## Article

# Navigating the Doctrinal Tension in U.S. Asylum Law

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## I. INTRODUCTION

Qiao Lin Wang fled her native country of China in early 2005 after the local Chinese Family Planning Officials (FPOs) discovered her to be "pregnant without permission" and forced her to have an abortion.[1] She had entered into a traditional marriage with her husband in 2004, although the marriage was not recognized as legal by the Chinese government because they were both too young to be wed under Chinese law. They began living together as husband and wife, but a neighbor reported their illegal cohabitation to authorities. FPOs then required Ms. Wang to submit to a gynecological examination. When the FPOs found her to be "pregnant without permission" on December 3, 2004, they forced her to undergo an abortion the same day. She was also fined 2,000 yuan, instructed to not have any children for two years, and ordered to have an intrauterine device (IUD) forcibly inserted one month later. She fled China for the United States and entered through the U.S.-Mexico border at Brownsville, Texas in July 2005.

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1. The facts of this case were summarized by the Third Circuit in an unpublished decision in Wang v. Attorney Gen. of U.S., 391 F. App'x 190, 191–92 (3d Cir. 2010).

Ms. Wang applied for asylum in the United States, invoking an exceptional statutory rule in the definition of "refugee" in the Immigration and Nationality Act (INA) which included "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization."[2] Under this rule, the past persecution or future fear of persecution due to forced abortion, involuntary sterilization, or "other resistance" to a coercive population control program is deemed to establish "a well-founded fear of persecution on account of a political opinion."[3] Ms. Wang used the rule to meet the requisite persecution nexus to a protected ground that is required to claim asylum under statutory law. Despite the benefit of this rule, she was still bound to meet her burden of proof and have an immigration judge find her credible in the totality of the circumstances.[4] A decade earlier, Ms. Wang would have had no protection in the United States because precedent before 1996 dictated that China's population law was not a basis for asylum.[5]

The truly exceptional nature of legislative amendment of a country's refugee definition can be seen by how infrequently it is done in other countries. According to the United Nations High Commissioner for Refugees (UNHCR), in 2013, the top ten countries receiving asylum claims were: (1) Germany; (2) United States; (3) France; (4) Sweden; (5) Turkey; (6) United Kingdom; (7) Italy; (8) Australia; (9) Switzerland; and (10) Hungary.[6] Of these countries, only the United States and Sweden have defined refugee categories beyond the five grounds in the 1951 United Nations Refugee Convention.[7] Sweden's Aliens Act expressly

2. Immigration & Nationality Act (INA) of 1965, *codified at* 8 U.S.C. § 1101(a)(42)(B) (2011), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009 (1996).

3. *Id.*

4. *See* INA § 208(b)(1)(B); 8 U.S.C. § 1158(b)(1)(A)(iii). While the immigration judge and Board of Immigration Appeals (BIA or the Board) found Ms. Wang did not sustain her burden of proof because she lacked key corroboration, the Third Circuit disagreed and remanded to the BIA. *See* Wang, 391 F. App'x at 194.

5. *See* Matter of Chang, 20 I. & N. Dec. 38 (1989).

6. UNITED NATIONS HIGH COMM'R FOR REFUGEES, ASYLUM TRENDS 2013: LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 11 (2014), http://www.unhcr.org/5329b15a9.html.

7. *See* Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention]. Italy's Legislative Decree No. 286 of 25 July 1998 amends the *non-refoulement* requirement, but not refugee law, to include: "race, sex, language, citizenship, religion, political opinions, personal or social circumstances." D.Lgs. 25 Luglio

amended the social group definition to provide gender and sexual orientation as examples.[8] The United States acted more broadly when Congress not only specified what constitutes a cognizable ground, but also expressly provided the statutory harm required to establish persecution and the nexus (or "on account of") hurdle for asylum-seekers fleeing forced abortion and sterilization.[9] In this regard, only the United States has enacted domestic legislation to create a rule establishing persecution, nexus, and a claim category in one fell swoop, and additionally, only the United States has targeted coercive family planning policies.[10]

The 1996 amendment to the refugee definition reflects a key doctrinal tension inherent in asylum law.[11] Stephen Legomsky and Cristina Rodriguez raise the existence of doctrinal tension between a national self-interest and the humanitarian or human rights vision of refugee policy.[12] This tension manifests in the selection criteria to become a refugee.[13] The 1996 amendment identifies specific selection criteria for forced abortion and sterilization. The statutory language only requires an applicant to show a past or future fear of forced abortion or sterilization; then an automatic nexus to a political opinion is triggered.[14] Congress's intent to provide broad asylum protections for these human rights violations is reflected in the legislative history.[15]

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1998, n.286, Aug. 18, 1998, n.139 (It.).

8. *See* UTLÄNNINGSLAG [UB] [Enforcement Code] 2005:716 (Swed.) (defining the grounds for refugee status as "race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group").

9. *See* 8 U.S.C. § 1101(a)(42)(B).

10. For instance, if Ms. Wang had instead applied for protection in Canada, which was ranked sixteenth in 2013, she would have had to credibly demonstrate: (1) that her past forced abortion was both sufficiently persecutory; and (2) her membership in a particular social group, pursuant to the leading precedent in *Cheung v. Canada*, [1993] 2 S.C.R. 689, 739 (Can.). *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, *supra* note 6, at 22.

11. IIRAIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42)(B) (1996).

12. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 870 (5th ed. 2009).

13. *Id.*

14. 8 U.S.C. § 1101(a)(42)(B).

15. *Coercive Population Control in China: Hearings Before the Subcommittee on Int'l Operations & Human Rts.*, *H. Comm. on Int'l Relations*, 104th Cong. 3 (statement of Representative King) ("[I]f our asylum policy is going to stand for anything, there has to be a strong regard for human rights."); *see also* H.R. REP. No. 104-469 pt. 1, at 173–74 (1996) (noting that *Matter of Chang* precludes claims of "undeniable and grotesque violations of fundamental human rights").

This humanitarian aim, shrouded in a human rights justification for forced abortion and sterilization, is in tension with limiting principles to avoid a deluge of asylum-seekers and the rule of law. By emphasizing the underlying human rights violation and eliminating the requirement for these applicants to show that the fear is on account of one of the five grounds, Congress potentially opened the floodgates to millions of possible asylum-seekers claiming persecution in China's one-child policy.[16] Congress perceived that, under the refugee definition as originally enacted in 1980, executive branch administrative agency policies and precedent failed to strike a coherent balance between humanitarian protections and the legitimacy of the claims adjudication system. These agencies screened out potentially worthy claims based on forced abortion and sterilization by focusing on the lack of link between the harm and a cognizable ground.[17] Congress then stepped in to amend the refugee definition, which directly resolved the doctrinal tension in this limited context.

This Article extrapolates larger lessons for manifestations of the doctrinal tension in other asylum areas necessitating congressional action by exploring the context leading to legislation for asylum-seekers fleeing China's one-child policy to the United States.[18] Part II begins by examining the one-child policy in China and the international legal frameworks implicated in the coercive enforcement measures of forced abortion and forced sterilization. Part III traces the development of the political and legal undercurrents in the United States, which led Congress to amend the refugee definition to expressly include coercive population control in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).

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16. *See* 142 CONG. REC. S4592 (daily ed. May 2, 1996) (statement of Sen. Simpson) (pointing out that millions of people will qualify if the coercive population control amendment passes); *see also* H.R. REP. No. 104-469 pt. 1, 173–74 (finding that smuggled aliens may be coached to make coercive family planning claims).

17. *See* Matter of Chang, 20 I. & N. Dec. 38 (B.I.A. 1989), 1989 BIA LEXIS 13.

18. While spouses have also sought asylum based on their partner's forced abortion, this area has been covered in depth in scholarship, and the law is relatively settled after *Matter of J-S-*, 24 I. & N. Dec. 520 (2008), 2008 BIA LEXIS 16. *See, e.g.*, Heather M. Kolinsky, *A Fine Line, Redefined: Moving Toward More Equitable Asylum Policies*, 40 U. BALT. L. REV. 649, 669–72 (2011); Peter G. Wagner, Shi Liang Lin v. Gonzales*: How the Second Circuit Overruled the Board of Immigration Appeals and Denied Asylum to the Spouses of One-Child Policy Victims*, 30 WOMEN'S RTS. L. REP. 219 (2008).

Part III also introduces empirical trends in subsequent adjudications of asylum claims based on the fear of coercive population control policies. Part IV describes the doctrinal tension in U.S. asylum law between meeting international humanitarian-based obligations and the practical and political need to limit the number of claims to the most worthy and legitimate. Part IV then analyzes why Congress is in the best position to deal with this doctrinal tension. Finally, in Part V, this Article proposes a policy change to define "particular social group," using Congress's actions on forced abortion and sterilization claims from China as a model.

## II. COERCIVE POPULATION CONTROL IN CHINA WITHIN THE INTERNATIONAL LEGAL FRAMEWORK

### A. ENACTING & ENFORCING THE ONE-CHILD POLICY IN CHINA

The central government of China strictly controls the reproductive choices of its female citizens.[19] The "one-child policy" component of China's family planning law was originally promulgated in June 1979 as a response to control an explosion in population growth.[20] Though the national law limits each couple to one child, enforcement is decentralized. Local FPOs implement the one-child policy through a variety of means: fines and "child-raising fees" or "social compensation fees," mandatory birth control or IUD insertion, regularly scheduled gynecological examinations and pregnancy tests, registration of pregnancies, and abortion and sterilization—both voluntary and involuntary.[21] The policy is also enforced through incentives, including housing assignments, better childcare, cash awards,

19. Amartya Sen has criticized the effectiveness of coercive policies in controlling population growth and instead advocates for individual family planning decision-making and social development, especially by empowering women through education and employment. *See* Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1061 (1996) (discussing the importance of health care as well as the link between a woman's well-being and her agency).

20. *See* CONG.-EXEC. COMM'N ON CHINA, 2007 ANNUAL REPORT 108 (2007), http://www.cecc.gov/sites/chinacommission.house.gov/files/2007%20CECC%20Annual%20Report.PDF.

21. *E.g.*, U.S. DEP'T OF STATE, 2013 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 54–59 (2014); *see also The One-Child Policy: The Brutal Truth*, THE ECONOMIST (June 23, 2012), http://www.economist.com/node/21557369 (citing demographer He Yafu's estimation that the government has collected over 2 trillion yuan ($314 billion) in social maintenance fees since 1980).

and longer maternity leave.[22] While the national family planning policy outlaws physically coercing an abortion or sterilization, the local FPOs face pressure to meet birth quotas in their geographic area and penalties if unmet.[23] The very structure of the system encourages FPOs to use coercive tactics.[24] As a result of the policy, according to data released by China's Health Ministry in 2012, 336 million abortions and 222 million sterilizations were performed since 1971.[25]

The family planning law is also enforced through limitations on marriage. Under the Marriage Law component of the family planning policy, unmarried women are prohibited from bearing a child, and couples must reach a threshold age to be legally married.[26] In fact, some local FPOs mandate abortion for single women who become pregnant.[27] Some provinces' regulations specifically require abortions for married women who violate family planning policies.[28] Other provinces may keep a forced abortion or sterilization practice disguised in an ambiguous policy by mandating "remedial measures" when family planning laws are violated.[29] The 2003 U.S. State Department Human Rights Report on China noted that although FPOs "should not violate citizens' rights" in enforcing the one-child policy, neither the rights nor the legal remedies for violations are clearly articulated in the law.[30]

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22. *See* Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 317 (1996).

23. *See* U.S. DEP'T OF STATE, *supra* note 21, at 54–56.

24. *See id.* at 54, 57 (explaining that job promotion is linked to the ability to meet birth targets which created an incentive to use coercive population control measures).

25. *See id.* at 54. However, official statistics from China did not differentiate between voluntary and compulsory procedures, and data is lacking regarding the frequency of coerced or forced abortions or sterilizations. *See* Edward Wong, *Reports of Forced Abortion Fuel Push to End Chinese Law*, N.Y. TIMES (July 22, 2012), http://www.nytimes.com/2012/07/23/world/asia/pressure-to-repeal-chinas-one-child-law-is-growing.html.

26. *See* U.S. DEP'T OF STATE, 2003 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCUDES TIBET, HONG KONG AND MACAU) (2004) (noting that men must be twenty-two years old and women must be twenty to marry).

27. *See* U.S. DEP'T OF STATE, *supra* note 21, at 55 (explaining that in some localities, a de facto permit system exists given some provinces' requirement to register births).

28. *Id.* at 55 (specifically noting Liaoning and Heilongjiang).

29. *Id.* (citing Fujian, Guizhou, Guangdong, Gansu, Jiangxi, Qinghai, Shanxi, and Shaanxi as using remedial measures).

30. *See* U.S. DEP'T OF STATE, *supra* note 26, at 57; *see also* Stanley Lubman, *The Law on Forced Abortion in China: Few Options for Victims*, WALL ST. J.

Recent changes in the family planning policy give the impression that its enforcement may be relaxing.[31] The 2002 family planning amendment allowed local FPOs to grant permission to some couples to have a second child if they meet certain conditions.[32] As a result, a significantly fewer number of asylum claims in the United States today are based on the coercive family planning policy.[33] However, reports continue to reveal local FPOs forcing women to abort their unauthorized pregnancies and targeting couples with more than one child, subjecting them to sterilization against their will.[34] So long as FPOs carry out compelled sterilizations and abortions in enforcing China's one-child policy, asylum-seekers will continue to seek refuge in the United States.

1. International Refugee Law Binds the United States to Protect Refugees

The United Nations Convention Relating to the Status of Refugees of 1951[35] provides international protections to persons designated as "refugees" who have lost the protection of their state of origin or nationality.[36] The 1951 Convention, as amended by the 1967 United Nations Protocol Relating to the Status of Refugees,[37] defines "refugee" as a person:

> owing to well-founded fear of being persecuted for

(July 4, 2012), http://blogs.wsj.com/chinarealtime/2012/07/04/the-law-on-forced-abortion-in-china-few-options-for-victims/.

31. *See, e.g.*, Chris Buckley, *China to Ease Longtime Policy of 1-Child Limit*, N.Y. TIMES (Nov. 16, 2013), http://www.nytimes.com/2013/11/16/world/asia/china-to-loosen-its-one-child-policy.html.

32. *See* U.S. DEP'T OF STATE, *supra* note 21, at 54–55.

33. *See infra* Figures 1 & 3.

34. *See An Evaluation of 30 Years of the One-Child Policy in China: Hearing Before the Tom Lantos Human Rights Comm'n.*, 111th Cong. 1 (2009); *see also* U.S. DEP'T OF STATE, *supra* note 21, at 55–56.

35. 1951 Convention, *supra* note 7, art. 1(A)(2).

36. *See* U.N. HIGH COMM'R FOR REFUGEES, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 6 (1990). Notably, the rights of stateless persons are situated in an independent international legal framework in the U.N.'s 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. *E.g.*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: IN SEARCH OF SOLIDARITY 14–15 (2012).

37. 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

> reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[38]

While the United States has not ratified the 1951 Convention, it has bound itself to the 1967 Protocol which affords rights and protections to those meeting the above definition of refugee.[39]

Refugee law under the auspices of the 1951 Convention contains a humanitarian premise to protect persons from persecution by state or non-state actors whom the government cannot control and to give them certain rights in the state in which they seek protection. Signatory states are obligated to abide by the principle of *non-refoulement*, which prohibits returning a refugee when her life or freedom would be threatened on account of a protected ground.[40] At its core, the normative value shaping the development of international refugee law is the protection of inherent human dignity, including rights and beliefs, from abuses within the country of origin.[41] This purpose casts a wide net in terms of the possible spectrum of harms driving a person to flee and seek protection abroad.

This broad purpose contrasts with limiting principles within the definition. First, the five cognizable grounds for which asylum can be claimed—race, nationality, religion, political opinion, or particular social group—narrow the possible basis of a claim while essentializing core aspects of human dignity. These five characteristics of a person create a hierarchy of characteristics by protecting only 'worthy' aspects and thereby

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38. 1951 Convention, *supra* note 7, at art. 1(A)(1); 1967 Protocol, *supra* note 37, art. 1(1).

39. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 3 (2005).

40. *See* 1951 Convention, *supra* note 7, art. 33(1). The U.S. incorporates this requirement through offering withholding of removal to those with a threat to life or freedom who are not otherwise eligible for asylum. *See* 8 U.S.C. § 1231(b)(3).

41. *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 5 (2011 ed.); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 108 (1991).

explicitly assigning values as a matter of international law. The claimants then must submit sufficient proof that these prioritized characteristics have a causal link to the fear of persecution in the country of origin. This 'nexus' requirement limits how the refugee claim is viewed by adjudicators. As discussed *infra*, the humanitarian aims of asylum law are in tension with the limiting principles of the U.S. statutory definition, which may require recalibration by Congress.

2. International Human Rights Law Frames the Harm

The international human rights framework is a separate regime in international law that overlaps with international refugee law in several key aspects. First, the justifications for each lies in basic human dignity. While no single coherent philosophical theory grounds international human rights law,[42] many justifications hinge on the fundamental human dignity and personhood each individual innately possess by virtue of being a human.[43] This justification parallels the notion in refugee law that persons deserve protection elsewhere when their government cannot stop persecution. Second, both regimes depend on international treaties to outline the boundaries of state behavior. The treaties in international human rights law outline duties and responsibilities for states, such as the duty in the 1951 Refugee Convention binding states to not return asylum seekers to their place of origin and to grant temporary admission even if they do not have proper documentation.[44]

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42. *See* JOHN RAWLS, POLITICAL LIBERALISM 147 (1993) (explaining the notion of overlapping consensus draws on religious, philosophical, and moral grounds of political conception).

43. *See generally* Aryeh Neier, *Between Dignity and Human Rights*, 60 DISSENT 60, 61 (2013) (discussing Immanuel Kant's categorical imperative as the philosophical basis for human dignity and its eventual prominence in the human rights dialogue); JAMES GRIFFIN, ON HUMAN RIGHTS 5–6 (2008) (reimaging the framework of human rights as "the dignity of the human person"). *But see* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS (Stephen Shute & Susan Surley eds., 1993) (arguing that international human rights law is not derived from a single foundational norm); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 723 (2008) (explaining that there is not yet an "agreed transnational, transcultural, non-ideological, humanistic, non-positivistic, individualistic-yet-communitarian conception of human dignity").

44. *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 384 (3d ed. 2007) (citing 1951 Convention arts. 31, 33). However, international human rights law has formal reporting and monitoring

Third, many violations of international human rights law constitute persecutory state actions giving rise to a well-founded fear of persecution in refugee law.[45] The UNHCR has noted that serious human rights violations on account of race, religion, nationality, political opinion, or membership in a particular social group constitute the persecutory act for asylum.[46] This third commonality is referred to as the human rights approach to analyzing persecution in asylum law in legal scholarship.[47] While the original intent of international refugee law was not to enforce human rights treaty obligations, in reality, the scope of rights violations underpinning a fear of persecution provide a role for human rights treaties.

In the context of forced abortion and forced sterilization practices in China, the local FPOs unabashedly violated many international human rights that could be used to describe the persecution for an asylum claim. These include the rights to privacy,[48] security of person,[49] life,[50] and "the right to decide freely and responsibly on the number and spacing of . . . children."[51] Moreover, the United Nations' treaty-monitoring

processes in the United Nations specific to each treaty, unlike the 1951 Refugee Convention, which is monitored by UNHCR without a naming or shaming value.

45. *See* Fatma E. Marouf, *The Rising Bar for Persecution in Asylum Cases Involving Sexual and Reproductive Harm*, 22 COLUM. J. GENDER & L. 81, 139 (2011) (citing MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS 38–39 (2007)).

46. *See* U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992).

47. *See* HATHAWAY, *supra* note 41, at 104–10; JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2005). For a summary of the scholarship on the use of human rights treaties to interpret refugee law, see Stephen Meili, *When Do Human Rights Treaties Help Asylum-Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 OSGOODE HALL L.J. 627 (2014).

48. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (S. Treaty Doc. No. 95-20) [hereinafter ICCPR]; U.N. Human Rights Comm., CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (discussing women's reproductive choices as gaining equal access to the right to privacy).

49. *See* UDHR, *supra* note 48, art. 3; ICCPR, *supra* note 48, art. 9(1).

50. *See* UDHR, *supra* note 48, art. 3; ICCPR, *supra* note 48, art. 6(1). The right to life is non-derogable under ICCPR Article 4. *See* ICCPR, *supra* note 48, art. 4.

51. *See* Convention on the Elimination of All Forms of Discrimination

bodies have criticized the Chinese government's acts—including forced abortion and forced sterilization—that give rise to asylum claims. For example, the U.N. Committee on the Elimination of Discrimination Against Women's Concluding Comments on China noted, "Notwithstanding the Government's clear rejection of coercive measures, there are consistent reports of abuse and violence by local family planning officials. These include forced sterilizations and abortions, arbitrary detention and house demolitions, particularly in rural areas and among ethnic minorities."[52] In 2006, the Committee's Concluding Comments emphasized eliminating forced sterilization and forced abortion against ethnic minority women in particular in China.[53] These reports can be relied on to support a claim of persecution. Therefore, the international human rights norms define the persecution inherent in the coercive aspects of China's one-child policy and link to the broader elements of human dignity articulated through the five protected grounds of an asylum claim.[54] The symbiotic interactions between these two subsets of international law shape an emphasis on the humanitarian purpose of asylum law.

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against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980) [hereinafter CEDAW]; UDHR, *supra* note 48, art. 16(1); ICCPR, *supra* note 48, arts. 13 & 17; Rep. of the Int'l Conference on Population & Develop., *International Conference on Population and Development*, U.N. Doc. A/CONF.171/13, annex II (Oct. 18. 1994) (articulating the right of women to determine their own reproduction); *see also* U.N. Human Rights Comm., CCPR General Comments No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of Spouses (1990), adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994). ("[T]he right to found a family implies, in principle, the possibility to procreate and live together.").

52. Rep. of the Comm. on the Elimination of Discrimination Against Women, 299(b), U.N. Doc. A/54/38/Rev.1 (1999).

53. *See* U.N. Comm. on the Elimination of Discrimination Against Women, Concluding Comments of the Committee on Elimination of Discrimination Against Women, ¶ 32, U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006). Forced abortion was mentioned in passing in discussing gender preference and sex-selective abortions. *See id.* ¶ 31.

54. While the behavior of other states may be influenced by regional human rights regimes, such as the Inter-American Convention on Human Rights, Nov. 29, 1969, 1144 U.N.T.S. 123, China is not a member of a regional human rights body and is, therefore, not bound by the November 2012 Association of Southeast Asian Nations Human Rights Declaration. *See ASEAN Human Rights Declaration*, Ass'n of Southeast Asian Nations (Nov. 19, 2012), http://www.asean.org/?static_post=asean-human-rights-declaration-ahrd3.

## B. ASYLEES IN THE UNITED STATES FLEEING FORCED ABORTION OR STERILIZATION

### 1. The U.S. Asylum System

Unlike a refugee who is outside of the United States attempting to enter based on a well-founded fear of future persecution in the country of nationality,[55] an asylum applicant has arrived in U.S. territory or at a port of entry and seeks to remain based on past or future persecution. Under the Refugee Act of 1980, as amended, an asylum applicant makes a claim by either (1) affirmatively filing an application with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS);[56] or (2) defensively filing while in removal proceedings before a non-Article III immigration judge in the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ).[57] Removal proceedings are adversarial and are initiated upon DHS[58] filing a Notice to Appear in one of fifty-seven immigration

55. The President determines the number of refugees who may be admitted to the United States for humanitarian reasons before each fiscal year, after "appropriate consultation" with Congress. 8 U.S.C. § 1157(b) (2015). President Obama capped the overall 2014 fiscal year level at 70,000 refugees and set further regional ceilings. Office of the Press Secretary, *Presidential Memorandum—Refugee Admissions for Fiscal Year 2014*, WHITE HOUSE (Oct. 2, 2013), http://www.whitehouse.gov/the-press-office/2013/10/02/presidential-memorandum-refugee-admissions-fiscal-year-2014. A total of 14,000 slots were allocated to East Asia, which includes China, down from 17,000 in the 2013 fiscal year. *Compare id.*, *with* Office of the Press Secretary, *Presidential Memorandum—Annual Refugee Admissions Numbers*, WHITE HOUSE (Sept. 28, 2012), http://www.whitehouse.gov/the-press-office/2012/09/28/presidential-memorandum-annual-refugee-admissions-numbers. There is no statutory cap for asylum applicants. 8 U.S.C. § 1158(a)(1).

56. Until the creation of the Department of Homeland Security (DHS) on March 1, 2003, immigration enforcement was initiated and adjudicated through Citizenship and Immigration Services and EOIR within the Department of Justice. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, *codified at* 6 U.S.C. §§ 101–644 (2012).

57. EOIR was created in 1983 and is delegated authority from the U.S. Attorney General to interpret and administer federal immigration laws by conducting hearings, appellate review, and administrative hearings. *See Exec. Office for Immigration Review, About the Office*, U.S. DEP'T OF JUSTICE, www.justice.gov/eoir/orginfo.htm.

58. The Obama Administration's renewed emphasis on DHS prosecutorial discretion through the June 2011 Morton Memoranda implicates a possible outcome in defensive asylum adjudications. *See* Memorandum from Dir. John Morton, U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the

courts.[59] Any asylum claim not granted by USCIS is referred to an immigration court for an independent adjudication of the claim.[60]

An asylum applicant has the burden of demonstrating she is a refugee as defined in the INA, including showing either past persecution or a well-founded fear of future persecution "on account of" one of the five protected grounds.[61] A finding of past persecution gives a presumption of future persecution, which the DHS attorney may rebut by showing changed country conditions or reasonable internal relocation.[62] While the INA does not define persecution, the Board of Immigration Appeals (BIA or the Board) has established that the harm or suffering must be more than mere harassment or discrimination and may include cumulative harm.[63] As an alternative to meet international *non-refoulement* obligations, withholding of removal and protection under the Convention Against Torture remain options for applicants who cannot meet the requirements for asylum.[64]

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Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

59. *Exec. Office for Immigration Review*, *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/ocijinfo.htm.

60. WASEM, *supra* note 39, at 9.

61. INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) ("[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."). Key language differences distinguish the U.S. refugee definition from the U.N. Refugee Convention, such as (1) requiring membership "in" a particular social group instead of the Convention "of" a particular social group and (2) framing the nexus requirement in terms of "on account of" instead of "for reasons of" in the 1951 Convention. *Compare id.*, *with* 1951 Convention, *supra* note 7.

62. 8 C.F.R. § 1208.13(b)(1)(i) (2014).

63. *In re* O-Z- & I-Z-, 22 I. & N. Dec. 23, 26 (B.I.A. 1998); *In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

64. INA § 241(b)(3); 8 U.S.C. § 1231(b)(3) (2011) (restricting removal to a country where the applicant's life or freedom would be threatened); 8 C.F.R. § 1208.16 (outlining the requirements for relief under the Convention Against Torture).

## C. LEGISLATING AN AMENDMENT TO THE REFUGEE DEFINITION

### 1. Political and Administrative Context for a Legislative Solution

The asylum framework described above serves as the backdrop for responses by the executive branch and Congress to China's alarming human rights abuses.[65] Congress politicized the forced abortion and sterilization aspects of China's family planning policy as early as 1985 when it defunded the United Nations Fund for Population Activities (UNFPA) due to its financial support for China's efforts to curb population.[66] Furthermore, beginning in the late 1980s, American media sources began reporting on the forced abortion and sterilization practices in China and the protection those fleeing coercive enforcement sought in the United States.[67] Asylum claims on these grounds began to trickle in during this time.[68]

In 1988, the Reagan administration responded when then-Attorney General Edwin Meese issued a policy directive for asylum claims based on coercive population control policies in China.[69] Under the directive, all asylum officers were to give "careful consideration to applicants from nationals of the People's Republic of China who express a fear of persecution . . . because they refuse to abort a pregnancy or resist

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65. For additional analysis of the historical political, social, and legal context leading to the congressional amendment in IIRAIRA § 601(a), see Chen v. INS, 95 F.3d 801, 803–05 (9th Cir. 1996); Schulman, *supra* note 22, at 320–23; Kimberly Sicard, Note, *Section 601 of IIRAIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 932–37 (2000); Shoshanna Malett, *Affirmative Asylum Claims from China Based on Coercive Family Planning*, 06-06 IMMIGR. BRIEFINGS 1 (2006).

66. Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, 99 Stat. 293 (1985); *see also* Rachel Farkas, *The Bush Administration's Decision to Defund the United Nations Population Fund and its Implications for Women in Developing Nations*, 18 BERKELEY WOMEN'S L.J. 237, 244–46 (2003).

67. *See e.g.*, Robert Pear, *Chinese Foes of One-Child Plan Get U.S. Asylum*, N.Y. TIMES 5 (Aug. 6, 1988), http://www.nytimes.com/1988/08/06/world/chinese-foes-of-one-child-plan-get-us-asylum.html.

68. *See* 101 CONG. REC. H7947 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley) (stating that around fifty cases had been processed based on forced abortion and sterilization since the issuance of the Department of Justice regulations in August 1988).

69. *See* Wang v. Reno, 862 F. Supp. 801, 804 n.4 (E.D.N.Y. 1994) (citing Memorandum from Edwin Meese III, Attorney General, to Alan C. Nelson, INS Commissioner (Aug. 5, 1988)).

sterilization . . . in violation of the Chinese Communist party directives on population."[70] The Meese directive recognized an applicant's refusal to follow the family planning policy as constituting "an act of political defiance" sufficient to establish refugee status in the United States.[71] Thus, the first official reactions from the executive branch framed the issue as an asylum issue under the refugee definition and not as an immigration issue.

President George H. W. Bush's administration continued the Meese policy.[72] In May 1989—just months after President Bush's inauguration—the BIA decided *Matter of Chang* which concerned a Chinese man claiming asylum based on his fear of forced sterilization for evading the one-child policy.[73] Under this precedential decision, the Board held that it was not bound to the Meese guidelines.[74] The Board also held the one-child policy was not persecutory because it was a general law tied to a legitimate end (reducing population), and asylum-seekers fleeing this policy generally were not persecuted "on account of" a protected ground.[75] According to the BIA, the applicant lacked a well-founded fear of future persecution on account of a protected ground, "even to the extent that involuntary sterilization may occur."[76] The Board discounted the possible human rights violations and fastidiously traced the evidentiary

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70. *Id.*

71. *Id.*

72. Attorney General Meese resigned mere days after issuing his policy directive regarding coercive population control asylum claims. His successor Richard Thornburgh, appointed by President Reagan, remained Attorney General for President Bush until 1991. The continued application of the Meese directive for these claims under Thornburgh may have been an unintended consequence of time and attention being devoted to a massive influx of asylum-seekers from Central America in 1988. *See* Joel Williams, *INS Hoping New Asylum Procedure Reduces Flood of Central Americans*, AP NEWS ARCHIVE (Dec. 16, 1988), http://www.apnewsarchive.com/1988/INS-Hoping-New-Asylum-Procedure-Reduces-Flood-Of-Central-Americans/id-4afb98d68c22c4c3e8046db13a06a344.

73. 20 I. & N. Dec. 38 (B.I.A. 1989). Mr. Chang's forced sterilization fear was not expressed in his original asylum application but became a significant part of his hearing. *Id.* at 39.

74. *Id.* at 43 (explaining that the Meese guidelines only apply to INS and not EOIR). The Board cited *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) without additional explanation. *Id.* at 43. *Shaughnessy* discusses the delegated authority from the Attorney General to the Board and the importance of the Board's "own judgment when considering appeals." 347 U.S. at 266–67.

75. *Chang*, 20 I. & N. Dec. at 48–49.

76. *Id.* at 44.

gaps leading to a failure to establish nexus and a cognizable ground.[77] After this decision, a population control policy could not be the basis of an asylum claim unless the policy was targeted at a person "as a subterfuge" for one of the five grounds of persecution.[78]

Less than a month after the Board issued *Matter of Chang*, tanks rolled into Tiananmen Square and the Communist regime's deadly stand-off with student protesters broadened the political dialogue about China's human rights violations beyond the one-child policy. In response, the House of Representatives proposed the Emergency Chinese Immigration Relief Act of 1989.[79] The Armstrong-DeConcini amendment would have required the Attorney General to issue regulations that granted asylum to Chinese refugees fleeing forced abortion and sterilization, and to codify the "careful consideration" requirement in the Meese directive for other one-child policy asylees.[80] In urging its adoption, Representative Smith cited actual case examples of asylum being denied and framed it as "clearly a humanitarian effort that should be supported by all."[81] The Emergency Chinese Immigration Relief Act passed both chambers of Congress, but was vetoed by President Bush on the grounds that "administrative steps make it unnecessary."[82] President Bush's Statement of Disapproval indicated that Congress's actions were too narrow by singling out China.[83] President Bush instead directed the Attorney General to implement asylum protections administratively for "*all* foreign nationals, regardless of their country of origin."[84] The corresponding Memorandum of Disapproval stated that the President's ability to manage foreign relations was preserved by

77. *Id.* at 45–47. However, *Matter of Chang* did not provide any clues into the evidentiary threshold that would satisfy a claim based on opposing a countrywide policy.

78. *Id.* at 47.

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

80. *Id.*; *see also* 135 CONG. REC. S8299 (daily ed. July 19, 1989) (statement of Sen. Armstrong) ("The Department shall view violations of the one-child policy as 'political dissent,' and a finding of the requisite well-founded fear of persecution under these circumstances is reasonable.").

81. 135 CONG. REC. H6731 (daily ed. Oct. 5, 1989).

82. Statement on the Disapproval of the Bill Providing Emergency Chinese Immigration Relief, 2 PUB. PAPERS 1612 (Nov. 30, 1989).

83. *Id.*

84. *Id.* (emphasis in original).

relying on administrative actions.[85] None of Bush's statements, however, mentioned the particular administrative action that would be used. Members of Congress questioned the legality of President Bush's use of the pocket veto,[86] but were unable to override it.[87]

On December 1, 1989, the day after Bush's veto, INS Commissioner Gene McNary issued instructions to all field offices to de facto implement the substance of the Emergency Chinese Immigration Relief Act and promulgate regulations.[88] In accordance with President Bush's preference for a flexible administrative solution, Attorney General Richard Thornburgh implemented an interim regulation on January 29, 1990 that authorized INS officers to grant asylum on account of political opinion for applicants who refused to abort a pregnancy or be sterilized or had a well-founded fear that they would be required to do so in the future.[89] As President Bush foreshadowed in his Statement of Disapproval, the interim regulations expanded asylum to *all* foreign nationals fleeing forced abortion or sterilization—not just asylees originating from China.[90] However, concerns arose from immigration advocates that the interim regulations may not have overturned *Matter of Chang* because they failed to mention China's policies were coercive in particular.[91]

President Bush incorporated the January 1990 interim regulation when he issued Executive Order 12,711 on April 11, 1990. His Executive Order directed the Attorney General and Secretary of State to give "enhanced consideration" to individuals fearing persecution from a policy of forced abortion

85. Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, 2 PUB. PAPERS 1611 (Nov. 30, 1989).

86. 136 CONG. REC. 529 (Jan. 25, 1990) (statement of Sen. Armstrong) (noting that "[w]e are dealing with a real abuse of human rights").

87. *See H.R. 2712 (101st): Emergency Chinese Immigration Relief Act of 1989*, GOVTRACK.US, https://www.govtrack.us/congress/bills/101/hr2712 (last visited April 5, 2016).

88. *President Vetoes Chinese Student Bill, Offers Administrative Relief Instead*, 66 No. 46 INTERPRETER RELEASES 1313, 1314 (Dec. 4, 1989).

89. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2805 (Jan. 29, 1990) (amending 8 C.F.R. § 208.5(b)(2)).

90. *Id.*

91. Letter from Edwin Rubin & Jimmy Wu, American Immigration Lawyers Ass'n, & Robert Hill, Former Deputy Dir., Asylum Pol'y & Rev. Unit, Dep't of Justice, to Sen. William Armstrong (Jan. 23, 1990), 136 CONG. REC. 529 (Jan. 25, 1990).

or coerced sterilization.[92] The Executive Order had the force and effect of law and its enforceability was supported by the interim regulations.[93]

The final rule published by Attorney General Thornburgh on July 27, 1990 revised the INS regulations for asylum and withholding of removal.[94] Whether it was a mere oversight or a purposeful rewrite, the final rule eliminated the language and substance of the January 1990 interim regulation authorizing asylum to those fearing persecution for refusing forced abortion or sterilization based on their political opinion.[95] In its place was a rule about the special duties toward detained asylum seekers.[96] Without a binding regulation for coercive family planning asylum applicants, then-INS General Counsel Grover Rees issued an internal policy in November 1991 which gave "presumptive eligibility" for asylum for applicants fleeing one-child policies.[97] However, this limited agency response did not apply to EOIR, and its immigration judges continued to implement *Matter of Chang*. Moreover, the Executive Order no longer had the force and effect of law to create a basis for asylum since the final regulations eliminated a regulatory basis for "enhanced consideration" in coercive family planning asylum cases.[98]

President Bush lost the 1992 election, and mere days before President Clinton was inaugurated, Attorney General William

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92. Exec. Order 12,711, Policy Implementation With Respect to Nationals of the People's Republic of China, 55 Fed. Reg. 13897 (Apr. 13, 1990); *see also* Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 582 (1996).

93. *See* Chen v. INS, 95 F.3d 801, 805 (9th Cir. 1996) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 303–04 (1979)).

94. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674 (July 27, 1990); *see also Chen*, 95 F.3d at 804 (tracing the history of the administrative process for forced abortion and sterilization asylum claims).

95. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30674; *see also INS Asylum Regulations Mistakenly Supersede Regulations on PRC "One Couple, One Child" Policy*, 67 INTERPRETER RELEASES 1222, 1222 (1990) ("[T]he July regulations inadvertently supersede and negate the January regulations, because they completely replace the Justice Department's asylum regulations . . . and make no mention of the Chinese population control measures.").

96. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. at 30674-01, pt. II(5) (discussing 8 C.F.R. § 208.5).

97. *INS General Counsel Instructs on Asylum Claims Based on Coercive Family Planning Policies*, 69 INTERPRETER RELEASES 297 (1992).

98. *See Chen*, 95 F.3d at 805.

Barr signed a final rule reiterating the substance of the January 1990 interim regulation.[99] The language of the Barr rule was much stronger than the 1990 version: it turned the discretionary "may" establish a fear of political persecution language into a mandatory "shall," if an applicant made the proper showing of a fear of persecution based on forced abortion or sterilization.[100] Further, the commentary to this rule expressly stated that it would effectively supersede *Matter of Chang*.[101] This eleventh-hour attempt to implement an enforceable regulation was supposed to take effect on the date of publication in the Federal Register.[102] Before the 1993 final rule could be published, however, President Clinton issued a sweeping directive to his Office of Management and Budget director, requiring him to deliver a memorandum to each agency mandating that all not-yet-published regulations to be withdrawn from the Federal Register.[103] This directive, while rooted in the sea change from a Republican to a Democratic administration, meant that the 1993 final rule was never published.

Given the sheer confusion within the DOJ, with INS following an internal policy reflecting Bush's Executive Order 12711 and immigration judges in EOIR adhering to *Matter of Chang*, the BIA certified two coercive population control asylum cases to Attorney General Janet Reno.[104] U.S. State Department reports in May 1993 and August 1993 contributed to this disarray by casting doubt on China's continued use of coercive enforcement measures.[105] Attorney General Reno, in a memorandum declining to review the cases, noted they "do not require a determination that one or the other of these standards

99. Att'y Gen. Order No. 1659-93 (Jan. 15, 1993); *see also In re* J-S-, 24 I. & N. Dec. 520, 540–41 n.12 (B.I.A. 2008).

100. *See* Att'y Gen. Order No. 1659-93.

101. *Id.*; *see also Chen*, 95 F.3d at 804.

102. *Id.*

103. Regulatory Review Notice, 58 Fed. Reg. 6074 (Jan. 25, 1993).

104. *See* Chris Sale, *Processing of Chinese Nationals Who Fear Coercive Family Planning Practices*, 71 INTERPRETER RELEASES 1053, 1066 (1994).

105. *See generally* Dep't of State, Bureau of Human Rights & Humanitarian Affairs, *Family Planning in the Wenzhou Area of Zhejian Province* (May 1993); Dep't of State, Bureau of Human Rights & Humanitarian Affairs, *Asylum Claims Relating to Family Planning in Fujian Province* (Aug. 1993). *But see* Nicholas Kristoff, *China's Crackdown on Births: A Stunning, and Harsh, Success*, N.Y. TIMES (Apr. 25, 1993), http://www.nytimes.com/1993/04/25/world 0/china-s-crackdown-on-births-a-stunning-and-harsh-success.html (reporting that in 1989 for every 100 girls born, there were 113.8 boys which amounts to 900,000 missing Chinese girls each year).

is lawful and binding."[106] The next day, on December 8, 1993, in *Matter of G-*, the BIA reaffirmed *Matter of Chang* as legally correct in denying asylum based on China's coercive population control policy.[107]

In August 1994, Deputy INS Commissioner Chris Sale issued a policy directive to INS employees, binding them to apply *Matter of G-* and *Matter of Chang* when assessing asylum claims from Chinese nationals fleeing coercive family planning policies.[108] While prior agency statements of policy focused on general practices of forced abortion or sterilization in countries, the 1994 INS directive specifically named Chinese asylees. As a result, INS and EOIR policies united for the first time to generally deny asylum claims based on enforcement practices of China's family planning law. Deputy Commissioner Sale articulated that the directive was not a blanket policy, but instead was consistent with *Matter of G-* in limiting grants of asylum in family planning policy cases to applicants facing selective application in China.[109] Some notion of protection remained, though not with the full scope of asylum benefits, because Deputy Commissioner Sale authorized INS officials to issue stays of deportation on humanitarian grounds for Chinese nationals credibly fearing (1) imminent forced abortion or involuntary sterilization; (2) past or future suffering for refusing to submit to an abortion or sterilization; or (3) past or future suffering due to violating "other unreasonable family planning restrictions."[110] This discretionary review provided only nominal humanitarian protection: the INS reviewed 767 family-planning cases and granted 24 applicants' humanitarian stays, or 3%, in the first year.[111]

2. Federal Courts and Congress Intervene

When President Clinton took office in 1993, inconsistencies abounded within the executive branch, and between *Matter of*

106. *See* Sale, *supra* note 104, at 1066.

107. *In re* G-, 20 I. & N. Dec. 764, 775 (B.I.A. 1993).

108. *See* Sale, *supra* note 104, at 1066.

109. *Id.* at 1067.

110. *Id.* (clarifying that humanitarian stays of deportation do not include a person with one child who expresses an intention to have a second and foresees harm from this).

111. *See Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts., H. Comm. on Int'l Relations*, 104th Cong. 33 (1995) (statement of Craig T. Trebilcock).

*Chang* and the other two branches. The issue of asylum-seekers from China gained national prominence when the *Golden Venture*, a ship with almost 300 Chinese migrants smuggled on board, ran into a sandbar off New York City in 1993.[112] Many aboard sought asylum based on forced abortion or sterilization. The Eastern District of Virginia adopted a contrasting position from the BIA regarding China's one-child policy in *Guo Chun Di v. Carroll*.[113] The federal district court held that the "cacophony of administrative voices" were not entitled to deference and that the respondent was eligible for asylum by demonstrating persecution on account of a political opinion.[114] According to the court, an individual's view of procreation constitutes a political opinion because the right to bear children is a basic civil right of man.[115]

Furthermore, China's one-child policy was a moving political target in debates before several committees and subcommittees in the 103rd Congress. Since 1973, in the wake of *Roe v. Wade*,[116] Congress banned foreign aid to nations where abortions would be used as a method of family planning or where any person could face coercion to get an abortion.[117] In 1994, Congress debated whether to continue to defund UNFPA—previously defunded under Presidents Reagan and Bush—due to allegations of working with local Chinese officials using coercive tactics.[118] The 1995 debates on defunding UNFPA continued to polarize this process by citing horrific stories from China of late-term abortions, alleged dietary trends of eating embryos, and decontextualized statements by UNFPA executives showing

112. Opinion, *The Golden Venture, Plus 100,000*, N.Y. TIMES (June 9, 1993), http://www.nytimes.com/1993/06/09/opinion/the-golden-venture-plus-100000.html.

113. Guo Chun Di v. Carroll, 842 F. Supp. 858, 874 (E.D. Va. 1994), *rev'd sub nom* Guo Chun Di v. Moscato, 66 F.3d 315 (4th Cir. 1995) (applying Fourth Circuit precedent from Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995), which held that the Board's decision in *Matter of Chang* is entitled to deference). *But see* Chen v. Carroll, 866 F. Supp. 283, 286–87 (E.D. Va. 1994) (finding *Matter of Chang* to be a reasonable interpretation).

114. *See* Guo Chun Di v. Carroll, 842 F. Supp. 858, 870 (E.D. Va. 1994), *rev'd sub nom.*, Guo Chun Di v. Moscato, 66 F.3d 315 (4th Cir. 1995).

115. *Id.* at 872.

116. Roe v. Wade, 410 U.S. 113 (1973); *see also* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

117. Foreign Assistance Act, Pub. L. No. 93-189, § 114, 87 Stat. 714 (1973), *codified at* 22 U.S.C. § 2151b(f) (2011).

118. SEE LUISA BLANCHFIELD, CONG. RESEARCH SERV., ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 8–9 (2014) (contextualizing the Leahy amendment).

support for China's population policy.[119]

Attention shifted to congressional intervention in May 1995 when Republican lawmakers introduced the American Overseas Interest Act to cut spending in foreign affairs.[120] Representative Chris Smith's amendment specifically aimed to overturn *Matter of Chang* by amending the definition of "refugee" in the INA to grant asylum to persons fleeing persecution for forced abortion or sterilization or other resistance to a coercive population control program.[121] Moreover, the House Subcommittee on International Operations and Human Rights, chaired by Representative Smith, held three separate hearings in May, June, and July 1995 regarding this issue. Testimony discussed the human rights violations in China's use of forced abortion and sterilization, as well as the United States' failures to protect Chinese seeking asylum because of coercive policies under *Matter of Chang*.[122] Several statements classified China's family planning policy as modern-day eugenics and noted that forced abortion was already found to be a crime against humanity in violation of international law during the Nuremburg trials.[123] Three female asylum seekers who were smuggled to the United States aboard the *Golden Venture* also testified before the Subcommittee in July 1995 about their forced abortions and

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119. *See* 141 CONG. REC. H6446, H6446–62 (daily ed. June 28, 1995) (debating the continued funding of United Nations Fund for Population Activities). The Smith amendment proposed defunding the UNFPA until the President certified to congressional committees that either (1) the UNFPA has terminated all activities in China; or (2) there have been no forced abortions in China for a period of twelve months. 141 CONG. REC. H6448 (daily ed. June 28, 1995). The Smith amendment passed the House by a vote of 243-187. 141 CONG. REC. at H6462. *See also Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts.*, *H. Comm. on Int'l Relations*, 104th Cong. 17 (1995) (statement of Nicholas Eberstadt, Researcher, American Enterprise Institute) ("Hong Kong reporters have traveled into China and are reporting the harvesting of babies, of babies and fetuses for medicine, delicacies, other consumer uses.").

120. American Overseas Interest Act of 1995, H.R. 1561, 104th Cong. (1995).

121. *Id.* § 2252; COMM. ON INT'L RELATIONS, AMERICAN OVERSEAS INTEREST ACT OF 1995, H.R. REP. NO. 104-128, pt. 1, at 42–43 (1995), http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt128/pdf/CRPT-104hrpt128-pt1.pdf (citing the desire to have "speedy adjudication" of these cases based on "a careful and sensitive application of the principles underlying our refugee laws").

122. *Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts.*, *H. Comm. on Int'l Relations*, 104th Cong. 4–5, 12–13 (statement of Dr. John Aird, demographer).

123. *Id.* at 1–2 (statement of Rep. Smith), 17 (statement of Nicholas Eberstadt).

sterilizations for violating China's one-child policy.[124] The Subcommittee criticized the Clinton administration for the 1994 INS shift in policy and its failure to protect a woman's right of reproductive self-determination.[125]

The American Overseas Interest Act passed the House of Representatives on June 8, 1995, and passed the Senate on December 14, 1995.[126] From its introduction, President Clinton promised to veto the bill based on isolationism and cuts to foreign aid.[127] President Clinton fulfilled his promise and vetoed the bill on the grounds that it would impair U.S. foreign affairs and would complicate our relationship with China.[128] The Veto Message did not specifically mention the amendment to the refugee definition for asylees fleeing forced abortion and sterilization practices.[129] As with the Emergency Chinese Immigration Relief Act of 1989, Congress could not override the President's veto, and the measure did not become law.

A few months later, on June 11, 1996, the Omnibus Consolidated Appropriations Act was introduced and quickly passed in the House of Representatives and Senate.[130] President Clinton signed it into law on September 30, 1996.[131] Division C of the bill contained the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA) which made sweeping changes to U.S. immigration law and procedure. Section 601(a) of IIRAIRA amended the refugee definition in the INA and introduced a per se well-founded fear of persecution on

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124. *Id.* at 56–59 (statement of Chen Yun Fei), 60 (statement of Hu Shuye), 60–62 (statement of Li Bao Yu). The Subcommittee was forced to subpoena the Department of Justice for these women to testify, as they were detained in INS custody pending the outcome of their cases. *See id.* at 43–50.

125. *Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts.*, *H. Comm. on Int'l Relations,* 104th Cong. 2, 55 (1995). These human rights pronouncements specific to coercive family planning claims may be the closest the United States has gotten to a human rights approach to asylum adjudications.

126. *Bill Summary and Status, 104th Congress (1995–1996), H.R. 1561*, LIBRARY OF CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR01561:@@@R (last visited Mar. 14, 2016).

127. Norman Kempster, *Clinton Vows He'll Veto GOP Cuts in Foreign Aid*, L.A. TIMES (May 24, 1995), http://articles.latimes.com/1995-05-24/news/mn-5477_1_foreign-aid.

128. 142 CONG. REC. H3304 (daily ed. Apr. 12, 1996).

129. *Id.*

130. *H.R. 3610 (104th): Omnibus Consolidated Appropriations Act, 1997*, GOVTRACK.US, https://www.govtrack.us/congress/bills/104/hr3610.

131. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

account of a political opinion for individuals fleeing forced abortion, forced sterilization, and "other resistance" to a coercive family planning policy.[132] This categorical refugee status only applied to a person subjected to involuntary abortion or sterilization, with DHS able to rebut this presumption by demonstrating changed circumstances or the ability to relocate elsewhere in China.[133]

Section 601(b) incorporated a 1,000-person fiscal year cap on the number of asylum grants and refugee admissions based on coercive family planning claims.[134] This first ever asylum cap originated from the 1989 Armstrong-DeConcini amendment to the Emergency Chinese Immigration Relief Act to manage "fears that this would be a wide-open loophole to circumvent immigration policy."[135] Although Congress in 1996 did not specifically debate the cap or its size, some members of Congress had lingering concerns about a slippery slope that would allow potentially millions of eligible Chinese asylum-seekers to claim persecution based on forced family planning practices.[136] The cap may have quashed these fears, but it only had nominal effect since the BIA authorized applicants to receive conditional grants of asylum irrespective of cap capacity.[137] Eventually, the REAL ID Act of 2005 eliminated the cap.[138]

### D. IMPLICATIONS OF A CHANGE IN LAW FOR FORCED ABORTION OR STERILIZATION

#### 1. 601(a) as a Statement of Foreign Policy

Much existing scholarship discusses the politicization of

132. IIRAIRA § 601(a); INA § 101(a)(42)(B); 8 U.S.C. § 1101(a)(42)(B).

133. Mei Fun Wong v. Holder, 633 F.3d 64, 79 (2d Cir. 2011) (explaining the context of section 601(a) and Congress's intent with regard to "other resistance" to coercive population control policies).

134. H.R. REP. NO. 104-469 at 174 (1996).

135. 135 CONG. REC. H7947 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley). *But see id.* at H7946 (statement of Rep. Morrison) ("[W]e are limiting for no apparent reason, limiting the rights of people under our asylum laws rather than expanding them.").

136. 142 CONG. REC. S4592–93 (daily ed. May 2, 1996) (debating the Immigration and Financial Responsibility Act of 1996); 142 CONG. REC. H2633 (daily ed. Mar. 21, 1996) (statement of Rep. Smith, noting that the statutory cap is unfortunate and unnecessary, but probably will not make any difference).

137. *See In re* X-P-T-, 21 I. & N. Dec. 634, 637 (B.I.A. 1996) (en banc).

138. REAL ID Act of 2005 § 101(g)(2), Pub. L. No. 109-13, 119 Stat. 302, 305 (2005).

asylum law and the detrimental impact of it on the ability of asylum adjudications to consistently and fairly protect those fleeing harm.[139] The impact of politics also manifests in the forced abortion and sterilization realm. Katherine Vaughns has criticized the ideological underpinnings of legislatively amending the refugee definition which de-emphasized humanitarian concerns.[140] The political process is not inherently anti-humanitarian, however. In fact, international refugee law obligations framed the legislative debates to grant asylum for credible fears of forced abortion or sterilization. First, the United States aimed to be an international leader by example in the face of a human rights crisis in China's enforcement of the one-child policy. While language of section 601(a) does not explicitly mention the words "human rights," Congress's intent to adopt a statutory exemption as a statement of its human rights policy toward China is clear from the debates.[141] In the same way, Dr. Matthew Price has described the anti-brutality norm supported by the United States in legislating an exception for coercive population control asylum claims.[142]

While a human rights basis framed the forced abortion and sterilization issue, it is siloed from broader pronouncements of the United States' normative human rights foreign policy agenda for asylum. Around the time of *Matter of Chang*, the BIA had denied asylum to other survivors of brutal human rights violations as not having sufficient persecution or nexus, like the Tamils fleeing Sri Lanka[143] or the Marielitos who attempted to leave Cuba.[144] By implication of Congress's unwillingness to act

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139. *See e.g.*, LEGOMSKY & RODRIGUEZ, *supra* note 12, at 1032–33; Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002); Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum, and Discretion*, 38 WILLAMETTE L. REV. 751, 758–59 (positing that asylum adjudications are a tool of foreign policy) (1992); James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 148–51 (1990).

140. *See* Katherine L. Vaughns, *Retooling the "Refugee" Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 83–84 (1998).

141. *Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts.*, *H. Comm. on Int'l Relations*, 104th Cong. 3 (1995) (statement of Rep. King) (noting that a strong regard for human rights is required in both U.S. foreign policy and immigration policy and that "ignoring a deprivation of human rights is as bad as carrying it out itself").

142. MATTHEW E. PRICE, RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS 113–14 (2009).

143. *See In re* T-, 20 I. & N. Dec. 521 (B.I.A. 1992).

144. *See* Matter of Barrera, 19 I. & N. Dec. 837 (B.I.A 1988) (finding the

to overturn these adverse BIA decisions, in contrast to its political will for forced abortion and sterilization asylees, a hierarchy of human rights norms worthy of legislative action emerged. Moreover, the United States sent a mixed message for its stance on gender-based harms because it was reluctant to recognize some gender-based harms as the basis for asylum claims, like domestic violence against women,[145] but decisively took repeated legislative action for forced abortion and sterilization. Congress used politics to offer some survivors of brutality safety through a per se rule for nexus, persecution, and cognizable grounds, but not others. Thus, a blanket anti-brutality norm cannot underlie the political action taken. Inconsistent congressional action and omissions toward the anti-brutality norm makes it difficult to extrapolate broader normative ideals based on humanitarianism. The humanitarian justification underlying amendments to section 601(a) was contingent on a country's reproductive policy being broadly antithetical to Western political values.[146] Instead of politics and human rights acting as mutually exclusive justifications, Congress signaled a willingness to protect certain asylees when human rights and politics aligned to allow for the expression of a positivist international human rights rationale.

Second, the politicization of forced abortion and sterilization through congressional action in section 601(a) sent important signals from the United States to international institutions, such as the UNFPA and UNHCR. In stark contrast to *Matter of Chang*'s justification to deny claims, in part due to the fact that "China was in fact encouraged by world opinion to take

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Cuban Government's diplomatic assurances of non-reprisal as meaningful evidence).

145. For example, Rody Alvarado Pena, the applicant in *Matter of R-A-*, first applied for asylum in the United States based on severe domestic violence by her husband in Guatemala in 1995; her epic legal battle to gain protection lasted fourteen years. *See In re* R-A-, 24 I. & N. Dec. 629 (A.G. 2008); *Matter of R-A-,* CENTER FOR GENDER & REFUGEE STUDIES, http://cgrs.uchastings.edu/our-work/matter-r (last visited Mar. 14, 2016).

146. *See Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts., H. Comm. on Int'l Relations*, 104th Cong. 1–2 (1995). Another example of the alignment of political and humanitarian interests to amend refugee law is the 1989 Lautenberg amendment, which gave refugee status to "certain nationals or residents of the former Soviet Union or Estonia, Latvia and Lithuania, who are Jews, evangelical Christians or Ukrainian Catholics . . . if they assert a 'credible basis for concern about the possibility of . . . persecution.'" Pub. L. No. 101-167, 103 Stat. 1195, 1262 (1989).

measures to control its population,"[147] the adoption of 601(a) recognized the limits of domestic population policies. The United States signaled the outer boundaries of acceptable methods for countries to control birth rates under United Nations programs. Henceforth, a population control program with coercive practices constituted a ground for humanitarian protection in the United States.

Finally, the U.S. legislative stance against forced abortion and coerced sterilization in China's family planning policy was a politicized foreign policy statement directed at China about its human rights practices.[148] A few months before passing IIRAIRA, the U.S. House issued a conference report on H.R. 1561 entitled *Declaration of Congress Regarding United States Government Human Rights Policy Toward China.*[149] Congress required the President to report on the progress of a litany of human rights issues in China, from religious freedom and Tibet to the family planning law.[150] After vocalizing the human rights violations in forced abortion and sterilization in legislative debates, Congress created a specific remedy in asylum law by providing a safe haven within U.S. borders from China's family-planning policy, as well as delegating a responsibility to monitor the situation. These political steps attempted to correct ambiguous executive branch policies toward China by shifting the doctrinal tension to a humanitarian rationale. IIRAIRA, however, made clear that forced abortion and sterilization are per se persecutory and resisting these practices constitutes a political opinion. Congress expressly intended section 601(a) to overturn *Matter of Chang* and *Matter of G-* and to convey a conceptualization of asylum claims based on forced abortion or

147. Matter of Chang, 20 I. & N. Dec. 38, 44 (B.I.A. 1989).

148. The U.S. Congress has relayed foreign policy messages about China's human rights practices through legislation in other contexts. For example, sustained advocacy from Rep. Frank Wolf led to a law preventing NASA researchers from working with Chinese scientists, ostensibly due to national security concerns, but additionally in protest of China's human rights practices. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2014, § 532(a), Pub. L. No. 113-76, 128 Stat. 5 (2014); *see also* Letter from Rep. Frank Wolf to Charles F. Bolden, Jr., Administrator, NASA (Oct. 8, 2013), http://www.spacepolicyonline.com/news/text-of-october-2013-wolf-letter-to-bolden-regarding-chinese-nationals-at-nasa-facilities (explaining his support for limiting new collaboration with China in space "until we see improvement in its human rights record" and a reduction in cyberattacks).

149. H.R. REP. NO. 104-478, at 99 (1996) (Conf. Rep.), *reprinted in* 142 CONG. REC. H2013 (daily ed. Mar. 8, 1996).

150. *Id.*

forced sterilization.[151] Subsequently, an en banc Board of Immigration Appeals found that IIRAIRA section 601(a) superseded *Matter of Chang*, and even the INS agreed that the asylum application should be granted since forcible sterilization constitutes past persecution on account of political opinion.[152]

However, some ambiguities remained in the scope of the amendment, which softened its political impact. Section 601(a) failed to expressly name China as the culprit of coercive family-planning policies, therefore reducing its utility as a human rights mechanism to "name and shame" violations.[153] On the other hand, congressional debates left little doubt that flexing political muscle against China's one-child policy was the aim.[154] The House Conference Report for the amendment to the refugee definition explicitly named China's practice of subjecting women to involuntary abortions "with 'unauthorized' second or third pregnancies," as well as forcible sterilizations for both men and women.[155] In the almost twenty years since section 601(a) became law, no published Board decision has applied the amended definition to any country besides China.[156] Additionally, the political importance of this action was highlighted when the nominal 1,000-applicant cap did not dissuade INS and EOIR from granting worthy asylum applications. Conditional asylum continued to protect worthy applicants even if the statutory capacity was full. Congress also drafted the statutory rule in gender-neutral language, which broadened the scope of possible claims.[157] Finally, the language

151. H.R. REP. NO. 104-469, pt. 1, at 173 (1996).

152. Matter of X-P-T-, 21 I. & N. Dec. 634, 636 (B.I.A. 1996) (en banc).

153. *See, e.g.*, Stephan Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Sills to Human Rights*, 39 WASH. U. J.L. & POL'Y 257, 266 n.27 (2012).

154. *See* 142 CONG. REC. S4592–93 (daily ed. May 2, 1996) (debating the Immigration and Financial Responsibility Act of 1996). Senator Simpson feared a deluge of millions of asylum claims because "[w]e are dealing with China," and it would apply to all countries. *Id.* at S4593; *see also* Ding v. Ashcroft, 387 F.3d 1131, 1139 (9th Cir. 2004) (describing the statute's purpose "to bestow refugee status on those individuals in China forced to undergo involuntary abortion or sterilization").

155. H.R. REP. NO. 104-469, pt. 1, at 173 (1996).

156. The per se rule of forced abortion and sterilization may have renewed applicability to the 1.33 million Rohingya Muslims in Myanmar subjected to birth limits. *See* Matthew Smith & Taylor Landis, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar*, FORTIFY RIGHTS (Feb. 2014), http://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf.

157. *See* Immigration and Nationality Act of 1965 § 101(a)(42)(A), 8 U.S.C.

specifically named two bases, forced abortion and sterilization, while leaving a wide interpretation for claims based on "other resistance."[158]

2. 601(a) as a Signal to Domestic Coalitions and Lobbies

The march to legislative change in U.S. asylum law for forced abortion and sterilization also relayed signals to domestic coalitions and lobbyists to find commonalities and unite across the political spectrum. Forced abortion as an asylum basis united strange bedfellows in both anti-abortion lobbyists and refugee advocates.[159] Legislative debates reiterated that the issue of protecting asylum-seekers from coercive family-planning policies cuts across the heavily politicized pro-choice/pro-life divide.[160] Members of Congress on both sides of the aisle could call protection from forced abortion and sterilization a political win and send signals to their constituencies and lobbyists that they either supported a woman's right to choose or the right to life.[161] These hearings, framed as a refugee issue, brought the issue out of insular immigration communities or courtrooms and brought national prominence to a human rights violation that was salient in the United States' broader abortion debate.

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§ 1101(a)(42)(A) (granting protection to "a person" who experienced forced abortion or sterilization). Congress thus couched a female-specific harm (forced abortion) in gender-neutral terminology (a person). The effect of failing to use appropriate terminology not only broadened the applicability of section 601(a), but also equated the male experience with the female experience, which changes the dynamics of a gender-based harm. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 22 n.5 (1990) ("The choice of terms to describe an individual or group unavoidably reflects one perspective among others.").

158. 8 U.S.C. § 1101(a)(42)(B); *see also* Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 883 (2000).

159. *See* Vaughns, *supra* note 140, at 82.

160. *See* 142 CONG. REC. S4593 (daily ed. May 2, 1996) (statement of Sen. DeWine); 142 CONG. REC. H2633 (daily ed. Mar. 21, 1996) (statement by Rep. Smith) ("Almost all Americans, whatever their views on the moral and political questions surrounding abortion, regard forced abortion and forced sterilization as particularly gruesome violations of fundamental human rights.").

161. *See* 142 CONG. REC. S4593 (daily ed. May 2, 1996) (statement of Sen. DeWine) (explaining that the amendment to grant asylum to those forced to undergo coerced abortions or sterilizations is supported by both the Center for Reproductive Law and Policy and the National Right to Life Committee); 135 CONG. REC. H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley).

Since Representative Smith set this issue on the agenda, a pro-life view framed the debate but did not dominate it. Representative Smith's leadership to enact legislation when the executive branch status quo of *Matter of Chang* necessarily incorporated a pro-life view. He has served in the congressional Pro-Life Caucus since 1982.[162] The issue framed forced abortion and sterilization in fulfillment of a population policy broadly as "undeniable and grotesque violations of fundamental human rights."[163] Smith's views also continued framing the issue as one involving refugees, which began in 1989, rather than an illegal immigration problem.[164] Section 601(a), as both proposed and enacted, contained neutral language which allowed pro-choice groups, like the Center for Reproductive Rights, to become bedfellows and advocate for the issue.[165] The right to reproductive freedom, articulated only a few years earlier by the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, was also confirmed as a matter of U.S. asylum law.[166]

The legislative debates and eventual protections for asylees fearing coercive family planning policies additionally signaled that a human rights approach could have a place in U.S. asylum law. Congress acknowledged the fundamental human rights violations in China's coercive family planning policies and highlighted the United States' obligations to consider these asylum claims.[167] Congress also relied on important findings in Department of State reports and human rights organizations to define the persecution and link it to a political opinion.[168] For example, Amnesty International's report on forced abortion practices in China was quoted in the House Subcommittee's

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162. *Biography*, U.S. CONGRESSMAN CHRIS SMITH, http://chrissmith.house.gov/biography/ (last visited Apr. 26, 2016).

163. H.R. REP. NO. 104-469, pt. 1, at 173 (1996).

164. *See* 142 CONG. REC. H2633 (daily ed. Mar. 21, 1996) (statement by Rep. Smith).

165. *See Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts., H. Comm. on Int'l Relations*, 104th Cong. 65 (1995).

166. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . .").

167. *See* 135 CONG. REC. H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley).

168. *See* 142 CONG. REC. S4593 (daily ed. May 2, 1996) (statement of Sen. DeWine).

hearing, as well as their recommendation that resistance to family-planning policies should make a person eligible for protection under asylum law.[169] These justifications signaled the United States' willingness to consider human rights to define the basis of certain, though not all, asylum claims and to grant protections based on human rights rationales when politically expedient and feasible.

While strategic foreign policy and politicized human rights considerations partially motivated Congress to protect asylees fleeing forced abortion or sterilization, Congress did not expressly cite human rights treaties.[170] The human rights approach to asylum law was decoupled from the enforcement of treaty obligations. John Burgess testified before the House Subcommittee on International Operations and Human Rights and cited some of the relevant human rights treaties to which the United States was bound and were implicated by forced abortion and sterilization.[171] However, none of the human rights instruments were cited in the final House Report explaining the intent of section 601(a). The legislative history to section 601(a) relied on general pronouncements of human rights principles but was unwilling to go as far as citing specific international human rights treaty obligations.[172]

### E. ALMOST TWENTY YEARS AFTER SECTION 601(A): AN ANALYSIS OF THE DATA

An analysis of the data of the subsequent outcomes of asylum claims brought under section 601(a) provides insight into the role of Congress in resolving the doctrinal tension of U.S. asylum law. Based on Freedom of Information Act (FOIA) requests for data on coercive population control-based asylum claims to USCIS and EOIR, some key findings arise. A total of 11,756 applicants were affirmatively granted asylum based on

169. *See Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts., H. Comm. On Int'l Relations*, 104th Cong. 53, 53–54 (1992) (statement of Rep. Chris Smith). Amnesty International recommended asylum procedures based on a particular social group akin to Canada's jurisprudence in *Cheung v. Canada*—in contrast to section 601(a) determining a political opinion. *Id.*

170. *E.g.*, *id.*

171. *See id.* at 38–39 (statement of John Burgess) (citing the Universal Declaration on Human Rights, ICCPR, and the U.N. Convention Against Torture).

172. *See generally* H.R. REP. NO. 104-469 (1996).

coercive population control policies by USCIS from fiscal years 1996–2013.[173] For defensive applicants in immigration courts, 21,017 claims based on fleeing coercive population control policies were granted from fiscal years 1996–2013.[174] These figures show that the fears of a flood of millions of refugees expressed by opponents to the legislation simply did not materialize. Whether the high costs (both financially and socially) of fleeing China prevented potential applicants from leaving or that existing illicit smuggling rings presented an alternative to the asylum system, the numbers speak for themselves.

Section 601(a) cannot be blamed for the recent increase in asylum claims from China. While Chinese asylum applicants have been the greatest proportion of asylum grants in the United States in recent years,[175] suffice it to say that it is not because of the statutory rule. In fiscal year 2012, 44.94% of all grants of asylum in immigration courts, or 5,383 cases (out of 11,978 total grants), were applicants from China.[176] Yet, only 146 cases were granted based on coercive population control.[177] Assuming that all 146 cases were Chinese nationals, this number represents 1.2% of all asylum grants in immigration courts, and 2.7% of all applications granted from China.[178]

The graphs below summarize key trends and findings from the data obtained through FOIA requests about asylum applications based on coercive population control policies. To summarize some of the key trends, grant rates of affirmative coercive population control-based applications at USCIS were scattered, with many more cases referred to the immigration courts than being outright granted or denied. This inconsistent rate may reflect broader trends of disparate grant rates for

173. Freedom of Information Act (FOIA) Letter from USCIS (NRC2012113194), to author (on file with author) [hereinafter USCIS FOIA]; FOIA letter from EOIR (No. 2014-1463), to author (on file with author) [hereinafter EOIR FOIA].

174. *Id.*

175. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2012 STATISTICAL YEARBOOK J1 (Mar. 2013), http://www.justice.gov/eoir/statspub/fy12syb.pdf.

176. *Id.*

177. EOIR FOIA, *supra* note 173.

178. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 175, at J1. Though specifically requested in the FOIA Request to DOJ EOIR, the agency was unable to provide data about coercive population control applications and grants by the country. A thorough review of hundreds of BIA and Circuit decisions did not reveal applicants claiming asylum based on coercive population control policies from any other country besides China.

Chinese cases.[179] However, once a coercive population control case came into immigration court, the grant rate was consistently very high, with an average of 92.34% of applications granted from 1996–2013. This stands in stark contrast to the average grant rate of less than 45% for all defensive asylum applicants from the same period.[180] Furthermore, section 601(a) had an immediate effect in the number of asylum claims granted for this group of applicants. From fiscal year 1994–96, 312 asylum applications out of a total 320 claims based on coercive family planning were granted before USCIS and EOIR combined.[181] In 1997 alone, the number spiked to 4,178 claims in EOIR and USCIS with 674 combined grants (167 at USCIS and 507 in immigration courts).[182] Additionally, the number of claims made in immigration courts peaked in 2003, and have been on a decline ever since. USCIS claims do not have a similar trend, as the number of cases has actually increased after 2002.[183]

*(continued with charts on following page)*

179. *See* ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 171–73 (2014).

180. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 28 fig.4 (Sept. 2008), http://www.gao.gov/assets/290/281794.pdf (covering years 1995–2007); EXEC. OFFICE FOR IMMIGRATION REVIEW, ASYLUM STATISTICS FY 2009–13 (Apr. 2014), http://www.justice.gov/eoir/efoia/FY2009-FY2013AsylumStatisticsbyNationality.pdf.

181. USCIS FOIA, *supra* note 173; EOIR FOIA, *supra* note 173.

182. *Id.*

183. *See id.*

Figure 1: Affirmative Asylum Claim Decisions Based on Coercive Family Planning Policies[184]

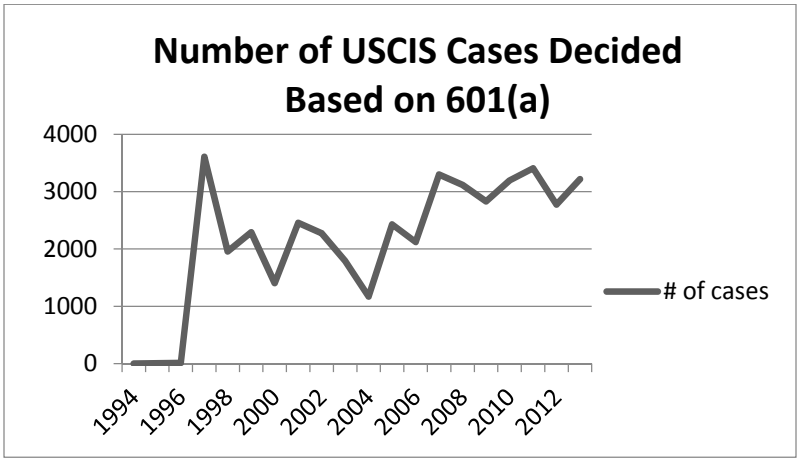
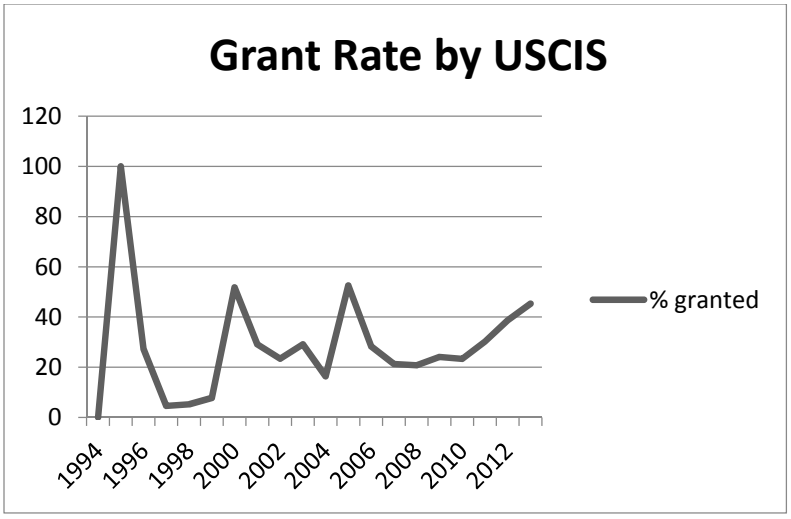



Figure 2: Percentage of Coercive Family Planning Asylum Claims Granted by USCIS




184. USCIS FOIA, *supra* note 173. USCIS's FOIA response noted that the agency does not track the basis of the ground on which the applicant applies for asylum. *Id.* Instead, USCIS only notes the ground upon which the Asylum Officer makes the decision. *Id.*

Figure 3: Number of Asylum Decisions Completed in Immigration Courts with Coercive Population Control as a Basis[185]

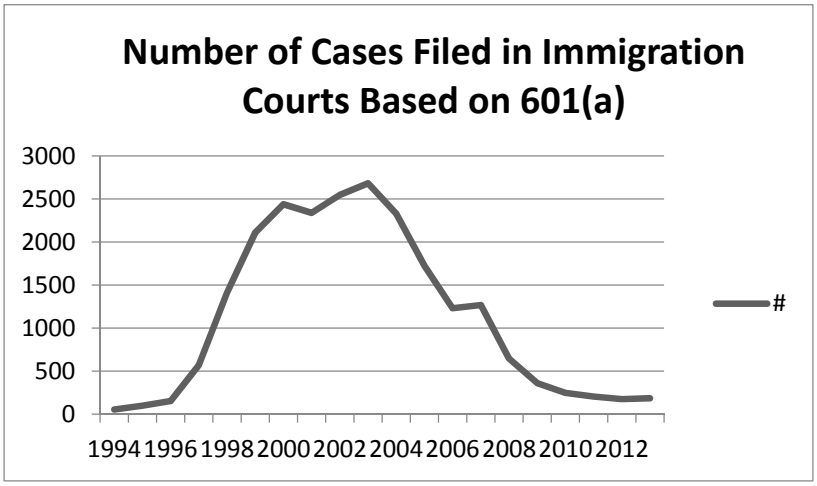
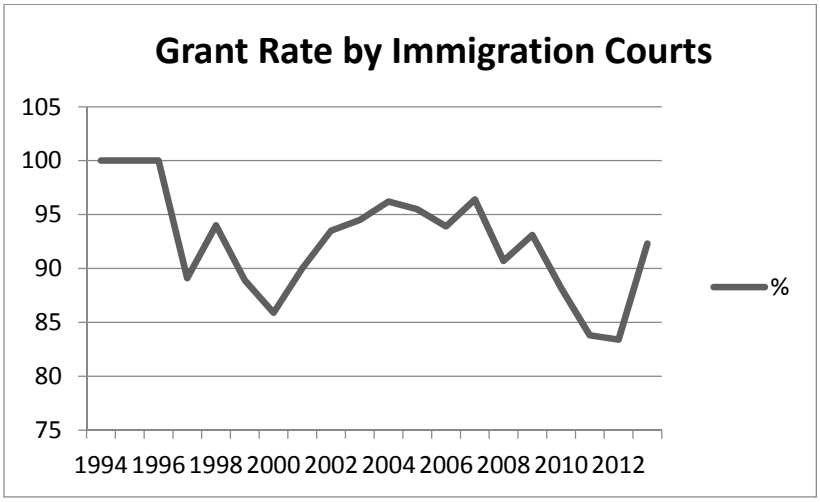



Figure 4: Percentage of Coercive Family Planning Asylum Claims Granted by Immigration Courts




The immediate and dramatic impact of a high grant rate by

185. EOIR FOIA, *supra* note 173.

immigration courts has several explanations. First, Congress provided a clear directive to executive agencies to provide asylum protection to applicants fleeing forced abortion and sterilization.[186] Congressional action narrowed the discretion of the asylum adjudicators interpreting the refugee definition—expressly overruling *Matter of Chang*.[187] Appellate courts knew the legislative purpose of 601(a), including the repeated concerns of Representative Smith, and opinions relied on legislative history when reviewing cases based on forced abortion or sterilization.[188] Second, the rule formulated by Congress eliminated the need for an applicant to meet the two limiting principles: nexus and one of the five bases. By striking the nexus requirement, Congress avoided the pitfall of *Matter of Chang*, which assessed the legitimate, non-persecutory ends of a population policy.[189] Applicants also skirted the difficult showing of the persecutors' motives in establishing nexus.[190] Finally, applicants evaded the need to articulate a political opinion or particular social group. Since 2008, the Board has complicated the analysis of a social group by requiring adjudicators to consider several additional factors,[191] beyond the original *Matter of Acosta* formulation.[192] Thus, the relaxation of the limiting principles and the renewed emphasis on the humanitarian aim had an effect on actual case outcomes in immigration court.

The data demonstrates that once an applicant claiming a

186. *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

187. H.R. REP. NO. 104-469, pt. 1, at 173 (1996).

188. *See, e.g.*, Yang v. U.S. Attorney Gen., 418 F.3d 1198 (11th Cir. 2005); Li v. Ashcroft, 356 F.3d 1153, 1157 (9th Cir. 2004); Zhao v. U.S. Dep't of Justice, 265 F.3d 83, 92 (2d Cir. 2001); Yong Hao Chen v. U.S. Immigration & Naturalization Serv., 195 F.3d 198, 203 (4th Cir. 1999).

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

190. *See* Immigration and Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

191. *See* M-E-V-G-, 26 I. & N. Dec. 227, 236 (B.I.A. 2014) (clarifying that social distinction is required instead of social visibility); W-G-R-, 26 I. & N. Dec. 208, 212 (B.I.A. 2014); S-E-G-, 24 I. & N. Dec. 579, 582–83 (B.I.A. 2008) (requiring a particular social group to have a common immutable characteristic, particularity, and social visibility); E-A-G-, 24 I. & N. Dec. 591, 593 (B.I.A. 2008).

192. *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (articulating the particular social group analysis as involving a group of persons who share a common, immutable characteristic that the group members either cannot change or should not be required to change because it is fundamental to their individual identities).

fear of persecution based on a coercive family planning policy had the case before an immigration court, the recalibrated doctrinal tension shifted the emphasis to the applicant's credibility.[193] Notably, the FOIA response from EOIR clarified that the agency does not track decisions based on adverse credibility.[194] Nothing in the legislative history intended to change the credibility requirement for applicants. It is possible that the decline in grants after 2005 could be correlated with the REAL ID Act's more stringent credibility standard.[195] Nonetheless, the vast majority of coercive population cases in immigration court are granted asylum, irrespective of an intervening law clarifying credibility. This trend demonstrates that the forced abortion and sterilization protections in the statutory rule tended to trump the fears of fraud driving adverse credibility.

## III. CONGRESS RESOLVED THE DOCTRINAL TENSION IN ASYLUM LAW

The impetus behind the legislative action taken to amend the refugee definition in section 601(a) demonstrates a larger doctrinal tension in asylum law inherent in the U.S. definition of "refugee." At its essence, asylum law has laudable humanitarian aims to protect survivors of atrocities and human rights abuses committed in their country of origin.[196] This expansive goal exposes the United States and other asylum-granting countries to possibly take in millions of people who face violence, oppression, and suffering at the hands of their governments or from actors the government is unable or unwilling to control. Thus, it is necessary to set limits on who can be accepted as asylees, including amendments to the

193. *See* Audrey Macklin, *Refugee Roulette in the Canadian Casino*, *in* REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 135, 137–38 (Jaya Ramji-Nogales et al. eds., 2009) ("[C]redibility is the single most important determinant of outcomes. Yet the process of credibility determination remains opaque and undertheorized . . . . [A]n uncultivated field of normativity whose role and impact in any system of justice dwarfs statutory and constitutional adjudication.").

194. EOIR FOIA, *supra* note 173.

195. *See* Immigration and Nationality Act of 1965 § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2014).

196. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (noting in the purpose of the Refugee Act the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands").

definition of refugee. This Part describes the doctrinal tension within the refugee definition, which often results in the limiting principles trumping the aspirational humanitarian purpose of asylum law.[197]

### A. DOCTRINAL TENSION BETWEEN MEETING HUMANITARIAN OBLIGATIONS AND ENSURING ONLY ELIGIBLE APPLICANTS RECEIVE THE BENEFIT

The congressional debates to enact protections for those fleeing forced abortion or sterilization in connection with population control policies encapsulate a key doctrinal tension in asylum law. On the one hand, the 1951 Convention and 1967 Protocol created international obligations for states receiving refugees based on a humanitarian motivation.[198] The United States often touts its pro-asylum stance and commitment to meeting its international obligations to protect asylum-seekers.[199] For example, the alarming human rights violations in forced abortion and sterilization in China clearly constituted persecution for the individuals subjected to them.[200] Representative Smith described these harms as "particularly gruesome violations of fundamental human rights."[201] The United States' aspiration to be, and to appear pro-asylum, is reflected in a flexible notion of "persecution," encompassing many types of harms.[202] The broad "persecution" requirement in

197. Other limiting features of U.S. asylum law, beyond the definition of refugee, also act to quell possible grants of asylum. These include: failing to apply within one year of arrival, the persecution bar, firm resettlement, being convicted of an aggravated felony or particularly serious crime, or material support of terrorism. 8 U.S.C. § 1158(b)(2)(A) (2014). Moreover, all applicants must present credible testimony to be granted asylum, 8 U.S.C. § 1158(b)(1)(B), as well as be found warranting asylum as a matter of discretion. *See* 8 C.F.R. § 1208.14(a)–(b).

198. *See* U.N. HIGH COMM'R FOR REFUGEES, *supra* note 36, at 6.

199. *See, e.g.*, DANIEL C. MARTIN & JAMES E. YANKAY, REFUGEES AND ASYLEES: 2012, 2 (2013), http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf.

200. *See supra* notes 48–53 (outlining the violations of international human rights norms).

201. 142 CONG. REC. H2629, H2633 (daily ed. Mar. 21, 1996).

202. *See In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (recognizing persecution as "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim"); *see also* Fisher v. Immigration and Naturalization Serv., 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (defining persecution as the infliction of suffering or harm upon those who differ in a way that is regarded as offensive);

the refugee definition contains the humanitarian motivation for asylum law generally. Once a persecutory act happens in the past, or the applicant fears it will occur in the future, a receiving state's duty to protect is possibly triggered as a matter of international refugee law.[203] The robust persecution requirement in the refugee definition therefore opens the door to possibly millions of asylum-seekers who fear harm.

On the other hand, the United States cannot accept everyone who fears persecution in his or her country of origin.[204] First, the United States' international humanitarian obligations are narrowed by the legal definition of refugee adopted by Congress in the Refugee Act. Two elements in the refugee definition limit the number of claims by requiring: (1) a cognizable ground;[205] and (2) a nexus between the fear of persecution and that ground.[206] The Board in *Matter of Chang* expressly rejected the applicant's argument that the persecution from an international human rights violation in forced sterilization alone sufficed to grant asylum.[207] The Board reminded the applicant that the violation must occur on account of a reason protected by the Act in order to meet the refugee definition.[208] Second, the practical burdens of accepting any possible persecuted person as an asylee justified the two aforementioned definitional limits. The possible deluge of millions of Chinese asylum-seekers permeated the congressional debates surrounding the amendment to the refugee definition for coercive population control.[209] Another salient congressional

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A-K-, 24 I. & N. Dec. 275, 277 (B.I.A. 2007) (allowing persecution based on solely psychological harm); T-Z-, 24 I. & N. Dec. 163, 170 (B.I.A. 2007) (defining persecution as possibility arising from severe economic disadvantage).

203. *See* U.N. HIGH COMM'R FOR REFUGEES, *supra* note 36, at 6.

204. Deborah Anker and Michael Posner described the Refugee Act as recognizing that the United States cannot accept an unlimited number of refugees. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981).

205. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2014) ("[R]ace, religion, nationality, membership in a particular social group, or political opinion . . . .").

206. *Id.* The U.S. has a strict interpretation of the nexus requirement that depends on the persecutors' motives. *See, e.g.*, Immigration and Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478 (1992). However, the U.N. Convention did not intend for such a narrow scope. U.N. HIGH COMM'R FOR REFUGEES, NOTE ON REFUGEE CLAIMS BASED ON COERCIVE FAMILY PLANNING LAWS OR POLICIES ¶ 26 (2005), http://www.refworld.org/docid/4301a9184.html.

207. *See* Matter of Chang, 20 I. & N. Dec. at 46 (B.I.A. 1989).

208. *Id.* at 47.

209. *See* 142 CONG. REC. H2634 (daily ed. Mar. 21, 1996) (calling the fear of

fear concerned the fraudulent use of this statutory exception for population policies and asylum applicants who could use the eased definition to falsely claim a fear of forced abortion or sterilization as a pretext to gain better economic opportunity in the United States.[210] The INA's five cognizable grounds and their nexus to a fear of persecution gave principled reasons to curtail the humanitarian aspirations of asylum law.

The doctrinal tension between the U.S. duty to offer broad protection to persons fearing persecution and the need to tailor the law to avoid a flood of claims or fraud remains in the background of every asylum adjudication. Deborah Anker and Michael Posner described the phrase in the refugee definition encompassing these three elements as "a complex assessment of the alien's subjective perceptions and his objective background situation."[211] This tension also reflects a broader administrative law struggle between protecting individuals' rights to claim asylum and the need for effective administration of the law. At the heart of the tension are signal-sending statements about the United States meeting its international duties, as well as implicit foreign policy messages when it accepts an asylee fleeing from harm abroad. After the asylum-seeker flees from her country of origin and travels to the United States, an adjudicator considers the merits of her claim without any prima facie eligibility requirement.[212] The structured legal process gives the asylum-seeker a preliminary recognition of her fear that the United States may return her to her previous country.

To attain full recognition and a grant of asylum, an asylum applicant's claim must be scrutinized through the resource-constrained legal process and she must justify her claim (often based on violent human rights violations) by crafting it to meet the two definitional limiting factors.[213] As a result, the limiting

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billions of economic migrants from China as a "scare tactic").

210. *See, e.g.*, Kirk Semple, Joseph Goldstein & Jeffrey E. Singer, *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES (Feb. 22, 2014), http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html?_r=0.

211. *See* Anker & Posner, *supra* note 204, at 66.

212. Matter of E-F-H-L-, 26 I. & N. Dec. 319, 319 (B.I.A. 2014).

213. Having representation in asylum proceedings in immigration court is essential to presenting a successful asylum claim. During 2010, only 11% of those without attorneys were granted asylum, while 54% of those represented by counsel had their claims granted. *See* Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2289 n.35 (2013) (citing the research on disparities in adjudications which was eventually published in SCHOENHOLTZ, SCHRAG, & RAMJI-NOGALES, *supra* note 179); *see also* Syracuse Univ., *Asylum Denial Rate*

principles become the entirety of the asylum claim[214] and end up swallowing the humanitarian considerations in two main ways. First, in *INS v. Elias-Zacarias*, the Supreme Court held that asylum applicants in the United States must provide evidence of the persecutors' motives to meet the nexus prong.[215] Second, she must fit her claim into one of five boxes that essentialize certain aspects of her worthiness to attain refugee status and the rights that come with it. These limiting factors, as two distinct elements, are difficult for applicants—especially those without representation—to meet because they have the burden of proof to present evidence to meet the high jurisprudential bars. The limitations in the definition ease floodgate concerns, but end up swallowing the humanitarian justification encapsulated by the broad persecution requirement. In fact, the default rule for adjudicators is to scrutinize the claim under the agency's interpretations of the limiting principles with little regard to the other factors. For instance, *Matter of Chang* emphasized that forced sterilization was not a basis for asylum, yet failed to analyze whether forced sterilization was persecutory.[216] In this manner, the tension is routinely resolved in favor of the limiting factors, which override the humanitarian justification. Resultantly, the United States' international duty to protect asylum-seekers has been weakened by courts addressing this doctrinal tension in a way that emphasizes the limiting principles in a way similar to the court in *Matter of Chang*.

The Board of Immigration Appeals, as an executive agency, was previously unwilling to reconfigure these structural requirements on its own with regards to the coercive family planning context.[217] Congress, beginning with the Emergency Chinese Immigration Relief Act of 1989, however, did attempt to

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*Reaches All Time Low: FY 2010 Results, A Twenty-Five Year Perspective*, TRAC IMMIGRATION (Sept. 2, 2010), http://trac.syr.edu/immigration/reports/240.

214. This phenomenon is exacerbated in part due to the severe resource constraints affecting immigration courts across the nation. *See Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law, H. Comm. on the Judiciary*, 111th Cong. 53 (2010), (statement of Dana Leigh Marks, President, Nat'l Assoc. of Immigration Judges) (noting that in 2010, each immigration judge had a case load of 1,500).

215. INS v. Elias- Zacarias, 502 U.S. 478, 483 (1991). *But see* U.N. HIGH COMM'R FOR REFUGEES, *supra* note 36, ¶ 26 (explaining that the drafting history of the 1951 Convention does not require a link to the persecutors' motives to show nexus).

216. *See* Matter of Chang, 20 I. & N. Dec. 38, 47 (B.I.A 1989).

217. *Id.* at 47.

recalibrate the definition of "refugee" by requiring regulations to eliminate the cognizable ground and nexus limiting factors mere weeks after the Board decided *Matter of Chang*.[218] Even back in 1989, Congress demonstrated that it was motivated by the severe international human rights violations in forced abortion and sterilization and by the fact that agency precedent denied protection.[219] Additionally, its ambivalence about other reproductive harms (related to the one child policy, but outside of forced abortion and sterilization) also demonstrates that the abortion politics of the United States were likely another factor that motivated it to act.[220] Notably, Congress worked in a piecemeal fashion for this particular group of asylees fleeing coercive population policies and did not make broader pronouncements on the contours of persecution, nexus, or cognizable grounds.[221] Furthermore, Congress enacted a solution to the problem within asylum law and did not create an alternative form of relief or status, such as Temporary Protected Status[222] or a broader relief act.[223] *Matter of Chang* actually invited Congress to change the law and to "provide temporary or permanent relief from deportation."[224] Although the Board did not specify that a change to *asylum* law specifically was required, this is the sphere in which Congress chose to act, by clarifying who would be included under the definition of "refugee."[225]

Not only did congressional action to realign the key asylum

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

219. *See* 135 CONG. REC. H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley) ("This amendment is about fairness and human rights, not just forced abortion and sterilization.").

220. *See*, Abrams *supra* note 158, at 904–05.

221. Anjum Gupta, *The New Nexus*, 85 COLO. L. REV. 377, 392 (2013).

222. INA § 244, 8 U.S.C. § 1254(a) (authorizing the Attorney General to grant Temporary Protected Status (TPS)). The Chinese and Central American Temporary Protected Status Act of 1989 would have given TPS to nationals of the People's Republic of China. Chinese and Central American Temporary Protected Status Act of 1989, H.R. Res. 45, 101st Cong. (1989). The bill died in committee in the Senate.

223. *See, e.g.*, Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193–201 (1997) (allowing asylum seekers from specified countries to become lawful permanent residents upon meeting certain eligibility requirements).

224. Matter of Chang, 20 I. & N. Dec. 38, 47 (B.I.A. 1989).

225. Congress could not have directly changed the outcome in *Matter of Chang* due to the Supreme Court's holding that the legislative veto is unconstitutional. *See* INS v. Chadha, 462 U.S. 919 (1983).

factors resolve the doctrinal tension for asylum-seekers fleeing forced abortion and sterilization, but it also refocused the lens of the persecutory actions at issue. Originally, *Matter of Chang* situated the claim of persecution in a country-wide context that severely limited what action would actually be considered persecutory.[226] Section 601(a) broadened the view of the persecutory act by taking it outside the context of violating the family planning law and focusing instead on the act of forced abortion and sterilization. In doing so, Congress resolved the doctrinal tension in favor of asylum's humanitarian basis by articulating a nexus and cognizable ground once the fear of persecution (forced abortion or sterilization) was established.[227] The implications of the law were to strike the two limiting factors all together and enact an entirely new default rule under which an applicant fleeing forced abortion or sterilization need only show credible fear.

Congress's support for the shift to a humanitarian-based resolution is evident in its legislative history. The congressional debate to enact protections for people fleeing forced abortion and sterilization in China framed the issue as a central human rights obligation for the United States.[228] Testimony invoked historical analogues of these harms, such as the Nuremburg trials and Nazi eugenics policies.[229] This historical framing tied the asylum protections to a broader humanitarian agenda,[230] as well as the U.S. human rights policy and the foreign policy agenda for China. In addition to recalibrating the doctrinal tension, the legislative process instrumentally gained momentum and political will by linking the debate with prior high-stakes humanitarian crises, like World War II. As discussed below, Congress can and should act to resolve tensions inherent in the definition of "refugee" to recalibrate the humanitarian emphasis in other areas.

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226. *Chang*, 20 I. & N. Dec. at 45.

227. However, this was not the case for a claim based on "other resistance" because the boundaries of this persecution require assessing whether that "resistance" caused the harm. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

228. *See, e.g.*, *Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Operations & Human Rts., H. Comm. on Int'l Relations*, 104th Cong. 3 (1995) (statement of Rep. King).

229. *Id.* at 2 (statement of Rep. Smith).

230. *See* Anker & Posner, *supra* note 204, at 63 (citing Congressman Rodino's characterization of the 1980 Refugee Act as "one of the most important pieces of humanitarian legislation ever enacted by a United States Congress").

### B. CONGRESS IS IN THE BEST POSITION TO NAVIGATE DOCTRINAL TENSION

Separation of powers drives the framework for asylum-seekers attempting to meet the refugee definition, and acts as an inherent structural tension. Congress used its plenary power over immigration[231] to define "refugee" in the Refugee Act and to authorize the Attorney General to take actions to process asylum claims that were subject to judicial review.[232] Specifically, the Attorney General and the Secretary of Homeland Security now work in conjunction to determine whether an asylum-seeker meets the definition of refugee.[233] Congress also delegated significant decision-making authority in the asylum realm to the executive branch to administer these laws. Its regulatory delegation, particularly in the 1980 Refugee Act's definition of "refugee," was more analogous to a criminal statute because of the way elements were laid out. In this manner, Congress had more control over the shape of asylum law than it did over other more discretionary elements of immigration law. Additionally, it still maintained its oversight through the appropriations power[234] and legislative oversight, as well as its ability to ultimately amend the authorizing statute using its plenary power.

Besides the constitutional power to act, there are other administrative law values that support Congress taking a role to navigate the doctrinal tension in asylum law. First, as a matter of political accountability, individual members and the chamber as a whole are accountable to an electorate, and they respond to constituents' concerns when the doctrinal tension denies asylum protection. Their constituents do not include asylum-seekers directly since asylum-seekers cannot vote. Political accountability instead depends on an informed and vocal electorate to raise the issue when the doctrinal tension denies important claims. Political accountability began in this arena when Congress enacted the 1980 Refugee Act. The Act is

231. U.S. CONST. art. 1, § 8, cl. 4; *see also* Fiallo v. Bello, 430 U.S. 787, 794 (1977) (noting that Congress has "exceptionally broad power to determine which classes of aliens may lawfully enter the country").

232. *E.g.*, Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681 (1996); *see also* Anker & Posner, *supra* note 204, at 46 (describing Congress's attempts to limit the executive's power in the 1980 Refugee Act and construe a definition that was universal and not based in ideology).

233. INA § 208(b)(1)(A); 8 U.S.C. § 1158(b)(1)(A).

234. U.S. CONST. art. I, § 8, cl. 1.

generally consistent with the international treaties' definition of "refugee" that attempted to remain flexible while drawing lines to exclude unworthy claims irrespective of the myriad of possible harms.[235] Moreover, since the refugee definition implicates international treaty obligations and broader foreign policy concerns, Congress is in the best position to consider any amendments to it, due to Congress's constitutionally-based powers in these areas.[236] While Congress is accountable to voters for changes in asylum law, it institutionally lacks the asylum expertise of a specialized administrative agency. This trade-off was evident in Congress's drafting of section 601(a), where Congress expressly decided to grant asylum to claimants fleeing forced abortion or sterilization once they have made a credible claim of persecution. However, by invalidating *Matter of Chang* and redefining refugee, Congress stepped into the role of executive agencies to craft the contours of the law. Unfortunately, since it did not have the same immigration expertise as the agencies, section 601(a) failed to specify regulations for implementing the 1,000-person cap. On the whole, however, Congress's political accountability prevented any over-stepping or unfeasible actions, and minimized its lack of expertise.

As a second administrative law value, congressional action brings predictability and certainty in outcomes. Unlike relying on courts and interim administrative solutions, enacting a change in law in one fell swoop is efficient, cost-effective, and drives consistent outcomes. As seen with asylum claims based on coercive population control policies after 1996, the vast majority of cases making this claim in immigration court were granted asylum.[237] The subsequent uncertainties for adjudicators in applying the statute occurred on the margins. For example, many claims based on section 601(a) were male partners claiming asylum by "standing in the shoes" of their female partner in China who faced forced abortion or sterilization.[238] Although not ideal, some uncertainty was debatably preferable to a blanket prescription from Congress

235. H.R. REP. NO. 96-608, at 9–10 (1979).

236. U.S. CONST. art. II, § 2, cl. 2 (requiring two-thirds of the Senate to concur with the President's negotiated treaties); *see also* art. I, § 8, cl. 11.

237. *See supra* Figure 4.

238. Matter of C-Y-Z-, 21 I. & N. Dec. 915 (B.I.A. 1997) (en banc) *overruled by* Matter of J-S-, 24 I. & N. Dec. 520 (A.G. 2008); *see also* Abrams, *supra* note 158, at 904.

that could undermine the flexibility and responsiveness of agency actions. When Congress amended the refugee definition, it recognized that a political opinion is found when a population control policy mandates a forced abortion and sterilization on a person.[239] The subsequent scope of these asylum claims resultantly remained anchored solely to political opinions. Applicants fearing forced abortion and sterilization did not file for asylum based on religion or their membership in a particular social group, perhaps because it was known that courts granted a high percentage of claims under the statutory rule.[240] While claims based on section 601(a) are more certain to get granted asylum,[241] applicants and agencies have less flexibility to incorporate different lenses through which to view a coercive family planning case besides through the narrow telescope dictated by Congress. It is also unclear if the statutory rule could apply to another context beyond China's one-child policy given that only two reproductive harms—forced abortion and sterilization—are expressly listed. Until the outer boundaries are tested in adjudications before the agency, the predictability for the political opinion-based claim outlined by Congress will be presented and likely granted to the detriment of greater flexibility.

Third, the legislative process to resolve a doctrinal tension reinforces democratic norms, especially when an agency remedy denies legitimate claims. Congress, made up of publicly elected officials, invoked a transparent democratic process to correct the agency and judicial interpretation of the refugee definition. The corresponding legislative debate, testimony, and public votes now provide transparency and legitimacy to the outcomes, even if it took two prior attempts to get through Congress due to the President's veto. Conversely, when Congress acted to allow legitimate asylum claims despite the agency's continued application of precedent and policy that denied them, the Board's

239. INA § 101(a)(42)(B); 8 U.S.C. § 101(a)(42)(B).

240. *See supra* Figure 4. The high grant rate could have been known amongst the community of immigration attorneys and advocates at the time as many of the coercive population control claims from China were centrally decided in the New York Immigration Court. *See* U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS: DIRECTIVE #8. ANALYSIS AND RECOMMENDATIONS REGARDING DISPARITIES IN ASYLUM GRANT RATES 3–4 (2014), http://trac.syr.edu/immigration/reports/210/include/08-EOIR_asylum_disparity_report.pdf.

241. *See supra* Figure 4.

decision-making authority was mitigated. Congressional action actually effectuated the normal agency rulemaking power.

The democratic process can easily be hijacked by side issues, fear-mongering, and appeals to emotion instead of sound legal bases for change. For example, the congressional debates to enact 601(a) used extreme examples, such as late-term forced abortions,[242] to legislate a broad rule for all forced abortion and sterilization-based claims, even though some human rights reports relied on claims by Chinese officials that they were uncommon.[243] Moreover, several legislative debates focused on a fear of the deluge of asylum claims, both fraudulent and real, from China based on a relaxed standard,[244] yet proof that the deluge does not manifest takes time to develop and requires the agency to adjudicate cases under the standard for many years.[245] Therefore, while the legislative process reinforces key aspects of democracy such as transparency, fairness, and rule of law, Congress may be distracted by corollary side issues when navigating the doctrinal tension, which can delay, detract, and dilute the ultimate goal of increasing protection.

Besides accountability, consistency, and enhanced democratic norms, Congress is also in the best position to resolve the tension in asylum law because the Senate ratified the 1967 Protocol and was aware of the underlying humanitarian purpose of the treaty.[246] It was aware of the international consensus surrounding the definition of refugee when it adopted it into U.S.

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242. *See* 141 CONG. REC. H6446–62 (daily ed. June 28, 1995).

243. *See, e.g.*, U.S. DEP'T OF STATE, CHINA HUMAN RIGHTS PRACTICES, 1994 (1995), http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_eap/China.html.

244. 142 CONG. REC. S4593 (daily ed. May 2, 1996); 142 CONG. REC. H2634 (daily ed. Mar. 21, 1996).

245. For example, it was not until several years of adjudicating claims that immigration courts could demonstrate that millions of coercive population asylum claims from China would not happen. *See supra* Figures 1 & 3 (demonstrating the number of claims brought each year based on forced abortion and sterilization).

246. *See, e.g.*, Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, 2 PUB. PAPERS 868 (Aug. 1, 1968) ("It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.").

law.[247] Congress also framed the purpose of the 1980 Refugee Act by citing "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[248] In this manner, Congress was able to consider factors beyond the individual facts of a case, such as historic, humanitarian, and foreign policy interests,[249] whereas the courts and the agency are structurally limited from doing so. While the limiting principles in the refugee definition separate worthy claims from unworthy, Congress's amendment of the definition created a safety valve to agency interpretations by including "other resistance." This open-ended reproductive harm allowed agencies to have flexibility in the statutory rule.[250] Congressional delegation through statutory flexibility for asylum claims left the agency room to grant cases beyond forced abortion and sterilization—a broadening that is consistent with the international humanitarian prerogative that the agency lacked authority on its own to efficiently incorporate. This delegation is an example of Adam Cox and Cristina Rodriguez's suggestion that Congress is increasingly delegating immigration authority to executive officials because of perceived political benefits.[251] However, the congressional prerogative to expand the humanitarian aims of asylum law may unnecessarily constrain the executive branch's foreign policy agenda and risk a presidential veto.[252] Therefore, congressional action to amend the refugee definition most likely exists when executive and congressional interests align.

A counterargument to Congress resolving the doctrinal tension definitionally is that the law-making process is time-consuming and requires a great deal of effort. Cox and Rodriguez

247. Anker & Posner, *supra* note 204, at 60 (citing S. REP. NO. 96-590, at 1 (1980)).

248. *Id.*; *see also* 125 CONG. REC. S23231–32 (daily ed. Sept. 6, 1979) (statement of Sen. Kennedy) (describing the Refugee Act as "giv[ing] statutory meaning to our national commitment to human rights and humanitarian concerns").

249. Anker & Posner, *supra* note 204, at 64.

250. *See* Marouf, *supra* note 45, at 94–96, 117–18.

251. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 529 (2009) (extending William Stuntz's observations about separation of powers dynamics in criminal law to parallels in immigration law).

252. *See, e.g.*, American Overseas Interest Act: Veto Message from the President of the United States, 142 CONG. REC. H3304 (daily ed. Apr. 12, 1996); Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, *supra* note 85.

describe the horizontal separation of powers scheme and the relative monopoly of Congress over immigration law generally.[253] The deliberative law-making process often renders congressional action not immediately responsive to the structural failures driving agencies to deny key immigration protections.[254] Nor is this necessarily desirable as a matter of democratic governance between the political branches, as congressional delegation principles presume that independent agencies act efficiently to fulfill their delegated missions based on intelligible principles.[255] Once Congress gains momentum to remedy the protections initially denied by the agency through a change in law, the new rule may be applied retroactively through agency and judicial interpretations. For instance, when *Matter of Chang* denied asylum for applicants claiming a fear of persecution based on violating China's one-child policy, Congress's solution amended the refugee definition after the agency failed to act. Subsequently, the Board applied 601(a) as retroactively superseding *Matter of Chang* and authorized reopening prior cases in which asylum protection had been denied.[256] Thus, the onus is able to shift back to the agency to interpret policies consistent with congressional intent.[257]

There is an important caveat to keep in mind, however. Any congressional amendment to the refugee definition may not necessarily make a pro-humanitarian adjustment. It is possible that Congress could act inversely to its approach under section 601(a), ratcheting up the limiting principles if the Board is seen as granting asylum with too much emphasis on the rights violation. For example, if the immigration courts granted certain claims for asylum broadly through emphasizing the humanitarian aspects (either in actuality or as perceived) and the agency failed to rein them in through policy or rule making, Congress could conceivably tighten the nexus requirement and

253. Cox & Rodriguez, *supra* note 251, at 483–84.

254. *Id.* at 532–33 ("[C]hange in immigration policy at the Congressional level comes only after long periods of legislative stasis.").

255. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721–22 (2002).

256. Matter of X-P-T-, 21 I. & N. Dec. 634, 636 (B.I.A. 1996).

257. The broad intent expressed in the legislative debates to amend the refugee definition to "save" women facing forced abortion may also explain the general acceptance of these claims before the agencies and the high grant rate. *See, e.g.*, 142 CONG. REC. H2633 (daily ed. Mar. 21, 1996) (containing Rep. Smith's contention that proposed section 601(a) "would restore the traditional interpretation and save these women").

cognizable grounds by amending the refugee definition. An amendment to the refugee definition could also be hijacked by fear-mongering and anti-immigrant sentiments as legal basis for resolving the doctrinal tension.[258] Despite this risk, the political accountability of individual members of Congress and Congress's duty under international law to abide in good faith by treaty obligations[259] serve as important checks on attempts to significantly narrow asylum law's humanitarian agenda through legislation.[260]

## IV. CONGRESSIONAL ACTION IS APPROPRIATE TO RECALIBRATE OTHER ASPECTS OF THE REFUGEE DEFINITION

Scholars have proposed changing or refining various aspects of the refugee definition to resolve the doctrinal tension in asylum law by shifting the balance away from the dual limiting principles.[261] Other scholars have cautioned against changes to the definition.[262] Congress has previously amended the refugee

258. In contrast, immigration administrative agencies are generally more insulated from political forces. *See* Rebecca Hamlin, *International Law and Administrative Insulation: A Comparison of Refugee Status Determinations in the United States, Canada, and Australia*, 37 LAW & SOC. INQUIRY 933, 946 (2012).

259. Vienna Convention on the Law of Treaties, art. 26, Jan. 27, 1980, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention, courts interpret it as "an authoritative guide to the customary international law of treaties." Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008).

260. A separate, but related issue is whether a group of similarly-situated asylum seekers from a country is deserving of the "refugee" label instead of "illegal immigrants." Coercive family planning arrivals were consistently seen as asylum seekers in the political dialogue, even in light of *Matter of Chang* denying asylum and the controversy of a mass influx from the *Golden Venture* ship.

261. *See* Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Protection*, 22 CARDOZO L. REV. 223, 258 (2000); Gupta, *supra* note 221; *see also* Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465 (2015); Eleanor Acer & Tara Magner, *Restoring America's Commitment to Refugees and Humanitarian Protection*, 27 GEO. IMMIGR. L.J. 445 (2013); Scott Rempell, *Defining Persecution,* 2013 UTAH L. REV. 283, 343 (2013).

262. *See* Vaughns, *supra* note 140, at 79 (arguing that the amendment to the refugee definition in section 601(a) deviates from established asylum doctrine because it gives a group preferential treatment in what is supposed to be case-by-case adjudications); J. Michael Cavosie, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 436–37 (1992) (critiquing the relaxed treatment of refugees from some countries under the Foreign Operations Act).

definition to protect those fleeing forced abortion and sterilization; however, no scholars have taken lessons from the previous amendment. This Part aims to fill the gap in scholarship by extrapolating and applying lessons from Congress intervening and recalibrating the doctrinal tension in asylum law. This analysis presumes that the process to legislate a rule to allow asylum claims based on forced abortion or sterilization was not unique to the political and legal context in the 1990s. This era involved both severe reproductive rights harms in China and asylees who were denied protection in the United States.[263] Despite this presumption, the structural aspects of congressional intervention to resolve asylum's doctrinal tension are constants irrespective of the political issue du jour. This Part begins by extrapolating the lessons from Congress's enactment of section 601(a) and then applies them to propose a policy for Congress to amend the refugee definition regarding particular social groups.

### A. BROAD LESSONS FROM CONGRESS LEGISLATING A SOLUTION IN SECTION 601(A)

As seen from the battle to enact section 601(a), the feasibility and necessity for Congress to step in to amend the refugee definition depends on two critical components: (1) a key loss of protection resulting from the asylum claims adjudication system; and (2) external political conditions. First, the protections enacted in section 601(a) illustrate that several structural attributes and omissions manifested to give Congress the motivation and opportunity to act. In the years leading up to the amendment of the refugee definition for forced abortion and sterilization, the Board of Immigration Appeals adopted a stance that overemphasized the limiting principles to the detriment of the humanitarian considerations.[264] Through this, the doctrinal tension was resolved due to the agency denying these claims by default. Moreover, leaders in the executive branch, including the President and the Attorney General, unsuccessfully attempted to implement an intra-agency solution, e.g., policy memoranda, directives, proposed regulations, and certification to obtain an Attorney General opinion. These ad hoc internalized efforts failed to remedy the detrimental precedent because the

263. *See supra* Part III.

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

structure of the administrative agency to act independently impeded comprehensive action.[265] Then in 1994, the agency took a more restrictive stance when the INS changed its policy to adopt the *Matter of Chang* decision from the EOIR. As a result of failed agency attempts to realign the doctrine after *Chang*, and a claims-denying policy set forth anew in a different component, Congress was prompted to act and overturn the administrative chaos through legislation.

Second, political factors must align. Several attributes of the necessary preconditions for the effective exercise of Congress's political will can be drawn from the enactment of section 601(a). The importance of a strong congressional leader to maintain the issue on the legislative agenda and drive political will, such as Representative Chris Smith in 1995–96, cannot be understated. As the leader of a House subcommittee, Representative Smith's tireless advocacy for this rather niche issue in asylum law helped sustain momentum for the definitional change regarding coercive family planning. The nature of the issue also united unique bedfellows of Congresspersons and interest groups across the political spectrum to support the amendment. Groups as diverse as Amnesty International, the Center for Reproductive Law and Policy, the U.S. Catholic Conference, the Council of Jewish Federations, and the National Right to Life Committee supported amending the refugee definition for forced abortion and sterilization claims.[266] The nature of the issue meant that everyone could claim a victory if the amendment were passed, and the unique bedfellows' reinforced political feasibility.

The political implications behind framing the issue as one involving the Chinese government violating human rights reflected the substance of section 601(a). As discussed *supra*, coercive family planning, used as a justification for asylum, touches upon much broader issues. The impetus behind the legislative amendment included broader foreign policy implications, specifically human rights policy, vis-à-vis a major world power—China. Next, the coercive family planning issue was viewed by Congress as central to human rights, and the

265. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1667–86 (2010) (citing United States *ex rel.* Shaughnessy v. Accardi, 347 U.S. 260, 264 (1954) and 8 C.F.R. §§ 1003.1(d)(2), 1003.10(b) as establishing the agency independent judgment requirement for immigration adjudication).

266. 142 CONG. REC. S4593 (daily ed. May 2, 1996) (statement of Sen. DeWine).

legislative debates cited human rights principles and reports on country conditions. Congress originally framed asylum seekers from China fleeing forced abortions as a refugee issue instead of an illegal immigration issue.[267] The human rights approach seemingly defined the harm, as well as denigrated the practice of forced abortion and sterilization in China. Indeed, the prototypical case in Congress's mind was forced abortion,[268] and the amendment eliminated the limiting principles for abortion and sterilization. Still, a claim based on "other resistance" is not expressly articulated in the statute and thus requires showing both persecution and nexus.[269] Therefore, the strength of the protection is contingent on the framing of the issue.

Besides a reaction to structural limitations under favorable political conditions, section 601(a) is the product of diligent work and compromise, and the boundaries it protects reflect a compromise as well. Despite prior attempts to enact an amendment for asylum-seekers fleeing forced abortion and sterilization, it was not until the change was embedded in IIRAIRA, a comprehensive immigration reform that the solution became binding law. The other attempts were embroiled in bills that the President interpreted as tying his hands in foreign policy, namely a bill reacting to student protests in China,[270] and another limiting foreign aid.[271] IIRAIRA provided broader immigration fixes and provided that section 601(a), as a pro-asylum provision, could be used as a political trade-off to demonstrate pro-humanitarian aspects in a generally anti-immigrant law. Nevertheless, the sweeping policy prescriptions to immigration law in IIRAIRA hid the political accountability for each constituent part of the bill. By consequence, positive praise for section 601(a) is diluted and may diminish political incentives to craft pro-humanitarian bills.

Section 601(a) illustrates the fluctuation in the compromise aspects of the law as it was implemented over time. The 1,000-applicant cap was originally added in the 1989 version to quell fears that a surge of claims would result.[272] Section 601(a) was

267. 135 CONG. REC. H7949 (daily ed. Nov. 2, 1989) (statement of Rep. Smith).

268. *See, e.g.*, *id.*; 142 CONG. REC. H2633 (daily ed. Mar. 21, 1996) (statement of Rep. Smith).

269. Matter of M-F-W- & L-G-, 24 I. & N. Dec. 633, 637 (B.I.A. 2008).

270. Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong. (1989).

271. American Overseas Interest Act of 1995, H.R. 1561, 104th Cong. (1995).

272. 135 CONG. REC. H7947 (daily ed. Nov. 2, 1989) (statement of Rep.

more politically feasible with a theoretical backstop in place, which limited the agency's ability to grant asylum. However, the cap was later eliminated once the surge of claims failed to occur and after the cap hindered asylum claims processing. Another compromise was the catch-all "other resistance" in addition to forced abortion and sterilization claims. There is no legislative history clarifying the "other resistance" element,[273] and as a practical matter, claims on this basis have no statutory advantage since the applicant still must prove persecution which has occurred or will occur on account of a political opinion.[274] Absent regulations, these gaps in the law were left for the agency to deal with through individualized adjudications.

Congress proceeded with caution in amending the refugee definition and did not intend to create a per se asylum claim.[275] To this end, the applicant was still required to provide a credible account of the fear of forced abortion and sterilization.[276] These credibility determinations remain in the discretion of the agency with limited review on appeal, absent clear error.[277] As a result, the narrative of the asylum applicant who claims a fear of persecution based on forced abortion or sterilization must

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Hefley).

273. Matter of M-F-W- & L-G-, 24 I. & N. Dec. 633, 641 (B.I.A. 2008) (citing Yang v. U.S. Att'y Gen., 418 F.3d 1198, 1203 n.5, 1205 n.9 (11th Cir. 2005)).

274. Abrams, *supra* note 158, at 885, 900–01. For example, the legal analysis and outcome for women fleeing forced IUD insertion is relegated to "other resistance" and requires a higher standard. The BIA and several circuits used the framework of section 601(a) to find that forced IUD insertion is not sterilization under the per se rule but may constitute "other resistance" rising to the level of a political opinion with additional aggravating factors. *See* Mei Fun Wong v. Holder, 633 F.3d 64, 72–73 (2d Cir. 2011) (tracing the congressional history of section 601(a) and concluding that forced IUD insertion is not the same as forced sterilization for attaining the benefit of the per se rule); Matter of M-F-W- & L-G-, 24 I. & N. Dec. 633, 642 (B.I.A. 2008). The Second Circuit's analysis in *Wong* focused solely on the lack of persecution in a forced IUD insertion. 633 F.3d at 72–73 (finding that although forced IUDs violate personal privacy and a woman's autonomy, "simply requiring a woman to use an IUD, and other more routine methods of China's implementation of its family planning policy, do not generally rise to the level of harm required to establish persecution"). The Second Circuit's reasoning downplayed the persecutory nature of non-physical harms and seemed to justify some legitimate means in enforcing China's family planning policy as in *Matter of Chang*, which Congress overturned in passing section 601(a). *See supra* Part III; *see also* Marouf, *supra* note 45, at 130–32.

275. *See* H.R. REP. NO. 104-469, pt. 1, 173–74 (1996).

276. *Id.* (noting that mere speculation of mistreatment in the future will not suffice).

277. 8 C.F.R. § 1003.1(d)(3)(i) (2016).

present a survivor narrative and meet the expectation of congressional action in this area.[278] The survivor narrative is embedded in the legislative debates and the U.S. State Department Human Rights Reports, and an applicant must meet the authenticity expectations of the adjudicators.[279] While the expectations arising from the media and human rights reports may screen fraudulent claims, there can also be perverse consequences for a group specifically identified in the refugee definition.

For instance, in *Chen v. Holder*, the Second Circuit Court of Appeals upheld the immigration judge's determination that the applicant's "testimony was vague and lacking in details *that one would expect* from the victim of a coerced abortion."[280] The court then noted its expectation for the woman's testimony to provide specific treatment by the FPOs, including how they forcibly took her from her home, forcibly inserted an IUD, and forced her to undergo an abortion.[281] Even more troubling was when the Second Circuit affirmed an immigration judge's finding that a claimant's demeanor while testifying was "nonchalant" regarding her forced abortion, and apparently restated the facts in her affidavit.[282] While this was not used as the basis of an explicit adverse credibility determination, the immigration judge and reviewing courts failed to recognize the various ways in which trauma can manifest in survivors of a traumatic event.[283] Because the applicant's story and presentation of the facts did not meet the expectations of what a narrative of forced abortion *should* look like, the Second Circuit found it was reasonable that she did not sustain her burden of proof and to

278. *See also* Xiu Ying Wu v. U.S. Att'y Gen., 712 F.3d 486, 494 (11th Cir. 2013) (criticizing the immigration judge's bald assertion and personal perception questioning whether the applicant had a forced abortion); Li v. Ashcroft, 356 F.3d 1154, 1157 (9th Cir. 2004) (*reh'g en banc*) ("Concern for the *victims* of these harsh population control practices prompted Congress to amend the definition of '"refugee."') (emphasis added); *see id.* at 1169 (Kleinfeld, J., dissenting) ("By broadening the grant to those who are most peripheral to this class, young lovers thwarted in their desire to marry, we may well be withdrawing American protection from those at the heart of it . . . .").

279. Efrat Arbel, *The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases*, 58 MCGILL L.J. 729, 732 (2013).

280. Yan Juan Chen v. Holder, 658 F.3d 246, 252 (2d Cir. 2011) (emphasis added).

281. *Id.*

282. *Id.*

283. *See* ROBERT C. SCAER, THE TRAUMA SPECTRUM: HIDDEN WOUNDS AND HUMAN RESILIENCY 205–51 (2005).

expect that she should have corroborated her story to their expectations. The court reaffirmed the applicant did not warrant asylum, emphasizing in practice the key compromise made by Congress in setting limits on its own ability to grant claims with a recalibration of the refugee definition. Congress acted to shift the doctrinal tension from the limiting principles of nexus and cognizable ground to instead emphasize persecution. Nonetheless, asylum determinations happen in a delegated, discretionary claims-adjudicating system and ultimate credibility is left to the factfinder, which serves as an ever-present check on the statutory refugee definition.

### B. LEGISLATING A SOLUTION TO THE PARTICULAR SOCIAL GROUP QUESTION

Congress's amendment to the refugee definition in 1996 seized an opportunity to resolve the doctrinal tension of asylum law when agency adjudicators denied asylum to legitimate and worthy claims after the agency rule-making process failed to catch up. The same agency stalemate has manifested itself in the jurisprudence surrounding agency interpretations of the particular social group standard.[284] As discussed in the below policy proposal below, Congress should use its precedent-setting actions in enacting section 601(a) to amend the refugee definition and to refine the particular social group definition which currently emphasizes limiting principles over asylum's aims of the international humanitarian protection.

Currently, there is a need for congressional action with respect to asylum-seekers attempting to show persecution on account of membership in a particular social group. The befuddled agency action in this area of asylum law is strikingly similar to pre-IIRAIRA coercive family planning cases. The Board of Immigration Appeals first articulated the standard to show membership in a particular social group in *Matter of Acosta*—a group of persons, all of whom share a common, immutable characteristic.[285] Two decades later, the Board in *Matter of S-E-G-* narrowed the definition to require any social

284. Yet another manifestation of the issue and motivation for Congress to act arises in the agency impasse regarding gender-based harms for asylum claims. *See* Karen Musalo & Stephen Knight, *Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States*, 13 INT'L J. REFUGEE L. 51, 58 (2001).

285. Matter of Acosta, 19 I. & N. Dec. 221, 233 (B.I.A. 1985).

group-based asylum claim to meet two limiting principles.[286] Besides an immutable characteristic, asylum applicants claiming a fear of persecution due to membership in a particular social group must show social visibility and particularity.[287] Like *Matter of Chang*, the BIA interpretations of the asylum standard place an onerous burden on the applicant to meet these standards that deemphasizes the humanitarian purpose of asylum law and overstresses the limiting principles. A social group based solely on being targeted for persecution without any other common factor presents a floodgate issue.[288] Many applicants with legitimate articulations of social groups are denied asylum due to the burdensome limiting principles applied inconsistently by the agency.[289] In the social group jurisprudence, as well as pre-IIRAIRA claims based on forced abortion and sterilization, the agency promised to resolve the detrimental precedent through rule-making procedures, but to no avail.[290] The Attorney General's call for rulemaking to address the particular social group interpretations did not actually manifest in interim regulation in contrast to the 1990 interim regulations drafted by the Attorney General to address forced abortion and sterilization, which mysteriously never made it in the final rule. In this way, officials in the executive branch attempted, but failed, to correct agency precedent while domestic coalitions began to urge Congress to clarify the law to ensure the protections were consistent with international legal obligations.[291]

The Attorney General's failure to enact regulations

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286. Matter of S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008); *see also* Benjamin Casper et al., Matter of M-E-V-G- *and the BIA's Confounding Legal Standard for Membership in a Particular Social Group*, 14-06 IMMIGR. BRIEFINGS 1 (2014).

287. Matter of S-E-G-, 24 I. & N. Dec. at 582; Matter of A-M-E-, 24 I. & N. Dec. 69, 73–74 (B.I.A. 2008), *aff'd sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

288. *See, e.g.*, *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

289. *See id.* at 615–16.

290. Asylum and Withholding, Definitions, 65 Fed. Reg. 76,588, 76,593–98 (proposed Dec. 7, 2000); *see also* 74 Fed. Reg. 64, 220–21 (proposed Dec. 7, 2009) (noting that the proposed rule should "provide greater stability and clarity in this important area of law").

291. *See, e.g.*, Ctr. for Gender and Refugee Studies, *State for the Hearing Record on "Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010" Before the United States Senate Committee on the Judiciary*, REFUGEE COUNCIL USA 2, 5–7 (May 19, 2010), http://www.rcusa.org/uploads/pdfs/CGRS%20Testimony,%205-19-10.pdf.

propelled congressional action in both arenas.[292] Similar to the initial attempts for congressional action in recalibrating the doctrinal tension through an amended refugee definition for forced abortion and sterilization, Senator Patrick Leahy introduced legislation to amend the refugee definition in 2010 for a particular social group.[293] Senator Leahy's Refugee Protection Act proposed adding the following language to the refugee definition to expressly define a particular social group:

> For purposes of determinations under this Act, any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person's human rights such that the person should not be required to change it, shall be deemed a particular social group without any additional requirement.[294]

The specific subsection for amending the particular social group definition was entitled "Protecting Certain Vulnerable Groups of Asylum Seekers."[295] Senator Leahy's introduction of the Refugee Protection Act did not refer to the particular amendment for social groups or the need to overturn BIA precedent.[296] This attempt to amend the refugee definition was decoupled from any comprehensive immigration reform bill and consequently failed to make it out of committee.[297] The Refugee Protection Act was reintroduced in 2011 and 2013,[298] and, like its 2010 predecessor and the earlier attempts for Congress to enact section 601(a), it lacked the political support to become

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292. *See* 142 CONG. REC. H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Morrison) ("The fact is that this problem is one that the Attorney General could easily solve. The Attorney General merely needs to issue a regulation . . . which directs everyone under his jurisdiction including the immigration judges as to the fact that this is persecution under the Refugee Act.").

293. Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5 (2010).

294. *Id.*

295. *Id.*

296. CONG. REC. S1518–21 (daily ed. Mar. 15, 2010) (statement of Sen. Leahy).

297. *See S. 3113 (111th): Refugee Protection Act of 2010*, GOVTRACK.US, https://www.govtrack.us/congress/bills/111/s3113 (last visited July 26, 2015).

298. *See* The Leahy-Levin-Akaka-Durbin Refugee Protection Act of 2011, *Sectional Analysis*, http://www.leahy.senate.gov/imo/media/doc/SectionBySection-RefugeeProtectionAct.pdf; *S. 645 (113th): The Refugee Protection Act of 2013*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s645 (last visited Mar. 14, 2016).

law.[299] Notably, a comprehensive immigration reform bill passed the Senate,[300] but it did not amend the refugee definition to resolve the agency stalemate surrounding particular social groups.

Congress should apply the lessons from this example of an amendment to the refugee definition to maximize the likelihood that the proposed change for a particular social group will overturn poor agency precedent.[301] As described above, the structural impasse at the agency is already in place; yet, the political conditions need fine-tuning. The current proposed legislation is in a stand-alone bill for refugee protection and is separate from any comprehensive immigration reform bill. Legislative efforts to redefine a particular social group should instead take lessons from the attempts to amend the refugee definition for forced abortion and sterilization and include the proposal in a comprehensive immigration bill. Indeed, even before the "Gang of Eight" began drafting a comprehensive immigration reform in early 2013, advocates sought to amend the particular social group standard in the broader immigration bill.[302] As seen in IIRAIRA, adding a niche asylum issue to increase protections for those fleeing harms abroad may increase the odds of it becoming law. The provision needs a strong champion in Congress with the political capital to gain votes and keep the amended definition on the political agenda. Advocates can take lessons from the build-up to the 1996 amendment to make alliances across the political spectrum and revamp the issue into a controversial one to develop an equivalent to the rather strange set of bedfellows united in the forced abortion and sterilization issue.[303] Also, the definition as reformulated in the proposed legislation contains a key compromise by making the previous particular social group standard under *Matter of Acosta* law once again.[304] It is a modest proposal to reassert the

299. Refugee Protection Act of 2013, S. 645, 113th Cong. (2013).

300. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013).

301. Casper et al., *supra* note 286 (outlining key criticisms of the BIA's particular social group jurisprudence).

302. *E.g.*, *How to Repair the U.S. Asylum and Refugee Resettlement Systems: Blueprint for the Next Administration*, HUMAN RIGHTS FIRST 5 (Dec. 2012), http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Asylum_blueprint.pdf.

303. *See BIA Affirms Its Views on Chinese Family Planning Asylum Issue*, 71 INTERPRETER RELEASES 155, 159 (1994).

304. 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (defining a particular social group

humanitarian link in asylum by overturning harmful agency precedent—similar to Congress overruling *Matter of Chang* by redefining refugee in section 601(a). The proposal continues to give the agency room to act in its discretion.

A handful of key differences may produce a different outcome for amending the refugee definition for a particular social group in contrast to the successful forced abortion and sterilization legislation. For four years, the Refugee Protection Act introduced stand-alone proposed legislation to amend certain aspects of asylum and refugee law, including the test for a particular social group. The proposal was not part of any broader comprehensive immigration reform, in contrast to IIRAIRA. The Refugee Protection Act did not deal with the nexus hurdle, which will remain a barrier to many asylum claims; it is because the Supreme Court in *INS v. Elias-Zacarias* required applicants to show the persecutors' motives to meet this prong which presents proof issues for asylum-seekers fleeing persecution.[305] As such, the doctrinal tension is not completely shifted from limiting principles to humanitarian concerns as it was in section 601(a). To maximize humanitarian protection, the agency's nexus limiting principle must be specifically addressed under the proposed legislation, such as defining "on account of" to overrule *INS v. Elias-Zacarias*.[306] Otherwise, it remains a limiting principle on a claim facing harm from a particular social group.

The particular social group analysis under the proposed legislation will align with how the UNHCR envisioned defining a social group,[307] and, if enacted, will send signals that the U.S. is committed to its humanitarian obligations. The proposed recalibrated definition for a particular social group directly confronts foreign policy considerations because this asylum proposal captures many possible scenarios of persecution, unlike targeting China's coercive population policies which outlined

based on sharing a common, immutable characteristic that either cannot be changed or is so fundamental to identity that it should not be required to be changed).

305. INS v. Elias-Zacarias, 502 U.S. 478 (1991); *see also* Gupta, *supra* note 221.

306. For another creative proposal to change the nexus definition, see Gupta, *supra* note 261.

307. U.N. High Comm'r for Refugees, *supra* note 46, ¶¶ 77–79. The Board, in *Matter of Acosta*, found that the *Handbook* is a "useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol." 19 I. & N. Dec. at 221.

only three: forced abortion, forced sterilization, and "other resistance." Without a central political issue driving the legislation, Congress lacks the motivation or sense of urgency to act as demonstrated by the three unsuccessful attempts to pass a Refugee Protection Act. Finally, the particular social group issue does not directly involve abortion.[308] The salience of the abortion issue in driving policy positions, including amending the refugee definition, highlights the strict positivism of the U.S. position on human rights issues and how it frames these issues in the first place. Regardless of these differences, an amendment to the refugee definition to define a particular social group will abolish two limiting factors that overemphasize limiting viable claims. Because the BIA strictly interprets the asylum definition, many worthy applicants are being denied, just as many forced sterilization applicants were denied in the early 1990s. The agent limitations are re-entrenched in the agency's construction, as demonstrated by recent decisions.[309] It is time for Congress to wake up to the unduly narrow definition and for advocacy groups to unite to initiate change in asylum law.

## V. CONCLUSION

The U.S. asylum adjudication system is fraught with fears of fraud and is pulled by policy makers and adjudicators in a constant tug-of-war between allowing legitimate claims and screening out illegitimate ones, alongside avoiding a mass influx of asylum claims. The U.S. asylum system is reactionary to the humanitarian crises driven by repressive and persecutory governments that may arise. Moreover, the U.S. prides itself on exemplifying strong refugee protections.[310]

These considerations reflect the doctrinal tension in the definition of asylum between providing humanitarian-based protections to a broad array of persecutory harms, yet limiting the number of worthy claims based on principled reasons. Mass influxes of asylum-seekers, such as the Chinese fleeing coercive

308. For example, an asylum claim could possibly be formed as the flipside to section 601(a) to grant asylum to those fleeing countries that do not allow abortion or prevent the use of contraceptives.

309. Matter of M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

310. *See, e.g.*, Lyndon B. Johnson, Message from the President of the United States Transmitting the Protocol Relating to the Status of Refugees, 114 CONG. REC. 24628 (1968) (explaining the symbolism of U.S. accession to the 1967 Protocol "in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations; and to secure and preserve peace in the world").

family planning in the 1990s or Central American women and children fleeing gang violence in 2014, intensify this doctrinal tension and puts pressure on the executive branch to forego a humanitarian justification in favor of the limiting principles. Given these pressures, Congress is in the best position to champion the humanitarian purpose of asylum law and make changes to the refugee definition to strike a workable balance while maintaining the fairness and due process aspects in asylum claims adjudications. The confluence of factors present when Congress passed section 601(a) should serve as lessons for asylum advocates rallying congressional support, as well as for Congress itself in formulating a policy proposal to change the social group definition by aligning it consistently with the humanitarian obligations at the heart of asylum claims.