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Deliberate Destitution as Deterrent: Withholding the Right to Work and Undermining Asylum Protection

Lori A. Nessel

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Deliberate Destitution as Deterrent: Withholding the Right to Work and Undermining Asylum Protection

LORI A. NESSEL*

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* © 2015 Lori A. Nessel. Professor of Law and Director, Center for Social Justice, Seton Hall University School of Law. This Article grows out of a related human rights report undertaken in conjunction with Bill Frelick at Human Rights Watch and Kristina Hon, Brian Jacek, and George Jewell while students at Seton Hall Law School. My thinking on the topic has benefitted greatly from discussions and work with them on the human rights report.

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“Without the right to work, all other rights were meaningless.”¹

“Being without money is hard, it makes you feel like less of a man. You have no voice; no one will listen to you.”²

I. INTRODUCTION

“Work, or at least the aspiration to work, is ubiquitous.”³ Work is transformative and provides a person not only with a means of paying for the costs of life, but also with a sense of identification and value. Work also allows for a sense of belonging to a community and is essential to one’s sense of place in the world.⁴ For those who have fled persecution

1. United Nations, Econ. & Soc. Council, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., 37th mtg. at 12, U.N. Doc. E/AC.32/SR.37 (Sept. 16, 1950) (statement of Mr. Henkin of the United States).

2. HUMAN RIGHTS WATCH & SETON HALL UNIVERSITY SCHOOL OF LAW, AT LEAST LET THEM WORK: THE DENIAL OF WORK AUTHORIZATION AND ASSISTANCE FOR ASYLUM SEEKERS IN THE UNITED STATES 30 (Nov. 2013) (citing Seton Hall interview with Bosco N.) [hereinafter AT LEAST LET THEM WORK], available at <http://www.hrw.org/reports/2013/11/12/least-let-them-work> [<http://perma.cc/39S4-2M99>].

3. David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129 (1988) (discussing the importance of the ability to work).

4. This is particularly important in immigrant communities. For example, a study of immigrant integration found that work is not merely a means of producing income, but also provides a “purpose to life, it defines status and identity, and enables individuals to establish relationships with others in the society . . . [t]herefore, for those who are out of work, the result is not only a decline in psychological well-being, but also a delay in adaptation.” Zeynep Aycan & John W. Berry, *Impact of Employment-Related Experiences on Immigrants’ Psychological Well-Being and Adaptation to Canada*, 28 CANADIAN J. BEHAV. SCI. 240, 248 (1996).

and are seeking asylum protection in the United States, work takes on an even greater importance. For the vast majority of asylum seekers, work holds the key to economic survival, as federal law also precludes them from accessing nearly any social benefits.⁵ Asylum seekers are only entitled to a lawyer at their own expense—which may hinder their ability to retain counsel and lessen the chances that they would be granted asylum—so work is closely linked with the ability to afford a lawyer and dramatically increases the chances of gaining protection.⁶ For asylum seekers who suffer from mental health issues as a result of torture or persecution, work is also a crucial element in recovery.⁷

Notwithstanding the essential nature of work for asylum seekers, United States immigration law bars them from accessing employment for at least six months and often for years.⁸ While their asylum claims proceed, asylum seekers must remain idle, surviving only from the charity

5. See 8 U.S.C. § 1611(a) (2012). In order for asylum seekers to participate in state or federal health insurance exchange programs and seek premium tax credits under the Affordable Care Act, they must have employment authorization. See “Lawfully Present” *Individuals Under the Affordable Care Act*, NAT’L IMMIGR. L. CTR. (Sept. 2012), available at <http://www.nilc.org/document.html?id=809> (citing 26 C.F.R. § 1.36B-1(g) (2014); 77 Fed. Reg. 30, 377 (May 23, 2012)).

6. Studies show that those with lawyers are almost three times as likely to be granted asylum in the United States. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (“[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.” (citing Donald Kerwin, *Revisiting the Need for Appointed Counsel*, in INSIGHT, at 1, 5–6 (Migration Pol’y Inst., No. 4, 2005), available at <http://www.migrationpolicy.org/insight/InsightKerwin.pdf>; Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 232, 239 (2004); Andrew I. Schoenholz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 739–40 (2002)).

7. See e.g., AT LEAST LET THEM WORK, *supra* note 2, at 30 (“Work may be the single ‘most important thing’ in rehabilitating traumatized asylum seekers, said Dr. Joanne Ahola, a medical doctor of both the Weill Cornell Center for Human Rights and Research Institute Without Walls. . . . A job gives asylum seekers a sense of purpose and can function as a ‘distraction from thinking about traumatic experiences.’”).

8. 8 U.S.C. § 1158(d)(2) (2012).

of others.⁹ The only other option is to work without legal authorization and risk exploitation and negative immigration consequences.¹⁰

Under international law, one becomes a refugee when the events giving rise to such status take place rather than when the receiving country affords such status.¹¹ However, under United States immigration law, only refugees, who have been granted asylum or who have had their claims pending for at least 180 days through no fault of their own, are eligible for employment authorization.¹² Ostensibly, the United States denies work authorization and public benefits to asylum seekers to deter “economic migrants” from filing fraudulent asylum applications to work

9. See AT LEAST LET THEM WORK, *supra* note 2, at 27–31 (documenting the emotional toll caused by forcing asylum seekers to remain idle and dependent on others).

10. For example, United States immigration law imposes a ten-year bar on readmission for any alien who has been in the country unlawfully for at least one year and then departs. See 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2012). To avoid penalizing asylum seekers, Congress carved out an exception for time during which an asylum seeker has a pending bona fide asylum application. See § 1182(a)(9)(B)(iii)(II). However, this exception does not apply if the asylum seeker worked without authorization. See *id.* (“No period of time in which an alien has a bona fide application for asylum pending under [8 U.S.C. § 1158] shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.”) (emphasis added). See also *Bar on Work Authorization Creates Hardship*, REFUGEE R., June 30, 1996, at 6–7 (noting that the denial of work authorization and social benefits to asylum seekers in the United States has resulted in more homelessness, psychological deterioration, stress, illegal work, exploitation, and begging).

11. James C. Hathaway & Annie K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 484–85 (2000). As refugee scholars have noted, states try to avoid their obligations to refugees by denying them that title, or even that of asylum seeker and instead, labeling them as “‘displaced persons,’ ‘illegal immigrants,’ ‘economic migrants,’ ‘quasi-refugees,’ ‘aliens,’ ‘departees,’ ‘boat people,’ or ‘stowaways.’” GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 50 (3d ed. 2007).

12. § 1158(d)(2).

lawfully.¹³ The denial of work authorization is also part of a broader effort to deter asylum seekers from coming to the United States.¹⁴

This Article critiques the United States' bar on employment for asylum seekers on a number of fronts. Beginning with a historical perspective, I explore the more humane regime that existed in the United States until 1995. Under this prior system, asylum seekers with bona fide claims were permitted to work while their claims proceeded. This Article examines the underlying fears and policy goals that led Congress to dramatically curtail protection and the right to work for asylum seekers. By situating the prohibition on work for asylum seekers within the larger context of overall punitive immigration reforms and the increasing criminalization of immigration law, this Article argues that the ban on employment for asylum seekers is unnecessary as a means to deter fraud. It also argues that it is inconsistent with other humanitarian immigration relief that exists in United States immigration law.

Turning to the Refugee Convention itself, it is argued that denying refugees seeking asylum the right to work violates the spirit of the Refugee Convention and the very right to seek asylum.¹⁵ This Article further argues

13. See JOHN COLLETT, *SOCIAL WORK, IMMIGRATION, AND ASYLUM* 78 (Debra Hayes & Beth Humphries, eds., 2004). Such arguments are premised on the distinction between “deserving” true refugees and undeserving “economic migrants.” *Id.* This distinction fails to capture the nuances in migration and the mix of persecution and economic harm that may be the impetus for fleeing. “The poverty people are escaping is often tied in with the political and social malaise a country is experiencing: “by suggesting that there are “genuine” people that are forced out of their homes by persecution and war, on the one hand, and those who simply seek a better life, on the other, the simplistic and unhelpful dichotomy between an asylum-seeker and an economic migrant . . . is perpetuated. In reality, “the same situations of societal transformations and crisis linked to war, poverty, and nation-state formation” contribute to a mixed flow of asylum seekers and economic migrants.” In this context, to question whether people leave out of desperation or aspiration is irrelevant. They seek to escape from social, economic and/or political insecurity to a more secure future.” P. Kahn, *Asylum-Seekers in the UK: Implications for Social Service Involvement*, 8 *SOC. WORK & SOC. SCI. REV.* 116, 121 (2000).

14. The United States utilizes a broad array of tactics to deter asylum seekers from accessing its territory, including mandatory detention and denial of employment authorization. Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 *COLUM. HUM. RTS. L. REV.* 625, 627, 629 (2009). See also GOODWIN-GILL & MCADAM, *supra* note 11, at 50 (“[T]he developed world, in particular, expends considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others.”).

15. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (guaranteeing a right to seek asylum).

that denying a means of support and attempting to make life so difficult that asylum seekers choose to return home to persecution rather than seek protection amounts to constructive nonrefoulement in violation of the Refugee Convention.

Finally, from a policy perspective, this Article argues that allowing asylum seekers to work while their claims proceed would restore dignity to refugees and realign U.S. immigration policy with important international law norms. It would also be consistent with domestic immigration policy for other classes of similarly situated vulnerable immigrants. Additionally, in light of the heightened enforcement efforts and more restrictive immigration regime which now exists in the United States, it is unlikely that the number of fraudulent asylum applications filed would significantly increase.

II. DEHUMANIZING THE RIGHT TO SEEK ASYLUM IN THE UNITED STATES

The number of people seeking asylum protection around the world continues to climb. In 2014, 866,000 people sought asylum in industrialized countries, an increase of 45% from the prior year.¹⁶ The United States received the second highest number of these asylum claims.¹⁷ In 2014, approximately 121,200 new asylum claims were filed in the United States, a 44% increase from the prior year.¹⁸ While the number of people fleeing persecution and torture in their homelands continues to climb dramatically, countries around the world are making it harder for these refugees to gain access to asylum protection.¹⁹

One way the United States and other countries have made it harder for refugees to seek protection is by removing any means of self-sufficiency during the asylum adjudication process. Those refugees who are lucky enough to be admitted to the United States lawfully—or who enter the country without being detected—have one year in which to seek asylum protection.²⁰ These refugees are not allowed to work or to receive any social benefits unless either they are granted asylum or more than six months have passed without a decision through no fault of the asylum

16. U.N. HIGH COMM’R FOR REFUGEES, UNHCR ASYLUM TRENDS 2014, LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2 (2015), available at <http://www.unhcr.org/551128679.html> [<http://perma.cc/E7PW-AJG5>].

17. *Id.* While the United States was the industrialized nation with the highest number of asylum claims for seven consecutive years, Germany has outpaced the United States for the past two years. *Id.*

18. *Id.*

19. Nessel, *supra* note 14, at 627–28.

20. 8 U.S.C. § 1158(a)(2)(b) (2012).

seeker.²¹ Asylum seekers are thus left with a Hobson's choice: rush to present their cases in hopes of gaining asylum and the right to work—but risk not having sufficient time to adequately prepare the case—or take time to prepare their cases and forego the possibility of working while the case proceeds. Adding another layer to the dilemma is the fact that there is no right to free counsel in asylum proceedings.²² The only way to proceed with counsel is to hire a lawyer, a prospect undermined by the inability to work.²³

A. *The System before "Reform"*

Asylum seekers in the United States have not always had to choose between destitution and inadequately prepared asylum applications. When the Refugee Act was implemented in 1980, Congress's intention was to bring United States law into harmony with its obligations under the U.N. Refugee Convention.²⁴ From 1980 until 1987, the district director at the Immigration and Naturalization Service (INS) had discretion as to whether to grant employment authorization to an alien who was seeking asylum.²⁵ In 1987, after a class action challenge where a district court

21. § 1158(d)(2).

22. 8 C.F.R. § 1240.10 (2014); Yunie Hong & Timothy Griffiths, *A Matter of Life and Death: Asylum Seekers' Lack of Access to Competent Legal Representation*, LEGAL SERVICES OF N. CAL., <http://equity.lsnr.net/a-matter-of-life-and-death-asylum-seekers'-lack-of-access-to-competent-legal-representation> [<http://perma.cc/K6T4-JPRB>] (last visited June 9, 2015).

23. *Id.* ("Even if jobs were plentiful, asylum seekers cannot simply work to earn the money they need to pay for an attorney, because they cannot get employment authorization until after their cases have been filed and pending for at least 6 months—and that's the best case scenario.").

24. The United States ratified the Refugee Convention in 1968 when it signed the U.N. Optional Protocol on Refugees (incorporating the Refugee Convention). RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS, 3 (2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32621.pdf> [<http://perma.cc/39GD-S47Z>]. From 1968 to 1980, the United States did not have a domestic law on refugee protection and instead relied upon ad hoc legislation and discretion. *Id.*

25. See Employment Authorization, 45 Fed. Reg. 19,563 (Mar. 26, 1980) (to be codified at 8 C.F.R. pt. 109). Former 8 C.F.R. § 109.1(b)(2) provided that "[a]ny alien who has filed a non-frivolous application for asylum pursuant to Part 208 of this chapter may be granted permission to be employed for the period of time necessary to decide the case." Former 8 C.F.R. § 208.4 provided that "[u]pon the filing of a nonfrivolous I-589, the district director may, in his discretion, grant a request by the applicant for employment authorization." Once granted, employment authorization could be revoked

judge found a likelihood of irreparable harm if the district director was allowed to continue to deny employment authorizations to asylum seekers,²⁶ the INS promulgated new regulations guaranteeing a right to employment authorization in all nonfrivolous cases.²⁷ For the next eight years, a refugee in need of protection could apply for asylum and the right to work simultaneously.²⁸ As long as the government did not find the application for asylum to be frivolous, it granted employment authorization so that the asylum seeker could pay for the basic necessities of life and survive while the claim was adjudicated.²⁹

This system of allowing asylum seekers to work and support themselves while their cases proceeded was consistent with the magnitude of the interest at stake. As the Court in *National Center for Immigrants Rights* found, “The hardship [to aliens] from being unable to work to support themselves and their dependents . . . is beyond question.”³⁰

However, cases proceeded slowly because of a growing backlog. When the Asylum Corps was first established to adjudicate affirmative asylum claims, it expected that it would decide about 70,000 claims per year.³¹ But by 1992, 103,000 people filed affirmative asylum claims in the United States.³² The following year, 150,000 people sought asylum in the United States.³³ As the backlog of asylum cases continued to mount, adjudication slowed down. Additionally, because the immigration regime at the time did not include the myriad of enforcement and deterrent mechanisms that

under some circumstances. Pursuant to former 8 C.F.R. § 109.2(a), “[e]mployment authorization granted under § 109.1(b) of this part may be revoked by the district director when it appears that one or more of the conditions upon which it was granted no longer exist, or for good cause shown.”

26. *Diaz v. INS*, 648 F. Supp. 638, 657 (E.D. Cal. 1986) (granting a preliminary injunction prohibiting denial and revocation of work authorization until adjudication process for asylum claim had been completed). As the judge found, “I am hard pressed to see how placing a refugee in a position where he or she must break the law to survive during the years it may take for a decision on a political asylum application *cannot* be considered an irreparable hardship.” *Id.* at 648.

27. Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,226 (May 1, 1987) (to be codified at 8 C.F.R. pt. 274a).

28. *Id.*

29. *See id.*

30. Nat’l Ctr. for Immigrants Rights, Inc. v. INS, 743 F.2d 1365, 1369 (1984).

31. *History of the United States Asylum Officer Corps*, AM. IMMIGR. L. CENTER, <http://www.ailec.com/services/asylum/history.htm#F> [<http://perma.cc/26ME-YRW9>] (last visited Feb. 10, 2015).

32. *Id.*

33. *Id.*

exist today, asylum seekers who gained employment authorization could evade removal if the asylum claim was ultimately denied.³⁴

Although it stands to reason that there must have been some degree of fraud taking place, greatly exaggerated accounts of rampant abuse picked up traction in the media, including allegations that anyone could get a work permit by uttering the words “political asylum.”³⁵ This caused a flurry of activity in Congress.³⁶ During congressional hearings on asylum reform, the number of asylum applications was characterized as a “torrent” and as a “giant cascade.”³⁷

David Martin, an immigration scholar and former general counsel to INS, recounted a mix of political factors that led to the decoupling of asylum and employment authorization.³⁸ For example, just one week into the new Clinton administration, a lone gunman who opened fire outside the CIA headquarters in northern Virginia, killing two, was identified as a Pakistani national who allegedly entered the United States illegally and gained an extended stay in this country, with work authorization, as an asylum applicant.³⁹ In addition, “some [of the men] charged in the World Trade Center bombing a month later also turned out to be asylum applicants who had stayed in the United States as part of the backlog.”⁴⁰

34. *Asylum and Inspections Reform: Hearing on H.R. 1153, H.R. 1355, and H.R. 1679 Before the Subcomm. on Int'l Law, Immigration, and Refugees of the H. Comm. on the Judiciary*, 103d Cong. 1–3 (1993) (statement of Romano L. Mazzoli, Chairman, Subcomm. on Int'l Law, Immigration, and Refugees).

35. See e.g., Ira H. Mehlman, *The New Jet Set: Think the Rio Grande Is a Porous Border? Try New York's JFK, Where Anyone Can Enter Through the Magic of Political Asylum*, NAT'L REV., Mar. 15, 1993, at 40, 60 (referring to a Liberian asylum seeker at JFK airport and asserting that “[o]nce he utters ‘political asylum’ his chances of remaining in the United States are 93%.”). According to the article, the asylum officer at JFK airport complained, “We’re being deluged. It’s scandalous . . . In a matter of hours he’s going to be walking out onto the street joining the ranks of the unemployed. We don’t know anything about him. We don’t know if he has AIDS. We don’t know if he’s a murderer.” *Id.*

36. Tim Weiner, *Pleas for Asylum Inundate System for Immigration*, N.Y. TIMES, Apr. 25, 1993, at A1 (discussing how immigrants, including one of the suspects in the 1993 World Trade Center bombing, “can arrive at an airport having destroyed [their] travel documents, [and] plead for asylum” before disappearing).

37. *Asylum and Inspections Reform*, *supra* note 34, at 1.

38. David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 738–39 (1995).

39. *Id.* at 737.

40. *Id.* at 737–38.

The media stoked the coals even further with its reporting on fraud and asylum. For example, the television program, 60 Minutes, aired a segment showing individuals destroying their identity documentation upon arrival at Kennedy airport in New York in order to seek asylum.⁴¹ Even without any proof of identity, “many were simply released, with work authorization . . . and few ever appeared for their . . . hearings in immigration court.”⁴²

Adding to the perfect storm, “several large ships were reported on both coasts discharging passengers, mostly Chinese, at unauthorized locations. The *Golden Venture*, which ran aground off Long Island in June 1993, became the best known smuggler’s vessel. Many of its desperate passengers tried to swim to shore,” and those that survived sought asylum.”⁴³ These events, and the widespread media attention, had a strong impact on lawmakers.

Bills aimed at dramatically revamping the asylum regime began to churn through Congress. There were calls for mandatory detention for all asylum seekers and a requirement that asylum applications be lodged within days of entering the country.⁴⁴ This crisis mentality, and the fear that asylum itself was at stake, led some prominent refugee rights advocates to support efforts to limit the right to work for asylum seekers.⁴⁵

Ultimately, the Clinton Administration acted to address this situation. It added more asylum officers and put new provisions in place to reduce the backlog of cases and make asylum processing more efficient.⁴⁶ It also bifurcated the process for seeking asylum from that of seeking work authorization.⁴⁷ Pursuant to the new regulations, an “asylum clock” would start running once the applicant submitted a complete asylum application.⁴⁸ The applicant was then required to wait until the clock had registered at

41. *Id.* at 738.

42. *Id.*

43. *Id.*

44. Bill Frelick, *U.S. Detention of Asylum Seekers and Human Rights*, MIGRATION POL’Y INST. (Mar. 1, 2005), <http://www.migrationpolicy.org/article/us-detention-asylum-seekers-and-human-rights> [<http://perma.cc/F8PE-DTRK>].

45. According to David Martin, “the traditional refugee advocacy groups proved quite willing to engage with the Administration in considering a wide range of reform ideas. Their hope was to head off the scariest of the legislative proposals by showing that the genuine problems of the system could be mastered, that abuses could be defeated, by other means that still preserved a genuine opportunity for asylum for those in real need.” Martin, *supra* note 38, at 738–39.

46. Ron Fournier, *Immigration Curbs Sought—Clinton Seeks To Add Border Agents, Speed Asylum Reviews*, THE SEATTLE TIMES, July 27, 1993, <http://community.seattletimes.nwsources.com/archive/?date=19930727&slug=1712986> [<http://perma.cc/L4VY-ZV9M>].

47. Martin, *supra* note 38, at 753–54.

48. See 8 C.F.R. § 208.7(a)(1) (2014).

least 150 days before submitting a request for work authorization.⁴⁹ At that point, the government had thirty days to consider the work authorization application.⁵⁰ In addition, under the new regulations, “any delay requested or caused by the applicant” would stop the clock until proceedings were restarted.⁵¹ Furthermore, the regulations clarified that an asylum seeker would not start to accrue time toward work authorization if he or she “fail[ed] to appear for a scheduled interview before an asylum officer or a hearing before an immigration judge.”⁵² When Congress dramatically altered the immigration landscape in 1996 with its passage of the restrictive Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), these revised employment authorization regulations for asylum seekers officially became law.⁵³

This reformed immigration regime had a devastating impact on an asylum seeker’s right to work. Except in those unusual instances where asylum was granted sooner, applicants for asylum could no longer secure work authorization for at least 180 days after filing their asylum application, and often much longer if applicants requested an adjournment at any point.⁵⁴ IIRIRA is even harsher for applicants who have been denied asylum or asylum seekers renewing their work authorization. If an asylum officer denies asylum to an applicant previously granted work authorization, that authorization terminates sixty days after the denial or upon the expiration of the authorization, whichever time period is longer.⁵⁵ If an immigration judge, the Board of Immigration Appeals, or a federal court denies asylum, “employment authorization terminates upon the expiration of the . . . document,” unless the applicant appropriately appeals.⁵⁶ A government appeal of a grant of asylum does not affect an asylum seeker’s work

49. 8 C.F.R. § 208.7(a)(2).

50. 8 C.F.R. § 208.7(a)(1).

51. 8 C.F.R. § 208.7(a)(2).

52. 8 C.F.R. § 208.7(a)(4).

53. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, §§ 401–405, 110 Stat. 3009-546, 3009-655 to -666 (1996); *see* 8 U.S.C. § 1158(d)(2) (2012).

54. *See* 8 U.S.C. § 1158(d)(2); *see also* 8 C.F.R. § 208.7(a)(2) (“Any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by the failure without good cause to follow the requirements for fingerprint processing.”).

55. 8 C.F.R. § 1208.7(b)(1) (2014).

56. 8 C.F.R. § 1208.7(b)(2).

authorization eligibility throughout the appeals process.⁵⁷ An applicant who has been denied asylum before receiving work authorization, however, is not eligible to apply for work authorization, regardless if the applicant appeals.⁵⁸ Perhaps the harshest provision is that an asylum seeker who did not appear at a scheduled interview or hearing may not even apply for work authorization until asylum is granted, unless the applicant can show “exceptional circumstances.”⁵⁹

*B. Pressure Mounts to Ameliorate the Harshest Aspects
of the New “Asylum Clock”*

Although some prominent advocates involved in the process initially accepted the work authorization reforms, believing that this was a way to save the asylum regime from being gutted altogether,⁶⁰ the majority of comments received in response to the proposed regulatory changes were quite negative and foresaw the dangers ahead.⁶¹ Commentators warned of the undue hardship these changes would impose on asylum seekers and cited interference with the right to seek asylum and with due process guarantees.⁶² There was also fear of a heightened risk of exploitation, as asylum seekers would be pushed into the black market for employment.⁶³

By 2011, the Ombudsman from the United States Citizenship and Immigration Services (USCIS) recommended changes to the way the government managed the asylum clock, including greater transparency and clearer communication as to the workings of the clock.⁶⁴ By 2012, a group of asylum seekers filed a class action against the Department of Homeland Security, claiming that its policies and practices regarding the asylum clock deprived them of the opportunity to obtain employment authorization, fair notice of decisions regarding employment authorization,

57. 8 C.F.R. § 208.7(c)(3).

58. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).

59. 8 C.F.R. § 208.7(a)(4).

60. Martin, *supra* note 38, at 743.

61. *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 62284, 62290–91 (Dec. 5, 1994) (to be codified at 8 C.F.R. pt. 208), available at <http://www.gpo.gov/fdsys/pkg/FR-1994-12-05/html/94-29724.htm> [<http://perma.cc/GQ29-HDPJ>].

62. *Id.*

63. *Id.*

64. CITIZENSHIP & IMMIGRATION SERV. OMBUDSMAN, U.S. DEP’T OF HOMELAND SEC., EMPLOYMENT AUTHORIZATION FOR ASYLUM APPLICANTS: RECOMMENDATIONS TO IMPROVE COORDINATION AND COMMUNICATION 4–6 (2011), available at <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf> [<http://perma.cc/Z38D-XZTG>].

and a means of correcting erroneous decisions.⁶⁵ Indeed, the government statistics showed that the system was not functioning in the way it had been envisioned, for example, with asylum seekers waiting no more than 150 days before being eligible to seek employment authorization—assuming there was no delay attributable to the applicant. Rather, between 2007 and May 2011, there were 285,101 pending cases before the immigration courts.⁶⁶ Of those pending cases, 262,025 (91.9%) had their employment authorization clocks stopped at some point.⁶⁷

The hardship such delays cause to asylum seekers has been well documented. In 2010, Penn State Law School's Center for Immigrants' Rights joined with the American Immigration Council's Legal Action Center to issue a comprehensive report detailing problems with the asylum clock system and calling for reform.⁶⁸ In 2013, Seton Hall Law School and Human Rights Watch released a human rights report documenting the physical and emotional harm that comes with enforced destitution.⁶⁹

In April 2013, the government agreed to a settlement in the class action litigation challenging the flagrant violations of the asylum clock system.⁷⁰ The settlement terms aimed to increase transparency and soften some of the harshest aspects of the asylum employment authorization clock. For example, prior to the settlement, an asylum applicant who failed to appear

65. Plaintiff's Motion for Class Certification at 1–2, 4, *A.B.T. v. U.S. Citizenship & Immigration Serv.*, No. C11-2108-RAJ (W.D. Wash. Nov. 4, 2013) [hereinafter *A.B.T. Motion*], available at http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock-Motion-Exhibits-Order-12-20-2011.pdf [<http://perma.cc/62ML-2CZU>].

66. *Id.* at 9; *A.B.T. Motion*, exhibit 1, at 2–3.

67. *Id.*

68. See JESÚS SAUCEDO & DAVID RODRIGUEZ, PENN STATE LAW'S CTR. FOR IMMIGRANTS' RIGHTS FOR AM. IMMIGRATION COUNCIL'S LEGAL ACTION CTR., *UP AGAINST THE CLOCK: FIXING THE BROKEN EMPLOYMENT AUTHORIZATION ASYLUM CLOCK 2–3* (2010), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf [<http://perma.cc/6PV8-EXWJ>].

69. AT LEAST LET THEM WORK, *supra* note 2, at 28. For example, a Rwandan rape-survivor recounts the depression that came with not being able to work for years while her asylum claim was pending. She explains, “[j]ust sitting on your own, one year, two years, three years, five, doing nothing, just sitting there, kills you. I was so depressed.” *Id.* Other asylum seekers spoke of feelings of “worthlessness” and of “being nothing without a work permit.” *Id.* at 29.

70. Settlement Agreement at 17–18, *A.B.T. v. U.S. Citizenship & Immigration Serv.*, No. C11-2108-RAJ (W.D. Wash. Nov. 4, 2013) [hereinafter *A.B.T. Settlement Agreement*], available at <http://legalactioncenter.org/sites/default/files/60-1Settlement%20Agreement.pdf> [<http://perma.cc/LQH3-YKX5>].

for an interview or hearing date would be barred from receiving employment authorization during the asylum-seeking process, unless the applicant could show exceptional circumstances for missing the interview or hearing.⁷¹ Under the terms of the settlement, the government is now required to send a letter to an applicant who misses an interview or hearing, which notifies such person about the consequences it has on employment authorization, and allow forty-five days to demonstrate “good cause” for failing to appear.⁷² Prior to the settlement, asylum seekers appearing in court before an immigration judge would often find their cases adjourned without explanation.⁷³ Under the terms of the settlement agreement, judges are now required to state, on the record, the reasons for adjourning a hearing.⁷⁴ Judges must also allow asylum seekers forty-five days before scheduling an expedited hearing date—previously, judges only had to allow fourteen days.⁷⁵ For the small number of asylum seekers who appeal and win their cases, the settlement now requires that the asylum seeker be credited with the number of days that elapsed between the initial denial of asylum to the date of the order remanding the case.⁷⁶ While this is an improvement from the prior system, where none of this time on appeal was counted toward employment authorization, asylum seekers will still be left without employment authorization until there is a remand, unless they had accrued 150 days prior to the appeal.⁷⁷ Finally, asylum seekers are now allowed to submit their asylum applications with the court clerk and use that submission date to start the employment authorization clock—rather than waiting to submit at the hearing date.⁷⁸ Although the settlement agreement ameliorates the lack of transparency and chips away at some of the most egregious aspects of the asylum clock, it does not address the inherent inequities or dangers in conditioning asylum on the refugee’s ability to withstand destitution.

III. ANALYZING ASYLUM REFORM WITHIN THE BROADER CONTEXT OF A MORE RESTRICTIVE IMMIGRATION REGIME

While the asylum reforms of 1995 and 1996 reduced the backlog in cases, there is no evidence to establish that the reduction was attributable

71. 8 C.F.R. § 208.7(a)(4) (2014).

72. A.B.T. Settlement Agreement, *supra* note 70, at 17–18.

73. A.B.T. Motion, *supra* note 65, at 4.

74. A.B.T. Settlement Agreement, *supra* note 70, at 15.

75. *Id.* at 17.

76. *Id.* at 19.

77. *See id.*

78. *Id.* at 16.

to the denial of employment authorization to asylum seekers. Rather, it is likely that increasing the number of asylum officers, speeding up the processing of asylum claims, and weeding out fraudulent asylum claims played a much greater role in reducing the backlog. In 1995, prior to the reforms, “the INS had 325 asylum officers, 149,566 new asylum claims,” and a backlog of 457,670 pending cases.⁷⁹ In 2013, USCIS had fewer asylum officers than in 1995; even with only 279 asylum officers, USCIS received 44,453 new asylum claims and only had a backlog of 32,560 cases.⁸⁰ Whereas the ratio of new asylum claims to officers was 693-to-1, not including the massive backlog of cases; in 1992, the ratio of new applicants to officers was down to 159-to-1 in 2013.⁸¹

While the law barring asylum seekers from employment authorization and governmental benefits has remained frozen in time since its adoption in 1996, the broader immigration landscape has dramatically shifted such that these restrictions have become obsolete. The reforms have created real disincentives to filing for asylum as a guise for securing work authorization. For example, prior to the employment authorization reforms, an asylum seeker could apply for asylum and employment authorization and work for years while the claim moved slowly through the adjudication and appeals process.⁸² Once the asylum seeker accrued seven years in the United States, the asylum seeker could seek to suspend deportation if it could be shown that deportation would result in extreme hardship to an

79. AT LEAST LET THEM WORK, *supra* note 2, at 15 (citing *Asylum Cases Filed with Immigration and Naturalization Service Asylum Officers, Approved, Denied, and Referred After Interview, by Selected Nationalities, April 1991–September 1995*, REFUGEE REP., Dec. 31, 1995, at 12.).

80. *Id.* (citing Telephone Interview by Human Rights Watch with David Pilotti, HQ Asylum Branch Chief – Mgmt., USCIS (Oct. 11, 2013)).

81. *Id.* Although the asylum offices are currently experiencing significant backlogs, USCIS is hiring hundreds of additional officers to address the situation. See CHERI ATTIX, AM. IMMIGRATION LAWYERS ASS’N, THE AFFIRMATIVE ASYLUM BACKLOG EXPLAINED, 2 (2014), available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/AILA_Explanation%20of%20the%20Affirmative%20Asylum%20Backlog_4.2.14.pdf [<https://perma.cc/QMB2-MFFP>].

82. As one scholar notes, “[d]uring the late 1990s a queue of appeals to the BIA created delays in hearing cases that in turn encouraged some noncitizens to file appeals merely for the benefit of delay.” See Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11–12 (2006) (citing Press Release, Dep’t of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), available at <http://www.justice.gov/sites/default/files/eoir/legacy/2002/08/26/BIARestruct.pdf> [<http://perma.cc/FNH9-92LD>]).

immediate family member who was a United States citizen or a lawful permanent resident.⁸³ In 1996, Congress removed this immigration remedy (known as “Suspension of Deportation”)⁸⁴ and replaced it with a much more limited form of relief known as “Cancellation of Removal.”⁸⁵ In order to be eligible for this more restrictive provision, an asylum seeker needs to accrue ten years in the United States without being placed in removal proceedings.⁸⁶ Because of the requirement that the immigrant accrue ten years *prior* to being placed in removal proceedings, there is no longer any incentive to appeal in hopes of accruing time for cancellation of removal.⁸⁷ Congress also changed the showing of hardship to immediate family if the applicant were deported from “extreme hardship”⁸⁸ to “exceptional and extremely unusual hardship.”⁸⁹ Finally, the exceptional and extremely unusual hardship standard no longer applies to the applicant, but only to a United States citizen or to a spouse, parent, or child who is a lawfully permanent resident.⁹⁰ All of these statutory changes have resulted in a more restrictive regime for gaining asylum relief that effectively blunts any attempt to file for asylum simply for the goal of securing work authorization.

Congress also implemented a system of expedited removal aimed at dramatically reducing the backlog of cases. Under this system, an immigration officer stationed at a port of entry is empowered to determine whether to quickly remove a person who has improper or no documentation or to allow them to seek asylum.⁹¹ “If the officer believes that [the person] does not have a credible fear of persecution,” the officer has the power to

83. See 8 U.S.C. § 1254 (1994) (repealed in 1996); H. COMM. ON THE JUDICIARY, IMMIGRATION IN THE NATIONAL INTEREST ACT OF 1995, H.R. REP. NO. 104-469, pt. 1, at 122 (1996) (expressing concern that, “[s]uspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued. This includes aliens who failed to appear for their deportation proceedings and were ordered deported in absentia, and then seek to re-open proceedings once the requisite time has passed. Such tactics are possible because some Federal courts permit aliens to continue to accrue time toward the seven year threshold even after they have been placed in deportation proceedings.”).

84. 8 U.S.C. § 1254 (1994) (repealed in 1996).

85. 8 U.S.C. § 1229b(a) (2012).

86. § 1229b(b)(1)(A).

87. See *id.*

88. 8 U.S.C. § 1254a(e) (2012).

89. § 1229b.

90. § 1229b(b)(1)(D) (establishing that “removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”).

91. RUTH ELLEN WASEM, CONG. RESEARCH SERV., 7-5700, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY HEARING ON “ASYLUM ABUSE: IS IT OVERWHELMING OUR BORDERS?” 7 (2013); 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

“order the [person] removed . . . without further hearing or review.”⁹² Credible fear is a lower standard than “well-founded,” which is required for a grant of asylum;⁹³ credible fear “means that there is a significant possibility . . . that the alien could establish eligibility for asylum.”⁹⁴ This process was implemented to “target the perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at a port of entry.”⁹⁵

Moreover, any person with fraudulent or no documentation, who presents himself or herself to an immigration officer at a port of entry, *must* be detained pending the credible fear determination.⁹⁶ If that person is “found not to have such a fear,” he or she is removed.⁹⁷ Mandatory detention thus makes it easier to monitor persons who purport to seek asylum and then remove them from the United States if their pleas for asylum are deemed not to meet the credible fear standards of asylum law. If, on the other hand, an officer or immigration judge concludes that a person does have a credible fear of persecution in his or her home country, the person may be released until the full case is heard before a judge,⁹⁸ but most often remains in detention and must present a claim within those confines.⁹⁹

In enacting IIRIRA, Congress made additional revisions to existing law, which further restricted an asylum seeker’s ability to seek protection. For example, Congress imposed a one-year time limit for seeking asylum

92. § 1225(b)(1)(B)(iii)(I).

93. 8 U.S.C. § 1101(a)(42)(A)(2012); *Asylum in the United States*, IMMIGR. POL’Y CTR. (Aug. 27, 2014), <http://www.immigrationpolicy.org/just-facts/asylum-united-states> [<http://perma.cc/PBK6-PFW9>].

94. § 1225(b)(1)(B)(v).

95. WASEM, *supra* note 91, at 7.

96. WASEM, *supra* note 91, at 7–8; § 1225(b)(1)(B)(iii)(IV).

97. § 1225(b)(1)(B)(iii)(IV).

98. WASEM, *supra* note 91, at 5.

99. Letter from Robin M. Stutman, Gen. Counsel of U.S. Dep’t of Justice Exec. Office for Immigration Review, to Mary Meg McCarthy, Exec. Dir., Nat’l Immigrant Justice Ctr, Petition for Rulemaking to Promulgate Regulations Governing Custody Determinations for Arriving Alien Asylum Seekers (Mar. 19, 2012) (“The great majority of aliens who assert a credible fear of persecution or torture are found to have such fear; in fiscal year 2009, DHS made positive credible fear findings in 79.7 percent of cases involving arriving aliens that proceeded to a decision.”); *Credible Fear Workload Report Summary: FY 2012 Total Caseload*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (2012), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Credible-Reasonable-workloadsFY12.pdf> [<http://perma.cc/M363-XZSP>].

protection.¹⁰⁰ This seemingly arbitrary temporal limitation on asylum has been sharply criticized by human rights advocates because it deprives many deserving refugees of protection.¹⁰¹ In addition, anyone who has traveled through a “safe-third country” prior to seeking asylum in the United States is now barred from asylum protection.¹⁰² Asylum seekers who have previously applied for, but were denied, asylum are also ineligible.¹⁰³ Finally, if the Attorney General determines that an asylum seeker submitted a frivolous application, the asylum seeker becomes “permanently ineligible for any [asylum] benefits.”¹⁰⁴

In addition to removing asylum eligibility for refugees who waited over a year to apply, traveled through a safe third country, were denied protection in the past, or previously submitted a fraudulent application, Congress dramatically restricted immigration relief more generally and focused greater resources on heightened enforcement measures. The IIRIRA focused almost exclusively on border security and strengthening interior enforcement against undocumented immigrants.¹⁰⁵ Congress allocated a dramatic increase in resources for personnel, physical barriers, and technology at the border,¹⁰⁶ and authorized additional funding for more Federal prosecutors, detention facilities, and the actual removal of undocumented immigrants with removal orders.¹⁰⁷ The IIRIRA also established a pilot program for employer electronic verification of workers’ identities and work authorizations¹⁰⁸ and substantially increased civil and criminal penalties for alien smuggling, document and other fraud, as well as other miscellaneous immigration-related offenses.¹⁰⁹ It also created the three and ten year bars to reentry for immigrants who were previously

100. 8 U.S.C. § 1158(a)(2)(B) (2012). The only exception to this time limit is if the applicant can show that there were certain “changed circumstances which materially affect[ed] the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing” the asylum application. § 1158(a)(2)(D).

101. See, e.g., *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*, HUMAN RIGHTS FIRST (Sept. 2010), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf> [<http://perma.cc/AYH2-PKHQ>].

102. WASEM, *supra* note 91, at 8; § 1158(a)(2)(A). That third country must be a signatory to the Refugee Convention and one with which the United States has a special treaty and that would afford the asylum seeker a “full and fair procedure” to determine asylum eligibility in that country. § 1158(a)(2)(A).

103. WASEM, *supra* note 91, at 8; § 1158(a)(2)(C).

104. WASEM, *supra* note 91, at 8–9; § 1158(d)(6).

105. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

106. *Id.* §§ 101–12.

107. *Id.* §§ 204, 131–34, 385, 386.

108. *Id.* §§ 401–05.

109. *Id.* §§ 202, 203, 211–20, 321–34.

unlawfully present in the United States, expanded the crime-related and terrorism-related removal grounds, restricted the availability of discretionary remedies, and narrowed the procedural rights previously applicable in removal proceedings.¹¹⁰ The Act broadened, and in some circumstances mandated, the use of preventive detention in connection with removal proceedings.¹¹¹

Whereas appealing a denial of asylum in the past often resulted in years of employment authorization while the case sat before a backlogged Board of Appeals, in 1999 the Board of Immigration Appeals began streamlining adjudication of appeals.¹¹² In August 2002, the Department of Justice promulgated new rules aimed at procedural reforms to the Board of Immigration Appeals and reducing the backlog of cases.¹¹³ The new rules changed the appeals process so that most cases would be decided by a single Board member rather than a three-member panel.¹¹⁴ It also allowed for a single Board member to summarily dismiss an appeal prior to briefing or to issue an “affirmance without opinion,” substantially reducing the amount of time necessary for issuing decisions.¹¹⁵

Moreover, since 1996 Congress has enacted additional legislation aimed at increasing enforcement measures and making immigration laws less generous or forgiving. For example, Congress enacted the USA PATRIOT Act of 2001,¹¹⁶ which:

110. *Id.* §§ 301–58.

111. *Id.* § 305.

112. Press Release, U.S. Dep’t of Justice, EOIR Publishes Final Rule for Streamlining Appeals Process (Oct. 18 1999) (on file with author).

113. “The preamble to the proposed rules states that the ‘Procedural Reforms’ are intended to: (1) eliminate the backlog of approximately 55,000 cases pending before the BIA, (2) eliminate unwarranted delays in the adjudication of administrative appeals, (3) utilize BIA resources more efficiently, and (4) allow more resources to be allocated to the resolution of those cases that present difficult or controversial legal questions.” DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 20 (2003) (citing Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 7309, 7310 (proposed Feb. 19, 2002) (to be codified at 8 C.F.R. pt. 3)), *available at* <http://www.dorsey.com/files/Upload/DorseyStudyABA.pdf> [<https://perma.cc/AW9C-K6F6?type=pdf>].

114. DORSEY & WHITNEY LLP, *supra* note 113, at 20.

115. *Id.* at 17.

116. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[B]uilt on previous restrictions and introduced a series of new measures that broadened terrorism-related grounds for removal, narrowed the possibilities for discretionary relief, reinforced border security, expanded detention, and streamlined the procedures for removing alien terrorists. Five years later, the REAL ID Act of 2005 again expanded grounds of inadmissibility, further restricted judicial review in immigration proceedings, prohibited the issuance of driver's licenses to undocumented individuals, and mandated various security procedures relating to applications for drivers' licenses. The Secure Fence Act of 2006 bolstered existing border security measures by mandating 700 miles of fencing along the Southern border. . . . Overall, in the years following the attacks of September 11, 2001, Federal laws enacted in the immigration realm have focused almost entirely on interior enforcement and border security.¹¹⁷

Not surprisingly, in light of the dramatically increased spending in this area, U.S. Immigration and Customs Enforcement (ICE) has carried out a record high number of immigrant removals from the United States.¹¹⁸

If the motive for restricting the right to work was to reduce fraud and provide a disincentive to seeking asylum solely to gain employment authorization, such a restriction is no longer necessary in light of the current harsh refugee regime. At the same time, the Executive Branch has focused greater resources on enforcement actions and achieved record high numbers of removals. In addition, the Board of Immigration Appeals revamped its processes to streamline decision-making and diminish the backlog of cases. While in no way condoning the punitive regime facing asylum seekers, also forcing poverty upon asylum seekers is immoral and superfluous as a means of avoiding fraudulent asylum claims.

117. BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT, S. REP. NO. 113-40, pt. 1, at 15 (2013) (citations omitted). Congress has also adopted other measures to bolster immigration enforcement. *See, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 5101–5204, 118 Stat. 3638, 3732–35 (containing several border security and immigration enforcement provisions, including authorization of an increase of at least 2000 Border Patrol agents and 800 ICE agents); Security and Accountability for Every Port (SAFE Port) Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884; Jamie Zapata Border Enforcement Security Task Force Act, Pub. L. No. 112-205, 126 Stat. 1487 (2012).

118. Ben Winograd, *Clearing up the Controversy over the Number of ICE "Removals,"* AM. IMMIGRATION COUNCIL: IMMIGRATION IMPACT (Sept. 10, 2012), <http://immigrationimpact.com/2012/09/10/clearing-up-the-controversy-over-the-number-of-ice-removals/> [http://perma.cc/GMH2-KGBG].

IV. RESTRICTING EMPLOYMENT AUTHORIZATION FOR ASYLUM
SEEKERS IS INCONSISTENT WITH THE UNITED STATES'
APPROACH TO OTHER FORMS OF HUMANITARIAN-
BASED RELIEF UNDER DOMESTIC
IMMIGRATION LAW

United States immigration law is driven by a number of important and at times conflicting policy goals such as family reunification, strengthening the economy, protecting the nation's borders, and providing a safe haven for those in need. As for the latter category, the United States offers asylum to those fleeing persecution, T visas to those who escape human trafficking,¹¹⁹ U visas to victims of violent crimes within the United States,¹²⁰ the ability to self-petition for permanent residency for those who have suffered domestic violence at the hands of an American or lawful permanent resident spouse,¹²¹ and temporary protected status (TPS) to those who cannot return home due to natural disaster or civil conflict ravaging their countries.¹²² While domestic law separates victims into particular

119. A T visa is a non-immigrant visa that provides a way for victims of human trafficking to remain in the United States and to assist law enforcement in an investigation. 8 U.S.C. § 1101(a)(15)(T)(i) (2012); 28 C.F.R. § 1100.27(a)(3) (2014).

120. U visas are nonimmigrant visas that allow victims of violent crime to remain in the United States and assist in the investigation or prosecution of the crime by law enforcement. 8 C.F.R. § 214.14(b)(1)–(2) (2014).

121. The Violence Against Women Act (VAWA) of 1994 created a process by which a battered spouse, child, or parent can obtain legal status by self-petition. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 801–810, 127 Stat. 54, 110–18; *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 7, 2011), <http://www.uscis.gov/humanitarian/battered-spouse-children-parents> [<https://perma.cc/T6KQ-XZNT?type=source>]; *Fact Sheet: USCIS Issues Guidance for Approved Violence Against Women Act (VAWA) Self-Petitioners*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 11, 2008), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2cac37668c779110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> [<http://perma.cc/LT3F-3STV>]. It is intended to be used by those victims whose qualifying family member—whether a United States citizen or lawful permanent resident—was willfully withholding, or threatening to “withhold legal immigration sponsorship as a tool of abuse.” *Id.* Upon a successful grant of a VAWA petition, that person—as well as any “derivative child”—will be able to apply for work authorization. 8 U.S.C. § 1154(a)(1)(D)(i)(IV) (2012).

122. Temporary Protected Status is intended to provide a safe haven for those who may not meet the legal definition of refugee but have fled or cannot return to perilous conditions in their native countries. 8 U.S.C. § 1254a (2012). Once the USCIS approves an application for TPS, the applicant is also granted work authorization for the duration of

categories, in actuality these distinctions are often artificial as an immigrant can simultaneously be both a trafficking victim and a refugee or a domestic violence victim and a victim of a violent crime. For example, take the case of a woman who flees an abusive relationship in Guatemala believing she is coming to the United States as a nanny when in actuality she is held captive by her employer and not paid for her labor. This immigrant woman could seek asylum protection based on the domestic violence she suffered in Guatemala and also seek a T visa as a victim of human trafficking in the United States. If she was subjected to domestic violence in the United States, she could also seek a U visa for victims of violent crime. If her abuser was also her spouse and a United States citizen or lawful permanent resident, she could self-petition for permanent residency. If her country was designated for protection while she was in the United States, she could also seek TPS.

United States law allows for employment authorization in all of these humanitarian-based situations. In some of these categories, like TPS, the processing time is relatively fast so that applicants are not left for long without the ability to support themselves.¹²³ In other situations, the processing can be slow¹²⁴ or there are limits on how many visas can be allocated per year.¹²⁵ In order to address these situations, United States law either allows for employment authorization in the interim period (as

his or her country's designation as an unsafe state. LISA SEGHELLI ET AL., CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES (2015).

123. Processing time for employment authorization based on TPS is generally three months. See *USCIS Processing Time Information for the Vermont Service Center*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 12, 2015), <https://egov.uscis.gov/cris/processing-timesdisplay.do> [<https://perma.cc/SDU6-J5XN>].

124. For example, applicants for U visas are currently waiting approximately thirteen months for approval and concomitant employment authorization; T visa applicants are currently waiting about four months for approval and employment authorization. *Id.*

125. There are only 10,000 U visas available per year, and they are taken very quickly. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<http://perma.cc/L3YM-2HN7>] (last updated Jan. 9, 2014).

with U visas),¹²⁶ or allows for public benefits (as with T visas)¹²⁷ and VAWA petitions.¹²⁸ Only when it comes to refugees seeking asylum does

126. USCIS may grant conditional work authorization to applicants in excess of the 10,000 cap if there is a bona fide U visa application pending before USCIS. 8 U.S.C. § 1184(p)(6) (2012). An application is considered bona fide when USCIS determines that it is not fraudulent, is complete and properly filed, contains the requisite certification by law enforcement, is accompanied by fingerprint and background checks, and “established prima facie eligibility for” U visa status. See SUZANNE B. SELTZER ET AL., NY ANTI-TRAFFICKING NETWORK, IMMIGRATION RELIEF FOR CRIME VICTIMS: THE U VISA MANUAL A-iv (2010), available at <http://aaldef.org/docs/U-Visa-Manual.pdf> [<http://perma.cc/NM46-RQ7U>]. Even prior to the full implementation of the U visa program, USCIS took steps to ensure that potential U visa applicants would not be left without the ability to work. From 2000 until 2009, USCIS granted interim relief, which allowed those individuals who were U visa-eligible to receive work authorization and additional benefits. *USCIS Update: U Nonimmigrant Interim Relief Recipients Reminded To Apply for U Visa*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=1c4cb1be1ce85210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> [<http://perma.cc/Y27K-SPPA>] (last updated Dec. 14, 2009). Upon the interim relief program’s conclusion, benefit recipients were encouraged to apply for the U visa; those who already had pending applications were allowed to continue receiving benefits until their applications were adjudicated. *Id.*

127. Victims of human trafficking are afforded an alternative form of temporary immigration status called “continued presence.” 22 U.S.C. § 7105(c)(3) (2008). To receive continued presence, a law enforcement official must submit an application to the Secretary of Homeland Security certifying that a person “is a victim of a severe form of trafficking and may be a potential witness to such trafficking,” which would require that the person remain in the United States for one year, subject to renewal, to assist in investigation and prosecution. § 7105(c)(3)(A)(i); U.S. Immigration and Customs Enforcement, *Continued Presence: Temporary Immigration Status for Victims of Human Trafficking*, DEP’T OF HOMELAND SECURITY (July 2010) [hereinafter *Continued Presence*], http://www.dhs.gov/sites/default/files/publications/blue-campaign/BC_Continued_Presence.pdf [<http://perma.cc/FX2K-AZB2>]. Upon a successful grant of continued presence, the person will be able to obtain state and federal benefits as well as work authorization. § 7105(b)(1)(A); *Continued Presence, supra*; 28 C.F.R. § 1100.35 (2014). A decision on employment authorization usually takes three months from the date of application for authorization. *USCIS Processing Time Information for the Vermont Service Center, supra* note 123.

128. VAWA self-petitioners can receive benefits while their claims are processed. See CECILIA OLAVARRIA ET AL., NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, PUBLIC BENEFITS ACCESS FOR BATTERED IMMIGRANT WOMEN AND CHILDREN 2 (2013), available at http://niwaplibrary.wcl.american.edu/public-benefits/benefits-for-qualified-immigrants/4.2_PB_BB-PublBens_for_Imm_Women_and_Children-MANUAL-BB.pdf [<http://perma.cc/T84Y-RYL5>]. Indeed, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) recognized that certain classes of immigrants might be unable to support themselves and so provided for those “qualified immigrants” to receive certain public benefits. *Id.* An individual petitioning under VAWA may receive benefits if the individual’s application contains a prima facie showing of VAWA eligibility, the individual has

United States law leave the applicant for prolonged periods of time without either the ability to work or access to social services.¹²⁹ While it is true that asylum seekers are eligible to seek employment authorization after six months, this is only available for those few who have never requested additional time to prepare their cases.¹³⁰ For those who were offered a quick asylum interview or hearing, but needed more time to adequately prepare their case, they are left in limbo without a means to survive for an indefinite period. This punitive aspect of United States asylum law is inconsistent with other areas of law and places an undue burden on one sub-category of vulnerable immigrants in need of protection.

V. THE RESTRICTION ON EMPLOYMENT AUTHORIZATION UNDERMINES THE STATUTORY RIGHTS TO SEEK ASYLUM AND TO OBTAIN COUNSEL

Congress enacted the Refugee Act in 1980 in order to give “statutory meaning to our national commitment to human rights and humanitarian concerns.”¹³¹ The Refugee Act for the first time created a statutory right to seek asylum.¹³² Although not required to do so pursuant to the Refugee

been battered or subject to extremely cruel treatment by a United States citizen or lawful permanent resident, there is a demonstrated connection between the abuse and the necessity of public benefits, and the individual does not live with his or her abuser. Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 62 Fed. Reg. 61,344, 61,366 (Nov. 17, 1997). Those persons who meet the requirements are allowed access to “federal means-tested public benefits, [other] federal public benefits, and federally funded social service programs.” OLAVARRIA ET AL., *supra*, at 7.

129. Perhaps a reason for allowing broader benefits for T and U visa applicants is because they are not solely humanitarian-based. See *Victims of Trafficking and Violence Protection Act (T and U Visas)*, IMMIGR. CENTER FOR WOMEN & CHILDREN, <http://icwclaw.org/services-available/victims-of-trafficking-and-violence-protection-act-t-and-u-visas> [http://perma.cc/6984-5EUY] (last visited June 9, 2015). Rather, T and U visas are also aimed at assisting law enforcement in the prosecution of criminals. *Id.* However, the VAWA self-petition visas are solely humanitarian. See *Fact Sheet: USCIS Issues Guidance for Approved Violence Against Women Act (VAWA) Self-Petitioners*, *supra* note 121. Moreover, asylum seekers sued to be afforded the right to work before it was dramatically curtailed in 1995. See AT LEAST LET THEM WORK, *supra* note 2, at 15.

130. See *supra* note 54 and accompanying text.

131. Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303, 313 (2001) (quoting S. REP. NO. 96-256, at 141 (1980)).

132. 8 U.S.C. § 1158(a)(1) provides that, “[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.” 8 U.S.C. § 1158(a)(1) (2012). According to David Martin, “It is indeed quite plausible to read Congress’s enactment of [section] 208 in 1980 as creating a right for

Act of 1980, the INS promulgated regulations allowing for both a right to counsel—as long as there is no cost to the government or undue delay¹³³ and a right to employment authorization in non-frivolous cases—at the discretion of the District Director.¹³⁴

The INS initially retained discretion to decide work authorization requests while asylum claims were pending on a case by case basis.¹³⁵ However, in *Diaz v. INS*, a class of asylum seekers, largely from Central America, challenged the district director's use of restrictive criteria to deny or revoke work authorization.¹³⁶ The Court initially noted that “the INS may not have been required to enact regulations permitting aliens to work while awaiting a decision on their political asylum applications.”¹³⁷ However, in enjoining the INS from denying employment authorization based on restrictive factors, the Court held that once the agency chose to promulgate a regulation, it had an obligation to follow it.¹³⁸

Within a year after the *Diaz* decision, the INS issued new nondiscretionary regulations in 1987, making the right to seek work authorization nearly automatic for refugees seeking asylum.¹³⁹ Noting the significance of the new nondiscretionary employment authorization procedure, David Martin advised:

If work authorization is now to be denied, any lawyer for the Department of Justice is bound to be asked in court how the government expects asylum seekers to survive during the months (and possibly years) until a final ruling is obtained on the application. Unless the government takes further steps to provide for such

persons physically present in the United States to have their asylum claims heard on the merits.” David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1374 (1990).

133. See *infra* note 144 and accompanying text.

134. See *supra* note 27 and accompanying text.

135. The applicable regulations provided that “[a]ny alien who has filed a non-frivolous application for asylum pursuant to Part 208 of this chapter may be granted permission to be employed for the period of time necessary to decide the case.” 8 C.F.R. § 109.1(b)(2) (1986). Section 208.4 provided that “[u]pon the filing of a non-frivolous I-589, the district director may, in his discretion, grant a request by the applicant for employment authorization.” 8 C.F.R. § 208.4 (1986) (cited by *Diaz v. INS*, 684 F. Supp. 638, 646 (E.D. Cal. 1986)).

136. *Diaz*, 648 F. Supp. at 641.

137. *Id.* at 647.

138. *Id.* (citing *Confederated Tribes & Bands of Yakima Indian Nation v. Fed. Energy Regulatory Comm’n*, 746 F.2d 466, 474 (9th Cir. 1984)).

139. Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,221 (May 1, 1987) (to be codified at 8 C.F.R. pt. 274a); Martin, *supra* note 132, at 1374.

people during the pendency of the claim, the lawyer has no respectable answer. Courts might easily conclude that the government was trying to starve people out of pursuing a congressionally mandated right. And they would surely point out that a no-work authorization policy falls as heavily on bona fide refugees as on the abusers who are the ostensible targets.¹⁴⁰

Notwithstanding Martin's admonition, the INS changed course in 1995 and instituted the present policy of disallowing work authorization for at least 180 days.¹⁴¹ During this period, the United States does not "take[] further steps to provide for such people . . ." arguably leaving a government lawyer in the same unanswerable position as Martin hypothesized about in 1990.¹⁴² The current bar on employment authorization for at least six months is indeed an attempt to "starve people out of pursuing a congressionally mandated right."¹⁴³

As noted, Congress has also provided a right to counsel in immigration proceedings, so long as there is no cost to the government or undue delay.¹⁴⁴ In recognition of the intricacy of asylum law and the difference that having a lawyer can make in the process, the asylum application itself contains the following admonition: "Immigration law concerning asylum and withholding of removal or deferral of removal is complex. You have a right to provide your own legal representation at an asylum interview and during immigration proceedings before the Immigration Court at no cost to the U.S. government."¹⁴⁵ Indeed, studies have shown that having counsel dramatically increases the likelihood of prevailing in an asylum claim.¹⁴⁶ Unfortunately, there are extremely limited options for obtaining free legal representation in asylum cases.¹⁴⁷

140. Martin, *supra* note 132, at 1374 (citations omitted). Martin also warned that, "At times of heavy influx, a policy of near-automatic work authorizations may well be ended, but the government must then provide alternative arrangements for feeding and housing the asylum seekers." *Id.*

141. 8 U.S.C. § 1158(d)(2) (2012).

142. Martin, *supra* note 132, at 1374.

143. *Id.*

144. 8 C.F.R. § 1240.10 (2014).

145. See I-589, *Application for Asylum and for Withholding of Removal, Instructions*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Dec. 29, 2014), <http://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf> [<http://perma.cc/BX3F-KD7C>].

146. See e.g., Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 55 (2008) (finding that "asylum seekers represented by counsel were three times more likely to succeed in their claim than pro se applicants").

147. Under 45 C.F.R. § 1626.3, recipients of Legal Services Corporation (LSC) funds "may not provide legal assistance for or on behalf of an ineligible alien." 45 C.F.R. § 1626.3 (2014). This applies also to any non-LSC funds that LSC-funded institutions could use. See *id.* There is an exception to this, termed the Kennedy Amendment Provision, which "permits LSC recipients to use non-LSC funds to provide legal assistance to ineligible aliens

Because the likelihood of securing a pro bono lawyer is so remote, the bar on employment authorization results in a de facto bar on representation by counsel. Given the complexity of asylum law, undermining the ability to afford a lawyer dramatically decreases the likelihood of gaining asylum. If the statutory right to seek asylum is to have any real meaning, the United States should either provide free counsel or allow asylum seekers to work so they can hire lawyers.

VI. IMPOSING DESTITUTION ON ASYLUM SEEKERS IS CONTRARY TO
THE SPIRIT OF THE REFUGEE CONVENTION AND OTHER
INTERNATIONAL HUMAN RIGHTS TREATIES
AND CONVENTIONS

*A. Denying Access to Employment and Benefits Can Rise to a Level of
Constructive Refoulement as Prohibited by the
Refugee Convention*

In addition to undermining the statutory right to seek asylum and obtain counsel, denying refugees the ability to work, without providing any alternative way to provide for the costs of living while seeking asylum, threatens to eviscerate the very essence of the Refugee Convention. Although the Refugee Convention does not explicitly require signatory states to provide for the right to work for asylum seekers, failing to provide asylum seekers with any lawful means of basic sustenance for at least six months undermines the ability to seek protection, which is at the core of the Refugee Convention. International law precludes state parties from attaching reservations or understandings that undermine the purpose of the treaty or convention being ratified.¹⁴⁸ As a state party to the U.N.

who are the victims of domestic abuse when the legal assistance is ‘directly related to the prevention of, or obtaining relief from,’ the abuse.” Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19,409, 19,410 (Apr. 21, 1997) (to be codified at 45 C.F.R. pt. 1626).

148. See Leo R. McIntyre III, Comment, *Of Treaties and Reservations: The International Covenant on Civil and Political Rights and the Juvenile Death Penalty in the United States*, 40 HOUS. L. REV. 147, 155–56 (2003) (citing Vienna Convention on the Law of Treaties, art. 19, May 23, 1969, 1155 U.N.T.S. 331, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/VV9Y-T579>]). Another fundamental tenet of international law is that if a reservation to a treaty is contrary to the object and purpose of the treaty, it will be found invalid. Vienna Convention, *supra* (“A State may, when signing, ratifying, accepting,

Protocol on Refugees, the United States must act consistently with the spirit of the Convention. By enacting a set of laws and adopting policies that simultaneously preclude those who come forward to seek refugee status from any lawful means of economic survival for at least six months, the United States is undermining the purpose of the Refugee Convention and constructively refouling those who cannot sustain themselves.

The Refugee Convention provides that, “[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁴⁹ This obligation is not limited solely to recognized refugees, but applies to asylum seekers as well.¹⁵⁰

The question is whether compelling asylum seekers to live in destitution for a minimum of six months—most often for much greater periods—and making it almost impossible for them to afford lawyers essentially forces them to return to their home countries and thus, amounts to constructive refolement under the Refugee Convention. James Hathaway has remarked that “[i]n some cases, depriving refugees of the necessities of life may give rise to a breach of the duty of *non-refoulement*. Repatriation under coercion, including situations in which refugees are left with no real option but to leave, is in breach of Art. 33 of the Refugee Convention.”¹⁵¹ The United Nations High Commission on Refugees has also noted that States limit socio-economic opportunities for refugees in order to “promote early repatriation.”¹⁵² Although there is a paucity of scholarly literature discussing

approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty.”)

149. Convention Relating to the Status of Refugees, G.A. Res. 429 (V), U.N. Doc. A/CONF.2/108, at 29 (July 28, 1951) *available at* <http://www.unhcr.org/3b66c2aa10.html> [<http://perma.cc/CQN4-PFNL>].

150. See Ryszard Cholewinski, *Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights*, 10 INT’L J. REFUGEE L. 462, 487 (1998).

151. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 464 (2005). See also Merrill Smith, *Warehousing Refugees: A Denial of Rights, A Waste of Humanity*, WORLD REFUGEE SURV., 2004, at 38–39, *available at* http://www.uscrirefugees.org/2010Website/5_Resources/5_5_Refugee_Warehousing/5_5_3_Translations/Warehousing_Refugees_A_Denial_of_Rights.pdf [<http://perma.cc/7XGX-4U72>] (arguing that denial of necessary socio-economic support to refugees constitutes constructive *refoulement* under international law).

152. U.N. High Comm’r on Refugees, *Global Consultations on International Protection, Local Integration*, ¶ 3, U.N. Doc. EC/GC/02/6 (Apr. 25, 2002), *available at* <http://www.unhcr.org/3ccd64536.pdf> [<http://perma.cc/3HYD-YM6Y>] (last accessed June 9, 2015).

what constitutes constructive refoulement under the Refugee Convention, various international tribunals have interpreted the term.

For example, in *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights (ECHR) was faced with a claim of constructive refoulement based upon Italy's action in intercepting and forcibly pushing a boat of Somalian and Eritrean asylum seekers, who had fled from Libya in hopes of seeking asylum in Italy, back to Libya.¹⁵³ In ruling that Italy's actions in intercepting and pushing back the asylum seekers to Libya (a country that was not even a signatory to the Refugee Convention) were in clear violation of the protection against refoulement, the ECHR based its decision upon the doctrine of constructive refoulement.¹⁵⁴

In *Regina v. Secretary of State for Social Security*, the United Kingdom Court of Appeal struck down regulations that excluded any asylum seeker who did not lodge an application upon entry to the United Kingdom from accessing previously available economic benefits.¹⁵⁵ The Court gave weight to the concerns of the United Nations High Commission on Refugees [UNHCR] that:

[A]sylum seekers may be forced into unlawful exploitative conditions to support themselves whilst exercising their appeal rights. It is difficult to speculate on the range of illegal activities that increasingly desperate persons may resort to, but these are likely to include unlawful employment, dishonesty offences and perhaps more serious criminality involving drugs, prostitution or violent crimes.¹⁵⁶

In the UNHCR's opinion, "this could amount to 'constructive refoulement' and may place the United Kingdom in violation of its obligations under the Refugee Convention."¹⁵⁷ In striking down the regulations, the Court concluded that, "the Regulations necessarily contemplate for some a life so destitute that to my mind no civilized nation can tolerate it."¹⁵⁸ The Court aptly noted the Hobsian choice facing asylum seekers: "[T]he need

153. *Jamaa v. Italy*, 2012-II Eur. Ct. H.R., 97, 107.

154. *Id.* at 154.

155. *R v. Sec'y of State for Soc. Sec. ex parte Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275 (A.C.) at 293 (Eng.).

156. *Id.* at 289. The Court explained that "[s]uch activity could bring them into conflict with the law and undermine the delicate balance of reciprocity that exists between the State offering asylum and the asylum-seeker. Confronted with these choices even genuine but desperate refugees might be compelled to return to face persecution in the country of origin, rather than remain in an impossible position in the United Kingdom." *Id.*

157. *Id.*

158. *Id.* at 292.

either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.”¹⁵⁹

Furthermore, while silent on the issue of socioeconomic rights for asylum seekers, the Refugee Convention does generally mandate a broad spectrum of socio-economic rights for refugees. For example, Article 17 guarantees “lawfully staying” refugees “the right to wage-earning employment” (with the most favorable terms afforded to nationals of other countries).¹⁶⁰ The Refugee Convention also guarantees “lawfully staying” refugees additional socio-economic rights including the right to housing¹⁶¹ and to social security.¹⁶² The question is whether the term “lawfully staying” can be interpreted to include asylum seekers.

Some refugee scholars interpret lawful presence as implying “admission in accordance with the applicable immigration law, for a temporary purpose, for example, as a student, visitor, or recipient of medical attention.”¹⁶³ However, at least one prominent refugee scholar has argued that once an asylum seeker lodges an application for asylum, the asylum seeker should be considered to be in lawful presence. According to Hathaway, “lawful presence is an intermediary category which occupies the ground between illegal presence on the one hand, and a right to stay on the other.”¹⁶⁴ Independent experts have also concluded:

The meaning of the term ‘lawful’ must be ascertained in accordance with a good faith interpretation of the Refugee Convention, and in light of human rights treaties that protect rights on the basis of physical presence and the premise of equality. If a refugee’s presence in the territory of a state party to the Convention is not unlawful, in that the state is aware, or should be aware, of the refugee’s presence and the state is unable or unwilling to remove the refugee, then the refugee’s presence may be regarded as lawful for purposes of the Refugee Convention.¹⁶⁵

While asylum seekers are not generally considered to be lawfully staying for purposes of the rights to employment, housing, or social security under the Refugee Convention, an argument can be made that asylum seekers who

159. *Id.* at 293.

160. Convention Relating to the Status of Refugees, *supra* note 149, at 22.

161. *Id.* at 23.

162. *Id.* at 24–25.

163. GOODWIN-GILL & MCADAM, *supra* note 11, at 524. The authors note that Canada, in its reservation to Articles 23 and 24, stated that “it interprets lawfully staying as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence are to be accorded the same treatment with respect to those articles as is accorded to visitors generally.” *Id.* at 526 n.105.

164. HATHAWAY, *supra* note 151, at 183.

165. PENELOPE MATHEW, REWORKING THE RELATIONSHIP BETWEEN ASYLUM AND EMPLOYMENTS 81 (2012) (citing Colloquium, *The Michigan Guidelines on the Right To Work*, 31 MICH. J. INT’L L. 293, 298 (2010)).

are forced to wait months or years for a determination on their asylum applications should be deemed lawfully staying and entitled to the more robust protections afforded to these longer-term refugees.¹⁶⁶

1. *United Nations Convention Against Torture*

As a signatory to the United Nations Convention Against Torture, the United States is obligated under Article 3 not to return anyone to a country “where there are substantial grounds for believing that individual would be . . . subject[] to torture.”¹⁶⁷ The only way to apply for protection under Article 3 of the Convention Against Torture is to apply for asylum.¹⁶⁸ Under United States immigration law, an application for asylum is automatically considered also to be an application for protection under the Convention Against Torture (also known as the Torture Convention).¹⁶⁹ The same rules apply in terms of not being entitled to public benefits or authorized to work for at least 180 days.¹⁷⁰ Therefore, by depriving those who fear torture or the ability to survive while their claims proceed, the United States may also be engaged in constructive return in violation of its obligations under the Torture Convention.

B. *Interpretations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)*

Although the United States has not ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), it nevertheless provides a useful lens for examining the human rights violations inherent in

166. Asylum seekers who have lodged applications are normally considered to be “lawfully present” rather than “lawfully staying” as the latter designation contemplates a more significant duration and purpose than a period of lawful presence. MATHEW, *supra* note 165, at 87.

167. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

168. See I-589, *Application for Asylum and for Withholding of Removal, Instructions*, *supra* note 145.

169. *Id.*

170. *Asylum and Withholding of Removal Relief: Convention Against Torture Protections Fact Sheet*, U.S. DEP’T OF JUSTICE, (Jan. 15, 2009), available at <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf> [<http://perma.cc/TV66-PPKE>].

keeping asylum seekers in a state of destitution. Under the ICESCR, member states must ensure that everyone has the same right to an adequate standard of living, including the right to work, the right to adequate health care, and the right to social security.¹⁷¹ If a member state, through direct discrimination or omission, fails to uphold these rights for asylum seekers, it may be in violation of its obligations under the ICESCR. In addition, the United Nations Committee on Economic, Social and Cultural Rights has clarified that a member state breaches its obligations under the ICESCR when it changes policy and legislation in such a way as to cause a “decline in living and housing conditions” beyond minimum standards.¹⁷²

C. The European Court on Human Rights and the Right to Be Free of Inhumane or Degrading Treatment or Punishment

The European Court of Human Rights is developing an important body of jurisprudence in cases alleging that a state’s failure to provide adequate employment opportunities and subsistence benefits to asylum seekers constitutes inhumane or degrading treatment or punishment as proscribed by Article 3 of the European Convention on Human Rights. While there is no positive obligation on the State to ensure that everyone has adequate housing and sufficient resources to survive, the Court has recognized asylum seekers as a particularly vulnerable group deserving of greater protections.¹⁷³

The Court has also distinguished between the lack of a positive duty to ensure that all have adequate resources and situations in which the state’s laws or policies create a situation of destitution for asylum seekers. For example, in *Regina v. Secretary of State for the Home Department ex parte Limbuela*, an asylum seeker challenged legislation that prohibited the Secretary of State from providing accommodations and basic economic support to refugees who did not immediately seek asylum.¹⁷⁴ The legislation similarly barred such asylum seekers from working to support themselves.¹⁷⁵ The House of Lords held that placing asylum seekers who did not apply right away in a state of destitution by denying them welfare benefits, the

171. International Covenant on Economic, Social and Cultural Rights, art. 6(1), 9, 12, Dec. 19, 1966, 999 U.N.T.S. 171.

172. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing*, P11, U.N. Doc. E/1992/23 (Dec. 13, 1991).

173. See *R v. Sec’y of State for Soc. Sec. ex parte Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275 (A.C.) at 289 (Eng.).

174. *R v. Sec’y of State for the Home Dep’t ex parte Limbuela*, [2005] UKHL 66, [2006] 1 A.C. 396 (H.L.) (appeal taken from Eng.), available at <http://www.escri-net.org/sites/default/files/Decision%20Limbuela%20%28en%20ingles%29.pdf> [<http://perma.cc/CG7A-KD6C>].

175. *Id.* at 2.

right to work, and access to other forms of social support violated Article 3.¹⁷⁶ As Lord Bingham explained:

[T]reatment is inhumane or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being . . . A general public duty to house the homeless or provide for the destitute could not be spelled out of Article 3. But I have no doubt that the threshold may be crossed if a person with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.”¹⁷⁷

Similarly, in *M.S.S. v. Belgium & Greece*, the European Court of Human Rights assessed the state’s role in creating a situation in which vulnerable asylum seekers were left destitute.¹⁷⁸ As explained by the Court:

the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.¹⁷⁹

The Court noted that the applicant had “been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation . . . without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation.”¹⁸⁰ The Court concluded that “such living conditions, combined with the prolonged uncertainty in which [the applicant] remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.”¹⁸¹

Similarly, in *R v. Secretary of State for Social Security, ex parte Joint Consul for the Welfare of Immigrants*, the Judge cautioned that, “[p]arliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma:

176. *Id.* at 3.

177. *Id.* at 4. As explained by Lord Bingham, treatment must reach a minimum level of severity in order to be proscribed by Article 3. *Id.* Moreover, when the treatment at issue does not involve “deliberate infliction of pain or suffering, the threshold is a high one.” *Id.*

178. *M.S.S. v. Belg. & Greece*, 2011 Eur. Ct. H.R. 93 (2011).

179. *Id.* at 53.

180. *Id.*

181. *Id.*

the need to either abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.”¹⁸²

In *R (on the application of Q) v. Secretary of State for the Home Department*, the Court once again found that excluding destitute asylum seekers from governmental assistance violated Article 3’s prohibition against inhumane or degrading treatment or punishment.¹⁸³ As the Court explained:

It is clear that there is no duty on a state to provide a home. It may even be that there is no duty to provide any form of social security. But the situation here is different since asylum seekers are forbidden to work and so cannot provide for themselves. Unless they can find friends or charitable bodies or persons, they will indeed be destitute. They will suffer at least damage to their health.¹⁸⁴

In the United States, even if the system functioned perfectly, asylum seekers would be forced to survive without working or accessing any public benefits until at least six months after they file for asylum.¹⁸⁵ Based on the jurisprudence interpreting Article 3’s prohibition on inhumane or degrading treatment or punishment, it seems unlikely that a six-month bar would be considered a per se violation. However, in cases involving a particularly traumatized individual or applicants without any charitable assistance, a six-month period of destitution might well constitute the type of dehumanizing treatment prohibited under the European Convention on Human Rights. Moreover, the reality is that asylum seekers in the United States most often endure much longer periods of time without access to employment or benefits. Based on the jurisprudence from the ECHR and the United Kingdom, the longer the period of deprivation of a means of support, the more likely it constitutes inhumane or degrading treatment or punishment.

VII. DENYING A RIGHT TO WORK IS PARTICULARLY HARSH FOR ASYLUM SEEKERS WHO ARE ALSO DENIED ACCESS TO PUBLIC BENEFITS: A GLOBAL PERSPECTIVE

The confluence of immigration, public benefits, and health care laws and policies in the United States leaves asylum seekers outside of the realms of both gainful employment and public benefits. In addition to being

182. *R v. Sec’y of State for Soc. Sec. ex parte Joint Council for the Welfare of Immigrants*, [1997] 1 W.L.R. 275 (A.C.) at 293 (Eng.).

183. *R ex rel. Q v. Sec’y of State for the Home Dep’t*, [2003] EWHC (Admin) 195 (Eng.).

184. *Id.*

185. 8 U.S.C. § 1158(d)(2) (2012).

prohibited from working for at least 180 days, asylum seekers in the United States are also barred from receiving federal public benefits.¹⁸⁶ The illusive safety net remains out of reach for asylum seekers without employment authorization, even when it comes to buying subsidized health insurance through the Affordable Care Act.¹⁸⁷ While a handful of states provide social services to needy asylum seekers, the vast majority do not, leaving asylum seekers in an extremely vulnerable situation.¹⁸⁸

Countries around the world are searching for ways to deter asylum seekers, and some impose wait times for employment authorization that are as long, if not longer, than in the United States.¹⁸⁹ For example, even the new European Union Directive, which is scheduled to come into effect in July 2015, will only guarantee that asylum seekers have access to the labor market “no later than 9 months from the date when the application for

186. 8 U.S.C. §1611(a) (2012). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) includes asylum seekers within the definition of non-qualified immigrants who are explicitly excluded from social benefits. See Karina Fortuny & Ajay Chaudry, *Overview of Immigrants' Eligibility for SNAP, TANF, MEDICAID, and CHIP*, ASPE ISSUE BRIEF, Mar. 2012, available at <http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Eligibility/ib.pdf> [<http://perma.cc/5KVC-95SX>].

187. Only those asylum seekers with employment authorization are considered to be lawfully present under the Affordable Care Act. See “*Lawfully Present*” *Individuals Eligible under the Affordable Care Act*, NAT’L IMMIGR. L. CENTER (Sept. 2012), available at <http://www.nilc.org/lawfullypresent.html> [<http://perma.cc/5JQL-B84N>].

188. Only California, Hawaii, Minnesota, New York, and Washington allow asylum seekers to access social benefits through the Temporary Assistance to Needy Families (TANF) program. Fortuny & Chaudry, *supra* note 186, at 4. Although sixteen states and the District of Columbia provide some state-funded health assistance to particular subgroups of asylum seekers, such as the elderly or children, most asylum seekers are precluded from coverage. Tanya Broder & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NAT’L IMMIGR. L. CENTER (last revised Oct. 2011), available at <http://www.nilc.org/overview-immeligfedprograms.html> [<http://perma.cc/QQH5-537D>].

189. However, some nations allow for an immediate right to work. For example, Greece permits almost immediate access to the labor market (after the initial interview, which is supposed to occur within two months from filing the asylum application). MATHEW, *supra* note 165, at 27. With the exception of unskilled or farm labor, however, preference in employment is given to Greeks, EU nationals, recognized refugees or persons of Greek descent. *Id.* In Spain, asylum seekers can work for six months after applying for asylum. *Id.* at 28. In Portugal, asylum seekers can work once a decision on admissibility is made, which must occur within twenty days of filing the application. *Id.* Austria permits asylum seekers to work or be self-employed three months after applying for asylum. However, in practice, only seasonal employment is permitted. *Id.* Self-employment as a paper boy is also allowed, as is prostitution and work in reception centers for those who are detained there. *Id.*

international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.”¹⁹⁰

Outside of the European Union, some nations impose even greater wait times before asylum seekers are permitted to work. For example, in the United Kingdom, asylum seekers can only seek employment authorization after a year if there has been no delay attributable to the asylum seeker and the employment is limited to sectors with a labor shortage.¹⁹¹ Asylum seekers in the United Kingdom are also not allowed to be self-employed or start a business.¹⁹² Slovenia permits access to the labor market after nine months, as long as identity can be established and delay is not attributable to the asylum seeker.¹⁹³

While many countries impose wait times on the right to work for asylum seekers, the United States stands alone in simultaneously denying access to social benefits and leaving asylum seekers in an enforced state of destitution. For example, when the European Union implements its new Directive in July 2015, it will require states to provide financial and social benefits consistent with international human rights law.¹⁹⁴ Article 17 of the Reception Directive guarantees financial social assistance and access to health care.¹⁹⁵ The United Kingdom permits asylum seekers to obtain benefits such as free health care, legal counsel, and housing if they establish financial need.¹⁹⁶

In Australia, mandatory detention and a policy of deterrence predominate when it comes to unauthorized asylum seekers. Those asylum seekers that arrive lawfully in Australia may be allowed a bridging visa in order to work. However, boat arrivals can only seek a Bridging Visa E that requires a “compelling need to work.”¹⁹⁷ But even here, in the context of a more restrictive legal framework for seeking asylum, the Australian government, working with the Red Cross, uses a number of programs to

190. Council Directive 2013/33/EU, art.15, 2013 O.J. (L 180) 96, 104 (effective July 2015), *available at* <http://www.refworld.org/docid/51d29db54.html> [<http://perma.cc/85NP-6TUN>].

191. MATHEW, *supra* note 165, at 27.

192. *Id.*

193. *Id.* at 27. In Cyprus, employment is allowed after an asylum application has been pending for six months, but only in high-demand sectors such as “garbage collection, cleaning and food delivery.” *Id.* In Belgium, asylum seekers can seek a special work permit after six months of a pending asylum application. *Id.* at 28.

194. See Council Directive 2013/33/EU, *supra* note 190.

195. MATHEW, *supra* note 165, at 26.

196. *Benefits & Credits: Asylum Support*, GOV.UK, <https://www.gov.uk/asylum-support/print> [<https://perma.cc/ZWD6-EYYS>].

197. MATHEW, *supra* note 165, at 33.

provide “medical care, immigration advice and financial assistance.”¹⁹⁸ In New Zealand, non-detained asylum seekers may be issued a work permit, and if they “cannot find work, social assistance and access to some health services is available.”¹⁹⁹ In Canada, asylum seekers who cannot support themselves without working may apply for a work permit.²⁰⁰ Social assistance is also available to asylum seekers, such as social security, healthcare and legal representation.²⁰¹

In addition to recognizing that asylum seekers must be afforded benefits if they are not permitted to work, courts have also assessed the constitutionality of providing less support to asylum seekers than to citizens. For example, in 2012, the Federal Constitutional Court in Germany faced a challenge to the disparity between benefits allowed to asylum seekers as compared with citizens.²⁰² Germany reduced the amount of cash assistance available by fifteen percent in an effort to avoid attracting asylum seekers.²⁰³ The Court held that it was unconstitutional for Germany to allocate cash benefits to asylum seekers that were “insufficient to guarantee a dignified minimum existence.”²⁰⁴ In ordering the German government to increase its cash allocations to asylum seekers, the Court relied on the International Covenant on Economic, Social, and Cultural Rights to hold that “[h]uman dignity may not be relativized by migration-policy considerations.”²⁰⁵

198. AT LEAST LET THEM WORK, *supra* note 2, at 47.

199. MATHEW, *supra* note 165, at 34.

200. *Id.* at 35.

201. AT LEAST LET THEM WORK, *supra* note 2, at 46. However, refugee claims from countries that Canada deems safe “cannot apply for work permits while their cases are being processed.” *Number of Asylum Claimants Plummeting in Canada*, CTV NEWS (Feb. 21, 2013), <http://www.ctvnews.ca/canada/number-of-asylum-claimants-plummeting-in-canada-1.1166984#> [<http://perma.cc/YV2D-LWCM>].

202. *See Judgment of the Federal Constitutional Court in the Proceeding 1 BvL 10/10*, ESCR-NET, <http://www.escr-net.org/node/364979> [<http://perma.cc/77Q4-JU6E>] (last visited May 15, 2015).

203. *Today's Front Pages*, VOXEUROP (July 19, 2012), <http://www.voxeurop.eu/en/content/todays-front-pages/2374811-todays-front-pages> [<http://perma.cc/F9YX-734E>].

204. *Judgment of 18 July 2012 - 1 BvL 10/10*, BUNDESVERFASSUNGSGERICHT, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html [<http://perma.cc/9MSP-D3PV>] (last visited June 9, 2015).

205. *Id.*

VIII. DENYING THE RIGHT TO EMPLOYMENT AUTHORIZATION UNDERMINES IMPORTANT PUBLIC POLICY GOALS

In addition to the moral and human rights-based arguments that focus on the rights of the asylum seeker, there are also strong arguments to be made that allowing asylum seekers to work benefits the host country. For example, studies show that allowing refugees and asylum seekers to work facilitates assimilation, and furthers a sense of self-sufficiency for the asylum seeker or refugee.²⁰⁶ It is for this very reason that the United States encourages refugees to work upon arrival. As explained by the U.S. Department of State, “Based on years of experience, the U.S. refugee resettlement program has found that people learn English and begin to function comfortably much faster if they start work soon after arrival.”²⁰⁷ This is equally true for asylum seekers who have not yet been formally recognized as refugees.

In contrast, requiring asylum seekers to remain idle may well lead to societal costs. In most countries, when the government prohibits asylum seekers from supporting themselves, it assumes the role of providing for them.²⁰⁸ For countries like the United States, which prohibit work and fail to provide benefits, asylum seekers are left with little alternative but to work illegally.²⁰⁹ Encouraging entrance into the black market leads to exploitation by unscrupulous employers as well as depression of wages and working conditions for all workers.²¹⁰

Tribunals around the world have focused on the connection between dignity and the right to work in the context of asylum seekers. In a recent case in South Korea, an asylum seeker, with a deportation order for violating a law that restricted asylum seekers from working for the first year after filing an asylum claim, brought suit against the head of the Seoul Immigration Office.²¹¹ In granting the asylum seeker’s challenge and canceling the deportation order, the Judge explained:

206. For example, a 2004 study on refugees and social exclusion in Australia discusses how poverty contributes to social exclusion of refugees. Janet Taylor, *Refugees and Social Exclusion: What the Literature Says*, 36 *MIGRATION ACTION*, no. 2, 2004, at 16, 16–31.

207. *The Reception and Placement Program*, U.S. DEP’T OF STATE, <http://www.state.gov/j/prm/ra/receptionplacement/index.htm> [<http://perma.cc/DGG4-QFGB>] (last visited Feb. 27, 2015).

208. See, e.g., *supra* notes 193–201 and accompanying text.

209. AT LEAST LET THEM WORK, *supra* note 2, at 24.

210. *Id.* at 33–35; Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 *HARV. C.R.–C.L. L. REV.* 345 (2001).

211. *Migrants and Refugees*, GONGGAM HUMAN RIGHTS LAW FOUNDATION, <http://www.kpil.org/opboard/viewbody.php?code=eRefugees&page=1&id=16&number=16>

The Korean government did not provide any financial support for refugee applicants. When it prohibits all work under these circumstances, the survival of refugee applicants has to depend on the goodwill of philanthropic organizations or non-governmental organizations for refugees. This policy runs against the spirit of the Constitution of a civilized country, which should protect the dignity of humans and ensure their right to survival.²¹²

The Judge also noted that by ordering deportation on the basis of the plaintiff working outside of the permitted period, the Immigration Office “ignored the dignity of refugee applicants as humans and only emphasized the administrative consistency and expediency.”²¹³ According to the Judge, “[t]his act is illegal, because the harm that it does to the plaintiff is significantly greater than the public benefit that it achieves.”²¹⁴

Regarding concerns about the abuse of the refugee application process, the Court responded that the lengthy waiting period should not be used as a reason to disadvantage refugee applicants, as one of its main causes is delay on the part of the administration:

This problem should be solved by hiring more examiners, shortening the time it takes for the refugee status determination process, or setting up complementary instruments to remove the benefits of abusing the refugee application process. If the government assumes that all refugee applicants are not refugees until they are recognized, and prevents them from working without providing them with financial support, it practically neglects its obligation to protect refugees of good standing. Justice delayed is justice denied.²¹⁵

The Court emphasized that it is a fundamental issue “that exceptions to the principle of non-refoulement must be very strictly applied.”²¹⁶

In contrast, in *Minster of Home Affairs v. Watchenuka*, the Supreme Court of Appeal of South Africa distinguished between the right to work as a means of self-fulfillment and the right to work as the sole means to survive.²¹⁷ Although the Court equated the right to work as a means of

&keyfield=&keyword=&category=&BoardType=&admin= [http://perma.cc/Z5ZU-X3GA]
(last visited June 9, 2015).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. The appellant in this case was a widowed asylum seeker who needed to work in order to provide for herself and her 20 year old disabled son who had fled with her from their native country. *Minister of Home Affairs v. Watchenuka* 2004 (1) All SA 21 (SCA) (S.

fulfillment with the paramount right to human dignity at the heart of the Constitution, it held that even such essential human rights could be curtailed in appropriate circumstances under the constitution of South Africa.²¹⁸ But, even so, the Court went on to state that “where employment is the only reasonable means for the person’s support . . . [at] issue is not merely a restriction upon the person’s capacity for self-fulfillment, but a restriction upon his or her ability to live without positive humiliation or degradation.”²¹⁹

In addition, the denial of work authorization in the United States results in a denial of critical public benefits.²²⁰ For example, an asylum seeker with work authorization is eligible to buy into subsidized health insurance under the exchanges set up through the Affordable Care Act.²²¹ By denying work authorization to asylum seekers, the United States is interfering with the ability to purchase health insurance, which violates the human right to health and results in a commensurate cost to society.²²²

IX. THE UNITED STATES POLICY OF DELIBERATE DESTITUTION FURTHER TRAUMATIZES A VULNERABLE POPULATION IN NEED OF PROTECTION

The importance of being able to work cannot be disputed. The inability to work results in a commonly shared experience of feeling devalued by being denied the opportunity to earn a living as well as the opportunity for dignity and worth that work provides. Refugees often suffer from depression and other mental health problems as a result of the trauma they have endured in their home countries and the dangers that come with fleeing and attempting to access a safe country.²²³ The mental stress and anguish for

Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2003/142.pdf> [<http://perma.cc/2G6Q-V4DW>].

218. The Judge held that, based on notions of sovereignty and self-preservation, South Africa was entitled, through its constitution, to limit the right to dignity “so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment—a limitation that is implied by . . . the Refugees Act, and that has been expressed in the Standing Committee’s decision.” *Id.* at 13–14.

219. *Id.* at 14.

220. *Immigration Status and the Marketplace*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/immigration-status/> [<https://perma.cc/KY6J-C2K9>] (last visited June 9, 2015).

221. *Id.*

222. See, e.g., Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457 (2001) (elaborating on the basis for asserting a right to health under international human rights law).

223. It is well understood that “[s]urvivors of torture often suffer from complex posttraumatic stress that manifests itself as anxiety, distrust, depression, flashbacks, intrusive

refugees is often so severe that they consider returning home notwithstanding the danger that awaits them.²²⁴

Such conditions are compounded by a system in which asylum seekers are forced to live in isolation and poverty.²²⁵ Indeed, the lack of work has “a negative impact on the self-concept.”²²⁶ As noted in one study assessing the mental health needs of asylum seekers in the United Kingdom, “[s]alient ongoing stressors identified across several studies include delays in the processing of refugee applications, conflict with immigration officials, being denied a work permit, unemployment, separation from family, and loneliness and boredom.”²²⁷ Inability to work has also been cited as a major

memories of the traumatic event, concentration and memory problems, and a range of physical symptoms. Disempowerment of individuals and communities is the goal of torture.” Mary Fabri et al., *Caring for Torture Survivors: The Marjorie Kovler Center*, in *THE NEW HUMANITARIANS: INSPIRATION, INNOVATIONS, AND BLUEPRINTS FOR VISIONARIES* 157, 157 (Chris E. Stout ed., 2009).

224. “Nostalgia, depression, anxiety, guilt, anger and frustration are so severe that many refugees toy with the idea of going home even though they fear the consequences.” Barry N. Stein, *The Experience of Being a Refugee: Insights from the Research Literature*, in *REFUGEE MENTAL HEALTH IN RESETTLEMENT COUNTRIES* 5, 14 (Carolyn L. Williams & Joseph Westermeyer eds., 1986) (citing CHARLES ZWINGMANN & MARIA PFISTER-AMMENSE, *UPROOTING AND AFTER* 8–10, 188 (1973)). The author also notes that, “they will confront the loss of their culture—their identity, their habits. Every action that used to be habitual or routine will require careful examination and consideration. Stein, *supra* at 14 (citing L. Etinger, *The Symptomatology of Mental Disease Among Refugees in Norway*, 106 *J. OF MENTAL SCI.* 947, 947–66 (1960); J. EX, *ADJUSTMENT AFTER MIGRATION: A LONGITUDINAL STUDY OF THE PROCESS OF ADJUSTMENT BY REFUGEES TO A NEW ENVIRONMENT* 98–100 (Dr. G. Beijer ed., 1966)). “Refugees suddenly find themselves virtual islands in a strange and sometimes hostile sea.” *Id.* (citing R.M. Mutiso, *Counseling of Refugees in Africa*, Paper presented at Pan African Conference on Refugees, Arusha, Tanzania (1979)). Strains will appear at home because the husband can’t provide, the women must work and the children don’t respect the old ways. (Hans Hoff, *Home and Identity*, in *UPROOTING AND RESETTLEMENT* 130–41 (1960); Elfán Rees, *Common Psychological Factors in Refugee Problems Throughout the World*, in *UPROOTING AND RESETTLEMENT* 31–43 (1960). *Id.*

225. Angela Burnett & Michael Peel, *Asylum Seekers and Refugees in Britain, Health Needs of Asylum Seekers and Refugees*, 322 *BRIT. MED. J.* 544, 545 (2001). A study of immigrants to Canada found that the longer they were unemployed, the more likely they would suffer from “stress, negative self-concept, alienation from the society, and adaptation difficulties.” Aycan & Berry, *supra* note 4, at 241.

226. *Id.*

227. COLLETT, *supra* note 13, at 83 (citing Derrick Silove et al., *Policies of Deterrence and the Mental Health of Asylum Seekers*, 284 *J. AM. MED. ASSOC.* 604, 606 (2000)).

factor in the breakdown of refugee families.²²⁸ They experience, “erosion of a sense of identity and independence, feelings of shame at having to beg and accept hand-outs for their survival, and the inability to integrate socially and economically into [the host] society.”²²⁹

For women asylum seekers, the isolation and trauma are often even greater as a result of their inability to work. Women asylum seekers live precarious lives while awaiting protection and are at risk of “physical assault, sexual harassment, and rape.”²³⁰ They “are at special risk both during flight and in seeking asylum because of the dependency of children and the sick and disabled on them, and because of their vulnerability to sexual exploitation.”²³¹ Leaving vulnerable women without the ability to work lawfully pushes them into even more precarious situations, as they must either work unlawfully and risk exploitation or live off the assistance of others.

In contrast, studies have shown that “[r]educing isolation and dependence, having suitable accommodation, and spending time more creatively through education or work can often do much to relieve depression and anxiety.”²³²

X. CONCLUSION

“UNHCR is of the opinion that within the humanitarian spirit of the Refugee Convention lies a State’s obligation to ensure that asylum-seekers enjoy basic subsistence support to sustain them in dignity during this waiting period.”²³³

Not allowing asylum seekers to work is often couched in terms of reducing pull factors and ensuring that economic refugees do not abuse the asylum system in order to gain work permits. However, not allowing

228. See ANNE MCNEVIN, *SEEKING SAFETY, NOT CHARITY: A REPORT IN SUPPORT OF WORK-RIGHTS FOR ASYLUM-SEEKERS LIVING IN THE COMMUNITY ON BRIDGING VISA E 28* (2005).

229. *Id.*

230. Burnett & Peel, *supra* note 225, at 546.

231. COLLETT, *supra* note 13, at 81 (citing Marjorie A. Muecke, *New Paradigms for Refugee Health Problems*, 35 *SOC. SCI. & MED.* 515, 517–18 (1992)).

232. Burnett & Peel, *supra* note 225, at 545. “Positive changes can be seen as immigrants adjust, are reunited with families, and take up educational and employment opportunities.” *Id.* (citing J. Shackman & J. Reynolds, *Working with Refugees and Torture Survivors: Help for the Helpers*, in *MENTAL HEALTH MATTERS: A READER*. London: Macmillan, Open University (Heller T., Reynolds J., Gomm R., Pattison S., eds., 1996)).

233. UN High Commissioner for Refugees (UNHCR), *Representations to the Social Security Advisory Committee on the “Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1995”*, (Nov. 10, 1995), available at <http://www.refworld.org/docid/3ae6b31daf.html> [<http://perma.cc/WZA7-WH3X>].

asylum seekers to work—like mandatory detention of asylum seekers—does not reach its intended goal and should be viewed as a punitive measure aimed at discouraging access to asylum in contravention of the Refugee Convention and the Universal Declaration on Human Rights.²³⁴ Consistent with these international directives, Congress should act to rescind the ban on work authorization denials for asylum seekers.

234. Various studies support this conclusion. For example a study in Norway concluded, “All in all, our findings suggest that the increased restrictions in respect of permission to work have not proved to be any discouragement to potential asylum-seekers.” See Marko Valenta & Kristin Thorshaug, *Asylum-Seekers’ Perspectives on Work and Proof of Identity: The Norwegian Experience*, 31 REFUGEE SURV. Q. 76, 87 (2012). Although work is a factor that can attract asylum seekers to a particular country, restrictions on the right to work will not serve as a deterrent if the employment market allows for opportunities in the informal labor market. *Id.* Rational choice theory also suggests that asylum seekers are concerned with safety, protection, and a better life for their children. *Id.* at 89. Whether there is a lawful right to work during the asylum process will have little deterrent effect. Numerous studies have confirmed that removing the right to work and social rights has marginal impact on decreasing the number of asylum seekers. *Id.*

