

Precarious Protection

How Unsettled Policy and Current Laws
Harm Women and Girls Fleeing Persecution



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The Tahirih Justice Center

The Tahirih Justice Center (Tahirih) is a 501(c)(3) non-profit organization located in Falls Church, VA, and Houston, TX, offering free legal services to women and girls fleeing violent human rights abuses such as female genital mutilation, torture, rape, human trafficking, honor crimes, forced marriage, and domestic violence. Since 1997, through direct services and referrals, Tahirih has assisted almost 10,000 women and girls. Tahirih also engages in national public policy advocacy, working to pass laws, develop regulations, transform policies, and establish precedent so that systemic change will ensure the long-term protection of women and girls from violence. Among other awards, Tahirih is the winner of the 2007 Washington Post Award for Excellence in Non-Profit Management.

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Most importantly, we express our profound appreciation and admiration for the extraordinary women and girls that Tahirih has represented in their asylum cases, for enabling us to tell their stories and for inspiring us, by their own courageous stands against injustice, to call upon the United States to offer women and girls fleeing persecution more than mere "precarious protection."

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Introduction

In 2002, a report titled *Refugee Women at Risk* called attention to several acute challenges facing women seeking asylum in the United States. Published by the Lawyers Committee for Human Rights (now Human Rights First), *Refugee Women at Risk* illustrated how restrictive provisions in a 1996 immigration law, the “Illegal Immigration Reform and Immigrant Responsibility Act,” undermined the United States’ commitment to offer protection to those fleeing persecution. *Refugee Women at Risk* highlighted how barriers that the 1996 law created for all asylum seekers interposed particularly significant and even insurmountable obstacles to women fleeing violence and oppression, principally through policies of expedited removal, detention of asylum seekers, and the one-year filing deadline for asylum claims.

In the seven years since the release of *Refugee Women at Risk*, asylum advocates’ alarm about these troubling provisions and the United States’ increasingly restrictive immigration policy overall has grown and intensified. Numerous recent reports have decried the injustice inherent in the expedited removal process (let alone its expansion); the escalating use of prison-like detention and worsening detention conditions; and the harsh implications of the one-year filing deadline that deny some refugees any protection at all and grant others only temporary forms of protection. Reports have also critiqued other chronic shortcomings of the US asylum system, such as vast disparities in asylum adjudications rendered by overburdened Immigration Judges across the country.¹

Over this period, too, advocates have seen a disturbing stagnation and even some regression in the United States’ treatment of asylum claims by women and girls seeking protection from gender-related persecution, such as female genital mutilation, forced marriage and severe domestic and sexual violence. While the United States first recognized gender-related persecution as a valid basis for asylum in 1995, draft regulations proposed in 2000 have yet to be revised and finalized. Without clear and binding guidance to resolve the novel and complex issues that asylum claims by women and girls have raised, today, in 2009, inconsistent and incoherent decision-making around the country is taking this field of law dangerously off-course, preventing women and girls fleeing persecution from receiving fair treatment and true justice in the United States.

The Tahirih Justice Center has been dedicated since its founding in 1997 to promoting justice for women and girls seeking asylum in the United States, through both client representation and public policy advocacy. While many of our clients have successfully secured a grant of asylum, others have been forced to accept lesser forms of protection, and all of Tahirih’s asylum clients have faced substantial challenges in their quest for a new life in the United States free of violence and oppression.

Drawing on the experiences of Tahirih’s clients and important findings from numerous studies by advocacy organizations and governmental agencies, this new report by Tahirih, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution*, exposes the continuing injustices facing women and girls seeking asylum in the United States, and offers recommendations for systemic change.

Part I addresses how the uncertain terrain and unsettled ground regarding gender-related claims in particular continues to deny women and girls a firm foothold in US asylum law and policy. Part II addresses how women and girls are especially harshly impacted by current immigration laws and policies of general application to all asylum seekers (expedited removal, mandatory detention, and the one-year filing deadline).



Part I: Uncertain Terrain, Unsettled Ground

Women and Girls Continue to be Denied a Firm Foothold in US Asylum Law

The United States was a pioneer in recognizing gender-based persecution as a valid basis for asylum, issuing a memorandum in 1995 to guide asylum officers in adjudicating women's applications, and granting asylum in the 1996 landmark case *Matter of Kasinga* to a young woman who had fled female genital mutilation. Over the last decade, however, those promising first steps have repeatedly sputtered and stalled. Draft regulations proposed in 2000 have still not been finalized, and adjudicators struggling with novel issues have reached inconsistent decisions. As a result of this Administrative inaction and judicial incoherence, some women's claims have been left to languish unresolved for years in the US immigration court system. Part I of this report examines:

- The origins and development of gender-based asylum law in the United States;
- Particular obstacles currently posed to gender-based asylum claims, and the urgent need for clear and binding guidance (by statute or regulations or both); and
- The agonizing choice that US asylum law forces on parents of daughters facing female genital mutilation, often making family separation the price of a daughter's protection.

Background and Overview of “Gender-Based Asylum”

Under US and international law, “refugees” cannot be forced to return to countries where their lives or freedom would be threatened. When an individual in the United States is found to have met the definition of a “refugee,” he or she may be granted “asylum,” a form of long-term protection which enables an asylee to live and work lawfully here, to be reunited with his or her spouse and children, and ultimately to naturalize as a US citizen. A “refugee” is defined as

“any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to avail himself or herself of the protection of that country because of [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”²

This definition originated in the post-World War II era, to respond to the types of atrocities motivated by religious and ethnic hatred on which the global community was focused at that time. As a result, neither the 1951 United Nations Refugee Convention and its 1967 Protocol,³ nor the 1980 Refugee Act,⁴ which incorporated our international obligations into US law, expressly included “gender” as one of the five protected grounds. In more recent decades, the global community has gained greater awareness of the extreme forms of violence and oppression that women suffer around the world. These harms—including female genital mutilation, forced marriage, domestic violence, sexual violence (including as a weapon of war), so-called “honor” crimes and killings, acid burnings, dowry deaths, widow rituals, human trafficking, and pervasive gender segregation and oppression amounting to “gender apartheid”—are inflicted on women in some parts of the world in a terrible and often interrelated continuum that runs from the time they are born until the time they die.⁵ [See *Tida’s Story*, at 9.] Women may be victimized because they are women, or because they dare to transgress restrictive gender norms imposed on women in their societies. The need to interpret the refugee definition so as to ensure equal protection to all those fleeing persecution, both men and women, has become clear and urgent.

Some movement, but little progress: Over a decade of attempts to level the playing field for women asylum seekers

Steps forward

Early steps taken to close the gap in protection for women asylum seekers were promising. In 1995, the United States became one of the first countries in the world to affirm the availability of asylum for women fleeing gender-related persecution, with the issuance of a US Department of Justice (DOJ) memorandum providing Immigration and Naturalization Service Asylum Officers with “guidance and background” on the adjudication of asylum applications from women.⁶ Unlike statutes or regulations, however, this memorandum had (and still has) no binding effect on Immigration Judges.⁷ Indeed, shortly after the memorandum was released, an Immigration Judge denied asylum to Fauziya Kassindja, a young woman who had fled Togo to escape female genital mutilation⁸ and a forced polygamous marriage.

In 1996, in the landmark case *Matter of Kasinga* [*sic*],⁹ the Board of Immigration Appeals (BIA)¹⁰ granted Ms. Kassindja asylum, recognizing female genital mutilation as persecution and finding that her claim fit within the “particular social group” ground of the refugee definition.¹¹ This case set national legal precedent and paved the way, or so advocates hoped, for future gender-based asylum claims involving not only female genital mutilation but also other forms of gender-related persecution.

Steps backward

In 1999, however, in *Matter of R-A-*, the BIA denied asylum to Rody Alvarado, a Guatemalan woman who suffered more than a decade of extreme and relentless domestic violence—her husband broke windows and mirrors with her head, raped and sodomized her, whipped her, threatened her with a machete, and kicked her repeatedly when she was pregnant with the specific intent to cause a miscarriage. This was “deliberate and severe” violence from which she could not escape, despite her repeated attempts, and from which neither the courts nor the police would protect her, despite her repeated pleas, because they would not “interfere in domestic disputes.”¹² Notwithstanding the clear failure of her government to protect her, the BIA characterized what Ms. Alvarado endured as “private acts of violence.”¹³ The BIA’s decision in *Matter of R-A-* called into question the US’ commitment to protect women fleeing gender-based violence.

Similarly, the BIA also denied asylum in 1999 to a woman who feared she would be killed by her family in the name of “honor” if she were returned to Jordan. The US Department of State’s 1998 Country Report on Human Rights Practices reported that an estimated 25 percent of all murders in Jordan were so-called “honor killings,”¹⁴ and that the only form of protection offered by the Jordanian government to a woman at risk was to imprison the woman herself.¹⁵ Still, again, the BIA characterized this woman’s desperate plight not as persecution but instead, the unfortunate result of a “personal family dispute.”¹⁶

Fits and starts

In December 2000, the DOJ proposed draft regulations¹⁷ that were intended to course-correct following these decisions by the BIA to deny asylum. The draft regulations sought to make clear that gender could be the basis of a particular social group, and to address “nexus” (the “on account of” element of the refugee definition) as well as other “difficult analytical questions” arising in the novel context of gender-based asylum claims. More specifically, the draft regulations aimed to “remove[] certain barriers that the *Matter of R-A-* decision seems to pose” to domestic violence-based asylum claims.¹⁸ Advocates welcomed these draft regulations as a step toward providing critically needed clarification about the proper analytical framework to apply to women’s asylum claims, so as to ensure fair and consistent decision-making.¹⁹ However, to this day, these regulations have not been finalized (and thus are not binding on Asylum Officers or Immigration Judges).

The next several years witnessed spurts of governmental interest in resolving the outstanding issues regarding gender-based asylum claims, but no sustained attention: In 2001, responding to a “nationwide campaign of outrage and concern,”²⁰ Attorney General Reno vacated the BIA’s decision in *Matter of R-A-* and directed the BIA to reconsider Ms. Alvarado’s case only after the DOJ had finalized the draft regulations. In 2003, Attorney General Ashcroft ordered *Matter of R-A-* to be sent to him for a decision. The Department of Homeland Security (DHS) filed a legal brief with the Attorney General in 2004 that favored a grant of asylum to Ms. Alvarado.²¹ But in 2005, the Attorney General sent the case back to the BIA without a decision, again enjoining the BIA from reconsidering the case until

What Happened to the Gender-Based Asylum Regulations?

In 1995, the United States became one of the first countries to affirm the availability of asylum to women fleeing gender-related persecution, in a memo from the US Department of Justice (DOJ) providing guidance to Asylum Officers on adjudicating women’s applications.

In 2000, DOJ proposed draft regulations to clarify the scope of protection available to those fleeing gender-based violence.

In 2009, DOJ and the Department of Homeland Security have yet to finalize the draft regulations or to propose new or revised regulations. Without clear and binding guidance, many women’s applications are held in legal limbo or bounced from trial court to appeals court and back again. Decisions rendered around the country are widely inconsistent, and often unjust.

the draft regulations were finalized. Another three years passed and in 2008, Attorney General Mukasey lifted the injunction his two predecessors had imposed and directed the BIA to decide Ms. Alvarado's case under the existing caselaw, without the benefit of final regulations to clarify key questions. In addition, in these intervening years, that caselaw has strayed further off-course, imposing additional unnecessary (and unexplained) burdens on applicants seeking asylum based on "membership in a particular social group."²² Ms. Alvarado's case is now back before an Immigration Judge for additional fact-finding—exactly where she was in 1996, when her case began.

Resistance to progress, and even attempts to retreat?

While *Matter of Kasinga* has continued to provide protection for women who fear female genital mutilation, government lawyers have repeatedly tried to place limitations on when female genital mutilation may be a basis for asylum. For example, in 2005, government lawyers argued before the Ninth Circuit Court of Appeals that the widespread practice and acceptance of female genital mutilation in Somalia meant that it could not form the basis for an asylum claim. The Ninth Circuit properly rejected this argument and admonished the government that the analysis of an asylum claim does not change because the type of harm is widespread.²³

In September 2007, the BIA rendered two stunning decisions, *Matter of A-T*- and *Matter of A-K*-, that threatened to dramatically undermine the *Matter of Kasinga* precedent and deny any protection to women who have already undergone female genital mutilation in the past, as well as to parents who fear that female genital mutilation will be inflicted on their daughters.²⁴

In *Matter of A-T*-, the BIA denied withholding of removal to a woman who had endured female genital mutilation as a child, treating it as a "one-time" occurrence which, because it could not be repeated, itself rebutted the presumption that she faced future persecution and thus defeated her claim for protection.²⁵ After an advocacy campaign that included direct appeals from Members of Congress,²⁶ in September 2008, Attorney General Mukasey ordered the BIA to reconsider its decision in *Matter of A-T*-, finding the BIA's analysis to be both legally and factually flawed.²⁷

While this was certainly a welcome development, between September 2007, when the BIA issued its original decision denying protection to *A-T*-, and September 2008, when the Attorney General stepped in to remedy the BIA's mistakes, the BIA's holding blocked many women's cases based on past female genital mutilation from proceeding, was misconstrued and expanded to wrongfully deny protection, and even prompted the government to rescind asylum from some women who had previously been granted protection.²⁸ Moreover, as is typical of the procedural ping-pong that has plagued many gender-based asylum cases, as of September 2009, two years after the BIA's original decision, *Matter of A-T*- is again before an Immigration Judge for further fact-finding.

In *Matter of A-K*-, in a case brought by a father seeking to protect his two daughters, the BIA held that a parent is not eligible for asylum based solely on a fear that a daughter would be subjected to female genital mutilation. The BIA ordered the father deported to Senegal. The daughters, the BIA noted, could remain here either with their mother (who was not (yet) in removal proceedings herself) or with a legally appointed guardian. This devastating decision effectively makes family separation the price of a girl's protection. Unfortunately, in August 2009, the Court of Appeals for the Fifth Circuit declined to review the case, leaving the BIA's decision as binding precedent on Immigration Judges.²⁹

Government adjudicators and lawyers have expressed resistance to asylum claims based on other types of gender-related persecution as well. In the 2007 *Matter of A-T*- decision, for example, the BIA completely discounted the applicant's fear of a forced marriage. They agreed that as an educated woman she might want to marry a man of her choice and for love and that there were "valid concerns" about birth defects related to being forced to marry her first cousin.³⁰ However, they concluded that such a situation was not a basis for an

asylum claim.³¹ Also in 2007, the US Solicitor General objected to asylum for a young Chinese woman fleeing a forced marriage into which she was sold by her parents for \$2,200, in large part because the majority of the women in the world are forced or sold into marriage.³²

Where does that leave women seeking protection in the United States from gender-related persecution?

There have been few positive, precedent-setting decisions in the field of gender-based asylum, and Immigration Judges, the BIA, and federal circuit courts have been anything but uniform in how they follow—or instead choose to distinguish and thus depart from—positive decisions like *Matter of Kasinga*. Administrative guidance also continues to be only in the form of memos, legal briefs, and draft regulations, none of which is binding system-wide, and some of which confuse rather than clarify the applicable standards. As a result, women asylum seekers today confront a US asylum system that remains widely inconsistent in resolving gender-based claims.³³ This inconsistency and uncertainty leaves many women asylum seekers in a tortuous legal limbo that can last for many years, unable to move forward with their cases, regularize their immigration status, or petition to reunite with children they were forced to leave behind.³⁴

The Womb-to-Tomb Nature of Gender-Based Violence

The story of the Tahirih Justice Center client below exemplifies just how entrenched and pervasive gender-related violence is in some communities and countries, affecting women at every step and stage of their lives.

Tida* has no memory of the genital mutilation she was subjected to as an infant, but she experiences the consequences every day. She suffers constant pain and burning in her genital region and severe cramps during her menstrual cycle. This was (and is) a mandatory ritual in Tida's home tribe in West Africa, and one of her aunts was in charge of performing the rite on girls in their city and the surrounding countryside.

When Tida was just two years old, her parents sent her to live in the house of her eldest aunt. She worked as a servant in her aunt's family home for the next twenty years—cooking, washing clothes, and doing housework for the family. Tida woke up every day at five in the morning to start work, and, yet, was so small that she had to stand on a chair to make her aunt's bed.

Although Tida managed to escape and return home two or three times, her parents always made her return to her aunt's house. In Tida's own words, “in my country, when they give you away, they give you away for life.”

Every day Tida brought lunch in to her aunt's son, her cousin, who lived in a separate section of the family home. One day, when Tida was around 8 years old, her cousin, who was 22 at the time, grabbed her as she entered the room and raped her. Afterwards, he threatened to kill her if she ever told anyone. Tida was raped by her cousin every day for the next ten years.

Also around the time she turned 8, a man living down the street from her aunt's house, Lamin, pulled Tida into his house as she was walking past on an errand, stuffed a handkerchief down her throat, told her he had a knife, and raped her. Lamin belonged to a prominent family in the community and said he would kill her if she ever spoke about what happened.

(Tida's story continues on page 10)

(Tida's story continued from page 9)

Lamin continued to rape her every few weeks when she was forced to go past his house; the assaults finally ended after three years when Lamin immigrated to the United States.

Tida finally escaped from her aunt's house when she was 21 years old, and when her parents learned how badly she had been treated, they did not make her return. Tida began to grow more and more anxious, however, expecting that soon she would be forced to marry. In Tida's tribe, a woman must be a virgin at marriage: "to be not a virgin is an abomination which results in severe consequences and humiliation. The woman will be known and treated as a whore, the marriage will be annulled, and the woman's father may even divorce her mother because the offense is so great." Because of the rapes, Tida was terrified at what her future husband, her family and her tribe would do to her if they discovered she was not a virgin.

Around this time, Lamin returned and decided he wanted to take her as his wife. Tida's family approved the marriage because Lamin's family was so powerful and influential. Tida could not bear the thought of marrying Lamin, but under the circumstances, neither could she hope to marry anyone else. On the night of Tida's wedding to Lamin, when they were inside the marriage hut, Tida cried and told Lamin "you know what you did to me – make things right." In order to save herself and her family from terrible retribution and disgrace, Tida had no choice but to marry the man who had raped her beginning when she was eight years old.

After the wedding, Lamin returned to the United States, leaving Tida a virtual prisoner in his family's compound. Tida's in-laws treated her as a servant. Lamin brought Tida to the United States using false papers (leaving Tida with no legal status) and forced Tida to care for the four children that Lamin had with his mistress here. Both Lamin and the children beat Tida severely. Lamin raped her nearly every day and threatened her often, saying that it was very easy to kill someone in the United States and ship them back to their home country, and no one would ever know. Tida gave birth to three daughters during the marriage, and Lamin would tell her that he was going to keep the girls and have her deported if she ever told anyone about the abuse.

After the birth of each daughter, Tida received greater and greater pressure, letters and calls from her family and community members in her home country, demanding that she bring her daughters back to be cut as she had been. Although Tida did not remember her own genital mutilation, she had attended ceremonies and watched as other girls from her community were taken, blindfolded, and cut with scissors and small knives. Some of the girls bled to death during the ritual, and Tida worried what would happen to her daughters. The family and community pressure turned to outright threats.

Tida finally managed to leave Lamin after enduring seven years of abuse. She obtained a divorce and won custody of her daughters. Although Tida was finally free of her abusive marriage, she remained at risk from her family and community in her home country. Tida learned what had happened to her divorced sister, who had also objected when it was time for her own daughters (Tida's nieces) to be cut. Although Tida's sister tried to protect the girls, they were kidnapped and forcibly cut by others in the community. Tida's sister was then married off to a man fifty years her senior as punishment for going against the family's traditions.

Tida's asylum claim based on this vast complex of past and feared future persecution was granted in early 2009. Tida can now remain in the United States, finally safe and free, with her daughters.

*Tahirih client's name has been changed to protect her safety and privacy.

Key Hurdles to Gender-Based Asylum Claims

All the elements of the refugee definition—past persecution or a well-founded fear of future persecution on account of one of the five protected grounds, and an inability or unwillingness on the part of one’s own State to offer protection—are interrelated concepts and require overlapping legal and factual analyses. As a result, women’s asylum claims are often plagued by a “ripple effect” when an adjudicator’s flawed analysis of one element spills over into the analysis of other elements as well. The lack of authoritative, binding guidance in the form of statutes or regulations exacerbates and compounds these problems.

Explained in greater detail below are some of the common barriers that US asylum law currently interposes between women asylum seekers and protection:

Establishing that the harm rises to the level of “persecution”

“Persecution” is understood in asylum law as the infliction of suffering or harm on those who differ in a way regarded as offensive by the persecutor. Persecution goes beyond mere discrimination or harassment; it is harm “of a deliberate and severe nature . . . such that [it] is condemned by civilized governments.”³⁵

The first hurdle that women asylum seekers often have to overcome is to ensure that adjudicators recognize “deliberate and severe” violations of women’s human rights as every bit as “persecutory” as other types of serious human rights violations. Sadly, we are so accustomed to the pervasive oppression of women that adjudicators may fail to see gender-related harms in this revealing true light. Throughout the last decade, we have continued to see decisions made by judges and briefs filed by government lawyers that grossly discount the types of human rights violations that women suffer, or even attempt to discredit them as valid grounds for asylum precisely because they are so pervasive.

In 2007, for example, in *Matter of A-T*, the BIA bluntly compared the female genital mutilation endured by the applicant to the “loss of a limb,”³⁶ despite the permanent and ongoing physical and psychological devastation that the practice causes. In the same case, the BIA declined to consider the applicant’s fear of a forced marriage as grounds for her protection, downplaying it as an arranged marriage and mischaracterizing her fear as merely “the reluctant acceptance of family tradition over personal preference.”³⁷ The BIA asserted that it did “not discount the respondent’s concerns” about her forced marriage, even while discounting all of the evidence she presented. Displaying a distressing lack of understanding of the grave and lifelong violation that occurs when a woman is forced to marry against her will, the BIA cited the fact that the intended groom and the applicant “are of similar ages and backgrounds” as reasons that the arrangement would not “disadvantage” her.³⁸

In other cases, the government has sought to defeat women’s asylum claims with the simplistic and irrelevant argument, essentially, that “it [the harm in question] happens” and “it happens a lot” (*cf.* US Solicitor General’s objecting to asylum for a Chinese woman fleeing a forced marriage into which she had been sold;³⁹ and DHS’ objecting to asylum for a Somali woman fleeing female genital mutilation⁴⁰). The fact that serious human rights abuses occur, and may be lamentably common around the world, does not seem similarly invoked to attempt to defeat asylum claims based on race, religion, nationality, or political opinion.

Another problem that women asylum seekers face is an adjudicator who sees one type of harm that a woman endured in a vacuum, rather than as part of a larger complex of the womb-to-tomb persecution that women

experience in some societies. [See *Tida's Story*, at 9.] In September 2007, in *Matter of A-T*, the BIA denied withholding of removal to a woman who had endured female genital mutilation as a child, treating it as a “one-time” occurrence.⁴¹ This “one-time harm” premise seems particularly false when applied to female genital mutilation, which is prevalent in communities and countries in which women often face several further threats to their life and freedom, including forced marriage and brutal domestic and sexual violence. And the premise seems uniquely applied in the context of gender-related harms, even as it would be obviously illogical “to find that a political dissident whose tongue was cut out could be found to have no future fear of harm on account of her political opinion, merely because she cannot again lose her tongue. Or that a man whose house is burned down on account of his tribal identity fears no future danger since that house has already been destroyed.”⁴²

As noted above, in September 2008, the Attorney General ordered the BIA to reconsider its decision in *Matter of A-T*. The Attorney General observed that female genital mutilation “is indeed capable of repetition” in certain forms,⁴³ but more importantly, that the BIA “was wrong to focus on whether the future harm to life or freedom that [the applicant] feared would take the ‘identical’ form—namely, female genital mutilation—as the harm she suffered in the past.”⁴⁴ The BIA has since remanded *Matter of A-T* to an Immigration Judge in order to re-evaluate the facts supporting the applicant’s claim in light of the framework set out by the Attorney General.⁴⁵

Showing the “on account of” connection between the persecution and one of the grounds protected under the Refugee Convention

A second hurdle that a women asylum seeker may face is proving that the harm was inflicted “on account of” her “membership in a particular social group” (or another protected ground). Adjudicators have at times taken an overly narrow approach to analyzing whether this “nexus” element is met. This can lead to an unfair denial of gender-related claims in particular: the types of harms women suffer may be seen to reflect purely “personal” motives (especially where the persecutor is a family member); to be chalked up as purely criminal acts; or to be ascribed to culture or tradition. In most women’s cases, too, the motivation behind the infliction of the harm by such non-State actors is unlikely to be articulated, broadcast, or memorialized in the same way that a government’s suppression of its political opponents might be highly publicized.

The BIA’s narrow analysis of nexus was a key factor in its 1999 denial of asylum to Ms. Rody Alvarado, who based her claim on years of brutal domestic violence and her government’s failure to protect her.⁴⁶ In *Matter of R-A*, the BIA found that Ms. Alvarado had not shown that her husband was motivated to harm her “on account of” her membership in a particular social group (essentially, Guatemalan women intimately involved with abusive Guatemalan men). The BIA’s first rationale was that Ms. Alvarado’s husband appeared only to target her, and not other members of that social group.⁴⁷ The BIA’s second rationale was that, despite evidence that “the views of society and of many governmental institutions in Guatemala can result in the tolerance of spouse abuse at levels we find appalling,” this evidence did not support an argument that this broader context played a role in motivating her husband to abuse her.⁴⁸

The preamble to the 2000 draft regulations proposed by DOJ addresses the BIA’s flawed conclusions, explaining that just as “in a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor,” so, too, might an abuser be motivated to harm his victim because of her gender or subordinate status in their relationship, “even though social limitations and other factors result in the abuser having the opportunity and . . . motivation” only to harm the one woman who is in a relationship with him. In both circumstances, the persecutor would be motivated by a characteristic that the victim shares in common with others—being a slave, or being a woman in a subordinate status in a relationship—even though he might only harm the victim herself.⁴⁹

When Legal or Social Norms That Tolerate Violence Against Women Result in a “Failure of State Protection”

In 2000, in a statement released with the proposed draft regulations, the US Department of Justice (DOJ) criticized the Board of Immigration Appeals’ mischaracterization of domestic violence in *Matter of R-A-* as “a private, family matter.” Importantly, DOJ acknowledged

“that certain forms of domestic violence may constitute persecution, despite the fact that they occur within familial or intimate relationships . . . The proposed rule recognizes that such patterns of violence are not private matters, but rather should be addressed when they are supported by a legal system or social norms that condone or perpetuate domestic violence.”

— US Dep’t of Justice, INS, *Questions and Answers on the R-A- Rule*, (Dec. 7, 2000).

The Tahirih client stories below exemplify the desperate predicament in which women facing gender-based persecution find themselves—just like political activists, religious dissidents, or ethnic minorities who face other forms of persecution—when the legal system and society conspire in perpetual threat to their lives and freedom.

Serena* was happily married with two small children when her family forcibly “remarried” her to a wealthier man who already had five wives and 25 children. Serena fled to her husband’s home and refused to see this new man again. The police arrested her for “making a deal in bad confidence” with the man to whom her family had promised her. Serena was only released after she swore to return to the man, but instead she went into hiding with her husband. So the police came after Serena, arrested her again, held her in a filthy cell and beat her.

Zahra*, an educated professional, came to the United States from Afghanistan for further training. A relative intent on marrying her—who had (and abused) one wife already, and was associated with the Taliban—spread lies that she had been corrupted by the West and brought shame on her family, in an attempt to make marriage to him the solution to salvage her honor. The men in Zahra’s family insisted that she return and marry this man. Fearing a lifetime of abuse and rape by a man she did not love or choose, Zahra refused. Her refusal enraged her family further and they threatened to kill her. As Zahra explained, “men in Afghanistan kill their wives, daughters or other women who bring shame to their families with their bare hands. I know of many cases where women have been killed by their fathers, husbands or brothers. They can commit these crimes with impunity, as the police do not interfere, claiming they do not intervene in domestic matters.”

Aminata*s uncle, who had married her mother after Aminata’s father died, forced Aminata to marry a much older man, who viciously beat and raped her. This man and his family also forced her to undergo female genital mutilation after she gave birth to a son. After Aminata was cut, she was in even more excruciating pain than before when the man would rape her. Aminata sought help from the police, but they refused to help her, saying it was “normal” for a husband to abuse his wife. Under the law of her country, Aminata could not get a divorce. Aminata fled her husband but could not escape, since when he pressured her family, they told him where she had gone.

**Tahirih clients’ names have been changed to protect their safety and privacy.*

Second, the preamble to the regulations makes clear that the broader legal and social context is both relevant and vitally important to the analysis of nexus in domestic violence-based asylum claims.⁵⁰ This is consistent with the Supreme Court's decision in *INS v. Elias-Zacarias*,⁵¹ which states that an asylum seeker can demonstrate the motive of the persecutor through either "direct or circumstantial" evidence.⁵² The preamble to the regulations construed this to mean "any direct evidence about the abuser's own actions," as well as "any circumstantial evidence that such patterns of violence" are "supported by the legal system or social norms in the country in question" and "reflect a prevalent belief within society or within relevant segments of society."⁵³

DHS has since cited the nexus framework proposed in the 2000 draft regulations as persuasive authority in two briefs filed in domestic violence cases, one submitted to the Attorney General in 2004 regarding *Matter of R-A*, and one submitted to the BIA in April 2009 regarding *Matter of L-R*.⁵⁴ Like the 2004 DHS brief, the 2009 DHS brief echoed the draft regulations' view that such contextual factors are both valid and valuable insights into the persecutor's motives in domestic violence asylum claims,⁵⁵ because they "work in concert" to "reinforce [an abuser's] confidence that he may abuse [his victim] without interference or reprisal."⁵⁶

While the analytical position taken on nexus in these two DHS briefs is helpful, like the 2000 draft-but-not-final regulations, the briefs have no binding effect on adjudicators across the country that continue to struggle with reaching decisions in these cases without the benefit of clear and authoritative guidance.⁵⁷

Fitting the claim into one of the grounds protected under the Refugee Convention, especially the "particular social group" category

Because "gender" is not a specifically enumerated ground in the refugee definition, most asylum claims involving gender-related persecution are based on the "particular social group" ground, though they may also involve harm inflicted on account of "religion," "political opinion," or other grounds.

Exactly what is—and is not—required to demonstrate the existence of a "particular social group" has become one of the most contentious issues in asylum jurisprudence. In the 1985 decision *Matter of Acosta*,⁵⁸ the BIA outlined a framework in which "particular social groups" are comprised of individuals who 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."⁵⁹ The BIA expressly recognized gender as one such characteristic.⁶⁰ The BIA arrived at this framework by interpreting particular social group in line with the other grounds of the Refugee Convention—race, religion, nationality, and political opinion—all of which concern characteristics that are either immutable or fundamental to an individual's identity, and as such, warrant protection from persecution.

Most federal circuit courts have adopted *Acosta's* "immutable or fundamental characteristics" approach to analyzing social group claims.⁶¹ DOJ also expressly embraced the *Acosta* approach in its 2000 proposed draft regulations.⁶² The preamble to the regulations observed that "[g]ender is clearly such an immutable trait," that an applicant's "marital status" could also be considered immutable (if religious, cultural, or legal constraints prevented a divorce), and further, that "all relevant evidence" should be considered in assessing whether a characteristic is "immutable or fundamental," including information both about the applicant's individual circumstances and about conditions in her country and society.⁶³

Despite the widespread acceptance of the *Acosta* approach, and that *Acosta* expressly recognized gender as an immutable characteristic, adjudicators have not accepted gender, standing alone, as sufficient to constitute a "particular social group." Instead, a combination of "gender plus" one or more other characteristics that define and delimit the group has been required.

Difficulties defining a particular social group that is neither too broad, nor too narrow, but just right

In rare instances, federal circuit courts have held that gender plus ethnicity can suffice to define a particular social group. In a case involving female genital mutilation, for example, the Ninth Circuit Court of Appeals approved a particular social group defined as “Somali females” or “young girls in the Benadiri clan.” The Ninth Circuit stated that it was simply “logical” to recognize that girls or women of a particular clan or nationality could constitute a social group, since “[f]ew would argue that sex or gender, combined with clan membership or nationality, is not an ‘innate characteristic,’ ‘fundamental to individual identity.’”⁶⁴

Other courts, however, have accepted a “particular social group” only when it is far more narrowly drawn. Such formulations are usually based not only on gender plus ethnicity, but also on a combination of additional characteristics like marital status, age, education level, absence of male protection, opposition to abuse, or the rejection of social or cultural norms.

In its 1996 landmark *Kasinga* decision, for example, the BIA recognized Ms. Kassindja as a member of a social group consisting of “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice.”⁶⁵ Applicants and Immigration Judges alike have thereafter tended to propose particular social groups that were similarly compound and contorted, in an attempt both to closely track *Kasinga*’s successful social group formulation, and to steer clear of any argument that to recognize a more broadly defined (though perhaps more accurately defined) social group would risk “opening the floodgates” to a tide of women seeking protection in the United States.⁶⁶ [See Appendix A: *The Truth Trickles Out: There’s No Reason to Fear a ‘Flood’ of Women Asylum Seekers*, at 42.] Following this careful path, in *Matter of R-A*—an immigration judge had initially granted asylum to Ms. Alvarado based on a social group comprised of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”⁶⁷

“It would . . . be inaccurate to say that the social group is broadly defined by gender, the marital relationship, by her inability to leave the relationship or nationality. Rather it is the space occupied by the intersection of these factors—married women in Guatemala who are unable to leave the relationship—that is the targeted characteristic.”

— US Department of Homeland Security, Position on Respondent’s Eligibility for Relief, *Matter of R-A* (February 19, 2004) (emphasis added).

Unfortunately, such complex formulations can be self-defeating. Often this is because they are “impermissibly circular,” by defining the group primarily by the persecution that is feared rather than by immutable or fundamental characteristics.⁶⁸ A narrowly defined social group can also prevent adjudicators from seeing the full continuum of harm that a woman seeking asylum may face if she is returned to her home country. That is, if a woman claims membership in a social group of “young female members of the X tribe who have not undergone female genital mutilation,” then the fact that she may also be subjected to other gender-related persecution throughout her life as a member of that tribe—such as forced marriage, domestic violence, or “widow” rituals—may not be seen as relevant to the narrow social group she has defined.⁶⁹ By contrast, if the social group were defined simply as “women of the X tribe,” then all the ways in which women of that tribe are persecuted would be seen as relevant to her asylum claim.

Difficulties meeting additional burdensome requirements imposed post-Acosta

Since the BIA’s positive decision in *Matter of Kasinga* and DHS’s 2004 brief in *Matter of R-A*—arguing that Ms. Alvarado had suffered persecution on account of her membership in a particular social group, the BIA in a series of (non-gender-based) cases introduced two additional hurdles for defining a particular social group:

“social visibility” and “particularity.”⁷⁰ These new requirements have unfortunately been adopted by several federal circuit courts of appeals as well.⁷¹

With respect to “social visibility,” the BIA claimed that guidelines issued by the UN High Commissioner for Refugees (UNHCR) in 2002 “confirm that ‘visibility’ is an important element in identifying the existence of a particular social group.”⁷² Yet in the guidelines cited by the BIA, UNHCR refers to whether a group can be “perceived” or is “cognizable” as a group by society, not visible. More importantly, the UNHCR guidelines advise adjudicators to use this “social perception” approach only as an alternative—*not as an addition*—to the preferred means of establishing a particular social group, which is the *Acosta* approach, requiring identification of a shared group trait that is “innate, unchangeable, or . . . otherwise fundamental to identity, conscience or the exercise of one’s human rights.”⁷³ The BIA’s imposition of “social visibility” as a requirement poses a

“The only way, on the Board’s view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend ‘I am a Mungiki defector.’”

— Gatimi v. Holder, No. 08-3197
(7th Circuit August 20, 2009) (Posner, J.).

significant obstacle to all gender-based cases, but is particularly problematic for domestic violence-based asylum cases in which the abuse and even the victim herself may be purposely shielded by the abuser from the public eye.⁷⁴

A frustrated judge on the Seventh Circuit Court of Appeals recently lamented that the BIA has also been wildly inconsistent, recognizing some particular social groups without reference to social visibility, but also

“refusing to classify socially invisible groups as particular social groups [] without repudiating the other line of cases.”⁷⁵ It is indeed impossible to reconcile how the BIA can recognize a social group consisting of “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice,” and yet reject a social group consisting of “young Bambara women who oppose arranged marriage,” ostensibly because the latter (but not the former?) does not have “the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them.”⁷⁶ Requiring a particular social group that is being persecuted to be socially visible also makes no sense, since “if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being social visible.”⁷⁷

As for “particularity,” the BIA stated in a 2008 case, *Matter of S-E-G-*, that the key question is whether the social group described is “sufficiently particular” or is “too amorphous . . . to create a benchmark for determining group membership.”⁷⁸ The BIA has therefore rejected social groups premised on characteristics that “remain amorphous because ‘people’s ideas of what those terms mean can vary.’”⁷⁹ According to the BIA, however, this is not all that “particularity” demands: “The essence of the ‘particularity’ requirement . . . is whether the proposed group . . . would be recognized, in the society in question, as a discrete class of persons.”⁸⁰ Framed in this way, “particularity” seems simply a restatement of “social visibility,” and thus not an independent “third” test to determine a particular social group. Moreover, when a social group is properly defined under *Acosta*, any notion of particularity has likely been established.

In practice, it is puzzling what, in particular, really makes the requirement of “particularity” an independent test. An examination of the 2009 brief submitted by DHS in a domestic violence-based asylum case, *Matter of L-R-*, reveals how convoluted a “particularity” discussion can become. The DHS brief states that the respondent’s own proposed particular social group of “Mexican women in an abusive domestic relationship who are unable to leave” is deficient because the term “abusive” is too amorphous, since there may be no general consensus in Mexican society as to what constitutes an “abusive” domestic relationship.⁸¹

However, the two alternative formulations proposed by DHS—1) Mexican women in domestic relationships who are unable to leave and 2) Mexican women who are viewed as property by virtue of their positions

within a domestic relationship⁸²—are arguably also susceptible of being called deficient because they likewise contain terms (“domestic relationship,” “unable to leave,” “viewed as property”) that are “amorphous,” subjective, or as to which no general consensus may exist in Mexican society. Indeed, DHS admits that these terms could raise concerns about particularity as that term has been defined by the BIA.⁸³

That said, DHS asserts that any such concerns can be addressed through the same “case-by-case, fact-specific examinations” required in other aspects of an asylum case.⁸⁴ And DHS’ own articulation of “particularity” is that “a particular social group must be defined with sufficient particularity that it clearly delineates who is in the group and accurately identifies the shared trait on account of which the applicant is targeted by the persecutor for harm.”⁸⁵ By the time DHS reaches the end of its winding discussion of “particularity,” it appears DHS has simply come full circle, right back to the *Acosta* standard.

Adhering to *Acosta*, without more, would rescue the standard to establish a particular social group from the hopeless muddle of additional murky requirements that DHS, the BIA and others have attempted to layer upon the *Acosta* core. In essence, once a “particular social group” has met the *Acosta* test, then that group will also typically be both “recognizable” and “sufficiently particular” to respect the integrity of the refugee definition. Dispensing with these additional tests simply avoids further unnecessarily tortured analyses that, as the jurisprudence has shown, are highly vulnerable to misconstruction and misapplication.

Charting a clear path forward for women asylum seekers

Critics have called the decade-plus wait for a decision in Ms. Alvarado’s case and the continuing hold-up on the issuance of gender-based asylum regulations “an egregious example of public foot-dragging and bureaucratic inefficiency in immigration rule-making.”⁸⁶ The lack of clarity in gender-based asylum law has given rise to a repeated need for appeals of judges’ decisions,⁸⁷ grassroots and Congressional advocacy campaigns, and interventions by several Attorneys General to break protracted impasses or prevent grave injustices.

The DHS legal brief filed in April 2009 in the domestic-violence based asylum case, *Matter of L-R-*, has been heralded as announcing a “new policy that permits asylum for battered women”⁸⁸ which at long last points the way forward. As noted above, however, while it is certainly a “positive signal” that this Administration is concerned about resolving long-outstanding issues related to gender-based asylum,⁸⁹ the 2009 DHS brief actually breaks little new positive ground not already covered by a similar 2004 DHS brief. Moreover, the 2009 DHS brief takes the negative step of adopting the problematic additional requirements (“social visibility” and “particularity”) that the BIA has imposed on “particular social group” asylum claims in this interim. Most importantly, the 2009 DHS brief is properly seen as a statement of one agency’s position in one case, not the unequivocal and binding expression of national policy on gender-based asylum.

Until further definitive action—legislation, or joint DOJ-DHS regulations, or both—is taken to affirm and clarify the scope of protection available to those fleeing all forms of gender-based persecution, women and girls will continue to find themselves without firm footing as they seek justice in the United States.

Obstacles to Parent-Child Asylum Claims

Under current law and jurisprudence, there is no clear path to asylum or withholding of removal⁹⁰ for parents who fear that their children will suffer persecution.⁹¹ Because female genital mutilation by tradition is often inflicted on very young girls, such parent-child asylum claims have predominately been raised in that context.⁹² One recent decision has struck a harsh blow to the ability of families, not only their daughters, to remain intact and unharmed.

In September 2007, in *Matter of A-K*,⁹³ the BIA held that a father was not eligible for withholding of removal due to his fear that his two US citizen daughters would be subjected to female genital mutilation if they returned with him to Senegal. The BIA then ordered the father deported, and in August 2009, the Fifth Circuit Court of Appeals declined to review the decision, agreeing with the BIA.⁹⁴

To Protect or To Parent?

US asylum law often forces an agonizing choice on parent-protectors of daughters facing female genital mutilation.

“...normally a mother would not be expected to leave her child in the United States in order to avoid persecution.”

— *Matter of Dibba*, No. A73 541 857 (BIA Nov. 23, 2001) (unpublished).

“I do not believe that Congress intended any parent to face that choice. If 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. Our consciousness of FGM [female genital mutilation] has now grown, as has our knowledge that hundreds of thousands of children are compelled to serve as child soldiers in deadly conflicts around the world.”

— *Abebe v. Ashcroft*, 379 F.3d 755, 763 (9th Cir. 2004) (Ferguson, J., dissenting), *rev'd en banc* by *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir 2005).

The BIA rested its decision primarily on factual findings—that the girls could avoid the risk by remaining in the United States with their mother, who was not in removal proceedings, or with a legally appointed guardian; or that the family could presumably avoid the risk by relocating because female genital mutilation is practiced only by certain groups in certain parts of Senegal, and the government has made serious efforts to combat the practice. The BIA also found that the father would be harassed, but not persecuted, for his opposition to the practice.

Advocates have disputed the BIA's factual findings, knowing the kind of round-the-clock vigilance that would be required of a parent to protect a daughter who comes from a community where female genital mutilation is prevalent and where relatives will not desist, even kidnapping a girl and forcibly overpowering her parent, to ensure that the girl is cut.⁹⁵

But it is the BIA's legal reasoning that is most troubling, and threatens the most devastating consequences for other parents trying to protect their daughters without having to relinquish the right to be a parent to those daughters.⁹⁶ The

BIA's decision forces parents of girls who face female genital mutilation on return to the parents' home country to make an impossible choice between two torturous extremes: to place those girls at risk but keep their families together; or to remove the risk only by surrendering those girls to grow up a world apart from them.

Driving the BIA's flawed legal analysis was the BIA's fixation on the fact that *A-K*'s daughters had a legal right to remain in the United States.⁹⁷ Surveying federal circuit court decisions on the question, the BIA concluded that the major distinction between cases that granted or denied a parent's eligibility for asylum or withholding of removal was whether a child without US citizenship or legal permanent resident status would be "constructively deported" along with the parent to face persecution.⁹⁸

This is an entirely false distinction. Any girl with a well-founded fear of female genital mutilation in her parents' home country would be eligible to remain here (whether because she has US citizenship or other legal status, or because she herself applies for asylum).⁹⁹ Moreover, the distinction threatens to create an unnecessary new "foster class" of children who must become wards of the state rather than continue to be cared for by their own parents.¹⁰⁰ The distinction is also at stark odds with the BIA's own natural assumption in prior decisions that a child will follow her custodial parent if that parent is forced to leave the United States, regardless of the child's citizenship status.¹⁰¹

The BIA next characterized the father's claim in *A-K* as merely "derivative" of his daughters' principal fears of persecution.¹⁰² The BIA noted correctly, unfortunately, that under US asylum law, while the spouse or minor child of an individual granted asylum can be granted the same status "derivatively," there is no statutory provision that permits parents to derive asylum from their children.¹⁰³ But the BIA failed to note that this gap in protection stands at sharp odds with UNHCR guidance permitting child-to-parent derivative refugee status where female genital mutilation is threatened,¹⁰⁴ as well as with other humanitarian schemes under US immigration law that permit parents of vulnerable minor children, such as victims of human trafficking, to derive their status from the child's principal application for protection.¹⁰⁵

Most importantly, the BIA wrongly concluded in *A-K* that the evidence did not show a clear probability that the father's own life or freedom would be threatened upon his deportation. By misconstruing the father's claims as derivative, not personal, the BIA declined to accept the proposition that persecution to one's child is persecution to oneself,¹⁰⁶ a straightforward theory of harm that was readily accepted by the Sixth Circuit Court of Appeals in the leading favorable case on parent-child asylum claims.¹⁰⁷ The BIA's position is inexplicably unsympathetic to the fact that the genital mutilation of a daughter against a parent's will causes the parent severe mental anguish, including:

*"witnessing the child's pain and suffering (both in the short and long term), the possible death of the child from the procedure, the feeling of having failed as a parent and protector, having personal knowledge of the lifelong suffering caused by FGC [female genital cutting] for mothers who have undergone the practice themselves... [It also] undermin[es] the parent's right to make decisions about his or her child, as well as the child's trust in the parent, and may irreparably harm the relationship."*¹⁰⁸

Instead, the BIA agreed with a Fourth Circuit Court of Appeals decision that discounted these grave consequences as "incidental psychological suffering" which, without accompanying physical harm directly to the parent, cannot support a claim for asylum or withholding of removal.¹⁰⁹

The BIA's decision in *A-K* unfortunately reflects just the latest garbled pronouncement in a long line of confused and conflicting jurisprudence in parent-child asylum claims. In addition to the BIA's own inconsistencies, divergent decisions have come out of the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits on this issue.¹¹⁰

What is clear is that current asylum law and jurisprudence does not protect the best interests of the child, does not respect the special bond of parents with their children, does not promote family unity, and leaves parents with choices that are no real choice at all.¹¹¹ Adjudicators themselves have lamented the lack of authority they have to reach anything other than a patently unjust result in such cases.¹¹² Congressional action may therefore be needed to right the many wrongs that riddle this area of asylum law: among other possibilities, to clarify that extreme psychological harm can amount to persecution sufficient to support an asylum claim;¹¹³ that persecution of one's minor child is persecution to oneself;¹¹⁴ and to legislate a presumption in asylum claims that minor children, regardless of their citizenship or immigration status, would return with their parents to their home country and would thus be constructively deported upon the parents' removal.¹¹⁵ The status quo is untenable as a matter of law, and unconscionable as a matter of policy.

Open Wounds: A Mother's Anguish at the Genital Mutilation of Her Daughter

Both my daughter and I were forced to undergo female genital mutilation as young girls. I was cut when I was 11 years old. I am now 53, and 42 years later, I still vividly recall what happened to me. My daughter was cut when she was 7 years old. She is now 35 and 28 years later, her painful memories are still with her. Even though we were really only children, you are old enough at 7, 8, 9, 10, or 11 years old to carry with you the memory of that kind of horror forever. Every day of our lives it affects us, both physically and emotionally.

For me, the worst is what happened to my daughter. It hurts to talk about what happened to me, what I went through, what I go through still to this day, but I can do it, I can get through it without breaking down. But I cannot speak of what my daughter went through without weeping. I am overwhelmed with feelings of guilt and sadness that I could not protect her. This is unbearable torture for a mother, and yet I must bear it every day of my life.

It was my own mother who betrayed us both. Because she was the oldest in our tribe, and believed to have special powers to see the future, she was the tribal leader. She was ashamed to have any daughter or granddaughter who was not cut, because to her that meant the girl was not "clean." As my daughter grew older, I begged my mother not to cut her, reminding her of how awfully I had suffered. My mother promised me she would not cut my daughter, but she broke that promise. My daughter was taken by force from my hands one terrible night and brought by tribe members, including my mother, to another part of the compound. I was helplessly screaming and fighting hoping to save my daughter from the agonizing procedure. I was pregnant and carrying a child but I kept fighting and screaming until they started beating me and made me helpless by holding me down while they cut my daughter and I had to listen to her screams. There was nothing I could do to stop them. They did not take no for an answer.

They used an unsterilized razor blade to mutilate my daughter's genitals—most probably the same blade that was used to mutilate many, many other young girls that same day. My daughter remembers seeing the cut-out pieces of the other girls in the room where she was taken, pieces of flesh and blood just lined up. Afterwards, my daughter came out crawling on her hands and knees in pain, screaming like an animal. The wild sound she made is something I can hear in my memory even now. She was bleeding so much, it wouldn't stop—the leaves they applied after the procedure didn't help. My daughter was in too much pain to walk on her own, but no one was allowed to help her walk either. I still clearly remember my daughter having to crawl on her hands and knees for weeks afterwards.

(Story continues on page 21)

(Story continued from page 20)

My mother was ignorant and had old beliefs. But I am not like her. I did not want this to happen to my daughter, but still I could not protect her. I do not want any more generations of my family or anyone else's family to have to know this pain.

I wanted to share our story to help others understand what it is like for the women these girls become who carry those wounds with them forever afterwards. I say "wounds," because for me these are not "scars," not a past pain that is now finished. For me, these are lasting physical and emotional wounds. It also deeply affects my relationship with my daughters. All these issues are taboo—they are not discussed. For a long time, even though my daughter who was cut and I had a terrible experience in common, we could not talk openly about it, and so we could not even help each other through our shared suffering.

**Story shared with Tahirih in March 2008; name withheld to protect privacy and safety.*



Part II: Penalizing the Persecuted

The Particular Implications for Women and Girls of Harsh Immigration Laws

A 1996 immigration law, the “Illegal Immigration Reform and Immigrant Responsibility Act,” enacted restrictive provisions that undermine the United States’ commitment to offer protection to those fleeing persecution. This harsh law, together with later reactionary legislation and policy pronouncements following the September 11th terrorist attacks, has created barriers to safe haven for all asylum seekers, and interposed particularly significant and even insurmountable obstacles to women and girls fleeing violence and oppression. Part II examines:

- The inadequacy of current safeguards to prevent asylum seekers placed in “expedited removal” (essentially, summary deportation without a hearing) from being returned to persecution;
- The increasing detention of asylum seekers in prisons or prison-like settings with limited access to parole; and
- The unjust consequences of a filing deadline that bars asylum claims unless they are filed within one year of a person’s arrival in the United States.

The Expedited Removal Process

Prior to passage of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), individuals arriving at the US border without proper travel documents were guaranteed due process—deportation could only be ordered by an immigration judge, and the order could be challenged through appeal. The policy of expedited removal—one of IIRAIRA’s restrictive asylum reform measures—severely curtailed due process rights of asylum seekers, and increased their risk of unjust deportation to their country of origin. These concerns are magnified by a lack of adherence to and failure to enforce procedural safeguards that could protect individuals during the expedited removal process.

Expedited removal authorizes Customs and Border Protection (CBP) Officers to order the immediate removal of individuals attempting to enter the United States without proper travel documents. All individuals arriving at US airports or other ports of entry, or that are apprehended within 100 miles of a US land or sea border, are subject to the expedited removal process.¹¹⁶ If placed in expedited removal, individuals will be ordered removed from the United States unless they express a fear of return, ask for asylum, or claim citizenship, permanent residence, asylee, or refugee status during secondary screening by CBP Officers.¹¹⁷ Expedited removal orders can be executed based solely on the approval of a non-specialist CBP supervisor (instead of an Asylum Officer or Immigration Judge), and individuals may be sent back to their country of origin, and subject to a minimum five-year bar on return to the United States, without any chance to petition for judicial review of the CBP’s decision.¹¹⁸ Individuals who express a fear of return—that is also recognized as such by the CBP Officer—are referred for a credible fear interview before an Asylum Officer to determine their eligibility for asylum, and may request limited judicial review of the credible fear determination prior to their removal from the United States.¹¹⁹ [See Appendix B: *The Expedited Removal Process*, at 44.]

Since its inception in April of 1997, expedited removal has posed a significant hurdle for asylum seekers. Many individuals fleeing violence, oppression, torture, and other abuses cannot obtain travel documents or are forced to rely on false papers to evade detection by their persecutors, making it highly likely that they will be placed in expedited removal upon arrival in the United States.¹²⁰ Although procedures are theoretically in

Protection Left to Chance?

The 2005 USCIRF Report authorized by Congress highlighted the arbitrary nature of the expedited removal system, including the alarming finding that:

“the chance of being granted refuge may depend on which airport an asylum seeker uses.”

— Nina Bernstein, *Kennedy Airport is Called Toughest for Asylum Seekers*, *The New York Times* (February 10, 2005), at B2 (emphasis added).

place to channel individuals eligible for asylum to a credible fear interview with an Asylum Officer, CBP Officers often fail to adequately screen and recognize individuals with a fear of return.¹²¹ Even if CBP correctly identifies asylum seekers, poor record-keeping during screenings and interviews may omit information about or mischaracterize an asylum seeker’s story, compromising their credibility during later court hearings.¹²² Individuals in expedited removal are also subject to mandatory detention with limited chance for parole, isolating asylum seekers from service providers and support networks.¹²³

Controversy surrounding expedited removal has spurred numerous critical studies over the last decade documenting how the process often subjects asylum seekers to punitive treatment, and denies

In one study, a woman—shackled for 16 hours upon arrival at a US airport—described experiencing “shouting, screaming; poor translation; no explanation of procedure” and feeling ‘humiliated’ because she traveled so far to save her life and yet could not tell her story.

— Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), at 143-144.

them fair opportunities to petition for asylum in the United States.¹²⁴ Certain findings from these studies also indicate that expedited removal may unfairly hinder women asylum seekers. In 2005, the United States Commission on International Religious Freedom (USCIRF) released a report where, for the first time, researchers directly observed CBP inspections at airports and other border points-of-entry, providing an unparalleled view of the challenges asylum seekers face when subject to expedited

removal.¹²⁵ Among other findings, the USCIRF Report noted gender differences in credible fear referral rates, discussed the harsh impact of detention on female asylum seekers during the expedited removal process, and documented numerous procedural failures that could negatively impact a woman’s ability to obtain a credible fear interview and avoid return to persecution in her country of origin.¹²⁶ To date, many of the USCIRF Report’s recommendations have not yet been implemented and, in this interim, the Department of Homeland Security (DHS) has significantly expanded the use of expedited removal.¹²⁷

The expedited removal process can be a shocking and debilitating experience for asylum seekers who arrive in the United States hoping for refuge and protection. Although expedited removal affects many individuals fleeing persecution, certain fundamental problems with the expedited removal process can place women asylum seekers at particular risk for unjust removal.

I. Women may be ashamed or afraid to discuss sexual violence or intimate harms

Many female asylum seekers fleeing to the United States are seeking protection from or are survivors of rape, domestic violence, female genital mutilation, forced marriage, and other forms of gender-based violence. Religious and cultural barriers, feelings of shame, and fear of social stigmatization often prevents women from talking about the violence they experienced,¹²⁸ making it hard for women to articulate a fear of return to a CBP Officer. This reluctance may be compounded if interviews are conducted by male CBP Officers or if a male translator is used during the screening process.

Speaking about past persecution may be difficult for women experiencing Post-Traumatic Stress Disorder (PTSD) or other psychological trauma

Many asylum seekers fleeing torture, rape, or other forms of violence are already suffering from post-traumatic stress, anxiety, or depressive disorders when they arrive at the US border.¹²⁹ Adversarial interviews delving into painful past experiences may make survivors relive the trauma and persecution they suffered,¹³⁰ and it may be impossible for some women to discuss their experiences with CBP Officers without first receiving treatment and support.¹³¹

Lack of privacy during interviews may prevent a woman from telling her story

At certain ports of entry, asylum seekers are interviewed in open areas with little or no privacy.¹³² In an interview with *The New York Times*, the director of the USCIRF study noted that, particularly at Kennedy Airport in New York, lack of privacy and discomfort during open, at-counter interviews could discourage an arriving asylum seeker and customs officer from a full exchange of information.¹³³ This lack of privacy may be a particularly acute barrier for women seeking protection from sexual or domestic violence and prevent them from speaking to CBP Officers about their experiences.

Prison-like procedures can further traumatize women fleeing violence

Asylum seekers in expedited removal are often treated like criminals during the initial and secondary screening process, with CBP Officers using shackles and restraints, failing to provide food and water, and subjecting individuals to strip searches.¹³⁴ This punitive treatment may make women reluctant or wary of CBP Officers, and discourage them from speaking freely about their experiences.

2. Many women do not realize that they can ask for protection from gender-based violence

During secondary screenings, CBP Officers often fail to explain that individuals with a fear of return can ask for protection in the United States. Although regulations mandate that CBP Officers read a script notifying individuals in expedited removal that they may ask for protection based on fear of return,¹³⁵ past studies have shown that officers follow this procedure *in less than half of all screenings*.¹³⁶ Women arriving in the United States are likely unaware of US asylum laws and, even if they are, may not realize that fear of domestic violence, rape, and other gender-based violence could qualify them for protection.¹³⁷ Studies also show that women receive fewer credible fear interviews than men,¹³⁸ which may indicate that a failure to notify women about such protection, among other reasons, may lead to their removal to their country of origin.

3. Language barriers may prevent a woman from communicating a fear of return

Secondary screening procedure “places a premium on the ability of an applicant to verbalize his or her story, a requirement that is especially problematic when . . . the interview is conducted in a language that the applicant does not adequately understand.”¹³⁹ Interpreters are supposed to be used when necessary,¹⁴⁰ but officers frequently deny requests for translation assistance or rely on untrained or improper personnel (such as airline personnel from state-run carriers) that may compromise an individual’s ability to communicate their fear of return.¹⁴¹ Women fleeing certain types of persecution, such as female genital mutilation, may rely on euphemisms to describe the abuse they suffered, and poor translation, or use of a translator who does not agree with the woman’s decision to reject and flee certain cultural practices, may prevent a woman from being able to communicate a fear of return.

4. CBP Officers may fail to recognize gender-based or other non-traditional bases for asylum

Individuals expressing fear in non-verbal forms, such as crying or hysteria, or asking for asylum based on unresolved legal issues, such as domestic violence or other types of persecution that involve unsettled aspects of asylum law, should—according to official guidance—be referred for a credible fear interview during secondary screening.¹⁴² However, CBP Officers may not channel individuals who qualify under the above criteria to a credible fear interview with an Asylum Officer, forcing some asylum seekers to return to situations of violence and persecution.

CBP Officers may discount or entirely fail to recognize expressions of fear by women

Women arriving at US ports-of-entry may display non-verbal signs of fear, particularly if they endured sexual violence or other forms of persecution that are difficult to discuss with strangers or taboo to discuss

When a woman “spontaneously expressed fear of her ex-husband, crying and asking the officer to help her” at an airport in Houston, Texas, the officer questioning her recorded her response as:

“Not really a fear. My ex-husband does not like me.”

After being repeatedly told by the officer that she would be “in trouble” and would not see her family if she tried to claim fear of return, the woman withdrew her application for admission to the United States.

— Nina Bernstein, *Kennedy Airport is Called Toughest for Asylum Seekers*, *The New York Times* (February 10, 2005), at B2 (quoting USCIRF Report findings) (emphasis added).

at all. CBP Officers have failed to recognize non-traditional expressions of fear by some asylum seekers,¹⁴³ and may minimize women's experiences with and fear of domestic and sexual violence.

Conflicting guidelines may prevent women from obtaining a credible fear interview

During the expedited removal process, up to five governmental agencies can be involved in an applicant's asylum adjudication, and coordination is a continual challenge.¹⁴⁴ For example, although DHS has issued regulations stating that "an immigration inspector must refer an alien for a credible fear determination if that alien indicates 'an intention to apply for asylum, a fear of torture, or a fear of return to their home country,'" CBP Guidelines "provide the inspector with more discretion than the regulations, allowing the inspector to decline referral in cases where the fear claimed by the applicant is unrelated to the criteria for asylum."¹⁴⁵ This conflicting guidance can keep bona fide asylum seekers from receiving credible fear interviews,¹⁴⁶ and may pose particular obstacles to women fleeing forms of gender-based violence that fall into unsettled terrain under US asylum law.

5. Women in expedited removal are only eligible for protection under asylum law and the Convention Against Torture

Individuals placed in expedited removal cannot petition for the many other protections for survivors of violence available under US law – including the right to relief under the Violence Against Women Act or the Trafficking Victims Protection Act.¹⁴⁷ These restrictions, coupled with the unsettled nature of gender-based asylum law, may lead to preemptive deportation of women with valid claims to protection under US law.

The Detention of Asylum Seekers

Policies implemented as a result of the 1996 IIRAIRA have led to the detention of tens of thousands of asylum seekers in the United States. Advocacy organizations have joined with Members of Congress to repeatedly criticize the widespread detention of asylum seekers and the troubling conditions in which immigrant detainees are held.¹⁴⁸ The US government recently announced plans to reform the immigration detention system by expanding federal oversight, standardizing conditions, and consolidating locations where immigrant detainees are held.¹⁴⁹ But what is conspicuously absent from the government’s announcement is a clear commitment to due process safeguards for asylum seekers: there still are no legally enforceable standards regulating the conditions and length of their detention,¹⁵⁰ they continue to be denied adequate medical care and opportunities for parole, and, finally, the changes the government plans will likely only increase oversight while failing to reduce the number of individuals actually detained.¹⁵¹

Under the policy of “mandatory detention,” asylum seekers subject to expedited removal at US airports and other border areas must be detained by Immigration and Customs Enforcement (ICE) pending a credible fear interview with an Asylum Officer, which may take months to obtain.¹⁵² And even after an asylum seeker establishes a credible fear of return, she can still be detained for months until her application for asylum is finally adjudicated.¹⁵³ Parole is discretionary, and may only be granted if an asylum seeker submits a written request for release and meets several strict requirements for parole.¹⁵⁴ If ICE denies the parole request—as it often does—there is no external mechanism for review of that decision, such as the opportunity to go before an Immigration Judge for a custody determination hearing, a due process protection provided to most other detained immigrant populations.¹⁵⁵

Startling Statistics

In *Seeking Protection, Finding Prison*, Human Rights First reports alarming figures on the detention of asylum seekers since the Department of Homeland Security took over immigration enforcement in 2003:

- Use of “jail-like” detention facilities has increased by **62 percent**.
- Asylum seekers may endure **2 weeks to 6 months** in detention awaiting a credible fear interview, and months or even years in detention thereafter awaiting a decision in their asylum case.
- Estimates indicate that ICE currently paroles less than **13 percent** of asylum seekers in detention, down from **86 percent** in 2001.

In addition to this policy of mandatory detention, ICE has also stepped up the detention of individuals fleeing persecution who are already present and petitioning for asylum from within the United States.¹⁵⁶ Although asylum seekers who are not subject to expedited removal may request a parole hearing before an Immigration Judge,¹⁵⁷ they, too, face obstacles to release, including bond amounts set prohibitively high for most asylum seekers and improperly continued detention even after an asylum seeker has been found eligible for asylum or withholding of removal.¹⁵⁸ There are few limits on the length of time an asylum seeker may be detained, and recent studies have found that asylum seekers spend on average 5-6 months in detention, with some news reports documenting cases where asylum seekers were held for three, four, or even five years while awaiting a decision in their asylum case.¹⁵⁹

ICE officials have unchecked authority over the detention and parole of asylum seekers subject to expedited removal.¹⁶⁰ ICE operates as “both judge and jailer with respect to parole decisions,” and arriving asylum seekers are not afforded the

opportunity to go before an Immigration Judge for a custody determination hearing.¹⁶¹ In recent years, ICE has issued increasingly restrictive parole guidelines,¹⁶² parole grant rates have plummeted,¹⁶³ and the inconsistent interpretation of parole eligibility under the guidelines has led to widely varying outcomes for detained asylum seekers around the country.¹⁶⁴ In rare occasions where parole is available, ICE often attaches a bond requirement as a condition of release. In many cases, the bond amount is set at levels that are unattainable for refugees who fled to this country without any personal property or means of support.¹⁶⁵

Asylum seekers are often held at prison-like facilities in substandard conditions that are not appropriate for civil detainees. Many are placed in state-run prisons and local jails and may share cells with criminal inmates.¹⁶⁶ Asylum seekers are often forced to wear uniforms, provided with little or no privacy, subjected to repeated “counts” by prison guards, and confined to cell blocks or “pods” for most of the day.¹⁶⁷ Recreational and other activities are often severely limited, and detained asylum seekers may not have access to outdoor spaces with sunlight and fresh air.¹⁶⁸ Medical treatment is often inadequate, and prolonged detention can contribute to the deterioration of mental and physical health.¹⁶⁹ Visitation may be severely limited, with many prison-like facilities allowing only “no-contact” visits, forcing detained asylum seekers to visit with family through a glass partition or video screen.¹⁷⁰ ICE’s most recent parole guidance, released in 2007, significantly increases hurdles to parole¹⁷¹ and mandates that asylum seekers submit a written request for parole before their eligibility for release is even considered.¹⁷²

Although detention can be devastating for all asylum seekers who arrive in the United States in search of sanctuary, it may have a particularly harsh effect on women and girls fleeing persecution. Conditions in prisons, jails, and detention centers may further traumatize survivors of violence, and these facilities are ill-equipped to meet the needs of women and girls who have endured horrific gender-based persecution.¹⁷³ Women asylum seekers may feel especial desperation at the isolation from family, friends, and advocates, and at the slim chance for parole. For some women, detention is so traumatizing that they feel forced to abandon their petition for asylum, risking future persecution in their country of origin, rather than face the prospect of continued imprisonment.

I. Detention exacerbates trauma in women who have fled persecution

Asylum seekers are often highly traumatized when they arrive in the United States, and are thus more susceptible to “retraumatization” and other harmful consequences of detention.¹⁷⁴ In a 2003 study examining the mental health of detained asylum seekers, Physicians for Human Rights and the NYU/Bellevue Program for Survivors of Torture found that “[c]onfinement and the loss of liberty profoundly disturbed asylum seekers and triggered feelings of isolation, powerlessness, and disturbing memories of persecution that asylum seekers suffered in their countries of origin.”¹⁷⁵ ICE’s current detention model does little to protect and support female asylum seekers, making them particularly prone to increased trauma and further abuse.

Detained women may endure further abuse from criminal inmates and mistreatment by poorly-trained facility staff

Asylum seekers are often extremely isolated from family, friends, and community support networks while in detention,¹⁷⁶ placing them at greater risk for further abuse.¹⁷⁷ ICE-contracted prisons and jails often co-mingle immigration detainees with the regular prison population, and immigrant women fleeing persecution may share cells and living quarters with violent criminal inmates.¹⁷⁸ Women asylum seekers have been placed in

“The guards are always yelling. They always want us to fear them. They don’t communicate. They shout ... I don’t think they understand what we have been through.”

— Female asylum seeker describing treatment of detainees by detention facility staff. Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), at 115.

“They woke me up at 4 a.m. and told me to pack my stuff. They didn’t tell me where I was being taken. They took me to Processing and made me change into the clothes I was wearing when I came to this country. They put shackles on my legs and handcuffs on me, and a chain around my waist. And they gave me bags and took me to the van. I wasn’t sure if I was being taken to the airport to be deported. They didn’t tell me anything. I was very frightened.”

— Female asylum seeker, tortured in prison in her country of origin, describing her experience being transferred to a county jail. Her lawyer was not informed that she was moved. Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), at 13.

cells with violent criminals, including drug traffickers and murderers, and are more likely than male asylum seekers to be commingled with a detention center’s criminal population.¹⁷⁹ Detained refugee women have reported bullying, harassment, and intimidation, and, in a recent study by the University of Arizona, one detained asylum seeker refused to leave her cell “because the other women scared her.”¹⁸⁰ Women lacking English-language skills may have difficulty communicating with staff, making it hard to report abuse, ask for assistance, or follow orders given by detention staff.¹⁸¹ Detention staff are often not trained to work with survivors of trauma,¹⁸² and may place survivors in solitary confinement or isolation as punishment for “trivial offenses,” or for uncontrolled weeping, panic attacks, or other symptoms commonly associated with PTSD or depression.¹⁸³

Harsh, prison-like policies and procedures can strip women of privacy and control

Policies imposed by ICE and detention facilities often treat asylum seekers like criminals, denying them basic privacy rights and subjecting them to detention conditions that may further traumatize survivors of violence and abuse.¹⁸⁴ Asylum seekers are often forced to give up their clothing and personal belongings upon entering a detention facility, which may be all they possess after fleeing their home country in search of refuge.¹⁸⁵ Detainees are often held in dormitories or “pods” that hold up to 100 other inmates and lack private bathroom facilities.¹⁸⁶ Asylum seekers may be subject to unexpected transfers, often without notice and in the middle of the night, increasing their sense of disempowerment¹⁸⁷ and further distancing them from support networks and legal service providers.¹⁸⁸ Strip searches, routine at certain facilities that also contain convicted criminals, are “debilitating affronts to [women’s] dignity,” and can be particularly devastating for women asylum seekers from religious or cultural backgrounds that place great value on personal modesty.¹⁸⁹ In certain detention centers, women’s freedom of movement is severely restricted,¹⁹⁰ women are placed in restraints during transport,¹⁹¹ and forced to remain in shackles while receiving medical care¹⁹² or appearing before Asylum Officers and Immigration Judges.¹⁹³ These harsh conditions may have a profound effect on women, and, even in better-run facilities, female asylum seekers have reported widespread depression and even suicide attempts.¹⁹⁴

2. Women asylum seekers have limited access to desperately needed medical and mental health care while in detention

Detained asylum seekers may have acute medical needs that require immediate attention.¹⁹⁵ However, ICE policies still do not “comprehensively address the needs of survivors of violence” and ICE-mandated medical screenings at detention facilities can fail to identify victims of gender-based violence.¹⁹⁶ Women often require specialized treatment for injuries resulting from brutal rapes, female genital mutilation, and other forms of gender-based persecution, and they are unlikely to receive the level of care they need under ICE’s current guidelines for the medical treatment of detainees.¹⁹⁷

Detention facilities provide poor-quality and severely delayed health care, and often fail to treat refugee women’s specific medical needs ¹⁹⁸

Detention facilities housing asylum seekers often lack adequate medical staff, and severely backlogged medical care requests can create significant delays for detainees in need of treatment.¹⁹⁹ Detained women may be forced to request help for intimate health issues through male prison guards and other non-medical staff,²⁰⁰ and asylum seekers often have to use ICE Officers, prison guards, or other detainees for translation assistance during medical exams.²⁰¹ Many detention centers and jails require female detainees to be shackled and restrained during transport to and from outside medical appointments.²⁰² Some detention centers lacking proper exam rooms conduct medical exams behind a curtain where there is little physical and no sound privacy,²⁰³ and certain facilities keep a guard stationed in the room during medical treatment, causing discomfort and discouraging female detainees from asking for needed medical care.²⁰⁴ Refugee women with unique medical needs arising from past violence and abuse, including refugee women who have undergone female genital mutilation, may not be adequately screened for or provided with specialized medical and gynecological care.²⁰⁵

Detention may compound PTSD and other mental health conditions in women fleeing violence

Mental distress in asylum seekers is exacerbated by the prison-like conditions of detention,²⁰⁶ and a recent study found that over 80 percent of detained asylum seekers had signs of clinical depression, three-quarters exhibited anxiety-related symptoms, and fully half showed signs of PTSD.²⁰⁷ Despite these startling findings, most detention facilities do not monitor the mental and emotional well-being of detained asylum seekers,²⁰⁸ and psychological counseling and treatment is extremely difficult to obtain.²⁰⁹ Detained women with anxiety and depression have reported receiving only medication without accompanying therapy and fearing “negative consequences,” such as transfer or isolation, if they report their condition to security guards or medical staff.²¹⁰ Over-medication, inappropriate sedation, and mismanaged medical treatment have also been reported at detention facilities.²¹¹ This lack of attention to mental health can have tragic consequences, including increased rates of depression, anxiety, and attempts at suicide among women asylum seekers.

3. Detention may compromise a woman’s ability to obtain asylum and force some women to abandon valid asylum claims

Increasingly, ICE is detaining asylum seekers in prison-like facilities for longer periods of time, both prior to their credible fear interview (when parole is not even an option)²¹² and afterwards while their case works its way through the immigration court system.²¹³ Asylum seekers in detention often have difficulty securing legal counsel, gathering evidence, obtaining documents, and finding witnesses to support their case. Lengthy detention can have a disproportionate impact on women asylum seekers, who often have complicated legal cases and who may find prolonged separation from children and families during the asylum process to be unbearable.

“[An asylum seeker] had undergone female genital mutilation in her home country before she fled to the United States. **While in detention, she began to have severe lower abdominal pain, which was most likely a long-term effect of FGM. She was told to exercise and watch her diet.** After nearly six months in detention without care, she was taken to a public hospital where an ultrasound found a cyst that had grown to be the size of a five-month-old fetus. Although ICE had actively opposed efforts to release her up to this point, she was abruptly released within days of receiving this news, with no money or health insurance to cover the surgery.”

— University of Arizona, Southwest Institute for Research on Women, et al., *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona* (January 2009), at 19 (emphasis added).

Detention facilities are often far from legal service providers, asylum offices, and immigration courts

Legal representation dramatically improves an asylum seeker's chances of bringing a successful claim.²¹⁴ However, numerous detention facilities housing asylum seekers are located in remote areas, far from pro bono legal assistance organizations and urban centers where asylum seekers could more easily find and access legal aid services.²¹⁵ Women seeking protection from gender-based persecution often have complicated legal claims that rely on unsettled law and require specialized legal expertise. Detention centers may also be far from asylum offices and immigration courts, and asylum seekers may be compelled to use "video conferencing" instead of being able to make an in-person appeal to the adjudicator.²¹⁶ This remoteness can severely impact a woman's ability to secure legal counsel, prepare materials, and present a credible and compelling asylum case.²¹⁷

Indefinite detention and prolonged separation from children may influence women to abandon their asylum claims

During post-release surveys of asylum seekers, many "indicated that the nature of their post-credible fear detention treatment was one of the factors that led to their decision to terminate their application."²¹⁸ Prolonged isolation, terrible detention conditions, separation from family, and uncertainty about how and when they might be released (or deported) can create extreme psychological stress and anxiety in detained women.²¹⁹ Continual separation from children and family is one of the "most difficult" aspects of detention for women,²²⁰ particularly as certain facilities severely restrict visitation or only allow "no contact" visits where women asylum seekers are forced to see children and other family members through a thick glass partition or video screen and speak over a phone.²²¹ This trauma and stress may influence women asylum seekers, who often face long, drawn out legal cases during which there is little chance of parole, to withdraw their application and risk further persecution in their home country rather than face months, or even years, of further detention in the United States.²²²

The One-Year Filing Deadline

In 1996, Congress enacted a filing deadline that bars an individual from seeking asylum unless he or she files within one year of arrival in the United States.²²³ The bar was intended to prevent longtime migrants facing deportation from making fraudulent asylum applications only as a delaying tactic, and was never intended to deny safe haven to legitimate asylum seekers.²²⁴

Consistent with Congress' narrow intent, and recognizing that the most valid asylum claims may be raised by individuals who are so "severely persecuted," "brutalized," and "traumatized" that they have an "inherent reluctance to come forward,"²²⁵ Congress enacted two broad exceptions (for "changed" or "extraordinary" circumstances) to excuse a late-filed asylum application.²²⁶ These exceptions were later elaborated by regulations that carried forward Congress' intent not to penalize genuine refugees whose filing delays are justifiable.²²⁷ "Changed circumstances" were defined as those which "materially affect the applicant's eligibility for asylum"—including but not limited to changes in the individual's own circumstances or worsening conditions in his or her country of origin that put the individual at greater risk of harm.²²⁸ "Extraordinary circumstances" were defined as those "directly related to the failure to meet the one-year deadline"—again, including but not limited to serious illness, mental or physical disability (including suffering the aftereffects of past violent trauma), ineffective assistance of counsel, and other compelling circumstances.²²⁹

Yet despite Congress' intent, adjudicators have strictly applied the deadline and narrowly applied these exceptions. The discretionary nature of the exceptions has led to their widely inconsistent and even clearly improper application.²³⁰ Unfortunately, there are few "checks" on such determinations: as a general rule the

From 1999-2006, "Asylum Officers referred about 64,000 cases to immigration court based at least in part on the 1-year rule."

— US Government Accountability Office, *US Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* (September 2008), at 58.

"[I]t is common for an [Immigration Judge] to deny asylum based on the deadline and then—in the same opinion—find that it is more likely than not that a woman will face persecution or torture in her home country. Clearly, therefore, the one-year bar is adversely impacting bona fide, i.e., non-fraudulent claims."

— Karen Musalo and Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int'l & Comp. L. Rev.* 693, 698-699 (2008).

Immigration and Nationality Act (INA) prohibits federal courts from reviewing adjudicators' decisions relating to the filing deadline,²³¹ and many federal courts have declined to invoke a separate provision of the INA that would authorize them to review such decisions in certain circumstances.²³² As a result, for more than a decade adjudicators have regularly denied asylum to bona fide applicants who deserve and qualify for protection based on the one-year filing deadline. This arbitrary procedural hurdle has led not only to grave injustices in particular cases,²³³ but also to gross inefficiencies in the overall asylum process, as cases that could and should have been granted by Asylum Officers at the initial interview, but for the one year filing deadline, are referred to Immigration Judges and add to the ever growing case loads clogging immigration courts.²³⁴ [See Appendix C: *The One-Year Deadline is Either Unjust, Inefficient, or Both*, at 44.]

“A local policeman demanded that the applicant [a Tanzanian woman whose parents were involved in an opposition political party] marry him and undergo FGC [female genital cutting], despite the fact that she was already married.

Because of the applicant’s refusal to submit to his demands, her parents were placed in police custody without charge, and tortured. The applicant was then taken into custody in exchange for her parents’ release. She was raped, burned, slapped, beaten, starved, deprived of water, and left naked in her cell.

She escaped to the United States where she sought shelter and food among strangers who exploited her for financial gain. She filed for asylum 18 months after her arrival. The IJ [Immigration Judge] denied asylum because of the one-year bar, but granted CAT [Convention Against Torture] relief.

Because neither withholding nor CAT provides a recipient with an opportunity to petition for an immediate relative, the applicant will never be able to reunite with her children who remain in Tanzania.”

— Karen Musalo and Marcelle Rice, *Center for Gender and Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int’l & Comp. L. Rev.* 693, 700-701 (2008)(emphasis added).

The consequences of unexcused late filing are severe and devastating. Asylum applicants who cannot satisfy one of the exceptions to the filing deadline have only two remaining options: to petition for “withholding of removal”²³⁵ or to seek protection under the Convention Against Torture.²³⁶ Both forms of relief demand that the applicant surmount a much higher standard of proof than asylum—to be granted withholding, an applicant must show that, if deported, she faces a “clear probability” of persecution or torture, whereas asylum can be granted if she faces even a “reasonable likelihood” of persecution.²³⁷ Perversely, then, late-filing applicants who would have had very strong asylum claims, but who cannot meet the still higher standard of proof for these other forms of relief, may be deported and returned to persecution.

And even if an applicant can qualify for “withholding of removal” or

protection under the Convention Against Torture, unlike asylum, these other forms of relief offer only temporary safe haven and stripped-down benefits. Individuals granted “withholding of removal” are often distraught to learn that while they themselves can remain in safety in the United States, they cannot sponsor their spouse and children who may still be in danger to join them here.²³⁸ Moreover, “withholding of removal” is a perpetually temporary measure—it comes with no permanent promise of integration into the United States (an individual can be deported at any time if conditions in his home country improve or if another country can provide safe haven); no access to refugee benefits; and no ability to ever adjust one’s legal status to become a legal permanent resident or citizen.²³⁹

Clearly, the one-year filing deadline has a detrimental impact on all asylum seekers petitioning for protection in the United States. That said, for a number of reasons, women asylum seekers—especially those who fled or fear domestic violence, female genital mutilation, “honor” crimes and other forms of gender-based persecution in their home countries—often have particular complications that delay their applications for protection and place them at greater risk of being denied asylum due to the one-year bar.²⁴⁰

I. The regulatory exceptions to the one-year filing deadline do not expressly reference the many compelling but “ordinary” circumstances that can reasonably prevent a woman fleeing persecution from filing for asylum within her first year in the United States ²⁴¹

Though the list of circumstances provided under the regulations is illustrative, not exhaustive, of all possible reasonable justifications for untimely filing, adjudicators are still rarely moved to waive untimely filing based on the following:

As soon as they reach safety in the United States, many women are consumed by the challenges of surviving in a new country

Unlike refugees processed through the US refugee resettlement program, individuals fleeing persecution are ineligible for most forms of public assistance and work authorization, and many struggle simply to find shelter, food, and other basic necessities needed to survive.²⁴² Women in particular may not have a network of family, friends, or community to whom they can turn for help—the prospect of isolation and hardship is especially acute when the persecution the woman fears is a harmful traditional practice inflicted and sanctioned by her own family or community, such as female genital mutilation or forced marriage, and the very fact that she has defied the practice and is seeking refuge in the United States may put her at risk for retribution.

Women may not know they can ask for asylum, let alone that they are “on the clock” to submit a timely application

In the first year or more after they arrive, many individuals who have escaped persecution are grateful just to find safety and have no idea what “asylum” is, let alone what steps they must take to apply and that they must apply within one year of arrival or risk losing their chance for protection.²⁴³ A fear of detection and retribution by their communities can deprive women asylum seekers not only of community support, as referenced above, but also of community guidance that could help acclimate them to US asylum laws and procedures. Women may also have an ingrained distrust due to their experiences with corrupt, unresponsive, or repressive government officials in their home countries, that keeps them from seeking advice from the authorities. Powerful social taboos and feelings of shame can also prevent a woman from speaking of the harm she suffered (or fears she will suffer) with anyone,²⁴⁴ so that no one with whom she interacts, not even a woman doctor, nurse, or counselor, may think to suggest the possibility of asylum to her.

Women who know about asylum may not realize that it offers protection to survivors of gender-based persecution

Women who are aware of “asylum” at all may think of it as a form of protection reserved for victims of political persecution, and may not realize that the kinds of harm they suffered—including female genital mutilation, severe domestic violence, forced marriage, “honor” crimes, or other forms of gender-based persecution—can make them eligible for protection in the United States.

Women may purposely and understandably delay applying for asylum

Women and girls may also hesitate to take the drastic step of applying for asylum, which in gender-based cases can mean severing ties with one’s family and community, as well as one’s country, until it is absolutely clear that the danger they face will not pass and they have no other choice.

2. Women fleeing persecution may have particular difficulty finding and affording competent legal representation

Asylum seekers often have few resources to pay for legal services, and may be taken advantage of by unlicensed “immigration advisors” or incompetent or dishonest attorneys.²⁴⁵ Most individuals fleeing persecution are not aware that they can seek legal advice from pro bono attorney networks or legal assistance organizations, and even when they find them, may be put on a waitlist before they are accepted as a client and can begin work on their asylum applications. These common problems can be compounded for women asylum seekers who, in addition to the practical obstacles noted above (a necessary focus on survival and scarce resources), may require the assistance of counsel with specialized expertise in gender-based asylum cases. This kind of specialized non-profit legal service-provider can be especially hard to find, let alone near where a woman asylum seeker lives, and is likely to have long waitlists.

3. Women may face challenges when preparing and gathering evidence for an asylum application

Women fleeing family- or community-inflicted violence, rather than state-sponsored violence, may also have greater difficulty, and thus take longer, to produce the kind of evidence necessary to build their application. Unlike a political asylum case, for example, the abuse they suffered was likely not documented in media accounts; nor can they likely count on an affidavit from a fellow opposition party member to attest to the persecution they suffered. Instead, women's asylum applications often rely heavily on their ability to relate a consistent, coherent, compelling, and detailed account of what they endured, corroborated by affidavits from medical and mental health professionals. Yet women fleeing rape, sexual torture, and other forms of gender-based violence often struggle with intense feelings of shame and powerful social taboos, and may be unwilling or unable to discuss their experiences even with a sympathetic doctor or pro bono attorney.²⁴⁶ It may take months of therapy before a woman is able to relate the kinds of specific details about the persecution and violence she suffered that are necessary to build a solid asylum application.

4. Adjudicators' inconsistent and improper application of the exceptions to the one-year filing deadline prevents some women from obtaining asylum, and denies other women any protection at all

The discretionary nature of one-year rulings, together with a narrow application of the circumstances expressly enumerated as exceptions, a failure to read into the regulations other circumstances that could also justify a filing delay, an improper tendency by adjudicators to substitute their conclusions about an applicant's mental state for those of trained professionals, and a lack of judicial review over all these decisions, can severely impact a woman's chances to receive asylum in the United States.²⁴⁷ And as noted above, if a woman is not found eligible for asylum because of the one-year bar, her only chance for protection is to apply for "withholding of removal" or protection under the Convention Against Torture, both of which require her to meet a high standard of proof, that she is "more likely than not" to be persecuted or tortured if returned to her home country. A woman who cannot meet this extremely demanding standard will be deported, even though she could have met the standard for asylum had the one-year bar not been triggered.

Adjudicators may disregard or discount evidence of "changed circumstances" particular to gender-related persecution that prevented women from timely filing

For example, an adjudicator denied asylum to an Afghan woman who gave birth to two children out of wedlock in the United States. She feared an "honor killing" by her father and brothers in Pakistan²⁴⁸ and being stoned to death in Afghanistan if she were removed to either country, and requested an exception to the one-year bar based on "changed circumstances"—namely that the birth of her children gave rise to the danger that compelled her to seek asylum. The adjudicator refused to grant asylum based on her personal changed circumstances, and she was instead granted withholding of removal.²⁴⁹

In another case, a Senegalese woman fearing female genital mutilation and forced marriage to a man forty years her senior was denied asylum based on the one-year filing deadline. The Immigration Judge declined to find "changed circumstances" even though the woman filed her asylum application only three months after learning that her sister was subjected to female genital mutilation as well as other facts that changed her personal circumstances by greatly increasing the risk that she, too, would be subjected to the practice and forced into marriage. Ultimately, the woman was also denied withholding of removal as well, since the Fourth Circuit Court of Appeals declined to review the conclusion of the Immigration Judge and the Board of Immigration Appeals (BIA) that, despite the fact that her own sister had just been cut, the applicant "had not established that it was *more likely than not* that she, as an educated adult, would be subjected to female genital mutilation upon return to Dakar" (emphasis added).²⁵⁰ The cruel consequence of the one-year filing deadline is that this woman may be deported to face a strong likelihood that she will be subjected to female genital

mutilation and forced into marriage, even as she could not (according to these courts) establish a clear probability that such a terrible fate awaits her.²⁵¹

Adjudicators may disregard evidence of “extraordinary circumstances” that prevented women from timely filing

To make a complete and compelling application for asylum, women must often discuss, in excruciating detail, the persecution or torture that they endured prior to fleeing their country of origin. This can be a difficult and painful process, and it may be months or years before trauma victims suffering from PTSD and other such disorders are able to discuss their experiences. As a result, many women asylum seekers petition under the “extraordinary circumstances” exception to the one-year bar, and submit expert testimony in support. Yet some adjudicators ignore this evidence and instead focus on the applicant’s other behaviors—whether the applicant could still function in her daily life, take care of her children, work, etc.—when evaluating whether she was mentally unable to timely file an asylum application.²⁵² Such denials appear to be based on the adjudicator’s personal perception about the symptoms and effects of PTSD,²⁵³ and ignore the fact that many survivors of persecution and torture may “function quite well so long as they are not reminded of the original [traumatizing] event.”²⁵⁴

Case Comparison: How women asylum seekers are harmed by the one-year filing deadline

In 1996, Congress enacted a series of reforms that made it more difficult for those fleeing persecution to obtain asylum in the United States. Among other changes, Congress instituted a new filing deadline—within one year of an individual’s arrival—which was intended to discourage fraudulent applications made only to delay or avoid deportation. Exceptions (based on “changed” or “extraordinary” circumstances) may excuse late filing, but have been applied narrowly by Asylum Officers and Immigration Judges.

The punishment for unexcused late filing is severe and devastating. If an asylum seeker can meet the higher proof standard for “withholding of removal” or protection under the Convention Against Torture (“more likely than not” to face persecution or torture if deported), she may be denied asylum but at least will not be deported. However, these are lesser forms of protection than asylum that offer only temporary safe haven in the United States and do not entitle her ever to reunite with immediate family members whom she may have been forced to leave behind—including her own children who may continue to be at risk of harm. Still more troubling, in many cases applicants who would have had very strong asylum claims—but-for the one-year filing deadline—will not be able to meet the higher standard of proof for withholding or relief under the Convention Against Torture, and thus will be denied any protection at all.

The cases below* expose how the current one-year filing deadline can force dramatically different results for two women despite their nearly identical experiences of sustained and brutal persecution. Both cases present a compelling case for the United States’ protection and compassion, but only one of these women truly received justice.

Case I: “Aida”

Aida’s birth father was physically abusive and abandoned the family when she was a young girl. Her mother also beat her, and her mother’s boyfriend sexually assaulted her. When she was 13 years old, Aida was effectively given to her abusive husband Juan, who was twenty-seven years her senior and a high ranking army officer in her home country in Central America, in return for financial support that he provided to her family. Juan raped her frequently and inflicted on her a wide range of abuse, much of it learned in the military, including: throwing boiling water on her, gouging her with fence wire, burning

her with a branding iron, and rubbing salt in open wounds. In addition, when she was 15 years old, Juan discovered she was pregnant and he beat her belly until she aborted twins. Then Juan hired his gang-member nephew to murder Aida. She was shot in the stomach, but recovered. Aida fled to the United States but she was forced to return to Central America because Juan, who had decided he wanted to keep Aida as his wife, threatened to stop paying for her mother's life-saving chemotherapy treatment. She returned to Central America for two months, but the abuse and the rapes continued. In February 2002, after nearly 11 years of abuse, she again fled to the United States.

Aida did not file for asylum until December 2007. Despite waiting nearly six years to file, Aida was granted asylum in November 2008. Her attorneys successfully argued that she had established "extraordinary circumstances" for not filing within one year, in the form of the "serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past" that constitutes an exception. They also argued that she then filed within a reasonable period of time, namely within one year of discovering that her brother had been murdered, probably by Juan to punish Aida for leaving him. Aida's application for asylum included a lengthy psychological evaluation performed by a psychologist who is a domestic violence expert. This evaluation diagnosed Aida with severe Post-Traumatic Stress Disorder (PTSD), depression, and anxiety and noted that she "would have been unable to go through the process of applying for asylum without impeding her recovery from trauma and would likely have re-traumatized herself had she applied." In time, Aida can apply for permanent residency and eventually, citizenship.

Case 2: "Lina"

Lina's birth father left her family when she was a child and Lina stayed with her mother who was physically abusive. Lina was forced to leave school during the third grade and while she was still a child, her mother threw her out of the house, leaving her homeless. She moved around many times, giving birth to her first son when she was 16 years old and to her second son when she was 17 years old. Shortly thereafter, she met her abusive partner, Oswaldo, a soldier in the military, who later became a policeman and a high-profile bodyguard. The abuse began immediately after they moved in together and included: violent rapes, banging her head into cinder blocks, whipping her with cables and wires, dragging her through the streets by her hair, and other military torture techniques. Lina tried to escape by running away and starting a relationship with another man she hoped would protect her. Oswaldo tracked her down, beat her and her new boyfriend and took Lina back with him, and when she gave birth to the other man's child, Oswaldo took the baby from her when it was one month old and gave it away. In September 2000, after 11 years of abuse, Lina fled to the United States from her home country in Central America. When she sent for her three youngest children, Oswaldo came with them and tried to kill Lina in the U.S.

Lina did not file for asylum until January 2007. Because she did not file within one year of her arrival, and the Immigration Judge did not find that she had established "extraordinary circumstances," Lina was granted withholding of removal, not asylum. As in the case of Aida, Lina's attorneys argued that her failure to file within one year was due to the psychological effects of her past persecution. The psychologist in her case found that Lina suffered from depression, intrusive memories, nightmares, that she avoided thinking and talking about her past trauma, and that she showed suicidal tendencies. Nonetheless, the Immigration Judge concluded that because Lina had demonstrated she was capable of arranging for her children to escape from their home country, she was likewise capable of applying for asylum in a timely manner. Because Lina was granted withholding of removal, her children remain without legal status in the U.S. and face the possibility of deportation, and Lina can never become a permanent resident or citizen.

As the cases above attest, whether or not an individual files for asylum within one year of arrival—a year (or more) in which her thoughts are focused sharply on survival with scarce resources against steep odds—has little to do with the merits of her claim. The current filing deadline arbitrarily punishes meritorious claimants, and leaves Asylum Officers and Immigration Judges either feeling they have no discretion—or failing to exercise what limited discretion they do have – to prevent terrible injustices.

The one-year filing deadline should simply be eliminated as an outright bar to asylum, as it has failed to fulfill the 1996 reforms’ original intent—to separate meritorious from frivolous claims. Some have suggested that the current exceptions to the one-year filing deadline could simply be expanded to expressly recognize other legitimate and compelling reasons for filing delays. This suggestion overlooks the fact that no matter how many discretionary exceptions are expressly enumerated, they will always be subject to the subjective application of the adjudicator. Notably, expanded exceptions would not have helped Lina. While her circumstances arguably fit an existing exception (for serious mental disability, including the aftereffects of past violent harm) just as squarely as Aida’s did, the Immigration Judge in Lina’s case declined to excuse the one-year filing deadline that stood as a barrier between Lina and the full protection of asylum. The divergent results in these cases therefore underscore that eliminating the arbitrary filing deadline is the only way to promote true justice for all, returning adjudicators’ focus where it should belong—on the merits of the claim for protection.

**Aida and Lina are clients of the Tabirih Justice Center whose names have been changed to protect their safety and privacy.*

Conclusion and Recommendations

Across the globe, women and girls face terrible violations of their basic human rights. The United States plays a vitally important leadership role in the global community's response to such abuses and especially to violence against women. For those few women who manage to escape and seek protection under US asylum laws, the United States can be a beacon of hope, offering the promise of a peaceful future to a woman who may never have known so much as a day's respite from violence and oppression before.

The United States also has a long and proud history of providing safe haven to refugees fleeing persecution. But a series of harsh reforms instigated in the mid-1990s, together with additional restrictive measures imposed in the wake of September 11th, have undermined US leadership and degraded the integrity and fairness of the US asylum system.²⁵⁵

All asylum seekers are adversely impacted by these changes, but women and girls fleeing gender-related persecution may be particularly vulnerable to serious harm. We urge you not to lose sight of the fact that, at each of the dry legal twists and turns recounted in this report, the lives and freedom of real women and girls hang in the balance.

To recommit the United States to ensuring the best possible regime of protection for women and girls fleeing persecution, the Tahirih Justice Center recommends that the following reforms be made to the laws and policies regarding gender-based asylum, expedited removal, detention, and the one-year filing deadline:

- **Clarify the availability of asylum in the United States to those fleeing gender-related persecution**, particularly in unsettled areas like domestic violence as a basis for asylum or the right of parents to seek asylum in order to protect their daughters from gender-related persecution. The legal limbo in which many women and girls who seek asylum currently find themselves is unjust and untenable. A combination of legislation and regulations are likely needed to set clear national policy, given the muddled decision-making among immigration courts and split decisions among federal circuit courts. Any such legislation or regulations should resolve crucial issues, among others, clarifying that a “particular social group” is established where members share an “immutable” or “fundamental” characteristic, without any additional requirement; and that “nexus” can be established where an applicant’s State or legal or social norms in her country have failed to protect her, and thus relegated her to persecution.
- **Minimize dangers inherent in the “expedited removal” process, to ensure that individuals fearing for their lives or freedom are not returned to persecution.** In its extensive 2005 study of the expedited removal process, the bipartisan US Commission on International Religious Freedom (USCIRF) found that safeguards either were not being followed or were inadequate to ensure that bona fide refugees would not be returned to persecution. This danger has since been heightened because DHS expanded the use of this flawed process from the US border into the interior of the country, without first addressing the serious concerns raised by the USCIRF study. DHS should fully implement the recommendations made by USCIRF, principally including better training, record-keeping and oversight to ensure that existing safeguards are being faithfully implemented and that additional safeguards are devised where necessary. Better training, record-keeping, and oversight will be especially critical to ensure that requests for protection by women and girls fleeing gender-related persecution are properly recognized.

- **Avoid the detention of asylum seekers as a general matter; reform parole procedures; provide for review by an immigration judge of detention and parole decisions; promote alternatives to detention; and improve detention conditions.** Asylum seekers should not be detained, except when absolutely necessary, and any detention should be in a setting that is non-penal in design and standards. Among other things, this means that arriving asylum seekers should have timely access to individualized bond hearings as well as a reformed parole process that encourages release and provides for review of parole denials by an immigration judge. Alternatives to detention should be promoted for circumstances in which some supervision of an asylum seeker is deemed necessary, but any such alternatives involving restrictive means (such as ankle bracelets) should not be used as an alternative to the release of an asylum seeker who meets the parole criteria. Standards that improve the conditions of detention for asylum seekers should be codified and enforced. Consistent with a non-penal setting, asylum seekers should, among other accommodations, be permitted to wear their own clothes, have freedom of movement within the facility, and have the opportunity for contact visits with family and friends. Asylum seekers should not be detained in remote facilities that deny them access to *pro bono* legal resources, Asylum Offices, and Immigration Judges.
- **Eliminate the one-year filing deadline.** This arbitrary procedural hurdle has led to grave injustices for individuals and gross inefficiencies in the adjudications process. Congress should eliminate the filing deadline that bars an individual from seeking asylum unless they apply within one year of arrival in the United States. In the interim, adjudicators (both Asylum Officers and Immigration Judges) should be instructed to broadly interpret and apply the exceptions to the filing deadline, and adjudicators' decisions on the deadline and exceptions should be subject to vigilant judicial review.

The United States urgently needs to course-correct from the dangerous departure it has made from its longstanding commitment to provide safe haven to refugees fleeing persecution. Adopting the recommendations above would take several critical steps in that direction.

The kinds of women and girls that Tahirih represents are individuals of stunning courage and extraordinary resilience. By sharing their stories and struggles, and those of other women and girls like them, we hope to inspire a renewed sense of purpose among policymakers that the United States can, and must, extend more to them than mere “precarious protection.”

Appendix A:

The Truth Trickles Out: There's No Reason to Fear a "Flood" of Women Asylum Seekers*

Some critics argue that because nearly half the world is made up of women, and because a significant percentage of the world's women are oppressed, that the United States risks "opening the floodgates" to an overwhelming tide of women seeking our protection by recognizing gender-related persecution (such as female genital mutilation, forced marriage, and domestic and sexual violence) as a legitimate basis for asylum.²⁵⁶

This persistent misconception is easily debunked by relying on statistics and past experience rather than fears and projections. Despite the alarmist specter that has been raised of a massive flood flowing from gender-based asylum claims, the actual flow is revealed to be a mere "trickle," for a number of reasons:

- **Only a small fraction of all people persecuted worldwide, on any basis, ever seek and receive asylum in the United States.** For example, China is an authoritarian state with a poor human rights record that includes, among other things, the severe repression of cultural and religious minorities and political dissidents, and the imposition of coercive population control measures such as forced sterilizations and abortions.²⁵⁷ China's population in 2008 was 1.3 billion;²⁵⁸ yet according to US immigration authorities, in 2008 only 5,459 Chinese received asylum in the United States.²⁵⁹
- **The unfortunate reality is that most women and girls around the world simply do not have the power or resources to escape persecution and make it to the United States.**²⁶⁰ The very women whose persecution would give them a legitimate claim to asylum in the United States often live in countries where they have little or no legal and social rights (and who are prohibited from leaving the home unaccompanied, let alone the country); have caretaking responsibilities for extended family members, in addition to their own children (whom they are understandably unwilling to leave behind, but may be unable to bring with them if they tried to flee); have little access to family resources to finance their escape; and are usually facing forms of family- or community-inflicted gender-based persecution so pervasive and entrenched that there may be literally no one to whom they can turn to help them leave the country in search of refuge.²⁶¹
- **Only a small fraction of all women and girls facing female genital mutilation worldwide ever seek and receive asylum in the United States.** According to the World Health Organization (WHO), between 100-140 million women and girls worldwide have been subjected to female genital mutilation.²⁶² Although US immigration authorities do not track asylum claims based on female genital mutilation, the asylum grants for applicants coming from countries where female genital mutilation is prevalent offer relevant insights. In 2001, for example, an estimated 92% of women and girls in Mali had undergone female genital mutilation;²⁶³ or approximately 5.17 million women,²⁶⁴ yet in 2001 only 10 Malians total, men or women, were granted asylum in the United States on any basis.²⁶⁵

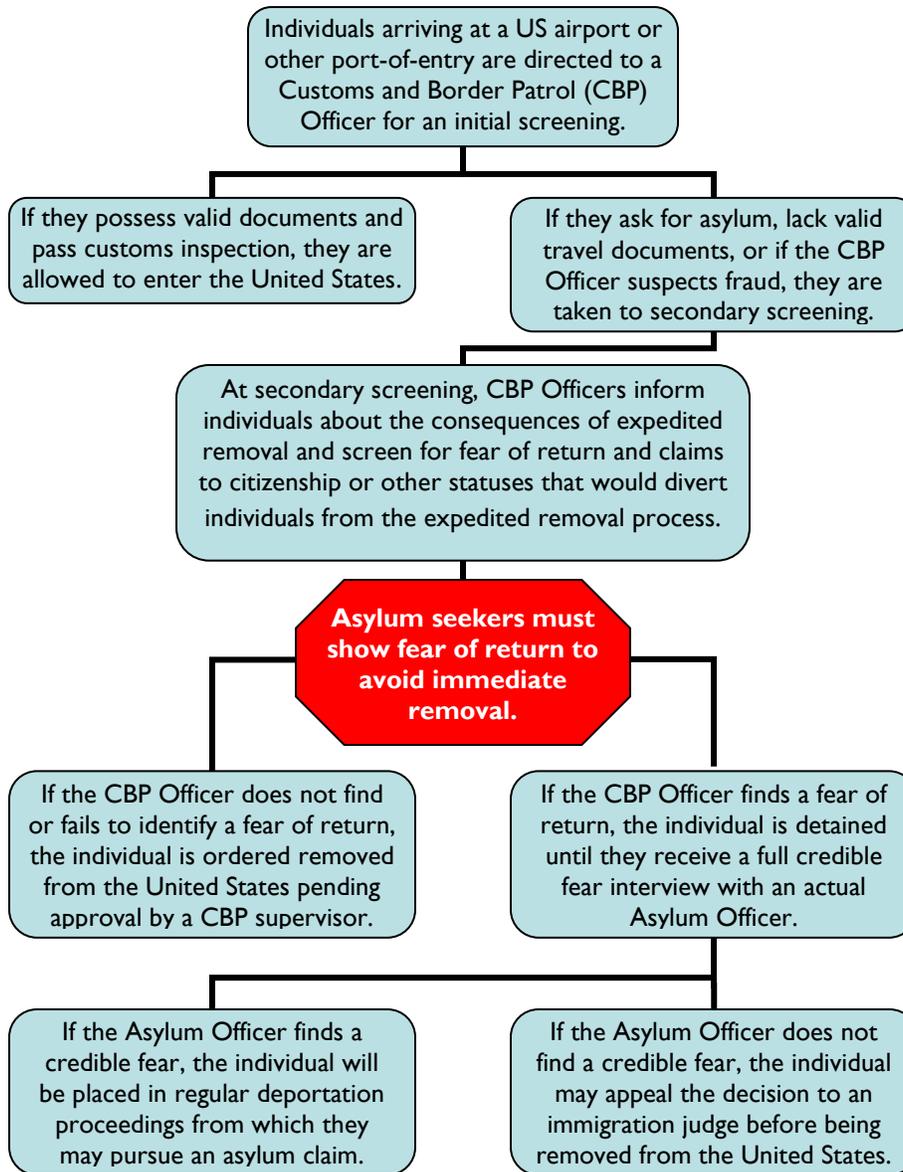
Moreover, in a 2000 press release, the US Immigration and Naturalization Service (INS) confirmed that "[a]lthough genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM [female genital mutilation]" since such claims were first recognized as a legitimate basis for asylum in 1996.²⁶⁶ The truth is that only a relative "handful of women have sought protection from U.S. immigration courts since the law recognized female genital mutilation as grounds for asylum [over] 12 years ago."²⁶⁷

- **The overall number of affirmative asylum applications filed in the United States has remained steady, despite the highly publicized availability of new legal protections for women fleeing gender-related persecution.** Applicants have been granted asylum on the basis of gender-related persecution since 1996, and specifically on the basis of severe and sustained domestic violence since 2004, and yet no flood of applications has resulted. In a legal brief recently filed by the US Department of Homeland Security (DHS), DHS dedicated a half-page footnote to discrediting the fear of opening the floodgates, providing figures showing that annual applications actually fell from 27,908 in FY 2004 to 25,505 in FY 2008 (and dipped still lower in FY 2005 at 24,260 applications).²⁶⁸
- **The subtotal of all affirmative asylum applications filed in the United States that are based in whole or in part on “membership in a particular social group,” has also remained steady.** Persecution on account of “particular social group” membership is the basis for asylum most often raised by women and girls fleeing gender-related persecution, although this basis is also raised by individuals fleeing persecution unrelated to gender. The total number of applications (by men and women combined) filed on this basis also held steady at 3,000-3,500/year in each year from FY 2004-2007.²⁶⁹
- **Other countries that grant asylum to women fleeing gender-related persecution report similar experiences: low numbers, small percentages, and certainly no surge of claims.** For example, beginning in 1993 Canada issued gender guidelines that included recognition of domestic violence as a basis for asylum. But in the six years thereafter, fewer than 2% of all asylum seekers in Canada based their claims on domestic violence.²⁷⁰ In fact, Canadian authorities reported that gender-related claims (including all other types of gender-related claims as well as those involving domestic violence) actually declined from a peak of 315 claims in 1995, to a reported 175 cases in 1999.²⁷¹
- **The asylum system is designed to consider the possible persecution of large populations, and to permit only the most compelling, bona fide cases of refugees fleeing persecution to go forward.** Critics who raise the “floodgates” concern in order to deny victims of gender-based persecution the right to seek asylum in the United States seem to forget or ignore “the filtering function [performed by]...the other elements of the refugee definition.”²⁷² As DHS itself recently noted, for example, accepting the possible existence of a “particular social group” that could render some victims of domestic violence eligible for asylum “does not mean, however, that every victim of domestic violence would be eligible for asylum. As with any asylum claim, the full range of generally applicable requirements for asylum must be satisfied.”²⁷³ This includes requiring an applicant to demonstrate abuse serious enough to constitute persecution; that her fear of persecution is “well-founded;” that the persecution is connected to her membership in a “particular social group;” that she could not reasonably be expected to relocate in her home country to avoid abuse; and finally, that her government is unwilling or unable to protect her from abuse.

Notably, all of the grounds for asylum under the refugee definition—race, religion, nationality, political opinion, and membership in a particular social group—typically encompass large groups fleeing widespread persecution in countries all around the world. Thus, this “floodgates” concern seems unfairly and uniquely invoked against permitting women and girls fleeing gender-based persecution to seek asylum in the United States.

Appendix B:

The Expedited Removal Process



****Individuals placed in expedited removal are detained as they move through this process.***

Appendix C:

The One-Year Deadline is Either Unjust, Inefficient, or Both

The one-year filing deadline creates terrible inefficiencies in an already overloaded immigration adjudications system. If an Asylum Officer finds an asylum claim to be barred by the filing deadline, and declines to find that an exception applies, the applicant may still be eligible for other forms of relief. But because those other forms can only be granted by an Immigration Judge, these applicants must be referred to an immigration court for a full judicial hearing. Based on statistics obtained by the Government Accountability Office, from 1999-2006, “Asylum Officers referred about 64,000 cases to immigration court based at least in part on the 1-year rule.”²⁷⁴ Some of these applicants end up winning their asylum cases because an Immigration Judge finds that they do, in fact, meet an exception to the filing deadline. Others are not granted an exception but still win their cases for forms of relief other than asylum, because they are able to meet the higher standards of proof that apply. Still others, however, lose their cases in court purely because of the procedural barrier interposed by the filing deadline, even though they would have easily qualified for asylum at the Asylum Office.

In effect, the filing deadline results in slower adjudications and needless referrals for full court hearings before an Immigration Judge for asylum cases that could and should have been granted at the initial interview stage before an Asylum Officer. The table below graphically illustrates how three applicants, all with equally compelling asylum claims at the time of their interviews before an Asylum Officer, can wind up with vastly different outcomes as their case is referred to an Immigration Judge (and beyond, as their case may come before the Board of Immigration Appeals (BIA) on appeal). In each applicant’s case, the outcome is either inefficient (because ultimately, asylum or another form of protection was granted) or unjust (because ultimately, either a lesser form of protection, or no protection, was granted), or both.

Please see the chart on the following page for a more detailed analysis.

	Asylum Officer Interview >	Immigration Judge (Hearing) >	Outcome
Applicant A	<p><u>Would have qualified for asylum, but-for filing deadline</u></p> <p>Adjudicator misapplies exceptions / decides none apply.</p> <p>Applicant continues to pursue asylum and alternatively seeks withholding of removal or relief under Convention Against Torture (CAT) before the immigration court.</p>	<p>Claim for protection must be re-adjudicated in court</p> <p>Adjudicator correctly applies exceptions, decides untimely filing is excused.</p>	<p>Granted asylum.</p> <p>INEFFICIENT</p>
Applicant B	<p><u>Would have qualified for asylum, but-for filing deadline.</u></p> <p>Adjudicator misapplies exceptions / decides none apply.</p> <p>Applicant continues to pursue asylum and alternatively seeks withholding of removal or relief under Convention Against Torture (CAT) before the immigration court.</p>	<p>Claim for protection must be re-adjudicated in court</p> <p>Adjudicator misapplies exceptions / decides none apply.</p> <p>Applicant able to meet higher proof standard for withholding/CAT.</p>	<p>Receives lesser form of protection than asylum. The individual <u>cannot</u>:</p> <ul style="list-style-type: none"> • Sponsor spouse and children still in danger to join him or her in the United States, • Receive refugee benefits, • Become legal permanent resident or citizen, or • Ever fully integrate into the United States. At any time, s/he could be deported to country of origin if conditions improve or to another country that can provide safe haven. <p>UNJUST AND INEFFICIENT</p>
Applicant C	<p><u>Would have qualified for asylum, but-for filing deadline.</u></p> <p>Adjudicator misapplies exceptions / decides none apply.</p> <p>Applicant continues to pursue asylum and alternatively seeks withholding of removal or relief under Convention Against Torture (CAT) before the immigration court.</p>	<p>Claim for protection must be re-adjudicated in court</p> <p>Adjudicator misapplies exceptions / decides none apply.</p> <p>Applicant not able to meet higher proof standard for withholding/CAT.</p>	<p>Receives no protection.</p> <p>Deported to face persecution and/or torture.</p> <p>United States fails to meet international and domestic obligations not to return individuals to persecution and/or torture.</p> <p>UNJUST AND INEFFICIENT</p>

Endnotes

¹ Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007), available at <http://www12.georgetown.edu/sfs/isim/Publications/AndyPubs/RefugeeRoulette.pdf>.

² Immigration and Nationality Act [hereinafter INA] §101(a)(42), 8 USC §1101 (a)(42).

³ See United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 1(a)(2), 189 U.N.T.S. 150 (entered into force April 22, 1954) [hereinafter Refugee Convention]; United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force October 4, 1967) [hereinafter Refugee Protocol]. The obligation not to return refugees to persecution (“non-refoulement”) is set forth in the Refugee Convention at art. 33 and in the 1967 Protocol at art. 1(1) (by incorporation).

⁴ Pub. L. No. 96-212, 94 Stat. 197 (1980).

⁵ To illustrate the interrelationship of the points in the continuum: sometime between infancy and young adulthood, a girl is subjected to female genital mutilation, which makes her marriageable; she is then forced into an arranged marriage, perhaps with a much older man who already has other wives; if she enters the marriage, she is subjected to domestic violence and marital rape, and may already have been beaten and raped by others; if she refuses the marriage (or the genital mutilation preceding it), at best she risks being treated as an outcast and “whore,” and at worst, she risks being targeted for retribution through an “honor” beating or killing; after childbirth or if the original cutting is seen as “incomplete,” she may be re-subjected to female genital mutilation, including “re-infibulation” (the creation of a covering seal that leaves an opening only large enough for urine and menstrual flow); if she tries to protect her daughters from female genital mutilation and forced marriage, she is beaten; if her husband dies, she is forced to remarry (perhaps becoming the wife of her husband’s brother in another abusive, polygamous marriage) and/or subjected to other harmful widow rituals, etc. Please see the story of “Tida,” a Tahirih Justice Center client who faced this sort of terrible continuum, at page 9 of this report.

⁶ See Memorandum from Phyllis Coven, Dep’t of Justice, Office of International Affairs, “Considerations for Asylum Officers Adjudicating Asylum Claims from Women,” (May 26, 1995), reprinted in “INS Publishes Gender Persecution Guidelines,” 72 Interpreter Releases 771 app. (June 5, 1995) [hereinafter Coven Memorandum].

⁷ Notably, too, the memorandum acknowledges that it serves as a preliminary attempt to put forward a framework for legal analysis of such claims in a “still developing” area of law. See Coven Memorandum, *supra* note 6, at 1, 8.

⁸ This report references the term “female genital mutilation” rather than alternative references (“cutting” or “circumcision”), in deference to Tahirih Justice Center clients who have expressed that “female genital mutilation” more accurately describes their experience of the practice. The term refers to one of several types of procedures that involve the “partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.” World Health Organization, *Female Genital Mutilation: Fact Sheet* (May 2008), available at <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> [hereinafter WHO, *FGM Factsheet*]. All types of female genital mutilation have been condemned internationally as a violation of the rights of women and girls. The practice is typically imposed on young girls between infancy and age 15 (3 million of whom are at risk of female genital mutilation each year). See *id.*

⁹ *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

¹⁰ The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying United States immigration laws, and reviews appeals from certain decisions rendered by Immigration Judges. See US Dep’t of Justice, Executive Office for Immigration Review, *Fact Sheet: Board of Immigration Appeals* (August 2009), available at <http://www.usdoj.gov/eoir/fs/biabios.pdf>.

¹¹ *Matter of Kasinga*, 21 I. & N. Dec. at 357. The BIA found that Ms. Kassindja was a member of a social group consisting of “young women of the Tchamba-Kunsuntu Tribe who have not had FGC [female genital cutting], as practiced by that tribe, and who oppose the practice.” *Id.* at 358. The BIA found that female genital mutilation is a form of “sexual oppression...to ensure male dominance and exploitation” and that the procedure “permanently disfigures the female genitalia. [Female genital mutilation] exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic function.” *Id.* at 361, 366-367.

¹² See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 24 Va. J. Soc. Pol’y & L. 119, 124, n. 19, n. 20 (2007) [hereinafter Musalo, *Fear of Floodgates*].

¹³ *Matter of R-A-*, 22 I. & N. Dec. 906, 922 (BIA 1999; Att’y Gen. 2001).

¹⁴ “Honor” crimes are acts of violence, often murder, predominantly committed by male family members against female family members who are perceived to have brought dishonor upon the family. A woman can be targeted for a variety of reasons, including: refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking a divorce—

even from an abusive husband—or allegedly committing adultery. The violation of a woman’s chastity is seen as an offense against her family’s honor and is enough to trigger an attack. Honor crimes are not specific to any religion, nor are they limited to any one region of the world. Human Rights Watch, HRW Oral Intervention, 57th Session of the United Nations Commission on Human Rights (April 5, 2001),

<http://hrw.org/english/docs/2001/04/06/global268.htm>. Worldwide, 5,000 women die as a result of honor crimes each year. United Nations Population Fund, *State of the World Population 2000: Lives together Worlds Apart*, Chapter 3: Ending Violence against Women and Girls, available at <http://www.unfpa.org/swp/2000/english/ch03.html>.

¹⁵ US Dep’t of State, 2000 Country Report on Human Rights Practices: Jordan (February 23, 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/836.htm>.

¹⁶ See *Matter of A-* [number withheld] (BIA August 20, 1999), cited in Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress amid Uncertainty*, 79 Interpreter Releases 689 (May 13, 2002), at 694. After concerted advocacy, including from Members of Congress, the then-Immigration and Naturalization Service withdrew its opposition to Ms. A-’s application and she was granted asylum by the BIA. See Center for Gender & Refugee Studies, Gender Asylum Campaigns, *Ms. A’s Story*, <http://cgrs.uchastings.edu/campaigns/honor.php>.

¹⁷ Dep’t of Justice, Immigration and Naturalization Services, 65 Fed. Reg. 76588-98, (proposed December 7, 2000), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-30602-filed.pdf [hereinafter Proposed Gender-Based Asylum Regulations].

¹⁸ *Id.* at 76589, Supplementary Information.

¹⁹ That said, certain provisions of the draft regulations concerned advocates. Rather than eliminate new tests imposed by the BIA in *Matter of R-A-* to determine whether an applicant was a member of a “particular social group,” the draft regulations incorporated them in a list of six “considerations” that may be “relevant in some cases” but that are “not determinative” as to whether a particular social group may be found. *Id.* at 76594, Supplementary Information; see also proposed regulation §208.15(C)(3) at 76598. Advocates feared that despite these disclaimers, “some judges [may] use the factors as a checklist or test, and . . . deny those cases in which all of the factors are not established.” Knight, *supra* note 16, at 689 (citing Karen Musalo & Stephen Knight, *Steps Forward and Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the U.S.*, 13 Int’l J. Refugee L. 51 (2001)). In addition, since the draft regulations were issued in 2000, UNHCR has issued additional guidance relevant to the adjudication of women’s asylum claims that would need to be taken into account in any final regulations. See United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Female Genital Mutilation* (Geneva: UNHCR Division of International Protection, May 2009), available at <http://www.unhcr.org/refworld/pdfid/4a0c28492.pdf> [hereinafter UNHCR, *FGM Guidance*]; UNHCR Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR, *Gender Guidelines*]; UNHCR Guidelines on International Protection: Membership of a Particular Social Group within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR, *Particular Social Group Guidelines*].

²⁰ See Center for Gender and Refugee Studies, *Documents and Information on Rody Alvarado’s Claim for Asylum in the U.S.*, <http://cgrs.uchastings.edu/campaigns/alvarado.php>.

²¹ See Dep’t of Homeland Security’s Position on Respondent’s Eligibility for Relief in *Matter of R-A-* (filed before Attorney General Ashcroft, February 2004) available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf [hereinafter DHS Brief, *Matter of R-A-*].

²² In 2009, DHS again filed a favorable legal brief in a domestic violence-based asylum case known as *Matter of L-R-*, echoing arguments raised in 2004 in *Matter of R-A-*. See Dep’t of Homeland Security’s Supplemental Brief in *Matter of L-R-* (filed before the Board of Immigration Appeals, April 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter DHS Brief, *Matter of L-R-*]. This brief affirms DHS’ position taken in 2004 that asylum may be granted to women who have fled domestic violence in appropriate circumstances. Among other things, the brief makes helpful arguments regarding the critical relevance of country conditions (evidence of a State’s response or lack thereof to a victim’s appeal for protection, as well as legal and social norms that may condone or tolerate her abuse) to the “nexus” analysis. That said, the 2009 brief also carries forward more problematic arguments, such as adopting burdensome and poorly articulated additional elements that the BIA has required in recent years before an applicant may establish her “membership in a particular social group.” See *id.* at 8-9 (requiring that such groups exhibit not only “immutability” but also “visibility” and “particularity”).

²³ See *Mohammed v. Gonzales*, 400 F.3d 785, 796 n. 15 (9th Cir. 2005).

²⁴ See Lisa Frydman and Kim Thuy Seelinger, *Kasinga’s Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 13 *Bender’s Immigration Bulletin* 1073 (September 1, 2008).

²⁵ *Matter of A-T-*, 24 I. & N. Dec. 296, 299 (BIA 2007) (denying withholding of removal). *But see* *Matter of S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 465 (BIA 2008) (granting asylum under regulations permitting a “humanitarian” grant based on the “severity of the past persecution” to mother and daughter who had been subjected to an “atrocious” form of female genital mutilation causing “continuing physical pain and discomfort”). This form of discretionary relief is not available in the withholding of removal context.

²⁶ *See* Center for Gender and Refugee Studies, Gender Asylum Campaigns, *Campaign to Reverse Matter of A-T- and Defend Women’s Rights*, <http://cgrs.uchastings.edu/campaigns/matterofat.php>.

²⁷ *Matter of A-T-*, 24 I. & N. Dec. at 617.

²⁸ *See* Frydman & Seelinger, *supra* note 24, at 1073.

²⁹ 24 I. & N. Dec. 275 (BIA 2007), *cert. denied* Kane v. Holder, No. 07-60757 (5th Cir. August 26, 2009).

³⁰ *Matter of A-T-*, 24 I. & N. Dec. at 302-303.

³¹ *Id.*

³² *See* Warren Richey, *Does the prospect of arranged marriage and abuse warrant asylum in the US? An immigration judge said no, but an appeals court panel found a valid fear of persecution*, Christian Science Monitor, March 23, 2007, available at http://cgrs.uchastings.edu/documents/media/csmonitor_3-07.pdf.

³³ *See* Lisa Frydman Covers Recent Developments in Domestic Violence-Based Asylum Claims, 2009 Emerging Issues 4075 (Lexis-Nexis: July 27, 2009) [hereinafter Frydman, *Recent Developments*] (citing “inconsistent decision making” ranging from grants to denials to “legal limbo” as cases are referred to the Asylum Office headquarters, administratively closed or indefinitely continued, and appeals languish with the BIA, all so that Asylum Officers and Immigration Judges can await “direction from above” in gender-based asylum cases). *See also* Musalo, *Fear of Floodgates*, *supra* note 12, at 128 n. 27 (citing numerous cases in which Immigration Judges exhibited “confused and erroneous decision-making”).

³⁴ *See, e.g.*, Esta Soler and Karen Musalo, *Time to End an Asylum Limbo for Abused Women*, The Washington Post, July 18, 2009 (op-ed); William Fisher, *Abused Woman Waits 12 Years for Asylum*, Inter-Press News Agency, October 14, 2008; Alex Kotlowitz, *Asylum for the World’s Battered Women*, The New York Times, February 11, 2007; Tresa Baldas, *Waiting for Asylum*, National Law Journal, March 13, 2006; D.M Osborne, *The Gender Gap*, American Lawyer, February 2006; Leena Khandwala, *Don’t Send Women Back to their Tormentors*, Miami Herald, January 23, 2006; Edwidge Danticat, *A Crime to Dream*, The Nation, May 2, 2005; Tina Sussman, *Long wait for women seeking asylum as U.S. operates in legal vacuum*, New York Newsday, March 31, 2005.

³⁵ *Matter of T-Z-*, 24 I. & N. Dec. 163, 173 (BIA 2007).

³⁶ *Matter of A-T-*, 24 I. & N. Dec. at 301.

³⁷ *Id.* at 302-303.

³⁸ *See id.* at 302.

³⁹ *See* Petition for Certiorari, Paul D. Clement, Gonzales v. Gao, No. 06-1264, at 14-16, available at <http://www.usdoj.gov/osg/briefs/2006/2pet/7pet/2006-1264.pet.aa.pdf>.

⁴⁰ *See* Mohammed v. Gonzales, 400 F.3d 785, 796 n. 15 (9th Cir. 2005) (rejecting the “government’s suggestion that female genital mutilation cannot be a basis for a claim of past persecution because it is ‘widely-accepted and widely-practiced’”).

⁴¹ *Matter of A-T-*, 24 I. & N. Dec. at 299. The BIA also based its denial of protection to *A-T-* on a false distinction it drew between refugees fleeing forced sterilization and those fleeing female genital mutilation. The BIA fully acknowledged the factual similarities in the “one-time” nature of both forced sterilization and female genital mutilation, but asserted that refugees fleeing forced sterilization are better situated legally than refugees fleeing female genital mutilation, because Congress passed “special statutory provisions” to ease their burden of proof regarding a fear of future persecution. *See id.* at 300-301. But the BIA misconstrued Congressional intent: the legislative history makes clear that all Congress meant to do was establish forced sterilization as persecution “on account of political opinion,” not to give refugees fleeing forced sterilization any evidentiary “free pass.” *See* Frydman & Seelinger, *supra* note 24, at 1081-1082.

⁴² *See* Frydman & Seelinger, *supra* note 24, at 1080.

⁴³ Infibulation is one such form of female genital mutilation. It is the narrowing of the vaginal opening through the creation of a “covering seal,” formed by cutting and repositioning the labia to heal or be stitched together, so that the opening allows only for urine and menstrual flow. WHO, *FGM Factsheet*, *supra* note 8. Infibulation may be repeated after childbirth. Women who have undergone other forms of female genital mutilation may also be forced to submit to more extensive cutting if the initial procedure is deemed to be “incomplete.” World Health Organization, et. al., *Eliminating Female Genital Mutilation: An Interagency Statement* (2008), at 35, available at http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf [hereinafter WHO, *FGM Interagency Statement*].

⁴⁴ *Matter of A-T-*, 24 I. & N. Dec. at 622. The Second Circuit Court of Appeals preceded the Attorney General in finding that in *Matter of A-T-* the BIA committed “significant error in its application of its own regulatory framework.” Bah v. Mukasey, 529 F.3d 99, 101 (2d. Cir. 2008).

⁴⁵ Matter of A-T-, 25 I. & N. Dec. 4, 9 (BIA 2009).

⁴⁶ See Matter of R-A-, 22 I. & N. 906, 922 (BIA 1999; Att’y Gen. 2001), available at <http://www.usdoj.gov/eoir/vll/intdec/vol22/3403.pdf>.

⁴⁷ See *id.* at 920-921.

⁴⁸ See *id.* at 922-923.

⁴⁹ Proposed Gender-Based Asylum Regulations, 65 Fed. Reg. at 76592-93.

⁵⁰ *Id.* at 76593. See also Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DePaul L. Rev. 777, 779 (Spring 2003) [hereinafter Musalo, *Revisiting Social Group*] (urging an approach that “does not limit the nexus consideration to an analysis of the motives of the individual perpetrator of the persecution, but includes societal and State factors in the equation”).

⁵¹ 502 U.S. 478 (1992).

⁵² See *id.* at 483.

⁵³ Proposed Gender-Based Asylum Regulations, 65 Fed. Reg. at 76593.

⁵⁴ See DHS Brief, *Matter of R-A-*, *supra* note 21; DHS Brief, *Matter of L-R-*, *supra* note 22.

⁵⁵ Presumably, the same logic could extend to claims involving other forms of gender-based violence as well, to the extent that many other forms (e.g., female genital mutilation, forced marriage, and “honor” crimes) may be condoned or tolerated by the State or by legal or social norms.

⁵⁶ See DHS Brief, *Matter of L-R-*, *supra* note 22, at 15. While the language cited relates to the identification of a viable “particular social group,” it is likewise relevant to the “circumstantial evidence” analysis. Furthermore, the 2009 DHS brief continues to discuss country conditions, past government responses to the applicant’s reports of abuse, and other factors that relate to the state’s unwillingness or inability to protect her that also arguably factor into the “nexus” analysis, including citing the fact that Mexico has laws on the books prohibiting domestic violence that are not well enforced, and that several states within Mexico either do not criminalize domestic violence or only do so when it is a repeated offense. *Id.* at 17-18. See also, DHS Brief, *Matter of R-A-*, *supra* note 21, at 35 n. 45 (citing evidence that the abuser “uses violence to enforce power and control over the applicant because of the social status that the applicant has within the family relationship is highly relevant to determining the persecutor’s motive”). Guidelines issued by UNHCR in 2002 take a different analytical tack, but likewise consider legal and social norms central to the nexus analysis. The guidelines state that nexus can be established in the case of non-State actors (such as abusive husbands) either if the persecution is related to one of the grounds protected under the Refugee Convention, or if the persecution itself is unrelated to one of the grounds but the State’s inability or unwillingness to offer protection is so related (such as when a State or society condones or tolerates domestic abuse of women, because of beliefs that women in a domestic relationship should be subordinated to their husbands). See UNHCR, *Gender Guidelines*, *supra* note 19, at ¶ 21.

⁵⁷ See, e.g., Soler & Musalo, *supra* note 34 (“The filing of one brief is no substitute for clear national policy”).

⁵⁸ Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

⁵⁹ *Id.* at 233.

⁶⁰ *Id.*

⁶¹ See Frydman, *Recent Developments*, *supra* note 33, at n. 14 (citing decisions following the *Acosta* standard from the First, Third, Fifth, Sixth, Seventh and Ninth Circuits).

⁶² Proposed Gender-Based Asylum Regulations, 65 Fed. Reg. at 76588, 76593.

⁶³ *Id.*

⁶⁴ *Mohammad*, 400 F.3d at 797; see also *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (recognizing a social group of “Somali females” in a case involving female genital mutilation); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (recognizing females of the Tukulor-Fulani tribe in Senegal as a social group in a case involving female genital mutilation).

⁶⁵ *Kasinga*, 21 I. & N. Dec. at 358.

⁶⁶ See Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol’y Rev. 47, 90-91 (Fall 2008).

⁶⁷ *Matter of R-A-*, 22 I. & N. at 911.

⁶⁸ See, e.g., DHS Brief, *Matter of L-R-*, *supra* note 22, at 10 (rejecting a particular social group of “Mexican women in an abusive domestic relationship who are unable to leave”).

⁶⁹ This problem plagued the applicant in *Matter of A-T-*. The combination of her poorly constructed social group, combined with the BIA’s flawed legal analysis, resulted in the conclusion that her claim was self-defeating. See, e.g., USCIS, Participant Workbook of the Immigration Officer Academy, Asylum Officer Basic Training Course: *Asylum Eligibility Part II: Well-Founded Fear* (March 13, 2009), at 29, available at <http://www.uscis.gov/files/article/AOBTCLesson8AsylumEligibilityPart%20IIWellFoundedFear.pdf>

[hereinafter Asylum Officer Training Workbook] (“...[O]nce FGM has been performed the protected characteristic on account of which the FGM was inflicted is usually no longer possessed by the victim. For most claims based on the infliction of FGM the protected characteristic asserted is membership in a particular social group, and the particular social group is often defined as some subset of women who possess (or possessed) the trait of not having undergone FGM as required by the social expectations under which they live. In many cases, after having been subjected to FGM in the past, the applicant will no longer be a member of the particular social group on account of which she was persecuted”).

⁷⁰ See Frydman, *Recent Developments*, *supra* note 33 (citing *Matter of C-A-*, 23 I. & N. Dec. 951, 957-960 (BIA 2006) in which the BIA held that the claimed social group—former informants against the Cali drug cartel—was not “socially visible” and was “too loosely defined to meet the requirement of particularity”); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (BIA 2007) (group of “affluent Guatemalans” lacked social visibility and was not sufficiently particular, since “wealthy” and “affluent” were too amorphous); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008) (“Salvadoran youths who have resisted gang recruitment” and “family members of such Salvadoran youth” do not satisfy the social visibility test and do not constitute particular social groups).

⁷¹ See Frydman, *Recent Developments*, *supra* note 33, at n. 63 (citing decisions from the First, Second, Eighth, and Ninth Circuits).

⁷² *Matter of C-A-*, 23 I. & N. at 960.

⁷³ See UNHCR, *Gender Guidelines*, *supra* note 19, at ¶¶ 5-13.

⁷⁴ See Marouf, *supra* note 66, at 94-98.

⁷⁵ *Gatimi v. Holder*, No. 08-3197 (7th Cir. August 20, 2009) (Posner, J.), at 8.

⁷⁶ See *Matter of A-T-*, 24 I. & N. Dec. 296, 303 (BIA 2007).

⁷⁷ *Gatimi*, No. 08-3197, at 7.

⁷⁸ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008).

⁷⁹ *Id.* at 585.

⁸⁰ *Id.* at 584.

⁸¹ See DHS Brief, *Matter of L-R-*, *supra* note 22, at 11, n. 8. DHS also rejected this formulation of the particular social group because “abusive” is “impermissibly circular” (i.e., would define the group by the persecution suffered or feared). *Id.* at 10-11.

⁸² See *id.* at 14.

⁸³ See *id.* at 19-20.

⁸⁴ See *id.* at 20.

⁸⁵ *Id.* at 18.

⁸⁶ William Fisher, *Abused Woman Waits 12 Years for Asylum*, Inter-Press News Agency, October 14, 2008. See also Alex Kotlowitz, *Asylum for the World’s Battered Women*, The New York Times, February 11, 2007 (citing case of a South Asian woman who arrived in the US in 1997 to seek asylum based on domestic violence that included being hit so hard that she lost her sense of smell, as one of the many women who, like Ms. Alvarado, have been kept in legal limbo over this period).

⁸⁷ Indeed, in one case involving a Tahiri client who had suffered twenty years of extreme domestic violence at the hands of a husband with powerful political and military connections, the Immigration Judge granted the client relief under the Convention Against Torture (CAT) rather than asylum, but then herself urged the client to appeal her decision in the hope of obtaining desperately need guidance from above on how such cases should be adjudicated.

⁸⁸ See Julia Preston, *New Policy Permits Asylum for Battered Women*, The New York Times, July 16, 2009 (asserting that DHS’ legal brief “opened the way for foreign women who are victims of severe domestic beatings and sexual abuse to receive asylum in the United States” and calling it an Obama Administration “action [that] reverses a Bush [A]dministration stance in a protracted and passionate legal battle over the possibilities for battered women to become refugees”).

⁸⁹ See Soler & Musalo, *supra* note 34 (noting “[t]he administration recently sent a positive signal about these types of cases, but it needs to do much more . . . our nation’s promise of mercy and refuge is still applied erratically, even capriciously”).

⁹⁰ Asylum and “withholding of removal” are both forms of protection against return to persecution that are based on the refugee definition, but withholding sets a higher proof standard. To be granted withholding of removal, an applicant must prove not just a well-founded fear of persecution but that there is a “clear probability” that the applicant’s life or freedom would be threatened on account of one of the five enumerated grounds of the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). INA § 241(b)(3)(A); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 423-424 (1987).

⁹¹ See, e.g., *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (“[T]here is simply no statutory or regulatory authority for . . . withholding from removal based on threatened hardship to [a] U.S. citizen minor daughter. [...] The tragic nature

of this choice [to have to leave a child behind in the U.S. to ensure her protection] is undeniable, but it does not warrant that we recognize a derivative claim where Congress has not seen fit to provide for it. [...] While it is entirely reasonable to believe that the law ideally should not present [parents] with such dilemmas, the existing law does.”); *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (“As United States citizens, [the daughters] have the right to stay here without [their parent], but that would likely require some form of guardianship – not a Hobson’s choice, but a choice no [parent] wants to make”).

⁹² *But see* *Tchoukrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005), *rehearing denied en banc*, 430 F.3d 1222 (2005), *vacated by* 127 S. Ct. 57 (2006) (involving persecution suffered by disabled child).

⁹³ 24 I. & N. Dec. 275 (BIA 2007), *cert. denied* *Kane v. Holder*, No. 07-60757 (5th Cir. August 26, 2009).

⁹⁴ *Id.*

⁹⁵ For more insights into the impossibility of ensuring a girl’s protection against female genital mutilation in communities where the practice is prevalent, and the struggles of a mother to seek asylum in the United States in order to protect her daughter from the practice, see the documentary film *Mrs. Goundo’s Daughter*, (Attie & Goldwater Productions: 2009), available at <http://www.attiegoldwater.com/goundosdaughter/home.htm>.

⁹⁶ *See* *Frydman & Seelinger*, *supra* note 24, at 1100-1101 (discussing cases decided after the BIA issued its decision in *A-K* that likewise denied parents protection).

⁹⁷ 24 I. & N. Dec. 275, at 276-277 (BIA 2007).

⁹⁸ The BIA cited *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003) (rejecting mother’s asylum claim and noting that because Ms. Oforji’s two US citizen daughters have a legal right to remain in the United States, they would not be “constructively deported”). *See also* *Olowo v. Ashcroft*, 368 F.3d 692, 700-701 (7th Cir. 2004) (rejecting a mother’s asylum claim because her daughters and the other parent had legal permanent resident status; holding that “if an applicant’s daughter can avoid constructive deportation by remaining in the United States with her other parent, the applicant cannot use the threat of FGM [(female genital mutilation)] against her daughter as a basis for her asylum claim”). By comparison, the BIA cited *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (Ethiopian mother and daughter both applied for asylum based on fear that daughter would be subjected to female genital mutilation) for the proposition that where a daughter does not herself have any legal right to remain in the United States, a parent may establish her own well-founded fear of persecution based on the likelihood that her daughter would be forced to undergo female genital mutilation in the event that they were returned to their home country and the mother would be forced to witness her daughter’s pain and suffering.

⁹⁹ *See* *Frydman & Seelinger*, *supra* note 24, at 1097. Moreover, drawing this false distinction actually places US citizen and legal permanent resident children at a terrible disadvantage relative to children without status, since the very fact that they are entitled to remain in the United States may be construed to undermine their parents’ asylum claim. *See* Dree K. Collopy, *Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of Children*. 21 *Geo. Immigr. L.J.* 469, 488 (Spring 2007). To counteract the disadvantage at which US citizen and legal permanent resident children are placed, this article argues “that the ‘hardship factor’ of cancellation of removal claims should be legislatively incorporated into the asylum and withholding of removal regime to offer LPR or citizen children protection from the devastating choices their parents currently face.” *Id.* at 473. Cancellation of removal is a form of relief from deportation requiring an applicant to prove continuous presence in the country for ten years, good moral character, and no convictions for certain offenses. INA § 240A(b). Applicants must also show that their removal would place “exceptional and extremely unusual hardship” upon a qualifying relative (such as the child of the applicant) who is a citizen or legal permanent resident. INA § 240A(b)(1)(d).

¹⁰⁰ *See* *Oforji*, 354 F.3d at 620 (noting that “the only condition in which the girls could remain in the United States... would be as foster children”). *See also* Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, *Immigr. Briefings*, No. 04-11, November 2004, at 12-13 (decrying the outcome dictated by the *Oforji* decision, forcing a mother to leave her daughter behind, possibly in foster care, as contrary to strong policy arguments protecting family unity: under *Oforji*, “the parents, the daughters, and the American taxpayer all lose”).

¹⁰¹ *See* *Matter of Dibba*, No. A73 541 857 (BIA November 23, 2001) (unpublished) (granting a Gambian mother’s motion to reopen based on her fear that her US citizen daughter would be subjected to female genital mutilation if they were forced to return; finding that the mother need not “prove she would take her child with her as part of her burden... if she has custody of the child... normally a mother would not be expected to leave her child in the U.S. in order to avoid persecution”). Courts of Appeal in both the Ninth and Eighth Circuits have also analyzed decisions from the viewpoint that a US citizen daughter would necessarily follow her parents to their home country if they were forced to return there, regardless of her own legal entitlement to remain in the United States. *See, e.g.*, *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) (*en banc*); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007).

¹⁰² *See* *Matter of A-K*, 24 I. & N. Dec. at 278-279.

¹⁰³ See *id.* at 279 (citing INA § 208(b)(3)(A), 8 USC § 1158(b)(3)(A): “a spouse or child...of an alien who is granted asylum...may, if not otherwise eligible for asylum...be granted the same status as the alien if accompanying, or following to join, [such alien]”). Some have argued that Congress should amend the INA to permit child-to-parent derivative status in certain asylum cases. See, e.g., Alida Yvonne Lasker, *Solomon’s Choice: The Case for Granting Derivative Asylum to Parents*, 32 Brook. J. Int’l L. Vol. XXXII, 231, 231-36 (2006) (arguing that courts should grant asylum to parents of persecuted children on the theory that they qualify for derivative asylum status through their child’s claim, and calling for Congress to amend the INA to expressly authorize courts to do so). An expansion of the derivative asylum provisions would not have changed the result in *A-K-*, however. The BIA also found that the father in *A-K-* was further barred from receiving derivative asylum status because his daughters were US citizens, and thus could not have applied for asylum themselves; and furthermore, the BIA found that the father was barred because he sought withholding of removal rather than asylum, and withholding does not permit any derivative status under any circumstances. See *Matter of A-K-*, 24 I. & N. Dec. at 279.

¹⁰⁴ See UNHCR, *FGM Guidance*, *supra* note 19, at 8, ¶ 11 (advising that “[w]here a family seeks asylum based on a fear that a female child of the family will be subjected to FGM, the child will normally be the principal applicant, even when accompanied by her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his or her child’s refugee status”); UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate: Unit 5: Processing Claims Based on the Right to Family Unity* (September 2005) § 5.1.2 available at <http://www.unhcr.org/4317223c9.pdf> (including parents or primary caregivers of minor applicants in the list of persons eligible for derivative refugee status).

¹⁰⁵ See Collopy, *supra* note 99, at 488 n. 215. Congress created the “T” visa for victims of human trafficking and the “U” visa for victims of certain other violent crimes who assist law enforcement in investigations and prosecutions, each of which permits parents of the principal applicant to be granted derivative status. INA §§ 101(a)(15)(T) and (U).

¹⁰⁶ See UNHCR, *FGM Guidance*, *supra* note 19, at 8 (advising that in addition to a derivative claim to asylum status through a daughter threatened with female genital mutilation, a parent could “have a claim in his or her own right. This includes cases where the parent would be forced to witness the pain and suffering of the child...”). See also Frydman & Seelinger, *supra* note 24, at 1088 (observing that circuit courts are split on the question but that this theory of personal harm to parent-protectors “is supported by two well-established principles in asylum law: a) that persecution encompasses psychological harm and b) that persecution of one’s beloved family member can constitute persecution as to oneself.”); Rice, *supra* note 100, at 1-2 (arguing that the analysis should focus on the persecution of a parent herself through “the mother’s own experience of resisting and being unable to prevent, indeed forced to play witness to, the mutilation of her daughter’s genitalia in violation of the mother’s deeply held beliefs”).

¹⁰⁷ See *Abay v. Ashcroft*, 368 F.3d 634, 636 (6th Cir. 2004) (granting asylum to mother based on her well-founded fear that her daughter would be subjected to female genital mutilation upon their return to Ethiopia). The Court of Appeals in *Abay* articulated a clear standard that favors granting asylum “in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.” *Id.* at 642.

¹⁰⁸ See Frydman & Seelinger, *supra* note 24, at 1088.

¹⁰⁹ See *Matter of A-K-*, 24 I. & N. Dec. at 276-277 (citing with approval the decision in *Niang v. Gonzales*, 429 F.3d 505, 512 (4th Cir. 2007), denying a claim for withholding of removal by a mother who feared her daughter would be forced to undergo female genital mutilation, because the claim focused solely on psychological harm to the mother).

¹¹⁰ See Frydman & Seelinger, *supra* note 24, at 1090.

¹¹¹ See Rice, *supra* note 100, at 12-13.

¹¹² See, e.g., *Oforji*, 354 F.3d at 618 (calling Ms. Oforji’s “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” a “distasteful Solomon choice” that Congress has foreseen but left to the immigrant in proceedings, not the courts, to make); *Abebe v. Ashcroft*, 379 F.3d 755, 763 (9th Cir. 2004) (Ferguson, J., dissenting), *rev’d en banc* by *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005) (“I do not believe that Congress intended any parent to make that choice”); see also Frydman & Seelinger, *supra* note 24, at 1100-1101 (citing denials of asylum or withholding of removal following *A-K-*, including one case in which “the judge felt she had no choice but to deny under *A-K-*, despite her disagreement with the decision”).

¹¹³ After all, the implementing regulations of the INA already expressly recognize that extreme psychological harm can constitute torture for the purposes of applications for relief from removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. See 8 C.F.R. § 208.16(a)(1) (defining torture to include severe mental pain or suffering).

¹¹⁴ Notably, the BIA has already held that persecution of a close family member can constitute persecution of oneself in a different context, with regard to individuals seeking asylum based on coercive population control (CPC) measures. See

In re C-Y-Z-, 21 I. & N. Dec. 915, 918 (BIA 1997) (holding that “the husband of a sterilized wife can essentially stand in her shoes and made a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than him”). To reach this holding, the BIA inferred Congressional intent from the 1996 passage of a CPC statute extending broad protection to such refugees. Without a similar expression of Congressional intent regarding parent-child asylum claims, the BIA has declined to extend C-Y-Z’s rationale to such claims.

¹¹⁵ Anticipating the counter-argument that such measures would open the proverbial floodgates to economic migrants manipulating fears of persecution to their children, it is well worth noting: a) the several other steep legal hurdles that the asylum system requires applicants to overcome will prevent baseless claims from succeeding; and b) the fear of floodgates has been raised before with respect to gender-based asylum claims generally, but in practice, has simply not been realized. [See Appendix A: *The Truth Trickles Out: There’s No Reason to Fear a Flood of Women Asylum Seekers*, at page 42 of this report.] More specifically, despite the fact that the Sixth Circuit Court of Appeals issued a favorable decision receptive to parent-child asylum claims in *Abay v. Ashcroft* back in 2004, the subtotal of affirmative asylum applications based on “particular social group” that were filed in the United States by individuals with children (a subtotal which includes, but is certainly not limited to, asylum claims filed by parents seeking to protect their daughters from being subjected to female genital mutilation) actually declined between FY 2004 (355 claims) and FY 2007 (293 claims). See Chart, “Applicants with Claims Based in Whole or in Part on Particular Social Group” (covering the period FY 2007 - FY 2008 YTD) obtained by the Tahirih Justice Center from Asylum Headquarters, DHS, in September 2008 (on file with the Tahirih Justice Center and available upon request) [hereinafter Applicant Chart].

¹¹⁶ Press Release, *Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border* (January 30, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0845.shtm. Although expedited removal initially applied only to individuals arriving at US border ports-of-entry, the Attorney General through the Immigration and Naturalization Services (INS), and, more recently, the Department of Homeland Security (DHS), has expanded the scope of expedited removal numerous times since its implementation. See Alison Siskin and Ruth Ellen Wasem, *CRS Report for Congress: Immigration Policy on Expedited Removal of Aliens* (September 30, 2005), at 8-10, available at <http://www.au.af.mil/au/awc/awcgate/crs/r133109.pdf>.

¹¹⁷ INA § 235(b)(1). Individuals without proper documentation or in possession of documents produced by fraud or misrepresentation are inadmissible and subject to expedited removal. INA §§ 212(a)(6)(C) and 212(a)(7).

¹¹⁸ 8 CFR § 235.3(b)(1); 8 USC § 1182(a)(9)(a)(1).

¹¹⁹ INA § 235(b)(1)(A)(ii). If a finding of credible fear is made, asylum seekers are placed in regular removal proceedings where they may pursue an asylum claim before an immigration judge. Asylum seekers are detained throughout this process, and there is limited chance for parole. If an asylum officer does not find credible fear, the asylum seeker may petition for limited review before an immigration judge; however, absent a favorable ruling, the asylum seeker will be immediately deported from the United States. INA § 235(b)(1)(B)(iii). Persons claiming US citizenship, lawful permanent residence, refugee, or asylee status also cannot be removed until they receive a hearing to determine the validity of that claim. 8 CFR §§ 235.3(b)(4) and (b)(5).

¹²⁰ Michelle R. Pistone and John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immgr. L.J. 167, 174 (2006).

¹²¹ Expedited removal gave “unprecedented authority to INS inspectors, who now have the unreviewable authority to issue orders of removal previously only issued by Immigration Judges and subject to review by the [BIA] and federal courts.” See Karen Musalo, et al., *The Expedited Removal Study: Evaluation of the General Accounting Offices’ Second Report on Expedited Removal* (October 2000), at 1 [hereinafter Musalo, et al., *Expedited Removal Study*]. Although INS regulations set out strict procedures that border officers must follow when processing individuals in expedited removal, “in almost every particular, the promise of these carefully drawn and negotiated compromise safeguards has been broken through failure to apply them adequately and with consistency.” Pistone & Hoeffner, *supra* note 120, at 169.

¹²² Studies found that statements from initial screenings are often used against asylum seekers during later hearings before an immigration judge and cited as factors in decisions to deny asylum or withholding of removal. US Commission on International Religious Freedom (USCIRF), *Report on Asylum Seekers in Expedited Removal, Volume 1: Findings and Recommendations* (February 2005), at 5, 58 [hereinafter USCIRF Report, *Volume 1*].

¹²³ *Id.* at 4.

¹²⁴ While the USCIRF study remains the most comprehensive and current study of expedited removal and asylum seekers, numerous other reports have also documented the detrimental effects that the expedited removal process has on individuals seeking refuge in the United States. After the implementation of expedited removal in 1997, researchers at University of California, Hastings College of Law conducted an independent, three-year study of expedited removal that relied on anecdotal evidence obtained from both immigrants who had gone through the process and practitioners. Among other conclusions, this study found that more women were removed during expedited removal than during regular deportation proceedings, and postulated, among other theories, that “expedited removal may be applied in a

manner that disfavors women.” See *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 Notre Dame J.L. Ethics & Pub. Pol’y 1, 50, 54-55 (2001). A confidential United Nations report conducted in 2003 found that Border Patrol agents at US airports sometimes failed to refer asylum seekers expressing fear to a credible fear interview with an Asylum Officer, and often did not follow other procedures that would enable asylum seekers to express fear of return and ask for protection in the United States. Rachel L. Swarns, *UN Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, The New York Times (August 13, 2004), at A11. Congress authorized two reports on expedited removal from the General Accounting Office, released in 1998 and 2000, but critics of the studies noted that they failed to fully answer the questions posed by Congress and did not evaluate situations that would require a qualitative analysis. Musalo, et al., *Expedited Removal Study*, *supra* note 121, at 1, 4. The Congressional Research Service also released a study of expedited removal prior to the proposed expansion of the expedited removal program in 2005. See Siskin & Wasem, *supra* note 116.

¹²⁵ Congress authorized USCIRF to conduct a comprehensive study of the expedited removal process in Section 605 of the International Religious Freedom Act of 1998. USCIRF Report, *Volume 1*, *supra* note 122, at 14.

¹²⁶ USCIRF, *Report on Asylum Seekers in Expedited Removal, Volume 2: Expert Reports* (February 2005), at 229, 288, 296 [hereinafter USCIRF Report, *Volume 2*].

¹²⁷ USCIRF, *Expedited Removal Study Report Card: Two Years Later* (February 2007) available at http://www.uscirf.gov/images/stories/pdf/scorecard_final.pdf [hereinafter USCIRF, *Report Card*]; USCIRF Press Release: *USCIRF Disappointed that DHS Action on Expedited Removal Process Falls Short* (January 9, 2009), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=2340&Itemid=126 [hereinafter USCIRF Press Release].

¹²⁸ Lawyers Committee for Human Rights (now Human Rights First), *Refugee Women at Risk: Unfair Laws Hurt US Asylum Seekers* (2002), at 6, available at http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf [hereinafter *Refugee Women at Risk*].

¹²⁹ USCIRF Report, *Volume 2*, *supra* note 126, at 197.

¹³⁰ Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), at 141-142 [hereinafter *From Persecution to Prison*]; *Refugee Women at Risk*, *supra* note 128, at 7.

¹³¹ It is often very difficult for victims of gender-based violence to discuss their stories with anyone, including attorneys and other service providers that provide a supportive environment. “When she came to me, she was extremely traumatized. She would disassociate in my offices, it was hard for her to concentrate, and she was preoccupied with living in this country and trying to find housing and how was she going to support herself, and it was very difficult for her to focus on telling her story.” Colleen Renk Zengotibengoa, former Director of Legal Services at Tahirih Justice Center, discussing her experiences with Gisele, a survivor of forced marriage, rape, and other forms of gender-based violence who was granted asylum (video available at <http://www.tahirih.org/education/tahirih-resources/>).

¹³² During interviews with researchers, 50 percent of asylum seekers reported being questioned in open areas with little or no privacy during the initial screening. *From Persecution to Prison*, *supra* note 130, at 141.

¹³³ Nina Bernstein, *Kennedy Airport is Called Toughest for Asylum Seekers*, The New York Times (February 10, 2005), at B2.

¹³⁴ *From Persecution to Prison*, *supra* note 130, at 142, 145, 149.

¹³⁵ Pistone & Hoeffner, *supra* note 120, at 169 (citing *Asylum Procedures*, 65 Fed. Reg. 76, 121 (December 6, 2001)).

¹³⁶ USCIRF Report, *Volume 1*, *supra* note 122, at 54. During interviews for a 2003 study, researchers from Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture found that 66 percent of asylum seekers reported that INS (now CBP) failed to adequately explain their right to ask for asylum in the United States. *From Persecution to Prison*, *supra* note 130, at 140.

¹³⁷ “Many victims of persecution are from countries that tightly control information about the ability of victims of persecution to seek refuge in other countries. Thus, for this or other reasons, many applicants for admission are unaware of their right to ask for protection from return and must affirmatively be told about this right by the inspections officer.” Pistone & Hoeffner, *supra* note 120, at 177.

¹³⁸ USCIRF Report, *Volume 2*, *supra* note 126, at 288, 296.

¹³⁹ Pistone & Hoeffner, *supra* note 120, at 173.

¹⁴⁰ 8 CFR § 235.3(b)(1).

¹⁴¹ Reliance on airline employees from state-run airline carriers for translation can be particularly problematic. Individuals fleeing persecution may view such persons as “state” employees and fear that allegations of persecution may be minimized, dismissed, or reported back to their home government, compromising their ability to articulate fear and ask for refuge. Pistone & Hoeffner, *supra* note 120, at 184.

¹⁴² Musalo, et al., *Expedited Removal Study*, *supra* note 121, at 19 (citing INS Office of Programs, Memorandum: *Supplemental Training Materials on Credible Fear Referrals* (February 6, 1998)).

¹⁴³ Pistone & Hoeffner, *supra* note 120, at 191-192.

¹⁴⁴ USCIRF, *Report Card*, *supra* note 127, at 1-2.

¹⁴⁵ USCIRF Report, *Volume 1*, *supra* note 122, at 6.

¹⁴⁶ Researchers found that over 15 percent of individuals expressing fear of return were not referred for a credible fear interview. *Id.* at 53-54.

¹⁴⁷ Siskin & Wasem, *supra* note 116, at CR14.

¹⁴⁸ Numerous organizations have issued reports criticizing US detention of asylum seekers and other immigrants over the last decade, and Members of Congress have repeatedly introduced bills to reform the immigration detention system, including the Secure and Safe Detention and Asylum Act (S.1594, introduced by Senator Joseph Lieberman on August 6, 2009) and the Immigration Oversight and Fairness Act (H.R.1215, introduced by Rep. Lucille Roybal-Allard on February 26, 2009) currently pending before Congress.

¹⁴⁹ ICE News Release, *ICE Announces Major Reforms to Immigration Detention System* (August 6, 2009), available at <http://www.ice.gov/pi/nr/0908/090806washington.htm>.

¹⁵⁰ Spencer Hsu, *Agency Plans to Improve Oversight of Immigration Detention*, *The Washington Post* (August 7, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601543.html>. Although ICE has issued new detention standards to improve conditions for all immigrant detainees in the past, these standards contain no enforcement mechanism and non-compliance continues to be widespread. Southwest Institute for Research on Women, et al., *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona* (January 2009), at 9-10 [hereinafter *Unseen Prisoners*].

¹⁵¹ Michelle Roberts, *ICE: Detention overhaul won't lead to fewer beds*, *Associated Press* (August 12, 2009), available at http://www.newsvine.com/_news/2009/08/12/3146993-ice-detention-overhaul-wont-lead-to-fewer-beds.

¹⁵² INA § 235(b)(1)(B)(iii)(IV); 8 CFR § 235.3(b). Prior to a credible fear interview, an asylum seeker may only be paroled to meet a medical emergency or for a “legitimate law enforcement objective.” 8 CFR § 235.3(b)(2)(iii) and (4)(ii).

According to USCIS statistics, asylum seekers detained at airports and other border points wait on average around two weeks (in detention) from the date of referral for a credible fear interview, but advocates around the country have repeatedly reported waits for as long as six months, delaying an asylum seeker’s ability to apply for parole and extending the length of detention. Human Rights First, *US Detention of Asylum Seekers: Seeking Protection, Finding Prison* (April 2009), at 37-38 available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf> [hereinafter *Seeking Protection, Finding Prison*].

¹⁵³ *Seeking Protection, Finding Prison*, *supra* note 152, at 39.

¹⁵⁴ 8 CFR § 212.5(b); ICE, *Parole of Arriving Aliens Found to Have a “Credible Fear” of Persecution or Torture* (November 6, 2007) [hereinafter ICE Parole Directive].

¹⁵⁵ *Seeking Protection, Finding Prison*, *supra* note 152, at 32.

¹⁵⁶ Every year, ICE detains thousands of individuals “defensively” petitioning for asylum after they have been put into removal (deportation) proceedings within the United States. While individuals “affirmatively” seeking asylum are not generally detained, detention of affirmative asylum applicants is also growing. *Id.* at 15-16.

¹⁵⁷ INA § 236(a)(2); 8 CFR § 1003.19(d).

¹⁵⁸ *Seeking Protection, Finding Prison*, *supra* note 152, at 38-40.

¹⁵⁹ *Id.* at 39.

¹⁶⁰ For asylum seekers stopped at US borders, “[t]he discretionary nature of the parole decision making process means that an individual’s chance of release may depend entirely on where he or she is detained... Advocates told Amnesty International that some ICE offices have unwritten ‘no release’ policies, rendering ICE officer’s review meaningless. The parole process concentrates extraordinary power in the hands of individual ICE officers and lacks effective oversight and review, in contravention of international human rights standards.” Amnesty International, *Jailed Without Justice: Immigrant Detention in the US* (March 2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>, at 15 [hereinafter *Jailed Without Justice*].

¹⁶¹ *Seeking Protection, Finding Prison*, *supra* note 152, at 32.

¹⁶² ICE Parole Directive, *supra* note 154.

¹⁶³ According to USCIRF data, parole rates dropped from 86.1 percent to 62.5 percent from 2001 to 2003. More recent (though incomplete) data reflects an even further decline, with Human Rights First estimating recent parole rates at less than 13 percent for asylum seekers. *Seeking Protection, Finding Prison*, *supra* note 152, at 31, 35. See also USCIRF Report, *Volume 1*, *supra* note 122, at 62.

¹⁶⁴ Statistical analysis by USCIRF revealed widely varying release rates for asylum seekers detained in major districts, with parole rates as low as .5 percent (New Orleans, LA) to a high of 97.6 percent (Harlingen, TX). USCIRF Report, *Volume 1*, *supra* note 122, at 62.

¹⁶⁵ *Seeking Protection, Finding Prison*, *supra* note 152, at 38.

¹⁶⁶ ICE utilizes over 500 facilities for detention, including service processing centers operated by ICE, contract detention facilities managed by private companies, state-run prisons, and local county jails. In order to hold women, these facilities must only show ICE that they can provide “physical and visual separation of the sexes” and are not required to segregate asylum seekers from the general criminal population. Human Rights Watch, *Detained and Dismissed: Women’s Struggles to Obtain Health Care in Detention* (2009), at 12-13 available

at http://www.hrw.org/sites/default/files/reports/wrd0309webwcover_1.pdf [hereinafter *Detained and Dismissed*].

¹⁶⁷ *Seeking Protection, Finding Prison*, *supra* note 152, at 19-20.

¹⁶⁸ *Id.* at 20-21.

¹⁶⁹ The study conducted by Physicians for Human Rights and the NYU/Bellevue Program for Survivors of Torture found that “the mental health of asylum seekers interviewed . . . was extremely poor and worsened the longer that individuals were in detention. [...] Study physicians, experienced in evaluating and caring for asylum seekers, found extremely high symptom levels of anxiety, depression, and post-traumatic stress disorder (PTSD) among detained asylum seekers.” *From Persecution to Prison*, *supra* note 130, at 1.

¹⁷⁰ *Seeking Protection, Finding Prison*, *supra* note 152, at 22; *Unseen Prisoners*, *supra* note 150, at 37.

¹⁷¹ “Instead of putting the prior asylum parole guidelines into regulations, ICE rescinded those guidelines in November 2007 and issued new guidance that inserted an additional level of eligibility requirements for release on parole. The new directive makes it clear that meeting the previous parole criteria—establishing [credible fear,] identity, community ties, and no security risk—is no longer enough. An asylum seeker must also establish that: there are medical reasons which warrant release, s/he is a juvenile or a governmental witness in a legal proceeding, or that the release would be ‘in the public interest.’” *Seeking Protection, Finding Prison*, *supra* note 152, at 34.

¹⁷² “ICE’s new parole guidance does not require that all asylum seekers be assessed for release to ensure that those who can and should be released are not being detained. Instead, asylum seekers must submit a written request for parole before being considered for release. This approach disadvantages individuals who do not speak English or are not represented—and more than a third of asylum seekers in detention are not represented. These individuals are less likely to learn about the parole process or be able to make a formal written application.” *Id.* at 34. Prior to 2007, DHS policy advocated the release of asylum seekers who could establish credible fear, identity, community ties, and who did not pose a security risk. However, available data did not allow for evaluation of ICE’s interpretation and application of these more liberal criteria for release. USCIRF Report, *Volume 1*, *supra* note 122, at 60.

¹⁷³ It is worth noting, though it will not be addressed in this report, that some female asylum seekers are detained with their children, making it vital to consider not only the conditions and impact of detention on women, but also the consequences of prolonged detention on children and the family dynamic. For more information on this important topic, please see Women’s Refugee Commission, *Locking Up Family Values: The Detention of Immigrant Families* (February 2009), available at <http://www.womenscommission.org/pdf/famdeten.pdf>.

¹⁷⁴ USCIRF Report, *Volume 2*, *supra* note 126, at 196-197.

¹⁷⁵ *From Persecution to Prison*, *supra* note 130, at 5.

¹⁷⁶ *Refugee Women at Risk*, *supra* note 128, at 13.

¹⁷⁷ Refugee women have experienced sexual assault, verbal harassment, and other forms of abuse while in detention. *Id.* Verbal abuse and solitary confinement were repeatedly reported by detained asylum seekers interviewed for the Physicians for Human Rights and NYU/Bellevue study. *From Persecution to Prison*, *supra* note 130, at 2. Advocates continue to report incidents of sexual abuse of female detainees at certain detention facilities. Emily Butera, Program Officer, Women’s Refugee Commission, email message to authors (September 16, 2009) [hereinafter Butera Email].

¹⁷⁸ *Unseen Prisoners*, *supra* note 150, at 26, 36.

¹⁷⁹ Women’s Commission for Refugee Women and Children (now Women’s Refugee Commission), *Liberty Denied: Women Seeking Asylum in the United States* (April 1997), at 14 [hereinafter *Liberty Denied*].

¹⁸⁰ *Unseen Prisoners*, *supra* note 150, at 26, 28; *Liberty Denied*, *supra* note 179, at 14.

¹⁸¹ USCIRF Report, *Volume 2*, *supra* note 126, at 190. “The inability to adequately communicate carries repercussions for many of the other issues facing detainees. First, it greatly exacerbates the detainees’ fear and confusion about their detention and the legal status of their asylum claims. Second, it results in an inability to communicate medical problems. Third, it leads to unnecessary disciplinary actions due to a detainee’s lack of understanding of the facility regulations. Fourth, it inhibits the ability of detainees to access the few services available in the facilities, such as outdoor exercise, because they are unaware of the existence of such services or are unsure about how to request them. Finally, detainees are left with no recourse to raise complaints when abuses occur. This is particularly disturbing for women asylum seekers, many of whom come from cultures where they are taught not to question authority.” *Liberty Denied*, *supra* note 179, at 18.

¹⁸² “[S]taff members in the overwhelming majority of detention facilities surveyed received little or no client-appropriate training. [...] Instead, the overwhelming majority of staff members have received jail-appropriate training in security and

custody-related matters. Many have become accustomed to working with a domestic criminal population who have little in common with asylum seekers. This is especially true in the case of women and children asylum seekers, whose trauma histories and emotional needs may be more severe and require more specialized training.” USCIRF Report, *Volume 2*, *supra* note 126, at 200.

¹⁸³ Former asylum detainees reported that they could be placed in isolation or solitary confinement if they had verbal disagreements with other detainees or for simply crying. *Id.* at 190. Other asylum seekers have reported being threatened with solitary confinement, or being put “in the hole” if they asked for seconds at mealtimes or if the television was too loud. *From Persecution to Prison*, *supra* note 130, at 116-117.

¹⁸⁴ *From Persecution to Prison*, *supra* note 130, at 191-193; USCIRF Report, *Volume 2*, *supra* note 126, at 190.

¹⁸⁵ *Seeking Protection, Finding Prison*, *supra* note 152, at 19-20. “Clothing is a simple, yet important way to” help asylum seekers “identify themselves as individuals and not criminals.” *From Persecution to Prison*, *supra* note 130, at 191.

¹⁸⁶ *Seeking Protection, Finding Prison*, *supra* note 152, at 19-21.

¹⁸⁷ *From Persecution to Prison*, *supra* note 130, at 13.

¹⁸⁸ *Jailed Without Justice*, *supra* note 160, at 34.

¹⁸⁹ *Detained and Dismissed*, *supra* note 166, at 36.

¹⁹⁰ Women’s ability to move about detention centers is often significantly less than that of male detainees, and women are more often confined to just their living quarters. *Unseen Prisoners*, *supra* note 150, at 40-41.

¹⁹¹ *Seeking Protection, Finding Prison*, *supra* note 152, at 17.

¹⁹² *From Persecution to Prison*, *supra* note 130, at 90-91.

¹⁹³ *Seeking Protection, Finding Prison*, *supra* note 152, at 19.

¹⁹⁴ USCIRF Report, *Volume 2*, *supra* note 126, at 190.

¹⁹⁵ *Detained and Dismissed*, *supra* note 166, at 17.

¹⁹⁶ *Id.* at 58-59.

¹⁹⁷ New ICE medical care standards (released in 2008 but not binding until January 2010) show improvements in proposed standards of care for pregnant women and recent mothers, but little else is guaranteed in relation to women’s specific health needs. *Id.* at 17. International organizations have also decried the treatment of women in US immigration detention, with the UN Human Rights Council, Report of the Special Rapporteur on Migrants “recommend[ing] that the US develop gender-specific detention standards with attention to the medical and mental health needs of women survivors of violence and refrain from detaining women who are suffering the effects of persecution or abuse, or who are pregnant or nursing infants.” *Id.* at 21.

¹⁹⁸ Human Rights Watch found that “ICE policies unduly deprive women of basic health services [and] ... services that are provided are often *unconscionably delayed* or otherwise *seriously substandard*.” *Id.* at 1 (emphasis added).

¹⁹⁹ *Seeking Protection, Finding Prison*, *supra* note 152, at 51-53.

²⁰⁰ Researchers found that even in “the most benign instances, some women said that they did not feel comfortable sharing private health information with the individuals with which they interacted day in and day out. In other cases, women alleged mistreatment by security staff in the course of requesting medical care or being transported for treatment.” *Detained and Dismissed*, *supra* note 166, at 29; *Unseen Prisoners*, *supra* note 150, at 19-20.

²⁰¹ *Seeking Protection, Finding Prison*, *supra* note 152, at 53. Although ICE detention standards mandate translation assistance if medical personnel are unable to communicate with detainees, detention facilities often do not provide translators during medical exams. This lack of translation assistance can be particularly difficult for detainees with less widely-known languages, and studies have found that detainees lacking English language ability are “more likely to be ignored, misdiagnosed and/or incorrectly treated.” Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody* (February 2009), at 47 available at <http://www.fiacfla.org/reports/DyingForDecentCare.pdf> [hereinafter *Dying for Decent Care*].

²⁰² *Detained and Dismissed*, *supra* note 166, at 35-36.

²⁰³ Butera Email, *supra* note 177.

²⁰⁴ *Detained and Dismissed*, *supra* note 166, at 33.

²⁰⁵ *Id.* at 60.

²⁰⁶ *From Persecution to Prison*, *supra* note 130, at 66-67, 69.

²⁰⁷ USCIRF Report, *Volume 2*, *supra* note 126, at 197 (citing A. Keller, et al., *Mental Health of Detained Asylum Seekers*, *The Lancet* (November 22, 2003), at 1721-1723).

²⁰⁸ USCIRF Report, *Volume 2*, *supra* note 126, at 190.

²⁰⁹ *Unseen Prisoners*, *supra* note 150, at 24; *From Persecution to Prison*, *supra* note 130, at 55.

²¹⁰ *Detained and Dismissed*, *supra* note 166, at 62-63.

²¹¹ Butera Email, *supra* note 177. *See, e.g.*, alarming examples of mismanaged medical treatment in *Dying for Decent Care*, *supra* note 201, at 41-42.

²¹² According to USCIS statistics, asylum seekers detained at airports and other border points wait in detention on average around two weeks from the date they are referred for a credible fear interview until the actual interview takes place; however, advocates around the country have reported that asylum seekers may occasionally wait for as long as six months for a credible fear interview, delaying an asylum seeker's ability to apply for parole and extending the length of detention. *See Seeking Protection, Finding Prison, supra* note 152, at 37-38.

²¹³ "Since DHS and ICE took over responsibility for detention in 2003, the flawed asylum detention system has become more restrictive, leaving asylum seekers sitting in jails for months or even longer." *Id.* at 31.

²¹⁴ *Id.* at 58. Asylum seekers in expedited removal who petition on their own have a 2 percent chance of being granted asylum as compared to a 25 percent grant rate for those with legal representation. USCIRF Report, *Volume 1, supra* note 122, at 4.

²¹⁵ *See Seeking Protection, Finding Prison, supra* note 152, at 9, 26-27.

²¹⁶ *Id.* at 55-56.

²¹⁷ *Id.* at 44.

²¹⁸ USCIRF Report, *Volume 2, supra* note 126, at 198.

²¹⁹ *Unseen Prisoners, supra* note 150, at 12-13, 23-24.

²²⁰ *Id.* at 44; *Refugee Women at Risk, supra* note 128, at 12-13.

²²¹ *See Seeking Protection, Finding Prison, supra* note 152, at 22; *Unseen Prisoners, supra* note 150, at 37; Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County, Pennsylvania* (July 1998), at 4.

²²² *See, e.g.*, the case of a Brazilian woman fleeing brutal domestic violence who abandoned her asylum claim because she could no longer face indefinite detention in the United States. *Seeking Protection, Finding Prison, supra* note 152, at 45-46.

²²³ INA § 208(a)(2)(B).

²²⁴ *See, e.g.*, statement of former Senator Alan Simpson, one of the sponsors of the deadline, explaining that it was meant to address migrants coming from "a country that is your leading source of illegal immigration" who are "pick[ed] up" and claim asylum defensively only to delay their deportation: "We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system." 142 Cong. Rec. S4468 daily ed. (May 1, 1996); *see also* statement of Senator Orrin Hatch that "...[i]f the time limit is not implemented fairly or cannot be implemented fairly I will be prepared to revisit this issue in a later Congress." See 142 Cong. Rec. S11840 (daily ed. September 30, 1996), *cited in* Leena Khandwala, Karen Musalo, Stephen Knight, and Maria Anna K. Hreshchyshyn, *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 Immigr. Briefings 1, 5 (2005).

²²⁵ Statement of Senator Ted Kennedy, 142 Cong. Rec. S3282 daily ed. (April 15, 1996), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S3282&dbname=1996_record ("[T]he cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted [and] brutalized by their own governments. They have an inherent reluctance to come forward . . . before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to do it"). For an in-depth understanding of all the practical challenges faced by individuals who flee persecution to find safety in the United States, *see* Michele R. Pistone and Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 Geo. Immigr. L.J. 1, 8-9 (2001) ("Refugees usually flee without their property or savings and often must spend their first weeks or months in search of food, shelter, and basic social services. Frequently, they do not speak English. Many have been traumatized by recent imprisonment or torture and by separation from their homeland and family. Many are in poor mental and physical health. Few know about American asylum law. When they learn about it, they discover that a successful asylum application must be accompanied by a very detailed personal narrative to prove that the applicant really has a well-founded fear of persecution. In addition, the filing must include dozens, and sometimes hundreds, of pages of evidence to corroborate the facts alleged in the narrative, such as birth and marriage certificates, arrest records, affidavits of eyewitnesses, and records from refugee camps. These records may take months or years to compile because refugees usually leave them behind, and the documents may be available only in the country from which the refugee has fled. Even if friends or family members can obtain copies of the documents, hostile governments may intercept international mail. Therefore, asylum applicants may hesitate for a long time before asking others to put themselves at risk by requesting corroborating records. Some potential applicants also learn that their chances of obtaining asylum are much greater if they are represented by counsel than if they are not, but if they lack resources to pay for an attorney, they often have to wait for many months to be represented by a non-profit organization or pro bono lawyer.").

²²⁶ INA § 208(a)(2)(D).

²²⁷ USCIS guidance instructs Asylum Officers to take a “flexible and inclusive” approach to one-year filing deadline determinations. See USCIS Asylum Office, Lesson Plan Overview, *Asylum Officer Basic Training: One-Year Filing Deadline* (March 23, 2009), at 22, available at <http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf>.

²²⁸ 8 CFR § 208.4(a)(4).

²²⁹ 8 CFR § 208.4(a)(5).

²³⁰ Both the statute and regulations state that exceptions to the one-year filing deadline *may* excuse an applicant’s late filing, leaving adjudicators the discretion to deny an asylum seeker’s petition even if she qualifies under one of the exceptions. INA § 208(a)(2)(D); 8 CFR § 208.4(a)(2)(i)(B). Moreover, the applicant bears the burden of proving “to the satisfaction” of the adjudicator that she qualifies for an exception. INA § 208(a)(2)(D); 8 CFR § 208.4(a)(2)(i)(B). Adjudicators have failed to recognize circumstances, such as serious illness of a family member and other instances specifically enumerated under the regulations, as exceptions, and have also interpreted the expressly *non-exhaustive* list of examples given in the regulations as exhaustive. Karen Musalo and Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int’l & Comp. L. Rev.* 693, 707-710 (2008). Adjudicators have also disregarded expert evidence submitted by asylum applicants, substituting their own non-expert conclusions about such questions as, e.g., whether an applicant’s fragile mental state might prevent her from focusing on the trauma she endured in order to pursue an asylum application, but still enable her to perform daily functions. *Id.* at 703-706 (2008); see also Khandwala, et al., *supra* note 224, at 2.

²³¹ INA § 208(a)(3).

²³² See American Immigration Law Foundation, *Judicial Review of Asylum One Year Filing Decisions* (April 23, 2007), http://www.aifl.org/lac/clearinghouse_oneyearfiling.shtml. Advocates are currently petitioning for US Supreme Court certiorari of a recent Fourth Circuit decision declining to review a denial of asylum based on the one-year filing deadline. See Brief of Amici Curiae, Human Rights First, et al., Petition for Certiorari, *Gomis v. Holder* (September 14, 2009)(No. 09-149), available at <http://www.humanrightsfirst.org/pdf/090925-ASY-gomis.pdf> [hereinafter Amici Brief, *Gomis*].

²³³ The one-year deadline has been strongly criticized by asylum advocates as well as by the UNHCR which expressed concern that “unreasonable time-limits for the filing of asylum requests” might lead to the *refoulement* (return to persecution) of bona fide refugee seeking protection in the United States. United Nations Executive Committee of the High Commissioner’s Programme, *Note on International Protection*, U.N. Doc A/AC.96/898 (July 3, 1998).

²³⁴ See Appendix C: *The One-Year Deadline is Either Unjust, Inefficient, or Both*, at page 45 of this report. The injustices and inefficiencies are particularly galling since the asylum process already has multiple measures in place to prevent fraud, which was the filing deadline’s sole original intent. Strict requirements to establish credibility and supply corroborating evidence, as well as to undergo background and security checks, are designed to weed out fraudulent claims early in the proceedings. The law also imposes steep penalties on individuals who submit fraudulent applications. INA § 208(b)(1)(B); INA § 208(d)(5)(A)(i); INA § 208(d)(6).

²³⁵ INA § 241(b)(3).

²³⁶ United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, December 10, 1984, art. 3, 1465 U.N.T.S. 85 (entered into force June 26, 1987), available at <http://www.un.org/documents/ga/res/39/a39r046.htm>.

²³⁷ 8 CFR § 208.16(b) and (c) (requiring proof that applicant will “more likely than not” face torture if deported); see also *INS v. Cardozo-Fonseca*, 480 US 421, 423-424 (1987) (articulating the different burdens of proof required of an applicant for asylum versus withholding). While these are inherently qualitative determinations, it has been held that asylum may be granted if an applicant shows she faces even a “one in ten” chance of future persecution, versus an applicant for withholding of removal who must show she faces at least a 51 percent chance that she will be subjected to future persecution or torture or persecution upon her return to her country of origin. Musalo & Rice, *supra* note 230, at 700.

²³⁸ US Dep’t of Justice, Executive Office for Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections* (January 15, 2009), available at <http://www.usdoj.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf>.

²³⁹ *Id.*

²⁴⁰ A Canadian court that recently reviewed US and Canadian case law and anecdotal evidence from advocates concluded that the one-year filing deadline can have a particularly serious impact on refugee women with gender-based claims, and that exceptions under the deadline may not assist women fleeing domestic violence and other forms of gender-based persecution. See *Canadian Council for Refugees v. Canada* (2007 FC 1262) IMM-7818-05, 29 November 2007, at 69.

²⁴¹ For further discussion of the common and compelling circumstances that prevent genuine refugees from filing asylum claims but are not among the circumstances expressly enumerated under the exceptions and do not often move adjudicators to waive untimely filing, see Pistone & Schrag, *supra* note 225, at 23-30.

²⁴² Even after filing their asylum applications, asylum seekers are ineligible to receive US work authorization until they have been granted asylum or until their case has been pending due to government delays for 180 days. 8 CFR § 208.7.

²⁴³ Individuals fleeing persecution may live in the United States for years before they realize that they need to submit a formal petition for protection under US asylum law, while others may not realize that they can lose eligibility for certain protections if they do not apply for asylum within one year. Pistone & Schrag, *supra* note 225, at 25-26.

²⁴⁴ “In many cultures, victims of sexual abuse, rape, and sexual torture experience an overwhelming amount of shame. Because in many cultures it is important not to lose face, these painful experiences would be difficult to share with loved ones, let alone with strangers in a public setting.” Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don’t Be Fooled*, 31 *Hastings Int’l & Comp. L. Rev.* 725, 730 (2008).

²⁴⁵ Pistone & Schrag, *supra* note 225, at 27-28. Although there is an express exception to the one-year deadline for ineffective assistance of counsel, an asylum seeker must complete a multistep complaints process to qualify for the exception. 8 CFR § 208.4(a)(5)(iii). There is no similar provision to excuse an asylum seeker’s reliance on shoddy advice by non-lawyers.

²⁴⁶ Lustig, *supra* note 244, at 730.

²⁴⁷ When tracking outcomes in gender cases, the Center for Gender and Refugee Studies found that “[a]ttorneys have reported to CGRS that the one-year bar is often the sole reason, or a significant reason among others, for denial of asylum in many cases that would have otherwise been granted. . . . The primary reason for the denial of cases was a narrow interpretation of the exceptions to the one-year bar, and a clear tendency not only to view the examples listed in the regulations as an exhaustive list, but to deny relief even where the individual presented factual circumstances which are listed as examples in the regulations. In many cases, adjudicators denied relief after finding changed or extraordinary circumstances, ruling that the application was not within a reasonable time after those circumstances.” Khandwala, et al., *supra* note 224, at 7.

²⁴⁸ The problem of so-called “honor killing” is particularly acute in Pakistan. One in every five homicides in Pakistan is an “honor killing,” according to a new epidemiological study published in the *European Journal of Public Health*. According to the study, on average, a woman a day was killed in the name of “honor,” based on a total of nearly 2,000 incidents recorded over four years. See Nasrullah Muazzam, Sobia Haqqi, and Kristin J. Cummings, *The Epidemiological Patterns of Honour Killing of Women in Pakistan*, 19 *Eur. J. of Pub. Health* 193 (April 2009).

²⁴⁹ Khandwala, et al., *supra* note 224, at 9.

²⁵⁰ *Gomis v. Holder*, No. 08-1380 (4th Cir. September 21, 2009), at 2, available at <http://pacer.ca4.uscourts.gov/dailyopinions/opinion.pdf/081389R1.P.pdf>.

²⁵¹ Advocates are currently petitioning for US Supreme Court certiorari of this recent Fourth Circuit decision. *Aimici Brief, Gomis*, *supra* note 232. It is unclear what “State Department’s reports” formed the basis for the decision that female genital mutilation (FGM) “is now hardly practiced populated areas, such as Dakar.” See *Gomis*, No. 08-1380. By contrast, according to the State Dep’t Report on Human Rights Practices, Senegal (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119021.htm>: “The NGO Tostan and UNICEF estimated that FGM was practiced in thousands of villages throughout the country. Some girls were as young as one when FGM was performed on them. Almost all women in the country’s northern Fouta region were FGM victims, as were 60 to 70 percent of women in the south and southeast. Sealing, one of the most extreme and dangerous forms of FGM, was sometimes practiced by the Toucouleur, Mandinka, Soninke, Peul, and Bambara ethnicities, particularly in rural and some urban areas” and that despite its criminalization, “many persons still practiced FGM openly and with impunity.”

²⁵² Musalo & Rice, *supra* note 230, at 703-707.

²⁵³ *Id.* at 700, 705-707.

²⁵⁴ Lustig, *supra* note 244, at 731.

²⁵⁵ The limited scope of this report did not permit us to address all the many ways in which women and girls seeking protection are harmed by the current US asylum system, such as statutorily-mandated delays in obtaining work authorization; poor quality and chronically delayed adjudications resulting from overloaded government lawyers and Immigration Judges; and dangerous delays in reunifying asylees with vulnerable family members abroad. The lack of access to work authorization causes particular hardships and risks to Tahirih’s asylum clients, and is worth especial mention here, in the hope of encouraging some relief through reform. One of the changes made to the INA in the mid-1990s barred asylum seekers from work authorization for 180 days, without providing them any access to public assistance. INA § 208(d)(2). Tahirih’s social worker diligently tries to connect our clients with housing and other help to meet their basic needs (through shelters, faith communities, or “good Samaritans”), but there are few resources available to help asylum seekers survive while they prepare their application and await a decision on their case. One Tahirih client became so desperate that when she overheard a family speaking her native language at a bus stop, she went up to them and implored them to take her in. In some instances, this sort of appeal does lead our clients to experience the

wonderful “kindness of strangers.” In other instances, however, a client may find herself in renewed danger, trapped in an abusive or exploitative situation.

²⁵⁶ Warren Richey, *Does the Prospect of Arranged Marriage and Abuse Warrant Asylum in the US?* The Christian Sci. Monitor, March 23, 2007 (quoting US Solicitor General arguing against a federal appeals court’s grant of asylum to a Chinese woman fleeing an arranged marriage into which she was sold by her parents, because such a decision “has far-reaching ramifications...in light of the fact that approximately 60 percent of marriages worldwide are arranged”).

²⁵⁷ See State Dep’t Report on Human Rights Practices, China (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm>.

²⁵⁸ U.S. Census Bureau, International Database, 2008 Country Rankings, <http://www.census.gov/idb/ranks.html>.

²⁵⁹ Daniel C. Martin and Michael Hofer, DHS Office of Immigration Statistics, *Refugees and Asylees: 2008*, Annual Flow Report (June 2009) Table 6: All Asylees by Country of Nationality: Fiscal Years 2006 to 2008, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf. In 2008, in fact, only about 17,400 Chinese sought asylum worldwide. See UN High Commissioner for Refugees, *Asylum Levels and Trends in Industrialized Countries 2008* (March 24 2009), available at <http://www.unhcr.org/49c796572.pdf>, at 11.

²⁶⁰ See also Zainab Zakari, *FGM Asylum Cases Forge New Legal Standing*, Women’s E-News, November 25, 2008 (citing expert’s observation that because female genital mutilation is usually performed on very young girls, some in their infancy, they are often powerless to resist the practice or to flee).

²⁶¹ See Musalo, *Fear of Floodgates*, *supra* note 12, at 133.

²⁶² WHO, *FGM Factsheet*, *supra* note 8.

²⁶³ WHO, *FGM Interagency Statement*, *supra* note 43 (providing the FGM prevalence rates for women aged 15-49).

²⁶⁴ In 2001, the population of Mali was approximately 11,008,518 people, and the male-to-female ratio was .96, resulting in a female subtotal of approximately 5,616,591. See CIA, World Factbook: Mali (2001), searchable at <http://www.umsl.edu/services/govdocs/wofact2001/index.html>.

²⁶⁵ US Dep’t of Homeland Security, 2008 Yearbook of Immigration Statistics, Tables 17 and 19, available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table17d.xls> and <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table19d.xls> (figure derived by adding total applicants granted asylum either affirmatively (Table 17: 3 applicants from Mali) or defensively (Table 19: 7 applicants from Mali)).

²⁶⁶ See U.S. Dep’t of Justice, INS, *Questions and Answers on the R-A- Rule* (December 7, 2000), at 4, available at http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf. In that same 2000 press release, the INS anticipated that recognizing domestic violence as a possible basis for asylum would likewise not result in a surge of such claims.

²⁶⁷ Pamela Constable, *Area Immigrants with Wounds that Won’t Heal: Mutilated Women Seek Asylum in US*, The Washington Post, November 3, 2008, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/02/AR2008110202219.html>. See also Zakari, *supra* note 260 (“the number of women seeking asylum for FGM has remained small”) (quoting David Smith, a former consultant to the US Committee for Refugees and Immigrants who directed a task force on female genital mutilation during the Clinton Administration).

²⁶⁸ See DHS Supplemental Brief, *Matter of Anon* (April 13, 2009), at 13-14, n. 10, available as redacted at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter DHS Supplemental Brief]. The same stable statistics can be seen in “credible fear” determinations. This is a preliminary finding that an asylum officer makes while screening individuals who arrive in the United States without proper travel documents, that an individual has expressed a “credible fear” of returning to his or her home country and thus should be referred for a full asylum hearing. Since 2000, US Citizenship and Immigration Services (USCIS) has instructed Asylum Officers to make such a “credible fear” finding whenever there is a “significant possibility” that a woman fleeing domestic violence can establish her eligibility for asylum. And yet even under this favorable preliminary screening standard, credible fear determinations have remained steady, ranging between 4,500-5,300 in the four-year period between FY 2005-FY 2008.

²⁶⁹ Applicant Chart, *supra* note 115.

²⁷⁰ See D.M. Osborne, *The Gender Gap: Women seeking asylum for claims based on rape or domestic violence still get a skeptical hearing in the U.S.*, Am. Law. (February 2006).

²⁷¹ See DHS Supplemental Brief, *supra* note 268; *R-A- Rule*, *supra* note 266, at 4.

²⁷² See Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, Practicing L. Inst. PLI Order No. 8729 (October 2006), at 200.

²⁷³ See DHS Supplemental Brief, *supra* note 268, at 13-14, n. 10.

²⁷⁴ US Government Accountability Office, *US Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges*, GAO-08-940 (September 2008), at 58 (emphasis added), available at <http://www.gao.gov/new.items/d08940.pdf>.