

2012

Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law

Jessica Mayo

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Immigration Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Jessica Mayo, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 WASH. U. L. REV. 1485 (2012).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol89/iss6/10

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

COURT-MANDATED STORY TIME: THE VICTIM NARRATIVE IN U.S. ASYLUM LAW

*This much we know: stories can change people's minds.*¹

INTRODUCTION

In the late 2000s and early 2010s, anti-immigrant rhetoric rose on a tide of fears about the U.S. economy.² Nativist narratives inspired by rising unemployment dominated an increasingly antagonistic debate about U.S. immigration policy.³ Restrictive state laws, most notably those found in Alabama and Arizona,⁴ and a movement to ban birthright citizenship⁵ became hot political topics that sent some Republican and Tea Party politicians scurrying to claim the positions their constituencies demanded.⁶

But as popular concern regarding “illegals”⁷ dominated the discussion, federal immigration policy continued on, misunderstood and excluded from the highly political sound bites that shape public opinion.⁸ Most

1. Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63, 63 (2010).

2. AUDREY SINGER & JILL H. WILSON, METRO. POLICY PROGRAM, THE IMPACT OF THE GREAT RECESSION ON METROPOLITAN IMMIGRATION TRENDS 1 (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/1216_immigration_singer_wilson/1216_immigration_singer_wilson.pdf (“During 2009, the U.S. economy was in the throes of the Great Recession, and immigration had become a highly polarized topic of debate, reflected by a rise in anti-immigrant sentiment.”).

3. The Merriam-Webster Dictionary defines “nativism” as “a policy of favoring native inhabitants as opposed to immigrants.” *Nativism Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/nativism> (last visited May 19, 2012). For some prominent American nativist writings, see PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995), and Patrick J. Buchanan, *Nation or Notion? America Rose from Kin and Culture, Not an Abstract Proposition*, AM. CONSERVATIVE, Sept. 25, 2006, at 12.

4. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Pub. Act No. 535, 2011 Ala. Laws 535; Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 113.

5. Marc Lacey, *On Immigration, Birthright Fight in U.S. Is Looming*, N.Y. TIMES, Jan. 5, 2011, at A1.

6. See, e.g., Julie Hirschfeld Davis, *McCain Retools Immigration Stance*, WASH. POST, Feb. 27, 2008, http://www.washingtonpost.com/wpdyn/content/article/2008/02/27/AR2008022702495_pf.html.

7. Just as this Note focuses on the use of narratives, it is itself a narrative. I seek to use objective language, such as “undocumented” rather than “illegal,” that contributes to a nuanced discussion of underlying issues and avoids political ideologies. I must acknowledge that these choices themselves create a particular type of narrative effect.

8. There were some significant changes in federal immigration policy during the summer of 2011 that, while provoking the ire of conservative pundits, actually received very little attention by the public. In particular, the Department of Homeland Security issued a memo stating that it would exercise prosecutorial discretion to administratively close removal cases for immigrants who presented certain favorable factors. In practical terms, the memo announces the Department's intention to focus

political rhetoric involves immigration from Mexico. Unbeknownst to many of those most passionate about immigration issues, people of Hispanic origin make up about 15 percent of the U.S. population, and only about 6 percent of the Hispanic population in the United States is foreign-born.⁹ Those who are not foreign-born are U.S. citizens.¹⁰ Many of those who are foreign-born have legal status in the United States. Of the immigrants filling our land with different tongues and cultural diversity, most came legally as family-sponsored immigrants, as holders of employment-based visas, or, as this Note discusses, as refugees and asylees.¹¹

Over 73,000 refugees settled in the United States in 2010.¹² The refugees had the necessary paperwork to legally immigrate to the United States after having been determined by the United Nations to be a victim of persecution.¹³ The vast majority of these immigrants were resettled from refugee camps to which they escaped after fleeing war, unrest, or other forms of persecution in their own native country.¹⁴ Similarly, those seeking asylum come to the United States after having suffered persecution but without formal recognition of their status.¹⁵ They arrive either under a temporary visa or without documentation and then seek recognition from the U.S. government that they are victims of persecution and qualify as asylees.¹⁶

The narratives accompanying U.S. asylum law differ markedly from those filling the pages of the current immigration debate. Asylum

its removal efforts on immigrants who have committed crimes. Memorandum from John Morton, Dir., U.S. Dep't of Homeland Sec., for All Field Office Directors, All Special Agents in Charge, and All Chief Counsel (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

9. ELIZABETH M. GRIECO, U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2007, at 3 (2010), available at <http://www.census.gov/prod/2010pubs/acs-11.pdf>.

10. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1. The Supreme Court interpreted this clause to provide citizenship to people born in the United States, regardless of the parents' citizenship status. *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898). This principle is now codified in federal law. 8 U.S.C. § 1401 (2006).

11. Legal immigration to the United States occurs through four primary avenues: immediate relative and family sponsored visas, employment-based visas, diversity visas, and refugee admissions. MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 42 (2009).

12. *FY10 Refugee Admissions Statistics*, U.S. DEP'T OF STATE, <http://www.state.gov/j/prm/releases/statistics/181160.htm> (last visited May 19, 2012).

13. See *infra* note 23 for the definition of "refugee."

14. See *infra* note 23.

15. For a discussion of the standard for asylum, see *infra* Part I.B.

16. See *infra* notes 24–25 and accompanying text.

applicants' stories are filled with accounts of terrible suffering, courageous journeys, and hope for a future without fear.¹⁷ Raising awareness of these heroic individuals would add a different hue to the current discussion, which is colored more by vitriol and passion than by a true understanding of the diversity of global migration.

But the asylum narrative also suffers shortcomings. To meet the standard required to obtain asylum, applicants must focus on their suffering, describing themselves as victims of their persecutors and their native land.¹⁸ This Note examines the ways the victim narrative can have long-lasting effects, primarily on the client but also on the attorney and on society as a whole. The immigration debate treats the applicants as powerless victims, rather than as a culturally diverse group of survivors that is contributing to the changing fabric of American society. But several steps can be taken, both on a practical individual level and through systemic changes, to mitigate such potential damage.

Part I of this Note provides an overview of U.S. asylum law: the legal standards, the process by which individuals seek asylum, and the purposes of U.S. asylum law. Part II turns to the subject of narratives, focusing specifically on the victim narrative and its prevalence in asylum law. Part III addresses the many concerns raised by the use of the victim narrative in asylum law. Finally, Part IV follows with suggestions on how to mitigate these concerns. While many of these suggestions are hallmarks of the client-centered lawyering and Therapeutic Jurisprudence movements,¹⁹ this Note focuses specifically on their application to victim narratives in asylum law. The result is a practical outline that practitioners and clients can use to maneuver within the rich narrative landscape and static legal standards and to create legal and personal narratives that achieve legal goals, personal growth, and societal enlightenment.

17. In fact, these stories are echoed by many immigrants who arrive in the United States, either with or without documentation. Some immigrants suffer economic deprivation, but such suffering rarely leads to a grant of asylee status. *See infra* note 51 and accompanying text (discussing the standard for economic persecution). Many Hispanic immigrants are unable to obtain asylum despite severe gang-related persecution. For more information on gang-related asylum claims, see generally Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827 (2008).

18. *See infra* note 145.

19. *See infra* notes 192–94 and accompanying text.

I. OUTLINING THE STORY: AN OVERVIEW OF U.S. ASYLUM LAW

The United States granted asylum to over 21,000 individuals in 2010.²⁰ Much of the world is embroiled in life-threatening situations that create massive migration movements around the globe: conflicts, dictators, famines, natural disasters, and wars. Very few affected individuals make their way to the United States. Those fleeing turmoil may find refuge in their own country, where they are considered internally displaced.²¹ Alternatively, they may seek protection outside their country of origin. Some make their way to a refugee camp,²² usually in a neighboring country, where they are given refugee status by the United Nations.²³ Others may make their way further, to countries around the world where they seek peace, often in the form of a grant of asylum. Individuals seeking asylum without refugee status come to the United States in one of three ways: legally on a short-term visa,²⁴ without documentation, or with

20. DANIEL C. MARTIN, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2010, at 1 (2011), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2010.pdf.

21. *Thematic Areas: Displacement*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., <http://www.unocha.org/what-we-do/policy/thematic-areas/displacement> (last visited May 19, 2012) (explaining that internally displaced people do not receive refugee protection, but rather must rely on their own country or non-governmental organizations for aid).

22. Refugee camps are established on an emergency basis, but many remain in existence for decades. About one-third of refugees live in refugee camps. *Urban Refugees*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/4b0e4cba6.html> (last visited May 19, 2012).

23. The United Nations uses the definition of "refugee" found in the Convention and Protocol Relating to the Status of Refugees. See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Convention provides that a refugee is one who, among other requirements, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." Refugee Convention, *supra*, art. 1(A)(2). This definition closely resembles that used in the U.S. statute. See *infra* Part I.B (discussing the U.S. statutory standard for refugee status).

Once it determines that the individual seeking refugee status satisfies the requirements, the United Nations may aid the individual in resettling in their native country after danger has abated, resettling in a third country like the United States, or assimilating into the country in which the refugee camp is located. KATE JASTRAM & MARILYN ACHIRON, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 21 (2001), available at http://www.ipu.org/PDF/publications/refugee_en.pdf.

24. If such individuals are eligible for a permanent visa, they are welcome to apply for one. But such visas typically require long waiting times. See *Visa Bulletin*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/bulletin/bulletin_1360.html (last visited May 19, 2012). Further, if a permanent visa were obtained, the individual would have no need to apply for asylum, as a permanent visa provides legal status and a route to U.S. citizenship under the Immigration and Nationality Act. I.N.A. § 245(a); 8 U.S.C. § 1255(a) (2006).

an application for asylum upon arrival at a U.S. port of entry. All are equally able to apply for asylum.²⁵ Asylum affirms the U.S. commitment to freedom and opportunity, but achieving that desired status can be complicated. U.S. asylum law is a confusing hopscotch of requirements that may be all but incomprehensible to the newly arrived, traumatized foreigner.

A. *The Purpose of Asylum Law*

U.S. immigration law has several purposes, but the purpose of asylum law is “to provide a haven for refugees and asylum-seekers—people who are unable or unwilling to return to their home country because of persecution (or a well-founded fear of persecution) on account of their race, religion, nationality, membership in a particular social group, or political opinions.”²⁶ This policy carefully encapsulates the specific statutory definition of a refugee.²⁷ That definition is carefully insulated from broad humanitarian efforts, such as to provide a better life or eliminate suffering.²⁸ From a practical point of view, this policy conserves finite resources.²⁹ The categories chosen exhibit a belief that discrimination based upon the enumerated categories is somehow more harmful, or at least more worthy of redress, than other suffering.³⁰ Other purposes of U.S. immigration law include promoting family unity, admitting workers to enter the workforce as needed, and promoting diversity.³¹ These other goals are not achieved through asylum policy, but through other avenues of immigration law.

25. I.N.A. § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2006).

26. CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES 6 (2006), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/70xx/doc7051/02-28-immigration.pdf>.

27. See *infra* Part I.B (discussing the statutory standard for refugee status).

28. Eliminating physical suffering is not the end purpose of asylum law. For instance, asylum law does not provide a remedy for those suffering due to natural disasters or extreme poverty. Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 370 (2010).

29. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 987–88 (5th ed. 2009) (“While all victims of persecution would benefit from protection, the resources of the receiving countries are finite.”).

30. *Id.* at 988 (“Congress presumably selected those categories because it believed that persecution, while inherently bad, is even worse when it discriminates on the basis of one of the named classifications or otherwise impedes the free flow of ideas.”).

31. See IMMIGRATION POLICY IN THE UNITED STATES, *supra* note 26, at vii.

B. *The Legal Standard for Asylum*

In order to receive asylum, the applicant must meet the definition of a refugee.³² The United States Code defines a “refugee” as someone who cannot return to his or her 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.”³³

This definition includes several important aspects. The first significant portion of the statutory standard is past or future persecution. The refugee’s inability to return to her home country must stem from either past persecution or a “well-founded fear” of future persecution.³⁴ This provides two routes that can be used separately or in combination to prove eligibility for asylum: (1) a retrospective consideration of past persecution, or (2) a prospective consideration of fear of future persecution. But asylum applicants rarely succeed by using only the first option. Past persecution creates a presumption of a well-founded fear of future persecution.³⁵ If, however, opposing counsel or the immigration judge adequately rebuts the fear of future persecution, then proof of past persecution may be inadequate to obtain asylee status.³⁶ The second route—fear of future persecution—is enough to establish a claim for asylum even without past persecution; that fear, however, must be both subjectively and objectively reasonable.³⁷

32. I.N.A. § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006).

33. I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

34. *Id.* For a discussion of what constitutes persecution, see *infra* text accompanying notes 45–52.

35. 8 C.F.R. § 208.13(b)(1) (2011).

36. The sufficiency of past persecution in such cases becomes a discretionary matter. 8 C.F.R. § 208.13(b)(2) (2011). If the presumption of fear of future persecution has been rebutted, asylum may be denied if changed circumstances make it such that the applicant no longer has a reasonable fear of future persecution. The asylum officer or immigration judge makes this decision “in the exercise of his or her discretion.” *Id.* Thus, in certain cases, asylum may be granted solely on the basis of past persecution. See *Milanouic v. Holder*, 591 F.3d 566 (7th Cir. 2010) (holding that changed country conditions are sufficient to overcome the rebuttable presumption of future persecution established by a demonstration of past persecution, thus justifying denial of an asylum application).

37. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–32 (1987) (noting that Congress established two standards: one requires objective evidence, and the other requires subjective fear). Variances in these standards can be applied. For example, fear of future persecution can be proven by the demonstration of a pattern or practice of persecution. 8 C.F.R. § 208.13(B)(2)(iii) (2006); see, e.g., *Raghunathan v. Holder*, 604 F.3d 371, 377 (7th Cir. 2010) (“A pattern or practice claim starts with the presumption that an alien failed to establish that he was persecuted Despite the absence of this evidence, an alien may prevail by establishing a pattern or practice of persecution But the level of persecution must be extreme”). Minors may also receive special treatment and an amended standard. See *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010) (en banc) (holding that an immigration judge must follow the Department of Homeland Security’s *Guidelines for Children’s Asylum Claims* and the

The second significant aspect of this standard is the requirement that the persecution be “on account of” one of several categories: race, religion, nationality, membership in a particular social group,³⁸ or political opinion.³⁹ The “on account of” standard has been interpreted as requiring evidence that the persecutor was motivated to target the applicant because of the protected ground.⁴⁰ This opaque statement requires an asylum applicant to provide “some evidence”⁴¹ of her persecutor’s motivation—a monumental task.⁴² This standard may be intended to help accomplish the purposes of asylum law. The “on account of” standard screens out applicants who have “merely” suffered harassment,⁴³ rather than persecution deemed worthy of protection. Mere harassment is not necessarily less severe than persecution, but it stems from a non-targeted source and thus does not meet the “on account of” requirement.⁴⁴

The statute itself does not define persecution. The Board of Immigration Appeals (“BIA”) has developed a non-statutory definition of persecution: the “infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”⁴⁵ This definition does little to illuminate the

Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children in dealing with child applicants for asylum). Finally, humanitarian asylum is available in extreme cases even without any fear of future persecution. See *Kone v. Holder*, 596 F.3d 141, 146 (2d Cir. 2010) (“[Humanitarian asylum] is reserved for persecuted aliens whose persecution was particularly severe or who may suffer ‘other serious harm’ if removed.” (quoting 8 C.F.R. § 1208.13(b)(1)(iii))).

38. The term “particular social group” is not defined by statute or regulation, and courts have not developed a consistent definition. Edward L. Carter & Brad Clark, “*Membership in a Particular Social Group*”: *International Journalists and U.S. Asylum Law*, 12 COMM. L. & POL’Y 279, 292 (2007).

39. I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

40. A persecutor’s political motivation, for example, is not relevant; it is only the applicant’s characteristics that are. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (“The ordinary meaning of the phrase ‘persecution on account of . . . political opinion’ in § 101(a)(42) is persecution on account of the *victim’s* political opinion, not the persecutor’s.”).

41. *Id.* at 483 (“Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors’ motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.”).

42. “[P]ersecution obscure[s] the reasons that particular individuals were targeted” Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63, 64 (2001).

43. “To show persecution, an alien must show more than ‘unpleasantness, harassment, and even basic suffering.’” *Barsoum v. Holder*, 617 F.3d 73, 79 (1st Cir. 2010) (quoting *Jorgji v. Mukasey*, 514 F.3d 53, 57 (1st Cir. 2008)). The opinion later finds that even injury associated with death threats “does not necessarily establish . . . persecution.” *Id.* at 79–80.

44. For more discussion regarding the purpose of asylum law and the policy decisions accompanying it, see *supra* Part I.A.

45. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). One critic says this standard is at best “inartfully worded” and at worst “clearly contrary to the statute.” John S. Kane, *Deference as Death Sentence—The Importance of Vigilant Judicial Review of Refugee-Claim Denials*, 15 ANN. SURV. INT’L & COMP. L. 279, 323 (2009).

issue, using only “harm or suffering” in its attempt to elucidate the ambiguous term “persecution.”⁴⁶ Commentators have provided some additional detail in their definitions of persecution. One authoritative scholar defines persecution as “an *action* . . . rather than a condition, such as poverty. Persecution that is *physical* in nature . . . is more likely to ‘count’ as a basis for asylum than mere death threats, harassment, or psychological suffering.”⁴⁷ But persecution undoubtedly includes an entire spectrum of different types of harm.⁴⁸ Case law provides fact-specific examples of what does *not* qualify as persecution: harassment⁴⁹ and generalized conditions of fear⁵⁰ or suffering, such as those stemming from economic poverty⁵¹ or natural disasters,⁵² are consistently ruled inadequate bases for a grant of asylum.

The final significant factor that plays into many asylum cases is credibility.⁵³ Questions of credibility can be raised in response to poor oral

46. For an authoritative analysis of the statutory meaning of persecution, see T. Alexander Aleinikoff, *The Meaning of ‘Persecution’ in United States Asylum Law*, 3 INT’L J. REFUGEE L. 5 (1991).

47. Coutin, *supra* note 42, at 86. Coutin further explores the ways in which the law’s conception of persecution is at odds with actual experiences of persecution. For example, she says persecution is defined “as a discrete temporal event that has a clear beginning and ending . . . as something that happened in the past and is now over.” *Id.* at 87. In reality, most victims experience persecution as an event that is “continually relived and that permanently marks individuals.” *Id.* The statutes and the courts fail to incorporate “[s]uch notions of continual risk, long memory, inextricable connectedness, and institutionalized repression . . .” *Id.* at 87–88.

48. Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, in BASIC IMMIGRATION LAW 2009, at 295, 303 (Practising Law Institute ed., 2009).

49. *Barsoum v. Holder*, 617 F.3d 73, 79 (1st Cir. 2010). The word “harassment” presents only further ambiguity, leading to the likely conclusion that a judge does not decide the case based on whether the suffering is persecution or harassment, but rather decides whether to grant asylum and then applies the appropriate label.

50. Mark R. von Sternberg, *Emerging Bases of “Persecution” in American Refugee Law: Political Opinion and the Dilemma of Neutrality*, 13 SUFFOLK TRANSNAT’L L.J. 1, 3 (1989) (“[A] generalized fear of violence will not support a finding of ‘persecution’ in the statutory sense.”).

51. Economic suffering can be persecution, but the harm “must be so severe that it threatens the life or freedom of the applicant.” *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010).

52. *See In re Sosa Ventura*, 25 I. & N. Dec. 391, 394 (B.I.A. 2010) (explaining that Congress created the alternative relief of Temporary Protected Status because natural disasters “did not establish a basis for claiming persecution,” thus making those seeking protection from the effects of such incidents ineligible for asylum).

53. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003) (“[I]n practice, being deemed credible may be the single biggest substantive hurdle . . .”). All asylum applications filed after May 11, 2005, are governed by new regulations put in place by the REAL ID Act. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. The changes included increased discretion for judges seeking corroboration of claims. This change introduces a serious obstacle for applicants who have difficulty demonstrating their credibility. The credibility determination itself can be made on a “totality of the circumstances” basis, giving the judge greater latitude to make adverse findings. I.N.A. § 208(b)(1)(B)(iii), 8 U.S.C. § 1158 (b)(1)(B)(iii) (2006).

responses during an asylum hearing,⁵⁴ inconsistencies between the written responses in an asylum application and the oral responses given in a hearing,⁵⁵ or a lack of corroborating evidence.⁵⁶ Credibility can be a particular challenge for traumatized clients,⁵⁷ and adverse findings can have a harrowing effect on recovery from trauma.

C. Legal Process

An applicant must apply for asylum within one year of arriving in the United States unless the applicant can meet a stringent standard of changed circumstances.⁵⁸ For fewer than half of all asylum applicants, the process begins with a visit to a lawyer's office.⁵⁹ The government does not publish statistics on the success rate of represented applicants as opposed to unrepresented applicants, but a study spanning fiscal years 1994–2005 reported that represented applicants were significantly more successful than pro se applicants. Claims by pro-se applicants were denied 93 percent of the time, compared to 64 percent for represented clients.⁶⁰ Without legal representation, applicants have little understanding of the overall process and are often unprepared to effectively present their story.⁶¹

The application process begins with the submission of Form I-589, in which the applicant provides his or her personal history and answers short

54. See, e.g., *Espinosa-Cortez v. Att'y Gen.*, 607 F.3d 101, 105 (3d Cir. 2010) (“[The immigration judge] found that Espinosa-Cortez’s testimony concerning the FARC’s pursuit of him to become their informant was credible, but she did not find his testimony concerning his Liberal Party campaign activities to be credible.”).

55. Steven Forester, *Haitian Asylum Advocacy: Questions to Ask Applicants and Notes on Interviewing and Representation*, 10 N.Y.L. SCH. J. HUM. RTS. 351, 413 (1993) (“Officers and judges, months or years after you submit the application, note the discrepancies between it and your client’s live testimony and deny asylum based on omissions and inconsistencies between the two, often on minor points.”).

56. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

57. See *infra* note 156.

58. I.N.A. § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006).

59. Only 43 percent of applicants were represented by an attorney in fiscal year 2010. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEARBOOK G1 (2011) [hereinafter FY 2010 STATISTICAL YEARBOOK], available at <http://www.justice.gov/eoir/statpub/fy10syb.pdf>. The actual number may be slightly higher. The DOJ statistics reflect representation of clients whose cases are decided before an immigration judge. *Id.* Those applications granted by an asylum officer are not factored into this statistic, and given the success of most cases that are not referred to an immigration judge, see *infra* note 72, it might be assumed that such applicants had a somewhat higher than normal rate of representation.

60. *Immigration Judges*, TRAC IMMIGR. (July 31, 2006), <http://trac.syr.edu/immigration/reports/160/>. The study found an overall asylum grant rate of 31 percent for fiscal year 1994 through the first few months of fiscal year 1995. In fiscal year 2010, 51 percent of asylum applications were approved in Immigration Court. See FY 2010 STATISTICAL YEARBOOK, *supra* note 59, at K1.

61. See *infra* note 132.

questions designed to elicit details regarding the alleged persecution.⁶² A lengthy affidavit from the applicant supplements the form and provides a “life story” focused particularly on those details that demonstrate why the applicant meets the standard for asylum.⁶³ Corroborating evidence and supporting documentation accompany the application. The supporting documentation may include affidavits from family and friends, relevant news articles, country conditions, medical records, official documents, personal statements, photographs, or any other probative material.⁶⁴ Through each component, legal representatives seek to demonstrate specific ways the applicant meets each standard for asylum.

An applicant submits the package to the United States Citizenship and Immigration Service, which then contacts the applicant for fingerprinting⁶⁵ and an interview with an asylum officer.⁶⁶ The asylum officer conducts the interview under oath, considering all relevant evidence, including testimony by the applicant and any witnesses.⁶⁷ The asylum officer then determines eligibility for asylum.⁶⁸ If the officer determines that the applicant is both eligible for asylum and passes the discretionary hurdle,⁶⁹ asylum is granted.⁷⁰ Otherwise, the asylum officer refers the case to an immigration judge,⁷¹ who then conducts a hearing to determine removability.⁷² This hearing once again requires testimony and the

62. See DEP’T OF HOMELAND SEC. & U.S. DEP’T OF JUSTICE, FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2010), available at <http://www.uscis.gov/files/form/i-589.pdf>.

63. Stacy Caplow, *Putting the “I” in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 J. LEGAL WRITING INST. 249, 249 (2008) (“[A] written personal statement in affidavit format drafted by a legal representative will be the first exposure the fact finder has to the heart of the claim. That affidavit, like an opening statement, creates a lasting first impression that previews the facts, establishes the case theory, introduces the client, and sets the stage for all subsequent proceedings.” (footnote omitted)).

64. DEP’T OF HOMELAND SEC. & U.S. DEP’T OF JUSTICE, FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: INSTRUCTIONS 8 (2010) [hereinafter FORM I-589 INSTRUCTIONS], available at <http://www.uscis.gov/files/form/i-589instr.pdf> (“You must submit reasonably available corroborative evidence showing (1) the general conditions in the country from which you are seeking asylum, and (2) the specific facts on which you are relying to support your claim.”). Corroborating evidence helps establish the credibility of the applicant. I.N.A. § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2006); see *supra* note 53.

65. I.N.A. § 208(d)(1), 8 U.S.C. § 1158(d)(1) (2006).

66. I.N.A. § 208(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii) (2006).

67. 8 C.F.R. § 208.9(b) (2011).

68. I.N.A. § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C) (2006).

69. Even if an applicant is eligible, the adjudicator still has discretion to either grant or deny asylum. I.N.A. § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2006).

70. 8 C.F.R. § 208.14(b)–(c) (2011).

71. *Id.*

72. I.N.A. § 208(d)(5)(A)(iv), 8 U.S.C. § 1158(d)(5)(A)(iv) (2006). “Removal” is “[t]he expulsion of an alien from the United States.” *Definition of Terms*, DEP’T OF HOMELAND SEC. (Sept.

presentation of all relevant evidence. The immigration judge then decides whether to grant asylum, some other form of relief,⁷³ or to issue an order of removal.⁷⁴

Appellate review of the immigration judge's ruling by the BIA is available.⁷⁵ In FY 2010, only 8 percent of decisions were appealed,⁷⁶ and 79 percent of appellees were represented by an attorney.⁷⁷ Upon appeal to the BIA, attorneys submit briefs, but no further testimony is necessary. The BIA issues an opinion that can then be appealed to the court of appeals.⁷⁸ The Supreme Court reviews very few decisions rendered by the courts of appeals.⁷⁹ For most applicants, the process ends with the asylum officer or the immigration judge.

II. STORY TIME IN COURT: NARRATIVE STRUCTURE

As legal representatives construct an asylum claim, they are writing a story that will determine the fate of their client. This Note explores the way those narratives intersect with the law, the client's well-being, and society as a whole. In order to begin that analysis, this Part considers the

10, 2009), <http://www.dhs.gov/files/statistics/stdfdef.shtm#17>. The term encompasses decisions based on both inadmissibility (grounds for removal arose prior to the immigrant's admission to the United States) and deportability (grounds for removal arose after the immigrant was admitted to the United States). *Id.*

An asylum officer only refers the case to the immigration judge if the applicant does not have an alternative means to stay in the country legally. If the applicant is in the United States on a short-term visa that has not expired, then he or she is not removable until the expiration of the visa. In this situation, the application is simply denied, rather than referred to the immigration judge for the initiation of removal proceedings. 8 C.F.R. § 208.14(c) (2011).

73. One alternative form of relief, for example, is Withholding of Removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006).

74. "The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." I.N.A. § 101(a)(47), 8 U.S.C. § 1101(a)(47) (2006).

75. 8 C.F.R. § 250.53(a) (2011).

76. *See* FY 2010 STATISTICAL YEARBOOK, *supra* note 59, at X1.

77. *Id.* at VI.

78. I.N.A. § 242(a), 8 U.S.C. § 1252(a) (2006). Only the asylum applicant, not the government, can appeal the BIA decision. EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, ASYLUM VARIATIONS IN IMMIGRATION COURT (2007), available at <http://www.justice.gov/eoir/press/07/AsylumVariationsNov07.htm>.

79. In the last four years, the Supreme Court has heard only four cases involving asylum. *See* *Kucana v. Holder*, 130 S. Ct. 827 (2010) (deciding jurisdiction for judicial review of a BIA order refusing to reopen removal proceedings to hear new evidence in support of an asylum claim); *Nken v. Holder*, 129 S. Ct. 1749 (2009) (determining standard for granting a stay of removal pending petition for review of asylum denial); *Negusie v. Holder*, 555 U.S. 511 (2009) (interpreting the persecutor bar to eligibility for asylum); *Gonzales v. Thomas*, 547 U.S. 183 (2006) (remanding for a determination of whether an applicant was eligible for asylum on basis of membership in a particular social group).

basic scholarship on narratives in general, the victim narrative, victim narratives in asylum law, and concerns about the victim narrative.

A. *Narratives: An Overview*

What is a narrative? One researcher defined narrative as “a form in which activities and events are described as having a meaningful and coherent order, imposing on reality a unity which it does not inherently possess.”⁸⁰ Lived experience is an impossibly complex tangle of different points of view, stream-of-consciousness reactions, and limited perception.⁸¹ In telling their stories, individuals seek to take this complicated experience and turn it into a coherent narrative.⁸² The attorney then takes this story, which is often non-chronological and difficult to follow,⁸³ and fits it into the necessary form required for an asylum application.

The difference between this final version of the story and the actual lived experience can sometimes represent a lack of absolute “truth” in narrative.⁸⁴ But narrative truth is the “inescapably imperfect and fluid work of memory, organization and meaning.”⁸⁵ Working within the imperfections of human language and expression, the final product is, in the ideal situation, the best and only truth available to the legal system.⁸⁶

Narrative truth does not, however, always guarantee a believable and credible story. Stories have incredible power,⁸⁷ but that power emerges only after the narrative passes a certain threshold of coherence, fidelity, and conformity to the listener’s perception of the world.⁸⁸ In the case of

80. Marita Eastmond, *Stories as Lived Experience: Narratives in Forced Migration Research*, 20 J. REFUGEE STUD. 248, 250 (2007).

81. See Carol M. Suzuki, *Unpacking Pandora’s Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 260 (2007) (“[P]eople take in sensory fragments and unconsciously store them into a personal narrative. . . . The reconstructive process of autobiographical memory results in a recollection of the past that is subject to distortion. It is not a literal recording of the past.”).

82. See Eastmond, *supra* note 80, at 250 (“Narrative also inevitably reduces experience which, in its vitality and richness, always far exceeds the expression which a person can give it.”).

83. See *infra* note 139.

84. See Eastmond, *supra* note 80, at 260 (“[S]tories are never transparent renditions of reality, but partial and selective versions of it, arising out of social interaction.”).

85. *Id.*

86. An ideal situation assumes honesty and reasonable memory on the part of the client, and narrative fidelity, ethics, and reasonable skill on the part of the advocate.

87. See Johansen, *supra* note 1, at 63.

88. *Id.* at 67 (“To be believable, stories must have narrative coherence and fidelity. . . . [S]tories need to fit into the listener’s understanding of the way the world, or at least the world of the story, acts. But what stories do not have to be is true.”).

traumatic⁸⁹ suffering inflicted by fellow human beings, asylum narratives often diverge from the average listener's comfortable conceptions of their fellow human beings. This causes the listener to search even more deeply for comprehensible motives on the part of the persecutor, a detail that is often obscured from the victim.⁹⁰

Asylum law, of course, does not require acceptance by an "average" listener, but by an immigration judge that is both trained and experienced in assessing such accounts. Immigration judges who are assigned to hear asylum cases are familiar with country conditions and asylum claims,⁹¹ and thus would presumably respond less adversely to the inexplicable nature of human cruelty. But judges are not immune from the power of narrative, in which "[n]arrative coherence and fidelity, not truth, is what makes a story believable."⁹² Success of an asylum claim may therefore turn less on merit than on storytelling skills,⁹³ raising ethical issues and questions about the entire system of asylum adjudication.⁹⁴

A further concern regarding narratives is that they operate not only on a logical level, but also on an emotional one.⁹⁵ The use of feelings in legal advocacy "seems at odds with our traditional concepts of objective, impartial justice," raising "concerns that storytelling is unfairly manipulative."⁹⁶ It is difficult to imagine an asylum claim that avoids the implication of emotion, as the very basis of an asylum claim rests upon the emotion of fear and, usually, pain. But concerns about overly manipulative, emotional accounts may cause decision-makers to adopt a more skeptical approach than would otherwise be expected.⁹⁷

89. "Trauma is the harm produced by a traumatic experience. Traumatic experiences shake the foundations of our beliefs about safety, and shatter our assumptions of trust. . . . [But b]y and large, these are normal responses to abnormal events." Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 168 (2007) (internal quotation marks omitted).

90. See *supra* notes 40–42 and accompanying text.

91. Caplow, *supra* note 63, at 256.

92. Johansen, *supra* note 1, at 64.

93. This is problematic, however, as traumatized applicants are particularly likely to have incoherent or inconsistent stories. While "discrepancies in recall over time do not necessarily indicate lying," Suzuki, *supra* note 81, at 258, adjudicators often interpret them as such. As a result, they tend to issue an adverse credibility finding if there is any divergence in accounts. See *supra* note 55. As will be examined *infra*, the importance of the claim's merit is also diminished by disparities in judicial decision-making.

94. The ethical issue most relevant to use of the victim narrative is selective storytelling. See *infra* text accompanying notes 170–71 and accompanying text.

95. Johansen, *supra* note 1, at 64.

96. *Id.*

97. A related issue is a lack of congruence between the emotion portrayed by the storyteller, or

B. *Creating Characters: Victim Narratives*

The search for narrative coherence and fidelity⁹⁸ leads to the creation of certain formulaic structures that are readily recognizable, and thus effective, narrative forms.⁹⁹ The victim narrative is one of these structures.¹⁰⁰ It focuses on the sources of suffering and death that shape refugees into recognizable victims, thus “paint[ing the refugees] as sympathetic figures for the American audience which receives them.”¹⁰¹ Some scholars divide victim narratives into two general types: innocent victim narratives and victim-as-manipulator narratives.¹⁰² The first evokes pity; the second, suspicion.¹⁰³ Pity leads to a feeling of superiority and characterization of the victim as “other.”¹⁰⁴ Suspicion leads, in asylum cases, to adverse credibility findings.¹⁰⁵ Thus, the attorney and client typically gravitate towards the innocent victim construct in an effort to achieve the legal goal of asylum.

1. *Everyone Is a Victim*

On a very broad level, everyone faces the danger of succumbing to a victim narrative.¹⁰⁶ Going to the doctor or any sort of specialist, particularly for an ongoing or chronic ailment, provides an opportunity for self-identification tied to that particular suffering. In such situations,

asylum applicant, and the emotion inherent within the story. “The cognitive dissonance between hearing a story that should be emotionally evocative and not feeling that reaction because the applicant is perceived as distant leads to a subconscious skepticism in the Immigration Judge’s mind.” Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 269 (2008).

98. Johansen, *supra* note 1, at 63.

99. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 287.

100. In the context of refugee stories, another frequent narrative frame is the search for the American Dream. Sarah J. Steimel, *Refugees as People: The Portrayal of Refugees in American Human Interest Stories*, 23 J. REFUGEE STUD. 219, 219 (2010).

101. *Id.* at 227. Given the other dominant immigrant discourses accompanying discussions of immigration (illegals, usurpers, etc.), this is a relatively positive frame for American society.

102. Rovner, *supra* note 99, at 288. Rovner describes the innocent victim as one of the most common characters, featuring “an image of a person who is not responsible for her condition, who is weak, submissive, defeated, and pitiable.” *Id.* The victim-as-manipulator narrative, on the other hand, reflects the “idea that everyone is somehow trying to claim victimhood, and that doing so ‘reflects a readiness not merely to feel sorry for oneself but to wield one’s resentments as weapons of social advantage and to regard deficiencies as entitlements to society’s deference.’” *Id.* at 293 (quoting CHARLES J. SYKES, *A NATION OF VICTIMS* 12 (1992)).

103. *Id.* at 289, 295.

104. *Id.* at 289.

105. See Kagan, *supra* note 53, at 368.

106. Thanks to Professor Legomsky for this insight.

however, individuals have agency to determine what part of their suffering to share, with whom to share it, and whether to accept the proposed treatment. While the patient may face some power differential—particularly if less well educated or of lower socioeconomic status¹⁰⁷—the doctor has no power to force the client to submit to a proposed course of treatment. The patient retains agency to decide how to address the suffering that has become a part of his story, thus preventing the suffering from supplanting a more complete personal identity.

2. *Every Case Has a Victim*

On a somewhat more narrow level, litigation has the potential to evoke victim narratives in several areas of law, particularly those involving the disabled¹⁰⁸ or the poor.¹⁰⁹ In such cases, legal recovery is often premised upon the creation of a sufficiently victimized plaintiff. The legal system dictates the standards upon which legal goals may be met, and if the plaintiff wants “justice,” it can only be obtained through the use of a victim narrative.¹¹⁰

3. *Every Asylee Is a Victim*

The above-described cases can be differentiated from asylum cases in three crucial ways. First, most disability and poverty litigation is elective. Disability discrimination cases seek to obtain compensation for ill-treatment. While a loss in such cases may be serious on both financial and emotional levels, there are no additional consequences imposed upon the plaintiff. Losing welfare benefits creates a heavy burden on impoverished individuals by removing a primary source of income, but legal action

107. See generally Dean C. Barnlund, *The Mystification of Meaning: Doctor-Patient Encounters*, 51 J. MED. EDUC. 716 (1976).

108. In disability rights cases, the plaintiff must first establish his own disability before proving how he has been harmed. See Rovner, *supra* note 99, at 250–52. The harm is usually discrimination based upon a protected characteristic—the disability. One lawyer said, for example, “I would counsel clients to describe themselves as totally helpless in order to convince the court that they met the statutory definition of disability.” Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 28 (1990). This disability standard echoes that of asylum law and implicates similar concerns. For more about the use of victim narratives in disability rights cases, see Rovner, *supra* note 99.

109. See White, *supra* note 108, at 46 (noting that when working with a client appealing a demand for repayment of welfare benefits, victim identity “was the only strategy for the hearing that the lawyer . . . could imagine for [the client]”).

110. “[T]he price for disabled people of using those statutes to enforce their rights may be to force them to adopt the very stereotypes Congress sought to eradicate in passing the laws.” Rovner, *supra* note 99, at 250.

remains an optional avenue for obtaining relief. Legitimate asylum applicants, on the other hand, face much more severe consequences if they fail to obtain relief: the likelihood of persecution or even death if they are not allowed to remain in the United States.¹¹¹

Second, litigation necessitates the presence of an identifiable adversary. In disability cases, for example, the opponent is the party who has perpetrated the wrong and is being asked to pay.¹¹² Such parties understandably defend themselves out of a sense of self-preservation. In asylum cases, on the other hand, the adversary is the government, which presumably faces no disadvantage upon the success of the asylum applicant.¹¹³ Rather, the government's goal is to question the very suffering that forms the victim identity presented by the asylum applicant.¹¹⁴ This requires that asylum applicants assume the victim identity even more completely, stabilizing their narratives against the inevitable attack of opposing forces. They tell their stories as evidence, rather than in an effort to seek healing.¹¹⁵

Finally, asylum applicants have frequently experienced trauma, a level of harm not frequently suffered by those seeking medical attention or even compensation in disability or welfare-related cases.

These special concerns make asylum victim narratives ripe for analysis and criticism. Such concerns may ring hollow to many. The elaboration of victimhood is intricately interwoven within our system of justice, and there is no rational alternative to the current system for granting asylum. Further exploration of systematic weaknesses is necessary, however, both in efforts to improve the system and to effectively work within it. As this Note examines, the victim narrative as applied in the context of asylum has many important implications for the client, attorney, and society.

For many asylum applicants, staying in the United States is only one of many critical steps in the process of recovery from traumatization. These steps are not entirely within the realm of the legal field;¹¹⁶ neither, however, are they completely divorced from it. Attorneys inevitably

111. See *supra* Part I.B for the asylum standard.

112. Rovner, *supra* note 99, at 285.

113. The only conceivable damage to the government would occur if the asylee utilizes public benefits, which is not in any way relevant to the standard upon which asylum is granted.

114. See *supra* notes 43–52 and accompanying text (regarding the standard for determining whether an applicant has suffered persecution, rather than mere harassment or another unqualified form of suffering).

115. Evert Bloemen et al., *Psychological and Psychiatric Aspects of Recounting Traumatic Events by Asylum Seekers*, in CARE FULL: MEDICO-LEGAL REPORTS AND THE ISTANBUL PROTOCOL IN ASYLUM PROCEDURES 42, 76 (René Bruin et al. eds., 2006).

116. See *infra* notes 211–12 and accompanying text.

encounter the broader life effects of the trauma and must confront these issues in order to construct a convincing narrative. Once embroiled in the client's deeper, ongoing issues, the choice to limit one's involvement to the presentation of the asylum claim appears limited.¹¹⁷ Opportunities abound to work both within traditional legal boundaries and to expand those limited conceptions to address and, when possible, limit the negative effects of the victim narrative. The legal field can only benefit from critical analysis of its role in the lives of clients and in society, taking legal action one step beyond constrained legal goals and into the broader realm of societal change.

C. Narratives in the Asylum Process

For represented asylum applicants, attorneys shape the narratives provided by their clients.¹¹⁸ This process begins in the initial client meeting as the attorney asks questions in order to determine whether the client can meet the standard for asylum. This process continues throughout subsequent meetings as the attorney gathers further details and drafts the affidavit. Throughout this process, the attorney distills the truth from the client's version of his or her story into an acceptable format for the legal system. This requires the construction of narrative truth, which ideally conforms as closely as possible to the client's lived experience. But the final affidavit is a narrative constructed through the joint efforts of both client and attorney, an amalgamation of both voices and points of view.¹¹⁹

Oral testimony in front of an asylum officer or in immigration court supplements the written narratives of the application.¹²⁰ At this point the narrative rests in the hands of the client, who responds to questions by the attorney, the government, and the asylum officer or immigration judge.¹²¹ Attorneys spend substantial time prior to the hearing preparing their

117. For many asylum applicants, an "attorney might be [the] only point of contact with anyone in the United States outside of the underground network of persons in exile that assist one another in survival. . . . [This] can raise many issues which cannot be satisfied by legal means." Ingrid Loreen, *Therapeutic Jurisprudence and the Law School Asylum Clinic*, 17 ST. THOMAS L. REV. 835, 835 (2005).

118. Unrepresented applicants face related problems but with added difficulties, such as language barriers, lack of familiarity with the U.S. legal system, and lack of experience with asylum claims in particular. This Note focuses on represented applicants and the interaction between client, attorney, and the legal system.

119. This concept is recognized in other disciplines like anthropology, but it also applies to lawyers. "In all stories, the personal voice is always interwoven with those of many others, and in narrative analysis it necessarily includes that of the researcher." Eastmond, *supra* note 80, at 261.

120. I.N.A. § 208(d)(5)(A)(ii)-(iv), 8 U.S.C. § 1158(d)(5)(A)(ii)-(iv) (2006).

121. 8 C.F.R. § 1240.70(d) (2011).

clients for the hearing and attempting, as much as possible, to create a coherent and credible narrative in both written and oral versions.¹²² From a legal standpoint, this transition from attorney control to client control over the narrative represents a dangerous intersection where outside observers might detect weaknesses in the case.¹²³ But from a narrative standpoint, and perhaps from a strategic standpoint, the oral narrative provides the client with a greater opportunity to present his or her story and to convince the immigration judge of the merits of the asylum claim.¹²⁴ The hearing before the immigration judge establishes the “known” facts for the record. Any appeals rely on the factual basis established in the hearing and the application, with greater emphasis often placed upon the oral account.¹²⁵

III. THE DARK SIDE OF STORY TIME: CONCERNS WITH THE VICTIM NARRATIVE

The legal standard for asylum most often requires a demonstration of past persecution.¹²⁶ This presents the need for a perfect, or at least adequate, victim.¹²⁷ Thus, an effective legal advocate will shape the client’s story to meet this standard as much as possible within ethical limits. Regardless of the attorney’s misgivings regarding the use of the victim narrative, zealous advocacy requires that the attorney not subvert the client’s goals for some higher ideological cause of usurping the victim narrative.¹²⁸ But narrative theory teaches that the story becomes a piece of reality, forming and shaping attitudes and opinions, and even creating

122. See Parker, *supra* note 89, at 179 (noting that learning how to prepare a client to testify is a critical skill for clinic students representing asylum applicants).

123. Given the many difficulties traumatized clients may have sharing their story, taking their account outside the relatively safe domain of a trusting attorney-client relationship could lead to inconsistencies in the story. See *infra* note 153.

124. “In spite of the constraints of verbal accounts, they are more effective than written statements, ‘reducing claimants’ life histories to dry, objective facts which may or may not capture their reasons for fearing persecution.’” Eastmond, *supra* note 80, at 262 n.4 (quoting PETER SHOWLER, REFUGEE SANDWICH: STORIES OF EXILE AND ASYLUM xvi (2006)).

125. See, e.g., *Khattabi v. I.N.S.*, No. 95-9504, 1995 WL 684371, at *2 (10th Cir. Nov. 17, 1995) (“The BIA did consider [the affidavit containing significant amounts of hearsay], and gave it exactly the weight it merited, which is less weight than it accorded Ms. Youngman’s live testimony.”).

126. I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

127. For a discussion of this tendency in other areas of the law, such as trafficking, see Jayashri Srikanthiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

128. Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379, 414 (2006) (“You are not a bystander offering objective scholarly expertise if you are asking the practitioner to help you subvert or expand the client’s goals in favor of a larger cause.”).

truth since full unprocessed reality cannot be properly conceptualized.¹²⁹ Thus, the created reality of the client's application narrative becomes part of his or her self-identification. It also shapes public opinion, to the extent that the story is shared in a public forum.¹³⁰ Thus, the power of narrative turns the legal process into a vehicle for personal and societal definition. This Part examines the concerns raised by this dynamic for asylum applicants, attorneys, and society at large.

A. Concerns for the Asylum Applicant

Possible concerns for the asylum applicant include re-traumatization, re-victimization, frustration with self-identity, and high anxiety stemming from both the uncertainty of his or her claim and the enormous consequences the decision will have on the future. The following analysis considers these concerns in the context of the chronological process of an asylum claim.

The potential harm to the asylum applicant begins immediately upon formation of the attorney-client relationship. The attorney immediately and unavoidably assumes a position of power over the client, with the authority to set the rules of engagement.¹³¹ The client has little understanding of the necessary requirements to obtain asylum, thus

129. See Eastmond, *supra* note 80, at 260.

130. This inevitably occurs as affirmative asylum applicants continue to live and work in society while their claims are being adjudicated. Defensive asylum applicants, on the other hand, apply for asylum as a relief from removal proceedings and thus may or may not be detained while proceedings take place. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Mar. 10, 2011), <http://www.uscis.gov/asylum> (follow "Obtaining Asylum in the United States" hyperlink). The applicant initiates an affirmative asylum case as an application for a benefit for which she is eligible. *Id.*

Opinions form around both individual interactions with asylees and the collective impact of the universe of stories to which each individual is exposed. See *supra* note 101 and accompanying text.

131. "[The client] had to tell me everything awful that had ever happened to her, and I had all the power to probe her for more information and for more tragic specifics." Loreen, *supra* note 117, at 837; see also Suzuki, *supra* note 81, at 270 ("Trauma survivors may come to see subsequent relationships through the lens of dominance and submission.").

Also consider the following:

The dyadic therapeutic situation itself may be evocative of certain aspects of the torture experience: for example, two people, one of whom is licensed by or a representative of the state or larger society and the other of whom is vulnerable and in need, meeting privately in a room; the questioning of extremely personal matters, a process often experienced as intrusive; the character of the regular sessions being explicitly subject to privacy; the discrepancy in power; and the intensity of emotion usually evoked by the process.

Kenneth S. Pope & Rosa E. Garcia-Peltoniemi, *Responding to Victims of Torture: Clinical Issues, Professional Responsibilities, and Useful Resources*, 22 PROF. PSYCHOL.: RESOURCES & PRAC. 269, 271 (1991).

requiring absolute dependence upon the attorney.¹³² This dependent relationship curtails the asylum applicant's sense of agency, a potentially critical trait in his or her survival thus far.¹³³ Upon the attorney's request, the client must provide endless details regarding highly personal and traumatic events.¹³⁴

Depending on the coping mechanism the client uses to deal with past trauma, attorney-client interactions could be extremely difficult and even psychologically harmful.¹³⁵ The effects of pain and suffering upon language have been well-documented.¹³⁶ Many individuals respond to trauma with silence,¹³⁷ never allowing their lived experience to be transformed into the reality of a narrative. Others may have voiced certain aspects of their experiences, but never across cultural lines.¹³⁸

The attorney's job is to take the client's story, which may be disjointed and non-chronological notwithstanding the obstacle of past trauma,¹³⁹ and turn it into a coherent narrative that fits the framework of a traditional asylum claim. This process of crystallizing a personal life narrative presents additional opportunities for re-victimization. Fitting unique individual experiences into the asylum framework requires a certain homogenization of claims.¹⁴⁰ Asylum law appears to award the "iconic"

132. See Eastmond, *supra* note 80, at 260 ("[W]hile the criteria for judging a story convincing are usually not fully known to the narrator, the price of failure (i.e. deportation) is enormous.")

133. *Id.* at 253 ("Nor are refugees necessarily helpless victims, but rather likely to be people with agency and voice.")

134. One practitioner observed, "but for my being her attorney, and but for the asylum system requiring her to detail every terrible life occurrence to prove her fears of returning home were justified, she would not be telling me any of this." Loreen, *supra* note 117, at 836.

135. See Parker, *supra* note 89, at 175–76 ("The greatest risk to the client is that she will be re-traumatized when she is forced to talk about or remember a traumatic event.")

136. See Eastmond, *supra* note 80, at 258 ("Power may also work on memory and narration in more insidious ways . . . traumatic experiences tend to fragment memory, undermine trust, and inhibit expression."); see also Parker, *supra* note 89, at 170–71 (pointing out that traumatized clients often do not want to talk about traumatic events and may exhibit forgetfulness or avoidance).

137. See Caplow, *supra* note 63, at 266 ("[T]rauma may interfere with recollection or with the ability to talk about the events. . . . [T]he individual simply may lack the language to describe feelings or occurrences even when speaking in their native tongue."); see also Loreen, *supra* note 117, at 839 (noting that torture or trauma "may adversely impact an asylum seeker's ability to cogently present his story."). Eastmond also speaks extensively about the ability of violence to interfere with narrative and language. See Eastmond, *supra* note 80, at 259.

138. See *infra* note 153 and accompanying text.

139. Clients tend to "omit details, go off on tangents, and drift between time frames." Caplow, *supra* note 63, at 266. Trauma exasperates this natural tendency, particularly in cases of post-traumatic stress disorder ("PTSD"). Suzuki, *supra* note 81, at 239 ("PTSD can profoundly affect the ability to tell consistent and detailed stories of past persecution.")

140. Hinger, *supra* note 28, at 367 ("[T]he surest way for applicants and advocates to demonstrate that the asylum standard is met is to put forward a familiar and universalized picture of the persecuted woman, lesbian, or gay man, minimizing variability or complicating factors in the individual case.")

victim whose claim has few complicating elements.¹⁴¹ By essentializing the client's story in this manner, the client's identity becomes intertwined with the persecution, rather than being a complex combination of the client's entire lived experience.¹⁴² The victim narrative becomes a victim identity—an “extremely limiting” role that “leaves no room for any other features of a person's identity.”¹⁴³

The asylum process also attacks those features of an individual's identity that are defined by cultural or national characteristics. The asylum standard requires that persecution not stem from merely personal persecution.¹⁴⁴ Rather, the government must either participate in the persecution, refuse to respond to the persecution, or be unable to stop the persecution.¹⁴⁵ This forces applicants to construct their asylum applications in such a way that their native country becomes an antagonist in their personal narratives.¹⁴⁶ They are thus encouraged to abandon all allegiance to national practices or, often, cultural practices.¹⁴⁷ The alternative is to risk being deemed not credible.

All of these risks to the client occur before the asylum application has even been filed. The process of filing the victim narrative provides additional opportunities for re-victimization. First, the chronic anxiety caused by the wait can aggravate existing feelings of uncertainty and

Practitioners may prefer this method, utilizing the framework to develop successful claims. See Troy E. Elder, *Antagonizing*, 40 U. MIAMI INTER-AM. L. REV. 301, 303 (2009) (“[S]takeholders in the system of refugee admissions likely welcome it: stock settings play a valuable role in narrative production, providing an archetypal location from which the specifics of case storytelling can proceed.”). But this framework also presents challenges to the asylum applicant and his definition of identity.

141. Elder, *supra* note 140, at 312. Asylum law “encourages applicants to narrowly define the basis for their claim and deemphasize complicating elements. . . . Thus, ‘the successful asylum seeker must cast herself as a cultural Other, that is, as someone fleeing from a more primitive culture.’” Hinger, *supra* note 28, at 384 (quoting SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* 92 (1998) (as quoted in Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the “Cultural Hook” for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1578 (2001))).

142. The standardization of claims also paves the way for fraudulent applications. See *infra* note 169. Though not addressed by this Note, adopting a fictional identity for the purposes of remaining in the United States presents a new array of potential identity issues.

143. Rovner, *supra* note 99, at 290. For a discussion regarding the possibility of this reaction to any type of suffering, see *supra* text accompanying notes 106–10.

144. See *supra* note 45.

145. “[S]cene-setting is crucial to the production of a persuasive narrative. . . . But to prove her claim and find safety in a country of refuge, she must, under international refugee law, indict ‘Bogatá’ as a participant in her persecution, be it through governmental indifference or as a willing co-victimizer.” Elder, *supra* note 140, at 302.

146. *Id.* at 303 (“Bogatá itself has been antagonized.”).

147. This force may be related to efforts to integrate immigrants, but it was not constructed with that goal in the mind, and the merits of such a goal are not addressed in this Note.

insecurity. After filing the application, the applicant must wait up to forty-five days for an interview with an asylum officer.¹⁴⁸ If the case is referred to an immigration judge, another long waiting period ensues. During this time, asylum applicants may feel that they are no longer in control of their destiny; their future will once again be shaped by unknown authority figures, echoes of their former persecutors.¹⁴⁹

During the interview with the asylum officer and the hearing with the immigration judge,¹⁵⁰ asylum applicants must once again share intimate details with absolute strangers who will determine their future—another unequal power dynamic that may echo the original trauma. This can be a particular problem for women who have suffered sexual assault and must share the details of that experience in a credible and convincing way with a male officer or judge.¹⁵¹ Cultural taboos regarding male-female conversation or discussion of sexual topics may compound the psychological stress of these situations.¹⁵²

The hearing before the asylum officer or immigration judge proceeds without any efforts to build trust or cultural understanding between the adjudicator and the applicant, in contrast to what ideally occurs in the attorney-client relationship.¹⁵³ Depending on the applicant's cultural

148. I.N.A. § 208(d)(5)(A)(ii), 8 U.S.C. § 1158(d)(5)(A)(ii) (2006).

149. See Eastmond, *supra* note 80, at 260 (“Asylum determination hearings, in their contexts of radical inequality and uncertainty, constitute a profoundly challenging context for refugee stories.” (internal citations omitted)).

150. See *supra* Part I.C for an explanation of the immigration process, including the interview with an asylum officer and the hearing with an immigration judge.

151. One commentator explains:

Women who have been tortured or traumatized face large psychological barriers . . . which prohibit them from testifying consistently and with the appropriate demeanor. Thus, under the REAL ID Act, women asylum seekers, particularly victims of rape or sexual assault, are at risk of being erroneously deemed not credible.

Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 640 (2007).

The problem is exasperated by the disproportionately high number of male judges. One study found seventy-eight female judges as compared to 169 male judges. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 342 n.78 (2007). At the agency level, the disparity was smaller but still present: of immigration officers who decided fifty or more asylum cases, 264 were male and 257 were female. *Id.* at 343.

152. Melloy, *supra* note 151, at 641. Thanks to Professor Legomsky for this insight.

153. Immigration judges are presumed to have cultural understanding. Caplow, *supra* note 63, at 256. But this understanding and training is still subject to misleading assumptions:

Asylum law, like liberal legal theory, presumes the existence of a generic or universal personhood that is essentially devoid of cultural, class, ethnic, or other content. Thus, the judge who assesses an asylum application and the individual asylum applicant are presumed to share basic assumptions about risk, reality, and fear.

Coutin, *supra* note 42, at 83. The existence of presumptions and expectations of this sort is particularly relevant to determinations of credibility and reasonableness.

competence and the attorney's preparation of the client, the applicant may still have a great deal of uncertainty regarding the elements necessary to obtain asylum.¹⁵⁴ The asylum applicant's portrayal of facts and circumstances must not only be accurate, but narratively recognizable.¹⁵⁵ Without the benefit of reflection and deliberation that accompanies written narratives, clients must voice their most traumatic experiences in a convincing and accurate way, which can be particularly challenging for traumatized individuals.¹⁵⁶

Even when the court grants asylum, the asylee may have lingering effects of re-victimization. The asylee may find it difficult to shed the victim narrative after it has been reinforced during court-mandated story time.¹⁵⁷ The creation of a victim identity that persists beyond the asylum claim may be a serious side effect of the victim narrative. Indeed, the asylum system almost requires commitment to the victim identity, as asylum could theoretically be revoked if country conditions change such that the fear of future persecution is no longer warranted.¹⁵⁸ The legal standard thus creates a strategic ban on shedding the victim identity, even once asylum is officially obtained. Certain strategies, however, may help to combat this effect; for example, work authorization is available both for asylees and for some asylum applicants.¹⁵⁹ Employment allows the applicant to obtain a professional identity, to exercise agency, and to begin the process of creating an "American" identity.¹⁶⁰

Some clients may not see the victim narrative as problematic, instead adopting that identity more or less voluntarily. For example, the victim

154. See Eastmond, *supra* note 80, at 260.

155. Johansen explains:

To be believable, stories must have narrative coherence and fidelity Simply put, stories need to fit into the listener's understanding of the way the world, or at least the world of the story, acts. But what stories do not have to be is true. Fiction can be believable, and the truth can seem implausible, or downright impossible.

Johansen, *supra* note 1, at 67.

156. Parker, *supra* note 89, at 177 ("Because credible testimony is the primary basis for deciding some cases, such as political asylum cases, when a traumatized client has difficulty expressing emotion it may affect the outcome of the case."); see also Eastmond, *supra* note 80, at 259 (explaining possible effects of trauma, such as flat affect and monotony).

157. See *supra* text accompanying notes 142–43 (discussing the totalizing effect of narratives).

158. I.N.A. § 208(c)(2), 8 U.S.C. § 1158(c)(2) (2006); see also Carter & Clark, *supra* note 38, at 286. Such instances, however, are rare in practice. Asylees are eligible to apply for status as a legal permanent resident ("LPR") one year after receiving asylum. I.N.A. § 209(b), 8 U.S.C. § 1159(b) (2006). Because of the unlikely but real possibility of losing asylee status, nearly all apply for and receive LPR status at the one-year mark.

159. I.N.A. § 209(b), 8 U.S.C. § 1159(b) (2006).

160. See *infra* note 189 (regarding the potential problems with attempts by refugees and asylees to assume an American identity).

story can serve as a remembrance that must be protected as a form of community identity or as a source of individual advantage.¹⁶¹ Pity is often preferred to suspicion, and for many immigrants in today's society, they have only these limited options from which to choose.¹⁶² The rest of this Note, however, focuses on the negative effects of such an adoption.

B. Concerns for the Attorney

The attorney, too, can be harmed by the persistence of the victim narrative throughout the asylum process. These concerns include feelings of insufficiency, communication barriers, burnout, secondary trauma, and ethical dilemmas.

Many of the asylum applicant's potential problems stem from a lack of alternative sources of assistance. This presents the first major obstacle to the legal representative of the asylum applicant. Asylum applicants ideally find legal assistance within one year of arrival in the United States,¹⁶³ allowing little time to find a support system and to begin dealing with trauma. An applicant then comes to an attorney seeking to turn these traumatic experiences into a source of hope for the future. In such a situation, the attorney may be faced with the client's need for more than just legal assistance.¹⁶⁴ Lawyers are not traditionally trained as therapists,¹⁶⁵ but they must still be able to build trust with their client in order to effectively assemble the asylum application. This difficult situation can lead to feelings of insufficiency on the part of the attorney, who may feel capable in legal matters but not necessarily capable in addressing personal and emotional issues. While this problem is common to all attorneys of traumatized clients, it is particularly acute in asylum situations due to the high stakes of the case and the attorney's role in crafting the client's narrative.

161. Eastmond, *supra* note 80.

162. Rovner, *supra* note 99, at 289, 295.

163. This is because of the one-year standard for filing of asylum claims; an applicant must show changed conditions if filing more than one year after arrival in the United States. I.N.A. § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006).

164. Loreen, *supra* note 117, at 835 (“[S]uch a client can raise many issues which cannot be satisfied by legal means.”); *see also* Parker, *supra* note 89, at 169 (“The client may begin to approach the meetings as counseling sessions because the law student has asked for information about the traumatic events for purposes of preparing a declaration. . . . The law student may then assume or desire to assume the role of social worker and counselor.”).

165. Loreen, *supra* note 117, at 843 (“[L]awyers lack an understanding of when or how to comfort a client mourning a lost relationship or contemplating death.”).

The attorney faces additional problems in the area of communication, especially when a language barrier exists. The problem is sometimes more pronounced in cases in which the attorney and client must work together to construct a detailed narrative, such as asylum.¹⁶⁶ Applicants may have difficulty verbalizing their trauma,¹⁶⁷ and these issues are multiplied by the necessity of yet another stranger to interpret the client's story. Confidentiality can be a further concern with interpreters, who typically live in the same ethnic and geographic community as the client.¹⁶⁸

Communication difficulties lend themselves to ethical quandaries. When the story is unclear, there are gaps, or the timing does not make sense, communication failures can provide the attorney with an excuse to selectively hear or to shape the narrative in such a way that it is more likely to be successful. To some degree, this is the representative's duty—to take the unpolished expression of lived experiences and turn it into a logical narrative that meets, whenever possible, the legal standard for asylum. But a lack of clarity on the client's part¹⁶⁹ may lead the attorney to take liberty with the story or to choose whichever version of an inconsistent story¹⁷⁰ best fits the legal goal.¹⁷¹ More subtly, it presents the attorney with the difficult task of maintaining the individual nature of the client's experience while at the same time molding that experience into an appropriate form that complies with requirements of asylum law.¹⁷²

The attorney also must beware of the potential for secondary trauma—a collection of adverse reactions triggered by empathetic involvement with

166. "Culture influences the way one processes the world and also the way one explains the world to others." *Id.* at 840.

167. *See supra* note 137.

168. I have worked with two clients who refused to work with interpreters from their own country. We had to use an interpreter from a different country despite the differences in dialect because confidentiality was so difficult to attain within the ethnic community in which the clients lived.

169. This lack of clarity is likely due to trauma in the majority of cases, but fraudulent asylum claims present a different sort of challenge. While most likely comprising only a small percentage of all asylum cases, the Dominique Strauss-Kahn scandal brought the fraud issue a great deal of media attention. *See, e.g.,* Sam Dolnick, *Asylum Ploys Play Off News To Open Door*, N.Y. TIMES, July 12, 2011, at A1.

170. While it may be tempting for the attorney to choose the best version for the written application and affidavit, this will likely create a weaker case if the client appears inconsistent and incredible when forced to provide an oral account. *See supra* note 55.

171. This is in some ways addressed by the legal standard, which requires ample corroboration of most aspects of an asylum claim. "Ethical issues are acute when dealing with individuals who are not in a position to control the fate of their stories . . ." Eastmond, *supra* note 80, at 261.

172. "If we leave out too much, our story becomes misleading." Johansen, *supra* note 1, at 64. Johansen continues, explaining how easy it is for "storytellers to cross the line from effective and appropriate persuasion to inappropriate manipulation." *Id.*

suffering individuals.¹⁷³ Burnout often follows.¹⁷⁴ Compassion fatigue is another side effect of secondary trauma,¹⁷⁵ leading to a decreased ability to react empathetically to suffering individuals.¹⁷⁶ These are well-recognized concerns in therapeutic communities, but many legal practitioners fail to account for such effects when interacting with clients who share traumatizing experiences. Burnout and compassion fatigue not only affect the lawyer but also may compromise the adequate fulfillment of representational duties toward the client. Burnout will interfere with the attorney's ability to engage in the many strategies available to counteract the victim narrative, compounding the systemic harm facing applicants.¹⁷⁷

C. Concerns for Society

The role of narrative in asylum law has the potential to raise serious concerns for society as a whole. Such issues may seem more attenuated than the very real and immediate threats facing the client, and the similarly real and immediate concerns of the attorney. The power of narratives, however, is their ability to convey meaning beyond the place and moment of telling, projecting their message to a much broader audience. Asylum applicants live in society while their claims are being adjudicated,¹⁷⁸ and those granted asylum carry their story with them as they become U.S. residents and eventually citizens. Beyond these individual narrative transporters, asylum stories are presented to society through other mediums as well, such as advocacy groups and the media. All of these

173. Pope & Garcia-Peltoniemi, *supra* note 131, at 271 (“They may experience depression, anxiety, or symptoms associated with posttraumatic stress disorder (e.g., intrusive thoughts, nightmares, unbidden images).”).

174. Melissa Radey & Charles R. Figley, *The Social Psychology of Compassion*, 35 CLINICAL SOC. WORK J. 207, 207 (2007) (“Social workers take on their clients’ problems leading to mental, physical, and emotional exhaustion and feelings of hopelessness and disconnection from others.”).

175. *Id.* (“Compassion fatigue is a direct result of exposure to client suffering and complicated by a lack of support in the workplace and at home.”). Radey and Figley continue, noting that “[f]our major factors appear to contribute to compassion fatigue: poor self-care, previous unresolved trauma, inability or refusal to control work stressors, and a lack of satisfaction for the work.” *Id.*

176. Some legal scholarship does examine the effect of compassion fatigue and secondary trauma on attorneys, usually in the context of specific legal disciplines. *See, e.g.*, Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965 (2007); Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, A.B.A. ENEWSLETTER, Winter 2008, http://www.americanbar.org/newsletter/publications/cdv_enewsletter_home/expertLevin.html.

177. Radey & Figley, *supra* note 174, at 213 (“[S]elf-care should be emphasized as critical not only for the success and health of the practitioner, but, also, the success of clients.”).

178. With the exception of those in detention, which usually requires a defensive asylum application. *See supra* note 130 (explaining defensive asylum applications).

outlets provide opportunities for the victim narrative to influence society, for better or worse.

Cultural essentialism has been identified as one of the primary dangers of the victim narrative for society.¹⁷⁹ The victim narrative is one of the primary forms in which the public encounters refugee stories.¹⁸⁰ While this frame paints refugees in a relatively positive light,¹⁸¹ particularly in comparison to their “illegal” immigrant counterparts, it prevents society from gaining a true understanding of refugees as individuals, rather than as a group.¹⁸² The asylum applicant risks tying identity to suffering,¹⁸³ and society risks losing a well-rounded view of its members, instead creating stereotypes. This perception then erroneously perpetuates the view that refugees lack agency, potentially leading to paternalistic policy measures.¹⁸⁴

This essentialization goes beyond placing the individuals into an inescapable group category; it also condemns entire countries to “enemy” status. In order to gain refugee status, the statutory standard requires

179.

When news accounts like those of refugee resettlement perpetuate the stereotype of Third World citizens as victim subjects . . . such portrayals of victim subjects encourage cultural essentialism. Refugees are portrayed as victims of their culture, which “reinforces stereotyped and racist representations of their culture and privileges the culture of the West.” Thus refugees are characterized only by the horrors of the national or international conflicts which they fled, not by the strong religious, cultural or national traditions of the lands from which they came. This perpetuates a sense of American superiority and refugee cultural inferiority, even in these seemingly positive depictions of refugees.

Steimel, *supra* note 100, at 232 (quoting Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002)).

180. *Id.* at 226 (“[T]he victim story clearly dominates as the preferred narrative for refugees settling in the US [sic].”).

181. See *supra* text accompanying note 101 (noting the ability of victimhood to induce a reaction of pity). Not all react positively to victim narratives. Rather, many perceive asylum applicants as “illegals” who want to monopolize the country’s resources. This attitude is particularly prevalent in Europe. For a study of public opinion in England, see NISSA FINNEY & ESME PEACH, ATTITUDES TOWARDS ASYLUM SEEKERS, REFUGEES AND OTHER IMMIGRANTS 21 (2004), available at http://www.icar.org.uk/asylum_icar_report.pdf (“Polls and anecdotal accounts certainly evidence a great deal of hostility towards asylum seekers in Britain.”). This attitude is memorialized in the 2009 fictional work *Little Bee*. CHRIS CLEAVE, LITTLE BEE (2009).

182. See Eastmond, *supra* note 80, at 253 (warning of the “notion of ‘the refugee experience’ as a uniform condition and of the tendency to think of refugees as an undifferentiated, essentialized and universal category quite irrespective of the different historical and political conditions of displacement and of the individual differences between people who become refugees”).

183. See *supra* notes 142–43 and accompanying text.

184. See Steimel, *supra* note 100, at 232 (“[A]t a policy level . . . the victim subject portrayal of Third World citizens invites protectionist remedies and responses that are not necessarily in the victims’ interests . . . [which] strips refugees of agency and hinders refugee empowerment.”).

persecution somehow aided, or at least not stopped, by the government.¹⁸⁵ Both the legal process for asylum applicants and the popular portrayal of refugees in the media¹⁸⁶ reinforce the idea that the native country is evil and perhaps irredeemable. Refugees and asylees lose their claim to a cultural identity if it is connected to the country that persecuted them.¹⁸⁷ Society, then, also loses that cultural heritage as it shuns the “evil oppressor.”¹⁸⁸ This can place upon asylees the burden of seeking an American identity, which is most often achieved through financial success—an unlikely prospect for a newly arrived, traumatized individual with no previous ties to the United States.¹⁸⁹

IV. REFORMING STORY TIME: SUGGESTIONS FOR AMELIORATING THE EFFECTS OF THE VICTIM NARRATIVE

Faced with these monumental philosophies of grief, mourning, and narrative, how are everyday practitioners—attorneys and judges—supposed to approach their duty? Our legal system does not, and most likely never will, accept that truth is unattainable and that victimhood is a condition that cannot be fully expressed. Congress and the courts will continue to offer practical standards that must be attained in order to receive legal protection. Those standards exclude many who have suffered greatly. Those individuals may be deemed not credible as a result of their inability to effectively tell their stories. They may be forced to return to situations where their suffering will resume and they may even be killed.¹⁹⁰ But the United States has practical goals and has set policies intended to achieve those goals. How, then, can we work within this framework to see that justice is done?

185. Regarding the standard for persecution and government involvement, see *supra* text accompanying note 45.

186. See generally Steimel, *supra* note 100.

187. See Elder, *supra* note 140, at 302.

188. This deprives society of the cultural appreciation that can be gained from the diversity of refugee experiences. Even statutory asylum law recognizes the benefit of diversity, allocating 55,000 visas each year to immigrants from countries that are underrepresented in the United States. I.N.A. § 201(e), 8 U.S.C. § 1151(e) (2006). See *supra* Part I.A (discussing the goals of asylum law and immigration regulations in general).

189. Steimel, *supra* note 100, at 233 (“[T]he very materialist assumptions of the [American] dream cast refugees as consumers who are not fully American if they cannot consume their way to the idealized American lifestyle.”).

190. Examples of such dire consequences abound. See, e.g., Michele A. Voss, *Young and Marked for Death: Expanding the Definition of “Particular Social Group” in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235 (2005).

If the legal structure of asylum adjudication cannot be changed (which is debatable¹⁹¹), it becomes the attorney's role to facilitate this impossible telling. Inherent in this approach are risks both to the client being forced to tell his or her story and to the attorney who must construct an honest, coherent, and logical narrative out of the likely disjunctive account relayed by the client. But practitioners have been seeking out workable relationships and solutions since asylum law began, and a number of solutions have been developed. The following Part outlines several suggestions, first for asylum applicants and attorneys, and then for society. These practical steps have the potential to ameliorate the negative effects of the victim narrative. This Part concludes with a discussion of possible statutory reforms.

A. *Suggestions for Asylum Applicants and Attorneys*

The attorney is the primary strategist in developing an approach that will minimize the effects of the victim narrative on his or her client. In setting the scene for story time, the attorney can take several steps to minimize the potential re-traumatization associated with the asylum process. These steps are best described by scholars working in the fields of Therapeutic Jurisprudence and client-centered lawyering. In addition to these attorney-focused strategies, this part will also examine a counter-intuitive suggestion for minimizing the victim narrative: expanding story time for a more complete telling of client biography.

1. *Applied Theoretical Approaches*

Therapeutic Jurisprudence involves recognizing the consequences of the law and using the law to serve positive purposes for both clients and attorneys.¹⁹² Client-centered lawyering involves giving clients agency¹⁹³ and allowing them to be part of the solution that addresses their needs.¹⁹⁴ Both of these approaches look beyond the formalistic confines of the law to serve holistic needs of the client, and, in the case of Therapeutic Jurisprudence, the attorney as well.

191. For examples of possibilities for systemic change, see *infra* Part IV.C.

192. Loreen, *supra* note 117, at 846 (“Therapeutic Jurisprudence emphasizes the ability of the law to serve both clients and attorneys as a therapeutic agent by addressing law’s therapeutic and anti-therapeutic consequences. . . . [It is] a holistic approach to lawyering . . .”).

193. Thus preventing the stripping of the applicant’s agency. See *supra* note 133.

194. Haynes, *supra* note 128.

The strategies associated with these movements can be employed to counteract the concerns of the victim narrative, particularly in the process of interviewing clients and constructing the affidavit. Interview questions must avoid further traumatization and instead help the client recount their experiences “in a truthful, consistent, and detailed way . . . that avoid[s] unnecessary mental anguish.”¹⁹⁵ This is a tall order. Some strategies for effectively accomplishing this task include beginning every session with a discussion of goals, taking frequent breaks if needed, avoiding lengthy sessions due to the emotional drain, and taking steps to lower anxiety.¹⁹⁶ Specific interview techniques include focusing on sensory perceptions, permitting the client to relate details in non-chronological order,¹⁹⁷ creating a timeline,¹⁹⁸ and allowing the client to communicate through written means, perhaps by writing in a diary.¹⁹⁹ Additionally, commentators suggest avoiding questions that could stimulate false memories, particularly when seeking details.²⁰⁰ Finally, practitioners should address the power dynamic inherent in the attorney-client relationship and create safe boundaries so the client both feels and actually is protected. Means of accomplishing this dynamic could include using more neutral meeting spaces, sitting face-to-face instead of across a desk, or giving the client some control over the course of the meeting.²⁰¹

These strategies address many of the ethical issues associated with narrative construction. Attorneys, however, must always remain aware of the difficulty of balancing the need for detail with the greater likelihood for inconsistencies that such detail elicits.²⁰² The attorney must therefore weigh the need for zealous advocacy,²⁰³ which in the case of asylum requires the construction of another individual’s personal narrative, with

195. Suzuki, *supra* note 81, at 239.

196. *Id.* at 268–72.

197. *Id.* at 274 (“Varying the order of information retrieval can also assist an asylum applicant in recalling other details.”).

198. Practitioners must, however, keep in mind that in many cultures individuals are unlikely to know the exact date or time. See Forester, *supra* note 55, at 413 (providing the example of Haitians who do not wear watches or know the date of events).

199. *Id.* at 273–77.

200. Kagan, *supra* note 53, at 394.

201. Thanks to Suzanne Brown, a practitioner of client-centered lawyering, who expressed some of these ideas.

202. See Suzuki, *supra* note 81, at 278 (“[T]he more details he gives, the more chances arise for him to be inconsistent. Inconsistencies in peripheral details may add up to a story lacking credibility in the eyes of the factfinder. However, testimony that is consistent but lacking in detail may also be viewed as not credible.”).

203. MODEL RULES OF PROF’L CONDUCT Preamble ¶ 2 (2008).

the absolute requirement of honesty.²⁰⁴ Open conversations with the client can help the attorney express both this difficulty and the client's responsibility for honesty. But, as discussed, inconsistencies are not necessarily indicative of dishonesty,²⁰⁵ so the attorney must take further care not to alienate a client by suspecting ill motives rather than the memory inconsistencies common to all and even more frequently found in traumatized individuals.²⁰⁶

Attorneys dealing with traumatic cases must also take specific steps to avoid burnout. Many of the suggestions for practitioners are directed toward those providing therapy, rather than legal aid. But the advice is often equally applicable. For example, the perennial suggestion of adequate personal self-care (eating right, sleeping, exercising) certainly applies across professional boundaries.²⁰⁷ Personal self-care can be combined with organizational self-care, which includes limiting and diversifying difficult caseloads to create an environment in which burnout is less likely to occur.²⁰⁸

Other suggestions call for personal self-knowledge and positive thinking. One clinician suggests, "[i]n preventing compassion fatigue, clinicians should detect and reinforce the sense of satisfaction of working with the suffering."²⁰⁹ In addition, "energy from compassion stress can lead instead to a sense of flourishing. To flourish, social workers experience the joy of helping others and find satisfaction with their work."²¹⁰ This is a highly personalized quest, but it is essential for all who work with traumatized individuals.

Finally, just as attorneys must seek assistance when necessary to deal with the effects of their caseloads, they also must recognize when the client needs more than just legal services. Some asylum applicants may shun the idea of mental health services because of cultural taboos.²¹¹ But the availability of free or low-cost services is a way for many attorneys to

204. *Id.* R. 8.4(c) (requiring that a lawyer shall not engage in any dishonest conduct).

205. *See supra* note 93.

206. *See supra* notes 136–37 and accompanying text (discussing the effect of trauma on a victim's ability to accurately recall traumatic events).

207. Suzuki, *supra* note 81, at 210.

208. *Id.*

209. *See* Radey & Figley, *supra* note 174, at 207.

210. *Id.* at 208. Lawyers may need to approach this strategy differently from therapists. Lawyers, for example, have an objective measure of success in the disposition of the asylum application. Thus, lawyers may need additional strategies to cope with those situations in which an application is denied.

211. *See* Loes H. M. van Willigen, *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims*, 19 J. REFUGEE STUD. 133 (2006) (reviewing *BROKEN SPIRITS: THE TREATMENT OF TRAUMATIZED ASYLUM SEEKERS, REFUGEES, WAR AND TORTURE VICTIMS* (John P. Wilson & Boris Drozdek eds., 2004)).

establish appropriate boundaries in the attorney-client relationship and at the same time ensure that the client's holistic needs are met. In some cities, this is accomplished through collaborative partnerships between non-profit legal organizations, mental health providers, and case management services.²¹² Access to such services gives asylum applicants a forum in which they can seek help in dealing with the effects of the victim narrative in which they are immersed during the asylum process.

2. *Expanding Story Time*

Many asylum applicants also benefit from having the opportunity to tell their story, however difficult it may be for the lawyer to listen.²¹³ Silence is a frequent coping mechanism for those who have suffered trauma.²¹⁴ But many individuals find that an oral narrative serves many purposes in the recovery process. First, the telling may be a “reaffirmation of self”—a way of individualizing an experience that has been or will be essentialized.²¹⁵ Second, many find that voicing their story is a way of bearing witness to loss and injustice, with the hope that such testimony will bring about awareness and change.²¹⁶ But this altruistic goal occasionally conflicts with the personal need for healing as the act of bearing witness can be painful, particularly when done in a public forum.²¹⁷

212. During the summer of 2010, I worked with such a collaborative organized under Care Access for New Americans. The collaborative, located in St. Louis, received a grant through which clients were shared among four agencies providing legal services, mental health services, case management, and English tutoring.

213. See Pope & Garcia-Peltoniemi, *supra* note 131, at 273 (“Personal testimony may be an exceptionally healing experience for many victims of torture.”).

214. Eastmond, *supra* note 80, at 259 (“Some survivors remain silent because they need to dissociate themselves from painful memories or fear that their stories will not be believed, or be bearable to the listener” (internal citation omitted)).

215. *Id.* at 254. Of course, while this serves the purpose of de-essentializing the experience, it certainly does not help the client move beyond their victim narrative. But the victim narrative is part of who the asylum applicant is; the goal is not to strip applicants of that facet of their experience but to minimize its harmful effects. Telling and coping with that narrative is often the first step towards recovery. “Thus, stories are important sites not only for negotiating what has happened and what it means, but also for seeking ways of going forward.” *Id.* at 251.

216. *Id.* at 258 (“[Some] men and women wanted their lives to bear witness to the wrongs that they had experienced and to the injustices of history.” (quoting Vieda Skultans, *Weaving New Lives from an Old Fleece: Gender and Ethnicity in Latvian Narrative*, in ETHNICITY, GENDER, AND SOCIAL CHANGE 169 (Rohit Barot et al. eds., 1999)).

217. For many who choose to tell their story, “it [is] a struggle between the moral imperative not to forget and the extreme pain of remembering.” *Id.* at 259.

Nonetheless, public tellings in particular can help establish a community identity.²¹⁸ The danger of cultural stripping associated with antagonizing the home country makes this aspect of national identity especially important for many displaced individuals.²¹⁹ When the narrative is shared with others in the community, it becomes a source of hope and inner strength.²²⁰

Some asylum applicants have no community once displaced. Others have extremely sensitive details that cannot be shared with the public, perhaps because of ongoing security concerns, family and friends left behind,²²¹ or legal strategy.²²² For these individuals, a feeling of “exile” might make this inability to tell their story a further impediment to recovery.²²³ In such cases, telling the story to an attorney and government adjudicator may be a way to accomplish healing, rather than further harm, particularly when properly facilitated by the listeners.

Many of these suggestions center on ways in which a narrative of suffering can be useful for an asylum applicant. There are, however, many difficulties in the telling of a victim narrative. And even when it can be therapeutic, the attorney’s office is not always the place where that healing will take place. But for some clients, there is a need to tell more than just the victim narrative. Placing suffering in the context of an entire life story can be highly beneficial. For some asylum applicants, having a safe setting in which to wax eloquent about unrelated details and other important life events can help them to narrow their focus to the persecution in the asylum claim itself.²²⁴ The need to present a perfect victim in the asylum application conflicts with the desire to share an extended life story with all of its messy details. But allowing a more extended telling in an unrelated

218. “When testimony is communal in nature, it can help counter the victims’ sense of being overwhelmed by a powerful communal force.” Pope & Garcia-Peltoniemi, *supra* note 131, at 273.

219. Eastmond, *supra* note 80, at 258 (“[T]heir stories . . . served to forge a sense of collective identity and survival as a nation . . .”).

220. *Id.* at 251 (“Story-telling in itself, as a way for individuals and communities to remember, bear witness, or seek to restore continuity and identity, can be a symbolic resource enlisted to alleviate suffering and change their situation.”).

221. I worked with such a client during a summer internship. Although she had already received asylum, some of her family members had not yet reached safety. As a result, confidentiality remained of the utmost importance.

222. Attorneys should also be aware of the potential danger of voiding the attorney-client privilege with public narrative tellings.

223. Eastmond, *supra* note 80, at 252 (“Suffering became meaningless as it became socially invisible and, instead of being a source of self-esteem and agency, it subsequently manifested as illness and depression.”).

224. *Id.*

setting can aid the client who wishes to avoid the need to limit identity to suffering in the legal storybook.

Beyond modifications in forum and format for the telling of lived experience, some clients might benefit from efforts at redefinition. For those denied asylum, this will be a self-initiated and necessary process for survival—redefining their identity in a manner that will not attract persecution. For those granted asylum, the government and society at large will benefit from providing such opportunities. The citizenship process, for example, provides opportunities for asylees to find a new identity in American citizenship.²²⁵

B. Strategies for Society

Ideas for galvanizing society as a whole to take steps to prevent the unrecognized harm of essentialization and stereotyping clearly falls into the realm of academic palaver. But certain key players within society do have a central role in shaping public opinion and relaying victim narratives to a wider audience. Journalists are one source through which the stories are publicized,²²⁶ many non-governmental organizations and religious organizations also play a role.²²⁷ For these professionals, recognition of the problems with victim narratives can pave the way for the use of coping strategies that limit the damage of such limited narratives and instead open the way to a more diverse discourse.

The first strategy is straightforward: do not stop with the victim narrative. Seek out the entire story. Asylum applicants may be encouraged to share a more complete life history, including details of their life successes and accomplishments, as a way of de-essentializing their own experience.²²⁸ Listeners can then take the suffering, which is perhaps the “hook” in the story, and place it in a more complex context that better accounts for the varied life circumstances that describe the individual as a whole. This process forces the listener to move beyond stereotypes and to reflect on an entire individual instead of a character-type. It also helps society recognize the potential contributions of refugees and asylees to

225. See Geri Smyth et al., *Introduction: Critical Reflections on Refugee Integration: Lessons from International Perspectives*, 23 J. REFUGEE STUD. 411, 412 (2010) (“The role assigned to citizenship in the integration process also raises issues pertaining to identity and belonging . . .”).

226. See generally Steimel, *supra* note 100.

227. See, e.g., JUST. FOR IMMIGRANTS, <http://www.justiceformigrants.org> (last visited May 19, 2012); AM. IMMIGR. COUNCIL, <http://www.americanimmigrationcouncil.org> (last visited May 19, 2012); FED’N FOR AM. IMMIGR. REFORM, <http://www.fairus.org> (last visited May 19, 2012).

228. See *supra* text accompanying note 179.

their new homelands: benefiting, rather than burdening, society with their presence.²²⁹

Such expanded stories are necessarily less “catchy”—they cannot be told in a paragraph. Victim narratives are effective because they fit within a recognized narrative form that appeals to a listener’s sense of form and order.²³⁰ But a complete story “can promote a greater appreciation of the diversity of experience involved in forced migration, against universalizing and stereotypical descriptions of what it means to be a ‘refugee’.”²³¹ In the broader effort to subvert stereotypes, such efforts may even humanize political discourses concerning immigration as a whole by introducing a greater understanding of individualized experiences and social forces in place of stock characters and political sound bites.

In addition to expanding individual stories, society needs to hear *more* stories. This serves to broaden the stereotype, rather than narrowing it to the experiences of a single individual: “[f]rom personal accounts we may also glean the diversity behind over-generalized notions of ‘the refugee experience’.”²³² Recognizing diversity is not a strong point of asylum law, making it unlikely that society will spontaneously develop such an understanding. But by hearing a broad range of experiences and stories, members of society can see asylees as a diverse group, perhaps eventually encouraging changes in the legal system from the ground up.

C. Statutory Reforms

Political realities make comprehensive reform elusive,²³³ heightening the importance of the practical suggestions discussed *infra*. Nonetheless, change that reduces the harmful effects to applicants and still preserves the

229. Thanks to Professor Legomsky for this insight.

230. See Eastmond, *supra* note 80, at 250.

231. *Id.* at 253.

232. *Id.* at 249.

233. The Republican Party, traditionally known for more restrictionist immigration sentiments, gained control of the House of Representatives in the 2010 elections. Nonetheless, President Obama continued to call for comprehensive immigration reform in his 2011 State of the Union Address, leaving some activists with hope that change might still be on the horizon. President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>. The administration began implementing some reforms through administrative channels, including changes to the standard for prosecutorial discretion, see *supra* note 8, and new regulations allowing in-country processing of family unity waivers. USCIS to Propose Changing the Process for Certain Waivers, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Feb. 22, 2012), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95356a0d87aa4310VgnVCM100000082ca60aRCRD&vgnnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD>.

goals of the U.S. asylum system is possible. The following section addresses those suggestions most likely to alleviate the negative impact of the victim narrative in asylum applications. These suggestions focus on the application process and objective judicial standards.²³⁴

Many of the problems with the asylum system stem from a lack of sensitivity towards the extreme suffering—both past and present—experienced by applicants.²³⁵ One of the ways in which the asylum process accentuates this difficulty is by imposing a one-year deadline for affirmative²³⁶ applications for asylum.²³⁷ Eliminating the one-year deadline could specifically address the issue of the victim narrative by

234. Reforming the procedures associated with credibility determinations is another area in which numerous suggestions have been made for reform. As previously discussed, credibility determinations present particular difficulty to traumatized clients and have the potential to negatively affect self-identity. The scope of these proposals is outside the reach of this Note. One commentator, however, summarized the proposed reforms, which include

using objective criteria, considering trauma-related symptoms, requiring a rebuttable presumption of credibility of political asylum applicants on due process grounds, or adopting a ‘benefit of the doubt’ standard because of the emphasis on testimony and the lack of corroborating evidence when an individual flees his home country with little or no documentation.

Suzuki, *supra* note 81, at 240 (footnotes omitted); *see also* Kagan, *supra* note 53.

235. United States Citizenship and Immigration Services perhaps recognizes such criticisms. Officers undergo several areas of sensitivity training, including lessons on interviewing survivors of torture and cross-cultural communication. *See, e.g.*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Interviewing Part V: Interviewing Survivors*, in PARTICIPANT HANDBOOK (2004), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview-Part5-Interviewing-Survivors31aug10.pdf>; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Interviewing Part IV: Inter-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview*, in PARTICIPANT HANDBOOK (2002), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview-Part4-Intercultural-Communication-31aug10.pdf>. In addition to the potential lack of human sensitivity, the system itself lacks sensitivity, as will be explored *infra*.

236. *See supra* note 130 (discussing the differences between affirmative and defensive applications for asylum).

237. I.N.A. § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006). For a critique of the one-year deadline, see HEARTLAND ALLIANCE NAT’L IMMIGRATION JUSTICE CTR. ET AL., *THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS 2* (2010) [hereinafter HEARTLAND ALLIANCE], available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/1YD-report-FULL.pdf> (“The one-year deadline threatens the U.S. government’s fundamental moral and legal commitment to protect refugees. Legal experts conclude that the filing deadline results in the arbitrary denial of protection to refugees.”).

Similar deadlines exist for other immigration benefits. For example, applications for family reunification for refugees must be filed within two years of the principal applicant’s arrival in the United States. 8 C.F.R. § 207.7(d) (2011). The regulations were originally written to impose a one-year deadline, but concerns raised during comment period persuaded the Immigration and Naturalization Service to extend the deadline to two years. *See* Procedures for Filing a Derivative Petition (Form I-730) for a Spouse and Unmarried Children of a Refugee/Asylee, 63 Fed. Reg. 3792 (Jan. 27, 1998) (responding to comments opposing a one-year deadline and amending to a two-year deadline for refugee family reunification petitions).

eliminating an artificial pressure. Traumatized asylum applicants would have extra time to address psychological and emotional needs before rehashing their experiences in court. Appropriate care could help asylum applicants re-establish an identity distinct from their suffering, and they could then tell their stories without essentializing themselves and being defined by a moment of persecution. It would also eliminate the arbitrariness of asylum decisions based not on the legal standard, but on a procedural requirement.²³⁸

An additional source of dissatisfaction with the asylum system stems from the substantial disparities in judicial decision-making.²³⁹ This particular area offers a counterpoint to the idea that lawyers control their clients' cases through the shaping of various narratives; the final outcome might be more related to individual decision-making standards and personal ideologies than to a comprehensible system of law.²⁴⁰ Suggestions for improving judicial decision-making focus on setting more objective standards and improving training, particularly related to cultural sensitivity.²⁴¹

None of these suggestions will eliminate the need to rely on a victim narrative in crafting a successful asylum application. But they are possible coping methods that can alleviate the harmful effects of the human need for recognizable characters and stories. On another level, they allow the legal system to be flexible in the application of its formal standard to individual, real-life people. Even assuming that legislative changes will not be forthcoming in the near future, options exist for working towards the goal of providing holistic relief, rather than merely providing limited legal relief in the form of asylum, to the tired and poor who make their way to America's shores.²⁴²

238. A 2010 report points out that the one-year deadline resulted in denials "on the basis of a technicality." HEARTLAND ALLIANCE, *supra* note 237, at 3. It offered the following suggestions for the administrative agencies to address the issue even before the deadline is repealed: "DOJ and DHS should revisit regulations governing exceptions to the deadline, create additional training materials and guidance on the deadline, issue precedential decisions interpreting the deadline . . . and monitor the adjudication of asylum cases involving the deadline." *Id.*

239. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 413, 415 (2007) ("[A]sylum outcomes often depend as much on the luck of the draw as on the merits of the case.").

240. Of course, zealous legal advocacy does not allow a prudent practitioner to accept that the outcome is out of her control; indeed, while their standards may vary, even the harshest judge is surely influenced by the strength of the applicant's claim and preparation.

241. Legomsky, *supra* note 239, at 444–57.

242. "Give me your tired, your poor/Your huddled masses yearning to breathe free." EMMA LAZARUS, *THE NEW COLOSSUS* (1883).

V. CONCLUSION: ASYLUM AND THE STORIES AMERICA TELLS

Immigration is one of the most hotly contested political issues today, but a true understanding of the immigration system and its many facets eludes most involved in the debate. Political narratives focus on emotional appeals rather than detailed analysis and thoughtful suggestions for reform. This Note has suggested that this polarization could be ameliorated by a deeper consideration of the existing black-letter law and the human stories that color its pages. Asylum is an often-overlooked aspect of U.S. immigration law that holds promise for a greater appreciation of immigrants and their stories. But the asylum process is rife with obstacles, and its narrow focus on the victim narrative impedes a broader societal appreciation for the courageous stories of those navigating the asylum process. By putting into practice the suggestions explored in this Note, an expanded narrative vision may emerge. The resulting stories may provide a glimmer of common ground on which America can build a reformed immigration system that continues her venerable tradition of welcoming the foreigner.

*Jessica Mayo**

* J.D. (2012), Washington University School of Law; B.A. (2006), Truman State University. A special thanks to my husband, Ken Mayo, for his selfless and tireless support. I also extend my gratitude to Professor Legomsky for his scholarship and suggestions, as well as to the editors of the *Washington University Law Review*.