A HANDBOOK FOR EXPERT WITNESSES IN LATIN AMERICAN GENDER- AND SEXUALITY-BASED ASYLUM CASES

PRACTICING ASYLUM

EDITED BY
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WITH A FOREWORD BY BLAINE BOOKEY

Practicing Asylum

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A Handbook for Expert Witnesses in Latin American Gender- and Sexuality-Based Asylum Cases

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In memory of Dr. Thomas M. Davies Jr., 1940–2019

For Ariela, la Quiteña de mi corazón

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FOREWORD

Twenty years ago I embarked on my career in immigrant rights as a paralegal specializing in asylum cases. Since then I have had the great privilege of helping hundreds of individuals find safety in the United States. Behind each successful case is a team of lawyers, academics, doctors, and other professionals dedicated to ensuring that each person deserving of protection can meet the hefty evidentiary burden placed on them by U.S. law.

One of the first experts I collaborated with would also become one of the most memorable, Thomas M. Davies Jr. Beyond his immense passion, Professor Davies exhibited vast knowledge of the underlying conditions forcing LGBTQ+ individuals to flee. And more importantly, he possessed an exceptional ability to translate complicated concepts with complex histories to at best uneducated and at worst disinterested audiences. We worked together on dozens of cases, but one stands out. We were before the toughest immigration judge in San Francisco who rarely granted asylum to applicants. Davies's testimony—even over the phone—had a visible impact on the judge, who granted asylum to our client, a lesbian from Central America. We had prepared our client for a loss; after hearing the result, the look of relief and calm on her face left an indelible impression on me.

Many others fleeing violence and persecution in their home countries can attribute their safety to the groundbreaking work of Professor Davies and other experts and organizations like my own, the Center for Gender and Refugee Studies, that support bringing scholarly expertise to bear on asylum hearings. It has been an honor being involved in the Practicing Asylum Project, resulting in this robust volume, and to support its lofty goal of increasing the availability of experts to carry on this work. It was especially moving to have the chance to meet Professor

Davies in person before his passing. I keep on my wall a letter he wrote to me after I graduated from law school and started at the Center, congratulating me and thanking me for my efforts. It is a reminder that one person can touch many lives and do it with joy, gratitude, and humility. Thank you, Professor Davies, for leading by example and inspiring a generation.

Since its inception with the passage of the 1980 Refugee Act, the U.S. asylum system has faced challenges to fulfilling its promise of upholding our obligations to those escaping persecution. But all challenges of the past pale in comparison to those of the past several years that have attacked its very existence. The Trump administration led a multiyear campaign to dismantle asylum in the United States, from shutting off access altogether to raising the legal requirements to such an extent that only a small number of people could meet them. While the Biden administration has taken some actions and made some promises to restore protections, progress has been slow. The ratcheted-up standards have made the use of experts all but essential to gaining asylum for applicants.

The importance of experts cannot be overstated. The courts of appeals regularly cite expert testimony and reverse asylum denials where the adjudicator overlooked that testimony, which the courts have held must be considered when evaluating the need for protection. Indeed, as described in this handbook, Davies's testimony regarding persecution of gay men in Mexico led to the first published federal court precedent recognizing those claims. The landmark victory in that case paved the way for recognition of similar claims for LGBTQ+ people fleeing from countries all over the globe. The availability of expert testimony can quite literally have life or death consequences. Despite the central role country conditions experts play at this point in the broader asylum adjudication system, the need for experts far outstrips their availability.

The Center for Gender and Refugee Studies, which I have called home since 2011, has been a pioneer in this area of the law. Our founding director, Karen Musalo, was one of the first attorneys to introduce, decades ago, expert testimony into asylum proceedings in immigration court. Among our programs, the Center provides technical assistance to legal representatives across the country, in over eight thousand cases in 2021 alone. We mentor attorneys, consult on winning legal theories, provide litigation resources, and connect advocates with experts.

In 2018 the Center launched the Asylum Expert Witness Database, the first of its kind. Over three hundred experts—including those specializing in country conditions and forensic medicine—have created profiles. Advocates have contacted experts through the database in more than 5,700 cases. In addition to facilitating such connections, the Center provides training for advocates and experts on substantive law and best practices in the field.

Bringing together asylum practitioners with experts, this handbook will make a meaningful contribution to this ongoing endeavor of expanding and professionalizing the use of expert testimony in asylum proceedings. The authors provide

both an interdisciplinary, scholarly grounding for this area and practical guidance for performing the work. Significantly, they offer insights into the challenges witnessing poses for experts on professional but also personal, emotional levels, which will normalize these conversations and help guide collective solutions for overcoming them.

The use of this handbook will go a long way toward ensuring our ultimate objective of securing safe haven for those in need. Hats off to Kimberly Gauderman and the other contributors for this accomplishment.

Blaine Bookey
Legal Director, Center for Gender and Refugee Studies,
University of California College of the Law, San Francisco

ACKNOWLEDGMENTS

Practicing Asylum is a community project, one that has brought together practitioners of asylum, from immigration attorneys to legal scholars and academics, around the shared purpose of making effective expert testimony available to those seeking asylum. It began with a 2015 road trip to California with Liz Hutchison to meet with Blaine Bookey at the Center for Gender and Refugee Studies to discuss ways to increase the number of country conditions expert witnesses. Already by that date, it was apparent that the need for experts far exceeded our number. We expanded our conversations in a national conference held at the University of New Mexico in 2017, bringing together attorneys and experts to share ideas on best practices for expert witnessing. Many of the contributors to this volume attended that conference. By then we also knew that the right to asylum, particularly for those fleeing gender-based violence in their home countries, was under attack. In the following years, the path to asylum became increasingly narrow and asylum seekers would face greater hurdles to substantiate their claims of persecution in their home countries. Increasing the number of experts to document and explain the dangers that asylum seekers fled remains critical to the fair adjudication of their cases. We still need, as Thomas M. Davies Jr. stated in our interview with him in 2015, "to harness the army."

Over the years, this project has indeed harnessed a community of many people and institutions, and it is my honor to acknowledge their support to this volume. First, I thank the volume's contributors: Maria Baldini-Potermin, J. Anna Cabot, Natalie Hansen, Elizabeth Quay Hutchison, and M. Gabriela Torres. Little did we know when we met for a writers' workshop in Santa Fe, New Mexico, at the Women's International Studies Center (WISC) in early March 2020 that this event would be the last time that any of us would be in a group setting for the next two

years. Your ideas, creativity, and devotion of your time to this project in the midst of the COVID-19 pandemic, unprecedented attacks on asylum seekers and their advocates, and individual challenges uplifted my spirit, fortified my commitment to this project, and continue to inspire me. I also thank Blaine Bookey for contributing the foreword to this volume. In these times of unrelenting attacks on asylum seekers, your legal advocacy and the Center for Gender and Refugee Studies' support and resources for legal service providers and expert witnesses is vital to ensuring due process for those fleeing persecution in their home countries.

I am grateful to the institutions that supported my research and writing over the past years. The University of New Mexico History Department enthusiastically embraced my work as an expert witness and supported my research for this volume through the William Shoemaker Endowment in History Research Grant and the Snead-Wertheim Endowed Lectureship. Melissa Bokovoy and Judy Bieber, who chaired the department during this time, promoted my scholarship on immigration and asylum and facilitated my fellowship year and sabbatical leave. At the University of New Mexico, I also received generous support from the Latin American and Iberian Institute, including the Richard E. Greenleaf Conference Award, and from the Feminist Research Institute. Completion of this volume would not have been possible without funding from the American Council of Learned Societies (ACLS) and the Mellon Foundation's Scholars & Society Fellowship, which gave me the rare gift of a year to research, write, and work with the contributors to this volume. I especially thank Desire Barron-Callaci, ACLS Program Officer for Public Engagement, and John Paul Christy, ACLS Senior Director of U.S. Programs, who worked with grantees and provided me with guidance and support during my fellowship year. Through this fellowship, I partnered with the Women's International Study Center in Santa Fe and its executive director, Jordan Young. Jordan administered grant funds and organized logistics, arranged lodging in WISC's beautiful residences, and provided yummy food when all the contributors came together for our writers' workshop. Jordan's assistance, encouragement, and confidence in this project were key at critical junctures, and I am very grateful for my ongoing relationship with her and WISC.

I thank my colleagues who have supported this work and my life as an academic and expert witness. I have counted on Sam Truett, Jason Scott Smith, Durwood Ball, Les Field, and John Geissman for their good council, humor, and solidarity. Karen Powers, who introduced me to the National Archive of Ecuador many years ago, has continued to support me in my work and scholarship on asylum. Deborah Kang, with generosity and kindness, helped me refine my research on immigration history. Lynn Stephen inspires me as a model for her skill in combining rigorous scholarship with expert witnessing. Stefen Vogler's insightful scholarship on LGBTQ+ asylum claims helped me refine my analyses of sexuality-based claims. I thank Marc Becker for sharing his expansive knowledge of modern Ecuador. I have learned a great deal about the asylum system from the legal service

providers I have worked with over the years, and I thank them for entrusting me with their cases and for their guidance. I am especially thankful for the support I have received from attorneys Maria Baldini-Potermin, Blaine Bookey, Robert Etnyre, Natalie Hansen, Drew Heckman, Rebecca Kitson, and Hayden Rodarte. Tom Davies was extremely proud of his wife, Adele Davies, who nourished his spirit and joined him in his efforts to assist asylum seekers, and it is an honor to acknowledge her continuing work in support of immigrants and refugees in our community and her support for this project. The University of New Mexico has been my academic home for almost a quarter of a century, and I gratefully acknowledge the students I have been privileged to teach, my history and Latin Americanist colleagues, and the support I have received from staff, especially Yolanda Martinez, Barbara Wafer, and Dana Ellison. I also thank my colleagues in faculty governance and the staff who have supported us, especially Carol Stephens and Vivian Valencia, who are the keepers of our institutional memory. Shawn Austin, Chad Black, Sara Guengerich, and Margarita Ochoa, my former students and now professors, continue to inspire me to be a better historian. Laura Powell, ABD History, and Elisa Cibils, graduate of the MALAS/JD program, provided valuable assistance at different stages of this project.

I have been honored to work with the University of California Press editor, Kate Marshall, who consistently believed in the value of this volume and promoted its publication, including its release in the Luminos open access publishing program. I am also thankful for the guidance I received from Enrique Ochoa-Kaup and Chad Attenborough, who at different stages helped move this volume into production, and Sheila Berg, for skillfully copyediting the manuscript. I thank the anonymous peer reviewers for their careful reading of the manuscript and their insights that helped us refine and polish our chapters.

Finally, this volume would not be possible without the support I have personally received from my friends and family. *El pueblo unido jamas sera vencido* is a rallying cry for social justice, but it also defines my life and my reliance on and commitment to my community. My daughter, Ariela, continues to bring me light, laughter, and great pride. Liz Hutchison is always on my side in times of uncertainty, darkness, and celebration. I am grateful for the love and support of Judy Bieber, my *comadre*. Marcelo Cruz brings me great joy and play-by-play reports on Latin American and European *futbol* matches. Gabriela Torres has been a constant friend since our time in Ecuador, and our expert witnessing was a nodal point for our work together in this volume. Ericka Verba brought music into my life and to our 2017 Practicing Asylum conference. James Wiltgen puts world politics into perspective and provides chocolates. Dan Harwig, Rosie Pegueros, Jacques Kapuscinski, Andrea Fox, Arcie Chapa, and Alicia Torres from FLACSO-Quito have continually supported me over the years. Joe, Scott, and Jenene have always championed their "big sis." I am fortunate to live on a block that has become my extended family. I am especially grateful to Tina Valentine and Andy Young, who

make sure that I am well, feed me, and light my pilot light; and to Elizabeth Weil, Frank Melcori, and Eve and Cary Morrow, for lifting my spirits when the world seems harsh. I also thank Jill and Tim, Nicole and Chris, Beth and Justin, Naomi and Sang, Dagmar, Maggie, Norma, and Laura for their many kindnesses and our famous block parties.

My path to expert witnessing and to this volume began with Tom Davies. Because of his tireless work on behalf of asylum seekers and his firm belief that each of us can contribute to social justice, we dedicate this book to his memory and devote a chapter to his life. We share his dedication to those who flee persecution and seek safe haven in the U.S., and his respect for their bravery in the face of danger in their home countries and in the U.S. asylum system.

Kimberly Gauderman
Albuquerque, NM
July 2022

ABBREVIATIONS

AAA	American Anthropological Association
ACLS	American Council of Learned Societies
ACLU	American Civil Liberties Union
AEDPA	Antiterrorism and Effective Death Penalty Act
AHA	American Historical Association
ATD	alternative to detention
BIA	Board of Immigration Appeals
CAT	Convention Against Torture
CBP	Customs and Border Protection
CFI	credible fear interview
CICIG	International Commission against Impunity in Guatemala
CRS	Congressional Research Service
DHS	Department of Homeland Security
DOJ	Department of Justice
DV	domestic violence
ECLAC	Economic Commission for Latin America and the Caribbean
EOIR	Executive Office for Immigration Review
FGC	female genital cutting
GBV	gender-based violence
IIRAIRA	Illegal Immigration Reform and Immigrant Responsibility Act

IJ	immigration judge
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act
MCH	master calendar hearing
MPP	Migrant Protection Protocol
NTA	Notice to Appear
ORR	Office of Refugee Resettlement
PSG	particular social group
RFI	reasonable fear interview
SPC	Service Processing Center
TPS	Temporary Protected Status
TRAC	Transactional Records Access Clearinghouse (Syracuse University)
UNFPA	United Nations Fund for Population Activities (now United Nations Population Fund)
UNHCR	United Nations High Commissioner for Refugees
USCIS	United States Citizenship and Immigration Services
VAWA	Violence Against Women Act

Introduction

Expert Witnessing: A Call to Scholars

Kimberly Gauderman

The scale and severity of violence in Latin America, and Central America in particular, has grown in the past decade, a trend exacerbated by social and legal norms that subordinate and disempower specific social groups, including women, children, and LGBTQ+ persons; by gangs that exercise territorial control and infiltrate security forces; and by weak governmental institutions and corrupt officials. This deepening violence and lack of state protection has forced new populations to flee their homes and seek safety at the U.S. border. The 2014 surge of mothers with children and unaccompanied minors, originating predominantly from the Northern Triangle of Central America, marked a demographic shift at the U.S.-Mexico border that has only continued to intensify. In 2014, family members and unaccompanied children accounted for 29 percent of apprehensions; in 2018, they accounted for almost 50 percent of apprehensions.[1] In November 2019, more immigrants from Guatemala and Honduras were apprehended than Mexicans, the first time any other country had exceeded the number of Mexican nationals apprehended at the border.[2]

Unlike the majority of immigrants who enter the U.S. from Mexico—many of them single adults seeking economic opportunity—most women, children, and members of other persecuted groups who cross our border do not avoid apprehension but rather seek out and present themselves to Customs and Border Protection (CBP) officers. They are asylum seekers, fleeing physical and sexual assault, kidnapping, torture, and death threats often perpetrated by family members, gangs, and/or security officials. According to both international and U.S. law, migrants on U.S. territory who claim persecution in their home country on account of race, religion, nationality, membership in a particular social group (PSG), or political

opinion (collectively known as "protected grounds") must be given a "credible fear interview" (CFI) or a "reasonable fear interview" (RFI) by an asylum officer, to determine whether the individual will be allowed to apply for asylum.[3] If an asylum officer determines in this interview that the person seeking asylum would face credible or reasonable fear of persecution upon return to their country of origin, they may be detained or released with a bond to a sponsor, usually a family member, while they initiate an asylum claim.

On March 20, 2020, the Trump administration suspended the right of noncitizens to ask for protection at our southern border, using Title 42, a health provision in U.S. law. Under Title 42, individuals have been expelled with no opportunity to seek asylum.[4] Despite this decline in the proportion of those allowed to apply for asylum, the number of asylum seekers has continued to grow, resulting in a backlog of over 1.6 million cases pending before immigration judges in early 2022; asylum applicants now wait an average of five years for an immigration hearing.[5] Despite this sizable backlog, the government has repeatedly starved the immigration court system of resources, choosing instead to increase funding to agencies involved in immigration enforcement.[6]

Barriers for asylum seekers to access the immigration system and qualify for asylum dramatically increased during the Trump administration, from 2016 to 2020. Following through on a key campaign promise, he sought to reduce if not end immigration at the southern border, including and sometimes explicitly targeting asylum seekers. In all, Trump issued 1,064 restrictive immigration polices between January 2017 and January 2021, or over 5 per week during his term in office.[7] Many of these policies focused directly on stopping immigrants and asylum seekers at the Mexican border, migrants whom Trump declared "aren't people. These are animals."[8] Departing from other administrations, Trump's goal was not only to restrict asylum, but to end it altogether. In a 2019 speech, he told Congress to "get rid of the whole asylum system."[9] According to Eleanor Acer, senior director of refugee protection at Human Rights First, Trump championed once-extremist views that characterized refugees and asylum seekers as privileged cheaters who jumped the line in front of other immigrants and as criminals.[10] This discursive shift not only portrayed asylum seekers and refugees as unworthy of protection but also attacked a core vision, one that predates the U.S. Constitution, of the U.S. as a shelter for those fleeing persecution.

Two particular Trump administration policies—the infamous family separation policy and the equally draconian Migrant Protection Protocols (MPP)—dramatically reduced asylum seekers' access to due process in U.S. immigration courts. First, in summer 2018, the Department of Justice (DOJ) enacted a "zero-tolerance" policy that criminalized migrant parents and led to the long-term separation of over five thousand children from their parents.[11] According to Trump officials, the goal of this policy was specifically to deter mothers from seeking asylum at the Mexican border.[12] As of February 2021, over one thousand children remained

separated from their parents and the parents of another five hundred children remained missing because the government did not keep adequate records of family relationships and some parents were deported without their children.[13] Then, in 2019, the Trump administration enacted the MPP, a program that removed over seventy thousand asylum seekers in the U.S. to Mexico, where they awaited a hearing with a U.S. immigration judge (IJ).[14] MPP was designed exclusively for individuals from Latin America, and before the program's end in 2020, less than 1 percent of asylum seekers were successful in their cases. The Biden administration initially stopped this program but, due to legal challenges by several border states, restarted MPP in December 2021, and it became known as MPP 2. In its first six months, only 5 percent of those assigned to this program found legal representation and only 2.4 percent were granted asylum or some other form of protection.[15]

After 2016, migrants who made it across the border faced increasingly higher barriers within the asylum system itself. Under the Trump administration, the path to asylum and other forms of relief was substantially narrowed, and the requirements to substantiate a case were increased. Executive orders, decisions by attorneys general, and new rules in the past four years have denied asylum applicants due process and narrowed the grounds of protection. Building on Obama-era responses to increased immigration at the southern border,[16] Trump issued the Border Immigration Enforcement Executive Order on January 25, 2017. This executive order further expanded immigration detention and the use of expedited removal for asylum seekers, effectively foreclosing an individual's ability to meaningfully prepare for a hearing in front of an immigration judge.[17] In 2018 and 2019, Attorneys General Jeff Sessions and William Barr issued decisions that defined gender-based and gang violence as private criminality ineligible for asylum protection, limited protection to family members fleeing violence, and increased the burden on applicants to demonstrate their government's failure to protect them from violence.[18] These decisions had a particularly negative impact on women, children, and LGBTQ+ persons fleeing domestic and gang violence in the Northern Triangle; in fact, some have argued, the changes were designed to target, return, and discourage precisely these populations.[19] In the final month of the Trump administration, December 2020, the DOJ and the Department of Homeland Security (DHS) jointly issued a rule that, among other damaging provisions, allowed immigration judges for the first time to deny asylum claims without holding hearings. Scheduled for implementation on January 11, 2021, this rule was legally challenged by immigration advocacy organizations, and they were granted a preliminary injunction that has, at least temporarily, prevented it from taking effect.[20]

As this volume goes to press, the Biden administration has only just begun to dismantle some of Trump's immigration policies, a process that could take many years to complete. In the meantime, asylum applicants will continue to navigate a system that requires them to articulate and substantiate multiple narrow and

interconnected legal arguments, and to do so without access to legal or social services necessary to sustain an asylum process that can take years to resolve.[21] As discussed below and further in this volume, changes to many of the criteria that establish asylum eligibility can be executed through administrative fiat by the attorney general rather than through Congress or the courts. Asylum seekers, along with immigration rights activists and legal service providers, have had no choice other than to adapt to these politically motivated efforts to dismantle the asylum system, a process that Trump regularly referred to as a "scam."[22] This handbook provides the tools and resources essential for both the existing asylum process and the changes that will inevitably follow in this contentious and highly vulnerable area of U.S. asylum law.

WHY WE NEED A HANDBOOK FOR PRACTICING ASYLUM

Although this handbook was created in the context of the Trump administration's wholesale assault on asylum, it goes beyond these changes to address the long-standing and continuing need for readily available and effective expert witness testimony in the asylum system. Even as many researchers in anthropology, history, political science, and sociology have regularly supported the work of immigration lawyers and intervened as experts in public debates on immigration reform, the academy contains untapped scholarly expertise that can contribute productively to the fair adjudication of asylum claims in the United States. Country conditions expert witnesses are positioned to provide critical support, through written affidavits and live hearing testimony, that may confirm on what grounds the applicant may seek protection, based on evidence of the types of violence that exist in the country of origin. In particular, over the past ten to fifteen years, scholars and legal professionals have increasingly collaborated to defend the rights of women, children, LGBTQ+ persons, and others who have experienced gender-based, sexuality-based, and gang violence in their home countries. Observing almost daily the lack of trained expert witnesses for this important work, the collaborators in this volume set out to compile a record of best practices for engaging, training, employing, and increasing the efficacy of the work of academics as expert witnesses in order to respond effectively to the ever-increasing number of asylum cases and to the heightened burden for applicants to document their status and vulnerability to persecution in their home countries. What followed were a series of conversations, held in multiple academic and legal professional venues, and a lengthy workshop and editing project led by Kimberly Gauderman.[23]

Our objective in this volume is to build on the ongoing cooperation between legal service providers and scholars engaged in asylum work and to offer an interdisciplinary, scholarly, and practical guide to current and future practitioners in this growing field. We center the practice of expert witness testimony within the

exigencies of the academy, which requires scholars to exercise disciplinary rigor in their fields of expertise and to navigate institutional standards that recognize scholarly achievement and determine criteria for promotion. Acknowledging these tensions inherent in community-engaged scholarship, the book's chapters address how to establish expertise as a country conditions witness through teaching and research; how disciplinary expertise intersects with legal argumentation; and how our labor as expert witnesses balances with and fulfills institutional requirements for teaching, research, and service.

This volume also offers practical instruction for drafting affidavits, communicating with legal professionals, preparing for oral testimony in hearings, and handling the specific challenges of working with applicants in detention centers. The appendixes offer guidance for affidavits and agreements between expert witnesses and legal service providers. Finally, the volume offers an analysis of gender-based, sexuality-based, and gang violence in Latin America; a discussion of persecution on account of gender identity and/or sexual orientation; a history of U.S. immigration and asylum laws; and discussion of the emotional challenges and secondary trauma that may have an impact on expert witnesses and legal professionals working with individuals who have experienced high levels of violence in their home countries. These topics provide a context for expert witness testimony that will allow practitioners to adapt to shifting criteria for refugee status and present a multidisciplinary perspective on how the normalization and dismissal of gender-based and sexuality-based violence not only forces people to flee their homes, but continues to endanger them within the asylum system itself.

The *Practicing Asylum* handbook is divided into three sections. In Part 1, "The Professional Is Political: Life Stories in Asylum Work," three scholars who have served as country conditions expert witnesses for decades discuss their motivations for engaging in expert witnessing, the disciplinary expertise they bring to asylum work, and how they have balanced expert witnessing with the rigors and requirements of academic life. The first chapter provides an oral history with Thomas M. Davies Jr., a don of expert witness testimony who worked on hundreds of Latin American LGBTQ+, gang violence, and domestic violence cases from Latin America, inspiring other scholars—including several contributors to this volume—to work as expert witnesses. Davies, whose energies focused on asylum throughout his retirement up to his death in 2019, was renowned for his 2000 testimony in *Hernandez-Montiel v. INS*, a groundbreaking case before the Ninth Circuit that for the first time affirmed transgender women's right to asylum. In the next two chapters, M. Gabriela Torres and Kimberly Gauderman offer very different perspectives on the disciplinary and professional challenges they have faced in their work as country conditions experts. In her chapter, Torres analyzes how an anthropologist as expert can assess the failures of Guatemala's current legal and social protections for women in marital arrangements (including common law unions), which drive many women to seek refuge in the United States to

escape forced, violent marriages. In her chapter, the historian and handbook editor Kimberly Gauderman argues that expert witness testimony is not only crucial to the success of asylum claimants but also builds on and strengthens the profile of academics in their institutions and professional disciplines. Taken together, the three chapters in part 1 provide different models for how scholars engaged in expert witnessing can integrate expert witnessing into their academic work, advancing both research and legal strategies for asylum defense and strengthening their professional trajectories.

The second part of *Practicing Asylum*, "Enhancing Expertise: Legal, Conceptual, and Practical Guidance for Scholar-Experts," offers specific advice for scholars presenting expert testimony in gender-based and sexuality-based claims. Chapter 4, by the legal scholar J. Anna Cabot, describes the complex history of asylum law and demystifies current policies, such as asylum eligibility requirements and immigration court procedures, which were transformed by the Trump administration's attempts to eviscerate asylum protections, especially for women fleeing gender-based violence. In chapter 5, Gauderman and Torres together analyze how rape contributes to establishing the basis for the persecution critical to the definition of particular social groups (PSGs), in particular, contrasting the experience of cisgender, heterosexual women and LGBTQ+ individuals in the asylum process. By examining how testimonies presented by refugee claimants in U.S. immigration courts narrate rape and the PSGs that are devised to support such asylum claims, the authors reveal how rape and human subjectivities are constructed differently through individual narratives and legal arguments. The part's final chapter, by Gauderman, offers detailed, practical advice for scholar-experts and the legal service providers they work with, including how to strengthen the expert–legal service provider relationship; decide which cases an expert should take on; structure, revise, and finalize an affidavit; and prepare for and testify in hearings. The chapter provides a list of resources for expert witnesses, including U.S. governmental and nongovernmental organization (NGO) guides on immigration and asylum practice, guides on framing and writing country conditions affidavits, and online resources for country conditions research. Addressed primarily to scholars considering or already working as country conditions experts, the chapters in "Enhancing Expertise" shed light on how when legal service providers and experts clearly understand and communicate their respective roles, they collaborate more effectively to achieve positive outcomes in asylum cases.

While the previous chapters focus on experience and practice, Part 3, "Learning the System: Tools for Context and Support in Asylum Work," offers additional insights and resources necessary to initiate and sustain the work of expert witnessing. In chapters 7 and 8, Gauderman and the immigration attorney Natalie Hansen provide an overview of the role of expert witnesses in the history of immigration, asylum law and policy, and immigrant detention in the United States, with particular emphasis on significant and recent shifts affecting asylum claims by women,

families, and unaccompanied minors. These chapters help explain why, even though congressional overhauls of the Immigration and Nationality Act (INA) are infrequent, the ongoing impact of political agendas and corporate interests may substantially change the asylum process in ways that affect the work of expert witnessing. Following Gauderman's comprehensive review of U.S. immigration law and its application in the changing landscape of asylum, Hansen provides practical guidance to experts working on asylum cases for individuals who are detained, including discussion of the bond/parole process. The final chapter in this part, by a leading asylum law practitioner and scholar, Maria Baldini-Potermin, addresses the human dimension of expert witnessing, offering guidance to practitioners on how to recognize and respond to secondary trauma that may be triggered through engagement with applicants' experiences with extreme and sustained violence, including torture. Baldini-Potermin's chapter helps asylum practitioners recognize the anxiety, depression, preoccupation with suffering, and compassion fatigue that characterize secondary trauma and identifies some of the practices that ameliorate the impact of this work, to the benefit of asylum seekers, their legal advocates, and expert witnesses.

Our intention in this volume is to provide tools and orientation that will serve this and successive generations of expert witnesses, because neither the executive mandates shaping asylum policies nor the legal strategies appropriate to support asylum seekers nor the country conditions shaping their claims are fixed. In this fluid system, scholar-witnesses must adapt to changing circumstances to provide accurate and effective testimony, and in some cases they must intervene (as did Thomas Davies) to enhance the courts' ability to recognize asylum claims, thereby easing human suffering and living up to the promise of asylum in international and U.S. law.

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PART ONE

The Professional Is Political

Life Stories in Asylum Work

1

Thomas Davies, "I can't not do it"

Testifying to a Life of Witness

Elizabeth Quay Hutchison

"Winds of the Old Days" is an incredible statement of how Joan Baez views [Bob] Dylan: "So thank you for writing the best songs / Thank you for righting a few wrongs / You're a savage gift on a wayward bus / But you stepped down and you sang to us." The song I think sort of ties together everything, at least it did for me, and people like me, that were involved in all this stuff.

—THOMAS M. DAVIES JR., 2015

Tom Davies always came prepared. Ever the expert witness—this time prepared to explain *himself*—on this September afternoon he brought three documents to our second interview: a list of the almost five hundred asylum cases he had worked on, a personal chronology of key political events of the 1960s, and the lyrics to a song Joan Baez wrote about Bob Dylan. The next two hours did indeed tie it all together, exposing the qualities of compassion, expertise, and commitment that shaped Davies's work as an expert witness, primarily on Mexican LGBTQ+ cases, for over two decades. In these interviews, conducted in August and September 2015 in his Albuquerque home, with his wife and collaborator, Adele Davies, standing by, Tom (or "Tommy") worked from his documents as he testified to us, with modesty and insight, about why he had devoted so much of his life to the singular purpose of supporting attorneys seeking asylum for Latin American LGBTQ+ persons, Indigenous people, women, and others who flee persecution.

Kimberly Gauderman and I had arranged to conduct these interviews with Davies for a variety of reasons. We went to Davies not only because of his critical participation in so many successful asylum cases—including his intervention in the first successful case of asylum for a Mexican transgender woman in 2000—but also because he represents the heart and best expression of this book's focus, practicing asylum. Even as Davies refined his own practice as an expert over the

years, he partnered with and mentored many immigration attorneys and expert witnesses, including several of this book's contributors. In addition to formal work as a country conditions expert, Davies collaborated extensively with an emerging cohort of asylum attorneys and also trained other academics as expert witnesses, setting high standards for integrity, research, and legal strategy as he did so. Up to his death in 2019, Davies provided critical support to many experts and attorneys, remaining even now an inspiration and a model for his life of scholarly activism.

As a young man in the 1960s, Davies embraced activism in both the antiwar and civil rights movements, concerns that shaped his subsequent travels in Latin America and his career as a historian. By Davies's own account, his life took a turn in the summer of 1960, when he observed expressions of white supremacy while traveling with a friend in the segregated South. Thereafter Davies taught for several summers in Peru with the Peace Corps and became active in the civil rights, antiwar, and democratic socialist movements. Throughout his scholarly career, Davies continued this activist practice, supporting the engagement of students and colleagues with a variety of social justice movements, escorting community members to visits along the U.S.-Mexico border, and developing university departments and programs that expanded student training in ethnic, women's, and Latin American studies. Listening to Davies recounting his personal and political journey over seven decades—from Nebraska farm boy raised after World War II to senior historian and country conditions expert—we heard echoes of his participation in the radical social movements of the 1960s. In Davies's case, this sometimes also included now-antiquated notions of racial and sexual identity, or even the white guilt so common among progressive activists of his generation. But the principles of equality, human rights, and social justice that guided Davies's long life of scholarly activism also animated his continuous learning, and he modeled these critical values for the attorneys and academics with whom he worked.

For Davies, the full-time work of expert witnessing came only after a long and successful career as a scholar and academic. Specializing at first in Indigenous laws of twentieth-century Peru, Davies received his PhD in Latin American history in 1966 from the University of New Mexico and went on to an academic career at San Diego State University (SDSU), where he taught in the Department of History and founded and served as director of the Center for Latin American Studies for twenty-three years. After publishing *Indian Integration in Peru: A Half Century of Experience 1900–1948* and related articles, Davies collaborated with the political scientist Brian Loveman, producing edited collections on authoritarian and revolutionary movements in Cold War Latin America, works still widely used in university courses in Latin American studies.[1] This scholarly trajectory illustrates Davies's penchant for constant expansion of his research horizons, which led him to take in new regions, research questions, and collaborations throughout his career. Asked to reflect on his own scholarly record, Davies remarked that "the publications, if you look at them in order, are a desperate search for some way to

do something for people, and maybe harness the army." As founder and director of San Diego State's Center for Latin American Studies, Davies engaged in constant community outreach, lecturing on Latin America to local teachers and professionals and organizing university-led tours across the U.S.-Mexico border.

As a senior scholar in the early 1990s, Davies began another long career as a country conditions expert for Latin American asylum cases, where his efforts—supported by his wife, Adele Davies—made him a sought-after witness for LGBTQ+, gang, and domestic violence cases. The volume of requests for his expertise—he completed over 487 affidavits in less than thirty years, an average of eighteen cases per year—inspired Davies to first limit his work to Mexico and then train others to handle the growing tide of asylum seekers from Central America and other parts of Latin America. Davies's success as an expert witness relied not only on his deep knowledge of Latin American history but also on his unceasing research into the contours of state violence, gender discrimination, and religion in contemporary Latin America.

Davies's work as an expert witness was remarkable, not only because of how often his testimony contributed to grants of asylum (in 418, or 85 percent, of the total of 476 cases in which he testified), but also because of his participation in several cases that were won on appeal at the Ninth Circuit Court, which unlike immigration court rulings granted them precedential status. By far the most important of these victories was *Hernández-Montiel v. INS*, a landmark case at the Ninth Circuit Court that in 2000 first established "homosexual men who manifest female characteristics" as a particular social group worthy of asylum in the United States.[2] In his hearing testimony for the 1996 asylum case, Davies testified that Geovanni Hernández-Montiel—a homosexual Mexican man with feminine characteristics who had been repeatedly raped by police, set upon by street mobs, and discriminated against by his family and school administrators—belonged to the particular social group "gay men with female sexual identities" and would likely be persecuted if he returned to Mexico. Drawing on extensive social science research and country conditions reports, Davies argued that homosexual men exhibiting feminine characteristics had been subjected to violence, both historically and in contemporary Mexican society. Although the immigration judge and the Board of Immigration Appeals (BIA) did not refute Davies's testimony, or present any evidence to the contrary, they refused to grant asylum or withholding from deportation; instead, they found that the applicant's appearance and behavior were not "immutable characteristics" and that therefore the applicant had failed to demonstrate persecution on account of a protected ground.

Three years later, attorneys appealed the BIA decision in *Hernández-Montiel* to the Ninth Circuit Court, which in 2000 found in favor of withholding of deportation for Hernández-Montiel and recommended that the attorney general grant him asylum. Significantly, both the amicus brief filed in the appeal and the court's opinion cited Davies's 1996 affidavit repeatedly (nine and seventeen times,

respectively) to argue against the BIA ruling. The final opinion noted, "Although not necessary to establish the 'particular social group,' the testimony of Professor Davies is helpful to our analysis." The Ninth Circuit's *Hernández-Montiel* decision established an important precedent for later decisions granting asylum to transgender women and has been cited in hundreds of cases thereafter: ten years later, Davies himself was focusing exclusively on LGBTQ+ cases from Mexico and the Northern Triangle countries, completing affidavits on almost three hundred LGBTQ+ cases, including forty-three Mexican transgender women's cases.

Although Davies himself never put it this way, he helped to transform the legal arguments for asylum in U.S. immigration courts, responding as political pressures against asylum mounted with ever more deft and detailed affidavits on the conditions of violence and persecution faced by asylum seekers in their countries of origin. As a historian, he also understood the value of his considerable archive of cases, donating with his wife, Adele Davies, a set of redacted affidavits to the San Diego State archival collections for use by future researchers.[3] By sharing with us in summer 2015 how and why he employed his considerable expertise in defense of Latin Americans seeking asylum in the United States, Davies took yet another step in his lifelong effort to—in Davies's words—"harness the army."

ELIZABETH QUAY HUTCHISON: *What can you tell us about your transition in retirement from San Diego State University to full-time work on Latin American asylum cases?*

The transition was actually very easy, because I had been doing these cases before I retired. And I hadn't done very many. Then in 1996, an ex-student of mine who was a lawyer in town called me and said that they had a case of a young Mexican transvestite who was living in Balboa Park as a [prostitute]. And one of my other graduate students who now lives here in Albuquerque had found him, and they wanted to get him asylum. Well, that was impossible before that. And so I went in, and I didn't know what I was doing, I didn't write an affidavit, I just talked. The stupid attorney for the government said, "Have you ever been in a gay bar?," and I said "Yeah." And he said, "Have you ever been in a heterosexual bar?," and I said, "Yeah." And he said, "That's all," and the judge just [assented]. We lost, obviously. There was never any way we were going to win that. That is the famous *Hernández-Montiel* decision. That's the base for everything that Kymm [Gauderman] and I do, in terms of LGBT. That's where it started.

. . . And so when I got here [to Albuquerque] . . . I was deeply committed to this. So after the *Hernández-Montiel* decision, which came out in 2000, the phone didn't stop ringing. Because, all of a sudden, if you had an LGBT client, then you had a chance. It wasn't a gimmee, I've lost I think just about two out of three hundred, . . . and I didn't have a chance. But one thing that has been the most difficult: even the nut-balls in this country admit there's something

called a gay or a lesbian, but the transgender person is hard to wrap your head around, and I've worked awfully hard on those [cases]. . . . It's hard to get isolated judges to understand that you can have a girl in a boy's body.

And I think it was hard for the LGBT community in the United States ten years ago. Two of the organizations I think the most of, Human Rights Campaign and Lambda Legal, fought against [transgender rights]. Now, they wouldn't do that today.

But I have had trouble with this. I had a transgender case. Lady called me from Salt Lake, and she was working for Catholic Charities. And she was in her office, . . . [and I] came in and said, "You have a very interesting case out there." So it was transgender. We wound up with a Mormon judge and a Mormon trial attorney. He started out by saying, "He is a male and I'm going to call him 'he,'" and by the end of my testimony, which went on for an hour and a half or so, he was calling her "she." But it's hard, I think that's the last frontier. . . . We're working on it.

And I think [Caitlyn] Jenner has helped.[4]

EQH: *What strikes me about some of the continuities here is the focus, from your work in San Diego to your work with asylum cases, on education: your emphasis on reaching judges and attorneys in a specific way, for specific cases. You worked so much in Latin American studies on outreach and work with students, retirees . . . do you see that coming into the asylum phase of your work as well?*

I think the education has kept up, because I had to keep up, I keep reading all day. . . . The education part has not stopped: we don't stop learning, and if I don't keep up, then my clients are gonna lose. And we're not talking about a $10,000 settlement, we're talking about a human life. And I've actually said that to several judges. One said, "This [affidavit] is too long" or "What are you doing?," and I said "Your Honor, I'm dealing with a human life, there can't be too much." And so I've kept up, but what I couldn't keep up on was all twenty countries and all topics. But you'll see if you go through this [list of cases] that it isn't until *Hernández-Montiel* that there's a gay or lesbian case, and I just couldn't do [all of] it anymore. . . . No, I've done over half, oh, more than that, probably three-quarters of the cases, I've done pro bono, but I got to the point where, you know, I've got a law firm that's got two thousand lawyers, they can come up with fifteen hundred bucks.[5] I think I started at 500, then I went to 750. . . . But the other thing is, and I've been told—you know, this takes a toll on me—and I've been told by a couple of doctors to stop it, and I think they understand sort of now: I can't not do it. And I can't be sitting around knowing that there's somebody out there whose life I might be able to save. Now I'm sure that sounds corny, but I really mean it. And even with just doing Mexico, and then just Mexico LGBT, I couldn't keep up with the other [countries]. . . .

But I think the thing is, I was able to keep up in my own way, the scholarship and the teaching. Because yes, that's what I have to do. I have to teach a court that this person deserves political asylum. . . . But it also has the leading component of political activism. Teaching a class at San Diego State was not an act of political raising hell, although I got a lot of political stuff in there. Well, I just told them all at the beginning of the year, "You don't have to agree with whatever I say, you can agree with whatever, but please, please just listen and think, that's all I ask." And that's basically what I'm doing with judges. I try to do it with trial attorneys, but with all fairness I tried to cut the affidavits down three times, because the last one I sent off with the appendices was 311 single-spaced pages, longer than [my book, *Indian Integration in Peru*]. And then the trial attorneys would say, "Well, what about this? You don't have proof for that. You don't have documentation, you are just making this up. This is an anomaly." Well, see, the minute that comes up and I don't have a good answer, I'm [in trouble], and so is the client. So they're getting [everything I can give them]. And in all fairness to them, there are 190-some countries in the world, and I don't know how many languages, probably a thousand or more, and you can't expect a judge or [government] attorney to know the internal conditions of each one of these countries, and that's why [immigration] lawyers go out and get country experts, because they don't either. So I think if you're polite, as we always were with our students, and try to make [the judges and attorneys] see something, another side which they haven't seen or understood, then, yeah, I'm still Professor Davies, I really am. I try to educate lawyers.

But, yeah, I'll tell you what I quit doing. There are a couple of law firms in L.A., huge ones that have offices all over, they have 2,500 lawyers in them, they were assigning these cases to associates who had just come on that year. And it became clear to me, after longer than it should have, that I was being used to train their [junior associates], and [they] wanted this or that or didn't understand what I was talking about, and finally I just gave it up. I just don't work for [those firms] anymore. I don't have anything against associates. What I'm against is the law firm using me as the postdoc professor, you know, so no. But there are so many others I don't have to worry about. And the vast majority [of asylum requests I get], I do.

We had one attorney . . . she had a case, and, well, at some point I said, "Well, now, what about some money," and she said, "Well, I haven't been paid," and I said, "Well, until you're paid I'm not going to take any money." Six years later we won . . . we finally won it. Now, see, if I were a lawyer I would have been charging for every minute, because I was putting all sorts of stuff together—send this to her, send that, do this. Now [that attorney] is something else . . .

EQH: *I have been thinking about your work in asylum. You mentioned the kind of trauma that's involved in the work of working with asylum clients, working with the subjects that you have to work with as an expert witness, and being immersed in what has caused people to flee and seek asylum. Is there more that you want to say about trauma as another unifying theme running through this kind of work?*

No, [you're right]: I think it's there. And I think [the work you describe] contains very emotional things. And I guess, well, I'm an emotional person. And when we got [to Albuquerque] we had this doctor . . . and all he wanted to do was just prescribe medicines, so I just kept getting these sleeping medicines because I have PTSD,[6] and of course I was waking up every two hours and taking two more. And so we went to this doctor and said that I couldn't take them anymore at all and tried to explain and nada, and so with [my wife] Adele we decided to stop taking everything.

[Recently] I had this horrible case, I had just read it, it was two little boys who were five and six . . . and the family started raping them, and they finally made it here, and I was really upset, I remember sitting there crying, and I told [my psychologist] about it, and she'd always been very serious, and she had never really cracked a smile, and as I was leaving she stood up and smiled, and she said, "Thank you for what you're doing," but it's hard, Adele can attest to it. There was a chair in there, and I [would] just go sit down and cry. Now, did I cry on several of these? Yeah, but a lot of that is me, you see. Other people that do this don't get as involved emotionally as I do, and I don't suppose that's good, but I don't know how to change it. I think the only way you can be a lawyer and do this, you have to be disengaged, personally and emotionally, and the ones that can't, have trouble, and I've worked with some. You're going to find that Blaine Bookey[7] is sort of a combination of both of these. . . . I've been working with her since she was in law school, . . . and now she's in a position where she's got to have pure objectivity and sort of stand off and take a look at it while at the same time having the emotional commitment. I don't know if this is making any sense at all . . .

EQH: *It seems like expert witnesses really have to deal not only with the traumatic impact of the testimony, with what individuals have gone through, but then systematically research the broader collective trauma. And so I wonder just how one's skills and practice as a researcher provide not only insight but also the opportunity for distance, so that you can actually do the work?*

It's hard. I remember I had a case . . . and this woman had married this guy, she spoke a Maya dialect that is extremely rare, and so she got married to him, and then the brothers and uncle and father, everybody else, gang raped her. And somehow she got away, and she made it to Los Angeles. And the judge said, "Well, that's impossible." And I'm sitting there on the stand, and

I said, "What's impossible, Your Honor?," and he said, "You can't walk from Guatemala to Los Angeles." . . . I just looked up and said, "Well, it takes a little longer, Your Honor. Why can't you walk from Guatemala? Of course you can walk!" But we've got this thing in our heads, you see, with "modernity," that if you can't get a plane or a train or a fast-moving bus, you can't do it. A friend of mine used to say, "It all depends," whatever it was, it all depends: can you take a train, do you have to walk, do you have to get a job, all of this. And we don't really in U.S. culture even think about things like that. But people in other countries do, and the ones who are being oppressed and threatened with death—and these are all death threats, regardless of what the affidavit says—they are escaping from very real potential death, torture and death. I have no trouble saying that with cases I accept, because I think it's true . . .

KIMBERLY GAUDERMAN: *Can you talk more about the kind of research you have to do for these cases? One of the reasons I think I have been as successful as an expert witness is because you trained me, and one of the important lessons that you gave me is the extreme amount of research—as you call it, throwing the kitchen sink in—using every single element of a country's conditions in your affidavit. You're really able to do that broad research that shows, through citations and through analysis, that indeed what that individual has lived through is in fact documented, it reflects the general conditions. I'm wondering if maybe you could expand on that process that we, as expert witnesses, use in order to present that individual experience in a context of those broader cultural conditions, which we have to be able to show.*

OK, and I overdo it . . . I tried to cut it back, I tried to cut it back a couple of times, and I had attorneys and even judges saying, "Well, then it's an anomaly, it's just [the one incident]," and so I put in the kitchen sink. And it also restricts the government attorney and the judge; they do not have an open playing field. Which is why I won't testify without having a written affidavit. [My affidavits] are out of control, I'm fully cognizant of that, but I'm not going to be around that much longer to do 'em, so. . . . Boy, the last case [I did], with a lawyer I've worked with a number of times in L.A., it was the first time in his career he walked in and he got inside the door, and the trial attorney said, "Well, this is all over," before anybody testified or anybody said anything, because he knew he didn't have [a strong case]. Now, in fairness to [the government attorneys and judges], there are 190-something countries, you can't know the internal conditions of all of them, and so you can inundate them [with information]. But I think it's terribly important to put the individual's case in the context of what's happening in the country at a given point in time. And that varies, depending on the country and who's under attack, and there are groups you don't even think about.

I've done a number of cases for Jehovah's Witnesses . . . and they're persecuted, and the children are really persecuted. They won't salute the flag, they won't sing the national anthem, and so really it's fallen on the children. And a couple of them were married to non–Jehovah's Witnesses, citizens of a country (let's say, Mexico), and so [some of the in-laws] hated the Jehovah's Witnesses, and saw them again as dangerous, as evil, and the kids were terribly harassed. And that I think is a real concern, someone's gonna kill one of those children, they really are. And so yeah, it's not as exciting, I guess, as doing [research on] guerrilla movements or crazy armies that are wiping villages out like in Guatemala, but it's nevertheless for the individual just as real, and the danger's just as real. . . . And so all of a sudden you've got a Jehovah's Witness, and the children, and all of these things that really aren't that dangerous that they're doing, confronting 98 percent of the population that's Catholic . . . yeah, I think [this work is about] education, and obviously this is why [expert witnesses can be] so successful: you're doing this, you're educating judges and attorneys about the things that they don't understand and they don't know. And without the expert witness, the loss rate is enormous, it's huge.

KG: *Maybe you could talk a little bit more about that process, of how we take the individual and connect them to that particular social group that makes them eligible for asylum, because that too is a really careful process, and we have to use education, and we also have to be good storytellers, to be able to grab the judge and convince the judge that our person deserves asylum.*
Absolutely, and it is a process of education. Some don't need to be educated, believe it or not, there are immigration judges who never heard about *Hernández-Montiel*, the turning point that made [transgender women] a particular social group. It is a matter of education, it's a matter of first really understanding what happened to the individual. But the other ones, yes, they need to be connected, connecting their own individual case and circumstance to what is happening in the country. And that's why I dwell so much on internal conditions: and this is what's happening, the vigilantes are on the loose, and all law and order has broken down, and Mexico is a failed state. And then you put the individual in the context of the failed state. Its definition is that you don't control the national territory, you don't have a monopoly of force, and you can't provide basic security for your people, that's the Carnegie Endowment for Peace and United Nations definitions. All right, if you've got chaos like you do in Mexico, with the drug gangs and cartels and then the vigilante [groups] growing, and then you've got all sorts of other reactions, you got the military going in and just killing people, just going into a situation and doing what Rios Montt did in Guatemala where you just wipe everybody out. . . . And yeah, it's really difficult, and I can't say I was always successful in what I did. In the early days I didn't have any idea about what I was doing,

but I learned as I went along, and then I developed what I'm using today, obviously a much shorter version, because we didn't have that much. But yes, you've got to tie everything together, it's gotta make sense, and if there are any big holes, they're going to jump [all over the expert], either the attorney or the judge. You see, in a federal district court, the judge can't just ask you a question, but they sure as hell can in immigration court, there are no rules! . . .

EQH: *I wanted to ask whether you see in this role, educating the court and working within these cases, any continuities with the kind of education and activism that marked your long career as an academic as well? . . . We kept asking you about the institution and your work, and you kept taking us out to social movements and to political change of the period. Do you see yourself in a Latin American tradition more than a U.S. tradition with respect to how these different pulls of education, intellectual life, and the institutional life are connected?*
Well, I think I would go back to something I probably said the last time we met. That is why I brought up Dylan and folk music. What I'm doing is a very logical consequence of what I've been doing for fifty years. I don't see any difference between testifying for these people and fighting for civil rights in Mississippi. That list [of events from the 1960s] I gave you, I was involved in most of that, and we had the first women's studies department in the United States. . . . I worked for the dean behind the scenes on that, and I worked on Chicano studies, and we had one of the first Chicano studies departments. And I think through all of this and what I've written—and there is a line through all of that—this is a logical step beyond what I have done all my life. It's a matter of civil rights and human rights. And I had a judge one time who said, "Well, how did you get interested in all of this?" And I said, "Well when the [AIDS] plague hit San Diego my friends and students started to die." It was 1981, and it was just logical to me that [the call to action] was the same as guerrilla movements or Indian integration in Peru or trying to have APRA[8] be the savior of the continent. . . .

I'm a teacher . . . teaching is more than just getting up with a set of notes in front of a class. It entails being ready to deal with new things and helping other people understand new things. And that's what I think I've been doing all my life, starting in that swamp outside Pine Bluff, Arkansas [in 1960]. So yeah, we are teachers, and we have to be, that's what we're supposed to do: make sure that we have taught the judge and the attorney correctly.

I have had to do a lot of research on a number of these [cases]. I didn't know what a Jehovah's Witness was or what a Mormon was or what they believed or how they viewed themselves within the context of the society in which they lived. I had to do a lot of research on disabled [persons], I've been very active in the disabled student thing, in San Diego, and Jayne[9] was a part of that, got me deeper involved than I had been before, but she really did it. And yeah, you can't go into one of these cases and just wing it: you'll get killed [lose the case]. Marching for a civil rights law is one thing; trying to ensure that someone is

not tortured and murdered is quite another. And so I spend at least two days just preparing for the oral [testimony], just going over stuff, making sure, and I scatter stuff around here. I probably don't have to anymore, I've seen it so many times. You've got to sit down and read the Amnesty International report on torture. You've gotta read other cases. Now there's one that came out in California about three or four years ago, and it was some lawyer . . . and she had this gay guy [as a client], and she didn't do anything, so they lost. The Ninth Circuit just threw it out, and I was getting phone calls saying [we've lost], and I said I don't think so. . . . I had not seen her affidavit, but she couldn't have lost, three or four years ago, on a simple homosexual case, with *Hernández-Montiel* in force since 2000. She apparently didn't do any work at all. Well, that young man, I hope to God he didn't get killed or tortured, and it has never come up again in anything I've done on Mexico; nobody has mentioned that decision. Which tells me that they understood that this kind of nothing [result] doesn't count. But you do have to do research, and we're trained to do that. You can have other expert witnesses that aren't trained in research, and I've heard stories about them, some of them just sort of get up and try to wing it, and that does everybody a disservice, and I think it's very unfair and dangerous.

And [Kymm,] you've had some pretty brutal stuff too. Domestic violence, what I did on that was just go back and find anything I could on how women were treated within a culture, historically and today, and what laws protect them. You gotta remember, it wasn't until the mid-1960s that you could charge a husband with raping his wife. I remember my dad saying in the early sixties, "Well, it just isn't gonna work, you can't charge a husband." Well [that's a lie]! Rape's rape, I don't care who the person is. But that's how [recently] we were just not paying any attention. In San Diego, my greatest fear was that the local police had the address of the women's shelter, and the worst people as professionals on domestic violence are the police and the military, and you gave them the address. I suppose that follows from our commitment to law and order; it's really stupid.

EQH: *In encountering that, or exposing what it is that people need to see about how violence functions or could function in a particular case, it's not just the techniques of knowing how to research that are important, but maybe asking the right questions. So for gang violence or guerrilla organizations, the whole roster of cases, you have to draw on different kinds of questions. If you aren't guided by those questions, you just have an assemblage of facts, right?*
Yes, you have to be able to offer the court your expert opinion as to what the facts mean. You're an expert witness, and if you can't do that, then don't do it. And you opened with a question about commitment, the emotional commitment that I have, and I think you have to have it. I don't think you can look at something like this dispassionately and just say, well, this is like a parking ticket. It's not; it's a human life—or lives, you've got families involved.

NOTES

1. Thomas M. Davies, "Indian Integration in Peru: A Half Century of Experience 1900–1948" (PhD diss., University of New Mexico, 1974); Thomas M. Davies and Brian Loveman, eds., *The Politics of Antipolitics: The Military in Latin America* (Lincoln: University of Nebraska Press, 1978); Che Guevara, *Guerrilla Warfare*, introd. Thomas M. Davies Jr. and Brian Loveman (Wilmington, DE: Scholarly Resources, 1997).

2. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

3. Thomas M. Davies Jr., Papers and Lecture, SDSU Library and Information Access Digital Collections, https://digital.sdsu.edu/view-item?key=R3siTiI6NTAsIlAiOnsiaXRlbV90eXBlcyI6WzJdfX0&pg=26&WINID=1583075630632#6mRbI_toEpgAAAFwlqkdfQ/300244, accessed Mar. 1, 2020. See also Davies's 2016 recorded lecture, "LGBT Asylum Warrior: The Road to the Courtroom," SDSU Digital Collection, https://digital.sdsu.edu/view-item?i=334097, accessed Mar. 1, 2020.

4. Caitlyn Jenner, an American decathlete who won an Olympic gold medal in 1976, came out as transgender in 2015.

5. While many expert witnesses work pro bono on behalf of asylum applicants, some experts accept compensation for their work.

6. Davies suffered post-traumatic stress disorder as a result of his research on the Peruvian military at the height of the Cold War, during which he witnessed military violence against guerrilla forces in the Peruvian rain forest.

7. Blaine Bookey is an attorney and the legal director of the Center for Gender and Refugee Studies at the University of California College of the Law, San Francisco.

8. APRA, or the Alianza Popular Revolucionaria Americana (American Popular Revolutionary Alliance), is a Peruvian socialist political party that was the subject of Davies's early research.

9. Jayne Spencer (1950–2004) received her PhD in history at UCLA, where she also lectured. She was active in Latin American solidarity and human rights movements in the 1980s. As a young woman, she became confined to a wheelchair due to a car accident. She advocated for accessibility for persons with disabilities at UCLA, and in 2005 a fund was established in her name to support students doing work in disability studies.

2

Guatemalan Women's Asylum in the United States

How Legacies of Inequity Shape Gender-Based Asylum

M. Gabriela Torres

In providing expert testimony, I come face-to-face with multiple specters of violence at play in the depictions of asylum seekers, which over the past decade have taken multiple shapes of alterity. For example, the 2019–20 social media hashtag #migrantcaravan[1] portrayed the otherness of marauding needy hoards, criminal/terrorists disguised in our midst,[2] metallic blanket–covered victim-prisoners, and shantytown dwellers clamoring at the southern border. Asylum seekers, like other migrants, have been purposefully constructed as an "other" too foreign to merit empathy. Naomi Paik suggests that specters of otherness are "essential impulses" in the way migrants are incorporated into the U.S. imaginary. Discourses of otherness are, for Paik, foundational to the nature of the "U.S. settler state." In settler colonial logic, the state "controls who is allowed into the country, and who is allowed to stay and fully participate in it."[3]

I would like to imagine that the work of expert witnessing in asylum courts works to counter discourses of exclusion, but I suspect instead that the work of expert witnessing makes some migrants viable for inclusion by highlighting particular ways that they can be othered as victims. Expert witnessing supports a category of exceptionality wherein individuals are particularly affected because of their identity by country conditions construed in U.S. asylum practice as harms worthy of protection. In this context, even as some migrants are redeemed as worthy of protection, the work of expert witnessing is ethically fraught and cannot be construed as external to the workings of the U.S. immigration system. Siobhán McGurik and Adrienne Pine have pointed to the ways that expert testimony benefits as few as 2 percent of applicants.[4] Beyond

the pitfalls of working within the so-called asylum industry, there are ethical pitfalls in making sense of embodied violence in courts engaged in intercultural dialogue.[5] Experts' evaluation of different registers of violence as explanatory of asylum worthiness reinforces the idea that some migrants are more deserving of inclusion than others. Charting the meaning of violence, expert witnesses are cultural translators in legal venues and explain how culture patterns shape individual life courses.

As an anthropologist, expert witnessing engages in the work of cultural translation that is already central to my discipline. Yet working within the constraints of legal processes is not the same as other forms of scholarly engagement. Whitney Duncan and Beatriz Reyes-Foster note that legal rhetorics seek singular simplified truths that can be adjudicated.[6] Yet simplified truths run counter to the "thick description" that both experts and anthropologists engage in when describing the cultural setting and its meaning from multiple local perspectives to give a complex sense of a lived experience.[7] This chapter presents a thick description of my work as an expert witness, tracing the mundane tasks of the work but also the cultural production of meanings spanning the legal, the scholarly, and the personal realms that the work touches. As a thick description of expert witnessing, the chapter touches on the setting and politics of the work, the ethical struggles, the application of country knowledge, and the ways that the practice of expert witnessing can shape the knowledge of experts about the asylum system and their work in the country or countries for which they provide conditions reports.

THE SETTING: COURTROOMS AND DISCIPLINARY ETHICS

My work with refugees began in Guatemalan refugee camps in the 1990s. In 1994–95 I worked in camps sponsored by the United Nations High Commissioner for Refugees (UNHCR) in the Mexican states of Campeche and Quintana Roo. In the camps Maya women spoke with me not only about the genocide orchestrated by the Guatemalan armed forces in the early 1980s but also about how they had built new vibrant communities in preparation for their return to highland villages after ten years in exile, only to be forced to flee to the U.S. border to save their lives. I came to work as an expert witness in large part because of my research on the relationship between sexual violence and the Guatemalan state. My work has also centered on how cultural notions of authority embody and amplify gender inequalities. Attorneys began to contact me in 2007 because of my publications on femicide (the socially supported killing of a woman or girl because of her gender) and other forms of gender-based violence.

Work with asylum seekers today looks rather different from that in the 1990s, and it relies on the knowledge about violence that I gained with asylum seekers

almost twenty years ago. The practice of expert work in an in-person hearing looks like this:

> I am waiting to testify about what brings Guatemalans to the United States in the rubbery chain-linked chair of the courtroom waiting room. By the time we sit, all of us, experts, children, and attorneys, have been searched, identified, and run through metal detectors under the surveillance of uniformed guards. I sit beside a physician who has also come to testify, and the courtroom is abustle with families. She is ready to explain the wounds registered on the body of the asylum seeker, and I am prepared to contextualize their meaning for an audience that lacked cultural fluency of Guatemala. I know Guatemala well as a scholar but also from my own lived experience as the country of my birth. My testimony relies on the former qualification alone, as the latter is too easily portrayed as a bias deficit.
>
> Across from me three teenage girls, also Guatemalan as their accent betrays, sit huddled around the empty seat their father held before he left to learn about his hearing's conclusion. They cannot contain their nervous bodies as they wait for his return from one of the many doors that leads into courtrooms. More than an hour passes while a mother struggles to control a toddler with a toy car intent on using the walkway as his highway. As he evades his mother, the imagined highway is occasionally traversed by an official who calls out names like "Ordoñez," "Garcia," or "Lopez" and gathers them into a line of followers who disappear with her into yet another nondescript door.
>
> Lawyers come in and out, sometimes with news that shocks joy into teenage bodies but also sometimes with news that makes other bodies limp or stiff. "What will happen now?" is barely audible from the lips of a young man whose color vanished as his lawyer spoke in hushed tones. As she explains, he utters, "I don't know if I have the money to pay," catching himself as he tries to refocus on her words. Families seek comfort staring with visible fear into the eyes of strangers or, contrarily, by lowering their gaze in an attempt to become invisible, trying not to be seen.
>
> And the rhythm continues. Attorneys come and go, as do the lined-up bodies that are called into rooms that open into the long hallway where the water fountain stands alone.[8]

Having worked as a country conditions expert in over 110 cases in eleven U.S. Circuits, as well as criminal courts, and supporting ACLU challenges to recent changes in immigration practice, I know that before coming into a courtroom, some asylum seekers have been shackled in ankle bracelets issued by bond companies.[9] For this "alternative to detention" (ATD), they must pay $300 to $450 monthly, sometimes for years. In my last case, a young woman had paid $9,000 over the years that she waited for her hearing, spending two hours each day charging the bracelet so that her movements might be surveilled electronically. In addition to this cost for the ankle monitor, she had to pay attorney's fees.

Most of the testimony I provide shows how individuals are targeted for abuse and persecuted because of their membership in a particular social group (PSG).

The work of anthropologists easily fits the role that experts play, explaining (1) how individuals fit into locally understood PSGs, (2) the cultural contexts in which harms leading to persecution take place, and (3) the ways that states or societies discriminate by action and omission. Working with the multiple demands of expert witnessing is a complicated juggling act of managing the constraints of how legal arguments define social groups, supporting the rights of asylum applicants, and complying with the ethical practice of anthropology by framing individual experiences as part of a social pattern.

The PSG is one of five protected grounds and can be roughly defined as a group that shares a common characteristic that is immutable or is so fundamental to their individual identities that members cannot—or should not be expected to—change it. PSGs are defined in case law and are often substantiated by the cultural context that experts most often provide. PSGs do change over time as decisions on cases recast them, challenge their visibility, and define new PSGs. PSGs challenge anthropologists because the legal requirement to document a specific social identity in country conditions declarations may fix people in static social groups that too often rely on problematic cultural essentialist generalizations. To some extent, the language of PSGs relies on the idea that cultures can have fixed characteristics—in contrast to anthropologists' understanding of culture as dynamic and heterogeneous. Ensuring that expert testimony is consistent with anthropology's understanding of culture is part of following the principles of ethical conduct.[10] For me, this is a challenge in every case.

The balance for me lies in arguing, albeit in the normative presentation style of the court and translating anthropological knowledge into legal-speak, what I know to be true from my own research and the research of other scholars. I argue orally and in written testimony beyond the essential categorization that legal rhetorics and categories elicit. I argue that in Guatemala—as elsewhere—gender-based violence does not just threaten individual lives, but is best understood as a harm that requires systemic supports and can be traced to particular historical and social processes that become visible in individual lives.

This is work that has outcomes for individual lives that are transformative, and it is perhaps one of the most fulfilling aspects of my work. But it also produces outcomes with which I am much less comfortable. In anthropology-speak, we would say that the work of expert witnessing is culturally productive, and cultural production always has impacts beyond our control. Specifically, the narratives we write shape worldviews that have the potential to mischaracterize a society by entrenching problematic conceptions of womanhood or by inadvertently furthering ideas of failed or retrograde states where the agency of civil society is stunted. In addition, our narratives risk making women in intimacy into victims of violence, as well as in effect reinforcing the state's role as arbiter in intimate relationships in the United States. While expert testimony details the harms suffered by particular groups in

Guatemalan society, its focus on harms has the unintended consequence of becoming representative for the entirety of the country's cultural dynamics.

NEW KNOWLEDGE: RECASTING ASYLUM PROCESSES OF WOMEN FLEEING GENDER-BASED VIOLENCE

My contribution centers on the cultural acceptance of gendered inequities as a central thread in the continuum of violence reflected in what in global terms would be called a "refugee crisis"—a crisis that in 2018 alone brought 33,000 Guatemalans to seek asylum in the United States. This is evident in the declarations made by asylum seekers, but importantly, it is evident in the interventions the Trump administration made to curtail asylum in the United States that have been continued in the Biden administration. I draw from two vantage points: first, my understanding of the realities of violence that asylum seekers flee; and second, my participant observation in the asylum system as an expert witness.

I have learned much from the work of expert witnessing about how gender inequities are reproduced and challenged in practice. Gender inequity, or the unequal treatment or perceptions of individuals based on their gender role, shapes the asylum process from beginning to end. My first lesson was learning that, beginning with the experience of the asylum applicant in Guatemala—including the experiences they are expected to endure and the ways that gender-based violence is addressed—and continuing in the ways that U.S. law and its interpretation affect women unequally, gender inequity characterizes the experience of the asylum process. This is particularly easy to see in my practice as I focus on women who flee violence in their intimate partnerships or marriages and seek asylum on the basis of these gender-based harms and persecutions. Gendered inequities, both in Guatemala and in the United States, are central to all the cases in which I have provided testimony since I began doing this work in 2010.

What follows in this three-part section is a discussion of the new perspective I have gained by understanding the continuum of gendered inequity in gender-based violence asylum processes for cisgendered, heterosexual women fleeing so-called domestic violence, first through the lens of experiences in Guatemala and second through the lens of experiences in the U.S. asylum system. In this section, I discuss three key, interrelated conditions that shape both national contexts and further gendered inequities for cisgendered women applicants fleeing violence in intimate relationships. First, gender-based violence, once it happens, is mitigated by processes wherein deeply entrenched gender inequities and discrimination persist. Second, the narratives of affidavits for asylum applicants amplify gendered inequities as they rest on primarily interpersonal conceptions of gender-based violence that extend cultural and legal assumptions about the nature of gender and violence in both the Guatemalan and U.S. contexts to asylum applicants'

stories. And third, gender-based violence claims have been under challenge since 2016. Attorneys General Sessions, Whitaker, and Barr all issued revised decisions on case law during their tenure in office. The particular cases that were reviewed overturned precedent that had been established in asylum practice. Sessions, Whitaker, and Barr also revised United States Citizen and Immigration Services (USCIS) policy on the practice of credible fear interviews. Together the changes in USCIS policy and the revised decisions have further amplified gendered inequity in the asylum application process.[11] The Biden administration's lack of progress on reviewing PSG regulations leaves untouched many gender inequities inherent in the treatment of domestic violence.[12] These three conditions entrench cisgendered, heterosexual women in a continuum of gender inequity obstacles that the Guatemalan women I have worked with must traverse to make an asylum claim, regardless of whether it is ultimately successful.

Gender-Based Violence and Inequities in the Lives of Women in Guatemala

Multiple forms of violence shape the everyday lives of Guatemalans. Histories of gender and ethnic violence are enmeshed in what we now too simplistically understand as "gang violence" or "domestic violence" driving migration. These forms of violence are not incidental, spontaneously criminal, or fully private acts. Gang violence and domestic violence, I argue, are rather a predictable cultural production of a rapidly vacating state plagued by corruption, legacies of genocidal racism that have disrupted the social fabric, long histories of colonialist intervention, and a society that has become accustomed to the leveraging of gendered power imbalances as a core element of the effective wielding of authority.

As the experience of violence is mapped onto an individual life, it reads like what I am calling Diana's narrative, a patterned composite story drawn from common experiences that are repeated time and time again in the lives of Guatemalan women seeking asylum.[13]

> Arriving in the United States in 2018, Diana and her twelve-year-old daughter, Christa, were separated. For three months, she struggled to stay alive, wrought with worry about her child. She eventually was told where Christa had been taken, but she was not with her and did not know when she might see her again. She could not find comfort in the *hielera* (cold detention cell) where she was warehoused with many others; her heart ached for home and her children. She could only bring Christa with her and had left two younger children with her sister. Diana had never been imprisoned before, but she had been locked up, sometimes for days, in the little shed that was at the back of the house that she shared with her husband and his family. The desperately lonely nights in detention, without knowing what could happen, were eerily familiar, and Diana stopped talking . . . eating. Worry was all-consuming. "Me descompuse" (I am breaking), she told the volunteer translator working with the immigrant advocacy group that offered to help.

> Diana fled for her life and for Christa's. At twenty-seven years of age, she had been beaten, forced to have sex, and repeatedly told by her husband, Carlos, that without him she was nothing, "menos que nada, basura [less than nothing, trash]," and that he would take her out like the trash in the black bags that he used for work. Carlos's work, Diana knew, was violent—other people said so—but she could bear it, *aguante*. And *aguantar*, or endure, she had for nearly ten years.
>
> When Carlos began to pay too much attention to Christa as she began to show signs of being a señorita, Diana decided to take her children to her sister's home and fled. Carlos came and forcefully took them back home, locking Diana in the shed for three days, "para que aprenda." He told her that if she tried to leave again, she would end up in the black bag. Diana believed him, and when she got her next chance, she fled to the United States with Christa, using money she borrowed from a friend.

Where gendered inequities as authority shapes this narrative is clear. Many societal factors contribute to the prevalence of gendered violence against women in Guatemala. First, sexual violence against women approached the level of normalization during the Guatemalan civil war and is a practice that has continued in the post-conflict period and has become seen as normative.[14] Second, poverty, economic dislocation, and urban migration have disrupted historical notions of family and community ties that could function to stop violence against women.[15] Third, the interests of Guatemalan women, especially Maya women, are not represented in the government, and there is thus a lack of political will to combat violence against women.[16] In other words, the experience of violence is normalized in Guatemala because the political, social, and economic tools that might be available to combat violence in the lives of women are missing.

Substantial empirical evidence demonstrates that women in Guatemala are socioculturally normalized to violence and are expected to "put up" with or "endure" it, as, for example, Cecilia Menjívar has noted.[17] The normalization of violence into gender role expectations is, importantly, not a narrative about the essentialist *machista* nature of Guatemalan men. It is an iterative cultural construction. It has taken place through a long history of state-sponsored practices of violence against women; unequal societal access to education, political representation, and economic opportunities; and the country's legal legacy that defined women and children for centuries as the property of men. While this is no longer sanctioned in law, many customary practices such as forced sex to initiate new intimate partnerships, discussed by Menjívar as *robadas* (stolen), continue to persist.[18]

During the genocide, the Guatemalan military legitimated itself through established notions of paternal love, guidance, and discipline. The acceptance of violence on women's bodies during the civil war has had lasting gendered consequences, including the above-discussed complacency surrounding femicide.[19] Violence in Guatemala has gendered women into cultural scripts that represent them as victims or objects of torture—a role that actively disciplines women out of political agency.[20] This is the very reason the country has developed a distinct set

of laws, courts, and forms of policing that mitigate women's vulnerability and can work to address the needs of these identifiable groups of citizens. Among these are police stations staffed by women officers with special training.[21] However, the specialized judicial institutions and prevention system that the 2012 Law against Femicide compelled rapidly became ineffective and overburdened; courts are not able to provide a timely response and are inaccessible in much of the country. At year's end in 2019, only thirteen of the twenty-two specialized courts originally mandated were still functioning,[22] and even in departments where they were present, they were, like "regular" courts, often inaccessible for many Guatemalans because of long delays in processing, distance from rural communities, and, especially for Indigenous peoples and women, lack of access to the cultural capital required to be successful in a court proceeding.

In addition, the state routinely fails to fund key institutions charged with the monitoring and investigation of this type of gender-based violence. Guatemalan budgets have for several years cut funding of significance to victims of gender-based violence and disabled the effective application of the Law against Femicide, which admittedly was costly to implement. Further, state officials regularly acknowledge the pervasiveness of violence against women.[23] Crimes against women are directly related to the high levels of gender inequity and gender-based violence, and this particularly affects women with limited formal education.

What state action and inaction make clear is that culturally, Guatemalan women are frequently seen as lesser and not deserving of the opportunities to which men are entitled. This can be seen in a number of ways: women have lower profitable employment levels and less political representation. For example, 78.4 percent of women are employed in the country's low productivity sectors,[24] with many of those (73.4 percent) working in informal industries.[25] More than 51 percent of women report not having access to their own income, even if this is income they have earned.[26] In terms of political representation, women make up less than 16 percent of the cabinet posts in public ministries and 3 percent of all elected mayors.[27] In addition, they have less access to state services. A clear example is that Guatemalan women have the third highest rate of unmet need in family planning (including access to contraception) in Latin America and the Caribbean.[28]

Fleeing to a Safe Country

Vulnerable migrant women are impacted too by broader changes in U.S. approaches to migrants. Importantly, in the current demarcation of "Americanness," gender plays a particular role in the management of Black and Brown bodies, and the asylum context is no different. The pressure to control migration to the United States is increasing the levels of militarization and criminalization of migrants within Guatemala's borders. The increased exportation of asylum seekers from the United States is not just a matter of exporting bodies; it is a form

of U.S. population management that follows historical trajectories of colonial intervention in Central America. Thurka Sangaramoorthy has argued that the criminalization of migrants is part of a continuum of U.S. carceral structures. Sangaramoorthy suggests that "the management of immigrants today must be seen in the broader pattern of the growth and intensity of the American penal system that began with slavery, and continued through the convict leasing system and chain gangs."[29] In public rhetoric, the threat implied in the "migration crisis" is linked with the growing power of organized crime, and migrants are now seen as threats to the country's national security.

Guatemalan women I work with have been affected by the magical realist move of the declaration by the United States, against all evidence, of Guatemala as a "safe" country through a bilateral international agreement to reorder the management of asylum seekers. In January 2020, Alejandro Giammattei, former head of the country's prison system and known to have close ties to criminal organizations, took office.[30] Before becoming president, Giammattei was arrested after the Comisión Internacional contra la Impunidad en Guatemala (CICIG; International Commission against Impunity in Guatemala) found that during his term as head of prisons he had participated in a social cleansing program, and he served time for abuse of power, murder, and extrajudicial execution.[31] Giammattei's government has not departed from the documented corrupt practices of the previous president, Jimmy Morales, whose administration also espoused anticorruption rhetoric.[32] In addition, there is a worrisome militarization trend in a country that is thirty years shy of the genocide. In his approach to resolving issues of corruption and the presence of gangs,[33] Giammattei's policies have repurposed the army and police—known to also suffer from corruption—for population control.[34] One year after taking office, Giammattei's government was enmeshed in a political crisis when it was implicated in the use of force against its own citizens.[35] The crisis originated in the passing of a budget in mid-November 2020 with deep cuts to the country's judicial and health systems. The budget was repealed, but a continuing crisis in this "safe country" is inevitable given the cascading disasters—COVID-19, two major hurricanes, and volcanic activity—that have shaken the country's finances and ability to govern. In fact, the Guatemalan government has officially requested Temporary Protected Status (TPS) for its citizens as a result of the most recent disasters.[36]

Gender Inequities in the U.S. Asylum Process

Once in the United States, Diana was lucky enough to be connected with an immigration rights organization that helped her gain pro bono representation from a large firm. The attorneys she worked with did not speak Spanish, but there was a Spanish-speaking case coordinator and a Spanish-speaking legal intern who she regularly communicated with.

I spoke to Diana after I was retained by the firm to write a country conditions report. While I know that not all experts speak to asylum applicants directly, I do, primarily because it is regular disciplinary practice for me.

As an anthropologist, I regularly interview people to better understand their life circumstances. The interviews I conduct are structured to further understand the details outlined in draft declarations; they are conducted in Spanish, and they are translated for attorneys. I asked Diana how she began her relationship with Carlos, how she sustained herself through Carlos's abuse, what she had tried to do to get help in Guatemala, who she was supported by in Guatemala, what her family thought about her relationship, what she herself thought about her relationship, about her religion, and about her community, as well as any other clarifying questions that arise in unstructured interviews. I always learn new things that were not outlined in a draft asylum applicant declaration, in large part because as a country expert I tend to ask questions differently and in idiomatic ways that might be more familiar to applicants.

Diana was taken aback by some of my questions, and it was hard for her to talk about her experiences, particularly because she felt she might be judged for not staying with her husband as she knew some members of her family criticized her for leaving him. As we talked, she explained that while she began her relationship with Carlos when she was barely fifteen years old, had been aggressively pursued by him, and was really unsure about the first time they had sex, Carlos provided an escape from her family. He was older and an alternative to the difficult life she had in her paternal grandmother's house, where she regularly had been expected to do much manual labor since she moved there after both parents migrated to the United States when she was ten.

After my interview with Diana, I explained to her attorneys how I interpreted the details of her life in terms of broader country conditions. Her attorneys were kind and open but admitted to knowing little about gender-based violence and even less about Guatemala. They were, after all, legal experts and not scholars of gender or Latin America. One noted that he had not stopped to think about how social "domestic violence" was before. Another asked whether it was okay in Guatemala for fifteen-year-old children to marry: "Is that just the way it is there?" After touching on the ways that child marriage is viewed in different contexts and a systemic understanding of gendered violence, we discussed why women do not report the violence in their relationships to authorities. Diana, I explained, did not live in a department where the special judicial courts had been set up and her town was an hour away from the closest administrative center. Her attorneys were eager to learn about gender in Guatemala, but it was clear that, like the students in my college classes, their frame of reference for understanding gender and the cultural differences between Guatemala and the United States were drawn from the media and their own interpersonal repertoires. I talked with Diana's attorneys several times as they tried to understand Diana's intimate relationship, her reactions, and the role of the state in the Guatemalan cultural context. In our interactions, the specter of

how law, intimacy, and gender are understood in the United States. featured large as a referent for how Diana needed to be framed as different. The occasions when mutually nourishing partnerships of learning are created between the country expert witnesses and the attorneys whose expertise is the law have always yielded the most effective outcomes in the uncertain work of asylum determination.

Heather R. Hlavka and Sameena Mulla remind us that legal investigative and adjudicative processes are always steeped in culture and norms,[37] or what Robert Cover terms *nomos*.[38] Despite the requirement of asylum law that PSGs be understood in the cultural context in which they arise, I could see in my interactions that interpretation for the attorneys I worked with (in Diana's case and others) and ultimately also for judges, rests on a U.S.-based nomos that is tied to the political realities of migrants, attitudes toward gendered inequities, and "domestic violence" as one form of gender-based violence.

Thinking that gender inequities' interplay with authority ends in Guatemala would be to seriously misunderstand the ideological complex within which women seek asylum. Gendered inequities exist in the United States context too, and they shape not only the executive branch's legal changes, but the daily practices of interpretation of asylum applicants' stories. I see gender inequities entrenched both in the reliance on victimhood that permeates the way that women are formed into asylum seekers and in the challenges lodged by past and current administrations to the right to seek asylum. Gender undoubtedly shapes worldviews, perceptions, and practices in the United States as much as it does in Guatemala.

Domestic violence survivors, like Diana, had been recognized as eligible for asylum through their condition of victimhood before 2018. Accepting Diana's victimhood rests on the understanding that she was targeted because she was part of a recognizable social group based on her gender (a PSG in legal-speak). Such victimhood is essential to offering women like Diana relief (another nugget of legal-speak). Mulla has noted in "The Violence of Care" that criterial legal practices have a history of understanding women who survive gender-based violence through the lens of victimhood.[39] This leaves no room for women's nuanced resilience and resistance. Victimhood as a required identity in asylum, as much as it is capable of providing relief, needs to be thought of as a bureaucratized practice of gendered inequities. Further, gendered inequities are central to the practice of asylum itself, where gender-based violence PSGs have been under constant challenge since 2017. This is most notable in *Matter of A-B-*, in which Attorney General Jeff Sessions overruled a decision by the Board of Immigration Appeals in the *Matter of A-R-C-G-*. What Sessions's decision made clear is that gender-based violence in U.S. society is too easily defined as an interpersonal act (a relationship between private actors) rather than indicative of systemic gendered inequities supported by action and omission by states and our society.[40]

The underlying cultural belief on which such legal changes in the United States rely is the old idea that domestic violence is a private matter. Feminist scholars

have written against this misunderstanding of gender-based violence for decades. Nicola Gavey's work, to give but one example, notes that violence against women is conjured in intimacy by its cultural conditions of possibility.[41] Violence and the ways that it is woven into the cultural fabric of the everyday lives of persons is a particular strength in the narratives that anthropologists offer in ethnographies but also in the work of asylum.

CONCLUDING THOUGHTS

As a thick description of expert witnessing, this chapter discusses the ways in which the practice of expert witnessing can shape the knowledge of the expert about the asylum system itself and their own work in the country or countries for which they provide conditions reports. There are three key lessons I want to highlight from engaging in this work. First, I have learned that gender inequities do not end at the border for Central American asylum seekers. After applying for asylum, applicants are enmeshed in a system shaped by new layers of gendered inequities that are embedded in the narration and adjudication of their cases in the United States.

Second, this work has shown me the persistence of rhetorics of otherness in the construction of "Americanness." In courtrooms today, familiar practices of colonial domination and gender and racial violence are refashioned to function now (or perhaps as they always have) transnationally. Cisgendered asylum applicants making gendered-based violence claims are doubly affected by the violence that compelled them to flee and the gendered inequalities that persist in the practice of asylum. Yet the transnational nature of gendered and racial inequities does not just affect asylum seekers. Expert witnesses who, like me, can be easily othered because of their ethnicity or country of birth need to also be particularly wary of their entanglement in the replay of colonial othering in asylum courts. I have learned this the hard way as my own Guatemalan origin is often weighed and weaponized against my academic expertise. In one particularly egregious example of giving oral testimony on a case in Texas, I listened incredulously as a government attorney unsuccessfully tried to convince the court that I should not be allowed to testify because I myself am Guatemalan.

Third, working as an expert has taught me about the power and constraints of applied scholarship. In making my own scholarship applicable to legal proceedings, I have learned that while the work is complicated, it does not require abandonment of a critical lens on structures of power and inequality. Participating as an expert in the "asylum economy" requires weighing the impact that scholarship can have on individual lives and our own participation in unequal structures.[42] This is imperfect work, but it is in no way dissimilar to other applications of scientific knowledge, such as medicine, that require decisions to be made and weighed in real-world contexts. It is work that deeply engages our intellect but equally

shakes us to our core. Diana's case was no exception. Despite all the work put in by her attorneys, because of how the law applied to the particularities of her case, she was unable to gain asylum and had to settle for the limbo of relief offered by the withholding of removal.[43]

NOTES

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43. Withholding of removal is a fraught form of relief. It does not allow those granted this form of relief to leave the United States without executing an order of removal nor gives them a path to citizenship. In chapters 4 and 7 in this volume, withholding of removal is discussed in greater detail. Specifically in Diana's case, this form of relief does not allow her to sponsor her other children to come to the United States. Diana's and her older daughter's safety comes at the cost of permanent family separation.

3

Putting Expertise to Work

Best Practices for Academic Expert Witnesses

Kimberly Gauderman

As a historian and an expert witness in Latin American asylum cases, I struggle against indifference. As a scholar of Latin American history, I repeatedly share historical narratives with my students, often wishing that these stories had different endings. As an expert witness, I strategize about how to change an individual's future. The stark reality of the human experience of injustice is daunting, and the practice of repeatedly going into dark places, and not becoming indifferent to them, requires devotion to sources, the art of storytelling, and stamina. It also necessitates answering your emails.

When I got the first email from an attorney asking me to be an expert witness, I ignored it. I had lectures to prepare, exams to grade, and meetings to attend. I thought the email must have been misdirected: Why would someone ask me, a historian of early Latin America, to be an expert witness in an asylum case? When I later went back to clean up my emails, I read the attorney's message more carefully and saw that, indeed, it was directed to me. I called my friend and mentor, Thomas M. Davies Jr., who served for decades as an expert witness, to ask him if he thought I could be helpful as an expert in asylum cases. As a fellow historian, he understood my background as a scholar, encouraged me to take that first case, and mentored me in my first affidavits.

Twelve years later, I continue to serve as an expert witness, documenting the gender-based, sexual, and gang violence that forces women, children, and LGBTQ+ persons to choose between persecution and possible death and flight to the U.S. I use my years of teaching experience to educate attorneys and judges that these individuals are not just fleeing private crimes rooted in an imagined, inexorable cycle of third world violence. Instead, asylum seekers and applicants for withholding of removal and relief under the Convention Against Torture (CAT)

are survivors of specific forms of mistreatment and violence by perpetrators who are not held accountable by their governments.[1] My work as an expert witness has, in turn, transformed my scholarship by broadening my community-engaged research, allowing me to design new courses and to engage with a national community of scholars from many disciplines and legal professionals.

My practice as an expert witness has changed over these years. When I began, I was already tenured and thus had a stable position, a teaching portfolio of established courses, and a national scholarly profile as a specialist in Indigenous-Spanish relations and gender and sexuality in early Latin America. Still, at first I accepted relatively few cases and maintained a narrow focus on LGBTQ+ cases in the Andes. As I gained greater understanding of asylum law and experience as an expert witness, I expanded the geographic and thematic scope of my research, taking on cases from the Northern Triangle (Guatemala, El Salvador, Honduras), as well as those involving gang violence.

There is an ebb and flow to the workload, one that obeys not the patterns of the academic calendar but rather the seemingly arbitrary scheduling, postponements, and cancellations of the immigration courts. A new affidavit requires intensive research and writing, usually followed by a quiet period of weeks or months before the scheduled hearing. I am careful not to accept cases with scheduled hearings that conflict with my teaching schedule or other prior obligations. While I have gradually increased the number of cases I accept, I have also taken breaks from expert witnessing because of increased teaching and service obligations at my university. In addition, while work as an expert witness is compelling, it can be emotionally draining. It is healthy to pause from this work for a period of weeks or months to avoid or heal from compassion fatigue. When I have taken breaks, I determine the amount of time, and when requests arrive during that period, I do not read the case details but inform the attorney that I am currently not taking new cases and indicate the date that I expect to resume this work.[2]

WHAT IS EXPERTISE?

Expert witnesses are not permanently designated as qualified to submit affidavits and to testify in immigration courts; rather, the credentials of an expert witness are evaluated in each hearing by the immigration judge (IJ). Immigration proceedings are administrative rather than judicial hearings; however, the Federal Rules of Evidence guide immigration judges, who have discretion to evaluate a variety of documents and testimony submitted by applicants to substantiate their claims, including information and opinions provided by expert witnesses. Expert witnesses are those who have "scientific, technical, or other specialized knowledge" that "will help the trier of fact to understand the evidence or to determine a fact in issue."[3] While attorneys advocate for asylum applicants, expert witnesses must maintain objectivity by providing accurate and documented affidavits as the basis for their professional

opinions.[4] The strength of expert witnesses depends on their ability to critically analyze the experiences of the applicant and to demonstrate whether and how those experiences reflect both general and specific country conditions. Academics may qualify as country conditions experts based on research, teaching, and other relevant experience, such as field research and travel in relevant countries and regions.[5]

Scholars are particularly well equipped to serve as country conditions experts in asylum cases. University and college professors have status, skills, expertise, and experience that prepare them to serve as expert witnesses. Faculty members have earned doctoral degrees that qualify them to teach in their institutions. Tenured faculty members have been nationally evaluated and vetted by their institutions, and tenure's safeguard of academic freedom supports their intellectual independence and objectivity as scholars and expert witnesses. Disciplinary training in the humanities and social sciences provides scholars with research skills and methodologies for evaluating and critically analyzing sources. Scholars also bring their theoretical expertise in areas such as law, human rights, gender relations, and sexual violence, for example, to bear on the individual experiences and country conditions of each asylum case. Finally, as experienced teachers, scholars are able to counsel immigration attorneys, draft affidavits, and provide hearing testimony in ways that make legible the causes and consequences of the violence that asylum seekers have experienced or fear experiencing in their countries of origin.

Country conditions expert witnesses will often determine the scope of their expertise, at times to secure their standing before immigration courts and at times to limit what can quickly become an unsustainable workload. Some scholars choose to narrowly focus their expertise on a single country and specific forms of violence inflicted on a particular population, for example, gender-based and sexual violence perpetrated against women in Guatemala. Others choose a multicountry and thematic approach, such as the impact of gender-based, sexual, and gang violence on women and LGBTQ+ persons in the Northern Triangle. Based on continuing research and teaching interests, scholars may expand or constrict the focus of their expertise. In the course of my work, for example, early on I expanded my research on LGBTQ+ persons in the Andes to include gender-based and sexual violence against cisgender women and violence perpetrated against Indigenous peoples and Afro-Andeans. This geographic and thematic focus in my expert witness work, which I maintained for several years, reflected my scholarly and teaching profile in my department.

After gaining experience in researching and writing affidavits and providing testimony in immigration hearings, I determined to broaden the geographic scope of my expertise. As a faculty member associated with the Latin American Studies Program, my profile also included interdisciplinary and comparative research on Latin America, specifically including Central America. I maintained my thematic focus on gender norms, sexuality, and race/ethnicity but expanded my expert witness work geographically first to Guatemala, then to El Salvador, and finally to Honduras. Because gang members are often perpetrators of violence in these Northern Triangle countries, I added gang violence as a critical topic in

my research. Specific cases, moreover, may require experts to conduct additional research in new areas. For example, prompted by individual cases, I have conducted research on the status of children, persons with disabilities, and those with specific psychological or medical diagnoses, such as clinical depression or HIV.

Maintaining and expanding one's geographic or thematic focus as an expert witness requires an ethical commitment to engage in the research necessary for this work. To expand my expertise on country conditions in Honduras, for example, I compiled a bibliography of scholarly works on Honduras and conducted primary research that included reports by the U.S. and Honduran governments, UN entities, and nongovernmental organizations (NGOs). Each case requires targeted research on topics specific to the case, as well as updated country conditions. I have established google alerts for the countries I work on and daily receive dozens of news articles on current events in each country. I also monitor blogs, such as the AULA Blog produced by the Latin American and Caribbean Center at American University, and reports by InSight Crime, a research foundation that focuses on organized crime in the Americas. This research builds on my decades of experience as a scholar of Latin America. It is critical that expert witnesses carefully consider their current academic profile and their capacity for further research in determining whether to work on specific cases. Being clear on one's scope of expertise and refusing to work on cases outside of that scope can also save lives because an expert witness's affidavit and hearing testimony play a critical role in the determination of whether an applicant receives a form of relief or is deported.

Because of the time investment and the emotional toll that this work entails, academics regularly pause their work as expert witnesses. In periods in which I limit the number of cases I am working on, I sometimes restrict them geographically, accepting cases only from the Andes or from the Northern Triangle. I also limit my caseload thematically, for example, only accepting LGBTQ+ cases as it is often more difficult to find expert witnesses qualified for these cases. And while country conditions experts may choose to temporarily or permanently broaden or narrow the scope of their expertise, they should not feel pressured by attorneys to conduct research or offer professional opinions outside of their defined scope of expertise. Scholars of Latin America also bring linguistic skills to their expert witnessing, such as knowledge of Spanish, Portuguese, or Indigenous languages. However, expert witnesses are not responsible for facilitating communication with the applicant or translating documents for the attorney.[6]

LEVERAGING EXPERTISE

An expert witness not only provides a critical component of the asylum seeker's case—the country conditions affidavit and corresponding testimony—but can also influence how attorneys evaluate possible legal arguments and shape how judges and government attorneys evaluate the legitimacy of asylum claims. A scholar's academic status and expertise, as well as experience as an expert witness, should

inform their consultations with attorneys and can be used in immigration courts, the Bureau of Immigration Appeals (BIA), and federal circuit courts.[7] As expert witnesses, scholars continue to deepen their understanding of historical and current conditions in their countries of focus through ongoing research for individual affidavits. In addition, expert witnesses fill a critical role in strengthening due process in hearing proceedings; through their consultations with attorneys, authoring of affidavits, and provision of hearing testimony, scholars acquire knowledge about asylum law and procedures. Scholars may leverage this research and experience as expert witnesses in work that is directed to public engagement by publishing articles in disciplinary journals and engaging with the media.

For many expert witnesses, most work will entail the preparation of affidavits used in immigration hearings for applicants applying for relief through the defensive process, which includes individuals who were apprehended at the border or within the U.S. without a valid immigration status or who have a valid immigration status but have been convicted of certain crimes.[8] (Applicants pursuing an "affirmative process" following the overstay of a visa, for example, may apply directly to the U.S. Citizen and Immigration Services [USCIS], for which they may also require a country conditions affidavit.)[9] Noncitizens in the defensive process have received a Notice to Appear (NTA), a charging document in which the Department of Homeland Security (DHS) alleges that the noncitizen should be deported because the individual lacks valid immigration status to remain in the U.S. The NTA indicates the factual allegations against the individual, the section of the law that the DHS alleges supports deportation, and a date to appear in immigration court.[10] In a hearing before an immigration judge, noncitizens have an opportunity to defend themselves from deportation by arguing that they have a legal reason to remain in the U.S., which includes claims for asylum and other forms of relief.[11]

Expert witnesses share their knowledge with attorneys, who have varying degrees of familiarity with the applicant's country of origin, through consulting as well as through writing affidavits. Through their work, expert witnesses can draw attorneys' attention to aspects of the applicant's situation that reflect specific country conditions that may restrict or extend grounds for relief. For example, in one case I worked on, the applicant was called a racial epithet in one instance. The attorney believed that this racial slur indicated that the individual was perceived as a racial minority and that therefore race could be considered an additional ground of relief. However, I knew that in this country such terms were not always directed at racial minorities but could be used to denigrate any individual. In consultation with the attorney, I was able to explain the context for the usage of this term and, as there was no other supporting information in the record that the individual was perceived as a racial minority, the perceived racial status of the individual did not contribute to the applicant's persecution in this case. It is perjury for an expert witness to knowingly substantiate false claims.

In other cases, my research for affidavits has provided new information to attorneys that substantiated applicants' inability to relocate within their countries of origin to escape violence. In one situation, the perpetrator was a convicted rapist who threatened future harm to the applicant, who survived this rape and gave birth to her child. My research showed that in this country, rapists, like all other criminally convicted persons, retain custodial rights over children and that therefore legally the applicant would be obligated to share her location with him if he were to assert custodial rights. Because my research also indicated that abusive men regularly assert control over children as leverage against the mother, this additional information from the penal code substantiated the applicant's claim that she would be endangered anywhere in the country because the perpetrator would have access to information on her location.

As Dr. Davies explained in chapter 1, the courtroom is another venue for education. Country conditions experts are becoming increasingly necessary due to policies that have increased the burden on asylum applicants to substantiate their claims for relief. Expert testimony provides immigration judges with objective information for evaluating an individual applicant's fear of persecution, but what judges learn from one case may continue to guide them in subsequent cases as well. For example, in one hearing, I testified to the cultural conditions, forms and levels of violence, and lack of government protection for transgender women in Guatemala. The immigration judge granted asylum in that case. Months later, I was scheduled to testify in a similar case with a different attorney in front of the same judge. The attorney I was working with called to inform me that once the judge saw that I was the expert witness, the judge determined that it would be more expedient to grant asylum in that case as well. As in the classroom, effective teaching informed by research and critical analysis can have a lasting impact; experienced scholars in the courtroom provide relevant facts and interpretation that may assist immigration judges to evaluate future cases.[12]

Providing hearing testimony is demanding. Experts often endure long, stressful waits on the day of the hearing to offer their testimony and may face aggressive questioning from DHS attorneys, who regularly seek to disqualify witnesses and undermine the credibility of their affidavits through cross-examination. Immigration hearings are adversarial, insofar as the government has charged the applicant (known as "respondent" in the hearing) with unlawful status in the U.S., and it is the role of the DHS attorney to present the government's case that the respondent should be deported.[13] The stakes for these hearings are high, but scholars who prepare well for their expert testimony can withstand such challenges by the government. Because of scholars' professional standing, depth of research, and preparation for the specific hearing, no one in that courtroom is more able to explain to the judge how persecution, torture, and impunity are grounded in country conditions, as well as the likely consequences of deportation for the applicant. However, expert witnesses are not responsible for the outcome of the hearing;

our role is to convey, to the best of our ability, accurate information on country conditions and our informed professional opinion on the risks the applicant likely faces in the home country or, if the individual is stateless, in the last country of residence.

It is helpful to remember that the DHS attorney's potentially aggressive tactics are not personal attacks. As an example, in one hearing, I was rigorously interrogated by a DHS attorney on my qualifications. Her objections focused on my lack of personal experience in the country, my record of publication, and the quality of my research. The immigration judge qualified me as an expert witness over the DHS attorney's objections. Because of the length of time the DHS attorney spent challenging my expertise and cross-examining my testimony, the hearing was continued to the following day. Further testimony from me was not necessary, but, even though I was not present, the DHS attorney tried again to disqualify me. The judge again overruled her objections and ultimately granted asylum to the applicant. Months later, I was contacted by a different attorney for a case in the same court. The immigration judge assigned to the case was the newly appointed former DHS attorney who had rigorously opposed my testimony in that previous hearing. I at first declined the case. As I explained to the attorney, based on my previous experience with this former DHS attorney who had rejected my professional qualifications, I would be an ineffective expert witness in this new case. However, with the support of the attorney I agreed to work on the case.

In that hearing, the newly installed judge was respectful, qualified me as an expert, and granted asylum to the applicant. In these two hearings, the same individual evaluated my qualifications as an expert in radically different ways that depended on her role in the hearing procedures. Her reaction to me was not personal but based on her professional objectives. As a DHS attorney, she believed her role was to disqualify me in order to weaken the applicant's asylum claim; as a judge, she found my research and opinion helpful to her evaluation of the case. However aggressive DHS attorneys are, it is critical to remember that their role in the proceedings is usually adversarial and that challenges to an expert's credentials may be a strategy to undermine the respondent's claims rather than an objective evaluation of the expert witness's background and experience. A negative hearing experience is neither reflective of an academic's status as a scholar in their field, nor does it diminish the valuable contributions that the expert witness can make in other hearings.

A common question posed by DHS attorneys, intended to challenge an expert witness's qualifications, concerns whether an expert witness has personal experience in the country of expertise. The question of experience cuts both ways: DHS attorneys may accuse an expert witness who has spent considerable time in a country of bias or—taking the opposite approach—accuse an expert who has not recently or never visited the country of ignorance. There is no preferable answer, but in any case, the more important basis of expertise—according to judges who

have regularly certified my work as an expert—is the scholarly credentials and research abilities of the expert witness. Contrary to what is argued by many DHS attorneys, immigration judges rarely qualify experts based on the witness's physical presence in a country. An example from a historian's perspective is instructive here. As a historian, for example, the scope of my expertise includes seventeenth-century Quito; however, I have never physically been present in colonial Quito. Although I lived in modern Quito for several years, my expertise on its past is based on archival research, not my observations and experience during my stay in Ecuador to conduct my research. The documents I needed were only available in that national archive, so I traveled there. For countries I focus on as an expert witness, by contrast, including modern Ecuador, there is a sufficient digital archive to support my research, including reports and analysis by U.S. and foreign governments, UN entities, NGOs, research institutes, and media. Curating a digital archive for research purposes is not unique to academics. Researchers for the Congressional Research Service (CRS), a public policy institute that exclusively provides research and analysis to the U.S. Congress, also primarily use sources that are digitally available rather than personally conducting field research in specific countries. In a hearing, an expert must be prepared to explain the basis of expertise, which may or may not include physical presence in the country of focus. Because I conduct deep research using digital sources and can explain the relevance of that research, I have always been qualified as an expert regardless of whether I have visited the applicant's country.

When the immigration hearing has concluded, the expert witness's work on the case is completed, but the expert witness's affidavit—which becomes part of the permanent record of the case—may continue to shape the future of the applicant and play a critical role in changing legal standards. If the immigration judge denies the applicant's claim, the negative decision may be appealed to the Bureau of Immigration Appeals, an appellate court that, like the immigration court, is under the authority of the Executive Office for Immigration Review (EOIR) within the Department of Justice. At the BIA level, the expert witness's affidavit used in immigration court is a permanent part of the evidentiary record. Expert witnesses typically do not provide new affidavits or hearing testimony in these appellate hearings.

If a particular ruling is appealed to the BIA, the EOIR provides that court with a full record of proceedings from the immigration court, including the expert witness's affidavit and all other evidence. The BIA is not a fact-finding body; it is charged to review the immigration judge's decisions for factual or legal errors. Typically, the BIA does not accept new evidence.[14] The court, at its discretion, may accept amicus briefs, which are documents written by individuals or organizations (called amicus curiae, or friends of the court) that are not party to the case but can offer information, expertise, and insight that can inform the proceedings. As a scholar and an expert witness on the status of LGBTQ+ persons in Latin America,

for example, I have consulted with and provided research to attorneys charged with writing amicus briefs on behalf of organizations.[15]

If the BIA affirms the immigration judge's denial of the applicant's claim, the case can be appealed to the Federal Circuit Courts of Appeal. The federal circuit court only has discretion to deny or accept an appeal; like the BIA, the federal circuit court is not a fact-finding body. It reviews constitutional claims and facts of law by reviewing the evidentiary record of the immigration and BIA hearings.[16] As in BIA proceedings, expert witnesses may consult with and provide research to assist in amicus briefs.[17] Judicial decisions at this level are precedential; that is, the federal circuit court's decision on the case will change legal standards for future cases. The expert witness's original affidavit continues to be a critical document at this level. Davies, for example, was the country conditions expert witness in the 2000 asylum hearing of applicant Hernández Montiel, a "gay man with a female sexual identity" from Mexico. The immigration judge denied the applicant's asylum claim, and the BIA affirmed the immigration judge's denial. The case was appealed to the Ninth Circuit Court of Appeals. Federal circuit judges extensively cited Davies's affidavit in the decision to grant asylum to Hernández Montiel in 2000. This decision significantly broadened the particular social group (PSG) for gender-nonconforming persons to specifically include "gay men with female characteristics" and continues to protect transgender and gender-fluid applicants seeking relief today.[18]

In addition to case-specific affidavits and testimony and research for amicus briefs submitted during appeals, country conditions experts may—if they so choose—provide critical support at the federal level in litigation against executive branch actions to restrict immigration and asylum. Research by expert witnesses may support amicus briefs, and expert witnesses may author or coauthor generalized affidavits used to support litigation. For example, M. Gabriela Torres, a contributor to this volume, coauthored an affidavit on the status of women in Guatemala that was introduced as evidence by the American Civil Liberties Union (ACLU) and the Center for Gender and Refugee Studies (CGRS) in *Grace v. Whitaker*.[19] In 2018, the ACLU and CGRS challenged Attorney General Jeff Sessions's decision in *Matter of A-B-* that restricted domestic violence as a basis for asylum relief.[20] Because of Sessions's decision, the USCIS issued a policy memo that directed immigration officers to deny the claims of survivors of domestic violence in credible fear interviews to prevent these women from continuing the asylum process.[21] Torres's coauthored affidavit contributed to the success of this litigation in the U.S. District Court for the District of Columbia that resulted in an injunction against the USCIS from using this policy.[22]

Country condition expertise can also be effective in other venues at the federal level. For example, expert witnesses may author affidavits (referred to as "reports") and provide oral testimony in Hague Convention cases. The Hague Abduction Convention is an international treaty that provides procedures through U.S.

federal courts for determining whether children under the age of sixteen have been abducted internationally and if a child is determined to have been abducted, for the return of that child to the country of habitual residence.[23] While distinct from the asylum process, the respondents in these cases may also be asylum seekers. This was the circumstance in one asylum case for which I was an expert witness: the respondent was a woman who had fled with her child from her home country because of domestic abuse and had applied for asylum on behalf of herself and her child. The father of this child had already applied to the U.S. government under the Hague Convention for the return of the child to his custody in his home country. If he had been successful in this request, although the mother would not have been legally required to return to her home country, she indicated that she would feel compelled to return to protect her child from the father's abuse. As I argued in my report, abusive men assert authority and even abuse children to control the mother, and this man's motive was more likely not the well-being of the child but rather to force the woman to return so that he could carry out his violent threats against her. My report included research on the status of children in that country, demonstrating that the government did not protect children from violence. Because the father had a history of violent behavior, I argued that the child would likely be endangered if returned to the country of origin. The case was resolved through settlement, and the woman and her child continued the asylum process in the U.S.

Affidavits are powerful documents that illustrate and document the historical and cultural context and actual occurrence of distinct forms of violence and mistreatment in specific countries. Expert witnesses usually tailor their research to explain those factors that are relevant to the status and claims of an individual applicant, and the affidavit is submitted as evidence for that individual's case. However, expert witnesses may also craft general, or universal, affidavits that may be submitted in several cases. The research for this type of affidavit usually focuses on a specific population, women domestic violence survivors in Honduras, for example, or specific perpetrators, such as gangs in Guatemala. Universal affidavits are helpful in cases in which it is difficult to find an expert witness, either because of the general shortage of expert witnesses or because the applicant's hearing has been expedited and there is not sufficient time for an expert witness to provide an individualized affidavit. Universal affidavits also assist other expert witnesses and can be cited as evidence in their affidavits. The CGRS, for example, sponsors and shares universal affidavits with attorneys and expert witnesses to inform briefs and affidavits and to submit as evidence in specific cases. In my work, I have provided universal affidavits used in cases for detained applicants with expedited hearings. I have also provided universal affidavits to be used for populations for which there is a chronic shortage of expert witnesses, such as LGBTQ+ persons. On one occasion, I crafted a universal affidavit on the status of transgender women in El Salvador that documented an increase in violence against this population since

2005. This affidavit substantiated the claim that there was a change of circumstances for transgender women in El Salvador since that time, and it was submitted by an attorney as evidence to reopen a number of cases.

Scholars with expert witness experience can also make an impact in their contributions to disciplinary journals on emergent issues and by engaging with the media. Disciplinary societies with dedicated academic journals, such as the Society for Cultural Anthropology, devote issues to current events. Torres, for example, based on her scholarly background and her experience as an expert witness, contributed an article on gender-based violence in Guatemala and the U.S. asylum system in an issue of *Fieldsights* that was motivated by the migrant caravans that left the Northern Triangle of Central America throughout 2018. This issue of *Fieldsights* brought together articles by ethnographers, many of whom are also practicing expert witnesses, to discuss the conditions in these countries that motivated migrants in the caravans to leave their homes and seek safety in the U.S.[24]

Newspapers with national circulation, such as the *Los Angeles Times*, also offer platforms for scholarly expert witnesses to share their expertise. Reflective of this practice, Torres coauthored an op-ed in the *Los Angeles Times* with Cecilia Menjívar, another expert witness and scholar on gender-based and state violence in Guatemala, that disputed the government's designation of Guatemala in July 2019 as a "safe third country." Torres and Menjívar argued that citizens from other Central American countries should not be forced to apply for asylum in Guatemala before making an application to the U.S. because Guatemala is a dangerous country due to gang violence and government corruption.[25] An organization that assists academics to connect their scholarship and experience to policy makers, civic groups, and the media is the Scholars Strategy Network at the Center for American Political Studies, Harvard University. The Institute of Latin American Studies (ILAS) at Columbia University has established the Regional Expert Papers Series, which publishes peer-reviewed research papers by U.S. researchers and academics on contemporary conditions in Latin American countries.

EXPERT WITNESSING IN THE ACADEMY

Tenure and promotion at colleges and universities are usually based on three weighted criteria: scholarship, teaching, and service. Because country conditions expert witnesses provide predominantly pro bono assistance and produce writings that, while extensive, are neither peer-reviewed nor published, most departments and institutions consider this work in the category of service, if it is considered at all. However, as discussed throughout this book, your qualification as an expert witness relies on your reputation and experience as a researcher and teacher at your institution. Country conditions affidavits are intensively researched documents that are vetted by legal professionals and immigration judges before being admitted into the judicial record. The immigration court hearing is another venue for

teaching; and research for affidavits and experience as an expert witness can also be used as the basis for designing new courses or enhancing the existing curriculum. The work of expert witnesses is community-engaged scholarship that should be given due weight in career advancement decisions.

These changes are slowly taking hold in university tenure review processes and in how professional associations and foundations value community-based research in higher education. The American Council of Learned Societies (ACLS) and the Mellon Foundation, for example, recognized the value of community-engaged scholarship and inaugurated the Scholars and Society Fellowship in 2019. This fellowship supports humanities faculty in PhD-granting institutions who are engaged in projects that link their disciplinary training to significant societal issues.[26] Professional associations, such as the American Historical Association (AHA) and the American Anthropological Association (AAA), have made firm commitments to promote publicly engaged scholarship and teaching by revising tenure and promotion guidelines. The AHA incorporated recommendations by the Working Group on Evaluating Public History Scholarship in 2017. Traditional criteria for career advancement privilege published scholarship, which may discourage scholars from engaging in research and teaching connected to projects that address local, national, and global challenges. According to the AHA, however, "publicly engaged projects can bring funding and prestige to departments and fulfill institutional missions." These new guidelines recognize that historians are increasingly participating in community-engaged work and urge institutions to formalize mechanisms that recognize and promote civic engagement.[27] The AHA acknowledges that the work of expert witnesses is a "disciplined learned practice" in its criteria for valid community-engaged scholarship, which include "preparing reports for government bodies, academic institutions, and nonprofits" and "providing expertise, advice, and consultation for . . . governmental and nongovernmental agencies[] and community groups." Because expert witness affidavits are assessed by attorneys, judges, and government officials, these documents also meet the guidelines for peer-reviewed scholarship, which can include "a broader and more diverse group of peers, many from outside traditional academic departments."

The AAA has recognized since 2004 that anthropologists are increasingly involved in community-engaged research and in 2011 issued guidelines that specifically included expert witnessing as a valid form of scholarship to be evaluated in tenure and promotion decisions.[28] In 2017, the AAA issued guidelines for tenure and promotion committees that urge institutions to "acknowledge the value of public forms of communicating, writing and publishing as Scholarship."[29] Like the field of history, anthropology traditionally privileges published scholarship in career advancement decisions; however, the AAA recognizes that "public scholarship communicates the insights and value of anthropology beyond the academy." To evaluate publicly engaged scholarship, the AAA also recommends

that external reviewers may include nonacademics, such as "community or organizational partners." For both the AHA and the AAA, scholarship is a process and not a product that exclusively manifests as a published article or book that is peer reviewed by other academics. Expert witness affidavits require disciplinary methodologies and practice and are reviewed by legal professionals and scholars, as well as government-appointed attorneys and immigration judges.

The AHA offers recommendations for historians involved in publicly engaged research that are applicable to all academic expert witnesses. First, clearly document your expert witnessing and explain the ways your work qualifies as scholarship within your discipline. Keep careful records of each case, noting the country focus, the basis of the claim (e.g., sexual violence, LGBTQ+, police torture), the court location, the legal provider (private attorney, legal aid society, law school clinic, etc.), and the outcome. I have found it helpful to provide redacted affidavits to my department so that my colleagues can see the level of research involved in these cases. I include information on my cases in my curriculum vitae used for evaluation and promotion in my university. Expert witnesses also acquire specialized knowledge about immigration and asylum law and policies and legal argumentation. Organizations such as the Center for Gender and Refugee Studies and Tahirih Justice Center offer webinars that provide guidance for managing specific legal challenges. I participate in and document these trainings, noting the topic and date for each webinar. Finally, presentations on your research and experience as an expert witness to professional organizations will reinforce that this work is valued by the academy.

Second, the AHA recommends that scholars work with their departments to establish criteria for career advancement that reflect publicly engaged scholarship, which could include adjustments to workload distribution and expectations for publication. In addition to conversations with my department chair, I have found it helpful to participate in department-wide discussions about expert witnessing to educate my colleagues on the scope of this work and its value to our academic mission. Public presentations within the department, in the university at large, and at local community groups, as well as guest lectures in colleagues' classes, can inform and generate enthusiasm for acknowledging this work as a form of publicly engaged scholarship that should be recognized in academic institutions. Some departments evaluate faculty yearly based on scholarship, teaching, and service. These evaluations are an opportunity to explain and document the value of expert witnessing as a form of scholarship.

Expert witnessing contributes to the teaching mission of institutions of higher education. Teaching skills are used in hearing testimony, but more concretely, country-specific research can be incorporated into existing courses, while experience and specialized knowledge acquired as an expert witness can be the basis for designing a new curriculum. Research I conducted on the status of Indigenous women in Ecuador in the context of asylum claims, for example,

broadened the scope of my courses on Indigenous peoples in Latin America to include information and discussion on gender norms within Indigenous customary legal practices. Based on my work as an expert witness, I have also created new undergraduate and graduate courses that focus on Latin American immigrants and refugees and the history and current practice of U.S. immigration and asylum laws. These courses have attracted students from across the campus, thereby increasing enrollment and expanding departmental outreach throughout the university, including the law school. Embedding research and practice as an expert witness in the curriculum also augments your qualifications as an expert in immigration hearings.

Looking back on my years as a professor and an expert witness, I recognize that expert witnessing is consistent with my journey as a scholar. As a first-generation college graduate, I have always viewed research and teaching in the university system as an avenue for social change. The academy has never been an Ivory Tower, a pejorative accusation insinuating that scholars are disconnected and irrelevant to society; rather faculty members and their scholarship are embedded in and transformed by the world around them.[30] My work as an expert witness would not be possible without my faculty position in the university. Scholars have a unique status and skill set that enable them to be effective expert witnesses.

CONCLUSION

Expert witnessing has transformed my scholarship, expanded the communities I engage with, and augmented my commitment to research and teaching. It is true that I am busier; the level of my research has increased as I monitor current events in my countries of focus and delve deeply into topics relevant to specific cases. However, my work as an expert witness is compatible with my academic obligations and, indeed, has enhanced my profile as a scholar in my university and nationally.

As an expert witness, I am strengthened by the bravery and resilience of individuals who, despite the terrors and abuse they have survived in their home countries, believe that our country will honor its pledge to provide refuge for the persecuted. My heart is crowded with their stories. Each hearing with a successful outcome is a reminder that justice is possible and sometimes manifests one person at a time.

NOTES

1. Asylum, withholding of removal, and relief under the Convention Against Torture are distinct forms of relief that halt deportation but offer different levels of protection. Generally, applicants apply for all three forms of relief simultaneously. See chapter 6 of this volume for further information.

2. Applicants for relief are usually survivors of physical, sexual, and/or mental trauma. Expert witnesses, like attorneys, may experience compassion fatigue, which is a state, sometimes described as "burnout," that includes symptoms of secondary trauma. See chapter 9 of this volume for further information.

3. Federal Rules of Evidence, Dec. 1, 2017, Rule 702 Testimony by Expert Witnesses.

4. USCIS Policy Manual, vol. 1, chap. 6, "Evidence," Nov. 23, 2021.

5. This chapter focuses on the role of academics as country conditions experts. Academics also engage in immigration court proceedings as medical, psychological, and forensic experts. Professional associations, such as the American Medical Association, the American Psychological Association, and the American Anthropological Association, offer information on expert witnessing in these fields.

6. It is my personal policy to not speak with the applicant. My rationale is that as a historian, my expertise is based on the analysis of documents; the inclusion of information given orally could introduce bias in my research. Some expert witnesses who are certified translators, for example, do speak with the applicant in exceptional circumstances. Expert witnesses from other disciplines, such as anthropology, may also be more inclined to consider speaking with the applicant. This is discussed further in chapters 2 and 6 of this volume.

7. Decisions by immigration judges may be appealed to the BIA. Immigration courts and the BIA are under the authority of the Department of Justice. Decisions by the BIA may be appealed to U.S. Courts of Appeal, organized into twelve regional circuits, under the authority of the federal judiciary.

8. For a discussion of the distinctions in forms of relief included in asylum, withholding of removal, and the Convention Against Torture, see chapters 4 and 7 of this volume.

9. USCIS, "Obtaining Asylum in the U.S." See also chapter 4 of this volume.

10. 8 USC 1229: Initiation of Removal Proceedings.

11. For an overview of the asylum process, see American Immigration Council, "Asylum in the United States," June 11, 2020.

12. For an analysis of the roles of expert witnesses in immigration hearings by a former attorney and immigration judge, see Jefferey S. Chase, "The Importance of Expert Witnesses," Opinions/Analysis on Immigration Law (blog), Aug. 24, 2017. Andrew I. Schoenholtz et al., "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review* 60:25 (2007): 295–412, discusses the authority of adjudicators in immigration proceedings and analyzes the disparity in adjudicators' approval rate in DHS, immigration hearings, BIA, and federal circuit courts.

13. For an overview of the mission and scope of the EOIR, including immigration hearing procedures, see "Executive Office for Immigration Review: An Agency Guide," U.S. Department of Justice, Dec. 2017.

14. 8 CFR § 1003.1—"Organization, jurisdiction, and powers of the Board of Immigration Appeals."

15. For an example of an amicus brief filed with the BIA, see Catholic Legal Immigration Network, Inc., "CLINIC Files Amicus Brief on BIA Appeal for Transgender Honduran," Mar. 25, 2020.

16. U.S. Code Title 8. ALIENS AND NATIONALITY Chapter 12. IMMIGRATION AND NATIONALITY Subchapter II. IMMIGRATION Part V. Adjustment and Change of Status Section 1252. Judicial review of orders of removal.

17. For an example of an amicus brief filed in the Ninth Circuit Court of Appeals, see *Maldonado Lopez v. Holder*, CGRS Amicus Brief, June 6, 2013.

18. See chapters 1 and 5 of this volume and *Hernandez-Montiel v. INS*, Aug. 24, 2000.

19. Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

20. For a discussion of gender-based asylum, including *Matter of A-B-*, see chapter 4.

21. Credible fear interviews are the first step in the asylum process. They occur after the noncitizen is apprehended, usually at the border. Noncitizens must show that they have a reasonable likelihood of establishing in an immigration hearing that they have been persecuted or have a well-founded fear of future persecution based on at least one of the protected grounds. If a noncitizen is denied during the credible fear interview, they risk expedited removal. Credible fear interviews are explained more fully in chapter 7 of this volume.

22. For a discussion of the significance of *Grace v. Whitaker*, see Richard A. Boswell and Elisa Vari, "*Grace v. Whitaker:* Advancing Refugee Rights beyond the Credible Fear Interview," *Bender's Immigration Bulletin* 24:685 (2019); Jeffery S. Chase, "How Far Reaching Is the Impact of *Grace v. Whitaker?*," Dec. 24, 2018.

23. Hague Conference on Private International Law (HCCH), "Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

24. Jennifer Burrell and Ellen Moodie, "Behind the Migrant Caravan: Ethnographic Updates from Central America," Hot Spots, *Fieldsights*, Jan. 23, 2019.

25. Cecilia Menjívar and M. Gabriela Torres, "Op-Ed: Trump May Wish Guatemala Were a Safe Place for Asylum Applicants to Wait, But It's Not," *Los Angeles Times*, July 25, 2019.

26. American Council of Learned Societies, Mellon/ACLS Scholars and Society Fellowships. Based on my research and experience as an expert witness, I was awarded a Scholars and Society Fellowship in 2019, its inaugural year.

27. AHA, "Tenure, Promotion, and the Publicly Engaged Academic Historian," 2017.

28. AAA, "Guidelines for Evaluating Scholarship in the Realm of Practicing, Applied, and Public Interest in Anthropology for Academic Promotion and Tenure," 2011.

29. AAA, "American Anthropological Association Guidelines for Tenure and Promotion Review: Communicating Public Scholarship in Anthropology," 2017.

30. Steven Shapin, "The Ivory Tower: The History of a Figure of Speech and Its Cultural Uses," *British Journal for the History of Science* 45:1 (2012): 1–27.

PART TWO

Enhancing Expertise

Legal, Conceptual, and Practical Guidance for Scholar-Experts

4

Understanding the Legal Framework of Gender-Based Asylum

A Guide for Expert Witnesses

J. Anna Cabot

Domestic violence is a global issue. It is well known that survivors of gender-based violence in the U.S. face obstacles to their safety. But for all those obstacles—lack of resources, apathy of law enforcement, and antiquated misogynist views on violence in the home, to name but a few—a woman seeking protection in a domestic violence shelter is not asked to prove that she needs protection by providing a sociological analysis of the practices of, motivations for, and social attitudes toward domestic violence in the United States.[1] Yet that is precisely what U.S. immigration courts demand of asylum seekers with gender-based violence claims. For a gender-based asylum claim to be successful, applicants must have the legal sophistication to know that their experience makes them part of a gender-based particular social group (PSG), have the capacity to prove to a judge that this group is clearly defined in the applicants' country of origin, and be able to explain how their society regards this group as special or different. This is impossible for most applicants to show, unless they have a lawyer to guide them through the asylum process and an expert witness to explain to the court the societal patterns and motivations for violence against women that exist in their country of origin.

This chapter explains the role experts play in asylum proceedings, with a focus on domestic violence claims. Expert testimony is vitally important to all gender-based asylum claims, but domestic violence claims have greater complexity as this form of violence is often—just as in the U.S.—both ubiquitous and invisible. Because domestic violence is perpetrated by private actors against other family members, courts regularly classify such violence as a private, interpersonal crime that is ineligible as a basis for asylum, unless expert witnesses have the opportunity

to present research on cultural, societal, and legal norms that identifies motivations and causal factors for domestic violence. This chapter is organized in three parts. First, I explain the legal requirements and the procedural steps for asylum. Second, I review the development of gender-based and domestic violence asylum law since 1985 by analyzing decisions made by the Board of Immigration Appeals (BIA) and attorneys general. And third, I discuss the critical role of expert testimony for successful domestic violence claims and explain the particular issues that experts should be prepared to address in their written reports and oral testimony.

CURRENT STATE OF ASYLUM LAW AND PROCEDURE

The legal eligibility requirements for asylum in U.S. law derive from the United Nations 1951 Refugee Convention and the 1967 Protocol, which define "a refugee" as any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country."[2] This definition was incorporated into U.S. law in the Refugee Act of 1980 and slightly expanded to allow asylum for people who either feared persecution or had experienced past persecution.[3] To be granted asylum, an asylum seeker needs to demonstrate that she meets this definition of a refugee.[4]

Persecution, a central concept in the definition of a refugee, is unfortunately ill defined in asylum law, with neither statute nor regulation delineating its boundaries.[5] Generally, persecution includes severe physical, psychological, emotional, or—sometimes—economic harm. Whether an applicant with a specific set of experiences has suffered persecution can only be determined through a case-by-case analysis of the cumulative suffering of the applicant.[6] The asylum seeker must show either that she was persecuted in the past or that she has a "well-founded fear" of harm in the future.[7] In order to demonstrate a sufficient risk of future harm, an applicant must show that she faces a "reasonable possibility" of persecution, at least a 10 percent chance of harm.[8]

The immigration court must also consider the role of the government of an applicant's country of origin in protecting the applicant from persecution. An applicant must show that she was persecuted at the hands of a government actor or that the government of her home county was or would be unable or unwilling to protect her.[9] A government-actor persecutor can include national or local authorities, as well as agents of a de facto government, that is, a group that takes on some roles normally carried out by a government like collecting taxes or enforcing the law.[10] An applicant persecuted by a nongovernment actor only needs to show that her government is *either* unable *or* unwilling to protect, not both. A government can be willing but unable to protect its citizen, and that is sufficient to meet the asylum eligibility requirement. Furthermore, if an applicant can demonstrate that

it would have been futile or dangerous to seek government protection, she does not need to show that she sought this protection from the state.[11]

A key element of any asylum case is the demonstration that the harm experienced by the applicant occurred due to specific motivations on the part of the perpetrator. An applicant needs to demonstrate that one of the five listed motives for persecution—race, religion, nationality, membership in a PSG, or political opinion—is at least "one central reason" for her harm, either in the past or likely to occur in the future.[12] This language, added to the Immigration and Nationality Act in 2005 by the REAL ID Act, indicates clearly that Congress felt that an act of persecution could have more than one motivation, and so long as one of the central reasons was one of those listed in the refugee definition—known as a "protected ground"—that element of asylum eligibility would be satisfied.[13] In a 2007 decision, the BIA further emphasized that the protected ground must be a *substantial* cause of the persecution, ruling that "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment"—that is, "it cannot be incidental or tangential to" another reason for harm.[14]

These "protected grounds" are themselves subject to legal interpretation. The grounds frequently overlap and are meant to be broadly interpreted. For instance, a person who was persecuted because of her political opinion need not be a member of an established political party but need only express herself on a subject in which "the machinery of State, government or policy may be engaged."[15] An applicant can be eligible for asylum even if her persecutor believes that she possesses one of the protected grounds that she does not, that is, that he imputes the characteristic to her. An applicant also may be eligible for asylum if she is persecuted for *not* being a member of a particular social category—for example, where an atheist is subjected to harm in a society dominated by religious participation.[16]

Many gender-based violence (GBV) claims are based on the ground of the applicant's "membership in a particular social group."[17] While the definitions for the other protected grounds—race, religion, nationality, and political opinion—are largely commonsense ones, membership in a particular social group has been more difficult to characterize legally. In 1985, a BIA case called *Matter of Acosta* determined that in order to make the term "particular social group" consistent with the other protected grounds in the refugee definition, a PSG must be defined by an immutable characteristic, that is, "a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[18] PSGs accepted by federal appeals courts have included groups based on characteristics such as family, sexual orientation or gender identity, childhood, past experiences or associations, mental or physical disabilities, AIDS/HIV status, and gender.[19] In fact, *Matter of Acosta* explicitly lists "sex" as an immutable characteristic on which a viable PSG can be established.[20]

The "protected characteristic" rubric laid out in *Acosta* was widely accepted by other countries and the United Nations High Commissioner for Refugees

(UNHCR).[21] Though *Matter of Acosta*'s interpretation of "particular social group" garnered international approval, between 2006 and 2014 the BIA added two further requirements to particular social groups that narrowed how GBV claims might be recognized by the courts. In addition to referencing immutable characteristics, under current U.S. law a PSG must be "particular," in that it must have clear boundaries, and "socially distinct," in that the society or community where the persecution occurred must regard people within the PSG as a societal grouping.[22] Rather than clarifying the definition of a PSG, as the BIA claimed, the new requirements have caused serious confusion among adjudicators and made asylum claims based on PSG much more difficult for applicants to argue, especially when they do not have legal counsel.

Once an applicant has demonstrated that she was persecuted in the past on account of one of the protected grounds and that her government failed to protect her, she is presumed to have a well-founded fear of future persecution.[23] At that point in the proceedings, the government has the chance to rebut the finding of future fear—usually leading to a denial of asylum—by showing either that the applicant can relocate safely and reasonably within her country or that the conditions in the applicant's country of origin have changed and she would no longer be in danger were she to return.[24] In terms of relocation, the government has to show not only that the applicant would be safe in a certain area of her home country but also that her relocation there would be reasonable in light of "ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties."[25] If an applicant has not suffered past persecution but has established a well-founded fear of future persecution, it is up to her to show that it would be either unsafe or unreasonable for her to relocate.

For applicants who have suffered past persecution but for whom the U.S. government has been able to rebut the presumption of a well-founded fear of future persecution, relief may still be granted if the harm they experienced was extremely severe or if they can show that they would suffer other persecution, unrelated to past persecution, if they were returned.[26] This is called "humanitarian asylum." For instance, if an applicant was subjected to serious sexual violence by an older relative when she was a child, but that relative has since died, she would not have a well-founded fear of future persecution from that same source, but she may be eligible for this additional category of protection if her persecution was particularly severe or she faced other serious harm.[27]

Finally, even if an applicant meets the eligibility requirements described above, she may still be denied asylum, either because she is legally precluded by an asylum bar or the judge exercises their discretion to deny because they believe she is undeserving of asylum. Bars to asylum include the commission of certain criminal acts, persecution of another person, support for terrorism, having been resettled in another country, and missing the one-year filing deadline.[28] An immigration

judge or asylum officer also has discretionary power to deny asylum when considering such factors as attempts to seek asylum elsewhere, length of stay in or ties to a third country, and use of fraud to enter the U.S., among others.[29]

Significantly, even if an applicant is barred from being granted asylum or the immigration judge denies asylum due to a negative discretionary finding, she may still be eligible for either "withholding of removal" or protection under the Convention Against Torture (CAT). Withholding of removal has standards very similar to those of asylum but fewer bars; for example, there is no filing deadline.[30] Protection under CAT requires a finding of a likelihood of future torture—a more severe form of harm than persecution—and greater government involvement in the torture but does not require that torture to be motivated by a protected ground.[31] On the other hand, both withholding of removal and CAT protection have fewer benefits than a successful asylum claim, including no path to legal permanent residence and citizenship.[32] These options are usually considered secondary alternatives when asylum is not available to an applicant.

Now we turn to the procedure for an applicant to attain asylum or one of the corresponding forms of relief. There are two pathways for asylum adjudication: the affirmative asylum system and the defensive asylum system. The dividing line between the two systems is whether the U.S. government has already notified the immigration court of its intent to try to deport or remove the applicant before she has filed her asylum application. If the applicant has a valid visa or if the applicant is undocumented but as yet undiscovered by the government, she is not in removal proceedings, and if she applies for asylum, her application will be processed through the affirmative process. If an applicant is already in removal proceedings—if, for instance, she was living in the U.S. and was caught in an immigration enforcement action or she came to the border and requested asylum—she will go through the defensive asylum process.

In the affirmative process, the applicant submits her application to the Asylum Office—a subdivision of the Department of Homeland Security (DHS)—and then is scheduled for an interview.[33] It is Asylum Office practice to schedule the interview twenty-one days in advance and to inform the applicant by mail, so the applicant and her attorney, if she has one, may in reality only have little over a week's notice.[34] In addition, it is very difficult, especially now, to predict even roughly when an asylum interview will be scheduled in most cases. Over the years, the Asylum Office has switched between a policy whereby the most recent applications get scheduling priority and a policy whereby the applications are scheduled on a first-come, first-served basis and back again.[35] Under the first regime, an applicant might be scheduled within a month of filing her application; in the second, she is likely to be caught in the backlog, which is hundreds of thousands of applications, and may have to wait for years.[36]

The asylum interview itself is nonadversarial. The participants include the applicant, an interpreter who must be provided by the applicant if necessary, a legal representative if the applicant has one, and the asylum officer.[37] Importantly,

there is no one at the asylum interview who is openly opposing the interests of the applicant.[38] The asylum officer is an employee of the DHS but is in the role of a neutral fact-finder and adjudicator.[39] As such, the asylum officer's interests do not conflict with the applicant's; according to DHS policy, the asylum officer must maintain a professional demeanor, and "it is inappropriate" to interrogate or argue with any interviewee.[40] The role of a legal representative during the asylum interview is very limited. The representative may provide additional documentation and a written legal brief before the interview but is present during the interview only to ask some clarifying questions—if the officer allows—and may give a closing statement. The role of an expert in an asylum interview is largely restricted to written material. Witnesses are almost never called during asylum interviews, and on the rare occasions they are invited, they are usually family members of minor applicants who may provide critical information. Experts rarely attend asylum interviews. Instead, experts working on Asylum Office cases generally draft a written report and do not testify. If the asylum officer does not grant asylum and if the applicant does not have other immigration status in the U.S., the applicant will be referred to the immigration court, where she has another chance to prove her case and can present new evidence.

The defensive asylum process, on the other hand, looks very different, and the role of an expert in defensive asylum proceeding is much more involved than in affirmative cases. The expert will need to draft a written report (an affidavit or declaration) but also will usually, though not always, be called on to give testimony in court and be cross-examined. Testimony is not required if the DHS attorney will agree not to challenge the contents of the written report. If the DHS attorney does not stipulate to the written report, it is critical for an expert to be prepared and available to testify. The expert's written report may be given less weight by the judge if the DHS attorney does not have the opportunity to cross-examine the expert, even if the DHS attorney chooses not to do so in the hearing.

When an applicant first files her application in the defensive asylum process, she is already in removal proceedings and is appearing before an immigration judge (IJ). Immigration courts are administrative law adjudicative bodies. Although the rules and procedures for immigration courts have been modified over time, immigration courts follow the basic outlines of the popular understanding of an adversarial court. Each hearing includes an IJ, who is an employee of the U.S. Department of Justice (DOJ); the applicant; an interpreter hired by the immigration court; a legal representative if the applicant has one; any witnesses the applicant wants to present; and a government attorney representing the interests of DHS. Like prosecutors in criminal courts, the DHS attorney is responsible, along with the IJ, for "ensuring that refugee protection is provided where [it] is warranted."[41] In reality, however, DHS attorneys frequently demonstrate that the interest of DHS is to deport as many people as possible rather than fairly enforce immigration laws.

Usually, over the course of an asylum adjudication in immigration court, there will be a series of master calendar hearings (MCHs) where the IJ will advise the applicant of her rights and the applicant will file pleadings and her asylum application.[42] The series of MCHs culminates in a merits hearing or individual calendar hearing, an evidentiary hearing where the IJ will determine whether the applicant is eligible for and deserving of asylum. At each hearing, the next hearing is scheduled, so the applicat is better able to plan for the adjudication; however, it is very difficult to predict how long the process will take in total. Across the U.S. in 2020, there were over 1.2 million cases pending at immigration courts.[43] As a consequence, cases spent an average of 759 days in immigration court before resolution, with some courts averaging over a thousand days.[44] Merits hearings—evidentiary hearings at which the applicant gets the opportunity to prove her case—can be scheduled years in advance and may be bumped to later dates with little warning. This can create difficulty for experts who change jobs or whose reports are out of date by the time of the final hearing.

During the merits hearing, both the applicant's representative (if she has one) and the DHS attorney will have the opportunity to present evidence, including the testimony of witnesses, and cross-examine the other side's witnesses. Both sides can make objections to evidence or testimony and give opening and closing statements. In reality, the DHS attorney does not often present evidence and almost never provides witnesses, because the burden is on the applicant to prove asylum eligibility.

After the IJ issues a decision, either the applicant or the DHS can appeal the decision to the BIA and thereafter to the federal courts of appeals and the Supreme Court.

THE EVOLUTION OF GENDER-BASED ASYLUM

Here I review the development of gender-based asylum claims in the U.S. This review touches on the major cases defining gender-based asylum but does not go into great detail.[45] As indicated in the previous section, "gender" was mentioned as a potential basis for an asylum claim as early as 1985, in *Matter of Acosta*.[46] *Acosta* was the first case to interpret the meaning of "particular social group." The BIA held that persons forming a PSG must share common immutable or fundamental traits such as "sex, color, [or] kinship ties," or in some circumstances, "a shared past experience such as former military leadership or land ownership."[47] The facts of the case, however, show that it was not a gender-based claim.[48] Instead, the respondent claimed that he feared persecution at the hands of guerrillas because of his membership in the particular social group "COTAXI drivers and person engaged in the transportation industry."[49]

The first time the BIA supported a gender-based claim was in 1996 in *Matter of Kasinga*.[50] The BIA granted asylum to a woman from Togo fleeing female genital cutting (FGC).[51] The BIA held both that the practice of FGC where committed

against the will of the applicant constituted persecution and that Ms. Kasinga's proffered PSG, which was based on gender, nationality, tribal membership, and opposition to FGC, was viable.[52] *Matter of Kasinga* was a landmark decision as it was the first time that the BIA found that a woman fleeing violence because of her gender could be eligible for asylum. Despite the decision's appearance as a watershed moment, asylum claims based on GBV, especially those that did not involve FGC, were still very difficult to win. Three years later, in *Matter of R-A-*, the BIA seemed to reverse course and denied asylum to Rody Alvarado Peña, a Guatemalan woman who had been subject to severe domestic violence. Ms. Alvarado also articulated a gender-based claim, and while the immigration judge granted her asylum, the BIA reversed that decision.[53] The BIA acknowledged the extremity of Ms. Alvarado's suffering but denied her claim, rejecting the proposed group, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," because the group was not "recognized and understood to be a societal faction."[54]

Matter of R-A- faced immediate criticism and long-term procedural chaos.[55] The next year, in 2000, Attorney General Janet Reno issued proposed regulations in order to "remove certain barriers that the [*Matter of*] *R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group."[56] Attorney General Reno then certified the BIA's decision to herself and vacated it, sending it back to the BIA with instructions to stay the case until proposed regulations were made final and could guide its decision.[57] The regulations, however, were never finalized during her term as attorney general, and in 2003, Attorney General John Ashcroft again certified the decision to himself and again remanded to the BIA to reconsider under the anticipated final regulations, which also were never issued.[58] In 2008, Attorney General Michael Mukasey vacated the stay and ordered the BIA to issue a decision on the case without the guidance of regulations.[59] The BIA then remanded the case to the immigration judge, who again granted asylum in 2009.[60] Though this case—thankfully, from the point of view of Ms. Alvarado—concluded with an asylum grant, it created no positive new case law or guidance from the DOJ.

In 2004, an immigration judge denied asylum to Ms. L-R-, who also suffered severe domestic violence at the hands of her partner, who held her in virtual captivity for years.[61] Ms. L-R- appealed the adverse decision to the BIA, where the government initially opposed granting asylum but changed position under the Obama administration.[62] DHS submitted a supplemental brief in 2009 arguing that Ms. L-R-'s proposed group, "Mexican women in an abusive domestic relationship who are unable to leave," was circular since it was centrally defined by the existence of the abuse feared by members of the group.[63] However, DHS then proposed alternative groups that could be the basis of successful asylum claims for

survivors of domestic violence: "Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[64] Whether a domestic violence (DV) asylum claim with either of those groups would be granted depended, DHS asserted, on whether applicants presented evidence that their proposed groups were particular and socially distinct, otherwise they would not automatically be viable.[65] DHS suggested that the BIA remand Ms. L-R-'s case to the immigration judge for findings regarding these alternative groups, and the BIA remanded without a precedential decision. The immigration judge again granted asylum.

Since the BIA did not issue any published decisions—published BIA decisions are binding on all immigration courts and asylum offices—as a result of *Matters of R-A-* and *L-R-*, immigration judges and adjudicators were still deciding domestic violence asylum cases without guidance from the DOJ until 2014. At that point, the BIA issued its first precedential opinion, granting asylum to a survivor of domestic violence in *Matter of A-R-C-G-*.[66] In it, the BIA recognized that the social group "married women in Guatemala who are unable to leave their relationship" could be a viable PSG if certain evidence was provided.[67] The BIA considered the three requirements for a PSG—immutability, particularity, and social distinction—and found that the group satisfied these elements considering the "societal expectations about gender and subordination" and a culture of "machismo and family violence" in Guatemala.[68]

Matter of A-R-C-G- was very significant, though far from ideal. It formed a basis for victims of domestic violence to be eligible for asylum, but the solution—using PSGs similar to "married women in Guatemala who are unable to leave their relationship"—is not logical or common sense, especially to unrepresented applicants; leaves loopholes for adjudicators who do not want to grant asylum for DV survivors; and requires significant and sometimes difficult-to-obtain evidence to prove. Advocates have long pushed for courts to accept PSGs defined by nationality and gender—for example, Guatemalan women—because in certain national contexts gender norms legitimate misogyny and discrimination against women that generally promote and enable gender-based violence against women, specifically domestic violence. The decision in *Matter of A-R-C-G-* and the position articulated in the DHS brief in *Matter of L-R-*, however, both indicate that the government would prefer to narrow the gender plus nationality group with further restrictions. In the next section I discuss the kinds of evidence needed to bolster gender-based claims and the role that experts can play given these restrictions.

Matter of A-R-C-G-, even with all its flaws, was at least far preferable to what followed, when the Trump administration's DOJ actively sought to eliminate domestic violence as a component of the PSG. In late 2015, an IJ in Charlotte, North Carolina, notorious for denying the vast majority of all asylum claims before him, denied the asylum case of Ms. A-B-, a Salvadoran woman and survivor of more than a decade of domestic violence.[69] The IJ disregarded *Matter of A-R-C-G-*,

though it was binding precedent at the time. Ms. A-B- appealed to the BIA, which took the unusual step of reversing the IJ's denial and directing the IJ to grant asylum if the background security checks cleared.[70] Instead of granting asylum, the IJ dawdled and tried to get the BIA to take the case again without issuing a decision. While the IJ delayed granting Ms. A-B- asylum, Attorney General Jeff Sessions personally intervened and referred Ms. A-B-'s case to himself.[71]

On June 11, 2018, Sessions overruled both the prior BIA precedent of *Matter of A-R-C-G-* and the BIA's grant of asylum to Ms. A-B-.[72] Sessions went much further than the facts of Ms. A-B-'s case, concluding that "generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-government actors will not qualify for asylum"—despite the fact that Ms. A-B-'s case presented no gang claim.[73] For over three years, this decision caused chaos for GBV asylum claims. Many judges stopped granting them altogether. Some IJs approved them based on PSGs including nationality plus gender, nationality plus gender plus race/Indigenous status, and nationality plus gender plus relationship status/viewed as property.[74] Some IJs even granted cases based on the political opinion of feminism or opposition to male domination. Ultimately, many survivors of domestic violence were denied asylum because of this ruling. Advocates fought pitched battles with the administration at the BIA and federal courts and had some success, and on June 16, 2021, Attorney General Merrick Garland vacated *Matter of A-B-*, restoring *Matter of A-R-C-G-* as the BIA's most recent ruling on gender-based asylum claims.[75]

The state of domestic violence asylum claims remains precarious, however. Already, *Matter of A-R-C-G-* has been rejected (in October 2021, since *Matter of A-B-* was vacated) by the Fifth Circuit, which held that the group "Honduran women unable to leave their relationship" was impermissibly circular.[76]

EXPERT WITNESS TESTIMONY IN ASYLUM PROCEEDINGS

Now I turn to the important role that country conditions experts can play in asylum proceedings, explaining why they are particularly vital in gender-based and domestic violence cases. In spite of *Matter of A-R-C-G-* paving a path for asylum claims based on domestic violence, each case needs to be proven anew. Just because the respondent in *Matter of A-R-C-G-* was granted asylum based on the group "married women in Guatemala who are unable to leave their relationship," the next woman who applies for asylum, claiming persecution under the identical group, has to establish the group's viability—including particularity and social distinction—all over again.

This section explains the various legal elements of asylum based on domestic violence for which experts are especially necessary. Experts are so valuable because of their detailed knowledge and nuanced understanding of various aspects of society, and they are being called on to explain how this complex knowledge

answers relatively simplistic legal questions. Adjudicators and even the lawyers representing the applicant may try to push experts to oversimplify or cut their explanations short, and experts must push back against that kind of influence. Ultimately, misrepresenting the facts to suit the process will backfire, as the experts may be seen as biased or lacking the requisite expertise.

As discussed above, the applicant needs to show (1) that she is a member of the PSG she proposes; (2) that the group is viable or "cognizable" under the law by being immutable, particular, and socially distinct; and (3) that her past persecution or feared future persecution is on account of that group membership. The second point, whether the proposed PSG is acceptable or cognizable, is a fact-intensive analysis that often requires significant information about the applicant's home country. Showing particularity and social distinction depends on an expert's ability to demonstrate the values, beliefs, and perceptions of the society from which the applicant comes. For instance, a domestic violence survivor applying for asylum using a PSG like the one in *A-R-C-G-* would have to prove the society in their country of origin regards married women unable to leave their relationship as a distinct societal grouping. She might also need to demonstrate that domestic violence is criminalized but that the laws are not effectively enforced, that women in those situations face more danger when they seek police protection, or that the country of origin acknowledges the problem but does not allocate nearly enough resources.

Frequently advocates propose gender plus nationality social groups as less complex to prove than *A-R-C-G-* groups—groups that involve the inability to leave a marriage or relationship. It is easier to establish that "Guatemalan women" is a group that has distinct societal boundaries and is seen as a group by Guatemalan society. Though usually gender plus nationality groups face less of a challenge establishing particularity and social distinction, some adjudicators mistakenly think that large groups—like "Guatemalan women," who represent half a population—are not particular. PSGs that incorporate relationship status—like "Single Guatemalan women" or "Married Salvadoran women unable to leave their relationship"—or groups that incorporate being viewed as property—like "Ecuadoran women viewed as property" or "Ecuadoran women viewed as property by virtue of their domestic relationship"—require extensive evidence.

Demonstrating the cognizability or viability of a particular social group is complex. An applicant must demonstrate that her proposed group is particular by showing that in the eyes of the society she comes from, her group's membership is easily defined—that it has clear boundaries. An applicant must also demonstrate that her proposed group is socially distinct by showing that it is "significantly distinct" within society—that it is "perceived of as a group by society."[77] While an applicant's testimony is critical to an asylum application and she can testify to her own understanding of the group's boundaries or how the group is viewed, she is generally restricted from opining on the general perception of her society except anecdotally, based on experiences she has had or is aware of.[78] For the majority of

applicants, especially those who are not involved in women's rights organizations, testimony regarding the particularity and social distinction of their own proposed PSG will be limited and in some cases insufficient. Experts, on the other hand, are allowed to speak to these issues, and their scholarly credentials can give their words weight and legitimacy. An expert, through country conditions analysis, can demonstrate the cognizability of the PSG in ways that most applicants are not equipped to do.

Consider the example of the group "Salvadoran women viewed as property by virtue of their domestic relationship." Experts can help bolster the cognizability of this PSG by addressing a variety of questions and explaining how they have reached their answers: What is a domestic relationship in El Salvador? What does it look like? Is it common to have domestic relationships between people who are not legally married? Are there special terms used for those relationships, or are all domestic relationships generally referred to as "marriage"? Are those types of relationships treated similarly to marital relationships? Do they have any legal protections? Are some women in domestic relationships viewed as property? Is it a common phenomenon? What are typical indicators or treatment, and how do they differ from the treatment of women not viewed as property? What is the source of this phenomenon? Has it been long-standing? Is there a cultural understanding of this phenomenon? Is the behavior of the perpetrator officially prohibited, through anti–domestic violence laws, for example? If so, how does it persist? Are Salvadorans aware of this phenomenon generally? Do elements of society, like the judiciary or the police or a government agency, treat this group as special, either in a positive or a negative way?

Immigration adjudicators have sometimes pushed back against the PSG formulation that includes "viewed as property," claiming that the phrase is amorphous and has no ready societal definition, so it is very important to be able to explain exactly how this group is perceived in a specific social and historical context. Clearly, as much as legal representatives might wish it, these questions do not have simple or absolute answers. One of the strengths of experts is their ability to make nuanced explanations of complex ideas and realities, and it is the duty of experts to be as accurate as possible and not oversimplify.

As previously discussed, another persistent requirement of a viable social group is that the group must not be exclusively defined by the harm that the applicant suffered: in other words, the definition of the PSG cannot be circular.[79] If, for instance, the applicant defined her group exclusively by the harm she suffered and proposed the group "domestic violence victims," she would then have to prove that she was subject to harm—domestic violence—because she was a victim of domestic violence. In many cases that would be a tautology, and the applicant would fail to establish the nexus prong.[80]

Adjudicators, especially while *Matter of A-B-* was binding, have asserted that groups that involve the inability to leave a relationship are not valid because they are circular.[81] As the First Circuit and the D.C. Circuit have pointed out, this

ignores the fact that a woman may be prevented from leaving her relationship by a number of factors not involving the harm she suffered, including "cultural, societal, religious, economic, or other factors."[82] Expert testimony can be critical to describe those external circumstances that would imprison a woman in a domestic relationship, aside from the violence by her partner.

In addition, though establishing that the applicant is actually a member of her proposed group—the first prong of PSG claims—is usually the least controversial and requires the least support by expert testimony, in "inability to leave" groups, adjudicators sometimes determine that the applicant is not a member of that group because she has, by virtue of being in the United States, left the relationship. This argument is seductive to adjudicators who want to deny asylum claims but does not consider the applicant's situation should she return to her home country. For example, though her persecutor might not be able to reach the applicant in the U.S., he might still believe that she is his possession and might harm her again if she returns. She may, in fact, be at increased risk of harm due to retaliation by her perpetrator on account of her attempt to flee the relationship by coming to the U.S. Or an applicant might be from a country where divorce is not possible and be forced to return to her husband. An expert can help explain the cultural norms relating to a woman's ability to leave a relationship of her own accord and thus help demonstrate that she has not effectively or permanently left the relationship.

Once membership in and validity of a PSG is established, the applicant must show that she was or would be persecuted because of her membership in that group. This can be particularly problematic for survivors of domestic violence. In the U.S., domestic violence has long been seen as private, as harm done by a husband to his wife because of their personal relationship.[83] Adjudicators, therefore, commonly apply those assumptions to persecutors in domestic violence asylum claims and deny that there is a nexus to a protected ground. The adjudicator may view the motives for the abuse as being criminal or deranged but may not be aware of the societal norms that allow and even encourage domestic violence against women on a broad scale. Experts can help establish the connections (if they exist) between societal norms like patriarchy or misogyny and discrimination and violence against women, especially in domestic relationships. If the applicant articulates a group that includes race, ethnicity, or Indigenous status, the expert may be able to explain how levels of violence or cultural norms differ within certain groups.

The final element of persecution itself is the question of government protection: Is the government either unable or unwilling to protect the applicant.[84] An expert's testimony can be critical to meet this threshold, especially for the majority of DV cases where the persecutor is a private actor, not a government agent. Many countries have legislation to protect survivors of domestic violence, and some have government programs to provide shelter or assistance. While that is positive in many circumstances, adjudicators tend to view the existence of those laws and programs as evidence of a willingness or ability to protect women from violence.

Experts can speak to the how those laws and programs are implemented on the ground and to what extent they offer protection to those they claim to protect. In addition, an applicant can show that the government is unwilling or unable to protect her, even if she did not seek protection from them, if she can show that that effort would have been futile or dangerous.[85] Expert testimony can help support this argument by documenting the result of other women seeking protection in circumstances similar to the applicant's.

An applicant's otherwise successful asylum claim will be derailed if the IJ determines that she can safely or reasonably relocate within her country. Sometimes it is the applicant's burden to show that she cannot relocate, and sometimes it is the government's burden to show that she can, but regardless a legal representative will want to make the strongest case possible for why relocation would not be safe or reasonable. The safety of relocation for a domestic violence claim often comes under severe scrutiny because, again, frequently the persecutor is a single person, not connected to the government. An adjudicator may, given the size and relative anonymity of living in the U.S., assume that the applicant could return to her home and, so long as she did not return to her old neighborhood, be able to safely avoid her persecutor. Societies with interconnected communities, with easily identifiable names or ethnic markers, or that use family connections or identity documents for simple tasks, among other characteristics, may make it impossible for an applicant to return to her home country without attracting the attention of her persecutor. Experts are well positioned to explain these differing societal situations.

Even if an applicant *could* be safe from her persecutor if she returned to a different part of the country, it still may not be reasonable for her to do so. Adjudicators must take into account "ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties."[86] Again, adjudicators may erroneously impute the relative ease of relocating within the U.S. to applicants within their own countries or may baselessly view an applicant's ability to relocate to the U.S. as evidence that she could reasonably relocate within her home country. Those comparisons are irrelevant, but it may require the affirmative description by an expert of the social and cultural difficulties of relocation to dispel those assumptions.

CONCLUSION

Despite Attorney General Garland vacating *Matter of A-B-*, gender-based asylum claims, especially those involving domestic violence, remain challenging from a legal and evidentiary perspective. Many of the legal elements of an asylum case are more challenging to prove for a victim of GBV, as discussed above. Unlike asylum seekers claiming persecution based on one of the other four grounds, particular social group claims require proof that the group is particular, has clear

boundaries, is socially distinct, and is viewed as a distinct group by society. The applicant generally cannot speak to the attitudes of her society, and even the most diligent lawyers may not be able to find articles and other documents that fully prove these points in the specific context of their clients. Experts not only have highly specialized knowledge; they are also able to explain it to the adjudicator and bridge the gap between the complexities of a society and the relative simplicity of a legal standard. In a drastically imbalanced system where one side, the government, has all the resources, and the other, the applicant, has the burden of proof, experts are crucial to redressing this injustice and combating adjudicators' ignorance and prejudice.

NOTES

1. National Domestic Violence Hotline, "50 Obstacles to Leaving."

2. UNHCR, 1951 Refugee Convention.

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.A.); INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

4. INA § 208(b), 8 U.S.C.A. § 1158(b).

5. Panoto v. Holder, 770 F.3d 43, 46 (1st Cir. 2014); see, e.g., Mei Fun Wong v. Holder, 633 F.3d 64, 71–72 (2d Cir. 2011) ("[Persecution] is not statutorily defined and courts have not settled on a single, uniform definition" [internal quotation marks omitted]); Karim v. Holder, 596 F.3d 893, 896 (8th Cir. 2010) (stating that "persecution is a 'fluid concept'" [citations omitted]).

6. Hernandez-Lima v. Lynch, 836 F.3d 109, 114 (1st Cir. 2016) ("An applicant . . . is not obliged to show the infliction of physical harm in order to carry her burden of proving past persecution," although "the absence of physical harm weighs against a finding that threats amounted to persecution" [citations omitted]); Mendoza-Pablo v. Holder, 667 F.3d 1308, 1313 (9th Cir. 2012) (holding that persecution can take many forms, including physical, economic, and emotional); Sanchez Jimenez v. U.S. Atty. Gen., 492 F.3d 1223, 1233 (11th Cir. 2007) (finding that intentionally being shot at constitutes persecution, even where the applicant manages to escape physical harm); Tarraf v. Gonzales, 495 F.3d 525, 534–35 (7th Cir. 2007) ("Physical abuse causing serious injuries is not the sine qua non of persecution"); Fatin v. I.N.S., 12 F.3d 1233, 1242 (3d Cir. 1993) ("The concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs"); Mendoza-Pablo v. Holder, 667 F.3d 1308, 1313 (9th Cir. 2012) (recognizing that persecution can come in many forms, including physical, economic, and emotional); Vincent v. Holder, 632 F.3d 351, 355 (6th Cir. 2011) ("Economic deprivation [in the form of a house burning] may constitute persecution"); Mei Fun Wong v. Holder, 633 F.3d 64, 72 (2d Cir. 2011) ("[Persecution] is sufficiently general to encompass 'a variety of forms of adverse treatment, including non-life-threatening violence and physical abuse, or non-physical forms of harm such as the deliberate imposition of a substantial economic disadvantage'" [quoting Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006)]; Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011) (finding that a "'threat of death' qualifies as persecution"); Shan Zhu Qiu v. Holder, 611 F.3d 403, 405 (7th Cir. 2010) ("We have defined persecution to include 'detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, torture, behavior that threatens the same, and non-life-threatening behavior such as torture and economic deprivation if the resulting conditions are sufficiently severe'" [citations omitted]); Matter of T-Z-, 24 I&N Dec. 163, 171, 2007 WL 1371944 (B.I.A. 2007) ("The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life").

7. See INA § 101(a)(42).

8. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

9. Matter of Acosta, 19 I&N Dec. at 222.

10. See, e.g., Ai Hua Chen v. Holder, 742 F.3d 171, 177 n.1 (4th Cir. 2014), as amended (May 30, 2014) (noting that although Chinese law prohibited official abuses relating to population control, "the relevant question for asylum purposes is not what local authorities are *authorized* to do; the question . . . is what they *actually* do" [emphasis in original]); Ruqiang Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012) (remanding where the applicant suffered past persecution "by an organ of the state—the police"); Zheng v. Mukasey, 552 F.3d 277, 287 (2d Cir. 2009) ("It is simply not the case that an applicant for asylum may be denied relief if his claim focuses upon persecution at the hands of local, as opposed to national, political authorities"). "A foreign State, although not recognized by the political arm of the United States Government to be de jure, may nevertheless have a de facto existence which is judicially cognizable. A government de facto in firm possession of any country is clothed, while it exists, with the same rights, powers, and duties, both at home and abroad, as a government de jure. Any government, however violent and wrongful in its origin, must be considered a 'de facto government' if it is in full and actual exercise of sovereignty over a territory and has people large enough for a nation" (citations omitted).

11. Matter of S-A-, 22 I&N Dec. at 1330–31 (accepting testimony that reporting would have been futile because Moroccan law gives fathers "unfettered" power over daughters and dangerous where harm to respondent would likely escalate after a report); Korablina v. I.N.S., 158 F.3d 1038, 1045 (9th Cir. 1998) (accepting petitioner's testimony that she did not report because the police had ties to the persecutory group); Bringas-Rodriguez, 850 F.3d at 1069; Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1056–57 (9th Cir. 2006).

12. Pub. L. No. 109-13, 119 Stat. 302 (2005), codified at INA § 208(b)(1)(B)(i), 8 U.S.C.A. § 1158(b)(1)(B)(i).

13. Matter of S-P-, 21 I&N Dec. 486 (B.I.A. 1996) ("In some fact situations, the evidence may reasonably suggest mixed motives, at least one or more of which is related to a protected ground").

14. Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (B.I.A. 2007).

15. Chang v. I.N.S., 119 F.3d 1055, 1063 n.5 (3d Cir. 1997) (defining "political" as "pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy" [quoting *Black's Law Dictionary*, 5th ed. (1979)]).

16. See Matter of S-P-, 21 I &N Dec. 486, 489 (B.I.A. 1996) ("Persecution for 'imputed' grounds [e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect] can satisfy the 'refugee' definition").

17. See generally Blaine Bookey, "Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012," *Hastings Women's Law Journal* 24:107 (2013).

18. Matter of Acosta, 19 I&N Dec. at 233.

19. See generally National Immigration Project, Immigration Law and Defense § 13:40 (providing an overview of different U.S. circuit court approaches to analyzing social group claims).

20. Matter of Acosta, 19 I &N Dec. at 222.

21. See Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (adopting a similar immutability formulation and noting *Acosta*'s application of *ejusdem generis* reflects "classic discrimination analysis"); Islam v. Sec'y of State for the Home Dep't, [1998] 2 W.L.R. 1015, and Regina v. Immigration Appeal Tribunal and Another, ex parte Shah, 2 All E.R. 545 (1999) (H.L.) (finding women in Pakistan are a particular social group, adopting *Acosta*'s approach, and relying on *ejusdem generis* approach); *Re ZWD*, Refugee Appeal No. 3/91, 92 (N.Z. R.S.A.A. 1992); *Re GJ*, Refugee Appeal No. 1312/93 (N.Z. R.S.A.A. 1995) (same); Applicant S v. Minister for Immigration & Multicultural Affairs, [2004]

217 C 387 ¶ 16 (Austl.) ("The question is not whether some undefined section of, or minority, or majority, or leaders of a country regard and recognise a particular group as a social group. . . . The correct question is simply whether an identifiable group or class of persons constitutes a particular social group"); UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees ¶¶ 1, 11–12 (HCR/GIP/02/02) (May 7, 2002), available at http://www.unhcr.org/3d58de2da.html [perma.cc/YGV3-CL5Q].

22. See Matter of C-A-, 23 I&N Dec. 951, 959 (B.I.A. 2006); Matter of S-E-G-, 24 I&N Dec. 579, 582 (B.I.A. 2008); Matter of E-A-G-, 24 I&N Dec. 591, 593–94 (B.I.A. 2008); Matter of W-G-R-, 26 I&N Dec. 208, 212 (B.I.A. 2014); Matter of M-E-V-G-, 26 I&N Dec. 227, 237 (B.I.A. 2014). All of these decisions implicated Central American gang violence claims, and the introduction of the restrictive additional requirements is widely seen not as a legitimate outgrowth of prior case law but instead a covert method of discriminating against Central American asylum seekers. All of the federal circuit courts of appeals have adopted these additional requirements except for the Seventh Circuit. Amaya v. Rosen, 986 F.3d 424, 434-35 (4th Cir. 2021).

23. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1).

24. 8 C.F.R. §§ 208.13(b)(1)(i)(A), 1208.13(b)(1)(i)(A).

25. 8 C.F.R. § 1208.13(b)(3).

26. 8 C.F.R. §§ 208.13(b)(1)(iii)(B), 1208.13(b)(1)(iii)(B).

27. Matter of L-S-, 25 I&N Dec. 705 (BIA 2012).

28. INA § 208(b)(2), 8 U.S.C.A. § 1158(b)(2); 8 C.F.R. §§ 208.13(c)(2), 1208.13(c)(2); INA § 208(a)(2), 8 U.S.C.A. § 1158(a)(2).

29. Matter of Pula, 19 I&N Dec. 467, 473–74 (B.I.A. 1987). For more information on the use of discretion in asylum claims, see Kate Aschenbrenner, "Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum," *University of Michigan Journal of Law Reform* 45:3 (2012): 595–633.

30. INA § 241(b)(3)(A), 8 U.S.C.A. § 1231(b)(3)(A); see 8 C.F.R. §§ 208.16(b), 1208.16(b).

31. 8 C.F.R. §§ 208.16(c), 1208.16(c).

32. U.S. EOIR Fact Sheet, Asylum and Withholding of Removal Relief, Convention Against Torture Protections, available at https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf.

33. U.S. Citizenship and Immigration Services, Asylum Division, Affirmative Asylum Procedures Manual (AAPM), November 2013, Sections II.B., G., available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf.

34. Id. at Section II.G.

35. USCIS, "Affirmative Asylum Interview Scheduling."

36. TRAC Immigration, "A Mounting Asylum Backlog and Growing Wait Times," Dec. 22, 2021.

37. AAPM at II.J.

38. USCIS RAIO Directorate, "Interviewing: Introduction to the Non-Adversarial Interview," Dec. 20, 2019.

39. Id.

40. Id.

41. Matter of S-M-J-, 21 I&N Dec. 722, 723–27 (B.I.A. 1997) (finding that "the government wins when justice is done").

42. U.S. Department of Justice, "Immigration Court Practice Manual," Dec. 31, 2020.

43. Transactional Records Access Clearinghouse, "Immigration Court Backlog Tool," Syracuse University.

44. Id.

45. For a more detailed overview of the history of gender-based asylum in the United States, see, e.g., Karen Musalo, "Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law," *Harvard International Review* 45 (Fall 2014–Winter 2015); Deborah E. Anker, "Legal Change

from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States," in *Gender in Refugee Law: From the Margins to the Centre*, ed. Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (New York: Routledge, 2014), 46; Karen Musalo, "A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching towards Recognition of Women's Claims," *Refugee Survey Quarterly* 29:46 (2010).

46. Matter of Acosta, 19 I&N Dec. at 222.

47. Id. at 233.

48. Id. at 232.

49. Id.

50. 21 I&N Dec. 357 (B.I.A. 1996).

51. Id. at 358.

52. Id. at 365–68.

53. Matter of R-A-, 22 I&N Dec. 906 (B.I.A. 1999).

54. Id. at 918–19.

55. See Musalo, "A Short History of Gender Asylum in the United States," discussing the development of DV-based asylum in the United States.

56. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 at 76,589 (Dec. 7, 2000).

57. Matter of R-A-, 22 I&N Dec. at 906.

58. Matter of R-A-, 24 I&N Dec. 629, 629 (A.G. 2008) ("On February 21, 2003, Attorney General Ashcroft certified the Board's decision for review but remanded the case on January 19, 2005, again directing the Board to reconsider its decision 'in light of the final rule'" (quoting Matter of R-A-, 23 I&N Dec. 694 (A.G. 2005)).

59. Matter of R-A-, 24 I&N at 629.

60. See Matter of A-R-C-G-, 26 I&N Dec. 388, 391–92 n.12 (B.I.A. 2014) ("In remanded proceedings, the parties stipulated that [Ms. Alvarado] was eligible for asylum. Her application was granted on December 10, 2009").

61. Center for Gender and Refugee Studies, "Brief Filed by CGRS in *Matter of L-R-*," Mar. 10, 2010.

62. See generally id.

63. See id. at 10–11.

64. Id. at 14.

65. Id. at 14–15.

66. 26 I&N Dec. 388 (B.I.A. 2014).

67. Id. at 389.

68. Id. at 393–94 (noting that "married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation," and that "the record in this case includes unrebutted evidence that Guatemala has a culture of 'machismo and family violence'").

69. Matter of A-B-, 27 I&N Dec. 316, 321 (A.G. 2018).

70. Id.

71. Matter of A-B-, 27 I&N Dec. 227 (A.G. 2018) (certification order).

72. See generally Matter of A-B-, 27 I&N Dec. 316.

73. Id. at 320.

74. *Post-Matter of A-B- Litigation Update*, CGRS Practice Advisory at 14, Dec. 2018, available through the CGRS Technical Assistance program.

75. Matter of A-B-, 28 I&N Dec. 307 (A.G. 2021). See also "Matter of A-B- Attorney General Garland Vacates Matter of A-B-," *Harvard Law Review*, Feb. 10, 2022.

76. See Jaco v. Garland, 16 F.4th 1169, 1178 (5th Cir. 2021). For a discussion of the continuing fragility of gender-based PSGs, see Sabrineh Ardalan and Deborah Anker, "Re-setting Gender-Based Asylum Law," *Harvard Law Review Blog*, Dec. 30, 2021.

77. Matter of M-E-V-G-, 26 I&N Dec. at 240–41.

78. In an Article 3 court in the U.S., a witness is prevented from testifying on what she has not directly experienced by hearsay rules, but those rules do not apply in immigration court because of the difficulty of obtaining evidence or witnesses from abroad.

79. Matter of M-E-V-G-, 26 I&N Dec. at 232.

80. There are situations in which a group could be defined by harm but would not present circularity issues because the persecution at issue in the asylum claim is different. For instance, an applicant could be a member of a group of "girls kidnapped by rebels during the civil war," but this would not necessarily be problematic if the applicant was claiming that she was persecuted by her community at the end of the war because she had been kidnapped by the rebels. In a case like that, the group would not be impermissibly circular.

81. Kate Jastram and Sayoni Maitra, "*Matter of A-B-* One Year Later: Winning Back Gender-Based Asylum through Litigation and Legislation," 18 *Santa Clara Journal of International Law* 48 (2020): 74–75.

82. *Grace, et al. v. Barr, et al.*, USCA Case #19–5013, Doc. #1852194, Decided July 17, 2020, at 36 ("If A.B.'s inability to leave her relationship stems from circumstances independent of the alleged harm—for example, legal constraints on divorce—then the group would not be circular because the 'inability to leave' does not refer to harm at all. See De Pena-Paniagua, 957 F.3d at 93–94 [explaining that the 'inability to leave a relationship may be the product of forces other than physical abuse,' such as 'cultural, societal, religious, economic, or other factors']").

83. Throughout this chapter, I almost exclusively refer to domestic violence in opposite-sex couples where the man is the perpetrator. This is not to say that the reverse situation does not occur or that domestic violence does not occur in same-sex couples, but in the context of asylum, this is overwhelmingly the most common situation. See chapters 2 and 5 of this volume for discussion of the limitations of considering gender-based violence as private crime.

84. See Matter of Acosta, 19 I&N Dec. at 222.

85. Matter of S-A-, 22 I&N Dec. at 1330–31 (accepting testimony that reporting would have been futile because Moroccan law gives fathers "unfettered" power over daughters, and dangerous where harm to respondent would likely escalate after a report); Korablina v. I.N.S., 158 F.3d at 1045 (accepting petitioner's testimony that she did not report because the police had ties to the persecutory group); Bringas-Rodriguez, 850 F.3d at 1069; Ornelas-Chavez v. Gonzales, 458 F.3d at 1056–57.

86. 8 C.F.R. § 1208.13(b)(3).

5

The Fragility of Particular Social Groups

The Differential Weight of Rape in Gender-Based Violence and LGBTQ+ Asylum Cases

Kimberly Gauderman and M. Gabriela Torres

When the men sexually assaulted her, they called her degrading names and told her that they had been sent to "make her a woman." After this attack, she fled her country and applied for asylum in the U.S. The asylum system would also try to "make her a woman"; the DHS attorney argued that the sexual assault was on account of her gender, a tenuous status for relief, rather than her sexual orientation as a lesbian, a firmer ground. However, the applicant, her attorney, and the expert witness convincingly, and perhaps awkwardly, argued that the men had attacked the applicant because she was a lesbian, not because she was a woman. Absent any previous harm, the sexual assault, because of the homophobic words and actions of the perpetrators, confirmed the attackers' motivations and her lesbian status within the asylum system. The judge granted her asylum through her membership in an LGBTQ+ particular social group (PSG).

When she was a teen, Mayeli met a young man several years her senior who seemed nice and worked in the city. Soon after meeting her, he asked her to be his girlfriend. While they were not in a relationship from her perspective, the young man came to visit her one day and in her own bedroom lifted up her *corte* [garment], raped her, and quickly left. She did not scream. He came back a few days later, asked to marry her, and raped her again in her room. The third time he returned, he forced her to come live with him and she felt obliged to do so because she was pregnant. Once they arrived, the young man's mother sent word to Maveli's family—she had no parents but a grandmother and siblings—that she would now be living with them. In their life together, he choked her, raped her repeatedly, sequestered her in a shack, and hit her repeatedly. She regularly escaped to return home, but the man's mother or

other members of his family always came to force her back to her common-law husband. The expert witness and attorney argued that she had been forced into marriage and that the rape constituted the initiation of the marital union. The judge granted her asylum through her membership in a PSG substantiated by expert testimony as "an indigenous woman robada in Guatemala."

Gender-based persecution, like other forms of violence considered worthy of protection in the context of asylum, generate "typologies of worthy victims" and "expectations about how asylum seekers should demonstrate their credibility and the legitimacy of their claims."[1] Drawing on international law, Meghana Nayak orders gender-based persecution in three general types that each carry its own weight of "worthiness" and "burdens of credibility": targeting because of gendered expectation; gendered acts of violence, such as rape; and violence enacted in reaction to nonconforming gender identities and sexual orientation.[2] The cases that open this chapter are emblematic of the different ways that rape can work to constitute a particular social group (PSG). In practice, the different forms of gender-based violence, but most particularly in domestic violence cases for cisgender women, have a high degree of variance in decisions that determine the merit of gender-based violence for asylum claims.[3] One contributing factor to this is that courts in the U.S. have been unwilling to define gender—or at least "women" or "men"—as the defining feature of a social group.[4] Importantly, our analysis shows that in law and in society rape is still very much a concept in flux that serves to constitute socially stratified rights based on prevailing ideologies. Heather Hlavka and Sameena Mulla call attention to the cultural repertoires—including prevailing racialized stereotypes, gendered assumptions, and dispositions to minimize the harms of gender-based violence in the interpersonal realm—through which sexual violence is interpreted as legal evidence and shaped into adjudicative practice.[5]

This chapter explores the adjudication of the meaning of rape in asylum cases as a fundamentally cultural practice that, by drawing on prevailing notions of the deservedness of protections, bestows stratified benefits. Importantly, when we use the term "asylum," we are also referring to withholding of removal, a form of relief with similar requirements that offers more limited protection. Applicants generally apply for both forms of relief simultaneously. Our work in this chapter explores this variability in decisions by assessing the differential impact of rape on defining the bases for asylum-worthy persecution in PSGs.

Sexual orientation, unlike gender, has regularly been found to be an "immutable" characteristic or a "fundamental" identity that individuals in the group should not be forced to change.[6] We argue that in "sexual minority cases"—the term asylum practice ascribes to LGBTQ+ cases—especially for male homosexuals and transgender women, rape often works to strengthen the PSG on which the asylum claim is based. For lesbians, corrective rape may also effectively strengthen a PSG based on sexual orientation. Lesbians risk categorization as women because gender-based sexual violence is socially tolerated and regularly dismissed in the

asylum system. Scholars have noted the politics of credibility that burden LGBTQ+ applicants in the process of applying for asylum.[7] In our experience as experts, the harm of rape involving cisgender women needs to be contextualized adequately. Without a clear context, rape presented as a harm that rises to the level of persecution can be detrimental to an asylum argument or diminish the forms of relief that become available to women.

The authors recognize that "women" and "sexual minorities" are not mutually exclusive legal categories. We distinguish these terms through the assignment of individuals to distinct PSGs; cisgender women are likely to be framed through their gender, while LGBTQ+ persons are included in sexuality-based social groups. In this chapter, we address some of the consequences for lesbians, who as cisgender women and sexual minorities, may be included in both categories. Importantly, the legal category "sexual minority" is out of sync with humanities and social science understandings of the irreducibility of sexual orientation, nonbinary gender identities, and transgendered identities into notions of sexual alterity connoted in the term "sexual minority."[8]

Drawing on our disciplinary training in history and anthropology and over twelve years of experience as expert witnesses, we consider how rape as harm contributes to defining the bases for asylum-worthy persecution in gender-based and LGBTQ+ PSGs. Collectively we have worked on over three hundred cases in the Northern Triangle and the Andes (Peru and Ecuador). These cases are all focused on the full range of gender-based and sexual violence perpetrated against cisgender, heterosexual women and sexual/gender identity minorities. In addition to our experience working as experts, we draw from humanities, social science, and legal studies of asylum, as well as from the texts of precedential cases. References to cases, such as the cases at the beginning of this chapter, are based on a composite of similar cases in order to protect the privacy of individual applicants.

THE PROBLEM OF RAPE IN LAW IN THE AMERICAS AND IN PRECEDENTIAL ASYLUM CASES

Relevant International Frameworks for Understanding the Harm of Rape

In general, condemnation of rape as a harm is found not only internally in country-specific penal codes or laws that prohibit violence against women but also in international humanitarian law. Defining rape as a humanitarian harm was first codified in the Geneva Convention (1949), which has both general protections and special protections for women.[9] The Statutes of the International Criminal Tribunals for Yugoslavia (1993) and Rwanda (1994) defined rape as a crime against humanity in the context of war.[10] The Rome Statute (1998) defines rape both as a crime against humanity and as a war crime.[11]

In the Americas specifically, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, better known as the Belém do Pará Convention, defined standards for states that have ratified it in Central and South America. The Belém do Pará Convention requires states to proactively

> provide appropriate specialized services for women who have been subjected to violence[,] . . . provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life[,] . . . [and conduct] research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes.[12]

In addition, in the Americas rape is an implied harm in article 5.1 of the Inter-American Convention on Human Rights, which guarantees that "every person has the right to have his physical, mental, and moral integrity respected."[13]

On November 19, 2015, the Inter-American Court of Human Rights,[14] in *Velásquez Paiz and Others vs. Guatemala*,[15] ruled that Guatemalan authorities were culpable in failing to ensure the right to physical integrity and right to life of women. Ruling on a particularly well evidenced case of rape leading to murder, the court noted that Guatemalan police did not pursue the woman's kidnapper, despite having ample cause. Further, the court ruled that police officers' refusal to act on the complaint was not an isolated instance of police and the courts failing to grasp the gravity of crimes against women, particularly rape and murder. Guatemala was cited in this ruling as making little effort to prevent and prosecute crimes against women in a systemic way, despite the country's recognition of violence against women as criminal and its signing of international conventions that compel the country to safeguard women's lives.

Rape in U.S. Asylum Law

Sexual assault survivors, like other applicants for asylum and withholding of removal, must demonstrate that the harm they experienced rises to the level of persecution, that the perpetrator was motivated because of the applicant's "race, religion, nationality, membership in a particular social group, or political opinion," and that the government is unwilling or unable to protect them.[16] The Immigration and Nationality Act (INA) does not define "persecution," but, as discussed below, in case law sexual assault is considered a serious harm that rises to the level of persecution. Women and sexual minorities must demonstrate that they were sexually assaulted on account of a protected ground, usually a gender-based PSG or one framed through sexual orientation or gender identity, rather than due to personal animosity or common criminality. Finally, sexual assault survivors must demonstrate that the government is directly involved in the persecution or that

the government is acquiescent because it fails to protect victims from harm by private actors.[17]

Women and sexual minorities are targeted for high levels of violence, including sexual assault. In our cases, we find that assailants usually indicate that they are raping the victim because of their status as a woman or as a sexual minority. It is common for a male perpetrator to tell a woman that he is raping her because she is "his woman." Likewise, rapists tell LGBTQ+ persons that they are sexually assaulting them because they are "gay." While government agents, usually security officials, may sexually assault women and sexual minorities, perpetrators are likely to be private actors. Despite these apparent similarities in the situations of women and LGBTQ+ rape survivors, a defining difference is that women lack status in the asylum system. As discussed below, women's gender-based PSGs are fragile and continually challenged, while sexuality-based PSGs have been continuously reaffirmed in case law. This distinction is determinative in sexual assault cases because sexual minorities can connect this form of persecution to a stable protected ground, thereby demonstrating nexus, a necessary requirement for obtaining asylum. Because women's gender is regularly invalidated as a basis for protection, they are more likely to be disqualified for asylum protection. In their cases, sexual assault is likely to be deemed a private crime, one motivated by the depraved nature of the perpetrator. As Sarah Hinger observes, implicit in asylum law is the assumption that "persecution is not only defined by the physical severity of the injury, but also, simultaneously, through the relationship between the harm and the identity characteristic."[18]

Rape and Persecution. Rape has been recognized as a harm that rises to the level of persecution since *Lazo-Majano v. INS* in 1987.[19] In this case, Ms. Lazo-Majano was repeatedly sexually assaulted by a general during the Salvadoran civil war. Reflective of women's cases that we are familiar with in our work as experts, the sexual assaults she suffered were included in a complex of other gender-based violence. She had been "bullied, beaten, injured, raped and enslaved." Her request for asylum was denied by an immigration judge (IJ) and by the Board of Immigration Appeals (BIA). In her final appeal to the Ninth Circuit Court of Appeals, the judges decided that the general's sexual assaults were motivated by her imputed political opinion, not by her gender status. In this decision, adjudicators advanced an argument that feminism, a belief that women should not be subordinated to men, can be considered a political opinion. The dissenting judge, in reference to the sexual and physical assaults, countered that "such mistreatment is clearly personal in nature and does not constitute political persecution. . . . [She] was abused and dominated by an individual purely for sexual, and clearly ego reasons." While this was a minority opinion in the decision, this judge articulated the still-dominant view that sexual violence

against women constitutes a private crime, a determination repeatedly used to deny women asylum relief.

Political Opinion. Political opinion is distinct from the other protected grounds in that it is based on attitude rather than status. "Political opinion" refers to a broad range of attitudes, actual or imputed, that individuals have concerning their government or society. To establish political opinion as a basis for asylum, the applicant must demonstrate that the perpetrator perceived that the victim held an oppositional view and harmed the individual for that reason. Ms. Lazo-Majano, for example, had to demonstrate that her rapist perceived her lack of consent to his right to sexually and physically assault her. She was, then, granted asylum based on her attitude about male domination rather than on her status as a woman who had been sexually assaulted.[20]

The question of whether a woman demonstrates sufficient resistance to harm would continue to define women's asylum cases. In *Fatin v. INS*, the applicant presented both gender-based PSGs and feminism as a political opinion.[21] In this case, Ms. Fatin, who left Iran shortly before the culmination of the 1979 Iranian Revolution, requested asylum because she feared persecution under the new regime as a "woman," as a member in the subgroup "Iranian women who refuse to conform to the government's gender-specific laws and social norms," and as a "feminist." The Third Circuit judges determined that the category "woman" was too broad. In consideration of the second gender-based PSG, the judges focused on the degree to which Ms. Fatin would resist Islamic law by wearing the chador, or veil, despite the severe penalty for noncompliance, which she described as "74 lashes, a year's imprisonment, and in many cases brutal rapes and death." Because Ms. Fatin indicated that she would try to avoid wearing the chador rather than engage in full noncompliance due to the risk of harm to her, the judges determined that her level of resistance was inadequate to include her within the social group defined through her gender and undermined her claim based on her feminist political opinion.

Gender-Based Harm. In 1996, the BIA's decision in *Matter of Kasinga* was the first precedent decision that established that women fleeing gender-based persecution were eligible for asylum. The BIA's definition of a gender-based PSG for Ms. Kasinga, however, still emphasized an element of her opposition to harm, "young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice."[22] In this case, the applicant was a young woman from Togo who, after her father died, was forced by her aunt into a polygamous marriage with a much older man who planned to force her to undergo FGM before consummating the marriage. Fearing FGM, Ms. Kasinga fled her country. In its review, the BIA found that FGM is persecution that is practiced "to overcome sexual characteristics of young women of

the tribe who have not been, and do not wish to be, subjected to FGM," confirming her as a member of a particular social group.

In a concurring opinion, a Board member questioned the inclusion of opposition to harm in a gender-based PSG by comparing the situation of Ms. Kasinga to that of a prior case that concerned a man who had experienced persecution in Somalia on account of his clan membership. The judge pointed out that the court had not examined the male applicant's attitude toward his persecution and that the only distinction between the two cases was that Ms. Kasinga is a woman.

> It may be true that sometimes an individual woman's political opinion may overlap or coexist with her membership in a group designated as a particular social group; however, that does not detract from the fact that social group membership is a status-based ground protected under the Act, just as is religion or ethnicity. While it is not impossible that a political or social opinion, either actual or imputed, may be shared by persons whom, as a result, we would characterize as constituting a particular social group[,] . . . as I have stated, the applicant's political or social views—her attitude or intent—is not relevant to our definition of the social group to which she belongs, but rather to whether the harm or abuse she faces constitutes persecution.[23]

Matter of Kasinga recognized a gender-based social group, defined through gender plus other characteristics (referred to as "gender plus" by some researchers), that could be used by women fleeing other kinds of gender-based violence, including rape.[24] An element of resistance to gender-based harm continued to be regularly incorporated in gender plus PSGs. In 1996, the IJ granted Ms. Rodi Alvarado asylum on the basis of a gender-based PSG, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," and her political opinion that "women should not be dominated by men."[25] Ms. Alvarado was subjected to over a decade of egregious abuse, including serial rape, and threats to her life by her spouse in Guatemala. The IJ found that the physical and sexual assaults she suffered rose to the level of persecution and that this persecution was on account of her gender-based PSG, citing *Matter of Kasinga*, and on her political opinion, citing *Lazo-Majano v. INS.* However, the INS appealed this decision to the BIA, which ruled in 1999 that though Ms. Alvarado had suffered harm rising to the level of persecution, the persecution was not on account of a protected ground. The BIA determined that her spouse abused her for personal reasons, "because she was *his* wife," and that her resistance against him was not political opinion but a "common human desire not to be harmed or abused" (emphasis in original).[26]

Attorney General Janet Reno vacated this decision in 2001 and remanded it to the BIA to reconsider after the finalization of a proposed regulation that, among other guidance, would have confirmed gender as the basis of a particular social group.[27] This regulation has never been finalized.[28] In an analysis of 45 nonpublished decisions after *Matter of R-A-* was vacated, Karen Musalo and Stephen Knight found that immigration judges inconsistently recognized

gender-based PSGs.[29] The researchers noted that in a case concerning a Peruvian lesbian who had been raped, because of the controversy over gender-based PSGs, the immigration judge relied instead on precedent decisions that affirmed a PSG based on sexual orientation. Blaine Bookey analyzed 206 case outcomes for domestic and sexual violence between 1994 and 2012 and confirmed that many immigration judges refused to recognize gender-based PSGs because they lacked "social visibility" and "particularity" and, on this basis, denied asylum to women fleeing domestic violence.[30] In a case concerning a Guatemalan woman who had endured severe physical and sexual assault by her partner, the immigration judge determined that her abuser "was simply a horrible husband who lacked a basic sense of morality" and that she was a "victim of crime which was perpetrated without reason." In a case concerning a survivor of sexual assault, the IJ determined that rape is a private, criminal act, "an isolated, random act of violence 'untethered' to the government," and denied the woman's asylum claim.[31]

Adjudicators continue to vacillate regarding the validity of gender-based social groups. In 2014, the BIA issued a precedential opinion, *Matter of A-R-C-G-*, recognizing that women fleeing domestic violence may merit asylum protection.[32] In this case, Ms. C.G. had endured years of physical and sexual assault in Guatemala. The BIA overruled the immigration judge, who had determined that the abuse Ms. C.G. had suffered was not persecution but constituted "criminal acts" perpetrated "arbitrarily" and "without reason." In 2018, Attorney General Jeff Sessions vacated *Matter of A-R-C-G-* in *Matter of A-B-*, which concerned a Salvadoran woman whose husband had regularly physically and sexually assaulted her in the course of their relationship.[33] Sessions determined that "generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for Asylum." He decided that the applicant's gender-based social group was invalid and that the abuse she had suffered was "private, criminal activity."[34] The lack of consistent recognition of gender-based claims jeopardizes women who have been sexually assaulted. When rape is considered part of a complex of other types of violence, rather than augment the level of harm, adjudicators may subsume sexual assault under the general category "domestic violence," which does not warrant asylum protection.

Sexuality-Based Harm. Unlike cisgender, heterosexual women, who are framed through often multiple and creative gender-based PSGs, there is strong legal recognition that sexual orientation and gender identity are, on their own, protected grounds that may merit asylum protection. Sexual minorities were excluded from immigration to the United States until the Immigration Act of 1990.[35] That same year, protections for gay men were recognized in *Matter of Toboso-Alfonso*,[36] designated as precedent by Attorney General Janet Reno in 1994. Lesbians may be included in this PSG based on sexual orientation.[37] Gender identity was confirmed as a basis for membership in a sexuality-based PSG in 2003 in *Hernandez-Montiel v. INS*,

a case that involved "a gay male with a female sexual identity."[38] The case *Amanfi v. Ashcroft*, also in 2003, determined that heterosexual individuals who are perceived as gender nonconforming merit asylum protection.[39] There are no precedential cases that specifically recognize asylum protection for bisexual people, though in practice they have been included as individuals who are perceived as homosexual.[40] In 2005, the Ninth Circuit confirmed the validity of sexuality-based PSGs in *Karouni v. Gonzales:* "to the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a 'particular social group" (emphasis in original).[41]

In LGBTQ+ cases that include sexual assault, as in women's claims, adjudicators usually cite *Lazo-Majano v. INS* as a precedential decision that recognizes sexual assault as persecution. However, different determinations about rapists' motivations complicate women's claims and facilitate claims by sexual minorities. Adjudicators considered Ms. Lazo-Majano's gender status insufficient motivation for her sexual assault and instead considered sexual assault to be retribution for and punishment of her imputed or actual political opinion. In LGBTQ+ cases, the perpetrators' motivations are directly connected to the applicant's sexual orientation and gender identity; that is, for LGBTQ+ persons the nexus between this form of persecution and a protected ground is regularly confirmed. In *Hernandez-Montiel v. INS* the Ninth Circuit judges determined in 2000, "Through police harassment and rape, Geovanni suffered past persecution in Mexico on account of his sexual orientation for being a gay man with a female sexual identity." The court ruled that "sexual orientation and sexual identity are immutable" and "are so fundamental to one's identity that persons should not be required to abandon them."[42] In *Avendano-Hernandez v. Lynch*, a 2015 case concerning a transgender woman from Mexico who was raped by police and military officers, Ninth Circuit judges ruled that rape of LGBTQ+ persons may even rise to the level of torture: "Rape and sexual abuse due to a person's gender identity or sexual orientation, whether perceived or actual, certainly rises to the level of torture for CAT purposes."[43] Significantly, in these cases the survivors of the sexual assaults were not required to show resistance to the perpetrators, nor did adjudicators examine their attitudes about the status of sexual minorities in their home countries. The challenges to LGBTQ+ asylum cases that include sexual assault focus on demonstrating the applicants' gender nonconformity and their inclusion in acknowledged PSGs. When rape is framed as sexuality-based violence, applicants generally face fewer obstacles to gaining asylum.[44] In contrast, cisgender women must demonstrate that they were raped on account of their gender, a weaker claim because male violence against women is normalized. Men can be "horrible" and abuse women "without reason."[45]

The strength of sexuality-based PSGs is reflected in their citation by adjudicators to validate gender-based PSGs for women. For example, in *Mohammed v. Gonzales*, in 2005, the Ninth Circuit judges cited *Hernandez-Montiel v. INS* to

validate Ms. Mohammed's gender-based PSG and, separately, to establish nexus to persecution.[46] In this case, Ms. Mohammed was subjected to FGM as a small child in Somalia; her request for asylum was denied by the immigration judge and the BIA because it was determined that, as FGM had already occurred, there was no fear of future persecution. In citing the *Hernandez-Montiel* case, the judges asserted an equivalency between gender and male homosexuality to establish that being female is an "innate" characteristic. The judges ruled that just as "persecution on account of homosexuality can constitute persecution on account of membership in a particular social group[,] . . . possession of the immutable trait of being female is a motivating factor—if not a but-for cause—of the persecution." The judges decided that FGM is "a permanent and continuing harm" that is linked to other forms of gender-based harm, including rape, because in her country "women are subordinated systematically in the country's overwhelmingly patriarchal culture."[47]

The Problem of Rape, in Theory

The interpretations that have been given to the harm of rape in the context of asylum law reflect debates in social theory on the subject. Specifically, in asylum law rape is too often construed as an interpersonal, intimate, or private act that is seldom contextualized as a product of a particular sociocultural historical context. This especially narrow conceptualization is shared in the operationalizing of U.S. rape laws, which until the 1980s situated the harm of rape in a woman's resistance and lack of consent to sexual acts.[48] While the need to demonstrate resistance particularly to physical expressions of force has subsided, consent-based definitions still put the harm of rape firmly in the context of the interpersonal. This despite MacKinnon's well-known work in *Toward a Feminist Theory of the State* (1989) that noted the important role that socialization plays in mediating the experience of force and consent.[49]

The harm of sexual violence is misunderstood by the prevailing cultural view, often still reflected in scholarship, that sexual violence is a private or individualized problem.[50] That rape is a private matter—as a cultural conception—has significant historical roots in U.S. law. According to Estelle Freedman, in the U.S. in the seventeenth and eighteenth centuries, rape was identified as interpersonal and seen as a violation or appropriation of a man's sexual rights over his wife or daughter and, for some men, a state-sanctioned right over their female slaves.[51] Even in the nineteenth and early twentieth centuries, rape was typically viewed as an interpersonal violation of women's purity, not a violation of her consent or personhood. In many respects, these understandings were reinforced by the fact that only men—white men, more precisely—enjoyed fully the privileges of citizenship. Freedman notes that the efforts to define women's personhood and access to citizenship in the twentieth century map onto a growing reconceptualization of rape as consent-based violations of personhood.

The idea that rape is an interpersonal problem—and read as a private act—lies at the core of the limitations to evidencing and stabilizing gender-identity-focused PSGs for cisgender women. While PSGs such as "Guatemalan women" or "Guatemalan Indigenous women" exist, harms of rape do not easily confirm membership in those groups, even though men often explicitly state that they rape women because they are a "dirty woman," a "bad woman," or even "my woman." Importantly, while rape is not a harm that is limited to gendered women, the ways in which rape is enacted and understood in society and law is a product of a particular sociocultural historical context.

There is a significant body of scholarship that for decades has foregrounded that social historical contexts constitute rape as a harm that cannot be either defined or understood as interpersonal.[52] Sexual violence, as an experience, is widely understood to alter selfhood,[53] as it particularly targets women's ability to reason.[54] In the Peruvian context, Jelke Boesten has argued that the nexus between wartime sexual violence and sexual violence in peacetime can be studied by tracing its social vestiges: patriarchal gender scripts that "impose dominance and affirm hierarchies."[55] As Rita Laura Sagato argues for the case of Juárez, representations of sexual violence in particular are expressions of dominance and control requiring an audience where "some bodies are in their death chosen to represent the drama of domination" that enacts and validates authority itself.[56] The role of patriarchal domination in making enactments of rape possible has been discussed often within the constraints of interpersonal acts.[57]

More recently, scholars have also shown that sexual violence is scaffolded by language, practices, and discourses that Nicola Gavey notes produce "cultural conditions of possibility" in particular places.[58] Rape as a harm is, in social theory, inexorably bound to the cultural context in which it is conjured as an act. This is not to say that sexual violence resides in the essential nature of any particular culture; cross-cultural research on sexual violence rejects this assumption.[59] Rather acts of rape always express cultural patterns or, as perhaps Gavey might say, are made possible by their "cultural conditions of possibility." This line of argument is borne out in findings that show that the harm of rape is employed in political opinion cases, as in *Lazo-Majano v. INS*, where rape by men is a way to suppress opposition to male dominance as a political opinion.[60]

In the sections that follow, based on cases on which we have worked, we trace how the legacy of rape as an interpersonal act marks the way that cisgender women must show the basis of their opposition to male domination—often encapsulated as a form of political opinion—for rape to be considered linked to a ground for protection. Importantly, the perceived location of rape as a harm taking place in the public sphere for LGBTQ+ cases repositions the evidence for violence against gay men and transgender women in a more favorable light. Cisgender women need to overcome the burden of the evidence of their harm that by default is located in a private sphere where they are presumed to be targeted as individuals,

despite cross-cultural research that demonstrates the cultural conditionality of intimate sexual violence.[61]

Cis-women, Rape, and Asylum

The context of a relationship in which the woman finds herself becomes central to the way that rape features as a harm for cis-women. Examples of PSGs that follow this pattern are "Guatemalan women unable to leave their relationship," "Guatemalan women living without a male protective figure," "immediate family members of," and "Guatemalan women forced into marriage." Given that PSGs have "no statutory definition,"[62] expert testimony "contribute[s] to the development of case law and precedent over time."[63] The importance of a woman's relationship to contextualizing the harm of rape is in part an artifact of the way that the gender-based violence PSGs have come to be constituted and challenged, as we discussed above, but it is also a result of the challenges inherent in this expression of gender-based violence in society and law.

Focusing on how asylum seeker narratives are structured allows more nuanced thinking about the insufficiency of rape in intimacy to sustain a claim for asylum and evidence membership in a particular social group for cisgender women. Narratives that include rape do not typically feature it as a particularly noteworthy harm but rather one harm among many that substantiate a woman's experience of gender inequality in society and in a relationship. To understand this better, this section focuses on forced marriage, which is encapsulated in PSGs like "Guatemalan women forced into marriage." Forced marriages take place as part of the normalization of violence in gender role expectations. Gender role expectations have developed in Guatemala as part of a long, state-sponsored history comprising violence against women; unequal societal access to education, political representation, and economic opportunities; and the country's legal legacy that had defined women and children for centuries as property of men. While no longer sanctioned by law, many customary practices such as forced sex to initiate new intimate partnerships discussed by Cecilia Menjívar as *robadas* (translated as "stolen" or "captured") continue to persist.[64]

In one specific example, Lisbeth's relationship had the classic signs of forced marriage or robada typology as her husband believed himself to be of a higher social status, paid Lisbeth's parents for their daughter, and rapidly engaged Lisbeth in a relationship against her consent when she was fifteen years old. Forced marriages are most common in Guatemala in circumstances of social inequality, when women are teenagers, and when the man is older than the woman, as in Lisbeth's case. Robada relationships are dually reflective of the greater vulnerability that Lisbeth had because of her family's poverty and her young age. Forced relationships deeply complicate leaving a relationship, as Lisbeth's story below evidences. According to a study by the United Nations Fund for Population Activities (UNFPA), the Ford Foundation, and the Guatemalan government, in Guatemala

there are a significant number of "early" or "infant/child" unions that, because of the power inequities that sustain them, need to be understood as forced unions.[65] Research has demonstrated that child unions derail a woman's ability to determine her own life course, often leading to teen pregnancies, higher rates of interpersonal violence, and lack of control over household resources.[66]

Lisbeth endured physical, emotional, psychological, and sexual abuse at the hands of her husband. The abuse was worse when he was drunk. Her husband was a chronic alcoholic who spent much of the household funds on alcohol; Lisbeth would hide money she earned to use for the family's essential needs so that her husband would not use it to buy alcohol. Lisbeth filed a complaint against her husband over twenty years ago, which landed him in jail for a few days, but he was quickly released, and the abuse continued to escalate. Lisbeth's narratives, like those of many asylum seekers we work with, place rape as one abuse among many that show that gender inequality is tolerated in a family and society. In cases where rape is a particularly egregious harm, the narratives are more oriented to substantiating, not membership in a PSG, but rather relief under the Convention Against Torture (CAT). In Lisbeth's case, the physical and sexual abuse was so intense that her older son assisted her financially and helped build a shack that could be locked from the inside where she could protect herself and the smaller children when her husband was drunk and violent toward them. Sometimes her husband hit the door with a machete, terrifying Lisbeth and her daughter, who were protecting the grandchild and who felt their lives were in danger.

Despite its recent prohibition in Guatemalan law, rape is still used to initiate a forced marriage. Sonia, another applicant, told her attorney that one day when she was taking the bus home, a man got on the bus with her and forced her to get off with him. As they deboarded, he began kicking at her legs to make her keep walking. He forced her inside a house, pushed her onto a bed, and raped her. After the rape, he told her that if she told her family he would hurt them and make them and her disappear. He told her the police would not help her and that he now owned her. He told everyone at work that she was "his woman." He raped her repeatedly and beat her if she resisted. She felt her life was no longer her own. As time went on, his displays of violence became increasingly public. He forced her to move in with him and became so violent that Sonia regularly feared for her life.

This form of engagement into intimacy had, until changes in gender-based violence law at the end of the 2000s, been enshrined in the Guatemalan Penal Code. The penal code had stated that criminal responsibility of persons accused of the crimes of rape, sexual assault, dishonest sexual abuse, and sexual abduction was to be vacated should there be a "legitimate marriage of the victim with the offending party as long as the victim is older than twelve years old" (Decreto 17–73 §III at 200). Early unions in which girls are younger than eighteen, whether engaged in by forcible intercourse or other means, are defined by the United Nations as contrary to the rights of children.[67] Early unions, also termed child marriages, have well-documented detrimental health and economic consequences for women, includ-

ing lifetime loss of income,[68] increased rates of gender-based violence, and higher rates of maternal mortality.[69] As a result, early unions are explicitly defined as a human rights violation globally and are included in the Fifth Goal of the United Nations Sustainable Development Goals.[70]

Narratives of rape feature particularly large when they are the focus of the PSG, as they typically are for forced marriages like Sonia's or Lisbeth's where rape evidences a history of persecution. Forced marriages, despite having commonalities with early marriages in terms of harm, differ in that forced marriages are socially recognized as a kind of intimate union that takes place in some ladino and Indigenous communities. Alice Y. Taylor et al. found that there are significant social supports for forced marriages that are entrenched in ideas of what women's agency should be and whether parents have agency in the marital choices of their daughters.[71] Menjívar defines *robada* as a cultural practice where "women are being 'taken' or 'stolen' as part of courtship" and where the relationship becomes one of "extreme control over their bodies, social relations, and physical movement; [and there is] a social premium on their honor and 'good behavior,' the expectation that they will be partnered and be mothers, and the devaluation of their suffering and their lives more generally."[72]

According to Kim Thuy Seelinger, while most forced marriage cases originate on the African continent, Guatemala is the most common country for asylum claims of forced marriage in the Americas.[73] Some studies suggest that, in general, 10 percent of Guatemalan women enter intimate partnerships before the age of fifteen and that this figure is 13 percent for rural Guatemala women.[74] Generally, 29 percent of Guatemalan women are engaged in unions before they are eighteen. Beyond Guatemala, 34 percent of Honduran women, 24 percent of Salvadoran women, and 35 percent of Nicaraguan women are in intimate unions before they turn eighteen.[75] International advocates and analysts find that poverty, discriminatory gender norms toward women, and unenforced laws are key causes for the phenomenon of early unions.[76]

Gendered targeting is defined through a woman's relationship even in forced marriage PSGs, such as robadas, that are characterized by forcible intercourse as marriage initiation and rape as a central form of persecution. Establishing gender-based targeting in PSGs beyond forced sex is much more difficult given the instability in changing case laws since 2016, which has increased the burden on experts to substantiate legal and cultural norms that define women's status in their home countries.

Rape and LGBTQ+ Cases

Expert witnesses in LGBTQ+ cases conduct research that includes documenting how individuals would be perceived as gender nonconforming in their home country, the types of violence they would likely be targeted with, and why perpetrators would be motivated to harm the individuals. In the over one hundred LGBTQ+ affidavits the first author of this chapter has completed, all

the applicants had experienced sexual violence or feared future sexual assault.[77] Vulnerability to sexual assault is embedded in the precedential cases discussed above that recognized sexual orientation and gender identity as bases for PSGs. There is a strong presumption that when LGBTQ+ persons, especially male homosexuals and transgender women, are sexually assaulted, these attacks are motivated by their sexual orientation or gender identity. Sexual assault, in these cases, often serves to confirm the applicant's membership in a sexuality-based PSG. For example, in a hearing for a gay man who had been sexually assaulted by gang members, the Department of Homeland Security (DHS) attorney asked the expert whether gang members also regularly attacked women. The apparent objective of the attorney was to challenge the nexus between the man's sexual orientation and the assault by asserting equivalence between the harm he suffered and the sexual assault of women, a harm frequently minimalized and treated with skepticism in immigration courts.[78] Casting doubt on the motivations of the perpetrators, in this instance, was a tactic to undermine the applicant's claim to be a sexual minority.

In the over three hundred affidavits we have collectively completed, cisgender, heterosexual men are uniquely the perpetrators of sexual violence against women and sexual minorities in the countries on which we focus. An expert witness in LGBTQ+ cases must explain that not all same-sex activity is considered gender nonconforming; men may maintain their heterosexual status if they are the aggressors in sexual assaults on male-assigned sexual minorities. In other words, vulnerability to sexual assault is a characteristic that differentiates gay men and transgender women from heterosexual men. The definition of homosexuality in the United States is distinct from how it is viewed in some Latin American countries. In a recent study of sexual behavior in the U.S., the researchers found that participants were likely to characterize men as homosexual after only one same-sex encounter.[79] Contrarily, in some Latin American countries, men who have sexual contact with other assigned males are not necessarily considered homosexual. Patriarchal norms that legitimate male violence against women also permit heterosexual men to degrade and punish perceived gender-nonconforming males by sexual assault.[80] In the cases that the first author of this chapter works on, perceived male homosexuals and transgender women are routinely raped by men who identify and are perceived as heterosexual. These cases suggest that in some cultures there is not a meaningful distinction between homosexual men and transgender women, who are similarly stigmatized as passive, effeminate, and penetrated men who have rejected the proper role of the male. Perpetrators use similar pejorative language in their physical and sexual assaults on both groups. Perceived male gender nonconformity is sharply defined as "other," a view shared by the immigration attorney Michael Jarecki: "There's just a heteronormative understanding of lifestyle in a lot of these countries and then there's other. And that other can be everything else. . . . [T]hat's all grouped together as gay, not normal."[81]

In practice, the acknowledgment that sexual assault is a harm that distinguishes male homosexuals and transgender women from heterosexual men functions to confirm status within a sexuality-based PSG. This was the situation in a case in which the applicant identified as a heterosexual man but was perceived to be homosexual by his community and gang members. In his hometown, he was publicly harassed for being homosexual because of his appearance and his relationships with gay men. Gang members attempted to force him to collaborate in criminal acts and, because he refused, tortured and repeatedly sexually assaulted him. During these assaults, gang members called him pejorative names for homosexual men and threatened to kill him and his family if he reported the assaults. For the immigration judge, the serial rapes were the main evidence that the applicant was perceived as homosexual, overriding information that might have indicated otherwise, including his heterosexual relationship and children in another town where there were no accounts that he was perceived as homosexual. The judge decided that the sexual assaults were perpetrated because of the applicant's imputed status as a homosexual and granted asylum.

Researchers regularly argue that a factor that facilitates the asylum cases of homosexual men and transgender women is that the harm they experience regularly occurs in the public realm and is perpetrated by public actors, including government officials. Cisgender women, including lesbians, contrarily, are more likely to be targeted with violence by private actors in the private, domestic sphere and therefore face greater challenges in their asylum claims.[82] The asylum system does privilege public harm, often recognizing it as evidence that the government does not protect a societal group. In the precedential cases for the establishment of sexuality-based PSGs, for example, the perpetrators of the applicants' sexual assaults were government officials, thus meeting the two prongs of persecution: serious harm and governmental complicity or acquiescence in the harm. But even in cases in which homosexual men and transgender women are sexually assaulted by private actors, immigration judges are still more likely to grant asylum than in cases of cisgender women who face similar violence. In the above case, while the applicant did endure public denigration because of the perception that he was gay, he was granted asylum on account of persecution carried out by gang members who are private actors. Another example is the case of a transgender woman who was sexually assaulted by family members. In this case, the applicant, who identified and was perceived as a gay male in her home country, was physically and emotionally abused by her parents and regularly raped by her uncle. Her uncle told her she was his property and threatened to kill her if she told anyone about the assaults. When she attempted to report the sexual assaults to the police, they refused to help her. The expert presented evidence on gender norms that condone violence against gender-nonconforming persons, information on the assault and murder of LGBTQ+ persons, and documentation that security officials refuse to assist

sexual minorities and perpetrate violence against them. The judge determined that, although the sexual assaults were committed by a family member in the domestic sphere, they were motivated by the perceived sexual orientation of the applicant and granted asylum.

Lesbians are sexual minorities who precariously are also women. Affidavits in lesbian asylum cases typically include information on the status of sexual minorities as well as documentation of gender-based violence against women. While it might seem reasonable to argue that lesbians, who are at the intersection of homophobic and gender-based violence, are more vulnerable to persecution, in fact, their status as women is regularly ignored in asylum hearings.[83] In the debriefing after an asylum hearing for a lesbian, the first author of this chapter asked the applicant's attorney why none of the information on gender-based violence was addressed; the attorney explained that "judges don't care about gender-based violence." Lesbians' status as women, however, still has an impact on the outcomes of their cases. According to recent research analyzing the outcomes of asylum cases for gay and bisexual men and lesbians, though lesbians were more likely to report sexual violence in their asylum applications, they were more than twice as likely to fail in their claims than male sexual minorities.[84] Lesbians' status as a sexual minority is also regularly challenged because, like women in general, they are more likely to experience persecution by private actors, often family members. Because of repression, lesbians may mask their sexual orientation, making it more difficult for them to establish intimate relations with other women, evidence frequently required in asylum hearings, and to have engaged in heterosexual relationships with men, sometimes coerced or forced, which judges may interpret as invalidating their credibility as members of a sexual minority.[85] Lesbians, in fact, are invisible in their home countries and in research on sexual minorities carried out by national entities, the U.S. State Department, and the United Nations, all of which overwhelmingly focus on gay men and transgender women.

The lack of documentation on the specific status of lesbians is a serious impediment in preparing for an asylum hearing and the reason that lesbians are somewhat awkwardly included in a generic "homosexual" PSG that is framed around the experiences of homosexual men and transgender women.[86] An example is the 2020 *Xochihua-Jaimes v. Barr* case.[87] Ms. Xochihua-Jaimes is a lesbian who was repeatedly raped as a small child by family members and as a teenager, by a teacher who impregnated her. As a young woman, she began a relationship with a prominent leader in the Mexican Zeta drug cartel who continually raped her. She had several children as a result of this coerced relationship. He beat her, threatened to kill her, raped her twelve-year-old daughter, and mobilized other Zeta cartel members, including members of his family, to attack her. She was not eligible for asylum, but judges did evaluate her situation based on the Convention Against Torture. In determining the likelihood of future torture, it was her

status as a sexual minority that was cited, not her status as a woman, despite the fact that at the time of her hearing Mexico was well documented as one of the most dangerous countries in the world for women because of high rates of sexual assault and femicide.[88] Instead, adjudicators framed her risk of future torture through the precedential *Avendando-Hernandez* case, which, as noted above, concerned a transgender woman. They wrote, "Even if Los Zetas did not find her, Petitioner is at heightened risk throughout Mexico on account of her sexual orientation. Extensive record evidence demonstrates that LGBTQ+ individuals are at risk throughout Mexico." The judges determined that the serial rapes she endured over many years constituted torture on account of her sexual orientation, also citing *Avendano-Hernandez:* "Rape and sexual assault may constitute torture, and 'certainly rise to the level of torture for CAT purposes' when inflicted due to the victim's sexual orientation."[89] To offer Ms. Xochihua-Jaimes protection, adjudicators ignored her status as a cisgender woman and instead incorporated her in a sexuality-based PSG framed through the experiences of a transgender woman.

CONCLUSION

The weight or relevance given to rape in asylum claims differs depending on whether it is defined as gender-based or sexuality-based targeting. By looking at relevant case law and our own work as experts in asylum cases, we argue that in practice asylum adjudication ascribes women and sexual minorities distinct collective identities, or PSGs, that reframe the weight given to rape based on the identity of the target. Gender-based and, in particular, domestic violence cases in which women are raped in their intimate partnerships, have a high degree of variance in decisions that determine the merit of gender-based violence. We attribute this differential assessment of the harms of rape to two coexistent processes. First, it is a result of the ways that law and legal practice reproduce prevailing U.S.-based cultural assumptions of rape that theorists of rape have actively debunked. Second, courts in the U.S. have been unwilling to define gender—or at least "women"—as the defining feature of a social group but have made it clear that sexual minorities—including those defined by variance from the gender binary—are to be considered a social group. As a result, experts working on LGBTQ+ and gender-based violence cases for women are tasked with different work. To evidence gender-based targeting, rape as persecution is insufficient evidence that a cisgender woman was targeted because of her gender, so experts must engage with explaining the country's gender-based violence laws, cultural conditions of discrimination against women, and the application of laws that protect women in society, as well as prevailing normative expectations, including those that are opposed by the applicant, among other conditions that pattern the applicant's particular targeting. For LGBTQ+ cases, rape is central to evidencing the PSG itself.

NOTES

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2. Ibid., 3.

3. María Cristina Garcia, *The Refugee Challenge in Post–Cold War America* (New York: Oxford University Press, 2017), 184.

4. Matter of Kasinga, 21 I&N 357 (1996).

5. Heather Hlavka and Sameena Mulla, "Thinking Forensically: Law, Medicine and the Nomos of Sexual Violence," in *Research Handbook on Socio-Legal Studies of Medicine and Health*, ed. Marie-Andrée Jacob and Anna Kirkland (Cheltanham: Edward Elgar, 2020).

6. Matter of Toboso-Alfonso, 20 I&N Dec. 819 (1990).

7. Siobhán McGuirk, "(In)credible Subjects: NGOs, Attorneys, and Permissible LGBT Asylum Seeker Identities," *Political and Legal Anthropology Review* 41:S1 (2018): 4–18.

8. Robert Mizzi and Gerald Walton, "Catchalls and Conundrums: Theorizing 'Sexual Minority' in Social, Cultural, and Political Contexts," *Paideusis* 22:1 (2014): 81–90.

9. Anna Crowe, "'All the Regard Due to Their Sex': Women in the Geneva Conventions of 1949," HRP Research Working Paper Series, HRP 16-001, Dec. 2016, p. 5.

10. Statute of the International Criminal Tribunal for the former Yugoslavia Security Council Resolution 827 (1993); Statute of the International Tribunal for Rwanda (1994).

11. Rome Statute of the International Criminal Court (1998).

12. Belém do Pará Convention 33 I.L.M. 1618 (1994).

13. Inter-American Convention on Human Rights (1969), entered into force July 18, 1978.

14. The Inter-American Court of Human Rights has an active archive of cases and hearings organized by country and topic that may be of use to experts and attorneys.

15. CIDH, Nov. 19, 2015.

16. 8 U.S.C. §1101(a)(42)(A).

17. See chapters 4 and 7 in this volume.

18. Sarah Hinger, "Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Cases," *Columbia Journal of Gender and Law* 19:2 (2010): 367–408.

19. Lazo-Majano v. INS, 813 F.2d 1432 (1987).

20. Maureen Mulligan, "Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion," *Boston College Third World Law Journal* 10:2 (1990): 355–80; Isaac T. R. Smith, "Searching for Consistency in Asylum's Protected Grounds," *Iowa Law Review* 100:4 (2015).

21. Fatin v. INS, 12 F.3d 1233 (1993).

22. Matter of Kasinga, 21 I&N 357 (BIA 1996).

23. Ibid.

24. Karen Musalo and Stephen Knight, "Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions," *Westlaw* (Dec. 2003): 1–25.

25. Matter of R-A-, 22 I&N Dec. 906 (A.G. 2001; BIA 1999).

26. Ibid.

27. Federal Regulation Asylum and Withholding Definitions.

28. Matter of R-A-, 24 I&N Dec. 629 (A.G. 2008).

29. Musalo and Knight, "Asylum for Victims of Gender Violence."

30. Blaine Bookey, "Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012," *Hastings Women Law Journal* 24:1 (2013): 107–48; Fatma E. Marouf, "The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group,' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender," *Yale Law & Policy Review* 27:1 (2008): 47–106.

31. Bookey, "Domestic Violence as a Basis for Asylum," 130.

32. Matter of A-R-C-G-, 26 I&N Dec 388 (2015).

33. Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

34. Ibid.

35. Jin S. Park, "Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians under U.S. Immigration Policy," *UCLA Law Review* 42 (1995): 1115–56; Margo Canady, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009).

36. Matter of Toboso-Alfonso, 20 I&N Dec. 819 (1990).

37. Pitcherskaia v. INS, 118 F.3d 641 (1997), is a precedential case for a Russian lesbian in which it was determined that the applicant does not have to demonstrate that the perpetrator intended to harm or punish her for the harm to rise to the level of persecution. The woman was forced to undergo electroshock treatment to "cure" her of her homosexuality.

38. Hernández-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

39. Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

40. Immigration Equality, "Challenging Asylum Cases," n.d.; Apphia Kumar, "I Was the First Bisexual Person Granted Asylum in the U.S.': A First-Person Account for #BiWeek," *glaad*, Sept. 20, 2017.

41. Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Stefan Vogler, "Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims," *Law & Society Review* 50:4 (2016): 856–89.

42. Hernández-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

43. Avendano-Hernandez v. Lynch, No. 13–73744 (9th Cir. 2015).

44. Scholars generally agree that for cisgender women, adjudicators' rejection of their gender-based PSGs is the main hurdle in asylum cases, while for LGBTQ+ persons, the challenge is to demonstrate that the harm they experienced or fear experiencing rises to the level of persecution. Because rape is acknowledged as a form of persecution, LGBTQ+ applicants face fewer challenges in cases that include sexual assault than do cisgender women. See Laurie Berg and Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants," *Journal of Refugee Studies* 22:2 (June 2009): 195–223.

45. Joanna J. Kallinosis, "Refugee Roulette: A Comparative Analysis of Gender-Related Persecution in Asylum Law," *DePaul Journal of Women, Gender and the Law* 6:1 (2017): 55–93.

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48. Stephen J. Schulhofer, "Reforming the Law of Rape," *Law & Inequality: A Journal of Theory and Practice* 35:2 (2017): 335–54.

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51. Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2015).

52. Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon & Schuster, 1975); David Carey and M. Gabriela Torres, "Precursors to Femicide: Guatemalan Woman in a Vortex of Violence," *Latin American Research Review* 45:3 (2010): 142–64; Marcela Lagarde, "Del femicidio al feminicidio," *Desde el Jardín de Freud* 0:6 (2006): 2016–25; Peggy Reeves Sanday, "The Socio-Cultural Context of Rape: A Cross-Cultural Study," *Journal of Social Issues* 37:4 (1981): 5–27.

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54. Susan Brison, *Aftermath: Violence and the Remaking of the Self* (Princeton, NJ: Princeton University Press, 2003).

55. Jelke Boesten, *Sexual Violence during War and Peace: Gender, Power and Post-Conflict Justice in Peru* (London: Palgrave Macmillan, 2014), 42.

56. Rita Laura Segato, *La escritura en el cuerpo de las mujeres asesinadas en Ciudad Juárez, Mexico* (Mexico City: Universidad del Claustro de Sor Juana, 2006), 22.

57. Brownmiller, *Against Our Will*, 209.

58. Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Oxford: Routledge, 2008).

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64. Cecilia Menjívar, "Normalizing Suffering, *Robadas*, Coercive Power and Marital Unions among Ladinas in Eastern Guatemala," in Yllö and Torres, *Marital Rape*, 75–86.

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69. Anita Raj and Ulrike Boehmer, "Girl Child Marriage and Its Association with National Rates of HIV, Maternal Health, and Infant Mortality Across 97 Countries," *Violence Against Women* 19:4 (2013): 536–51; Margaret E. Greene, "A Hidden Reality for Adolescent Girls: Child, Early and Forced Marriages and Unions in Latin American and the Caribbean," Regional Report, Plan International in the Americas and the United Nations Population Fund (UNFPA), Regional Office for Latin America and the Caribbean (2019).

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74. Sajeda Amim, "Programs to Address Child Marriage," Population Council, 2011.

75. UNICEF, "Perfil del matrimonio infantil y las uniones tempranas en América Latina y el Caribe," Aug. 2019.

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83. Ibid. Neilson also argues that the asylum system does not recognize women's intersectional claims.

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87. Xochihua-Jaimes v. Barr, No. 18-71460 (USCA 9th Cir. 2020).

88. Anabel Hernandez, "Against the Current: Femicide in Mexico on the Rise and Growing More Brutal," *DW*, Aug. 21, 2019.

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6

Practicing Expert Witnessing

Tips from an Expert

Kimberly Gauderman

Expert witnesses work with a variety of legal professionals, including experienced immigration and asylum attorneys, pro bono non-immigration attorneys, nonprofit immigration agencies, and faculty and students in law school clinics. Experts and legal service providers can negotiate differing concerns and perspectives through clear communication and mutually determined expectations. This chapter discusses best practices for developing collaborative and productive relationships between country conditions experts and legal service providers from the initial contact to the final hearing testimony.

DETERMINING CASES

As an expert witness, your initial contact with a legal service provider usually occurs via email. In that email, the legal service provider should clearly identify their firm, organization, or law school, include a general outline of the case, and indicate the filing date for the affidavit and the day and time of the hearing. If the case is an affirmative case before a USCIS asylum officer, in which event testimony is not necessary, the legal service provider should give the date of that interview and the filing date for the affidavit. Based on this information, if you have an interest in possibly assisting with the case, the next step is to respond with a copy of your CV and schedule a phone conversation with the legal service provider.

This first conversation is an opportunity to learn more about the case, determine when a draft of the affidavit is expected, and confirm if your work will be on a pro bono basis or what level of compensation is available. It is important to clarify whether you will be available for hearing testimony by telephone, by

video conference, or in person; because of academic schedules and institutional responsibilities, most scholars are only available for testimony by telephone or by video conferencing from their homes or offices and do not travel to hearings. While telephonic and video conference testimony is usually approved, it is at the discretion of the immigration judge, and the legal service provider will file a motion to request telephonic or video conference testimony. Some immigration judges require a statement by the expert witness to accompany the motion, explaining the circumstances that make it not possible to travel for in-person testimony. It is important to be clear and firm if you are not available for testimony at the time of the hearing, even if the legal service provider suggests that it is highly unlikely that you will be called to testify. To indicate to the court that you are available to testify at a time that you and the legal service provider know is not possible constitutes perjury. Occasionally, legal service providers will contact an expert before a hearing or interview date has been scheduled or when the hearing or interview has been scheduled several months in the future. In these instances, it is appropriate for you to encourage the legal service provider to secure an expert for the case and establish a timeline for the completion of the draft affidavit that is closer to the scheduled hearing or interview date. It is not recommended to draft an affidavit more than three months in advance, because it could require substantial revisions due to changes in country conditions, circumstances of the applicant, or case law.

Before committing to a case, it is recommended that you review the applicant's draft declaration to determine whether the applicant's experiences reflect country conditions as you understand them and to confirm that the research-based opinion required for the case falls within your scope of expertise. Legal service providers generally agree to share a draft of the applicant's declaration but may require that you sign a confidentiality agreement before doing so. All communications and information shared with you by the legal service provider must be kept confidential.

After talking with the legal service provider, reviewing the case, and considering the amount of time anticipated for research and other scheduled activities, you then email the legal service provider to formally decline or commit to the case. Some legal service providers will require that you sign an engagement letter. Regardless of how the agreement is formalized, you should clarify the scope of work. In many cases, this means specifying that you agree to provide one affidavit and preparation and hearing testimony on a specific day. If the hearing is postponed, which commonly occurs, supplemental work such as the completion of addendums to update an affidavit, additional hearing preparation, or availability at future hearings may necessitate further discussion with the legal service provider and a separate contract or agreement. Further guidance on provisions to consider in agreements with legal service providers is found in the appendixes in this volume.

WORKING WITH DIFFERENT LEGAL SERVICE PROVIDERS

As an expert witness, you will most often work with immigration and asylum attorneys. Before speaking with them, it is helpful to get some background information on the attorneys and their firms by conducting a search on Google, Westlaw, or LexusNexus. In your conversation, it is also appropriate to ask the attorneys about their experiences in hearings, how often they have taken cases to immigration court, and if they have worked with expert witnesses in the past.

Non-immigration attorneys, often junior associates in large corporate firms who work in teams of two to three persons, regularly represent asylum applicants on a pro bono basis. Cases are usually referred to large firms by nonprofit immigration agencies that assign a staff person, normally an immigration attorney, to work with the attorneys on a specific case. In your conversation with the attorneys, it is helpful to inquire who referred the case to them and the name of the individual assigned to the case. Some firms have a coordinator for pro bono cases, and it is appropriate to inquire about that person's name and contact information. This information is important as there is often turnover in those assigned to a particular case, and you may work with different attorneys over time on a case. Often, these attorneys have never worked on an asylum case, so it is especially important to inquire about their experience so that you can provide extra guidance and support if necessary. Some non-immigration attorneys, however, have worked on numerous asylum cases because of their commitment to this form of service in their firms. Non-immigration attorneys, as legal professionals, can provide excellent representation for applicants and have access to financial resources to schedule psychological and medical exams, pay for interviews and documents in the applicant's home country, and finance appeals or respond to government appeals of immigration judges' decisions.

When engaging directly with nonprofit immigration agencies, experts are normally working with an immigration attorney on staff but may also work with an "accredited representative." Accredited representatives are nonattorneys who may only provide immigration legal services through nonprofit, tax-exempt entities.[1] Regardless of the type of legal service provider, experts are encouraged to inquire about the name and contact information of the individual's supervisor. It may be helpful for you to search for information on the nonprofit, including members of the board of directors. As with other legal service providers, it is appropriate to inquire about the level of experience with asylum cases and with expert witnesses.

Working with students in law school immigration clinics may be gratifying as it is an extension of our teaching mission as scholars. You will normally be contacted by a pair of law students assigned to a particular case. It is essential that you are given the name and contact information for the faculty member who is supervising the students and that the supervisor is copied on all correspondence with the students and is present for all telephonic communications. Frequently,

law students will contact an expert when the hearing has not been scheduled or is scheduled far into the future. As in other situations, it is appropriate to decline to work on a case until the hearing is imminent. It is helpful to set firm deadlines for the receipt of materials from the students and to request that the students communicate with you in the same email stream rather than send emails independently. Because students are enrolled in law clinics for one to two semesters, you will likely work with several pairs of students on the same case. Therefore, it is especially important that the supervisor and the students clearly communicate deadlines, hearing delays, and shifts in the composition of the students representing the applicant. It is also important to inquire who will prepare you for a hearing if it is scheduled outside of the semester system, for example, in the summer months. In your initial conversation with the students and their supervisor, ascertain if the students have met with the applicant and the status of the applicant's declaration. Finally, as cases with law school clinics may be postponed multiple times, it is possible that your schedule may change, and you may not be able to continue on the case.

THE EXPERT WITNESS AFFIDAVIT

There are no legal rules that pertain to the structure or content of expert witness affidavits or testimony in immigration courts, beyond the Immigration Court Practice Manual's requirement that the expert witness swear that the information in the affidavit is true under penalties of perjury and that the expert witness's curriculum vitae (CV) or resume is submitted in a timely manner to the court before the hearing testimony.[2] However, Federal Rules of Evidence, while not binding, guide immigration court practice.[3] Article VII, "Opinions and Expert Testimony," of the Federal Rules of Evidence defines what constitutes expertise and allowable evidence that forms the basis of an expert witness's opinion.[4]

There is, in fact, no requirement that an expert witness submit an affidavit prior to testimony, though best practices indicate that an expert witness's affidavit is a critical element in successful cases. The affidavit is usually accepted into evidence in immigration hearings, and therefore the immigration judge must consider research and analysis included in this document. The affidavit is an educational tool and framing device that is helpful to the applicant's attorney and may guide questioning and testimony during the immigration hearing. While there are no rules concerning the citation of evidence that forms the basis of the expert's opinion in the affidavit, a well-documented affidavit may strengthen the persuasiveness and legibility of the expert's opinion, support the expert's credibility, and, in some instances, eliminate the need for the expert to supplement the affidavit with hearing testimony. Finally, a well-documented affidavit contains relevant evidence that may have an impact on the case beyond the immigration hearing if there is an appeal of the immigration judge's decision.

Drafting an affidavit is a collaborative process between the expert witness and the attorney. It is critical that the attorney communicate the proposed grounds of relief for the applicant so that the expert can determine what further research is necessary. There are several online resources for expert witnesses to help them craft an affidavit and prepare hearing testimony. A list of resources is provided at the end of this chapter, including general guides for experts, practice advisories for specific types of cases, and suggestions for sources useful for research on specific country conditions.

Expert witnesses usually rely on the applicant's declaration and any other supporting documentation shared by the attorney and do not speak directly with the applicant.[5] Supporting documents include the I-589 Application for Asylum and Withholding of Removal; legal documents such as police reports, court judgments, or divorce decrees; and the applicant's psychological and medical evaluations if relevant. Attorneys determine which documentation, beyond the applicant's declaration, to share with the expert witness, but they should consult with the expert witness before sending supplemental information. It is not always appropriate, for example, for the attorney to share audio/visual evidence as it may be compromising and prejudice your objectivity. It is important to remember that any and all evidence reviewed by the expert witness may be requested and reviewed by the immigration judge and the Department of Homeland Security (DHS) attorney, even if the attorney chose not to include this evidence as part of the asylum submission.

While drafting the expert affidavit, questions may arise about the case. It is important to contact the attorney to ask for clarification of any information in the applicant's declaration or supporting documentation that is unclear so that the attorney can convey questions to the applicant. Using research on country conditions and information about the applicant, the expert's affidavit will contextualize the applicant's experiences, providing crucial information that will assist the immigration judge to evaluate the causes and levels of persecution or torture that the applicant has suffered and/or fears experiencing in the future.

A country conditions affidavit may take many forms but commonly has numbered paragraphs and is divided into four main sections. This is a dated, signed, and sworn document. The first section is the expert witness's narrative CV, which describes the expert's background and other information that supports and documents country-specific and topical expertise. The next section focuses on the applicant; using the applicant's declaration and any other supporting documentation provided by the attorney, the expert provides a synopsis of the applicant's experiences that form the basis of the claim. The bulk of the affidavit is the expert witness's research organized according to discrete topics. For example, an affidavit focused on domestic violence might include subsections on cultural norms that define women's status, legislation and governmental actions that focus on women, the efficacy of the judiciary and security officials in protecting women

from violence, and the possibility or constraints for the applicant to relocate in their home country to avoid persecution or torture. In the final section, the expert witness's professional opinion on the applicant's claims is confirmed, referring to the country conditions research and analysis of the experiences of the applicant. After this concluding section, the expert witness provides a statement that, under penalty of perjury, affirms that the foregoing information and analysis, to the best of the expert witness's knowledge and capacity, is true and correct, before the signature line with the name and title of the expert and the date. Further guidance and a template for structuring the expert's report (called either an affidavit or a declaration) are found in the appendixes in this volume.

Expert witnesses provide a draft of the affidavit to the attorney by the date agreed upon. Attorneys may offer suggestions to revise and/or delete language or request further research on an aspect of the case that has gained relevance. Suggestions by attorneys can be very helpful to clarify language, reduce redundancy, and identify the need for further documentation to support arguments. The revision process may, however, produce tensions over authorship of the affidavit; it is important to remember that expert witnesses are the sole authors of their affidavits. While expert witnesses should consider suggestions by attorneys, they are not required to revise their affidavits. Sometimes, for example, an element of the case may have arisen in the course of preparing for the hearing that was not apparent when the expert agreed to work on the case and is outside the scholar's scope of expertise. In this instance, it is important for experts to respect the scope of their expertise and to determine whether further research is appropriate, considering their own research priorities and time constraints. Attorneys may also attempt to reformat an affidavit, for example, by changing margins and fonts and renumbering paragraphs. Expert witnesses are not required to accept these changes; if they agree to new formatting, it is reasonable to expect that any errors caused by reformatting will be corrected by the attorney. Expert witnesses must maintain their authority over their affidavits as they are solely responsible for the substance and appearance of these documents.

The expert witness and the attorney determine when the affidavit is in its final form. To finalize the affidavit, the expert witness will print, sign, and scan the document to the attorney. Sometimes attorneys request that the original, signed signature page be sent to their office and, more rarely, that the document be notarized.[6] Along with the scan of the signed document, it is helpful to include an updated CV, as both will be filed with the court. Most immigration judges will not allow the testimony of an expert witness without a current CV or resume of relevant experience. This is also an opportunity to provide the telephone number the court should use on the day of the hearing or confirm information for video conferencing, to ensure that the attorney has a cell number in order to update the expert witness during the hearing, and to confirm the date, time, and length of the hearing.

When hearings are postponed six months or longer after the filing of the affidavit, it may be necessary to provide an addendum, commonly referred to as a supplemental affidavit, to update country conditions. It is imperative that the attorney contact the expert at least one month before the new filing date to inquire if the expert is able to provide a supplemental affidavit. It is not necessary to include information that was addressed in the original affidavit. The supplemental affidavit provides the opportunity for the expert to confirm their continuing expertise on the relevant topics by indicating any new achievements in their narrative CV and to include analysis of recent reports on developments in the country that may have an impact on the applicant's status. In the concluding section, the expert indicates whether, in light of the new information, they affirm their original professional opinion on the status of the applicant. Supplemental affidavits are usually substantially shorter than original affidavits but are also sworn and signed documents. If applicable, the expert should submit an updated CV with the supplemental affidavit.

UNIVERSAL AFFIDAVITS

The above information pertains to affidavits that are individualized for specific applicants. Expert witnesses may also author general affidavits, commonly referred to as universal affidavits. Universal affidavits are also dated, signed, and sworn documents and must be accompanied by the expert witness's CV or resume. Universal affidavits are country and topic specific, for example, "The Status of Women in Honduras." Expert witnesses may organize these documents in a manner similar to that of individualized affidavits: a narrative CV, thematically organized research, and a concluding section giving their professional opinion. Expert witnesses may craft universal affidavits using research they compiled and organized for individualized affidavits. Universal affidavits may be used in several hearings and may be especially helpful for applicants representing themselves in immigration hearings without a professional legal service provider (pro se). There are organizations that work with nonrepresented applicants that can provide the applicants with universal affidavits. Universal affidavits may also be used by legal service providers representing individual applicants in instances in which the expert witness does not have capacity for that case and it is not possible to find an alternative expert witness. Expert witnesses do not generally provide hearing testimony on the basis of universal affidavits.

TESTIMONY

Attorneys will schedule a telephone conversation to prepare for the hearing. Before that conversation, attorneys may provide sample questions that may arise during the expert witness's testimony. Typically, questions cover four aspects of testimony: voir dire, general country conditions, the applicant's experiences, and possible cross-examination. In reviewing the questions with the attorney, expert

witnesses have an opportunity to clarify, add, and delete questions. It is important to remember that these sample questions are a guide for hearing testimony; specific questions during the hearing may differ, and an expert witness needs to be prepared for all kinds of questions. This conversation with the applicant's attorney is also an opportunity to confirm which immigration judge will hear the case. The attorney may share information on past experiences in hearings with this immigration judge, and you may search for information on the judge's background and record on Google and Trac Immigration Judge Reports.[7]

Voir dire is the opening testimony by the expert in which the immigration judge evaluates the expert's qualifications and confirms or denies expertise. Because the judge and the DHS attorney have already received the expert witness's CV and affidavit, sometimes the government will concede or stipulate to the expert witness's qualifications, and this part of the testimony is not necessary.

Questions in voir dire solicit information about educational background, current employment, focus of teaching and research, scholarly recognition, and any other relevant experiences that qualify the scholar as a country conditions expert. Questions about general country conditions and the applicant's experiences reflect research and analysis in the expert witness's affidavit. In the course of preparing for the hearing, the attorney and the expert witness will also discuss possible points of contestation by the DHS attorney or the immigration judge. Increasingly, DHS attorneys challenge expert witnesses on the basis of their statements on social media or opinions published in the media. While you have a right to your personal opinion on all matters, it is prudent to be aware of what information is publicly available about you and to inform the applicant's attorney before the hearing if there is any information that might be perceived to compromise your objectivity as an expert.

During hearing preparation, it is prudent to again verify contact information for the hearing (telephone number or video conferencing information) and to confirm that the attorney has your cell number in order to communicate updates, if possible, during the hearing and to notify you at the end of the hearing. Legal providers may have no means to contact you during the hearing because cell phones and computers are often not allowed into DHS, state, county, or private custodial facilities. This is also the time to confirm expectations of your hearing availability. Usually, you should expect to be available during the entire hearing, but if there are time constraints it may be possible to arrange a specific time frame for expert testimony. While the immigration judge controls the order of testimony during the hearing, the attorney can indicate whether you may expect to testify at the beginning of the hearing or after the applicant's examination.

Immigration hearings are increasingly postponed with little notice, including on the day of the scheduled hearing. Hearing dockets are overscheduled, and judges will prioritize certain cases. In addition, earlier hearings may exceed the expected time and eclipse hearings scheduled later that day. Expert witnesses need to be flexible; hearings may start later in the day than anticipated and may be

rescheduled up to two or three years in the future. An expert witness's prior commitments take precedence in rescheduling hearings, so information on teaching and meeting schedules, conferences and travel, and any other time constraints should be communicated to the attorney.

HEARING

In preparation for the hearing, it is helpful to have available your CV, the affidavit, and the questions you prepared with the applicant's attorney. It is also good practice to review the applicant's declaration and any other supporting documents provided to you by the applicant's attorney. You should be alone and disconnect or mute all electronic devices. At the beginning of the hearing, the applicant's attorney will consult with the DHS attorney and the immigration judge to see if they will stipulate to your qualification as an expert witness and to the inclusion of your affidavit as evidence in the court record. If both are stipulated, the applicant's attorney, if able to communicate with you during the hearing, will inform you that your testimony is not necessary at the hearing, and you are free to go.

If your testimony is necessary, the immigration judge will call you from the courtroom at the number you indicated, or the legal service provider will notify you (usually by cell phone) that they are ready for you to call in or to connect through video conferencing. The immigration judge will begin by asking you to raise your right hand and to swear to testify truthfully. The immigration judge will inform you whether the government has stipulated to your credentials; if not, the applicant's attorney will begin with voir dire. Once you have completed this process with the applicant's attorney, the DHS attorney and the immigration judge will have an opportunity to ask you questions about your qualifications. The immigration judge will make the final determination on your qualifications as an expert.

Once your qualifications have been confirmed, the applicant's attorney will ask you questions relevant to the applicant's case, guided by your earlier preparation. You may be asked to contextualize any new information that arose during the applicant's testimony if it occurred before your testimony. After your testimony guided by the applicant's attorney, the DHS attorney will cross-examine you. Immigration hearing proceedings are formal, adversarial, evidentiary hearings. While sometimes cross-examination can feel confrontational, the applicant's attorney, and sometimes the immigration judge, will object to overly aggressive questioning and can intervene if you are not allowed to fully answer questions. During cross-examination, the DHS attorney may precede a question with a general statement about some aspect of your research or testimony. If the DHS attorney misinterprets information, it is appropriate to correct this misinterpretation before answering the specific question posed. The applicant's attorney will have another opportunity to examine you (redirect) to clarify any points that were raised during cross-examination. The immigration judge may intervene at any time to ask questions or to object to questioning by either attorney. Your testimony is audio

recorded as part of the official hearing record, and if the applicant is non–English speaking, there will be a translator. The immigration judge will inform you when your testimony is completed, and you are free to go.

After the hearing, you can expect the applicant's attorney to contact you with information about the proceedings and the immigration judge's decision. The judge may issue an oral decision at the completion of the hearing or a written decision at a later date. Attorneys may share a copy of the decision with you.

Expert witnesses are critical to successful asylum cases. As a scholar, you have a profile, deep country-specific knowledge, and research, writing, and teaching skills that allow you to contribute directly to this process that will determine whether an individual receives relief or is deported to the country they fled.

U.S. GOVERNMENTAL RESOURCES ON IMMIGRATION AND ASYLUM PRACTICE

The Executive Office for Immigration Review (EOIR) is an agency within the Department of Justice under the authority of the attorney general. The EOIR is tasked with interpreting and administering U.S. immigration laws that are enacted by Congress. The EOIR conducts immigration court proceedings, appellate reviews through the Board of Immigration Appeals (BIA), and administrative hearings. Expert witnesses are likely to work on cases in which the applicants are applying for three main forms of humanitarian relief administered by the EOIR: asylum, withholding of removal, and Convention Against Torture (CAT) protection. Applicants generally apply for all three forms of relief simultaneously in Form I-589, administered by the U.S. Citizen and Immigration Services (USCIS), an agency in DHS that enforces U.S. immigration laws.

- "Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections," EOIR, https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf
- "Immigration Court Practice Manual," EOIR, https://www.justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual
- USCIS Humanitarian Relief, https://www.uscis.gov/humanitarian
- I-589 Application for Asylum and Withholding of Removal, https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf

NONGOVERNMENTAL ORGANIZATIONS

Because asylum policies change rapidly and require new and evolving strategies to substantiate claims, online resources provide additional practical guidance for expert witnesses. These guides, produced by legal practitioners and scholars in national immigration advocacy nongovernmental organizations (NGOs), are a resource for expert witnesses who wish to remain attuned to current strategies for dealing with changing asylum policies. A number of NGOs issue practice

advisories and offer webinars to prepare expert witnesses and attorneys to respond to restrictions to applicants' access to asylum proceedings and the increase in the evidentiary burden for substantiating asylum claims, especially for cisgender women, children, and LGBTQ+ persons.

- **American Immigration Lawyers Association (AILA)** is a national organization of immigration attorneys and law professors. AILA provides updates and support on immigration and asylum law and policy and partners with the American Immigration Council in the Immigration Justice Campaign. This campaign offers free trainings for legal service providers that may be helpful for expert witnesses and promotes pro bono representation of immigrants. https://www.aila.org
- **Catholic Legal Immigration Network, Inc. (CLINIC)** focuses on a wide range of immigration issues and supports nonprofits in their immigration advocacy efforts. CLINIC offers practice advisories, fact sheets, and webinars on asylum and refugee law. https://cliniclegal.org
- **Center for Gender and Refugee Studies (CGRS),** housed at the University of California College of the Law, San Francisco, is a nationally prominent organization that focuses on legal representation of vulnerable populations such as women, children, and LGBTQ+ persons fleeing violence and persecution in their home countries. CGRS offers technical assistance and training to expert witnesses and attorneys, including an Expert Witness Database to connect expert witnesses to attorneys. Expert witnesses and attorneys may register individual cases and receive supporting documentation tailored for specific countries and case facts. https://cgrs.uchastings.edu
- **Immigration Equality** is the nation's foremost organization that provides direct legal services to LGBTQ+ and HIV-positive immigrants. Immigration Equality offers numerous resources for legal service providers that are also helpful for expert witnesses, including practice advisories and the "Asylum Manual," a collaborative project with the Midwest Immigrant and Human Rights Center (MIHRC) that provides guidance for preparing LGBTQ+ and HIV-positive claims for asylum, withholding of removal, and CAT. https://immigrationequality.org
- **National Immigrant Justice Center (NIJC)** is a Heartland Alliance Program that provides direct legal services to applicants for asylum, withholding of removal, and CAT protection and recruits, refers, and supports cases handled by pro bono legal service providers, often non-immigration attorneys. The NIJC offers practice advisories and webinar trainings to legal service providers and expert witnesses. https://immigrantjustice.org
- **Tahirih Justice Center** is a national organization dedicated to ending gender-based violence against immigrant women and girls. The Center provides legal services directly to applicants seeking relief due to gender-based violence,

as well as through a pro bono network of attorneys. The Center offers analysis of immigration policies and webinars on specific challenges to gender-based asylum. https://www.tahirih.org

COUNTRY CONDITIONS AFFIDAVIT GUIDANCE

- "Expert Witness Testimony in Latin America Asylum Cases," by conference rapporteur Laura Powell and Kimberly Gauderman, was produced for the national conference on expert witnessing sponsored by the Latin American and Iberian Institute at the University of New Mexico in 2017, co-organized by Kimberly Gauderman and Elizabeth Hutchison. The report discusses the asylum process from the perspective of conference participants, including expert witnesses, attorneys, and legal advocates. https://laii.unm.edu/events/2017/04/2017–04–14-practicing-asylum-final-report.pdf
- "Expert Witnesses in U.S. Asylum Cases: A Handbook" (2018), by Kelcey Baker, Katherine Freeman, Gigi Warner, and Deborah Weissman, was produced by students in Weissman's course on forced migration at the University of North Carolina at Chapel Hill School of Law. This handbook describes the roles of expert witnesses, including recommendations for framing affidavits and preparing for hearing testimony. https://law.unc.edu/wp-content/uploads/2019/10/expertwitnesshandbook.pdf
- "Special Issue: Cultural Expert Witnessing," edited by Austin Sarat and Leila Rodriguez, *Studies in Law, Politics, and Society*, vol. 74 (Bingley, UK: Emerald Publishing, 2018), brings together cultural anthropologists engaging with the practical and ethical challenges of expert witnessing, including guidance on how to conceptualize and culturally frame PSGs.
- "Providing Expert Testimony: Promises and Pitfalls of Engaging in Immigration Proceedings" (Webinar, October 24, 2019) was sponsored by the Anthropologist Action Network for Immigrants and Refugees, the Society for Applied Anthropology's Migration TIG and Immigration Initiative, and the American Anthropological Association. In this panel, an attorney and anthropologists discuss the asylum process and offer advice based on their substantial experience as expert witnesses. https://www.youtube.com/watch?v=pEWCoGvT5bs
- "Special Section: Expert Witnessing in Asylum Cases," *Annals of Anthropological Practice* 46:1 (May 2022), edited by James Phillips and M. Gabriela Torres, is divided into three parts that include discussion by leading scholars on the practice, challenges, and techniques of expert witnessing.
- Maria Baldini-Potermin, *The Immigration and Trial Handbook* (Eagan, MN: Thompson Reuters, 2022), is a comprehensive guide to immigration and asylum legal practice written by an experienced immigration and asylum attorney. This work, revised annually to reflect new laws and best practices, discusses the role and legal framework for expert witness assistance to attorneys.

COUNTRY CONDITIONS RESEARCH

Country conditions expert witness affidavits should focus on specific elements of the applicant's claims rather than provide general information about the applicant's home country. It is important for expert witnesses to remain current on country conditions and prudent to provide references for sources of information included in the affidavit.[8]

Daily and Weekly Alerts and Newsletters

- **American Immigration Council (AIC)** provides a weekly analysis of recent events, legislation, and litigation on U.S. immigration and asylum law and practice, including fact sheets on specific issues concerning immigrants and immigration in the United States. https://www.americanimmigrationcouncil.org
- **AULA Blog,** produced by the Center for Latin American and Latino Studies at American University, offers weekly analysis of hemispheric affairs, including country-specific issues and U.S. immigration policy, written by scholars and policy experts. This site archives past articles organized by country and includes links to research centers, media, and other Latin American studies blogs. https://aulablog.net
- **Early Arrival Newsletter and Documented Weekly** is a nonprofit news site that partners with other media organizations focused on immigration news in New York and nationally and on federal immigration policies. The Documented site includes an easily searchable archive of prior news stories and resources for immigrants. https://documentedny.com/newsletter
- **Frontera Dispatch** is a weekly newsletter on national and international news that affects immigrants and asylum seekers on the U.S.-Mexico border, produced by Hope Border Institute. News items contain links to resources with further information on each topic. https://www.hopeborder.org/frontera-dispatch
- **Google Alerts.** Through Google Alerts, expert witnesses can set up daily alerts that contain a compilation of news items from the U.S. and internationally that pertain to a specific country, population, or thematic topic. Expert witnesses focused on LGBTQ+ persons in El Salvador, for example, may set up separate alerts for "El Salvador," "El Salvador LGBT," and "El Salvador Sexual Violence," to ensure greater coverage of information that pertains to the status of Salvadoran LGBTQ+ persons. https://www.google.com/alerts
- **InSight Crime** is a foundation, housed at American University, dedicated to the investigation of organized crime in Latin America, including gangs, drug cartels, death squads, and corruption and human rights abuses by the police, the military, and politicians. InSight Crime provides a weekly newsletter with top stories and a repository of country-specific analyses and in-depth reports. https://www.insightcrime.org

- **Latin American News Dispatch (LAND)** compiles a weekly report, "This Week in Latin America," with links to news stories on Latin America and the United States. https://latindispatch.com
- **Latin American Working Group (LAWG)** produces "Migration News Brief," a weekly compilation of recent articles and reports related to issues of U.S. immigration and enforcement policy, migration from Central America and Mexico, and country-specific news items in English and Spanish. https://www.lawg.org
- **Transactional Records Access Clearing House (TRAC)** is a nonpartisan joint research center housed at Syracuse University focused on federal immigration enforcement, including the records of immigration judges. TRAC offers periodic email announcements and policy statements on immigration enforcement. https://trac.syr.edu

U.S. Governmental Sources

Sources created by the U.S. government are heavily weighted by immigration judges and should always be included and analyzed in expert witness affidavits.

- **U.S. Department of State Country Reports on Human Rights Practices.** These country-specific reports are issued by the U.S. State Department annually, usually in March or April. It is essential to include these reports and to contextualize them with other documentation. The reports include information on security forces, the military, governmental structure, and legislation, as well as information on specific demographic sectors such as women, children, LGBTQ+ persons, people with disabilities, and racial minority populations. https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices
- **U.S. Department of State Travel Advisories.** While not as critical to include in affidavits, these reports offer information on crime levels, governmental ability to respond to criminality, availability of health care, and dangers faced by specific societal groups such as women and LGBTQ+ persons. https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html
- **U.S. Department of State International Religious Freedom Reports.** Issued annually, these country-specific reports describe the status of religious freedom, governmental policies concerning religious beliefs and practices, and demographics and status of religious dominations. https://www.state.gov/reports/2019-report-on-international-religious-freedom
- **Congressional Research Service (CRS).** CRS is a component of the Library of Congress that conducts research and analysis for Congress. CRS periodically issues reports on specific countries and topics, such as background and U.S. relations, gangs, and root causes of migration. https://crsreports.congress.gov

- **CIA World Factbook.** The Factbook provides an overview of specific countries, including information on history, geography, people and society, government, economy, energy, geography, communications, transportation, military, and transnational issues. https://www.cia.gov/the-world-factbook

United Nations

The United Nations initiates and sponsors investigations and on-site official visits to evaluate conditions for specific demographic groups. Reports by Special Rapporteurs and Independent Experts document the status of specific societal groups and the levels of protection that their governments are able or willing to enforce.[9] Mandate holders that may be particularly relevant include the following:

- Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, https://www.ohchr.org/en/issues/slavery/srslavery/pages/srslaveryindex.aspx
- Special Rapporteur on the Rights of Indigenous Peoples, https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx
- Special Rapporteur on the Rights of Persons with Disabilities, https://www.ohchr.org/en/issues/disability/srdisabilities/pages/srdisabilitiesindex.aspx
- Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx
- Special Rapporteur on Trafficking in Persons, Especially Women and Children, https://www.ohchr.org/en/issues/trafficking/pages/traffickingindex.aspx
- Special Rapporteur on Violence Against Women, Its Causes and Consequences, https://www.ohchr.org/en/issues/women/srwomen/pages/srwomenindex.aspx
- Independent Expert on Sexual Orientation and Gender Identity, https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx
- U.N. Agency for Children, https://www.un.org/en/global-issues/children
- UNAIDS. The organization is dedicated to ending AIDS globally and provides country-specific reports and data on the demographics and status of individuals who are HIV positive. https://www.unaids.org/en

Immigration and Refugee Board of Canada (IRB)

- The IRB produces country of origin information through "National Documentation Packages" that compile and link to country-specific sources. https://irb-cisr.gc.ca/en/Pages/index.aspx

Nongovernmental Organizations

- **Amnesty International** produces regional and country-specific reports on human rights violations in Latin America. https://www.amnesty.org/en

- **AVERT** is a UK-based charity focused on global information and education on HIV and AIDS. AVERT produces reports on the status of persons who have contracted HIV/AIDS in Latin America. https://www.avert.org
- **Freedom House** annually issues country-specific reports on democracy, political freedom, and human rights. https://freedomhouse.org
- **Human Rights First** is a nonprofit, nonpartisan human rights organization that produces reports on regional and country-specific human rights practices and U.S. and international human rights policies. https://www.humanrightsfirst.org
- **Human Rights Watch** advocates for the global eradication of human rights abuses and produces country-specific reports on a wide range of topics in Latin America. https://www.hrw.org/#
- **Pew Research Center** issues reports and data sets on multiple topics in Latin America. https://www.pewresearch.org/topics/latin-america
- **Spartacus Gay Travel Index** monitors and annually ranks countries according to the safety of LGBTQ+ persons. https://spartacus.gayguide.travel/gaytravelindex.pdf
- **Temple University Beasley School of Law and Washington Office on Latin America (WOLA)** produce the "Annotated Table of Contents" (ATOC), which is a compilation of country- and topic-specific sources for use in asylum cases. https://www2.law.temple.edu/csj/atoc
- **Washington Office on Latin America (WOLA)** is a research and advocacy organization focused on human rights in Latin America. WOLA produces comprehensively researched publications, commentary, videos, and podcasts. https://www.wola.org

NOTES

1. U.S. Department of Justice Recognition and Accreditation (R&A) Program, https://www.justice.gov/eoir/recognition-and-accreditation-program.

2. Executive Office for Immigration Review, "Immigration Court Practice Manual," https://www.justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual.

3. Catholic Legal Immigration Network, Inc. (CLINIC), "Practice Advisory: Rules of Evidence in Immigration Court Proceedings," Mar. 13, 2020; Federal Rules of Evidence, https://www.rulesofevidence.org.

4. Federal Rules of Evidence, Article VII, https://www.rulesofevidence.org/article-vii.

5. The decision to speak to the applicant is discipline-specific. As noted in chapter 2 of this volume, anthropologists, who in their disciplinary practice regularly conduct oral interviews during fieldwork, may find talking with the applicant helpful. Such conversations always take place in the presence of the legal service provider. Information from these conversations may be incorporated into the applicant's declaration, which, regardless of an expert's contact with the applicant, is still the main source of information about the applicant's experiences.

6. The specific order of an immigration judge on the need for notarization should be followed to avoid having the affidavit excluded or given no weight by the immigration judge. In certain instances,

testimony may not be permitted by the expert witness for failure to comply with the Immigration Court Practice Manual or a specific judge's order.

7. TRAC Immigration Judge Reports, https://trac.syr.edu/immigration/reports/judgereports.

8. While citation of evidence is recommended for reasons mentioned in this chapter, it is not legally required. Case law supports the admission of expert opinion based solely on the credibility of the expert witness. See Castillo v. Barr (9th Cir. 2020).

9. "OHCHR Current Mandates, Including Special Rapporteurs, Independent Experts, and Working Groups," https://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx.

PART THREE

Learning the System

Tools for Context and Support in Asylum Work

7

History and Politics of Immigration, Refugee, and Asylum Laws and Policies in the United States

Kimberly Gauderman

In 2019, former president Trump declared, "Asylum—you know, I look at some of these asylum people; they're gang members. They're not afraid of anything. They have lawyers greeting them. They read what the lawyer tells them to read. . . . And they say, 'I fear for my life.' . . . It's a scam. Okay? It's a scam. It's a hoax."[1] Vitriol directed at immigrants, refugees, and asylum seekers is not new. As many scholars have shown, U.S. immigration laws have often degraded or excluded various populations based on criteria that include race, nationality, politics, occupation, gender, and sexuality.[2] This chapter provides an overview of asylum and immigration laws and policies to explain the historical context of the current asylum system and its politicization.

Restrictive immigration laws coexist with a deeply embedded narrative about American identity: "We are a 'nation of immigrants.'" The phrase can be traced at least as far back as 1874, when it was used in an editorial in the *Daily State Journal of Alexandria*.[3] From its inception, however, the idea of the United States as a nation of immigrants, with its connotations of inclusivity and racial harmony, coexisted with the racial exclusions of federal immigration laws and policies that ignored the rights of Native Americans, disregarded the legacy of enslaved Africans, and excluded Asians.[4] In 1876, two years after the *Daily State Journal*'s celebration of immigrants, the Supreme Court affirmed that the government's capacity to restrict immigration was a matter of national sovereignty. This ruling formally recognized the federal government's authority to regulate immigration and confirmed Congress's exclusive power to make immigration law. Federal immigration laws, however, continued to be enforced by states, which contributed to disparate

treatment of migrants.[5] To standardize federal authority over immigration laws, Congress created the Bureau of Immigration in 1891, a precursor to the Immigration and Naturalization Service (INS), currently part of the Department of Homeland Security (DHS).[6]

The U.S. first recognized people fleeing persecution as a distinct category in immigration law in response to the refugee crisis after World War II. Congress began to create a formal refugee policy with the passage of the Displaced Persons Act of 1948, which allowed a restricted number of displaced persons from Europe to establish legal residency in the U.S. Subsequent legislation continued the use of quotas to extend visas to those fleeing communist regimes in Europe and China for limited periods of time. U.S. immigration laws did not include a permanent policy for refugees until the Immigration and Nationality Act of 1965. Congress expanded refugee law in the Refugee Act of 1980, which legally defined refugee and systematized federal policies concerning the admission and treatment of refugees. The Refugee Act marked the first time that the U.S. embraced international legal principles regarding refugees. The law distinguishes two types of refugees, applicants for refugee status outside the U.S., who are processed in their home country, and applicants for refugee status physically present in the U.S., who are subject to an "Asylum Procedure" defined by Congress. While the 1980 Refugee Act continues to be the key document governing the treatment of asylum seekers, subsequent presidential administrations have relied on executive authority to enact policies that procedurally deter asylum seekers and substantively narrow grounds for asylum relief.[7]

HISTORY OF U.S. IMMIGRATION LAW

Federal immigration policies have historically encouraged, or limited, specific groups based on criteria that include race, national origin, political affiliation, occupation, and family relationships. Changes in immigration laws stem from national debates that often cross political party lines. Historically, both Democratic and Republican administrations have enacted restrictive immigration laws and policies, and both have implemented laws and policies that expanded immigration and broadened protections for noncitizens living in the U.S. The passage of new immigration laws in Congress has depended on coalitions of liberal and conservative politicians aligned with governmental and national interest groups. When these coalitions fail, presidents have often taken executive action to overcome congressional gridlock and further their own political agendas.[8]

The federal government's first significant acts to regulate immigration restricted migrants because of race and national origin, following earlier legislation that had excluded most "non-white" persons from obtaining citizenship through the Naturalization Acts of 1790 and 1795.[9] While citizenship was extended to persons of African descent in 1870, the continuing exclusion of other "non-white" populations from citizenship legitimized later racially based immigration restrictions. In

1875, Congress passed the Page Act, which sought to regulate Asian immigration by specifically restricting women of Asian descent. The Page Act included a provision that excluded prostitutes but that in practice was used to deny entry to all Asian women, especially women from China. The Chinese Exclusion Act, passed by Congress in 1882, extended immigration restrictions to Chinese men by placing a moratorium on the migration of Chinese laborers to the U.S. In 1907, President Theodore Roosevelt moved to restrict immigration from Japan in the Gentlemen's Agreement, in which the U.S. pledged not to officially bar Japanese immigrants if Japan would end emigration to the U.S. The 1917 Immigration Act went further by restricting all immigrants from a so-called Asiatic zone that included Asians beyond the terms of the Chinese Exclusion acts and the 1907 Gentlemen's Agreement. This Immigration Act resulted in the passage of a literacy test and specified other excludable groups such as "idiots," "imbeciles," and others deemed undesirable based on perceived mental, physical, and moral capacity (characteristics used to exclude LGBTQ+ migrants), criminal background, political views, and occupation. The Asian Exclusion Act, included in the 1924 Immigration Act, restricted all immigration by Asian laborers and prevented all those legally restricted from citizenship in previous legislation from migrating to the U.S.[10]

The Immigration Act of 1924 was openly conceived of as an "act to limit the immigration of aliens to the United States."[11] Rep. Albert Johnson, who authored the bill and chaired the House Immigration Committee, declared during the debate over the bill, "It has become necessary that the United States cease to become an asylum."[12] The 1924 legislation was the first to permanently limit immigration to the United States; it instituted the "national origins quota system," created preferences for family unification and occupation, and authorized the Border Patrol, which was created via an appropriations bill in 1924. The Immigration Acts of 1917 and 1924 defined immigration policies until the 1952 Immigration and Nationality Act (INA), which continued to uphold the national origins quota system and immigration preferences based on family unification and occupation or skills. The 1952 act explicitly barred LGBTQ+ migrants as "sexual deviants," a ban that lasted until 1990. The INA incorporated immigration statutes into one body of law, compiled under Title 8 of the U.S. Code. Subsequent immigration reforms would amend provisions of the 1952 INA. The first significant amendment occurred through the 1965 Immigration and Nationality Act, which repealed the national quota system and ended consideration of race and ethnicity in immigration admissions. Instead, the 1965 law established a preference system based on family relationships and skills, criteria that continue to define U.S. immigration policy today.[13]

The 1986 Immigration Reform and Control Act (IRCA), enacted during the Reagan administration, was an immigration enforcement bill that prohibited employers from hiring undocumented workers. In addition, IRCA regularized the status of some undocumented persons in the U.S. To qualify, individuals had to show that they had resided continuously in the United States since January 1, 1982.

Over three million noncitizens achieved legal status, but this cutoff date excluded many Central American immigrants who fled civil wars in their countries after the deadline. During the George H. W. Bush administration, the Immigration Act of 1990 affirmed family unification as a priority for immigration visas but increased the allotment of employment-based visas and established a new category based on diversity to increase immigration from countries with low rates of immigration to the U.S. The 1990 law ended restrictions on LGBTQ+ migrants and created Temporary Protected Status (TPS), which allowed the attorney general to grant individuals from specific countries temporary protection from deportation and employment authorization. In 1994, Congress authorized the Violence Against Women Act (VAWA), which contained provisions for noncitizens to petition for immigration relief independently of their abusive spouse or parent. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), enacted under the Clinton administration, is the last comprehensive immigration reform passed by Congress. Forged during an economic recession amid fears about terrorism, a revival of xenophobia, and Republican domination of both houses of Congress, the IIRAIRA, signed by a Democratic president, was one of the toughest pieces of legislation limiting immigration to date. The 1996 law provides the legal authority for many current enforcement actions. Notably, it mandated that noncitizens who resided in the U.S. for over 365 days after April 1, 1997, would face expulsion for ten years and that noncitizens convicted of minor crimes (such as shoplifting) would be detained and deported.[14] IIRAIRA also created an expedited removal process that permitted deportation without an immigration hearing and authorized the attorney general to construct physical barriers on the U.S. border with Mexico. Restrictions for noncitizens were further increased in 1996 through the Antiterrorism and Effective Death Penalty Act (AEDPA). This law prohibited the return of noncitizens who had previously been deported and established fines and ten-year imprisonment for violators.[15]

REFUGEE AND ASYLUM LAW

Fear of past and future persecution is the defining feature of being a refugee. Economic motivations and family reunification—the criteria for admission historically used in U.S. immigration law—are not relevant for determining refugee status. Applicants for refugee status outside the United States are subject to numerical quotas yearly established by the president in consultation with Congress. There are no numerical quotas for those already inside the United States, who are defined as asylum applicants. The 1951 United Nations Refugee Convention and the 1967 United Nations Protocol Relating to the Status of Refugees define a refugee as

> a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion

> [the five protected grounds], is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.

Asylum applicants must demonstrate that they fear persecution on account of at least one of five protected grounds: race, religion, nationality, membership in a particular social group (PSG), and political opinion.[16]

The United States is a party to the 1967 UN Protocol, which affirms the principle of non-refoulement: "refugees should not be returned to a country where they face serious threats to their life or freedom." The Refugee Act of 1980 adopts essentially the same definition of *refugee* as the 1951 UN Refugee Convention and the 1967 UN Protocol; the Refugee Act explicitly links the definition of persecution to the protected grounds and establishes a path to refugee status for those already physically present in the U.S. through asylum. U.S. law permits noncitizens, regardless of their legal status in the U.S., to petition via the affirmative or defensive asylum processes;[17] it includes two additional forms of relief, withholding of removal and relief under the UN Convention Against Torture (CAT), ratified by the U.S. in 1994. The 2005 Real ID Act contained additional provisions that increased the burden on applicants seeking relief through asylum, withholding of removal, and CAT to substantiate their claims. Specifically, the Real ID Act heightens the need for applicants to corroborate, through testimony and supplemental documentation, their personal credibility, the facts of their claim, and the nexus between the persecution they experienced and at least one of the protected grounds, or the reason for torture distinct from the protected grounds.[18]

Not everyone who flees violence in their home countries is eligible for asylum or other forms of relief. Under U.S. law, asylum is a discretionary form of relief that an asylum applicant must apply for within one year of initial physical presence in the United States, unless they meet one of the enumerated exceptions. Individuals who are convicted of certain crimes are not eligible for asylum. Applicants must show a "well-founded fear" (at least 10 percent) of persecution on account of at least one of the protected grounds. If an applicant can demonstrate that they have been persecuted in the past, there is a presumption of future persecution. A grant of asylum confers permission to remain in the U.S. and provides a basis for permanent residency and a path to citizenship. Asylum status may be extended to immediate family members.[19]

Withholding of removal is defined in INA section 241(b)(3). Unlike asylum, there is no one-year filing deadline. While applicants must also show fear of persecution on account of a protected ground, the standard is much higher: "more likely than not," or a 51 percent or higher chance that they will be persecuted if returned to their home country. As in asylum claims, there is presumption of future harm if

applicants can show past persecution. Applicants convicted of certain crimes are also barred from this form of relief. Relief under withholding of removal is mandatory rather than discretionary; that is, if an applicant proves statutory eligibility and meets the burden of proof, the immigration judge must grant the application. Withholding of removal does not provide a basis for permanent residency, nor does it extend to family members. Withholding of removal prohibits deportation to the country of origin but does allow deportation to another "safe" country.[20]

Withholding of Removal and Deferral of Removal through the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are U.S. treaty obligations under article 3. CAT requires governments to prevent the use of torture within their territories and prohibits governments from sending persons to any country where they are likely to be tortured. The U.S. became a signatory in 1988 and ratified the Convention in 1994. To gain relief under CAT, applicants must show that it is "more likely than not" that they will be subjected to future torture by governmental officials or by individuals acting with the consent or acquiescence of public officials. Torture is defined in article 1 of the Convention Against Torture as "severe pain or suffering, whether physical or mental."[21] Like withholding of removal under the INA, there is no filing deadline, and if an applicant proves statutory eligibility and meets the burden of proof, relief is mandatory. Unlike asylum and INA-defined withholding of removal, torture does not have to be based on one of the protected grounds; instead an applicant must prove that the act they have been or will be subjected to rises to the level of severe pain and suffering, that the act is intentional and is carried out when the individual is in the perpetrator's custody or control, and that the government is complicit or acquiescent in the act. There are no exemptions to CAT protection, such as past criminal convictions, and there is no presumption of future torture based on past torture. CAT protection does not extend to family members and only prohibits removal to the individual's home country but permits deportation to a safe third country or detention in the United States.[22]

PRACTICE OF ASYLUM AND OTHER FORMS OF RELIEF

Individuals usually apply for all three forms of relief, indicated on Form I-589, "Application for Asylum and for Withholding of Removal." For asylum and withholding under the INA, applicants specify which of the protected grounds are the basis for the requested form(s) of relief and briefly explain the nature of past persecution and/or reasons for fearing future persecution. For relief under CAT, applicants explain the nature of past torture and/or fear of future torture. In a hearing before an immigration judge, this information may be supplemented by additional documentation, including affidavits and testimony by expert witnesses. The grounds for asylum are very narrow, and the criteria for evaluating claims are multifaceted. Applicants (referred to as respondents in hearings) for

asylum and relief through withholding of removal must demonstrate that the violence they fear rises to the level of persecution, that at least one central reason for the persecution is a protected ground (race, religion, nationality, membership in a particular social group, or political opinion), that the government is acquiescent or directly responsible for the persecution (unwilling and/or unable to protect), and that relocation within the country of origin will not protect the individual from persecution. Applicants bear the burden of establishing, by a "preponderance of evidence," that they meet each of these criteria in order to gain refugee status.[23]

Generalized violence and criminality in a country are not bases for asylum. Applicants must demonstrate that they are perceived distinctly in their society on account of at least one of the protected grounds and that the violence they fear is a result of their perceived differences from others. The link between the applicable protected ground(s) and the violent act(s) is referred to as the nexus. Differentiating violent acts that reflect persecution based on a protected ground from generalized violence poses challenges for those who come from countries with high levels of crime and murder, such as the Northern Triangle countries (Guatemala, El Salvador, and Honduras). Gangs, for example, have territorial control in these nations, have infiltrated security and governmental officials, and use extortion, torture, and murder to control these societies. Yet specific sectors, for example, women and LGBTQ+ persons, face forms of violence distinct from the general population because of their gender, gender identity, or sexual orientation. Gangs, for instance, regularly rape and murder women and LGBTQ+ persons not only to assert authority over the individual victims, but to maintain territorial control by enforcing patriarchal norms that subordinate women and degrade LGBTQ+ persons. Governmental policies, practices of security officials and the judiciary, and treatment by family and community members demonstrate that women and LGBTQ+ persons are viewed and treated distinctly in these countries and may thus be considered members of a PSG.

Women, children, and LGBTQ+ persons often flee their countries of origin because of domestic, gender-based, and sexual violence, and their claims for protection are therefore based on their membership in a PSG, the most recently recognized and unstable protected ground in U.S. immigration law. The PSG was incorporated as a new basis for protection in the 1980 Refugee Act to bring U.S. immigration law into alignment with the 1967 UN Protocol; however, Congress did not define the scope of this new category. The PSG was first defined in case law, *Matter of Acosta*, in 1985. In that case, the Board of Immigration Appeals (BIA) interpreted the PSG as "a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." Immigration judges, the BIA, federal circuit courts, and attorneys general have inconsistently interpreted

membership in a PSG, especially what constitutes "social visibility" and "particularity," making this a difficult protected ground for applicants to substantiate.[24]

Asylum applicants must demonstrate a "well-founded fear" of persecution based on objective facts. Persecution is not defined in U.S. immigration law. The BIA, in *Matter of Acosta*, defines persecution as "harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." Individuals must explain why the violence, which can include both physical and mental harm, is persecution. Types of harm that may be considered persecution include physical and sexual violence, torture, and psychological and mental harm. Critically, the applicant must demonstrate that the harm is not caused by a personal grievance or delinquency but that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[25] For women and children, who often experience violence in the domestic sphere, the need to connect persecution to a protected ground is a challenge because judges frequently interpret domestic violence as a private crime and thus ineligible as a basis for asylum.[26]

After establishing that persecution is on account of at least one protected ground, applicants must show that the government cannot protect them from that persecution. U.S. immigration law affirms that governments have the responsibility to protect their citizens from persecution. The BIA clarified the connection between persecution and government authority in *Matter of Acosta*, specifying that "harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." For some applicants, such as women, the need to present evidence that the government is unwilling or unable to protect them presents obstacles. Women often flee persecution perpetrated by private actors, gender-based violence and femicide are generally underreported, and protective legislation may mask the government's lack of will or incapacity to protect women.[27]

A well-founded fear of persecution is also dependent on the ability of the applicant to escape persecution by relocating within the home country. Individuals need to present evidence that they would be endangered anywhere in the country by demonstrating a widespread pattern of persecution on account of one of the protected grounds and/or that the persecutor has the capacity to locate them anywhere in the country. Relocation must also be a "reasonable" option; that is, judges may consider other factors, such as economic, cultural, or social constraints, that would subject the respondent to other forms of harm. Claims of an individual's inability to relocate have come under increasing scrutiny by the U.S. government; in 2019, U.S. Citizenship and Immigration Services (USCIS) issued guidance to asylum officers asserting that "private violence" (referring to gang violence in this instance) is not "pervasive" throughout the Northern Triangle. Citing U.S. State Department reports, the USCIS contended that "there are areas that are generally

very safe within each of the countries" and directed asylum officers to obtain information on prior attempts to relocate within the country of origin. This USCIS guidance reflects a trend in U.S. immigration procedures to increase the burden on applicants to present supporting documentation for each aspect of their claims for relief.[28]

ACCESS TO LEGAL REPRESENTATION AND IMMIGRATION COURT ASSIGNMENT

Asylum and withholding of removal claims require applicants to articulate and substantiate narrow and interconnected legal arguments. Considering the complexity of this process, it is not surprising that applicants with legal representation are twice as likely to gain protection. The Transactional Records Access Clearinghouse (TRAC) at Syracuse University annually tracks data and produces reports on civil, criminal, and DHS immigration enforcement, immigration courts, and judges. According to TRAC, there were a record number of asylum hearings in FY 2019 and an exceptionally high denial rate; 69 percent of applicants were denied asylum and other forms of relief. In FY 2019, unrepresented applicants were successful in only 16 percent of their claims, compared to a 33 percent rate of success for applicants with legal representation.[29]

Lack of legal representation is especially disadvantageous for some populations, such as children, who find themselves alone in immigration courts. In 2014, the ACLU, the American Immigration Council, and other legal advocacy groups argued that children cannot be expected to understand the complexity of U.S. immigration law and that, therefore, lack of legal representation prevented them from receiving a "full and fair" hearing, a violation of due process. In response to a class-action lawsuit on behalf of minors, the Obama administration presented Judge Jack Weil, an assistant chief immigration judge responsible for overseeing policies in the fifty-eight immigration courts, as an expert witness to argue that children did not need legal representation in immigration hearings. Judge Weil told an ACLU attorney, "I've taught immigration law literally to 3-year-olds and 4-year-olds. . . . They get it." This legal challenge to require representation for children failed; the Ninth Circuit ruled in 2016 that the plaintiffs lacked jurisdiction and in 2018 denied a request for a rehearing. Unaccompanied minors without legal representation in immigration hearings are more likely than other populations to be returned to their country of origin; between 2005 and 2014, 90 percent of children without legal representation were deported.[30]

Serendipity is a major determinant in asylum claims. The success of asylum claims also depends on the location of the immigration court and assignment to a specific immigration judge. Immigration judges have great discretion in granting or denying asylum claims. TRAC records the decisions of all immigration judges and found, for example, that in New York denial rates of individual judges range

from an average of 5 percent to 95 percent.[31] Applicants are also affected by the hearing docket of the judge to which they are assigned. There is a tremendous backlog of active docket (scheduled) cases (1,596,193 as of December 2021). This case load is not evenly distributed among the relatively few immigration judges; in New York, for example, in June 2021 there were over 100,000 pending cases, while in Montana there were fewer than 1,000 pending cases.[32] As more cases are placed on a judge's docket, applicants assigned to that judge will face increasingly long wait times for their hearings. Asylum applicants waiting for hearings are in legal limbo; they cannot leave the country during this time and increasingly are not given work authorizations. In addition, cases may become harder to prepare as conditions change in their countries of origin and witnesses become unavailable.[33]

IMPACT OF NATIONAL ORIGIN ON THE ASYLUM PROCESS

Individuals apprehended at the U.S.-Mexico border are primarily women and children from the Northern Triangle. According to the U.S. Customs and Border Patrol (CBP), in FY 2019, 851,508 persons were apprehended at the border. Of that number, 549,702, or 65 percent, were unaccompanied minors and family units (a term used to describe a parent, usually a mother, traveling with a child or children), the majority from Northern Triangle countries. This migration pattern can be traced to the 2014 immigration "surge," when there was a sharp increase in the number of mothers and children from the Northern Triangle apprehended at the border. Between October 2013 and June 2014, 47,000 children, three-quarters from Northern Triangle countries, were apprehended crossing the U.S.-Mexico border, representing a 90 percent increase from the previous year. The UNHCR issued a report on unaccompanied child migrants on the U.S. southern border in 2014, finding that 58 percent of the 404 children the agency interviewed had suffered serious harm that might merit international protection. In 2019, 76,020 children arrived alone at the border to ask for protection; 83 percent (62,748) fled Northern Triangle countries.[34]

Women and children are fleeing the Northern Triangle primarily because of gender-based, sexual, and gang violence. The UNHCR reported that U.S. immigration officers who conducted credible fear interviews (CFIs) on the U.S. border in fiscal year 2015 found that 80 percent of women and girls from Northern Triangle countries and Mexico established a "significant possibility" of persecution or a well-founded fear of persecution on account of a protected ground or that they would be subjected to torture if returned to their countries of origin. According to the UNHCR, most of these women and girls fled gender-based and sexual violence perpetrated by domestic partners and gang members. In this report, the UNHCR reiterated that its "long-standing interpretation of refugee law recognizes that gender violence (including intimate partner violence); family

association; political opinion; lesbian, gay, bisexual, transgender and intersex (LGBTI) status; and racial or indigenous status, among others, meet the criteria for protection."[35]

By federal law, asylum claims must be evaluated on a case-by-case basis through the process outlined above. However, individuals from the Northern Triangle face increasing barriers to accessing the asylum process and immigration judges deny their asylum claims at significantly higher rates than for applicants from other countries. CBP officers are required to ask individuals apprehended at the border and subject to expedited removal whether they fear returning to their country of origin because of persecution and/or torture. If individuals answer affirmatively, they are referred to a CFI, conducted by an asylum officer. At the end of 2017, Attorney General Jeff Sessions urged greater review of CFI claims specifically for individuals apprehended at the Mexican border, mostly individuals from the Northern Triangle, because he predetermined that their claims were likely to be fraudulent. As seen above, recent USCIS guidance to asylum officers specifically targets those from Northern Triangle countries for additional scrutiny. The USCIS assertion that Northern Triangle countries have safe regions undermines the credible fear claims of those fleeing violence in that region and encourages asylum officers to order their expedited deportation rather than allow them to apply for asylum. While negative CFIs may be reviewed by an immigration judge, due to increasing politicization of the immigration court and judicial appointments, since 2018 immigration judges have increasingly upheld CFI denials. Once in the asylum hearing, immigration judges are also more likely to deny applications from Northern Triangle applicants. The greatest number of asylum applicants are from China, and in FY 2021 they had an overall success rate of 67 percent, in contrast to Honduran applicants, who had a success rate of 18 percent. Nearly one in every three asylum grants in the past two decades were for applicants from China.[36]

PRESIDENTIAL POLITICAL AGENDAS GENERATE RESTRICTIVE ASYLUM POLICIES

U.S. immigration and refugee laws are determined by Congress. The executive branch is constrained by congressional intent but still exercises great authority to implement policies and procedures that affect immigrants and refugees. Recent administrations, through executive orders and precedential decisions by attorneys general, have deterred asylum applicants, obstructed due process, and narrowed grounds for asylum. Detention policies and legal directives that exclude most forms of gender-based and gang violence from asylum protection target noncitizens from Northern Triangle countries, especially women and children. Civil and immigration rights organizations have filed federal lawsuits to halt some of these policies, but the overall effect of these presidential initiatives has been to make it more difficult for individuals to initiate and substantiate asylum claims.[37]

Procedural Restrictions through Executive Orders

Both the Obama and Trump administrations responded to increasing numbers of asylum seekers from the Northern Triangle at the U.S.-Mexico border by issuing executive orders to expand immigrant detention. Expansion of detention effectively limits applicants' ability to obtain legal representation, which, as discussed above, is a critical factor determining the outcome of asylum cases. According to the National Immigrant Justice Center (NIJC), detained individuals with representation are five times more likely to succeed in their claims for protection than those without representation. Detained persons are hampered by the location of detention centers in often remote areas, lack and expense of communication, and limited access to information or documentation to support claims for relief. In addition, conditions in detention centers can augment physical and mental trauma, due to lack of medical and psychological services and incidences of family separation, all of which diminish the capacity of detained persons to advance a complex set of arguments and procure the documentation necessary to support an asylum claim. Finally, hearings for detained cases are often expedited, giving applicants little time (a matter of weeks) to prepare for their hearings in front of an immigration judge.[38]

The Obama administration took executive action in 2014 to expand the use of family detention. Detention of children and families was not a new practice, but before 2014 the only government-operated family detention center was the Berks County Residential Center in Pennsylvania, with ninety-six beds. In 2014, the Obama administration opened new, larger family detention centers; family detention increased by 1,200 percent between June and August 2014. The first new family detention facility opened in Artesia, New Mexico, in June 2014 to house up to seven hundred mothers and children from the Northern Triangle in trailers. The remoteness of the detention center, two hundred miles from any major city, and policies that restricted access to the center by attorneys impeded oversight of the facility's conditions and access to legal representation. Additional family detention centers in Texas would eventually house thousands more women and children. The creation and administration of these family detention centers, by design, discouraged due process of asylum claims; Obama officials viewed these detention facilities for women and children from the Northern Triangle as deportation holding centers. Secretary of Homeland Security Jeh Johnson, testifying before a Senate committee in 2014 about the situation of mothers and children in detention centers, stated bluntly, "Our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated." The Obama administration faced court challenges regarding family detention and the lack of access to counsel.[39]

The Trump administration also viewed immigrant detention as a tool to restrict asylum claims. President Trump accelerated widespread family detention and

instituted expansive policies to separate and detain children away from their parents. In January 2017, Trump issued Executive Order 13767: Border Security and Immigration Enforcement Improvements. Among the provisions included in this order were directives to expand the use of expedited removal and to construct additional immigrant detention centers. In response to public condemnation and litigation against what had become the standard practice under his administration to separate and detain children away from their parents, in June 2018 Trump issued Executive Order 13841: Affording Congress an Opportunity to Address Family Separation. This order called for indefinite detention of immigrant families and expedited processing of their asylum proceedings.[40]

Because of President Trump's executive orders, the number of detained children skyrocketed to the highest ever recorded. In September 2018, the *New York Times* counted 12,800 detained children. In May 2017, this number was 2,400. The Trump administration announced its intention to triple the size of a temporary "tent city" in Tornillo, Texas, to house up to 3,800 children through the end of the year. At its height, in December 2018, the Tornillo detention center held children in one hundred tents and was the largest immigrant child detention center in the country. Public protest and legal challenges due to the poor conditions in Tornillo closed the center in January 2019. Detaining children in these privately run detention centers costs about $750 per child per day, or three times the amount of a typical shelter. In August 2019, the Trump administration challenged the Flores Settlement Agreement, which prohibits the detention of children for more than twenty days, arguing that the government should be able to detain children indefinitely. In addition, the Flores Settlement Agreement mandates that children be provided with food, clothing, grooming items, and medical care. In response to litigation, an attorney for the Trump administration argued that soap and toothbrushes might not be necessary for detained children. Further undermining safety in immigration detention centers, the government decided not to administer flu vaccines to immigrants detained in border facilities, despite outbreaks of other preventable diseases, such as mumps. Despite challenges by both the Obama and Trump administrations, federal courts have repeatedly preserved the Flores Settlement Agreement.[41]

Trump officials separated immigrant children from their families on an unprecedented scale. In spring 2018, 2,700 children, including infants and toddlers, were separated from their parents and put into detention. A federal judge ordered the government to reunite children with their parents by the end of July, but at the end of August almost 500 children remained separated from their parents. Over 100 children remained separated from their parents five months later. When ordered to reunite the parents and children, the government admitted it could not identify the children's parents because of inadequate accounting. According to the ACLU, 55.8 percent of the children separated from their parents were from Guatemala. In

October 2019, the ACLU and co-counsels sued the U.S. government for damages on behalf of the separated families, including ongoing trauma.[42]

Substantive Restrictions by Attorneys General

Presidential executive orders to expand the use of immigrant detention and expedited removal have an impact on detainees' access to due process for their asylum claims. The executive branch also exercises influence over the interpretation and application of asylum law through the Executive Office for Immigration Review (EOIR), an office within the Department of Justice. The Department of Justice is run by the attorney general, who is nominated by the president and approved by the Senate, is a member of the president's cabinet, and can be removed at will by the president. Immigration judges are appointed by the attorney general and are therefore employees of the Department of Justice in the executive branch, unlike judges in the judiciary branch. Decisions by immigration judges can be appealed to the Bureau of Immigration Appeals, also an office in the EOIR. BIA decisions are binding but can be overruled or modified by the attorney general. Decisions by both the BIA and the attorney general can be appealed to U.S. Circuit Courts of Appeal to determine whether the decisions are congruent with congressional intent in the INA. The attorney general can intervene in the appeal of a BIA decision to U.S. Circuit Courts of Appeal by certifying a case for review. Based on this review, the attorney general's decision sets precedent for future cases for immigration judges and the BIA. The authority of the attorney general to appoint immigration judges, establish judicial proceedings in immigration hearings, and issue precedential decisions regarding asylum policy enables the executive branch to advance presidential priorities by changing judicial practice and narrowing asylum eligibility through the EOIR.[43]

The EOIR extends the authority of presidential administrations to create and enforce immigration and refugee policies. Under the Trump administration, Attorneys General Jeffery Sessions and William Barr directly targeted the protected ground that defines refugee status for women and children who are fleeing persecution in the Northern Triangle on account of their membership in a PSG related to their gender and/or family status. Using their authority to review BIA decisions in *Matter of A-B-* and *Matter of L-E-A-*, Sessions and Barr changed asylum legal standards by excluding most forms of gender-based, sexual, and gang violence from consideration as forms of persecution; instead, they defined this violence as private criminality and therefore not a basis for asylum or withholding of removal.

In 2018, Attorney General Sessions issued the decision *Matter of A-B-*, which overturned a 2014 BIA decision, *Matter of A-R-C-G*. In that earlier decision, the BIA determined that in some instances women fleeing domestic violence could "constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal." This BIA decision significantly advanced the

claims for women who experienced gender-based persecution on account of their status in a domestic partnership. In *Matter of A-B-*, Attorney General Sessions certified the case to himself to decide whether "being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum and withholding of removal." In reference to the original cases, *A-R-C-G-* and *A-B-*, he determined that domestic violence is "vile" and can be severe enough to rise to the level of persecution but defined domestic abuse as personal, private conflict rather than persecution on account of a protected ground. While the original case did not include gang violence as a factor of persecution, Sessions extended his decision in *Matter of A-B-* to include gang violence as another form of private crime caused by delinquency and therefore not a basis for refugee protection. In his decision Sessions wrote, "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." Legal professionals and scholars have found numerous faults with Sessions's decision, including his use of dicta—unsubstantiated opinion—rather than legal analysis based on facts of the case and prior case law.[44] Despite legal challenges to *Matter of A-B-*, Sessions's decision made it easier for immigration judges and the BIA to dismiss claims by applicants fleeing violence perpetrated by domestic partners, gang members, and other private actors.[45]

Attorney General Barr, in 2019, sought to further narrow the PSG by limiting family membership as a basis for persecution, ruling that "most nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups.'" This decision complicates claims by women who are fleeing violence on account of their status in a domestic relationship and by victims of gang violence who are targeted with violence because of their kinship with another targeted individual. The respondent in *L-E-A-* was targeted in retaliation for his father's refusal to collaborate with a drug cartel. As in *Matter of A-B-*, legal professionals and scholars challenged Attorney General Barr's decision in *Matter of L-E-A-* because it relied on dicta rather than legal analysis based on evidence. There is a considerable quantity of case law confirming that family-based social groups have been continually recognized as a PSG since *Matter of Acosta* in 1985. In that decision, "family background" and "kinship relations" are included as foundational examples of "a group of persons all of whom share a common, immutable characteristic," the defining characteristic of a PSG. *Matter of L-E-A-* reflects the capacity of presidential administrations to restrict access to asylum by narrowing the scope of the PSG in order to exclude people seeking refuge at our border with Mexico. Because the PSG continues to be ambiguously defined, individuals fleeing gender-based, sexuality-based, and gang violence face greater challenges in their asylum claims.[46]

* * *

Leaving home is not trivial. Among those who embark from Northern Triangle countries, 80 percent of women and girls are raped crossing through Mexico.[47] At

the U.S. border, numerically restricted entry ("metering") prevented thousands from requesting asylum, others have been forced to return to Mexico to await televised immigration hearings held in tents ("Migrant Protection Protocol"), and some were immediately deported to request asylum in countries known for high levels of violence ("Third-Country Transit Ban").[48] For those granted an immigration hearing, U.S. asylum law authorized by Congress is both narrow and ambiguous, allowing the executive branch to further political agendas by crafting restrictive procedures and substantively changing legal standards. Antipathy to noncitizens continues to uneasily coexist with the definition of the United States as a "nation of immigrants"; a 2019 Gallup poll found that 76 percent of respondents viewed immigration as "good" for our country.[49]

Many attorneys view recent attacks on asylum as unprecedented, but the U.S. has a long history of stigmatizing and excluding immigrants and asylum seekers.[50] Despite the odds against them, 99.9 percent of represented immigrant families released from detention attend their immigration hearings.[51] Applicants with legal representation are clearly advantaged, but the criteria for substantiating claims for asylum and other forms of relief increasingly require significant documentation to contextualize the violence that provokes individuals to flee their homes. Expert witnesses on country conditions provide research and analysis that informs attorneys and assists immigration judges to determine the merits of an individual's claim. The stakes are high for asylum applicants; through affidavits and hearing testimony, expert witnesses are an integral part of the process that will determine their fate.

NOTES

I thank S. Deborah Kang and Maria Baldini-Potermin for their careful reading of and insightful suggestions on this chapter. Any factual or interpretive errors are my own.

1. "Remarks by President Trump in Roundtable on Immigration and Border Security | Calexico, California," May 5, 2019.

2. Oscar Handlin is known as the founder of U.S. immigration history and is the author of *The Uprooted: The Epic Story of the Great Migrations That Made the American People* (Boston: Little, Brown, 1951), which won the Pulitzer Prize for History in 1952. For an analysis of the impact of U.S. foreign policy and racialized politics on restrictive immigration laws and policies, see Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004). Nancy Hiemstra, in *Detain and Deport: The Chaotic U.S. Immigration Enforcement Regime* (Athens: University of Georgia Press, 2019), argues that racism and xenophobia are enforced through detention and deportation policies; S. Deborah Kang offers a comprehensive analysis of restrictive immigration policies carried out by INS officials on the U.S.-Mexico border in *The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917–1954* (Oxford: Oxford University Press, 2017). For analyses of Central American immigrants and refugees, see María Cristina García, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* (Berkeley: University of California Press, 2006); and Susanne Jonas and Néstor Rodríguez, *Guatemala-U.S. Migration* (Austin: University of Texas Press, 2014). For gender- and sexuality-based restrictions on immigration and

asylum, see Efrat Arbel et al., eds., *Gender in Refugee Law: From the Margins to the Centre* (London: Routledge, 2014); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009); and Sara L. McKinnon, *Gendered Asylum: Race and Violence in the U.S. Law and Politics* (Urbana: University of Illinois Press, 2016).

3. Miriam Jordan, "Is America a 'Nation of Immigrants'? Immigration Agency Says No," *New York Times*, Feb. 22, 2018.

4. Handlin, *The Uprooted*.

5. Chy Lung v. Freeman, et al., 92 U.S. 275 (1876); Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (Oxford: Oxford University Press, 2017).

6. Kelly Lytle Hernández, *Migra! A History of the U.S Border Patrol* (Berkeley: University of California Press, 2010).

7. USCIS, "Immigration and Naturalization Service Refugee Law and Policy Timeline, 1891–2003"; Displaced Persons Act of 1948 (Pub. L. 80-774); 1980 Refugee Act, 94 STAT. 102 PUBLIC LAW 96-212–MAR. 17, 1980.

8. Daniel J. Tichenor, in *Dividing Lines: The Politics of Immigration Control in America* (Princeton, NJ: Princeton University Press, 2009), analyzes the policies and politics of immigration reforms from the nineteenth century to the 1990s.

9. "A Bill to Establish an Uniform Rule of Naturalization, and Enable Aliens to Hold Lands under Certain Conditions," Mar. 4, 1790 (SEN1A-C1); "An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on that Subject," Jan. 29, 1795; 18th Cong., 1st sess., May 26, 1824, Chap. CLXXXV, Act 4, Stat. 69. While most immigration historians concur that the first immigration restrictions were racially motivated, Hidetaka Hirota argues that class biases were the motivation. See Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (Oxford: Oxford University Press, 2017).

10. 1870 Naturalization Law (Pub. L. 41-254); Page Act (Pub. L. 43-141); 1882 Chinese Exclusion Act (Pub. L. 47-126); "Chinese Heritage," U.S. National Archives; 1906 Gentlemen's Agreement: *Letter from Theodore Roosevelt to Victor Howard Metcalf*, Nov. 27, 1906, Theodore Roosevelt Collection, MS Am 1540 (408), Harvard College Library; 1917 Immigration Act (Pub. L. 64-301); 1924 Immigration Act (Pub. L. 68-139); "Chinese Immigration to the United States 1884–1944," Bancroft Library Digital Archive, University of California, Berkeley.

11. Immigration Act of 1924 (Pub. L. 68-139).

12. "The Immigration Act of 1924: Historical Highlights," U.S. House of Representatives.

13. Immigration and Nationality Act of 1952 (Pub. L. 82-414); Sharita Gruberg, "On the 50th Anniversary of the Immigration and Nationality Act, Changes Are Needed to Protect LGBT Immigrants," Center for American Progress, Mar. 23, 2014; Immigration and Nationality Act of 1965 (Pub. L. 89-236); U.S. Code Title 8: Aliens and Nationality.

14. In 1996, IIRAIRA and AEDPA added twenty-one new crimes to the aggravated felony ground for deportation. IIRAIRA also lowered the threshold for crimes that would qualify for the status of aggravated felony by reducing the term of imprisonment provision from five years to one year. See Human Rights Watch, "Deportation Law Based on Criminal Convictions after 1996," in "Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy," 2007.

15. National Archives, "Major United States Laws Relating to Immigration and Naturalization: 1790–2005"; Immigration Reform and Control Act of 1986 (Pub. L. 99-603); Immigration Act of 1990 (Pub. L. 101-649); Violence Against Women Act, Subtitle G—Protections for Battered Immigrant Women and Children, Sec. 40710, H.R. 3355, 1994; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104-208); Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132).

16. UNHCR, "Convention and Protocol Relating to the Status of Refugees"; U.S. Dept. of Justice Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections (2009).

17. In affirmative asylum claims, the applicant is not under removal proceedings and applies directly to the U.S. Citizen and Immigration Services (USCIS). In defensive asylum claims, the applicant is in removal proceedings and is referred to an immigration judge. USCIS, "Obtaining Asylum in the United States"; see also chapter 4 in this volume.

18. Human Rights First, "Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk," Nov. 2018 ; Real ID Act of 2005 (Pub. L. 109-13); Immigration Equality, "Asylum Manual: Real ID" (chap. 9); Mary Giovagnoli, Esq., "Overhauling Immigration Law: A Brief History and Basic Principles of Reform," American Immigration Council, Feb. 14, 2013.

19. 8 USC 1158: Asylum; American Immigration Council, "Asylum in the United States," June 11, 2020; Immigration Law Blog, "Exceptions to the 1-Year Bar in Asylum," Sept. 9, 2014.

20. Withholding of removal under section 241(b)(3)(B) of the act and withholding of removal under the Convention Against Torture, Title 8 CFR 208.16.

21. The full definition of torture in CAT Article 1.1 is as follows: "For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions."

22. UNHCR, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"; "Deferral of Removal under the Convention Against Torture," Title 8 CFR 208.17; "Implementation of the Convention Against Torture," Title 8 CFR 208.18.

23. USCIS, "Form I-589"; "Definition of Refugee," 8 USC 1101(a) INA 101(a); UNHCR, "How to Apply for Asylum, Withholding of Removal, and/or Protection under Article 3 of the Convention Against Torture."

24. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985); Immigration Equality, "Asylum Basics: Elements of Asylum Law."

25. INA § 208(b)(1)(B)(I).

26. Ilona Bray, J.D., "What Counts as Persecution When Applying for Asylum or Refugee Status," NOLO, n.d; see also chapter 4 in this volume.

27. Elsa M. Bullard, "Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases," *Minnesota Law Review* 95:1867 (2011); Blaine Bookey, "Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994–2012," *Hastings Women's Law Journal* 24:107 (2013); see also chapter 4 in this volume.

28. USCIS, "Asylum and Internal Relocation Guidance," July 26, 2019; "Title 8: Aliens and Nationality," Code of Federal Regulations.

29. TRAC Immigration, "Record Number of Asylum Cases in FY 2019," Jan. 8, 2020; TRAC Immigration, "Asylum Decisions" (Tracking Tool).

30. F.L.B. v. Lynch (J.E.F.M. v. Holder), No. 2:14-cv-01026; American Immigration Council, "Right to Appointed Counsel for Children in Immigration Proceedings," July 19, 2014; ACLU, "Can Toddlers Really Represent Themselves in Court?," Mar. 20, 2016 (YouTube video); National Immigrant Justice Center, "Unaccompanied Immigrant Children"; Info Please, "Migrant Minors: FAQS, Facts, and Statistics," Feb. 28, 2017.

31. TRAC Immigration, "Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases," Jan. 18, 2022.

32. TRAC Immigration, "How Many Pending Deportation Cases Are There in Your State? TRAC's Updated Mapping Tool Has the Answer," June 28, 2021; TRAC Immigration, "Burgeoning Immigration Judge Workloads," May 23, 2019; Migration Policy Institute (MPI), "Frequently Requested

Statistics on Immigrants and Immigration in the United States," Mar. 14, 2019; TRAC Immigration, "Asylum Decisions Vary Widely across Judges and Courts—Latest Results," Jan. 13, 2019.

33. Denise Lu and Derek Watkins, "Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall," *New York Times*, Jan. 24, 2019.

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8

Supporting Asylum Seekers in Detention

An Immigration Attorney's Guide

Natalie Hansen

The United States currently detains immigrants at an unprecedented rate. The detention of asylum seekers who are fleeing persecution in their home countries exacerbates mental and physical trauma.[1] Detention also shapes the legal process, making winning an asylum case exponentially more difficult. Detained asylum seekers are less likely to obtain legal representation, and for the small percentage who do acquire representation, detention poses extraordinary challenges.

Among the many challenges of representation of asylum seekers are physical barriers. Detention centers are often in isolated areas, which means that applicants have limited access to their attorneys. Advocates may need to drive hours to reach the detention center and, once they arrive, may wait for hours for one of a limited number of private attorney-client rooms to become available. Furthermore, telephone and email communications are fraught with issues that make it difficult to consult with clients, even about simple matters such as information on seeking bond.[2] Poor living conditions in detention—overcrowding; inadequate food; and poor hygiene, medical treatment, and mental health care—also pose obstacles to meaningful representation of detained asylum seekers.[3] Compounding these issues, the pace of asylum cases for detained individuals is expedited, which decreases the time for applicants to prepare for their immigration hearings.[4]

Considering these obstacles, the work of expert witnesses is especially important for detained asylum seekers. This chapter provides an overview of the immigration detention system, discusses detention conditions, and, finally, discusses release from detention, as well as the legal process for individuals detained for

the entirety of their cases. The chapter serves experts working with detained asylum seekers by providing concrete practice tools to overcome barriers imposed by detention.

DETENTION LANDSCAPE AND ALTERNATIVES TO DETENTION

The federal government has broad power over regulating immigration to the U.S., including the power to arrest and detain noncitizens. The Immigration and Nationality Act (INA) authorizes, and sometimes requires, the U.S. Department of Homeland Security (DHS) to detain noncitizens while their removal proceedings are pending. In 1996, Congress made sweeping reforms to the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). This law laid out new detention priorities, among them the requirement that certain classes of noncitizens be detained, including individuals arriving in the United States through a port of entry, such as an airport or an international bridge, without a visa or lawful status to enter the country.[5] Many asylum seekers fall into this category.

Immigration detention expanded over fivefold between 1995 and 2011.[6] In 1995, the average daily population of detained immigrants was approximately 5,000; in 2019, it was over 50,000.[7] In 2009, Congress imposed an arbitrary bed quota that remained in place until 2017.[8] The bed quota mandated that 34,000 immigration detention beds be filled at all times.[9] Even after national bed quotas were eliminated, they continue to be included in local contracts with immigration detention centers.[10] In 2019, before the COVID-19 pandemic, the average daily population of DHS detainees was over 52,000.[11] Due to pandemic restrictions, the number of detainees fell to a record low of 13,500 in early 2021. Since then, however, the numbers of detainees have continued to rise, reaching 22,000 in March 2022.[12]

DHS detains immigrants at different types of detention centers: (1) facilities operated directly by DHS, called Service Processing Centers (SPCs);[13] (2) facilities operated by private contractors; (3) local jails; (4) family detention centers; and (5) children-only detention facilities.[14] Most detained immigrants are held in private facilities rather than government Service Processing Centers. In 2018, 70 percent of individuals in immigration detention were held in facilities operated by private prison companies, compared to just 9 percent of the total prison population in the United States.[15] By January 2020, the proportion of detained immigrants in private facilities had risen to 81 percent, and as of September 2021, four in five people detained each day by DHS are held in private facilities.[16] Private corporations, both large and small, have a financial interest in maximizing the number of immigrants held in detention centers. According to the Detention Watch Network, private prison companies' dependence on the immigration detention system to maintain corporate profits has increased over the past decade. In 2020,

the two largest corporations, GEO Group, Inc. (GEO) and CoreCivic (formerly Corrections Corporation of America), administered 81 percent of detention beds; in 2009, they operated 49 percent of detention beds.[17] The private prison lobby devotes substantial resources to advocating for immigration policies that increase the number of detained immigrants in the U.S.[18]

Children's detention is handled differently from that of adults. In 2002, Congress transferred the responsibility of custody of unaccompanied minors to the Health and Human Services Office of Refugee Resettlement (ORR).[19] In FY 2019, 76,000 unaccompanied minors were arrested by DHS, up from 50,000 in FY 2018; in 1990, 8,500 minors were arrested, not all of whom were unaccompanied.[20] Though CBP reported a 60 percent decrease in arrests of unaccompanied minors in FY 2020, a record number of 147,000 unaccompanied migrant children were apprehended in FY 2021.[21]

Unaccompanied minors are a particularly vulnerable population. The legal landscape for the detention of immigrant minors is largely influenced by a 1997 binding legal settlement agreement between the government and Jenny Flores, a young Salvadoran girl. Jenny Flores came to the U.S. as an unaccompanied minor in 1985 and was detained by the U.S. in deplorable conditions. Further, the government policy at that time made it difficult for her to be released to her family in the United States. She sued the government, and her lawsuit argued (1) that the government improve conditions in which it held minors to meet minimum child welfare standards; and (2) that INS screen for other adults to whom children could be released rather than restrict release to parents or legal guardians. After many years of litigation, including an appeal to the Supreme Court, the parties signed a binding agreement that extended to almost all unaccompanied minors in 1997.[22]

Known as the *Flores* settlement, this agreement requires that the government detain minors separate from adult non–family members and from juvenile criminal offenders. The government also agreed to hold minors in safe and sanitary conditions and in most cases to transfer them to a licensed temporary facility within three days of apprehension. There a minor is detained until she can be released to a family member. Over time, *Flores* has been expanded and defined through litigation; it now covers both accompanied and unaccompanied minors and limits the detention of minors to twenty days, regardless of whether they are accompanied by a family member.[23] *Flores* is binding on the government until it promulgates final regulations that implement the agreement.[24] Over twenty years later, this has not happened.[25]

The government contracts with organizations to jail unaccompanied minors, allegedly pursuant to the detention and release standards dictated by *Flores*. While these organizations are often nonprofits or other "antipoverty" groups, they have come under criticism for essentially jailing immigrant minors on behalf of the government. Many advocates see a conflict of interest between accepting money from the government for the detention of minors and working for their release.[26]

Family groups, usually a mother and her child or children, are another sector that has been detained in designated detention centers. In December 2021, the Biden administration repurposed the three remaining family detention centers into detention centers for single adults: Berks Family Residential Center in Pennsylvania and the Karnes Residential Center and the South Texas Family Residential Center, both in Texas.[27] Women and children held in the three family detention centers, for months or even years, endured harsh conditions that violated their human rights.[28]

Families seeking asylum at the southern border continue to face obstacles. In 2017, the Trump administration separated children from their parents, to detain and deport the parents separately. After public outcry, the Trump administration officially ended its policy of family separation in June 2018, though reports of family separation in smaller numbers continued.[29] At the end of 2021, the parents of 270 children separated at the border still were not found.[30] In March 2020, amid the unfolding COVID-19 pandemic, the Trump administration invoked Title 42 of the Public Health Service Act to expel asylum seekers at the southern border. The Biden administration has continued the Title 42 expulsion policy, which has resulted in further family separation.[31] Desperate parents, who face starvation, disease, and violence in Mexico, send their children unaccompanied across the U.S. border, where they are held in a growing number of child detention facilities.[32]

While *Flores* has placed some limits on the abusive detention of children and families, the general conditions for detainees involve systematic abuse, including sexual assault and medical neglect. The current detention standards and oversight process are based on the standard adopted at each detention facility. There are four versions of ICE detention standards: the 2000 National Detention Standards (NDS) revised in 2019 and the 2008 and 2011 Performance-Based National Detention Standards (PBNDS) revised in 2016. These standards are not legally codified, so it is difficult for detained immigrants to hold DHS accountable for violations of these policies. Many important aspects of life for detained individuals are not covered by these standards, and even when a standard does exist, there are rarely consequences for the government or the facility that violates them.[33] Even in the most egregious cases, such as sexual assault or medical neglect of detainees, DHS is rarely held accountable.[34]

In addition to detention, DHS implements other restraints on asylum seekers' freedom of movement, called "alternatives to detention" (ATDs), under programs that amount to functional custody. DHS argues that they are necessary to ensure people attend their court dates and, in some cases, comply with subsequent deportations. These programs have been criticized for their punitive nature.[35] ATDs currently include parole/release on the immigrant's own recognizance, bond, in-person check-ins at DHS offices, home visits, telephonic monitoring, and GPS monitoring by means of ankle bracelets. Parole and bond are discussed below. ATDs are primarily run by private prison companies, many of which also profit

from immigrant detention. The Biden administration greatly expanded the use of ATDs, including a pilot program launched in February 2022, run by a subsidiary of GEO, that would place hundreds of immigrants under house arrest with electronic monitoring.[36] Despite the government's claim that asylum seekers will not attend immigration hearings if released from detention, reports show that this is untrue.[37] Research indicates that the great majority of asylum seekers released from detention attend their hearings, and the number increases to almost 100 percent when individuals are represented by legal counsel.[38] Access to free or affordable counsel is critical to ensure that asylum applicants have the capacity to navigate the asylum system.[39]

DETENTION CONDITIONS

Negative detention conditions act as barriers to meaningful legal representation for asylum seekers. Advocates should be familiar with common problems within immigration detention so that they can be prepared to competently represent individuals in detention and to advocate for improved conditions on behalf of their clients. Common detention conditions that advocates and experts should be aware of when representing detained asylum seekers are discussed in this section.

First, access to and communication with detained individuals is limited in various ways that make representation difficult. Detained immigrants generally lack access to the internet or email, which makes it difficult for them to locate and communicate with attorneys and to acquire the documentation necessary to support their asylum claims.[40] Access to telephones is, thus, critical for asylum seekers. In February 2019, the California Department of Justice launched an investigation into detention conditions after reports of wrongful deaths and other deplorable conditions.[41] The report details the common issues with the phone systems in detention, finding that detainees have little access, or none at all, to private areas to speak with their attorneys.[42] Detainees usually access telephones in their housing units, where other detainees and facility staff can overhear their conversations. This lack of privacy makes it difficult for detained individuals to share sensitive information critical to preparing their asylum cases, such as prior experiences of violence, with their attorneys.[43] For example, it can be unsafe or traumatic for a woman to reveal to her attorney that she is transgender or discuss the details of a sexual assault in a space where this information is easily overheard. In addition, with limited exceptions, calls are monitored and recorded and can be prohibitively expensive. The California report found that detained individuals have restricted and inconsistent access to telephones and that most facilities do not accept messages from attorneys.[44] These issues are not unique to California and should be expected across the country when working with asylum seekers. Experts rely on information in the asylum declarations, typically provided by the attorney. In the nondetained context, it is easy to clarify information in the declaration by having

the attorney meet with or call the applicant, using an interpreter if needed. However, because communication with attorneys or experts and use of interpreters are limited for detainees, experts should assume that clarifications will take time, or in some instances are not possible. It is important to plan accordingly and to do the best you can given the real limitations of detention work.

Because of these communication barriers, as well as the inability to earn money, detained individuals have a much harder time than nondetained applicants obtaining documentation to support their cases. This not only includes evidence from their home countries such as police reports or witness statements but also country conditions evidence like human rights reports, media reports, and expert witness affidavits. Some experts have provided affidavits that are not specific to an individual applicant's case but rather give expert analysis of a common issue affecting many applicants. For example, a generalized affidavit of country conditions explaining forced marriage in Guatemala can be helpful in multiple cases. Experts can make these generalized affidavits (sometimes referred to as universal affidavits) available to local nonprofit legal organizations to disseminate to detainees. Generalized affidavits can be powerful tools that help many applicants. Consider your expertise: Is there a subject on which you could provide a meaningful generalized expert affidavit? What local legal nonprofit serves a detention center in your area? Consider asking the attorneys there if a generalized affidavit you could provide would be helpful.

Access to interpreters and translators for asylum seekers in detention is another barrier to meaningful representation and working with experts. According to the Center for American Progress, "although DHS comes into contact with the broadest range of foreign-language speakers of any federal agency, it lags far behind in providing real-time interpretation for many of the people placed most at risk when their needs are ignored."[45] People who speak Indigenous languages are particularly vulnerable, and language needs are routinely ignored or made impossible to meet by other barriers, such as lack of access to telephones or private meeting rooms.[46]

Health care in detention is woefully inadequate, and when persons' basic health care needs are neglected, it is difficult for them to focus on or have the strength to meaningfully prepare a complex legal case. The Civil Rights and Civil Liberties Office in DHS found in 2020 that ICE had "systematically provided inadequate medical and mental health care and oversight to immigration detainees in facilities throughout the U.S."[47] Human Rights Watch found that detained women are routinely denied gynecological examinations, proper prenatal care, counseling after sexual assault, sanitary pads for menstruation, and hormonal contraceptives.[48] A recent whistleblower report reveals allegations of coerced sterilization of immigrant women by DHS health care providers in Georgia.[49] The lack of accountability regarding health care in detention centers leaves detained immigrants in duress, sometimes choosing deportation over continued suffering from extreme medical neglect or harm.

Mental health services in detention are also extremely problematic. Asylum seekers in DHS custody are fleeing persecution and commonly have recently experienced rape and/or beatings, witnessed the murder of a loved one, and/or experienced torture. This trauma is ignored by DHS. In 2016, ICE reported that only 21 of 230 DHS detention facilities offered in-person mental health services.[50] DHS has not prioritized screening and treatment of mental illness in its detained population and uses solitary confinement as a means of controlling mentally ill detainees. Reports indicate that at least 40 percent of detainees in solitary confinement have a mental illness.[51]

DHS also does little to respond to acts of sexual or physical violence perpetrated against detainees. For example, a *Los Angeles Times* investigation showed that of 265 calls to the police reporting physical and sexual violence in immigrant detention centers, only 3 cases resulted in a suspect being charged, and two of the three suspects were deported before being arrested.[52] Accusations of sexual assault of detainees by DHS officers and contracted staff are commonplace.[53]

Other problems in detention centers include poor food quality, overcrowding and hygiene issues, and changing visitation policies that impede attorneys' access to facilities. DHS is not held accountable for these systematic human rights abuses. The Office of the Inspector General reported in 2019 that ICE did not hold contractors accountable for meeting performance standards in detention centers.

> Instead of holding facilities accountable through financial penalties, ICE issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards. However, DHS has no formal policies and procedures to govern the waiver process, has allowed officials without clear authority to grant waivers, and does not ensure that key stakeholders (such as human rights groups, attorneys, journalists, or faith organizations) have access to approved waivers.[54]

Because conditions in immigrant detention facilities are harsh, regularly violate detainees' human rights, and impede access to legal representation, many immigration advocates and professionals argue that immigration detention should be abolished and that the federal government should redirect the billions of dollars budgeted for detention centers to providing migrants with legal representation and social services.[55]

THE DETAINED ASYLUM PROCESS AND RELEASE FROM CUSTODY

In your work as an expert, you may become involved in an asylum case at various legal stages. In this section, I discuss the asylum case process and the ways that individuals can be released from detention at different stages of that process. Understanding the general process and context of asylum cases is important because experts can be utilized at different stages of an asylum case.

Expedited Removal and Reinstatement of Removal

In 1996, the IIRAIRA not only increased immigration detention but also created an "expedited removal" process whereby an individual coming to the U.S. without authorization could be removed "without further hearing or review."[56] Prior to 1996, an individual who entered the United States without authorization generally received a full immigration court hearing, in which they could apply for asylum or other forms of relief before they could be removed from the country. Now the law requires mandatory detention of individuals who are seeking initial entry into the United States or who have entered the United States outside an official point of entry and are believed to be subject to removal.[57]

Expedited removal is a process that allows DHS to rapidly remove noncitizens coming to the United States. Noncitizens arrested by DHS within fourteen days of their arrival in the country and within one hundred miles of the border who have not been admitted or paroled are subjected to this streamlined removal process under expedited removal.[58] The Trump administration expanded this program to include any noncitizen apprehended anywhere within the United States who entered the country without lawful immigration status, who has not been admitted or paroled at a port of entry, and who cannot prove that he or she has been present in the United States for two years or more.[59] In March 2022, the Biden administration rejected the expansion of expedited removal, but a month later it changed course and announced a plan to expand this form of fast-track deportation.[60] A similar fast-track removal process is initiated for individuals who have been previously deported (or previously subjected to expedited removal). In this case, DHS places the individual in a process called "reinstatement of removal." Like expedited removal, reinstatement of removal puts the individual in a process that fast-tracks their removal and does not provide a hearing before an immigration judge.[61]

The IIRAIRA created an exception to removal (both expedited and reinstatement) for individuals who indicate "an intention to apply for asylum" or "a fear of persecution" upon returning to their home countries.[62] The exception provides certain protections for individuals who show that they could potentially win an asylum case, withholding of removal, or CAT relief before an immigration judge. The process that individuals undergo to obtain protection from fast-track removal under expedited or reinstatement of removal is similar but slightly different. I discuss both processes here: first, for individuals arriving in the United States for the very first time who are placed in expedited removal; and second, for individuals with prior deportations or expedited removal orders but who also fear return to their home countries.

Credible and Reasonable Fear Interviews

Under the IIRAIRA exception to expedited removal for individuals who fear return to their home countries, once a person tells an immigration officer that they are afraid to return to their home country, the officer refers the individual

for an interview by an asylum officer to determine if they have a "credible fear of persecution."[63] A "credible fear of persecution" 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."[64] To establish eligibility for asylum, an applicant must show that there is at least a 10 percent chance that they will be persecuted based on one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[65] The asylum officer asks the individual a series of questions in order to determine if the individual meets this standard. The credible fear interview (CFI) screens only for potential asylum eligibility, not other forms of relief. If the individual passes the CFI, DHS suspends their expedited removal and they are entitled to a full asylum hearing before an immigration judge.[66] If not, the individual is ordered removed from the United States without "further hearing or review,"[67] a decision the individual can appeal and have reviewed by an immigration judge.[68]

The original intent of Congress when it created the CFI process was that it be a screening standard for admission into the full asylum process with a low threshold of proof.[69] DHS conducts trainings for asylum officers to carry out these interviews. The trainings instruct officers on how to make determinations regarding whether an individual should "pass" the interview. Over time, training materials have guided officers to impose stricter standards, making it harder for individuals to pass the interview and enter the full asylum process.

Previous versions of the Refugee, Asylum, and International Operations (RAIO) Directorate Asylum Officer Basic Training Manual describe the credible fear standard as a broad net designed to protect bona fide asylum seekers and avoid the chance of deporting someone with a potentially legitimate asylum claim. The Trump administration made changes to the CFI process that greatly decreased the number of people who pass this initial screening.[70] Changes to training guidance include (1) deemphasizing the broad legal threshold for passing CFIs; (2) requiring that an applicant establish her identity "by a preponderance of the evidence"; (3) allowing officers to require country conditions materials as evidence; (4) eliminating language that indicated that the officer should consider the impact of cross-cultural issues, trauma, and the effects of detention on credibility assessments, as well as other previously listed factors that might explain or mitigate inconsistencies; and (5) eliminating the explicit duty to elicit information relevant to the nexus determination.[71] Because of added emphasis on country conditions evidence that had never previously been part of the CFI process, some expert witnesses produce expert affidavits for submission at this stage.[72]

In addition, the law requires the CFI to be conducted by an "asylum officer," defined as an immigration officer with the requisite training.[73] In 2019, reports emerged that DHS began to replace trained USCIS asylum officers with officers

from Customs and Border Patrol, which, according to the suit filed against CBP by the American Immigration Council, is "a law enforcement agency with a history of abuse of and misconduct towards asylum seekers."[74] CFI denial rates skyrocketed, and in March 2020, immigrant women detained at the Dilley, Texas, family detention center litigated against the government: "Plaintiffs allege that since mid-July the number of women and children at Dilley family detention center in Texas who pass the first interview necessary to apply for asylum has dropped from 97% of applicants to fewer than 10%."[75] On August 31, 2020, the U.S. District Court for the District of Columbia issued a preliminary injunction, halting the practice of using CBP officers until the case is fully decided.[76]

If, on the other hand, a person who is arrested by DHS has previously been to the United States and was ordered deported by an immigration judge or deported under expedited removal, she will proceed according to a similar but slightly different process. DHS will reinstate her prior removal order, which, like expedited removal, does not allow her to petition an immigration judge for permanent protection in the United States. However, if she claims fear to return to her home country, she is entitled to an initial screening by the asylum office, called a "reasonable fear interview" (RFI), and the process is essentially the same as the CFI process. One notable difference is that RFI interviews often take longer for the asylum office to schedule. If the person passes, she will be allowed a hearing before an immigration judge. However, she is not eligible to apply for asylum because of her prior deportation order and can only apply for related forms of relief: withholding of removal and/or protection under the Convention Against Torture. These forms of relief have more stringent legal standards than asylum. To pass the RFI, an individual must "credibly establish that there is a 'reasonable possibility' she would be persecuted in the future on account of her race, religion, nationality, membership in a particular social group, or political opinion."[77] A "reasonable possibility" requires her to demonstrate that there is at least a 51 percent likelihood that she will be persecuted, as opposed to the 10 percent likelihood stipulated by the asylum standard.

Screening interviews for both CFIs and RFIs are usually conducted by telephone with an asylum officer through a telephonic interpreter. The asylum seeker has a right to an attorney, but most people do not have attorneys present. The asylum officer asks a series of questions pertaining to the individual's identity, past experiences in her home country, and her fears of returning. The interview is recorded and then later transcribed into English and given to the asylum seeker with the written interview results. This is called the CFI/RFI transcript. If an individual passes the interview, the full asylum court process is initiated, and the individual may be eligible for release from detention. The CFI/RFI transcripts become part of the applicant's official records and are additional documents that attorneys may provide to experts to include in their analyses.

Release from Detention

Once an individual passes her CFI, DHS has broad discretionary authority to release the individual from detention under conditional parole, referred to as release on recognizance, or under a bond.[78] If she is released, she will argue her asylum case before a nondetained court in the jurisdiction where she lives. If she is not released from detention at this point, she can continue the process to argue her asylum case from detention, which is described in the next section.

Conditional parole allows release of an individual from detention without requiring her to pay a monetary bond.[79] However, DHS may place other conditions of release on the individual, such as regular check-ins at DHS offices or GPS ankle monitoring. Parole practices vary widely across detention centers and jurisdictions but are on the decline. DHS has broad authority to parole individuals otherwise subject to detention for "urgent humanitarian reasons or significant public benefit."[80] However, this tool is increasingly ignored, which results in asylum seekers' prolonged detention.[81] DHS also has the authority to release a detained individual from detention under a bond of at least $1,500.[82] In making release determination, DHS is required to consider whether the individual poses a danger to property or people outside of detention and whether the individual is likely to appear for future hearings.[83] However, some DHS field offices have not followed this criteria and have automatically denied all requests for parole.[84] DHS sometimes sets bonds impossibly high—$10,000, $20,000, or $30,000—and many asylum seekers are unable to pay the bond and must remain in detention.[85]

Custody determinations by DHS may be reviewed by an immigration judge (IJ) at any time before a final removal order.[86] If DHS does not issue an initial bond or release under conditional parole, an asylum seeker can ask an IJ to review the decision. The IJ has authority to lower the immigration bond or set an initial bond if no bond was set by DHS. Usually the asylum seeker requests a bond hearing in writing to the immigration court. She can be represented by counsel or represent herself. If DHS or the immigration judge set a bond, it can be paid at a DHS office anywhere in the United States, and DHS usually releases the asylum seeker from custody within a day or two. When she attends her hearings, DHS returns the bond amount, with interest, to the person who paid it. Sometimes people without resources to pay a bond will have a private bail bond company pay for them, resulting in high interest rates or even GPS ankle monitoring by the company.[87]

Certain people are not eligible for release and/or a custody determination review with an IJ. If an asylum seeker is classified as an "arriving alien," which means that she presented herself to immigration officers at an official point of entry, she is not eligible for IJ review.[88] She is reliant on DHS to release her on bond or conditional parole. In addition, people with prior removal orders are not eligible for IJ review of DHS custody determinations. Finally, anyone subject to "mandatory detention" under INA section 236(c)(1) is not eligible for release by

DHS.[89] Mandatory detention applies to people suspected of terrorism and people with certain criminal convictions. In June 2022, the Supreme Court determined that the government is not required to provide bond hearings for immigrants, who thus may be detained indefinitely.[90]

Detained Asylum, Withholding of Removal, and CAT Cases

The full asylum court process for detained and nondetained individuals follows the same basic pattern, but detained individuals experience certain differences that again make their representation more difficult. The first step in the asylum hearing process is a preliminary hearing with an IJ, called a master calendar hearing (MCH). If the individual is detained, the detention center might have a dedicated immigration court to which the individual is escorted for her hearings. More often, however, the facility does not have an in-facility court, and an IJ located in an immigration court outside of a detention center, usually in a large city, conducts the hearing with the asylum seeker by video conference. There is a series of MCH hearings during which the IJ establishes the person's identity, confirms the facts and allegations against her in the Notice to Appear (NTA), and accepts any applications for relief from deportation, such as the asylum application. Once the individual submits her asylum application at an MCH, the IJ schedules the final hearing to decide whether she qualifies for asylum, withholding of removal, or CAT protection.

A detained asylum hearing presents unique challenges to the asylum seeker. First, remote participation in televideo hearings can lead to miscommunications and translation lags. Privacy is also a concern. Because asylum applicants are forced to recount traumatic past experiences, such as rapes and torture, the hearings should be guarded and private and are legally required to be closed hearings. However, in practice, guards and other detained immigrants can sometimes overhear the proceedings due to the poor room quality, and detention staff conversations nearby can interfere with communication between hearing participants. Expert witnesses can testify telephonically in these hearings, but because telephonic testimony is always discretionary, IJs may deny this request.

Another challenge to detained hearings is the speed of the docket. Detained dockets take priority over those for nondetained individuals, and cases progress at relatively rapid paces. This can present real challenges to the asylum applicant and her attorneys to prepare her case in time. Gathering evidence from her home country, obtaining legal counsel, and working with experts takes time. The barriers of being detained makes these tasks even more difficult, given limited or totally restricted access to phones, email, and legal libraries. If an asylum seeker asks the IJ for more time to prepare her case, she is subjecting herself to additional weeks or months of detention, often in inhumane conditions. Asylum applicants are put in the difficult position of balancing their case preparation time frame with the realities of continued or prolonged detention.

Appeals

If an IJ denies asylum, withholding of removal, or protection under CAT, the applicant has thirty days to submit an appeal notice to the Board of Immigration Appeals (BIA). This must be done using a specific legal form in English that is difficult for detained individuals to complete without assistance. If an applicant does successfully appeal the case, she usually remains detained until the BIA issues a decision. DHS is unlikely to reverse its decision to detain the applicant while the BIA considers her appeal. The appeal process could mean months, and sometimes years, of detention. Prolonged detention is a strong disincentive for appeal, and many people give up and accept deportation at this stage. The appeals courts generally do not accept new evidence, so experts are rarely involved at this stage.

In sum, detention work requires flexibility from all parties. There are many variables that can change the timeline of a detained case. The applicant might be released from detention on bond or parole a day before the expert was prepared to testify, and the hearing could be scheduled for months or years later. The applicant might move to another state and change attorneys. A detained hearing might be postponed for weeks or months for no apparent reason. You might call in for testimony at an asylum hearing only to find out that the court failed to schedule the proper interpreter, and the hearing will be postponed. There is little applicants, attorneys, or experts can do to control these situations, so flexibility is key. Plan on unexpected bumps and timeline mishaps when working with detained asylum applicants.

FINAL THOUGHTS

Expert witnesses very often determine the outcome of an asylum, withholding of removal, or CAT case. Your importance cannot be overstated. Immigration judges often rely on expert witness testimony in their written and oral decisions granting relief, and decisions supported by expert testimony are more difficult for DHS attorneys to successfully appeal. This is true in the detained and the nondetained contexts, but the stakes are even higher for the detained applicant: enduring an appeal in DHS custody means being locked away from children and family and being subject to human rights abuses. While representation for detained individuals presents challenges, when experts work through these challenges and provide effective testimony, the applicant is more likely to win freedom. A nationwide list of nonprofit legal organizations, organized by state and immigration court jurisdiction, can be found on the Department of Justice's website, https://www.justice.gov/eoir/list-pro-bono-legal-service-providers. If you are interested in providing expert testimony for detained asylum seekers, you may contact your local nonprofit organizations and national organizations that provide support to local nonprofits, such as the Center for Gender and Refugee Studies and the Detention Watch Network.

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9

Trauma and Support for Asylum Seekers, Legal Service Providers, and Expert Witnesses

Maria Baldini-Potermin

Working as an expert witness is rewarding. However, precisely because it requires delving into the applicant's experience of persecution and torture, it can also be stressful and take an emotional toll on the witness, as it does on the applicant and the attorneys.

For more than thirty-two years, I have worked as a legal service provider with asylum seekers. Secondary trauma and vicarious trauma, long identified as occupational hazards for those working in victim and emergency services, can affect legal service providers who work directly with asylum seekers.[1] Over the years, I have listened to harrowing stories from many applicants who have fled their homes, and witnessing their pain in the retelling of their stories remains with me. To prepare their cases, I must ask questions that force them to relive their traumatic experiences, and I have witnessed their flashbacks and other reactions. The human spirit can be battered by a single act or multiple acts of violence against bodily integrity, as well as extreme mental cruelty and torture, by an individual actor or government-sanctioned actors. Those most harmed are resilient and some of the bravest people I have ever met, as are the attorneys who support their asylum claims and therefore vicariously experience the suffering these migrants have had to endure. After many years, the legal profession has finally begun to recognize and address the secondary trauma that so many immigration attorneys regularly experience.

This chapter outlines the issues that an expert witness may encounter while working with legal service providers on asylum cases. It provides suggestions for self-care and assistance to address concerns that may arise.[2]

TRAUMA IN THE ASYLUM PROCESS

Near the beginning of the COVID-19 pandemic, as the virus spread throughout the United States, the contributors to this handbook and I met for five days at the Women's International Study Center (WISC) in Santa Fe, New Mexico, where we separately and collectively worked on our chapters. Little did we then understand, or could we predict, the trauma that many of us would experience during the pandemic. Throughout 2020, many asylum applicants, their family members, legal service providers, and expert witnesses contracted COVID-19, and several were hospitalized, resulting in additional work to prepare and file motions for continuances and late filings. On top of all this, attorneys have had to struggle to get documents from clients who lack access to computers and face U.S. Postal Service delays. The extended COVID-19 pandemic produced specific challenges that have compounded the increased stress, loss, and anxiety felt across the country and the world.[3]

In March 2020, we had also already endured more than three years of the Trump administration's gutting of asylum and refugee law, defiance of international treaties and due process, and other offenses to human decency. Still ahead of us lay the murder of George Floyd and the demonstrations around the world sparked by his death, with law enforcement attacks on expressions of free speech. We had yet to see the threats against the lives of government officials by other government officials, let alone the attempted overthrow of a legitimate presidential election. All this added heavy burdens to the already difficult work of representing applicants seeking protection in the U.S. to prevent them from being returned to their home or transit countries.

Almost by definition, applicants for asylum have suffered trauma.[4] The American Psychological Association defines trauma as "an emotional response to a terrible event like an accident, rape or natural disaster."[5] Responses to trauma can include shock, denial, unpredictable emotions, flashbacks, strained relationships, and physical symptoms such as headaches and nausea.[6] The majority of asylum applicants have endured persecution and/or torture in their home countries and/or the countries through which they passed en route to the U.S. Those from Mexico and South and Central America may have been victimized by cartels, criminals, and corrupt military and law enforcement officials—both in their home countries and during their travels to the U.S.—and it is the job of the expert witness to help the asylum adjudicator understand each applicant's experience. Expert witnesses analyze evidence of criminal activities and the failure of foreign governments and corresponding institutions to protect applicants for protection in the U.S. and are therefore constantly engaging with the realities and evidence of horrifying patterns of violence and abuse in the countries of origin.

Both attorneys and expert witnesses who offer support for asylum claims can be deeply affected by the violent details of these cases. Legal service providers must submit to the immigration courts complete and accurate applications for relief from

removal. To do this, they interview the applicants and prepare declarations, also referred to as affidavits. They must record often-disturbing specific details in these affidavits to the Asylum Office and the immigration court. For expert witnesses, reviewing the applicant's declaration and conducting extensive country conditions research can also be challenging because of the extreme or pervasive structural violence and impunity that characterizes the applicant's country of origin.

Expert witnesses on country conditions must immerse themselves in studies published by scholarly specialists, nongovernmental organizations, governments, and the media. They then typically review the applicant's affidavit and supporting evidence, which may include medical documents, police reports, psychological evaluations, and statements by friends and relatives. These documents usually contain disturbing information, which can induce secondary trauma in expert witnesses and, in some cases, memories of their own past trauma(s). In short, the violent nature of most asylum cases, along with the realities of stress and compassion fatigue that attorneys and experts may also experience, demand that practitioners develop healthy practices and support networks while they prepare an asylum case, even at its earliest stages.

After reviewing the evidence supplied by the applicant's attorney, the expert witness must then provide their expert opinion on the country conditions, the violence experienced by the applicant, and the likelihood that such persecution would recur in their detailed affidavit. For asylum cases presented and filed affirmatively with the U.S. Citizenship and Immigration Services (USCIS) Asylum Offices, an asylum applicant can file their application initially and provide the expert witness affidavit either before or at the time of the asylum interview. The expert witness may or may not be called to testify in person or telephonically at the interview conducted by the USCIS asylum officer. Unlike state and federal courts, the immigration court requires that the applicant present a detailed written affidavit of the proffered expert witness in advance of the trial. An expert witness will usually be called to testify during the hearing. Live expert witness testimony may be presented in person, telephonically, or via the new Webex video conference platform.[7] Providing testimony presents its own challenges, particularly for expert witnesses who have experienced previous personal trauma that may be triggered by the case in which they are preparing to testify or who are facing other forms of stress.

RECOGNIZING TRAUMA

For academics and others new to the practice of serving as an expert witness, a review of the psychological terms related to trauma, with examples of how these factors may affect expert witnesses, may be helpful.

- **Stress:** An automatic, evolutionarily developed response to an actual or perceived threat. It can be a positive or negative force in a given situation; chronic stress is linked to a plethora of physical and mental illnesses.[8] For

example, a deadline for finalizing an affidavit as an expert witness can cause stress when it conflicts with an academic deadline.

- **Anxiety:** An emotional and physiological response based on a negative mood, apprehension about the future, and physical tension.[9]
  - Example: An expert witness may feel anxiety in the days leading up to the individual hearing at which testimony will be presented and cross-examination will take place before an immigration judge with a very low rate of granting asylum.
- **Burnout/Professional Burnout:** A state of work-related emotional exhaustion, depersonalization, and decreased sense of accomplishment.[10] Burnout decreases adaptivity and lessens one's ability to cope with stress. It can contribute to feelings of hopelessness and depression as well as decreased productivity and empathy with clients.[11]
  - Example: Expert witnesses who contribute to many unsuccessful asylum cases may face burnout.
- **Compassion Fatigue:** Considered a negative effect of empathy in people engaged in helping professions, compassion fatigue resembles secondary traumatic stress and can be combined with burnout.[12]
  - Example: Attorneys can experience compassion fatigue when they focus only on asylum cases in their practices and realize that they cannot alleviate the effects of the trauma that the asylum seekers have experienced.
- **Depersonalization:** Characterized by cynicism, detachment, and a deeper sense of disconnection from clients and loved ones.[13]
  - Example: Expert witnesses can become cynical where they feel that their work as expert witnesses is not valued by their academic institutions.
- **Depression:** A unipolar (one-sided) mood disorder characterized by a sustained sad or "down" mood, decreased positive mood, distress, loss of motivation, low energy and activity, and anhedonia, or the inability to feel pleasure.[14]
  - Example: An expert witness may experience depression when an immigration judge denies an asylum claim and reveals that the expert's testimony was not given what the expert witness believes is appropriate weight.
- **Emotional Exhaustion:** Occurs when emotional resources are depleted by work so that one lacks enough emotional capacity to fulfill their own or the clients' needs.[15] This decreased sense of accomplishment can encompass feelings of professional failure and demoralization.[16]
  - Example: During the Trump administration, many attorneys experienced emotional exhaustion from the relentless attacks on asylum law, on immigration attorneys being labeled "dirty immigration attorneys" by Attorney General Jeff Sessions, and the implementation of the Migrant Protection Protocols (MPP).

- **Post-Traumatic Stress Disorder (PTSD):** Caused by experiencing or witnessing a traumatic event, resulting in cognitive, emotional, behavioral, and/or reexperiencing symptoms.[17] Common PTSD symptoms include flashbacks, emotional numbness, inability to remember aspects of the traumatic event, chronic overarousal, excessive anxiety related to the trigger, and loss of everyday functioning.
  - Example: Attorneys involved in representing asylum seekers subjected to the MPP program experienced PTSD watching their clients be denied and deported to Mexico, where they had already faced sexual assault, kidnappings by cartels, and even murder of other individuals in the migrant camps.
- **Secondary Traumatic Stress (STS):** Shares many symptoms with PTSD, but it is developed through significant vicarious trauma rather than firsthand exposure to trauma.[18] It includes physiological symptoms of a stress response to the trauma, such as avoidance, arousal, and intrusive thoughts.[19]
  - Example: An expert witness may experience secondary traumatic stress in reviewing a detailed affidavit that describes the applicant's account of repeated and brutal violence.
- **Vicarious Trauma (VT):** Cumulative harm to the cognitive schemas, perspective, and mental health of a professional due to exposure to the traumatic experiences of their clients.[20] Vicarious trauma is especially relevant for professionals in the field of immigration law, as on a daily basis they must elicit, listen to, view, analyze, and present evidence of the horrific experiences that occurred to their clients or that their clients fear will happen if they are deported to their home country or country of last habitual residence.
  - Example: An expert witness may experience vicarious traumatization in reviewing the affidavit of an asylum applicant and placing it in the context of deteriorating country conditions in the applicant's home country in their expert witness affidavit.
- **Vicarious Resilience (VR):** A positive psychological process by which individuals learn to adapt and cope with stress in a healthy manner by vicariously experiencing the growth of their clients, resulting in improved confidence, independence, and resilience for helping professionals.[21]
  - Example: Attorneys can experience vicarious resilience when they speak with a client who has left her abusive partner and has been granted asylum.

Virtually every survivor of persecution and torture has experienced trauma. Most commonly, they suffer from a trilogy of depression, anxiety, and post-traumatic stress disorder.[22] The symptoms affecting those who assist them may include some degree of burnout, emotional exhaustion, and compassion fatigue. These in turn can lead to conditions such as secondary post-traumatic stress and symptoms such as anxiety and depression.[23]

Many expert witnesses are intimately familiar with the countries where asylum applicants experienced persecution. For these experts, the drafting of affidavits can be quite difficult since they may be able to visualize the places and situations included in the accounts. In some cases, they may even know personally or have met some of the individuals named. This closeness to the events described increases the likelihood that the expert witness will experience trauma and other psychological harms in the process of reviewing the materials, preparing the affidavit, and testifying to the immigration court. The expert's identification with the applicant may be even greater in the process of writing an analysis of why the applicant's account accords with the conditions in the country and why the applicant may be in danger if forced to return.

At the same time, the very process of immersion in the documentation and writing of the report may itself be therapeutic, particularly if the expert witness identifies as part of the team ensuring that the applicant will, through this painful exercise, finally find safety. It may help to try to envision a hopeful future for the applicant in which she can engage in activities such as seeking education, taking part in worthwhile work, and forming strong relationships.

RELATIONSHIPS OF EXPERT WITNESSES WITH LEGAL SERVICE PROVIDERS

It is not uncommon for an expert witness, having already engaged in the difficult work of reviewing an applicant's declaration, drafted and revised their affidavit, and prepared to participate in the asylum hearing, to find that a hearing is canceled due to the pandemic or to changes in priorities of the Executive Office for Immigration Review (EOIR). The expert witness must then spend more time preparing a supplemental expert witness affidavit and reschedule the individual hearing in what may already be a crowded academic schedule. The cancellation and rescheduling of hearings, and the increased workload they signify for the expert witness, has become exponentially more frequent over the past six years.[24] Since January 2017, the trauma experienced by those who practice immigration law full-time has been extreme as attacks on the asylum system by the executive branch have intensified.[25] The daily changes in policies, procedures, regulations, and precedent decisions that have ostensibly overturned decades of established law have left practitioners on edge as they attempt to frame claims to protect those facing persecution and torture in their home countries.

Experienced immigration legal service providers may often feel helpless. Those who assisted Latin Americans who fled civil wars and persecution in the 1980s and early 1990s see history repeating itself, except that cartels and gangs have taken the place of paramilitary, guerrilla, and insurgent groups. It has been remarked that persecution and torture claims were easier to frame and litigate in the "old days,"

when the political lines were clearly drawn. Burnout among asylum practitioners can happen, along with anxiety and depression. The American Immigration Lawyers Association (AILA) recently released the results of a survey of immigration practitioners regarding vicarious trauma and encourages a call to build resilience among practitioners.[26] Steps to build resilience include trauma time management, education in law school classes and clinics, setting and keeping client boundaries, and creating and using a safety plan or toolbox of behaviors and activities that can be accessed when triggered or following periods of crisis.[27]

Pro bono attorneys and new immigration practitioners who are working on their first asylum case or who have represented applicants in a few cases must learn the ropes of this area of law: in this respect, they face challenges similar to academics who are taking on their first cases as expert witnesses. They often are not prepared for the emotional impact of the direct representation of individuals who have gone through horrific life experiences. They may be solo practitioners and face the challenge of not having colleagues immediately available to talk through case issues.[28] In large firms where competition can exist among attorneys, they may not have the emotional support of colleagues at their same experience level or of their supervising attorneys. Similarly, law students do not always receive training to address the impact that these cases may have on their lives. As expert witnesses often work with law students in clinical or pro bono projects, they should be aware of the struggle that the students and newly licensed attorneys may face. Expert witnesses may face similar struggles as they often work in isolation on asylum cases and cannot discuss the facts with their academic colleagues.

Asylum applicants do not always disclose facts that are important to their claims for protection from deportation. Country conditions expert witnesses can provide the context of the cultural and historical background of the clients and their interaction (or lack thereof) with their families, government officials, and law enforcement and other organizations.

THE NEED FOR SELF-CARE FOR EXPERT WITNESSES AND LEGAL PRACTITIONERS

The work to prepare an asylum case can become very intense at times, especially when the immigration court system changes policies and procedures without advance notice. The workloads of expert witnesses and immigration practitioners may result in tensions when filing deadlines approach. Expert witnesses who are academics also usually have full-time employment. Serving as an expert witness in a case before an immigration court requires an additional time commitment that must be worked into an expert witness's schedule. Cancellation of individual hearings can be quite stressful for expert witnesses, and at times expert witnesses may not be available to testify at the rescheduled hearing.

In addition to the stress of a shifting and demanding workload, asylum expert witnesses, including academics and legal service providers, should be prepared

for the possibility that they may experience vicarious trauma by engaging in this work. According to the psychologists Karen Saakvitne and Laurie Anne Pearlman, those experiencing vicarious trauma can cultivate "awareness of their needs" by paying close attention to how this work affects their emotional state. For those supporting asylum applicants, this might mean keeping a personal record of when and how secondary trauma is experienced more acutely—when reading a declaration or during a hearing—and making specific plans to alleviate or recover from those feelings as they move through a case. Saakvitne and Pearlman also recommend cultivating "balance between work, leisure time, and rest," which, however challenging for those engaged in lifesaving and time-sensitive asylum work, is crucial for sustaining both the work and their own health. Finally, it may be useful for asylum practitioners to cultivate connection—with themselves or with others—through mindful, spiritual, or communal practices.[29]

Sometimes such connections can be found among those offering support to the applicant. Given that legal service providers and expert witnesses are often suffering from similar issues while dealing with the same cases, it makes sense for the expert witness to keep in close touch with the attorneys working on the case. Since it is often difficult or inappropriate to discuss a case with friends or colleagues, it may help to speak with someone familiar with the facts who can provide support and encouragement. The attorney can also update the expert witness on how the applicant is doing. In some cases, it is possible for the expert witness to speak directly with the applicant if both are in agreement and such conversation will be helpful to the presentation of the case before the adjudicator. Where the case is before the immigration court, however, the immigration practitioner may want to consult with other local practitioners regarding the practices and views of the local court and the Immigration and Customs Enforcement (ICE) assistant chief counsel before scheduling the conversation between the expert witness and the applicant.

COVID-19 AND MENTAL HEALTH

The COVID-19 pandemic has had a detrimental impact on mental health globally. The lockdowns, quarantines, shortages, xenophobia, fear of disease, economic downturn, and many losses have increased stress levels for most people. This extraordinary stress has led to heightened levels of anxiety, depression, and trauma, in addition to worsened symptoms in people with preexisting mental illnesses.[30]

Asylum applicants have been forced to remain in Mexico under the Migrant Protection Protocols and the Trump executive orders during the pandemic. Those who are in the U.S. have had to address the impact of the virus on themselves and their family members abroad, including those who have been deported from the U.S. and targeted for persecution and torture in their home countries or a country through which they had transited because they tested positive for COVID-19 on their arrival. COVID-19 may form the basis of a claim for asylum based on

membership in a particular social group or on political opinion. Many have lost family members to the virus and may suffer from survivor's guilt.

Living through a once-in-a-century, ongoing disaster with long-term impacts has been challenging for everyone. On top of managing the everyday challenges inflicted by the Trump administration, attorneys have had to navigate constantly changing regulations, court orders, and, for many, the transition to working virtually while struggling with their ethical obligations to represent their clients when immigration courts have refused to continue hearings until the pandemic has subsided in the U.S. Expert witnesses have also fallen ill with COVID-19 in the midst of preparing their affidavits and their court testimony in asylum cases. In addition, academics have been affected by the additional time required to prepare recorded lectures and conduct classes online instead of in person.

The issues of personal safety and professional responsibility have been a constant struggle for many immigration practitioners who represent asylum applicants, as well as for expert witnesses who engage in this work. For asylum applicants who do not have access to computers and printers during the pandemic, documents are exchanged by mail or in person with their counsel. The USCIS does not permit online filing of asylum applications, and most immigration courts do not have online filing of documentation. Thus counsel are required to prepare their filings on paper, which means leaving their homes to go to their offices, the U.S. Postal Service, and courier locations. For interviews at the Asylum Offices and immigration court hearings and interviews, attorneys face a difficult ethical conflict to either appear telephonically and waive their clients' rights to object to evidence presented during the proceedings or to appear in person and risk their own health and that of those with whom they live and work.

While the need for greater self-care has been exposed by the pandemic, it is not new or substantially different from such needs identified before COVID-19. Minimizing time spent on traditional and social media, establishing boundaries, maintaining social connections in a safe manner, and setting aside time every day for mindfulness are all essential practices for staying grounded during chaotic times. As always, taking care of one's body by sleeping enough, exercising, eating nourishing foods, hydrating, and taking regular breaks from screens help maintain physical wellness, which can affect mental wellness.[31] Understanding when to seek professional help is also key to preventing or catching mental health issues before they worsen.

IMPLEMENTING CHANGE—GETTING HELP

The stigma surrounding mental health is reinforced by toxic cultures embedded in academic institutions, government institutions, and workplaces. Overlooking and neglecting the mental health needs of legal professionals worsens and invalidates the immense challenges they face. In addition, it is necessary to look beyond immigration attorneys and ensure that resources are inclusive of all involved in the process of an asylum case, as interpreters and expert witnesses can experience

vicarious trauma.[32] Changing the way mental health is perceived and eliminating stigma in academia, law firms, and nonprofit organizations will take decades, but change can begin now.

Legal proceedings, especially those related to asylum, are dependent on the presentation of events and ability to recall trauma.[33] As such, it is in the best interest of legal employers to preserve their employees' ability to engage with such material for the best outcome of the client. This means prioritizing the mental health of employees to avoid any negative psychological impact of such work. Employers at law firms and legal research centers can work to foster a supportive, open, and balanced environment, valuing employees as humans and implementing policies that encourage work-life balance, mental health days, and health insurance.

Legal service providers should communicate to expert witnesses any changes in filing deadlines as soon as the changes become known. If the live testimony of the expert witness is critical to the case, they should ascertain the availability of the expert witness prior to accepting a new individual hearing date. As academics may have different course schedules every semester of the academic year and individual hearings are frequently moved to different dates by the immigration courts, consideration of the schedules of all parties must be prioritized.

An expert witness may not be able to continue to serve when a case is rescheduled multiple times by an immigration court, often from a few years to more than a decade. As an expert witness may change the focus of their research over time, they may no longer be the appropriate person to serve as an expert witness for the hearing that is anticipated to be the final hearing. In addition, the expert witness may not have the time available to provide more than one affidavit for a case. Attorneys need to inquire whether the expert witness is available to continue to serve as the expert witness and not assume that the expert witness will automatically do so.

MENTAL HEALTH RESOURCES

Academics serving as expert witnesses can inquire whether their institutions provide mental health resources through their health centers or other providers. The opportunity for cross-departmental collaboration exists as well. Local psychologists and social workers may be willing to donate their time to give presentations about mental health concerns to expert witnesses via Zoom or other platforms.

Research and resources for attorneys and law students may be of interest to expert witnesses. In 2016, the American Bar Association (ABA) in collaboration with the Hazelden Betty Ford Foundation published a report on the mental health of attorneys and law students to address concerns beyond drug addiction and alcoholism.[34] The ABA and additional national organizations created the National Task Force on Lawyer Well-Being to address the issues raised in the report and implement programs for attorneys.[35] In its 2017 report, the Task Force defined "lawyer well-being" as "a continuous process whereby lawyers seek to thrive in

each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others."[36]

Since the ABA report was published, state bar associations and state licensing agencies have moved to require mental health continuing legal education courses for attorneys. These courses help legal service providers fulfill their obligations under the rules of professional responsibility to remain "competent" rather than impaired and possibly incompetent.

State bar associations and licensing agencies have also expanded their Legal Assistance Programs to provide assistance to attorneys and law students who suffer from mental health conditions, such as stress, depression, and anxiety. Colleagues can confidentially report attorneys who could benefit from confidential assistance to address issues that arise in the practice of law.[37]

Expert witnesses may find that a legal service provider is struggling emotionally and mentally with a case involving persecution and torture. Pro bono attorneys, law students, and other attorneys who do not normally handle immigration cases may not realize that their reactions to the facts of an individual case involving severe persecution and torture may be normal, such as becoming tearful, becoming upset with certain judicial or administrative systems, and struggling to express their emotions in a constructive way.

Resources

The resources below may be helpful to expert witnesses who are academics and graduate students.

- The International Society for Traumatic Stress Studies provides resources, guidelines, and research. https://istss.org/home
- The National Association of Social Workers provides a resource center and listings of social workers. http://www.naswdc.org
- The following organizations provide search engines to find therapists:
  - American Psychological Association, https://locator.apa.org/?gclid=EAIaIQobChMIt8rvzcTq7QIVpeHACh0hzAiCEAAYBCAAEgJEdPD_BwE
  - American Family Therapy Academy, https://afta.org/afta-therapist-search
  - Psychology Today, https://www.psychologytoday.com/us/therapists
- Resources for mental health during COVID-19:
  - American Psychological Association, https://www.apa.org/topics/covid-19/local-mental-health
  - American Bar Association, https://www.americanbar.org/groups/lawyer_assistance/resources/covid-19-mental-health-resources
  - U.S. Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html

- The Compassion Fatigue Awareness Project maintains a website with self-tests, speakers, and resources. http://www.compassionfatigue.org/index.html
- U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, "Trauma-Informed Care in Behavioral Health Services," 2014. https://www.ncbi.nlm.nih.gov/books/NBK207201
- The ABA maintains a resources page with links to substantive articles and links to speakers on different topics, including compassion fatigue, depression, mental health, peer support, stress, substance abuse, and wellness. https://www.americanbar.org/groups/lawyer_assistance/resources/speakers_bureau_topic_list.html
- The ABA National Task Force on Lawyer Well-Being has developed a website defining lawyer well-being and produced a report with recommendations, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change." http://lawyerwellbeing.net
- The ABA also maintains links to national resources and state lawyers' assistance programs. https://www.americanbar.org/groups/lawyer_assistance/resources.html
- The American Immigration Lawyers Association has created a new section on its website, Self-Care Center. The Center has links to substantive articles, podcasts, and practice tips on topics that include PTSD, creating a self-care tool kit, work-life balance, secondary trauma, compassion fatigue, and mindfulness.
- The Trauma Stewardship Institute offers online resources and books to address trauma and create a cross-disciplinary movement. Materials are available for downloading and purchase. https://traumastewardship.com/the-trauma-stewardship-institute
- R. Gomez, B. Newell, and S. Vannini, "Empathic Humanitarianism: Understanding the Motivations behind Humanitarian Work with Migrants at the US-Mexico Border," *Journal on Migration and Human Security*, Jan. 20, 2020, https://journals.sagepub.com/doi/full/10.1177/2331502419900764.

CONCLUSION

The role and work of the expert witness may engender stress and trauma precisely because the stakes for the asylum applicant are so high and the violence that a country conditions expert must document is so brutal and pervasive. Expert witnesses need to care for themselves as they engage in this difficult work and give voice to an applicant whose voice may not otherwise be heard. At the same time, they must keep in mind the immense value of their work in saving lives and bringing applicants through a tormented passage to safety and freedom. The applicant, the legal service provider, and the expert witness walk together on the path to justice.

NOTES

1. Sometimes referred to as "compassion fatigue" or burnout, the term "vicarious traumatization" was created in 1996 by Pearlman and Saakvitne to treat helping professionals whose work with trauma victims produced significant negative effects on their functioning and mental health. Karen Saakvitne and Laurie Ann Pearlman, *Transforming the Pain: A Workbook on Vicarious Traumatization* (New York: Norton, 1996).

2. I thank Gail Dreyfuss, a linguistics PhD, for her pro bono efforts on behalf of many applicants for asylum, withholding of removal, and relief under article 3 of the Convention Against Torture. Gail has been fundamental to finding and working with academic and other expert witnesses for my firm's clients. Her support and review of this chapter are very much appreciated.

I also thank Christine Marie Potermin, a sophomore at Northwestern University, who contributed to research and partial writing regarding the psychology terms in this chapter. As my daughter and the daughter of an immigrant, she has experienced trauma and witnessed the impact of the immigration court system on me and close colleagues over the past five years of chaos in the immigration and civil rights arenas. The impact of the Trump administration on the immediate family members of immigration practitioners would be a valuable future research topic.

3. Reid Wilson, "Why 2020 Really Was the Worst Year Ever," *The Hill*, Dec. 27, 2020: "The cascade of terrible trend lines that has marred 2020 is taking a toll on Americans. One in 5 say their mental health is worse now than it was at this point last year, according to a survey by the American Psychological Association, including more than a third of Generation Z. About two-thirds of Americans told researchers they felt nervous, anxious or on edge for at least several days in the last week."

4. The use of the term "asylum" in this chapter also refers to applicants for withholding of removal and relief under Article 3 of the Convention against Torture. 8 U.S.C. § 1231(b)(3) (requiring a demonstration of the probability of persecution to be granted withholding of removal); United Nations Convention against Torture and Other Crimes, Inhumane or Degrading Treatment or Punishment, Article 3, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51 at 197, U.N. Doc. A/Res/39/708 (1984), U.N. Doc. 571 Leg./SER.E/13.IV.9 (1995).

5. American Psychological Association, "Trauma," available at https://tinyurl.com/4jrrtrac.

6. Id.

7. Webex allows an attorney and witnesses to appear by televideo from locations outside of the courthouse. The Executive Office for Immigration Review (EOIR) began to implement Webex in fall 2020 after immigration attorneys and court personnel fell ill and a few died from COVID-19 after having appeared in person before the immigration courts. See AILA New Jersey Chapter v. EOIR, case no. 2:20-cv-09748 (D.NJ.), pleadings, orders, and case history, available at https://www.aila.org/infonet/aila-new-jersey-chapter-v-eoir-7-31-20; EOIR Director James McHenry III, "OPPM 21-03: Immigration Court Hearings Conducted by Telephone and Video Teleconferencing," Nov. 6, 2020, available at https://www.justice.gov/eoir/page/file/1335096/download. Instructions for the use of Webex in immigration court hearings are available at https://www.justice.gov/eoir/page/file/1339071/download. As Webex is implemented in immigration courts across the U.S., the individual courts will issue standing orders regarding appearances by Webex. The standing orders are available on the EOIR Operational Status website at https://www.justice.gov/eoir-operational-status/operational-status-map.

8. American Psychological Association, "How Stress Affects Your Health," 2013, available at https://www.apa.org/topics/stress-health.

9. D. Barlow et al., *Abnormal Psychology: An Integrative Approach* (Boston: Cengage Learning, 2018), 160.

10. J. Newell and A. Gordon, "Professional Burnout, Vicarious Trauma, Secondary Traumatic Stress, and Compassion Fatigue: A Review of Theoretical Terms, Risk Factors, and Preventive Methods for Clinicians and Researchers," *Best Practices in Mental Health* 6:2 (2010): 57–68.

11. E. Gillander, "Bearing Witness to Crime: An Examination of Secondary Traumatic Stress and Vicarious Trauma among Attorneys" (ProQuest Dissertations Publishing, 2018).

12. C. Figley, "Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview," in *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized*, ed. C. R. Figley (New York: Taylor & Francis Group, 1995), 1–20; C. Figley, "Compassion Fatigue: Psychotherapists' Chronic Lack of Self Care," *Psychology in Practice* 58:11 (2002): 1433–41.

13. Id.

14. Id.

15. Id.

16. Id.

17. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 2017, 274.

18. K. Baird and A. Kracen, "Vicarious Traumatization and Secondary Traumatic Stress: A Research Synthesis," *Counselling Psychology Quarterly* 19:2 (2006): 181–88.

19. See Gillander, "Bearing Witness to Crime," n. 9.

20. See Baird and Kracen, "Vicarious Traumatization and Secondary Traumatic Stress," n. 16.

21. See Gillander, "Bearing Witness to Crime," n. 19. Vicarious resilience is a developing concept for those who work in the helping professions. See P. Hernandez, D. Gangsei, and D. Engstrom, "Vicarious Resilience: A New Concept in Work with Those Who Survive Trauma," *Family Process* 46:2 (2007): 229–41.

22. A. Williams and J. va der Merwe, "The Psychological Impact of Torture," *British Journal of Pain* 7:2 (May 2013): 101–6, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4590125.

23. S. Keller, "The Impact Compassion Fatigue Can Play," Anxiety Resource Center, Dec. 23, 2019; "Compassion Fatigue: Symptoms to Look for," *WebMD*, https://www.webmd.com/mental-health/signs-compassion-fatigue#1.

24. For discussions regarding the changes in the asylum system and detention conditions that began under the Obama administration and had an impact on attorneys and other legal assistance providers for asylum seekers, see M. Baldini-Potermin, "A Step Forward and Back: The Border Crisis and Possible Solutions Focused on Fundamental Fairness and Basic Human Rights," *Interpreter Releases* 91:1401 (Aug. 11, 2014); M. Baldini-Potermin, "An Update Regarding the Central American Border Crisis and Executive Action," *Interpreter Releases* 91:2237 (Dec. 15, 2014).

25. M. Baldini-Potermin, "Wild Rides: 1986 and 1996 Immigration Reforms, Their 2017 Execution and Expansion under the Trump Administration, and Hope for the Future," 18-01 Immigration Briefings, Jan. 2018; M. Baldini-Potermin, "The Battle to Protect Those Fleeing Persecution and Torture Intensifies under the Trump Administration," Foreword to *Asylum Case Law Sourcebook*, 20th ed. (Sept. 2020), available at https://static.legalsolutions.thomsonreuters.com/product_files/relateddocs/216787_2020246_05141.pdf.

26. H. Cartwright and A. Rahman, "Vicarious Trauma and Ethical Obligations for Attorneys Representing Immigrant Clients: A Call to Build Resilience among the Immigration Bar," *AILA Law Journal* 2:1 (Apr. 2020).

27. Id.

28. J. Cho, "Lawyer Loneliness: Facing and Fighting 'No. 1 Public Health Issue,'" *ABA Journal*, July 2018.

29. Saakvitne and Pearlman, *Transforming the Pain*.

30. Tedros Adhanom Ghebreyesus, "Addressing Mental Health Needs: An Integral Part of COVID-19 Response," *World Psychiatry* 19:2 (June 2020): 129–30.

31. S. Hiremath, "COVID 19: Impact of Lock-Down on Mental Health and Tips to Overcome," *Asian Journal of Psychiatry* 51 (June 2020): 102088.

32. K. Splevins, K. Cohen, S. Joseph, C. Murray, and J. Bowley, "Vicarious Posttraumatic Growth among Interpreters," *Qualitative Health Research* 20:12 (Dec. 2010): 1705–16.

33. T. Herlihy, "The Psychology of Seeking Protection," *International Journal of Refugee Law* 21:2 (July 2009): 171–92.

34. P. Krill, R. Johnson, and L. Albert, "The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys," *Journal of Addiction Medicine* (Jan.–Feb. 2016).

35. https://lawyerwellbeing.net/about-us.

36. National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, 9, available at https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf.

37. The American Bar Association maintains a webpage with links to the lawyers assistance programs by state: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.

APPENDIX 1

Country Conditions Expert Affidavit/Declaration

The most important contribution of the country conditions expert is to provide the applicant's legal service provider with an affidavit or declaration that responds to the applicant's past harm(s) and/or fear of future harm(s) and relevant conditions in their country of origin. This appendix offers the expert witness guidance and a template for drafting the affidavit or declaration and incorporates information included in part 2 of this volume, "Enhancing Expertise." Experts are encouraged to register with the Center for Gender and Refugee Studies (CGRS) to be added to the Expert Witness Database and to receive opportunities for training and resources for this work.

The report created by a country conditions expert may be referred to by legal service providers and courts as either an affidavit or a declaration. The objectives of the affidavit/declaration are to demonstrate expertise on the country and the harms experienced or feared by the applicant; to explain how the applicant's specific experiences and/or fears of future harm are embedded in and perpetuated by the country's cultural norms and legal system and judiciary practices, as well as the government's inability and/or unwillingness to protect citizens in the applicant's social sector; to substantiate grounds for relief and nexus to harm; and to consider the likelihood that the applicant would be able to avoid harm by relocating within the country. Importantly, declarations are solely the expert's professional opinion. Experts are the sole authors of these documents.

GENERAL GUIDANCE

- All paragraphs should be numbered consecutively throughout the affidavit/declaration.
- The first section is a credentials section. Here an expert should establish the scope of their knowledge and highlight expertise in the specific issues addressed in the

affidavit/declaration. Experts should avoid addressing topics outside of their defined scope of expertise throughout the affidavit/declaration.

- Avoid using legal terminology, even when these words are also used in common parlance. For example, "persecution" is a legal determination of the level of harm experienced by the applicant that can only be made by the immigration judge and, therefore, is a term to be avoided in the affidavit/declaration.
- Avoid exaggeration, such as statements that a particular situation never or always happens, unless that is demonstrably true. For example, even in countries such as those in the Northern Triangle, where impunity for femicide is between 95 and 98 percent, it is not accurate to state that men face no consequences for the murder of women; rather, it is more accurate to state that it is highly unlikely that a man will face consequences for murdering a woman.
- Provide evidence, including examples as relevant, that support your statements. For example, if the country's government does not enforce legal protections for LGBTQ+ persons, include evidence from reliable sources (e.g., U.S. State Department Human Rights Reports; LGBTQ+ advocacy organizations in the home country) and other available examples of harm to individuals and lack of governmental protection.
- Provide citations for all evidence referred to in the affidavit/declaration. Evidence may be cited in footnotes or parenthetically at the end of each numbered paragraph.
- Experts will submit a CV, along with their affidavit/declaration. In the CV, do not include private information, such as home address, private phone number, and marital or citizenship status, because it (like the affidavit/declaration) becomes part of the court record. Avoid entries such as "expert in LGBTQ+ status in X country," because expertise is not a permanent status but is determined on a case-by-case basis by immigration judges.

TEMPLATE

Experts may organize their affidavit/declaration in various ways, but the template below frames information in the order it is normally included in this document. Text suitable for insertion in the expert's document is in boldface; instructions to the expert appear in italics.

Title:
AFFIDAVIT IN SUPPORT OF [Applicant's full name] APPLICATION FOR [*indicate applicant's application(s) here*]*:* ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE [if applicable]

[Date]

I, [your full name]**, declare:**

Section 1: Credentials

Professional Qualifications

1. **Attached to this Affidavit is a true and correct copy of my curriculum vitae.**
2. *Professional title, institution, education (where you obtained your PhD), leadership positions at your institution, affiliations with other departments and programs, and length of time you have engaged in academic study, teaching, field work, and scholarly research on the study of Latin America and your regional and thematic emphases.*
3. *Expert witness history summary. If applicable, indicate the countries and thematic foci of your expertise, number of affidavits submitted/completed, and where your affidavits have been accepted as evidence.*
4. *National/International professional/scholarly status. Leadership in professional associations, appointments to research screening committees by national organizations, such as Fulbright and the National Endowment for the Humanities, and affiliations and consultancies with international institutions and organizations.*
5. *Expertise relevant to the specific Affidavit/Declaration. Based on the expert's research, teaching, and presentations. Include relevant publications and field research (time in country), and awards and fellowships, if applicable. When indicating these factors that demonstrate expertise, it is important to explain how these experiences reflect your knowledge and status as a researcher on the country and thematic focus of the Affidavit/Declaration. Do you teach specific classes that focus on the country? Do you regularly teach courses and give presentations on thematic issues relevant to the case? Have you visited or lived in the country, and do you have affiliations with universities or organizations there? How do your scholarly awards and recognitions reflect how your expertise is relevant to this case?*
6. *Explain how you stay current on country conditions. For example, do you regularly visit the country, read journals and reports from Latin America and/or consult U.S. governmental reports, country-specific reports by UN entities and NGOs? Do you receive regular alerts on the country through Google Alerts, or some other service?*
7. *Explain how you are qualified on the thematic elements relevant to the case. If it is an LGBTQ+ case, for example, indicate the main sources for your research, including, for example, reference to LGBTQ+ organizations in the country. If the case includes gang violence, explain how you keep current on the prevalence and activities of organized crime in the country, including reference to appropriate sources such as InSight Crime, an NGO that focuses on organized crime in the Americas and produces country-specific profiles.*

Section 2: Introductory Information

Scope of Work in Preparation of this Affidavit

In this section, explain who the applicant is and include a general description of the harms experienced or feared by the applicant, along with a brief description of the scope of the research the expert completed in preparing the Affidavit/Declaration. Below are sample paragraphs that provide this information.

8. **I do not know** [applicant's name]**, but I have been asked by her attorney to assist with this case** *or* **I have interviewed** [applicant's name] **and have agreed to assist her attorney in this case. After reading the facts of this case, I agreed to provide expert testimony regarding the risks she faces in** [Country] **as a woman who was subjected to** [*list examples of harmful acts*] **by her intimate partner** [intimate partner's name]. [intimate partner's name] **regularly** [*describe harms*]**. Because of deeply entrenched patriarchal norms in** [Country]**, women and girls face murder, torture, and physical and sexual assault. The** [Country] **government and its official security forces do not protect women and girls from this violence.**
9. **In addition to the research I conducted leading up to my opinion, which is cited below, I reviewed** [*list all personal documents of the applicant you reviewed, such as the applicant's declaration, police reports, psychological evaluations, etc., with the dates of each document*]**.**

Section 3: Information about the Applicant

[Full Name of Applicant]

Some Affidavits/Declarations include a section that describes the applicant and their experiences, based on information from the applicant's Declaration and any other personal documents shared by the legal service provider. This section may be labeled with the full name of the applicant and narrates, in numbered paragraphs, the main elements that form the basis of the applicant's claim(s) for relief. In the last paragraph of this section, you may briefly express your professional opinion, based on the applicant's personal experiences, on the level of risk the applicant would likely face if returned to their country of origin. Below is a sample paragraph concluding this section.

10. **It is my professional opinion that** [applicant's name] **is at elevated risk of egregious physical and sexual abuse and femicide in** [Country] **because**

she defied the authority of [perpetrator] **by** [*list examples of resistance, including fleeing the country*]**.** [Perpetrator] **has threatened to kill** [applicant's name]**, and because he faced no meaningful consequences for his violence, it is unlikely that the government will protect her from him.**

Section 4: Country Conditions Research

The bulk of the Affidavit/Declaration is devoted to the research and evidence that the expert has relied on to form their professional opinion on the likelihood that the applicant would experience harm if returned to their country of origin. The goal is to provide readers (including the immigration judge and the DHS attorney) a clear picture of how the applicant's individual experiences and status reflect general country conditions for others in their societal sector. This research may be divided into subsections that address specific issues relevant to the case. Some experts label each subsection with a declarative statement, which is then supported by the evidence included in that section of the Affidavit/Declaration. Below are some examples of subsection headings for a gender-based violence case.

- [Country] **gender and sexual norms condone violence against women.**
- **Women in** [Country] **experience some of the highest levels of gender-based violence and femicide in Latin America.**
- **Gangs in** [Country] **specifically target women and girls with violence, including murder.**
- [Country's] **protective legislation, penal code, and the judiciary recognize that women are a specific segment of the population that is targeted for violence but do not effectively protect women from gender-based violence.**
- **The** [Country] **government does not protect women from violence.**

Section 5: Professional Opinion/Conclusion

Conclusion

The last section of the Affidavit/Declaration is the conclusion where the expert states their professional opinions about the case, making brief reference to the research included. For example, a lead sentence might read:

- **Given the high levels of violence against women, the continuing high rate of impunity for acts of violence against women, and the government's unwillingness and/or inability to protect women in** [Country]**, as described in this Affidavit, it is my professional opinion that** [applicant's name] **cannot safely return to** [Country]**.**

In the conclusion, the expert should, if possible, provide a professional opinion regarding nexus, the connection between the harm(s) the applicant experienced and/or fears to experience in the future and the perception by the perpetrator(s) of the applicant's social identity. Experts can explain why they believe the applicant was targeted or would likely be targeted in the future, given the particular cultural context and country background. In a gender-based violence case, it may be because she is a woman, because of her status in a domestic relationship, because of her feminist political opinions, and so on.

Because of the frequency with which government attorneys raise this challenge, experts should also, if possible, express their professional opinion on the likelihood that the applicant could relocate within the country to avoid harm. Some factors in this determination may include the small size of the country, the widespread incidence of the harm experienced or feared by the applicant, the ability of the perpetrator to locate the applicant throughout the country, and personal attributes of the applicant, such as low level of education and need for family support and resources. In addition, because the government's decision to return the applicant to their country must be "reasonable," the expert may cite other factors that might make it difficult to return, such as economic and environmental disasters, civil strife, and high levels of general violence.

A final paragraph should summarize the expert's professional opinion on the likelihood of harm that the applicant would face if returned to their home country.

Signature Line:
All Affidavits are signed and dated, once finalized by the expert and the applicant's legal service provider. Below is an example of a signature line.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and capacity.

_____ _____

[Name and Title] [Date]

APPENDIX 2

Elements to Consider in Expert Witness/Legal Service Provider Agreements

Expert witnesses may enter into an informal agreement in which the terms of expert witness service are described in an email exchange or into a formal agreement proffered by the legal service provider, usually in the form of a retainer letter that requires a signature. Some legal service providers have standard agreements, but the expert may negotiate to exclude or include specific provisions. Whether an expert enters into an informal or formal agreement with a legal service provider, the following are provisions to consider.

CONFIDENTIALITY AGREEMENT

Before sharing personal documentation about the applicant with the expert witness (the applicant's declaration, for example), some legal service providers will require the expert to sign a confidentiality agreement. This type of agreement confirms that the expert will keep all information about the case confidential, including any information that is heard, read, or learned about the applicant in the course of providing services as an expert witness.

More often than not, confidentiality agreements are folded into service agreements or the terms outlined in a retainer letter.

Service Agreement/Retainer Letter

- Confirmation of the Parties Involved and the Role of the Parties. This confirmation includes the name(s) of the legal service provider(s) and law firm/organization and the name of the applicant(s) represented by the legal service provider.
- Scope of Expert Witness Service. Services expected from an expert witness usually include conducting relevant research, consulting with the legal service provider, and preparing an expert affidavit and may include preparation with the legal

service provider for testimony and hearing testimony. Depending on the expert's disciplinary methods and comfort level, interviews with the applicant(s) might be included as an expected service. The filing date for the affidavit and the date the legal service provider expects the draft affidavit are often indicated. It is important to clarify the date of the hearing and the mode of testimony, that is, whether the expert agrees to travel to the hearing site or will give testimony telephonically or by video conferencing. Most academic expert witnesses provide testimony telephonically or remotely via Web connection.

- Change in Timeline, Law, or Other Circumstances. A statement that the legal service provider will keep the expert witness informed about any changes in the timeline (filing or hearing dates) may also be included. This statement may include specification that the legal service provider will consult with the expert if a hearing is rescheduled to confirm the availability of the expert on the new date. Postponement of a hearing as well as changes in asylum law or country conditions may necessitate a revised and updated supplemental affidavit, which can mean a significant amount of additional work for the expert. Experts may wish to add a clause that indicates the conditions for preparing additional affidavits, which may include specification that each affidavit requires a separate agreement with the legal service provider and, if applicable, additional compensation. Certainly, if the hearing is postponed one year or more, the capacity of the expert witness to serve may be uncertain, and a new agreement would be necessary.
- Independence Clause. This clause confirms that the expert witness's services are those of an independent expert consultant and that the opinions expressed are solely based on the expert witness's expertise and judgment.
- No Conflicts Clause. This clause confirms that the expert witness is not aware of any conflict of interest that would impede their ability to perform expert witness services, for example, conflict as to the applicant or to the U.S. Department of Homeland Security.
- Expert Fees. This clause indicates that the expert witness agrees to provide services on a pro bono basis or with specified compensation. The sum of the fee should be indicated, as well as the timing of the payment. Usually experts are compensated after the affidavit is finalized and before the immigration hearing. It may be desired to also outline the billing and payment terms as part of the terms of agreement.
- Termination of the Agreement. This clause indicates that the agreement can be terminated at any time, at the discretion of either party, on written notice or with the consent of both parties.

A Note on Correspondence between Attorney and Expert

- It is important to remember that the terms of the service agreement/retainer letter may be changed in correspondence between the attorney and the expert.

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KIMBERLY GAUDERMAN received her PhD in Latin American History at UCLA and joined the University of New Mexico (UNM) Department of History in 1998. She is a 2019–20 recipient of the American Council of Learned Societies (ACLS) Scholars & Society Fellowship, sponsored by the Mellon Foundation. Gauderman is the 2020 Distinguished Feminist Research Lecturer at UNM, awarded by the Feminist Research Institute. Her research focuses on the construction of institutional authority in the early modern and modern periods in Iberia and Latin America and the creation of racial categories, gender norms, and sexuality. She is the author of *Women's Lives in Colonial Quito: Gender, Law, and Economy in Spanish America*. She served as director of the UNM Latin American Studies Program and is a faculty affiliate of the UNM School of Law. Since 2010 she has regularly served as an expert witness, providing country condition affidavits for Ecuador, Peru, and the Northern Triangle of Central America. She has worked with immigration attorneys, nonprofit legal aid organizations, and law students at numerous universities across the nation who support women, members of the LGBTQ+ community, unaccompanied minors, Indigenous persons, and Afro-Latinos who seek asylum in the United States.

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This multidisciplinary volume brings together experienced expert witnesses and immigration attorneys to highlight best practices and strategies for giving expert testimony in asylum cases. As the scale and severity of violence in Latin America has grown in the last decade, scholars and attorneys have collaborated to defend the rights of immigrant women, children, and LGBTQ+ persons who are threatened by gender-based, sexual, and gang violence in their home countries. Researchers in anthropology, history, political science, and sociology have regularly supported the work of immigration lawyers and contributed to public debates on immigration reform, but the academy contains untapped scholarly expertise that, guided by the resources provided in this handbook, can aid asylum seekers and refugees and promote the fair adjudication of asylum claims in US courts. As the recent refugee crisis of immigrant mothers and children and unaccompanied minors has made clear, there is an urgent need for academics to work with other professionals to build a legal framework and national network that can respond effectively to this human rights crisis.

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"It is rare to read a book that has been written with so much heart and so many insights for academics, attorneys, and advocates alike."—**S. DEBORAH KANG,** Associate Professor of History, University of Virginia

"*Practicing Asylum* is a call to action that comes amid an unfolding humanitarian disaster met by a system cruelly stacked against asylum seekers."—**J. T. WAY,** Associate Professor of Latin American History, Georgia State University

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