

## COMMENT

### **Using Learned Helplessness to Understand the Effects of Posttraumatic Stress Disorder and Major Depressive Disorder on Refugees and Explain Why These Disorders Should Qualify as Extraordinary Circumstances Excusing Untimely Asylum Applications**

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#### INTRODUCTION

Imagine you are a refugee. For some personal reason outside of your control, say your race or religion, you are targeted by others and suffer some harm. This harm almost certainly involves some level of violence. Perhaps you are beaten, raped, or tortured. Maybe you watched your family and friends suffer the same, maybe some of these family and friends were murdered in front of your eyes. Obviously, going to your government for help is pointless. Either your government is directly involved or they are completely unwilling or unable to protect you. Fleeing is your only real option.

You are able to bring few of your possessions and you probably spend most, if not all, of your money escaping. You arrive in a new country, are confused by its culture and language, and have a tenuous and uncertain legal status. You desire a more permanent status, but your first priority

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is finding a way of supporting yourself and your family. You don't know about asylum, and the thought of turning to your new government for help never crossed your mind. Perhaps even after becoming aware of asylum, because of your past experiences, you do not trust any state officials.

At any rate, the trauma you suffered prevents you from seeking help right away. When you think about the past, you re-experience that fear and pain, and you desperately avoid everything that reminds you of your old trauma. After time and (if you are lucky) treatment, you finally feel ready to seek asylum. However, you learn that you are too late. Your new government has deemed any application for asylum submitted more than a year after arrival in this new country to be presumptively fraudulent and barred.

Unfortunately, this is an accurate description of the experience of many refugees seeking asylum in the United States. Asylum law in the United States imposes a one-year bar for all asylum applications. While this bar may be waived for certain changed or extraordinary circumstances—which include mental illnesses—the actual application of these exceptions is prohibitively narrow. As a result, many refugees who suffer from severe mental disorders that prevent them from applying for asylum are precluded from obtaining appropriate relief.

This problem is not the result of spite or caprice on the part of adjudicating officials. Rather, the problem arises out of a misunderstanding of the nature of these disorders. Looking into other areas of law that have struggled to account for and explain mental processes may offer some help to these refugees. Specifically, the theory of learned helplessness, a central aspect of the Battered Woman's Syndrome, could provide that help.

First, Part I provides a brief overview of United States asylum law before moving on to a more detailed discussion of the one-year bar. This Part proposes that the one-year bar was a misguided effort at reform that has failed to further Congress's objectives and poses an unfair obstacle to bona-fide refugees. Part II discusses posttraumatic stress disorder ("PTSD") and major depressive disorder ("MDD")—the most prevalent mental disorders in the refugee community—and explains why these disorders are so common in that

community, and how refugees are affected by them. Part III outlines how immigration judges and asylum officers have adjudicated claims raising PTSD and MDD as extraordinary circumstances and explains why their analysis is often flawed. Part IV briefly discusses Battered Woman Syndrome by way of introducing the theory of learned helplessness, a model of behavior closely tied to both PTSD and MDD and one which the courts are familiar with. Finally, this Comment concludes with Part V, which argues that learned helplessness, as a straight forward and intuitive theory, is well-suited for explaining the effects of PTSD and MDD on refugees and (1) provides support for the abolition of the one-year bar; and (2) supplies late-filing refugees a way to demonstrate that their mental ailments are extraordinary circumstances within the framework of the current law.

## I. OVERVIEW OF UNITED STATES ASYLUM LAW AND THE ONE-YEAR BAR

### A. *International Asylum Law*

Responding to a massive increase in refugees fleeing Europe following World War II,<sup>1</sup> the United Nations (“UN”) adopted the 1951 Convention Relating to the Status of Refugees (“the Convention”).<sup>2</sup> The Convention formalized the rights belonging to refugees and the legal obligations of participating states.<sup>3</sup> These include a guarantee of non-rejection at borders and fair procedures for determining an applicant’s refugee status.<sup>4</sup> The principal legal obligation imposed on participating states, however, is the duty of

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1. UNITED NATIONS HIGH COMM’R FOR REFUGEES, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (Sept. 2011), <http://www.unhcr.org/4ec262df9.html> [hereinafter UNHCR, CONVENTION & PROTOCOL].

2. United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

3. See PAUL WEIS, THE REFUGEE CONVENTION, 1951, at 32-36 (Paul Weis ed., 1995) [hereinafter PAUL WEIS, CONVENTION].

4. Scott Kuhagen, *The Third—and Likely Fourth—Death of the Refugee Protection Act: Sensible Changes to Asylum Still Required*, 21 TEMP. POL. & C.R. L. REV. 567, 571 (2012).

nonrefoulement, which prohibits participating states from returning a refugee to a country where he or she will face persecution.<sup>5</sup>

To help standardize asylum law in signatory nations, the Convention also promulgated a universal definition of “refugee.”<sup>6</sup> Under the Convention’s definition, a refugee is an individual who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>7</sup>

The provisions of the Convention were limited in reach and only required to apply to situations arising in Europe before January 1, 1951.<sup>8</sup> Newly arising humanitarian crises compelled the UN and participating states to expand the reach of the Convention’s protections.<sup>9</sup> This was accomplished through the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”), which incorporated the Convention in its entirety and removed the date and originating country limitations.<sup>10</sup>

In 1968, the United States acceded to the 1967 Protocol.<sup>11</sup> While the United States is not a direct signatory of the

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5. Lowenstein Int’l Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1, 14 (1993).

6. UNHCR, CONVENTION & PROTOCOL, *supra* note 1, at 3.

7. 1951 Convention, *supra* note 2, at 152.

8. *Id.* at 152-53.

9. UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 6 (2011), <http://www.unhcr.org/3d58e13b4.pdf> [hereinafter UNHCR HANDBOOK]; M.R. ALBORZI, EVALUATING THE EFFECTIVENESS OF INTERNATIONAL REFUGEE LAW: THE PROTECTION OF IRAQI REFUGEES 138-39 (2006).

10. Protocol Relating to the Status of Refugees art. I, ¶ 2, Jan. 31, 1967, 606 U.N.T.S. 267.

11. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 634 (1993).

Convention, because the 1967 Protocol incorporated the Convention, in acceding to the 1967 Protocol the United States became a party to the Convention as well.<sup>12</sup>

### B. *Asylum Law in the United States*

Though the United States has a long history of offering protection and safe harbor to refugees, refugee status was determined on an ad-hoc, case-by-case basis until 1980.<sup>13</sup> It was only when the Refugee Act of 1980 was passed that the United States formally codified its asylum law.<sup>14</sup> Congress recognized that the Convention and 1967 Protocol carried legal—as well as moral—authority, and the Refugee Act was intended to “bring United States refugee law into conformance with [its treaty obligations under] the 1967 United Nations Protocol.”<sup>15</sup> Accordingly, the Refugee Act incorporated the Convention’s definition of refugee nearly verbatim.<sup>16</sup> Under the Refugee Act, a refugee is

any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>17</sup>

To be granted asylum in the United States, an individual must demonstrate that they are a refugee according to this definition.<sup>18</sup> To do so, an applicant must show that they (1) have a well-founded fear of future persecution; (2) based on the statutorily protected grounds of race, religion,

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12. UNHCR HANDBOOK, *supra* note 9, at 6; JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 110-11 (2005).

13. See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12 (1981).

14. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

15. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

16. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1068-69 (2011).

17. 8 U.S.C. § 1101(a)(42)(a) (2012).

18. § 1158(b)(1)(A).

nationality, membership in a social group, or political opinion.<sup>19</sup>

A well-founded fear of future persecution consists of both a subjective and objective element.<sup>20</sup> The applicant must have an actual, subjective fear of persecution, and this fear must be objectively reasonable.<sup>21</sup> A showing that the applicant suffered persecution in the past gives rise to a presumption that the applicant has a well-founded fear of future persecution.<sup>22</sup>

There is no statutory or regulatory definition of persecution.<sup>23</sup> However, while “courts have not ‘settled on a single, uniform definition,’” there is general agreement on what persecution entails<sup>24</sup>—persecution consists of a high degree of harm accompanied by some level of involvement by the government.<sup>25</sup>

As for the harm aspect, persecution is “the infliction of suffering or harm upon those who differ (in race, religion[, nationality, social group,] or political opinion) in a way regarded as offensive.”<sup>26</sup> Put differently, persecution is “the infliction or threat of death, torture, or injury to one’s person or freedom.”<sup>27</sup> The level of harm required to find

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19. §1101(a)(42).

20. *Kyaw Zwar Tun v. INS*, 445 F.3d 554, 564 (2d Cir. 2006).

21. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987). An objectively reasonable fear has been construed to mean only a 10% or higher chance of persecution if returned. *Id.* at 439-40.

22. 8 C.F.R. § 208.13(b)(1) (2015); *see also, e.g., Imelda v. U.S. Att’y Gen.*, 611 F.3d 724, 728 (11th Cir. 2010).

23. *Gonzalez v. INS*, 77 F.3d 1015, 1021 (7th Cir. 1996).

24. *Mei Fun Wong v. Holder*, 633 F.3d 64, 72 (2d Cir. 2011) (quoting *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 340 (2d Cir. 2006)).

25. *See, e.g., Garcia-Colindres v. Holder*, 700 F.3d 1153, 1157 (8th Cir. 2012) (“The BIA has adopted, and we have approved as reasonable, a definition of persecution that requires a harm to be inflicted either by the government of [a country] or by persons or an organization that the government was unable or unwilling to control.”) (alteration in original) (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005)).

26. *In re S-A-*, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000).

27. *Ngure v. Ashcroft*, 367 F.3d 975, 990 (8th Cir. 2004) (quoting *Regalado-Garcia v. INS*, 305 F.3d 784, 787 (8th Cir. 2002)).

persecution is “more than mere discomfiture, unpleasantness, harassment, or unfair treatment.”<sup>28</sup> Harm qualifying as persecution is often extreme and severe. Disturbingly common examples of persecution include various forms of torture,<sup>29</sup> mutilation,<sup>30</sup> rape,<sup>31</sup> and other types of interpersonal violence.<sup>32</sup> However, the effect of the harm must be considered in the cumulative, and the sum of relatively minor harms can rise to the level of persecution.<sup>33</sup>

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28. *Vasili v. Holder*, 732 F.3d 83, 90 (1st Cir. 2013) (quoting *Lopez-Castro v. Holder*, 577 F.3d 49, 54 (1st Cir. 2009)).

29. *See, e.g., Ilunga v. Holder*, 777 F.3d 199, 204 (4th Cir. 2015) (“The government sent Ilunga to prison where he spent more than a month in a small cell . . . Ilunga suffered daily torture. Prison guards stabbed him and poured battery acid in the wounds. They shocked him with an electrical club, routinely whipped him, and raped him. . . . Ilunga . . . escaped from prison . . . [and] fled to Zambia . . . . While Ilunga remained in Zambia, the government tortured his family, raped his wife, and burned his home.”); *Kann Vegas v. U.S. Att’y. Gen.*, 356 F. App’x 326, 329 (11th Cir. 2009) (“When Kann Vegas awoke he was in a room, handcuffed, blindfolded, and hanging without a shirt. His captors beat him, electrocuted him, and doused him with water for twelve hours . . . .”).

30. *See, e.g., Niang v. Gonzales*, 422 F.3d 1187, 1191-92 (10th Cir. 2005) (“When Ms. Niang was nearly 25, her family had a meeting in which they decided that she must consummate her marriage with Daud that evening. She again refused, and her family threw themselves on her, stripping her of her clothes, beating her, and burning her with a hot iron. Some then performed FGM on her ‘[s]o that [she] wouldn’t be able to commit adultery and so that no one would want to have anything to do with [her]. And then she would be ashamed to show [her] body in front of another man.’” (alteration in original)).

31. *See, e.g., Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1071 (9th Cir. 2004) (“One of the soldiers came back inside of the house, told my mother that she had to cook food for them, and took her by force to the kitchen and made her cook food for them. While my mother was in the kitchen cooking food and my father was tied up, I was left alone with one of the soldiers. The soldier hit me with his gun and fists and then held my arms down while he raped me. When he was finished, the other two soldiers took turns raping and beating me.”).

32. *See, e.g., Vincent v. Holder*, 632 F.3d 351, 356 (6th Cir. 2011) (“[T]he totality of the circumstances—which includes the killing of Vincent’s son and the house burning—satisfy a finding of past persecution.”); *Voci v. Gonzales*, 409 F.3d 607, 610 (3d Cir. 2005) (“Voci indicated that . . . he was beaten up on many occasions by the police. Voci testified that seven of these beatings were severe, resulting in bleeding and scars. . . . On one occasion, the police beat Voci with the blunt end of a gun, breaking his knee and causing Voci to spend several weeks in the hospital.”).

33. *Karki v. Holder*, 715 F.3d 792, 805 (10th Cir. 2013) (“We do not look at each incident in isolation, but instead consider them collectively, because the

Aside from the harm requirement, persecution also “implies some connection to government action or inaction.”<sup>34</sup> This connection often exists through direct government involvement, where the persecutors are agents of the government acting at its direction.<sup>35</sup> The government connection may also arise through acquiescence, where government officials are aware of the persecution but implicitly authorize it or refuse to take action to prevent it.<sup>36</sup> Finally, the connection may exist where, despite its best efforts, the government is simply unable to stop the persecutors.<sup>37</sup>

Individuals present in the United States may apply for asylum two different ways.<sup>38</sup> First, they may seek asylum

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cumulative effects of multiple incidents may constitute persecution.” (quoting *Ritonga v. Holder*, 633 F.3d 971, 975 (10th Cir. 2011)).

34. *Vasili v. Holder*, 732 F.3d 83, 90 (1st Cir. 2013) (quoting *Lopez-Castro v. Holder*, 577 F.3d 49, 54 (1st Cir. 2009)).

35. *See, e.g., Mei Fun Wong v. Holder*, 633 F.3d 64 (2d Cir. 2011).

36. *Vitug v. Holder*, 723 F.3d 1056, 1066 (9th Cir. 2013) (“[A]wareness and willful blindness’ are sufficient to constitute acquiescence by government officials; actual knowledge or willful acceptance is not required.” (quoting *Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2013))).

37. *See, e.g., Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008).

38. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIVISION OVERVIEW 9 (Mar. 4, 2011), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/Asylum%20Division%20Overview.pdf> [hereinafter ASYLUM DIVISION OVERVIEW]. Applying for asylum after arriving in the United States is not the only way for refugees to obtain asylum. Refugees who have fled persecution to other countries may be granted asylum in the United States through the Refugee Admissions Program. U.S. DEP’T STATE, REFUGEE RESETTLEMENT IN THE UNITED STATES (May 23, 2014), <http://www.state.gov/j/prm/releases/factsheets/2014/228681.htm>. These individuals first register as refugees with the United Nations High Commissioner for Refugees (“UNHCR”). *Id.*; *see also* U.S. DEP’T STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2016: REPORT TO THE CONGRESS v-vi (Oct. 1, 2015), <http://www.state.gov/documents/organization/247982.pdf>. The Department of State and the Department of Homeland Security interviews the refugee and conducts a medical and security screening. U.S. DEP’T STATE ET AL., *supra*. If the outcome of the interview and screenings are satisfactory, the refugee will be granted asylum in the United States. *Id.*



proactively through an affirmative asylum application.<sup>39</sup> Alternatively, individuals may defensively file for asylum in an Immigration Court.<sup>40</sup> Affirmative asylum applications begin with the submission of an asylum application form to the United States Citizenship and Immigration Service (“USCIS”).<sup>41</sup> The applicant then conducts a non-adversarial interview with an asylum officer at one of eight asylum offices.<sup>42</sup> If the asylum officer finds the applicant credible and the applicant satisfies the requirements for asylum, the officer will grant the applicant asylum.<sup>43</sup> If the asylum officer believes the applicant is not credible or does not meet the requirements for asylum, the officer will deny the application and—if the applicant does not have lawful status or requests review of the decision—forward the application to an immigration judge for a *de novo* determination.<sup>44</sup>

Defensive asylum applications are filed reactively by individuals already in removal proceedings.<sup>45</sup> These defensive applications, as well as appeals or referrals from an asylum office, are heard in an administrative court run by the Department of Justice’s Executive Office of Immigration

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39. U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 2 (Nov. 2013), [http://www.uscis.gov/sites/default/files/files/native\\_documents/Asylum\\_Procedures\\_Manual\\_2013.pdf](http://www.uscis.gov/sites/default/files/files/native_documents/Asylum_Procedures_Manual_2013.pdf) [hereinafter AFFIRMATIVE ASYLUM MANUAL].

40. ASYLUM DIVISION OVERVIEW, *supra* note 38, at 9.

41. AFFIRMATIVE ASYLUM MANUAL, *supra* note 39, at 4-5. For affirmative asylum applications, the applicant is first run through a security screening that includes running the applicants biometrics and conducting a background check. *Id.* at 5-7. If the background check returns satisfactory results, the applicant will conduct a non-adversarial interview with an asylum officer at one of eight asylum offices. *See id.* at 8-12, 29.

42. ASYLUM DIVISION OVERVIEW, *supra* note 38, at 4, 9-10.

43. AFFIRMATIVE ASYLUM MANUAL, *supra* note 39, at 23-24.

44. *See Shoukat v. U.S. Att’y Gen.*, 151 F. App’x 110, 113 (3d Cir. 2005); *Martins v. USCIS*, 962 F. Supp. 2d 1106, 1112 (N.D. Cal. 2013); 8 C.F.R. §§ 208.30(g), 1208.30(g); *see also* Rachel D. Settlege, *Affirmatively Denied: The Detrimental Effects of A Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT’L L.J. 61, 71, 75 (2009).

45. Settlege, *supra* note 44, at 75.

Review (“EOIR”).<sup>46</sup> Immigration Court proceedings are adversarial in nature and held in front of an immigration judge, opposed by counsel from DHS.<sup>47</sup> Immigration Court decisions may be appealed to the Board of Immigration Appeals (“BIA”).<sup>48</sup> In turn, BIA decisions may be appealed to the federal court of appeals for the jurisdiction in which the Immigration Court originally adjudicated the application.<sup>49</sup>

### C. *The One-Year Bar*

In the early 1990s, some members of Congress became convinced that the asylum system was being abused by individuals who were not bona-fide refugees.<sup>50</sup> These Congress members believed that individuals in removal proceedings were applying for asylum defensively simply to delay their removal<sup>51</sup> and that many applicants who were not actual refugees were applying for asylum solely to obtain work permits.<sup>52</sup> It was felt that such meritless and fraudulent claims were imposing an excessive burden on the adjudication system.<sup>53</sup>

In 1996, as a measure to combat this perceived fraud problem, Congress passed the Illegal Immigration Reform

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46. OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 1.2(a)-(d), 3.1(b)(iii) (2016).

47. *EOIR at a Glance*, U.S. DEP’T JUSTICE (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

48. *Id.*

49. *Id.*

50. See 141 CONG. REC. E1635 (daily ed. Aug. 3, 1995) (statement of Rep. Franks); Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 GEO. IMMIGR. L.J. 95, 102 (1996); see also 142 CONG. REC. S4468 (daily ed. May 1, 1996) (statement of Sen. Simpson) (“We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system.”).

51. Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT’L & COMP. L. REV. 693, 695 (2008).

52. Misha Seay, *Better Late than Never: A Critique of the United States’ Asylum Filing Deadline from International and Comparative Law Perspectives*, 34 HASTINGS INT’L & COMP. L. REV. 407, 423 (2011).

53. Pistone, *supra* note 50, at 101-02.

and Immigrant Responsibility Act (“IIRIRA”).<sup>54</sup> Responding to the concerns discussed above, the IIRIRA established, among other things, a timeline during which asylum applications would be accepted.<sup>55</sup> This provision provides that an applicant for asylum must demonstrate, by “clear and convincing evidence,” that their asylum application was filed within one year of their entry in the United States.<sup>56</sup> In essence, the IIRIRA enacted a statute of limitations for asylum that begins to run on an alien’s arrival in the United States.<sup>57</sup>

The original bill proposed a 30-day bar and included no exceptions.<sup>58</sup> Despite concerns about fraud, many members of Congress wanted to ensure that legitimate asylum claims were not precluded by any time-bar.<sup>59</sup> Mental disability was a special concern and was explicitly mentioned in the Senate debates as a circumstance that should give rise to an exception for untimely asylum applications.<sup>60</sup> As Senator

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

55. Philip G. Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 670-71 (2010).

56. 8 U.S.C. § 1158(a)(2)(B) (2012).

57. *Id.*

58. Schrag et al., *supra* note 55, at 672.

59. 142 CONG. REC. S11839-40 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch) (indicating desire to “ensure that asylum is available to those with legitimate claims of asylum” and commitment to “ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies”); *id.* at S11840 (statement of Sen. Abraham) (“If the time limit and the exceptions you have discussed do not provide sufficient protection to aliens with bona fide claims of asylum, I will be prepared to work with my colleagues to address that problem.”); *id.* at S11904 (statement of Sen. Leahy) (“If the use of asylum claims defensively to ward off deportation is the problem, let us deal with that problem and not penalize refugees with valid asylum claims who were too traumatized or fearful to come forward until they had gotten settled in this new land.”); Musalo & Rice, *supra* note 51, at 695.

60. 142 CONG. REC. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch) (“Extraordinary circumstances excusing the delay could include, for instance, physical or mental disability . . .”); 142 CONG. REC. S3299 (daily ed. Apr. 15, 1996) (statement of Sen. DeWine) (“Among those excluded [by a time bar] would be . . . the very people who need more time to apply, the very people who deadlines

Edward Kennedy explained in a speech supporting an amendment to extend the original 30-day application deadline:

The bottom line is that the cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted. They have been brutalized by their own governments. They have an inherent reluctance to come forward and to review their own stories before authority figures. Many of them are so traumatized by the kinds of persecution and torture they have undergone, they are psychologically unprepared to be able to do it. It takes a great deal of time for them to develop any kind of confidence in any kind of legal or judicial system, after what they have been through, and to muster the courage to come forward.<sup>61</sup>

Ultimately, concern for protecting legitimate refugees motivated Congress to increase the timeline to one year and provide for exceptions that would waive untimely applications in certain situations.<sup>62</sup> The exceptions were “intended to provide adequate protections to those with legitimate claims of asylum.”<sup>63</sup> In order to avoid denying bona-fide refugees asylum, the exceptions to the one-year bar were designed to cover a broad range of circumstances in order to prevent denying asylum claims “for technical difficulties.”<sup>64</sup>

Two separate exceptions to the one-year bar were recognized by the statute.<sup>65</sup> First, an exception was granted for “changed circumstances” that “materially affect the

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would hurt the most. These are the people who have suffered a great trauma that prevents them from coming forward. . . . Time can cure the personal trauma and culture shock that prevents them from seeking asylum. Time can allow conditions to change back home. A time limit—any time limit—will place these people at risk.”).

61. 142 CONG. REC. S3282 (daily ed. Apr. 15, 1996).

62. Schrag et al., *supra* note 55, at 672.

63. 142 CONG. REC. S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch).

64. *Id.*

65. 8 U.S.C. § 1158(a)(2)(D) (2012).

applicant's eligibility for asylum."<sup>66</sup> This includes changes in United States law applicable to asylum, changes in the applicant's circumstances, and/or changes in the conditions of the applicant's home country.<sup>67</sup> Second, an exception was made for "extraordinary circumstances relating to the delay in filing an application."<sup>68</sup> An applicant seeking an exception under either ground must "demonstrate[ ] to the satisfaction of the Attorney General"<sup>69</sup> that either changed or extraordinary circumstances excused their failure to timely file.<sup>70</sup>

Several years after the IIRIRA was enacted into law, the INS promulgated implementing regulations for the one-year bar.<sup>71</sup> The regulations provide a nonexhaustive list of

66. *Id.*

67. 8 C.F.R. § 208.4(a)(4)(i)(A)-(C) (2015).

68. 8 U.S.C. § 1158(a)(2)(D); *see also* 8 C.F.R. §§ 208.4(a)(4)-(5), 1208.4(a)(4)-(5).

69. 8 U.S.C. § 1158(a)(2)(D). In other contexts, the BIA has explained that "to the satisfaction of the Attorney General" requires a showing of "credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially." *In re Bufalino*, 12 I. & N. Dec. 277, 282 (B.I.A. 1967). This standard has been interpreted as equivalent to the "preponderance of the evidence" standard. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: ONE-YEAR FILING DEADLINE 21 (Mar. 23, 2009), <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf> [hereinafter FILING DEADLINE TRAINING COURSE].

70. 8 U.S.C. § 1158(a)(2)(D). The statute enacting the one year bar originally precluded federal review of decisions regarding exceptions to the one year bar. *See* 8 U.S.C. § 1158(a)(3) ("No Court shall have jurisdiction to review any determination of the Attorney General [as to exceptions to the one-year bar]."). In 2005, Congress passed the REAL ID Act which modified the law to permit Courts of Appeals to review BIA decisions that raised constitutional questions or questions of law. Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (May 11, 2005) (codified at 8 U.S.C. § 1252(a)(2)(D)) (explaining that "[n]othing in . . . any . . . provision of this Act . . . shall be construed as precluding review of constitutional claims or questions of law"). There is currently a circuit split as to whether, and the extent to which, a BIA determination regarding the applicability of exceptions to the one-year bar is reviewable. *Compare* *Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007) (reviewable), *with* *Ruiz v. Gonzalez*, 479 F.3d 762, 765 (11th Cir. 2007) (not reviewable).

71. 8 C.F.R. § 208.4(a)(4)-(5); Seay, *supra* note 52, at 425.

circumstances which may excuse an untimely filing.<sup>72</sup> Among these circumstances are “[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival.”<sup>73</sup>

The existence of one of the enumerated examples is, by itself, insufficient to excuse an untimely asylum application.<sup>74</sup> Rather, the determination of whether an exception exists requires “an individualized analysis of the facts of the particular case.”<sup>75</sup> The regulations for the one year bar provide that, even if an exception to the bar applies, the applicant bears the burden of proving that the subsequent delay was “reasonable under the circumstances.”<sup>76</sup> The regulations further provide that the circumstance must not have been created intentionally by the applicant and must be directly related to failure to file.<sup>77</sup>

Failure to demonstrate an exception to the one year bar does not necessarily prevent a refugee from obtaining any relief from removal.<sup>78</sup> Withholding under the INA may still be available to refugees and is not subject to the one year bar.<sup>79</sup> Withholding, like asylum, requires that an applicant

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72. § 208.4(a)(4)-(5).

73. § 208.4(5)(i). Other extraordinary circumstances include legal disability, ineffective assistance of counsel, possessing another form of legal status, the rejection of an application submitted within the one-year period for technical defects, and/or death or serious illness of an immediate family member of the applicant. § 208.4(5)(ii)-(vi).

74. *In re Y-C-*, 23 I. & N. Dec. 286, 287-88 (B.I.A. 2002).

75. *Id.* at 288 (“[T]he respondent must establish the existence or occurrence of the extraordinary circumstances, must show that those circumstances directly relate to his failure to file the application within the 1-year period, and must demonstrate that the delay in filing was reasonable under the circumstances.”).

76. 8 C.F.R. §§ 208.4(a)(4)-(5), 1208.4(a)(4)-(5).

77. §§ 208.4(a)(5), 1208.4(a)(5).

78. *See, e.g., Liu v. INS*, 508 F.3d 716, 722 (2d Cir. 2007).

79. *See, e.g., id.* Applicants denied asylum may also obtain relief under the Convention Against Torture (“CAT”), which is not subject to time bar. *See* 8 C.F.R. § 208.16(c). To obtain CAT relief, an applicant must “establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” § 208.16(c)(2). Though CAT “does not require that the prospective risk of torture be on account of certain protected grounds,” *Kamalthas v. INS*,

demonstrate that they are a refugee according to the statutory definition.<sup>80</sup> However, withholding relief is subject to a higher standard of proof.<sup>81</sup> Rather than simply demonstrating a *reasonable fear* of persecution, to be granted withholding, an applicant must show that they will *probably suffer* persecution if returned to their original country of residence (i.e., 10% vs. 51%).<sup>82</sup>

Moreover, withholding does not grant a refugee the same rights and privileges available to those granted asylum. Refugees granted asylum can obtain derivative asylum status for their spouse and children, even if they are otherwise ineligible for asylum themselves.<sup>83</sup> Derivative status applies not only to family members currently present in the United States, but also to family members present in other countries—enabling separated families to legally reunite.<sup>84</sup> Derivative status is unavailable to refugees who are granted withholding relief.<sup>85</sup> Refugees granted asylum

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251 F.3d 1279, 1280 (9th Cir. 2001), it still requires a nexus to government action or inaction. *In re J-E-*, 23 I. & N. Dec. 291 (B.I.A. 2002). Moreover, the harm required for actions to qualify as torture is much higher than that of persecution. *See, e.g., id.* CAT offers no path to citizenship, Musalo & Rice, *supra* note 51, at 721, and the relief offered by CAT is temporary and may be revoked by the government. *See Wanjiru v. Holder*, 705 F.3d 258, 264 (7th Cir. 2013) (“Deferral of removal is a more temporary form of protection. It can be terminated more quickly and easily if an alien no longer is likely to be tortured in the country of removal, or if the U.S. government receives assurances that the alien will not be tortured if returned.”).

80. *See* 8 U.S.C. § 1231(b)(3) (2012).

81. *See, e.g., Mulyani v. Holder*, 771 F.3d 190, 198 (4th Cir. 2014) (“Withholding of removal is also based on persecution but implicates a more demanding standard of proof.”) (quoting *Lizama v. Holder*, 629 F.3d 440, 446 n.3 (4th Cir. 2011)).

82. *See, e.g., Mendoza v. U.S. Att’y Gen.*, 327 F.3d 1283, 1287 (11th Cir. 2003) (explaining that, to obtain withholding, “[a]n alien bears the burden of demonstrating that he more-likely-than-not would be persecuted or tortured upon his return to the country in question”).

83. 8 U.S.C. § 1158(b)(3).

84. Melanie A. Conroy, *Refugees Themselves: The Asylum Case for Parents of Children at Risk of Female Genital Mutilation*, 22 HARV. HUM. RTS. J. 109, 111-12 (2009).

85. *Compare* 8 U.S.C. § 1158(b)(3)(A) (providing for derivative status), *with* 8 U.S.C. § 1231 (not providing for derivative status).

also have a path to citizenship: Asylees are eligible to apply for permanent status within one year of being granted asylum and can then pursue citizenship like any other legal permanent resident.<sup>86</sup> Withholding, on the other hand, provides no path to legal residence or citizenship.<sup>87</sup>

#### D. *Criticisms and Problems with the One-Year Bar*

The one year bar was an unnecessary measure based on a largely imagined problem.<sup>88</sup> As the Commissioner of the INS explained, a filing deadline was “an idea born of assumptions about a system in the past that wasn’t working effectively.”<sup>89</sup> By the time the provision came into law, the Justice Department had already developed and implemented a number of significant measures to prevent fraudulent asylum claims.<sup>90</sup> Among these measures, a unit dedicated exclusively to adjudicating asylum claims was created within the INS.<sup>91</sup> This unit utilized new procedures to quickly identify and grant meritorious claims while referring suspect

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86. See 8 U.S.C. § 1159(b).

87. See *Abdisalan v. Holder*, 774 F.3d 517, 523 n.5 (9th Cir. 2014) (“The grant of asylum is a broader form of relief that sets one on a path to citizenship. One year after being granted asylum, an asylee may apply for adjustment of status to lawful permanent resident. In contrast, the grant of withholding of removal merely prevents one from being removed to the country where one’s life or freedom would be threatened on account of a protected ground.”) (citations omitted).

88. The one year bar (or at least the way the bar is applied, which is discussed more fully below) may also be in violation of the 1951 Convention, see, e.g., UNHCR EXEC. COMM., CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 18, 19 (2009) (“While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.”), which the United States is obligated to comply with. See *INS v. Stevic*, 467 U.S. 407, 416 (1984).

89. Pistone, *supra* note 50, at 102.

90. HUMAN RIGHTS FIRST, THE ASYLUM FILING DEADLINE: DENYING PROTECTION TO THE PERSECUTED AND UNDERMINING GOVERNMENTAL EFFICIENCY 3, 25-26 (Sept. 2010) [hereinafter HRW, FILING DEADLINE].

91. Pistone, *supra* note 50, at 102.



claims to Immigration Court for removal proceedings.<sup>92</sup> The Department of Justice also removed much of the incentive for filing fraudulent asylum claims by reforming the procedures for obtaining employment authorization.<sup>93</sup>

These measures were quite successful. In the three years preceding the enactment of the one year bar provisions, the yearly rate of completed asylum claims increased more than two fold.<sup>94</sup> The rate of asylum claims submitted also fell, suggesting that many fraudulent or unmeritorious asylum applications had been discouraged.<sup>95</sup>

However, even ceding the validity of Congress's concern about fraudulent asylum applications, the bar has also produced the opposite result of its intended effect. A primary animating concern behind the bar was that the adjudicating agencies were being overwhelmed by frivolous asylum claims.<sup>96</sup> Congress believed the one-year bar would help relieve this burden.<sup>97</sup> Instead, the one-year bar has increased the strain on asylum offices and Immigration Courts.<sup>98</sup>

For every asylum claim, the adjudicating official must now be satisfied, "by clear and convincing evidence," that the application was filed within one year of the applicant arriving in the United States.<sup>99</sup> Even when an application is filed on time, this adds to the time, effort, and expense required to adjudicate claims.<sup>100</sup> However, a significant proportion of legitimate asylum seekers do not apply within one year of

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92. *Id.*

93. Musalo & Rice, *supra* note 51, at 696.

94. Pistone, *supra* note 50, at 102.

95. *Id.*

96. *Id.* at 101-02.

97. Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 9 (2001) ("[M]embers of the 104th congress were intent on imposing a deadline, apparently under the belief that such a bar was necessary to prevent time-consuming adjudication of fraudulent applications.").

98. HRW, FILING DEADLINE, *supra* note 90, at 14.

99. 8 C.F.R. § 1208.4(a)(2)(i)(A) (2015).

100. HRW, FILING DEADLINE, *supra* note 90, at 15.

arriving in the United States.<sup>101</sup> With the majority of these applicants seeking an exception to the bar (in addition to other forms of relief), this has created two proceedings within one, greatly increasing the cost of adjudication and time required to process asylum applications.<sup>102</sup>

Moreover, the one year bar has done a poor job separating legitimate asylum claims from fraudulent ones.<sup>103</sup> Instead, the one year bar is working to prevent legitimate refugees from obtaining appropriate relief.<sup>104</sup> The available documentation is rife with examples of individuals being denied asylum on the basis of the one year bar who then go on to satisfy the higher standard of withholding or CAT.<sup>105</sup> The one-year bar does not prevent fraud. It serves only to punish legitimate refugees.

Looking at the circumstances faced by newly arrived refugees demonstrates why the one-year bar is an inappropriate measure to screen legitimate asylum applications from fraudulent ones. Applying for asylum is a complex and demanding process.<sup>106</sup> Refugees must fill out, in

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101. See Pistone, *supra* note 50, at 96-97; see also NAT'L IMMIGRANT JUSTICE CTR. ET AL., THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS 5 (Oct. 2010) [hereinafter NO PROTECTION] ("This study analyzed 3,472 BIA cases, of which 662 (19 percent) involved the filing deadline."); Michele R. Pistone & Philip G. Schrag, *The 1996 Immigration Act: Asylum and Expedited Removal—What The INS Should Do*, 73 INTERPRETER RELEASES 1565, 1566 (1996) ("A study by the Lawyers Committee for Human Rights showed that in the past, only 38 percent of bona fide asylum applicants apply for asylum within one year.").

102. HRW, FILING DEADLINE, *supra* note 90, at 15.

103. Musalo & Rice, *supra* note 51, at 699-700; see also NO PROTECTION, *supra* note 101, at 6 ("In approximately 46 percent of cases where the filing deadline is an issue, it is the only reason cited by the BIA as justifying the denial of asylum.").

104. HRW, FILING DEADLINE, *supra* note 90, at 15-18.

105. See, e.g., *Abdisalan v. Holder*, 774 F.3d 517, 521 (9th Cir. 2014); *Gasparyan v. Holder*, 707 F.3d 1130, 1132 (9th Cir. 2013); *Vrljicak v. Holder*, 700 F.3d 1060, 1061 (7th Cir. 2012); *Vincent v. Holder*, 632 F.3d 351, 352 (6th Cir. 2011); *Khunaverdians v. Mukasey*, 548 F.3d 760, 764 (9th Cir. 2008); *Viracacha v. Mukasey*, 518 F.3d 511, 512-13 (7th Cir. 2008); *Mlambo v. Att'y Gen. of U.S.*, 297 F. App'x 198, 199 (3d Cir. 2008); see also Musalo & Rice, *supra* note 51, at 699-703.

106. See, e.g., Seay, *supra* note 52, at 428.

English, a complicated ten page form, and collect and compile and translate documentation to corroborate his or her story.<sup>107</sup> Refugees fleeing persecution often leave their countries of nationality with little, if any, documentation.<sup>108</sup> Depending on the conditions back home, this documentation may be extraordinary difficult, if not impossible, to obtain.<sup>109</sup>

Compounding these problems, many refugees are unable to afford legal representation to guide them through this process.<sup>110</sup> As a result, they must learn about the substantive law and navigate the procedural aspects of the law by themselves.<sup>111</sup> At the same time, often with minimal support and no work authorization, refugees must still find a way to support themselves, care for their families, and find a home.<sup>112</sup> This must all be done in a new country with a foreign language and unfamiliar culture.<sup>113</sup>

Perhaps most significantly, and the focus of the remainder of this Comment, the psychological effects of persecution on refugees have a profound negative impact on their ability to timely apply for asylum. The magnitude of this negative influence is directly tied to the severity of the persecution—the worse the trauma suffered, the more profound the impact is likely to be. Thus, the one-year bar has the perverse effect of placing a disproportionately higher burden on those individuals who have suffered the greatest injustice.

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107. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF JUSTICE, FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: INSTRUCTIONS (2014), <http://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf>.

108. Pistone & Schrag, *supra* note 97, at 1, 8-9.

109. *Id.* at 8-9.

110. HUMAN RIGHTS FIRST, REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS 15 (2002), [https://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee\\_women.pdf](https://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee_women.pdf) [hereinafter HRW, REFUGEE WOMEN AT RISK].

111. Pistone & Schrag, *supra* note 97, at 52-53.

112. HRW, REFUGEE WOMEN AT RISK, *supra* note 110, at 15-16.

113. Schrag et al., *supra* note 55, at 672. See generally Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230 (1986).

At every stage of asylum proceedings, adjudicating officials have consistently failed to appropriately and fairly recognize the negative effects of persecution. This failure has resulted in preventing those who have suffered the most from obtaining the relief they deserve and is a problem that must be addressed.

## II. MENTAL DISORDERS IN REFUGEE POPULATIONS

Before addressing how claims that a mental condition excused an untimely application are adjudicated, it is essential to understand the nature of the mental disorders that plague many refugees.<sup>114</sup> The most common mental disorders in the refugee population are posttraumatic stress disorder (“PTSD”) and major depressive disorder (“MDD”). This Part will discuss each of these disorders and then explain why they are so prevalent in the refugee community.

### A. *Posttraumatic Stress Disorder*

PTSD has been recognized by mental health clinicians since the DSM-III was published in 1980.<sup>115</sup> Previously recognized as an anxiety disorder, the newest iteration of the DSM, DSM-V, categorizes PTSD as a “Trauma and Stressor Related Disorder.”<sup>116</sup> PTSD describes a constellation of symptoms that may materialize as the result of a very

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114. Cf. Brandon R. White, *Termination of Parental Rights of the Mentally Disabled in New York: A Call for Change*, 34 BUFF. PUB. INT. L.J. 1 (2016) (examining social science research to support proposed amendment to state termination of parental rights statute).

115. Chris R. Brewin & Emily A. Holmes, *Psychological Theories of Posttraumatic Stress Disorder*, 23 CLINICAL PSYCHOL. REV. 339, 339 (2003); Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don't be Fooled*, 31 HASTINGS INT'L & COMP. L. REV. 725, 725 (2008). The medical community has recognized a PTSD-like trauma related mental condition, by various names, since at least the American Civil War. Charles B. Nemeroff et al., *Posttraumatic Stress Disorder: A State-of-the-Science Review*, 40 J. PSYCHIATRIC RES. 1, 2 (2006).

116. AM. PSYCHIATRIC ASS'N, POSTTRAUMATIC STRESS DISORDER 1 (2013), <http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf> [hereinafter PTSD FACTSHEET]. The DSM-V made only minor alterations to PTSD. *Id.* For the purposes of analysis these distinctions are largely inconsequential. *Id.*

stressful or traumatic event or series of events.<sup>117</sup> To be diagnosed with PTSD, an individual must be exposed to (or perceive that he or she was exposed to) death, serious injury, or sexual violation.<sup>118</sup> Additionally, the exposure must result from one or more of the following: (1) direct exposure to a traumatic event; (2) the witnessing of a traumatic event in person; (3) subsequently learning of a traumatic event that occurred to a close family member or friend; or (4) first-hand experiences with repeated or extreme exposure to details of a traumatic event.<sup>119</sup>

The DSM-V recognizes four distinct clusters of symptoms resulting from PTSD: re-experiencing, avoidance, negative changes in cognition and mood, and hyperarousal.<sup>120</sup> Re-experiencing symptoms are spontaneous and intrusive memories of the precipitating traumatic event or events.<sup>121</sup> These memories are usually accompanied by the same emotional responses (e.g., fear or horror) that accompanied the original event.<sup>122</sup> Re-experiencing symptoms may include reoccurring nightmares or flashbacks in which the individual re-experiences the traumatic event.<sup>123</sup> Flashbacks are often

117. *Id.*

118. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) [hereinafter DSM-V].

119. *Id.* The DSM-IV previously required that the individual experiencing the traumatic event respond with feelings of “intense fear, helplessness or horror.” PTSD FACTSHEET, *supra* note 116, at 1. It was found that this did not aid in predicting the onset of PTSD, and the requirement was deleted. *Id.*

120. DSM-V, *supra* note 118, at 271-72. The DSM-IV's description of PTSD is largely the same as the newest iteration, but clustered these symptoms in three groups: intrusive memories; avoidance and numbing; and increased anxiety or heightened emotions. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 463-68 (4th ed. 2000) [hereinafter DSM-IV].

121. DSM-V, *supra* note 118, at 271; see also Matthew J. Friedman et al., *Considering PTSD for DSM-5*, 28 DEPRESSION & ANXIETY 750, 750-51 (2011); Jose A. Saporta, Jr. & Bessel A. van der Kolk, *Psychobiological Consequences of Severe Trauma*, in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 151, 153 (Metin Basoglu ed., 1992).

122. DSM-V, *supra* note 118, at 271.

123. *Id.*; Matthew J. Friedman, *PTSD and Related Disorders*, in POST-TRAUMATIC STRESS DISORDER 1, 2 (Dan J. Stein et al. eds., 2011); see also STEVE

precipitated by a “trigger”—a sensory stimulus that the individual has associated with the trauma.<sup>124</sup> In more severe cases the individual may be unable to distinguish the memory from the present.<sup>125</sup>

Avoidance symptoms describe the actions an individual suffering from PTSD takes to avoid external reminders of the trauma.<sup>126</sup> Individuals suffering from PTSD often go to great lengths to avoid situations, places, or people that trigger memories, distressing thoughts, or feelings about the original trauma.<sup>127</sup> For example, someone who developed PTSD after a car accident would be likely to avoid driving or riding in cars. The motivation to avoid thinking about past trauma often prevents individuals with PTSD from seeking treatment because it would require them to talk about the event.<sup>128</sup>

The symptom cluster of negative changes in cognition and mood includes a number of changes in the ways PTSD afflicted individuals view themselves and others.<sup>129</sup> This often includes “persistent (i.e., always or almost always) and exaggerated negative expectations regarding important aspects of life applied to oneself, others, or the future (e.g., . . . ‘People in authority can’t be trusted’).”<sup>130</sup> Negative changes in cognition may also manifest as “persistent erroneous cognitions about the causes of the traumatic event that lead them to blame themselves or others[,] . . . [a] persistent negative mood state[,] . . . markedly diminished interest or participation in previously enjoyed activities, . . . estrange[ment] from other people[,] . . . a persistent inability to feel positive emotions,” and “an

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EARLE, COPPERHEAD ROAD (Universal City Records 1988) (“And now the D.E.A.’s got a chopper in the air. I wake up screaming like I’m back over there.”).

124. See Lustig, *supra* note 115, at 726.

125. DSM-V, *supra* note 118, at 271-72.

126. *Id.* at 271, 275; Friedman, *supra* note 123, at 763-64.

127. DSM-V, *supra* note 118, at 275.

128. *Id.*

129. *Id.*; see Friedman, *supra* note 123, at 10-11; Saporta & van der Kolk, *supra* note 121, at 153-54.

130. DSM-V, *supra* note 118, at 275.

inability to remember key aspects of the event.”<sup>131</sup> Individuals with PTSD will often exhibit restricted emotional range and report feeling numb.<sup>132</sup> This, in turn, negatively affects their ability to form and maintain normal relationships.<sup>133</sup> These changes may also lead to the development of a foreshortened sense of the future, anticipation of a short life, and a difficulty planning for the future.<sup>134</sup>

Hyperarousal symptoms represent a variety of behaviors, including “aggressive[,] . . . reckless or self-destructive behavior” and “hypervigilance.”<sup>135</sup> Individuals with PTSD are often at a constant state of alert and easily startled.<sup>136</sup> This increased vigilance often leads to sleep disturbances and difficulty concentrating.<sup>137</sup>

### B. *Depression*

All depressive disorders are characterized by a sad, empty, and/or irritable mood accompanied by somatic and cognitive changes that negatively influence the ability to function.<sup>138</sup> The classic depressive disorder is MDD.<sup>139</sup> MDD is diagnosed when an individual experiences discrete episodes of two or more weeks’ duration.<sup>140</sup> Generally, however, these episodes last much longer.<sup>141</sup> MDD is

131. *Id.*

132. *Id.*; Lustig, *supra* note 115, at 726.

133. DSM-V, *supra* note 118, at 275-76.

134. Friedman, *supra* note 123, at 14; Lustig, *supra* note 115, at 726.

135. DSM-V, *supra* note 118, at 272, 276; *see also* Saporta & van der Kolk, *supra* note 121, at 155-56.

136. DSM-V, *supra* note 118, at 276; Lustig, *supra* note 115, at 726.

137. DSM-V, *supra* note 118, at 276; Friedman, *supra* note 123, at 14-15.

138. DSM-V, *supra* note 118, at 155.

139. *Id.* at 160. The category of depressive disorders also includes Persistent Depressive Disorder (or Dysthymia), Disruptive Mood Dysregulation Disorder, Premenstrual Dysphoric Disorder, Substance/Medication-Induced Depressive Disorder, Depressive Disorder Due to Another Medical Condition, and Unspecified Depressive Disorder. *Id.* at 155.

140. *Id.* at 163.

141. *Id.*

characterized by depressed mood and markedly diminished interest in or pleasure from activities.<sup>142</sup> Other symptoms include significant weight loss or gain, insomnia or hypersomnia, psychomotor agitation or retardation, fatigue or loss of energy, feelings of worthlessness or guilt, diminished ability to think or concentrate, and suicidal ideation.<sup>143</sup> For MDD to be diagnosed, these symptoms must be present nearly every day.<sup>144</sup>

Individuals suffering from MDD describe their mood as depressed, sad, hopeless, discouraged, or numb.<sup>145</sup> Loss of interest and pleasure is almost always a symptom of MDD and individuals lose interest in hobbies or activities they used to find enjoyable.<sup>146</sup> Social withdrawal and distancing from family and friends is also very common in MDD.<sup>147</sup> MDD can have a profound impact on an individual's ability to think, concentrate, and make decisions.<sup>148</sup> Because they are often easily distracted and experience pronounced memory loss, cognitively demanding pursuits can become impossible for individuals with MDD.<sup>149</sup> At its worst, MDD can cause individuals to become catatonic or otherwise render them completely unable to conduct basic self-care.<sup>150</sup> Even outside of these extreme cases, those with MDD experience a higher rate of physical illness and attendant pain as well as decreases in physical, social, and role functioning.<sup>151</sup>

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142. *Id.* at 161.

143. *Id.* at 163-67.

144. *Id.* at 163.

145. *Id.* at 162.

146. *Id.* at 162-63.

147. *Id.* at 163.

148. *Id.* at 164.

149. *Id.*

150. *Id.* at 165-66.

151. *Id.* at 167.



C. *PTSD and MDD are Highly Comorbid*

PTSD and MDD are highly comorbid.<sup>152</sup> Estimates vary, but as many as two thirds of trauma survivors with PTSD also satisfy the diagnostic criteria for MDD.<sup>153</sup> Additionally, 95% of those with a diagnosis of PTSD will also develop MDD at some point in their life.<sup>154</sup> In addition to symptoms of depression appearing more frequently in trauma survivors, when they do appear, depressive symptoms are more intense in those suffering from PTSD.<sup>155</sup>

One reason for the high rate of comorbidity for PTSD and MDD is that the two disorders share common risk factors.<sup>156</sup> Particularly significant risk factors for the development of

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152. Sayamwong E. Hammack et al., *Overlapping Neurobiology of Learned Helplessness and Conditioned Defeat: Implications for PTSD and Mood Disorders*, 62 NEUROPHARMACOLOGY 565, 565 (2012); Shakeh Momartin et al., *Comorbidity of PTSD and Depression: Associations with Trauma Exposure, Symptom Severity and Functional Impairment in Bosnian Refugees Resettled in Australia*, 80 J. AFFECTIVE DISORDERS 231, 232 (2004); see also Rachel Yehuda et al., *Effects of Trauma Exposure on the Cortisol Response to Dexamethasone Administration in PTSD and Major Depressive Disorder*, 29 PSYCHONEUROENDOCRINOLOGY 389, 390-91 (2004).

153. Yehuda et al., *supra* note 152, at 390. Comorbidity studies often focus on particular at-risk groups, and while results vary, they consistently demonstrate a significant correlation. See Arie Y. Shalev et al., *Prospective Study of Posttraumatic Stress Disorder and Depression Following Trauma*, 155 AM. J. PSYCHIATRY 630, 630 (1998). For instance, co-occurrence of PTSD and MDD has been found in 30% of survivors of mass shootings, 29% of patients in burn units, 53% of help-seeking survivors of motor vehicle accidents, and 56% of help-seeking war veterans. *Id.* at 631.

154. Michael Brune et al., *Belief Systems as Coping Factors for Traumatized Refugees: A Pilot Study*, 17 EUR. PSYCHIATRY 451, 452 (2002).

155. Shalev et al., *supra* note 153, at 630.

156. See Kylie Sutherland & Richard A. Bryant, *Autobiographical Memory and the Self-Memory System in Posttraumatic Stress Disorder*, 22 J. ANXIETY DISORDERS 555, 555-56 (2008). There is some overlapping of symptoms for PTSD and MDD and, accordingly, some of this comorbidity may also be the result of diagnostic factors. See Sutherland & Bryant, *supra*, at 556 (“Although PTSD is nominally an anxiety disorder, it is also characterized by depressive symptomatology.”).

both PTSD and MDD are stress and unfavorable life conditions.<sup>157</sup>

Individuals diagnosed with MDD tend to have experienced more negative life events, like those resulting from trauma, than individuals without MDD.<sup>158</sup> Exposure to trauma has been “recognized as a major antecedent of both PTSD and MDD.”<sup>159</sup> Traumatization in childhood or adolescence also increases both the risk that individuals will develop depression later in life as well as the likelihood that PTSD will develop as the result of a later, unrelated trauma.<sup>160</sup>

In addition to creating a higher risk of developing PTSD and/or MDD, these same risk factors can also lead to aggravated symptoms in both.<sup>161</sup> In essence, this can form a positive feedback loop. The presence of one disorder may contribute to the development of the other.<sup>162</sup> The presentation of the second, in turn, can then lead to worsened symptoms in the first.<sup>163</sup> When PTSD and depression occur together this tends to result in a very high level psychosocial impairment.<sup>164</sup>

PTSD and MDD also appear to share similar causal mechanisms.<sup>165</sup> It has been proposed, with substantial support, that a critical component of both MDD and PTSD is some kind of disruption in the central serotonin system.<sup>166</sup> In

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157. See Angela Nickerson et al., *A Critical Review of Psychological Treatments of Posttraumatic Stress Disorder in Refugees*, 31 *CLINICAL PSYCHOL. REV.* 399, 412-13 (2011).

158. Yoav Kohn et al., *Increased Prevalence of Negative Life Events in Subtypes of Major Depressive Disorder*, 42 *COMPREHENSIVE PSYCHIATRY* 57, 57, 61 (2001).

159. Yehuda et al., *supra* note 152, at 390.

160. Pallavi Nishith et al., *Prior Interpersonal Trauma: The Contribution to Current PTSD Symptoms in Female Rape Victims*, 109 *J. ABNORMAL PSYCHOL.* 20, 20-21, 23-24 (2000).

161. See Brune et al., *supra* note 154, at 452.

162. See Momartin et al., *supra* note 152, at 236.

163. See Brune et al., *supra* note 154, at 451.

164. Momartin et al., *supra* note 152, at 232, 236.

165. Hammack et al., *supra* note 152, at 566.

166. *Id.*

light of this, it is unsurprising that a common and effective pharmacological treatment for both disorders is Selective Serotonin Reuptake Inhibitors (“SSRIs”).<sup>167</sup> Both MDD and PTSD are also associated with elevations in corticotropin-releasing factor (“CRF”).<sup>168</sup> These common physiological factors may help explain why individuals with one of these disorders are more prone to developing the other.<sup>169</sup>

#### D. PTSD and MDD in Refugees

Studies conducted on refugee mental health in a broad array of settings consistently show higher rates of psychological disorders—particularly mood, anxiety, and trauma disorders—in refugee populations than in non-refugee populations.<sup>170</sup> This is especially true for PTSD and MDD.<sup>171</sup> Estimates vary between groups, but PTSD likely occurs at a rate of over thirty percent for refugees as a whole.<sup>172</sup> Compare this rate to that for the general U.S.

167. *Id.*

168. Yehuda et al., *supra* note 152, at 399.

169. *See, e.g., id.*

170. Nickerson et al., *supra* note 157, at 400.

171. Belinda Graham et al., *Overgeneral Memory in Asylum Seekers and Refugees*, 45 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 375, 377 (2014) (“PTSD and depression are highly co-morbid particularly in the refugee population . . .”) (citations omitted).

172. Studies on PTSD prevalence in refugees and asylum seekers often focus on those fleeing particular countries in varying circumstances. Rates of PTSD in these groups vary. By way of example, a 2002 study found that 4% of Vietnamese refugees resettled in Australia suffer from PTSD, Zachary Steel et al., *Long-Term Effect of Psychological Trauma on the Mental Health of Vietnamese Refugees Resettled in Australia: A Population-Based Study*, 360 LANCET 1056, 1057-58 (2002), a 1998 study found that 90% of former Vietnamese political detainees resettled in Boston between 1990–1992 suffered from PTSD, Richard F. Mollica et al., *The Dose-Effect Relationships Between Torture and Psychiatric Symptoms in Vietnamese Ex-Political Detainees and a Comparison Group*, 186 J. NERVOUS & MENTAL DISEASE 543, 543-44 (1998) [hereinafter Mollica et al., *Torture*], and a 1999 study found 26.3% of Bosnian refugees living in a specific refugee camp suffered from PTSD, Richard F. Mollica et al., *Disability Associated with Psychiatric Comorbidity and Health Status in Bosnian Refugees Living in Croatia*, 281 JAMA 433, 434, 436 (1999) [hereinafter Mollica et al., *Bosnian Refugees*]. A meta-analysis of 181 studies estimated that the rate of PTSD occurrence in all refugee groups was 30.6%. Zachary Steel et al., *Association of*

population, which only suffers from PTSD at a rate of about 3.5 percent.<sup>173</sup> Outside the United States, the rate appears to be even lower.<sup>174</sup> The rate of depression in refugee populations has been estimated to be as high as nearly forty percent.<sup>175</sup> MDD occurs in the general U.S. population at a rate of about 6.7%, though this rate varies among different groups.<sup>176</sup>

The high rate of PTSD in refugee populations can largely be explained by two unique aspects of the refugee condition.<sup>177</sup> First, the nature of the trauma refugees suffer as a result of their persecution is especially conducive to the development of PTSD with particularly severe symptoms.<sup>178</sup> Second, events that often occur subsequent to a refugee's escape from persecution increases refugees' susceptibility to PTSD and MDD and are likely to aggravate resulting symptoms.<sup>179</sup>

The most obvious reason for the high rate of PTSD and MDD in refugees is the persecution at the core of their status

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*Torture and Other Potentially Traumatic Events with Mental Health Outcomes Among Populations Exposed to Mass Conflict and Displacement: A Systematic Review and Meta-Analysis*, 302 JAMA 537, 537 (2009). *But see* Mina Fazel et al., *Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review*, 365 LANCET 1309, 1310 (2005) (discussing meta-analysis and suggesting that the rate of PTSD among all groups of refugees is approximately 10%).

173. Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 617, 621 (2005).

174. *See id.* at 617.

175. Mollica et al., *Bosnian Refugees*, *supra* note 172, at 437. Like the estimates of PTSD prevalence, these estimates vary across different refugee groups and studies. Michael Hollifield et al., *Measuring Trauma and Health Status in Refugees: A Critical Review*, 288 JAMA 611, 611 (2002) (noting variation in studies, which have found refugees to suffer from PTSD at rates of 4–86% and depression at rates of 5–31%).

176. DSM-V, *supra* note 118, at 166. For example, the rate of MDD in individuals between 18 and 29 years old is three times higher than that for individuals 60 years or older. *Id.* Females are also 1.5 to 3 times more likely to suffer MDD than males. *Id.*

177. Brune et al., *supra* note 154, at 451.

178. *Id.* at 451-52.

179. *Id.*

as refugees. While individuals are classified as refugees solely on the basis of a fear of future persecution, many, if not most, refugees have actually suffered persecution in the past.<sup>180</sup> Persecution often includes incredibly traumatic and violent human rights violations and crimes like torture, murder, mutilation, and rape.<sup>181</sup> This type of severe trauma is closely linked to higher likelihoods of developing both stress disorders and depression.<sup>182</sup> Moreover, persecution necessitates that the trauma suffered was harm inflicted through the intentional actions of other humans.<sup>183</sup> Intimate, interpersonal violence is more likely to lead to PTSD than other kinds of trauma and tends to result in much more severe symptoms.<sup>184</sup> PTSD resulting from interpersonal violence is also more difficult to treat and recover from.<sup>185</sup>

Additionally, a refugee's trauma is often not the result of a single discrete incident, but rather prolonged and repeated

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180. See, e.g., Pistone & Schrag, *supra* note 97, at 33.

181. See, e.g., *Gathungu v. Holder*, 725 F.3d 900, 902 (8th Cir. 2013) ("The men gave him hallucinogenic drugs, beat him, and hung him upside down over a fire, causing him to lose consciousness several times."); *Bah v. Mukasey*, 529 F.3d 99, 102 (2d Cir. 2008) ("Genital Mutilation is often performed under unsanitary conditions with highly rudimentary instruments. The procedure is carried out with special knives, scissors, scalpels, pieces of glass or razor blades in poor light and septic conditions. . . . Genital mutilation can have devastating, permanent effects on victims, including immediate and long-term physical problems such as infection, difficulty during urination and menstruation, incontinence, and sexual dysfunction; complications during child birth such as fetal and maternal death, birth defects, and internal damage to the mother; and severe psychological problems.") (citations and alterations omitted); *Kebede v. Ashcroft*, 366 F.3d 808, 810 (9th Cir. 2004) ("Kebede testified that she tried to run, but that the soldiers held her while ripping off her clothes. The soldiers then beat her, and each took turns raping her while the other held her down."); *In Re D-V-*, 21 I. & N. Dec. 77, 78 (B.I.A. 1993) ("The applicant stated that the soldiers subsequently came to her family home where they gang-raped and severely beat her.").

182. See Murat Paker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, in *TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES* 72, 80 (Metin Basoglu ed., 1992); Shalev et al., *supra* note 153, at 631.

183. See 8 U.S.C. § 1101(a)(42)(A) (2012).

184. See DSM-V, *supra* note 118, at 274-76; Nishith et al., *supra* note 160 *passim*; see also Mollica et al., *Torture*, *supra* note 172, at 543-44, 550.

185. See Nickerson et al., *supra* note 157, at 412-13.

actions.<sup>186</sup> While a single traumatic event can cause PTSD by itself, this type of repeated exposure to multiple traumatic events is much more likely to result in PTSD.<sup>187</sup> Add to this the fact that refugees not only experience trauma directly, but also indirectly when friends and family are subjected to the same.<sup>188</sup> Witnessing trauma experienced to others can lead to PTSD and MDD by itself.<sup>189</sup> In combination with trauma suffered personally, this gives rise to an even greater likelihood of developing these disorders with more severe attendant symptoms.<sup>190</sup>

A less obvious, but still very significant, factor in the high rate of PTSD is the impact of resettlement difficulties.<sup>191</sup>

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186. *Vitug v. Holder*, 723 F.3d 1056, 1060 (9th Cir. 2013) (describing rape, abuse, and other mistreatment of petitioner for “perceived effeminate behavior and homosexuality” beginning at the age of three and lasting until petitioner fled country at the age of twenty); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 559-60 (7th Cir. 2008) (describing abuse on account of petitioner and his family’s membership in a minority religious group lasting from birth until family fled country when petitioner was fifteen years old); *Voci v. Gonzales*, 409 F.3d 607, 610 (3d Cir. 2005) (describing over ten years of continuous threats and intimidation with repeated and severe beatings).

187. Nishith et al., *supra* note 160, at 20; Joseph Ssenyonga et al., *Posttraumatic Growth, Resilience, and Posttraumatic Stress Disorder (PTSD) Among Refugees*, 82 *PROCEDIA-SOC. & BEHAV. SCI.* 144, 147 (2013).

188. *Flores v. Holder*, 699 F.3d 998, 1000-01 (8th Cir. 2012) (“In 1988, guerillas went to his father’s house. The guerillas attempted to extort Flores’s father and also asked about Flores’s whereabouts. When Flores’s father refused to meet the guerillas’ extortion demands, the guerillas killed him. . . . When Flores’s mother refused to give information on his whereabouts, the guerillas killed her and raped Flores’s fifteen-year-old sister. The guerillas later returned and killed Flores’s stepfather.”); *Zubeda v. Ashcroft*, 333 F.3d 463, 467 (3d Cir. 2003) (“Zubeda said that these soldiers tied her father and brother and forced them to watch as they gang raped her. When they were finished, the soldiers decapitated her father and brother with machetes and set fire to the family home while Zubeda’s mother and sister were still inside.”).

189. Louise Silvern et al., *Individual Psychotherapy for the Traumatized Children of Abused Women*, in *ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN* 43, 44 (Einat Peled et al. eds., 1995).

190. Silvern et al., *supra* note 189, at 44-45.

191. Sabina Palic & Ask Elklit, *Psychosocial Treatment of Posttraumatic Stress Disorder in Adult Refugees: A Systematic Review of Prospective Treatment Outcome Studies and a Critique*, 131 *J. AFFECTIVE DISORDERS* 8, 9 (2011).

Refugees' problems do not begin and end with the original persecution, and negative life events are generally associated with higher rates of depression.<sup>192</sup> Fleeing from their home, and often families, imposes additional stress and leads to a greater chance of developing PTSD and MDD and can exasperate the symptoms of already occurring PTSD.<sup>193</sup> Subsequent detention in the destination country is among the worst of these post-migration stressors.<sup>194</sup> Separation from family and friends, fear for those remaining in the country, and insecure immigration status also have a significant negative impact on refugee mental health.<sup>195</sup>

### III. INTERPRETATION OF THE EXCEPTIONS BY ADJUDICATING AGENCIES

With a better understanding of the mental conditions at issue, we now move on to how claims that PTSD and MDD are extraordinary circumstances are being adjudicated. As will be shown, while much of the earlier understanding of the exceptions mirrored the broad, flexible mandate intended by Congress, the current understanding of the exceptions has drastically shifted to an increasingly narrow approach.

The official and explicit guidance that has been given to adjudicating officials is minimal. There is only one published BIA decision addressing extraordinary circumstances and the opinion does little more than restate the language of the regulations.<sup>196</sup> Most federal courts of appeal will also not review Immigration Court and BIA decisions on exceptions to the bar. In light of this lack of guidance, USCIS training

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192. Kohn et al., *supra* note 158, at 57.

193. Nickerson et al., *supra* note 157, at 400.

194. Allen Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1721-23 (2003).

195. See Palic & Elklit, *supra* note 191, at 9.

196. *In re Y-C-*, 23 I. & N. Dec. 286, 287-88 (B.I.A. 2002).

materials for asylum officers take a position of particular significance.<sup>197</sup>

The USCIS emphasizes that asylum officers must utilize a “flexible and inclusive” approach in evaluating extraordinary circumstances.<sup>198</sup> In regards to the enumerated exception of “serious illness or mental or physical disability,” training materials explain that “serious illness or mental or physical disability include[s] any effects of persecution or violent harm suffered in the past.”<sup>199</sup> USCIS recognizes that torture or severe trauma “may result in serious illness or mental or physical disability.”<sup>200</sup> Moreover, the USCIS acknowledges that “[e]ffects of persecution can include inability to recall details, severe lack of focus, problems with eating and sleeping, and other posttraumatic stress disorder . . . symptoms.”<sup>201</sup> As such, if applicants suffered torture or trauma, it is important that asylum officers “elicit information about any continuing effects from that torture or trauma.”<sup>202</sup>

Recognizing the regulation’s enumerated list of extraordinary circumstances, the training materials on the one-year bar also include a list of additional examples not explicitly mentioned in the regulations.<sup>203</sup> These include “severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization,” if these factors “had a severe enough impact on the applicant’s functioning to have produced a significant barrier to timely filing.”<sup>204</sup>

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197. Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, 05-08 IMMIGR. BRIEFINGS 1, 3 (2005).

198. FILING DEADLINE TRAINING COURSE, *supra* note 69, at 21-22.

199. *Id.* at 13, 14.

200. *Id.* at 14.

201. *Id.*

202. *Id.*

203. *Id.* at 13, 20.

204. *Id.*



Congress' original intent was for the exceptions to be broadly applied. The language discussed above appears to recognize this intention. However, an examination of actual decisions regarding whether PTSD and MDD qualifies as an extraordinary circumstance belies an increasingly narrow and demanding interpretation.<sup>205</sup>

- A victim of domestic abuse from Guatemala filed for asylum outside the one year deadline.<sup>206</sup> She presented evidence of PTSD and argued that her mental condition constituted an extraordinary circumstance excusing her failure to timely file for asylum.<sup>207</sup> The immigration judge held that the applicant's PTSD did not rise to the level necessary to excuse her untimely application.<sup>208</sup> In support of this conclusion the immigration judge cited evidence showing that, since the applicant's arrival in the United States, she had found employment and paid her bills.<sup>209</sup>
- Similarly, an asylum applicant fleeing female genital cutting ("FGC") in Kenya was denied an extraordinary circumstances exception despite her mental health issues.<sup>210</sup> Applying to USCIS with an affirmative application, the applicant submitted a psychologist evaluation to show she

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205. The BIA and Immigration Courts publish very few cases and often provide very little substantive analysis of denials. *See* NO PROTECTION, *supra* note 101, at 7-8. Moreover, few federal courts even entertain challenges to decisions regarding decisions on one-year bar exceptions. *See, e.g.*, Ruiz v. Gonzalez, 479 F.3d 762, 765 (11th Cir. 2007). In those few courts, most of the decisions on this issue appear in unpublished decisions with minimal discussion. *See, e.g.*, Uppal v. Gonzales, 240 F. App'x 243, 244 (9th Cir. 2007). This dearth of precedent is a serious problem by itself but one that is beyond the limited scope of this Comment. The Center for Gender and Refugee Studies and Human Rights First have both done an admirable job of compiling data on asylum cases that do not appear in official adjudicating materials. *See generally* HRW, FILING DEADLINE, *supra* note 90; Musalo & Rice, *supra* note 51. The following cases are examples culled from this data.

206. Musalo & Rice, *supra* note 51, at 700.

207. *Id.*

208. *Id.*

209. *Id.* After being denied asylum, the applicant in this case was ultimately granted withholding and CAT relief. *Id.*

210. HRW, FILING DEADLINE, *supra* note 90, at 31-32.

was excused from her untimely failure by her mental issues.<sup>211</sup> The psychologist diagnosed the applicant with PTSD and MDD and concluded that her condition significantly interfered with her ability to function.<sup>212</sup> Noting that the applicant's condition had not prevented her from attending church during the year immediately after she arrived in the United States, the asylum officer concluded that the applicant's mental conditions did not excuse her late application.<sup>213</sup>

- Another woman fleeing FGC in Kenya, as well as an extremely abusive husband, was similarly denied an exception despite a diagnosis of PTSD.<sup>214</sup> The immigration judge accepted the applicant's diagnosis of PTSD.<sup>215</sup> However, the immigration judge was impressed by the applicant's well written pro se application and found that the applicant had shown "entrepreneurial skills" in raising money and caring for her children while she was homeless in the United States.<sup>216</sup> Because of this, the immigration judge did not see how her PTSD could be directly related to her untimely failure.<sup>217</sup>
- A woman from Gambia was forced to marry a man who, for decades, raped and physically abused her.<sup>218</sup> After attempting to leave him multiple times she was finally able to escape to the United States. Suffering from PTSD and MDD, the woman did not learn about asylum until after she had been in the United States for several years.<sup>219</sup> The applicant submitted a medical evaluation diagnosing her with PTSD and MDD but her application was rejected by

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211. *Id.*

212. *Id.* at 32.

213. *Id.*

214. Musalo & Rice, *supra* note 51, at 704-05.

215. *Id.* at 705.

216. *Id.*

217. *Id.* The applicant in this case was granted withholding of removal. *Id.*

218. HRW, FILING DEADLINE, *supra* note 90, at 31.

219. *Id.*

the asylum office and Immigration Court.<sup>220</sup> The immigration judge explained that he did not find her PTSD to constitute an extraordinary circumstance because the applicant was still “ab[le] to make appropriate life decisions [and] . . . relocate to take advantage of opportunities.”<sup>221</sup>

- A woman from Turkmenistan fled to the United States after her son was killed for converting to Christianity and she was tortured.<sup>222</sup> Suffering from extreme depression, panic attacks, and social isolation, she attempted suicide and was prescribed psychiatric medicine.<sup>223</sup> Because of her mental condition, she only learned of the availability of asylum after the one-year deadline had passed.<sup>224</sup> Her mental condition was found not to be an extraordinary circumstance and her application was rejected.<sup>225</sup>
- After being kidnapped and held prisoner by sex traffickers, an Albanian teenager escaped and fled to the United States as an unaccompanied minor.<sup>226</sup> Only a month after the expiration of the application deadline, she applied for asylum.<sup>227</sup> In Immigration Court, a clinical psychologist testified that the applicant suffered from PTSD and MDD and that this trauma had prevented her from speaking about the trauma she had experienced.<sup>228</sup> The immigration judge held that the applicant’s mental conditions

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220. *Id.*

221. *Id.*; *see also* Khan v. Filip, 554 F.3d 681, 686 (7th Cir. 2009) (“Khan asserted that he did not know about the one-year deadline and that his poor mental health—his depression and fear of being returned to Pakistan—compromised his ability to timely file for asylum. He argued that these were the sort of ‘extraordinary circumstances’ that should excuse the late filing under 8 U.S.C. § 1158(a)(2)(D), but the [immigration judge] disagreed.”).

222. HRW, FILING DEADLINE, *supra* note 90, at 31.

223. *Id.*

224. *Id.*

225. *Id.*

226. Musalo & Rice, *supra* note 51, at 705.

227. *Id.* *But see* Mukamasoni v. Ashcroft, 390 F.3d 110, 117 (1st Cir. 2004) (noting that immigration judge found applicant’s PTSD to be an extraordinary circumstance that waived untimely filing).

228. Musalo & Rice, *supra* note 51, at 705; *see also* Mlambo v. U.S. Att’y Gen., 297 Fed. App’x 198, 200 (3d Cir. 2008) (“The hearing transcript suggests that the

could not excuse her untimely failure because they could not have prevented her from seeking out an attorney.<sup>229</sup>

The above cases illustrate how many adjudicating officials consistently demonstrate a fundamental misunderstanding of the nature of mental disorders, particularly PTSD.<sup>230</sup> The most common manifestation of this misunderstanding seems to be when claims that PTSD prevented timely applications are denied on the strength of evidence that the applicant's mental condition did not interfere in other areas of their life.<sup>231</sup> Adjudicating officials see this as evidence that an applicant's PTSD or MDD is not directly related to their failure to timely file an application.<sup>232</sup>

This flawed analysis ignores the fact that avoidance symptoms are a principle component of PTSD.<sup>233</sup> An individual with PTSD might go about a great many aspects of their life with little or no difficulty if these activities do not remind them of their trauma.<sup>234</sup> At the same time, this individual might be completely unable to deal with circumstances that remind them of their trauma.<sup>235</sup> Such an individual might not be able discuss or deal with their past

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[immigration judge] did not believe that depression resulting from the separation from one's family would constitute extraordinary circumstances because that is a factor present in all cases.”).

229. Musalo & Rice, *supra* note 51, at 705; *see also* Goromou v. Holder, 721 F.3d 569, 575 (8th Cir. 2013) (explaining that the BIA held that the applicant's PTSD and depression did not excuse untimely asylum application because “the mental problems or isolation [the applicant] faced were not significantly different from others seeking asylum in the United States”).

230. Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Procedural Safeguards Are Necessary*, 29 J. CONTEMP. HEALTH L. & POL'Y 283, 313-14 (2013); *cf.* Ilunga v. Holder, 777 F.3d 199, 212 (4th Cir. 2015) (“In affirming the IJ[s] [adverse credibility determination], the BIA summarily disagreed with Ilunga's argument that it was normal for a victim of torture to appear ‘uncomfortable’ given his experiences. The BIA's disagreement manifests a basic misunderstanding of the human condition.”).

231. *See* Cummins, *supra* note 230, at 313-14.

232. *See id.* at 313; Musalo & Rice, *supra* note 51, at 703-07.

233. *See supra* Part II.A.

234. *See* Cummins, *supra* note 230, at 312-14.

235. *See* Lustig, *supra* note 115, at 725-26, 731.

persecution at all, let alone in the detail that is usually required to adequately demonstrate persecution.<sup>236</sup>

#### IV. BATTERED WOMAN SYNDROME AND LEARNED HELPLESSNESS

This Comment does not propose that these decisions are the result of asylum officers and judges that are callous or ill-intentioned. Rather, the problem here stems from a reasonable, but fundamental, misunderstanding of the mental disorders at issue. For those who have not been through it themselves, the effect of trauma on refugees is abstract and difficult to understand. This problem is not unique to asylum law. Reaching into another area of law that has presented very similar issues—excuse and justification in criminal law—may offer some guidance on how we might proceed.

##### A. *Battered Woman Syndrome*

Originally formulated by Dr. Lenore Walker, Battered Woman Syndrome (“BWS”) describes a condition which may occur in individuals who are subjected to sustained physical and psychological abuse at the hands of an intimate partner.<sup>237</sup> BWS is primarily used in the courts as part of a defense strategy when a battered woman kills or assaults her significant other,<sup>238</sup> and to explain changed testimony and rehabilitate a witness’s credibility.<sup>239</sup>

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236. *See id.*

237. *See, e.g.,* State v. Williams, 787 S.W.2d 308, 311 (Mo. Ct. App. 1990). *See generally* LEONE WALKER, THE BATTERED WOMAN (1979).

238. *See, e.g.,* Commonwealth v. Lazarovich, 574 N.E.2d 340, 343-44 (Mass. 1991).

239. *See, e.g.,* State v. Haines, 860 N.E.2d 91, 99-100 (Ohio 2006) (“Because the victim’s credibility can be attacked during cross-examination of the victim or even during opening statements, the prosecution need not wait until rebuttal to present expert testimony on battered woman syndrome. Rather, such testimony may be presented as rehabilitative evidence during the state’s case-in-chief.”) (quoting State v. Grecinger, 569 N.W.2d 189, 193 (Minn. 1997)).

Dr. Walker described BWS as the result of a continuous cycle consisting of three phases.<sup>240</sup> Phase one, or “tension-building,” involves minor incidents of physical and psychological abuse.<sup>241</sup> This minor abuse builds over time and eventually accumulates in phase two—“acute battering incident.”<sup>242</sup> Phase two involves a serious incident of physical abuse, often with significant injury to the battered partner.<sup>243</sup> Finally, phase three, or the “loving contrition phase,” involves a period of reprieve where the batterer pleads for forgiveness and promises to change.<sup>244</sup> This eventually segues back into phase one and the cycle begins anew.<sup>245</sup>

There are many factors that may prevent a battered woman from leaving an abusive relationship.<sup>246</sup> Women are sometimes economically dependent on their abuser and unable to get by on their own.<sup>247</sup> They may feel obligated to comply with social norms and embarrassed or ashamed of the failed relationship.<sup>248</sup> Battered women are often kept socially isolated by their batterers.<sup>249</sup> If children are involved, the battered woman may stay in the relationship out of concern for those children.<sup>250</sup> One of the most significant of these

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240. See LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 126-27 (2d ed. 2000).

241. *Id.* at 126.

242. *Id.*

243. *Id.* at 126-27.

244. *Id.* at 127.

245. *Id.*

246. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1993).

247. *Id.* at 1233-34; Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 88-89.

248. Michael B. Frisch & Cynthia J. MacKenzie, *A Comparison of Formerly and Chronically Battered Women on Cognitive and Situational Dimensions*, 28 PSYCHOTHERAPY 339, 342 (1991).

249. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 271-72 (2002).

250. Dutton, *supra* note 246, at 1234.

obstacles, however, is fear of the abuser.<sup>251</sup> Because attempts by battered women to remedy their situation often lead to increased abuse, this is a very legitimate fear.<sup>252</sup>

The crux of BWS is the theory of learned helplessness.<sup>253</sup> Under this theory, after going through multiple cycles of the abuse described above, battered women may “become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation.”<sup>254</sup> The woman becomes convinced that there is nothing she can do to escape her situation without resorting to extreme measures.<sup>255</sup> In effect, because of her experiences, a battered woman may learn to be helpless. BWS is used to explain why a battered woman would resort to such extreme measures and attack her abuser.<sup>256</sup>

Courts have been reluctant to create an independent defense based on BWS.<sup>257</sup> However, most jurisdictions recognize the relevance of BWS evidence within the constraints of traditional defenses.<sup>258</sup> Expert testimony on

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251. *Id.* at 1232-33; Burke, *supra* note 249, at 268-69.

252. Burke, *supra* note 249, at 268-69; Dalton, *supra* note 246, at 1232-33.

253. See Burke, *supra* note 247, at 223.

254. State v. Kelly, 478 A.2d 364, 372 (N.J. 1984).

255. See, e.g., Schopp et al., *supra* note 247, at 52-53.

256. See, e.g., Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 557 (2007).

257. See, e.g., Commonwealth v. Miller, 634 A.2d 614, 621 (Pa. Super. Ct. 1993).

258. See Bonner v. State, 740 So. 2d 439, 442 (Ala. Crim. App. 1998); People v. Humphrey, 921 P.2d 1, 10 (Cal. 1996); People v. Lafferty, 9 P.3d 1132, 1135 (Colo. Ct. App. 1999); State v. Morquecho, 54 A.3d 609, 615 (Conn. App. Ct. 2002); Earl v. United States, 932 A.2d 1122, 1128 (D.C. 2007); State v. Hickson, 630 So. 2d 172, 175 (Fla. 1993); Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981); People v. Evans, 631 N.E.2d 281, 291 (Ill. App. Ct. 1994); Marley v. State, 747 N.E.2d 1123, 1127 (Ind. 2001); State v. Frei, 831 N.W.2d 70, 75 (Iowa 2013); State v. Hundley, 693 P.2d 475, 479 (Kan. 1985); Springer v. Commonwealth, 998 S.W.2d 439, 454 (Ky. 1999); State v. Anaya, 438 A.2d 892, 894 (Me. 1981); State v. Smullen, 844 A.2d 429, 444 (Md. 2004); Commonwealth v. Rodriguez, 633 N.E.2d 1039, 1042 (Mass. 1994); People v. Wilson, 487 N.W.2d 822, 824-25 (Mich. Ct. App. 1992); State v. Henum, 441 N.W.2d 793, 799 (Minn. 1989); May v. State, 460 So. 2d 778, 785 (Miss. 1984); State v. Worrall, 220 S.W.3d 346, 349-50 (Mo. Ct. App.

BWS is generally admissible when used to establish credibility,<sup>259</sup> explain why a battered woman stayed in an abusive relationship,<sup>260</sup> and demonstrate the existence of a subjective belief of the need to defend as well as the reasonableness of such a belief.<sup>261</sup>

There are significant problems with BWS.<sup>262</sup> These problems, however, are beyond the scope of this Comment. The subject of BWS is broached only to introduce the theory of learned helplessness—a theory which has extensive support outside the context of BWS—and demonstrate that courts are familiar with, understand, and are receptive to this theory.<sup>263</sup>

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2007); *Boykins v. State*, 995 P.2d 474, 479 (Nev. 2000); *State v. B.H.*, 870 A.2d 273, 281 (N.J. 2005); *People v. Wilcox*, 788 N.Y.S.2d 503, 505 (App. Div. 2005); *State v. Leidholm*, 334 N.W.2d 811, 819-20 (N.D. 1983); *State v. Koss*, 551 N.E.2d 970, 974-75 (Ohio 1990); *Bechtel v. State*, 840 P.2d 1, 9 (Okla. Crim. App. 1992); *State v. Moore*, 695 P.2d 985, 990 (Or. 1985); *Commonwealth v. Miller*, 634 A.2d 614, 621 (Pa. Super. Ct. 1993); *State v. Urena*, 899 A.2d 1281, 1291 (R.I. 2006); *State v. Hill*, 339 S.E.2d 121, 122 (S.C. 1986); *Richardson v. State*, 906 S.W.2d 646, 648 (Tex. App. 1995); *State v. Hendrickson*, 914 P.2d 1194, 1197 (Wash. 1996); *State v. Stewart*, 719 S.E.2d 876, 884-85 (W. Va. 2011); *State v. Richardson*, 525 N.W.2d 378, 383 (Wis. Ct. App. 1994); *Witt v. State*, 892 P.2d 132, 138 (Wyo. 1995).

259. *See, e.g.*, *State v. Griffin*, 564 N.W.2d 370, 374-75 (Iowa 1997); *People v. Seeley*, 720 N.Y.S.2d 315, 319 (Sup. Ct. 2000).

260. *See, e.g.*, *People v. Williams*, 93 Cal. Rptr. 2d 356, 363 (Ct. App. 2000) (holding that expert testimony on BWS is “appropriate to explain why [a battered woman] allowed [her abuser] to return to the family residence” or “why such a victim may return to the perpetrator”); *Brown v. State*, 750 S.E.2d 453, 459 (Ga. Ct. App. 2013).

261. *See, e.g.*, *Bonner v. State*, 740 So. 2d 439, 443-44 (Ala. Crim. App. 1998); *People v. Jaspas*, 119 Cal. Rptr. 2d 470, 471-76 (Ct. App. 2002).

262. *Burke, supra* note 249, at 223; Julianne Parfett, *Beyond Battered Woman Syndrome Evidence: An Alternative Approach to the Use of Abuse Evidence in Spousal Homicide Cases*, 12 WINDSOR REV. LEGAL & SOC. ISSUES 55 (2001). Briefly, however, Walker’s experimental design and methodology has been attacked as seriously flawed. *Burke, supra* note 249, at 237-38. Additionally, from a feminist perspective, there have been criticisms that BWS “exploit[s] and, thereby, reproduc[es] norms that support the conditions of [women’s] subjugation.” Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 4 (1994).

263. In addition to the judiciary, several elements of the executive branch have demonstrated familiarity with the theory. Notably, learned helplessness was heavily incorporated in the CIA’s “enhanced interrogation” program. *See* SENATE



### B. *Learned Helplessness*

The theory of learned helplessness was first formulated by Martin Seligman.<sup>264</sup> Seligman's original laboratory experiment provides a straightforward, easy to comprehend demonstration of learned helplessness, and it is worthwhile to discuss it briefly. In that experiment, two sets of dogs were placed in a fenced-in area with an electricity conducting

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SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM 11 (2014) ("On the CIA's behalf, the contract psychologists developed theories of interrogation based on 'learned helplessness,' and developed the list of enhanced interrogation techniques that was approved for use against Abu Zubaydah and subsequent CIA detainees.") (citation omitted); *see also id.* at 19 n.32 ("Learned helplessness' in this context was the theory that detainees might become passive and depressed in response to adverse or uncontrollable events, and would thus cooperate and provide information."). The techniques utilized by the enhanced interrogation program were originally developed for use in the Resistance phase of the military's Survival, Evasion, Resist, and Escape ("SERE") training. *See* Memorandum from Stephen J. Bradbury, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, C.I.A., Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees 7-14, 37 (May 30, 2005). These techniques—which include, among others, dietary manipulation, nudity, stress positions, sleep deprivation, and waterboarding—were "designed to simulate conditions to which [U.S. military personnel] might be subject if taken prisoner by enemies that did not abide by the Geneva Conventions." STAFF OF S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xiii (Comm. Print, Nov. 20, 2008). The military recognized that soldiers involved in SERE training would be at risk for developing learned helplessness as a result of the training, and the SERE program included safeguards to prevent this eventuality. *See* M. GREGG BLOCHE, THE HIPPOCRATIC MYTH: WHY DOCTORS ARE UNDER PRESSURE TO RATION CARE, PRACTICE POLITICS, AND COMPROMISE THEIR PROMISE TO HEAL 129-31 (2011). The enhanced interrogation program, however—whose "primary goal . . . [was] to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner"—actively sought to develop and exploit those effects. Memorandum from Stephen J. Bradbury, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, C.I.A., Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees 59 (May 10, 2005).

264. Martin E. P. Seligman & Steven F. Maier, *Failure to Escape Traumatic Shock*, 74 J. EXPERIMENTAL PSYCHOL. 1, 1-2 (1967).

floor.<sup>265</sup> One group of dogs was tethered to the floor, while the other group was left free.<sup>266</sup> The experimenters then ran an electrical current through the floor, shocking the dogs.<sup>267</sup> The unrestrained dogs were able to jump the barrier and escape.<sup>268</sup> The restrained dogs tried to jump out, but were unable to.<sup>269</sup> After only a few iterations, the restrained dogs stopped trying to escape from the shocks.<sup>270</sup> The experimenters then untethered the restrained dogs.<sup>271</sup> Now, despite being entirely able to jump the fence and escape, when the experimenters shocked these newly untethered dogs, they only laid down on the floor and took the shocks.<sup>272</sup> Because these dogs' previous attempts at escape were ineffectual, they had disassociated any response from the outcome—they had learned to be helpless.<sup>273</sup>

As the theory was developed, Seligman and others found that it applied to human behavior as well.<sup>274</sup> Experimentally, learned helplessness has been demonstrated in humans by, among other things, exposing subjects to uncontrollable aversive physical stimuli such as loud noises;<sup>275</sup> tasking subjects with solving unsolvable cognitive tasks;<sup>276</sup> and even having subjects observe others fail at solving cognitive

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265. *Id.* at 2-3, 5.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 3-4.

271. *Id.* at 2-3, 5.

272. *Id.* at 3-4, 5-6.

273. *Id.* at 8-9.

274. See, e.g., Donald S. Hiroto & Martin E. P. Seligman, *Generality of Learned Helplessness in Man*, 31 J. PERSONALITY & SOC. PSYCHOL. 311, 311-12 (1975); Martin E.P. Seligman, *Learned Helplessness*, 23 ANN. REV. MED. 407, 408 (1972).

275. See, e.g., Alan Brier et al., *Controllable and Uncontrollable Stress in Humans: Alterations in Mood and Neuroendocrine and Psychophysiological Function*, 1444 AM. J. PSYCHIATRY 1419, 1419 (1987); D.S. Hiroto, *Locus of Control and Learned Helplessness*, 102 J. EXPERIMENTAL PSYCHOL. 187, 187 (1974).

276. See, e.g., David C. Klein et al., *Learned Helplessness, Depression, and Attribution of Failure*, 33 J. PERSONALITY & SOC. PSYCHOL. 508 (1976).

tasks.<sup>277</sup> In the real world, studies have also found high rates of learned helplessness effects in a number of diverse groups, including students,<sup>278</sup> drug dependent individuals,<sup>279</sup> the unemployed,<sup>280</sup> individuals with chronic illnesses,<sup>281</sup> and family members of patients being treated in intensive care units, among others.<sup>282</sup>

In humans, exposure to uncontrollable events may often lead to the development of learned helplessness.<sup>283</sup> This helpless behavior is primarily the result of two deficits: a difficulty recognizing a causal relationship between actions and outcomes and a reduction in motivation to respond to aversive stimuli.<sup>284</sup> First, like the dogs described above, individuals exposed to adverse stimuli or other events they are unable to control may learn that any response is futile, fail to recognize controllable situations, and cease their efforts to change their circumstances.<sup>285</sup> Second, motivation to respond and act is undermined by a perceived lack of control over one's surroundings.<sup>286</sup> When the situation

277. See Irvin Brown, Jr. & Dillon K. Inouye, *Learned Helplessness Through Modeling: The Role of Perceived Similarity in Competence*, 36 J. PERSONALITY & SOC. PSYCHOL. 900, 905 (1978); Robert F. DeVellis et al., *Vicarious Acquisition of Learned Helplessness*, 36 J. PERSONALITY & SOC. PSYCHOL. 894, 898-99 (1978).

278. CHRISTOPHER PETERSON, STEVEN F. MAIER & MARTIN E.P. SELIGMAN, *LEARNED HELPLESSNESS: A THEORY FOR THE AGE OF PERSONAL CONTROL* 251-53 (1993).

279. Robert C. Sterling et al., *Learned Helplessness and Cocaine Dependence: An Investigation*, 15 J. ADDICTIVE DISEASES 13, 13 (1996).

280. Arthur H. Goldsmith & William Darity, Jr., *Social Psychology, Unemployment Exposure and Equilibrium Unemployment*, 13 J. ECON. PSYCHOL. 449 (1992).

281. Sandra McGuinness, *Learned Helplessness in the Multiple Sclerosis Population*, 28 J. NEUROSCIENCE NURSING 163 (1996).

282. Donald R. Sullivan et al., *Learned Helplessness Among Families and Surrogate Decision-Makers of Patients Admitted to Medical, Surgical, and Trauma ICUs*, 142 CHEST 1140, 1141 (2012).

283. Steven F. Maier & Martin E.P. Seligman, *Learned Helplessness: Theory and Evidence*, 105 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 3-4 (1976).

284. MARIO MIKULINCER, *HUMAN LEARNED HELPLESSNESS: A COPING PERSPECTIVE* 15-16 (1994); see also Maier & Seligman, *supra* note 283, at 13.

285. Nickerson et al., *supra* note 156, at 413.

286. Hammack et al., *supra* note 151, at 568-69.

changes and becomes controllable, however, this learned helpless behavior remains.<sup>287</sup>

Moreover, the motivation deficiencies brought on by learned helplessness have, in many circumstances, been shown to be a somewhat generalized response.<sup>288</sup> Individuals may not simply learn to be helpless in a single, discrete situation.<sup>289</sup> Rather, motivation deficiencies may exist across a broad array of diverse circumstances unrelated to the precipitating stimuli.<sup>290</sup> The higher the stakes involved—e.g., the more aversive or highly desired the outcome—the more likely generalized learned helplessness is to develop.<sup>291</sup>

Learned helplessness also appears to be a major factor in the development of both depression and PTSD, and the perception of uncontrollability underlies multiple mood disorders.<sup>292</sup> Uncontrollable stress, or at least the perception of uncontrollable stress, underlies a number of mental disorders.<sup>293</sup> When animals develop learned helplessness they

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287. Nickerson et al., *supra* note 156, at 413.

288. MIKULINCER, *supra* note 284, at 16-18; Lyn Y. Abramson, Martin E. P. Seligman & John D. Teasdale, *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49 (1978).

289. See Christopher R. Pryce et al., *Establishing a Learned Helplessness Effect Paradigm in C57BL/6 Mice: Behavioural Evidence for Emotional, Motivational and Cognitive Effects of Aversive Uncontrollability per se*, 62 NEUROPHARMACOLOGY 358, 359 (2012).

290. See, e.g., Hiroto & Seligman, *supra* note 274, at 325-27.

291. Carsten Diener, *Altered Associative Learning and Learned Helplessness in Major Depression*, in PSYCHIATRIC DISORDERS: NEW FRONTIERS IN AFFECTIVE DISORDERS 57, 63 (Dieter Schoepf ed., 2013); see also Abramson, Seligman & Teasdale, *supra* note 288 at 68-70.

292. Vincent M. LoLordo & J. Bruce Overmier, *Trauma, Learned Helplessness, Its Neuroscience, and Implications for Posttraumatic Stress Disorder*, in ASSOCIATIVE LEARNING AND CONDITIONING THEORY: HUMAN AND NON-HUMAN APPLICATIONS 121, 139-42 (Todd R. Schachtman & Steve Reilly eds., 2011); Susan Mineka & Katherine Oehlberg, *The Relevance of Recent Developments in Classical Conditioning to Understanding the Etiology and Maintenance of Anxiety Disorders*, 127 ACTA PSYCHOLOGICA 567, 568-70 (2008); Christopher R. Pryce et al., *Helplessness: A Systematic Translational Review of Theory and Evidence for its Relevance to Understanding and Treating Depression*, 132 PHARMACOLOGY & THERAPEUTICS 242, 246-49 (2011).

293. Finn Somnier et al., *Psychosocial Consequences of Torture: Current Knowledge and Evidence*, in TORTURE AND ITS CONSEQUENCES: CURRENT

often develop a host of behaviors which closely mimic the symptoms of PTSD and depression.<sup>294</sup> These behaviors include avoidance behaviors, changes in sleeping, eating, and drinking patterns, increased alcohol consumption, and antisocial behaviors to name a few.<sup>295</sup> It is no surprise then that the feeling of being unable to control traumatic events is a significant risk factor for both PTSD and MDD.<sup>296</sup>

#### V. APPLYING LEARNED HELPLESSNESS TO THE ONE-YEAR BAR

Even for medical professionals, mental disorders like PTSD and MDD are complicated and difficult to understand. The endless editions and modifications of the American Psychiatric Association's Diagnostic and Statistical Manual are evidence enough of this.<sup>297</sup> For adjudicators and parties in

TREATMENT APPROACHES 56, 67 (Metin Basoglu ed., 1992); *see also* Steven F. Maier & Linda R. Watkins, *Stressor Controllability and Learned Helplessness: The Roles of the Dorsal Raphe Nucleus, Serotonin, and Corticotropin-Releasing Factor*, 29 NEUROSCIENCE & BEHAV. REV. 829, 837-38 (2005).

294. Maier & Watkins, *supra* note 293, at 830; Mineka & Oehlberg, *supra* note 292, at 569. There are also similarities between PTSD and MDD and animal learned helplessness at the biological level. For example, learned helplessness is accompanied by an increase in serotonin activity in the dorsal raphe nucleus. Maier & Watkins, *supra* note 293, at 833-34. As discussed above, changes in serotonin activity are linked with both PTSD and MDD. *See* Hammack et al., *supra* note 151, at 566. Additionally, many classes of drugs traditionally used as antidepressants in humans have also been shown to attenuate the effects of learned helplessness in animal studies. *See* Hymie Anisman & Zul Merali, *Learned Helplessness in Mice*, in MOOD AND ANXIETY RELATED PHENOTYPES IN MICE 177, 180 (Todd D. Gould ed., 2009).

295. *See* Maier & Watkins, *supra* note 293, at 830; Joseph Volpicelli et al., *The Role of Uncontrollable Trauma in the Development of PTSD and Alcohol Addiction*, 23 ALCOHOL RES. & HEALTH 256, 258-60 (1999); *see also* Lustig, *supra* note 115, at 725-26.

296. Pryce et al., *supra* note 292, at 244 ("Learned helplessness . . . has been proposed to be a major aetiological process in vulnerability to and onset of MDD, and helplessness has been proposed as a major psychopathological mechanism in maintenance of MDD.") (citations omitted); Volpicelli et al., *supra* note 295, at 257-58.

297. *See* DSM-V, *supra* note 118; DSM-IV, *supra* note 120; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. text rev. 1987); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND

asylum proceedings, this complexity is even more pronounced. Legal practitioners may be experts in their field of practice—the law—but they are laymen to the medical community.

The theory of learned helplessness is very well suited to describing the effects of trauma on refugees. Indeed, a “lack of control over one’s circumstances is a key characteristic of virtually every state of the refugee experience. This may result in a pervasive sense of helplessness in refugees, and can be likened to the concept of ‘mental defeat.’”<sup>298</sup>

Though there are many complexities to the theory of learned helplessness that this Comment has not deeply delved into, on its face, the effects are intuitive and the basic concept is easy to understand. The simplicity and straightforwardness of learned helplessness (at least on the surface) is where its true value lies in asylum adjudications. These qualities make learned helplessness extremely well suited to explaining the effects of PTSD and MDD to those not well versed in medicine or psychology. Inserting learned helplessness into the debate could serve an important role in asylum law, both in (1) demonstrating to legislators the inappropriateness of the one-year bar by adding to the wealth of data showing the bar is a very poor method for separating fraudulent asylum claims from legitimate ones; and (2) providing advocates a tool they can use to demonstrate extraordinary circumstances within the framework of the existing law.

A. *Learned Helplessness Offers More Support that the One-Year Bar Should be Abolished as an Inappropriate Obstacle to Obtaining Asylum*

The one-year bar is based on the presumption that, upon arriving in the United States, true refugees will run to the nearest asylum office post-haste and ask their new

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STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. text rev. 1974); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1st ed. 1952).

298. Nickerson et al., *supra* note 157, at 413.

government for help. This is an absurd expectation. A key element in the definition of refugee is government involvement in the persecution.<sup>299</sup> This can mean one of two things. First, the government of the refugee's home country or agents of that government were the actual persecutors.<sup>300</sup> Alternatively, if private actors were the persecutors, those private individuals acted with impunity while the government stood by and watched or was otherwise ineffectual.<sup>301</sup>

Either way, someone who has been persecuted has learned, often over the course of many years, that turning to the government for help is pointless or even counterproductive and dangerous. After escaping to a new country many refugees would certainly remain, at the very least, skeptical of any government and hesitant to seek its assistance. Learned helplessness provides empirical support for this intuitive conclusion.

Persecution, in all of its forms, is obviously an aversive stimulus. We might consider turning to law enforcement or other government officials, the most natural response to this stimulus. However, because the government is the persecutor (or at the least demonstrably unable to stop the persecutor) persecuted individuals would quickly learn that such "normal" responses aimed at alleviating this stimulus were futile. Their ability to recognize relationships between actions and outcomes along with their motivation to respond to aversive stimuli would become limited—especially in the context of seeking help from the government—and these effects would be reinforced the longer the refugee stayed in that situation.

Like the battered women whose behavior BWS endeavors to explain, refugees then turn to more extreme measures—fleeing. The learned helplessness effects,

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299. *See, e.g., Vasili v. Holder*, 732 F.3d 83, 90 (1st Cir. 2013) (noting that persecution "implies some connection to government action or inaction.") (quoting *Lopez-Castro v. Holder*, 577 F.3d 49, 54 (1st Cir. 2009)).

300. *See, e.g., Abdel-Masieh v. INS.*, 73 F.3d 579, 582 (5th Cir. 1996) (finding persecution where government was actual persecutor).

301. *See, e.g., Sarhan v. Holder*, 658 F.3d 649, 660 (7th Cir. 2011) (finding persecution by non-state actor where government was unwilling or unable to control actor).

however, would not disappear when their circumstances changed. Moreover, the motivational and pattern recognition deficiencies would not be strictly limited to the persecution stimulus, but would be much more generalized and extend broadly to other areas of a refugee's day-to-day life.

In this light, it appears unrealistic to expect anyone who has survived the trauma of persecution to reflexively accept and trust his or her new government with open arms, let alone actively seek out its help. Yet, this is exactly what the one-year filing deadline expects of legitimate refugees. Looking at the circumstances of refugees through the lens of learned helplessness helps demonstrate why the one-year bar is fundamentally flawed as a measure to prevent fraudulent asylum applications.

B. *In the Meantime, Learned Helplessness Can Offer Refugees Help in the Present*

Learned helplessness also offers practitioners and advocates a tool they can use now. Because learned helplessness is not recognized as a discrete mental illness, it would likely not qualify as an extraordinary circumstance excusing an untimely failure by itself.<sup>302</sup> An applicant attempting to show extraordinary circumstances would probably still have to raise PTSD and/or MDD as the grounds for waiving the bar. However, learned helplessness is a pattern of behavior that results from, aggravates, and contributes to the formation of other mental illnesses. Though many learned helplessness effects are distinct from the symptoms of depressive and trauma-related disorders, learned helplessness is closely related to those disorders and could be raised in the same breath as a PTSD and/or MDD claim.

The unique aspects of learned helplessness could be raised to bolster a claim that PTSD and/or MDD excused an untimely failure to file and also to help establish that PTSD and/or MDD was directly related to the untimely failure. Like the mental disorders raised as the extraordinary circumstances, the presence of learned helplessness would

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302. See 8 C.F.R. § 208.4(5)(i) (2015).



need to be demonstrated by an expert witness.<sup>303</sup> While certainly not all refugees develop learned helplessness, for those refugees who failed to apply within a year of arriving in the United States, especially those with PTSD and/or MDD, it does not appear that it would be difficult to make a strong case for the existence of learned helplessness effects.<sup>304</sup>

Experimentally, the learned helplessness phenomenon is identified in humans through the presence of three criteria. First, the individual displays “*inappropriate passivity*” by “failing through lack of mental or behavioral action to meet the demands of a situation in which effective coping is possible.”<sup>305</sup> Second, the learned helplessness effects are precipitated by “*uncontrollable events*.”<sup>306</sup> Third, the effects are “mediated by particular *cognitions* acquired during exposure to uncontrollable events and inappropriately generalized to new situations.”<sup>307</sup>

Applying these criteria to a refugee’s circumstances, an untimely failure itself demonstrates “inappropriate passivity.” The United States offers asylum openly during the first year of a refugee’s arrival in the United States and a failure to take advantage of this opportunity within that

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303. See, e.g., Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1022 (2015).

304. See Metin Basoglu et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES GEN. PSYCHIATRY 277, 283 (2007). (“Humiliating treatment and attacks on personal integrity, cultural values, morals, or religious beliefs may induce feelings of helplessness in the individual through not being able to act on anger and hostility generated by such aversive treatment.”). Learned helplessness would be especially likely to develop when the persecution involves physical or psychological torture. See *id.* at 283-84; see also Mollica et al., *Torture*, *supra* note 172, at 543, 549-50 (explaining that author’s study found “a higher prevalence of psychiatric symptomatology among the torture survivor group than the less traumatized comparison group,” which was consistent with other studies of torture survivors).

305. PETERSON, MAIER & SELIGMAN, *supra* note 278, at 228-29.

306. *Id.* at 229.

307. *Id.* This criterion refers generally to a belief that events are actually beyond control. *Id.*

time frame seems on its face to be inappropriate passivity.<sup>308</sup> This criteria could also be reinforced by other examples of similar passivity in a particular refugee's life. Second, as discussed above, any refugee who had suffered past persecution would undoubtedly have also experienced "uncontrollable events" ("the infliction or threat of death, torture, or injury to one's person or freedom" by the government, with its consent, or which the government is unable to stop).<sup>309</sup> Finally, the very failure to apply for asylum would support an inference that the helplessness effects are generalized, extending to situations beyond the precipitating stimuli.<sup>310</sup> The underlying cognitions would have to be determined on a case-by-case basis, but the existence of a diagnosable disorder in the form of depression or PTSD would go a long way towards that demonstration.<sup>311</sup>

Individuals raising PTSD and MDD as an extraordinary circumstance also often admit to not knowing about the availability of asylum or not knowing how to go about obtaining it.<sup>312</sup> Generally, lack of knowledge is not an

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308. *Cf. id.* at 257 ("Thus, burnout involves maladaptive passivity. Those experiencing work-related exhaustion are rigid and do not seek solutions to their problems."). Of course, this ignores other reasons for the passivity, including the avoidance symptoms of PTSD. However, human behavior can hardly be boiled down to single all-or-nothing causes or motivations, and this Comment does not propose the use of learned helplessness as a stand-alone ground for extraordinary circumstances.

309. *See supra* Part I.B.; *cf.* Susan J. Kelley, *Learned Helplessness in the Sexually Abused Child*, 9 ISSUES COMPREHENSIVE PEDIATRIC NURSING 193 (1986) (describing sexual abuse of children as an uncontrollable bad event).

310. *Cf.* DAVID C. GLASS & JEROME E. SINGER, URBAN STRESS: EXPERIMENTS ON NOISE AND SOCIAL STRESSORS 78, 85-86 (1972) (showing inability to control noise generalized to interfere with problem solving while identical noise, perceived as controllable, had no effect).

311. *See* PETERSON, MAIER & SELIGMAN, *supra* note 278, at 255 ("It is easier to argue for helpless cognitions on the part of Asian Americans. Sue (1997) reviews research showing that when compared with other (mostly white) Americans, Asian Americans report less autonomy and greater anxiety, nervousness, loneliness, alienation, and rejection.").

312. *See, e.g.*, *Mlambo v. Att'y Gen.*, 297 F. App'x 198, 200 n.3 (3d Cir. 2008) ("The [immigration judge] also noted that Mlambo had stated at the asylum office that he delayed filing his application because he did not know the asylum process.

extraordinary circumstance.<sup>313</sup> However, an individual experiencing the effects of learned helplessness could not be expected to proactively search for legal solutions to his or her problems. In this manner, learned helplessness could show that this lack of knowledge, being the result of a mental illness, is an “effect[ ] of persecution or violent harm suffered in the past.”<sup>314</sup> This could provide additional support for PTSD or MDD as an extraordinary circumstance and illustrate how those conditions are directly related to a failure to timely file.

Invoking learned helplessness as a way of explaining the effects of PTSD and/or MDD on an asylum applicant and, more importantly, how these effects are directly related to the applicant’s failure to timely file for asylum makes a more compelling case that an applicant’s PTSD and/or MDD qualifies as an extraordinary circumstance directly related to untimely asylum applications. Courts in different situations have already demonstrated that they are familiar and receptive to the theory of learned helplessness.<sup>315</sup> Raising the concept of learned helplessness in adjudicatory proceedings could help bridge the gap between the experiences of refugees and the understanding of that experience by those in the legal system.

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The [immigration judge] stated that such a lack of knowledge did not warrant a waiver of the filing deadline.”).

313. *See, e.g.,* Bokhari v. Holder, 463 F. App’x 23, 24-25 (2d Cir. 2012).

314. 8 C.F.R. § 208.4(5)(i) (2015).

315. *See supra* Part IV.A.