

FEARING THE UNITED STATES: RETHINKING MANDATORY DETENTION OF ASYLUM SEEKERS

KRISTEN M. JARVIS JOHNSON*

TABLE OF CONTENTS

Introduction	590
I. Striking a Balance Between Refugee Protection and National Security	593
A. United States Regulations Relating to Defensive Asylum, Mandatory Detention, and Credible Fear Interviews	595
B. International Refugee Obligations: Foundations for United States Asylum Law	597
C. National Security and Recent Immigration Policy Changes ...	599
II. The Problem of Mandatory Detention for Asylum Seekers	602
A. Mandatory Detention Penalizes the Persecuted.....	602
B. Case Study: An Injured Somali Refugee Spends Eight Months in Jail Without Medical Attention or Parole.....	606
III. Protecting Refugee Rights While Strengthening Enforcement: Rationale for Changing the System	608
A. Due Process: Deprivation of Liberty Must Have a Rational Basis	609
B. Thorough Credible Fear Hearings Can Lower Risks and Promote Release	613

* J.D. 2007, *magna cum laude*, American University Washington College of Law; B.A. 2002, Interdisciplinary Humanities, *magna cum laude*, Michigan State University. I would like to dedicate this Article to the memory of Daniel C. Learned, an ever-remembered immigration attorney and mentor who patiently instructed me in the foundations of law and immigration, which carried me through three years of law school and beyond. I would like to thank my family, particularly my grandmother, Antonia Marie Jarvis, who I am glad to resemble in all aspects of life. Also, my gratitude goes to Brittney Nystrom with the Capital Area Immigrants' Rights Coalition for her insight and assistance with this Article and her strong resolve to advocate for individuals struggling through the United States immigration system. I also thank Jared Rodrigues, Professor Muneer Ahmad, and the helpful staff of the *Administrative Law Review*.

IV. Comprehensive Reform Emphasizing the Least Restrictive Methods for Monitoring Asylum Seekers.....	615
A. Consistent and Clear Defensive Asylum and Parole Procedures	616
B. Increased Thoroughness of Credible Fear Determinations	618
C. Detention Alternatives	618
Conclusion	619

INTRODUCTION

When asylum seekers arrive at a United States point of entry without valid travel documents or with fraudulent documents, the Department of Homeland Security (DHS) must place them in detention.¹ These “defensive” asylum seekers typically remain in detention while waiting for credible fear interviews and final adjudication of their claims through an adversarial process.² The time asylum seekers spend in detention facilities, which include criminal jails, ranges from several months to several years.³ Although Congress has provided that the United States Attorney General, acting through DHS, may provide parole in limited situations,⁴ DHS rarely grants such parole prior to a finding of credible fear. Similarly, DHS grants

1. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2000) (“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”); 8 C.F.R. § 235.3(c) (2007) (requiring mandatory detention of inadmissible aliens with limited parole opportunities); see also LAWYERS’ COMM. FOR HUMAN RIGHTS, REVIEW OF STATES’ PROCEDURES AND PRACTICES RELATING TO DETENTION OF ASYLUM SEEKERS 119-20 (2002), available at http://www.humanrightsfirst.org/refugees/reports/cntry_rev_02/Full_countryreview.pdf (explaining the difference between asylum seekers who are inadmissible and subject to expedited removal due to invalid travel documents and those who enter the United States on valid documents and later affirmatively apply for asylum); AMNESTY INT’L, UNITED STATES OF AMERICA LOST IN THE LABYRINTH: DETENTION OF ASYLUM-SEEKERS 1-2 (1999) [hereinafter LOST IN THE LABYRINTH] (reporting that not only are asylum seekers detained, but the length and conditions of their detention often violate international standards, including co-mingling with and treatment as criminals). This Article focuses on “defensive” asylum seekers—those who are subject to mandatory detention because they lacked valid travel documents when trying to enter the United States. Affirmative asylum seekers are not generally detained and are outside the scope of this Article. For purposes of this Article, the term “asylum seekers” generally refers to defensive asylum seekers.

2. See 8 U.S.C. § 1229a (2000) (detailing the removal proceeding process, which applies to defensive asylum seekers); 8 C.F.R. § 1240.2(a) (2007) (providing for government attorneys to present the government’s case for removability).

3. See *infra* notes 125-27 and accompanying text.

4. See Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (2000)) (granting the Attorney General discretion to parole inadmissible aliens into the United States for “emergent reasons or for reasons deemed strictly in the public interest”).

parole after a finding of credible fear in a highly unpredictable manner.⁵ These parole decisions are made without reference to formal administrative guidelines and follow vague regulations.⁶

Defensive asylum seekers may escape fears of persecution in their countries of origin only to face fears of imprisonment in the United States. Detaining asylum seekers with legitimate claims, many of whom experienced persecution and wrongful incarceration in their home countries, can cause unexpected and undue trauma at the hands of the U.S. government.⁷ The harshness of mandatory detention in the United States and lack of agency parole regulations often makes the United States a fearful destination, rather than a safe haven for the persecuted.⁸

Stories of unjustifiable detention are frequent. Take, for example, the account of a Somali woman who sought asylum in the United States, arriving with two bullets lodged in her body and suffering from uncontrolled diabetes and high blood pressure.⁹ Her attorney requested parole, informed the government of a local cousin who could support her, and provided refugee identification. Despite these factors, Immigration and Customs Enforcement (ICE) detained the Somali asylum seeker for eight months and provided only basic medical care.¹⁰ When the time arrived for an immigration judge to hear her case, the judge immediately granted her asylum without governmental objection.¹¹

5. See, e.g., Cory Fleming & Fritz Scheuren, *Statistical Report on Detention, FY 2000-2003*, in U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS, 323, 332 (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/ [hereinafter USCIRF ASYLUM SEEKERS] (reporting that after the credible fear hearing, without clear guidelines, release rates vary from 0.5% to 98% at different holding facilities).

6. See 8 C.F.R. § 212.5(b) (2007) (authorizing parole of aliens within the United States under limited circumstances for “urgent humanitarian reasons” or “significant public benefit” where “the aliens present neither a security risk nor a risk of absconding”); LOST IN THE LABYRINTH, *supra* note 1, at 73 (listing the vague standards that exist for guiding officers in granting parole). *But see* HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SEC. 47 (2004), available at http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf [hereinafter IN LIBERTY'S SHADOW] (recommending the promulgation of regulations that provide understandable and realistic methods of obtaining parole, including an appeals process and the ability to sign affidavits testifying to identification).

7. For a discussion of the negative impact of detention on individuals who were traumatized through persecution, see *infra* Part II.A.

8. This Article later discusses how international refugee law prohibits refoulement—forcibly returning refugees to areas where they are likely to be persecuted. See *infra* notes 45-48 and accompanying text.

9. See *infra* Part II.B for the detailed case study.

10. Interview with Brittney Nystrom, Asylum Project Director, Capital Area Immigrants' Rights Coalition, in Washington, D.C. (Jan. 10, 2007); E-mail from Jared D. Rodrigues, Attorney for the Somali Asylum Seeker, to Kristen M. Jarvis Johnson, (Feb. 17, 2007, 13:23:55 EST) (on file with author).

11. See *supra* note 10.

Problems such as this can deter legitimate seekers of asylum. In addition, mandatory detention of asylum seekers implicates violations of international refugee and human rights treaties, including the Convention Against Torture.¹² Deterring refugees from seeking protection in the United States likely violates the principle of non-refoulement,¹³ which has led many nongovernmental organizations to be highly critical of U.S. mandatory detention policies.¹⁴ It also sets a poor example for the international community, which looks to the United States for leadership in setting human rights and civil rights standards. Given the fundamental purpose behind asylum law—to provide refuge for individuals with a credible fear of persecution, in addition to advances in modern monitoring technology—mandatory detention policies deserve legislative and administrative reconsideration.

This Article challenges the current policy and regulations behind mandatory detention for defensive asylum seekers and suggests that Congress and DHS should implement thorough and efficient credible fear interviews, define clear parole guidelines, and use humane detention alternatives. Part I of this Article discusses the failure of current asylum laws and regulations to strike a balance between the United States' international obligations to protect refugees with recent counter-terrorism and national security efforts. Part II of this Article identifies the inequitable burden that mandatory detention places on asylum seekers. Part III explains how detention must serve a rational purpose and how administrative reform of the credible fear review process would justify alleviating harsh mandatory detention requirements. In Part IV, this Article highlights how DHS should focus on clarifying asylum and parole guidelines by increasing the thoroughness of credible fear interviews and providing detention alternatives.

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 11, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (requiring “systematic review” of interrogation and custody procedures for anyone a State Party detains). For a discussion on the legal implications of mandatory detention, see *infra* Part I.B.

13. For an understanding of the principle of non-refoulement, which prohibits forcibly returning an individual to a country where he or she will be persecuted, see *infra* note 45.

14. See AMNESTY INT’L ET AL., COMMON PRINCIPLES ON REMOVAL OF IRREGULAR MIGRANTS AND REJECTED ASYLUM SEEKERS (2005), *available at* <http://www.hrw.org/europe/eu090105.pdf> [hereinafter COMMON PRINCIPLES] (declaring in the preamble that “[t]he undersigned NGOs deplore the increasing use of detention to deter asylum-seekers and migrants. Governments often justify detention as the only way to ensure an effective removal policy”). The declaration was signed by Amnesty International, EU Office; Caritas Europa, Churches’ Commission for Migrants in Europe; European Council on Refugees and Exiles; Human Rights Watch; Jesuit Refugee Service, Europe; Platform for International Cooperation on Undocumented Migrants; Quaker Council for European Affairs; Save the Children; Cimade, France; Iglesia Evangelica Espanola; Federazione delle Chiese Evangeliche in Italia; and SENSOA, Belgium. By deterring or preventing legitimate asylum claims, the United States could be “forcing” an asylum seeker to return to persecution.

I. STRIKING A BALANCE BETWEEN REFUGEE PROTECTION AND NATIONAL SECURITY

Current U.S. asylum policy and regulations subject defensive asylum seekers claiming a fear of persecution to mandatory detention.¹⁵ The immigration regulations do not consider arriving asylum seekers as having legally entered the United States because their request for asylum is a request for admittance.¹⁶ Therefore, having not legally crossed the border, it is debatable whether defensive asylum seekers receive full constitutional protections through the due process of law.¹⁷ In many cases, DHS places asylum seekers in jail or jail-like institutions, alongside convicted criminals.¹⁸

15. This Article includes a detailed discussion of the U.S. regulations subjecting defensive asylum seekers to mandatory detention. *See infra* Part I.A.

16. *See* 8 C.F.R. § 1.1(q) (2007) (defining “arriving aliens” as aliens who arrive at a U.S. port-of-entry and seek entry into the United States, which includes those temporarily paroled in the United States under 8 U.S.C. § 1182(d)(5)(A)(2000)); *see also* 8 U.S.C. § 1225 (2000) (codifying the Immigration and Nationality Act that governs inspection and admission of arriving aliens, including asylum seekers); *Matter of Sanchez*, 17 I. & N. Dec. 218, 220 (Bd. of Immigration Appeals 1980) (reiterating that aliens do not enter, even if paroled into the United States, until they are officially released from custody and admitted into the United States).

17. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (“[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens,” which include liberty rights); *Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001) (drawing a legal “distinction between an alien who has effected an entry into the United States and one who has never entered. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have *once passed through our gates*, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”) (emphasis added) (citations omitted); AM. BAR ASS’N, *DUE PROCESS & JUDICIAL REVIEW* 1 (Feb. 2006) (remarking that the immigration system fails to provide basic due process rights to asylum seekers and immigrants and supporting due process rights for removal hearings and immigration trials), available at <http://www.abanet.org/poladv/priorities/immigration/Due%20Process%20&%20Judicial%20Review.pdf>; *see also infra* note 47 (discussing *Zadvydas* and the due process rights afforded by the U.S. Constitution). *Kim* noted that aliens receive due process of law in deportation proceedings, but this is balanced with the government’s need to detain such aliens during those proceedings. 538 U.S. at 523.

18. *See* USCIRF ASYLUM SEEKERS, *supra* note 5, at 358 (showing that from fiscal year 2000 to fiscal year 2003, the majority of aliens (55%) detained for credible fear hearings were placed in state and local jails, federal prisons, and contract facilities and the remainder (45%) were held in service processing centers); *see also* MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 227-31 (2004) (quoting Superintendent James O’Mara of the Hillsborough County House of Corrections in New Hampshire who stated that most immigration detainees were not allowed educational, work-release, or community-based programs because they were classified as “detained,” which is a higher security classification than many of the criminal inmates). Other accounts from attorneys and immigration officials familiar with the detention system reported that separation of immigration detainees and criminals is impractical, if not impossible.

This creates a paradoxical problem: Those who knock on the door to the United States in search of a place of refuge are greeted with a welcome mat to the criminal corrections system.¹⁹

Ironically, current asylum regulations allow certain asylum seekers, who sneak over the border or enter the United States using fake travel documents, to live freely while having one year to prepare and file their asylum applications.²⁰ In fact, immigration experts attest that the current asylum system can actually diminish national security because it is “dysfunctional.”²¹ “National security, if that is the primary goal of our immigration system, is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher or unattainable standards or blindly treating all foreigners as potential terrorists.”²² Although holding asylum seekers who do not have entry documents may prevent undocumented individuals from entering the United States, increased biometrics, data collection, and thorough screening can eliminate the need for detention while still protecting national interests.

19. Note that asylum seekers are typically claiming to fear persecution that likely involved incarceration and mental or physical abuse, and detention can cause asylum seekers to relive or intensify their fears. *See, e.g.*, PHYSICIANS FOR HUMAN RIGHTS, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 50 (2003), available at <http://www.physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf> [hereinafter FROM PERSECUTION TO PRISON] (reporting in its study of mental and physical effects of detention on asylum seekers that 67% of asylum detainees were incarcerated in their home countries in relation to their persecution, 59% knew a friend or family member who had been murdered, 26% had been sexually assaulted, and 74% reported being subject to torture); *see also infra* notes 75-76 and accompanying text.

20. If an asylum seeker manages to enter the United States unlawfully using false documentation, then she may still apply for asylum under 8 U.S.C. § 1158, regardless of admissibility. *See* 8 C.F.R. § 208.14(c)(1) (2007) (allowing an immigration judge or asylum officer to grant asylum to aliens even if they entered the United States on fraudulent documents or in secret as defined in the Immigration and Nationality Act § 212(a) and 237(a)). *See generally* REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 103-09 (2d ed. 2000) (outlining the affirmative asylum process, which allows unlawful entrants to apply for asylum so long as the INS (now DHS) has not arrested and instigated removal proceedings against them).

21. *See Refugees: Seeking Solutions to a Global Concern: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. 62 (2004) [hereinafter Kuck Testimony] (statement of Prof. Charles H. Kuck) (construing a harsh and confusing asylum system as an impediment to effective anti-terrorism and enforcement efforts).

22. *Id.*

A. *United States Regulations Relating to Defensive Asylum, Mandatory Detention, and Credible Fear Interviews*

U.S. immigration law and DHS regulations place inadmissible aliens into an expedited removal process upon arrival at a U.S. port of entry.²³ This includes asylum seekers who are inadmissible because they lack valid entry documents.²⁴ Aliens subject to expedited removal must be detained, unless granted parole,²⁵ until an immigration judge adjudicates their asylum claims.²⁶ Title 8 of the U.S. Code, § 1225(b)(1)(B) states, “If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum. . . .”

When an alien arrives at a port of entry and claims to fear returning to her country, or appears to have false travel documents during the initial screening process, the screening officers place her into secondary inspection.²⁷ During secondary inspection, an inspection officer will ask questions to determine whether the individual is claiming to fear returning

23. 8 U.S.C. § 1225 (2000); 8 C.F.R. § 235.3 (2007); *see also* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002) (delineating the procedures for expedited removal and detention of inadmissible aliens).

24. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (2000) (“If an immigration officer determines that an alien . . . arriving in the United States . . . is inadmissible under section 1182 (a)(6)(C) or 1182 (a)(7) of this title and the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer . . .”); 8 C.F.R. § 235.3(b)(4) (2007) (noting that the inspecting officer must discontinue the removal process until an asylum officer interviews the alien); *see also* 8 U.S.C. § 1182(a)(7)(A)(i)(I) (2000) (stating that any immigrant “who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document . . . is inadmissible”).

25. For a discussion of parole *see infra* note 32.

26. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (2000) (detailing the credible fear determination procedure where after an asylum officer makes a positive determination, the case is referred for “further consideration of the application for asylum”); *id.* § 1229a(a)(1) (providing the immigration court with jurisdiction to hear removal cases). Because the asylum seeker has already been placed in removal proceedings, even though an asylum officer may make a determination of credible fear, once that determination is made, the case will be referred to an immigration court for determination of removability and the asylum claim. For a detailed explanation of the expedited removal process, including asylum officer determination of credible fear and immigration judge final determination, *see* ALLISON SISKIN & RUTH ELLEN WASEM, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, CRS REPORT FOR CONGRESS, RL33109 (Sept. 5, 2005), *available at* <http://trac.syr.edu/immigration/library/P13.pdf>.

27. 8 U.S.C. § 1225(b)(1)(A)(ii) (2000); *see also* Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in USCIRF ASYLUM SEEKERS, *supra* note 5, at 235-37 (outlining an arriving alien’s entry process into the United States). For a general description of the asylum process for immigrants who lack valid travel documents, *see* Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1045-47 (1999).

to the her country of origin.²⁸ The officer will also make a determination regarding the alien's travel documents. If the alien does not possess adequate entry documents, the officer will initiate expedited removal proceedings.²⁹ In addition, if the inspection officer determines the alien may have a fear of returning to her country, the officer will place that individual in detention while waiting for a "credible fear interview."³⁰ During the credible fear interview, an asylum officer will determine whether the alien has a credible fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."³¹

The law provides for discretionary parole only in limited circumstances, and the regulations provide no guidelines to expand or define these statutory provisions.³² In practice, defensive asylum seekers are rarely released prior to undergoing a credible fear interview.³³ DHS has the authority to grant parole to defensive asylum seekers, but 8 U.S.C. § 1182(b)(5)(A) determines parole on "a case-by-case basis [and allows parole only] for urgent humanitarian reasons or significant public benefit." DHS has not expanded upon or clarified how it grants parole under this

28. See Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in USCIRF ASYLUM SEEKERS, *supra* note 5, at 235-37 (explaining that the "officer is required to ask the arriving alien a series of questions, which are designed to ascertain whether the arriving alien has a fear of immediate return to the home country").

29. See *id.* (remarking how an alien must demonstrate a "'credible fear' of return to his or her home country," or risk being quickly removed from the United States).

30. See 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear as 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").

31. 8 C.F.R. § 208.13(b)(1) (2007); see also Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in USCIRF ASYLUM SEEKERS, *supra* note 5, at 235-37 (explaining that "an alien expressing a fear to return to the immigration inspector must be referred to an asylum officer, who then determines whether that fear is 'credible'").

32. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) tightened standards for parole, removing the Attorney General's ability to grant parole to select refugee populations deemed to be in a state of emergency. Pub. L. No. 104-208, § 602, 110 Stat. 3009-689 (amending 8 U.S.C. § 1182(d)(5)); see also *supra* note 6 and accompanying text regarding the lack of regulatory guidelines for granting parole.

33. See Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Abroad: *United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 89 n.66 (citing Karen Musalo et al., *The Expedited Removal Study Releases Its Third Report*, 77 INTERPRETER RELEASES 1189, 1190 (2000)) ("Once an applicant establishes a credible fear of persecution and is referred to an immigration judge, she is no longer in expedited removal proceedings and is eligible to apply for parole from detention."); see also USCIRF ASYLUM SEEKERS, *supra* note 5, at 330 (finding an average detention time of sixty-four days before an asylum officer conducts a credible fear interview with an asylum seeker).

code.³⁴ Additionally, after undergoing a credible fear interview, asylum seekers have disparate chances of receiving parole depending simply upon their port of entry.³⁵

During the credible fear interview, if the asylum officer, through careful examination, determines the alien claiming asylum has a credible fear of persecution, then detention serves little valid purpose.³⁶ To the contrary, detention can cause harm to aliens who experienced persecution in the forms of mental or physical violence and incarceration.³⁷ In the case of detained asylum seekers found to have a credible fear of persecution, Congress should consider whether detention serves any reasonable goal, and DHS should develop clear standards for paroling such asylum seekers.

B. International Refugee Obligations: Foundations for United States Asylum Law

The United States' international obligations under the 1951 Convention³⁸ and the 1967 Protocol³⁹ form the basis of U.S. asylum law when it relates to the status of refugees.⁴⁰ These treaties codify international consensus on providing refuge for humans who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. . . ."⁴¹ The international community agreed to protect refugees based on recognition of universal

34. See *supra* note 6 and accompanying text.

35. For more detailed information on discretion and statistics regarding parole release rates, see *infra* Part IV.A.

36. For a more thorough discussion of why thorough interviews would lessen the need for detention, see *infra* Part III.B.

37. See *infra* Part II.A.

38. Convention relating to the Status of Refugees art. 1(A)(2), July 28, 1951 [hereinafter Refugee Convention].

39. See Protocol Relating to the Status of Refugees art. I.2, Oct. 4, 1967 [hereinafter 1967 Protocol] (removing date limitations on the definition of "refugee").

40. See United States Citizenship and Immigration Servs., *Asylum Overview*, <http://www.uscis.gov/> (follow "Services & Benefits" hyperlink; then follow "Humanitarian Benefits" hyperlink; then follow "Asylum" hyperlink; then follow "Overview of Asylum" hyperlink) (last visited June 24, 2007) (noting additionally that U.S. asylum law is rooted in the 1948 Universal Declaration of Human Rights' concepts that recognize persecution as a problem and declare in Article 14 that all humans have the right to seek asylum from such persecution); see also Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention* 17 AM. U. INT'L L. REV. 1131, 1132 & n.5 (2002) (identifying the 1951 Refugee Convention, as amended by the 1967 Protocol, as the "most significant" multilateral treaty governing states' obligations to hear asylum claims).

41. Refugee Convention, *supra* note 38, art. 1(A)(2); 1967 Protocol, *supra* note 39, art. I.2; see also LOST IN THE LABYRINTH, *supra* note 1, at 86 (noting that the same international agreements that condemn return of asylum seekers to hostile countries also "require that the detention of asylum-seekers should normally be avoided" and if necessary should be demonstrated "by means of a prompt, fair individual hearing before a judicial or similar authority").

human rights,⁴² particularly fundamental rights to life and liberty.⁴³ Protecting such rights is the purpose and ultimate policy goal that U.S. asylum laws aim to achieve. The U.S. government must carefully preserve those rights.⁴⁴

The United States must not only protect refugees, but it also must not take actions that would impose penalties or deter refugees from seeking asylum.⁴⁵ Article 31 of the Refugee Convention proscribes state penalization of refugees who enter a territory to escape threats on their lives, even if the refugees enter without authorization. Under its international treaty obligations, the United States must (1) hear asylum claims and respect the principle of non-refoulement, which prohibits returning an asylum seeker to a country where she faces persecution,⁴⁶ and (2) respect international human rights by treating asylum seekers at and within U.S. borders with dignity and allowing them freedom of movement.⁴⁷ If mandatory detention deters refugees from entering the

42. See, e.g., CHRISTINA BOSWELL, *THE ETHICS OF REFUGEE POLICY* 27 (2005) (discussing the progression of international recognition of refugee rights and the development of the 1951 Convention, which was “clearly based on a universalist theory of human rights”).

43. See *id.* (affirming that “[t]hose party to Convention were obliged not to expel or send refugees back to countries where their ‘life or liberty’ would be at risk, thereby establishing the right to *non-refoulement*”); Universal Declaration of Human Rights art. 3, Dec. 10, 1948 (mandating that “[e]veryone has the right to life, liberty and security of person”). Article 14 of the Universal Declaration of Human Rights also states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” The United States has continued to enter into obligations that guarantee refugee rights, including the Convention Against Torture and the International Covenant on Civil and Political Rights, *entry into force* Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

44. See LOST IN THE LABYRINTH, *supra* note 1, at 85 (prioritizing state preservation of human rights, including the right to seek asylum, in immigration laws designed both to adhere to international refugee and human rights commitments and also to guard the state’s security and national population).

45. See Refugee Convention, *supra* note 38, arts. 26, 31-33 (mandating that states shall allow refugees freedom of movement, shall not penalize refugees for entering unlawfully in order to seek asylum, and shall not return (“refoul”) refugees whose lives and freedoms are threatened by such return); United Nations High Commissioner for Refugees, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 1999, Guideline 3, available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> [hereinafter UNHCR *Guidelines*] (prohibiting detention in order to discourage asylum seekers); ICCPR, *supra* note 43, art. 9 (prohibiting arbitrary detention); Convention Against Torture, *supra* note 12, art. 11 (requiring that states systematically review procedures and policies relating to “arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment”).

46. See, e.g., Refugee Convention, *supra* note 38, art. 33 (principle of non-refoulement); Convention Against Torture, *supra* note 12, art. 3 (principle of non-refoulement); Langenfeld, *supra* note 27, at 1055-56 (1999) (describing how United States obligations require “that a country not return (in French, *refouler*) a refugee to his home country when the refugee would be persecuted or killed upon return,” meaning that the United States must at least hear asylum claims to provide temporary refuge, not necessarily permanent asylum).

47. See, e.g., ICCPR, *supra* note 43, preamble and art. 9 (conforming with the Universal Declaration of Human Rights, protecting individual liberty and security, and prohibiting arbitrary arrest or detention); Convention Against Torture, *supra* note 12, art. 16

United States to seek asylum, then the United States risks violating its obligations to hear asylum claims.⁴⁸ Similarly, detention that serves no reasonable purpose, or is excessive in nature, risks violating international obligations to protect liberty, dignity, and freedom of movement.

C. National Security and Recent Immigration Policy Changes

Recent events of terrorism within the United States and concerns over immigration policy distract from refugee protection, which polarizes asylum policy between protection of fundamental human rights and protection of national interests.⁴⁹ Protection of the nation, especially in light of recent terrorism, remains a vital interest. However, it should not result in asylum laws that overlook or trivialize fundamental rights. Although effective protection of national security requires border security,⁵⁰ balance is necessary and enforcement efforts cannot disregard human rights and refugee protection obligations.⁵¹

(requiring states to prevent acts of “degrading treatment”). Degrading treatment plausibly includes placing legitimate asylum seekers who have faced real persecution in jail for extended periods of time and alongside criminal convicts. *See* U.S. CONST. amend. V (requiring due process of law to protect security of life, liberty, and property); Universal Declaration of Human Rights, arts. 6-7 (“[6] Everyone has the right to recognition everywhere as a person before the law. [7] All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”); Langenfeld, *supra* note 27, 1057-59 (describing due process protections afforded to immigrants). *But see* *Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001) (holding that the Due Process Clause only applies to aliens who have officially entered the United States and not to those not yet admitted or paroled into the United States).

48. ICE has reported that it uses detention to deter certain asylum seekers. *See* Bill Frelick, *US Detention of Asylum Seekers and Human Rights*, MIGRATION INFO. SOURCE, Mar. 1, 2005, <http://www.migrationinformation.org/Feature/print.cfm?ID=296> (reporting the ICE response to the U.S. Commission on International Religious Freedom’s report on asylum seekers in expedited removal as stating, “Aliens who arrive by boat are subject to a national policy of continued detention post-credible fear in order to deter others from taking the life-threatening boat trip and ensure our maritime defense assets are not diverted from their national security mission”); *see also infra* note 71 (discussing reports of cruel detention conditions).

49. *See* BOSWELL, *supra* note 42, at 6-7 (noting that the debate on refugee protections is “polarised around two apparently incompatible perspectives” of refugee protections and “national economic, strategic, and social goals”); *The Need for Comprehensive Immigration Reform: Strengthening Our National Security: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Hon. Asa Hutchinson) [hereinafter Hutchinson Testimony] (underscoring the heightened focus on national security post 9/11); *cf.* Kuck Testimony, *supra* note 21, at 62-65 (discussing the historic role of the U.S. refugee program as a tool to promote freedom and democracy and highlighting the undefined role of the current refugee system).

50. *See* Hutchinson Testimony, *supra* note 49, at 6 (asserting that “in order to be effective in the war against terrorism, our Nation must be able to secure its borders”).

51. Current refugee admittance statistics in the United States show a drastic decline after September 11, 2001. Kuck Testimony, *supra* note 21, at 61. The asylum admittance rate has declined, but not as sharply as the refugee numbers. Jeanne Batalova, *Spotlight on*

After the terrorist attacks of September 11, 2001, U.S. immigration policy came to the forefront of congressional and executive attention. Increased homeland security and anti-terrorism efforts led to changes in law and policy.⁵² In the immediate aftermath of September 11, congressional actions such as the USA PATRIOT Act⁵³ closed public immigration hearings of special interest cases,⁵⁴ tightened detention policies,⁵⁵ and heightened efforts towards stringent border controls.⁵⁶ The House and Senate passed many proposals relating to travel restrictions, including an increase in using and developing biometric data,⁵⁷

Refugees and Asylees in the United States, MIGRATION INFO. SOURCE, Aug. 1, 2006, <http://www.migrationinformation.org/USFocus/display.cfm?ID=415>.

52. See RICHARD PEÑA, ABA COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES 4 (2006) (reviewing reports that ICE detention and enforcement activities after 9/11 were highly reactive and often unreasonable); Bill Frelick, *supra* note 48 ("The issue of detaining asylum seekers has recently risen on the US political agenda Members of Congress have introduced [terrorism-related security measures in their] legislation both to limit grounds for asylum, arguing that terrorists use the asylum system to gain a foothold in the United States, and to expand detention of aliens, including asylum seekers.").

53. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 272 U.S.C.). See generally Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT Act*, 55 STAN. L. REV. 1419, 1420-21 (2003) (scrutinizing the constitutionality of Section 412 of the Patriot Act's requirement to mandatorily detain "certified" aliens).

54. See USA PATRIOT Act § 412 (allowing the Attorney General discretion to take suspected terrorist aliens into custody); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 199 (3d Cir. 2002) (defining "special interest cases" as those that the Attorney General identified as potential terrorist cases after September 11, 2001); *War on Terrorism: Immigration Enforcement Since September 11, 2001, Hearing Before the Subcomm. on Immigration, Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 32 (2003) (statement of Laura W. Murphy and Timothy H. Edgar, ACLU Washington National Office) ("The detentions and deportations of immigrants deemed 'special interest' to the government were accomplished under an unprecedented veil of secrecy."); Press Release, Human Rights First, *Supreme Court Allows Secret Deportation Hearings To Stand* (May 27, 2003), http://www.humanrightsfirst.org/media/2003_alerts/0527.htm (drawing attention to the holding in *North Jersey Media Group, Inc. v. Ashcroft* as potentially jeopardizing basic civil liberties by allowing the Chief Immigration Judge Michael Creppy's instructions to bar the public from "special interest cases"); DOW, *supra* note 18, at 22-24 (noting that after September 11, 2001, "[i]mmigration hearings, traditionally open to the press and to the public, were closed in the so-called special interest cases").

55. See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-65 (2002) (presenting a grim picture for immigrants placed in detention after September 11, 2001 who were subject to arbitrary detention often without having any formal charges against them for over a month and whose hearings were kept secret from the public and press).

56. See USA PATRIOT Act §§ 401-403, 405, 411-418 (placing greater protections on border security).

57. Biometric data increases particularly focused on documenting non-U.S. citizens. See MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, 9/11 COMMISSION: CURRENT LEGISLATIVE PROPOSALS FOR U.S. IMMIGRATION LAW AND POLICY, CRS REPORT FOR CONGRESS 3-4 (2004) (proposing a "hastening of the development and installation of a biometric entry and exit data system that is integrated with various databases and data systems that process or contain information on aliens").

securitizing travel documents, and inspecting fraudulent travel documents at airports in foreign countries.⁵⁸

Many recent immigration reforms specifically target asylum seekers and issues of detention. The 2004 Intelligence Reform and Terrorist Prevention Act authorized construction of up to 40,000 additional detention bed spaces, nearly twice the current average daily detainee bed space.⁵⁹ This could potentially increase detention costs by \$3.2 million per day.⁶⁰ The immigration reform bills of 2005 and 2006 proposed provisions that could allow the Department of Justice (DOJ) to prosecute asylum seekers for carrying false passports.⁶¹ House Resolution 4437 proposed returning asylum seekers to their country of origin, presumably where they experienced persecution, while any appeals were pending in federal court.⁶² It also proposed to expand expedited removal procedures.⁶³ U.S. Citizenship and Immigration Service's (USCIS) Ombudsman, Prakash Khatri, recommended limiting affirmative asylum to those with valid immigration status, which represent only five to ten percent of the total affirmative asylum applicants.⁶⁴ These attempts to further restrict asylum availability and to create additional complications within an overly

58. *See id.* (proposing, among other things, improvements of “the security of passports and other travel documents,” expansion of “pre-inspection programs in foreign countries and assistance to air carriers at selected foreign airports in the detection of fraudulent documents” and improvement of “the security of the visa issuance process by providing . . . greater training in detecting terrorist indicators, terrorist travel patterns and fraudulent documents”).

59. During the first two quarters of FY 2004, the average daily detainee rate for the Department of Homeland Security was 22,812 non-citizens. *See* ALISON SISKIN, 9/11 COMMISSION: IMMIGRANT-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, CRS REPORT FOR CONGRESS 12 (2004); 9/11 COMMISSION: IMMIGRANT-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, CRS REPORT FOR CONGRESS 12 (2004)

60. This figure is the total increase in detention costs if the beds were filled at the approximate \$80 per detainee, per day cost. *Id.* at 13.

61. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 213 (2d Sess. 2005); *see also* Human Rights First, *The U.S. Immigration Reform Debate: Senate Immigration Bill Passes, But Puts Refugees at Risk*, http://www.humanrightsfirst.org/asylum/asylum_12_reform.asp (last visited June 30, 2007) (discussing the problematic sections of H.R. 4437 as well as Senate bill S. 2611 passed in 2006). This sort of highly reactive provision reaches near absurdity when considering that many legitimate asylum seekers escape life-threatening situations that often leave them with no choice but to use false travel documents.

62. H.R. 4437 § 407.

63. *Id.*

64. Letter from Dr. Emilio T. Gonzalez, Director, U.S. Citizenship & Immigration Serv., to Prakash Khatri, U.S. Citizenship & Immigration Serv. Ombudsman (June 20, 2006), <http://www.humanrightsfirst.info/pdf/06721-asy-uscis-resp-omb-rec-2324.pdf> (responding to USCIS Ombudsman Khatri's recommendation to limit USCIS adjudication of asylum applications). Khatri also proposed eliminating USCIS expedited decisionmaking, thereby placing all asylum seekers with invalid immigration status in removal proceedings to be heard by immigration judges. *Id.*

complex asylum system do not place immigration restrictions aimed at national security protection in balance with U.S. obligations to protect the persecuted.

II. THE PROBLEM OF MANDATORY DETENTION FOR ASYLUM SEEKERS

Legitimate asylum seekers have faced traumatic, life-threatening situations; yet, U.S. asylum laws and regulations continue to require mandatory detention. Those who are granted asylum often report that they felt degraded and treated as criminals while they were in detention. The question must be raised: If detention is failing to serve any rational purpose, such as containing serious flight risks or criminal threats, then why does U.S. law continue to demand that asylum seekers be locked up? In most cases, not only do the laws appear to serve little valid purpose, they impose additional and severe burdens on many legitimately traumatized asylum seekers.

A. Mandatory Detention Penalizes the Persecuted

Numerous problems arise from mandatory detention of asylum seekers, presenting a compelling case for rethinking current asylum detention laws and regulations. Take for example, Marie Jocelyn Ocean, who was ultimately granted asylum to escape violent persecution in Haiti for her political opinions. Upon arriving in the United States, she was “thrown in jail” and treated like a criminal.⁶⁵ Initially she was locked in a hotel room with three other women for two months and allowed to “breathe fresh air” on only four days.⁶⁶ Once she was transferred to jail, guards strip-searched her and, at night, they would wake her up by banging flashlights on doors, which often caused her to relive trauma she had experienced in Haiti.⁶⁷ Relative to the detention of other asylum seekers, Marie’s detention period was rather short: a mere five months.⁶⁸

Marie’s story is too common; many asylum seekers are treated like criminals. Often, prison and jail guards do not know the difference between immigrant detainees and those incarcerated for criminal punishment.⁶⁹ This is contrary to the United Nations High Commissioner

65. *The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 83-85 (2002) (statement of Marie Jocelyn Ocean, Haitian Asylee and Former INS Detainee).

66. *Id.*

67. *Id.*

68. *See id.* (describing the conditions of her detention from December 2001 to May 2002).

69. *See, e.g.*, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2006: RIGHTS AND RISKS 103 (2006) [hereinafter WORLD REFUGEE SURVEY] (reporting commingling of criminal and asylum detainees who were held for an average of ten months and up to 3.5 years); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, REPORT TO

for Refugees (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, which prohibit commingling of detainees and criminal convicts.⁷⁰ Even separate detention facilities seem prison-like and are often overcrowded.⁷¹ Detainees are commonly physically abused or restrained, which has led to desperate attempts to return to the dangerous conditions in the detainee's home country and even suicide.⁷² Poor detention conditions compound the trauma that legitimate asylum seekers have already experienced from persecution in their home countries.⁷³

The prison-like conditions and criminal-like treatment of asylum seekers are deterrents to those seeking asylum in the United States. Many asylum seekers could easily perceive the detention system as penalizing them for attempting to seek refuge in the United States.⁷⁴ Two prevalent considerations emerge to question the policy of detaining asylum seekers alongside of criminal convicts in jails and prisons.

CONGRESS: DETAINED ASYLUM SEEKERS, FISCAL YEAR 1999 5, available at <http://www.immigration.com/newsletter1/fy99reportasylumseeker.pdf> (reporting an average of 145.1 days of detention for detained asylum seekers; it is unclear whether this number includes the time spent in detention before the credible fear interview); LOST IN THE LABYRINTH, *supra* note 1, at 48-51 (expressing concern that guards are often unaware that the detainees are asylum seekers, will treat detainees as if they pose a security threat, and will commonly limit access to legal counsel).

70. See UNHCR *Guidelines*, *supra* note 45, Guideline 10(iii) (recommending that criminal facilities should rarely be used in lieu of separate immigration detention centers).

71. See *The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 65 (2002) (statement of Cheryl Little, Executive Director, Florida Immigrant Advocacy Center) [hereinafter Little Testimony] (remarking that the Krome Service Processing Center in Florida was holding 800 detainees in May 2002 when the total capacity was limited to 538); CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES 15 (Aug. 2000) [hereinafter THE NEEDLESS DETENTION], available at <http://www.cliniclegal.org/Publications/AtRisk/atrisk4.pdf> (noting that in recent years the population at the Krome Service Processing Center has risen from 300 to over 600). The problems and allegations of "sexual molestation, harassment, and even rape" at Krome were so extensive that many female Haitian asylum seekers were transferred to a maximum-security jail where they were verbally abused by the guards, locked into cells, and bereft of proper nutrition and healthcare. Little Testimony, *supra*, at 6-7.

72. See, e.g., WORLD REFUGEE SURVEY, *supra* note 69, at 103 (citing specific examples of beatings and suicide attempts at Passaic County jail in New Jersey); LOST IN THE LABYRINTH, *supra* note 1, at 22 (reporting on the handcuffing and shackling of asylum seekers); THE NEEDLESS DETENTION, *supra* note 71, at 3, 6-10 & n.32 ("For certain asylum-seekers, detention can evoke and even mirror the conditions they fled.").

73. See, e.g., Langenfeld, *supra* note 27, at 1050-51 (1999) (emphasizing the "stressful conditions . . . that aggravate the trauma already experienced by asylum-seekers before arriving in the United States").

74. See U.N. High Comm'r for Refugees, Div. of Int'l Protection Servs., *Legal and Protection Policy Research Series: Alternatives to Detention of Asylum Seekers and Refugees*, ¶ 15, U.N. Doc. POLAS/2006/03 (Apr. 2006) (prepared by Ophelia Field) (explaining that associating asylum seekers with criminals and using criminal incarceration methods could amount to a penalty for asylum seekers and refugees); see also *supra* note 48 and accompanying text.

First, mandatory detention poses significant risks of intensifying trauma already experienced by asylum seekers with legitimate claims of persecution.⁷⁵ The psychological impact of detention can be devastating to many asylum seekers who are experiencing anxiety, depression, and post-traumatic stress disorder.⁷⁶ A harrowing report by the United Nations revealed that DHS regularly uses handcuffs, belly chains, and leg restraints.⁷⁷ DHS also conducts occasional strip searches of asylum seekers at entry ports.⁷⁸

Second, mandatory detention of asylum seekers, if it amounts to a penalty, violates article 31(1) of the 1951 Refugee Convention and sets a poor example within the international community for upholding international obligations and commitments to preserve human and civil rights.⁷⁹ The United States initiated world leadership in developing and promoting the International Covenant on Civil and Political Rights

75. Even if an asylum seeker does not meet the criteria for asylum, this does not indicate that he or she was not traumatized. For example, many victims of gang violence do not meet the asylum criteria of persecution “on the account of race, religion, nationality, membership in a particular social group, or political opinion.” See generally 8 C.F.R. § 208.13(b)(1) (2007). To confine such individuals to criminal prison settings may still create undue trauma. For a discussion on the mental and physical consequences that poor detention standards have on asylum seekers, see generally FROM PERSECUTION TO PRISON, *supra* note 19.

76. See FROM PERSECUTION TO PRISON, *supra* note 19, at 55-57.

[The] study team documented extremely high levels of anxiety, depression and post-traumatic stress disorder (PTSD) among the sample of detained asylum seekers interviewed. . . . Although many of the detainees had suffered substantial pre-migration trauma . . . the large majority said that their symptoms grew much worse while in detention. In fact, the levels of anxiety, depression, and PTSD observed in this sample of detained asylum seekers were substantially higher than those reported in several previous studies of refugees living in refugee camps

Id.

77. See Rachel L. Swarns, *Threats & Responses: Immigration; U.N. Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, N.Y. TIMES, Aug. 13, 2004, at A11 (reporting on a confidential U.N. report conducted in cooperation with DHS that also found an incident where officers had sexually and racially mocked a Liberian asylum seeker who was subject to a strip search). The U.N. report additionally noted that officers initially screening asylum seekers “discouraged some from seeking political asylum and often lacked an understanding of asylum law.” *Id.*; see also THE NEEDLESS DETENTION, *supra* note 71, at 13-14 (citing specific examples of substandard detention conditions and officer abuse).

78. See Swarns, *supra* note 77.

79. Refugee Convention, *supra* note 38, art. 31(1); see Field, *supra* note 74, at ¶ 15 (stating that because Article 31(1) of the Refugee Convention has been interpreted to mean that entering a country for asylum reasons is not an unlawful act, “restricting [asylum seekers’] freedom of movement . . . could amount to a penalty within the meaning of article 31”); see also LOST IN THE LABYRINTH, *supra* note 1, at 70-71 (discussing the ICCPR in relation to U.S. asylum detention standards). A possible third problem with mandatory detention is violation of the Convention Against Torture. The Convention Against Torture proscribes using degrading treatment towards humans, and disregarding the trauma that legitimate asylum seekers have experienced by placing them in criminal jails, which could possibly amount to such degrading treatment. See Convention Against Torture, *supra* note 12, art. 16.

(ICCPR), which specifically condemns the arbitrary or unlawful deprivation of liberty.⁸⁰ Although detention of asylum seekers has not been found to be arbitrary per se, if the asylum seekers cooperate with immigration officials and are unlikely to abscond, then detention appears to violate ICCPR Article 9.⁸¹

Detention conditions, however, are merely the start of a laundry list of problems arising from mandatory detention of asylum seekers.⁸² When placing asylum seekers in detention, the government confiscates their documents, which interferes with asylum seekers' ability to prepare an asylum case to present before an immigration judge. With respect to detention facilities, the remote rural locations, limited visiting hours, and frequent transfers impede access to attorneys and medical and psychological evaluations, which are often necessary to document persecution and treat trauma.⁸³ In fact, off-site psychological or medical examinations are often more difficult for asylum seekers to obtain than criminal inmates because the asylum seekers must get ICE permission rather than the jail's permission. Because ICE officials only make periodic visits to detention facilities, delays occur in receiving approval for necessary examinations.⁸⁴ The list goes on, but the problems could easily amount to an overall message to asylum seekers not to seek refuge in the United States, which contradicts international refugee standards.⁸⁵

80. See ICCPR, *supra* note 43, art. 9 (identifying the right to liberty and prohibiting arbitrary and unlawful detention).

81. See Field, *supra* note 74, ¶¶ 21-32 (postulating factors for determining whether detention is arbitrary and citing *A v. Australia*, HRC Case No. 560/1993, an Australian case assessing whether detention of asylum seekers violated ICCPR Article 9).

82. Amnesty International reported the following complaints from asylum seekers during a study of detention facilities in 1997: (1) unfamiliarity with asylum law and infrequent or no access to lawyers or other guidance; (2) poor communication abilities both linguistically and physically with limited phone access; (3) isolation, particularly in rural detention centers; (4) commingling with and fear of criminal convicts; and (5) frequent transfers, resulting in confusion and impeding attorney access. See *LOST IN THE LABYRINTH*, *supra* note 1, at 39-50.

83. Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007) (on file with author); see also *LOST IN THE LABYRINTH*, *supra* note 1, at 44 (1999) (describing the negative experience of a Ugandan asylum-seeker).

84. Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007).

85. See UNHCR *Guidelines*, *supra* note 45, Guideline 3(iv) (stating that detention should not be used as a punishment for illegal entry into the country, a dissuasion from bringing claims, or a deterrence for future asylum seekers); see also Frelick, *supra* note 48 (discussing the UNHCR Guidelines relating to the current U.S. detention system).

B. Case Study: An Injured Somali Refugee Spends Eight Months in Jail Without Medical Attention or Parole

When applied to a specific case, U.S. detention policies for asylum seekers appear strikingly arbitrary and place an inequitable burden on those individuals claiming fear of persecution. Take, for example, the recent case of a Somali asylee who was persecuted in Mogadishu.⁸⁶ During the intense fighting in Mogadishu in 1994, where her daughter died in her arms, this asylee was shot. Two bullets were lodged in her body. She escaped to an Ethiopian refugee camp where she developed diabetes and high blood pressure. The bullets remained in her body, and she was unable to firmly resettle. After the refugee camp closed in 1998, she was forced to illegally live in Ethiopia. Her relatives in the United Kingdom pooled together money for her trip to the United States.

The woman arrived in the United States with a fraudulent refugee card from the black market in Addis Abba and attempted entry with this document. Though she carried an old identification card issued by the Ethiopian government, the woman panicked and did not present this document to the immigration officer. Instead, she handed it to the person in line behind her, a recent acquaintance from the plane. When interviewed she promptly admitted her fraudulent use of a refugee card, but ICE officials placed her in detention because she no longer had possession of her original Ethiopian identification card. Her attorney requested parole, but because she had no identification, ICE would not release her.⁸⁷ Her family eventually relocated her Ethiopian identification card, but the government argued it was not sufficient to prove her identity. Eventually, family members in Somaliland located her original Somali identification card and forwarded the document to her attorney. This document was also insufficient proof of identity for ICE.⁸⁸

For seven months, the Somali asylum seeker stayed in the Hampton Roads Jail in Virginia. The majority of this time she was the only Somali and she did not speak English. Early in her detention she experienced panic attacks and emotional fits, exacerbated by her diabetes. In addition, her attorney had to drive 390 miles roundtrip to the jail every time he visited her. When her case finally went to trial in January 2005, the Department of Homeland Security conceded her eligibility for asylum

86. E-mail from Jared D. Rodrigues, Attorney for the Somali Asylum Seeker, to Kristen M. Jarvis Johnson (Feb. 17, 2007, 13:23:55 EST) (on file with author); Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007) (on file with author).

87. Attorney Jared D. Rodrigues represented the Somali asylum seeker.

88. See sources cited *supra* note 86.

before her attorney even completed the presentation of her case-in-chief. Meanwhile, a local cousin offered the woman a place to live, but because of the government's insistence on more identification, she was never given parole.⁸⁹

In the case of this Somali asylee, the United States achieved no compelling policy objectives to justify depriving this woman of her liberty for an extended period of time. Detaining the woman subjected her to unnecessary trauma by isolating her and neglecting her serious medical conditions. The U.S. government justifies its harsh detention policy by citing risks of absconding and threats to national security. However, it did not achieve either of these policy objectives by detaining the Somali woman. Immigration experts postulate, and Executive Office of Immigration Review (EOIR) statistics verify, that entering defensive asylum seekers, if released on parole, are unlikely to be flight risks.⁹⁰ Here, the Somali asylee provided evidence that she would not abscond in that she had a relative who offered her shelter while she awaited trial. Additionally, nothing in this case indicated that the Somali woman was a national security risk; to the contrary, she had physical evidence of being abused, rather than being an abuser.

In contrast, if ICE had released the Somali woman from detention, it would have achieved several additional policy objectives. Financially, the woman would not have cost the government the daily rate for holding her in detention because her relative would have provided her with a residence and living assistance. Release would have enabled the woman to seek timely medical attention for her bullet wounds, high blood pressure, and diabetes. Also, subjecting her to jail conditions intensified the trauma from the violence she endured in Somalia, as was apparent by her emotional outbursts in prison. Releasing the Somali asylum detainee would have also given her attorney better access to communicate with her in preparing her

89. See sources cited *supra* note 86.

90. According to EOIR asylum statistics for fiscal years 2003-2006, only 5-7% of asylum seekers failed to appear for their court dates. EOIR, FY 2006 STATISTICAL YEAR BOOK K1, K4 (Feb. 2007), available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> (reporting the asylum completions by disposition, including the number of abandoned cases, which are typically, but not always, abandoned due to a failure to appear, relative to the total number of cases). This is compared with the general flight rate for all aliens who fail to appear in court. *Id.* at H1-H4 (showing recent increases in overall failures to appear for all immigration cases before the EOIR, particularly in Harlingen and San Antonio, Texas, including non-detained cases and those where the alien was released on bond, to 39% for fiscal years 2005 and 2006—an increase from 22% in fiscal year 2003 and 25% in fiscal year 2004); accord Frelick, *supra* note 48 (showing that current absconder statistics are highly debated, but asylum seekers are more likely to appear for immigration court); see also FROM PERSECUTION TO PRISON, *supra* note 19, at 184-85 (showing a study of alternative detention programs for asylum seekers that had high appearance rates (93-96% is higher than the government-reported appearance rates)).

case by eliminating the physical barriers of the jail and 390 miles roundtrip drive the attorney made to the jail. Finally, by allowing the woman freedom of movement pending the processing of her asylum application, the United States would have upheld its obligation to preserve her human and civil rights.

III. PROTECTING REFUGEE RIGHTS WHILE STRENGTHENING ENFORCEMENT: RATIONALE FOR CHANGING THE SYSTEM

An efficient and humane asylum system need not imply a weak enforcement system. An alternative system may, in fact, strengthen enforcement by encouraging court appearances and discouraging unlawful entries into the United States.⁹¹ U.S. immigration enforcement laws must be administered in balance with due process rights and the obligations of U.S. international refugee rights. The current process to determine whether defensive asylum seekers have a credible fear of persecution encourages reviewing officers to nearly always find credible fear in order to avoid thorough administrative review.⁹² As a result, asylum seekers are detained on a mandatory basis while waiting for an immigration judge to make a final determination.⁹³ A more thorough initial process of determining credible fear for asylum seekers could narrow the gap between aliens recommended for an immigration judge's review and aliens who are ultimately approved.

Underlying the entire credible fear interview and asylum process are fundamental premises upon which mandatory detention policies are based. Congress ostensibly has passed each statute directing DHS to detain certain aliens predicated upon specific rationales or policy objectives. The next section addresses these predicates and questions whether the goals outlined in detaining asylum seekers are reasonable and effective. The following section then discusses how more thorough credible fear interviews can address these goals and alleviate the need for mandatory detention.

91. See *supra* note 22 and accompanying text.

92. For a detailed discussion on the credible fear determination process and its flaws, see *infra* Part III.B.

93. 8 U.S.C. § 1225(b)(1)(B) (2000); *id.* § 1229a(a)(1).

A. Due Process: Deprivation of Liberty Must Have a Rational Basis

Detaining asylum seekers deprives them of liberty, which is fundamental to the due process of law afforded by the Fifth Amendment.⁹⁴ Depriving such liberty requires at least a rational basis, such as the one the Supreme Court found in *Demore v. Kim*.⁹⁵ The Court held that detention of an alien, due to criminal convictions, was “a constitutionally valid aspect of the deportation process” because it served the purpose of preventing flight of criminal aliens while their removal proceedings were pending.⁹⁶ Although the Court did not explicitly reference *Mathews v. Eldridge*⁹⁷ in the *Kim* opinion, essentially it applied the balancing test set forth in *Mathews*. The balancing test requires that administrative procedures must balance the governmental and private interests at stake.⁹⁸ In *Kim*, the Court balanced the government purpose of preventing flight, which could potentially endanger the community by releasing a convicted criminal, against the agency temporarily depriving aliens of liberty without bail.⁹⁹ In that case, the Court found that Congress’s purpose passed constitutional muster.¹⁰⁰

In contrast with *Kim*, the Court in *Zadvydas v. Davis* granted a writ of habeas corpus to Kestutis Zadvydas, an alien with criminal convictions who was ordered to be removed; however, Zadvydas could not be returned to his native country.¹⁰¹ There, the balance tipped in favor of the alien’s

94. U.S. CONST. amend. V; see also *Reno v. Flores*, 507 U.S. 292, 315-16 (1993) (O’Conner, J., concurring) (pointing towards liberty as a core element of the Due Process Clause); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (suggesting that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (limiting detention in pre-trial situations due to the heightened importance of liberty in United States society). But see *supra* notes 17, 47 (outlining the debate whether aliens who have not yet been admitted into the United States have full due process protections).

95. 538 U.S. 510, 523, 527-28 (2003).

96. *Id.* at 523.

97. 424 U.S. 319 (1976).

98. *Id.* at 334-35. In *Mathews v. Eldridge*, the Court explained:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

99. See *Kim*, 538 U.S. at 527-28.

100. *Id.* at 531. The dissent in *Kim* argued that the Court should have applied an even higher standard of scrutiny since liberty was at stake, and argued that such liberty interests outweighed the governmental purposes for detention. *Id.* at 557-58 (Souter, J., concurring in part and dissenting in part).

101. 533 U.S. 678, 690 (2001).

liberty.¹⁰² The Court held that such an alien must be released after a six-month period unless the U.S. government can show reasons why the alien should remain detained.¹⁰³ Applying 8 U.S.C. § 1231(a)(6),¹⁰⁴ the Court emphasized that the Immigration and Naturalization Service (INS) would only consider release if the alien did not pose a flight risk or present harm to the community. Otherwise, detention was serving a valid purpose.¹⁰⁵ Considering these goals, the Court held that indefinite detention of Zadvydas was unreasonable, even though he had convictions for serious drug offenses, theft, and attempted robbery and burglary.¹⁰⁶

In *Kim*, the predicate behind the statute that required holding convicted criminal aliens was to protect the community from harm. Ostensibly, a criminal convicted of an aggravated felony could threaten this protection.¹⁰⁷

102. *Id.* at 702 (determining that the lower courts had not given proper weight to the “likelihood of successful future negotiations,” resulting in the Court vacating the judgments below).

103. *Id.* at 700-02 (remarking that the six-month period is only a presumed reasonable time). The Government can show evidence that the alien will be removed in the “reasonably foreseeable future,” which could extend the period without being unreasonable. *Id.* at 701. Therefore, it is not mandatory that every alien be automatically released after six months. *Id.*

104. 8 U.S.C. § 1231(a)(6) (2000) provides:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

105. *Zadvydas*, 533 U.S. at 683-85 (citing the agency regulations that allow for release unless there is a finding of danger to the community or risk of flight).

106. *Id.* at 690-91 (finding that Zadvydas was unlikely to be removed in the foreseeable future and reiterating that “detention is reserved for the most serious of crimes”) (internal citations and quotations omitted). Defensive asylum seekers would not likely prevail on an argument that their release from detention is not reasonably foreseeable. *See Demore v. Kim*, 538 U.S. 510, 528-29 (2003) (differentiating *Zadvydas* from *Kim* because detention in *Kim* was for determining removability, rather than waiting for a foreign government to cooperate with an alien already removed). However, even *Kim* was distinct from the situation facing defensive asylum seekers. In *Kim*, the alien was a convicted criminal who had conceded deportability and was detained while the government processed his removal. *Id.* at 530-31. In contrast, asylum seekers may have been victims of crimes and abuse, and may have compelling reasons to be *released* rather than detained. The dissent in *Kim* reminds the Court that “due process requires a ‘special justification’ for physical detention that ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint’ as well as ‘adequate procedural protections.’” *Id.* at 557 (Souter, J., concurring in part and dissenting in part) (quoting *Zadvydas*, 533 U.S. at 690-91) (suggesting that, in the dissent’s opinion, this justification for incarceration typically should be punitive in nature, indicating that asylum seekers should not be detained).

107. *See Kim*, 538 U.S. at 523, 527-28 (agreeing with the immigration agency’s cited justification for mandatory detention to keep criminal aliens from fleeing and missing their proceedings or harming the community); *see also* GAO, CRIMINAL ALIENS: INS’ EFFORTS TO IDENTIFY AND REMOVE IMPRISONED ALIENS NEED TO BE IMPROVED 5 n.8 (July 15, 1997) (reporting that INS could only release detained criminal aliens who were found to not pose a flight risk or a threat to the safety of the community). The GAO report also described increases in criminal aliens as the impetus for much of the 1996 legislative reforms requiring increased detention and expedited removal of such aliens. *Id.* at 3-4; *see also* U.S. COMM’N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY

The Court in *Kim* held that Congress had a rational basis for legalizing such policy.¹⁰⁸ In *Zadvydas*, the predicate behind the statute requiring DHS to detain aliens ordered to be removed and the agency regulations limiting parole is to prevent flight and harm to the community.¹⁰⁹ There, the Court required *Zadvydas*'s release, emphasizing that his detention no longer served any valid purpose.¹¹⁰

In the case of defensive asylum seekers, the predicate behind the statute that requires mandatory detention and stringent parole standards is the lack of valid entry documents and the claim of asylum.¹¹¹ It appears that Congress intended for asylum officers to conduct credible fear interviews immediately and in a similar fashion to affirmative asylum claims, in order to determine the alien's credibility and the possibility of establishing the asylum claim.¹¹² DHS has remarked that asylum seekers understandably lack valid documents, given that many enter the United States under extreme conditions that might not allow the alien to obtain proper documentation.¹¹³ Congress's intent of the mandatory detention provisions was to streamline the defensive asylum requests and to hold the asylum seekers for a minimal amount of time while their claims were being heard. It is apparent from the extensive times that asylum seekers are held in

153 (1994) (“[T]he top priority of enforcement strategies should be the removal of criminal aliens from the U.S.”). Compare H.R. REP. NO. 104-828, at 223 (1996) (Conf. Rep.) (describing criminal alien provisions in IIRAIRA that increased the aliens classified as having committed an “aggravated felony”), with *id.* at 209-10 (expounding on the purpose of IIRAIRA's provisions requiring detention of asylum seekers who lack proper entry documents only to the extent necessary to allow hasty and thorough review of the asylum seeker's claim).

108. 538 U.S. at 523. The dissent in *Kim* notably opined for an even higher standard of scrutiny towards the law requiring detention, since detention involved a deprivation of liberty and thus implicated the Due Process Clause of the Fifth Amendment. *Id.* at 557-58 (Souter, J., concurring in part and dissenting in part).

109. 533 U.S. at 683-84.

110. *Id.* at 690. The purpose of detaining *Zadvydas* was to hold him while his removal was processed. *Id.* at 684-85. The Court required his release even though *Zadvydas* had an extensive criminal record, and the court did not find that detention was necessary to prevent harm to the community. *Id.* at 690-91. Detention to protect the community should only be used for the “most serious of crimes.” *Id.* at 691 (internal quotation omitted).

111. See 8 U.S.C. §§ 1225(b)(1)(A)(ii), (b)(1)(B) (2000) (detention of asylum seekers with fraudulent documents or lacking documents); 8 U.S.C. § 1182(d)(5)(A) (2000) (parole in limited, humanitarian situations); H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep.) (“The purpose of these provisions is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.”).

112. H.R. REP. NO. 104-828, at 209-10 (1996) (Conf. Rep.).

113. See, e.g., Dep't of Homeland Sec., Obtaining Asylum in the United States: Two Paths, <http://www.uscis.gov> (search “Obtaining Asylum in the United States”) (last visited June 30, 2007) (“Because of the circumstances of their flight from their homes and departure from their countries, [asylum seekers] may arrive in the U.S. with no documents or with fraudulent documents obtained as the only way out of their country.”).

detention that DHS has not met Congress's intent.¹¹⁴ However, despite the lengthy detention times, DHS still maintains harsh parole standards without clear guidelines for release,¹¹⁵ and Congress has not alleviated the mandatory detention procedures delegated to DHS.

The predicate behind requiring mandatory detention for defensive asylum seekers is materially distinct from requiring detention for aliens inadmissible due to criminal convictions, as in *Kim*, and from requiring detention for aliens ordered removed, as in *Zadvydas*.¹¹⁶ For constitutional purposes, asylum seekers are differently situated than criminal aliens. Defensive asylum seekers are inadmissible because they do not possess the necessary travel documents to lawfully enter the United States.¹¹⁷ Under current law, DHS detains inadmissible asylum seekers until an immigration judge adjudicates their asylum claims.¹¹⁸ However, using the same approach as in *Kim*, where the Court balanced the government's interests against the alien's due process rights, the case for releasing asylum seekers strengthens. The underlying fear of flight by undocumented asylum seekers is a far less compelling interest than preventing harm to the community by a convicted criminal.¹¹⁹ As opposed to criminals, asylum seekers with legitimate claims are victims of crime and seek refuge in the U.S. asylum system.

The concern then turns to a task that falls squarely on the shoulders of DHS. DHS is tasked with interviewing asylum seekers to determine whether they have a credible fear of persecution. Through the credible fear interview process, asylum officers can use biometrics and databasing to create an identity for each asylum seeker. DHS can then issue regulations that require thorough screening of each asylum seeker in a manner consistent with the affirmative asylum process to ensure that findings of credible fear are accurate. This is one step towards alleviating a current regulatory scheme that unnecessarily deprives precious liberty from aliens seeking refuge from persecution.

114. See *infra* notes 125-27 (discussing the lengthy detention times for asylum seekers).

115. 8 U.S.C. § 1182(d)(5)(A) (authorizing parole); see also *supra* notes 32-35 and accompanying text.

116. Compare 8 U.S.C. § 1225(b)(1)(A)(ii), and 8 U.S.C. § 1225(b)(1)(B)(IV) (2000) (mandatory detention for asylum seekers without valid travel documentation), with 8 U.S.C. § 1226(c) (2000) (mandatory detention for certain criminal aliens without bail), and 8 U.S.C. § 1231(a)(6) (2000) (allowing for detention after ordering an alien removed).

117. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 U.S.C. § 1182(a)(7). Otherwise, with proper documents, asylum seekers enter the United States and follow the non-adversarial affirmative asylum process. See 8 U.S.C. § 1158 (2000) (setting out authority to apply for asylum in the United States as well as the procedure followed); 8 C.F.R. § 208.13 (2007) (establishing eligibility requirements to obtain asylum).

118. 8 U.S.C. § 1225(b)(1)(B); 8 U.S.C. § 1229a(a)(1).

119. Asylum seekers are less likely to abscond than other classes of aliens. See *supra* note 90 and accompanying text.

B. Thorough Credible Fear Hearings Can Lower Risks and Promote Release

Currently, when a screening officer refers an alien for a credible fear interview, that person is already a fraction—a mere five percent—of the total number of aliens who attempt to enter the United States with improper documentation and who are placed in expedited removal.¹²⁰ This puts those aliens in a limited class—a class of those determined to have a “significant possibility”¹²¹ that they could establish the grounds for an asylum grant. In other words, aliens who receive a credible fear interview should already show a high chance of being granted asylum.¹²² Unfortunately, the current system for determining credible fear does not promote thorough reviews.¹²³ Changes to this system could increase ICE’s confidence that releasing asylum seekers will not likely cause harm to the community or threaten national security.

The process for determining credible fear currently encourages findings of credible fear without detailed scrutiny because many inspection officers wish to avoid the strict review requirements of a negative finding.¹²⁴ In 2003, according to ICE, the average detention period for aliens referred for a credible fear interview was sixty-four days.¹²⁵ Additionally, many aliens are detained between the credible fear interview and the long court process of presenting their asylum claims. ICE reported an average detention time

120. See USCIRF ASYLUM SEEKERS, *supra* note 5, at 286-87 (using DHS statistics to chart the percentages of aliens whom the government either expeditiously removes, refers for a credible fear determination, or who withdraw their applications). On its face, this policy appears unreasonable because asylum seekers often leave their countries of origin in haste and without identification or travel documentation that other immigrants may possess.

121. 8 U.S.C. § 1225(b)(1)(B)(v); see Mark Hetfield, *Report on Credible Fear Determinations*, in USCIRF ASYLUM SEEKERS, *supra* note 5, at 170 (suggesting that § 1225 was enacted by Congress in opposition to the language recommended by UNHCR to make the asylum screening standard “not manifestly unfounded,” meaning “not clearly fraudulent”).

122. It could be argued that just as there is no significant likelihood of actual deportation for aliens whose home countries refuse to allow them to return, asylum seekers who have received and passed a credible fear interview also should have a diminished likelihood of deportation. *But see supra* note 106 (discussing how the Court in *Demore v. Kim* distinguished aliens who are waiting for removal proceedings to be finalized and Zadvydas, who was already ordered removed but could not be returned to his country of origin).

123. See Hetfield, *supra* note 121, at 171-72 (criticizing inconsistencies in the credible fear review process).

124. *Id.*

125. USCIRF ASYLUM SEEKERS, *supra* note 5, at 330. The average processing time of sixty-four days may still be excessive for persecuted aliens who may experience additional trauma by being kept in detention, particularly if the facility conditions are poor and the aliens are commingled with criminal convicts. Considering the Congressional reports surrounding the credible fear interview and judicial adjudication processes, which required interviews and judicial referrals to be completed within seven days, the processing times are more than excessive. H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep).

in 2003 of 145.1 days.¹²⁶ A study by Physicians for Human Rights of forty detained asylum seekers reported an average detention period of ten months, with detention periods of over three years.¹²⁷ In 1998, when the government first implemented expedited removal, asylum officers approved credible fear in 83% of the cases. This number increased and stabilized at 93% in 2004.¹²⁸ This high number of approvals has been attributed to the credible fear interview procedure rather than the standard of “significant possibility.”¹²⁹ Negative findings create additional burdensome work that many asylum officers avoid. If an officer denies credible fear, the Asylum Office automatically reviews it, which heightens the officer’s documentation requirements.¹³⁰

The problem of avoiding negative credible fear findings, if corrected, could greatly contribute to solving the detention problem for incoming asylum seekers. If immigration regulations refined the standards and increased the thoroughness required for credible fear interviews, affirmative decisions would become strong grounds for granting parole to the asylum seekers.¹³¹ Statistics from the EOIR show that immigration judges approve approximately one quarter of all asylum cases heard after an affirmative credible fear determination.¹³² If asylum officers were able to weed out weak claims in the initial screening stages, the likelihood of deportation for the remaining asylum seekers will decrease. Recall that absconder rates for asylum seekers are much lower than for other classes of released aliens, and that asylum seekers are likely to appear for court

126. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, REPORT TO CONGRESS: DETAINED ASYLUM SEEKERS, FISCAL YEAR 1999, *supra* note 69, at 5.

127. FROM PERSECUTION TO PRISON, *supra* note 19, at 50; *see also* WORLD REFUGEE SURVEY, *supra* note 69, at 103. Release rates during the period between the credible fear interview and the asylum determination appear to be a statistical gamble. The statistical range for release between Asylum Offices varies from 0.5% (New Orleans) to 98% (Harlingen and Los Angeles). USCIRF ASYLUM SEEKERS, *supra* note 5, at 332. Also, the release rate between the credible fear interview and the final immigration judge adjudication declined over 20% after the terrorist attacks of 2001. *Id.* at 333.

128. Hetfield, *supra* note 121, at 168-69.

129. 8 U.S.C. 1225(b)(1)(B)(v) (2000); *see also* Hetfield, *supra* note 121, at 171-72.

130. *See* Hetfield, *supra* note 121, at 172 (stating that negative credible fear determinations are subject to “100% quality assurance reviews,” while positive findings receive only random checks).

131. Asylum officers who conduct credible fear interviews should already possess training and knowledge similar to officers who hear asylum claims through the affirmative asylum process. *See* H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep.) (clarifying the training and role of asylum officers who conduct credible fear interviews in relation to asylum officers who process affirmative asylum claims).

132. USCIRF ASYLUM SEEKERS, *supra* note 5, at 398-99. This low number of defensive asylum admittance is logical considering that asylum entrants only make up approximately 8% of lawful permanent admittances per year. *See* CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES 5 (2006) (citing nearly one million permanently admitted immigrants in 2004, of which 8% were asylum grantees). This percentage becomes even smaller when considering the massive transit of nonimmigrants into the United States each year. *Id.* at 11 (reporting nearly 5 million nonimmigrant entrants in 2003).

hearings.¹³³ Therefore, if DHS implements regulations that more clearly define standards and that require more thorough reviews at the credible fear interview level, detention after a determination of credible fear would serve little valid purpose.¹³⁴

Governmental agencies and non-governmental organizations strongly support releasing asylum seekers found to have a credible fear of persecution.¹³⁵ ICE is pursuing alternatives to detention that involve managing detention space and promoting cost-effective enforcement.¹³⁶ The Vera Supervised Release Model, for example, resulted in a 55% cost reduction compared with detention.¹³⁷ The United States can alleviate its harsh mandatory detention requirements by providing viable alternatives and still maintain, and even strengthen, its national security. Providing viable alternatives will make the asylum process more humane and sensitive to refugee needs and simultaneously diminish the risk that asylum seekers, fearful of the process, will enter the United States clandestinely or while using false travel documents.¹³⁸

IV. COMPREHENSIVE REFORM EMPHASIZING THE LEAST RESTRICTIVE METHODS FOR MONITORING ASYLUM SEEKERS

In light of the issues raised above, several changes can significantly contribute to restoring the United States' leadership in hearing asylum claims and prioritizing human and civil rights. First, asylum and parole procedures should be consistently applied throughout the United States. Second, asylum officers should have the authority to conduct thorough credible fear hearings and to make decisions under clear guidelines that require the officers to document the interview process and rationale for the decision. Third, asylum officers, being specially trained to work with asylum seekers and having

133. See *supra* note 90 and accompanying text.

134. This assumes that improved standards and thorough reviews would make a determination of whether the asylum seeker is a threat to national security, which provides a valid basis for detention under 8 U.S.C. § 1226a(a) (2000).

135. See, e.g., *LOST IN THE LABYRINTH*, *supra* note 1, at 31 (quoting INS Commissioner Doris Meissner, who stated that the International and Naturalization Service (INS) (now DHS) is committed to pursuing non-detention alternatives for asylum seekers).

136. See, e.g., OFFICE OF MGMT. & BUDGET, DEP'T OF HOMELAND SEC., <http://www.whitehouse.gov/omb/budget/fy2005/homeland.html> (last visited June 30, 2007), (describing the FY 2005 budget for DHS and ICE, which recommends pursuing cost-effective detention or detention alternative methods); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEETS: ICE OFFICE OF DETENTION & REMOVAL, Nov. 2, 2006, <http://www.ice.gov/pi/news/factsheets/dro110206.htm> (listing various detention alternatives that ICE is working towards developing and using).

137. See *IN LIBERTY'S SHADOW*, *supra* note 6, at 42 (describing the program, which was contracted with the INS between 1997 and 2000).

138. For a discussion of how the current immigration code and regulations allow affirmative asylum applications for clandestine or fraudulent entrants, see *supra* note 20 and accompanying text.

in-depth understanding of asylum policies and procedures, should have the authority to grant parole to asylum seekers who the officers determine not to be significant flight risks or national security threats.¹³⁹ Lastly, if an asylum seeker must be monitored, with the exception of the rarest and most serious cases, DHS should use alternatives to detention.

A. Consistent and Clear Defensive Asylum and Parole Procedures

Inconsistent decisionmaking presents a significant procedural obstacle to asylum seekers. Statistically, the chance of receiving parole varies by office, ranging from 0.5% to 98%.¹⁴⁰ The ability of lawyers and social workers to access different detention facilities depends on the individual rules of each facility.¹⁴¹ Complete discretion and lack of guidance increases frustrations for asylum seekers and those assisting them. ICE officials possess few guidelines for releasing asylum seekers on parole or for maintaining detention facility standards.¹⁴² Compounding this problem is the lack of distinction in detention facilities between asylum seekers, who claim fear of persecution, and all other immigrant detainees.¹⁴³

In contrast with defensive asylum, DHS provides training and guidelines to the asylum officers who make determinations on affirmative asylum applications. A similar system could easily be transferred to defensive asylum applicants. DHS has the ability to regulate consistent handling of asylum cases, which could eliminate confusion from the asylum system. Congress could also present a mandate, as part of its immigration reform efforts, that requires streamlined procedures, including (1) determining credible fear, (2) granting parole, (3) monitoring asylum seekers, and (4) reviewing denials of parole and asylum.

B. Increased Thoroughness of Credible Fear Determinations

Asylum officers should have the training and capacity to make credible fear determinations that carry significant weight towards determining whether the asylum seeker is likely to meet the asylum criteria. This would provide additional justification for releasing asylum seekers until the courts

139. In the alternative, regulations could provide that all asylum seekers found to have credible fear of persecution have a presumption of eligibility for release on parole *unless* the officer has valid reason to believe the alien is a flight risk or national security risk.

140. USCIRF ASYLUM SEEKERS, *supra* note 5, at 332.

141. *See, e.g., Demore v. Kim*, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part) (stating that detention can place an obstacle in the way of developing the asylum case); LOST IN THE LABYRINTH, *supra* note 1, at 35-36 (providing an account of difficulties a refugee faces in obtaining information and legal assistance while in detention).

142. *See* Frelick, *supra* note 48 (“[T]he US criteria for the detention and release of asylum seekers nor the standards establishing acceptable conditions of detention are prescribed in law or regulations.”).

143. *Id.*

make a final determination.¹⁴⁴ Optimally, asylum officers could make final determinations as do asylum officers who hear affirmative asylum claims. At a minimum, asylum officers who hear credible fear claims could be trained similarly to the officers who process affirmative asylum claims. USCIS Director Emilio Gonzalez reasoned that asylum officers are best equipped to adjudicate affirmative asylum claims.¹⁴⁵ He stated that private, non-court hearings are more neutral environments for asylum-seekers to present their claims, which preserves Congress's intent "to set into place 'a policy which will treat all refugees fairly and assist all refugees equally.'"¹⁴⁶ Immigration courts, in contrast, process asylum claims at a significantly slower pace and use adversarial methods.¹⁴⁷

Similarly, defensive asylum seekers should have the opportunity to present their claims in the most neutral environment possible and should be treated equally to affirmative asylum seekers. Congress could propose to make the defensive asylum procedures similar to the affirmative asylum process. This could be facilitated by allowing asylum officers to conduct thorough credible fear or initial interviews and allowing asylum officers, rather than immigration judges, to adjudicate defensive claims. Alternatively, asylum officers could follow a clear procedure for granting parole to those found to have credible fear.

Asylum seekers often remain in detention without parole because asylum officers lack the authority to grant parole. Instead, the enforcement arm of the Department of Homeland Security, ICE, must make all parole determinations; asylum seekers have no right to appeal this decision.¹⁴⁸ As stated earlier, DHS has no concrete guidelines or regulations for granting such parole. Thus, the resulting release rates are disparate.¹⁴⁹ Compounding the problem, the rigid guideline requiring proof of identification prevents many asylum seekers from being granted parole.¹⁵⁰

144. A change in policy could also move the final determination from the immigration courts to Asylum Officers, subject to review. Currently 8 C.F.R. § 1208.2(b) (2007) gives the immigration courts the authority to determine defensive asylum claims where the alien is in removal proceedings.

145. Letter from Dr. Emilio T. Gonzalez, Director, U.S. Citizenship & Immigration Serv., to Prakash Khatri, U.S. Citizenship & Immigration Serv. Ombudsman at 8 (June 20, 2006), <http://www.humanrightsfirst.info/pdf/06721-asy-uscis-resp-omb-rec-2324.pdf> (quoting the Refugee Act, S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979)).

146. *Id.*

147. *Id.*

148. LOST IN THE LABYRINTH *supra* note 1, at 13-14.

149. *See, e.g.*, IN LIBERTY'S SHADOW, *supra* note 6, at 47 (2004) (recommending that regulations be clearly promulgated to allow understandable and realistic methods of obtaining parole, including an appeals process and the ability to sign affidavits testifying to identification); LOST IN THE LABYRINTH, *supra* note 1, at 73 (listing the vague standards that do exist for guiding officers in granting parole).

150. *See, e.g.*, Memorandum from Human Rights First to Members of the Human Rights Comm., 14 n.58 (Jan. 18, 2006), available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/hrfirst.doc> (referencing "Expedited Removal: Additional Policy Guidelines," Dec. 30,

This policy ignores the fact that many asylum seekers fled violent situations and may not have access to such documents. The identification policy also fails to take into account advancing biometrics systems that the United States can use to identify and track individuals.¹⁵¹

C. Detention Alternatives

Lastly, if DHS determines an asylum seeker must be monitored, then DHS should use alternatives to detention, reserving detention as a last resort. Many alternatives are viable and some are ready to be immediately implemented.¹⁵² Congress has supported moving towards alternatives to detention, recently providing several million dollars to ICE for development of alternative detention plans.¹⁵³ Non-correctional environments could eliminate the problem of commingling asylum seekers and criminal convicts and could specially train monitors to handle individuals who have experienced trauma. One case study of this sort of environment has proven highly successful. In Broward County, Florida, the ICE Detention and Removal Office developed a minimal security, non-criminal-oriented facility solely for asylum seekers. It “appears to be a much more humane and far less intrusive form of confinement that bears only minimal resemblance to a traditional prison or jail.”¹⁵⁴ However, these situations are not always ideal, and even family centers have been criticized as “fundamentally anti-family and anti-America.”¹⁵⁵

Modern technology provides an ever-developing landscape of options for monitoring asylum seekers without unnecessarily intruding on their freedom of movement or disregarding their traumatic experiences. Detention facilities already take biometric data, which provides increasingly reliable methods for identifying and tracking asylum

1997, a memorandum from Michael A. Pearson, INS Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, which states that officers may not grant parole unless the alien can prove identity and community ties).

151. See *LOST IN THE LABYRINTH*, *supra* note 1, at 13, 14 n.14 (noting the harshness of such a policy and commenting that the restriction on review for parole decisions is unique to immigration policy among U.S. law).

152. See *generally* Field, *supra* note 74, at 22-35 (listing and describing alternatives to detention of asylum seekers).

153. See Dep’t of Homeland Sec. Appropriations Act, Pub. L. No. 109-90, § 119 Stat. 2064, 2068-69 (2006).

154. Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*, in USCIRF ASYLUM SEEKERS, *supra* note 5, at 182.

155. Sylvia Moreno, *Detention Facility for Immigrants Criticized: Organizations Laud DHS Effort to Keep Families Together but Call Center a ‘Prison-Like Institution’*, WASH. POST, Feb. 22, 2007, at A3 (internal quotations omitted) (reporting that the T. Don Hutto Family Residential Facility in Texas even requires three-year-olds to follow rigid daily reporting requirements and limits outdoors recreational time for all residents to one hour per day “inside a concrete compound sealed off by metal gates and razor wire.” The residents are also required to have picture identification visible at all times).

seekers.¹⁵⁶ According to Victor Cerda, former Acting Chief of Staff and Counsel to the Assistant Secretary of ICE,¹⁵⁷ all field offices are equipped with the technology to implement ankle bracelets.¹⁵⁸

Ankle bracelets and other electronic monitoring devices (EMDs) provide less intrusive means of monitoring asylum seekers who might be a flight risk. However, if an asylum officer does not find an asylum seeker to be a flight risk or a security threat, then even EMDs could be an unnecessary interference with that seeker's freedom of movement. ICE has already begun working with an Intensive Supervision Appearance Program (ISAP), which is designed to supervise released asylum seekers.¹⁵⁹ This program requires various phases of accountability to ICE, which gradually provides freedoms upon a showing of cooperation. EMD programs can be used separately or in combination with supervised release, requiring registration and periodic check-ins with the government to prevent flight and to provide updates to the asylum seekers.

CONCLUSION

Detention isolates asylum seekers from the outside world and degrades them to the level of criminals facing punishment. Many men and women who escape harrowing situations where their lives are endangered seek refuge in the United States; however, U.S. laws maintain harsh mandatory detention requirements for these individuals. The case of the Somali refugee who suffered in U.S. jails for eight months before the government heard her case raises serious questions of whether her detention served a rational purpose.¹⁶⁰ She posed neither a serious flight risk nor a criminal threat; in fact, the humanitarian reasons to release her were overwhelmingly compelling. For the thousands of asylum seekers

156. See, e.g., Field, *supra* note 74, ¶ 123 (citing biometric data used in Zambia).

157. For Victor Cerda's biography, see http://www.hrpolicy.org/about/staff_vc.asp (last visited June 30, 2007).

158. Interview with Brittney Nystrom, Asylum Project Dir., Capital Area Immigrants' Rights Coal., in Washington, D.C. (Jan. 10, 2007) (on file with author).

159. See USCIS, FACT SHEET: DETENTION AND REMOVAL OPERATIONS: ALTERNATIVES TO DETENTION (Mar. 2007), <http://www.ice.gov/pi/news/factsheets/061704detFS2.htm> (introducing ISAP as a voluntary program where certain aliens can periodically check in with DHS; however, the fact sheet is unclear whether this would be of use to asylum seekers since it limits the program to "aliens who are not subject to mandatory detention"); Kathleen Glynn & Sarah Bronstein, CATHOLIC LEGAL IMMIGRATION NETWORK, SYSTEMIC PROBLEMS PERSIST IN U.S. ICE CUSTODY REVIEWS FOR "INDEFINITE" DETAINEES 28 (2005), available at <http://www.cliniclegal.org/DSP/Indefinite2005FINALforRELEASE.pdf> (describing the ICE supervision program).

160. For the details of this case, see *supra* Part II.B.

currently in detention, every day that passes without rethinking mandatory detention policies diminishes their dignity and deprives them of their basic rights to liberty and movement.¹⁶¹

The current statutory and regulatory scheme towards persons who seek refuge from persecution in the United States is excessive in light of available reasonable alternatives to detention. The United States is party to, and an international leader in, treaties that aim to protect refugees and to uphold individual human rights. These protections form the foundation of U.S. asylum law. Detaining asylum seekers for months, and sometimes years, before granting relief directly undermines this foundation. When considering comprehensive immigration reform, Congress should focus on mandating clear and consistent standards for credible fear determinations, parole, and defensive asylum claims and it also should focus on funding for detention alternatives. Detention should remain a tool of last resort, rather than the primary tool for monitoring asylum seekers.

161. Consider the Universal Declaration of Human Rights arts. 1-3, 9, 13-14, which declares the fundamental human rights of equality, dignity, life, liberty, freedom from arbitrary detention, freedom of movement, and the right to seek asylum from persecution. The U.S. government should not disregard these rights except in the most exigent of circumstances. Unless the United States has a reasonable foundation to believe an asylum seeker poses a high risk to national security, it should refrain from detaining that person and should use the least intrusive method possible to monitor and ensure that asylum seekers appear for adjudication of their claims.