

Hastings International and Comparative Law Review  
Summer 2008

## Article

**\*693** CENTER FOR GENDER & REFUGEE STUDIES: THE IMPLEMENTATION OF THE ONE-YEAR  
BAR TO ASYLUM [FNd1][FNd1]

Karen Musalo [FNa1][FNa1]

Marcelle Rice [FNaa1][FNaa1]

Copyright (c) 2008 UC Hastings College of the Law; Karen Musalo; Marcelle Rice

## I. Introduction

## A. The One-Year Bar to Asylum

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This provision of this law relating to the one-year bar was codified in the Immigration and Nationality Act (INA) § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B). IIRIRA contains a provision commonly known as “the one-year bar” to asylum. This provision requires any individual seeking asylum to apply within one year of her arrival in the United States.

The statute outlines certain exceptions to the one-year bar. According to the statute the Attorney General “may” [FN1][FN1] waive the application of the one-year bar where the applicant demonstrates “to the satisfaction of the Attorney General” that: (1) changed circumstances exist which materially affect the applicant's eligibility for asylum, or (2) extraordinary circumstances exist and relate to the delay in filing.

**\*694** IIRIRA also contains a provision prohibiting federal court review of agency one-year bar determinations; INA § 208(a)(3); 8 U.S.C. 1158(a)(3). [FN2][FN2] Congress subsequently enacted section 106 of the Real ID Act, which mandates that no provision of the INA shall be construed “to preclude review of constitutional claims or questions of law” in the federal courts; INA § 242(a)(2)(D) (as amended). The courts of appeals are just beginning to address the interplay of section 208(a)(3) and section 242(a)(2)(D). [FN3][FN3] Consensus is growing that section 208(a)(3) restored legal and constitutional jurisdiction over questions relevant to the one-year bar, including mixed questions of law and fact.

## B. This Article's Objectives

The Center for Gender and Refugee Studies (CGRS) is the nation's leading organization supporting women asylum-seekers fleeing gender related harm. CGRS's mission is to impact the development of law and policy to protect these women. CGRS provides training and technical support to attorneys, engages in appellate ad-

vocacy, and develops and implements strategies to impact national policy. Of salience to this article, CGRS also tracks asylum decisions. CGRS has thus developed an extensive catalog of decisions including many one-year bar determinations.

This article presents case summaries compiled from NGOs and practitioners in order to offer insight into the current application of the one-year bar. The scarcity of federal court review makes a random sample of cases unobtainable. The data referenced herein therefore presents invaluable information regardless of its anecdotal character.

#### \*695 C. Legislative Intent Behind the One-Year Bar

Congress' paramount objective in enacting the one-year bar was to prevent fraud. [FN4][FN4] Wide concern existed that undocumented immigrants were abusing the asylum process in order to obtain permission to work and access other societal benefits. Some saw "defensive applications" [FN5][FN5] for asylum as insincere. [FN6][FN6] The country's growing anti-immigrant sentiment also influenced passage of the one-year bar.

Of equal import to Congressional one-year bar proponents was ensuring that the United States remain a safe haven for legitimate asylum seekers fleeing persecution in their home countries. [FN7][FN7] One senator voiced concern about adequate protection, stating that Congress will "have to pay close attention to how this provision is interpreted." [FN8][FN8] Another senator, Orrin Hatch, assured the Senate that the statutory list of exceptions to the one-year bar was non-exhaustive and therefore "legitimate claims of asylum [would not be] returned to persecution, particularly for technical difficulties." [FN9][FN9] He indicated that he was also prepared to reconsider the time limit if it was not implemented fairly. [FN10][FN10] Representatives in the House shared these concerns. The Chief House sponsor, Representative Bill McCollum, expressed his understanding that "the Immigration Service would be required to tell people who came in that . . . [they can apply for \*696 asylum and they have one year to do so]." [FN11][FN11] No such advisory ever came about. [FN12][FN12]

#### D. Reactions by Other Authorities

The United Nations High Commissioner for Refugees (UNHCR) opposed the enactment of the one-year bar. [FN13][FN13] The legacy agency Immigration and Naturalization Service (INS), now Department of Homeland Security (DHS), also opposed it. The INS expressed its apprehension that the filing deadline would "frustrate and hamper efforts [by the agency to reform]." [FN14][FN14] According to the INS, the deadline was unnecessary. The INS had already taken substantial steps to reduce fraud. These included revoking the automatic issuance of work permits, increasing the speed of adjudications, and referring non-meritorious claims to Immigration Court. The acting Deputy Attorney General also opposed the one-year bar's passage. [FN15][FN15]

#### E. DHS's One-Year Bar Regulations

After its enactment, DHS promulgated regulations controlling application of the one-year bar. These regulations have assumed atypical importance because of the near absence of guidance from either the Board of Immigration Appeals (BIA) or the federal \*697 courts. [FN16][FN16] These regulations require the applicant to prove that an exception to the one-year bar applies. [FN17][FN17]

For a changed circumstance to provide an exception to the one-year bar, the regulations require that it be

material to the asylum claim. An applicant must also file within a “reasonable period of time” of the changed circumstances. The regulations provide a non-exhaustive list of examples of such circumstances: a change in conditions in country of nationality; a change in applicant's circumstances; a change in U.S. law; and termination of dependent status in an immediate relative's application for asylum.

Under the regulations, for an extraordinary circumstance to warrant an exception to the one-year bar, it must not be intentionally created by the applicant. The asylum seeker must apply within a reasonable period of time given the extraordinary circumstance. The regulation's non-exhaustive list of examples of such circumstances include: serious illness, mental or physical disability, legal disability, death or serious illness of legal representative, death or serious illness of an immediate family member, and the prior possession of an alternative legal status.

#### F. The Asylum Office's One-Year Bar Guidance

In its Asylum Officer Training Manual (Manual), the INS outlined additional considerations and standards relevant to the one-year bar determination. [FN18][FN18] As is also the case with the regulations, the paucity of one-year bar jurisprudence has significantly increased the Manual's influence.

Importantly, the Manual mandates a “flexible and inclusive” approach to evaluating exceptions to the one-year bar. The Manual explains that an applicant must prove by clear and convincing evidence that she is applying within one year of her entry into the United States. On the other hand, the applicant must only prove to the satisfaction of the AO that an exception excuses the untimely filing.

**\*698** The Manual also provides examples of extraordinary circumstances, beyond those described in the regulations. Among the Manual's examples are: severe family or spousal opposition, extreme isolation, profound language barriers, and profound difficulties in cultural acclimatization. It also mandates that all one-year bar referrals address whether or not conditions have changed in the applicant's home country.

The INS also provides guidance for evaluating whether the duration of time between the changed/extraordinary circumstance and the filing is “reasonable.” The Manual describes this analysis as fact-specific and governed by a reasonable person standard. Germane facts include the applicant's education and legal sophistication, the time it took to obtain legal assistance, any effects of persecution or illness, the date the applicant took notice of the changed circumstance, and any other relevant factors. The Manual indicates that the applicant should receive the benefit of the doubt in this evaluation. It also indicates that a delay of longer than six months will usually be considered unreasonable.

#### G. The Impact of the One-Year Bar

Between 1999 and 2005, Asylum Officers (AOs) denied at least 35,429 claims on account of the one-year bar. [FN19][FN19] Prior to 1996 less than half of all successful claims at Human Rights First were filed within one year of the applicant's entry. [FN20][FN20] The East Bay Sanctuary Covenant (EBSC) reports that the one-year bar is implicated in approximately eighty percent of its asylum cases. [FN21][FN21] CGRS undertook a survey of hundreds of post-1996 Survivors International (SI) case files. Somewhere between 33 percent and 44 percent of these applications were filed out of time. [FN22][FN22]

**\*699** Sources also indicate that the application of the one-year bar is increasingly rigid. The percentage of

timeliness denials is on the rise. In 1998, 37 percent of late filers were denied asylum, while 51 percent were denied between October 2000 and June 2001. [FN23][FN23] These figures demonstrate the breadth of the one-year bar's impact.

## II. The One-Year Bar is Applied in a Manner that Frustrates Congressional Intent

Narrative and data compiled by CGRS, and detailed below, illustrate that current application of the one-year bar is stringent. Congress' intent that the timeliness rule be applied flexibly is contravened. The Manual's principles of flexibility, inclusiveness and applicant-specific analysis are also ignored. The Manual's additional examples of exceptions are not applied. The regulations' non-exhaustive list of exceptions are narrowly construed, ignored, and applied as if they were prerequisites for relief.

### A. The One-Year Bar Does Not Prevent Fraud

CGRS's database contains countless examples where an AO or IJ explicitly finds an applicant credible, but denies asylum because of the one-year bar. Obviously, in such cases no fraud is at issue. An example is:

- A Taiwanese woman whose husband severely abused both her and her children. After making savage death threats, her husband was jailed in the United States and then deported. He was not placed in custody in Taiwan. The Taiwanese authorities had previously failed to protect the applicant from attempted murder at his hands. The applicant applied for asylum, arguing that her husband's deportation constitute a changed-circumstance exception to the one-year bar. The IJ found the woman credible but denied asylum, in part for failure to satisfy the one-year bar. [FN24][FN24]

CGRS's database also includes numerous cases where the \*700 applicant was denied asylum because of the one-year bar, but granted a different form of protection from persecution, such as withholding of removal (withholding) or relief under the Convention Against Torture (CAT). An applicant for withholding or CAT must demonstrate at least a 51 percent chance that she will be persecuted or tortured in her home country, while an applicant for asylum need only show a 10 percent chance of persecution. This means that an IJ has not only determined that such claims are non-fraudulent, but these claims have passed an even more rigorous test than that required for asylum.

Unfortunately for the withholding or CAT recipient, these forms of relief come with strict limitations. Unlike an asylee, this recipient is ineligible for many societal benefits, lacks any path toward residency or citizenship, and, above all, has no way to bring her child or spouse to the United States to join her.

Examples of CAT or withholding recipients who were denied asylum include:

- A Gambian mother who was married against her will at the age of 15, forcibly subjected to female genital cutting (FGC), suffered years of domestic violence and rape, witnessed domestic violence against her children, and finally escaped to the United States. As part of her asylum application, she submitted evidence of her diagnosis with Post Traumatic Stress Disorder (PTSD), resulting from the years of abuse. In spite of this, the IJ denied asylum because of the one-year bar and granted withholding. The BIA reversed on appeal. [FN25][FN25]
- A Guatemalan domestic violence victim, suffering from PTSD as a result of her abuse. Because the applicant had maintained employment and paid her bills since her arrival in the U.S., the IJ concluded that

her PTSD could not have prevented the applicant from meeting the filing deadline. The IJ denied asylum and granted CAT and withholding instead. [FN26][FN26]

- A Tanzanian woman whose parents were involved in an opposition political party. A local policeman demanded \*701 that the applicant marry him and undergo FGC, despite the fact that she was already married. Because of the applicant's refusal to submit to his demands, her parents were placed in police custody without charge, and tortured. The applicant was then taken into custody in exchange for her parents' release. She was raped, burned, slapped, beaten, starved, deprived of water, and left naked in her cell. She escaped to the United States where she sought shelter and food among strangers who exploited her for financial gain. She filed for asylum 18 months after her arrival. The IJ denied asylum because of the one-year bar, but granted CAT relief. Because neither withholding nor CAT provides a recipient with an opportunity to petition for an immediate relative, the applicant will never be able to reunite with her children who remain in Tanzania. [FN27][FN27]

- A woman from Mali who feared that both she and her three daughters would be forcibly subjected to FGC in her home country. The IJ granted CAT relief but denied asylum because of the filing deadline. [FN28][FN28]

- A Russian lesbian who was sexually assaulted by classmates, expelled from school, and subjected to treatment aimed at "curing" her of her orientation. Her partner was brutally beaten by her own father for having a relationship with the applicant. The applicant came to the United States on a J-1 visa. She applied for asylum after one year and shortly after learning that her partner had been raped and beaten to the point of mental incapacitation. She was granted withholding but denied asylum because she did not file within one year of arrival. [FN29][FN29]

- A woman from the Kikuyu tribe in Kenya. She escaped FGC because her parents opposed the practice. Members of Mungiki sect attacked and raped her because she was one of very few girls in her village who had not undergone FGC. She joined women's groups and educated women and girls about FGC and forced marriage. While helping a girl escape a forced marriage, the applicant was caught, \*702 imprisoned and tortured for one week. An IJ granted withholding but denied asylum because the applicant failed to meet the filing deadline. [FN30][FN30]

- A Somali woman fleeing FGC and persecution on account of membership in a minority ethnic clan was smuggled into the U.S. and had no proof of the date she entered. She received withholding and was denied asylum because of the one-year bar. [FN31][FN31]

- An Ethiopian woman who had experienced FGC and other harm due to an imputed connection to an anti-government political group could not establish clear and convincing proof of her entry within one year of application. The IJ denied asylum because of the one-year bar but granted CAT and withholding. [FN32][FN32]

- A 12-year-old indigenous girl fled Guatemala, fearing persecution on account of her actual and imputed political opinion arising out of her father's involvement in the Guatemalan army. She performed agricultural labor to survive until she filed for asylum at the age of 20. By the time of her hearing, she had become a single mother. The IJ denied asylum because of the one-year bar but granted withholding and another form of relief known as Cancellation of Removal. [FN34][FN34]

These examples illustrate that it is common for an IJ to deny asylum based on the deadline and then - in the same opinion - find that it is more likely than not that a woman will face persecution or torture in her home country. Clearly, therefore, the one-year bar is adversely impacting bona fide, i.e., non-fraudulent claims. The cases above happened to also meet the requirements for withholding or CAT. Other applicants with equally non-fraudulent claims, barred from asylum by the one-year problem, are unable to meet the heightened burden of proof for withholding or CAT and are denied \*703 all forms of relief (An example is the case of a 10-year-old

Pakistani girl as discussed in part C.)

## B. Cases that Meet the Plain Letter of the Regulatory Exceptions are Denied

Another pattern is apparent in CGRS's compilation of cases. Adjudicators deny cases that meet the plain letter of the regulatory exceptions.

### i. Adjudicators Ignore PTSD-Related Avoidance Symptoms Despite the Regulatory Exception

Despite Congress' clear intent to protect victims of persecution who suffer the psychological remnants of trauma, despite the regulations' explicit mandate that the effects of any mental disorders be considered in the one-year bar determination, and despite unchallenged expert testimony in individual cases, adjudicators frequently ignore or reject evidence of the impact of psychological disorders when considering exceptions to timely filing.

Adjudicators commonly misunderstand or ignore the phenomena of “avoidance symptoms” typically experienced by trauma victims who suffer from PTSD. [FN35][FN35] The American Medical Association and the American Psychiatric Association note that individuals suffering from PTSD habitually avoid “people places, thoughts, or activities that bring back memories of the trauma.” [FN36][FN36] An IJ who accepts that an applicant is suffering from a psychological disorder, but rejects the causal connection between the disorder and the delay in filing fails to recognize the phenomenon of avoidance symptoms. Some adjudicators conclude that if PTSD did not prevent an applicant from worshipping, giving birth, marrying, working, or studying in her first year after arrival, then it cannot have delayed the application for asylum. [FN37][FN37] This overlooks the glaring fact that the asylum seeking process requires the applicant to describe - at length - none other \*704 than those events which traumatized her, on numerous occasions and before governmental officials. Worship, child-bearing, marriage, employment and education require nothing of the sort.

Examples include:

- A Kenyan woman from the Mungiki sect who fled to the United States in fear of being subjected to FGC. She applied for asylum after the one-year deadline but submitted an evaluation by a psychologist, who diagnosed her with PTSD and Major Depressive Disorder (MDD). The evaluation stated that the applicant's psychological conditions seriously impaired her ability to function. The AO concluded that the applicant's disorders could not have directly related to her delay in filing because the applicant attended church during her first year in the United States. [FN38][FN38] See also the case of the Guatemalan domestic violence victim with PTSD described above, where the IJ concluded that the applicant's PTSD could not have delayed her filing where she paid bills and maintained employment after her arrival. [FN39][FN39]
- A woman from Nepal who was a victim of domestic violence. She was denied asylum for untimeliness, despite her PTSD diagnosis. The IJ concluded that PTSD could not be the cause of the untimeliness because the applicant still suffered from PTSD when she filed for asylum. The Nepali applicant received withholding. [FN40][FN40]
- A Kenyan woman whose mother and grandmother helped her escape FGC as a child. She was subsequently forced to marry a man with three other wives. While raping her to punish her for failing to conceive, her husband discovered she had not undergone FGC. When her husband and tribal elders attempted to subject her to FGC, the applicant attempted suicide. She was unconscious and hospitalized for four

months. When she recovered her husband beat and raped her again. When the applicant fled to her pastor's house, her husband burned the house down. The **\*705** applicant fled to the U.S. on a tourist visa and applied for asylum after the one-year deadline had passed. The IJ accepted her diagnosis of PTSD but rejected her contention that it was directly related to her delay in filing. The IJ reasoned that the applicant had exhibited "entrepreneurial skills" by caring for children to raise money while she was homeless and isolated, and because her pro se application was well written and articulate. Asylum was denied. She received withholding. [FN41][FN41]

Even more alarming are those cases where the failure to recognize psychological trauma results in the denial of all relief. In such cases, the applicant is sent back to the country of persecution.

ii. Adjudicators Replace Expert Testimony with Personal Speculation and Conjecture about the Behavioral Impacts of Psychological Disorders

Despite the significance Congress assigned to the residual effects of trauma, and notwithstanding expert testimony to the contrary, IJs regularly reject the idea that psychological disorders delay applications.

An example is:

- An Albanian teenager who was kidnapped by a trafficker, held captive, and raped and battered while plans were made to traffic her into prostitution. The adolescent escaped but could not return home for fear of being recaptured. She fled to the United States, entered as an unaccompanied minor, and applied for asylum 13 months after entering the country (and while still a minor). In immigration court, she presented the testimony of a clinical psychologist who diagnosed the applicant with PTSD and MDD. The clinical psychologist testified that the applicant's psychological conditions prevented her from speaking about the trauma she had been subjected to. Despite this expert testimony, the IJ concluded that the applicant could easily have rectified her feelings of shame by seeking out an attorney. The BIA dismissed the young woman's appeal. [FN42][FN42] **\*706** In the aforementioned case the IJ's disregard for expert testimony and reliance on personal speculation and conjecture is conspicuous. The same flaw is apparent, although not as explicit, in the overwhelming number of cases where an IJ fails to find extraordinary circumstances despite credible expert testimony that: (1) the applicant suffers from a medically recognized psychological disorder and (2) that disorder caused the delay in filing.

The pattern continues:

- A South African woman appealed to that country's police but received no protection from beatings and rape at the hands of her domestic partner. Her partner kidnapped their son and used access to the child as leverage for demands. The woman fled to the United States with her son and applied for asylum. She feared that her partner would beat, rape, and kill her for taking their child. She submitted a psychologist's assessment diagnosing her with PTSD. Despite the expert evidence, the IJ applied the one-year deadline, and barred her application. The IJ concluded that she did meet the requirements for withholding. [FN43][FN43]

- A Mexican homosexual man who entered the country without inspection at 18 years old, applied for asylum and presented evidence of his PTSD diagnosis. As a child, an older sibling subjected him to physical, mental and sexual abuse. He witnessed harassment and discrimination against homosexuals in Mexico, as well as the authorities' unwillingness to protect such individuals. In the United States, the traumatized young man asked immigration attorneys about legal protection on the basis of sexual orientation but was given no encouragement. Finally, in 2000, he learned about the possibility of asylum for gay men

from Mexico. He applied, but his legal representative failed to indicate his sexual orientation in the application. Too traumatized to tell the AO about the abuse he had endured, the applicant was referred to immigration court where he accepted a stipulation for withholding. [FN44][FN44]

**\*707** iii. Refusal to Recognize the Effects of Trauma Creates Senseless Outcomes

The failure to recognize that PTSD and other psychological disorders may delay an individual's application for asylum can produce illogical and incongruous results as a matter of policy. Most PTSD conditions recorded in the CGRS database are triggered by incidents of past persecution. Therefore applicants suffering from PTSD are more likely to have already experienced physical and emotional harm than other applicants, who may base their claims on their reasonable fear of future harm. The failure to apply the PTSD exception to the one-year deadline thus means that cases involving past persecution will be rejected at a higher rate than cases based solely on the fear of future persecution. This is not the outcome anyone envisioned.

The lack of recognition of reduced mental capacity is out of step with policy in other areas of American law. American criminal law acknowledges that reduced mental capacity reduces culpability because it hampers decision-making. [FN45][FN45] Refugees, the innocent victims of violence and torture, deserve no less consideration than criminals.

iv. Unaccompanied Minors are Denied Asylum for Failure to File Within One Year Despite the Regulatory Exception

Despite the fact that the regulation designates unaccompanied minor status among its list of examples of extraordinary circumstances excusing untimely filing, adjudicators apply the one-year bar to preclude claims presented by unaccompanied minors. The case of the Albanian teenager described above is one example of this.

In a landmark case in 2002, the en banc BIA held that entrance as an unaccompanied minor does not provide a per se exception to the one-year bar. See [Matter of Y-C-, 23 I & N Dec. 286 \(BIA 2002\)](#). In that case, the applicant entered without inspection at the age of fifteen and was detained for the duration of the year following his arrival. The applicant submitted a written application for asylum five **\*708** months after his release, and just after his seventeenth birthday. The IJ rejected that application. The minor filed another application five months later. The IJ rejected the second application as untimely. The Board found that this particular applicant's status as an unaccompanied minor, together with his year-long detention, did constitute extraordinary circumstances. The Board held, however, that "we are not required to excuse the respondent's tardy filing merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance." *Id.* at 288 (emphasis added). Six concurring Board members wrote separately - but made no objection regarding the absence of a per se rule for unaccompanied minors.

v. Applicants with Seriously Ill Immediate Family Members are Denied Asylum for Failure to File Within One Year, Despite the Regulatory Exception

CGRS's database contains numerous examples of applicants whose immediate family members fell ill during the critical one-year period post arrival. Adjudicators routinely fail to apply the regulatory exception for applicants with seriously ill immediate family members.

An example is a female victim of domestic violence from Jordan who left her husband while visiting the United States. For this transgression of cultural norms, she feared honor-killing in Jordan. After leaving her husband, she and her terminally ill minor child took up residence in a shelter. Her application for asylum was

denied for failure to present an exception to the deadline. She was granted deferred action. [FN46][FN46]

vi. Cases Based on a Changed Circumstance are Denied for Failure to File Within One Year, Despite the Statutory and Regulatory Exception

Despite clear Congressional intent to the contrary, adjudicators often deny claims arising from a changed circumstance. The case of the Russian lesbian who applied shortly after learning that her partner was beaten and raped to the point of mental incapacity (above), is one example of this. Another example is that of an \*709 Afghan woman who gave birth to two children out of wedlock in the United States. As a result she feared honor-killing by her father and brothers in Pakistan. She also feared harm in Afghanistan for transgressing cultural norms there. She asserted an exception to the one-year bar based on the changed circumstance of the birth of her two children out of wedlock. Asylum was denied. She received withholding. [FN47][FN47]

C. Adjudicators Interpret the Non-Exhaustive List of Exceptions as Exhaustive

Contrary to Congressional intent that the analysis be applicant-specific (above), and the plain language of the regulations, the regulatory list of exceptions to the one-year bar is being interpreted as exhaustive. One example is the case of the 10-year-old daughter of Shi'a Muslim parents from Pakistan. Her parents fled Pakistan with her after receiving death threats and attempts on their lives. The girl's father submitted an asylum application and the family's attorney assured the girl and her mother that they would "automatically" be granted asylum if the father/husband was. The girl's father was eventually granted withholding and denied asylum. Upon learning that the girl and her mother could not benefit from his status, they submitted their own applications for asylum. By this time, more than one year had passed since their entry. The IJ reasoned that because status as an "unaccompanied minor," was among the regulation's enumerated extraordinary circumstance, the 10-year-old's status as an accompanied minor could not be an exception. The IJ denied all relief and ordered the girl removed from the United States. He granted her mother withholding of removal. [FN48][FN48]

D. DHS and DOJ Inconsistently Apply a Presumptive Definition of a 'Reasonable' Period of Time Within Which to File After a Changed/Extraordinary Circumstance

DHS's stated position is that waiting longer than six months after a changed or extraordinary circumstance is presumptively unreasonable. [FN49][FN49] This presumption is not in accordance with the \*710 statute. When Congress enacted the one-year bar, it made explicit its understanding that 12 months is a reasonable time within which to file for asylum. The Afghan applicant described above, for example, had no reason to fear persecution in Afghanistan prior to the birth of her first child out of wedlock. After the occurrence of the facts that give rise to her claim, she too should be allowed one year within which to file. There is no reason to obligate her to apply for asylum more quickly than another applicant. The Department of Justice (DOJ) also appears to have embraced the six-month presumption in denying asylum claims. [FN50][FN50] It does not, however, apply the logical inverse counterpart of that presumption where it would benefit the applicant.

For example:

- A Yemeni man applied for asylum within five weeks of learning that his application for an extension of visitor status had been denied. He was denied asylum when an IJ determined that his five-week long delay was not reasonable. The IJ also found that the applicant's pending extension application was

not an “event or factor beyond the alien's control” and therefore was not an extraordinary circumstance. The BIA affirmed the IJ's denial. The U.S. Court of Appeals for the Ninth Circuit denied his petition for review, stating that the applicant could have filed during his first year in the United States. [FN51][FN51]

- A woman from Togo filed an asylum application five months after her student visa reinstatement application was denied. Her application for asylum was denied for failure to satisfy the one-year bar despite her fear that her parents would force her, like her two older sisters, to undergo FGC. The Immigration Judge granted asylum after the case was referred. [FN52][FN52]

### \*711 III. The Current Application of the One-Year Bar Returns Bona Fide Refugees to Countries Where They Fear Persecution

As the examples above demonstrate, in many of the cases where an applicant is denied asylum for failure to apply within one year, no other form of relief is available. Attorneys report that the one-year bar is the sole reason that many of their cases fail. This, together with the inflexible application of the statutory exceptions, places the U.S. in violation of its international obligations. The United States ratified the 1967 U.N. Protocol Relating to the Status of Refugees, which incorporates the 1951 Convention Relating to the Status of Refugees. Congress brought domestic law into accordance with international law via the 1980 Refugee Act. [FN53][FN53] The 1967 Protocol states that “no Contracting State shall expel or refole (return) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality . . .” In returning an asylum applicant to her home country for the sole reason that she failed to apply within one year of arrival, we are not only refusing her protection for “technical difficulties,” as Senator Abraham feared might happen (above), we are returning her to the frontier of a territory where her life or freedom would be threatened on account of a protected ground.

One example of this is a Guinean woman, who was forcibly subjected to FGC at the age of 6. She then refused an arranged marriage to a man 50 years her senior. Her uncle beat her and threatened her life for refusing. The applicant fled to the United States where she gave birth to two daughters. If returned to Guinea she risked death for dishonoring her family and feared that her daughters would be subjected to FGC. The IJ denied asylum because of the one-year bar and ordered her removed to Guinea. [FN54][FN54]

The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (Handbook) states that technical problems should not bar consideration of a legitimate asylum claim. [FN55][FN55] Indeed, the United States is the only one of the top \*712 five refugee-receiving countries that mechanically applies a time bar to asylum applications. [FN56][FN56] (Spain has a de jure timeliness rule but it is not automatically administered). [FN57][FN57] Notably, the recently adopted European Union Asylum Procedure Directive includes no time bar. [FN58][FN58]

## IV. The One-Year Bar Causes Numerous Other Adverse Policy Consequences

### A. Limited Federal Jurisdiction and the BIA Practice of ‘Affirming Without Opinion’ Invites Caprice

The jurisdiction stripping provisions of the INA applicable to one-year bar determinations discussed above, have meant a near absence of guidance from the federal courts. [FN59][FN59] Together with the BIA's recent practice of affirming IJ decisions without opinion, this means that judicial or quasi-judicial guidance on these

complicated legal issues is scant. The BIA has published only two decisions on the one-year bar. [FN60][FN60] There are also only a handful of unpublished BIA cases on point.

This deficit of published decisions frustrates Congress' aim to oversee the implementation of the one-year bar. It also allows arbitrariness to go unchecked. The outcome of a one-year bar determination is likely to turn on which IJ is assigned to the case. According to practitioners, IJs vary widely in the weight they assign to psychological evaluations and differ dramatically in the degree to which they understand why an asylum seeker might not come forward immediately. [FN61][FN61] Other attorneys report that the level of sympathy a \*713 case garners determines the outcome of the case's one-year issue. [FN62][FN62]

Several prototypes of caprice stand out:

- A Kenyan woman whom the police persecuted for her involvement with a political opposition group. The applicant also feared forcible FGC after two of her sisters were subjected to it and one died from complications. The applicant fled to the United States. After arrival, she married a U.S. citizen. Her husband filed an immigration petition on her behalf but soon began to drink heavily and was verbally abusive. The applicant attempted reconciliation with her husband but he withdrew his petition and asserted that the marriage had been fraudulent. By this time one year had already passed. The IJ found that the applicant "should have known" that her marriage was faltering and that she would need to find an alternative status in order to maintain a lawful presence. The IJ applied the one-year bar to deny her asylum claim, but granted withholding and CAT. On cross appeal the BIA sustained the denial of asylum and reversed the grants. [FN63][FN63]

- A Gambian woman was subjected to FGC against her will before she fled to the United States in 1994, three years before the one-year bar came into effect. A non-lawyer helped her fill out her asylum application. While in the U.S., she later gave birth to seven U.S. citizen children, including several daughters. She feared that they would also be forced to undergo FGC. Her retained lawyer promised but failed to update her application to include FGC in her claim. He later disappeared requiring her to make many court appearances without counsel. In 2003, \*714 she obtained new representation and immediately filed an amended application and supporting documents that included the FGC claim. Neither the government attorney nor the IJ objected to the amended application. A few months later, the case was transferred to another IJ for the merits hearing. The IJ found the applicant eligible for asylum but held that the applicant should have filed an amended application within one year of IIRIRA's effective date, and found that no exceptions applied. The IJ also found her ineligible for withholding. After her attorneys filed an extensive brief on appeal, the BIA remanded and ordered the IJ to grant asylum. [FN64][FN64]

## B. The One-Year Bar Causes Inefficiency and Waste

### i. The One-Year Bar Causes Excessive Referrals from the Asylum Office

Asylum practitioners report that the one-year bar causes most of their referrals to Immigration Court. [FN65][FN65] A survey of two years of cases referred to Survivors International confirms this as well. One practitioner reports that AOs refer cases under the one-year bar where they are otherwise reluctant to grant. [FN66][FN66] This surge in referrals undermines the very purpose the Asylum Office was created. The former INS established this office to make the asylum process more humane and more efficient. [FN67][FN67]

If the one-year bar shifts the burden of adjudicating asylum claims from the Asylum Office to the Immigra-

tion Court, the outcome is waste and inefficiency. When an IJ re-adjudicates an affirmative asylum claim, not only is the case presented and determined twice (once before the AO and once before the IJ), but three separate government employees take part in the adjudication: the AO, the IJ, and the DHS Trial Attorney (TA). When an AO \*715 adjudicates the claim, the cost to the taxpayers is the salary of one government employee, rather than three.

Another result of this shift is the squandering of expertise. IJs are responsible for all immigration cases and lack the AO's particular focus on, and training in, asylum matters. Even within the interview process before the AO, the one-year bar determination is highly resource intensive. Representatives report that "virtually the entire interview" is taken up with testimony about the one-year bar. [FN68][FN68]

### C. The One-Year Bar Deters Legitimate Asylum Claims

Where the one-year bar is at issue, attorneys may discourage clients from filing - even where arguable exceptions exist. Affirmative applicants [FN69][FN69] have much to lose by coming forward and a low likelihood of prevailing if the one-year bar is implicated.

Documented examples of attorney discouragement include:

- An applicant with severe symptoms indicative of PTSD and MDD, was told by her prior attorney that no refuge was available to her in the United States because of the one-year bar. [FN70][FN70]
- An applicant who entered the country as an unaccompanied minor and was diagnosed with PTSD and MDD. Despite the existence of two sets of facts giving rise to independent exceptions, the NGO that counseled her also told the applicant no relief was available. [FN71][FN71]

### D. The One-Year Bar Disproportionately Impacts Detained Persons

Physicians for Human Rights reports that detained asylum seekers have "extremely high symptom levels of anxiety, depression and post-traumatic stress disorder." [FN72][FN72] Together with limited access to \*716 counsel, this means that these individuals are more likely to delay their applications. The case of Y-C-, above, illustrates this point. There, the unaccompanied, detained minor did not apply until five months after his release. [FN73][FN73] It is conceivable that this delay would have been avoided if there were in fact a notice program like the one Representative McCollum envisioned ("the Immigration Service would be required to tell people who came in [about asylum and the one-year bar]"). [FN74][FN74] Detained persons may also experience greater difficulty obtaining the psychological services necessary to both their recovery and their asylum claim.

### E. The One-Year Bar Disproportionately Impacts Unaccompanied Minors

The Y-C- case described above provides precedent for adjudicators to deny the applications of unaccompanied minors for failure to submit an application within twelve months of entry. While the Board found that an exception applied in that particular case, the majority outlined the rule that "we are not required to excuse [an unaccompanied minor's] tardy filing merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance." [FN75][FN75] Unaccompanied minor status will therefore not always excuse untimely filing. An example is the case of the psychologically impaired Albanian teenager who filed one month late and was denied. [FN76][FN76]

#### F. The One-Year Bar Disproportionately Impacts Groups of Applicants Where Stigma Delays Filing

A victim of persecution may delay applying for asylum or may not divulge crucial information to her attorney where certain cultural stigmas impair disclosure. Such victims include women, victims of sexual violence, rape survivors, victims of domestic violence, lesbian, bisexual, gay and transgender persons, and HIV-positive individuals. Because applicants often hire immigration attorneys from the same \*717 cultural background, the same obstacles to disclosure apply.

Eighty percent of gender-based asylum claims involve a diagnosis of PTSD. [FN77][FN77] These individuals are therefore more likely to experience trauma-based obstacles to timely filing. Many victims experience feelings of shame, as documented in SI's case files. For example, in one SI case, a victim of incest, physical abuse and rape found it very difficult to relate these things and only did so when it appeared she had no other choice. [FN78][FN78]

Victims of stigma-inducing persecution may also fear revealing past events to current partners. In many cultures shame attaches to victims of rape. In others, domestic violence is not discussed. An example is:

- A Guatemalan domestic violence victim survived attempted murder by her influential husband, who followed her to the United States. The woman was afraid to tell the authorities about her husband because of his influence. She also had difficulty telling her lawyer what had happened to her because he was male. [FN79][FN79]

Lesbian, gay, bisexual and transgender persons also experience greater obstacles to timely filing. [FN80][FN80] Individuals are often not aware that protection exists for persons with these characteristics. [FN81][FN81] Until 1990, U.S. law continued to designate homosexuality as a ground of inadmissibility. U.S. anti-sodomy laws were first found to be unconstitutional as recently as 2003. Immigration policies restrict entry for HIV-positive individuals to this day.

\*718 The case of a Malaysian lesbian illustrates this pattern of delay. Familial and societal pressure led the lesbian applicant to marry a husband. Her husband was mentally and physically abusive. The applicant fled to the United States, where she isolated herself from both the Asian and the lesbian community for fear of rejection and condemnation. She sought immigration assistance soon after entering the country but sexual orientation had not yet been recognized as a basis for asylum. Years passed before the applicant filed. She testified that she could not have testified clearly to her lesbian identity at time of first entry and was still struggling with her lesbian identity, despite having had a female partner for many years. The applicant was granted asylum at the Immigration Court. [FN82][FN82]

#### G. The One-Year Bar Disproportionately Impacts Socio-economically Disadvantaged Persons

While asylum applicants have the right to representation in immigration proceedings, that representation is at their own expense. Because the vast majority of applicants are not permitted to work lawfully in this country and many have exhausted their resources in flight, asylum applicants have limited funds. Many appear without counsel. Lack of experience with the American legal system and unfamiliarity with the language add to their difficulty in establishing the date of entry by clear and convincing evidence.

Impoverished applicants who enter the country through the desert on foot, or as stowaways, do so without inspection and have no plane ticket to prove their date of entry. [FN83][FN83] Even if the applicant has a law-

yer, the advocate spends a significant portion of the interview soliciting testimony regarding the border crossing date in order to meet the “clear and convincing” standard. [FN84][FN84]

Relevant instances include:

- A 21- year-old Sikh man who fled India after multiple detentions and tortures. He entered without inspection and applied for asylum. The applicant submitted news \*719 reports and published photographs of himself outside of the U.S. less than one year before he entered. Notwithstanding this documentary evidence, the IJ held that the applicant was not credible, and that he had not met his burden of proving the date of entry. The BIA affirmed the IJ's decision without opinion and denied the applicant's motion to reconsider. [FN85][FN85]

- An Ethiopian woman fearing FGC and harm based on her imputed political opinion applied for asylum within six months of entering the country, but her testimony about her entry date was unreliable because of the extreme stress of her border crossing. The IJ found that she had not carried her burden of showing that she had applied within one year of her entry by clear and convincing evidence. The IJ denied asylum and granted withholding. [FN86][FN86]

Where an individual is subject to the one-year bar, but exceptions may apply, cost is also an obstacle. Establishing an exception to the deadline is resource intensive. The exceptions are highly technical, requiring expert assistance. Necessary psychological evaluations are costly, averaging between \$650 and \$1,000, and more if the expert's testimony is required. [FN87][FN87]

#### H. The One-Year Bar Begets Covert “Settlements” with DHS

Attorneys report that DHS counsel sometimes offer withholding or CAT in exchange for the applicant's withdrawal of the asylum claim. [FN88][FN88]

Examples include:

- An applicant was raped and beaten over a number of years. A psychologist diagnosed her with PTSD, MDD, chronic insomnia and chronic pain. The psychologist explained that these conditions delayed her application for asylum and affected her ability to explain why she applied late. The AO referred her to Immigration Court where the \*720 TA offered withholding if she withdrew her asylum claim. The applicant agonized over the choice, as it would strand her minor children in the home country. She accepted the offer, after which the TA remarked that she really must have had a well-founded fear of persecution. [FN89][FN89]

- A woman from Mali was subjected to FGC as a child. After the birth of her daughter in the United States she submitted an asylum claim based on her fear that her daughter would also be subjected to that fate. The TA negotiated with the applicant. The TA would not oppose a grant of withholding in exchange for withdrawal of the asylum claim. Terrified of losing her asylum claim and being forced to return to Mali, the applicant agreed to withholding, stranding her 7-year-old child in Mali with no prospect for reunification. The applicant must report periodically to removal officers and reapply annually to renew authorization to work. [FN90][FN90]

- A Filipina woman, suffering from PTSD after years of sexual and physical domestic violence at the hands of her husband (a political hit-man, charged with two murders) accepted the Trial Attorney's offer to not oppose withholding, in exchange for withdrawal of the asylum claim. Her husband maintains custody of their daughter. After the applicant was granted withholding, the United States Citizenship and Im-

migration Service denied her daughter's application for parole into the United States. [FN91][FN91]

- A gay Mexican male accepted withholding at the Immigration Court after referral from the AO (above).

- An Uzbekistani asylum seeker accepted a compromise of withholding in exchange for dropping the asylum claim because of one-year bar issues. [FN92][FN92] \*721 Outside the asylum area, the settlement of cases can be a useful and appropriate means to clear crowded dockets and enable parties to avoid protracted litigation. But in dealing with refugees fleeing persecution, it is not clear that offering an asylum applicant withholding is an appropriate use of DHS's prosecutorial discretion. The fact that a terrified, psychologically stressed, financially impoverished applicant accepts a "deal" does not necessarily mean that the United States is fulfilling its international obligations under the Refugee Convention or that DHS is providing bona fide refugees with the safe haven Congress envisioned.

#### I. The Refugee Population is Shifted into Withholding and CAT Statuses

As the examples listed in previous sections demonstrate, many individuals who would receive asylum, but for the one-year bar, instead receive the protection of withholding or relief under the CAT. Withholding and CAT prevent removal from the United States and entitle the recipient to a work permit. These statuses do not, however, provide any path to lawful permanent residence or citizenship. This gives rise to a growing class of persons with no future return to their home countries, no path to citizenship in their adopted country, and no foreseeable ability to vote and partake in the political process in their new home.

Most importantly, unlike asylum, these statuses do not allow the protected person to petition for reunification with her child or spouse. In many cases, this means that a protected person is powerless to help her child escape ongoing persecution in her country of origin. One example of this is the case of the Gambian mother described above whose children remain in Gambia where they are beaten and abused by their father. Another is that of the woman from Mali described above, with a U.S.-citizen-infant-daughter and a 7-year-old in Mali, who accepted DHS's non-opposition to a grant of withholding and duly withdrew her asylum claim.

These women are the "lucky" ones. Even more troublesome is the fate of those individuals who cannot show the 51 percent likelihood of persecution necessary for withholding or CAT relief. Such individuals may well have been able to show a 10 percent likelihood of persecution, but are instead returned to countries where they have a reasonable fear of persecution after a 12-month technicality triggers an automatic denial.

#### \*722 J. The One-Year Bar Penalizes Applicants Who Seek Other Forms of Relief During the First Year of Entry

Asylum applicants who attempt to maintain or obtain alternative lawful status during their first year are penalized. For example, a Hindu preacher from Bangladesh, like the Yemeni visitor described above, was penalized for relying on an alternative immigration status before submitting an asylum application. The Hindu preacher experienced torture, violence, harassment, beatings, and was forced to violate his religious beliefs in Bangladesh. He came to the United States and was working with a religious organization. He believed that he would be granted a religious worker visa but it was denied. Receiving the denial, he applied for asylum but was precluded for tardiness. He was found to qualify for withholding and did not appeal the asylum denial. His wife remains in Bangladesh and is at risk. The preacher has no means of reuniting with his wife. [FN93][FN93]

This contravenes DOJ's own published policy:

The Department does not wish to force a premature application for asylum in cases in which an individual believes circumstances in his country may improve, thus permitting him to return to his country. For example, an individual admitted as a student who expects that the political situation in her country may soon change for the better as a result of recent elections may wish to refrain from applying for asylum until absolutely necessary. [FN94][FN94]

## VI. Recommendations

The examples listed above demonstrate that legislative intent is frustrated by the current application of the one-year bar. The one-year bar has no impact on fraudulent claims. It does, however, cause the refoulement of legitimate refugees, in violation of international obligations. The one-year bar, in its current form, leads to arbitrary and disparate outcomes, deters bona fide claims, and squanders precious administrative resources. CGRS therefore recommends \*723 abandoning the one-year bar in its entirety. This would place the U.S. in the same position as the other top refugee-receiving countries.

Other measures to consider include: (1) reducing the burden of proof required to establish the date of entry, (2) requiring asylum officers to reach a claim's merits despite the implication of the one-year bar, (3) replacing the "one-year" bar with a "reasonable period" bar, [FN95][FN95] (4) expanding the non-exhaustive list of examples of exceptional and changed circumstances, and (5) making application of the bar non-obligatory.

Another suggestion is to craft legal presumptions out of the already enumerated examples. For example, today an applicant bears the burden of demonstrating that: (1) she entered the country as an unaccompanied minor, (2) this status related to the delay in filing and (3) she filed within a reasonable period of time given her minor status.

With the presumption, an applicant with PTSD could be required to present a credible expert diagnosis. Having made that showing, she would be entitled to a presumption that she qualifies for an exception to the one-year bar. The DHS could then rebut this presumption by demonstrating that the tardiness of her application was unrelated to her traumatized state, or that she did not file within a reasonable period of time given her condition.

Likewise, an unaccompanied minor would also presumptively be excused from the one-year deadline. DHS could then rebut the presumption with a showing that the applicant intentionally created her condition, that her failure to timely apply was unrelated to her unusual status, or that she did not apply within a reasonable period of time given her minor age and lack of guardian.

As the cases discussed herein demonstrate, the one-year bar has harsh humanitarian consequences. The Gambian woman with withholding will never reunite with her children or save them from their abusive father. The Albanian adolescent who escaped from sexual slavery, entered as an unaccompanied minor and documented her PTSD condition was nonetheless denied relief. The Mexican mother and daughter were denied asylum because they applied for asylum five months after police helped them escape from imprisonment by their abusive family member. These and countless \*724 other similar cases shock the conscience and indicate that the time has come for the oversight and reassessment that Senator Hatch and other legislators contemplated when they enacted the one-year bar.

[FNd1]. This article is a companion piece with Dr. Stuart Lustig's article.

[FN1]. Clinical Professor at U.C. Hastings, College of the Law, and Director of the Center for Gender & Refugee Studies. She would like to thank her co-author, Marcelle Rice, as well as members of the CGRS staff, and students in the U.C. Refugee and Human Rights Clinic, whose research and analysis made this article possible - most notably Neela Otoku Chakravartula, Meghan Hafner, Kaitlin Kalna, Stephen Knight and Shin-Ming Wong.

[FN2]. Associate immigration lawyer at the Law Office of Robert L. Lewis in Oakland, California, and a project-based consulting attorney with CGRS. She would like to thank Karen Musalo and Stephen Knight for their thoughtful mentorship. She is also grateful to the individuals who have shared information about their cases.

[FN3]. The use of the word “may” indicates that the Attorney General can deny an application for protection even where he is satisfied that the asylum seeker meets the statutory exceptions.

[FN4]. Decisions interpreting this statutory provision to completely bar federal court review abound. See, e.g., *Ismailov v. Reno*, 263 F.3d 851 (8th Cir. 2001); *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001); *Fahim v. U.S. Atty. Gen.*, 278 F.3d 1216 (11th Cir. 2002).

[FN5]. See, e.g., *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007) (finding jurisdiction over questions of law which include the application of law to undisputed facts, namely whether changed circumstances excused untimely filing in an asylum application, and relying on the doctrine of constitutional avoidance to interpret Congressional intent to restore judicial review); see also *Liu v. INS*, 475 F.3d 135 (2d Cir. 2007) (finding jurisdiction to review whether any rational trier of fact would be compelled to conclude that the petitioner timely filed his asylum application); *Chen v. U.S. DOJ*, 471 F.3d 315, 326-27 (2d Cir. 2006); *Nakimbugwe v. Gonzales*, 475 F.3d 281 (5th Cir. 2007) (finding jurisdiction where the Immigration Judge misinterpreted federal regulations regarding the one-year bar).

[FN6]. See 141 Cong. Rec. E1635 (daily ed. Aug. 3, 1995), cited in Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, *Immigr. Briefings*, Aug. 2005, at 4 (citing Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 *Geo Immigr. L.J.* 95, 101-102 (1996); Daniel Horne & Ari Weitzhandler, *Asylum Law After the Illegal Immigration Reform and Immigrant Responsibility Act*, 97-04 *Immigr. Briefings* 1, 2 (1997)).

[FN7]. Defensive asylum applications are those applications submitted after the individual is already in removal proceedings.

[FN8]. See Celia Dugger, *Immigration Bills' Deadlines May Imperil Asylum Seekers*, *N.Y. Times*, Feb. 12, 1996, at B1 (quoting Rep. Charles Schumer: “If you believe enough in America to claim asylum, you ought to come forward and not wait till someone says, ‘Gotcha’”), cited in Khandwala et al., *supra* note 4, at 4 (citing Pistone, *supra* note 4, at 101).

[FN9]. See Khandwala et al., *supra* note 4, at 5 (passage was “protection oriented”).

[FN10]. See 142 Cong. Rec. S11840 (daily ed. Sept. 30, 1996), cited in Khandwala et al., *supra* note 4, at 5.

[FN11]. See 142 Cong. Rec. S11838, S11840 (daily ed. Sept. 30, 1996), cited in Khandwala et al., *supra* note 4, at 5.

[FN10]. See *supra* note 8.

[FN11]. See Comments of Rep. Betty McCollum on Pork (America's Talking Television Broadcast Nov. 15, 1995) cited in *Khandwala et al.*, *supra*note 4, at 5, (citing Pistone, *supra* note 4, at 101).

[FN12]. The fact that immigrants often have no knowledge of asylum, let alone of a filing deadline is made clear by one IJ's comment that if lack of knowledge about asylum provided an exception to the deadline, "then the statute essentially would never apply." See *Matter of Anon.* (A# redacted) (Immigration Court, Sept. 7, 2004) (CGRS case no. NC0001) (denying the asylum application, but granting withholding of removal to a young Burmese man who endured more than three years of torture while imprisoned for political activism). See also *Matter of Anon.* (A# redacted) (Immigration Court, Feb. 2, 2006) (CGRS case no. 61897) (Peruvian survivor of severe domestic violence at the hands of her domestic partner who worked for the police delayed applying for several years because she did not know the possibility existed) (on file with CGRS).

[FN13]. See Letter from Rene van Rooyen, UNHCR Representative, to Senator Henry Hyde (Aug. 25, 1995), cited in *Khandwala et al.*, *supra*note 4, at 4 (citing Pistone, *supra* note 4, at 103).

[FN14]. See FDCH Political Transcripts, [sic] Holds News Conference on the Asylum Reform Efforts (Jan. 4, 1996), cited in *Khandwala et al.*, *supra*note 4, at 4.

[FN15]. See Letter from Jamie S. Gorelick, Deputy Attorney General, to Sen. Henry Hyde (Sept. 15, 1995), cited in *Khandwala et al.*, *supra*note 4, at 4.

[FN16]. See *Khandwala et al.*, *supra*note 4, at 5-6. The jurisdiction-stripping provision in the INA, combined with the BIA's practice of "affirmance without opinion," has suspended the development of relevant precedent. The BIA has issued two published opinions and a mere handful of unpublished decisions. *Id.*

[FN17]. 8 C.F.R. § 208.4 (a)(4) & (5) (2006).

[FN18]. INS, Asylum Officer Training Manual - Lesson Plan Overview: One Year Filing Deadline (Nov. 2001), available at [http://asylumlaw.org/docs/unitedstates/asylum\\_officer\\_training\\_oneyear\\_112001.pdf](http://asylumlaw.org/docs/unitedstates/asylum_officer_training_oneyear_112001.pdf), cited in *Khandwala et al.*, *supra*note 4, at 3-4.

[FN19]. See conversation with Andrew Schoenholtz, Deputy Director of the Institute for the Study of International Migration, Summer 2006; see also Andrew I. Schoenholtz, [Refugee Protection in the United States Post-September 11th](#), 36 *Colum. Hum. Rts. L. Rev.* 323, at 338 n. 62 (2005), cited in Shonali Some, *One Year Bar*, May, 2007 (unpublished manuscript, on file with the CGRS).

[FN20]. See Michael R. Pistone, & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 *Geo. Immgr. L.J.* 1, 9 (2001), cited in Shome, *supra* note 19, at 3 (The organization's former name was Lawyer's Committee for Human Rights).

[FN21]. See interview with East Bay Sanctuary Covenant Asylum Program Coordinator Michael Smith, June 27, 2007 (on file with CGRS).

[FN22]. Of 231 applications examined, approximately 77 were clearly filed after one year. Twenty-four more cases may have been filed out of time, but limited documentation made confirmation impossible. *Id.*

[FN23]. See Pistone & Schrag, *supra*, note 20, at 2.

[FN24]. See Matter of Anon. (A# redacted) (Immigration Court, July 3, 2003) (CGRS case no. 992) (the applicant later obtained alternative relief with a U visa)(on file with CGRS).

[FN25]. See Matter of Anon. (A# redacted) (Immigration Court, Feb. 14, 2005) (CGRS case no. 3064)(on file with CGRS).

[FN26]. See Matter of Anon. (A# redacted) (Immigration Court, Apr. 18, 2006) (CGRS case no. 3904)(on file with CGRS).

[FN27]. See Matter of Anon. (A# redacted) (Immigration Court, date unknown) (CGRS case no. 1394)(on file with CGRS).

[FN28]. See Matter of Anon. (A# redacted) (Immigration Court, Apr. 15, 2006) (CGRS case no. 3893)(on file with CGRS).

[FN29]. See Matter of Anon. (A# redacted) (Immigration Court, July 28, 2004) (CGRS case no. 2920)(on file with CGRS).

[FN30]. See Matter of Anon. (A# redacted) (Immigration Court, Apr. 15, 2005) (CGRS case no. 3154); see also Matter of Anon. (A # redacted) (Asylum Office) (East Bay Sanctuary case B-J- & M-)(on file with CGRS).

[FN31]. See Matter of Anon. (A# redacted) (Immigration Court, June 1, 2005) (CGRS case no. 2512)(on file with CGRS).

[FN32]. See Matter of Anon. (A# redacted) (Immigration Court, date unknown) (CGRS case no. NC0013)(on file with CGRS).

[FN34]. See Matter of Anon. (A# redacted) (Immigration Court, May 8, 2006) (CGRS case no. 378)(on file with CGRS).

[FN35]. See Khandwala et al., *supra*note 4, at 7.

[FN36]. See PTSD Patient Page 286 JAMA 630, 630 (2001), cited in Shome, *supra* note 19, at 4; see also Diagnostic Manual, American Psychiatric Association, 309.81 Posttraumatic Stress Disorder (2000), cited in Shome, *supra* note 19, at 4.

[FN37]. To satisfy the extraordinary circumstances exception to the one-year bar, the applicant must demonstrate that her mental disorder “directly related” to her delay in filing. 8 C.F.R. §208.4 (a)(5) (2006).

[FN38]. See Matter of Anon. (A# redacted) (Immigration Court, Apr. 22, 2005) (CGRS case no. 3267)(on file with CGRS).

[FN39]. See Matter of Anon. (A# redacted) (Immigration Court, Apr. 18, 2006) (CGRS case no. 3904); see also Matter of Anon. (A# redacted) (Immigration Court, Oct. 8, 2002) (CGRS case no. NC0003)(on file with CGRS).

[FN40]. See Matter of Anon. (A# redacted) (Immigration Court, June 18, 2002) (CGRS case no. 2545) (on file with CGRS).

[FN41]. See *Matter of Anon.* (A# redacted) (Immigration Court, date unknown) (CGRS case no. 3123)(on file with CGRS).

[FN42]. See *Matter of Anon.* (A# redacted) (Immigration Court, Feb. 5, 2004) (CGRS case no. 1034)(on file with CGRS).

[FN43]. See *Matter of Anon.* (A# redacted) (Immigration Court, June 12, 2006) (CGRS case no. 4000)(on file with CGRS).

[FN44]. See *Matter of Anon.* (A# redacted) (Immigration Court, Mar. 31, 2005) (CGRS case no. NC0007)(on file with CGRS).

[FN45]. See U.S. Federal Criminal Sentencing Guidelines, § 5K2.13. Diminished Capacity (Policy Statement), cited in Shome, *supra* note 19, at 7; see also *United States v. Cantu* (1993, CA9 Wash) 12 F.3d 1506 (holding that “reduced mental capacity” under § 5K2.13 comprehends ? behavioral disturbances that impair formation of reasoned judgments, and defendant suffering from post-traumatic stress disorder, an emotional illness, was eligible for [downward sentencing] departure if his ailment distorted his reasoning and interfered with his ability to make considered decisions), cited in Shome, *supra* note 19, at 7.

[FN46]. See *Matter of Anon.* (A# redacted) (Immigration Court, Jan. 15, 2005) (CGRS case no. 2562)(on file with CGRS).

[FN47]. See *Matter of Anon.* (A# redacted) (Immigration Court, June 15, 2002) (CGRS case no. 654)(on file with CGRS).

[FN48]. See *Matter of Anon.* (A# redacted) (Immigration Court, date unknown) (CGRS case no. NC0011)(on file with CGRS).

[FN49]. See INS, Asylum Officer Training Manual, *supra* note 18.

[FN50]. See 65 Fed. Reg. 76, 121, 76, 123 (Dec. 6, 2000) (to be codified at 8 C.F.R. pt. 208).

[FN51]. See *Matter of Anon.* (A# redacted) (Immigration Court, date unknown) (CGRS case no. NC0008) (on file with CGRS); *Al-Haiki v. Gonzales*, No 04-76593, 05-74155 slip op. (9th Cir. June 1, 2007) (denying petition for review); *Al-Haiki v. Gonzales*, No 04-76593, 05-74155 slip op. (9th Cir. July 9, 2007) (denying petition for rehearing and request for rehearing en banc).

[FN52]. See *Matter of Anon.* (A# redacted) (Asylum Office March 2004) (CGRS case no. 4517), reversed by *Matter of Anon.* (A# redacted) (Immigration Court, Dec. 19, 2006) (CGRS case no. 4517)(on file with CGRS).

[FN53]. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

[FN54]. See *Matter of Anon.* (A# redacted) (Immigration Court, Sept. 19, 2005) (CGRS case no. 3301)(on file with CGRS).

[FN55]. United Nations High Commission for Refugees Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees at ¶ 190.

[FN56]. See United Nations High Commission for Refugees, Asylum Levels and Trends in Industrialized Coun-

tries, 5 (2005).

[FN57]. Conversation with Spanish refugee attorney Carmen Miguel Juan, cited in Shome *supra* note 19, at 6 (on file with CGRS).

[FN58]. See Council Directive 2005/85/EC of December 1, 2005, available at < [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l\\_326/l\\_32620051213en00130034.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_326/l_32620051213en00130034.pdf)>(visited March 28, 2008).

[FN59]. As noted briefly in Part I above, the Real ID Act significantly impacts the INA's jurisdiction-stripping provisions. See, e.g., *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007); see also *Chen v. U.S. DOJ*, 471 F.3d 315, 326-27 (2d Cir. 2006).

[FN60]. *Matter of A-M-*, 23 I. & N. Dec. 737 (BIA 2005) and *Matter of Y-C-*, 23 I. & N. Dec. 286 (BIA 2002).

[FN61]. See Shin-Ming Wong & Neela Otoku Chakravartula, *How the One-Year Filing Deadline Has Affected Asylum Seekers in the United States 2* (May, 2007) (unpublished manuscript, on file with CGRS) (citing interviews with Cara Jobson, immigration attorney (Oct. 24, 2006), Alison Dixon, immigration attorney (Oct. 25, 2006), and Paul O'Dwyer, immigration attorney (Sept. 28, 2006)).

[FN62]. According to one attorney, all of her clients who had undergone FGC were granted an exception to the deadline. *Id.* Another attorney reports that “normative” judgments determine the outcome of timeliness verdicts. *Id.*

[FN63]. See *Matter of Anon.* (A# redacted) (Immigration Court, Sept. 2, 2004) (CGRS case no. 4244); reversed in part by *Matter of Anon.* (A # redacted) (Board of Immigration Appeals, July 27, 2006)(on file with CGRS). The BIA remanded for an order of removal. The IJ granted voluntary departure and denied the applicant's motion to reconsider and reopen the earlier decision. See *Matter of Anon.* (A# redacted) (Immigration Court, January 4, 2007) (CGRS case no. 4244) (CGRS case no. 4244). The appeal of the denial of the motion to reconsider is pending before the BIA (on file with CGRS).

[FN64]. See *Matter of Anon.* (A# redacted) (Immigration Court, Oct. 6, 2003) (CGRS case no. 1162)(on file with CGRS).

[FN65]. Wong & Chakravartula, *supra* note 61, at 8 (citing interviews with Alice Hall, immigration attorney (Oct. 25, 2006) and Joye Wiley, immigration attorney (Oct. 4, 2006)).

[FN66]. See *id.* at 9 (citing interview with Alison Dixon, immigration attorney (Oct. 25, 2006)).

[FN67]. *Id.* at 8 (citing INS Opens Asylum Offices Amid Large Backlogs, Charges of Inadequate Funding, 68 No. 13 Interpreter Releases 401 (1991)).

[FN68]. See Interview with Josh Caplan EBSC, CGRS Refugee Rights Clinic, Spring 2006, cited in Shome, *supra* note 19, at 2 (on file with CGRS).

[FN69]. “Affirmative applicants” are those asylum seekers who are not in removal proceedings and are contemplating bringing themselves to the attention of the immigration authorities by submitting an asylum application.

[FN70]. See *Matter of Anon.* (A# redacted) (CGRS one-year bar case no. 51761)(on file with CGRS).

[FN71]. See *Matter of Anon.* (A# redacted) (CGRS one-year bar case no. 51758)(on file with CGRS).

[FN72]. See Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* at 1 (2003).

[FN73]. *Matter of Y-C-*, 23 I & N Dec. at 286.

[FN74]. See Comments of Rep. McCollum, *supra* note 11.

[FN75]. *Matter of Y-C-*, 23 I & N Dec. at 288.

[FN76]. See *Matter of Anon.* (A# redacted) (Immigration Court, Feb. 5, 2004) (CGRS case no. 1034) (on file with CGRS).

[FN77]. Preliminary findings in a study conducted by Survivors International (on file with CGRS).

[FN78]. See *Matter of Anon.* (A# redacted) (CGRS one-year bar case no. 61913) (on file with CGRS).

[FN79]. See *Matter of Anon.* (A# redacted) (Asylum Office, date unknown) (CGRS one-year bar case no. 51761); see also *Matter of Anon.* (A# redacted) (CGRS one-year bar case no. 51762); see also *Matter of Anon.* (A# redacted) (CGRS one-year bar case no. 51759); see also *Matter of Anon.* (A# redacted) (Asylum Office, August, 2006) (CGRS one-year bar case no. 61913); see also *Matter of Anon.* (A# redacted) (Immigration Court, date unknown) (CGRS case no. MW0008)(on file with CGRS).

[FN80]. See Wong & Chakravartula, *supra* note 61, at 6-7 (citing Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. City L. Rev. 233 (2006)).

[FN81]. See e.g., *Matter of Anon.* (A# redacted) (did not seek asylum) (CGRS case no. MW0007)(on file with CGRS).

[FN82]. See *Matter of Anon.* (A# redacted) (Immigration Court, Jan. 7, 2005) (CGRS case no. NC0006).

[FN83]. Wong & Chakravartula, *supra* note 61, at 3 (citing Letter of Complaint from East Bay Sanctuary Covenant (Mar. 17, 2003)(on file with CGRS)).

[FN84]. See *id.* at 4 (citing interview with Michael Smith, Asylum Program Coordinator, East Bay Sanctuary Covenant (Nov. 10, 2006))(on file with CGRS).

[FN85]. See *Matter of Anon.* (A# redacted) (Immigration Court, date unknown) (CGRS case no. NC0009).

[FN86]. See *Matter of Anon.* (A# redacted) (Immigration Court, date unknown) (CGRS case no. NC0013).

[FN87]. See *supra* note 21.

[FN88]. See *id.* at 2 (citing interview with Joyce Wiley, immigration attorney (Oct. 4, 2006) and Cara Jobson, immigration attorney (Oct. 24, 2006)).

[FN89]. See Matter of Anon. (A# redacted) (Immigration Court, June 15, 2003) (CGRS case no. NC0021); See also Matter of Anon. (A# redacted) (CGRS one year bar case no. 51706)(on file with CGRS).

[FN90]. See Matter of Anon. (A# redacted) (Immigration Court, May 13, 2005) (CGRS case no. 970)(on file with CGRS).

[FN91]. See Matter of Anon. (A# redacted) (Immigration Court, March 15, 2004) (CGRS case no. 1256)(on file with CGRS).

[FN92]. See Matter of Anon. (A# redacted) (Immigration Court, date unavailable) (CGRS case no. 3748)(on file with CGRS).

[FN93]. See Matter of Anon. (A# redacted) (CGRS case no. MW0001)(on file with CGRS).

[FN94]. 65 Fed. Reg. at 76, 121-01.

[FN95]. This solution would avoid arbitrary results that ensue where, for example, an applicant applies 366 days after arrival.

31 Hastings Int'l & Comp. L. Rev. 693

END OF DOCUMENT