Panel One - Empowering Survivors with Legal-Status Challenges

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Panel One—Empowering Survivors with Legal-Status Challenges

**FIRST SPEAKER: KAREN MUSALO**

MS. KAREN MUSALO: Thank you very much, I want to thank the organizers of the conference for inviting me and I want to thank all of you for being here on a Friday so early in the morning. It really warms my soul to see so much interest in the issue.

I’m going to talk about “gender asylum” which is somewhat a technical term, but really what we’re talking about are women who are seeking refugee status because of violations to their fundamental human rights. And what I’d like to do is talk about the barriers to gender asylum claims, the evolution of the law in the U.S. and beyond the U.S., where we’re at now and then a way of thinking about a response to some of the resistance to recognizing gender claims, and the response isn’t necessarily legal in nature, but really sort of a broader response to the question of resistance to these claims.

So, the refugee definition which many of you know—I’m sure there’s a range of knowledge and expertise in this room—but we define a refugee as a person with a well-founded fear of persecution on account of one of five grounds: race, religion, nationality, political opinion or membership in a particular social group. And it’s a definition that has its origins in the post World War II period, many decades before there was a growing sense of “women’s rights as human rights” or gender as a protective category.

So when we ask the question, where originally did the obstacles come from in recognizing women who suffer violations of their rights as refugees, part of it we could say is due to the fact that the refugee definition really came from a period that wasn’t looking at refugee claims and human rights violations through a gender lens.

And so there are obstacles that are inherent in, or arose from that definition. The refugee definition requires a form of harm that we call “persecution,” and many of the things that women suffer are unique to their gender—female genital cutting, repressive social norms, domestic violence—and these are also forms of harm that are justified as cultural norms, or religious requirements.

So first of all, the harms that women suffered or suffer are not considered to meet the definition of persecution; that was one obstacle. Generally, in terms of who’s imposing the persecution, people tend to think that persecution is a

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1. Director, Center for Gender and Refugee Studies, University of California, Hastings College of the Law.
SYMPOSIUM: PANEL ONE

harm inflicted by the government and often what is inflicted on women is at the hands of their "intimate familiars,"—their family or their society. So that posed an obstacle.

And then the harm—if it’s imposed because the asylum seeker is a woman, there’s the additional issue that gender is not one of the five grounds. It’s race, religion, nationality, political opinion, membership in a particular social group, and so these really led to some of the original obstacles to recognizing women asylum seekers as refugees.

The U.N. High Commissioner for Refugees (UNHCR), which supervises State or country compliance with the international refugee definition, began to identify that there were these obstacles to women gaining full protection. And beginning in 1985, UNHCR began to issue different directives or guidance to countries as to how they could take that definition and actually not see obstacles arising from that definition, but rather, analyze how if you apply that definition in a fair way consistent with international human rights norms, women would actually come within the definition of refugee.

One of the things that UNHCR did in a series of pronouncements that it made, was to suggest that individual countries issue their own guidelines to guide their adjudicators on how to understand the refugee definition, in a gender-sensitive context. And after the UNHCR made this call, the first country that issued its own guidelines was Canada in 1993, and then due to the efforts of many advocates in the U.S., the U.S. issued its own set of guidelines in 1995.

So this sets the stage—there’s been this problem and these obstacles, UNHCR has given guidance, and some countries have come in and actually undertaken some measures to try to meet the challenge of protecting women. It was in that context that a case came up in 1995 in the U.S. right after the U.S. issued its guidelines. The case was of a young woman fleeing female genital cutting in Togo. Her name was Fauziya Kasinga and I was involved in that case as lead attorney with a group of students at American University in Washington.

And Fauziya Kasinga was really a test case for what the U.S. was going to do on this issue. The U.S. had just issued these guidelines, here comes this woman, arrives in the U.S., is thrown into detention, and claims asylum on the basis of fleeing both a forced polygamous marriage and the practice of female genital cutting from which she had escaped on the eve before she was to be subjected to it.

So, Ms. Kasinga appears in front of an immigration judge in Pennsylvania—and I wasn’t involved in the case at that point, but I have read the transcripts and can tell you what happened at that hearing. She had a very hostile immigration judge. He’s actually known for hostility to women. The judge said, first of all that he didn’t believe her story, but then he reached the legal issue by saying, “but even if I believe your story, you wouldn’t qualify for protection.” And it was really almost this classic application of all of these ideas about the obstacles that I have just talked about where he said, “well, what you’re fleeing is female genital cutting and that’s something that is a norm in your society. It’s...
not persecution; it's not on account of one of the five grounds. So I don't believe you but even if I believed you, I would deny you protection and I am denying you protection."

And it was at that point that the case came to my attention. I got involved after there was a denial by the immigration judge and I became involved in the appeal to the Board of Immigration Appeals. And one of the things that I often talk about when I talk about the development of the law, and when I teach law students, is that there's a really important part of legal advocacy which is being an excellent lawyer and knowing how to investigate your facts, and analyze your facts under the law and write really good briefs and have a good legal strategy. But the other really important part of moving the law forward is understanding what the social political context is, and how people feel about the issue and building social movements to support legal change. And I think the civil rights movement is such a beautiful example of how those two things [traditional lawyering and grassroots organizing] go hand in hand.

So the case of Fauziya Kasinga, when I became involved—number one, I saw that there wasn't a precedent decision [on FGM as a basis for asylum] in the United States. I realized there was a lot of opposition to it and I started to think that what might be helpful was actually getting some publicity around the issue. Ms. Kasinga had been in detention—which was another issue in this case—and the conditions of detention were so egregious that she was almost at the point of being ready to give up her case and go back to Togo rather than remain in detention.

So, to make a long story short, we started to get some journalists interested in her plight. Here's this young woman, fleeing polygamy, fleeing female genital cutting. It had a lot of drama to it, her mother had helped her escape from this and she'd gone through Germany, had strangers help her out, journalists became interested and got involved, and once they got involved and started writing stories, there were a lot of people around the country who started to say, "I can't believe that we wouldn't grant a woman like this asylum. Why did this immigration judge deny?"

And by the time her case got in front of the Board of Immigration Appeals, and I know this from insiders at the Board of Immigration Appeals, what was intended to not be a positive decision, was an almost unanimous decision granting her political asylum. It was an 11 to 1 decision in her favor.

Part of the explanation for this was that the question of whether women should be protected was being played out on the public stage. It wasn't something that [was] just happening behind closed doors, you know, in closed chambers with the judges left alone with whatever their stereotypes or their own mental barriers to granting protection were. Instead, they were seeing that there was a lot of political will to accept cases like this.

And when the decision was issued, it was a precedent, published decision by the Board of Immigration Appeals—the first decision in the United States granting asylum on the basis of gender persecution. It was a good decision, but
not the best decision, because it didn’t fully develop some of the legal questions and perhaps didn’t fully develop some of the legal issues and chart the path well enough for other adjudicators that were to come. But it was good in that it addressed some of the obstacles that I mentioned earlier. For example, it said that female genital cutting, cultural norm or not, was a human rights violation and, therefore, was persecution. It also said that in cases like this where the government doesn’t protect, that asylum can be granted, thus making clear something that should have been clear under U.S. law. It made it clear that in a gender case, we can accept and recognize claims where either the government is a persecutor, or the government can’t protect, so if the government doesn’t intervene to protect the woman, asylum is warranted.

And then maybe most importantly, saying that even though gender isn’t one of the five grounds in the refugee definition, that the ground of “particular social group”—and this is one of the things that the U.N. High Commissioner for Refugees had recommended—that the ground of particular social group could be interpreted to include claims defined by gender. In other words, women could make up a particular social group. Social group could be defined by gender, or by gender in combination with other identifying characteristics about the individual.

In the Kasinga case—and I don’t say this because I was involved with it and out of any kind of lack of modesty—but the Kasinga case really reverberated around the world. It was the first case accepting gender asylum in the U.S. The U.S., for better or for worse, is a world leader on these issues and other countries follow U.S. trends. Kasinga was cited not only in the U.S. by adjudicators dealing with this issue, but by tribunals in other countries.

So, those of us involved in this issue, who really cared about it started to get very excited about the fact that this door that had been closed to gender claims was opening. It seemed to be opening fairly wide, and it appeared that if you accepted that the principles in the case weren’t necessarily limited to female genital cutting, they could extend to claims of domestic violence, repressive social norms, forced marriage, all of the kinds of cases in which women suffer because of their gender.

But that was to be put to the test, too, the same way the Kasinga case put to the test whether the U.S. really was interested in protecting women. The next case that came along was the case of Rodi Alvarado, who was a Guatemalan woman fleeing very, very brutal domestic violence. The Alvarado case put to the test whether the door that Kasinga opened was going to stay open or it was going to slam shut.

Rodi Alvarado suffered 10 years of the most brutal domestic violence imaginable, I often describe it by saying it’s really a case where the home virtually had become a torture chamber, where her husband would drag Ms. Alvarado by the hair, and break windows and mirrors with her head, throw machetes across the room at her, wake her up in the middle of the night with a knife to her throat and tell her that he could kill her and nobody would care—and
he was probably right in terms of the authorities of Guatemala.

And so after 10 years of this, and after 10 years of Rodi Alvarado attempting to escape within Guatemala, attempting to secure the protection of the police and the courts, she decided that the only way to save her life was to come to the U.S. And she came, ended up in San Francisco, and through the Lawyers Committee for Civil Rights, managed to get pro bono representation. She was granted asylum by an immigration judge in San Francisco, several months after the Kasinga case, with the immigration judge invoking the Kasinga case and saying, “this is persecution on account of her membership in a social group defined by gender.”

Now obviously in twenty minutes, I’m not giving you all the legal niceties and the details of the arguments but really painting with a broad brush. The judge essentially ruled, as one would have thought was appropriate, that under the precedent of Kasinga, Rodi Alvarado met the refugee definition.

But the Immigration and Naturalization Service appealed. They appealed to the Board of Immigration Appeals which was the same body that had granted protection in the Kasinga case. The Board of Immigration Appeals sat on the case for three years and then at the end of three years—in 1999—reversed the grant of asylum. And basically, [the BIA] made as much distance as it could from the Kasinga decision. Or, if I were to say this in a more legally appropriate way, they distinguished Kasinga so that it really only applied to cases of female genital cutting, just like Kasinga’s and really refused to extend the legal principles in what I think would have been a principled way.

And it was for a lot of reasons, and we can spend time talking about it, but I’m going to come back to one of the reasons you could sort of understand, which is fear of the “floodgates.” Accepting female genital cutting as a basis for asylum, where the perception is that this is something that takes place in countries far away and those women can’t easily get here, is different from accepting domestic violence as a basis for asylum where domestic violence is in countries that are contiguous to the U.S. This really led to fear of floodgates.

So again, to make a very long story short, the reversal by the Board of Immigration Appeals of the granting of asylum to Rodi Alvarado—the same way Kasinga reverberated around the world in a positive way—the decision in Rodi Alvarado’s case reverberated in a very negative way. Advocates felt like this now was a death knell for these cases succeeding because it was a published decision. I was at that point involved in the case as co-counsel, and now am the sole counsel for Ms. Alvarado. You could take a case like this—a negative case of the Board of Immigration Appeals—and you can appeal it to the Ninth Circuit, but if you won at the Ninth Circuit, that negative decision at the Board of Immigration Appeals would continue to control throughout the rest of the country. And you were not guaranteed of winning at the Ninth Circuit.

So if you care about your client and the development of the law, you might say, “well, I’ll reach the 9th Circuit eventually but let me see if there’s anything else that would allow us to get relief and get rid of that bad Board of
Immigration Appeals decision.”

And there is a mechanism for doing that and it’s asking the Attorney General to personally get involved, and the Attorney General at that time was Janet Reno. And Janet Reno—after a lot of advocacy by a lot of people, and many organizations—Janet Reno personally got involved in the case of Rodi Alvarado. She vacated the negative decision of the Board; she didn’t do all that we would have really liked her to do, which was to issue a decision herself, granting asylum to Rodi Alvarado. But Janet Reno left office with her Justice Department proposing regulations that would govern gender claims, and she sent the case of Rodi Alvarado back to the Board of Immigration Appeals saying to them, “when these regulations that my Justice Department has proposed are issued as final, I want you, the Board of Immigration Appeals to re-adjudicate this case.” And she literally did that on her last, on the last day of the Clinton administration before she left office.

Okay, that was five years ago. Here we are. This issue has been so contentious that these proposed regulations have still not issued as final. We have no regulations on this issue and it is so contentious that John Ashcroft himself decided he was going to do what Janet Reno did. So, John Ashcroft reached out and took Rodi Alvarado’s case, probably to deny it—and we have that on inside information—but the way I like to talk about it is like somebody touching a hot potato and they realize they better put it back because they’ll get burned. He took the case really with the intent to deny it, and there was so much of an uproar when it was leaked that he was going to deny, that he quietly put it back before he left office.

So what’s the state of gender asylum law? Where is it after five years? Well, we have proposed regulations that have never been finalized, we have two Attorney Generals who have seen it as sort of the third rail, they won’t touch it, they won’t issue a decision. And we have some developing and positive federal jurisprudence, but we have a real vacuum at the level of the Executive because we don’t have regulations, we don’t have the Board of Immigration Appeals deciding this, and in that vacuum, what we really have, unfortunately, is arbitrariness run amuck.

We have the same cases with the same facts from the same countries—and one adjudicator will deny it, and another adjudicator will grant it. The Center that I direct, the Center for Gender and Refugee Studies, we track and monitor these claims. We have over 1,500 cases in a searchable database so we can sift through it and see how these cases are being decided. So it’s not hyperbole when I say that it is arbitrariness run amuck and cases are being decided in this vacuum [of Executive guidance].

Okay. So, what I want to end up with here is that as lawyers and as advocates who care about this issue, obviously we have to keep moving forward, making the good legal arguments. And we have been doing that, and to the degree that cases are being granted at various levels, it’s a testament to people doing that effectively.
We have to do good advocacy, which has been done, what is really the testament to that is Janet Reno vacating the [negative Rodi Alvarado] decision; John Ashcroft not denying [Rodi Alvarado’s case] and perhaps most positively, the Department of Homeland Security itself is now on record with a very well written brief saying that Rodi Alvarado does qualify and that under a fair application of the refugee definition, she should be granted asylum.

So we have to keep doing all of those things that lawyers do, and that lawyers do well. But I want to end on one other note—something else that I think we can start to do. And I want to return to something I said earlier; all of the resistance to this issue—I’ve done a lot of public debate and TV interviews with people like those from Federation for American Immigration Reform, who are real [immigration] restrictionists. And their tactic always in trying to get public opinion against gender asylum is to scare people with the specter of the floodgates. I debated them way back from Kasinga where they would wave the figure of 8 million women subject to female genital cutting and say “if we grant this, what’s going to happen?”

And anybody who works in this area can tell you that the floodgates [argument] is simply not true. If you look at the experience of Canada that has accepted these cases since 1993 and has kept statistics, there has been no explosion of claims. You can ask people in the U.S. INS, who after the Kasinga case recognizing female genital cutting as a basis, they kept track. There was no explosion of FGC claims. Why? There are lots of reasons, but women are persecuted in countries where they have few rights, and think about all the obstacles that industrialized refugee receiving countries have put in the way [of refugees arriving] and it’s no secret why there’s no floodgates, the women can’t leave their home countries and if they can leave, they can’t access the countries of asylum.

Fear of floodgates simply is a myth, but having said that, I think it’s important to address the floodgates in a way rooted in human rights that really is a constructive way to enter into dialogue with people. And I want to say that in the context of the Rodi Alvarado case.

Rodi Alvarado fled Guatemala because she couldn’t get protection in that country because women’s lives are worth less than a life of a mosquito that you would swat like that. And the proof of that, not just me saying it, is that you’ll hear later on about femicides in Mexico where there have been probably over 400 women killed in the last 13 years in these very brutal killings that people call femicides because what those murders have in common is that women are targeted in ways very specific to their gender.

Well, in Guatemala we’ve had over 2,000 killings of women in the last 4 years; these are also femicides. One [country’s femicides] is not more worthy of caring about than the other, but just, you may not have heard about the femicides in Guatemala because there’s been a press black out until very recently.

So one of the things that we’re doing as part of the Rodi Alvarado campaign is to say, yes, there could be floodgates from countries if we accept
domestic violence, but the response is not to deny protection to women who are worthy of protection because of your floodgates; the response is to ask why do they flee? They flee because their rights are not protected. They flee because of root causes, because of the lack of protection of women, and the more constructive way to respond to floodgates is to address the root causes. And I think we need to do this more and more in refugee advocacy—to turn this around and say that it’s injustice and inequity and human rights violations that cause people to flee, and [as long as these continue] you’ll never stop them from coming. But you can try to fix the problem.

So the last thing I will say is, and I’m out of time and I apologize, one of the things we’ve done is to try to join these issues in an effective way. We just published a report, I’m going to leave a couple of copies here, called “Getting Away With Murder,” Guatemala’s failure to protect women and Rodi Alvarado’s quest for safety.”

And we put together these two issues—of her case and an analysis of the femicides. And then [we made] some very specific recommendations about what the U.S. government that pours millions of dollars into the Guatemalan police and judicial system, what the U.S. government should do to get some real results to have accountability and to end impunity for violence against women. And we’re going to be launching a campaign, really a nationwide campaign on this issue of the Guatemalan femicides.

So, let me stop with that and I apologize for going a little bit over and I’ll leave some copies of this report and they will also be available on the Center for Gender and Refugee Studies website. And those of you who might be interested in finding out more about it or getting involved, I really invite you to join us in this. Thank you very much.

[Applause]

SECOND SPEAKER: LENA AYOUB2

Thank you, good morning, I, too, am honored to be here. And thank you all for coming this morning.

I’m in a lucky position to be speaking right after Karen because I am going to be taking on her discussion of membership in a particular social group by putting it into the context of how lesbian, gay, bisexual and transgender people come to a particular social group.

First I’m going to be speaking a little bit about the challenges to lesbian asylum claims specifically, but before going into that, I do want to provide a context of the development of the law specifically, finding that LGBT people constitute a particular social group, and talking a little bit about how most of the case law, if not all of it except for one, has been about gay men or transgender people, and only one case has focused on a lesbian asylum claim.

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2. Former Staff Attorney, National Center for Lesbian Rights. Ms. Ayoub is now in private practice.
To give you a general definition or understanding, persecution on account of one's sexual orientation occurs when someone is harmed or threatened with harm because they are gay, lesbian, or bisexual. Gender identity persecution occurs when someone is harmed or threatened with harm because they are transsexual or do not conform to gender stereotypes.

Since 1994, the United States has granted asylum cases based on sexual orientation. The first case is called Matter of Toboso-Alfonso in which the Board of Immigration Appeals upheld an immigration judge's determination that a Cuban, gay asylum applicant had established membership in a particular social group, defined by the status of being a homosexual.

In 1994 the Attorney General designated Toboso as "[P]recedent in all proceedings involving the same issue or issues." In 1996, the INS did formally adopt the position that, "[H]omosexuals do constitute a particular social group." It wasn't until 2000 that the Ninth Circuit Court of Appeals confronted for the first time a variation of this issue of whether homosexuals constitute a particular social group within the meaning of the Immigration and Nationality Act.

The primary issue to be decided in this case was whether a gay man with female sexual identities in Mexico constituted a protected particular social group under the asylum statute.

The Court answered that question in the affirmative and concluded that as a matter of law, the appropriate particular social group is that group in Mexico made up of gay men with female sexual identities. The Court went on to say that sexual identities of homosexuals are so fundamental to their human identities that they should not be required to change them.

Though the issue presented in this case, Hernandez-Montiel v. INS, was narrowly cast to encompass only gay men with female sexual identities, it was clear that Hernandez-Montiel suggested that all alien homosexuals are members of a particular social group within the meaning of the Immigration and Nationality Act.

In 2005, just this year, there was an attempt to clarify this definition of a particular social group as it relates to LGBT people by the Ninth Circuit. In this case, Karouni v. Gonzales, the Ninth Circuit held explicitly that all alien homosexuals are members of a particular social group.

So as I mentioned earlier, of the ten precedent cases—and Immigration Equality has all of the precedent sexual orientation and gender identity cases on their website, www.immigrationequality.org—of these ten, all of them deal with gay men. There is one case, however, that deals with a lesbian woman and that's Pitcherskaia v. INS.

The Ninth Circuit held in Pitcherskaia that forcing a person to attempt to alter or suppress her sexual orientation may be a form of persecution. So, even if the abuser does not intend to harm the victim, if the victim experiences abuse or harm, this can rise to the level of persecution. In this case, Pitcherskaia was a Russian lesbian whose former girlfriend was confined to a psychiatric institution and subjected to electric shock treatment and other so-called therapies in an
effort to change her sexual orientation.

While visiting her former girlfriend, Pitcherskaia was detained, interrogated and ordered to undergo treatment at a local clinic where psychiatrists attempted to hypnotize her, [and] prescribe drugs to cure her of her lesbianism.

The Board of Immigration Appeals held that Pitcherskaia failed to show persecution because her involuntary treatment and confinement were intended to treat or cure the supposed illness, not to punish her. The Ninth Circuit reversed, holding that persecution must be defined as an objective infliction or suffering of harm, not by a subjective intent to punish. Currently, this is the only precedent case we have dealing with a lesbian asylum applicant, and the case dealt mostly with the definition of persecution and not so much the fact that she was a lesbian asylum applicant, or membership in a particular social group per se.

Currently before the Ninth Circuit is a case in which NCLR filed an Amicus brief and it does deal with a gay man from Mexico who suffered past persecution by the police, his family, classmates [and] society for his effeminate mannerisms. Many of these gay asylum cases are relevant, the holdings are relevant and the reasonings are relevant to adjudicating lesbian asylum cases. Specifically in this case, the immigration judge denied asylum and the BIA affirmed it, holding that the applicant could avoid persecution by hiding his sexual orientation. In this case, Jorge Soto Vega v. Ashcroft, the judge reasoned that Jorge did not appear to him to possess the characteristics stereotypically associated with gay men, and this is a quote of the immigration judge, “[M]ost people would not be able to see that respondent is gay and it would not be obvious that he would be homosexual unless he made that obvious himself.”

The judge referred to Jorge’s alleged lack of appearance, dress, demeanor, gestures, voice or anything of that nature that remotely approached some of the stereotypical things that society attributes to gays, whether those are legitimate or not.

Our position is basically that whether an applicant can hide his identity is never an appropriate consideration in determining a person’s eligibility for asylum. The purpose of asylum and refugee law is to protect people who face persecution in other countries because of their protective characteristic. And the refugee status that asylum applicants seek includes protection from government persecution that attempts to suppress their expression of who they are as well as their opinions and beliefs.

The refugee status and appeals authority of New Zealand and Australia have recently addressed this very issue in granting refugee status to two gay men. And I do just want to briefly read portions of the decision because I feel that they do a great job in explaining why such a requirement is not okay and fundamentally inconsistent with refugee and asylum law.

The decision in the New Zealand case reads that “the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right
in jeopardy and the resulting harm. If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement and serious harm is threatened, it would be contrary to the language, context, objective and purpose of the refugee convention to require the refugee claimant to forfeit or forego that right and to be denied refugee status on the basis that he or she could engage in self-denial or discretion on return to the country of origin.”

The Court further explained that to require an asylum applicant to conceal or suppress his identity to avoid future persecution will be a misuse of the asylum process to achieve the persecutor’s goals.

So the fundamental human rights at stake here in presenting this case before the Ninth Circuit are Jorge’s freedom of association and freedom of expression as well as his fundamental right to engage in intimate relationships, which would be at stake if he were forced to return to Mexico and hide the fact that he was a gay man.

Requiring a gay man or requiring LGBT people to hide their identity imposes a burden that is not similarly imposed on applicants seeking asylum on any other basis, such as people seeking asylum based on account of religious persecution or on account of persecution based on their political opinion. Many lesbian asylum applicants rely heavily upon gender and family social group claims. Gender cannot be neglected as an independent element in lesbian asylum persecution. In fact, gender and sexual orientation rarely function as independent bases of persecution. Most typically, they intersect in ways that expose lesbians to unique vulnerabilities and unique harms that cannot be accounted for fully on the basis of either status in isolation.

In itself, for example, sexual orientation cannot account for lesbians’ unique vulnerability to persecution as a distinct group of women whose very existence is widely perceived to violate socially-imposed gender norms.

Sexual orientation also fails to account for a lesbian’s subordinated status as a woman, or for the fact that lesbians are less vulnerable to acts perpetrated by the State than to violence and coercion by family members or other non-state actors. Conversely, gender cannot fully account for the specific vulnerability of a woman who is beaten or raped not simply because she is a woman, but because she is a lesbian.

Similarly, sexual orientation fails to address the vulnerability of lesbians to rape and other gender specific harms because of their female gender. Gender is also inadequate to capture the full scope of the damage inflicted on lesbians through forced compulsory heterosexuality.

With respect to membership in a particular social group, that being your family, lesbian asylum applicants suffer persecution on account of their membership in their immediate family, specifically by abusive husbands who abuse them because they are lesbians and because they are their wives. The control or the right to beat a spouse because she is a lesbian, because she is a spouse, is a common characteristic that is found in many of the lesbian asylum
claims that we present at the National Center for Lesbian Rights.

Now there are specific challenges to lesbian asylum claims and I just briefly want to run through some of them. Culturally, social and economic constraints affecting women will generally impede lesbians’ flight from their home countries. Childcare obligations and domestic responsibilities to immediate family members, pressures of family responsibility will likely discourage some lesbians from leaving their country. Women are often not able to leave the home as frequently or develop a more independent life outside of the home; secluded lives also limit many lesbians’ awareness of ways to end or escape the persecution.

Economic and financial constraints also limit lesbians’ ability to travel to a country in which asylum may be available. It’s expensive to travel. Women also often have restricted access to money. Generally women have less access to their own financial means because often women earn less overall or family finances are controlled by a woman’s father or spouse.

Women also have fewer educational and employment opportunities than men and this makes them less qualified for opportunities to study or work abroad. As such, women travel much less and aren’t able or are less likely than men to get to a country where they can apply for asylum.

Women are often not allowed to travel alone within or outside their country of nationality, and women who attempt to flee across national borders are extremely vulnerable to sexual violence, extortion, robbery and murder.

Lastly, and I am running out of time and I do want to turn it over so that Susan has enough time to present as well, but proof of persecution and the fact that lesbian persecution tends to be less visible because, although it is often committed by state actors, it is more often than not committed by non-state actors, and there are a lot of factors that make proving persecution by non-state actors more difficult in presenting asylum claims.

So, I am happy to answer any questions or to go further into detail with this after the panel presentation. Thank you.

THIRD SPEAKER: SUSAN BOWYER

Thanks to everybody for being here, thanks for letting me be here on this amazing panel, Neha and Amy and all of the members of the Berkeley Journal of Gender, Law & Justice, and to be here with Karen is amazing because back in 1989, she gave this class on Working with Clients that has stayed with me forever. So, it’s an incredible honor to be here with her.

Some of our clients, and we do see a lot of clients of all kinds at the International Institute of the East Bay, write to us after they’ve gotten settled in and some of them allow us to use their stories to explain the situations that they, that most of our clients face. And I’d like to share one from Sandra:

3. Managing Attorney, International Institute of the East Bay
I came to the United States in 1998 to marry my husband. We fell in love even though he lived in the U.S. because he had family in El Salvador and he visited often. When his brother was murdered, he came back and I helped him get through that time. When he asked me to marry him, I thought we would be together forever. But when I came to the United States to join him I saw a side of him that I had not known. He started to abuse me. It was terrible. But I was afraid to leave him because he always threatened me with all kinds of things. He would always tell me that he would get me deported if I didn’t do what he says or if I called the police. He’d promised to put papers in for me but never did, so I was illegal. He said he would take my daughter away. I did not know what to do because I had no family here and no friends. I had no money because my husband would not get me a work permit and he would not let me learn English. I was lucky because I found out about the International Institute of the East Bay and they helped me with my immigration papers. Now I’m free and happy and I work and I live with my beautiful daughter who is now three years old.

Sandra points out a few things that are common to most of our clients. In addition to the enormous challenges imposed by being a battered spouse, especially with children, Sandra and thousands of other women also face crushing burdens imposed by their undocumented status in a country that’s hostile to immigrants generally and to undocumented immigrants in particular.

You’ll be hearing later on today about some of the challenges involved in migration to the United States. I’m going to take a minute to describe some of the challenges arising from the intersection within the United States of immigration and domestic violence.

They include, briefly, language isolation—survivors without strong English skills can’t access supportive services or call the police, and often the abuser does speak English and gets his story out instead. And this is particularly a bad situation where she cannot use her children or the abuser to translate for her.

Attitudes about women’s roles seem to be the sort of thing that these guys were talking about, it’s just the background that a woman is supposed to be stoic and keep the family together and do whatever that takes, and frequently the pressure is coming not only from her spouse but from his family and her family as well.

Poverty and financial reliance on the abuser: as Sandra said, she couldn’t get employment authorization and so she had to stay in that abusive relationship. We often find people who don’t even want to call the police because they fear that as much as their abuser has been hurting them, if he is incarcerated or deported she and her family will lose all their financial capacity.

Isolation from family and services: Sandra said it so well. She was here and she was completely alone and until she found us she had no place, she had no idea where to go. And we are unable to serve the universe of people that need help even in the East Bay.
Lack of knowledge of the U.S. legal system and that domestic violence is a crime and that somebody's undocumented status will not prevent the immigration service from prosecuting the abuser. Also, an incredible fear of police that is not unfounded at all. Judy Golub this afternoon will address things like the Clear Act that is in Congress, that would have police be required to cooperate with immigration authorities and turn undocumented immigrants they come across in to the immigration authorities.

Finally, the abuser, and I'll go into this more in a moment, controls the immigration status. And then there's the background of, like I said, this is a country that's hostile to immigrants and particularly to undocumented immigrants, and that is the world in which undocumented domestic violence survivors have to work.

I'll talk in a moment about how recent changes in immigration law addressed the last two of these challenges and alleviate some of the other problems some survivors face. But first, a tiny primer on a very small part of immigration law.

Many people who immigrate permanently to the United States do so through the family visa process in which a person with status as a U.S. citizen or lawful permanent resident can petition for an immediate family member to immigrate permanently to the U.S. Historically, this process was fairly short and family members who sought to immigrate waited outside of the United States until gaining papers to enter.

Increasingly, tight controls on the number of legal admissions and severe political and economic conditions throughout the world that force people to migrate here have created waiting lists of almost ten years to immigrate legally. And many people come before they get an immigrant visa, either by crossing the border without papers, coming with fraudulent papers, or coming on a temporary visa and then staying on without any status.

People without status in the United States can be caught and deported at any time, can't work legally or access most public benefits. It creates an intense vulnerability that can be exploited by abusive spouses and parents. An abuser can refuse ever to petition for his spouse or can withdraw or fail to follow up on a petition. He can call or threaten to call the police or immigration service to report his victim's undocumented status. He can try to force her to leave the United States even away from her children.

In 1994, the Violence Against Women Act was enacted to deal with this specific problem, not generally to alleviate burdens faced by immigrant domestic violence survivors. I point this out not to criticize one of the few bright spots in immigration law, but to help advocates understand the odd patchwork of eligibility and requirements created by a law that was meant to fix a very specific problem in a huge, ungainly body of law.

The original VAWA passed in 1994 provides that a survivor of abuse by a permanent resident or U.S. citizen spouse or parent can self-petition for lawful status independently of her abuser. VAWA also created an analogous
deportation defense. VAWA brought immense advantages to many survivors of domestic violence and now I’m going to get into my little—my kids say hokey, visual aids.

It [VAWA] took care of a little of the abuser control of status. It also created a procedure that can permit petitioners with prima facie eligibility for VAWA—that means an early determination that they will probably be granted [legal status] after the application is adjudicated—to get public benefits like CalWORKs very early in the process. And when they are finally approved they can also get employment authorization. So that deals with financial reliance on the abuser.

The application process is mostly confidential so there’s practically, I say practically, no exposure to deportation if a survivor’s application is denied.

This law has given thousands of survivors of domestic violence control over their lives where they had been powerless, and resources where they had none. Like Sandra, they and their children have escaped violence and moved on with lives radically different from the abuse they had endured.

As anyone who has provided legal services knows, and Amy who set me up to do this was the one who recommended this because she’s worked with us, implementation is just as important as the law itself and VAWA’s implementation is basically good. There’s a special VAWA unit within the immigration service and the staff there is well-trained and generally sympathetic to the domestic violence issues.

VAWA’s “any credible evidence” standard is significantly more realistic than the clear and convincing evidentiary standard for most immigration benefits. Not all problems of immigrant domestic violence survivors are resolved by VAWA though. It’s only available to spouses and children of [legal] permanent residents and U.S. citizens.

I’ve done dozens of VAWA trainings for shelters and other social service agencies who’ve been shocked and dismayed to learn that the vast majority of their undocumented immigrant clients don’t qualify as self-petitioners when their vulnerability is just as great.

Other problems, and again I’m nit-picking with VAWA, the original VAWA’s requirements included that an applicant had to stay married until after she filed her self-petition. She would lose eligibility if the abuser were deported. She would be ineligible if she committed certain crimes and immigration violations even if they were caused by the abuse, and she had to prove that not getting status would cause her extreme hardship. And then also the process is burdensome.

A huge amount of documentation is needed to prove VAWA eligibility and that’s hard even for people with stable lives and the cooperation from the petitioner. VAWA only helped the most empowered domestic violence survivors, the ones who’ve learned about it and had access like Sandra did to resources to apply.

Approval of a VAWA self-petition provides temporary legal status only
until an applicant files for permanent residence. And that is a process with such strict eligibility requirements that many thousands of immigrants cannot meet them. For example, if someone uses a false passport to enter the United States, that person is barred from permanent residence. This additional hurdle meant that many survivors who were officially eligible to immigrate through VAWA could not stay in the U.S. legally after their temporary status expired, thereby plunging them back into vulnerable status.

VAWA also provides no remedies and very few resources to address the other challenges that I talked about earlier. These challenges are partly addressed by community services provided by dedicated staff and volunteers.

But it was still a wonderful law that transformed many lives. Then in 1996, the draconian Illegal Immigration Reform and Immigrant Responsibility Act, called IIRIRA, was passed. Even though immigration law was already restrictive amid politically stoked anti-immigration sentiment in the mid 90s, it became far harsher.

Extreme restrictions were placed on immigrants' ability to become permanent residents, including a permanent bar to legal immigration for someone who has falsely claimed to be a U.S. citizen. A permanent bar so someone who lied about their citizenship status can never legally immigrate.

A ten-year bar to legal immigration for people with unlawful presence in the United States for a year or more and a permanent bar again for people who enter the United States without inspection after having been here without status, and stringent income requirements of the permanent resident or U.S. citizen petitioner to keep poor people from being able to immigrate their family members.

At the same time though that immigration benefits were being sharply cut back, immigrant and domestic violence advocates were working to improve VAWA. And in 2000, VAWA was amended. VAWA 2000 improved some aspects of VAWA self-petitioning and cancellation of removal including: an applicant no longer has to show that she'd face extreme hardship if she couldn't gain legal status; applicants can self-petition after divorce from or deportation of the abuser, if those things were connected to the abuse.

Applicants are still eligible even after they’ve committed certain crimes or immigration violations if there’s a connection between those violations and the law that was violated.

It also created VAWA-specific waivers of some grounds of inadmissibility so permanent resident status is available to more applicants. And some funding was provided for a few service providers to do outreach and services.

Like the original VAWA, the 2000 amendments demonstrated the power of advocacy, as Karen was talking about. Many of the changes made to VAWA did more than just patch holes in immigration law. They actually reflected the reality of many immigrant domestic violence survivors.

On the other hand, VAWA is still only available to the same narrow range of survivors and some new limits on gaining permanent residence status created
by IIRAIRA, like the false claim of U.S. citizenship ten-year bar [and the permanent bar] for entering after unlawful status without inspection, are not addressed.

Also, implementation seems to be getting increasingly uneven, with some adjudication being assigned to immigration service staff untrained in domestic violence dynamics who impose a much higher evidentiary standard.

Even in the best of times it still takes almost a year to get legal status and work authorization. Even without particularly harsh adjudicators, documenting how someone meets VAWA requirements is very hard and there are still very few resources to help people to do so. In fact, I think that there are fewer [resources] as private donors seem to be getting donor fatigue about this issue.

The 2000 amendments also created something called a U-visa. These were created to encourage crime victims to cooperate with investigation and prosecution of crimes including domestic violence. Benefits are deferred action—that is, the immigration service knows somebody is here without status but won’t deport them—and employment authorization.

Law enforcement agencies must certify that the victim cooperated in the investigation or prosecution of the crime. Again, U-visas were not created to try to address all these issues; they were created as a tool for law enforcement. Nevertheless, they have the potential to be very helpful because they impose no requirement of showing the relationship to a U.S. citizen or permanent resident abuser, just that the crime was reported and the victim plans to cooperate with the enforcement.

U-visas have the potential to provide this huge relief, except that no implementing regulations have been promulgated. And no relief was given at all until about 2003. In 2003 the VAWA unit of the immigration service started accepting applications for interim relief and granting deferred action and employment authorization to victims of crimes. It addresses that fear of police. It addresses the issue of lack of knowledge of law enforcement. In fact, here, for example, in the Oakland Police Department, the police tell people about the law, they tell people about U-visas, they tell people about domestic violence laws because they want to prosecute the offenders.

However, no path to permanent residence status yet because there are no regulations and we don’t know if there will be bars to permanent residency, if they’ll be the same—if there’ll be waivers in the same way that VAWA has and there, at this point, is no guarantee of confidentiality, so if somebody’s application is rejected because there are no guidelines, we can’t guarantee that somebody won’t be deported.

Right now, Congress is working on reconciling the House and Senate versions of new VAWA amendments that I’m going to call VAWA 2005 because I’m hoping they’ll be out this year. It’s expected to expand eligibility for self-petitioning and cancellation of removal including increasing the age of the self-petitioner from 21 to 25; permitting abused parents of U.S. citizens to self-petition; protecting potential beneficiaries from deportation while applications
are pending; making more waivers available for the bars for permanent residence; permitting abused spouses and children of asylees or other immigration beneficiaries to get legal status; making some changes in trafficking law that I'm sure Ivy Lee will talk about more today; it would also permit Legal Aid offices funded by the Legal Services Corporation to serve immigrant survivors of domestic violence; and will require implementing regulations for VAWA 2005 and U-visas within six months of passage.

So the law is getting a little better at a time as stories humanize decision-makers and advocates propose concrete solutions to documented flaws in the system. A lot remains undone.

My own pet peeve as an agency with a reputation for providing VAWA services is that there is next to no funding to do these services. Social service agencies ask me to do presentations to explain VAWA and I do, but I don't have the staff to provide the services when they get referred.

The amazing super-human attorney Naomi Onaga who did them until midnight many nights is leaving her office for some reason, so the bind has become really evident. Even worse, only the most empowered survivors learn about this relief and take the steps needed to apply.

In conclusion, I want to note that relief for domestic violence survivors, victims of trafficking and crimes, abused and abandoned children, and some people persecuted because of their gender, are ways that immigration law is moving up in a humane direction. This is great. But it's important that we see that it's the background of harsh immigration policies that has created so much of the special hardship endured by beneficiaries of these programs.

It is our clients' hope that instead of using their compelling situations just to carve out discreet exceptions to harsh policies, Congress should see that the gravity of these situations point to the need to significantly change these policies for all immigrants. Thank you.

FOURTH SPEAKER: ELENA MUNOZ (READ BY AMY CUCINELLA)

This statement, Elena and I prepared together:

I was really looking forward to coming to this symposium today and am very sad and sorry I am not there, as it was going to be my first time speaking out in public about my experience in getting my U-visa. I was also looking forward to meeting and talking to some of the other speakers that Amy told me about.

I just want to talk about my life living in the U.S. without having papers and how I came to getting a U-visa and I'm now on my way to getting my green card.

My mother brought me to Oakland when I was two or three years old. I don't even remember, too young to remember. She didn't have papers so I didn't

4. Former client of International Institute of the East Bay
either. My mom has worked very hard her whole life. She babysat other people’s
kids and cleaned houses. I used to tell her that she spends all her time with other
mothers’ kids but none with her own. Because she worked so much, I was left
alone a lot with a family member.

When I was five, my mom started dating a man who later became her
husband and my stepfather. Really the only father figure I ever had. He worked
nights and so I was often left with him during the day while my mom was
working. At first, he was really nice to me and would buy me presents and take
me places. But around the time when I was eight years old, he began to sexually
abuse me.

This continued until I was fourteen years old. I never really understood
what was happening. I remember looking around at other girls in my class and
thinking that they, too, went through this at home and wondering how they felt
about it.

At first, because I was confused and didn’t know any better, I never told
my mom or anyone about it. He would sometimes cry afterwards and ask me to
promise not to tell my mom. When I was fourteen I was watching Oprah and she
had an episode on a girl who was sexually abused at home.

Oprah made it obvious to me that this was not normal and even gave a
hotline number to call to and report such abuse. I know it sounds unbelievable
but that was really the first time that I fully realize that I was being mistreated.

I confronted my stepfather and told him I was going to tell my mom. He
begged me not to. He cried and said he didn’t mean to do it, he never meant to
do it and he gave me money and told me to go buy myself some clothes.

A few nights later, I got in a fight with him and my mom and finally told
my mom. He used to listen in on the phone calls when guys would call me and I
cought him doing it again that night and got angry. My mom got angry at me for
being disrespectful. I got upset and just blurted it out. It was the first time I told
anyone. My mom didn’t believe me. She told me I was a bad girl and a liar.

The next day I was with my friend at Starbucks. I was still upset with my
mom not believing me. It was on my mind and I was depressed. Looking back, I
was depressed for many months before that day at Starbucks and I continued to
be depressed for many months after.

While at Starbucks, I saw a policeman walk in and order coffee.
Coincidentally, I knew him. I decided I needed help and got the courage to go up
and talk to him. After saying hi, he asked me how I was doing. I asked him who
I should tell if I knew of something going on that was bad. He said I should talk
to him.

We sat down and I began to cry and tell him everything. After an hour or
so, he took me to my house and confronted my mother and stepfather. They took
my stepfather away to jail for questioning but my mom yelled at the cops that I
was a spoiled brat, that I was lying about it and that I always lied about these
things.

Luckily the cops didn’t believe her. I was taken to a foster home until my
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Mom would agree not to ever let my stepfather back into the house again. This took a couple of weeks. I was so depressed. I cried all the time. I would go to school and not listen to a word the teacher said. Before this, I was an honor student but my grades dropped quickly. I would just sit and cry in the middle of class. Although I told the police I wanted to get up on the stand and tell the world what my stepfather did to me, the prosecutor decided not to press charges. I'm still not sure why.

I was going to be a very good witness and be able to provide evidence that seemed very strong. I would like to know why the charges were dropped.

Two years passed. I started getting my life back together. I'd found happiness with my boyfriend, Jose, he helped me through many of my issues. When I was fifteen, we learned that I was pregnant. I gave birth to Joseph who became the center of my life and the best thing in it.

At six months old, Joseph was diagnosed with liver cancer and he survived a liver transplant. I spent every day and night with him in the hospital for eight months. I dropped out of school to stay with him.

During this time, I decided to look into getting papers. I asked around. I asked friends who'd received green cards and was referred to a place. I went there and told them my story. They told me that there was nothing they could do for me. But if I put myself in deportation or was about to be deported, I might be able to stay in the country because of Joseph's health. But other than that, I couldn't do anything.

I told them about the sexual abuse, too, but for some reason they didn't think I would qualify for help. I decided that I wanted a second opinion. I heard of the International Institute and went to the office. I met Naomi, an attorney there who listened to me while I told her the basics. She said she thought I could qualify for a U-visa. She said she would take my case.

When I went in the second time, I was told I would work with Amy on my U-visa. We met three or four times. It took a while for the whole story to come out. It was really hard to think about that time in my life again. The memories were really painful and I realized I had a lot of anger in me still that I needed to work out. But we made it through all the details and I actually felt better afterwards.

I came to really trust Amy and I became her friend. Sometimes when I couldn't get a ride, she'd come to Joseph's hospital and would work on my case there. We filed in April of last year and we recently found out that I was granted my interim U-visa. Now I can get my driver's license and have my driving permit.

I now have employment authorization and plan to get a job when Joseph is out of the hospital. I can now walk down the street and see a cop and not feel scared that he might turn to me and ask me, "where are your papers?"

I cannot say how important getting my U-visa has been in my life. When Joseph was out of the hospital, I used to take him to Stanford twice a week. I couldn't take him on the bus or train because he is immunocompromised. I
would drive him even though I didn't have a license because I had no other choice. But now I have a permit and will soon have a license and I won't have to worry the whole time.

I think it is important that more women know about the U-visa and about VAWA, which I've also learned about through Amy and IIEB. I think many women are in really bad situations and don't know how to get help and may not have the ability to go seek help. I was lucky. But from what I've seen, I don't think everyone is so lucky.

That's why I wanted to be able to be here today to let people know that there's so many more women and girls who are like I was or maybe in a worse situation and they need help and need to be reached. No one should have to go through what I lived through for six years, not a day longer than necessary.