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IMPROVED BUT STILL UNFAIR**

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**THE NEW ASYLUM RULE: IMPROVED BUT STILL UNFAIR**

MICHELE R. PISTONE\* AND PHILIP G. SCHRAG\*\*

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),<sup>1</sup> which some observers have reasonably characterized as “the harshest, most procrustean immigration control measure in [the twentieth] century.”<sup>2</sup> Enacted during a brief

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<sup>1</sup> Pub. L. No. 104-208, 100 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

<sup>2</sup> Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 371 (1999); *see also* Evangeline G. Abriel, *Ending the Welcome: Changes in the United States’ Treatment of Undocumented Aliens*, 1 RUTGERS RACE & L. REV. 1, 2-4 (1998) (noting that IIRIRA is a reflection of the existing backlash against undocumented aliens); Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998) (criticizing Congress for passing IIRIRA because it conferred an unchecked power upon the INS by eliminating judicial review); Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295 (1999) (noting that IIRIRA’s complete preclusion of federal jurisdiction over immigration matters – such as reviewing deportation proceedings – offends the criteria for habeas corpus); David Cole, *No Clear Statement: An Argument for Preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J. 427 (1998) (criticizing Congress for limiting, through IIRIRA, judicial review of immigration actions to the fullest extent possible under constitutional law); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833, 875-76 (1997) (arguing that as a result of IIRIRA and other legislation adopted at the height of anti-immigration sentiment, there is effectively no judicial check on the executive branch’s immigration policy); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 706 (1997) (predicting that because IIRIRA is “so unfair, and so divorced from our best traditions of constitutional democracy . . . it will not last long”); Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 214-15 (1999) (criticizing expedited removal procedure); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 97 (1998) (criticizing IIRIRA because it substantially increased the likelihood that lawful permanent residents will be deported from the United States for criminal convictions and because of the circumstances under which they will be barred from relief from deportation); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of*

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flood-tide of anti-immigrant sentiment, which receded soon afterward,<sup>3</sup> IIRIRA made it harder for non-wealthy families to sponsor their close relatives for immigration to the United States,<sup>4</sup> retroactively rendered permanent residents with minor criminal offenses deportable,<sup>5</sup> and restricted judicial review of many of the Justice Department's immigration decisions.<sup>6</sup>

Two IIRIRA provisions cause hardship and injustice to a particularly vulnerable and deserving group of would-be immigrants: people who fled to the United States because they have a well-founded fear of persecution in their home countries. These provisions (1) impose a one-year deadline for filing applications for asylum protection<sup>7</sup> and (2) permit "expedited removal," without administrative or judicial hearings, of certain persons who arrive at U.S. borders or airports without proper travel documents.<sup>8</sup> The expedited removal process includes some provisions intended to prevent the immediate deportation of asylum seekers; however, as we show below, they are not adequate.<sup>9</sup>

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*the Illegal Immigration Reform and Immigration Responsibility Act*, 37 STAN. J. INT'L L. 117, 118 (2001) (stating that IIRIRA violated U.S. obligations under international law and treaties when it amended numerous sections of the INA); Peter H. Schuck, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT'L L. 1, 9 (2001) (noting that IIRIRA is the "most radical reform of immigration law in decades, or perhaps ever, revamping enforcement in ways that even many INS officials find arbitrary, unfair, and unworkable").

<sup>3</sup> Most notably in California, this sentiment grew out of the recession of the early 1990s and was encouraged by ambitious politicians, particularly Governor Pete Wilson, who correctly equated his prospects for re-election in 1994 with support for a California initiative to restrict the social services available to undocumented aliens. See PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 53-54, 225 (2000) (discussing Wilson's support for the initiative and changes in public opinion after 1996) [hereinafter *A WELL-FOUNDED FEAR*].

<sup>4</sup> INA § 213A(a)(1), 8 U.S.C. § 1183a(a)(1) (Supp. V 1999) (added by § 551 of IIRIRA).

<sup>5</sup> INA §§ 101(a)(43), 212, 237, 8 U.S.C. §§ 1101(a)(43), 1182, 1227 (Supp. V 1999) (as amended by IIRIRA §§ 321, 348); see also Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589 (1998); Juan P. Osuna, *Criminal Aliens and Terrorists*, in UNDERSTANDING THE 1996 IMMIGRATION ACT 4-1 (Juan P. Osuna ed., 1997).

<sup>6</sup> See Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997). The welfare reform law known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, which was enacted at virtually the same time, also imposed harsh terms on many recent immigrants who had become permanent residents. See Charles Wheeler, *Public Benefits and Affidavits of Support: The Welfare Act*, in UNDERSTANDING THE 1996 IMMIGRATION ACT 9-1 (Juan P. Osuna ed., 1997).

<sup>7</sup> INA § 208, 8 U.S.C. § 1158(a)(2) (Supp. V 1999).

<sup>8</sup> INA § 235, 8 U.S.C. § 1225(b)(1) (Supp. V 1999).

<sup>9</sup> In addition to imposing these new hurdles for those who have already come to the United States, IIRIRA also required the Attorney General to establish "preinspection stations in at least 5 of the foreign airports that are among

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Immediately after Congress enacted IIRIRA on September 30, 1996, the INS began to implement these new provisions. In January 1997, it published proposed regulations (“rules”)<sup>10</sup> in the Federal Register and invited public comments on them.<sup>11</sup> Recognizing that it had to draft a complex rule quickly, the INS proposed only an interim rule and sought additional public comments before promulgating a final rule. It issued the interim rule in March 1997, allowing a second public comment period through July 7, 1997.<sup>12</sup> Although the INS stated that it hoped to issue the final rule by the end of September 1997,<sup>13</sup> nearly four years passed before the final rule was promulgated in December 2000.<sup>14</sup>

In its rules, the INS had the opportunity to ameliorate the unfairness of the new statute by requiring its employees to scrupulously follow fair procedures. At each stage of the regulatory process, we have tried to help the agency devise rules through which it could enforce the statute but avoid wrongful deportations of refugees. We have done so in collaboration with other scholars and advocates in an attempt to prevent refugees from being returned to the hands of

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the 10 foreign airports which the Attorney General identifies as serving as last points of departure for the greatest number of inadmissible alien passengers who arrive from abroad by air.” INA § 235A(a)(2), 8 U.S.C. § 1225a(a)(1) (Supp. V 1999). Preinspection of travel documents at European or Asian airports before passengers board planes to the United States also makes it more difficult for refugees to seek asylum in the United States because to apply for asylum, an alien must be “physically present in the United States” or must “arrive” in the United States. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (Supp. V 1999). A passenger from a persecuting third country who is intercepted at a U.S. preinspection station during an airport transit will presumably be unable to seek asylum because the passenger will have not yet arrived at a U.S. border, though perhaps it could be argued that the airport preinspection station is the equivalent of the immigration booth in a U.S. airport and is therefore a proper place at which to make a U.S. asylum claim.

<sup>10</sup> Federal regulations are denominated as “rules,” though they are commonly referred to as regulations and are published in the Code of Federal “Regulations.” See 5 U.S.C. § 551(4) (1994).

<sup>11</sup> Parts of this article compare three versions of the rules. For clarity, the following will be used to cite to the three versions when discussed in a comparative context: Proposed interim rule – 62 Fed. Reg. 444 (Jan. 3, 1997) (proposed interim rule); Interim rule – 8 C.F.R. § 208 (2000) (interim rule); Final rule – 8 C.F.R. § 208 (2001) (final rule).

<sup>12</sup> Asylum Procedures, 62 Fed. Reg. 10,312, 10,312 (Mar. 6, 1997) (commentary on interim rule).

<sup>13</sup> Paul Virtue, Acting Associate Commissioner for Programs, INS, Statement at a Briefing for Non-Governmental Organizations (Mar. 17, 1997).

<sup>14</sup> Asylum Procedures, 65 Fed. Reg. 76,121, 76,121 (Dec. 6, 2001) (to be codified at 8 C.F.R. pt. 208). It may not be coincidental that the rule was promulgated after the presidential election in November 2000. “The regulatory work of all modern presidents has ballooned at the end of their terms, according to the conservative Regulatory Studies

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persecutors who would torture and kill them. Before the INS proposed any rule, we suggested a set of regulatory safeguards.<sup>15</sup> The INS essentially ignored our recommendations. Next, we filed comments in January 1997 on the agency's proposed interim rule.<sup>16</sup> Two months later, in its interim rule, the agency accepted some of these suggestions. We were careful, however, to inform the agency and readers of this Journal that the interim rule was "not yet a model of fair procedure."<sup>17</sup>

Four years later, we have chosen to write this article in order to offer some observations on the provisions of the new final rule that are related to asylum and that devolve from IIRIRA.<sup>18</sup> In essence, we conclude that the INS significantly improved the one-year deadline rule, compared both with the agency's original proposal and with its interim rule. Just a few further changes would make the parts of the rule interpreting the one-year deadline about as fair as they could be under the present statutory constraints. Turning to expedited removal, we also find some improvements, but the agency's interim rule offered such little protection to traumatized refugees caught in the expedited removal process that the new rule's modest improvements are

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Program at George Mason University's Mercatus Center." Amy Goldstein, "Last-Minute" Spin on Regulatory Rate, WASH. POST, June 9, 2001, at A1.

<sup>15</sup> Michele R. Pistone & Philip G. Schrag, *The 1996 Immigration Act: Asylum Application Deadlines and Expedited Removal – What the INS Should Do*, 73 INTERPRETER RELEASES 1565 (1996).

<sup>16</sup> Letter from Michele R. Pistone & Philip G. Schrag to the Director of the Policy Directives and Instructions Branch, INS (Jan. 17, 1997) (on file with the Georgetown Immigration Law Journal).

<sup>17</sup> Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267 (1997) [hereinafter Schrag & Pistone].

<sup>18</sup> The final rule also changed asylum law in certain ways not required by IIRIRA, including the doctrinal formulation that the INS would use to determine when past persecution creates a presumption of future persecution. 8 C.F.R. § 208.13(b) (2001) (final rule). These other changes are certain to be addressed by other scholars and are not examined in this article. We must nonetheless commend the INS, particularly for following our suggestion, Schrag & Pistone, *supra* note 17, at 278-79, that it repeal the portion of the rule related to "safe third country" removals. The interim rule allowed asylum officers and immigration judges, at their discretion, to deny asylum if the applicant could be removed to a safe "third country which has offered resettlement." 8 C.F.R. § 208.13(d) (2000) (interim rule). We noted that though IIRIRA had a similar provision, the statute included a safeguard against arbitrary denials on this basis: the United States must have a pre-existing bilateral or multilateral removal agreement with the country in question. INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (Supp. V 1999). The United States has no such agreement with any country. INS disagreed with our analysis that the provision lacked statutory authority, but in the final version of the rule, it deleted the provision "to avoid confusion." Asylum Procedures, 65 Fed. Reg. at 76,126 (commentary on final rule).

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not very significant. Sadly, the rule remains fundamentally inadequate with respect to expedited removal.

In addition, we note that the Clinton administration attempted to fix the 1996 law only by tinkering with the implementing rules. At any time after the law was passed, it could have recommended that Congress repeal or amend both of these IIRIRA provisions because they put legitimate refugees at risk, but it did not do so. As a result, changing the statute remains the only way to restore true fairness to asylum procedure.

This is a propitious time to amend the law to restore protections to refugees. In 1996, Congress attempted to build a legal dike against what some members perceived as an unwanted tide of immigrants, but cracks in this dike appear continually. Recently, for example, the Supreme Court rejected part of the law. In order to avoid serious constitutional questions, it held that Congress did not eliminate judicial review for immigrants seeking to challenge certain portions of the statute through habeas corpus proceedings.<sup>19</sup> The Court also held that Congress was not clear enough in its apparent attempt to bar waivers for aliens being deported based on guilty pleas that they bargained for before the 1996 law was passed.<sup>20</sup> Moreover, there is reason to believe that the other branches of the federal government are now more willing to treat would-be immigrants with the greatest possible fairness. For example, on a July 2001 visit to Ellis Island, President Bush stated that “[i]mmigration is not a problem to be solved, [but] a sign of a confident and successful nation. . . . New arrivals should be greeted not with suspicion and resentment, but with openness and courtesy.”<sup>21</sup> His nominee for INS Commissioner testified at his confirmation hearing that “we are, and I hope always will be, a living symbol of religious,

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<sup>19</sup> *Calcano-Martinez v. INS*, 121 S. Ct. 2268, 2270 (2001).

<sup>20</sup> *INS v. St. Cyr*, 121 S. Ct. 2271, 2293 (2001).

<sup>21</sup> President George W. Bush, Remarks at the INS Naturalization Ceremony (July 10, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/07/20010710-1.html>).

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political and economic freedom and opportunity. That makes us a magnet for those who share our dreams and hopes.”<sup>22</sup> He added, “I definitely think that we need to change the process for asylum seekers coming here, to make sure that we know who these people are and what their claims are and whether they are legitimate before we turn around and put them on a plane back to an uncertain future.”<sup>23</sup> A few days later, a bipartisan group of Senators introduced a bill to repeal the one-year deadline and to limit the use of expedited removal procedures to periods in which sudden floods of immigrants overwhelm the government’s ability to process them in the normal way.<sup>24</sup>

The words of President Bush ring most true with respect to political and religious refugees. Their arrival on our shores does not endanger our fundamental principles of liberty and freedom; it validates them.<sup>25</sup> Our best opportunity to advance those principles is to adopt new legislation or regulations correcting IIRIRA’s mistreatment of refugees. For example, the INS handcuffs and shackles immigrants, sometimes for more than a day, if they arrive without proper documents.<sup>26</sup> This treatment is an unintended consequence of IIRIRA, and it hardly accords with the President’s call for greeting new arrivals with “openness and courtesy.”

The terrorist attacks on the United States on September 11, 2001, have appropriately provoked searching examinations of the State Department’s process for screening visa applicants and of the inability of the INS to locate and remove visitors who enter the United States as

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<sup>22</sup> James W. Ziglar, Testimony Before the Senate Judiciary Committee (July 18, 2001) [hereinafter Ziglar Testimony].

<sup>23</sup> *Id.*

<sup>24</sup> Refugee Protection Act of 2001, S. 1311, 107th Cong. (2001). The bill is summarized *infra* text accompanying notes 175-176.

<sup>25</sup> See Michele R. Pistone, *New Asylum Laws: Undermining an American Ideal*, in CATO INSTITUTE, POLICY ANALYSIS NO. 299 (1998) (discussing America’s role throughout its history as a refuge for people fleeing oppression), available at <http://www.cato.org/pubs/pas/pa299.pdf> [hereinafter *New Asylum Laws: Undermining an American Ideal*].

<sup>26</sup> See LAWYERS COMM. FOR HUMAN RIGHTS, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN AMERICA 25-28 (2000) [hereinafter IS THIS AMERICA?].

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students or other lawful visitors but remain after their visas are no longer valid.<sup>27</sup> Some officials have called for new restrictions on entering the United States.<sup>28</sup> But the attacks, and the resulting military strikes against suspected terrorists, highlight the importance of a humane and rational U.S. policy toward the particular class of would-be immigrants who qualify under the law as refugees. First, Americans should recognize that refugees are victims, not perpetrators, of oppression and that the upheavals instigated by war in Afghanistan, and perhaps in other countries, may facilitate and encourage increased flight to democratic nations by those who have been ruled by the Taliban or other repressive regimes. Thus, American military responses to the terrorist attacks may increase the need for the United States to accept more refugees through its own overseas refugee program and its asylum system.<sup>29</sup> Second, increased refugee flows to Europe will prompt calls from our allies for the United States to accept its fair share of the new refugees, so fair refugee and asylum policies and procedures will reduce friction at a time when the United States most needs strong bonds with allied nations. Third, at a time when the United States is focusing attention on human rights abuses in Afghanistan and elsewhere, it should eliminate unnecessary sources of criticism of its own human rights policies. Finally, as we argue in this article, eliminating the most arbitrary and unfair features of IIRIRA, and particularly of the expedited removal system, may enable the United States to agree with Canada on joint and unified immigration and border controls, eliminating the need to control a northern U.S. border that is extremely difficult to police and strengthening the security of both countries.<sup>30</sup> It should also be noted that humane asylum laws and procedures are fully consistent with immigration

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<sup>27</sup> See James V. Grimaldi et al., *Losing Track of Illegal Immigrants*, WASH. POST, Oct. 7, 2001, at A1 [hereinafter Grimaldi et al.].

<sup>28</sup> For example, Senator Dianne Feinstein called for a six-month moratorium on issuing new student visas. Diana Jean Schemo, *A Nation Challenged: Foreign Students*, N.Y. TIMES, Sept. 21, 2001, at B7.

<sup>29</sup> INA § 207, 8 U.S.C. § 1157 (1994 & Supp. V 1999).

<sup>30</sup> See *infra* text accompanying notes 411-17.



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controls over suspected terrorists. Terrorists are ineligible for asylum,<sup>31</sup> and an asylum seeker who is suspected of being a terrorist may be detained by the Department of Justice under laws that are applicable to asylum seekers as well as to other aliens.<sup>32</sup>

This article identifies the problems that IIRIRA created for potential asylum seekers, assesses the INS's response, and suggests needed regulatory and statutory reforms. Part I discusses the one-year deadline on the filing of asylum applications. It explains why the INS's new rule is a significant improvement compared to its interim rule and why further reform or outright repeal of the deadline remains necessary. Part II describes the expedited removal process and discusses the ways in which the new rule changes that process. It also suggests further changes necessary to transform the system so that expedited removal will not result in the death or renewed persecution of genuine refugees.

Even regulatory reforms reaching farther than those INS has already put into place will not eliminate many of the injustices caused by the asylum-related provisions of IIRIRA. Therefore, this article also recommends enactment of the Refugee Protection Act, currently pending in Congress.<sup>33</sup>

### I. THE ONE-YEAR FILING DEADLINE ON APPLICATIONS FOR ASYLUM

As a signatory to the 1967 Protocol Relating to the Status of Refugees,<sup>34</sup> the United States is bound not to return to his or her home country any individual who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion," is outside of the country of the individual's

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<sup>31</sup> INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) (Supp. V 1999).

<sup>32</sup> INA § 236(c)(1)(D), 8 U.S.C. § 1226(c)(1)(D) (Supp. V 1999); *see also* USA Act of 2001, Pub. L. No. 107-000, 000 Stat. 000.

<sup>33</sup> The Refugee Protection Act of 2001, S. 1311, 107th Cong., was introduced on August 2, 2001 by Senators Leahy, Brownback, Kennedy, Collins, Durbin, Jeffords, and Graham.

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nationality and is “unable or, owing to such fear, unwilling to avail” himself or herself of the protection of the home country.<sup>35</sup> *Non-refoulement*, the duty not to return a refugee to a country where his or her life or freedom would be threatened, is the treaty’s most fundamental requirement.

The United States’ *non-refoulement* obligations were incorporated into U.S. law through the Refugee Act of 1980.<sup>36</sup> The Refugee Act also authorizes the Attorney General to grant asylum to qualified individuals who are present in the United States or who arrive at its borders or airports.<sup>37</sup> In FY 2000, the United States granted asylum protection to 25,980 individuals.<sup>38</sup> Recent refugees include Afghan women fleeing gender-based persecution by the Taliban, Jehovah’s Witnesses fleeing religious persecution in Belarus, Chinese nationals fleeing forced family planning by their government, homosexuals fleeing persecution in Cuba, Krahn tribal members fleeing ethnic-based persecution in Liberia, and journalists fleeing a wave of politically motivated killings in Ukraine.

Individuals who are granted asylum protection may apply for asylum for their spouses and minor children.<sup>39</sup> They may also apply for work permits.<sup>40</sup> One year after being granted

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<sup>34</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Protocol provides that by ratifying it, all signatory nations are also bound by Articles 2-34 of the Convention Relating to the Status of Refugees. *Id.*, 19 U.S.T. at 6224, 606 U.N.T.S. at 267 (art. I(1)).

<sup>35</sup> Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152-54 [hereinafter Refugee Convention].

<sup>36</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. Before implementation of the Refugee Act, refugees and displaced persons were admitted to the United States on an ad hoc basis. *See, e.g.*, Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 (granting priority in the issuance of visas to certain persons who, during World War II, bore arms against enemies of the United States and were displaced); Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 (providing for the issuance of special non-quota visas to certain refugees).

<sup>37</sup> Individuals who are not present in the United States, such as those in a third country or refugee camps abroad, can apply for protection through the overseas refugee resettlement program. *See* INA § 207(a), 8 U.S.C. § 1157(a) (1994 & Supp. V 1999).

<sup>38</sup> EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, STATISTICAL YEAR BOOK 2000, at O3 (2000) (reporting that in FY 2000, 9,170 individuals were granted asylum by immigration judges); *see also* OFFICE OF POLICY AND PLANNING, INS, FISCAL YEAR 2001: MONTHLY STATISTICAL REPORT (2001) (reporting that in FY 2000, 16,810 individuals were granted asylum by the INS Asylum Office), *available at* <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrjan01-2/ASYLUM.HTM> (last modified June 28, 2001).

<sup>39</sup> INA § 208(b)(3), 8 U.S.C. § 1158(b)(3) (Supp. V 1999).

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asylum protection, asylees also become eligible to adjust their immigration status to become permanent residents of the United States.<sup>41</sup>

### A. *The 1996 Statutory Amendment*

Before IIRIRA went into effect,<sup>42</sup> a person could apply for asylum at any time. The lack of any deadline made sense because many obstacles prevent most refugees from applying for asylum immediately after entering the United States. 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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

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<sup>40</sup> INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (Supp. V 1999).

<sup>41</sup> INA § 209(b), 8 U.S.C. § 1159(b) (1994). The INA caps at 10,000 the number of asylum seekers who can adjust their status to permanent residency each year. *Id.*

<sup>42</sup> The deadline imposed by IIRIRA affected applicants who filed applications for asylum after April 1, 1998. *See* 8 C.F.R. § 208.4(a)(2)(B)(ii) (2001).

<sup>43</sup> *See infra* Part II.B.4.a.

<sup>44</sup> *See* INS Form I-589, Application for Asylum and for Withholding Removal; INS, Instructions for Form I-589 (providing instructions for filing for asylum).

<sup>45</sup> *See* Matter of Y-B-, 21 I. & N. Dec. 1136 (B.I.A. 1998); Matter of S-M-J-, 21 I. & N. Dec. 722 (B.I.A. 1997). The corroboration requirements are elaborated and analyzed in Virgil Wiebe & Serena Parker, *Asking for a Note from*

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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,<sup>46</sup> 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.<sup>47</sup>

As a result of these factors, in the years before IIRIRA was enacted,<sup>48</sup> fewer than half of the successful asylum applicants represented by volunteers from the Lawyers Committee for Human Rights<sup>49</sup> applied for asylum within their first year in the United States.<sup>50</sup> Despite the fact that most genuine refugees were not able to apply within one year of their arrival, members of

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*Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, in 2001-2002 IMMIGRATION AND NATIONALITY LAW HANDBOOK 414 (2001).

<sup>46</sup> Statistics on the differential rates of success in affirmative asylum cases are difficult to obtain, but the INS Asylum Office supplied relevant information to Philip Schrag's colleague Andrew Schoenfeld in connection with a conference he sponsored in May 2000 on representation in asylum cases (statistics on file with the Georgetown Immigration Law Journal). During the first five months of FY 2000 (October 1999 through February 2000), INS asylum officers reached results in 17,986 cases, including 6,262 cases in which the applicant was represented. *Id.* Asylum was granted to 56% of the represented applicants but to only 36% of the unrepresented applicants. *See id.* Of course it is possible that a higher proportion of meritorious applicants sought representation, but it seems more likely that professional representation improved the applicant's chances (e.g., because professionals understand what kind of corroborating evidence INS requires, and they make great efforts to obtain it). The statistical differences between represented and non-represented applicants are even greater in the cases in which asylum officers do not grant asylum but instead "refer" the cases to immigration court for a final determination of whether the applicant should be ordered deported or granted asylum by the court. Referrals (which only involve applicants who have no other valid immigration status and are therefore subject to involuntary removal from the United States) and "rejections" (e.g., because the applicant missed the filing deadline) account for about half of the dispositions of asylum officers. *See id.* In these court cases, unrepresented applicants win 1.0% of the time while represented applicants win 16% of the time. Lisa Getter, *A Man's Asylum Fight in the Land of the Free; His 642-day Journey Through the Backlogged Immigration Court Could Happen Anywhere and Calls into Question 'Justice for All,'* L.A. TIMES, Apr. 15, 2001, at A1.

<sup>47</sup> The reasons why many asylum seekers do not file applications promptly are described in greater detail in Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 GEO. IMMIGR. L.J. 95 (1996), and Philip G. Schrag, *Don't Gut Political Asylum*, WASH. POST, Nov. 12, 1995, at C7, *reprinted in* 10 GEO. IMMIGR. L.J. 93 (1996). *See also* Pistone, *New Asylum Laws: Undermining an American Ideal*, *supra* note 25, at 12-16.

<sup>48</sup> It is fair to assume that after a one-year deadline was put into force, some people would file within that period even though they would wait longer in the absence of a deadline. Therefore, the pre-IIRIRA statistics may no longer represent typical waiting periods. Nonetheless, the practical problems of filing within a year did not go away, and the INS now rejects more than 4,000 applications annually because they are filed too late. *See infra* note 166 and accompanying text.

<sup>49</sup> The Lawyers Committee for Human Rights is a nonprofit organization with offices in New York City and Washington, DC. Through its asylum program, it helps to secure pro bono legal representation for indigent asylum seekers and assists volunteer lawyers in the representation of their clients.

the 104th Congress were intent on imposing a deadline, apparently under the belief that such a bar was necessary to prevent time-consuming adjudication of fraudulent applications.<sup>51</sup>

Both the Clinton administration and the refugee advocacy community strenuously opposed any deadline.<sup>52</sup> Their opposition succeeded only in lengthening its duration from thirty days (as originally proposed) to one year and in obtaining the legislative exceptions for “changed” and “extraordinary” circumstances.<sup>53</sup>

### B. *The Sequence of INS Interpretations*

The exceptions to the filing deadline were not defined in the statute itself and were subject to regulatory interpretation. Given the administration’s opposition to any deadline and the fact that adjudications based on the deadline would necessarily result in the deportation of some refugees who could otherwise win asylum,<sup>54</sup> the INS might have been expected to interpret them broadly so that the deadline would affect as few applicants as possible. In fact, the INS’s

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<sup>50</sup> The results of the Lawyers Committee study of its docket of asylum cases is reported in *A WELL-FOUNDED FEAR*, *supra* note 3, at 132.

<sup>51</sup> The history of the origin of the deadline is traced in *A WELL-FOUNDED FEAR*, *supra* note 3, at 47-48, 71-72. Its chief proponent, Rep. Bill McCollum, appears to have been unaware that the Clinton administration recently had solved the problem of spurious asylum applications in a different way by reversing the government’s policy of granting work permits to asylum applicants. Months before McCollum sponsored his amendment to impose a deadline (at first, 30 days, a period so short that fewer than 1% of the Lawyers Committee’s clients would have qualified), the administration had amended the regulations so that an applicant had to win asylum before being allowed to work. As a result, annual applications suddenly dropped by 62%, though because of inadequate statistical methodology, even the INS did not realize the magnitude of its success. *Id.*

<sup>52</sup> See Letter from Jamie S. Gorelick, Deputy Attorney General to Hon. Henry J. Hyde (Sept. 15, 1995) (on file with the Georgetown Immigration Law Journal) (administration); *A WELL-FOUNDED FEAR*, *supra* note 3, at 111-44, 263-69 (advocacy community).

<sup>53</sup> *A WELL-FOUNDED FEAR*, *supra* note 3, at 179.

<sup>54</sup> The deadline affected only the right to seek asylum, so, in principle, refugees who missed it could avoid deportation by obtaining “withholding of removal,” though this status would leave them in an insecure status in the United States, unable to obtain lawful permanent residence, even in the long run, and unable to be reunited with members of their immediate family. See INA § 209, 8 U.S.C. § 1159 (1994) (allowing asylees to adjust to permanent resident status); INA § 208, 8 U.S.C. § 1158(b)(3) (Supp. V 1999) (permitting spouses and minor children to follow and join asylee and thereby obtain asylum). The burden of proving eligibility for withholding is, however, much higher than the burden for proving asylum. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In addition, asylum officers are barred from granting withholding of deportation. To obtain this status, a refugee must lose any other rights he has to remain in the United States so that he is subject to deportation, must have a deportation proceeding initiated against him in immigration court, and must assert and prove eligibility for withholding as a defense in that proceeding. 8 CFR § 208.16(a) (2001). Thus, obtaining withholding is more difficult than obtaining asylum, and seeking this status is also more expensive and cumbersome.

initial regulatory effort,<sup>55</sup> in its “proposed interim rule,” was hesitant and entirely inadequate. The agency performed better when it issued the interim rule several months later, but even this rule left much to be desired. Then, over the course of several years, the INS liberalized its practices without formally embodying the changes in a rule. It did this by adopting a training manual for asylum officers that in some respects enhanced the protections specified in the interim rule.<sup>56</sup> Unfortunately, the training manual lacked the legal force of regulations, so although it provided important guidance to asylum officers (who initially adjudicate affirmative asylum applications), it did not bind immigration judges (who resolve asylum claims, including issues involving the deadline, when the asylum officers do not grant them). Also, because the manual was not published in either the Federal Register or the Code of Federal Regulations, it was not as accessible as the regulations themselves to asylum seekers or their advocates.<sup>57</sup> At last, the INS issued its final rule in December 2000, incorporating into formal regulations many of the improvements it had made earlier through less formal means. Even more recently, the agency has revised its training manual in light of the final rule.<sup>58</sup> The new edition of the manual continues to be a vehicle through which law interpreting the deadline and its exceptions evolves.

### *C. The Evolution of the “Changed Circumstances” Exception*

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<sup>55</sup> For convenience, this article refers to regulations as if the INS alone promulgated them. The INS was the principal author of the regulations discussed in this article (except for those applicable only to immigration court proceedings), and an INS official was the recipient of public comments; however, the regulations were issued jointly in the name of the INS and the Justice Department’s Executive Office of Immigration Review. *See, e.g.*, Asylum Procedures, 65 Fed. Reg. 76,121 (Dec. 6, 2000).

<sup>56</sup> INS, A SYLUM OFFICER TRAINING MANUAL – LESSON: ONE-YEAR FILING DEADLINE (1999), available at [http://www.asylumlaw.org/legal\\_tools/united\\_states/legal\\_standards/us\\_guidelines/us\\_guidelines.htm](http://www.asylumlaw.org/legal_tools/united_states/legal_standards/us_guidelines/us_guidelines.htm) [hereinafter TRAINING MANUAL]. The training manual went through several minor alterations during 1998 and 1999; the March 1999 edition is cited and quoted in this article because it was made available to the public on the web by a non-governmental organization that was created to support asylum advocates.

<sup>57</sup> As of June 2000, the training manual for implementing the one-year deadline was not available on the official INS website for policy manuals, <http://www.ins.usdoj.gov/graphics/lawsregs/handbook/polpromem.htm>; however, it had been posted on the web by the non-governmental organization known as asylumlaw.org. *See supra* note 56.

<sup>58</sup> INS, A SYLUM OFFICER TRAINING MANUAL – LESSON: ONE-YEAR FILING DEADLINE (2001), available at [http://www.asylumlaw.org/legal\\_tools/united\\_states/legal\\_standards/us\\_guidelines/us\\_guidelines.htm](http://www.asylumlaw.org/legal_tools/united_states/legal_standards/us_guidelines/us_guidelines.htm) [hereinafter NEW TRAINING MANUAL].

## THE NEW ASYLUM RULE

### 1. *Delayed Awareness of Changes in Human Rights Conditions*

In some cases, governments that violate human rights are able to cover up their abuses for months or years.<sup>59</sup> A refugee who is in the United States when human rights conditions in his or her country worsen may not know until more than a year later that similarly situated people are being arrested or killed, particularly if the abuses are directed at a fairly small or discrete part of the population and are not widely reported in the U.S. press. By that time, more than a year will have passed since the conditions actually changed, but less than a year will have passed since the refugee learned about them.

Despite this reality, the proposed interim rule made no explicit provision for cases of delayed awareness of changed conditions, even though Senator Orrin G. Hatch, the floor manager for the bill, had told the Senate that “the changed circumstances provision will deal with situations . . . in which . . . the applicant obtains more information about likely retribution.”<sup>60</sup> But neither did it rule out exceptions in such cases, stating only that the term “changed circumstances” would refer to those that had arisen since the one-year deadline expired.<sup>61</sup> The interim rule, however, stated that “changed circumstances” could include “changes in conditions” in the applicant’s country or “changes in objective circumstances relating to the applicant in the United States.”<sup>62</sup> Because new information, or a new interpretation of information, is arguably a subjective rather than an objective change, this language may have been interpreted by some asylum officers or refugees to exclude cases of delayed awareness from the scope of the changed circumstances exception.

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<sup>59</sup> Recall that Nazi Germany began systematic genocide in 1941 and that death camps were in place by early 1942, but despite some leakage of information about the ongoing Holocaust, knowledge of the camps was not generally available in the United States until those camps were liberated in 1945.

<sup>60</sup> 142 CONG. REC. S11,838, S11,840 (daily ed. Sept. 30, 1996).

<sup>61</sup> 62 Fed. Reg. 444, 463 (Jan. 3, 1997) (proposed interim rule).

<sup>62</sup> 8 C.F.R. § 208.4(a)(4) (2000) (interim rule).

## THE NEW ASYLUM RULE

The final rule corrects this error. The INS has wisely deleted the word “objective” and added that “if the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a ‘reasonable period’” for submitting an otherwise late application.<sup>63</sup>

### 2. *Changed Political or Religious Viewpoint*

An alien<sup>64</sup> who is in the United States and is not initially at risk at home may nevertheless become at risk by changing (or abandoning) religion or by adopting political views at odds with those of the governing regime. In the case of aliens from autocratically ruled nations, exposure to the American democratic system may itself bring about a desire for a pluralistic government that would be punished if the alien were forced to return home. The proposed interim rule was broad enough to cover such a case because it defined a changed circumstance as one that had arisen after the deadline expired.<sup>65</sup> Similarly, the interim rule covered changes “relating to” the applicant in the United States, a phrase broad enough to cover a changed religious or political orientation.<sup>66</sup> But the training manual was more explicit about the broad scope of this provision. It explicitly cited “conversion from one religion to another” as a changed circumstance; by analogy, a changed political outlook would also qualify.<sup>67</sup>

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<sup>63</sup> 8 C.F.R. § 208.4(a)(4)(ii) (2001) (final rule).

<sup>64</sup> We are reluctant to use the term “alien” to refer to immigrants in the United States because we recognize its negative connotation. See Kevin Johnson, “*Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*,” 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (arguing that the term reinforces nativist sentiment towards new immigrants). Professor Pistone first confronted this application of the term when she herself was labeled an “alien” by the Japanese immigration service as a college student applying for a visa that would allow her to work for a short time in Japan. At the time, the only use of the term that she was aware of was to describe creatures from other planets and was terribly offended by the Japanese government’s use of it to describe her. It was only later, when she began to practice immigration law, that she learned that the Japanese government had borrowed the term from U.S. immigration laws. Nevertheless, we recognize that the term has become embedded in our law and language, and despite our efforts to devise an alternative, we were unsuccessful.

<sup>65</sup> 62 Fed. Reg. 444, 463 (Jan. 3, 1997) (proposed interim rule).

<sup>66</sup> 8 C.F.R. § 208.4(a)(4)(i)(B) (2000) (interim rule).

<sup>67</sup> TRAINING MANUAL, *supra* note 56, at 8.



## THE NEW ASYLUM RULE

The final rule further improves the INS policy by including a specific “changed circumstances” exception for “activities the applicant becomes involved in outside the country of feared persecution.”<sup>68</sup> Although this language appears to require outward “activities” rather than a merely subjective change of beliefs to trigger the exception, the INS has explained that it was meant to include “a subjective choice an applicant has made, such as a religious conversion or adoption of political views.”<sup>69</sup> In the usual case, the adoption of new political beliefs might be manifested by concomitant activities, such as participation in demonstrations in the United States that were organized by an American affiliate of the alien’s new political party. But there may be cases in which the group with which the alien has recently affiliated has no American branch or office. In those cases, the alien may be able only to testify to the asylum officer or immigration judge about the new political views, or perhaps show that he or she has expressed these new opinions to others in the community. The INS has sensibly recognized that forcing an alien to prove participation in formal political activities, where the new political group conducts no such activities, would work an injustice.

### *3. Recently Changed Circumstances*

As originally proposed, a changed or extraordinary circumstance on which an applicant relied would not qualify unless it arose “since the 1-year period has expired.”<sup>70</sup> This language would have caused unfair results in many cases in which the events constituting the exception occurred in the final month or two before the deadline expired but the applicant could not collect the corroborating evidence, find counsel, or otherwise file a complete application within the

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<sup>68</sup> 8 C.F.R. § 208.4(a)(4)(i)(B) (2001) (final rule).

<sup>69</sup> Asylum Procedures, 65 Fed. Reg. 76,121, 76,123 (Dec. 6, 2000) (commentary on final rule).

<sup>70</sup> 62 Fed. Reg. at 463 (proposed interim rule).

short period of time after those events occurred. Wisely, the INS dropped this requirement in the interim rule, and it did not re-emerge in the final rule.<sup>71</sup>

D. *The Evolution of the “Extraordinary Circumstances” Exception*

1. *Illness or Incapacity of the Applicant, a Close Relative, or the Applicant’s Representative*

The proposed interim rule did not include any illustrative examples of extraordinary circumstances.<sup>72</sup> The INS’s explanatory notes, however, mentioned, by way of example, physical, mental, and legal<sup>73</sup> disabilities and the ineffective assistance of counsel as possible exceptions to the deadline.<sup>74</sup> The interim rule created a particular exception for “serious illness or mental or physical disability” during the year in which the applicant could have applied.<sup>75</sup>

This general exception was subject to qualification. It was available only if the disability was “of significant duration.”<sup>76</sup> This qualification was arbitrary because even an illness lasting only a week could cause the deadline to be missed if the week happened to be the last week before the time period expired. Moreover, the “significant duration” requirement could have

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<sup>71</sup> The INS did not do as well when it related the date of changed circumstances to the date on which the statute was enacted. Neither the statute nor the interim rule included any language explaining whether political changes that began to occur before the statute was passed, and which continued to occur thereafter, would justify a late application. Curiously, in one of the few respects in which the training manual imposed restrictions that were not justified by law, the manual specified that changed circumstances “must occur on or after April 1, 1997.” TRAINING MANUAL, *supra* note 56, at 10. It even gave examples of supposedly good practices by asylum officers that seem unjust. For example, it described a hypothetical alien who had been in the United States since 1994. After a 1995 coup, the new rulers began executing members of his party. The executions continued right through the date on which the alien sought asylum in 1998. Because the coup occurred in 1995, before the statute became effective, his application had to be rejected. In the INS’s view, neither the additional executions nor the increased accumulation of executions constituted a changed circumstance, though these new events do seem to be changes that could reasonably persuade a person that his country presents more risks to his safety than he once thought. The agency did not explain its reasoning. *See id.* This limitation remains in the new version of the manual. NEW TRAINING MANUAL, *supra* note 58, at 8. But as 1997 recedes, it becomes ever less likely to affect cases.

<sup>72</sup> *See infra* text accompanying notes 88-90.

<sup>73</sup> An explicit exception for legal disabilities was included in both the interim and final rules. The final rule explains that legal-disabilities exceptions include such situations as those in which the applicant arrived as an unaccompanied minor or in which the applicant had a mental impairment during the usual filing period. 8 C.F.R. § 208.4(a)(5)(ii) (2001) (final rule). Presumably the term includes all situations where, as a matter of state law, the applicant could not have participated in legal proceedings without representation (e.g., by a parent or guardian).

<sup>74</sup> 62 Fed. Reg. 444, 447 (Jan. 3, 1997) (proposed interim rule).

<sup>75</sup> 8 C.F.R. § 208.4(a)(5)(i) (2000) (interim rule).

<sup>76</sup> *Id.*

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caused applicants and the government to waste a lot of money litigating the issue of whether the duration of particular illnesses had been “significant.” Fortunately, the final rule removed the “significant duration” requirement.

Asylum seekers often suffer from post-traumatic stress disorder and other mental disabilities caused by the traumas that were imposed on them.<sup>77</sup> While the interim rule provided that mental disability could be considered an extraordinary circumstance, no version of the rule has defined mental disability. The training manual, however, elaborated on this aspect of the rule in a manner that reflects awareness of the real situations in which refugees often find themselves and of the psychological stresses they experience. It included not only conditions that coincided with classical psychiatric categories, such as post-traumatic stress disorder and depression, but also inability to file because of “such factors as severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization.”<sup>78</sup> In the new training manual, these factors are retained; they are now examples of “other circumstances” excusing late filing, perhaps in recognition that they do not fit squarely into what some mental health professionals would regard as mental disabilities.<sup>79</sup>

Belated filing could also result from the illness or incapacity of an immediate family member or of the applicant’s legal representative. The interim rule did not recognize an exception on this basis, but the final rule does.<sup>80</sup> It provides that the word “immediate” in the regulation may cause some interpretive problems because in some cultures, people who are cousins, uncles, and nephews on a kinship diagram may be emotionally and psychologically as close as siblings, parents, or children in the United States. The new training manual therefore

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<sup>77</sup> See *infra* Part II.B.4.a and sources cited therein.

<sup>78</sup> TRAINING MANUAL, *supra* note 56, at 22.

<sup>79</sup> NEW TRAINING MANUAL, *supra* note 58, at 16.

<sup>80</sup> 8 C.F.R. § 208.4(a)(5)(vi) (2001) (final rule). Death of one of these persons also qualifies. *Id.*

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wisely notes that the degree of interaction between the family members, and not only the kinship relationship, must be considered.<sup>81</sup>

### *2. Applicant in Lawful Status*

Many aliens who have permission to enter or remain in the United States as nonimmigrants (e.g., those who hold student or tourist visas), independent of their possible refugee status, reasonably wait to file an asylum application until their nonimmigrant visa is about to expire. They wait because seeking asylum is a drastic step, usually involving at least psychologically severing ties to one's home country and starting to form a new, long-term allegiance to the United States. Therefore, they postpone going down that path for as long as possible, meanwhile hoping for a change of regime in their own country that would permit them to return safely. As a result, these nonimmigrants have two incentives to delay asylum applications: the usual reluctance to give up on their home countries and their right based on their visas to remain in temporary safety in the United States without seeking asylum.

The proposed interim rule did not address the potential problem that the one-year deadline created for nonimmigrants who had strong incentives to postpone seeking asylum. The interim rule recognized and solved the problem only partially, creating an exception to the deadline only for those accorded "temporary protected status."<sup>82</sup> Once again, the INS used its training manual to elaborate a more thoughtful policy. The manual acknowledged an exception to the deadline for *any* "immigrant<sup>83</sup> or non-immigrant lawful status [that] was maintained for

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<sup>81</sup> NEW TRAINING MANUAL, *supra* note 58, at 13.

<sup>82</sup> 8 C.F.R. § 208.4(a)(5)(iv) (2000) (interim rule). Under INA § 244A, 8 U.S.C. § 1254a (1994 & Supp. V 1999), the Attorney General may grant temporary protected status, commonly known as TPS, to most admissible aliens already in the United States who are nationals of countries that the Attorney General designates as having ongoing armed conflicts that would cause serious threats to the aliens' safety or where natural disasters have temporarily disrupted living conditions.

<sup>83</sup> It is possible even for an alien who has immigrant status to lose that status and need to seek asylum in order to remain in the United States. *See, e.g.*, INA § 216, 8 U.S.C. § 1186a (1994 & Supp. V 1999) (making permanent

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any period” during the year in which filing would have been required.<sup>84</sup> The manual explained that “although not explicitly provided for in the regulations, the maintaining of a lawful status as an exception will be followed as a matter of Asylum Division policy.”<sup>85</sup>

The INS embodied this policy in the final rule.<sup>86</sup> The phrase “for any period” that was used in the manual does not appear in the regulation, but that omission does not appear to be substantive because, in any event, the application must be made within a “reasonable period” of time after expiration of the lawful status.<sup>87</sup>

### 3. Causation

The INS originally proposed that only extraordinary circumstances “beyond the alien’s control that caused the failure” to apply in a more timely fashion would qualify.<sup>88</sup> The interim regulation adopted this language.<sup>89</sup> But every lawyer has taken a first-year torts class in which apparently simple common law rules of causation create head-pounding problems for students. This is inevitable because events often have multiple causes. For example, an alien might have been clinically depressed and not have known that he had to file for asylum within a year. While ignorance of the law is not explicitly recognized by the rule as an exception, depression is recognized as such.<sup>90</sup> The applicant’s depression may have made him more lethargic and less able to research his legal rights and obligations, but if the alien were nevertheless able to attend English language classes during the period of his depression, perhaps with more effort he could have learned about the asylum deadline. Under the interim regulation, his eligibility for an

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residence status conditional for two years in the case of persons who obtain it based on their marriage to a U.S. citizen or permanent resident alien).

<sup>84</sup> TRAINING MANUAL, *supra* note 56, at 24 (emphasis omitted).

<sup>85</sup> *Id.*

<sup>86</sup> 8 C.F.R. § 208.4(a)(5)(iv) (2001) (final rule).

<sup>87</sup> *Id.*

<sup>88</sup> 62 Fed. Reg. 444, 463 (Jan. 3, 1997) (proposed interim rule).

<sup>89</sup> 8 C.F.R. § 208.4(a)(5) (2000) (interim rule).

exception was in doubt, and lawyers might have had to make first-year torts arguments about the nature of causation in case after case.

The final rule seems to avoid these problems. Now, extraordinary circumstances are “events or factors directly related to the failure to meet the 1-year deadline.”<sup>91</sup> Situations of multiple causation will apparently qualify if at least one of the reasons for the delay was an accepted excuse. In making this change in the rule, the INS retreated because the statute itself did not require such a direct proof of causation. On the other hand, although the INS claims that it made the change “to ensure consistency with the statutory language,”<sup>92</sup> the statute does not use the word “directly.” Its exception applies to all extraordinary circumstances “relating to the delay.”<sup>93</sup> If there is ever administrative litigation over whether events connected to the delay occurred with sufficient directness, the alien should prevail because, notwithstanding the words of the final rule, directness is not a part of the statutory standard with which the INS attempted to be consistent.<sup>94</sup>

#### *E. Procedural Changes*

While amending its substantive interpretations of the “changed” and “extraordinary” circumstances exceptions, the INS also made important changes, over time, with respect to several procedural aspects of the new one-year deadline. In general, these procedural changes have better protected refugees.

##### *1. Determinations as to Late Filing*

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<sup>90</sup> *Id.* at § 208.4(a)(5)(i) (providing that extraordinary circumstances may include “serious illness or mental or physical disability of significant duration, including any effects of persecution or violent harm suffered in the past”).

<sup>91</sup> 8 C.F.R. § 208.4(a)(5) (2001) (final rule).

<sup>92</sup> Asylum Procedures, 65 Fed. Reg. 76,121, 76,123 (Dec. 6, 2000) (commentary on final rule).

<sup>93</sup> INA § 208, 8 U.S.C. § 1158(a)(2)(D) (Supp. V 1999).

<sup>94</sup> The final rule also includes a clause preventing recognition of an exception based on extraordinary circumstances; here, those circumstances were “intentionally created by the alien.” 8 C.F.R. § 208.4(a)(5) (2001). Even if the alien had a “limited amount of control” and had to “choose between the lesser of two evils,” the exception is still available. Asylum Procedures, 65 Fed. Reg. at 76,123 (commentary on final rule).

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The proposed interim rule raised the frightening possibility that if an alien tried to file an asylum application more than a year after entering the United States, the issues of whether the application was in fact late and, if so, whether an exception applied would be decided by ministerial personnel who process applications in one of the INS's regional Service Centers<sup>95</sup> rather than by asylum officers who had been trained in the nuances of refugee law. It also left open the possibility that any claim for an exception would be determined merely by examining the applicant's application form, not by interviewing the applicant. An example of exceptionally bad legislative drafting, the statute itself provided that the provision of law permitting an alien to apply for asylum "shall not apply" to an alien unless the alien demonstrates that the application was filed within a year after entry<sup>96</sup> or that an exception applied.<sup>97</sup> Therefore, under the rule, it was possible that late applications, like unsigned applications, would be summarily rejected, and the Service Center would never forward the file to an asylum officer, who would have studied it and then interviewed the applicant to determine whether he or she would have been barred by the deadline. The proposed interim rule clarified neither who would review the application nor in what degree of depth it would be reviewed.

By contrast, the interim rule resolved at least part of this issue. It provided that an asylum officer or immigration judge "shall review" an application that appeared to be late.<sup>98</sup> Only an asylum officer, immigration judge, or the Board of Immigration Appeals could "make determinations" regarding the deadlines.<sup>99</sup> This language implied that Service Center personnel

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<sup>95</sup> Affirmative asylum applications are filed by being mailed to one of several such regional centers. *See* INS, Instructions for Form I-589, *supra* note 44, at 9.

<sup>96</sup> INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (Supp. V 1999).

<sup>97</sup> INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (Supp. V 1999). Perhaps some members of Congress really did intend that INS should not even peruse late applications, thinking that this would reduce the agency's workload. But such reasoning would have been misguided because the agency must receive and read the application in order to determine whether it is late, and if so, whether one of the exceptions applies.

<sup>98</sup> 8 C.F.R. § 208.4(a)(1) (2000) (interim rule).

<sup>99</sup> *Id.* at § 208.4(a)(1).

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could not simply reject late filings. The interim rule, however, left open the issue of whether the “review” by more senior officials would merely consist of examining the paper filings, reviewing proposed Service Center rejections for accuracy, or whether asylum officers and immigration judges would personally interview the applicants, including even those who filed late.

The training manual resolved the question, specifying that “[a]n asylum interview is . . . the way to determine if any exceptions to the filing deadline apply. . . . [N]o applicant is to be denied a full asylum interview based solely on one-year filing deadline issues.”<sup>100</sup> Indeed, the manual acknowledged that “many applicants” might not be able to articulate why an exception applied and that “the unique nature of assessing an applicant’s need of protection places the officer in a ‘cooperative’ role [with a] duty to ‘elicit all relevant and useful information.’”<sup>101</sup>

The final rule now codifies the sound policy expressed in the training manual. The new rule specifies that an “asylum officer, in an interview, or immigration judge, in a hearing, shall review the application and give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions.”<sup>102</sup>

### *2. Publication of a Non-Exclusive List of Examples and the Consequences of Circumstances That Match an Entry on That List*

Asylum advocates were concerned that the INS might simply allow each asylum officer and immigration judge to interpret the statutory exceptions for “changed” and “extraordinary” circumstances for themselves, leading to arbitrary and non-uniform decision-making. They recommended that the agency list in the regulations several types of circumstances that would qualify as per se exceptions to the deadline. In addition, they wanted the agency to specify that

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<sup>100</sup> TRAINING MANUAL, *supra* note 56, at 4.

<sup>101</sup> *Id.* at 11. The source of the authority for this role was 8 C.F.R. § 208.9(b) (2000) (interim rule), which imposed such a duty on asylum officers with respect to the merits of cases. Because asylum officers have a responsibility for helping to elicit all relevant facts pertaining to threatened persecution, it is reasonable for them also to help develop the more technical facts pertaining to whether the applicant missed the deadline and why.



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the list was not exclusive so that other circumstances, not contemplated by the drafters of the rule, would also qualify. But when it issued the proposed interim rule, the INS stated that it had considered this suggestion and had rejected it so that it could provide its personnel with more “flexibility.”<sup>103</sup> In its Federal Register explanation, however, the INS conceded that “we can imagine several examples” that would qualify for an exception, and it listed physical or mental disability, legal disability, and ineffective assistance of counsel.<sup>104</sup> This concession was not adequate both because the list was too short and because the Federal Register comments would never be discovered by most advocates, who would consult only the Code of Federal Regulations and, eventually, relevant Board of Immigration Appeals decisions to determine the scope of the exceptions.<sup>105</sup>

In the interim rule, the agency relented because a “large number of [commentators]” had requested a list of examples.<sup>106</sup> The interim rule itself included the examples previously stated in the commentary as well as exceptions for applicants who maintained “temporary protected status”<sup>107</sup> until shortly before filing asylum applications and for those who had tried to file in a timely manner but whose applications had been rejected for technical deficiencies.<sup>108</sup> The list was later expanded still further by the training manual and by the final rule.<sup>109</sup>

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<sup>102</sup> 8 C.F.R. § 208.4(a) (2001) (final rule).

<sup>103</sup> 62 Fed. Reg. 444, 447 (Jan. 3, 1997) (proposed interim rule).

<sup>104</sup> *Id.*

<sup>105</sup> They would not have been able to rely on federal court cases because Congress had barred judicial review of determinations regarding the deadline. *See* INA § 208(a)(3), 8 U.S.C. § 1158(a)(3) (Supp. V 1999).

<sup>106</sup> Asylum Procedures, 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997) (commentary on interim rule).

<sup>107</sup> The Attorney General may designate a foreign state as one subject to ongoing armed conflict or one in which there has been a major disaster such as an earthquake or flood, making it dangerous for nationals from that state who are already in the United States to return to their homes. The Attorney General may then permit such nationals to remain in the United States temporarily. INA § 244A, 8 U.S.C. § 1254a (1994 & Supp. V 1999). Temporary protected status does not lead to permanent residency or asylum, nor does it benefit individuals who are not already in the United States at the time the Attorney General so designates his or her nation.

<sup>108</sup> 8 C.F.R. § 208.4(a)(5) (2000) (interim rule).

<sup>109</sup> Specific expansions are treated in *supra* Part I.D.

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The commentators who requested that examples be written into the rule had been careful also to ask for an explicit statement that it was not an exclusive list.<sup>110</sup> They feared that a list could close the door to some exceptions while opening it to others.<sup>111</sup> When it issued the interim rule, the INS made such a statement, but it once again showed its cautious side, putting the statement only into the commentary, not the rule itself.<sup>112</sup> Furthermore, the list in the rule muddied the waters by stating that the circumstances justifying late filing “may” include those on the list.<sup>113</sup> Did that mean that adjudicators could disregard facts justifying a late filing even if those facts fell squarely within the listed examples? The training manual further clarified the situation, stating that changed and extraordinary circumstances “include but are not limited to” those on the list.<sup>114</sup> At last, in the final rule, the agency has given formal recognition to the concept that the list is not exclusive. The new rule states that changed and extraordinary circumstances “may include but are not limited to” those in the list.<sup>115</sup>

If the applicant’s circumstances fall within one of the categories in the list (e.g., torture-induced depression that impaired his ability to file legal papers promptly), must the adjudicator grant the exception? On this issue, the INS’s ambivalence is particularly evident. The interim rule provided that the presence of extraordinary circumstances “shall excuse the failure to file within the 1-year period.”<sup>116</sup> Curiously, there was no equivalent language for changed circumstances, but the training manual filled in the gap. It described an example of a changed

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<sup>110</sup> See Schrag & Pistone, *supra* note 17, at 274.

<sup>111</sup> See *id.*

<sup>112</sup> Asylum Procedures, 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997) (commentary on interim rule) (“The list is not all-inclusive, and it is recognized that there are many other circumstances that might apply if the applicant is able to show that but for such circumstances the application would have been filed within the first year of the alien’s arrival in the United States.”).

<sup>113</sup> 8 C.F.R. § 208.4(a)(5) (2000) (interim rule). INS officials never disagreed with refugee advocates’ speculation that this formulation was a political compromise within the INS between those who wanted no list and those who wanted a list that would have mandatory effect.

<sup>114</sup> TRAINING MANUAL, *supra* note 56, at 8, 21 (changed circumstances and extraordinary circumstances, respectively).

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circumstance of a type listed in the regulation: new events in the country of the applicant's nationality.<sup>117</sup> The example provided involved an ethnic Albanian from the former Yugoslavia who was married to a Serbian woman.<sup>118</sup> Evidence (hypothetically) showed that nine years after he arrived in the United States, those in mixed marriages in the region began to be at risk, and the applicant filed within a year after the risk became apparent.<sup>119</sup> According to the manual, the applicant "would be" eligible for an exception to the deadline.<sup>120</sup>

Unfortunately, the mandatory language in the extraordinary circumstance exception vanished in the final rule. Instead, such circumstances now "may excuse the failure."<sup>121</sup> But the training manual continues to suggest that adjudicators may not arbitrarily reject circumstances that fit within the descriptions outlined in the rule. The ethnic Albanian is gone, but the manual still refers to a Russian citizen of West African ancestry who lived in the United States for eleven years before applying for asylum. "If there had been an escalation of violence between ethnic Russians and West Africans after April 1, 1997" and the Russian had applied within a reasonable time thereafter, he "would be" eligible for an exception.<sup>122</sup>

### 3. *The Burden of Proof*

When the INS started down the regulatory path, it made a serious error regarding the burden of proof, which it has now fully corrected. The IIRIRA requires an alien to prove by "clear and convincing" evidence that he or she filed within a year, but an alien who misses the deadline needs to demonstrate facts that qualify for an exception only "to the satisfaction of the

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<sup>115</sup> 8 C.F.R. § 208.4(a)(4)(i) (2001) (final rule).

<sup>116</sup> 8 C.F.R. § 208(a)(5) (2000) (interim rule).

<sup>117</sup> TRAINING MANUAL, *supra* note 56, at 12.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> 8 C.F.R. § 208.4(a)(5) (2001) (final rule).

<sup>122</sup> NEW TRAINING MANUAL, *supra* note 58, at 11-12.

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Attorney General.”<sup>123</sup> The proposed interim rule, however, would have required an applicant who filed more than a year after entering the United States to prove, “by clear and convincing evidence, that he or she is eligible.”<sup>124</sup>

In the interim rule, the agency conformed the burden of proof to that of the statute.<sup>125</sup> But what did the new phrase, “to the satisfaction of the Attorney General,” really mean? In civil litigation, a common contrast to the “clear and convincing” standard is the usual “preponderance of the evidence” standard, requiring the party with the burden of persuasion to show that the facts were at least 51% likely to have happened. Did the applicant have even this great a burden? The training manual clarified the meaning of the phrase in a way helpful to applicants, “This is a reasonableness test, i.e., it must be reasonable for the asylum officer, immigration judge, or BIA to conclude that a changed circumstance exists.”<sup>126</sup> This suggests the same lower standard as that which is used for judicial review of jury verdicts in civil cases; that is, if a reasonable person could think that the changed or extraordinary circumstance existed and were related to the delay, the applicant should be permitted to rely on that circumstance as an excuse. The “satisfaction” standard was not changed by the December 2000 revision, but the latest version of the training manual continues to be expansive on the “cooperative” role to be played by the asylum officer in developing the relevant facts.<sup>127</sup> In addition, regarding the applicant’s duty to prove by clear and convincing evidence that he or she actually entered the United States within a year before filing, the manual says that

[a]sylum officers should not assume that the absence of detailed and consistent testimony regarding the specifics of an applicant’s arrival indicate an attempt to circumvent the filing deadline requirements. There may be other reasons an applicant fails to provide

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<sup>123</sup> INA §§ 208(a)(2)(B), 208(a)(2)(D), 8 U.S.C. §§ 1158(a)(2)(B), 1158(a)(2)(D) (Supp. V 1999).

<sup>124</sup> 62 Fed. Reg. 444, 466 (Jan. 3, 1997) (proposed interim rule).

<sup>125</sup> 8 C.F.R. § 208.4(a)(2) (2000) (interim rule).

<sup>126</sup> TRAINING MANUAL, *supra* note 56, at 9.

<sup>127</sup> NEW TRAINING MANUAL, *supra* note 58, at 18.

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details about his or her arrival, such as the desire to protect the identity of the person whose passport an applicant used, language confusion, fear of smugglers, or the natural fading of memory over time. . . . If an applicant presents vague or inconsistent testimony about the date, manner and place of last entry, the applicant may nonetheless be able to establish by clear and convincing evidence that he or she was outside the United States less than one year prior to the filing date.<sup>128</sup>

### 4. *Expiration of the Exceptions*

When late filing is excused, the excuse itself expires at some point after the applicant discovers that he or she should have filed an application. Similar to the substantive standards for authorizing an excuse, the standard for determining how long the excuse lasts has evolved since the IIRIRA was enacted.

The proposed interim rule would have required asylum seekers affected by extraordinary circumstances<sup>129</sup> to apply “as soon after the deadline as practicable given those circumstances.”<sup>130</sup> This language could have prompted adjudicators to make an assessment determining the precise day on which a refugee should have been able to file an application. In response to comments requesting the INS to soften the phrase,<sup>131</sup> the INS included in the interim regulation a standard requiring applicants to file “within a reasonable period.”<sup>132</sup> Neither the interim regulation nor the INS’s discussion of it in the Federal Register shed light on how long a period might be reasonable. The training manual, however, implied that the Service would not be draconian in applying a final deadline, particularly to less well-educated applicants. “[O]fficers are encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file,” it cautioned.<sup>133</sup> “An applicant’s education and level of

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<sup>128</sup> *Id.* at 23-24.

<sup>129</sup> The proposed interim rule did not specify a standard for filing after the occurrence or discovery of changed circumstances, but this may have been a drafting oversight.

<sup>130</sup> 62 Fed. Reg. 444, 463 (Jan. 3, 1997) (proposed interim rule).

<sup>131</sup> Asylum Procedures, 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997) (commentary on interim rule).

<sup>132</sup> 8 C.F.R. §§ 208.4(a)(4)(ii), 208.4(a)(5) (2000) (interim rule) (changed circumstances and extraordinary circumstances, respectively).

<sup>133</sup> TRAINING MANUAL, *supra* note 56, at 18.

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sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, and many other factors should be considered.”<sup>134</sup> The manual even provided an example involving a three-year delay after country conditions had changed. In the example, such a long delay would probably be excessive, but the example is easily distinguished because of unusual facts.<sup>135</sup>

The final rule retains the reasonable-period test. The INS’s commentary, however, on the final rule, while not binding, nonetheless appears to be more restrictive than the rule itself. According to the INS, “[a]lthough there may be some rare cases in which a delay of one year or more may be justified because of particular circumstances, in most cases such a delay would not be justified.”<sup>136</sup> Nevertheless, the new training manual continues to offer applicants the benefit of the doubt, and its example involving a three-year delay remains.<sup>137</sup>

In addition, the INS commentary on the duration of an excuse suggests a special case in which an excuse may expire with unusual rapidity. With respect to filings after valid status expires, the INS says that it would expect the asylum seeker to apply “as soon as possible after expiration” of the status and that with respect to this particular exception, “waiting six months or longer” would not be considered reasonable.<sup>138</sup> The rule itself does not impose a different test in these circumstances, and the INS’s interpretation appears to be a throwback to the language of

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* In the example, the manual expressed skepticism that the applicant could explain away such a long period of inaction (he “would have to be very convincing”), but that was because the applicant was “an educated human rights lawyer” who had been in the United States for sixteen years before filing. The manual’s skepticism was a result of “this particular applicant’s grasp of his asylum possibilities.” *Id.*

<sup>136</sup> Asylum Procedures, 65 Fed. Reg. 76,121, 76,124 (Dec. 6, 2000) (commentary on final rule). The INS seems to have reacted, and perhaps overreacted, to “certain commentators” who had “believed that [an excused alien] would automatically receive” an additional year. That policy, the agency declared, would be at odds with the statutory intent to link the duration of the extension to the circumstances that caused the delay. *Id.*

<sup>137</sup> NEW TRAINING MANUAL, *supra* note 58, at 19.

<sup>138</sup> 65 Fed. Reg. at 76,123-24.

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the proposed interim rule.<sup>139</sup> The INS's position may reflect a guess that people who have valid nonimmigrant status are likely to have more awareness than other asylum applicants of U.S. immigration law and of the date or event that would cause their status to end. If so, the INS has not stated this justification, nor has it cited any supporting empirical research. Even if this supposition is based on a factual assessment, adjudicators should recognize that in many situations, one of the other changed or extraordinary circumstances might intervene to make it difficult for a nonimmigrant to file promptly after that status expires. For example, human rights conditions in the person's country may be in rapid flux around the time the nonimmigrant status is changing or the person may have great difficulty obtaining free or affordable legal representation.

### *F. Improvements Still Needed*

Over a four-year period, the INS has made steady strides to improve its approach to implementing the one-year asylum application deadline that Congress imposed.<sup>140</sup> Through two sets of improvements in its proposed regulations and through its practices as reflected and published in its training manual, it has interpreted the exceptions to the one-year deadline to recognize some of the most important reasons why asylum seekers who are genuine refugees do not file within a year after arrival and to permit consideration of reasons that are not among the most common.

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<sup>139</sup> See *supra* text accompanying note 132.

<sup>140</sup> In response to public comments, the INS also significantly improved its original draft of the instructions for and questions on the asylum application form relating to the one-year deadline. See *A WELL-FOUNDED FEAR*, *supra* note 3, at 217-23.

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Nevertheless, the list of exceptions is not yet broad enough to encompass all genuine refugees. If Congress does not repeal the deadline, the INS should make three additional technical corrections to improve its rule.<sup>141</sup>

### 1. *Danger to the Applicant's Relatives Abroad*

As it originally passed the Senate, IIRIRA included an exception where the applicant filed late because of threats of retaliation against relatives abroad.<sup>142</sup> Neither the interim nor the final rule explicitly excused late filing on this basis. The training manual, however, described “threats against an applicant’s family member living abroad” as a changed circumstance.<sup>143</sup> The new training manual continues this practice.<sup>144</sup> It also provides an example in which a threat to a relative could influence the timing of an asylum application. In the example, the applicant is safe in the United States more than a year after entering, but then his sister at home publishes a newspaper article critical of the government. The article endangers him, and this is a changed circumstance warranting a late filing.<sup>145</sup> That exception recognized by the manual should be written into the rule.

A related situation is one in which the applicant’s relative was not personally threatened but would have been endangered by providing needed documentary evidence to support a timely asylum application in the United States. At first blush, this would seem to be a rare occurrence because asylum applications are confidential<sup>146</sup> and because persecutors would seem to have no way of knowing that one of their nationals had applied. In fact, the need to provide documentary

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<sup>141</sup> In addition to these changes, the INS should eliminate ambiguous signals by changing the word “may” to “shall” in the portions of the rule stating that the excusing circumstances “may include” those on its lists. *See supra* text accompanying notes 115-122.

<sup>142</sup> H.R. 2202, 104th Cong. § 193 (1996) (as passed and renumbered by the Senate) (originally S. 1664); 142 CONG. REC. S4730 (daily ed. May 6, 1996).

<sup>143</sup> TRAINING MANUAL, *supra* note 56, at 15.

<sup>144</sup> NEW TRAINING MANUAL, *supra* note 58, at 11.

<sup>145</sup> *Id.* at 26.

<sup>146</sup> 8 C.F.R. § 208.6 (2001).



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corroboration whenever possible<sup>147</sup> often requires applicants to contact their relatives abroad to obtain birth, death, or marriage certificates, records of arrests or imprisonments, or affidavits from witnesses to the persecution.<sup>148</sup> Very often, persecuting governments intercept the mail and tap the telephones of families of persons known to have been dissidents, especially if the dissidents have fled the country. These family members know from the experiences of others that cooperation with their refugee relative may result in their own imprisonment, and a would-be asylum applicant may delay an application, knowing that a parent or sibling would be endangered by receiving even a single telephone call requesting corroborating evidence.<sup>149</sup>

Neither the manual nor the rule addresses the situation in which an asylum seeker avoids filing in a more timely fashion because to do so would place a relative at risk, but it would seem to constitute an extraordinary circumstance as that term is defined in the new rule.<sup>150</sup> The manual and rule should therefore be revised to make the exception clear. It should be revised so that it

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<sup>147</sup> See *supra* note 45 and accompanying text.

<sup>148</sup> For example, the CALS recently won asylum for an African client who needed to obtain from relatives in his home country an affidavit attesting to his year of imprisonment (for which there were no available documentary records) and to his physical condition (infested with parasites and in need of surgery) when he was finally released and stumbled home.

<sup>149</sup> In our clinics, much of the students' work on each case involves the collection of such evidence. That work often requires transmission of information through very indirect routes, such as contacting third parties through lawyers or American human rights workers who may be able to contact the family members who have the evidence. Exchanges of documents are often achieved through expensive international courier services, such as DHL. Many applicants are unable to pay for these services (which typically charge about \$80 per package), so they could not have collected the evidence on their own before securing professional assistance. CALS at Georgetown University maintains a special fund of donations from its alumni and others for this express purpose.

A 2001 case handled by Georgetown University students illustrates the bind in which the corroboration requirement puts advocates. Because the Board of Immigration Appeals decisions require corroboration, students representing a Guinean asylum seeker contacted a journalist in that country by telephone and later through a DHL package to ascertain whether he could corroborate their client's claim. The journalist provided a typed letter supporting the claim but added, in handwriting, that the inquiry had put him in danger. The journalist asked that the students refrain from any future contact. The students submitted the letter to the immigration judge as part of their client's case. The judge granted asylum to the applicant but criticized the students for putting the journalist in danger. Thus, the students were caught in a bind between the BIA's corroboration requirements and their client's consequent needs, on the one hand, and, on the other, their own wish not to endanger people's lives and the trial judge's desire that immigration proceedings not be the cause of such endangerment.

<sup>150</sup> Reluctance to contact a relative for required corroborating evidence because doing so may endanger the relative's life or freedom is a factor directly related to the failure to meet the one-year deadline which was "not intentionally created by the alien through his or her own action [and was] directly related" to the delay. 8 C.F.R. § 208.4(a)(5) (2001) (final rule).

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explicitly recognizes an “extraordinary circumstance” exception when a relative was temporarily unable to supply the asylum applicant with corroborating documentary evidence because of the relative’s own fear of persecution by a government that opens and monitors private mail or monitors electronic communication to or from the United States. This exception should also include cases in which an asylum applicant did not attempt to obtain such evidence earlier because of a reasonable fear that the relative would be endangered.

### *2. Belated Discovery of U.S. Asylum Law or of the Deadline*

Some refugees live for years in the United States both unaware of the country’s asylum statute and their need to file a formal application in order to obtain lasting protection. Others are aware of the existence of formal asylum status, but they remain unaware that they may forever lose the opportunity to seek asylum if they do not apply for it within a year after they arrive. In adopting a deadline, Congress may not have realized that many refugees would be unaware of it.<sup>151</sup> We, however, have personally encountered many asylum seekers who did not even know about asylum until they had been in the United States for a long time. Most of these asylum seekers were not highly educated professionals; on the contrary, most were trying to learn English while leading isolated lives in near-poverty.

None of the iterations of the rule have discussed this type of changed circumstance. Perhaps INS officials also do not think that people could flee their country, seeking safety in America, without knowing or soon learning about U.S. asylum laws. More likely, the INS is reluctant to write an explicit exception for belated discovery of the law because it fears that

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<sup>151</sup> The chief House sponsor of a deadline, Rep. Bill McCollum, was asked during a cable network television interview about the fact that his proposed law did not require INS to inform arriving aliens (even those who went through airport or border inspections by INS officials) of a deadline. He responded that the Committee Report on the legislation would state that the “Immigration Service would be required to tell people who came in that they could apply for asylum and this is how long it would take . . . and I think the Immigration Service is going to do that.” Comments of Rep. Bill McCollum on *Pork* (America’s Talking television broadcast, Nov. 15, 1995). The Committee Report did not include such language, and the INS did not take the action that Rep. McCollum expected.

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aliens who actually knew about asylum law could too easily evade the deadline by fraudulently invoking such an exception. This reasoning is less persuasive than it once was as the INS now accepts other subjective changes, such as adoption of changed political views, where proof may depend heavily on the credibility of the applicant. While it is appropriate for asylum officers to require applicants to prove that they belatedly learned about the law, they should not be precluded from believing an applicant's testimony to this effect, particularly if it can be backed by corroboration (e.g., from persons in relief or religious organizations who first informed the applicant about asylum law).

Although the final rule does not itemize an exception for the changed circumstance of belated discovery of the law, an amendment made by the final rule suggests that a belated discovery may now qualify as either a changed circumstance or an extraordinary circumstance.<sup>152</sup> As to changed circumstances, the INS deleted the word "objective" in the rule's description of what will qualify as a change.<sup>153</sup> The rule now covers "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum."<sup>154</sup> Eligibility depends on filing an application, and filing an application is not possible unless the applicant knows that the concept of asylum exists and is bounded by formal rules in American law. Therefore, at least the belated discovery of the existence of an asylum system should excuse a late filing.<sup>155</sup>

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<sup>152</sup> 8 C.F.R. § 208.4(a)(4)(i)(B) (2001) (final rule).

<sup>153</sup> *See supra* text accompanying note 69.

<sup>154</sup> 8 C.F.R. § 208.4(a)(4)(i)(B) (2001) (final rule).

<sup>155</sup> Until 2001, the training manual seemed to authorize asylum officers to honor an exception on this basis. It gave the example of a Bulgarian citizen who arrived in the United States in 1989, ten years before applying for asylum, and said that until 1998 (a year before applying for asylum), she did not know that asylum existed. TRAINING MANUAL, *supra* note 56, at 19. The manual said that she "has a changed condition but probably will not be considered to have filed within a reasonable period of time." *Id.* It added that "[t]he credibility of an applicant's unawareness of asylum should be assessed on a case-by-case basis," implying that if the adjudicator is convinced that the applicant is telling the truth, the belated discovery will justify an exception to the deadline. *Id.* Curiously, however, the new version of the manual alters the example of the Bulgarian applicant so that although the hypothetical example continues to refer to the applicant's alleged complete ignorance of asylum law, the explanation to asylum officers now pertains only to her delayed awareness of a liberalizing change in the law. NEW TRAINING

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In addition, an “extraordinary circumstance” is defined as one that is “directly related” to the failure to file on time and is “not intentionally created by the alien through his or her own action or inaction.”<sup>156</sup> The rule now states that the types of acceptable “extraordinary circumstances” are not limited to those on the illustrative list.<sup>157</sup> Therefore, if an alien learns about asylum law after the one-year deadline has passed or if the alien knew about the law but genuinely did not know about the deadline, that person is the victim of circumstances that are directly related to the failure to file on time and that were not intentionally created by him or her.<sup>158</sup> Because the final rule does not provide, however, explicit guidance on this subject, it should be amended to clarify that genuine belated discovery of the law, proved to the satisfaction of the adjudicator, is either a changed or an extraordinary circumstance.

### 3. *Ineffective Assistance and Complete Unavailability of Counsel*

The interim rule recognized an “extraordinary circumstances” exception for situations in which an applicant had relied on a lawyer to file a timely application, but the lawyer failed to do so.<sup>159</sup> In an apparent effort to spare asylum officers and immigration judges from having to determine whether applicants were telling the truth about their alleged reliance on counsel, the INS imposed strict procedural requirements that, if met, would per se excuse a late filing instead of requiring applicants to persuade an adjudicator that they had been poorly treated by a lawyer. Importing the procedures required by the Board of Immigration Appeals in *Matter of Lozada*,<sup>160</sup>

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MANUAL, *supra* note 58, at 27. It is not clear whether the authors of the revised manual intended with this alteration to reduce the flexibility that the previous edition gave to adjudicators.

<sup>156</sup> 8 C.F.R. § 208.4 (a)(5) (2001) (final rule).

<sup>157</sup> *Id.*

<sup>158</sup> In most circumstances, the lack of knowledge about asylum will not even be because of negligence; rather, it will result from isolation in a new culture and country and perhaps from language barriers. But in any event, ignorance attributable even to the applicant’s negligence is excusable under the rule because it is not “intentional.” The applicant would have the burden of proving that he did not know of the law and would have had to have filed within a reasonable time, under the circumstances, after learning about it. *Id.*

<sup>159</sup> 8 C.F.R. § 208.4(a)(5)(iii) (2000) (interim rule).

<sup>160</sup> 19 I. & N. Dec. 637, 639 (B.I.A. 1988).

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the interim rule recognized an exception where the applicant (a) files an affidavit setting forth in detail his or her agreement with “counsel” with respect to the “actions to be taken” and the “representations counsel did and did not make”; (b) informs counsel of the allegations of incompetence or lack of integrity and gives counsel the opportunity to respond; and (c) indicates whether a complaint has been filed with appropriate ethical disciplinary authorities and, if not, why not.<sup>161</sup> The idea is that the INS can reasonably credit a claim where the applicant has taken these steps because applicants will be loathe to file false claims with disciplinary authorities and, if they do, lawyers will expose the false claims in the course of defending themselves.<sup>162</sup>

For several reasons, these requirements are too demanding, particularly for pro se applicants. First, they seem to apply only to ineffective assistance by lawyers whereas many applicants who cannot afford lawyers rely for help on paid or unpaid lay advocates who may let them down with greater frequency than lawyers do. In fact, some experienced non-lawyers who help asylum applicants with their forms falsely purport to be lawyers, obtaining fees on that pretext, but do not file applications promptly.<sup>163</sup> Second, applicants do not always have records or even recollections in great detail regarding exactly what claims their representatives made about when their applications would be filed. When meeting with their representatives,

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<sup>161</sup> 8 C.F.R. § 208.4(a)(5)(iii) (2000) (interim rule).

<sup>162</sup> See *In re Rivera-Claros*, 21 I. & N. Dec. 599, 603-05 (B.I.A. 1996).

<sup>163</sup> In the spring of 2001, one of our clinics represented an African client who had relied for help on another man of African origin. That man falsely claimed that he was a lawyer and refused to file our client’s application until he was paid his full \$1,200 legal fee. The client was able to produce only half of the money before the one-year deadline expired, so without telling the client that the law imposed a deadline, the preparer waited until after it had passed and the client had paid in full. The preparer did not accompany the client to his interview with an asylum officer, who refused to grant asylum on the ground that the deadline had not been met. The client got new representatives (law students) for his removal hearing in immigration court, at which he reasserted his asylum claim. The students were uncertain whether they could rely on the exception in the interim rule partly because it referred only to ineffective assistance of counsel, not to those who falsely claimed to be counsel. Fortunately for the client, he was also diagnosed by a psychologist to have been suffering from depression, and the immigration judge excused the late filing and granted him asylum. This situation does not seem like an isolated case for a similar set of facts is given as one of only three examples in an early article on problems under the new deadline. Virgil Wiebe, *How to ‘Satisfy’ the Attorney General: Beating the One Year Asylum Filing Deadline*, in AMERICAN IMMIGRATION LAWYERS ASS’N, NEW YORK CHAPTER, FIRST ANNUAL IMMIGRATION LAW SYMPOSIUM HANDBOOK 93, 105 (1999).

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applicants typically are primarily concerned about explaining the horrific experiences they have endured and judging whether they can trust their new representative, rather than the procedural steps that lay ahead. Finally, pro se applicants may have no idea what constitutes an ethical violation by an attorney (or non-attorney), how to locate the appropriate disciplinary authorities, or how to file a complaint.

Despite the inadequacy of the ineffective assistance of counsel exception as articulated in the interim rule, the INS carried forward the provisions of the interim rule when it published the final rule.<sup>164</sup> Furthermore, it hinted at possible regression, suggesting that in the future it might not allow *any* exception to the one-year deadline or to any other immigration relief based on ineffective assistance of counsel.<sup>165</sup> This is an uncharacteristic step in the wrong direction.

Instead, the INS should permit applicants to satisfy the ineffective assistance exception either by complying with the *Lozada* procedures or, alternatively, by persuading the adjudicator, on the merits, that they had reasonably depended on a person who held himself or herself out to be a professional but who failed to follow through as promised.

A related problem for many applicants is that they are unable to file within a year not because their counsel was ineffective, but because owing to poverty or lack of knowledge, they were unable to obtain any counsel at all within that period of time. This is a problem largely of the government's own making because Congress has prohibited the Legal Services Corporation from allowing its funds to be used to provide assistance to people seeking asylum.<sup>166</sup> By contrast,

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<sup>164</sup> 8 C.F.R. § 208.4(a)(5)(iii) (2001) (final rule).

<sup>165</sup> The INS noted that it was arguing in a pending Board of Immigration Appeals case that because there is no constitutional right to *government-furnished* counsel in immigration cases, there could be no constitutional basis for relief based on a claim of ineffective assistance of counsel as in criminal cases. Asylum Procedures, 65 Fed. Reg. 76,121, 76,124 (Dec. 6, 2000) (commentary on final rule).

<sup>166</sup> District of Columbia Appropriations Act of 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000); Departments of Commerce, Justice & State, the Judiciary & Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

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several European governments affirmatively provide legal assistance to indigent asylum seekers.<sup>167</sup>

The final rule does not explicitly state that one's inability to obtain legal counsel constitutes an extraordinary circumstance. This should be made explicit. A government agency that allows extra time for people who obtain legal help that turns out to be inadequate should also allow extra time for those who try in good faith and in a timely fashion to obtain legal help but are unable to do so because of the shortage of free legal assistance for people of limited means. Moreover, Congress itself may have intended such an exception. As enacted by the Senate, the bill that became IIRIRA included an explicit provision for a "good cause" exception including "efforts to seek asylum that were delayed by the temporary unavailability of professional assistance."<sup>168</sup> The Senate's list of particular exceptions was replaced by the bill's conference committee with the unelaborated changed and extraordinary circumstances clauses. But in connection with final passage on the Senate floor, Senator Hatch, co-chair of the conference committee, assured the Senate that "most of the circumstances covered by the Senate's good-cause exception will be covered either by the changed circumstances exception or the extraordinary circumstances exception."<sup>169</sup>

The difficulty of separating bona fide from false claims of timely efforts to obtain professional assistance may have deterred the INS from listing this exception explicitly, though the final rule nevertheless permits individual asylum officers and immigration judges to allow an

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<sup>167</sup> ASYLUM PRACTICE AND PROCEDURE: COUNTRY-BY-COUNTRY HANDBOOK 16, 23, 126, 172 (Rebecca Wallace & Adele Brown eds., 1999) (describing assistance Austria, Belgium, Netherlands, and, for asylum seekers not receiving welfare funds, the United Kingdom).

<sup>168</sup> H.R. 2202, 104th Cong. § 193 (1996) (as passed and renumbered by the Senate) (originally S. 1664); 142 CONG. REC. S4730 (daily ed. May 6, 1996).

<sup>169</sup> 142 CONG. REC. S11,491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

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exception on this basis.<sup>170</sup> The applicant has the burden of proving such efforts, but an applicant may be able to carry that burden through such evidence as his or her own testimony, statements from witnesses as to the unsuccessful efforts to obtain assistance, and records of non-governmental organizations that refused timely assistance.<sup>171</sup> Accordingly, when claims for asylum are filed more than one year after entry, asylum officers and immigration judges should accept testimony and other evidence relevant to attempts to obtain counsel and should allow an exception to the deadline when the evidence is credible. The next iteration of the training manual and the next revision of the rule should elaborate the exception in a way that makes this clear.

### *G. The Need to Repeal the Deadline*

Despite the steady improvements that the INS has made in its regulations and manuals to encourage fair administration of the deadline, too many asylum applications are being rejected for reasons unrelated to their merits. Between October 2000 and June 2001, the INS interviewed 6,198 asylum applicants who were deemed “rejectable” in INS parlance for having filed their applications more than one year after entering the United States.<sup>172</sup> Of those, 3,057 were found to

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<sup>170</sup> As noted above, *supra* notes 156-58, the final rule defines extraordinary circumstances as those directly related to the failure to file on time and not intentionally created by the alien through his or her own action or inaction, and it now states that the types of acceptable circumstances are not limited to those on the illustrative list. 8 C.F.R. § 208.4(a)(5) (2001) (final rule).

<sup>171</sup> *Id.*

<sup>172</sup> The statistics regarding late filings were provided to Professor Schrag by the INS. Summary of Rejectable Asylum Cases, *in* Fax from the INS Asylum Division to Philip Schrag (July 10, 2001) (on file with authors) [hereinafter Summary of Rejectable Asylum Cases]. To avoid statistical distortion, these numbers exclude asylum seekers of Mexican nationality. Recently, hundreds of Mexican nationals who have been in the United States for many years have filed applications for asylum in Los Angeles not because they expect to be granted asylum, but because they have been misinformed by commercial entrepreneurs that they would have a good chance of persuading an immigration judge to grant them cancellation of removal under INA § 240A, 8 U.S.C. § 1229b(b)(1) (Supp. V 1999). The only way for them to become involved in a proceeding in which an immigration judge obtains jurisdiction (and could theoretically grant such a benefit) is for them to apply for asylum. Telephone Interview with Joseph Langlois, Director, INS Asylum Division (June 14, 2001). An applicant who has no valid immigration status and is rejected for asylum because he or she does not meet the one-year deadline is charged with being in the United States without permission and referred to an immigration judge for entry of a possible order of removal, a proceeding in which the applicant can assert a claim for cancellation of removal. 8 C.F.R. §§ 208.14, 240.20 (2001). The Mexican nationals who apply under these conditions are routinely rejected based on the deadline. The statistics (for the same period of time) for the Mexican asylum seekers, who were excluded from the statistics reported in the



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have changed or extraordinary circumstances that justified the late filing.<sup>173</sup> But that left 3,141 asylum seekers (51% of the late filers) who were actually rejected during this nine-month period; that is, whose claims were not adjudicated on the merits simply because they had filed too late and asylum officers did not fit their excuses into any of the pigeonholes elaborated in the regulations or training manual.

Furthermore, the percentage of late filers who are not excused on the basis of an exceptional pigeonhole has increased steadily – from 37% in FY 1998, to 39% in FY 1999, to 42% in FY 2000, and, as noted above, to 51% most recently.<sup>174</sup> Surprisingly, this climb has occurred despite the gradual liberalization of the exceptions described in this article. Possibly asylum officers were reluctant, while the ink was still wet on the 1996 immigration law, to reject asylum seekers on what was then a new and, to many, intuitively unfair basis. But as rejections of late filers became a bureaucratic routine rather than a new and therefore closely observed procedure, asylum officers may have become more deadened to the injustice of their rejection decisions.

The fine-tuning that we suggest would improve the rule by protecting some refugees with valid reasons for filing more than a year after entering the United States. It will not protect, however, all such persons because neither the INS nor we can anticipate all possible exceptional circumstances. The best solution would be to repeal the one-year deadline, as Section 102 of S. 1311 would do.<sup>175</sup> Congress passed the Refugee Act in 1980 to provide asylum for people who had actually been persecuted, or who had a well-founded fear of persecution, based on their race,

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text, are as follows: Number of rejectable asylum seekers: 4,519. Number rejected: 4,366 (97%). Summary of Rejectable Asylum Cases, *supra*.

<sup>173</sup> Summary of Rejectable Asylum Cases, *supra* note 172.

<sup>174</sup> *Id.* All of these numbers exclude applications by Mexican nationals.

<sup>175</sup> Refugee Protection Act of 2001, S. 1311, 107th Cong. (2001).

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religion, nationality, political opinion, or membership in a particular social group.<sup>176</sup> Nothing has changed to make people in those categories less deserving of American protection or less in need of starting a new life in a free country. Most asylum seekers who qualify for an exception to the deadline go on to win asylum.<sup>177</sup> Quite possibly, most of the asylum seekers who are rejected because they neither filed on time nor qualified for an exception would also have won asylum if their cases had been considered on the merits. The rejection of even a single asylum seeker based on a short statute of limitations is inconsistent with America's heritage and values. The rejection of thousands of asylum seekers each year on this basis is a national embarrassment.<sup>178</sup>

### II. EXPEDITED REMOVAL

This part of the article discusses IIRIRA's grant of authority to the INS to summarily remove individuals from the United States without a court hearing, an authority known as expedited removal. Part II.A reviews the expedited removal process. Part II.B discusses how the new rule improves the expedited removal process. Part II.C suggests further changes that are necessary to ensure that the system achieves a minimally acceptable level of fairness.

#### A. *The Expedited Removal Process*

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<sup>176</sup> See Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102.

<sup>177</sup> Of the 3,057 applicants found to have valid excuses during the first nine months of FY 2001, 1,876 were granted asylum by an INS asylum officer, 959 were referred for hearings before immigration judges, and 222 were denied. Summary of Rejectable Asylum Cases, *supra* note 172. Some of the 959 who were referred were probably granted asylum by the judges, but even if the judges denied every one of these cases, the success rate on the merits of the excused applicants was at least 61%. *See id.* The equivalent percentage for all of FY 2000 is 60% (2,573 grants to 4,293 excused non-Mexican late filers). *See id.* Thus, late filers who are excused because of a changed or extraordinary circumstance have a quite high probability of winning asylum.

<sup>178</sup> As noted above, *supra* note 177, excused non-Mexican late filers win asylum at a rate of at least 61%. If non-excused late filers were to prevail at the same rate, 1,916 of the 3,141 non-Mexican asylum seekers rejected during the first nine months of FY 2001 would have won asylum, a number equivalent to 2,555 on an annual basis. In FY 2000, the INS granted asylum in 16,810 cases. INS, CHART OF ASYLUM APPLICATIONS, *at* <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msmay01/ASYLUM.HTM> (last modified July 9, 2001) [hereinafter INS, CHART OF ASYLUM APPLICATIONS]. 2,555 additional grants would have increased the total by a significant 15%.

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In addition to imposing, for the first time, a filing deadline on asylum applications,<sup>179</sup> IIRIRA also introduced a new expedited removal process into U.S. immigration law. Under the new provisions, INS inspections officers stationed at airports, seaports, and land border crossings are authorized to order removed from the United States and deported back to their home countries certain individuals who arrive at the border without proper documentation. These individuals are returned directly from the airport or border “without further hearing or review.”<sup>180</sup> The law included procedures to exempt refugees from this type of summary deportation,<sup>181</sup> though as we explain, the protections for refugees are not adequate.

The new expedited removal provisions marked a radical change from prior law and they are among the most controversial changes made by IIRIRA.<sup>182</sup> The source of the controversy is that the new procedures give lower-level INS inspections officers one of the most powerful and awesome authorities entrusted to the INS: the authority to remove an individual from the United States.<sup>183</sup> Formerly the authority to deport individuals rested with immigration judges, who themselves were subject to review by the Board of Immigration Appeals and the federal courts.<sup>184</sup>

Armed with this new authority, INS inspections officers have deported numerous refugees who have suffered past persecution or have a well-founded fear of persecution upon returning to their home country without giving them an opportunity to apply for asylum protection. The Lawyers Committee for Human Rights and other organizations have documented

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<sup>179</sup> See *supra* Part I.

<sup>180</sup> INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (Supp. V 1999).

<sup>181</sup> *Id.*

<sup>182</sup> By virtue of a 51-49 vote, the Senate’s version of IIRIRA provided for a very limited use of expedited removal. But in a conference committee, the more expansive use of expedited removal favored by the House of Representatives prevailed. See *A WELL-FOUNDED FEAR*, *supra* note 3, chs. 9, 10.

<sup>183</sup> INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A).

<sup>184</sup> 8 U.S.C. § 1105a (repealed 1996).

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many stories of such deportations, including cases in which the aliens had explained to INS inspectors that they were afraid to return home.<sup>185</sup>

Perhaps the best way to sensitize yourself to the dangers of expedited removal is to perform the following thought experiment. Imagine that you are a U.S. citizen born in the United States returning home from an overseas conference. Your airplane arrives at your local international airport and you proceed to immigration inspections. When it is your turn to have your travel documents inspected by the INS inspections officer, you show the officer your passport. He looks at you suspiciously and tells you to follow him. You do. The inspections officer brings you into a room adjacent to the general inspections area and tells you to sit down on a long bench. Then, the inspections officer shackles your feet together. Next, he handcuffs you to the bench. You are not given anything to eat or drink. You ask to use the restroom facilities, but the officers deny your request. They tell you that your passport is false and that you are not really a citizen of the United States. They tell you they are going to deport you. But you are a U.S. citizen and your U.S. passport *is* valid.

Imagine further that your spouse has come to the airport to pick you up. You ask the officers if you can see him; he should be able to help you to prove that you are in fact a U.S. citizen. He can go home and get your birth certificate, which proves that you were born in the

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<sup>185</sup> See generally IS THIS AMERICA?, *supra* note 26; KAREN MUSALO ET AL., CTR. FOR HUMAN RIGHTS AND INT'L JUSTICE, THE EXPEDITED REMOVAL STUDY: REPORT ON THE FIRST THREE YEARS OF IMPLEMENTATION OF EXPEDITED REMOVAL (2000), *reprinted in* 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2001) [hereinafter THIRD EXPEDITED REMOVAL STUDY]. To give three examples (out of many) from the reports: Dem, a young ethnic Albanian student from Kosovo who did not speak English explained to the INS inspectors that he was afraid to return home, but inspectors at a California airport deported him. Desperate to save his life, Dem tried to enter the United States a second time. On the second occasion, a different INS inspections official referred him to a credible fear interview. IS THIS AMERICA?, *supra* note 26, at 21. The same thing happened to Driton, an ethnic Albanian who was fleeing persecution in Kosovo and arrived at Newark International Airport. *Id.* Likewise, Aramugan Thevakumar fled Sri Lanka after being severely beaten by the government because of his Tamil ethnicity. Through an interpreter, he requested asylum from an INS inspections officer at the airport. Instead, he was deported. His fate is unknown. *Id.* Finally, Tenzin Wangden, a Tibetan nun who was twice jailed by the Chinese government, similarly was deported from the United States by INS inspectors who told her that her travel documents were not valid. She has not been heard from since. *Id.* at 22.

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United States. Your request is denied. Instead, you are kept handcuffed and shackled to a bench in the airport overnight. You are not given anything to eat or drink.

The following morning, ten hours after your plane arrived in the United States, you are put on a plane back to the country where the conference was held. You never had a chance to prove to a judge that you are a U.S. citizen. Instead, the inspections officers who work at the airport ordered you expeditiously removed. In essence, you have been deported.

When the airplane touches down back in the country you had traveled to for the conference your luggage does not arrive. You have no money. You have nowhere to go.

Surely this is a Kafkaesque nightmare, no more likely to happen to you, you might be thinking, than awaking one morning to find that you have been turned into a giant insect.<sup>186</sup> But that comforting thought would be wrong. The story related above *is* the story of what happened to Sharon McKnight, a U.S. citizen, when she returned from traveling abroad.<sup>187</sup>

McKnight was born in the United States. She speaks English, albeit with diminished mental capacity. The nightmare described above is her story. McKnight traveled to Jamaica to visit relatives. Upon returning to the United States, she was sent to secondary inspections because INS inspections officers believed her U.S. passport was false. There, she was handcuffed, shackled to a chair for more than ten hours, and denied food, drink, and access to a restroom, in accordance with customary INS practice. Again, in accordance with standard procedure, family members who had come to the airport to pick her up were prohibited from seeing her. Their efforts to prove McKnight's U.S. citizenship by providing her birth certificate were rebuffed. Then, the following morning, INS officers summarily deported McKnight back to

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<sup>186</sup> See FRANZ KAFKA, *THE METAMORPHOSIS* 7 (Willa & Edwin Muir trans., Schocken Books 1968) (1935) ("As Gregor Samsa awoke one morning from uneasy dreams he found himself transformed in his bed into a gigantic insect.").

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Jamaica. She arrived there with no money. Her luggage was stolen. McKnight made it to her relatives' home only after skycaps at the Jamaican airport gave her money for the bus ticket.

If mistakes like this can be made with respect to United States citizens who speak English and have lived their entire lives in the United States, one can easily imagine how readily errors can occur when the person suspected of fraudulent entry is a refugee fleeing persecution. Most refugees do not speak English, do not understand U.S. culture, customs, or asylum law, are afraid of government officials, and are traumatized, scared, and alone. Moreover, because the interpretation assistance provided by the INS is seriously flawed, if it is even provided at all,<sup>188</sup> refugees are much more likely to be misunderstood by INS officials and much less likely to be able to explain why they should be allowed to stay in the United States. The net result is that while stories involving U.S. citizens like Ms. McKnight are a relative rarity, one cannot be so confident that the erroneous removal of fleeing refugees is at all uncommon. Issues of frequency aside, this is especially unfortunate because, in contrast to U.S. citizens, fleeing refugees who are erroneously removed are likely to land in a country that seeks their persecution, torture, or death.<sup>189</sup>

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<sup>187</sup> John Moreno Gonzales, *McKnight Comes Home; INS Officials Apologize for Blunder*, NEWSDAY, June 19, 2000, at A7.

<sup>188</sup> See *infra* Parts II.C.1.a & c.

<sup>189</sup> A more typical example of the risks of erroneous expedited removal is the case of Libardo Yepes, a Colombian cattle farmer, who arrived at Miami International Airport without a valid visa and told INS officials that he was afraid to return to Colombia because rival factions had killed or kidnapped at least six of his relatives. Despite special statutory protections against summary deportation for arriving aliens who express fear to INS officials, Mr. Yepes was returned to Colombia in less than forty-eight hours. Eric Schmitt, *When Asylum Requests Are Overlooked*, N.Y. TIMES, Aug. 15, 2001, at A16. His experience came to light because he fled Colombia again, and after a three-month journey, he was captured by the INS as he attempted to cross the Rio Grande in an inner tube. This time, although Mr. Yepes had no criminal record, they jailed him for two months at the Port Isabel Service Processing Center pending an interview with an asylum officer, who eventually found him credible and scheduled his asylum request to be considered by an immigration judge. *Id.* The Port Isabel Center is “a 347-acre, high-security compound set in an isolated stretch of cotton and sugar cane fields. Chain-linked fences are capped by barbed-wire or coils of razor wire. Armed guards march detainees dressed in blue, orange or red jumpsuits around in single file, as orders blare in Spanish from loudspeakers around the camp.” *Id.*

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The deportation of refugees to countries where they fear persecution violates the U.S. government's obligations under the Refugee Protocol<sup>190</sup> and potentially subjects the deportees to persecution, torture, or death. Because of the risk of deporting individuals to situations in which their life or freedom is in jeopardy, the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States called for the "[r]epeal of expedited removal," noting that repeal "should be a high priority for the Administration."<sup>191</sup> The Congressionally-created Commission on Immigration Reform did not urge outright repeal of expedited removal, but it too urged "immediate correction [to expedited removal processes] that can harm bona fide asylum seekers and undermine the efficiency of the asylum system."<sup>192</sup>

Expedited removal authority should be reformed. Outright repeal in the near future is unlikely because INS officials, who may share our concern for refugees, nevertheless favor a summary removal process for arriving undocumented aliens who are not refugees.<sup>193</sup> The proposed Refugee Protection Act of 2001, a recently introduced bill, provides a satisfactory middle ground. It would authorize expedited removal only during extraordinary situations, such as when the government's ordinary systems for inspecting and adjudicating the cases of new arrivals are unable to function.<sup>194</sup>

For as long as expedited removal authority remains a routine practice, and even after its use is limited to immigration emergencies, the INS must place greater emphasis on creating a

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<sup>190</sup> Refugee Protocol, *supra* note 34, 19 U.S.T. at 6224, 606 U.N.T.S. at 267 (art. I(1)).

<sup>191</sup> ADVISORY COMM. ON RELIGIOUS FREEDOM ABROAD, FINAL REPORT TO THE SECRETARY OF STATE AND TO THE PRESIDENT 45 (1999) [hereinafter ADVISORY COMMITTEE FINAL REPORT].

<sup>192</sup> U.S. COMM'N ON IMMIGRATION REFORM, U.S. REFUGEE POLICY: TAKING LEADERSHIP 38 (1997).

<sup>193</sup> See generally David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673 (2000).

<sup>194</sup> It might be argued that expedited removal should also continue to be available for suspected terrorists, regardless of an immigration overflow. Yet, if a suspected terrorist were apprehended upon arrival without valid travel documents, it is difficult to understand why the United States would want to remove that person immediately, making it possible for him or her to attempt another entry. A better strategy would be to detain the suspect pending a full hearing because a criminal case could be prepared against the person during the detention, and if sufficient

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system that reduces the risk of mistakenly deporting refugees before they can be identified as such. In that regard, the final rule improves the expedited removal process in several ways.<sup>195</sup>

Substantial evidence exists, however, that several glaring problems with the expedited removal process remain.<sup>196</sup>

This evidence is particularly troubling because the INS refuses to make the process sufficiently transparent for scholarly study. Therefore, an even greater wealth of evidence demonstrating problematic deportations surely exists but may never be disclosed. From the beginning, the INS has exercised its expedited removal authority behind closed doors. Individuals are removed from the United States each day without the intervention of any lawyers on their behalf, without the oversight of individual decisions by any judges and without outside monitoring of the procedures by any independent non-governmental organizations. And according to reports by the United States Government Accounting Office, the arm of the U.S. government charged with oversight of government activities, in many cases the INS is not even following its own regulatory procedures,<sup>197</sup> many of which were designed to make sure that the expedited removal procedures are being implemented fairly and justly.

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evidence for a criminal conviction could not be obtained, the individual could, in any event, be removed after an immigration court hearing.

<sup>195</sup> See *infra* Part II.B.

<sup>196</sup> See *infra* Part II.C.

<sup>197</sup> U.S. GOV'T ACCOUNTING OFFICE, GAO/GGD-00-176, OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS 20, 47 (2000), available at [http://www.access.gpo.gov/su\\_docs/aces/aces160.shtml](http://www.access.gpo.gov/su_docs/aces/aces160.shtml) [hereinafter GAO, OPPORTUNITIES EXIST]. This report was mandated by the International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2812. *Opportunities Exist* studies issues related to "expedited removal and those who claimed a fear of persecution or torture in their home country." GAO, OPPORTUNITIES EXIST, *supra*, at 4. In particular, the report addresses "INS' management controls over (1) the expedited removal process and (2) the credible fear determination process, including those determinations relating to aliens' decisions to recant their claims of a fear of persecution or torture." *Id.*

*Opportunities Exist* is the second study by the GAO of the expedited removal process. The GAO's first report studying the expedited removal process, *Changes in the Process of Denying Aliens Entry Into the United States*, was released in March 1998. U.S. GOV'T ACCOUNTING OFFICE, ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES (1998), available at [http://www.access.gpo.gov/su\\_docs/aces/aces160.shtml](http://www.access.gpo.gov/su_docs/aces/aces160.shtml) [hereinafter GAO, CHANGES IN THE PROCESS]. *Changes to the Process*, which was mandated by IIRIRA, reports on the implementation of the new expedited removal process by



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### 1. *The Inspections Process*

The expedited removal process operates within the context of the INS's function of inspecting all individuals who request entry into the United States at "ports of entry" (land borders, sea ports, and airports).<sup>198</sup> Every day INS inspections officials examine the travel documents (visas and passports) of thousands of individuals. Many of the individuals whose documents are inspected are United States citizens returning from travel abroad for business or pleasure. Others are foreign nationals seeking admission to the United States.

A passenger arriving at a seaport, airport, or border may encounter two types of inspections officers. A *primary* inspections officer at the port of entry questions each applicant for admission regarding the individual's purpose for traveling to the United States and intentions while here, including such matters as the "applicant's intended length of stay and whether the applicant intends to remain permanently."<sup>199</sup> Based on this brief interview and an examination of the travel documents (for example, passport, visas, or permanent residency card), the inspector decides whether the individual is a citizen or otherwise eligible for admission to the United States.<sup>200</sup> When the primary inspector suspects that an individual is ineligible for admission, the inspector refers the person to a *secondary* inspector for additional questioning in a "secondary inspection" interview.<sup>201</sup> Each year, approximately 340 million applicants for admission are

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describing (1) how the expedited removal process and [INS] procedures to implement it are different from the process and procedures used to exclude aliens before the 1996 Act; (2) the implementation and results of the process for making credible fear determinations during the 7 months following April 1, 1997; and (3) the mechanisms that INS established to monitor expedited removals and credible fear determinations and to further improve these processes.

*Id.* at 1.

<sup>198</sup> See INA § 235, 8 U.S.C. § 1225 (Supp. V 1999).

<sup>199</sup> INA § 235(a)(5), 8 U.S.C. § 1225(a)(5) (Supp. V 1999).

<sup>200</sup> *Id.*

<sup>201</sup> See GAO, OPPORTUNITIES EXIST, *supra* note 197, at 18-19.

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processed through primary inspections at ports of entry throughout the United States.<sup>202</sup>

Approximately 7.2 million of these individuals are sent to secondary inspections.<sup>203</sup>

Secondary inspection interviews, along with more searching document examinations, typically take place in a room adjacent to the primary inspections area of the airport or border.

The secondary inspector may either admit the individual to enter the country or deny admission.<sup>204</sup> About 744,000 people are not admitted each year. The majority of them are permitted to return immediately without being ordered removed,<sup>205</sup> but about 89,000 individuals are issued formal removal orders and are immediately deported through expedited removal.<sup>206</sup>

### *2. The Exercise of Expedited Removal Authority by Inspections Officers*

Under the authority granted by IIRIRA, secondary inspectors summarily deport individuals who arrive at an airport, seaport, or land border without proper travel documents<sup>207</sup> or who carry documents that INS inspections officials at the port or border suspect have been

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<sup>202</sup> See *id.* at 20.

<sup>203</sup> See *id.* (reporting *monthly* processing of 28.3 million applications for admission with 20,000 people sent to secondary inspection).

<sup>204</sup> Of the 601,000 individuals who are referred to secondary inspections each month, approximately 62,900 are denied admission. See GAO, OPPORTUNITIES EXIST, *supra* note 197, at 20. In limited cases, the inspections officer can also allow the individual to withdraw his or her application for admission, thereby achieving the same result of removal while avoiding an official record of denial of admission. Withdrawal might be preferable to an individual who does not want an order of removal on his record because the order of removal can result in a five-year bar on returning to the United States. INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)(i) (Supp. V 1999).

<sup>205</sup> The withdrawal option would not subject the alien to a five-year bar to re-entry. Since expedited removal and the five-year bar were implemented into law, expedited removal has increasingly been exercised as an alternative to permitting withdrawals of applications for admission. Thus, in 1996, the year before IIRIRA was implemented, “the overwhelming number of aliens who [were] found by INS inspectors to be excluded [were] allowed to withdraw their applications for admission and depart almost immediately.” INS, 1996 STATISTICAL YEARBOOK 169 (1997). In that year alone, 994,633 individuals withdrew their applications for admission during the inspections process; only 25,529 individuals chose not to withdraw. *Id.* In contrast, in 1998, after expedited removal was implemented, only 80,000 withdrew their applications for admission. INS, FACT SHEET: FY 1998 UPDATE ON EXPEDITED REMOVALS (1999), available at <http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/expedite.htm>.

<sup>206</sup> According to the GAO, 62,900 individuals who are sent to secondary inspection each month are not admitted. GAO, OPPORTUNITIES EXIST, *supra* note 197, at 20. From April through September 1997, 23,100 expedited removal orders were issued. In fiscal year 1998, 76,700 expedited removal orders were issued, and in fiscal year 1999, about 89,000 orders were issued. *Id.* at 19 n.6.

<sup>207</sup> See INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (1994 & Supp IV 1998).

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procured through fraud.<sup>208</sup> Removal is immediate.<sup>209</sup> In contrast to pre-IIRIRA practices, the individual may not obtain review of the inspector's decision by an immigration judge.<sup>210</sup>

Moreover, the removal order will usually bar the individual from returning to the United States for at least five years.<sup>211</sup> The authority to issue removal orders, which was given to inspections officers for the first time by IIRIRA, is referred to as expedited removal.<sup>212</sup>

Supporters of the new expedited removal procedures assert that expedited removal has become a crucial enforcement tool at airports and along the borders. They view expedited removal as a way to facilitate the rapid deportation of undocumented aliens who might otherwise clog the immigration courts with meritless cases. Former INS General Counsel David Martin, a leading academic authority on immigration law, notes, for example, that expedited removal “subject[s] clearly fraudulent violators at U.S. borders to a removal order more efficiently than ever before.”<sup>213</sup>

While the vast majority of expedited removal orders are issued to individuals who do not indicate a fear of harm or persecution if returned to their home countries, it is also true that because of the nature of the system, some individuals who do in fact fear persecution if returned

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<sup>208</sup> See INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (1994 & Supp. V 1999).

<sup>209</sup> INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. V 1999); see also GAO, CHANGES IN THE PROCESS, *supra* note 197, at 44 (estimating 95% of aliens who received removal orders were removed either the day they attempted to enter the United States or the day after).

<sup>210</sup> See INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (Supp. V 1999); 8 C.F.R. § 235.3(b)(5) (2001).

<sup>211</sup> INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (Supp. V 1999).

<sup>212</sup> IIRIRA also authorized the Attorney General to apply expedited removal procedures, as opposed to trial-type hearings, to deport summarily undocumented immigrants who are discovered in the United States less than two years after having entered the country. INA § 235(b)(1)(A)(iii)(II), 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (Supp. V 1999). To date, the Attorney General has not used this standby authority, and this provision of the 1996 Act is apparently unconstitutional. In *Zadvydas v. Davis*, 121 S. Ct. 2491, 2501 (2001), the Court said that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. . . . Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” A native or citizen from “a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry,” i.e., Cuba, is exempt from the application of expedited removal. See INA § 235(b)(1)(F), 8 U.S.C. § 1225(b)(1)(F) (Supp. V 1999).

<sup>213</sup> Martin, *supra* note 193, at 675.

are not identified through the summary process. The deportation of each such individual constitutes a violation of the United States' *non-refoulement* obligation.<sup>214</sup>

### 3. *The Treatment of Asylum Seekers Under Expedited Removal Procedures*

Recognizing that asylum seekers are often forced to flee without proper documents and that they thus would fall within the category of people who are subject to expedited removal, Congress expressly provided an exemption from expedited removal for those persons who indicate at the secondary-inspections interviews either a fear of persecution or an intent to apply for asylum.<sup>215</sup> The following two subsections explain the process for such persons.

#### *(a) Treatment of Asylum Seekers During the Secondary-Inspections Stage of the Expedited Removal Process*

The secondary-inspections interview is the most critical stage of the expedited removal process. At this stage of the process, an INS inspector makes the monumental decision of whether to admit the individual, to order expedited removal, or, in the case of an alien who apparently fears persecution if returned, to send the individual to a detention center for a further determination of eligibility to apply for asylum.<sup>216</sup> In making this determination, the secondary inspector has only the information related by the individual seeking admission and any documents the individual is carrying.<sup>217</sup> The alien has neither a lawyer nor assistance from friends or family. The inspector will not have received any special training about human rights conditions in foreign countries to aid in recognizing individuals who may have fled persecution.

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<sup>214</sup> See Refugee Protocol, *supra* note 34, 19 U.S.T. at 6224, 606 U.N.T.S. at 267 (art. I(1)); Refugee Convention, *supra* note 35, 19 U.S.T. at 6261, 189 U.N.T.S. at 152-54 (art. 1(A)(2)).

<sup>215</sup> See INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (Supp. V 1999). But if the arriving alien does not indicate fear because, for example, the alien is afraid of telling a uniformed U.S. government official about abuses by similarly uniformed officials back home, the alien is likely to be removed forthwith and barred from reentering the United States for five years, without any further hearing or judicial review. *See id.*

<sup>216</sup> INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (Supp. V 1999). Inspections officers are also required by law not to order deported those who claim lawful immigration status as U.S. citizens, lawful permanent residents, refugees, or asylees. INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (Supp. V 1999).

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And the inspector's decision will be made against the background of an agency culture in which border control is the primary mission.<sup>218</sup>

If the inspector decides to return the alien on the next flight home, no judge may review the decision.<sup>219</sup> Therefore, a mistake at this level – that is, a decision to deport an individual who genuinely fears persecution – could result in the individual's imprisonment and, possibly, death. Given this high potential cost, every effort should be made to eliminate all possibility of error.

Despite the serious consequences of an error, the environment of secondary inspections does not guarantee that secondary inspectors will learn from applicants for admission what is needed to make correct decisions.<sup>220</sup> One reason for this is that the secondary inspector may conduct the interview in a language that the individual does not understand.<sup>221</sup> Also, aliens awaiting secondary inspection interviews are often restrained with handcuffs and shackles. Under such conditions, asylum seekers, especially those suffering from post-traumatic stress disorder, may not tell inspectors what they need to know to make accurate decisions.<sup>222</sup> In addition, people being interviewed in secondary inspections are not told that their airport interviews are their last chances to request asylum; some think that they will have a court hearing at a later time.<sup>223</sup> No one knows how many refugees are erroneously deported as a result of

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<sup>217</sup> Passengers arriving by air or sea are not permitted to retrieve documents from their luggage before secondary inspection.

<sup>218</sup> The key responsibility of an immigration inspector is to prevent ineligible persons from entering the United States. USAJOBS, Job Posting for Immigration Inspector, at <http://www.usajobs.opm.gov/wfjic/jobs/BS2780.HTM> (last visited Oct. 8, 2001); see also Cornelius D. Scully, *Reorganizing the Administration of the Immigration Laws: Recommendations and Historical Context*, 75 INTERPRETER RELEASES 937, 939 (1998) (noting that the INS's "adjudications function has always tended to be subordinate to its enforcement function"). Scully notes that border patrol officers, who are considered enforcement personnel, and others at the INS have recognized that "specializing in enforcement has been the way to the top at the INS." *Id.* at 941.

<sup>219</sup> See INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (Supp. V 1999); 8 C.F.R. § 235.3(b)(5) (2001).

<sup>220</sup> This argument is elaborated in *infra* Part II.C.1.b.

<sup>221</sup> See *infra* Part II.C.1.a.

<sup>222</sup> See *infra* Part II.B.4.a & b.

<sup>223</sup> See *infra* Part II.C.1.c.

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secondary-inspections interviews, without ever having been sent to the next stage of the process – the credible fear determination.

### *(b) Treatment of Asylum Seekers During the Credible Fear Determination Stage of the Expedited Removal Process*

Individuals who request asylum or give secondary inspectors information about their fear of return are sent to detention centers, where the credible fear determination stage of the expedited removal process takes place.<sup>224</sup> Detention centers are prisons that the INS either owns and manages or from which the INS rents bed space for the detention of immigrants.<sup>225</sup> There, the asylum seekers are interviewed once again – this time by an asylum officer.<sup>226</sup> At this interview, asylum applicants must prove that they have a “credible fear of persecution.”<sup>227</sup> This credible fear interview is the second hurdle that asylum seekers must overcome before they are eligible to apply to an immigration judge for asylum protection. The term “credible fear of persecution” is statutorily defined to mean “that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”<sup>228</sup> The INS has interpreted this test to require a showing that there is a “significant possibility that the assertions underlying his or her claim could be found credible in a full asylum

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<sup>224</sup> See INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (Supp. V 1999).

<sup>225</sup> See Asylum Procedures, 62 Fed. Reg. 10,312, 10,323 (1997) (stating that as of 1997, “[a]pproximately 46 percent of the detention space used by the [INS was] with state and local facilities”); William Branigin, ‘*Criminal Aliens*’ Jam INS Detention Centers, WASH. POST, Nov. 2, 1998, at A17 (reporting that in 1998, up to 60% of INS detention beds were in non-federal facilities).

<sup>226</sup> INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (Supp. V 1999). An asylum officer is specially trained in asylum and refugee law and in the human rights conditions in foreign countries. 8 C.F.R. § 208.1(b) (2001) (final rule).

<sup>227</sup> INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (Supp. V 1999).

<sup>228</sup> INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. V 1999). By contrast, to establish eligibility for asylum, an alien must prove a well-founded fear of persecution on one of the grounds enumerated in the Act. See INA § 208, 8 U.S.C. § 1158 (Supp. V 1999). In interpreting the well-founded fear standard, the Supreme Court said that “there is simply no room within the United Nations’ definition [of ‘well-founded fear’] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.” *INS v. Cardozo-Fonseca*, 480 U.S. 421, 440 (1987).

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or withholding of removal hearing.”<sup>229</sup> If the asylum officer believes that the refugee has a credible fear of persecution, the refugee is then permitted to present a full-blown claim for asylum to an immigration judge at a contested removal hearing.<sup>230</sup>

If the asylum officer determines in the credible fear interview that the asylum applicant does not have a credible fear of persecution, an immigration judge reviews the finding.<sup>231</sup> The immigration judge’s review is extremely limited in this procedural setting.<sup>232</sup> It must be concluded “to the maximum extent practicable within 24 hours” but no later than seven days after the credible fear determination.<sup>233</sup> The hearing need not be conducted in person; it can be conducted through a telephonic or video connection.<sup>234</sup> Asylum seekers may not be represented by legal counsel at this immigration judge review, may not present evidence, and may not call witnesses.<sup>235</sup> Moreover, almost no additional review of these truncated proceedings is permitted.<sup>236</sup>

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<sup>229</sup> GAO, OPPORTUNITIES EXIST, *supra* note 197, at 55.

<sup>230</sup> The asylum seeker is issued a Form I-862, Notice to Appear, for full consideration of the claim for protection at removal proceedings pursuant to section 240 of the INA. 8 C.F.R. § 208.30(f) (2001); *see also* INA § 240, 8 U.S.C. § 1229a (Supp. V 1999).

<sup>231</sup> At this point, the asylum seeker is issued Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge. 8 C.F.R. § 208.30(g) (2001). Under the new rule, it is presumed that individuals who are found by an asylum officer not to have a credible fear desire to take advantage of the right to appeal the negative credible fear finding to the immigration judge. *See infra* Part II.B.3 for a discussion of this change. If the immigration judge confirms the asylum officer’s finding that the applicant does not have a credible fear of persecution, the individual is ordered removed from the United States. 8 C.F.R. § 208.30(g)(2)(iv)(A) (2001).

<sup>232</sup> *See* INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (Supp. V 1999).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *See* Operating Policy & Procedures Memorandum 97:3 from the Office of the Chief Immigration Judge on Procedures for Credible Fear and Claimed Status Reviews 8 n.10 (1997) (on file with the Georgetown Immigration Law Journal) [hereinafter Operating Policy & Procedures Memorandum].

<sup>236</sup> In most cases, Article III courts are barred from reviewing the individual determinations of asylum officers or of the immigration judges who review their credible fear determinations. In addition, IIRIRA expressly prohibits courts from granting any injunction, declaratory or other equitable relief, or from certifying a class for a class action lawsuit. INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) (Supp. V 1999); INA § 242(e), 8 U.S.C. § 1252(e) (Supp. V 1999). Judicial review is limited to only three issues: whether the petitioner is an alien; whether the petitioner was ordered removed pursuant to the summary removal procedures; and whether the petitioner can prove by a preponderance of the evidence that he or she was actually a lawful permanent resident or had earlier been granted status as a refugee or asylee. *See* INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) (Supp. V 1999).

Congress also imposed severe statutory limitations on actions to challenge the implementation of the expedited removal procedures. The statute specifically required that such cases be filed only in the United States

4. *The Law Prior to the Grant of Expedited Removal Authority to INS Inspections Officers*

IIRIRA's grant of expedited removal authority to the INS starkly changed the prior law. Under the old law, most people who came to the United States without valid entry documents were immediately and automatically made respondents in removal proceedings<sup>237</sup> before immigration judges. As a defense, a respondent could raise a claim for asylum protection and could assert any other claims for relief from deportation. The immigration court proceeding afforded the alien the opportunity to present witnesses and evidence to support his or her defense to removal, to cross-examine any government witnesses, and to be represented by counsel (at no expense to the government). Under the expedited removal laws, however, non-citizens who arrive at a border or airport in the same situation are denied these rights and are potentially are subject to being removed from the United States by a single immigration officer within hours of their arrival.<sup>238</sup>

B. *The New Rule's Changes to the Credible Fear Determination Stage of the Expedited Removal Process*

The final rule makes several welcome improvements to the expedited removal process in order to provide safeguards against the removal of genuine asylum seekers. These changes focus on the credible fear interview by asylum officers and the review by immigration judges of

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District Court for the District of Columbia and only within sixty days of the first implementation of the disputed regulation, policy, or guideline. INA § 242(e)(3)(A)-(B), 8 U.S.C. § 1252(e)(3)(A)-(B) (Supp. V 1999). Review was limited to whether the section of IIRIRA or the implementing regulation was constitutional or whether a regulation or a written policy, guideline, or procedure to implement IIRIRA violated the law. INA § 242(e)(4), 8 U.S.C. § 1252(e)(4) (Supp. V 1999). Litigation challenging the expedited removal system was filed within the statutory deadline but was dismissed. *See American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000).

<sup>237</sup> At the time, they were referred to as "deportation proceedings," but they were identical to today's removal proceedings in all material respects. Individuals could avoid these hearings by returning home voluntarily.

<sup>238</sup> *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. V 1999). Asylum seekers are often compelled to come to the United States without travel documents or with documents that were procured through fraud. In many cases, their governments, which would normally grant them such documents, may also be their persecutors. It is unrealistic to expect these individuals to ask their government for travel documents so that they can flee the country or to require them to show their own passports to their persecutor upon fleeing. Simply having such documents with them could put their lives in danger. In addition, many asylum seekers are fleeing imminent harm. Consequently, they do not have a realistic opportunity to obtain travel documents before they flee.



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negative credible fear determinations. The new rule amends the credible fear determination stage of the expedited removal procedures in five significant ways.

First, the rule makes it possible for new types of claims to be recognized during the expedited removal process. Second, the rule prohibits asylum officers from considering statutory bars to asylum protection when evaluating whether or not an individual has a credible fear of persecution. Third, the rule creates a presumption that asylum seekers want to appeal negative credible fear determinations to an immigration judge. Fourth, the rule codifies the INS's authority to reconsider a negative credible fear finding "even after such determination has been affirmed by an immigration judge."<sup>239</sup> These four changes improve the process by recognizing that the credible fear determination works best as a screening mechanism designed to identify clearly incredible claims. Finally, the rule sets out a streamlined procedure for the treatment of dependents on the principal's application. Each of these amendments to the rule is discussed below.

### 1. *Recognition of Novel Claims*

The first significant change to the law concerning credible fear determinations permits novel bases for asylum protection to fall within the scope of the term "credible fear of persecution."<sup>240</sup> Under previous law, the definition of "credible fear of persecution" limited the ability of asylum officers (and immigration judges reviewing negative credible fear determinations) to find that a claim presenting a novel issue of law satisfied the credible fear requirement.<sup>241</sup> The IIRIRA defined the term to mean that "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's

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<sup>239</sup> Asylum Procedures, 65 Fed. Reg. 76,121, 76,130 (Dec. 6, 2000) (commentary on final rule).

<sup>240</sup> *Id.* at 76,129.

<sup>241</sup> *See* 62 Fed. Reg. 10,312, 10,316 (Mar. 6, 1997) (commentary on interim rule).

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claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”<sup>242</sup>

The statutory standard could have been interpreted to require asylum officers to assume, for purposes of credible fear determinations, that asylum law would remain static and that any new basis for asylum asserted by the applicant was invalid. The new rule expressly recognizes the evolving nature of asylum law by requiring that an asylum officer or immigration judge in “determining whether the alien has a credible fear of persecution . . . consider whether the alien’s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.”<sup>243</sup>

The obvious interpretative parallel that the INS should follow in applying this “novel or unique issues” provision is the standard used for assessing frivolousness under Rule 11 of the Federal Rules of Civil Procedure. Rule 11 sanctions are imposed only when a claim is not warranted “by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”<sup>244</sup> Applied to credible fear interviews, this standard would require the asylum officer to find a credible fear of persecution unless no nonfrivolous argument could be made “for the extension, modification, or reversal of existing law or the establishment of new law.”<sup>245</sup> This liberal standard is entirely appropriate because the credible fear interview is only a screening process.<sup>246</sup> Immigration courts are better equipped to address novel asylum claims. There, the legal issues can be fully briefed, argued, and examined in a contested adversarial hearing and, if necessary, appealed to forums that are well suited to

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<sup>242</sup> INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. V 1999).

<sup>243</sup> 8 C.F.R. § 208.30(e)(2) (2001) (final rule).

<sup>244</sup> FED. R. CIV. P. 11(b)(2).

<sup>245</sup> *Id.*

<sup>246</sup> Indeed, if anything, asylum officers should be even more cautious than a court in finding this standard met because asylum officers typically will lack the legal training, briefing, support, and time that a judge ordinarily would possess.

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adopt and expand notions of protection, such as the Board of Immigration Appeals and the federal courts.

If the standard applied is more restrictive than Rule 11, unjust decisions will result because of the ever-changing nature of asylum law.<sup>247</sup> Much of this evolution is an ongoing process that takes place in the courts, and the pace of evolution seems to have accelerated in the last few years. For example, only in the past few years have immigration and federal courts begun to resolve the novel issues of law involving the extent to which victims of persecution based on sexual orientation are protected under the asylum laws.<sup>248</sup> Furthermore, it was only five years ago that the issue of whether a woman who flees her home country because of a fear of being subjected to female genital mutilation presented a novel legal issue.<sup>249</sup> The new rule should be interpreted to prevent asylum officers from concluding that equally worthy future claims cannot satisfy the credible fear requirement.

Similarly, the new rule should be interpreted to preclude negative credible fear determinations for refugees whose claims depend on the final outcome of proposed regulations. On occasion, the INS has, of its own initiative, revised its regulations or operating manuals and guidelines to recognize evolving notions of refugee protection. For example, one novel issue of law that the INS has encountered in recent years is the “extent to which victims of domestic

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<sup>247</sup> Schrag & Pistone, *supra* note 17, at 297-98.

<sup>248</sup> Sexual orientation has been found to constitute a particular social group for purposes of establishing protection from removal. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (finding that gay men with female sexual identities in Mexico can constitute a particular social group for asylum purposes); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (reversing and remanding BIA’s decision involving a lesbian who feared being “forcibly institutionalize her if she returns to Russia” because of being ordered by the Russian militia to attend therapy sessions to “cure” her of being a lesbian); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (finding that a Cuban man was entitled to withholding of deportation where he was systematically harassed, frequently jailed, sent to a forced labor camp, and threatened with long imprisonment because of his sexual orientation); *Matter of Tenorio*, No. A72-093-558 (IJ July 26, 1993) (granting asylum to a Brazilian gay man who had been beaten and stabbed by a group of people in Rio de Janeiro who repeatedly used anti-gay slogans), *cited in Hernandez-Montiel*, 225 F. 3d at 1094.

<sup>249</sup> *See Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

violence may be considered to have been persecuted under the asylum laws.”<sup>250</sup> The INS recently proposed new regulations to provide “generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors.”<sup>251</sup> While these and other proposed regulations are under consideration, no asylum seeker with a claim that colorably fit within their scope should be summarily deported.

## 2. *Statutory Bars Are Not Considered in Evaluating Credible Fear*

The rule also amends current law by mandating that asylum officers not consider statutory bars to gaining asylum protection when evaluating whether or not the individual has a credible fear of persecution. As a result, the ultimate ineligibility of an asylum seeker’s claim because of a past action that statutorily disqualifies him or her from protection is no longer relevant to a credible fear of persecution determination.

U.S. law prohibits the grant of asylum to persons who (1) “ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion;”<sup>252</sup> (2) have been “convicted by a

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<sup>250</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

<sup>251</sup> *Id.* The regulations were proposed, in part, in response to the Board’s decision in *In re R-A-*, Interim Dec. 3403, 2001 BIA LEXIS 1 (B.I.A. 1999). See Asylum and Withholding Definitions, 65 Fed. Reg. at 76,592. There, the Board denied asylum to a Guatemalan woman who had been the victim of severe domestic violence by her husband and who feared that she would be at risk of continuing violence if she returned to Guatemala. The Board found that the applicant’s husband did not seek to harm her either on account of her political opinion or on account of her membership in a particular social group. *In re R-A-*, 2001 BIA LEXIS at \*19. Furthermore, the Board found that there was no indication that the applicant’s husband would seek to harm other women who live with abusive partners. *Id.* at \*28. The harm was not seen to be “on account of” membership in a particular social group. *Id.* at \*38. No nexus had been shown between the husband’s violence and the particular social group. *Id.* \*44.

The INS’s proposed rules, however, suggest that the conclusion reached in *In re R-A-* should not be true for all cases. In particular, the INS noted that in some cases, a persecutor might in fact target an individual victim because of a shared characteristic that the individual victim has with a particular social group. The INS explained that “it may be possible in some cases for a victim of domestic violence to satisfy the ‘on account of’ requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic because only one of these women is in a domestic relationship with the abuser.” Asylum and Withholding Definitions, 65 Fed. Reg. at 76,592-93.

<sup>252</sup> INA §§ 101(a)(42), 208(b)(2)(A)(i), 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i) (1994 & Supp. V 1999).

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final judgment of a particularly serious crime in the U.S.” and “constitute[ ] a danger to the community;”<sup>253</sup> (3) “committed a serious nonpolitical crime outside of the United States;”<sup>254</sup> (4) present “a danger to the security of the United States;”<sup>255</sup> or (5) “firmly resettled in another country prior to arriving in the United States.”<sup>256</sup>

Under previous law, in making a credible fear determination, an asylum officer could consider whether or not an applicant for admission would be prevented from obtaining asylum protection because of one of these bars.<sup>257</sup> The presence of a bar would cause an applicant’s fear to be deemed not “credible,” and the applicant could not apply for asylum protection before an immigration judge.<sup>258</sup> Under the new rule, the asylum officer cannot consider these bars when determining credible fear.<sup>259</sup>

This change is quite reasonable as the credible fear determination stage was designed to serve only to screen out meritless claims. Asylum officers should not be asked to resolve difficult factual or legal issues at this preliminary stage during which the alien is incarcerated, has little or no opportunity to collect documentary evidence, and is usually not yet represented by counsel.<sup>260</sup>

The risk of erroneous decisions based on the statutory bars to asylum would be exacerbated by the fact that the case law surrounding some of these statutory bars is elaborate

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<sup>253</sup> INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (Supp. V 1999).

<sup>254</sup> INA § 208(b)(2)(A)(iii), 8 U.S.C. § 1158(b)(2)(A)(iii) (Supp. V 1999).

<sup>255</sup> INA § 208(b)(2)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(iv) (Supp. V 1999).

<sup>256</sup> INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi) (Supp. V 1999). A sixth bar is imposed against those applying for asylum more than a year after entering the United States. *See supra* Part I. But the one-year bar would not ordinarily apply to credible fear determinations because expedited removal proceedings occur within weeks after the alien’s arrival.

<sup>257</sup> *See* 65 Fed. Reg. 76,121, 76,129 (Dec. 6, 2000) (commentary on final rule).

<sup>258</sup> *See id.*

<sup>259</sup> 8 C.F.R. § 208.30(e)(3) (2001) (final rule).

<sup>260</sup> We recommend in *infra* Part II.C.2.d that asylum officers should be given the authority to make determinations about asylum eligibility during interviews at detention centers. If our suggestions are adopted, the asylum officers would not be operating within the context of a credible fear interview and would not be using the lower screening standard developed for credible fear interviews. In that case, assessments of the statutory bars would be appropriate because any decisions about applicability of the bars in individual cases would be subject to a full *de novo* review on

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and, in some instances, unresolved. For example, the issue of which crimes defined by state law are “aggravated felonies” within the meaning of federal law and hence are “particularly serious crimes” is frequently litigated and may not be accurately decided without full briefing by adversary lawyers.<sup>261</sup> A person convicted of simple possession of a controlled substance in Texas, a felony under state law, is not considered to have committed a “particularly serious crime,”<sup>262</sup> but driving while intoxicated in Texas, when considered a felony as a result of an enhanced sentence, can be an aggravated felony and thus a “particularly serious crime.”<sup>263</sup> Other bars have their own uncertainties, which also serve to make asylum officers’ consideration of the bars in the credible fear context unacceptably risky.<sup>264</sup>

In addition, most asylum seekers do not understand the nature of the statutory bars and thus are not equipped to defend themselves against charges of a bar early in the asylum application process. Fine distinctions of the type involving the definition of “particularly serious crime,” for example, are beyond the understanding of most asylum seekers, who typically appear at credible fear interviews without legal counsel. And during a screening process, busy INS officers are not obliged nor inclined to explore every possible exculpatory fact that an unknowledgeable applicant might – quite blamelessly – fail to reveal.

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the merits by an immigration judge during appeals of asylum eligibility decisions. No such review is available, of course, for appeals of credible fear determinations.

<sup>261</sup> See Lory Rosenberg & Nelson Vargas-Padilla, *Immigration Consequences of Crimes of the Doorstep of the Twenty-First Century*, 77 INTERPRETER RELEASES 685 (2000); Stephen Yale-Loehr & Brian M. Palmer, *New Developments in Aggravated Felony Cases*, 5 BENDER’S IMMIGR. BULL. 163 (2000).

<sup>262</sup> Matter of K-V-D-, Interim Dec. 3422 (B.I.A. 1999).

<sup>263</sup> Matter of Puente, Interim Dec. 3412 (B.I.A. 1999).

<sup>264</sup> The bar for having persecuted others, for example, is little developed, and a host of questions remain open, including basic issues involving the burden of proof in establishing the existence of the bar, the requisite mental state of the applicant when he committed the alleged acts of persecution, and how issues of causation should be applied.

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In sum, because the law regarding the statutory bars is complicated in some areas and unsettled in others, INS wisely relegated the application of these bars to the final stage of the asylum process, when the alien at last receives a full immigration court hearing.

### *3. Creation of a Presumption of Desire to Appeal Negative Credible Fear Findings*

Under INS's interim rule, aliens found not to have a credible fear could obtain immigration judge review of that decision only by requesting this procedure affirmatively.<sup>265</sup> Under the new rule, INS presumes that such individuals want to appeal, and the appeal will automatically follow unless waived.<sup>266</sup> A negative credible fear determination will be referred to an immigration judge whether the applicant requests the review or whether he or she "refuses to either request or decline such review."<sup>267</sup> The amendment is a sound change because it is reasonable to assume that individuals who expressed fear of returning to their home countries and participated in a credible fear interview would be eager to have an immigration judge review a finding that would prohibit them from gaining asylum protection. Such individuals, who may have little understanding of their rights, should not be prevented from availing themselves of a review of their case by an immigration judge simply because they fail to request it in an affirmative manner. During their first days in an unfamiliar legal system – which has jailed them – they may be reluctant to sign any papers or take any other actions that could have unexpected legal ramifications at a later stage.

Of course, the rule also acknowledges that some applicants may knowingly decide not to appeal a negative credible fear finding to an immigration judge. Recognizing that "it would be

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<sup>265</sup> 8 C.F.R. § 308.30(f) (2000) (interim rule).

<sup>266</sup> 8 C.F.R. § 208.30(g) (2001) (final rule) (requiring immigration court review of an adverse credible fear finding when an alien found not to have credible fear "refuses to either request or decline such review"). This amendment was first proposed in our earlier article, *The New Asylum Rule: Not Yet a Model of Fair Procedure*. Schrag & Pistone, *supra* note 17, at 299.

<sup>267</sup> 8 C.F.R. § 208.30(g)(i) (2001) (final rule).

contrary to the intent of the statute to mandate a review in every case,”<sup>268</sup> the rule leaves room for those cases not to be automatically appealed. This is appropriate because individuals should have the option to accept removal without requiring additional review, and because it avoids an unnecessary drain on judicial resources.

#### 4. *Codification of INS’s Authority to Reconsider Negative Credible Fear Findings*

The final rule also codifies authority for the INS’s asylum office to reconsider negative credible fear determinations made by its asylum officers.<sup>269</sup> The rule authorizes the Service to review negative credible fear determinations “even after such determination has been affirmed by an immigration judge, as long as the Service provides the immigration judge with notice of its reconsideration.”<sup>270</sup> This new authority is warranted for at least two reasons. First, many asylum seekers have experienced trauma relating to the persecution that they suffered, which is compounded by their unresolved status and stressful situation in the United States. Because of that trauma, they typically are either unable or reluctant to talk about the details of their persecution soon after arriving in the United States, particularly to a government official.<sup>271</sup> In addition, the requirement that asylum seekers be detained pending their credible fear determination sharply limits their ability to obtain counsel for, and to assist counsel with, their case. Each of these reasons is discussed in detail below.

##### *(a) Trauma Inhibits Asylum Seekers’ Ability to Communicate about their Persecution*

Refugees often suffer from post-traumatic stress disorder (“PTSD”) and other trauma-related illnesses.<sup>272</sup> Indeed, in many cases the trauma suffered by a refugee is the impetus for his

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<sup>268</sup> Asylum Procedures, 65 Fed. Reg. 76,121, 76,129 (Dec. 6, 2000) (commentary on final rule).

<sup>269</sup> 8 C.F.R. § 208.30(g)(2)(iv)(A) (2001) (final rule).

<sup>270</sup> 65 Fed. Reg. at 76,130 (commentary on final rule).

<sup>271</sup> See AM. PSYCHIATRIC ASS’N, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81, at 464-65 (4th ed. 2000) [hereinafter DIAGNOSIS AND STAT. MANUAL OF MENTAL DISORDERS].

<sup>272</sup> See, e.g., Kathleen Allden et al., *Burmese Political Dissidents in Thailand: Trauma and Survival among Young Adults in Exile*, 86 AM. J. PUB. HEALTH 1561, 1566-68 (1996) (noting that nearly one fourth of Burmese exiles had



or her flight from the home country to the United States. Refugees describe having suffered atrocities, including torture, beatings, and rape, or having witnessed the torture, beating, rape, or murder of others. Because they have endured such extreme forms of trauma, PTSD is the most prevalent psychiatric condition that afflicts such refugees.<sup>273</sup>

Symptoms of PTSD generally include “nightmares, flashbacks, intrusive recollections, startled responses, sleep disturbance, memory impairment, trouble concentrating, constricted affect, and chronic feelings of detachment from others.”<sup>274</sup> These symptoms are most prevalent when recalling a traumatic event and often prevent the victim even from remembering or

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PTSD and that cumulative trauma has had a significant impact on the mental health of Burmese exiles); Richard C. Cervantes et al., *Posttraumatic Stress in Immigrants from Central America and Mexico*, 40 HOSP. & COMMUNITY PSYCHIATRY 615, 619 (1989) (indicating a high rate of PTSD symptoms in 52% of Central Americans who had been exposed to war or its consequences); Giovanni De Girolamo & Alexander C. McFarlane, *The Epidemiology of PTSD: A Comprehensive Review of the International Literature*, in ETHNOCULTURAL ASPECTS OF POSTTRAUMATIC STRESS DISORDER: ISSUES, RESEARCH, AND CLINICAL APPLICATIONS 33, 51-52 (Anthony J. Marsella et al. eds., 1996); Mary C. Smith Fawzi et al., *Health Impact of Human Rights Violations in Haitian Refugees*, 350 THE LANCET 371, 372 (1997) (noting that 87% of Haitian refugees reported clinically significant symptoms related to PTSD); *Kosovo's Refugees: From Crisis to Catastrophe*, 353 THE LANCET 1199 (commenting that about 60% of Croats had symptoms of post-traumatic stress); Richard F. Mollica et al., *The Psychological Impact of War Trauma and Torture on Southeast Asian Refugees*, 144 AM. J. PSYCHIATRY 1567, 1571 (1987) (concluding that 50% of the Southeast Asian refugees studied were diagnosed with PTSD and that female Cambodian widows demonstrate more serious psychiatric problems than other Indochinese groups); Hans Thulesius & Anders Hakansson, *Brief Report: Screening for Posttraumatic Stress Disorder Symptoms Among Bosnian Refugees*, 12 J. TRAUMATIC STRESS 167, 171-73 (1999) (holding that Bosnian war refugees showed high levels of PTSD symptoms compared to a nonrefugee comparison group); Mark Van Ommeren et al., *Culture, Trauma, and Psychotrauma Programmes*, 350 THE LANCET 595 (“Increased rates of post-traumatic distress disorder have been found among Turkish, Palestinian, and Bhutanese survivors of torture.”); Stevan M. Weine et al., *PTSD Symptoms in Bosnian Refugees 1 Year After Resettlement in the United States*, 155 AM. J. PSYCHIATRY 562, 564 (1998) (finding there was a high rate of PTSD among Bosnian refugees, even 1 year into resettlement and several years after the initial traumatization); see also Derrick Silove et al., *Anxiety, Depression and PTSD in Asylum-Seekers: Associations With Pre-Migration Trauma and Post-Migration Stressors*, 170 BRIT. J. PSYCHIATRY 351, 351-57 (1997) (finding “[a] diagnosis of PTSD was associated with greater exposure to pre-migration trauma, delays in processing refugee applications, difficulties in dealing with immigration officials, obstacles to employment, racial discrimination, and loneliness and boredom”) [hereinafter Silove et al.].

<sup>273</sup> Neal R. Holtan, *Survivors of Torture*, 114 PUB. HEALTH REP. 489, 489 (1999). Major depression is the second most prevalent psychiatric condition among refugees. *Id.*

<sup>274</sup> See Edna B. Foa et al., *Behavioral/Cognitive Conceptualizations of Post-Traumatic Stress Disorder*, 20 BEHAVIOR THERAPY 155, 156 (1989); see also James K. Boehnlein & J. David Kinzie, *Brief Reports: Commentary: DSM Diagnosis of Posttraumatic Stress Disorder and Cultural Sensitivity: A Response*, 180 J. NERVOUS & MENTAL DISEASE 597, 597-99 (1992) (clarifying that PTSD is not a mental illness in the sense of psychosis or disruptive behavior and noting that a major problem in diagnosing PTSD is that the symptoms are subjective and private, and often people will suffer rather than seek help); Brian Engdahl et al., *Posttraumatic Stress Disorder in a Community Group of Former Prisoners of War: A Normative Response to Severe Trauma*, 154 AM. J. PSYCHIATRY 1576, 1579 (1997) (finding that “PTSD is both a frequent and central consequence of exposure to severe trauma”).

discussing the traumatic event.<sup>275</sup> As a result, on direct questioning, most PTSD sufferers do not elaborate in “detail or initially describe any personal reactions to the situation.”<sup>276</sup>

Even compared with others who experience PTSD, refugees often exhibit heightened levels of anxiety and depressive symptoms.<sup>277</sup> Reports of refugees with PTSD show that they avoid “thoughts, behaviors, and any activities that would remind them of the past”<sup>278</sup> and reveal their histories “reluctantly and incompletely.”<sup>279</sup>

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<sup>275</sup> In fact, the inability of victims of trauma to discuss or remember the details of their persecution shortly after a flight from a traumatic experience is well-documented. See DIAGNOSIS AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 271, at 464. The American Psychiatric Association’s Diagnosis and Statistical Manual of Mental Disorders, used widely to diagnose mental health disorders, explains that “[i]ndividuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder. Such individuals may be especially reluctant to divulge experiences of torture and trauma.” *Id.* at 465. Those suffering from PTSD typically “avoid thoughts, feelings, or conversations associated with the trauma,” “avoid activities, places, or people that arouse recollections of the trauma,” and are often unable “to recall an important aspect of the trauma.” *Id.* at 464; see also Mollica et al., *supra* note 272, at 1571 (revealing that “highly traumatized and tortured patients may have difficulty articulating their trauma-related symptoms”); *United States Policy Towards Victims of Torture: Hearing Before the Senate Subcomm. on Int’l Operations and Human Rights*, 106th Cong. (1999) (statement by Lavinia Limon, Dir. of the Office of Refugee Resettlement, Dep’t of Health and Human Serv.) (stating that torture victims “retain the impact of their torture; they are not able to speak about their experiences . . . they often cannot express themselves effectively in asylum interviews . . . [t]hey have learned to fear government and the police and they do not trust any government officials and authorities to help them”).

<sup>276</sup> J. David Kinzie et al., *Posttraumatic Stress Disorder Among Survivors of Cambodian Concentration Camps*, 141 AM. J. PSYCHIATRY 645, 646 (1984); see also Joseph Westermeyer, *Cross-Cultural Care for PTSD: Research, Training, and Service Needs for the Future*, 2 J. TRAUMATIC STRESS 515, 519 (1989) (commenting that “[a] common notion is that PTSD victims will report their symptoms if merely invited to report their problem, when in fact shame, guilt, suppression, and displacement typically make the PTSD diagnosis unavailable unless the clinician explicitly asks specific questions”).

<sup>277</sup> See Silove et al., *supra* note 272, at 351-57 (“[Asylum seekers] with PTSD also reported more serious stress in relation to post-migratory factors relevant to the asylum-seeking process, particularly relating to pursuing refugee status (delays in processing refugee applications, interviews by, and conflict with, immigration officers), to feelings of alienation and isolation (racial discrimination, loneliness and boredom), and to work issues (unemployment and not having a work permit.”); see also Mary Catherine Smith Fawzi et al., *Brief Report: The Validity of Posttraumatic Stress Disorder Among Vietnamese Refugees*, 10 J. TRAUMATIC STRESS 101, 106 (1997) (indicating that “given the extensive exposure to war trauma, forced dislocation, and stressors related to resettlement, refugees may be more likely to feel isolated in their traumatic experiences and may potentially present with social withdrawal more frequently than other traumatized populations”); Gordan Struwe, *Training Health and Medical Professionals to Care for Refugees: Issues and Methods*, in AMIDST PERIL & PAIN: THE MENTAL HEALTH & WELL-BEING OF THE WORLD’S REFUGEES 311, 312 (Anthony J. Marsella ed., 1994) (indicating that “in comparison with voluntary immigrants, refugees often have a more traumatic and violent background, and the disorders they present may be closely related to stress factors”).

<sup>278</sup> See DIAGNOSIS AND STAT. MANUAL OF MENTAL DISORDERS, *supra* note 271, at 464.

<sup>279</sup> See also Westermeyer, *supra* note 276, at 519. In noting that refugees and torture victims are almost never asked the relevant PTSD history questions, Westermeyer states that “[e]ven when a history of the violent event is obtained, there is a tendency to ignore the pre-migration and/or pre-trauma life experience although these are known to play an important role in the genesis of PTSD, treatment approaches, and outcome.” *Id.*

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Asylum seekers who have been persecuted in the past are also wary of strangers who inquire into their backgrounds.<sup>280</sup> Indeed, studies of refugees show that those with PTSD typically must be “encouraged to give more detail of what they experienced”<sup>281</sup> but can do so, if at all, only after “trusting relationships” have been established.<sup>282</sup>

As a consequence, victims of trauma may not reveal sufficient details about their situation to establish a credible fear of persecution to the asylum officer, who is a government official, during their first encounter.<sup>283</sup> Rather, they may need sufficient time to adjust to their new setting and begin to feel acclimated to their new environment before they are able or willing to discuss the details of their persecution and flight.<sup>284</sup> Thus, a second credible fear interview after this adjustment stage may reveal important additional facts. The procedural change allowing the INS to reconsider prior negative determinations represents a welcome recognition of these realities.

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<sup>280</sup> See Silove et al., *supra* note 272, at 351 (noting also that “language and cultural barriers make the collection of accurate data . . . difficult, especially if the sample includes subjects from diverse language groups”).

<sup>281</sup> Kinzie, *supra* note 276, at 649.

<sup>282</sup> See Silove et al., *supra* note 272, at 356 (citing Derrick Silove et al., *Psychological Needs of Torture Survivors*, AUSTL. & N.Z. J. PSYCHIATRY 25, 481-90 (1991)) (noting that survivors “suffering from PTSD may be mistrustful and experience difficulty in modulating feelings of frustration thus increasing the risk of conflict with authority figures”).

<sup>283</sup> See *id.* at 351 (finding that a diagnosis of PTSD was associated with “difficulties in dealing with immigration officials”); see also *IS THIS AMERICA?*, *supra* note 26, at 73 (describing Ms. Adeniji’s reluctance to speak candidly to uniformed INS officers because they reminded her of the government officials from her home country who had beaten her and caused her to miscarry a pregnancy).

<sup>284</sup> During the credible fear interview, the refugee is being detained in jail, is apprehensive about his or her future, is worried (in most cases) about the safety of friends and family members whom he or she left behind, and is not versed in the law of asylum and other protection. All of these conditions exacerbate the trauma refugees suffer. In fact, studies show that the trauma that refugees suffer continues to build even after they arrive in a country of exile. See Silove et al., *supra* note 272. Thus, under these conditions, it is highly likely that asylum seekers will be apprehensive and avoid speaking of events that remind them of the traumatic experience that triggered their need to flee.

Reluctance to speak of traumatic experiences is evident even among refugees who volunteered to participate in psychological research projects. See Rolf J. Kleber et al., *BEYOND TRAUMA: CULTURAL AND SOCIETAL DYNAMICS* 155 (1995). When refugees with PTSD are interviewed under comfortable conditions by trusting professionals, research revealed that the refugees were unwilling to discuss the traumatic events that they had suffered. This reluctance is evident even after the refugees have found safety outside of their home country, have lived in and become acclimated to their new country, and understand that what they say will not hurt them in any way in the future. Given the prevalence of these findings under favorable research conditions, they are more likely to occur under the conditions of the expedited removal process.

*(b) Detention Inhibits the Ability of Asylum Seekers to Present Their Cases*

In addition to the psychological realities involving traumatized asylum seekers, the final rule’s procedural amendment permitting the INS to reconsider negative credible fear determinations also is justified because of the stark *physical* reality of detention faced by many asylum seekers. The detention of asylum seekers sharply limits their access to counsel. Detention, especially when combined with the language, fiscal, and cultural barriers asylum seekers commonly face when first arriving in the United States, makes it extremely difficult for refugees to retain a lawyer. And once a lawyer is found, detention makes attorney-client communication difficult.<sup>285</sup> As a consequence, detained asylum seekers often do not have sufficient opportunity to consult with a lawyer before their credible fear interview, which can adversely impact how a case is presented. In fact, more than 60% of the asylum seekers in expedited removal proceedings attend their first credible fear interview unrepresented.<sup>286</sup> Obviously, if they retain representation after an initial negative decision (or then communicate additional information to a previously retained lawyer), the asylum seeker may subsequently be able to present a more persuasive case for meriting asylum protection, which the INS should not be required to reject.

*5. Treatment of Dependents on a Principal’s Application*

The new rule also allows the “spouse or child of an alien [to] be included in that alien’s credible fear evaluation and determination” if the applicant traveled to the United States with the

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<sup>285</sup> See INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (Supp. V 1999).

<sup>285</sup> See Michele R. Pistone, *Justice Delayed Is Justice Denied*, 12 HARV. HUM. RTS. J. 197, at 218 n. 118 (1999) [hereinafter *Justice Delayed Is Justice Denied*]. In one of Professor Pistone’s visits to an INS detention facility she “noticed a space in which lawyers and their clients meet in some detention centers . . . separated by a piece of plexiglass. Clear communication between attorney and client is inhibited by the [plexiglass], making it very difficult to accomplish the lawyer’s goals.” *Id.*

<sup>286</sup> See THIRD EXPEDITED REMOVAL STUDY, *supra* note 185, at A-35 (Table CA-3), A-39 (Table AY3-2).

relative.<sup>287</sup> As a result, the determination that the applicant is eligible for asylum becomes a determination for all family members who accompanied her to the United States. The inclusion of family members in the applicant's evaluation and determination is efficient because family members who flee persecution together often do so because the impetus for one family member to flee also warrants flight by his or her immediate family members. Thus, in such cases, the factual support for a determination about whether the fear of persecution is credible for each immediate family member is very similar, and there is no need to repeat it several times.<sup>288</sup>

### C. Suggested Changes to the Expedited Removal Process

Congress should virtually eliminate the INS's authority to use expedited removal by limiting it to extraordinary migration situations.<sup>289</sup> Pending attainment of this ideal, however, much could still be done to improve the expedited removal process beyond the positive changes embodied in the final rule and discussed above. This part of the article suggests further improvements to the expedited removal process. First, we propose changes to the secondary-inspections stage of the process, where secondary inspectors determine if a fear of persecution has been expressed.<sup>290</sup> Second, we suggest improvements to the credible fear stage of the

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<sup>287</sup> 8 C.F.R. § 208.30(b) (2001) (final rule). In the event that a concurrent evaluation is not desired by the spouse or child, then the relative's credible fear determination can be assessed separately. *Id.* § 208.30(b)(2).

<sup>288</sup> This change extended to expedited removal a practice that is typical in the context of other asylum applications. Typically, the spouse and minor children of the asylum applicant can derive asylum based on a grant of asylum to the applicant. 8 C.F.R. § 208.21 (2001) (final rule).

<sup>289</sup> For a more thorough statement of the case for drastic restrictions on governmental authority to use expedited removal, see Michele R. Pistone, *Assessing the Proposed Refugee Protection Act: One Step in the Right Direction*, 14 GEO. IMMIGR. L.J. 815 (2000) [hereinafter *Assessing the Proposed Refugee Protection Act*]; *New Asylum Laws*, *supra* note 25. For other critiques of aspects of expedited removal, see ADVISORY COMMITTEE FINAL REPORT, *supra* note 191, at 45; Brian Aust, *Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers Through the Lens of the Universal Declaration of Human Rights*, 20 HAMLINE J. PUB. L. & POL'Y 107 (1998); Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 GEO IMMIGR. L.J. 619 (2000); Beth Lyon, *An Expedited Removal Practice: Serving Asylum Seekers Subjected to Expedited Removal*, in PRACTICING LAW INSTITUTE, 31ST ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE (1998); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigration Responsibility Act*, 37 STAN. J. INT'L L. 117 (2001); THIRD EXPEDITED REMOVAL STUDY, *supra* note 185; U.S. COMM'N ON IMMIGR. REFORM, U.S. REFUGEE POLICY: TAKING LEADERSHIP 38 (1997); A WELL-FOUNDED FEAR, *supra* note 3, at 231-37.

<sup>290</sup> See *infra* Part II.C.1.

process, where asylum officers determine if a refugee has established a credible fear of persecution and immigration judges review negative credible fear determinations.<sup>291</sup>

1. *Suggested Changes to the Secondary-Inspections Stage of the Expedited Removal Process*

In order to minimize the chance of error during the secondary-inspections stage of the expedited removal process, the INS should implement three fundamental improvements. First, unbiased interpretation services must be made more widely available during the secondary-inspections interviews. Second, conditions of confinement must be improved prior to and during the interview. Third, fuller disclosure about the asylum process must be made at the start of the interview. These three changes are necessary to ensure that those who fear return to their home countries identify themselves to INS inspectors as asylum seekers at this critical stage of the process.

(a) *Interpretation During Secondary Inspections*

The final rule fails to address the issue of interpretation during secondary inspections but, rather, leaves in place the instruction that “[i]nterpretative assistance shall be used if necessary” during secondary inspections.<sup>292</sup> This standard, unobjectionable in itself, turns problematic when its application by the INS is considered.

The first major problem concerns what constitutes “interpretive assistance.”<sup>293</sup> At secondary inspections, the INS uses unpaid, non-professional interpreters, such as airline

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<sup>291</sup> See *infra* Part II.C.2.

<sup>292</sup> 8 C.F.R. § 235.3(b)(2)(i) (2001) (final rule).

<sup>293</sup> Despite the regular frequency with which secondary inspectors encounter individuals who are not English-proficient and the vital nature of secondary-inspections interview, the rule dealing with secondary inspections does not provide for even the minimal safeguards that are required at credible fear interviews. For example, there is no prohibition against the INS inspectors using a representative or employee of the applicant’s country of nationality as an interpreter. On the other hand, the regulations governing credible fear interviews expressly prohibit the use of an interpreter who is “a representative or employee of the applicant’s country of nationality.” 8 C.F.R. § 208.30(d)(5) (2001) (final rule). This provision also mandates the use of an interpreter for credible fear determinations “if the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in the

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personnel from the applicant's country of nationality.<sup>294</sup> This is troubling for several reasons. First, in many countries airlines are state or quasi-state enterprises.<sup>295</sup> Thus, airline personnel work for and have allegiances to the government; if used as interpreters, their interpretation may be biased.<sup>296</sup> In addition, even apart from issues of bias, questions of competence arise with the use of non-professional interpreters; as will be detailed in Part II.C.1.a, a person not trained in interpretation is likely to commit errors by, for example, resolving ambiguities on their own or by summarizing. (Recall that staple of sketch comedy, the three minute outburst in a made-up foreign language, complete with wide-ranging voice modulations and wild gesticulating, followed by a deadpan interpreter saying only, "He says no.") Such interpretive shortcuts would seem especially likely if the interpreter is not being paid for her services and has other commitments or even just wants to get to a hotel room and rest. Moreover, it is a real concern that someone who does in fact fear his or her government would be unwilling to say so to a representative or employee of that government. For all of these reasons, the use of a foreign government employee as an interpreter is antithetical to one of the primary purposes of the interview itself – to establish whether the applicant fears persecution, harm, or torture by his or her government.

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language chosen by the alien." *Id.* According to regulations, the interpreter at credible fear interviews also must be at least 18 years of age. *Id.*

<sup>294</sup> IS THIS AMERICA?, *supra* note 26, at 60, 64, 76.

<sup>295</sup> For instance, Kuwait Airways, Air India, China Air (a Taiwanese airline), and South African Airlines are all examples of airlines that service U.S. airports and are owned, at least in part, by their national governments.

<sup>296</sup> The International Religious Freedom Act recognizes this potential for bias by requiring the Attorney General to "develop guidelines to ensure that persons with potential biases against individuals on the grounds of religion, race, nationality, membership in a particular social group, or political opinion, including interpreters and personnel of airlines owned by governments known to be involved in practices which would meet the definition of persecution under international refugee law, shall not in any manner be used to interpret conversations between aliens and inspection or asylum officers." 22 U.S.C. § 6473(a) (Supp. V 1999). The Department of Justice Executive Order Implementation Plan appears to implement the part of this statutory requirement that deals with credible fear and asylum interviews by prohibiting the INS from relying upon, permitting, or authorizing "third persons to act as interpreters or translators in any credible fear or asylum interview where the third person may hold or is assumed to hold a bias against the applicant." DEP'T OF JUSTICE, EXECUTIVE ORDER IMPLEMENTATION PLAN 11 (2001),

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The second major problem is that because of the unavailability of professional interpreters and the concomitant need to recruit unpaid volunteers, secondary inspectors may too often try to “get by” without the use of an interpreter when an applicant displays even extremely limited English ability.<sup>297</sup> In other words, the INS has created a system that tempts secondary inspectors to define narrowly the circumstances in which “interpretive assistance” may be “necessary.” Indeed, scholars have documented this reluctance of INS inspectors to call upon interpreters during secondary inspections.<sup>298</sup>

Given the expedited and final nature of removal orders issued during secondary inspections – there is no opportunity for review of the secondary inspectors’ removal orders by asylum officers, immigration judges, or any other federal judges – the potential for irreparable harm caused by a biased or incompetent interpretation or by a failure to seek an interpreter is clear: it could erroneously and summarily return an applicant to suffer death or other persecution.

Even if an applicant survives the secondary-inspections hurdle, however, the INS’s application of its “interpretive assistance shall be used if necessary” standard<sup>299</sup> could haunt the applicant at the credible fear interview or at a hearing before an immigration judge. This is because the record of statements made during the secondary inspection becomes a part of the

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available at <http://www.usdoj.gov/crt/cor/lep/dojimp.htm#2> [hereinafter EXECUTIVE ORDER IMPLEMENTATION PLAN].

<sup>297</sup> Alternatively, the INS inspector could resort to communicating with an applicant in a language other than English; however, this is desirable only if both speakers are fluent in the other language. *See IS THIS AMERICA?*, *supra* note 26, at 60 (documenting an attempt to speak French with native Malinke speaker with limited French language ability). At least as likely a scenario, given the inability of the inspector to call upon a corps of readily-available interpreters, is that the inspector could resort to communicating with an applicant in a language that at least one of the communicants does not fully understand, e.g., when an applicant speaks Spanish and the inspector speaks some broken Spanish, or when an applicant speaks French and the inspector tries to communicate in Spanish, figuring that the languages’ common roots in Latin will create enough commonality to get by. *See id.* (documenting secondary inspectors’ use of English in an interview with an extremely limited English speaker from Guinea).

<sup>298</sup> THIRD EXPEDITED REMOVAL STUDY, *supra* note 185, at 72 (noting examples of INS inspectors accusing an Algerian national of lying about his inability to speak English and insisting upon conducting the interview in English).

<sup>299</sup> *See supra* notes 294-98 and accompanying text.



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permanent record of the case.<sup>300</sup> If the record contains statements that were misinterpreted either by a biased or incompetent, non-professional interpreter, by an asylum officer trying to get by without an interpreter, or by an applicant forced to try to communicate in a relatively unfamiliar language, the misstatements will become part of the applicant's permanent INS file. Later statements that are interpreted properly will be compared to the prior misinterpretation. The differences will raise unwarranted questions about the credibility of the applicant's testimony.<sup>301</sup>

Accordingly, the INS should amend its regulations to conform the requirements for secondary inspectors to those that already govern asylum officers when they conduct credible fear interviews. That is, secondary inspectors should have to use professional interpreters whenever the alien "is unable to proceed competently in English," and they should be barred from using as an interpreter "a representative or employee of the applicant's country of nationality."<sup>302</sup> These safeguards are especially necessary during secondary inspections because, unlike the credible fear interview stage of the expedited removal process, during secondary inspections there is no opportunity for review of the decision in an immigration court hearing, where live interpretation is guaranteed. For this reason, the Service should have a heightened interest in ensuring both that interpretation is completely accurate during secondary inspections and that no unnecessary impediments that would inhibit candid communications are imposed at this stage of the process.

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<sup>300</sup> See *Aravintan Balasubramaniam v. INS*, 143 F.3d 157, 161 (3d Cir. 1998) (reversing adverse credibility determinations by both the immigration judge and the BIA, which were based on perceived inconsistencies between the respondent's airport interview and his testimony before the immigration court because, due to inaccurate interpretation, the airport interview did not represent "an accurate account of the persecution [respondent] suffered").

<sup>301</sup> See *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000) (reversing an adverse credibility determination because the interpreter did not understand the language used by the respondent).

<sup>302</sup> See 8 C.F.R. § 208.30(d)(5) (2001). If a prohibition against using an employee of the applicant's home country were adopted, it should extend to employees of state-owned airlines. If the inspector is fluent in a language that the applicant also speaks fluently and a written record of the interview is made in that language and signed by the applicant, an interpreter should not be necessary.

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The INS might object to the cost of this proposal. The objection is weak, however, in light of the presidential Executive Order that commits the federal government to providing “meaningful access to [its] programs and activities” by individuals who are not proficient in English.<sup>303</sup> “[M]eaningful access” is assessed by a four-factor balancing test: (1) “the number or proportion of [limited English proficient] persons eligible to be . . . encountered . . . in carrying out its operations”;<sup>304</sup> (2) “the frequency with which [limited English proficient] individuals come into contact” with the agency, in this case the INS;<sup>305</sup> (3) “the nature and importance” of the activity;<sup>306</sup> and (4) the available resources.<sup>307</sup>

Application of the first three factors to secondary inspections overwhelmingly suggests that the INS should provide language assistance to those who are not proficient in English. In the case of secondary inspections, both the number and proportion of individuals with limited English proficiency encountered by secondary inspectors likely exceeds 75%, and contact with non-English proficient individuals is one of the primary functions of the inspectors’ job. Moreover, removing people from the United States and barring them from returning for five years is both one of the most important functions of the INS and one of the most devastating and life changing events for the individuals who are removed.

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<sup>303</sup> Improving Access to Services for Person of Limited English Proficiency, Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

<sup>304</sup> Policy Guidance, 66 Fed. Reg. 3833, 3835 (Jan. 16, 2001) (explaining that the “greater the number or proportion of [limited English proficient] persons, the more likely language services are needed”); Policy Guidance, 65 Fed. Reg. 50,123, 50,124 (Aug. 16, 2000).

<sup>305</sup> Policy Guidance, 66 Fed. Reg. at 3835; Policy Guidance, 65 Fed. Reg. at 50,125 (explaining that the more frequent the contact by limited English proficient persons with the Service, the more likely language services are needed).

<sup>306</sup> Policy Guidance, 66 Fed. Reg. at 3835 (explaining that the “more important the . . . information . . . or the greater the possible consequences of the contact with the [limited English proficient] individuals, the more likely language services are needed”); Policy Guidance, 65 Fed. Reg. at 50,125. The obligation to communicate rights to a person is more important in situations in which the denial of access to information could have serious implications for the limited English proficient individual.

<sup>307</sup> Policy Guidance, 66 Fed. Reg. at 3835; Policy Guidance, 65 Fed. Reg. at 50,125 (explaining that institutions with larger budgets should make language services available).

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As to the fourth factor – resources – given that the first three factors as applied in this context overwhelmingly favor making interpretation services available, it would seem that only exorbitant costs could justify a failure to provide interpretation. Otherwise, one will have effectively created a de facto *one*-factor test, where modest cost factors can override even the strongest case made by the other three factors. Fortunately, here the costs are likely to be relatively modest; hence, the conclusion that interpretation services should be made more widely available is inescapable.<sup>308</sup>

Certainly, at most airports and land crossings, the INS could predict with reasonable precision the languages that would need to be interpreted on a regular basis during secondary inspections. For example, at Los Angeles International Airport, 29% of the applicants for admission who are subject to secondary inspections are Chinese,<sup>309</sup> and 31% are from Spanish

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<sup>308</sup> We commend the INS for at least recognizing an injustice with respect to an interpretation that it has been unable to remedy. Most viewers of the 2000 National Public Television documentary “Well-Founded Fear” were struck by how often asylum officers made apparently erroneous decisions because applicant-supplied interpreters did not render their testimony accurately (as measured by the differences between the applicants’ subtitled text and the interpreters’ oral translations). INS acknowledged in its commentary on the final rule that “[s]ervice-appointed interpreters could benefit applicants and the Program.” Asylum Procedures, 65 Fed. Reg. 76,121, 76,125 (Dec. 6, 2000). It also took note of Executive Order 13,166, which directed federal agencies to establish written policies by December 11, 2000 on the language-accessibility of their programs. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000) (erroneously cited by INS as Executive Order 13,116). In response to that Order, INS later noted that approximately 90% of the asylum seekers its Asylum Officers interview need interpretation and that the agency does not yet have standards for determining interpreter competency, much less resources to provide government interpretation. It pledged to provide a competent interpreter or adjudicator at every asylum interview “as soon as fiscal resources permit.” EXECUTIVE ORDER IMPLEMENTATION PLAN, *supra* note 296, at 13. The Service has not received congressional appropriations for this purpose, and therefore, its current regulations do not assure competent interpretation during affirmative interviews with Asylum Officers. The Service does attempt to provide interpretation during the much smaller number of credible fear interviews with asylum seekers who are in its custody, but it does not provide adequate interpretation at the critical secondary inspection stage of the expedited removal process, and even the interpretation provided during credible fear determinations for those not already summarily deported is not adequate. *See infra* Parts II.C.1.a, c.

<sup>309</sup> GAO, OPPORTUNITIES EXIST, *supra* note 197, at 82. The Chinese language dialects most commonly spoken by immigrants in the United States are Foo Chow and Mandarin. In FY 2000, the Foo Chow and Mandarin dialects of Chinese together represented more than 15% of the total orders for interpretation for immigration court proceedings made by the Executive Office of Immigration Review. Response by Executive Office for Immigration Review to Freedom of Information Act Request, Re: FY 2000 Interpreter Orders (May 7, 2001) (on file with the Georgetown Immigration Law Journal). Therefore, interpreters who speak at least these dialects should be made available to secondary inspectors and their interviewees.

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speaking countries.<sup>310</sup> This predictability should greatly minimize the administrative burden in providing interpreters at secondary-inspections sites. And interpretation during secondary inspections should cost only a small fraction of the INS's annual budget of more than five billion dollars.<sup>311</sup>

### *(b) Conditions during Secondary-Inspections Interviews*

The final rule is silent about the conditions under which secondary inspections should be conducted. But given that expedited removal requires arriving refugees to discuss any fears they may have of being returned, the conditions in which these interviews are held must be designed to encourage truthfulness and candor by people who are frightened and fearful. Unfortunately, the environment created by INS at many airports and border crossings is more likely to promote an atmosphere of intimidation and fear, surely to the detriment of the truth-seeking function of the secondary-inspections interview. Accordingly, changes must be made in the conditions awaiting arriving immigrants during secondary inspections and in the treatment of arriving immigrants by secondary inspectors. In particular, the setting for secondary-inspections interviews should be redesigned to emphasize privacy and confidentiality. In addition, behaviors of inspectors, such as shackling and handcuffing, which create an atmosphere of suspicion and mistrust, should be minimized. Both of these recommendations are addressed below.

### *(i) The Setting for Secondary-Inspections Interviews*

The rule should have addressed the fundamental issue of the physical setting for secondary inspection interviews. Secondary inspections typically take place in a large room adjacent to the general inspection areas of the airport or border, in many cases separated from the

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<sup>310</sup> GAO, OPPORTUNITIES EXIST, *supra* note 197, at 82.

<sup>311</sup> The FY 2002 budget request for the INS totals \$5.5 billion. *The President's FY 2002 Budget Request Before the Comm. on Appropriations Subcomm. on Commerce, Justice, State, and the Judiciary, United States House of*

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other inspection areas by a wall of glass.<sup>312</sup> In many airports and border crossings, secondary-inspections officers conduct expedited removal interviews from behind a tall bank of counters, which resemble the counters used by airlines for passenger check-in. The applicant for admission stands on one side of the counter looking up to the officer on the other side of the counter. Several interviews can be conducted along the counter simultaneously; there are no partitions between the counter spaces.<sup>313</sup> Conversations between the inspector and the person being interviewed can easily be overheard by others in the secondary-inspections area.<sup>314</sup>

The physical design of these secondary-inspections rooms was planned to accommodate secondary inspections before expedited removal was implemented, when secondary inspections were limited to a review by the inspectors of the travel documents of each arriving alien to determine whether the individual was eligible for admission.<sup>315</sup> At that time, the applicant's fear of persecution or torture if returned was never addressed. Those who were deemed inadmissible either withdrew their application for admission or were referred to an immigration judge for a full hearing on the merits of their claim for admission during which any fear of persecution could be fully expressed.<sup>316</sup> Only a judge could issue a removal order.<sup>317</sup>

Under IIRIRA, the secondary inspection took on more significance. In the case of those who are traveling without proper documentation, the secondary inspection essentially replaces the immigration judge hearing. Secondary inspectors now have the authority to order an

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*Representatives*, 107th Cong. (2001) (statement by Kevin D. Rooney, Acting Commissioner, Immigration and Naturalization Service).

<sup>312</sup> Much of this and the following description is based in large part on the experiences and observations of the authors.

<sup>313</sup> See LAWYERS COMM. FOR HUMAN RIGHTS, *SLAMMING THE GOLDEN DOOR: A YEAR OF EXPEDITED REMOVAL* 13 (1998) [hereinafter *SLAMMING THE GOLDEN DOOR*].

<sup>314</sup> *Id.*

<sup>315</sup> INA § 235, 8 U.S.C. § 1225 (1994) (amended 1996).

<sup>316</sup> See INA § 235(a), 8 U.S.C. § 1225(a) (amended 1996); see also *SLAMMING THE GOLDEN DOORS*, *supra* note 313, at 3.

<sup>317</sup> 8 U.S.C. § 1105a (1994) (repealed 1996); 8 U.S.C. § 1126 (1994) (repealed 1996).

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individual removed from the United States.<sup>318</sup> The inspector's decision is final, subject to what is in practice a very cursory review by a supervisory officer.<sup>319</sup>

Because inspectors are now authorized to order an individual removed from the United States, the nature of the secondary-inspections interview has changed significantly. The interview is no longer simply a checkpoint on the path to an immigration judge hearing. Secondary inspectors must now determine whether the person in front of them is fearful of return and therefore exempt from immediate deportation.<sup>320</sup> In order to make that determination, the secondary inspectors must initiate discussion of such private and sensitive matters as why the individual left his or her home country, whether the individual has any fear or concern of being returned to his or her home country, and whether the individual would be harmed if returned to his or her home country.<sup>321</sup>

As explained above,<sup>322</sup> because of the nature of their persecution, many victims of persecution and torture suffer from post-traumatic stress disorder and are reluctant to discuss issues of fear or to divulge sensitive and emotionally-charged information to U.S. officials. Having to reveal information of this sort to a government official in a space in which others, including complete strangers or their fellow countrymen, can overhear the conversation only

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<sup>318</sup> INA § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (Supp. V 1999).

<sup>319</sup> GAO, OPPORTUNITIES EXIST, *supra* note 197, at 44 (reporting that in more than half of the problem cases reviewed by the GAO, the "sworn statements were either incomplete or . . . the wrong form was used").

<sup>320</sup> 8 C.F.R. § 208.4 (2001).

<sup>321</sup> See INS Form I-867AB, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act; 8 C.F.R. § 235(b)(1) (2001). In addition to these questions, the officer must make the following disclosure:

U.S. law provides protection to certain persons who face persecution, harm, or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during the interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

INS Form I-867AB, *supra*.

<sup>322</sup> See *supra* Part II.B.4.a.

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compounds the difficulties applicants face,<sup>323</sup> particularly as being overheard could endanger family members or associates who have remained behind.

Given the natural reluctance of those who fear return to talk about their fears with government officials in a quasi-public setting, the secondary-inspections process should consciously be designed to encourage, rather than to discourage, applicants for admission to speak openly.<sup>324</sup> One way to encourage them to speak openly is through the physical design of the space that is used to conduct individual secondary inspection interviews. That space should be redesigned in an effort to guarantee that secondary-inspections interviews are conducted in a non-adversarial manner and in a setting that affords the alien privacy and comfort.<sup>325</sup> Small private rooms would help interviewees feel comfortable expressing their fears, knowing that what they say will remain confidential. If private meeting-room space is not available for all secondary inspections, then, at a minimum, an interview in a more public space should be moved to a private room as soon as an alien indicates any signs of fear of return. The secondary-inspections area should have a water fountain and restroom facilities that can be accessed easily by those waiting there. If there is a delay between an individual's arrival in the secondary-

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<sup>323</sup> IS THIS AMERICA?, *supra* note 26, at 69 (explaining the reluctance of an asylum seeker from Sierra Leone, “Ms. Koromah,” to talk about the rape she suffered at the hands of rebel forces in a crowded secondary inspections area). For example, “Ms. Alexyera” was very uncomfortable discussing her fear of returning to Russia within earshot of other people, including other Russian citizens because of the nature of her claim for protection. *Id.* at 72; *see also id.* at 77 (describing the secondary inspections interview of “Ms. Barry” that took place in a large room in the presence of many other people).

<sup>324</sup> The new rule recognizes the value of encouraging openness during the credible fear interview stage of expedited removal by authorizing asylum officers to reschedule the interview if the applicant for admission is “unable to participate effectively in the interview because of illness, fatigue, or other impediments.” 8 C.F.R. § 208.30(d)(1) (2001) (final rule). The need for the applicant to “participate effectively” in secondary inspections is just as high because ineffective participation could result in the issuance of erroneous removal orders.

<sup>325</sup> The short time period that Congress initially gave the INS to implement expedited removal procedures may at one time have warranted that the new system be implemented within the confines of the existing physical infrastructure. Now, more than four years later, the old infrastructure for secondary inspections is no longer acceptable. The INS has plans to adapt other parts of their space at airports to accommodate the uses that arise out of the expedited removal laws. *See* GAO, OPPORTUNITIES EXIST, *supra* note 197, at 78 (discussing plans to accommodate INS's detention needs in newer airport terminals). These plans should include revisions to the space dedicated to secondary inspections.

inspections area and his or her interview, the individual should be offered simple food and drink prior to his or her interview. The point is not to replicate a first class airline lounge, but to provide minimal comfort in order to encourage openness.

*(ii) Treatment of Individuals During Secondary Inspections*

The final rule is also silent about how INS inspectors should treat arriving immigrants in their custody. Under current practices, INS inspectors handcuff and shackle the vast majority of arriving individuals processed through secondary inspections, sometimes for days.<sup>326</sup> For example, Ibrahim Abdelgadir, a democratic opposition activist from Sudan who had been tortured repeatedly before fleeing to the United States, was shackled by INS inspectors to a bench at an airport for one and one-half days.<sup>327</sup> Other individuals suffer both shackling and other mistreatment. Liu Nianchun, a prominent Chinese activist for democracy and labor rights who had been tortured by the Chinese government for over seventeen years, reported that he was shackled to a bench at JFK International Airport and “kicked by an INS officer when he fell asleep.”<sup>328</sup>

Handcuffing and shackling creates an atmosphere of suspicion and mistrust.<sup>329</sup> Asylum seekers who are handcuffed and treated like criminals by uniformed INS inspectors are likely to

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<sup>326</sup> IS THIS AMERICA?, *supra* note 26, at 25-28.

<sup>327</sup> *Id.* at 30.

<sup>328</sup> *Id.* at 27. “When he fell asleep, officers kicked him to wake him.” Susan Sachs, *I.N.S. Inspectors Are Judge, Jury and Deported, Report Says*, N.Y. TIMES, Oct. 6, 2000, at B5; *see also* Associated Press, *Woman Sues INS for \$8 Million*, N.Y. L.J., Aug. 17, 2000, at 6 (noting deportation of mentally handicapped woman after overnight shackling).

<sup>329</sup> As a torture victim from Algeria who was handcuffed and threatened by INS inspectors explained, “When I was put in cuffs, I felt I was in [my home country].” Brent Walth & Kim Christensen, *Speedy Deportation Power Seen as Controversial, Dangerous*, THE OREGONIAN, Dec. 13, 2000, at A15. There are credible reports of individuals being shackled to benches for extended periods of time, sometimes without food, water, or access to restroom facilities. *See generally* IS THIS AMERICA?, *supra* note 26, at 25-28; SLAMMING THE GOLDEN DOOR, *supra* note 313, at 13 (describing that the secondary-inspections room at JFK International Airport in New York is equipped with a long bench for those who are handcuffed or shackled). For example, a student of Syracuse University, who is a U.S. legal permanent resident of Jamaican origin, was detained, twice strip-searched, and shackled to a bench in JFK International Airport as INS agents ridiculed him, saying that “Jamaicans only live here to mop floors.” Sachs, *supra*



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be cautious and suspicious when later probed by officials about their fear of return. Under such adversarial conditions, individuals who fear oppression by their government may transfer that fear to the United States government and become unwilling to speak candidly during secondary inspections.<sup>330</sup> For example, a client of one of our clinics who was kidnapped and tortured in his home country reported that when the INS shackled him upon his arrival at the airport he “was reminded of being tied up with other captives when . . . kidnapped.”<sup>331</sup>

This environment is antithetical to the one that the INS should seek to create. Secondary inspections are the INS’s only opportunity to identify genuine asylum seekers who the U.S. government is bound by treaty to protect.<sup>332</sup> By creating an atmosphere of suspicion, asylum seekers will be reluctant to speak candidly about their fears, and the INS will fail to identify genuine asylum refugees. When the INS fails to identify genuine refugees, the refugees are not eligible to apply for asylum but rather are immediately deported from the United States and returned to countries where they fear danger. In such cases, the United States violates its obligations under international treaties.<sup>333</sup>

INS enforcement standards, which do not have the higher formal status of codified regulations, specify that handcuffing and shackling should be used only after an individual assessment of the situation, including “a review of the detainee’s criminal violations (if any), aggressive or asocial behavior, suspected influence of alcohol or drugs, physical condition, sex,

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note 324, at B5. In addition, a Guinean political dissident, who had been tortured and imprisoned in Guinea, spent fifty-five hours in the airport chained to a bench. *Id.*

<sup>330</sup> See *supra* Parts II.B.4.a & b.

<sup>331</sup> Report of Psychiatric Evaluation of B.L. by Dr. Andrew Stone (Aug. 2, 2001) (on file with the Georgetown Immigration Law Journal). He further explained that he was crying, very scared, “My heart went - - - waaah! I was shaking like this!” *Id.*

<sup>332</sup> See Refugee Protocol, *supra* note 34, 19 U.S.T. at 6224, 606 U.N.T.S. at 267 (art. I(1)); Refugee Convention, *supra* note 35, 19 U.S.T. at 6261, 189 U.N.T.S. at 152-54 (art. 1(A)(2)).

<sup>333</sup> See Refugee Protocol, *supra* note 34, 19 U.S.T. at 6224, 606 U.N.T.S. at 267 (art. I(1)); Refugee Convention, *supra* note 35, 19 U.S.T. at 6261, 189 U.N.T.S. at 152-54 (art. 1(A)(2)).

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age, and medical condition.”<sup>334</sup> Unsurprisingly, given the INS’s enforcement culture, INS applies this standard in a way that results in the nearly universal use of oppressive restraints.<sup>335</sup>

The effect of the INS’s enforcement culture cannot be underestimated. Even when House Judiciary Committee staff members observed secondary inspections, the enforcement priority was evident. The Minority counsel of the House Judiciary Committee described her and other congressional staff members’ reactions as they observed the expedited removal process,

[We] were shocked by the attitudes of INS officers conducting secondary inspections interviews at [JFK International Airport in New York]. Their tone and body language conveyed deep hostility, even to inquiries by congressional staff who were simply trying to understand the process. They acted as if every asylum claim was a personal affront, and the more we questioned them about the process, the more hostile they became. I can’t imagine how a traumatized refugee would have the courage to raise a claim for asylum or express a fear of persecution in that kind of environment.<sup>336</sup>

The rule should be amended to reserve handcuffing and shackling for rare situations, such as those in which the arriving alien is violent or tries to abscond. A separate and private space, as suggested above,<sup>337</sup> would go a long way toward reducing INS officers’ enforcement bias and changing their perceptions about the need for handcuffing and shackling of individuals in secondary inspections. The use of a room instead of a shackle should be viewed by inspections officers as a more humane but equally effective way to detain applicants securely.

In addition, the rule should permit aliens in secondary inspections to have assistance from any family, friends, or even attorneys who are waiting to greet them at the airport.<sup>338</sup> Such contacts could help interviewees to understand the process and the need immediately to reveal

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<sup>334</sup> INS HQDDP Operations (Detention and Removals), Enforcement Standard, “Use of Restraints,” Feb. 11, 1998, cited in *IS THIS AMERICA?*, *supra* note 26, at 25 n. 24.

<sup>335</sup> *IS THIS AMERICA?*, *supra* note 26, at 26.

<sup>336</sup> *Id.* at 37 (quoting Stephanie Peters); see also Scully, *supra* note 218, at 939 (noting that the INS’s “adjudications function has always tended to be subordinate to its enforcement function”); *Justice Delayed Is Justice Denied*, *supra* note 285, at 204.

<sup>337</sup> See *supra* Part II.C.1.b.i.

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the truth about their fears of return. In some cases, relatives at the airport may themselves have information that could help the secondary inspector to resolve relevant issues. These communications could expedite rather than retard the secondary-inspections process.

When a private, comfortable, and non-adversarial environment is not created, the value and accuracy of secondary-inspections interviews – the U.S. government’s only chance to identify a victim of persecution or torture before possible removal – is compromised. The risk is too great if errors are made during this stage of the process; people who fear persecution, torture, or death can mistakenly be ordered removed from the United States.

### *(a) Disclosure Before Screening Interviews in Secondary Inspections*

The accuracy of secondary-inspections interviews may be compromised if the applicant for admission does not understand the need to trust the inspector and to speak candidly about fears of return. Unfortunately, the final rule does not improve the disclosures that INS required in its interim rule.

At present, secondary inspectors must read the following to arriving undocumented individuals during the initial screening stage:

U.S. law provides protection to certain persons who face persecution, harm, or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.<sup>339</sup>

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<sup>338</sup> Martin, *supra* note 193, at 694. To the extent that U.S. Customs officials are concerned about such interactions, they should require individuals to clear customs before being permitted to see their friends and relatives.

<sup>339</sup> Forms I-867A and I-867B, Record of Sworn Statement in Proceedings Under 8 C.F.R. § 235(b)(1) (1997). INS rules require the secondary inspector to read orally “all information contained on the Form I-867A.” 8 C.F.R. § 235.3(b)(2) (2001). Form I-867A also requires an INS officer to disclose that in the event the immigrant is denied admission to the United States, he or she could be barred from reentry for five years or longer. *See* Form I-867A, *supra*. The rules provide that “interpretive assistance shall be used if necessary.” 8 C.F.R. § 235.3(b)(2). INS has made available to inspectors translations of the basic disclosures in thirteen languages, including Arabic, Haitian Creole, Mandarin, Somali, and Tamil. INS’s disclosures about credible fear interviews (its publication “M-444”) is

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This disclosure does not ensure that those who are referred to secondary inspections understand the significance of the interview. It assumes that genuine asylum seekers who fear persecution or harm will be willing to reveal their fear to uniformed U.S. government officials. But as discussed above, studies show that individuals who are suffering from trauma are oftentimes unable to talk truthfully to those in positions of authority, even to those authorities who do not handcuff them to a bench and deny them access to restroom facilities.<sup>340</sup>

At a minimum, the INS should be required to disclose certain additional information to the individual orally and in writing, and in a language the alien understands. In particular, arriving individuals should be told that American officials will not share the alien's confidences with anyone from the his or her country.<sup>341</sup> This assurance, of course, could not plausibly be made under the current system, as persons from the alien's country are typically used as interpreters.<sup>342</sup> Thus, the change we recommend above for the provision of professional interpreters is needed not only to assure accurate interpretation, but also to ensure adequate disclosure.

The disclosure should also expressly explain that if the alien is afraid of being persecuted in his or her country, the alien may apply for asylum in the United States. The INS has resisted explaining or even using the word "asylum" based on its untested assumption that doing so would encourage false claims. It should at least test its hypothesis for a year before concluding that revealing American law would increase fraud. After all, those intent on committing

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also available in these languages. Fax from Georgia Papas, INS, to Philip Schrag (Sept. 13, 2001) (on file with the Georgetown Immigration Law Journal).

<sup>340</sup> See *supra* Part II.B.4.a.

<sup>341</sup> Of course, even this express assurance of confidentiality is unlikely to be sufficient if the circumstances of the interview manifestly demonstrate a lack of confidentiality. See *supra* Part II.C.1.b.i.

<sup>342</sup> See *supra* text accompanying notes 294-96.

immigration fraud are the people most likely to have knowledge of the American asylum system before they arrive.

The timing of these disclosures is crucial in determining whether they educate refugees early enough in the process to impact their ability to navigate the process adequately. Optimally, the disclosures should not be made during the secondary-inspections interview. Instead, they should be given in the waiting room, well before the interview, so that interviewees have time to study and digest this important information.

Moreover, the language of the disclosure should be revised to make it clearer to legally unsophisticated arriving refugees. The Security and Exchange Commission's "plain English" regulations would serve as a model in this regard.<sup>343</sup> Indeed, sensitivity to the fact that some refugees have poor educations and may not understand complex disclosures seems much more necessary here than the corresponding requirement in the realm of the securities markets.<sup>344</sup> The same sensitivity requires review of the thirteen translations of the disclosure form provided by the INS<sup>345</sup> to ensure that the necessary disclosures are understood by speakers of "plain Spanish," "plain Creole," "plain Punjabi," etc.

## *2. Suggested Improvements to the Credible Fear Determination Stage of the Expedited Removal Process*

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<sup>343</sup> *Assessing the Proposed Refugee Protection Act*, *supra* note 289, at 837 n.118. The Securities and Exchange Commission adopted a plain English rule on October 1, 1998. *See* Plain English Disclosure, Release No. 337,497 (Oct. 1, 1998). For a description of the SEC's rule, *see* *Assessing the Proposed Refugee Protection Act*, *supra* note 289. The Ninth Circuit Court of Appeals has followed suit in the plain language movement, specifically requiring plain language to ensure due process protections. *Walters v. Reno*, 145 F.3d 1032, 1053 (9th Cir. 1998).

<sup>344</sup> In 1998, the Ninth Circuit ordered the INS to revise its legal forms issued to aliens. *See* *Walters*, 145 F.3d at 1053. The Ninth Circuit found that the forms used by the INS did not plainly and simply communicate the legal actions pending against non-citizens. *Id.* at 1041. These forms were found to be uninformative and misleading, and as such, they violated due process. *Id.* at 1042. The court ordered the INS to revise its deportation forms and refrain from deporting non-citizens who were served such forms. *Id.* at 1052-53. Indeed, the Service recently recognized the need to understand the expected reading level of the audience in translating documents into different languages. Policy Guidance, 65 Fed. Reg. 50,123, 50,125 (Aug. 16, 2000).

<sup>345</sup> *See supra* note 339.

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In addition to making the proposed changes to the secondary-inspections stage of expedited removal, the INS can also improve the credible fear stage of the process through its rule. In this section, we suggest four changes. First, the INS should increase its use of in-person, rather than telephonic, interpretation during credible fear interviews. Second, restrictions on the role of legal counsel during immigration judge reviews of credible fear determinations should be removed. Third, the INS should reduce detention of asylum seekers who have been found to have a credible fear of persecution pending their immigration court hearing on the merits of their claims for protection. Finally, asylum officers should be given limited authority to grant asylum after credible fear interviews. Each of these changes would improve the credible fear process by ensuring that asylum seekers are given a fair opportunity to establish a claim for protection, both before an asylum officer and before an immigration judge.

### *(a) Use of Telephonic Interpretation During Credible Fear Interviews*

The INS's explanation of the final rule confirms its current practice of relying almost exclusively on telephonic interpretation during credible fear interviews when the applicant is not proficient in English.<sup>346</sup> During these interviews, the interpreter, who is alone in one room, communicates over a speakerphone with the applicant and the asylum officer, who sit together in another room.

The INS reports that it has employed telephonic interpretation for three years and asserts that it has “worked well.”<sup>347</sup> For several reasons, this conclusion is premature at best. First, even when an interpreter can see the speaker whose words are being interpreted, problems with interpretation arise on a regular basis. For example, “a witness may mumble or speak in a slang or jargon that is very fast” and “if [the interpreter] misunderstand[s] what is said in the source

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<sup>346</sup> The new rule merely added a requirement that all interpreters must be at least 18 years of age. 8 C.F.R. § 208.30(d)(5) (2001) (final rule).

language, [he or she] may interpret it incorrectly in the target language.”<sup>348</sup> In other instances, the interpreter may understand the verbal utterances but misunderstand the context and therefore misinterpret the word or phrase, “If a word comes up out of context, and the interpreter guesses at its meaning, the interpreter may guess wrong.”<sup>349</sup> An interpreter may also substitute his or her own words for those of the speaker.<sup>350</sup> Errors can be made by an interpreter who fails to transmit all the spoken words into the target language, who does not understand idiomatic expressions in the source or target languages,<sup>351</sup> who does not understand regional expressions or the dialect of the speaker,<sup>352</sup> or who is not sensitive to potential cultural miscommunications.<sup>353</sup>

There is evidence that misinterpretations have resulted in flawed immigration determinations. Indeed, misinterpretations have been held responsible for adverse credibility findings in numerous immigration court proceedings.<sup>354</sup> For example, the government provides (at its own cost) in-person interpretation in all immigration court proceedings.<sup>355</sup> Even when in-person interpretation services are provided, however, poor interpretation has sometimes resulted in erroneous orders of deportation. Sometimes the mistakes on the part of the interpreter are not recognized as such by the immigration judge, and the applicant is found not to be credible. Often it is not until a case is reviewed by an appellate court that the inadequacy of an interpretation is

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<sup>347</sup> 65 Fed. Reg. 76,121, 76,129 (Dec. 6, 2000) (commentary on final rule).

<sup>348</sup> ALICIA EDWARDS, *THE PRACTICE OF COURT INTERPRETING* 92 (1995).

<sup>349</sup> *Id.* at 91; *see also* ELENA M. DEJONGH, *AN INTRODUCTION TO COURT INTERPRETING* 61 (1992) (“Words mean very little unless we place them in context. Context involves placing a word among other words, and it is also concerned with the situation in which the words are uttered. The place of origin and the intended meaning of the speaker, among other factors, must be taken into account by the court interpreter.”).

<sup>350</sup> *See Hartooni v. INS*, 21 F.3d 336, 340 (9th Cir. 1994) (stating that it would have been “inappropriate for [the applicant’s] interpreter to . . . substitute[] the interpreter’s words for those said by [the applicant]”).

<sup>351</sup> DEJONGH, *supra* note 349, at 62 (warning that “[i]nterpreters and translators must be sufficiently familiar with both the target and source language cultures to be able to understand idioms and provide equivalent idiomatic expressions, where required”).

<sup>352</sup> *See id.* at 67-85; EDWARDS, *supra* note 348, at 100-02.

<sup>353</sup> *See Amadou v. INS*, 226 F.3d 724, 727 (6th Cir. 2000) (reversing an adverse credibility determination by the immigration judge because “it was the interpreter, not [respondent], who was unfamiliar with the ethnic groups of [respondent’s country] and the terminology associated with those groups.”); DEJONGH, *supra* note 349, at 62-63.

<sup>354</sup> *See infra* note 356 and accompanying text.

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recognized. Indeed, the Board of Immigration Appeals and federal circuit courts have rejected adverse credibility findings by immigration judges in numerous cases because of errors in interpretation.<sup>356</sup> In those cases, administrative and court-appointed interpreters were found to lack the expertise or understanding necessary to provide a competent interpretation. The inadequate interpretations made the asylum applicants' testimony seem inconsistent and contradictory. As a result, through no fault of their own, the applicants' testimony was rendered unbelievable, leading to inaccurate credibility assessments.<sup>357</sup>

Interpretative unreliability is exacerbated when telephonic interpretation is used. Indeed, one of the companies employed by the INS to provide interpretation services itself recognizes that "there is a limit to what over-the-phone interpreters can do. On-site translators can use visual clues to understand what the client is saying. But if the interpretation is over the phone all of the visual clues are missing."<sup>358</sup> Interpretation experts recognize that "the full context of an interpreted statement involves verbal as well as nonverbal communication."<sup>359</sup> That may be why the Department of Justice itself has recognized that telephonic interpretation is not always optimal and that "sometimes it may be necessary to provide on-site interpreters to provide

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<sup>355</sup> 8 C.F.R. § 3.42(c) (2001).

<sup>356</sup> *See, e.g.,* *Perez-Lastor v. INS*, 208 F.3d 773, 780-81 (9th Cir. 2000) (finding that an incompetent translation prevented respondent from presenting relevant evidence and caused the BIA to find that his testimony was not credible); *Abovian v. INS*, 219 F.3d 972, 979 (9th Cir. 2000) (finding that the due process rights of the applicant were violated when the court-appointed translator admitted to being unable to translate the words the applicant used to explain what had happened to him); *Amadou*, 226 F.3d at 727 (finding that the "interpreter's faulty translation likely played a significant part in the judge's [adverse] credibility determination"); *Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999) (holding that inconsistencies in testimony that possibly resulted from mistranslation or miscommunication do not support an adverse credibility finding); *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996) (rejecting an adverse credibility finding based on "perceived inconsistencies" that "may have been simply the product of a language barrier"); *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988) (concluding that inconsistencies in testimony resulting from mistranslation cannot be used to support an adverse credibility finding).

<sup>357</sup> As asylum scholar Deborah Anker has noted, "[T]he applicant's testimony is often the critical core of the asylum determination, since refugees generally are unable to produce external corroborative evidence. [If they are to prevail,] that testimony must be found credible." DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 150 (3d ed. 1999).

<sup>358</sup> Interview with Harry Moedinger, AT&T Language Line (Nov. 4, 1996).

<sup>359</sup> DEJONGH, *supra* note 349, at 58.



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accurate and meaningful communication” with a person who has limited proficiency in English.<sup>360</sup>

Indeed, most failures in interpretation go undetected as the very fact that interpretation services are needed suggests that mistakes in the interpretation will not be recognized. On occasion, however, attorneys and applicants involved in the expedited removal process have reported telephonic interpretation mistakes made during both credible fear interviews and immigration court proceedings.<sup>361</sup> Sometimes the misinterpretations may be central to the claim, to the applicant’s great detriment. Other times the misinterpretations on their face may not be central to an asylum claim but nevertheless may be of great importance as differences among the asylum seeker’s descriptions of past experiences communicated at secondary inspections, credible fear interviews, and immigration judge hearings could potentially undermine the applicant’s credibility – especially with courts inclined to reason “*falsus in uno, falsus in omnibus.*”<sup>362</sup> Oftentimes, asylum cases hinge on such credibility assessments.<sup>363</sup>

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<sup>360</sup> Policy Guidance, 66 Fed. Reg. 3833, 3836 (Jan. 16, 2001).

<sup>361</sup> See *IS THIS AMERICA?*, *supra* note 26, at 31-34 (exemplifying circumstances in which interpretation is inadequate, such as male interpreters assigned to female rape victims and Serbian interpreters assigned to Albanians fleeing Kosovo); *SLAMMING THE GOLDEN DOOR*, *supra* note 313, at 16. The INS asylum office does not track cases that it refers to the Executive Office of Immigration Review to know whether statements recorded at the credible fear interview are inconsistent with what is said during later testimony and whether the inconsistencies are attributable to an error of interpretation. Such errors are impossible to determine solely based on the record of the credible fear interview, which is only a paper record written by the asylum officer.

<sup>362</sup> Literally, “false in one thing, false in everything.”

<sup>363</sup> An applicant’s testimony is a critical component in the asylum determination because refugees generally are unable to produce external corroborative evidence. The adjudicator may rely upon that testimony if it is deemed credible. 8 C.F.R. § 208.13(a) (2001); see also *Sotelo-Aquiye v. Slattery*, 17 F.3d 33, 36 n.2 (2d Cir. 1994) (noting that uncorroborated evidence is sufficient to establish a claim for asylum so long as it is credible); *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 (9th Cir. 1984) (“[B]ecause aliens have difficulties in collecting proof, credible accounts should be given the benefit of the doubt.”); *In re A-S-*, Interim Dec. 3336 (B.I.A. 1998) (averring that the credibility determination “apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.”); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) (“The alien’s own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account on the basis of his fear.”); *ANKER*, *supra* note 357; *REGINA GERMAIN*, *AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 58-61 (2d ed. 2000).

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The INS justifies its almost exclusive use of telephonic interpretation on the ground that it affords asylum officers more “flexibility in scheduling and conducting credible fear interviews.”<sup>364</sup> This justification is not entirely without merit, but current practice still is subject to legitimate criticism. The basic problem is that the INS gives its rationale too much weight, using it to defend a system of telephonic interpretation essentially all the time when it is, in fact, weighty enough to justify use of telephonic interpretation only some of the time.

In particular, given that, all else being equal, telephonic interpretation is less reliable than in-person interpretation, telephonic interpretation is not justified – as a general rule – when the refugee is detained in a large, culturally diverse city and is a member of a language group that constitutes a substantial percentage of the persons subject to credible fear interviews. In such cases, it would be eminently practical for the INS to provide in-person, rather than the less reliable telephonic, interpretation.

A rule limiting in-person interpretation to such circumstances probably would encompass a majority of the cases. For example, a large percentage of individuals who are detained by the INS pending their credible fear interviews are held in New York, Elizabeth,<sup>365</sup> Chicago, Los Angeles, San Francisco, Miami, Atlanta, and Houston – all cities in which the INS has Asylum Offices.<sup>366</sup> Each of these large, culturally diverse cities is likely to contain a large pool of qualified interpreters. Moreover, nationwide, 54% of individuals who are interviewed for credible fear come from only three countries, thus limiting the number of languages and dialects that would need to be made available under this limited proposal.<sup>367</sup> And further adding to the

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<sup>364</sup> 65 Fed. Reg. 76,121, 76,129 (Dec. 6, 2000).

<sup>365</sup> Elizabeth is located in northern New Jersey. The Asylum Office is located in Lynhurst, New Jersey.

<sup>366</sup> See THIRD EXPEDITED REMOVAL STUDY, *supra* note 185, at A-21 (Table INS-16).

<sup>367</sup> Twenty-seven percent of applicants for admission who were sent to asylum officers for credible fear interviews between April 1, 1997 and September 30, 1999 were citizens of China, 14% were citizens of Sri Lanka, and 13% were citizens of Haiti. GAO, OPPORTUNITIES EXIST, *supra* note 197, at 49.

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practicality of in-person interpretation, citizens of certain countries tend to predominate at certain ports of entry into the United States.<sup>368</sup> In Houston, for example, 90% of the individuals subjected to credible fear interviews are Spanish-speaking.<sup>369</sup>

The law obligates INS to follow the principle that “[t]o the maximum extent practical, limited English proficiency should play no role, directly or indirectly, in the grant or denial of authority to remain in the United States.”<sup>370</sup> Because telephonic interpretation is generally less reliable, its deficiencies do affect asylum decisions involving those who speak little or no English. This would seem to violate the INS’s obligation to the extent a practical alternative exists. The limited proposal made here is such an alternative and should be adopted by the Service. Fair consideration of all relevant concerns makes continuation of the current system unacceptable.<sup>371</sup>

### *(b) The Role of Legal Counsel During Credible Fear Interviews and Appeals of Negative Findings*

The new rule also confirms that legal counsel for the applicant can attend credible fear interviews. It permits “[a]ny person or persons with whom the alien chooses to consult [to] be

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<sup>368</sup> Thus, 52% of individuals subject to expedited removal in Los Angeles are citizens of either China or Mexico while 27% of individuals subject to expedited removal in Miami are from Spanish-speaking countries and 26% are from Haiti. *Id.* at 82. This is true of many of the major ports of entry. For example, 41% of individuals subject to expedited removal in Chicago are citizens of Mexico and 18% are Chinese. *Id.* at 83. Thirteen percent of individuals subject to expedited removal in New York are from Brazil, 9% are from Dominican Republic, and 8% are from Jamaica. *Id.* at 82.

<sup>369</sup> *Id.* at 83.

<sup>370</sup> EXECUTIVE ORDER IMPLEMENTATION PLAN, *supra* note 296, at 10.

<sup>371</sup> Our proposal would not be very costly because only approximately 4,500 credible fear interviews are conducted each year, some of which may not require any interpretation because the applicant speaks English. *See* GAO, OPPORTUNITIES EXIST, *supra* note 197, at 47. Also, efficiency considerations may argue against the current system. For example, any efficiency gains made by using telephonic interpretation at early stages of the asylum review process could prove to be illusory in the long term. Misinterpretations that are discovered after an interview ends may lead to more protracted litigation and in some cases longer terms of detention, which could be avoided if the system allocated sufficient resources to ensure clear and complete communication from the inception of the process.

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present at the interview.”<sup>372</sup> It also authorizes the accompanying person, at the discretion of the asylum officer, to present a statement at the end of the interview.<sup>373</sup>

The new rule, however, fails to address the role of legal counsel at an immigration judge’s review of a negative credible fear finding. Current practices allow (although they do not require) judges to prohibit legal counsel from participating in hearings reviewing negative credible fear determinations. Indeed, an immigration court operating memorandum provides that “there is no right to representation prior to<sup>374</sup> or during [a negative credible fear] review.”<sup>375</sup> At a minimum, the rule should be amended to allow representation, argument, and an opportunity to offer evidence at any immigration judge’s review of a negative credible fear determination so long as the lawyer’s representation is at no expense to the government. Particularly in light of the codification of an asylum officer’s authority to reconsider negative credible fear determinations,<sup>376</sup> failure to permit a full hearing with testimony will serve only to cause more administrative inefficiency and delay because the applicant may ask an asylum officer to conduct a new credible fear interview based on witnesses or evidence not previously considered by a fact-finder.

### *(c) Detention*

The new rule is silent about the INS’s practice of detaining asylum seekers who have been found to have a credible fear of persecution. Under current practices, the INS detains most asylum seekers as they make their way through the credible fear of persecution stage of the process and until they have been determined by an immigration judge to warrant asylum

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<sup>372</sup> 8 C.F.R. § 208.30(d)(4) (2001) (final rule).

<sup>373</sup> *Id.*

<sup>374</sup> Because representation is permitted during credible fear interviews, the term “prior to” apparently refers to the period of time after the case has been referred by the asylum officer to an immigration judge for review.

<sup>375</sup> Operating Policy & Procedures Memorandum, *supra* note 235, at 10 n.10.

<sup>376</sup> *See supra* Part II.C.2.d.

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protection. Even those whose claims for asylum are deemed credible by an asylum officer may be detained by the INS pending the adjudication of their claim at a removal hearing.<sup>377</sup> While INS regulations provide for parole from detention in certain circumstances, decisions about whether an individual is eligible to be paroled from detention rests with the district director who has jurisdiction over the detention facility.<sup>378</sup> There are many problems, which one of the authors has addressed elsewhere, with this allocation of jurisdiction over detention and release decisions, particularly with respect to individuals who have been found to have a credible fear of persecution.<sup>379</sup> In very brief summary, career and budgetary considerations, *inter alia*, combine to create powerful incentives for district directors not to release from detention credible asylum seekers until after they have been granted protection.<sup>380</sup>

The new rule fails to change the status quo. Parole decisions under the regulations remain in the jurisdiction of district directors.<sup>381</sup> When it promulgated the new rule, the INS cited the existing Asylum Pre-Screening Officer Program (“APSO”) procedure.<sup>382</sup> APSO was designed to screen credible asylum seekers for parole from detention. Even an INS internal evaluation, however, admitted that since its inception in 1990, the program has operated “inefficient[ly],” “inconsistent[ly] from district to district”<sup>383</sup> and “unevenly around the country.”<sup>384</sup>

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<sup>377</sup> Studies show that individuals who have passed the credible fear interview are detained an average of fifty-seven days. THIRD EXPEDITED REMOVAL STUDY, *supra* note 185, at A-37 (Table CA-9). The length of detention varies significantly by port of entry. Individuals who arrive at New York’s JFK International Airport are detained an average of 124 days while those who arrive in San Diego are detained for an average of only eleven days. *Id.*

<sup>378</sup> See 8 C.F.R. § 103.1(g)(2)(ii) (2001); see also GERMAIN, *supra* note 363, at 133.

<sup>379</sup> See *Justice Delayed Is Justice Denied*, *supra* note 285, at 247.

<sup>380</sup> *Id.*

<sup>381</sup> 8 C.F.R. § 212.5 (2001) (final rule).

<sup>382</sup> See *generally Justice Delayed Is Justice Denied*, *supra* note 285, at 201-03 (describing the APSO program in detail).

<sup>383</sup> INS Memorandum from the Office of General Counsel, Programs and International Affairs, to the Commissioner on Asylum Pre-Screening Program Evaluation 2 (June 13, 1996) (on file with the Georgetown Immigration Law Journal) [hereinafter 1996 Asylum Pre-Screening Evaluation]; see also INS Memorandum from the Office of General Counsel to the Commissioner on Asylum Pre-Screening, May 1993-Dec. 1993 (1994) (on file with the Georgetown Immigration Law Journal).

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Endorsement of the flawed status quo means the problems arising from the current system – the unnecessary expense of housing asylum seekers in detention, the detention of asylum seekers in distant jails, the detention of asylum seekers with trauma-related illnesses,<sup>385</sup> the recanting by asylum seekers of their claims because they “do not want to stay in detention,”<sup>386</sup> the commingling of asylum seekers with criminals in detention centers,<sup>387</sup> – will continue. And it comes despite evidence from a recent INS-commissioned program by the Vera Institute for Justice showing that a high degree of compliance with immigration laws and procedures can be obtained through supervised release, which reduces the need for detention.<sup>388</sup> The availability of alternative options and the extent of the problems associated with the current system, counsel in favor of change. The best way to change the current system and to ameliorate the conflicts of interest that infect it is to remove detention decisions from the jurisdiction of the Service and place them in the hands of neutral immigration judges.<sup>389</sup> One of the authors has proposed model legislation to accomplish this, under which impartial decision-makers would use

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<sup>384</sup> 1996 Asylum Pre-Screening Program Evaluation, *supra* note 379, at 2. The problems identified in the INS’s internal evaluations persist. See *Justice Delayed Is Justice Denied*, *supra* note 285, at 203; Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1698-1704 (1997) (discussing bureaucratic obstacles to creating an effective APSO program).

<sup>385</sup> See *supra* Part II.B.4.a.

<sup>386</sup> GAO, OPPORTUNITIES EXIST, *supra* note 197, at 59. Twelve percent of the thirty-nine cases reviewed by the GAO in which the asylum seeker recanted her claim indicated that the reason was that the applicant did not want to stay in detention. *Id.*

<sup>387</sup> See *id.* at 76. In 50% of the twelve detention facilities visited by the GAO, women immigrants were co-mingled with criminals. The INS justified this practice because, in its belief, “females were not as violent as males and thus there was no need to separate them.” *Id.* The INS’s explanation proves too much and implicitly concedes co-mingling presents dangers because the INS co-mingled male immigrants with the male criminals designated more violent by the INS in five of the twelve facilities visited. *Id.*

<sup>388</sup> EILEEN SULLIVAN, VERA INST., TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 3-4 (2000), available at [http://www.vera.org/publication\\_pdf/aapfinal.pdf](http://www.vera.org/publication_pdf/aapfinal.pdf). The Appearance Assistance Program demonstrated that the INS does not have to detain all noncitizens in removal proceedings to ensure high rates of appearance at immigration court hearings. Ninety-one percent of participants in the intensive program attended all required hearings in comparison to 71% of noncitizens released on bond or parole. *Id.* These appearance rates also indicate that even without supervision, many people, particularly asylum seekers, are willing to attend immigration court hearings as required without having to be detained at that stage in the process. In particular, participant asylum seekers appeared at a rate of 84% compared to nonparticipant asylum seekers, who appeared at a rate of 62%. *Id.* at iii.

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well-articulated substantive parole standards in a setting that incorporates procedural safeguards and encourages the use of alternatives to detention.<sup>390</sup>

Although we suggest that more asylum seekers who are determined to have credible fear of persecution should be released under supervision rather than kept in prison while they await full hearings, we are mindful that most asylum seekers in the expedited removal process arrive in the United States without proper travel documents, that some of them will have come with false documents, and that while false documents are sometimes necessary to effectuate an escape from persecution, false documents could also be used by terrorists attempting to enter the United States.<sup>391</sup> The APSO program already authorizes the INS to continue to detain an alien, despite a

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Also, supervision was determined to be more cost effective than detention for asylum seekers. It costs the INS \$3,300 to supervise each asylum seeker who appears for hearings, compared to \$7,300 for those detained. *Id.*

<sup>389</sup> *Justice Delayed Is Justice Denied*, *supra* note 285, at 255-56.

<sup>390</sup> *Id.* at 256. The INS may be willing to make changes in this area. The recent GAO study discusses plans by the INS to propose regulations that would clarify that the INS Headquarters would have jurisdiction over detention and release decisions. GAO, OPPORTUNITIES EXIST, *supra* note 197, at 62. While the planned regulations would fall short of the recommendation made in Professor Pistone's article, they would be a small step in the right direction. In addition, the Senate Appropriations Committee's Report on the appropriations bill for the Departments of Commerce, Justice, and State recommends that the government appropriate \$7,300,000 toward the development of alternatives to detention for asylum seekers. S. REP. NO. 107-42, at 40 (2001) (recommending funding of "community-based organizations to screen asylum seekers and other INS detainees for community ties, provide them with necessary services, and help to assure their appearance at court hearings").

<sup>391</sup> Posing as an asylum seeker is by no means the only or the best method by which a terrorist could attempt to enter the United States. "Counterterrorism has never been a top INS priority and the agency is ill-equipped to handle it"; for example, the INS "has no system in place" to learn when aliens with student visas depart, drop out, transfer, interrupt their education, violate status or otherwise violate the law." Grimaldi et al., *supra* note 27, at A1. "At least sixteen of the nineteen suspected hijackers who commandeered American jetliners entered the United States with legal visas. Peter Selven & Mary Beth Sheridan, *Suspects Entered U.S. on Legal Visas*, WASH. POST, Sept. 18, 2001, at A6. Most had business or tourist visas, and at least one had been issued a visa so that he could take flight training. *Id.* The government had also issued a visa to Sheik Omar Abdel Rahman, who was eventually sentenced to life in prison for his role in a plot to blow up the United Nations building and several New York City bridges and tunnels. See A WELL-FOUNDED FEAR, *supra* note 3, at 39. Terrorists are more likely to enter the United States with tourist visas than with false credentials and manufactured asylum claims because the use of false travel documents carries with it a much higher risk of detection and incarceration. In 1997, Abu Mezer, who turned out to be a terrorist, did apply for asylum. He had already been arrested and incarcerated, and before releasing him, the Justice Department asked the State Department whether he was a terrorist. He had criminal charges pending against him in Canada, and he had been detained in Israel. But he was released because the State Department told the Justice Department that it had no information on him, and "a senior [State Department] official later told investigators that he did not have the resources to check for terrorist activities on the thousands of asylum requests it got annually." Gilbert M. Gaul & Mary Pat Flaherty, *Potential Bomber Shows Resolve in Trips to U.S.*, WASH. POST, Oct. 7, 2001, at A16. This incident reflects inadequate funding for the State Department's efforts to obtain information on aliens about whom the Justice Department is inquiring, not a lapse in the legal regime for protecting the United States from terrorists who may masquerade as refugees.

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finding of credible fear, if it is concerned that the person could be a threat to U.S. security.<sup>392</sup>

This provision can and should be enforced, but many people who are now detained following positive credible fear findings are themselves victims who are in no way suspected of endangering American security.

### *(d) Asylum Officers Should Be Given Authority to Grant Asylum After Credible Fear Interviews*

Finally, the rule does not change the current system under which asylum officers are not authorized to conduct an *asylum interview* with any individuals who have been found to have a credible fear of persecution, even those with the most compelling cases.<sup>393</sup> A change allowing this would be welcome; that is, asylum officers should be given authority to grant asylum protection in cases in which it is clear that the applicant has a well-founded fear of persecution and is otherwise eligible for asylum. Once asylum is granted, continued detention is unnecessary and the asylee can be released.

Asylum officers currently have authority to grant asylum to applicants who apply affirmatively to the INS for protection outside of the expedited removal process.<sup>394</sup> These asylum applicants typically are individuals who entered the United States legally, often on tourist or student visas, and who can apply for asylum affirmatively with the local INS asylum office. In fact, many more people apply for asylum affirmatively each year than apply after encountering

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<sup>392</sup> See INS Memorandum from the Office of the Commissioner on the Parole Project for Asylum Seekers at Ports of Entry and in INS Detention 2 (Apr. 20, 1992) (stating that a person is only eligible for release if he or she is not “regarded as a danger to the security of the United States”) (on file with the Georgetown Immigration Law Journal).

<sup>393</sup> An asylum officer conducting an asylum interview can grant an applicant his or her ultimate relief: a grant of asylum protection. Secondary inspection and credible fear interviews, on the other hand, *never* result in a grant of asylum but only allow those who pass those hurdles to proceed to an immigration court judge, who will later rule on whether a grant of asylum is warranted.

<sup>393</sup> The INS was reportedly considering amending its regulations to permit grants of asylum when clearly warranted. THIRD EXPEDITED REMOVAL STUDY, *supra* note 185, at 20-21. We encourage it to do so.

<sup>394</sup> INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (Supp. V 1999).



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the expedited removal process upon entering the United States without proper documentation.<sup>395</sup> Indeed, under current law, individuals who physically enter the United States and are not stopped at an airport or border crossing can, regardless of their immigration status, affirmatively apply for asylum by submitting an asylum application to the INS.<sup>396</sup> When an affirmative application is made, the applicant's local INS asylum office<sup>397</sup> schedules an interview for the asylum applicant with an asylum officer. Those applicants who are not granted asylum are referred to a hearing before an immigration judge, where they can renew their request for asylum, which is adjudicated *de novo*.<sup>398</sup> About half of the affirmative applications for asylum are granted by either an asylum officer or an immigration judge.<sup>399</sup>

These asylum interviews resemble credible fear interviews in three respects. First, both credible fear and asylum interviews are conducted by asylum officers in a non-adversarial manner. Second, as with credible fear interviews, during asylum interviews the applicant is questioned by an asylum officer about his or her asylum claim.<sup>400</sup> Third, counsel for the applicant may be present at both asylum and credible fear interviews, with the counsel's role at both usually limited to making a statement at the conclusion of the officer's direct questioning of the applicant.<sup>401</sup>

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<sup>395</sup> Whereas approximately 4,500 credible fear interviews are conducted in the United States each year, *see* GAO, OPPORTUNITIES EXIST, *supra* note 197, at 47, almost 50,000 asylum applications were filed in the United States in 2000. INS, CHART OF ASYLUM APPLICATIONS, *supra* note 178.

<sup>396</sup> INA § 208(a)(1), 8 U.S.C. § 1158(a)(1). Their right to do so ends if they are apprehended by the INS and put into removal proceedings under INA Section 241.

<sup>397</sup> 8 C.F.R. § 100.4(f) (1999) (listing each asylum office and its jurisdiction). The INS has eight asylum offices throughout the country. They are located in Newark, New Jersey; New York, New York; Arlington, Virginia; Miami, Florida; Houston, Texas; Chicago, Illinois; Los Angeles, California; and San Francisco, California. *Id.*

<sup>398</sup> 8 C.F.R. § 208.17(d)(3) (2001).

<sup>399</sup> Compare the 25,980 applications granted by asylum officers and immigration judges in FY 2000, *supra* text accompanying note 38, with the 49,462 cases filed in that fiscal year. INS, CHART OF ASYLUM APPLICATIONS, *supra* note 178

<sup>400</sup> *See* 8 C.F.R. § 208.9(b) (2001).

<sup>401</sup> *See* 8 C.F.R. § 208.9(d) (2001). The asylum officer is authorized to limit the length of the representative's statement. *Id.*

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In fact, one of the few differences between the two interviews is the decisional standard applied. As mentioned above, the decisional standard for credible fear interviews is whether the applicant has a credible fear of persecution.<sup>402</sup> That standard is defined as whether the applicant can establish that there is a “significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”<sup>403</sup> The higher standard for a grant of asylum is a finding of a well-founded fear of persecution. The term “well-founded fear” has been interpreted to include cases in which there is a one in ten chance that the applicant would be persecuted or harmed if returned to the home country.<sup>404</sup> Both standards, it bears repeating, are familiar to and constantly applied by asylum officers. When granting asylum in expedited removal cases, of course, asylum officers also would have to evaluate the applicability of statutory bars. Because asylum officers would grant asylum at the credible fear stage only in clear cases, assessment of the statutory bars should not unduly complicate their determinations.

Given the extensive similarities between asylum interviews with affirmative applicants and credible fear interviews, it is difficult to see the basis for opposition to this proposal. The only reason for denying asylum officers the power to apply the “well-founded fear” standard and grant asylum in the clearest cases at credible fear interviews seems to be the separate historical development of the two procedures. But a more unified system would kill two birds with one stone. Asylum officers are already conducting a credible fear interview and, without the use of

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<sup>402</sup> See *supra* text accompanying notes 228-29.

<sup>403</sup> INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. V 1999). If the immigration judge confirms the asylum officer’s finding that the applicant does not have a credible fear of persecution, the individual is ordered removed from the United States. *Id.*

<sup>404</sup> In interpreting the well-founded fear standard, the Supreme Court stated that “[t]here is simply no room within the United Nations’ definition [of ‘well-founded fear’] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

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many additional resources, could easily expand the interview in appropriate cases to assess whether asylum should be granted.<sup>405</sup>

A grant of authority to asylum officers to determine whether expedited removal detainees have a well-founded fear is warranted for several reasons. One important consideration is judicial and administrative economy. As with the affirmative asylum process, it would screen out clearly valid claims, eliminating the need for immigration judges to review and the INS to litigate clearly meritorious cases. It would also reduce costs of detention for asylum seekers who are plainly eligible for asylum protection. Moreover, there are minimal, if any, additional costs associated with this proposal as the determination of a well-founded fear would not consume considerably more time than the current credible fear interview does. And because asylum officers already do in other settings exactly what is being proposed here, no additional training of asylum officers would be required.

Under this proposal, those who do not clearly satisfy the well-founded fear of persecution standard, whether they were found to have a credible fear of persecution or not, would proceed in the expedited removal system as it currently exists. This procedural change would take out of the process only those whose claims have been determined by asylum officers clearly to satisfy a well-founded fear standard, a standard that asylum officers are trained to understand and that they employ in interviews every day.

## CONCLUSION

The INS deserves considerable commendation for working over a period of four years to interpret the IIRIRA consistently with U.S. international obligations and its humanitarian

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<sup>405</sup> Of course, decisions by asylum officers would need to be monitored to ensure that the officers do not conflate the credible fear of persecution and well-founded fear of persecution decisional standards, applying the higher well-founded fear standard to the basic question of whether one has a credible fear of persecution or vice versa. Because

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principles. In particular, it has over time significantly liberalized its regulations and practices interpreting the exceptions to the new one-year deadline on asylum applications, and in more modest ways, it has somewhat improved its procedures for implementing expedited removal. The agency could, however, do better, consistent with the statute it must administer, and we have tried to show specific ways in which it could further improve its processes with respect to possible asylum seekers who may be affected by either of these IIRIRA provisions.

Still, there are limits to what the INS can accomplish by interpreting an unusually harsh and unfair law. The principal responsibility for reform lies with Congress, which should proceed to change the law so that refugees are treated with greater fairness and consideration.

The vehicle for Congressional reform is S. 1311, the proposed Refugee Protection Act of 2001. The bill would repeal the one-year deadline on asylum applications.<sup>406</sup> It would authorize the Attorney General to use expedited removal proceedings only after a determination that “the numbers or circumstances of aliens en route to or arriving in the United States by land, sea, or air present an extraordinary migration situation,” defined as “the arrival or imminent arrival in the United States or its territorial waters of aliens who by their numbers or circumstances substantially exceed the capacity for inspection and examination of those aliens, where there are extraordinary and temporary conditions in the foreign state of which those aliens are nationals.”<sup>407</sup> In other words, expedited removal could only be used in situations like those that occurred when oppression in Cuba and Haiti became so widespread that very large numbers of migrants risked their lives in small watercraft to reach the southern United States, swamping the ability of the INS to process them using ordinary procedures.

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supervisory asylum officers already monitor asylum officers’ decisions, however, this is not a substantial additional burden.

<sup>406</sup> S. 1311, 107th Cong. § 102 (2001).

<sup>407</sup> *Id.* § 101.

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Even in migration emergencies, the Refugee Protection Act would reduce the risk of error. It would limit the use of expedited removal to situations in which the immigrant had no documents or where the documents were invalid on their face so that expedited removal could not be employed simply because an inspector had a hunch that an arriving passenger had obtained valid documents without making full disclosures to the officials who had issued them. During appeals to immigration judges after negative credible fear determinations, immigrants would have the right to be represented at their own expense, and the immigration judge would be required to interview the immigrant in person, not by telephone or videoconference. The act would also restore judicial review of expedited removal procedures and decisions.<sup>408</sup>

Passage of the proposed Refugee Protection Act is consistent with INS Commissioner James W. Ziglar's hope to "change the process where asylum seekers come here, to make sure that we know who these people are and what their claims are and whether they're legitimate before we turn around and put them on a plane back to an uncertain future."<sup>409</sup>

In the wake of the recent terrorist attacks on the United States, some citizens and politicians undoubtedly will call for further substantive and procedural restrictions on immigration. Yet, restricting the use of expedited removal authority could actually reduce the risk of terrorism in the United States by making Canada more likely to cooperate fully with the United States in a joint effort to keep terrorists from entering both countries. Such an effort

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<sup>408</sup> *Id.* § 101. The bill would also eliminate the arbitrary annual ceiling of 10,000 on the number of asylees who may become permanent residents, a provision of the law that has resulted in delays of several years before people who are granted asylum can become more secure psychologically and advance toward U.S. citizenship. *Id.* § 103. It would also substitute discretionary for mandatory detention of persons in the expedited removal process, require the Attorney General to promulgate criteria for the release from prison of asylum seekers who are detained, and require rules for supervised release as an alternative to detention. *Id.* § 201. For asylum seekers who are nevertheless detained, it would require more humanitarian conditions of detention, e.g., by permitting visits from representatives and mental health providers, access to telephones and religious services, and attention to cultural dietary needs. *Id.* Finally, it would create a procedure under which detained asylum seekers could request release by an asylum officer, and it would require reasoned decisions on such requests. *Id.* at § 202.

<sup>409</sup> Ziglar Testimony, *supra* note 22.

should become part of the improved security measures adopted in response to the terrorist attacks on September 11, 2001.<sup>410</sup>

The Canadian Security Intelligence Service has reported that “Canada has been a frequent destination for international terrorists [who are now] planning and preparing terrorist acts from Canadian territory.”<sup>411</sup> Beyond the potential for terrorist acts in Canada to have ripple effects across the border, this has several consequences for the United States. First, it is now all too apparent that a terrorist who boards a large commercial plane in Canada, or even a smaller plane loaded with explosive materials, possibly could inflict directly the same harm on the United States as the terrorists who boarded planes in Boston, Newark, and Washington, DC. Second, the porousness of the U.S.-Canada border makes the presence of terrorists in Canada almost as great a problem for the United States as the presence of terrorists on U.S. soil. The 5,000-mile U.S.-Canada border has 30 official border crossings,<sup>412</sup> where “overwhelmed” INS officials “try to inspect hundreds of people, cars, trucks and buses that pass each day.”<sup>413</sup> In addition, according to Senator Judd Gregg (R-N.H.), “if you know the woods, it’s very easy to get on a logging road and cross the border. Hunters do it every year – by accident if nothing else.”<sup>414</sup>

Any attempt to protect the United States from terrorists that does not also change Canadian border enforcement is thus unlikely to succeed. Terrorism could be fought more

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<sup>410</sup> Richard Holbrooke, former U.S. Ambassador to the United Nations, and General Louis McKenzie recently agreed that joint border control was necessary to provide security against terrorism. *See Nightline* (ABC television broadcast, Sept. 19, 2001); *see also* DeNeen L. Brown & Ceci Connolly, *Suspects Entered Easily from Canada*, WASH. POST, Sept. 14, 2001, at A17 [hereinafter Brown & Connolly]. U.S. Ambassador to Canada Paul Cellucci said in the wake of the attacks that the United States and Canada should work on “synchronizing” immigration requirements to “defend the people of North America.” Brown & Connolly, *supra*.

<sup>411</sup> Brown & Connolly, *supra* note 410, at A17.

<sup>412</sup> Mary Beth Sheridan, *Tougher Enforcement by INS Urged*, WASH. POST, Sept. 18, 2001, at A15 (quoting Demetrios G. Papademetriou, Director of the Migration Policy Institute).

<sup>413</sup> Brown & Connolly, *supra* note 410, at A17. Some official border crossings are unmanned. “At some entry points [from Canada], agents put out orange rubber cones at night to dissuade travelers from crossing unchecked into the United States. ‘The nice ones will put the cones back after driving through,’ said Sen. Byron L. Dorgan (D-N.D.). Grimaldi et al., *supra* note 27, at A1.

<sup>414</sup> Grimaldi et al., *supra* note 27, at A1 (quoting Senator Judd Gregg (R.-N.H.)).

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effectively by opening the U.S.-Canada border and keeping terrorists from entering either country rather than by trying to control the common border.<sup>415</sup> That solution would give each nation a very strong stake in the other's ability to protect its perimeters and airports, requiring both cooperative border enforcement (possibly including inspectors from both nations at all entry points of either country) and, because a person admitted to each nation could easily enter the other, coordinated immigration policies and procedures.

But in any negotiations on common immigration procedures, Canada, with its strong tradition of humanitarian relief for refugees, may well insist that the United States amend expedited removal procedures so that genuine refugees are less likely to be swept homeward by airport inspectors. In 1996, when it became clear that Congress would put expedited removal into place, Canada was so offended by the lack of judicial or quasi-judicial procedure that the Canadian government abruptly suspended negotiations with the United States on a Memorandum of Understanding under which the United States and Canada would have returned asylum seekers for consideration in whichever country they first arrived.<sup>416</sup> The negotiations have never resumed.

Better continental border protection is not the only reason to limit expedited removal. We should be equally concerned about assuaging our fears by putting others at risk. Our best national traditions should enable us to distinguish between individuals who seek to enter the United States without legitimate reason (especially those who might perpetrate violence), and victims of

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<sup>415</sup> An open border between the United States and Canada also would be far better for North American trade and tourism. Recently, Canada, the United States, and Mexico established a joint-study group to investigate "how to open up borders and create more of a North American community." William Walker, *NAFTA Boosts Efforts to Open Borders*, TORONTO STAR, Aug. 1, 2001, at A1. "Under a new concept of continental border enforcement . . . [o]fficials at entry points would question new arrivals to weed out illegals and potential terrorists [but] once inside, people would be able to travel freely," which would eliminate border checkpoints for 200 million people who cross the U.S.-Canada border each year. William Walker, *Canada, U.S. Eye Scrapping Border*, TORONTO STAR, July 28, 2001, at A1. Some experts expect an unrestricted border within ten years. *Id.*

<sup>416</sup> Jacquie Miller, *Canada, U.S. Halt Talks on Refugee Deal*, TORONTO STAR, Apr. 16, 1996, at A11.

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persecution and violence who seek safety in America. Requiring fair, even moderately elaborate procedures, such as immigration court hearings, is our tried and true method for making those important distinctions. Commissioner Ziglar should support the Refugee Protection Act, and the 107th Congress should enact it into law.