

LEGAL CHALLENGES AND VIOLENCE FACING ASYLUM-SEEKING WOMEN AT THE UNITED STATES BORDER

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Introduction

The United States began regulating citizenship and immigration in 1790.¹ Over time, stringent restrictions have been placed for those hoping to enter the United States. As of 2023, the budget for the United States Border Patrol to enforce these restrictions is approximately 4.9 billion dollars—the biggest budget for a law enforcement agency in the nation.² The United States passed the nation’s first refugee and resettlement law after World War II to help Europeans seeking permanent residence in the United States.³ This allowed individuals to get around some immigration restrictions and be protected from removal.⁴ The United States later adopted laws based on provisions from the United Nations (UN) Convention relating to the Status of Refugees, which would become the Refugee Act of 1980.⁵ This is an essential piece of law for immigrants coming to the United States seeking asylum. The current enforcement of these laws is what stands in between women fleeing gender violence and asylum protection in the United States.

The challenges for asylum-seeking women do not end, even when there is a clear legal path for eligibility. Upon arrival at United States border facilities, the conditions that immigrants face are brutal and dehumanizing. From reports of violence, improper detention conditions, and procedural misconduct by customs officials, an immigrants’ acceptance into the United States is far from the end of their troubles.⁶ For female immigrants seeking asylum from gender violence, many may find familiar horrors at the border, where women report sexual abuse, shackling and detention of pregnant women, inadequate medical care, and reproductive rights violations.⁷

Female immigrants face disproportionate challenges compared to their male counterparts, which calls for more protective legislation of female immigrants. All individuals on United States soil retain their human rights, whether they are documented or undocumented.⁸ If the United States is to hold itself out as a free and civilized nation, improvements must be made to these processes and detention conditions. Legislation must be introduced to the House and Senate to ensure the protection of immigrants facing gender violence, as well as safe and humane treatment for those

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¹ Meredith Lawrence, *Confronting the long, uneven path to gender-based asylum in the US*, THE NEW HUMANITARIAN (Sept. 21, 2021) <https://perma.cc/6V2Z-9XME>.

² *The Cost of Immigration Enforcement and Border Security*, AMERICAN IMMIGRATION COUNCIL (Jan. 20, 2021) <https://perma.cc/W9VE-MGG>.

³ *U.S. Immigration Timeline*, HISTORY.COM (Aug. 23, 2022) <https://perma.cc/LNK4-EM6A>.

⁴ *Id.*

⁵ Deborah Anker, *The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States*, AMERICAN BAR ASSOCIATION (April 27, 2020) <https://perma.cc/JU2Y-92FK>.

⁶ *They Treat You Like You Are Worthless*, HUMAN RIGHTS WATCH (Oct. 21, 2021) <https://perma.cc/J3T9-ZFZ9>.

⁷ *US Records Show Physical, Sexual Abuse at Border*, HUMAN RIGHTS WATCH (Oct. 17, 2021) <https://perma.cc/8J9N-Y3P7>; Nora Ellmann, *Immigration Detention Is Dangerous for Women’s Health and Rights*, CENTER FOR AMERICAN PROGRESS (Oct. 21, 2019) <https://perma.cc/5DAH-Y7R5>.

⁸ *Know Your Rights: Immigrants’ Rights*, AMERICAN CIVIL LIBERTIES UNION, <https://perma.cc/6SDG-N5R5> (last visited Jan. 22, 2023).

in immigration facilities. There must be laws that clearly include gender as a particular social group that an individual seeking asylum could be made eligible for if they are being persecuted in their home country. Without this, the courts will continue to be divided on how to treat cases of asylum regarding gender and domestic violence. The inconsistency in the legal paths for those seeking asylum based on gender persecution is unacceptable and proper legislation must be passed to create stability in American immigration. Further oversight and legislation are also needed to ensure that abuse and misconduct on the border does not continue without consequences.

Challenges in the Language Defining Eligibility

The most recent influx of women seeking asylum in the United States are fleeing gender-based violence from places like El Salvador, Guatemala, and Honduras.⁹ Local police are known to treat these issues as private matters, telling women who seek help from law enforcement to go back to their husbands and homes.¹⁰ Without the protection of their own governments, they seek out protections from the United States through asylum. The United States does not have specific codified rules for gender-based asylum claims like Canada, Sweden, and the United Kingdom.¹¹ This makes the language from the Refugee Act of 1980 the most important piece of law for those seeking asylum in the United States.¹² The definition for a refugee is now codified in the Immigration and Nationality Act of the United States Code which states that,

“the term “refugee” means (a) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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. . .”¹³

This language came from the UN Convention relating to the Status of Refugees. For individuals seeking asylum based on their race, religion, or nationality, their eligibility is generally not questioned because these protected groups are explicitly stated in the Act's language. As for those seeking asylum because of gender violence or domestic violence, there is much less clarity on their eligibility. This is because their only eligibility option is to be considered part of a particular social group which has yet to be clearly defined. There is a division in how administrative agencies and courts across the country determine what constitutes a “particular social group.”¹⁴

Gender and sex are both well-recognized in American society as defining features of individuals. Within the United States, gender is also a class of individuals deserving of protection from discrimination under the United States Constitution, through the Equal Protection Clause, and the

⁹ Lawrence, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² Anker, *supra* note 5.

¹³ 8 U.S.C.A § 1101(a)(42)(a) (2023).

¹⁴ Anker, *supra* note 5.

Civil Rights Act of 1964.¹⁵ Both socially and legally, gender is generally accepted as a defining feature of a particular social group. However, gender as a defining feature of a particular social group for purposes of asylum is still debated in the United States courts and agencies.

The omission of gender as an explicit protected group is problematic. Gender, like race and nationality, are types of immutable characteristics that defines oneself and have frequently been a reason for persecution throughout history. Gender should have been included in the original language, along with other characteristics such as sexual orientation, age, and disability. Despite the drafters of the UN Convention on the Status of Refugees and the Refugee Act of 1980 specifically not incorporating gender in the language of the Act, it does not mean that progress could not be made to include this often oppressed and persecuted class of individuals. Gender discrimination was just beginning to be acknowledged in the United States with the Civil Rights Act of 1964. Case law was then slow to hold that separate treatment based on gender in a variety of settings was unconstitutional.¹⁶ It took time to recognize gender as a specific protected class, but the change was upheld and used to ensure justice. A similar approach must be taken in the legal landscape of asylum law to protect human rights. Reforming the Refugee Act to include a more exhaustive list of protected groups than the original language is needed to provide clarity for asylum seekers and the institutions regulating immigration. As it is currently, asylum-seekers fleeing gender violence fail to meet the eligibility requirements because they are held to not be a member of a “particular social group.”¹⁷

Constant Changes in Case Law for Eligibility

For the first ten years of the Act, asylum-seekers fleeing gender-based violence were routinely denied protection and status in the United States.¹⁸ Women facing domestic violence, female genital mutilation, and/or rape went unrecognized by asylum law until advocacy organizations began to transform the law.¹⁹ With the United States not specifically recognizing gender as an example of a particular social group under the refugee definition, the eligibility of women seeking asylum from gender-based violence was ambiguous. The lack of specificity forced asylum eligibility to be decided on a case-by-case basis, which required complex legal arguments and caused a flood of cases in immigration courts. This also led to very narrow holdings and different circuits coming to different conclusions which further complicated asylum law.

The foundation for gender asylum claims came from the Board of Immigration Appeals’ 1985 decision in *Matter of Acosta*. This decision defined a “particular social group” as a “common, immutable characteristic” that “members of the group either cannot change, or should not be

¹⁵ U.S. Const. amend. XIV, § 1.

¹⁶ See e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (held that an employer cannot refuse to hire a women for having young children and hire a similarly situated male as this was a direct violation of the Civil Rights Act of 1964); *Moritz v. Comm’r of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972) (held that a tax deduction that was denied to a male but not a similarly situated female was unconstitutional); *Reed v. Reed*, 404 U.S. 71 (1971) (held that a statute with a gender based provision preferring males to females as an administrator of an estate violates the Equal Protection Clause); *3 Pivotal Gender Discrimination Court Cases*, HER LAWYER (Mar. 29, 2021) <https://perma.cc/RU2W-25S>.

¹⁷ Anker, *supra* note 5.

¹⁸ *Id.*

¹⁹ *Id.*

required to change because it is fundamental to their individual identities or consciences” and cited sex as an example.²⁰ The same year as *Matter of Acosta*, the United Nations High Commissioner for Refugees Executive Committee adopted Conclusion Number 39, recognizing that women asylum-seekers who fear harsh or inhumane treatment for gender-based reasons may be considered a particular social group under the convention.²¹ As helpful as these new definitions were, little progress was made in the clarity and confidence for cases of asylum based on gender violence because it was still not codified into federal law. Judges could still vary on their decisions, and the UN definition was not part of United States law, thus it was not binding.

United States asylum procedure was then formally established in 1990, where another issue arose within the law in the form of the public versus private distinction. Domestic violence often occurred in the private sphere, making it so it was often not considered persecution for sake of asylum.²² When a Salvadoran army sergeant raped and enslaved a woman and threatened to turn her over as a “subversive” if she did not comply, a federal judge stated that it would “outdo Lewis Carroll to find that male domination in such a personal relationship constitutes political persecution.”²³ The woman was denied asylum because the violence she faced was considered to be of a private nature and not one recognized as persecution.

After this case, a divide in circuit court decisions began to be seen when a more hopeful standard came forward in a similar case, *Lazo-Majono v. INS*. The court recognized that the woman’s resistance and flight in an abusive situation could be considered a political opinion that they were being persecuted for.²⁴ In 1993, another helpful but differing rationale came from now Justice Samuel Alito sitting on the Third Circuit Court in *Fatin v. INS*. The court upheld the denial of asylum for an Iranian woman who feared persecution after she refused to wear the chador which she considered a sign of support for the Khomeini government.²⁵ An action of protest such as this may be considered a political opinion and being persecuted for a specific political opinion is explicitly stated as an eligible group under the refugee definition.²⁶ Following this rationale, Justice Alito stated that feminism, such as that in this case, was a political opinion and women who feared or were subject to serious abuse because of their gender would be eligible for protection.²⁷ Despite this, there was not enough evidence in this case to accept any application of asylum.²⁸ This case set the stage for many women to gain asylum protection—but only if their cases could be fit into this narrow rationale. The previous cases showed varying outcomes for gender and domestic violence survivors all based on the definition of political persecution. Some courts looked past the public and private distinction and focused solely on the act of political opinion itself, others did not. Split court decisions like these are still present today and can be the difference between life and death for many asylum seekers.

²⁰ *Id.*

²¹ Anker, *supra* note 5; *see also Refugee Women and International Protection No. 39*, EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER’S PROGRAMME (1985) <https://perma.cc/B47Y-Z46W>.

²² Anker, *supra* note 5.

²³ *Id.*

²⁴ *Id.*

²⁵ Anker, *supra* note 5; *Fatin v. I.N.S.*, 12 F3d 1233 (3rd Cir. 1993).

²⁶ 8 U.S.C.A § 1101(a)(42)(a) (2023).

²⁷ Anker, *supra* note 5.

²⁸ *Id.*

In the mid 1990's one of the first precedential asylum decisions that focused on gender as opposed to domestic violence came from *Matter of Kasinga*. The case ruled that female genital mutilation could provide an eligibility basis for asylum.²⁹ This was once again decided on narrow grounds that allowed for eligibility specifically for those who faced female genital mutilation. This made it so the broader recognition of gender as a particular social group was still not a guarantee. During this time, other nations issued positive decisions for gender asylum which were focused on the failure of states to meet their obligation to protect women from gender-based violence.³⁰ They began to recognize persecution using two prongs: serious harm and failure of state protection. The failure of state protection included harms caused by the state and failure to protect harm caused by non-state actors. Meanwhile, the United States continued to have radically differing case decisions, such as those discussed previously, which continued to shift the dynamic of asylum law.

Additional steps backward for gender violence asylum cases came down in 1999 in *Matter of Rodi Alvarado*.³¹ Despite previous decisions that seemed to support such a case, the Board denied asylum for a woman fleeing a violently abusive relationship.³² This raised the question as to whether domestic violence could serve as the basis for asylum *and* if gender could define a particular social group.³³ The denial in this case remained controversial but, was vacated ten years later when an immigration judge granted asylum.³⁴

The narrow grounds that cases were being decided on forced lawyers to argue domestic violence-based asylum cases along hyper-specific lines which further complicated the development of asylum law.³⁵ Successful cases for asylum did not always ensure that others would be able to use that decision as precedent because of how specific the particular social groups were being defined. Just fifteen years after *Matter of Rodi Alvarado*, which seemed like the most detrimental case to gender violence asylum law, the Board set a new precedent in *Matter of A-R-C-G*.³⁶ This case granted asylum and recognized that serious physical harms in domestic relationships can constitute persecution where state protection is unavailable.³⁷ It held that “married women in Guatemala who are unable to leave their relationship” constituted a particular social group that would be grounds for asylum.³⁸ The woman in this case had an abusive husband who pursued her around the country, beating her.³⁹ This showed that domestic violence survivors could be eligible for asylum in the eyes of the court, as long as there was a defining feature of the group that they claimed to belong to.⁴⁰ Although the holding here was for the specific group of women in Guatemala, other cases were able to be argued along similar lines to give women from other countries their best chance at receiving protection.⁴¹ These cases granted asylum strictly on

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Anker, *supra* note 5.

³³ *Id.*

³⁴ *Id.*

³⁵ Lawrence, *supra* note 1.

³⁶ *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).

³⁷ *Id.*

³⁸ Lawrence, *supra* note 1.

³⁹ *Id.*

⁴⁰ *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).

⁴¹ *Id.*

defining domestic violence as a social group, not on women’s gender. Lawyers were timid to push the more general idea of gender as the defining feature and so cases continued to be held on very narrow and convoluted grounds.⁴² These narrow definitions are problematic for women who may not be married and are facing gender-based violence and may not be granted asylum because of such a difference. Pushing for gender to be a category that is recognized as much as race or nationality is necessary to protect these women.

The hard-earned recognition that domestic violence could be a form of persecution and basis for asylum fell flat when Attorney General Sessions decided in June of 2018 in *Matter of A-B* to reverse the decision of the Board in *Matter of A-R-C-G*.⁴³ Sessions decided that a Salvadoran domestic violence survivor who had suffered fifteen years of abuse through beatings and threats from her husband was not eligible for asylum.⁴⁴ Sessions ordered immigration judges to deny all such claims “pertaining to domestic violence.”⁴⁵ This remained the precedent until February of 2021 when President Biden ordered Attorney General Garland to review whether the United States provides protection to people fleeing domestic and gang violence in a manner consistent with international standards and to determine how to define “a particular social group.”⁴⁶ Garland threw out Sessions’ 2018 ruling in *Matter of A-B* and ordered immigration judges and the Board to follow pre *A-B* precedent, including *Matter of A-R-C-G* while further rulemaking on the topic was pending.⁴⁷ A Notice of Rulemaking for the definition of a “particular social group” has not been made to the public as of the end of 2022, but an Interim Final Rule with request for comments on the “Procedures for Credible Fear Screening and Consideration of Asylum. . .” has mentioned that such a rule is forthcoming.⁴⁸ Clarity from this rulemaking will assist lawyers in knowing how they can fight for their clients eligibility for asylum.

Beyond the rulemaking to define “particular social groups”, further federal legislation is needed to protect asylum seekers facing gender-based violence. Gender should be included in the categories that are laid out in the Immigration and Naturalization Act definition so domestic violence survivors and other women fleeing persecution and gender violence may be protected. This would mean that lawyers no longer must argue that these victims are part of a particular social group, and instead prove whether the individual was persecuted on account of their gender. Other countries have protected asylum-seekers based on gender with the two-prong system and the United States should follow suit. The fluctuation in case law over the past several decades only made asylum more difficult to navigate and prevented women who need protection from receiving it. With split circuit decisions and the switch in opinions from attorney generals, clarity and stability is needed now more than ever. Consistency can be found in clear legislation that includes gender as a basis for persecution and eligibility for asylum.

Violence Against Asylum Seekers

⁴² *Id.*

⁴³ Anker, *supra* note 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 5, 2021); *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021).

⁴⁷ *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021).

⁴⁸ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022).

Beyond the legal turmoil that asylum-seeking women face when they reach the southern border of the United States, additional violence and abuse is often awaiting them. Although abuse and poor conditions are issues faced by more than just women, female asylum-seekers face additional threats including sexual abuse, improper medical care, and reproductive rights violations.

Immigrants, no matter their status, retain constitutional rights when they enter the United States. The United States Constitution frequently refers to “people,” not just “citizens” of the United States.⁴⁹ For immigrants who are held in detention centers upon arrival to the border, they have not faced trial or been convicted of any specific crime and are deemed pretrial detainees.⁵⁰ Pretrial detainees have the right to adequate medical care and cannot be punished.⁵¹ When evaluating the constitutionality of conditions of pretrial detention, the proper inquiry is whether the conditions or restrictions amount to punishment of the detainee.⁵² The treatment of immigrants arriving at border facilities is not beyond the protection of the United States Constitution or federal law. The abuses that immigrants face violate the laws and values of the United States and aggressive reform is needed to recover from the depths that border activities have fallen to.

Border Patrol agents and Customs and Border Protection (CBP) officers have faced severe allegations of misconduct for abusive treatment of immigrants at the border.⁵³ A young girl being forced to undress and being molested by officers, a woman being kned in the lower pelvis, and an asylum applicant being asked for oral sex in exchange for being released from custody are just a few of the reports that have come from the past several years.⁵⁴ CBP is the nation’s largest law enforcement agency and it suffers from serious transparency and oversight deficits, with 48% of CBP employees who were surveyed not believing officials at all levels were held accountable for their conduct.⁵⁵ Sexual abuse harms women disproportionately, and proper safeguards are needed to ensure that abuse is reported, investigated, and perpetrators are held accountable, especially at the border where there is less oversight. CBP does have the National Standards on Transport, Escort, Detention, and Search (TEDS) which provides the rules of conduct for the agency.⁵⁶ TEDS prohibits any sexual abuse by staff members and requires reporting of any incident of sexual abuse against a detainee, yet most misconduct goes unreported.⁵⁷ Proper investigations are also essential to ensuring that abuses do not continue and redress is provided to harmed migrants at the border.⁵⁸ Without additional accountability and systematic change, the individuals at these detention facilities are put in harm’s way and may have no ability for redress.

⁴⁹ Gretchen Frazee, *What constitutional rights do undocumented immigrants have?*, PBS (June 25, 2018) <https://perma.cc/M2TG-FYZR>.

⁵⁰ *Id.*

⁵¹ U.S. Const. amend. XIV; *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015).

⁵² U.S. Const. amend. XIV; *Kingsley*, 576 U.S. at 400.

⁵³ *They Treat You Like You Are Worthless*, *supra* note 6.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *National Standards on Transport, Escort, Detention, and Search*, U.S. CUSTOMS AND BORDER PROTECTION (Oct. 2015) <https://perma.cc/ZH62-BRPU>.

⁵⁷ *Id.*

⁵⁸ *US Records Show Physical, Sexual Abuse at Border*, *supra* note 7.

Further horrors faced by women at the border include severe cases of medical neglect, such as questionable hysterectomies.⁵⁹ A whistleblower nurse came forward from the Irwin County Detention Center to express concern about the standards of medical treatment and conditions at the center, including a mass amount of hysterectomies being performed.⁶⁰ Many of the women did not know why they had received the procedure and medical records were difficult to access.⁶¹ After a Senate investigation into the allegations, it was determined that immigrants at this facility were subjected to unnecessary transvaginal ultrasounds, contraceptive injections, and dilation and curettage procedures.⁶² There was also repeated failures by detention officials to obtain informed consent from the detainees or to vet the medical providers to ensure detainees' basic human rights.⁶³ These forced surgical procedures and medical treatments violate the constitutional rights of these individuals and systematic change is needed to end this practice along with providing individual redress.

Another prevalent issue for women at the border is the frequency of pregnant women being detained and shackled. Shackling is a common practice in detention to curtail any flight risk that a prisoner may pose. But pregnant women who are near delivery have been known to be shackled across the belly, arms, and legs, which poses serious risk to both the mother and the unborn fetus.⁶⁴ In 2017, ICE had detained 1,655 pregnant women, twenty-eight of whom had miscarriages while in custody.⁶⁵ Many were served spoiled or cold food, taken into custody in wet and mud-covered clothes, and never provided a chance to shower.⁶⁶ These conditions are unacceptable and inhumane for all individuals, but places pregnant women and their fetuses at increased medical risks. In 2021, ICE put forth a policy stating that “generally, ICE should not detain, arrest, or take into custody for an administrative violation of the immigration laws individuals known to be pregnant, postpartum, or nursing unless release is prohibited by law or exceptional circumstances exist.”⁶⁷ This policy is a step in the right direction, but was largely ignored by CBP. Instead CBP put forth new guidance requiring baby bassinets and “snacks” to be available to infants and people who are pregnant, postpartum, or nursing in CBP detention.⁶⁸ These new features of the detention policies will do little to help pregnant women who are still facing the harsh conditions in the overcrowded holding cells at CBP centers. CBP should follow the lead of ICE and refrain from detaining pregnant women unless there are exceptional circumstances present. Legislation to further strengthen these agency rules is also needed to ensure that as administrations change, the protection for pregnant women does not fade away.

⁵⁹ Rachel Treisman, *Whistleblower Alleges ‘Medical Neglect’ Questionable Hysterectomies of ICE Detainees*, NATIONAL PUBLIC RADIO (Sept. 16, 2020) <https://perma.cc/E7PE-QP54>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Ellen Gilmer, *Detained Immigrants Faced Invasive Medical Care, Senate Finds*, BLOOMBERG LAW (Nov. 15, 2022) <https://perma.cc/RG6U-E2VX>.

⁶³ *Id.*

⁶⁴ Ellmann, *supra* note 7.

⁶⁵ *Id.*

⁶⁶ Mitra Ebadolahi & Monika Y. Langarica, *New Guidance Fails to Stop Mistreatment of Pregnant People and Their Children in Detention*, AMERICAN CIVIL LIBERTIES UNION (Dec. 17, 2021) <https://perma.cc/NZ3H-9SUC>.

⁶⁷ ICE Directive 11032.4: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals, U.S. Immigration and Customs Enforcement (July 1, 2021) <https://perma.cc/RB9S-VHU>.

⁶⁸ Ebadolahi & Langarica, *supra* note 66.

Pregnant women have also faced issues receiving proper treatment for their pregnancy while detained at these facilities. A woman seeking asylum from El Salvador arrived at a port-of-entry on the U.S.-Mexico border and was held in a holding cell for 24 hours while she experienced pain and heavy bleeding.⁶⁹ She was transferred to another facility, and after telling immigration officials multiple times that she was pregnant and bleeding, the detention staff confirmed she had miscarried.⁷⁰ Months after the miscarriage she was still in detention being neglected by medical staff.⁷¹ Some standards guiding the provision of healthcare in these facilities is the ICE Performance-Based National Detention Standards.⁷² This was the first health care standards requiring ICE to specifically address women’s medical care.⁷³ However, these standards are often not enforced and facilities that violate them are rarely penalized.⁷⁴ With a lack of oversight or reporting in these facilities, it is difficult to hold individuals accountable for their violations.

To see any systematic change, legislation ensuring proper medical care for detainees is needed. While the Constitution protects pre-trial detainees and prisoners, including immigrants, litigation to enforce these rights is difficult, lengthy, and expensive. Hopeful pieces of legislation have entered both the United States House and Senate, but all have fallen short of enactment. For example, the Detainee Medical Act of 2008, introduced in the House aimed to establish procedures for the delivery of medical care to all immigration detainees in Department of Homeland Security (DHS) custody.⁷⁵ The Stop Shackling and Detaining Pregnant Women Act was introduced in both the House and the Senate, in 2021 and 2022 which prohibited the DHS from detaining an individual during pregnancy or postpartum recovery and required the release of any detainee found to be pregnant, unless they presented an immediate danger to themselves or others.⁷⁶ Also in 2021 and 2022, the Humanitarian Standards for Individuals in Customs and Border Protection Custody Act was introduced in both the House and the Senate which imposed requirements and standards related to the care of immigrants in CBP custody.⁷⁷ Each of these bills provided better protection for women being held in custody as they try to enter the United States. This type of legislation must be reintroduced to ensure that there is constitutional protection as well as statutory protection for immigrants facing horrific conditions on United States soil.

Conclusion

The long history of immigration in the United States has been complicated and ever changing. As some progress is made, other progress is lost as the law has been left in the hands of administrative agencies and the courts. Not only have the legal paths for asylum become difficult to navigate and gain safety through, but also the treatment of those looking to find asylum in the United States is inhumane and barbaric. Additional oversight and enforcement are needed to

⁶⁹ Ellmann, *supra* note 7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Ellmann, *supra* note 7.

⁷⁵ Detainee Basic Medical Care Act of 2008, H.R. 5950, 110th Cong. (2007).

⁷⁶ Stop Shackling and Detaining Pregnant Women Act, H.R. 3993, 117th Cong. (2021).

⁷⁷ Humanitarian Standards for Individuals in Customs and Border Protection Custody Act, H.R. 7257, 117th Cong. (2021).

ensure the humane and constitutional treatment of detained immigrants as the current regulations and standards are useless when not enforced and carry no accountability. Further legislation is needed to create a statutory protection for asylum seekers fleeing gender violence and those facing the harsh conditions of the detention facilities on their way to asylum.

Fyodor Dostoevsky argued that “the degree of civilization in a society can be judged by entering its prisons.”⁷⁸ A civilized nation such as the United States cannot be praised as such if it violates the basic human rights of those seeking safety and freedom in it.

⁷⁸ Fyodor Dostoevsky, *The House of the Dead* (1860) <https://perma.cc/4CMM-D4TT>.