THE ROCKY PATH FROM SECTION 601 OF THE IIRIRA TO ISSUE-SPECIFIC ASYLUM LEGISLATION PROTECTING THE PARENTS OF FGM-VULNERABLE CHILDREN

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Political asylum in the United States is intended to protect those who fear persecution if they are returned to their country of origin. Arguably, the United States asylum system works reasonably well when the asylum seeker fits neatly within the statutory asylum scheme. If, however, asylum seekers' claims fall outside the statute, the asylum system can work inhumane results. In these situations, Congress can use issue-specific legislation to protect a group facing a discrete humanitarian crisis. This was done in section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which explicitly provided asylum protection to individuals who resisted China's coercive population control measures. Issue-specific asylum legislation has not been attempted since section 601, which begs the question—why? This Comment argues that two factors contribute to congressional avoidance of similar issue-specific legislation. First, section 601 was poorly drafted, which resulted in legislative and judicial confusion about its intended scope and left future Congresses hesitant to provide issue-specific protection. Second, the terrorist attacks of September 11, 2001, made Congress and the general public wary about increased asylum protection, despite the attenuated link between terrorism and asylum.

Issue-specific legislation is needed to correct an inhumane result of current United States asylum law: girls who fear facing female genital mutilation ("FGM") if returned to their country of origin are afforded asylum protection, but their parents are not. This forces an impossible choice on the parents—either leave their daughter in the United States when

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deported, or keep the family together and return to their country of origin, thereby subjecting their daughter to a risk of female genital mutilation. This choice is contrary to the humanitarian aims of asylum law, yet Congress has done nothing. Issue-specific protection for the parents is necessary and can be achieved by avoiding the drafting problems of section 601 and by publicly emphasizing the lack of connection between asylum and terrorism. This Comment concludes with a model statute that provides issue-specific protection for the parents, addressing and avoiding the problems of section 601.

INTRODUCTION

> Oforji will be faced with the unpleasant dilemma of permitting her citizen children to remain in this country under the supervision of the state of Illinois or an otherwise suitable guardian, or taking her children back to Nigeria to face the potential threat of FGM. Congress has foreseen such difficult choices, but has opted to leave the choice with the illegal immigrant, not the courts.[1]

The goal of asylum law is to protect individuals who would likely face persecution if they return to their home country. Thus, asylum law is based on humanitarian objectives. Asylum law in the United States is generally effective at adapting to new forms of persecution, as long as that persecution fits within the asylum statute. To qualify for protection under current asylum laws, applicants must show that they have a well-founded fear of persecution based on at least one of five categories: race, religion, nationality, membership in a political social group, or political opinion.[2] If an applicant establishes a well-founded fear of persecution based on one of these five grounds, the adjudicator may grant asylum and the asylee will be able to remain in the United States legally.[3] This regime works well when the applicants fit neatly within the language of the statute.

When individuals are persecuted in a way that falls outside the statutory language, however, the asylum system fails miserably at meeting its humanitarian goals. An effective tool for catching those who slip through the cracks is new asylum

1. Oforji v. Ashcroft, 354 F.3d 609, 618 (7th Cir. 2003).

2. Immigration and Nationality Act of 1952 § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006) [hereinafter INA].

3. *Id.*

legislation that specifically covers a discrete group of people or a single issue that is of humanitarian concern. This type of legislation is referred to as "issue-specific" in this Comment. This Comment focuses on two groups that deserve asylum protection: those persecuted for resistance to China's coercive population control programs, and the parents of children who would face FGM if returned to their country of origin.[4] Both groups are similar in their need for asylum protection and in their inability to fit into the traditional framework of asylum law.[5] Congress, however, has only provided protection to one of these groups. Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") explicitly provided asylum protection for those fleeing China's population control programs.[6] Unfortunately, this legislation was ill-considered and was so vague as to give courts little guidance in interpreting the provisions. The result has been a decade of executive and legislative attempts to fix the problems created by section 601 of the IIRIRA. Congress has not yet attempted any similar issue-specific asylum legislation to protect parents of children at risk of FGM.

Congress's failure to act can be attributed to two factors: (1) the issue-specific legislation protecting those facing coercive population control was poorly drafted and ill-considered, and (2) the terrorist attacks of September 11, 2001, ("9/11") triggered a restriction on immigration laws. The problems created by section 601 of the IIRIRA left subsequent Congresses hesitant to enact similar legislation, even when there is a need to address a humanitarian problem (such as protecting the parents of FGM-vulnerable children). The 9/11 terrorist attacks further compounded this problem by taking the focus of asylum away from humanitarian concerns and constricting the asylum system in the name of national security. This Comment argues that the problems created by the IIRIRA, combined with the

4. There are other groups in need of protection that fall outside the asylum framework (for example, child soldiers), but the two groups addressed in this Comment are similar in that they both demonstrate the failure of asylum law's humanitarian aims. Also, both received some success in the adjudication process prior to congressional action.

5. This Comment refers to asylum law generally, but its arguments and principles are interchangeable with protection through withholding of removal and the Convention Against Torture. *See* INA § 241(b)(3); 8 C.F.R. § 208.16 (2007). For the sake of simplicity, the alternate avenues of protection are not differentiated in this Comment.

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 601(a)(1), 8 U.S.C. § 1101(a)(42) (2006) [hereinafter IIRIRA].

political climate after 9/11, resulted in obstacles for future issue-specific asylum legislation. But those obstacles are not insurmountable, and this Comment includes specific proposals for achieving issue-specific protection.

Part I of this Comment briefly describes the background issues of coercive population control and FGM. Part II describes the basic framework of asylum law in the United States. Part III examines how asylum law has applied to coercive population control, how the prior statutory language did not protect those resisting coercive population control, and how section 601 of the IIRIRA changed this by providing explicit protection. Part IV examines the negative consequences of section 601, which are attributable to its poor drafting. Part V explains why the next asylum issue Congress must legislatively address is that of protection for the parents of FGM-vulnerable children. Part VI looks to the effect 9/11 had in preventing the consideration of new issue-specific asylum legislation, and the social awareness required to overcome this obstacle. Finally, Part VII contains proposals for the future. These proposals include statutory considerations and an issue-specific model statute to protect the parents of FGM-vulnerable children.

I. BACKGROUND INFORMATION ON COERCIVE POPULATION CONTROL AND FGM

Coercive population control programs and FGM are matters of humanitarian concern. Both involve the infliction of physical and psychological harm on the victim and both can have effects that last a lifetime. If denied asylum, the parents of FGM-vulnerable children face the impossible choice of splitting up the family or returning the children to a dangerous environment. Victims of coercive population control face returning to a country where they may again be subject to coercive population control measures. These results are at odds with the humanitarian aims of asylum law.

A. China's One-Child Policy and Its Effects

China's one-child policy grew out of its perceived need to control population growth within its borders after it experienced decades of encouraged population growth under Mao

Zedong.[7] In response to the population concern, the Chinese government implemented family planning policies that included "promoting late marriage, birth control, and one child per couple."[8] The family planning laws use economic and social incentives to reduce population growth.[9] The general family planning law "grants married couples the right to have one child and allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations."[10] Some provinces require couples to apply for government permission before having their first child.[11] The Chinese government requires couples to use birth control measures.[12] In addition, "[t]he law requires couples who have an unapproved child to pay a 'social compensation fee.' "[13]

These laws may not appear persecutive, but local authorities implement the laws, and in many areas they use whatever means are necessary to meet their assigned population quotas.[14] A short list of the measures used to enforce the one-child policy is illuminating. The Chinese government routinely imposes heavy fines on couples who have "unauthorized" children.[15] The fines are sometimes staggering, equaling up to ten times the annual income of the citizen.[16] If the citizen cannot pay the fine, the government may destroy his home and confiscate personal property.[17] If a woman becomes pregnant and is not authorized to have a child, she may be subjected to intense psychological pressure from authority figures to undergo an

7. Jamie Jordan, Note, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the REAL ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 231–32 (2007).

8. *Id.* at 232.

9. *Id.* at 233.

10. U.S. Department of State, 2004 Country Reports on Human Rights Practices (Feb. 28, 2005), http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm.

11. *Id.*

12. *Id.*

13. *Id.*

14. Jordan, *supra* note 7, at 234.

15. *Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 105th Cong. 7 (1998) [hereinafter *Forced Abortion*] (statement of Christopher H. Smith, Chairman, Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations).

16. U.S. Department of State, *supra* note 10.

17. *Forced Abortion*, *supra* note 15, at 7 (statement of Christopher H. Smith, Chairman, Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations).

abortion.[18] If the woman refuses an abortion, local authorities may physically force her to go to an abortion facility.[19] The government may also forcibly sterilize her husband or partner.[20] In addition, the Chinese government has a network of paid informants who report unauthorized pregnancies to the government.[21] The government conducts nighttime raids on those suspected to be in violation of the national policies.[22] Sometimes sterilization is even employed not as a tool of population control, but as punishment.[23] Men or women can be forcibly sterilized even if they have not violated China's national family planning policies.[24] It is hardly any wonder, then, that so many individuals facing these harsh measures have fled China and come to the United States for protection.

The one-child policy not only affects the victims at the time of sterilization, but it also has lasting personal and societal effects.[25] On a personal level, fines, forced abortion, and sterilization have effects that can last a lifetime. Heavy fines can cripple individuals financially, forcing them to be dependent on the state or their relatives for income and protection.[26] Forced abortion forever deprives the couple of a child they would have had, and it can create lasting emotional scars.[27] Sterilization, as one court put it, is best seen as a "permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life . . . ."[28] The couple is permanently persecuted because they will not be able to reproduce, even if they leave China.[29]

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 8.
22. *Id.*
23. *Id.*
24. *Id.* ("It is also not widely known that sterilization is sometimes employed not only as a preventive measure, but also as a punishment. That is, a man or a woman may be sterilized even though he or she has not yet had the one child permitted by the Chinese Government policy as a means of punishing some infraction of the rules and of deterring others from similar infractions.").
25. *See id.* at 7.
26. *See, e.g., In re* Y-T-L-, 23 I. & N. Dec. 601, 602 (B.I.A. 2003) (a Chinese citizen was forced to borrow money from friends and relatives and survived by seeking employment at a relative's store).
27. *See* Jordan, *supra* note 7, at 234–35.
28. *In re Y-T-L-*, 23 I. & N. Dec. at 607.
29. *Id.*

On a societal level, the one-child policy changes the gender composition of the population.[30] Male children are seen as more desirable because they are able to carry on the family name, so female children are routinely aborted or cast aside.[31] In addition, some believe that the increased frustration with not being able to have another child leads to increased domestic violence.[32] It is clear that China's one-child policy, as implemented, affects many aspects of the lives of Chinese citizens.

B. The Parents of FGM-Vulnerable Children

FGM (sometimes called female genital cutting or female circumcision) is a practice that affects women worldwide.[33] It is not only practiced in Africa and the Middle East, but "in immigrant communities throughout the world."[34] The practice affects three million women and girls every year.[35] Many times FGM is performed on women against their will, and in countries where the government is either unwilling or unable to control the practice.[36] The prevalence of FGM varies from country to country and in regions within countries, with the highest rates occurring in African and the Middle Eastern countries.[37] In Guinea, for example, as much as ninety-nine percent of women aged fifteen to forty-nine have undergone some form of FGM.[38]

FGM may be best defined as "a range of practices involving the complete or partial removal or alteration of the external genitalia for nonmedical reasons."[39] The procedure is meant to help the victims and their families "acquire social status and respect. Failure to perform [FGM] brings shame and exclusion."[40] UNICEF has recently classified the FGM procedure

30. Jordan, *supra* note 7, at 235.
31. *Id.*
32. *Forced Abortion*, *supra* note 15, at 16 (statement of Nicole Hess, The Loagai Research Foundation).
33. UNICEF, INNOCENTI DIGEST, CHANGING A HARMFUL SOCIAL CONVENTION: FEMALE GENITAL MUTILATION/CUTTING, at vii (2005), http://www.unicef-irc.org/publications/pdf/fgm_eng.pdf [hereinafter UNICEF REPORT].
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 3.
38. *Id.* at 3–4.
39. FEMALE "CIRCUMCISION" IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE 3 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000).
40. UNICEF REPORT, *supra* note 33, at 1.

into five categories, each with different impacts and lasting effects for the victims:

> Type I refers to excision of the prepuce with partial or total excision of the clitoris (clitoridectomy);
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> Type II refers to partial or total excision of the labia minora, including the stitching or sealing of it, with or without the excision of part or all of the clitoris;
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> Type III indicates excision of part or most of the external genitalia and stitching/narrowing or sealing of the labia majora—often referred to as "infibulation";
>
> Type IV makes specific reference to a range of miscellaneous or unclassified practices, including stretching of the clitoris and/or labia, cauterization by burning of the clitoris and surrounding tissues, scraping (angurya cuts) of the vaginal orifice or cutting (gishiri cuts) of the vagina, and introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purpose of tightening or narrowing it;
>
> Type V refers to symbolic practices that involve the nicking or pricking of the clitoris to release a few drops of blood.[41]

The effects of FGM include not only the serious and potentially deadly immediate risks of the procedure, but also the long-lasting physical and emotional scars. A non-exhaustive list of the immediate physical consequences includes "severe pain, shock, hemorrhage, urine retention, ulceration of the genital region and injury to adjacent tissue. Hemorrhage and infection can cause death."[42] "Long-term [physical] consequences include cysts and abscesses, keloid scar formation, damage to the urethra resulting in urinary incontinence, dyspareunia (painful sexual intercourse) and sexual dysfunction and difficulties with childbirth."[43] There is also concern about the "lasting mark on the life and mind of the woman who has under-

41. *Id.* at 2 n.7 (explaining a draft to revise the types of FGM proposed by UNICEF, the United Nations Population Fund ("UNFPA"), and the United Nations Development Fund for Women ("UNIFEM")).

42. World Health Org., Female Genital Mutilation Fact Sheet N241, June 2000, http://www.canadiancrc.com/circumcision/circumcision_WHO_FGM_fact_sheet_241_JUN00.aspx.

43. *Id.*

gone [FGM]. In the longer term, women may suffer feelings of incompleteness, anxiety and depression."[44]

There are many reasons that FGM continues to be practiced, with the most predominent incentives being the perceived preservation of the girl's morality and enhancement of the family's status.[45] FGM, in many cultures, is a prerequisite to marriage because it can preserve the girl's virginity.[46] In those same cultures it is also thought to preserve the girl's morality by protecting against "excessive sexual emotions."[47] Although not prescribed by any religion, FGM has been justified on religious grounds as well.[48] Looking at these practices, it is not hard to see why FGM has been considered persecution that legitimates an asylum claim. Indeed, asylum law recognizes that an applicant with a well-founded fear of FGM may be granted asylum.[49]

A growing issue in asylum law is whether parents can be granted asylum based on the potential infliction of FGM on their daughter. The parents of these children need protection, if not for themselves then simply to keep their families intact. If the parents are not protected, then they must decide whether to take the child with them when deported or split up the family, which generally involves sending the child to a foster home.[50] An asylum regime based on humanitarian concerns must not force this choice on parents.

II. UNITED STATES ASYLUM LAW

Before examining how Congress must act to address these problems, it is important to understand the basic framework of United States asylum law. In general terms, an alien who is present in the United States and wishes to obtain asylum must establish that she has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular

44. *Id.*
45. UNICEF REPORT, *supra* note 33, at 12.
46. *Id.*
47. *Id.*
48. *Id.* (noting that many of Islamic faith believe that FGM is required by their religion, but it is not required by the Koran).
49. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).
50. Molly Stark, Comment, *Derivative Asylum Claims in the FGM Context: Protecting Family Unity and Women's Rights in the New Millennium*, 83 U. DET. MERCY L. REV. 543, 548–49 (2006).

social group, or political opinion.[51] The statutory language leaves much for the courts to interpret. Most notably, the courts have to determine the meaning of "persecution," which fears are well-founded, and when the potential persecution is on account of one of the five protected grounds.[52]

Courts use different definitions of the term "persecution," but for the purposes of this Comment, the Ninth Circuit defines it best: "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."[53] Judge Posner of the Seventh Circuit defined persecution differently, but that definition is defective in some important respects. Posner stated that " '[p]ersecution' means, in immigration law, punishment for political, religious, or other reasons that our country does not recognize as legitimate."[54] This definition fails to recognize that punishment is not the only way a person can be persecuted. The government can instead force 'therapy' or 'treatment' and harbor no subjective intent to harm.[55]

Even if the applicant can prove that the alleged harm is persecution, she must then establish that she has a well-founded fear of such persecution. This requirement includes both a subjective and objective element. The applicant must harbor an actual, reasonable, and subjective fear of persecution if returned to her country of origin.[56] In addition, the persecutor must be capable of persecuting the applicant.[57] The Board of Immigration Appeals further defined the objective requirement in *In re Mogharrabi*.[58] The evidence must establish that

51. *See* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

52. *See, e.g.*, *Kasinga*, 21 I. & N. Dec. 357.

53. Ghaly v. Immigration & Naturalization Serv., 58 F.3d 1425, 1431 (9th Cir. 1995).

54. Osaghae v. U.S. Immigration & Naturalization Serv., 942 F.2d 1160, 1163 (7th Cir. 1991) (citing Zalega v. Immigration & Naturalization Serv., 916 F.2d 1257, 1260 (7th Cir. 1990)).

55. *See, e.g.*, Pitcherskaia v. Immigration & Naturalization Serv., 118 F.3d 641 (9th Cir. 1997). In that case, a Russian lesbian was, among other things, forced to undergo "therapy" to change her sexual orientation. *Id.* at 644. Arguably, the Russian government was not attempting to harm the woman, but was attempting to give treatment in the form of electric shock and other painful therapy. *Id.* at 646.

56. Cardoza-Fonseca v. U.S. Immigration & Naturalization Serv., 767 F.2d 1448, 1452–53 (9th Cir. 1985), *aff'd*, 480 U.S 421 (1987).

57. *Id.*

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

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.[59]

A well-founded fear of persecution in and of itself is not enough to qualify the applicant for asylum. The persecution must be 'on account of' one of five categories enumerated in the Immigration and Nationality Act ("INA").[60] In general terms, this means that there must be some nexus between the persecution and the protected category.[61] This requirement becomes complicated because "it is often difficult to determine the exact motive or motives for which harm has been inflicted."[62] Prior to 2005, a totality of the circumstances test was used to determine the motive of the persecutor.[63] The REAL ID Act of 2005, discussed below, changed this test to require that the applicant establish that one of the protected categories "was or will be at least one central reason for persecuting the applicant."[64]

The applicant must then establish that her persecution is on account of one of the five statutory categories for asylum: race, religion, nationality, membership in a particular social group, or political opinion.[65] The most relevant categories for coercive population control and FGM are membership in a particular social group and political opinion.[66] A widely accepted definition of 'particular social group' was set forth in *In re Acosta*.[67] In that case the Board of Immigration Appeals ("BIA") held that the group must share a common characteristic that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[68] An applicant claiming a well-founded fear of persecution on account of political opinion must show that she holds a political opinion and

59. *Id.*
60. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).
61. *In re* S-L-L-, 24 I. & N. Dec. 1, 5 (B.I.A. 2006).
62. *In re* S-P-, 21 I. & N. Dec. 486, 492 (B.I.A. 1996).
63. *Id.* at 494.
64. REAL ID Act of 2005 § 101(a)(3)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).
65. *See* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).
66. *See* IIRIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42) (2006).
67. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
68. *Id.*

that such opinion is a reason that she was, or will be, persecuted. "Refugee law does not require that [the applicant] be a politician, only that he is persecuted in his home country for his political beliefs."[69]

Importantly, a grant of asylum is in the Attorney General's discretion.[70] If, however, the applicant meets all of the elements described above, and the adjudicator finds no reason to exercise discretion to deny the claim, the applicant will generally be granted asylum.[71]

III. ASYLUM LAW AS APPLIED TO COERCIVE POPULATION CONTROL

Prior to 1996, asylum claims based on coercive population control received mixed results in the courts. The BIA, however, settled the confusion by holding that a claim of coercive population control did not fit within the statutory language for asylum.[72] The IIRIRA of 1996 overruled this decision and, for the first time, provided asylum protection for a specific group of asylum-seekers—those who resisted China's one-child policy.[73]

A. Coercive Population Control and Asylum Prior to the IIRIRA of 1996

Prior to 1996, an asylum applicant who resisted coercive population control measures had to fit into one of the protected categories described above to be granted asylum. Asylum applicants in the early 1990s attempted to claim persecution based on resistance to China's sterilization policies, but those attempts were like forcing a square peg into a round hole.[74] Most often, the applicants claimed that they had a political opinion against coercive population control, and they were or would be persecuted based on that political opinion.[75] The statutory language for asylum did not quite protect their situa-

69. Osorio v. Immigration & Naturalization Serv., 18 F.3d 1017, 1030 (2d Cir. 1994).

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

71. *See id.*

72. *See In re* Chang, 20 I. & N. Dec. 38, 43 (B.I.A. 1989).

73. IIRIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42) (2006).

74. *See, e.g.*, *In re Chang*, 20 I. & N. Dec. at 43 (finding that persecution based on China's one-child policy was not persecution within the meaning of the INA).

75. *Id.*

tion, yet many believed that this was exactly who an asylum regime should protect.[76] The BIA then issued a decision that precluded asylum for almost all who resisted coercive population control measures in the landmark case of *In re Chang*.[77]

Chang was a native and citizen of the People's Republic of China.[78] He and his wife opposed the family planning policies of China, and they were forced to flee from their commune when they had two children and would not agree to stop.[79] Chang claimed that the Chinese government wanted him to be sterilized and that he would be sterilized if he returned to China.[80] Chang's wife was also in danger of being subjected to a family planning procedure.[81] The BIA did not find that China's one-child policy was on its face persecutive.[82] The court recognized the difficult position that China is in with respect to its population problem and viewed its one-child program as having legitimate policy considerations.[83] The court decided that the Chinese government must balance its concern that overpopulation may create a marginal existence for its citizens with an individual's ability to survive and enjoy benefits in life that people in other societies take for granted.[84]

According to the U.S. asylum statute, Chang had to establish that his persecution was on account of his membership in one of the five protected categories in the INA.[85] The court rejected Chang's claim that his persecution was on account of his membership in a particular social group or his political opinion.[86] Because the court found that China's one-child policy was not persecutive on its face, Chang had to establish that it was in fact persecutive as applied to him.[87] The court noted this may be established through evidence "that the policy was being selectively applied against members of particular religious groups."[88] It may also be established if the policy was

76. Jordan, *supra* note 7, at 230.
77. *In re Chang*, 20 I. & N. Dec. at 38.
78. *Id.* at 39.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 43.
83. *Id.* at 43–44.
84. *Id.*
85. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).
86. *In re Chang*, 20 I. & N. Dec. at 44.
87. *Id.*
88. *Id.*

used to punish individuals for their political opinions.[89] The court qualified this by stating that not all who oppose the practice, and are subjected to it, are being punished for their opinions.[90] "Rather, there must be evidence that the governmental action arises for a reason other than general population control (for example, evidence of disparate, more severe treatment for those who publicly oppose the policy)."[91]

In re Chang slammed the door shut for future asylum claims based on resistance to coercive population control measures. It seemed that only the rare case of exceptional resistance to an unusually coercive situation would qualify an individual for asylum. To more fully protect these individuals, Congress had to create a new path to asylum.

*B. Post-*Chang *Backlash and the Passage of the IIRIRA of 1996*

Members of Congress and the George H.W. Bush administration quickly reacted negatively to the *Chang* decision.[92] To further compound the issue's urgency, the Tiananmen Square incident occurred just three weeks after *Chang* was decided.[93] The years following *Chang* were filled with efforts by the legislature and the executive to overrule the decision.[94] The efforts included political wrangling through executive orders, interim rules by the Attorney General, and INS regulations.[95]

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89. *Id.*

90. *Id.*

91. *Id.* at 44–45.

92. Kimberly Sicard, Note, *Section 601 of the IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 933 (2000). The negative reaction occurred primarily because the *In re Chang* decision went against the express policies of the executive and its guidelines to the INS. *See id.*

93. *Id.*

94. *See id.* at 933–34. One commentator has noted the special circumstances that led to bipartisan support of extending asylum to those resisting coercive population control—anti-abortion groups found themselves strange bedfellows with international human rights activists as well as liberal pro-immigration groups. Carrie Acus Love, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV. 173, 216 (2008).

95. *See* Sicard, *supra* note 92, at 933–34. (explaining attempts to overrule *In re Chang*). "Congress . . . proposed the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989 for the express purpose of overruling *Chang*." *Id.* at 933. President George H.W. Bush vetoed the Act even though he supported the Armstrong-DeConcini Amendment. *Id.* Bush's Attorney General, Dick Thornburgh, issued an interim rule to carry out the president's de-

After other attempts to overrule *Chang* failed, any protection for those resisting coercive population control practices would have to come from Congress's collective pen. Congress held hearings on the practices and effects of coercive population control measures, which focused on the injustice of not providing protection to those fleeing coercive population control measures. [96] Congress also paid attention to the Chinese government's harsh punishment of the refugees who were returned, some of whom were beaten, sent to forced labor camps, or imprisoned.[97] The subcommittee chair was concerned about Chinese women who came to the United States but "were forced back to China because they were regarded as common criminals and treated accordingly."[98]

The hearings resulted in the enactment of unprecedented legislation entitled the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[99] The act largely restricted asylum in general, yet created an entirely new category of asylum claims specifically tailored to address the issue of coercive population control.[100]

The IIRIRA departed significantly from past congressional action on asylum.[101] The IIRIRA contained provisions that affected both asylum in general and the specific issue of coercive population control.[102] The general provisions of the act restricted the availability of asylum, instituting a one-year filing deadline for asylum applications.[103] The general provisions attempted to streamline the asylum process and reduce applica-

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sire to overrule *In re Chang*. *Id.* at 934. Bush then signed an executive order calling for enhanced consideration of the issue and urged the following of Thornburgh's rule. *Id.* at 933–34. In 1990, the INS published its final asylum regulations, but Thornburgh's interim rule was "inexplicably omitted." *Id.* at 934. "In January 1993, on the last day of the Bush Administration, then-Attorney General William Barr signed a final rule reiterating Dick Thornburgh's January 1990 interim rule overruling *Chang*." *Id.* After Clinton came to office, the rule was never published because of an administrative directive requiring the approval of any new rule by a Clinton-appointed agency head. *Id.*

96. *See* Zhao v. U.S. Dep't of Justice, 265 F.3d 83, 92 (2d Cir. 2001).

97. *Id.*

98. *Id.*

99. IIRIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42) (2006).

100. *See id.* at §§ 601, 604, 8 U.S.C. §§ 1101, 1104.

101. *See* Jordan, *supra* note 7, at 241.

102. IIRIRA § 601, 604, 8 U.S.C. § 1101, 1104.

103. Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 141 (2001).

tion backlog, but asylum proponents argued that it merely created more obstacles for legitimate asylum-seekers.[104]

The IIRIRA also included a provision that was a victory for proponents of asylum—section 601 expanded the definition of political opinion to include those who have resisted coercive population control policies.[105] Section 601 amended the definition of "refugee" in the United States Code to include the following:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[106]

Congress, through issue-specific legislation, amended the asylum statute to cover a specific set of applicants who would not be otherwise eligible for asylum.[107] The excitement of the new protection was short-lived, as asylum practitioners and adjudicators then attempted to interpret the meaning of section 601. This was a difficult task, and now, more than ten years later, its meaning is still unclear.

IV. PROBLEMS WITH SECTION 601 OF THE IIRIRA

Congress imposed major reforms on the asylum process with the IIRIRA. There were, however, problems with the coercive population control portions of the legislation that resulted in section 601 being interpreted more broadly than was probably intended. First, Congress did not specify whether section 601 applied retroactively. Second, Congress was not specific in describing which forms of past persecution were covered by section 601. Third, Congress was unclear on whether asy-

104. *See id.*
105. *See* IIRIRA, Pub. L. No.104-208, § 601, 110 Stat. 3009-546, -689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)).
106. *Id.*
107. *See id.*

lum was available to the spouses of the persecuted. Fourth, Congress included a vague catchall provision in section 601. Finally, Congress included an annual cap on the number of individuals who could be granted asylum based on resistance to coercive population control.

These problems created confusion and questions that persist more than ten years later, and the meaning of the statute is still being debated. The problems with section 601 could have been anticipated and avoided with more study and more specific legislation. Had these problems been anticipated and addressed in the IIRIRA, Congress would be more willing to provide protection for groups facing similar issues, such as for parents of potential FGM victims.

A. Congress Did Not Specify Whether Section 601 of the IIRIRA Was Intended To Apply Retroactively to Those Denied Asylum Based on Chang

Congress enacted section 601 specifically to overrule *Chang*, yet it did not specify whether individuals denied asylum based on *Chang* would be re-eligible for asylum.[108] Congress's silence on this important issue allowed the BIA to expand the scope of section 601. The BIA, of its own accord (and despite a vigorous dissent), decided that it would reconsider cases that were denied based on the ruling in *Chang*.[109] As one commentator put it, this was an effort to "correct the wrongs of the past."[110] In the BIA's decision in *In re X-G-W-*, the court decided that it would "consider motions to reopen to apply for asylum based on coerced population control policies pursuant to the Board's authority 'to reopen or reconsider on its own motion in any case in which we have rendered a decision.' "[111] *X-G-W-* opened the door for applicants who were denied under *Chang* and met certain conditions to reapply for asylum. This decision was then superseded by a 2002 BIA case, which ended the Board's policy of granting untimely motions to reopen.[112]

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108. *See id.*

109. *In re* X-G-W-, 22 I. & N. Dec. 71, 73 (B.I.A. 1998), *superseded by In re* G-C-L-, 23 I. & N. Dec. 359 (B.I.A. 2002). Board member Heilman, dissenting in *In re X-G-W-*, believed that "there is simply no authority in the regulations for allowing reopening out of time based on changes in law." *Id.* at 76 (Heilman, J., dissenting).

110. Jordan, *supra* note 7, at 241.

111. *In re X-G-W-*, 22 I. & N. Dec. at 71.

112. *In re G-C-L-*, 23 I. & N. Dec. at 359.

B. Section 601 of the IIRIRA Specified that Past Persecution Would Create a Valid Asylum Claim, but It Left Unanswered Questions as to What Types of Past Persecution Would Qualify

Section 601 extended protection to those who have been forced to abort a pregnancy or forcibly sterilized, those who have been persecuted for resisting such measures, and those persecuted for "other resistance" to coercive population control.[113] The language of section 601 did not require asylum for those who have been persecuted in the past; rather, it merely stated that the victims of past persecution "shall be deemed to have been persecuted on account of political opinion."[114] Past persecution is in no way a guarantee of asylum protection, but the administrative regulations for asylum allow an applicant a rebuttable presumption of future persecution based solely on the severity of past persecution.[115] Section 601 of the IIRIRA only made explicit that asylum applicants who were persecuted in the past for resistance to coercive population control may be eligible for asylum under the regulations.[116]

The BIA interpreted the limits of this protection in *In re Y-T-L-*.[117] In that case, the court found a problem: "a completed sterilization removes any reasonable, objective basis on which to fear a future act of coerced abortion or sterilization."[118] The court's dilemma was that an individual who has undergone a forced abortion or sterilization has indeed suffered past persecution, but the very nature of that persecution removes any fear of future persecution—a person can only be sterilized once.[119] In resolving the dilemma, the court recognized the "special nature of persecution at issue" and gave "full force to the intent of Congress in extending asylum to those who have sustained such persecution."[120]

The court, in granting asylum, concluded that "[c]oerced sterilization is better viewed as a permanent and continuing

113. IIRIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42) (2006).
114. *Id.*
115. *See* 8 C.F.R. § 208.13(b)(1) (2008) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.").
116. IIRIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42) (2006).
117. *In re* Y-T-L-, 23 I. & N. Dec. 601, 606–08 (B.I.A. 2003).
118. *Id.* at 606.
119. *Id.*
120. *Id.*

act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them."[121] Courts have not allowed a parallel argument in other contexts. In fact, the BIA has rejected the same argument in the FGM context, denying a claim for asylum because FGM is generally inflicted once, thereby eliminating the risk of identical future persecution.[122] In giving special effect to the vague words of Congress, the courts have accepted arguments that are traditionally rejected—a result that may or may not have been intended by Congress. Section 601 therefore made asylum available not only to those who only faced future persecution, but to anyone who had been subjected to coercive population control measures in the past, including those who had no fear of future persecution.

C. Section 601 Did Not Specify Whether Spouses or Partners Would Be Eligible for Protection, and as a Result, Courts Have Been Inconsistent in Extending Protection

Nothing in section 601 stated whether the spouses or partners of the persecuted would be eligible for protection. Without any guidance on the issue, the BIA extended asylum to the spouse of an individual who had a well-founded fear of coercive population control measures.[123] In *In re C-Y-Z-*, the applicant was a Chinese man who opposed the coercive population control policies, and whose wife was forcibly sterilized for having three children.[124] The court held that

> the applicant in this case has established eligibility for asylum by virtue of his wife's forced sterilization. This position is not in dispute, for the Service conceded in its appeal brief that the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution.[125]

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121. *Id.* at 607.

122. *In re* A-T-, 24 I. & N. Dec. 296, 299 (B.I.A. 2007).

123. *In re* C-Y-Z-, 21 I. & N. Dec. 915, 919–20 (B.I.A. 1997), *abrogated by* Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 300 (2d Cir. 2007).

124. *Id.* at 916.

125. *Id.* at 918.

This ruling extended asylum to a group who may not themselves be subject to persecution, but whose spouses would be. *In re C-Y-Z-* also decreased the gender gap in section 601. Indeed, more men are using this claim to gain asylum. "Of the 10,000 Chinese people who have obtained political asylum based on China's one-child policy, federal statistics show, three out of four are men."[126]

In 2007 the Second Circuit abrogated *C-Y-Z-*, finding that the BIA erred in its interpretation of section 601.[127] In reiterating its view expressed in *C-Y-Z-*, the BIA had reasoned that "§ 601(a) provided 'no clear or obvious answer to the scope of the protections . . . to partners of persons forced to submit to an abortion or sterilization.' "[128] The Second Circuit disagreed, holding in *Shi Liang Lin* that "the BIA lacks authority to adopt a policy that presumes that every person whose spouse was subjected to a forced abortion or sterilization has himself experienced persecution based on political opinion."[129] The court concluded "that the statute does not provide that a spouse—and *a fortiori*, a boyfriend or fiancé—of someone who has been forced to undergo, or is threatened with, an abortion or sterilization is automatically eligible for 'refugee' status."[130] Importantly, this is only the law in one circuit. The *Shi Liang Lin* court noted that its decision went against other circuits by not deferring to the BIA's interpretation.[131]

Additionally, circuits are split on whether a marriage recognized by the Chinese government is a prerequisite to spousal protection. The Seventh and Ninth Circuits extend protection to couples married in a traditional ceremony not recognized by the government, while the Third Circuit held that section 601 does not cover unmarried partners.[132] Some commentators have suggested that the marriage requirement is arbitrary and depends too much on China's marriage laws.[133]

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126. Patricia Wen, *Asylum Law Offers Chinese Loophole for Entering U.S.*, HOUSTON CHRONICLE, Sept. 22, 2002, at 8.

127. *Shi Liang Lin*, 494 F.3d at 300.

128. *Id.* at 302.

129. *Id.* at 308.

130. *Id.* at 309.

131. *See id.* at 300 n.4.

132. *See id.*; *see also* Zhu v. Gonzales, 465 F.3d 316, 321 (7th Cir.2006); Ma v. Ashcroft, 361 F.3d 553, 559–61 (9th Cir.2004); Chen v. Ashcroft, 381 F.3d 221, 232–34 (3d Cir. 2004).

133. *See Ma*, 361 F.3d at 559–61; Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 FORDHAM L. REV. 2153, 2185–86 (2007).

Therefore, because Congress was not specific in drafting section 601, the extent of protection afforded to spouses and unmarried partners depends on the circuit in which the case arises. This is something the law should avoid, and something that could have been avoided through more specific legislation.

D. Section 601 Included a Catchall Provision that Provided Protection for Persecution Based on "other resistance to a coercive population control program"

Courts also had to determine what Congress meant by "other resistance" to coercive population control. Though there is still much confusion and debate, the generally accepted question is whether the applicant made "expressions of general opposition, attempts to interfere with enforcement of government policy . . . and other overt forms of resistance . . . of the family planning law."[134] Even within this definition, however, there is an undefined category of "other overt forms of resistance," which perpetuates the uncertainty of the catchall provision. The exact scope of this catchall is yet to be determined, but some courts suggest that this category may be used for protecting unmarried partners who themselves have resisted China's family planning practices.[135]

E. Section 601 Included a Yearly Cap of 1000 Individuals Who Could Be Granted Asylum for Resistance to Coercive Population Control

The IIRIRA also limited the number of asylum grants for resistance to coercive population control programs to 1000 per year, but the IIRIRA was silent on how the cap was to be implemented.[136] It is unclear how Congress determined the number of grants to issue.[137] Possibly, Congress based this number on the statements of a commentator who, one year earlier, in speaking about INS regulations that address the same issue, "estimated that 800 more women per year will be granted asy-

134. *In re* S-L-L-, 24 I. & N. Dec. 1, 10 (B.I.A. 2006).
135. *See id.* at 11.
136. *See* Jordan, *supra* note 7, at 240.
137. *See* Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 621, 645–46 (1996).

lum."[138] It is also unclear what Congress intended to happen if the limit was surpassed: should there be a complete denial of any claims over 1000, or should there be a waiting list for those that were granted asylum?[139]

The 1000 per year limit turned out to be wholly inadequate to meet the demand for asylum.[140] In addition, the INS was given no direction on how to implement the limit.[141] The year 1997, the first year that the coercive population control legislation was in effect, was also the only year in which the grants fell under the limit.[142] In the years after 1997, the number of grants of asylum exceeded the limit.[143] The INS and courts were confused over how to treat the excess.[144] Immigration officials were directed to give to those over the limit what is known as "conditional asylum."[145] Those granted conditional asylum would be placed on a list in order of their date of grant, and when new spaces opened up in the following years, they would be granted full asylum.[146] This led to a developing backlog, which by 2003 had reached 7665 individuals.[147] This meant that it would take at least seven years for an individual who was granted conditional asylum to actually obtain asylee status.[148] It is evident then that Congress had not foreseen the need for asylum in this area.

In 2005, new asylum legislation—section 101(g)(2) of the REAL ID Act—removed the numerical limit on the number of applicants that could be granted asylum based on resistance to coercive population control.[149] The removal of the numerical limit can be seen as another victory for asylum applicants who resist coercive population control measures. Another view, however, is that this is just another step by Congress to try to fix section 601 of the IIRIRA. Congress removed the numerical limit ten years after its hearings on the problems of coercive

138. *Id.* at 645.
139. *See* Jordan, *supra* note 7, at 243.
140. *See id.*
141. *See id.*
142. *See id.*
143. *Id.*
144. *See id.*
145. *Id.*
146. *Id.*
147. *Id.* at 244.
148. 1000 grants per year plus a backlog of over 7000 results in more than a seven year wait.
149. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g)(2), 119 Stat. 231, 304–05 (codified as amended at 8 U.S.C. § 1157(a)(5) (2006)).

population control. It took ten years of backlog, judicial confusion, and a statutory amendment to finally correct one of the major problems with the IIRIRA.

F. As a Result of the Problems with Section 601, the Category of Individuals Eligible for Protection Based on Coercive Population Control Is Probably Broader than Congress Ever Contemplated

So, as the law stands today, asylum is available to those who have been persecuted through coercive population control in the past, those who have a well-founded fear of future persecution, the spouses of the persecuted (and possibly unmarried partners), and for a period those who were denied asylum under *Chang* could reapply. This has led at least one judge to comment that any Chinese woman of child-bearing age is being granted asylum, and that "the floodgates are probably open."[150]

This is not to say that these individuals are not in need or deserving of protection. Rather, this analysis shows the breadth of section 601 and how a lack of careful statutory drafting can result in a broader application than intended. Any future issue-specific asylum legislation must incorporate the lessons learned from the shortcomings of section 601.

V. CONGRESS SHOULD PROVIDE PROTECTION FOR THE PARENTS OF CHILDREN WHO WOULD POTENTIALLY BE FORCED TO UNDERGO FGM

Congressional action is needed to provide asylum protection for parents of FGM-vulnerable girls. There is little debate that the girls themselves would be eligible for asylum.[151] On the other hand, the parents may not be eligible for asylum because of their gender, age, or already having undergone FGM.[152] There are two obstacles to parents obtaining asylum based on the possibility of harm to their children. First, there is no provision in asylum law that allows for parents of children who are granted asylum to gain lawful resident status in the United States. Second, the literal statutory language re-

150. Matt O'Connor, *Citing China's 1-Child Policy, Court Allows Mom to Stay*, CHICAGO TRIBUNE, Sept. 23, 2004, at 1 (quoting Judge Terence Evans).

151. *See In re* Kasinga, 21 I. & N. Dec. 357, 364 (B.I.A. 1996).

152. *See* Niang v. Gonzales, 492 F.3d 505, 512–14 (4th Cir. 2007).

quires the parent to have a well-founded fear of persecution of herself, not of a family member.[153]

Asylum law in the United States allows for what is called derivative asylum. This, in essence, allows an individual granted asylum to bring members of her close family to the United States where they will also be protected. "[A] spouse . . . or child . . . also may be granted asylum if accompanying, or following to join, the principal alien who was granted asylum, unless it is determined that the spouse or child is ineligible for asylum. . . ."[154] Under this regulation, an individual granted asylum has the ability to keep her close family together and avoid separation, which is consistent with the humanitarian concerns of asylum law. A Chinese mother who travels to the United States, for example, may gain asylum based on the coercive population control practices, and then bring her child and spouse with her, who would receive derivative protection.[155]

There is no such provision for a child bringing a parent to the United States, even though the concerns in both situations are very similar. Indeed, there has been a call to allow derivative asylum for parents in the FGM context. As thoughtfully explained by Molly Stark:

> There is no provision for a parent to claim asylum based upon the persecution of her child. Many FGM-based asylum cases involve a mother who has already been subjected to the practice, thus having no fear of future persecution in the form of FGM for herself. In most countries, the mere opposition to the practice by someone who has already undergone the procedure will not lead to persecution although it may lead to ostracism. Without the derivative claim, or allowing a claim to be made based on the fear of seeing her child mutilated, a parent necessarily faces the choice of leaving a child behind in the United States or allowing the child to be subjected to persecution in the country of origin upon the parent's deportation.[156]

The next problem with parental claims is the text of the statutes. Most courts have held that the applicant must be the

153. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

154. 8 C.F.R. § 208.21(a) (2008). Ineligibility may result from a prior crime, persecuting others, participating in terrorist activity, and other bars listed in INA § 208(b)(2).

155. *See id.*

156. Stark, *supra* note 50, at 548–49.

target of the persecution, and the text of the statute does not allow for harm to others to be considered.[157] This position is, however, subject to debate. The Sixth Circuit has decided that the potential harm to the parent if her daughter is subjected to FGM can be great enough to warrant a grant of asylum.[158] In *Abay v. Ashcroft*, a mother (Abay) and her daughter (Amare), both natives and citizens of Ethiopia, applied for asylum based on Amare's fear of FGM if returned.[159] FGM was "nearly universal" in Ethiopia with an estimated ninety percent of women being subjected to the practice.[160] Abay was 'circumcised' by her mother when she was a young girl.[161] Abay was opposed to FGM, and testified that she would not be able to prevent Amare from being forcibly subjected to FGM.[162] The Immigration Judge held that "neither Abay nor Amare established that she is a 'refugee' eligible for asylum . . . ."[163] The Sixth Circuit disagreed with the Immigration Judge and held that "the evidence presented compels the conclusion that Amare has established that she is a 'refugee' under the Act."[164]

Abay's claim presented the more difficult problem. "Abay acknowledges that there is no express statutory authority for a parent to claim 'derivative asylum' based on her child's asylee status."[165] Instead, Abay argues "that she is eligible for asylum in her own right based on her fear that her daughter will be subjected to the torture of [FGM]."[166] Abay analogized her claim to a prior Board decision predicated on the coercive population control policies of China.[167] There, the Board held that "an alien whose spouse was forced to undergo sterilization could establish past persecution on account of political opinion and found that the alien established that he was a 'refugee' within the meaning of the Act."[168] The Sixth Circuit cited to oral decisions by Immigration Judges and the BIA to support the conclusion that the harm to the parent is sufficient to con-

157. *Niang*, 492 F.3d at 512.
158. Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004).
159. *Id.* at 636.
160. *Id.*
161. *Id.* at 639.
162. *Id.* at 640.
163. *Id.* at 636.
164. *Id.* at 640.
165. *Id.* at 641.
166. *Id.*
167. *Id.*
168. *Id.* (citing *In re* C-Y-Z-, 21 I. & N. Dec. 915, 919–20 (B.I.A. 1997)).

stitute persecution.[169] The court held that "a rational fact-finder would be compelled to find that Abay's fear of taking her daughter into the lion's den of [FGM] in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded."[170]

The *Abay* case is, however, alone among the circuits. Every other circuit that has considered the issue has found that the text of the statute simply does not cover the parents' claims. In *Oforji v. Ashcroft*, the Seventh Circuit rejected a mother's claim for asylum based on the threat of FGM to her daughter.[171] Commenting on the difficult choice this places on a parent, the court stated that "Congress has foreseen such difficult choices, but has opted to leave the choice with the illegal immigrant, not the courts."[172] The Fourth Circuit resolved the issue similarly in *Niang v. Gonzales*.[173] The court held that psychological harm, without any accompanying physical harm, does not constitute "persecution."[174] The court noted that "[a]s Congress has not provided for such a derivative withholding claim, we will not judicially amend the statute to create one."[175] Most recently, the Eighth Circuit followed the reasoning in *Niang* and *Oforji*. In *Gumaneh v. Mukasey*, the court considered for the first time whether the parents were eligible for protection.[176] "[U]nder the statutes as presently enacted, [the applicant] is not eligible for [protection] based upon a derivative claim that her daughters will be subjected to FGM."[177]

169. *Id.* at 641–42 (citing *In re* Adeniji, No. A41 542 131 (oral decision) (U.S. Dept. of Justice, Immigration Court, York, Penn., Mar. 10, 1998) as "granting application for withholding of removal to an alien father otherwise ineligible for asylum because his citizen daughters would be forced to return to Nigeria with him, where they would likely be subject to female genital mutilation by relatives despite their father's wishes"; *In re* Oluloro, No. A72 147 491 (oral decision) (U.S. Dept. of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994) as "granting suspension of deportation, directly resulting in permanent resident status, to an alien mother because the risk that her U.S.-born daughters would be subjected to female genital mutilation in Nigeria 'posed an extreme hardship' to the daughters").

170. *Id.* at 642.

171. Oforji v. Ashcroft, 354 F.3d 609, 618 (7th Cir. 2003).

172. *Id.*

173. Niang v. Gonzales, 492 F.3d 505, 513 (4th Cir. 2007).

174. *Id.* at 512.

175. *Id.* at 513.

176. Gumaneh v. Mukasey, 535 F.3d 785, 789 (8th Cir. 2008).

177. *Id.* at 790.

Other circuits, though not deciding the issue, have indicated an inclination to reject such claims.[178]

The result of Congress' inaction has created a sort of Sophie's choice[179] for the parents. In *Niang v. Gonzales*, the court explained the situation:

> We are, of course, mindful that the result reached here presents [the mother] with a heart-wrenching dilemma: either allow [her daughter] to remain in the U.S. with her father but without her mother, or take [her] to Senegal where [the mother] fears [her daughter] will be forced to undergo FGM. The tragic nature of this choice is undeniable, but it does not warrant that we recognize a derivative claim where Congress has not seen fit to provide for it.[180]

There have been proposals by commentators to amend the asylum laws to allow parents to gain asylum based on the potential harm to their daughters. In Molly Stark's comment on the derivative asylum system, she describes the Canadian legislature's approach to the issue.[181] The Canadian system enables government officials to take "into account the best interests of the child directly affected by the decision."[182] Stark further claims "it is clear that Canadian law in the context of refugee claims places a high premium on children's rights, one of which is the right to be raised with one's family."[183] An asylum law mandate to look at the "best interests of the child" would assure that this fundamental right is protected.

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178. *See* Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) (en banc); Osigwe v. Ashcroft, 77 F. App'x 235 (5th Cir. 2003). In a previous decision in *Abebe v. Ashcroft*, a dissenting judge forcefully argued that "[i]f Congress failed to clarify, in so many words, that a parent may claim asylum on the basis of a threat to her child, that omission is attributable only to a failure to imagine that so many young children would be independently targeted for persecution." 379 F.3d 755, 763 (9th Cir. 2004) (Ferguson, J., dissenting), *vacated*, 432 F.3d 1037 (9th Cir. 2005) (en banc). "Surely, Congress did not intend parents to choose between exposing their children to such threats and abandoning them halfway around the world." *Id.*

179. A "Sophie's choice" is a choice between two unbearable options. The term comes from the novel and film of the same name, and refers to a mother arriving at the Auschwitz concentration camp and having to choose which one of her two children will be killed and which one will live.

180. Niang v. Gonzales, 492 F.3d 505, 514 (4th Cir. 2007).

181. Stark, *supra* note 50, at 557–61.

182. *Id.* at 561 (citing Immigration and Refugee Protection Act ("IRPA"), 2001 S.C. ch. 27, § 67(1)(c) (Can.).

183. *Id.*

Another proposal, this time by Dree K. Collopy, is to require courts to consider an additional factor in asylum claims.[184] Collopy believes that the best way to protect children from FGM and separation from their family is to include a "hardship factor" in asylum determination.[185] Such a factor is currently used in other areas of immigration law,[186] and Collopy believes this would solve the difficult dilemma placed in front of the courts.[187] Collopy proposes amending INA section 101(a)(42), which defines the term "refugee," to include:

> Any exceptional and extremely unusual hardship to a person's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence, that would result from the person's removal, shall be considered for purposes of determining whether the person's fear is well founded.[188]

These proposals seek the addition of general language in the asylum statutes, thereby enabling the parents of FGM-vulnerable children to fall under its protection. This Comment, on the other hand, argues that the best tool to provide protection to a discrete, identifiable group is to direct legislation at the specific issue. This is what was done in section 601 of the IIRIRA, and it can be effective when done correctly. If the parents of FGM-vulnerable children are to be protected, legislation must create a path for asylum specifically directed at the parents as a group. If Congress creates specific legislation intended to protect this discrete group of individuals, it will yield predictable and efficient results.

A legislative solution is the best way to give the parents protection and keep the family together. Otherwise, applicants are forced to make strained claims to fall under the current asylum language, which may or may not be accepted by the court. In fact, several circuit courts have held that protection

184. Dree K. Collopy, Note, *Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of the Children*, 21 GEO. IMMIGR. L.J. 469, 499 (2007).

185. *Id.*

186. In cancellation of removal proceedings, extremely unusual hardship to family members is considered. 8 U.S.C. § 1229b(b)(1) (2006). Cancellation of removal is available to nonpermanent residents. *Id.* The applicant, however, must prove at least ten years of continuous physical presence in the United States. *Id.*

187. Collopy, *supra* note 184, at 499.

188. *Id.*

must be given by Congress.[189] In essence, this situation is similar to that confronting Congress when it passed the coercive population control legislation in 1996. Even though the situation seems ripe for action, Congress has done nothing. Congress has failed to uphold the humanitarian goals of asylum law, and its failure can be attributed to the events of 9/11 and to the problems with section 601 of the IIRIRA.

VI. THE EFFECT OF THE 9/11 TERRORIST ATTACKS ON THE UNITED STATES ASYLUM REGIME

The terrorist acts of 9/11 changed the political climate in the U.S. The humanitarian concerns of the United States quickly shifted to concerns of self-preservation.[190] The United States focused on discovering how the attacks could have occurred in the U.S. and determining what could be done to prevent future attacks.[191] Because the 9/11 terrorists were not United States citizens, a large part of that focus was on immigration. The result of the increased attention to immigration was further constriction of immigration and asylum.[192] In fact, even before any legislative changes, the percentage of applicants granted asylum dropped by nearly one half.[193]

The increased attention on asylum had little to do with any actual connection between asylum and 9/11,[194] and the public's perception that asylum and terrorism are connected creates a political barrier to any new asylum legislation. Public officials, scholars, and experts must overcome the barrier of public opinion through directed efforts at emphasizing the lack of connection between asylum and terrorism.

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189. *See* Niang v. Gonzales, 492 F.3d 505, 512 (4th Cir. 2007); Oforji v. Ashcroft, 354 F.3d 609, 612 (7th Cir. 2003).

190. Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration, U.S. State Department, Remarks to the American Society for International Law (April 3, 2003) (as prepared for delivery), http://www.state.gov/g/prm/rls/2003/37906.htm ("[W]e owed it to the American people to do everything we could to prevent any avenue from being used by terrorists to infiltrate the United States.").

191. *Id.*

192. *Id.* ("Thus, after 9/11, a freeze on refugee admissions was put into effect for over two months while a comprehensive review of procedures was undertaken."); REAL ID Act of 2005 § 101(a)(3)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

193. *See* Andy Rottman, Chris Fariss & Steven C. Poe, *The Path to Asylum in the U.S. and the Determinants for Who Gets In and Why*, 43 INT'L MIGRATION REV. 3 (2009) (conducting an empirical analysis of the factors that affect asylum grants).

194. See *infra* Section VI(a).

A. Immigration and Asylum Concerns Grew as a Result of 9/11

After 9/11, the United States public and government officials quickly reacted by examining how the terrorists could have manipulated United States immigration laws.[195] Many experts exacerbated fears of immigration in the public mind. One commentator noted that there were "115,000 foreign nationals from Middle Eastern countries living in the United States illegally (or quasi-legally in the cases of those seeking refugee status or political asylum)."[196]

Even though some of the focus was placed on our immigration laws, it is important to note, as one newspaper did, that "[t]he Sept. 11 hijackers 'are different in that they don't seem to have violated the law as much as some terrorists in the past'. . . . The brief U.S. stays and general lack of actions that would have alerted law enforcement 'may represent a kind of growing sophistication on the part of al-Qaida'. . ."[197]

Some prominent immigration experts were adamant that the asylum system was not correlated to an increased terrorism risk. Doris Meissner, a former INS Commissioner, stated that the asylum system, as presently implemented, is effective.[198] Meissner believes that the asylum system was vulnerable at the time of the 1993 World Trade Center bombing.[199] Since then, however, the "asylum system has been fixed and works effectively to provide protection to legitimate refugees but screen out malefactors."[200] Improvements to the system included hiring qualified and trained personnel, and providing better access to law enforcement information and intelligence resources to enhance decision-making.[201]

After 9/11, Congress and the President stepped up efforts for immigration reform. The Bush Administration sought to, and succeeded in, overhauling the immigration system.[202] At-

195. Dewey, *supra* note 190.

196. Joseph Perkins, *Wrong Way to Go on Immigration*, SAN DIEGO UNION-TRIBUNE, July 26, 2002, at B7.

197. Jonathan Peterson, *Sept. 11 Terrorists Were Here Legally, Pattern Called 'Sophisticated'*, SEATTLE TIMES, May 23, 2002, at A8 (explaining that most of the 9/11 terrorists entered the United States on tourist visas).

198. Doris Meissner, *Security Requires INS Reform*, MILWAUKEE JOURNAL SENTINEL, March 31, 2002, at J.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Terrorism Prompts Plan to Reform INS*, BUFFALO NEWS, Nov. 15, 2001.

torney General Ashcroft stated that "[t]he terrorist attacks of [September] 11 underscored in the most painful way for Americans that we need better control over individuals coming to our shores from other nations."[203]

Concerns over immigration also sparked debate over the vulnerability of the asylum system. Congressman James Sensenbrenner was at the forefront of the movement to constrict the availability of asylum.[204] Sensenbrenner's efforts eventually led to the passage of the REAL ID Act of 2005.

B. REAL ID Act of 2005

The REAL ID Act, like the IIRIRA, generally restricted access to asylum protection. The act restricted asylum eligibility and created additional bars to asylum related to terrorism.[205] The REAL ID Act was attached to an emergency supplemental appropriations bill in May 2005. "The U.S. Senate passed Real ID on a 100–0 vote as a rider on an emergency military spending and tsunami relief bill, a move that made it impossible for senators to vote against it."[206] "The majority of [the] changes were heavily criticized by immigrants' rights groups who claimed that the REAL ID Act would make it much harder for an asylum applicant to meet his burden and receive asylum."[207] These changes require more corroboration for a claim of asylum, increase the number of reasons that an immigration judge may make an adverse credibility finding, constrict the political opinion ground for asylum, and increase the burden of proof placed on the applicant.[208]

Amid these additional barriers, however, was a victory for proponents of asylum. The act removed the numerical cap on the number of individuals who could be granted asylum based on resistance to coercive population control measures. Thus, though there was a positive aspect to the REAL ID Act, the Act as a whole underscores that Congress was not supportive of increased asylum protections.

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203. *Id.*

204. DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, FORCED MIGRATION LAW AND POLICY 228–29 (2007).

205. Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Laws*, 1593 PLI/CORP 215 (2007).

206. Erin Rokita, *Big Brother's Watching*, EUGENE WEEKLY, June 28, 2007, *available at* http://www.eugeneweekly.com/2007/06/28/news1.html.

207. Jordan, *supra* note 7, at 245.

208. *Id.* at 246–47.

C. Separating Asylum from Terrorism in the Public Image Is the Only Option to Reduce the Political Barriers Created by 9/11

The initial response after 9/11, as described above, was to immediately rethink immigration law to prevent future terrorist attacks. Predictably, asylum was included in the debate, and there was (and still is) concern that terrorists may try to gain legal status in the United States to coordinate another attack. Some of this debate is good, as these concerns must be considered. Ultimately, however, legislators and the American public must realize that the overlap between terrorism and asylum is small. The asylum process requires a thorough review of criminal history and background checks. As a result, countless individuals have been denied asylum based on even the smallest connection to a group labeled as terrorist.[209] Public officials, academics, and experts must work to separate the issue of asylum from the issue of terrorism. Asylum for the most part is, and should be, a non-political issue. There should be no debate that the United States, as a powerful nation of great resources, should protect those in danger of being persecuted and possibly killed if returned home. This is the humanitarian goal of an asylum regime, and it is not incompatible with national security interests.

VII. PROPOSALS FOR THE FUTURE

Though there are clear barriers to issue-specific asylum legislation, Congress cannot shy away from essential reforms. The problems with the IIRIRA and 9/11 create an excuse for Congress not to act. However, Congress's concerns can be assuaged if careful steps are taken in the drafting of any new asylum legislation seeking to protect a discrete group of individuals.

The problems that must be addressed before any future issue-specific asylum legislation will gain support are, in the broadest sense, two-fold. First, the statute itself must be carefully researched and drafted to avoid problems similar to those encountered as a result of the IIRIRA. Second, public concerns

209. *See, e.g.*, Singh-Kaur v. Ashcroft, 385 F.3d 293, 299 (3d Cir. 2003) (holding that providing food and setting up tents for other individuals who were affiliated with a terrorist organization constituted material support, and asylum was denied).

about national security and terrorism must be separated from concerns about asylum law.[210]

A. Statutory Considerations

Section 601 of the IIRIRA created doubts about the wisdom of issue-specific asylum legislation. The upside is that Congress can learn from its shortcomings. Specifically, section 601 created distinct problems of definition and application that provide guidance on how to avoid repeating the same errors in future legislation. These discrete problems can be analyzed and future problems in similar legislation can be predicted. Distilled to their most basic components, the problems can be classified as problems with (1) retroactivity, (2) future/past persecution, (3) statutory definition of the individuals intended to be covered, (4) inclusion of a catchall provision, and (5) numerical limits.

As discussed in Part V, the main problems with section 601 were whether it was intended to provide relief to those denied asylum under *Chang* (retroactivity), the extent to which the IIRIRA was intended to cover those subjected to coercive population control in the past (future/past persecution), whether it was intended to cover the spouses of those subjected to persecution (definition of those intended to be covered), what was meant by "other resistance" to coercive population control (catchall), and the ill-considered cap on the number of asylum grants per year (numerical limits). Because these are the major problems that emerged over the ten year implementation of section 601, there is good reason to believe this list is exhaustive.

Therefore, the problems that may translate to asylum legislation in the FGM-parent context may be as follows:

1. Retroactivity: The legislation must specify whether it is intended to provide relief to those denied asylum in the circuits that rejected FGM-parent asylum.

2. Future/Past Persecution: The legislation needs to clearly state whether asylum would be available to the parent of a child if the child has already undergone some form of FGM.

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210. *See supra* Part VI.

3. Definition of those intended to be covered: The statute must specify what constitutes a "child" and a "parent" in this context: whether both parents are intended to be protected, whether the step-parent of such a child is entitled to protection, whether adopted children are included in the protection, whether a guardian who is not the actual parent can be protected, whether it applies to same-sex couples as parents, etc.

4. Inclusion of a Catchall: Whether it is wise to have a catchall provision in the statute, such as the "other resistance" category in section 601 of the IIRIRA.

5. Numerical Limits: The statute must be based on a realistic and thoroughly studied prediction about the number of applicants that may fit into the newly protected category.

B. Model Statute

INA section 208(b), which contains the provisions for derivative asylum, should be amended to include a subsection (4), which may look as follows:

> 208(b)(4) Treatment of the Primary Guardian of a Child who is or could be granted asylum based on the threat of Female Genital Mutilation.—
>
> (A) In General.—
>
> The primary guardian (as defined in section 101(a)(52)) of a child (as defined in section 101(b)(1)), who is not otherwise eligible for asylum, may be granted asylum if such child is or could be granted asylum in her own right based primarily on the threat of persecution in the form of female genital mutilation.

This would also necessitate including in INA section 101 a definition of "primary guardian":

> 101(a)(52) The term "primary guardian" as used in section 208(b)(4) is defined and limited to
>
> (A) The birth parents of the child (as defined in section 101(b)(2)), regardless of gender or sexual orientation, or

(B) The primary caretaker of the child, defined as an individual over the age of 18 who provides primary care and support for the child, regardless of gender or sexual orientation.

In drafting a model statute, the scope should be defined carefully. The most logical way to do this, especially with a Congress that is skeptical about issue-specific legislation, is to protect those who need it most—initially granting asylum to those who can be classified as the most deserving.

1. Retroactivity: The model statute should be applied retroactively to provide protection for those who have been denied asylum based on the decisions of circuits that have rejected similar claims. Most circuits have decided the issue very recently,[211] so there are likely very few applicants who have been denied asylum based solely on those decisions. Determining how many former applicants would be affected requires further study; and ultimately it may be the case that the number would be too high to include all former applicants under the statute. After such study, legislative statements or history could provide the basis for retroactive application of the statue, although any such statements should be explicit and the extent of retroactivity should be well-defined.

2. Future/Past Persecution: This distinction is less important in this context than with coercive population control. Necessarily, the daughter will not yet have suffered past persecution in the form of FGM. It is the daughter's fear of future persecution that gives rise to the parent's claim. An analogy to coercive population control on this point would be misguided. With the parents of FGM-vulnerable children, their entire claim of harm—that if the child is constructively deported she will face persecution—is eliminated if the harm has already occurred.

3. Definitions of those covered: The model statute initially grants asylum to those under the direct care and supervi-

211. For example, *Gumaneh v. Mukasey*, 535 F.3d 785, 789 (8th Cir. 2008), was decided in 2008; *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007), was decided in 2007; and *Oforji v. Ashcroft*, 354 F.3d 609, 612 (7th Cir. 2003), was decided in 2003.

sion of a parent or primary guardian. The goal here is to identify the parents or guardians and children with the greatest bond, for splitting up those families would be the most tragic. Additionally, these families would be the most likely to bring their children if they are ultimately deported. The statute is also explicit that the gender or sexual orientation of the parent or guardian is irrelevant as long as the applicant is the primary caretaker of the child. The concern should be with providing continuing support and maintaining the familial structure, whatever that may be.

The model statute requires a determination that the child would likely be subjected to FGM if she returned with her parents to their country of origin. This, in turn, requires an adjudication of whether the child is eligible for asylum even though she may already be a United States citizen or have some other protection. This is a necessary determination to identify the children who are most at risk of FGM were they to remain with their deported parents. Admittedly, this is an added administrative burden, but in many cases this could be done in conjunction with the child's own asylum claim to expedite the process.

4. Catchall Provision: There is no catchall provision such as "in other situations where the best interests of the child would be served by a grant of asylum." This may seem harsh, but the benefits in avoiding judicial confusion and inconsistency would be better served by a clear and explicit statute. If there is an identifiable group of individuals that routinely falls outside the statutory language, the statute can (and should) be amended to include that group.

5. Numerical Limits: The number of parents who would be eligible for asylum based on the model statute is unknown, and this would need to be carefully studied before enactment. Any statutory limit, however, must be avoided in light of the backlog problems created by section 601 of the IIRIRA.

This model statute is not perfect, and immigration opponents will be quick to point out that it can be exploited. A couple can come to the United States illegally and have a child. If the child is a girl, the parents can use her as a reason to be

granted asylum under this statute. This is an issue that must be considered, but other aspects of asylum law, such as the one-year time limit for applying, mitigate the concern.

CONCLUSION

The humanitarian aims of asylum law require an adaptive regime that will respond precisely and effectively to new crises. For asylum claims based on resistance to coercive population control, Congress responded relatively quickly but ineffectively. However, through the failures of section 601 of the IIRIRA, Congress has learned what to expect in subsequent issue-specific asylum legislation. Congress, however, must be convinced of two separate points: First, not all issue-specific asylum legislation is doomed to the repeat the mistakes of section 601. There are practical measures of planning and predicting that can aid in effective and targeted asylum legislation. Second, 9/11 did not show us the vulnerability of our asylum laws. Not one of the terrorists used asylum to gain entry into the U.S. This fact, coupled with increased security provisions in asylum law, has led to a system that effectively mitigates security concerns. The connection between asylum and terrorism is tenuous at best, and even terrorism does not negate the duty to protect those in danger of persecution.

An active effort to separate asylum and terrorism in the public image, combined with a carefully worded statute, will allow Congress to fulfill the humanitarian goals of asylum through issue-specific legislation.