with the procedure in their native country.⁴⁶ To gain asylum for threats or persecution, a victim-applicant must show a well-founded fear of persecution.⁴⁷ Like the INA, Section 601(a) of the IIRIRA contains the same ambiguous standards of “well-founded fear” and “persecution,” as well as the protected ground of political opinion.⁴⁸ Section 601(a) also gives a great amount of discretion to the Attorney General by failing to establish a detailed list of requirements for the Attorney General’s report.⁴⁹ This failure allows the Attorney General to exercise personal discretion in granting or refusing asylum. Clearly, Section 601(a) of the IIRIRA has many of the same problems and ambiguities of the INA.⁵⁰

Despite Congress’ attempt to clarify the controversial area of asylum by passing the Act, IIRIRA Section 601(a) contains many ambiguities and has caused much judicial confusion.⁵¹ The ambiguities in Section 601(a) include a lack of direction as to which relatives of the victim qualify for asylum and what difficulties faced by an applicant qualify as persecution.⁵² The circuits have applied the IIRIRA in varying ways, which reflects the lack of clarity contained in the statute. Some circuits have held that the IIRIRA gives asylum to the spouses of the victims;⁵³ other circuits have refused to follow this interpretation of the IIRIRA’s application to the relatives of victims. Although many of the following cases and subsequent statutes attempted to clarify the ambiguities, the confusion and lack of predictability in the area of asylum reflects the need for amendments to the IIRIRA that will help courts to apply the law to difficult and emotion-filled situations. The varying application of the IIRIRA by the circuits, the lack of standards for the Attorney General’s report and powers, and Section

45. IIRIRA § 601(a) (emphasis added).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* Rottman, *supra* note 25, at 544.

51. IIRIRA § 601(a); *see infra* Part III.

52. Rottman, *supra* note 25, at 548-49.

53. *Id.* at 552-53.

601(a)'s lack of a clear definition of a well-founded fear of persecution create problems that must be addressed, and this Note attempts to do it by proposing an amendment.

III. PROBLEM: THE LEGAL AND SOCIAL IMPLICATIONS OF THE IIRIRA'S SHORTCOMINGS

The ambiguity of the definitions contained in Section 601(a) of the IIRIRA has caused many problems in the legal and social sphere. A circuit split currently exists concerning whether amnesty should be extended to both the husbands of victims *and* the boyfriends of victims, or only to the husbands of victims, under Section 601(a). Additionally, the lack of standards for the Attorney General's report and decision-making powers threatens to give the Attorney General an extreme amount of discretion to decide whether applicants are awarded asylum. Finally, Section 601(a) lacks both a clear definition of and standards concerning what well-founded fear of persecution means. The current version of Section 601(a) of the IIRIRA is undercutting the Act's goal to clarify asylum law.

A. *The Controversy of In Re Chang That Preceded the IIRIRA*

In re Chang is a controversial case that preceded the IIRIRA and illuminated the need for statutory direction in the area of asylum law.⁵⁴ In *In re Chang*, the asylum applicant, a husband and father of two children, feared the effect of the forced family planning policy in China on his wife and himself.⁵⁵ According to the applicant, government officials told him and his wife to be sterilized after the birth of their second child.⁵⁶ The BIA heard this case and denied asylum to the Chinese applicant who fled his home country's coercive family planning system.⁵⁷ The BIA reasoned that the asylum applicant had not established a sufficiently well-founded fear of persecution.⁵⁸ The BIA's ruling represented a judicial and administrative refusal to accept husbands fleeing China's one-child policy unless the husband personally had experienced persecution.⁵⁹ Section 601(a) of the IIRIRA attempted to overrule this case by providing that "a person who has a *well founded fear that he or she* will be forced to undergo such a[n]

54. *In re Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989).

55. *Id.* at 39.

56. *Id.*

57. *Id.* at 39, 47.

58. *Id.* at 47.

59. *Id.* at 42.

[abortive or sterilization] 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.⁶⁰ Although there was no explicit language establishing the eligibility for asylum of the husbands of victims, subsequent case law concerning this issue established that Section 601(a) applied to the husbands of victims.⁶¹

Despite this provision in the IIRIRA, the statute did not identify how far, or even whether, the granting of asylum automatically extends to relatives of the victim who has undergone a forced abortion or sterilization, or been threatened with the procedure, in his or her native country. The statute also did not identify whether the granting of asylum extends to the unmarried partners of victims. Subsequent case law attempted to provide answers to these ambiguities. Although Section 601(a) attempted to nullify *In re Chang*'s denial of asylum to the husbands of victims, Section 601(a) was not clear enough to stand on its own as applicable to the husbands of victims and needed case law to determine its applicability.

B. The Effects of In re C-Y-Z-: Asylum to Husbands, but Not to Boyfriends

In *In re C-Y-Z-*, which was decided after the IIRIRA became law, the Board of Immigration Appeals held that the grant of asylum provided by Section 601(a) of the IIRIRA broadly extended to the spouse of a victim.⁶² In this case, the asylum applicant and his spouse had three children before Chinese government officials forcibly sterilized the wife.⁶³ American immigration officials denied the husband's application for asylum, and the husband subsequently appealed this decision to the BIA.⁶⁴ The BIA held that the spouses of victims of forcible sterilization or abortion qualified for asylum under IIRIRA Section 601(a) because the husband had shown that he underwent past persecution due to the persecution suffered by his wife.⁶⁵ The Board also held that the only way that immigration officials can rebut a husband's showing of past persecution is to show that the conditions or forced family planning programs in the applicant's native country changed to such an extent that the applicant would not be in danger if he returned to

60. IIRIRA § 601(a) (emphasis added).

61. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919-20 (B.I.A. 1997).

62. *Id.* at 919-20.

63. *Id.* at 915-16.

64. *Id.* at 915.

65. *Id.* at 918-19.

his native country.⁶⁶ This holding meant that the spouse could stand in the shoes of the victim in an asylum application.⁶⁷

Many criticized the Board's decision for a supposed lack of reasoning, while others praised the decision as a case ensuring equal protection of the rights of men and women. Although this decision gave asylum to spouses of victims, the holding did not guarantee this right to the spouses of victims in the way that a specific amendment to Section 601(a) would. Seven circuits have deferred to the BIA's interpretation of the IIRIRA in *In re C-Y-Z-* in various subsequent decisions.⁶⁸ *In re C-Y-Z-* established that asylum applied to the husbands of victims of abortions or sterilizations under Section 601(a), apparently solving the problem of the ambiguity of the statute.

1. Cases That Have Followed or Deferred to the Holding of *In re C-Y-Z-*

In re C-Y-Z- represents one side of the circuit split, and at least three circuits have directly followed its reasoning. *Chen v. Ashcroft* was an important case that effectively followed *In re C-Y-Z-* and used similar reasoning to those circuits that have followed or deferred to *In re C-Y-Z-*.⁶⁹ In *Chen v. Ashcroft*, the Third Circuit refused to grant asylum under Section 601(a) to the partner of a victim because the partner was not the spouse of the victim under Chinese law.⁷⁰ The court did not rule directly on *In re C-Y-Z-* because it reasoned that the partners' unmarried status caused the fiance to fall outside the scope of *In re C-Y-Z-*.⁷¹ The court also reasoned that a partner must be a legal spouse of the victim because the requirement of "objective documentary evidence"⁷² prevents falsification and fraud, unnecessary intrusion into the lives of the applicants, and that such a requirement did not subvert congressional intent.⁷³ In *Chen v. Ashcroft*, the

66. *Id.* at 919.

67. *Id.* at 915.

68. Heidi Murphy, *Sending the Men over First: Amending Section 601(A) of the Illegal Immigration Reform and Immigrant Responsibility Act to Allow Asylum for Spouses and Partners*, 33 VT. L. REV. 143, 155 (2008).

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

70. *Id.* at 233-35.

71. *Id.* at 227.

72. *Id.* at 228.

73. *Heller v. Doe*, 509 U.S. 312, 321 (1993). The Supreme Court has stated that marital status is a sufficiently rational requirement, even when the requirement is over- or under-inclusive. *Id.*

Third Circuit relied on the Supreme Court's holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* that all courts are required to give significant deference to an agency's interpretation of statutes when Congress has given administrative authority to that agency concerning the statute and the statutory language is ambiguous.⁷⁴ According to this principle, courts are to give deference to the BIA's interpretation of the IIRIRA because the BIA has administrative authority and the statutory language is ambiguous.⁷⁵

Another case that closely followed the holding and reasoning of *In re C-Y-Z-* is *Lin-Jian v. Gonzales*.⁷⁶ In *Lin-Jian*, the Fourth Circuit granted review for an applicant named Lin whose wife had undergone a forced abortion.⁷⁷ Lin claimed that his wife had undergone a forced abortion when she became pregnant after giving birth to a second child.⁷⁸ The court held that an applicant may gain refugee status when the applicant's spouse underwent a forced abortion, a forced sterilization, threats of either a forced abortion or sterilization, or had "a well-founded fear of being subjected to [a forced abortion or sterilization, or persecuted for resistance to] a coercive population control program."⁷⁹ The Fourth Circuit held that Lin was eligible for asylum if he could produce evidence that his *wife* underwent a forced abortion.⁸⁰ The Fourth Circuit represents another appellate circuit that followed *In re C-Y-Z-*'s holding that Section 601(a) of the IIRIRA broadly extends asylum to the spouse of the victim.⁸¹

Similarly, the Sixth Circuit extended asylum to a male applicant in *Huang v. Ashcroft* in accordance with the holding in *In re C-Y-Z-*.⁸² In *Huang*, Chinese government officials forced the applicant's wife to undergo not only an abortion but also sterilization when the couple became pregnant after having their first child.⁸³ The court stated that either of these events

74. *Chen*, 381 F.3d at 232; see *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

75. *Chen*, 381 F.3d at 232.

76. See *Lin-Jian v. Gonzales*, 489 F.3d 182 (4th Cir. 2007).

77. *Id.* at 193.

78. *Id.* at 185-86.

79. *Id.* at 188 (quoting *Chen v. INS*, 195 F.3d 198, 202 (4th Cir. 1999)).

80. *Id.* (citing *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997)).

81. *Id.*; see *In re C-Y-Z-*, 21 I. & N. Dec. at 919-20.

82. *Huang v. Ashcroft*, 113 F. App'x 695, 698-99 (6th Cir. 2004) (citing *In re C-Y-Z-*, 21 I. & N. Dec. at 915).

83. *Id.* at 697.

established past persecution of the applicant's wife.⁸⁴ The court recognized that a husband "stand[s] in his wife's shoes" in an application for asylum.⁸⁵ Like the Third and Fourth Circuits, the Sixth Circuit followed the reasoning of *In re C-Y-Z-* and extended eligibility for refugee status and asylum to spouses of victims of forced abortions and forced sterilizations.⁸⁶

These three cases, *Chen v. Ashcroft*, *Lin-Jian*, and *Huang*, explicitly followed the reasoning behind *In re C-Y-Z-*, even though *Chen v. Ashcroft* did not directly rule on *In re C-Y-Z-*.⁸⁷ In both *Chen v. Ashcroft* and *Lin-Jian*, the court emphasized the importance and requirement that the asylum applicant produce documentation of legal marriage to the victim.⁸⁸ Similarly, the court in *Huang* recognized that a legal husband gains the legal status of his wife concerning the result of an asylum application in the United States.⁸⁹ Each court focused on the victim's spousal relationship to the applicant in the review of both applications.⁹⁰

Even without directly commenting on the accuracy of *In re C-Y-Z-*, courts have also deferred to it in cases concerning asylum applications. This deference essentially achieves the same effect as explicitly following *In re C-Y-Z-*. However, the situation occurs when an appellate court does not comment on the validity of *In re C-Y-Z-*'s reasoning, but rather defers to the BIA's interpretation of the seminal case in that particular circumstance. For example, in *Zhang v. Ashcroft*, the Fifth Circuit affirmed the BIA's denial of asylum to the boyfriend of the victim of a forced abortion in deference to *In re C-Y-Z-* because the boyfriend was not the victim's husband.⁹¹ This court deferred to the BIA's interpretation of the IIRIRA in *In re C-Y-Z-* because the court merely identified and deferred to *In re C-Y-Z-* as controlling precedent.⁹² The court in *Zhang* also adopted the Third Circuit's analysis in *Chen v. Ashcroft*.⁹³ The Fifth Circuit additionally noted that the impregnation of a girlfriend did not represent sufficient resistance to the

84. *Id.* at 700.

85. *Id.* at 698 (quoting *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997)).

86. *Id.* at 700.

87. *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Chen v. Ashcroft*, 381 F.3d 221, 229-31 (3d Cir. 2004); *Huang v. Ashcroft*, 113 F. App'x 695, 698-99 (6th Cir. 2004) (citing *In re C-Y-Z-*, 21 I. & N. Dec. at 915).

88. *See supra* text accompanying notes 72 and 80.

89. *See supra* text accompanying note 85.

90. *See supra* text accompanying notes 71-72, 80, and 84-85.

91. *Zhang v. Ashcroft*, 395 F.3d 531-32 (5th Cir. 2004).

92. *Id.* at 532.

93. *Id.*

forced family planning system of an applicant's country.⁹⁴ As with the previous circuits, the Fifth Circuit refused to grant asylum to the partner of a victim of abortion or sterilization without proof of a legal marriage under Chinese law.⁹⁵

In another deferential case, *Ge v. Ashcroft*, the Ninth Circuit held that an applicant "is automatically eligible for asylum if he can show that his wife was forced to undergo an abortion under China's one-child policy."⁹⁶ In this case, a Chinese man applied for asylum on the claim that Chinese government authorities had forced his wife to undergo abortions.⁹⁷ The Immigration Board rejected the application, and the applicant appealed to the Ninth Circuit.⁹⁸ The Ninth Circuit overturned the Immigration Board's rejection in this case.⁹⁹ Although the Ninth Circuit directly referred to *In re C-Y-Z-* as the basis for its decision, the court remanded the case, instead of ruling according to *In re C-Y-Z-*, and granted the *BIA discretion* on whether to grant asylum.¹⁰⁰ The Ninth Circuit accepted the applicant's testimony as true; thus, the applicant should have been granted asylum.¹⁰¹ In this case, the Ninth Circuit apparently agreed with the other circuits that followed the literal holding of *In re C-Y-Z-*, but while the other circuits expressly treated the seminal case as good law, the Ninth Circuit instead used deferential language. Again, the effect of a deferential ruling concerning *In re C-Y-Z-* is the same as implicitly or explicitly following the case, as was the case with *Chen v. Ashcroft*, *Lin-Jiang*, and *Huang*,¹⁰² except deference indicates recognition of a case as precedential, and not necessarily a complete agreement with the case. The Ninth Circuit's refusal to apply *In re C-Y-Z-* directly via an immediate reversal of the BIA's denial of asylum exemplifies the line of cases that defer to *In re C-Y-Z-* without explicit comment on the case's validity.

The Ninth Circuit also applied the same deferential rationale the following year in *Zheng v. Ashcroft*. In *Zheng*, the court held that a married

94. *Id.*

95. *Id.*

96. *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004).

97. *Id.* at 1122.

98. *Id.*

99. *Id.* at 1127.

100. *Id.*

101. *Id.*

102. *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Chen v. Ashcroft*, 381 F.3d 221-22, 227 (3d Cir. 2004); *Huang v. Ashcroft*, 113 F. App'x 695, 698-99 (6th Cir. 2004) (citing *In re C-Y-Z-*, 21 I. & N. Dec. at 915).

asylum applicant had undergone past persecution because his wife had been forced to undergo an abortion.¹⁰³ According to the court, a husband also establishes a *rebuttable* presumption of future persecution by showing that his native country's policies forced his wife to undergo an abortion.¹⁰⁴ This court focused on the importance of marriage in deciding whether a husband can establish past persecution based on his wife's forced abortion.¹⁰⁵ However, the court allowed the husband to establish past persecution, even though the couple had not been legally married under Chinese law.¹⁰⁶ The court's decision to extend recognition of past persecution to the husband of a victim indicated only partial deference to *In re C-Y-Z*.¹⁰⁷ However, the court's recognition of past persecution and grant of a rebuttable presumption of future persecution to a partner that *technically was not married* under Chinese law indicates the need for an amendment to the IIRIRA that will clarify which partners of victims may gain asylum in the United States. The court's referral to *In re C-Y-Z* indicated deference, but it represented an incomplete following of the case as valid precedent; thus, the court refused to comment on the validity of *In re C-Y-Z* as precedent and merely deferred to the seminal case.

In another deferential case, *Chen v. Gonzalez*, the Seventh Circuit approved the BIA's decision to deny asylum to a non-spousal applicant for asylum.¹⁰⁸ In *Chen v. Gonzales*, the court reviewed a case where the BIA denied asylum to the boyfriend of a victim of a forced abortion, even though the boyfriend attempted to marry his girlfriend and was denied by Chinese officials based on marriage age limit laws.¹⁰⁹ The court favorably recognized the number of circuits that deferred to the BIA's decision in *In re C-Y-Z*.¹¹⁰ After considering the boyfriend's appeal, the Seventh Circuit ultimately denied the appeal, agreeing with previous rulings that gave broad deference to the BIA under the ruling of *Chevron*.¹¹¹ This broad deference given to the BIA demonstrated that the Seventh Circuit joined the Third,

103. Zheng v. Ashcroft, 397 F.3d 1139, 1148 (9th Cir. 2005).

104. *Id.* at 1148-49.

105. *Id.* at 1148.

106. *Id.*

107. *Id.* at 1148-49.

108. Chen v. Gonzales, 152 F. App'x 528, 528 (7th Cir. 2005).

109. *Id.* at 529-30.

110. *Id.* at 530.

111. *Id.* at 531; see *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); see also *supra* text accompanying notes 74-75.

Fourth, Fifth, and Sixth Circuits' agreements with the holding of *In re C-Y-Z*.

In contrast to the deferential line of cases lacking an opinion on *In re C-Y-Z*'s reasoning and validity as precedent, the Eighth Circuit explicitly recognized *In re C-Y-Z* as good law in *Cao v. Gonzales*, and analyzed a male's asylum application claim under that standard.¹¹² The male applicant had a registered marriage license at the time of his application and claimed his wife underwent a forced abortion.¹¹³ However, the applicant claimed that he impregnated his wife five months before they obtained a legal marriage certificate, but after a customary marriage ceremony.¹¹⁴ The Eighth Circuit denied the application for asylum because of inconsistencies in the applicant's testimony.¹¹⁵ The applicant claimed he and his wife received their official marriage registration when she was five months pregnant, but she said they received it at a later time; the court did not find these claims convincing.¹¹⁶ Although the court denied the husband's application for asylum due to inconsistent testimony, the Eighth Circuit recognized *In re C-Y-Z* as good law, which provided asylum to the *husbands* of victims of forced abortions and forced sterilizations in the absence of inconsistencies in testimony.¹¹⁷ Because IIRIRA Section 601(a) does not explicitly answer the question of whether a man whose wife has undergone a forced abortion or sterilization should be given asylum automatically, such a situation is left to the courts to decipher. Thus, an amendment to IIRIRA Section 601(a) would aid courts in applying the law to emotional situations such as this case. Although this case highlights the need for an amendment, it also identifies that the Eighth Circuit joins the ranks of the circuits that view *In re C-Y-Z* as good law.

Unlike *Chen v. Ashcroft*,¹¹⁸ *Lin-Jian v. Gonzales*,¹¹⁹ and *Huang v. Ashcroft*,¹²⁰ the cases of *Zhang v. Ashcroft*,¹²¹ *Ge v. Ashcroft*,¹²² *Zheng v.*

112. *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006).

113. *Id.* at 659.

114. *Id.* at 658-59.

115. *Id.* at 660.

116. *Id.*

117. *Id.* at 660-61.

118. 381 F.3d 221, 227 (3d Cir. 2004); *see supra* text accompanying notes 69-75.

119. 489 F.3d 182, 188 (4th Cir. 2007); *see supra* text accompanying notes 76-81.

120. 113 F. App'x 695, 698-99 (6th Cir. 2004) (citing *In re C-Y-Z*, 21 I. & N. Dec. 915); *see supra* text accompanying notes 82-86.

121. 395 F.3d 531, 531-32 (5th Cir. 2004).

122. 367 F.3d 1121, 1127 (9th Cir. 2004).

Ashcroft,¹²³ *Chen v. Gonzalez*,¹²⁴ and *Cao v. Gonzalez*¹²⁵ have deferred to *In re C-Y-Z-* by holding that a male asylum's application success is directly correlated to whether he is the legal husband of the victim of forced abortion or forced sterilization. As previously argued, mere deference to a case has the same effect as implicitly or explicitly following a case because the case's holding is essentially unchanged. However, mere deference to a case may indicate that a court only acquiesces to a case's holding because the court considers the case to be binding precedent.

Despite the difference between implicitly or explicitly following a case's holding and rationale, and merely deferring to a case's holding via application of the law in ways avoiding comment on *In re C-Y-Z-*'s reasoning and validity as precedent, each of these cases show that a majority of appellate courts have recently cited the holding in *In re C-Y-Z* as good law.¹²⁶ Therefore, these circuit courts collectively represent the side of the split that states that asylum extends only to the *spouses* of victims under Section 601(a) of the IIRIRA.¹²⁷

2. Cases That Have Indirectly or Directly Opposed *In re C-Y-Z-*

Indirect and direct opposition to the holding in *In re C-Y-Z-* exists, and is growing. Some circuits have opposed *In re C-Y-Z-* indirectly by holding that asylum under Section 601(a) extends to *both* the husbands *and* the boyfriends of victims of forced abortion and forced sterilization.¹²⁸ Such holdings have the effect of broadening the application of *In re C-Y-Z-*. Other circuits have directly opposed *In re C-Y-Z-* by holding that asylum under Section 601(a) does not automatically extend to *either* the husbands or boyfriends of victims of forced abortion and forced sterilization.¹²⁹ These views represent a growing minority of circuits and illuminate the need for clarification to IIRIRA Section 601(a).

a. Indirect Opposition: The Broadening of *In re C-Y-Z-* Application

In *Ma v. Ashcroft*, the Ninth Circuit granted asylum under Section 601(a) of the IIRIRA to the partner of a victim, even though the partner was not

123. 397 F.3d 1139, 1148 (9th Cir. 2005).

124. 152 F. App'x 528, 528 (7th Cir. 2005).

125. 442 F.3d 657, 660 (8th Cir. 2006).

126. *See supra* Part III.B.1.

127. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919-20 (B.I.A. 1997).

128. *See infra* Part III.B.2.a.

129. *See infra* Part III.B.2.b.

the spouse of the victim under Chinese law.¹³⁰ *Ma*'s opposition to *In re C-Y-Z*- only one year prior to *Zheng*'s deference to *In re C-Y-Z*- demonstrates a split within one appellate circuit.¹³¹ The court reasoned that the partner was not the spouse of the victim due to a Chinese law, which established the age of marriage in order to enhance coercive family planning policies and reduce the reproductive time period for Chinese couples.¹³² In *Ma*, the Ninth Circuit held that the court in *In re C-Y-Z*- and Congress intended to provide asylum to "'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together."¹³³ The court in *Ma* extended asylum to partners who did not have a legal marriage certificate from Chinese authorities.¹³⁴ Therefore, this ruling effectively diverged from how the majority of circuits apply *In re C-Y-Z*-. The court in *In re C-Y-Z*- did not specifically require a couple to be legally married under Chinese law in order for the husband to gain asylum. However, the court required the applicant to be the *spouse* of the victim.¹³⁵ The holding in *Ma* diverges from the plain reading of *In re C-Y-Z*- and the majority of circuits in that it extends asylum to the partners of victims, even when the partner does not have a valid legal document of marriage under Chinese law. *Ma*'s holding supports the need for an amendment to section 601(a) of the IIRIRA, which will require the objective documentary evidence requirement identified in *Chen v. Ashcroft*. Such an amendment will prevent falsification and fraud in the application process for asylum.¹³⁶

Additionally, the Seventh Circuit refused to consider *In re C-Y-Z*- in two separate opinions.¹³⁷ In *Zhang v. Gonzales*, the court held that participants in traditional marriage ceremonies without legal documentation will qualify for the automatic grant of asylum to spouses of victims if one of the participants undergoes a forced abortion or forced sterilization.¹³⁸ In *Zhu v. Gonzales*, the Seventh Circuit affirmed its application of the standard in

130. *Ma v. Ashcroft*, 361 F.3d 553, 661 (9th Cir. 2004).

131. *Ma*, 361 F.3d at 554, 561; *see* *Zheng v. Ashcroft*, 397 F.3d 1139, 1148 (9th Cir. 2005).

132. *Ma*, 361 F.3d at 560-61.

133. *Id.* at 559 (citing H.R. Rep. No. 104-469(I), at 174 (1996)); *see In re C-Y-Z*-, 21 I. & N. Dec. 915, 918 (B.I.A. 1997).

134. *Ma*, 361 F.3d at 561.

135. *In re C-Y-Z*-, 21 I. & N. Dec. at 919.

136. *Chen v. Ashcroft*, 381 F.3d 221, 228 (3d Cir. 2004).

137. *Zhu v. Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006); *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006).

138. *Zhang*, 434 F.3d at 999.

Zhang.¹³⁹ The Seventh and Ninth Circuits' applications of the automatic grant of asylum to participants in traditional marriage ceremonies represent a judicial refusal to follow the plain reading of *In re C-Y-Z* and an expansion of the rule in *In re C-Y-Z* according to the judicial opinion of Congressional intent behind the IIRIRA.

b. Direct Opposition: Eliminating *In re C-Y-Z* Application

In *Lin v. United States*, the Second Circuit held that the plain meaning of the language in Section 601(a) does not automatically extend asylum to either spouses or boyfriends of victims.¹⁴⁰ The Second Circuit directly opposed the holding in *In re C-Y-Z*, instead holding that the BIA's interpretation of the IIRIRA's automatic applicability to the spouses of victims was incorrect.¹⁴¹ *Lin* involved the asylum applications of several *unmarried* partners of victims of forced abortions, yet the Second Circuit did not rule solely on whether the IIRIRA gave asylum to non-spousal partners.¹⁴² Instead, the Second Circuit determined that the IIRIRA was not sufficiently ambiguous to force circuits to give *Chevron* deference¹⁴³ to the BIA and held that the IIRIRA did not extend automatic asylum to the spouse of a victim of a forced abortion or a forced sterilization.¹⁴⁴ In order to obtain asylum, an applicant has to show he or she had *personally* "undergone or been threatened with coercive birth control procedures."¹⁴⁵

Despite the ambiguities of Section 601(a) of the IIRIRA that required *Chevron* deference to the BIA's holding, the Second Circuit held contrary to the holding in *In re C-Y-Z*.¹⁴⁶ Similar holdings amongst many circuits show confusion concerning the law and its application and support the contention of this note for an amendment to IIRIRA Section 601(a). The First, Third, and Eleventh Circuits have also followed such a direct rejection of *In re C-Y-Z*.¹⁴⁷ In particular, the Third Circuit's rejection of *In re C-Y-Z*'s holding in *Lin-Zheng* contradicts its previous position in *Chen*

139. *Zhu*, 465 F.3d at 321.

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

141. *Id.* at 299.

142. *Id.* at 299-300.

143. *Id.* at 300; *see supra* text accompanying notes 74-75.

144. *Lin*, 494 F.3d at 299; *see Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

145. *Lin*, 494 F.3d at 314.

146. *Id.* at 299-300, 314.

147. *See Dong v. Holder*, 587 F.3d 8 (1st Cir. 2009); *Lin-Zheng v. U.S. Att'y Gen.*, 557 F.3d 147, 156 (3d Cir. 2009); *Yu v. U.S. Att'y Gen.*, 568 F.3d 1328, 1332-33 (11th Cir. 2009); *Zhu v. Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006).

v. Ashcroft.¹⁴⁸ Despite the Third Circuit's rejection of *In re C-Y-Z-*, it did not overrule *Chen v. Ashcroft* completely because *Chen v. Ashcroft* did not rule on *In re C-Y-Z-* directly.¹⁴⁹ The First, Second, Third, Seventh, and Eleventh Circuits' decisions indicate a growing trend in the circuits to reject the reasoning in *In re C-Y-Z-* and to reason that the IIRIRA is not sufficiently ambiguous to give deference to the BIA's decisions concerning the IIRIRA. At the very least, these three circuits' decisions represent a significant minority opinion that refuses to grant asylum to a spouse unless that spouse has personally undergone or been threatened with coercive birth control procedures. This shows the need for a clarifying amendment to Section 601(a) of the IIRIRA.

3. Summary of the Judicial Treatment of *In re C-Y-Z-*

In summary, a large quantity of case law exists concerning *In re C-Y-Z-*, and circuits are sharply divided on the ruling's validity. Seven circuits have either affirmed or deferred to the judgment in *In re C-Y-Z-*.¹⁵⁰ This majority reasons that asylum should extend only to the legally married husbands of the victims of forced abortions and forced sterilizations because this prevents fraud and keeps legal families together.¹⁵¹ However, a growing minority of circuits either hold that asylum should extend to victims' legal spouses *and* partners,¹⁵² or that Section 601(a) does not *automatically* extend asylum to *either* the spouses or partners of those victims.¹⁵³ The fact that the Third, Seventh, and Ninth Circuits have essentially either ruled

148. *Lin-Zheng*, 557 F.3d at 148-49, 153 n.7; *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004).

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

150. *Id.* at 227-28 (following *In re C-Y-Z-*); *see Lin-Jian v. Gonzales*, 489 F.3d 182 (4th Cir. 2007) (following *In re C-Y-Z-*); *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006) (deferring to *In re C-Y-Z-*); *Chen v. Gonzales*, 152 F. App'x 528 (7th Cir. 2005) (deferring to *In re C-Y-Z-*); *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (deferring to *In re C-Y-Z-*); *Huang v. Ashcroft*, 113 F. App'x 695, 698-99 (6th Cir. 2004) (following *In re C-Y-Z-*); *Ge v. Ashcroft*, 367 F.3d 1121, 1127 (9th Cir. 2004) (deferring to *In re C-Y-Z-*).

151. *See supra* text accompanying notes 72-73.

152. *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (affording protection to spouses in cases "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures"); *Zhu*, 465 F.3d at 321 (citing approvingly to the traditional marriage ceremony standard elicited in *Zhang*, even though the asylum applicant had not even been involved in such a ceremony); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (extending asylum to unmarried couples).

153. *See Lin-Zheng*, 557 F.3d 147; *Yu v. U.S. Att'y Gen.*, 568 F.3d 1328 (11th Cir. 2009); *Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007).

dichotomously or switched sides further indicates the confusion in this area of the law.¹⁵⁴ The mass of conflicting case law supports the need for either an amendment to Section 601(a) of the IIRIRA or a Supreme Court decision that clarifies the issue. The most effective method to ensure that all courts have clear and unambiguous legislative language to apply to applications for asylum would be an amendment to Section 601(a).

C. Statutory Provisions Show Recognition of the Problems with Section 601(a)

In addition to the circuit split concerning the application of Section 601(a), legislative action shows the existence of recognition among legislators that the current version of the IIRIRA contains ambiguous provisions, and is thus insufficient. The original version of Section 601 of the IIRIRA limited how many foreigners could gain asylum in the United States to 1000.¹⁵⁵ Congress has recently passed the REAL ID Act, which removed the numerical limitation on the admittance of refugees contained in Section 601(b) of the IIRIRA.¹⁵⁶ Although this removal of the numerical limitation of Section 601(b) allows more victims of persecution to find protection in the United States, the removal of the limitation also increases the possibility of laxity on the part of immigration officials. Unlimited admittance removes the catalyst for meticulous consideration in the determination of the applicants *best qualified* for asylum that a limitation on admittance provides. The removal of the numerical limitation enhances the importance of the Attorney General's report required by Section 601(a)(2),¹⁵⁷ further identifying the need for an amendment setting stricter standards and requirements for the Attorney General's report in order to prevent fraudulent applications.

D. Additional Cases That Show the Need for an Amendment to the IIRIRA

Finally, a disagreement exists concerning the meaning of a well-founded fear of persecution within the application of Section 601. As opposed to the previously cited cases, where there was disagreement as to whether asylum extended to certain members of the family, this disagreement concerns what constitutes a well-founded fear of forced sterilization or abortion.¹⁵⁸ In *Li v.*

154. *See supra* Part III.B.2.a.

155. IIRIRA § 601(b).

156. REAL ID Act of 2005, Pub. L. No. 109-13, §101, 119 Stat. 231, 304-05 (2005).

157. *See* IIRIRA § 601(a)(2); *supra* text accompanying note 45.

158. *See supra* Part III.B.

Gonzales, the Third Circuit rejected a Chinese woman's asylum application claim of a well-founded fear of persecution based upon coercive family planning procedures performed on other people.¹⁵⁹ The woman claimed that her fear of a forced abortion or forced sterilization due to the coerced experiences of her mother, sister, and aunt was well-founded.¹⁶⁰ The court reasoned that the woman could not stand in the shoes of her mother, aunt, or sister, just as a fiancé could not stand in the shoes of his non-spousal partner; therefore, the court's reasoning affirms the rationale in *In re C-Y-Z-*, even though it is applied to a different set of circumstances.¹⁶¹ *Li v. Gonzalez* identifies both the lack of a clear definition of a well-founded fear in Section 601(a), and the need for an amendment that specifies that only spouses can stand in the shoes of their partner with regard to that well-founded fear of persecution.

An amendment to Section 601 of the IIRIRA must also specify which relatives of a victim may claim asylum. In *Xue Yun Zhang v. Gonzales*, the Ninth Circuit rejected the application for asylum of a child whose mother underwent a forced abortion, affording deference to the BIA's denial of the application.¹⁶² The court cited *Chevron* in its deference to an agency's decision concerning an ambiguous statute.¹⁶³ The court held that the child of a victim of forced abortion or forced sterilization is not automatically eligible for asylum.¹⁶⁴ In *Yuan v. United States*, the Second Circuit denied automatic asylum to the parents and in-laws of victims of forced abortions and forced sterilizations.¹⁶⁵ The court reasoned that the purpose of Section 601(a) was to protect the actual victims of forced abortions and forced sterilizations, not the parents of the victims.¹⁶⁶ The effect of these cases is that a victim's flight from persecution results in a fractured and separated family. This result mandates that Section 601 must include a provision that specifies which relatives of victims of persecutions should qualify for asylum.

159. *Li v. Gonzales*, 151 Fed. App'x 137, 138 (3d Cir. 2005).

160. *Id.* at 138, 140.

161. *Id.* at 140.

162. *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1246, 1250 (9th Cir. 2005).

163. *Id.* at 1246; *see Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

164. *Xue Yun Zhang*, 408 F.3d at 1250.

165. *Yuan v. United States*, 416 F.3d 192, 194 (2d Cir. 2005).

166. *Id.* at 197.

IV. SOLUTION

Since the goal behind the IIRIRA should be to provide specific standards that require the government, courts, and officials to grant amnesty to certain oppressed individuals without unnecessarily providing the opportunity to foreign individuals to take advantage of the system, Section 601(a) must effectuate such a result.¹⁶⁷ However, as seen with the split in case law,¹⁶⁸ this section of the Act does not accomplish the IIRIRA's goal and thus undercuts an effective immigration policy for the United States.¹⁶⁹ The cases and statutes identified *supra* Part III reflect the confused application of IIRIRA Section 601(a), as well as the ambiguity of this key piece of legislation concerning disadvantaged individuals.¹⁷⁰ Despite the ambiguities in IIRIRA Section 601(a), it is not past saving.¹⁷¹ Its attempt to provide a solution to immigration problems has, at a minimum, established foundational tenets on which to build. Therefore, an entirely new bill would be an unnecessary waste of the valuable efforts that went into the drafting of the IIRIRA, including Section 601(a).¹⁷²

The disagreements and varying interpretations of Section 601(a) among the judicial circuits prove that judicial changes cannot be trusted to repair, or to clarify the ambiguities. Thus, an amendment to Section 601(a) would be the most efficient solution.¹⁷³ This Note will provide a sample amendment to Section 601(a) that would solve the problems previously identified.

Importantly, the legislation and its subsequent application affect not only foreign individuals, but also the integrity of United States governance. Section 601(a) does not clearly identify whether the granting of asylum extends to relatives of the victim.¹⁷⁴ Because Section 601(a) of the IIRIRA does not address the union of marriage, it does not provide requirements for a victim's partner to be considered a husband or spouse. A majority of circuits have held that the spouse of a victim of a forced abortion or a forced sterilization is automatically eligible for asylum, which is in

167. IIRIRA § 601(a).

168. *See supra* Part III.

169. IIRIRA § 601(a).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

accordance with *In re C-Y-Z*.¹⁷⁵ However, a growing minority of circuits has held that the standard of *In re C-Y-Z* does not apply, and that the BIA's interpretation of the IIRIRA's automatic applicability to the spouses of victims is incorrect.¹⁷⁶ Even some circuits, purporting to follow *In re C-Y-Z*, recognize partners that do not have a legal marriage certificate, but rather participated in a traditional marriage ceremony without legal documentation.¹⁷⁷ Section 601(a) provides little guidance and few requirements for the mandated Attorney General's report.¹⁷⁸ Section 601(a) of the IIRIRA must be amended to remedy its ambiguities and shortcomings and provide guidelines for the BIA and appellate circuits to follow.

The necessary solution to the problems identified *supra* Part III is to amend Section 601(a) of the IIRIRA to provide asylum to the immediate family members of a victim under the laws of the victim's home country. These immediate family members should only include the legal husband and the children of a victim because non-spousal partners are often not readily, and unmistakably, identifiable under the laws of the victim's home country. Additionally, only marriages that are recognized by the laws of the applicant's home country should be valid. According to the Third Circuit in *Chen v. Ashcroft*, this requirement would prevent falsification and fraud.¹⁷⁹ Therefore, a husband applying for asylum under Section 601(a) of the IIRIRA must produce legal documentation of marriage to a woman who has been forced to undergo an abortion or sterilization, or has a well-founded fear of a forced abortion or forced sterilization. An exception should be made for members of religious, political, racial, and ethnic groups that are prevented from legally marrying in their native country based on their religion, race, political ideology, and ethnicity.

Moreover, Section 601(a) must be amended to require that the Attorney General's report contain documented evidence that each approved applicant underwent a forced abortion or forced sterilization that was coercive. Section 601(a) should be amended to establish acceptance criteria for asylum; if an individual underwent a forced abortion or forced sterilization, or the individual's legal spouse underwent such treatment, and there are no legal inconsistencies or falsifications in the documents or testimony

175. See *supra* Part III.B.1; *In re C-Y-Z*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997).

176. See *supra* Part III.B.2.b.

177. See *supra* Part III.B.2.a.

178. IIRIRA § 601(a)(2).

179. See *Chen v. Ashcroft*, 381 F.3d 221, 228 (3d Cir. 2004).

presented, then the application may not be denied. This will prevent ad hoc decision making on the part of the Attorney General.

Additionally, Section 601(a) must be amended to include the following *legislative* definition of a well-founded fear of persecution: an applicant must prove that a “persecutor seeks to overcome” a belief “by means of punishment of some sort,” that “the persecutor is already aware, or could easily become aware” that the applicant holds that belief, and that the persecutor wants to punish holders of the belief and is capable of punishing holders of the belief. Each court will be required by the amendment to follow this definition of a well-founded fear of persecution in order to avoid inconsistency.

Finally, a candidate for asylum must not be exempt from the forced family planning policies of her native country, in any way, other than infertility caused by past persecution. Section 601(a) should be amended to include a provision that a woman may not obtain asylum under the IIRIRA if she is exempt from the forced family planning policies of her native country, in any way, other than infertility caused by past persecution. A personal exemption from the forced family planning policies of a woman’s native country would mean that the woman could not have a well-founded fear of persecution.

The proposed amendment is the best solution to the problems existing in this area of jurisprudence. If the statute is the foundation that cases are built upon, an amendment rebuilds the inadequate foundation instead of continually attempting to repair the faulty building above it. The IIRIRA, particularly Section 601(a), has failed since its inception due to faulty drafting that lacked the specifics to enable efficient and consistent application by officials and courts.¹⁸⁰ Courts have attempted to define, redefine, and follow a rule that gives little direction; such a cycle leads only to disaster, does not serve justice, and does not protect the United States.¹⁸¹ Therefore, any amendment must include the stated requirements in element form; each official involved in an asylum application must follow the elements; and any court involved must apply the elements.

Keeping in mind the actual text of Section 601(a)¹⁸² as quoted above, the following is an Amendment that would solve the ambiguities of Section 601(a):

180. IIRIRA § 601(a); *see supra* Part III.

181. *See supra* Part III.

182. *See supra* note 45 and accompanying text.

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 be a "victim" for the purposes of this Act and to have been persecuted on account of political opinion. Such a victim shall qualify for asylum under the provisions of this Act and all other applicable immigration laws of the United States of America.*

Additionally, 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 be a "victim" for the purposes of this Act, to have a well-founded fear of persecution on account of political opinion, and shall qualify for asylum under the provisions of this Act and all other applicable immigration laws of the United States of America. For the purposes of this Act, in order to prove that he or she has suffered a well-founded fear of persecution, an applicant must prove that:

- a. a persecutor seeks to overcome a belief by means of punishment or other force of some sort,*
- b. that the persecutor is already aware, or could easily become aware that the applicant holds that belief, and*
- c. that the persecutor wants to punish holders of the belief and is capable of punishing holders of the belief.*

Each court shall follow this definition of a well-founded fear of persecution. For the purposes of this Act, the refusal to undergo an abortion or sterilization constitutes a belief that such action is impermissible.

A female applicant may not obtain asylum under this section if she is exempt from the forced family planning policies of her native country, in any way, other than infertility caused by past persecution.

Asylum shall only be provided under this section of the Act to the immediate family members of a victim under the laws of the victim's home country. These immediate family members shall only include the legal husband and the children of a victim. Only marriages that are recognized by the laws of the applicant's

home country shall be valid. In order for a husband of a victim to qualify for asylum, the husband must produce valid documentation of marriage to a woman who has been forced to undergo an abortion or sterilization, or has a well-founded fear of a forced abortion or forced sterilization. However, members of religious, political, racial, and ethnic groups that are prevented from legally marrying in their native country based on their religion, race, political ideology, and ethnicity shall not have to produce such documentation, but rather must produce sufficient evidence of an attempt to marry and an official rejection on the basis of that husband's membership in one of those groups.

Not later than 90 days after the end of each fiscal year, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the number and countries of origin of aliens granted refugee status or asylum under determinations pursuant to the amendment made by paragraph (1). *This report must contain documented evidence that each approved applicant underwent a forced abortion or forced sterilization that was coercive. If an applicant personally underwent a forced abortion or forced sterilization, or the individual's legal spouse underwent such treatment, and there are no legal inconsistencies or falsifications in the documents or testimony presented, then the application shall not be denied.* Each such report shall also contain projections regarding the number and countries of origin of aliens that are likely to be granted refugee status or asylum for the subsequent 2 fiscal years.¹⁸³

This amendment to Section 601(a) addresses and solves multiple problems that the ambiguities in the existing section have caused.¹⁸⁴ The proposal identifies which individuals would be able to claim status as a victim. The amendment also clarifies what constitutes a well-founded fear of persecution. "A well founded fear of persecution" is a phrase that is continually used in case law,¹⁸⁵ but has not been clearly defined in Section

183. *See supra* text accompanying note 45 (additions to the original section are in italics).

184. IIRIRA § 601(a); *see supra* Part III.

185. *See supra* notes 23-24 and accompanying text.

601(a) in a way that includes persecution on the basis of a victim's beliefs.¹⁸⁶ Additionally, the proposed amendment establishes clear parameters for the Attorney General's report concerning grants of asylum.¹⁸⁷ Most importantly, the amendment identifies which family members of a "victim" qualify for asylum, leaving no room for disagreement in the application of Section 601(a) in immigration law and the appellate circuits.¹⁸⁸

V. CONCLUSION

Section 601(a) of the IIRIRA fails to effectuate the goal of United States immigration, which is to provide specific standards for application of immigration law by all judicial circuits and officials within the United States.¹⁸⁹ An increasingly slim majority of circuits tenuously holds to the questionably reasoned *In re C-Y-Z-* as a basis for the sole provision of asylum to the legal spouse of a victim of forced abortion or forced sterilization.¹⁹⁰ Some circuits interpret *In re C-Y-Z-* as extending asylum to both partners and legal spouses of victims, although this seems to stretch beyond a facial application of the case's holding.¹⁹¹ Still other circuits refuse to follow *In re C-Y-Z-*, and subsequent statutes have tweaked some requirements in Section 601(a), furthering the confusion.¹⁹²

In light of this confusion and disagreement, Section 601(a) of the IIRIRA must be amended to provide that only legal spouses of victims, and the victim's children, of forced abortion and forced sterilization can gain automatic asylum under the statute.¹⁹³ Such a provision is not a value judgment, but rather one of practicality. Justice Alito's reasoning in *Chen v. Ashcroft* holds true today: the "objective documentary evidence" that a legal spouse can produce prevents falsification, fraud, and unnecessary intrusion into the lives of the applicants during and after the application process.¹⁹⁴ Therefore, an amendment to Section 601(a) of the IIRIRA must provide asylum to the legal spouse of a victim and to the children of the

186. *See supra* text accompanying note 45; *see also* IIRIRA § 601(a).

187. *See supra* proposed amendment to § 601(a) at text accompanying note 183.

188. *See supra* Part III.

189. *See supra* Parts III and IV.

190. *See supra* Part III.

191. *See supra* Part III.

192. *See supra* Part III.

193. *See supra* proposed amendment to § 601(a) at text accompanying note 183.

194. *Chen v. Ashcroft*, 381 F.3d 221, 228 (3d Cir. 2004).

victim, require that the Attorney General's report contain documented evidence that each approved applicant underwent a forced abortion or forced sterilization that was coercive, include a proper *legislative* and not a judicial definition of a well-founded fear of persecution, and ensure that an applicant for asylum is not exempt from the forced family planning policies of her native country.¹⁹⁵

195. See *supra* Part IV proposed amendment to § 601(a) at text accompanying note 183.