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Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum

Stephen Paskey

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TELLING REFUGEE STORIES: TRAUMA, CREDIBILITY, AND THE ADVERSARIAL ADJUDICATION OF CLAIMS FOR ASYLUM

Stephen Paskey*

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“If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law.”¹ *Judith Herman*

PRELUDE

The scene is a small, plain courtroom: the carpeting deep blue, the walls a light grey. It could be anywhere in the United States. A woman sits in the witness chair, looking straight ahead. She came to this country from somewhere else, and she is seeking political asylum.

To her right, an immigration judge in a black robe sits at a raised wooden bench. A large government seal dominates the wall behind her. There are tables for the lawyers, with a podium between them, and several rows of empty benches behind a wooden railing. An interpreter sits in a chair, a notepad in his lap.

The U.S. Government’s lawyer stands at the podium, asking questions in a clipped monotone. The judge listens intently and stares at the applicant as if she knows where things are going.

“Remember that you are under oath. Is it your testimony

1. JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 72 (1992).

that police arrested you during a political demonstration in the capital?

"Yes," the applicant replies through the interpreter.

"And you were held in jail for approximately three weeks?"

"Yes," again.

And while you were held in jail, you were raped twice by guards?"

A brief pause. "Yes."

"Is there anyone in the United States who can confirm what happened to you?"

"No."

"Do you have any papers to prove you were arrested?"

"Of course not. Why would the police give me papers? They do as they please."

"Ma'am, I am asking 'yes' or 'no' questions. Please just answer 'yes' or 'no.' Do you understand?"

"I understand." A pause. "No, I do not have any papers."

"In May of last year did you sign a declaration that explains why you are applying for asylum?"

"Yes."

"Did your lawyer read that declaration to you, through an interpreter, before you signed it?"

"Yes."

"And you swore to tell the truth?"

"Yes."

"In your declaration, did you say you were held in jail for only one week?"

"I . . . I'm not . . ."

"Please answer 'yes' or 'no.' Would you like me to read your declaration to you?"

"Yes. That is what I said. One week."

"And in your declaration, you did not say anything about being raped?"

"I did not."

"Can you explain why your testimony today is different from your declaration?"

The woman looks abruptly at her lawyer, who remains expressionless. She turns back to the judge and shakes her head.

"How can I explain?," she asks. "I am telling the truth."

Twenty minutes later, the woman and her lawyer leave

the courtroom. The judge has denied her claim for asylum after finding she is not credible. An appeals court will later uphold the judge's ruling, and the woman will be deported.

INTRODUCTION

This story is a fiction,² but it reflects the reality often faced by survivors of psychological trauma when they seek political asylum in U.S. immigration courts.³ By design, the courts are adversarial. And by its nature, that adjudication system is biased against the stories told by trauma survivors.

Claims for asylum are a striking example of storytelling in the context of law. The applicant must prove either past persecution or a "well-founded fear" of future persecution.⁴ To meet that burden, the applicant must testify about her⁵ life before she arrived in the United States. In most cases, there is only one witness—the applicant—and no direct evidence to corroborate or contradict her story. Thus, whether asylum is granted depends largely on the applicant's ability to tell a "good" story; one an immigration judge deems to be "credible" and that fits within the statutory definition of a "refugee."

In most cases, the judge has at least two versions of the story: the applicant's oral testimony, and a written declaration prepared by either a lawyer or community group.⁶

2. Though this story is a fiction, it draws on the author's experiences. Between 1995 and 1998, the author worked as a Dept. of Justice trial attorney with the former Immigration and Naturalization Service, and represented the U.S. government in more than 600 asylum cases.

3. See e.g., *Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007). In *Zeru*, an asylum applicant stated on different occasions that she had been raped either once, twice, or three times. Despite expert testimony proving that the applicant was suffering from post-traumatic stress disorder (PTSD), the First Circuit upheld an immigration judge's conclusion that she was not credible. *Id.* at 69–70.

4. See 8 U.S.C. § 1158(b)(1)(A) (stating that a "refugee" is eligible for asylum); 8 U.S.C. § 1158(b)(1)(B)(i) (stating that an applicant has the burden of proof); 8 U.S.C. § 1101 (a)(42) (defining "refugee").

5. Many applicants, of course, are men. In the absence of an accepted gender neutral pronoun or a graceful way of avoiding gendered pronouns in every sentence, I've chosen to use "she" and "her" to refer to asylum applicants throughout this article.

6. See Stacy Caplow, *Putting the "I" in Writing: Drafting An A/Effective Personal Statement To Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INSTITUTE 249, 255–56 (2008) (discussing the role of a declaration in claims for asylum).

The only other evidence typically consists of written background reports on “country conditions” prepared by the U.S. State Department and human rights groups.⁷ In most cases, then, the only direct evidence regarding the applicant’s life experience is the applicant’s story itself, told in a foreign courtroom and filtered through lawyers, lay representatives, or interpreters.

Against this backdrop, the judge will consider the applicant’s declaration and testimony, and will assess the demeanor, candor, and responsiveness of the applicant, the “inherent plausibility” of the story, and whether the applicant’s statements are both internally consistent and consistent with other evidence.⁸ If the judge concludes the applicant is not credible, asylum will almost certainly be denied.

But psychological trauma is common among refugees,⁹ and the stories told by trauma survivors defy our expectations for a “credible” story. Trauma narratives tend to be fragmented and disjointed, both logically and chronologically.¹⁰ They may be lacking in detail, and the story will typically change over time, even with regard to critical details, as the survivor begins to heal.¹¹ None of these things are a reliable measure of whether a survivor is truthful, and yet they are the very things an immigration

7. In determining whether an asylum applicant is credible, an immigration judge may consider whether the applicant’s statements are consistent with “reports of the Department of State on country conditions.” 8 U.S.C. § 1158(b)(1)(B)(iii). Similarly, applicants often submit reports from groups like Human Rights Watch or Amnesty International. See U.S. Citizenship and Immigration Services, *Asylum Division Training Programs, Burden of Proof, Standards of Proof, and Evidence* 17–18, available <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last visited July 2, 2015) (hereinafter “Asylum Officer Training”).

8. See 8 U.S.C. § 1158(b)(1)(B)(iii) (setting standards for determining the credibility of asylum applicants).

9. Research on PTSD among refugees has found widely varying rates, with the prevalence of trauma ranging from 4% to 86% depending on sample size, country of origin, and other factors. Hollifield, M., Warner, T.D., Lian, N., Krakow, B., Jenkins, J.H., Kesler, J., Stevenson, J., & Westermeyer, J., *Measuring trauma and health status in refugees: A critical review*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 611–621 (2002). See also, Elisa E. Bolton, *PTSD in Refugees*, available at <http://www.ptsd.va.gov/professional/trauma/other/ptsd-refugees.asp> (last visited Feb. 6, 2016).

10. HERMAN, *supra* note 1, at 175–79.

11. HERMAN, *supra* note 1, at 180.

judge will typically point to as evidence that an asylum seeker is not credible.¹² Indeed, inconsistencies within and among various versions of an applicant's story are by far the most common factor cited by immigration judges when they make a negative credibility finding in an asylum case.¹³

In this country, core traits of the adjudication system compound the problem. In contrast to procedures used by some governments,¹⁴ the United States subjects most asylum seekers to adversarial cross-examination by a government lawyer.¹⁵ It does so in the apparent belief that cross-examination is an "engine" for "the discovery of truth."¹⁶ But when the applicant is a trauma survivor and the only evidence is the applicant's story, aggressive cross-examination is more likely to obscure the truth than reveal it—especially when an applicant is not represented.

The process also assumes that a judge with no training in the effects of trauma can reliably assess the credibility of a survivor. Indeed, as disputes over expert testimony on rape trauma syndrome demonstrate, our legal system assumes judges and juries can reliably assess the credibility of any and all witnesses without the benefit of training or expert guidance.¹⁷ However, when the witness is a trauma survivor, that assumption is not true.

Moreover, by requiring an applicant to tell her story

12. Because immigration judges are administrative law judges, their factual findings are subject to the substantial evidence standard, and a reviewing court must uphold the judge's determination if it is supported by reasonable, substantial, and probative evidence in the record. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Thus, judges routinely identify for the record the reasons why they concluded an applicant is not credible. For a detailed analysis of the review standard and suggested alternatives, see Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581 (November 2013).

13. See *infra*, text accompanying notes 85 to 99, discussing the results from a study of 369 decisions in the Federal Courts of Appeal.

14. For a comparative analysis of the asylum adjudication systems in Australia, Canada, the United Kingdom, and the United States, see generally Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253 (2000).

15. Executive Office for Immigration Review, *Immigration Court Practice Manual* 83, available at <http://www.justice.gov/eoir/office-chief-immigration-judge-0> (last visited June 10, 2013) (hereafter "EOIR Practice Manual").

16. 5 JOHN H. WIGMORE, EVIDENCE 29 (3d ed. 1940).

17. See generally Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991 (2007).

repeatedly over a lengthy period and “freezing” an early version in writing, the adjudication process increases the likelihood that a survivor will present inconsistent versions of her story.¹⁸ The role of lawyers and community groups introduces still further challenges. If the applicant is a survivor, inconsistencies between an applicant’s declaration and oral testimony are likely to say as much about the work habits and writing style of the person who drafted the declaration as they do about the applicant’s credibility.

This Article examines these issues from the perspective of scholarship on psychological trauma. Part II summarizes the standard for asylum and the process by which asylum claims are adjudicated in the United States. It concludes with the results of original research on 369 asylum decisions issued by federal appeals courts in 2010. A systematic review of the cases demonstrates that when immigration judges conclude an applicant is not credible, they *overwhelmingly* rely on inconsistencies within or among the various versions of the applicant’s story, and especially inconsistencies between the testimony and declaration.

Part III introduces a useful concept from structuralist narrative theory: the distinction between *story* and *discourse*, between the content of a story (characters and events) and the way the story is told. That distinction is critical to an understanding of the differences between multiple versions of a single story (the testimony and declaration, for instance), as well as the effects of trauma on storytelling. The most critical point is this: judges and lawyers typically assume that trauma impacts only the way an applicant tells her story—the *discourse*—but not the *content* of the story itself. Empirical research has proven that assumption to be wrong.¹⁹

The Article then turns directly to the challenges faced by survivors who seek asylum. After explaining the symptoms of trauma, Part IV examines the effects of trauma on a survivor’s ability to tell her story and the role of storytelling in the recovery process. Part V re-examines the asylum

18. In a study of refugees who suffered from PTSD, for instance, British researchers found that the rate of discrepancies increased substantially when they told their stories twice with a delay of six to seven months. Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 TORTURE 81 (2006).

19. See *infra*, text discussing notes 159 to 167.

adjudication system. It begins by reconsidering the process by which immigration judges evaluate credibility, then explores the ways a lawyer's handling of a case can impact an immigration judge's credibility findings.

The final section, Part VI, surveys proposals for reform, then recommends that the U.S. Government eliminate adversarial hearings for asylum seekers. In addition, both judges and lawyers should be trained to understand the symptoms and effects of trauma, and especially the impact of trauma on a survivor's ability to tell her story.

But in some respects the scope of this Article is limited: there are other cultural, psychological, and practical issues that may affect a survivor's testimony, ranging from feelings of shame or a fear of authority figures to the challenges of accurate interpretation.²⁰ Though the Article does not consider these issues, they further support the Article's central claim—that an adversarial hearing is a deeply and inherently flawed way to assess the credibility of asylum applicants who have experienced traumatic events.

I. THE ADJUDICATION OF CREDIBILITY IN U.S. CLAIMS FOR ASYLUM

In the words of a former immigration judge, the system by which the United States adjudicates claims for asylum is a “byzantine,” “crazy-quilt method” for deciding cases on which an applicant's life may depend.²¹ This section will walk readers through that method and then present the results of original empirical research on the reasons why immigration judges find applicants not to be credible.

A. *The Asylum Adjudication Process*

Asylum is potentially available to any foreign national

20. For instance, trauma survivors often feel shame, guilt, or self-loathing about their experiences, and survivor's ability to discuss her experiences in the presence of lawyers and judges may be diminished by cultural factors, gender roles, a fear of authority figures, or the social repercussions of talking about a rape with strangers. Herman, *supra* note 1, at 94; See David Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE 79, 80, 82 (2007). Moreover, because the goal of torturers is often to make their victims talk, a torture survivor may associate talking in a legal setting “with the experience of forced talking under torture.” *Id.* at 80.

21. Bruce J. Einhorn, *The Gift of Understanding*, 3 ALB. GOV'T L. REV. 149, 152, 156 (2010).

who is physically present in the United States.²² It is also available to any foreign national who seeks admission at a port of entry if the government determines, after an interview, that the person has a “credible fear” of persecution.²³ The ultimate goal of the adjudication process is to determine whether the applicant is a “refugee.” The applicant has the burden of proof²⁴ and must demonstrate she is unwilling or unable to return to her country of nationality or citizenship²⁵ because of past persecution or a “well-founded fear” of future persecution.²⁶ The term “persecution” is construed narrowly to include only serious (and usually physical) harm.²⁷

The applicant must also prove she has been (or may be) targeted for persecution “on account of” race, religion, nationality, political opinion, or “membership in a particular

22. 8 U.S.C. § 1158(a)(1). Refugee status may also be granted to certain persons who are outside the United States. *See* 8 U.S.C. § 1157.

23. 8 U.S.C. § 1225(b)(1)(B)(ii).

24. 8 U.S.C. § 1158(b)(1)(B).

25. 8 U.S.C. § 1101(a)(42) (defining “refugee”). But if the applicant is stateless (i.e., the applicant “has no nationality”), the assessment will focus instead on the country of the applicant’s “last habitual residence.” *Id.*

26. 8 U.S.C. § 1101(a)(42). To establish a “well-founded fear” of persecution, an applicant must demonstrate that her fear is both subjectively genuine and objectively reasonable. *See e.g.*, *Ahmed v. Keisler*, 504 F.3d 1183, 1191–92 (9th Cir. 2007).

27. *See, e.g.*, *Abdel-Masieh v. INS*, 73 F.3d 579, 584 (5th Cir. 1996) (two arrests with beatings and interrogation that the applicant did not characterize as “severe” or “excessive” did not establish past persecution); *Thomas v. Ashcroft*, 359 F.3d 1169, 1179 (9th Cir. 2004) (holding that escalating intimidation and a serious threat of physical violence established persecution); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir. 2002) (holding death threats along with beatings of family members and murders of political allies constitute persecution). The term persecution does not include lesser forms of discrimination. *E.g.*, *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (treatment of feminists in Iran was not so harsh as to amount to “persecution”). Nor does it include purely economic harms unless they threatened a person’s life or freedom. *See, e.g.*, *Li v. Attorney Gen. of U.S.*, 400 F.3d 157, 168 (3d Cir. 2005) (holding that the deliberate imposition of severe economic disadvantage which threatens a petitioner’s life or freedom may constitute persecution). In one case, the Ninth Circuit held that a Seventh Day Adventist minister had not suffered past persecution by being forced to serve as a porter for the Burmese military. *Khup v. Ashcroft*, 376 F.3d 898, 903 (9th Cir. 2004). However, because a fellow minister had been tortured and killed, the Court concluded that the applicant had a well-founded fear of persecution. *Id.* For a broader discussion of asylum’s persecution requirement, see Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109 (2007).

social group.”²⁸ A generalized fear of civil strife will not suffice,²⁹ nor will a threat motivated by personal animosity.³⁰ The standard is forward-looking: while past persecution creates a presumption that an applicant has a well-founded fear of future persecution, the Government can rebut that presumption by showing that circumstances have changed, or that internal relocation is both possible and reasonable.³¹ But in extreme cases, past persecution alone may be sufficient if the applicant demonstrates “compelling reasons” why he or she is unwilling to return to the country “arising out of the severity of the past persecution.”³²

Certain classes of applicants are barred as a matter of law. Some are excluded because the applicant was firmly resettled in another country³³ or could safely relocate to another part of her own country.³⁴ Still others are excluded for “bad” behavior, ranging from assistance in the persecution of others³⁵ to terrorism-related activity³⁶ to a conviction for certain crimes.³⁷ But even if an applicant clears these hurdles, an immigration judge still has discretion to deny her application on other, unspecified grounds.³⁸

28. 8 U.S.C. § 1101(a)(42). Several circuits have formally adopted the doctrine of “mixed motives,” which recognizes that an applicant may be eligible for asylum if her alleged persecutors have multiple motives as long as at least one of the motives is among those specified in the statute. *E.g.*, *Mohideen v. Gonzales*, 416 F.3d 567, 570 (7th Cir. 2005).

29. *E.g.*, *Rasiah v. Holder*, 589 F.3d 1, 5 (1st Cir. 2009) (“simply because civil strife causes substantial hardships for an ethnic minority, that does not automatically entitle all members of that minority to asylum”).

30. *E.g.*, *Zayas-Marini v. I.N.S.*, 785 F.2d 801, 806 (9th Cir. 1986) (holding that death threats grounded only in “personal animosity” were not grounds for asylum).

31. 8 C.F.R. 206.16(b)(1)(i).

32. 8 C.F.R. § 1208.13(b)(1)(iii)(A).

33. 8 U.S.C. § 1158(b)(2)(A)(vi); 8 CFR § 208.15 (defining “firm resettlement”).

34. 8 U.S.C. § 1158(a)(2)(A).

35. 8 U.S.C. §§ 1101(a)(42) & 1158(b)(2)(A)(i).

36. 8 U.S.C. § 1158(b)(2)(A)(v).

37. 8 U.S.C. § 1158(b)(2)(A)(iii) (conviction for serious non-political crime); 8 U.S.C. § 1158(b)(2)(B)(i) (conviction for aggravated felony).

38. *See* 8 U.S.C. § 1158(b)(1)(A) (providing that the Attorney General “may” grant asylum to an eligible refugee); 8 C.F.R. § 1208.14 (stating that an immigration judge “may grant or deny asylum in the exercise of discretion”). While immigration judges can and sometimes do deny asylum to otherwise eligible applicants on purely discretionary grounds, such denials are rare and are generally based on egregious conduct by the applicant. *See, e.g.*, *Aioub v. Mukasey*, 540 F.3d 609, 612 (7th Cir. 2008) (asylum denied because of

To meet her burden, an applicant must tell a story about her life. The context for this legal storytelling is unusual. The principle of *res judicata* is founded on the premise that a litigant is entitled to a single adjudication of any claim.³⁹ But for asylum cases, there are two distinct systems of adjudication, run by separate agencies. Some applicants receive a non-adversarial interview; some an adversarial hearing. Many claims are adjudicated twice,⁴⁰ and asylum can be granted after either adjudication. There is no “law of the case” doctrine, and the second adjudication (if there is one) is entirely *de novo*.⁴¹

The adjudication process begins with a government form⁴² on which the applicant provides biographic information and summarizes the facts underlying her claim. Many applicants also submit a declaration presenting the facts in greater detail than the form allows. The declaration is typically drafted by a lawyer if the applicant has one, or by a community group if she does not.⁴³

applicant’s fraudulent marriage); *Kouljinski v. Keisler*, 505 F.3d 534, 543 (6th Cir. 2007) (asylum denied because of applicant’s three drunk-driving convictions).

39. See, e.g., *Mahmood v. Research in Mot. Ltd.*, 905 F. Supp. 2d 498, 502 (S.D.N.Y. 2012) *aff’d*, 515 Fed. Appx. 891 (Fed. Cir. 2013).

40. The exact percentage is impossible to determine: two separate federal agencies are involved, and there are no statistics that track individual cases through the complete system. That said, the number is probably more than 20 percent. In fiscal year 2014, for instance, asylum offices referred roughly 50% of all cases to an immigration court, and 44% of the cases adjudicated by immigration judges that year had previously been adjudicated by an asylum officer. Those percentages were calculated from data separately maintained by the Asylum Office, see *infra* note 64, and the Executive Office for Immigration Review, see *infra* note 71..

41. If an alien in removal proceedings expresses fear of persecution and files an application for asylum, the immigration judge must conduct a hearing and consider the application unless the alien previously filed an application that was referred to (and considered by) another immigration judge. See 8 C.F.R. § 1240.11(c).

42. See 8 CFR § 208.3. Department of Homeland Security, *I-589, Application for Asylum and for Withholding of Removal*, available at <http://www.uscis.gov/sites/default/files/files/form/i-589.pdf> (last visited September 26, 2014).

43. Asylum applicants in removal proceedings are entitled to assistance by counsel of their choice at no expense to the government. 8 U.S.C. § 1229a(b)(4)(A). Some scholars have argued that the Government should provide free representation to indigent applicants. See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295, 384 (2007) (hereinafter

Once this paperwork is ready, the process diverges. If the government has initiated a removal case against the applicant—or if the applicant seeks asylum after a credible fear interview—the claim is *defensive* and will be adjudicated by an immigration judge during an adversarial hearing.⁴⁴ Other claims are *affirmative*, and the applicant will receive a non-adversarial interview with an asylum officer.⁴⁵ But asylum officers grant just 47% of the claims they adjudicate.⁴⁶ A larger number of applicants —50% of the total—are placed in removal proceedings, where they receive a second, adversarial adjudication. Because the adversarial hearings are the same for all applicants, this discussion will begin with an asylum interview and follow an affirmative claim through the process.

Asylum officers are employees of U.S. Citizenship and Immigration Services (USCIS), an agency in the Department of Homeland Security (DHS).⁴⁷ Most officers are not lawyers, but all receive extensive training.⁴⁸ Asylum interviews are conducted under oath but are not recorded or transcribed. The officer's handwritten notes are the only record of the applicant's statements, and the applicant has no opportunity to review the notes or challenge their accuracy.⁴⁹ If an

"Refugee Roulette").

44. See 8 CFR 208.2(a) (delineating the respective jurisdictions of immigration judges and asylum officers). See also EOIR Practice Manual at 38 (discussing the procedural differences between affirmative and defensive claims).

45. See 8 CFR 208.2 (outlining the respective jurisdictions of the asylum offices and immigration courts).

46. For an explanation of the data and sources on which that figure is based, see *infra*, text accompanying notes 64 to 67 and source cited therein.

47. U.S. Citizenship and Immigration Services, *Refugee, Asylum, and International Operations*, available at <http://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate> (last visited June 12, 2015). Prior to the creation of the Department of Homeland Security in 2003, most immigration functions were performed by employees of the Justice Department. See generally U.S. Citizenship and Immigration Services, *Our History*, available at <http://www.uscis.gov/about-us/our-history> (last visited June 12, 2015).

48. The training includes a 5–1/2 week course required of all USCIS immigration officers, and a five-week Asylum Officer Basic Training Course. Supervisory asylum officers receive an additional two weeks of training. U.S. Citizenship and Immigration Services, *Asylum Division and Training Programs*, available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last visited June 12, 2015).

49. The procedures for asylum interviews state that the record shall consist

applicant needs an interpreter she must provide one, and many use a family member or friend.⁵⁰

By design, the interviews are non-adversarial.⁵¹ Training materials explain that the officer is a “neutral decision-maker” rather than an “advocate,” and that a non-adversarial interview allows an applicant to present her claim in “as unrestricted a manner as possible, within the inherent constraints of an interview before a government official.”⁵² Officers are instructed to treat applicants with respect, to be “nonjudgmental and non-moralistic,” and to “create an atmosphere in which the applicant can freely express his or her claim.”⁵³

The applicant may bring a lawyer or another representative to the interview,⁵⁴ but the government is not represented.⁵⁵ The representative’s role is limited: he or she may ask questions about points the officer did not cover, and may also comment on the evidence and make a closing statement.⁵⁶ The documentary evidence typically consists of background material on the applicant’s country of nationality or citizenship, including reports from human rights organizations and the Department of State.⁵⁷ These

of the application, other documents submitted by the applicant, comments from the Department of State, and “other information specific to the applicant’s case.” 8 C.F.R. 208.9(f). The applicant’s statements are not ordinarily recorded: instead, the training for asylum officers includes a module on taking clear and comprehensive handwritten notes. *See generally* Asylum Officer Training, *supra* note 7, Interviewing Part 2: Notetaking.

50. The training for asylum officers notes that there are few limits on who may serve as an interpreter, and readily acknowledges the “inherent” challenges of working with an interpreter. Asylum Officer Training, *supra* note 7, Interviewing Part 6: Working with an Interpreter at 7–8, 12–15.

51. 8 CFR § 208.9(b).

52. Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 6.

53. Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 7–8.

54. In lieu of an attorney, an applicant may be represented during the interview by a person accredited by the Board of Immigration Appeals, by a law student or law graduate not yet admitted to the bar, or by a “reputable person” who meets certain criteria. *See* 8 CFR 292.1.

55. Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 6.

56. 8 CFR § 208.9(d). *See also* Asylum Officer Training, *supra* note 7, Interviewing Part I: Overview of Nonadversarial Asylum Interview at 23 (discussing the role of a representative).

57. 8 CFR § 208.12 (permitting an asylum officer to consider information

materials are aimed at showing whether a particular *category or class* of persons has been persecuted in the country in question on the basis of a protected trait.⁵⁸ In addition, applicants are required to corroborate their claim if they reasonably can: most cannot.⁵⁹

Two weeks after the interview, the applicant will return to receive the officer's written decision in person.⁶⁰ If the applicant is not in this country legally, the officer will either grant asylum or "refer" the applicant to immigration court—a circumspect way of saying the officer will initiate a removal case.⁶¹ But if the applicant has a valid legal status, the officer will either grant or deny asylum.⁶² In either situation, there is no appeal: an applicant's only remedy from an adverse decision is to renew her claim before an immigration judge if the Government attempts to deport her.⁶³

In 2014, asylum officers granted 47% of the 27,006 claims they adjudicated, while 50% of were referred to immigration courts and 3% were denied.⁶⁴ Among cases that were

provided by the State Department, by certain other U.S. government offices, or by "other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions".

58. The documentary evidence may also address secondary issues, such as the possibility of internal relocation. For instance, although Somalia has been plagued by clan-based civil strife since the collapse of the Siad Barre regime in 1991, the U.S. Department of State has long maintained that most Somalis can safely relocate to a part of the country controlled by their particular clan.

59. See 8 CFR § 208.9(e) (requiring the asylum officer to consider evidence submitted by an applicant in addition to the application itself).

60. See 8 CFR §§ 208.9 & 19 (requiring an asylum officer to communicate his or her decision to the applicant in person and in writing); U.S. Citizenship & Immigration Services, *Asylum Division, Asylum Procedures Manual*, § II.K.2. (November 2013), available at http://www.uscis.gov/sites/default/files/files/natedocuments/Asylum_Procedures_Manual_2013.pdf (last visited July 2, 2015) (hereinafter "Asylum Procedures").

61. See 8 CFR § 208.14(c) (denial, referral, or dismissal of claims by an asylum officer).

62. 8 CFR § 208.14(c)(2).

63. The Board of Immigration Appeals has authority to review asylum decisions by an immigration judge, but not the decisions of an asylum officer. See 8 CFR § 1003.1(b) (delineating the Board's appellate jurisdiction). Federal courts likewise do not have jurisdiction, primarily because the officer's decision is not a final agency adjudication. See, e.g., *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120 (9th Cir. 2001).

64. The asylum office statistics for 2014 are compiled from four separate quarterly summaries on the U.S.C.I.S. web site. All were last accessed on February 4, 2016. See *Asylum Office Workload January 2014*, available at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Pre>

“completed” but not “adjudicated,”⁶⁵ 4,706 were also referred to immigration courts, while 2,073 were closed.⁶⁶ Thus, 54% of all asylum cases completed by asylum officers in 2014 were referred to an immigration court, where the applicant was entitled to de novo consideration of her claim.⁶⁷

Immigration court hearings are conducted by the Executive Office for Immigration Review (EOIR), an agency in the Department of Justice (DOJ).⁶⁸ The presiding “judge” is a DOJ lawyer, appointed by the Attorney General to serve as an administrative judge.⁶⁹ In sharp contrast to an asylum interview, the hearings are adversarial and relatively formal. The court provides a professional interpreter and creates a formal record, which includes an audio recording of the hearing.⁷⁰ In fiscal year 2014, 55% of respondents were represented,⁷¹ and the government is almost always

vious%20Engagements/AffirmativeAsylum_JanuaryFebruaryMarch2014.pdf (first quarter); Asylum Office Workload April 2014 https://www.uscis.gov/sites/default/files/USCIS/Outreach/Affirmative_Asylum_-_April_May_June_2014.pdf (second quarter); Asylum Office Workload July 2014 https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Affirmative_Asylum_July_August_September_2014.pdf (third quarter); Asylum Office Workload October 2014 <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf> (fourth quarter). Hereinafter, these four documents are collectively referenced as “2014 Asylum Office Workload.”

65. U.S.C.I.S. regards a case as being “completed” but not “adjudicated” if the case is referred to an immigration court without an interview; dismissed for failure to provide fingerprints; or closed because the applicant failed to appear for an interview. See 2014 Asylum Office Workload, *supra* note 64.

66. See 2014 Asylum Office Workload, *supra* note 64. Most of these cases were closed because the applicant failed to appear for an interview.

67. The percentage was compiled from data in the 2014 Asylum Office Workload, *supra* note 64.

68. For an outline of the procedures, see generally 8 CFR § 1240. For more detail on any aspect of the procedure, see the EOIR Practice Manual, which has a detailed index.

69. 8 CFR § 1001.1 (l) (defining “immigration judge” as “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review”).

70. See 8 CFR § 1240.9 (requiring a verbatim recording of the proceeding, including any testimony); EOIR Practice Manual, *supra* note 15, at 12 (requiring that judges make a digital audio recording of hearings); § 1008.28 (barring the use of any recording equipment in immigration court other than the equipment used by the judge to create the official record). If either party appeals, the audio recording of the hearing will be transcribed. See 8 CFR § 1003.5(a) (discussing transcription of the proceedings on appeal to the BIA).

71. Respondents in removal proceeding have a statutory right to counsel of their choice at no expense to the Government. 8 U.S.C. § 1229a(b)(4)(A). See

represented.⁷²

During removal proceedings, an immigration judge must first determine whether the respondent is subject to removal.⁷³ If she is, she is entitled to apply for relief, which may include benefits other than asylum.⁷⁴ Respondents who previously filed an affirmative asylum application are entitled to a de novo hearing on their claim. In addition, immigration judges hear defensive claims for asylum—claims first filed after a removal case began. In fiscal year 2014, 44% of the 17,997 asylum claims adjudicated by immigration judges were affirmative, and 56% were defensive.⁷⁵ Most (but not all) of the affirmative claims were adjudicated twice.⁷⁶

In most cases, the judge will issue a brief oral decision at the end of the hearing.⁷⁷ Both the applicant and the government have the right to appeal an adverse decision to the Board of Immigration Appeals (BIA), an administrative appellate body in DOJ.⁷⁸ Finally, the applicant—but not the

also EOIR Practice Manual 19–25 (discussing the right to representation and the role of counsel). In fiscal year 2014, the immigration courts completed 167,774 cases: of that number, 55% of the respondents were represented. Executive Office for Immigration Review, *FY 2014 Statistics Yearbook A2, K4 (F2)* (March 2015), available at <http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf> (last visited July 2, 2015) (hereinafter “EOIR 2014 Yearbook”).

72. See 8 CFR § 1240.2 (delineating the authority and duties of Government counsel in a removal proceeding). The regulations continue to refer to “service counsel”—i.e., the counsel of the Immigration and Naturalization Service (INS)—even though the INS no longer exists. Since 2003, Government counsel in removal cases have been employed by Immigration and Customs Enforcement (ICE), a component of DHS.

73. See, e.g., RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 14.21 (2015 ed).

74. The INA gives immigration judges broad authority to consider applications for relief from removal. See 8 U.S.C. § 1229a(c)(4). The judge’s authority to grant various forms of relief are specified in other provisions of the INA or by regulation. See, e.g., 8 U.S.C. § 1229b (cancellation of removal); 8 C.F.R. § 245 (adjustment of status); 8 C.F.R. § 208.16 (withholding of removal and protection under the Convention Against Torture).

75. In 2014, immigration judges granted or denied 17,997 claims, of which 7,955 were affirmative and 10,042 were defensive. Judges granted 75% of the affirmative claims, but only 28% of the defensive claims. See EOIR 2014 Yearbook, *supra* note 71, at K3.

76. In FY 2014, 21.6% of the claims referred to immigration courts by asylum offices had not been adjudicated. See 2014 Asylum Office Workload, *supra* note 64.

77. See 8 CFR §§ 1240.12 & 13 (permitting immigration judges to issue an oral decision). In rare cases, judges will issue a written decision.

78. Under EOIR regulations, any adverse decision by an immigration

government⁷⁹—has the right to appeal an adverse BIA ruling to the federal Courts of Appeal.

During an asylum hearing, the applicant's testimony is the core of her case. The applicant will be examined by her lawyer, or by the judge if she is unrepresented. She will then be cross-examined by the government lawyer, and sometimes the judge as well.⁸⁰ The evidentiary rules are more lenient and more flexible than in other courts—for instance, hearsay is usually admissible.⁸¹

Beyond the testimony, the record will routinely include: the written application, the applicant's declaration, and background materials on the applicant's country of nationality or citizenship.⁸² In some cases, the record will also include an asylum officer's handwritten notes, or evidence of other prior statements by the applicant. If the applicant received a credible fear interview, documents from that interview will be part of the record.

Much less commonly, applicants present documents or testimony to corroborate their claim. When available, such materials typically consist of medical evidence, foreign government documents, the applicant's passport, or the testimony of family members. Some applicants support their claim with expert testimony, typically on medical issues, psychological issues, or political and conditions in the applicant's home country.

In the great majority of cases, however, there is no direct evidence to either corroborate or contradict the applicant's version of events. This is not surprising: the events took place in another country; the Government lacks the resources

judge, other than an in absentia order of removal, may be appealed to the BIA. 8 CFR § 1240.15.

79. Because the BIA's decision is an agency adjudication, government lawyers are bound to accept it. *See* 8 U.S.C. § 1240(a)(1) (final orders of removal are subject to judicial review under 28 U.S.C. § 158, which provides for review of federal agency decisions).

80. *See* 8 CFR § 1003.10(b) (authorizing immigration judges to "interrogate, examine, and cross-examine" witnesses).

81. *See, e.g.,* *Ogbolumani v. Napolitano*, 557 F.3d 729, 734 (7th Cir. 2009) ("in removal proceedings, hearsay is admissible so long as it's probative and its use is not fundamentally unfair").

82. *See, e.g.,* 8 CFR § 1208.11 (authorizing an immigration judge to consider information from the State Department, including both background information on country conditions and information specific to the applicant); 8 C.F.R. § 1240.10 (permitting both sides to submit documentary evidence).

to investigate; and if the applicant is indeed a refugee, she fled her homeland in fear for her safety. But an applicant's inability to corroborate her testimony is not fatal to her claim. Her testimony alone may be sufficient to meet her burden of proof if "it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account" of the essential facts.⁸³

Given this limited evidence, the applicant's credibility is the linchpin of the judge's analysis—asylum is all but certain to be denied to an applicant who is deemed not credible.⁸⁴ With that in mind, this Article now turns to the grounds on which judges typically rely when they make an adverse credibility finding.

B. The Reasons Why Applicants Are Found Not Credible

For asylum applications filed on or after May 11, 2005, credibility determinations are governed by statutory provisions enacted as part of the REAL ID Act.⁸⁵ The statute makes clear that judges must consider "the totality of circumstances, and all relevant factors."⁸⁶ Relevant factors include: the demeanor, candor, and responsiveness of the applicant; the inherent plausibility of the applicant's account; consistency between the applicant's written and oral statements; the internal consistency of each statement; and the consistency of the applicant's statements with other evidence.⁸⁷ The statute expressly provides that judges may consider any "inconsistency, inaccuracy, or falsehood" without regard to whether the discrepancy "goes to the heart of the applicant's claim or any other relevant factor."⁸⁸

83. See, e.g., *Biriac v. Holder*, 399 Fed. Appx 27, 35 (6th Cir. 2010) (citing *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987)).

84. Conversely, the fact that an applicant is credible is not enough. For instance, a judge may conclude that she is telling the truth, but the harm she fears does not rise to the level of "persecution."

85. See 8 U.S.C. § 1158(b)(1)(B)(iii). The same statute applies to credibility determinations by an asylum officer. To a large degree the REAL ID Act simply codified factors immigration judges had long considered on a case-by-case basis.

86. *Id.*

87. *Id.*

88. 8 U.S.C. § 1158(b)(1)(B)(iii). Prior to the REAL ID Act, some circuits held that an adverse credibility finding could not be supported by "minor inconsistencies that do not go to the heart of an applicant's claim." *Kaur v. Gonzales*, 418 F.3d 1061, 1064 (9th Cir. 2005); accord *Gao v. Ashcroft*, 299 F.3d 266, 299 (2002).

The REAL ID Act also codified a formal corroboration requirement, one that some courts had previously rejected. Under that standard, “[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”⁸⁹

Which of these factors do immigration judges rely on most frequently when they find an applicant is not credible? Because immigration hearings are administrative, it is possible to provide a detailed, nuanced answer to that question.

As noted earlier, immigration judges are employed by DOJ. On appeal to the BIA (also a component of DOJ), their credibility findings can be reversed only if the BIA determines the findings were “clearly erroneous.”⁹⁰ In a federal court of appeals, the administrative conclusion that an applicant is not credible is subject to the substantial evidence standard.⁹¹ Thus, even before the REAL ID Act was enacted, federal courts required an immigration judge to explicitly state the factors supporting a negative credibility finding.⁹² In the words of the Ninth Circuit, an immigration judge must “provide specific and cogent reasons” for such findings,⁹³ and that rule makes it possible to analyze the factors judges consider.

In 2010, the Courts of Appeals decided over 400 cases⁹⁴

89. 8 U.S.C. § 1158(b)(1)(B)(ii).

90. 8 C.F.R. §1003.1(d)(3)(i).

91. *See, e.g.,* Xiao Ji Chen v. U.S. Dept. of Justice, 471 F.3d 315, 334 n. 13 (2d Cir. 2006) (noting that the Second Circuit uses the substantial evidence standard, but suggesting that the standard of review in immigration cases may be even more deferential).

92. *See, e.g.,* Gui v. I.N.S., 280 F.3d 1217, 1225 (9th Cir. 2002) (an immigration judge “must have a legitimate articulable basis to question the petitioner’s credibility”); Secaida-Rosales v. I.N.S., 331 F.3d 297, 307 (2d Cir. 2003) (“Adverse credibility determinations based on speculation or conjecture, rather than on evidence in the record, are reversible.”); Ahmad v. I.N.S., 163 F.3d 457, 461 (7th Cir. 1999) (“Credibility determinations are accorded substantial deference, but they must be supported by specific, cogent reasons.”)

93. Shrestha v. Holder, 590 F.3d 1034, 1044 (9th Cir. 2010) (quoting *Gui*, 280 F.3d at 1225).

94. It should be noted that a significant percentage of asylum applicants do not have a lawyer during their immigration court hearing, and that many unrepresented applicants do not appeal an adverse decision to federal courts. *See* Refugee Roulette, *supra* note 43 at 325. Nonetheless, there is no obvious

(both published and unpublished) in which they reviewed an immigration judge's conclusion that an asylum applicant was not credible. Of those, 369 clearly state the reasons for the judge's negative credibility finding. Under a research project funded by the Baldy Center for Law and Social Policy, each of those decisions was reviewed, and the reasons judges gave for their negative credibility findings were tabulated. The data are fully summarized in the Appendix, which includes eight separate tables.

As detailed in Table 2, the factors relied on by judges were divided into three distinct groups. The first set of factors consisted of *internal inconsistencies* in the applicant's story, including inconsistent testimony during the hearing; inconsistencies between the applicant's testimony and declaration, and inconsistencies between the testimony and other prior statements. The second set involved aspects of the way the story was told, including the applicant's demeanor and other concerns, such as whether the applicant's story was deemed to be "vague" or "implausible." The final set of factors includes anything *external* to the applicant's story, including inconsistencies between the story and other evidence as well as an applicant's failure to corroborate her claim.

In 76% of cases, judges cited some combination of two to four of these factors in support of their adverse credibility findings. Only sixty-four decisions (17%) cited a single factor, most commonly inconsistencies between the applicant's testimony and either the written declaration or evidence external to the applicant's story. (See Table 8.)

Five key points emerge from this research. First, an applicant who is found to be not credible will almost certainly lose her case on appeal. In a remarkable 96% of the cases, an appeals court affirmed the immigration judge's negative credibility finding and the decision denying asylum.⁹⁵ Twelve

reason to believe inconsistencies within and among the applicant's statements would play a lesser role in such cases. Indeed, in one respect an unrepresented asylum seeker may have an advantage: if there is no written declaration, a judge cannot find that the applicant's testimony and declaration are inconsistent.

95. Of the 369 cases examined, 354 were affirmed. See Table 1, *infra*. In the remaining 15 cases, the appeals court vacated the administration decision and remanded the case for further proceedings. In at least one case, the court explicitly concluded that the applicant was credible, and directed the BIA to

of the fifteen remands were in the Ninth Circuit, where 86% of cases were affirmed. The Eleventh Circuit remanded two cases; the Second Circuit remanded one. In every other circuit, all cases were affirmed.

Second, immigration judges overwhelmingly expect that credible applicants will tell a consistent story. Internal inconsistencies within and among an applicant's written and oral statements are by far the dominant factor in negative credibility findings. Judges relied on some combination of these inconsistencies in 86% of the cases—roughly seven cases out of every eight.⁹⁶

Third, the applicant's ability to testify consistently with her declaration is critical. In 56% of cases, the immigration judge's negative credibility finding relied on inconsistencies between the applicant's oral testimony and her written declaration. In 47% of cases, judges relied on inconsistencies within the applicant's testimony itself. Inconsistencies between the testimony and other prior statements were cited in 28% of cases.⁹⁷ In this last group of cases, the evidence of a prior inconsistent statement often was limited to an asylum officer's notes. In other cases, the prior statement was created as part of a credible fear interview.

Fourth, judges also give significant weight to the way an applicant's story is told. Judges cited the applicant's demeanor in 18% of all cases. In 23% of all cases, judges also relied on other traits of the applicant's testimony.⁹⁸ Judges who did so frequently described the applicant's testimony as "implausible," "vague," "lacking in detail," "unresponsive," or "evasive." Less frequently, judges described an applicant's testimony as "confusing," "hesitant," "disjointed," "incoherent," or "unreliable."⁹⁹

Finally, the presence or absence of other evidence was important, but much less so than inconsistencies in the applicant's story. Inconsistencies between the applicant's testimony and other evidence were cited in 46% of cases, but

reconsider its decision in light of that finding. *Singh v. Holder*, 406 Fed. Appx. 166, 171 (9th Cir. 2010).

96. See Tables 2 and 3, *infra*.

97. See Table 3, *infra*.

98. See Table 7, *infra*.

99. Unpublished research notes by Brendan McCullen (undated) (on file with the author).

in 70% of those cases the judge also relied on inconsistencies in the applicant's oral or written statements. Similarly, judges cited the absence of corroborating evidence in 43% of cases, but in 85% of those cases they also relied on inconsistencies in the applicant's statements. In only 13% of cases did a judge conclude that an applicant who told her story consistently was not credible, most often because the testimony was inconsistent with other evidence.

The data are subject to certain limitations. Many asylum cases are not appealed to the BIA, and only a fraction of those cases are further appealed to the circuit courts. Moreover, the federal court decisions are weighted in favor of applicants with a lawyer: those who are not represented are less likely to appeal an adverse decision.

Nonetheless, the decisions in these cases reflect a cultural norm: in the United States (and elsewhere), it is widely assumed that consistent statements are central to credibility, and that a person whose story changes over time is not truthful. But as discussed in detail below, when the person is a trauma survivor, that assumption is not true.

II. THE STRUCTURE OF STORIES: NARRATIVE, STORY, AND DISCOURSE

Before considering the research on trauma and the effects of trauma on the stories told by survivors, it would be useful to step back and consider several questions: What do we mean by "story"? Why must an asylum applicant tell one? And what is the relationship between the "credibility" of a storyteller and the way the story is told? The answers to those questions are useful to an understanding of the challenges faced by survivors who seek asylum, the criteria by which we judge their credibility, and the ways in which a declaration drafted by a lawyer will differ from an applicant's testimony.

In a typical legal trial, the parties tell competing stories and present other evidence, and a trier of fact must determine whether one story or the other is true, or whether the truth lies between the two. But when there is only one story and no other evidence of the applicant's experience—as there is with most claims for asylum—the applicant's credibility becomes a proxy for the truth, even though a story that does not conform to our norms for a credible story may, in fact, be true. To help

explain precisely why that can happen, this Article will explore the ways narrative theorists think about the structure of stories, especially the distinction between *story* and *discourse*—in lay terms, between the content of a story and the form in which it is told.

At first blush, the idea of a “story” may seem obvious. A story is simply the “telling” of something that happened, an account of one or more events for which there is some sort of change or transformation—a “before” and an “after.”¹⁰⁰ If the story includes more than one event, the events will be related both logically and chronologically. The events are caused or experienced by characters, and there are places in which the events take place. But literary theorists have long recognized that even a simple story can be deceptively complex. In the 19th century, one scholar counted more than one thousand versions of the “Cinderella story.”¹⁰¹ What makes each of these versions the “same” story, and how do we account for the differences?

In the language of structuralist narrative theory, each distinct telling of a story is a separate *narrative text* (or narrative)¹⁰² and each narrative can be divided into two parts: *story* and *discourse*.¹⁰³ The demarcation between story and discourse has been characterized as a distinction between “content” and “expression,”¹⁰⁴ or between “plot” and “presentation.”¹⁰⁵

At the level of story, a narrative text contains elements known as *events* and *existents*.¹⁰⁶ The latter term includes,

100. Some narrative theorists argue that a single event does not suffice to make a story. See H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 15–16 (2d ed. 2008) (discussing definitions of “story”).

101. *Id.* at 21.

102. In this context, the word “text” is used broadly and may refer to stories that are told through a medium other than oral or written language. A story told, for instance, through dance, mime, or a silent film would also be considered a narrative “text,” so long as it has “narrativity,” the qualities that distinguish a narrative from other forms of expression. See generally, Abbott, *supra* note 92, at 1–12 (discussing the universality of narrative).

103. See, e.g., ABBOTT, *supra* note 100, at 16–20; SEYMOUR CHATWIN, *STORY AND DISCOURSE: NARRATIVE STRUCTURE IN FICTION AND FILM* 19–21 (1978).

104. CHATWIN, *supra* note 103, at 19.

105. JONATHAN CULLER, *LITERARY THEORY: A VERY SHORT INTRODUCTION* 81 (1997). Culler’s use of the word “plot” in this sense is potentially problematic: the same term is used in other (and sometimes conflicting) ways by other theorists.

106. CHATWIN, *supra* note 103, at 19, 34.

among other things, the characters who cause or experience events, the places where events happen, and various things that are present.¹⁰⁷ Hamlet's murder of his uncle Claudius is an event: the two men, the poisoned sword, and the court at Elsinore are existents. The category of events is further divided into *actions* and *happenings*—events caused by a character and those that are not.¹⁰⁸ The rebuilding of a home destroyed by Hurricane Katrina is an action, the storm itself a happening.

The term *discourse*, by contrast, refers to the way a story is communicated to an audience. It consists not only of the medium in which the story is told (as a written text, a video, or a live performance), but also a myriad of traits concerning the style and manner of expression. Among them: the perspective from which the story is told, the choice to include or omit various events and characters, the order and pacing of events, and the level of detail in which events and characters are described. If a narrative includes flashbacks, those shifts in time are part of the discourse: events need not be presented in the order in which they happened.

The distinction between narrative, story, and discourse is essential to convey a basic truth about storytelling: a single story can be told multiple ways from different perspectives in different media and for different purposes to different audiences. Kurosawa's landmark film *Rashomon* is a striking example. The story's events center on the rape of a woman and the killing of her samurai husband after the couple encounter a bandit. During the film, the wife, the bandit, and the dead samurai's spirit each tell the story in different ways, and each claims to be the killer. A woodcutter who witnessed the events gives a fourth account, inconsistent with the others.¹⁰⁹

But even when a story is told without contradiction from one perspective, the discourse may vary sharply. The events underlying L. Frank Baum's *The Wizard of Oz* have been told

107. CHATWIN, *supra* note 103, at 19, 44–45.

108. CHATWIN, *supra* note 103, at 19.

109. See, e.g., Wikipedia, *Rashomon*, available at <https://en.wikipedia.org/wiki/Rashomon> (summarizing the film's plot) (last visited June 15, 2015); Roger Ebert, *Rashomon*, available at <http://www.rogerebert.com/reviews/great-movie-rashomon-1950> (reviewing the film and discussing its cultural impact) (last visited June 15, 2015).

as a novel, a film, and two Broadway musicals, *Wiz* and *Wicked*.¹¹⁰ Each version is a separate narrative, in which the story is told through a different discourse. As the Cinderella example demonstrates, the potential variations in discourse are all but limitless.

Discussions of narrative theory most often focus on fictional narratives, but the distinction between narrative text, story, and discourse applies equally to nonfiction narratives. For nonfiction, however, there is an additional trait. As Doritt Cohn explains, a work of fiction is a non-referential (or self-referential) narrative: the text itself creates the world to which it refers by referring to it, and that world has no existence outside the text.¹¹¹ A work of nonfiction, on the other hand, is a referential narrative, one that makes reference to, and is bounded by, a world that exists beyond and independently from the text.¹¹² In Cohn's model, this world beyond the text is the *reference*.

Cohn recognized that fictional works need not be entirely self-referential. They may (and often do) refer to actual places, events, or characters.¹¹³ But while fiction can refer to the world outside the text, it does not do so exclusively, and references to that world are not bound to accuracy. As a result, a work of nonfiction is subject to judgments about "truth" or "falsity," but a work of fiction is not, and some narratives occupy a murky middle ground, part fiction and part fact.¹¹⁴

But whether a narrative is "true" cannot be determined simply by examining the discourse. As H. Porter Abbott has suggested, fiction can readily imitate fact and there is no *textual* property that can identify a narrative as a work of fiction.¹¹⁵ Instead, a narrative's truth can be assessed only by

110. Wikipedia, *Adaptations of The Wizard of Oz*, available at https://en.wikipedia.org/wiki/Adaptations_of_The_Wizard_of_Oz (last visited June 15, 2015).

111. See DORITT COHN, *THE DISTINCTION OF FICTION* 12–14 (1989).

112. *Id.* at 14–15.

113. *Id.* at 15. For instance, Elliot Roosevelt, the son of Franklin D. and Eleanor Roosevelt, wrote a series of novels casting his famous mother as a crime-solving detective, with titles like *Murder in the Lincoln Bedroom*. Elliot Roosevelt, *ELLIOT ROOSEVELT'S MURDER IN THE LINCOLN BEDROOM: AN ELEANOR ROOSEVELT MYSTERY* (2000).

114. COHN, *supra* note 111, at 15.

115. See ABBOTT, *supra* note 100, at 149. For an excellent discussion of the

evaluating statements in the narrative against other evidence. Complete and perfect accuracy is not possible.¹¹⁶

The application of these distinctions to claims for asylum is straightforward and useful. An applicant's written declaration is one narrative, while her testimony is another. They each intend to tell the same story, but the discourse is different, and any discrepancy between the two raises critical questions. How and why are they different? Are the differences a matter of *story* or *discourse*? To what degree has the applicant's story been shaped by a lawyer's involvement, or by the applicant's physical and mental state each time the story was told? And ultimately, there is this: to what degree—if any—do the differences tell us anything about the “truth” of the story or the credibility of the storyteller?

Whether the applicant's story is true depends on the relationship between the narrative and the reference—between the events of the story and events in the world. But without other evidence, how can an immigration judge verify the elements of the story, or determine whether the applicant has accurately represented what happened?

The answer, of course, is that the judge can never know what truly happened. Because the judge has no firsthand knowledge of the reference and no other evidence of the reference, the judge's conclusions about the “truth” of the story must rely on the story itself and how that story is told to determine whether the judge believes the applicant is credible. In short, the applicant's credibility becomes a surrogate for the story's truth.

For asylum seekers, their lawyers, and others who assist them, the challenges presented by this situation are inescapable. In the context of legal practice, storytelling is not optional, nor is it merely a rhetorical tactic or persuasive technique; it is, quite literally, required by the nature of legal rules.¹¹⁷ Both lawyers and the public think of law in terms of

issues relating to narrative and truth, *see id.* at 145–58.

116. As Abbott notes, historians and biographers must deal with an incomplete record, and what audiences expect from a nonfiction narrative is not so much the complete and literal truth as a good faith attempt to accurately represent the way things are (or were). *See* ABBOTT, *supra* note 100, at 146.

117. *See generally* Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories & Legal Rules*, 11 LEGAL COMM. & RHETORIC: JAWLD 51 (2014).

rules and logic, but all governing legal rules—the rules by which a decision maker can confer a benefit or impose a penalty—have the structure of a stock story, a story in which the elements (characters, events, and consequences) have been stripped to a bare minimum and stated in general terms. The “rags to riches” stories penned by Horatio Alger are classic examples. Though the characters and events change, in each of Alger’s stories a poor young boy achieves success through hard work and good character.

In the same way, the legal standard for asylum is also a stock story, a set of logically-related elements with characters, events, and a change of circumstances. To meet her burden of proof, the applicant must prove, among other things, that she left her country of nationality, and that she is unwilling or unable to return because of past persecution or a “well-founded fear” of future persecution. She cannot do so except by telling a story, in which she and those who would persecute her are the central characters.

But what happens to storytelling when the storyteller has experienced or witnessed a traumatic event? This Article now turns to that question.

III. THE IMPACT OF TRAUMA ON STORYTELLING

As some theorists have recognized, storytelling is a rhetorical act: stories are told to a particular audience for a particular purpose.¹¹⁸ But immigration courts are not intended to be a therapeutic environment, and the goals of the adjudication process differ from those of therapy.

As Schulamit Almog explains, the “poetics” of legal stories are different from those of trauma literature: “Law demands orderly, ‘closed’ stories, and has a valid reason for this demand.” Legal stories are normative, and the narrative in judgments “does not interpret reality or contemplate reality; rather, it *declares* that a particular occurrence is reality.”¹¹⁹ But the “literature” of trauma is “indifferent” to

118. See, e.g., James Phelan & Peter J. Rabinowitz, *Narrative as Rhetoric*, in David Herman et al., *NARRATIVE THEORY: CORE CONCEPTS & CRITICAL DEBATES* 3, 5 (2012). Under their definition, “[n]arrative is somebody telling somebody else, on some occasion, and for some purposes, that something happened to someone or something.”

119. Shulamit Almog, *Healing Stories in Law and Literature*, *TRAUMA AND MEMORY: READING, HEALING AND MAKING LAW* 289, 298 (Austin Sarat, Nadav

the needs of law: outside the courtroom, trauma narratives are “created first and foremost to serve its narrators, the trauma survivors.”¹²⁰ This inherent tension between the needs of the law and the psychological needs of survivors lies at the very heart of the challenges faced by trauma survivors who seek asylum. And if the system by which their stories are evaluated does not reliably account for this tension, the results can be tragic.

Most immigration judges understand that an applicant who suffers from psychological trauma may have difficulty “telling” her story. They know it is hard for people to talk about traumatic events, and that doing so may trigger painful memories or feelings. But the impact of trauma on storytelling is deeper and far more complex. It will certainly impact a survivor’s demeanor and memory, but it may also introduce a large degree of uncertainty, even with regard to the central details of the survivor’s story. And when the survivor’s story is the only evidence of what happened—as it is in most claims for asylum—the legal consequences can be severe. To understand how and why our system of asylum adjudication necessarily fails survivors, it is critical to explore the effects of trauma on storytelling in depth.

A. *The Nature and Symptoms of Trauma*

The word “trauma,” in a psychological sense, is usually associated with Post-Traumatic Stress Disorder (PTSD), but the meaning is broader.¹²¹ The word originally was used in medicine to denote “a sudden physical blow or injury.”¹²² Much later, it was borrowed by psychiatry¹²³ “to designate a blow to the self (and to the tissues of the mind), a shock that creates a psychological split or rupture, an emotional injury. . . .”¹²⁴ Psychological trauma begins with an

Davidovich & Michal Alberstein eds., 2008).

120. *Id.*

121. As Herman explains, “[t]here is a spectrum of traumatic disorders, ranging from the effects of a single overwhelming event to the more complicated effects of prolonged and repeated abuse.” HERMAN, *supra* note 1, at 3.

122. Almog, *supra* note 119, at 298.

123. Serious research on trauma originated in the late 19th century with the study of a “disorder” among women then known as “hysteria.” For a detailed discussion of the history, see Herman, *supra*, note 1 at 10–32.

124. SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS* 171 (Cambridge, MA: Harvard University Press 2012).

“extraordinary” event, one that “overwhelm[s] the ordinary human adaptations to life.”¹²⁵ Such events typically involve threats of death or serious bodily harm, or a “personal encounter with violence and death,” including the death of others.¹²⁶ The common denominator is a feeling of “intense fear, helplessness, loss of control, and threat of annihilation.”¹²⁷ As Judith Herman explains, the salient characteristic of the traumatic event is its power to inspire “helplessness and terror.”¹²⁸

While much of the study of trauma has centered on war veterans and survivors of child abuse or sexual abuse,¹²⁹ the symptoms of trauma are also widespread among “forcibly displaced persons”—a group that includes refugees.¹³⁰ Research has shown that refugees are ten times more likely to suffer from PTSD than the general population in the countries where they’ve resettled.¹³¹ Before they were displaced, refugees often experienced prolonged detention, severe violence, torture, or the death of family, friends, or associates. After displacement, they may experience additional risk factors for trauma, including arduous migration, the shock of resettlement in an unfamiliar culture, and stresses related to employment, finances, and their uncertain immigration status.¹³²

The general symptoms of trauma fall into three broad

125. HERMAN, *supra* note 1, at 33.

126. HERMAN, *supra* note 1, at 33.

127. HERMAN, *supra* note 1, at 33 (citing N.C. Andreasen, *Posttraumatic Stress Disorder*, in *Comprehensive Textbook of Psychiatry* 918-24 (H.I. Kaplan and B.J. Sadock, eds., 4th ed. 1985)).

128. HERMAN, *supra* note 1, at 33.

129. See HERMAN, *supra* note 1, at 20-32 (discussing the history of research on psychological trauma among war veterans and domestic abuse survivors); 96-114 (discussing research on child sexual abuse).

130. See, e.g., Farah Husain, et al., *Prevalence of War-Related Mental Health Conditions and Association With Displacement Status in Postwar Jaffna District, Sri Lanka*, 306 J. AM. MED. ASS’N 522 (2011) (finding high rates of PTSD and other mental health conditions among persons displaced by war in Sri Lanka); Andrés J. Pumariaga, Eugenio Rothe, and JoAnne B. Pumariaga, *Mental Health of Immigrants and Refugees*, 41 COMMUNITY MENTAL HEALTH J. 581, 588 (2005) (concluding that refugees are at high risk for depression, anxiety, and PTSD).

131. Fazel M, et al., *Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review*, 365 LANCET 1309 (2005).

132. See Crumlish and O’Rourke, *A Systematic Review of Treatments for Post-Traumatic Stress Disorder among Refugees and Asylum-Seekers*, 198 J OF NERVOUS AND MENTAL DISEASE 237 (2010).

categories. The first is hyperarousal: the nervous system "seems to go onto permanent alert, as if the danger might return at any moment."¹³³ As a result, many survivors sleep poorly, startle easily, and "react irritably to small provocations."¹³⁴ The second category of symptoms, intrusion, is perhaps the best known to laypersons. Survivors often "relive" traumatic events as though they were happening in the present. The experience of traumatic events "becomes encoded in an abnormal form of memory, which breaks spontaneously into consciousness, both as flashbacks during waking states and traumatic nightmares during sleep."¹³⁵ The experience of intrusion goes beyond simply remembering what happened: it "carries with it the emotional intensity of the original event," and survivors go to great lengths to avoid it.¹³⁶

The third class of symptoms is known as constriction or numbing. Robert J. Lifton found "psychic numbing" to be almost universal in survivors of war and called it a "paralysis of the mind."¹³⁷ In contrast to intrusion, survivors are aware of the present, but their perceptions and responses are altered, and their present experience may lose the qualities of ordinary reality, as if events are happening to someone else.¹³⁸ In Herman's words, "[t]hese perceptual changes combine with a feeling of indifference, emotional detachment, and profound passivity . . ."¹³⁹

Survivors often oscillate between intrusion and numbing, between reliving events and experiencing nothing.¹⁴⁰ Herman calls this "the dialectic of trauma," a complicated rhythm in which a survivor "finds herself caught between the extremes of amnesia or reliving the trauma, between floods of intense, overwhelming feeling and arid states of no feeling at all, between irritable, impulsive action and complete inhibition of action."¹⁴¹ Beyond these cardinal symptoms, traumatic

133. HERMAN, *supra* note 1, at 35.

134. HERMAN, *supra* note 1, at 35.

135. HERMAN, *supra* note 1, at 37.

136. HERMAN, *supra* note 1, at 42.

137. Robert Jay Lifton, *Beyond Psychic Numbing: A Call to Awareness*, 52 AM J. OF ORTHOPSYCHIATRY 619 (October 1982).

138. HERMAN, *supra* note 1, at 43.

139. HERMAN, *supra* note 1, at 43.

140. HERMAN, *supra* note 1, at 43.

141. HERMAN, *supra* note 1, at 47.

events often have a deeper, existential impact: they can undermine a survivor's belief systems, "violate the victim's faith in a natural or divine order," and "shatter the construction of the self that is formed and sustained in relation to others."¹⁴²

B. The Impact of Trauma on a Survivor's Story

Stories are central to the way human beings construct a sense of self, and the experience of trauma has a profound impact on a survivor's ability to tell her story. Our ability to describe the past relies on memory, but the memories left by traumatic events are different from those of day-to-day living. In contrast to ordinary memories, traumatic memories are not encoded "in a verbal, linear narrative that is assimilated into an ongoing life story."¹⁴³ Instead, they leave an "indelible image,"¹⁴⁴ whereby events are "encoded in the form of vivid sensations and images."¹⁴⁵ In other words, a survivor's memory is "imprinted" with the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person's ordinary memories a sense of logical and chronological coherence.

Because stories are key to the construction of self, they also play a critical role in the process of healing. Herman divides recovery into three distinct stages, each with a different task: the establishment of safety; remembrance and mourning; and reconnection with ordinary life.¹⁴⁶ In Herman's second stage, the survivor learns to tell her story completely, repeatedly, and in detail.¹⁴⁷ A survivor suffering from the symptoms of trauma may begin by telling a story that is "repetitious, stereotyped, and emotionless."¹⁴⁸ If a survivor can tell her story at all (some cannot), the character of traumatic memory often results in a narrative that is

142. HERMAN, *supra* note 1, at 51.

143. HERMAN, *supra* note 1, at 37.

144. HERMAN, *supra* note 1, at 38 (citing ROBERT J. LIFTON, *THE CONCEPT OF THE SURVIVOR*, IN *SURVIVORS, VICTIMS, AND PERPETRATORS: ESSAYS ON THE NAZI HOLOCAUST* 113 (Joel E. Dimsdale ed. 1980)).

145. HERMAN, *supra* note 1, at 38.

146. HERMAN, *supra* note 1, at 155.

147. HERMAN, *supra* note 1, at 175.

148. HERMAN, *supra* note 1, at 175.

incomplete, incoherent, fragmented, and chronologically fractured.¹⁴⁹

Even laypersons understand that a trauma survivor may have difficulty *telling* her story. Note the use of language here: the manner in which a story is told is the *discourse* and not the *story* itself. Whether a person was raped once or three times is *story*: each rape is a separate event. Whether the description of the events is vague, repetitious, or emotionless is *discourse*. But the symptoms of trauma do not affect only the discourse: they also affect the underlying story, the events and characters that form the content of a narrative. We assume the details of a “true” story will not change over time, but Herman emphasizes that this assumption does not hold for the stories told by survivors:

[B]oth patient and therapist must develop tolerance for some degree of uncertainty, even regarding the basic facts of the story. In the course of recovery, the story may change, even as missing pieces are recovered. . . . Thus, both patient and therapist must accept the fact that they do not have a complete knowledge, and must learn to live with ambiguity while exploring at a tolerable pace.¹⁵⁰

The pace of this work is often slow, and the process of constructing a full and detailed account is challenging. The survivor may become agitated or withdrawn; she may find it increasingly difficult to use words; she may suffer intrusive flashbacks; and to avoid the difficulties (and the pain) “[s]he may insist that the therapist validate a partial and incomplete version of events without further exploration.”¹⁵¹ And because the “truth” can be difficult to face, survivors “often vacillate in reconstructing their stories,” and they may be “ambivalen[t] about truth-telling.”¹⁵²

The impact of trauma on memory and storytelling has been explored extensively in certain groups of trauma survivors. For instance, the narratives told by Holocaust survivors are often described as “fractured,” “fragmented,” “disrupted,” or “interrupted.”¹⁵³ In some instances, the

149. See, e.g., HERMAN, *supra* note 1, at 177; Almog, *supra* note 119, at 426.

150. HERMAN, *supra* note 1, at 179-80.

151. HERMAN, *supra* note 1, at 180-81.

152. HERMAN, *supra* note 1, at 181.

153. See, e.g., Shulamit Almog, *Healing Stories in Law and Literature*, in TRAUMA AND MEMORY: READING, HEALING, AND MAKING LAW 289, 293 (Austin

memories are simply too painful to recall, even after decades have passed.¹⁵⁴ Among women who have been sexually abused, there is a tendency to revise the story over time, a phenomenon Kim Lane Schepple calls “shifting stories.”¹⁵⁵ As Schepple explains, “abused women frequently repress what happened; they cannot speak; they hesitate, waver and procrastinate; they hope the abuse will go away; [and] they cover up for their abusers . . .”¹⁵⁶ These actions “produce delayed or altered stories, which are then disbelieved for the very reason that they have been revised.”¹⁵⁷

The critical point—that the stories of trauma survivors change over time, even with regard to central details—has been proven by empirical research. In a 2006 article, British researchers Jane Herlihy and Stuart Turner describe a careful study in which thirty-nine refugees from Kosovo and Bosnia were interviewed on two occasions about two events in their past, one traumatic and one non-traumatic.¹⁵⁸ At the outset, the refugees were assessed for PTSD, and all exhibited symptoms of trauma in varying degrees.¹⁵⁹ All participants had been granted refugee status in the United Kingdom, and they had given accounts of the traumatic events in the course of obtaining that status.¹⁶⁰

The time between the two interviews ranged from three to thirty-two weeks.¹⁶¹ During the interviews, each refugee was asked an identical set of questions, and was also asked to rate particular details as being either “central” or “peripheral” to their experience. Differences between the interviews were noted, and researchers then calculated “discrepancy rates” for each refugee, with four separate

Sarat, et al., eds., 2007). For a book length discussion of oral testimonies by Holocaust survivors, see generally Lawrence Langer, *HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY* (1993).

154. See HERMAN, *supra* note 1, at 86-95 (discussing the effects of prolonged captivity).

155. Kim Lane Schepple, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 141 (1992).

156. Schepple, *supra* note 155 at 126-27.

157. *Id.* at 127.

158. Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 TORTURE 81 (2006).

159. *Id.* at 87-88.

160. *Id.*

161. *Id.*

calculations depending on whether the discrepancies involved the traumatic or non-traumatic event, and whether the details in question were central or peripheral.¹⁶²

The results of the research are striking. Though the discrepancy rate was higher for peripheral details, the rate for central details was far higher than a layperson might expect: for traumatic events, there were discrepancies in roughly 30% of the central details.¹⁶³ Though the authors give little information on the precise nature of the discrepancies, the descriptions they do provide suggest the discrepancies they found were precisely the sort of things an immigration judge might deem significant. For instance, during his first interview one participant said he was “slapped around” by military police. During the second, he said he was “badly beaten.”¹⁶⁴

The length of time between interviews was also an important factor: for refugees with high levels of PTSD, the overall discrepancy rate *doubled* when there was a long delay between interviews.¹⁶⁵ As the authors emphasize, if discrepancies are used as a factor in credibility determinations, then asylum seekers who suffer from PTSD at the time of their final interview or hearing “are systematically more likely to be rejected the longer their application takes.”¹⁶⁶ In light of those findings, Herlihy & Turner reach an unequivocal conclusion: “the assumption that discrepancies necessarily indicate a fabricated story is incorrect.”¹⁶⁷

C. The Testimony Method of Trauma Therapy

Despite the challenges survivors face, the act of telling the story can be critical to a survivor’s recovery, so much so that a form of therapy has developed around the process. In the 1980s, Chilean psychologists who worked with torture survivors created the “testimony method,” also known as

162. *Id.*

163. *Id.* at 88. Because the data are presented as a graph rather than a table, a more precise figure is not available.

164. Herlihy & Turner, *supra* note 158 at 89.

165. *Id.*

166. Herlihy & Turner, *Should Discrepant Accounts Given by Asylum Seekers be Taken as Proof of Deceit?*, 16 TORTURE at 90

167. *Id.* at 89.

testimonial therapy.¹⁶⁸ Subsequent research has used the method with Holocaust survivors,¹⁶⁹ recent refugees in the United States¹⁷⁰ and the Netherlands,¹⁷¹ and torture survivors in India.¹⁷²

Testimonial therapy is not a single procedure, but a practice used “in many variations and settings.”¹⁷³ Nonetheless, some features are common. The method’s “central project” is to create a written account of the patient’s experience. In most studies, the therapy took place during six to twelve weekly or bi-weekly sessions.¹⁷⁴ Therapy sessions are recorded and transcribed, and the resulting document is revised until the patient’s fragmented recollections have been assembled into a complete whole.¹⁷⁵ In many studies, the process ended with a “delivery ritual,” in which the final written version of the story was signed by the patient and copies were given to family members or human rights groups.¹⁷⁶

A pilot study among Bosnian refugees in the United States illustrates the process. In that study, the treatment involved six sessions of ninety minutes each.¹⁷⁷ For each

168. See, e.g., HERMAN, *supra* note 1, at 182; A. Cienfuegos & C. Monelli, *The Testimony of Political Repression as a Therapeutic Instrument*, 53 AM. J. OF ORTHOPSYCHIATRY 43 (1983).

169. Raul D. Strous, et al., *Video Testimony of Long-term Hospitalized Psychiatrically Ill Holocaust Survivors*, 162 AM. J. OF PSYCH. 2287 (Dec. 2005).

170. Stevan M. Weine, et al., *Testimonial Therapy in Bosnian Refugees: A Pilot Study*, 155 AM. J. PSYCHIATRY 1720 (1998).

171. Janie A. Van Dijk, et al., *Testimony Therapy: Treatment Method for Traumatized Victims of Organized Violence*, 57 AM. J. PSYCHOTHERAPY 361 (2003).

172. Inger Agger, et al., *Testimonial Therapy: A Pilot Project to Improve Psychological Well-Being Among Survivors of Torture in India*, 19 TORTURE 204 (2009).

173. *Id.* at 210.

174. See, e.g., Weine, et al., *supra* note 170, at 1721 (six sessions of 90 minutes each); Van Dijk, et al., *supra* note 171, at 363 (12 sessions); Agger, et al., *supra* note 172, at 211 (4 sessions of 90–120 minutes each). One study used only one or two sessions of 60 minutes each, but the authors of that study found no significant difference between the study participants and a control group. Victor Igreja, et al., *Testimony Method to Ameliorate Post-Traumatic Stress Symptoms: Community-based Intervention with Mozambican Civil War Survivors*, 184 THE BRITISH J. OF PSYCHIATRY 251, 252–54 (2004).

175. HERMAN, *supra* note 1, at 182.

176. See, e.g., Weine, et al., *supra* note 170, at 1722; Van Dijk, et al., *supra* note 171, at 362.

177. Weine, et al., *supra* note 170, at 1721.

survivor, testimony was not limited to traumatic events—rather, there was a “constant emphasis upon 1) the [refugee’s] life history, 2) the social context of life, and 3) the sense of self in history and history in one’s life.”¹⁷⁸ Once this “initial frame” was set, the interviewer asked “succinct, open-ended, and clarifying questions” about the patient’s experience, and provided “support and structure” to help the survivor give an full account of the events.¹⁷⁹ At the end of the therapy, a written account was read to the survivor, who corrected mistakes or added details. Two copies of the final version were signed, with one going to the survivor and the second to an oral history archive.¹⁸⁰

In virtually all reported studies, authors found a significant improvement in the psychological wellbeing of participants.¹⁸¹ When the study of Bosnian refugees began, for instance, all participants had been formally diagnosed with PTSD.¹⁸² A six-month follow-up found that 47% of the participants no longer suffered from PTSD, while the frequency and severity of symptoms in other participants substantially decreased.¹⁸³ In explaining similar findings, the authors of another study emphasized that “a main characteristic of trauma is the inability to talk about the traumatic experiences without being flooded by them.”¹⁸⁴ By giving survivors gradual and supportive exposure to painful memories, they theorized, testimonial therapy decreases the main symptoms—“avoidance and re-experiencing”—and helps survivors discuss and re-evaluate their experiences.¹⁸⁵

IV. THE ASYLUM ADJUDICATION PROCESS, REVISITED

Trauma survivors often appear in legal proceedings, most frequently in cases involving rape, sexual abuse, or domestic

178. Weine, et al., *supra* note 170, at 1722.

179. Weine, et al., *supra* note 170, at 1722.

180. Weine, et al., *supra* note 170, at 1722.

181. See, e.g., Weine, et al., *supra* note 170, at 1722–23 (reporting a substantial decrease in the rates of PTSD and the frequency and severity of symptoms with no negative effects); Van Dijk, et al., *supra* note 171, at 367 ; Agger, et al., *supra* note 172, at 204 (after therapy, all participants demonstrated “significant improvement” on a well-being index).

182. Weine, et al., *supra* note 170, at 1721.

183. Weine, et al., *supra* note 170, at 1722.

184. Van Dijk, et al., *supra* note 171, at 368.

185. Van Dijk, et al., *supra* note 171, at 368.

violence.¹⁸⁶ And yet, in important ways, trauma is uniquely situated in claims for asylum. It is uniquely situated in part because an applicant must prove that the persecution she suffered was sufficiently severe to constitute persecution, and the trauma itself is evidence of that fact. It is also different because the opposing party (the Government) rarely has evidence of its own. It is not a matter of “he said / she said,” but simply one of “he or she said.” And it is different because the balance of interests is weighed so overwhelmingly to one side. For instance, in a criminal case involving rape or sexual abuse, a court must balance the possible harm to the alleged victim with the harm of a wrongful conviction. But in an asylum case, the Government truly has little at stake: the consequences of erroneously *granting* asylum are de minimus.

What this means, quite simply, is that survivors who seek asylum must confront challenges for which there is no direct precedent in the U.S. legal system. With a focused understanding of both narrative theory and research on trauma narratives, this Article now turns to those challenges.

A. The Challenges Faced By Survivors Who Seek Asylum

Consider again the hypothetical case with which this Article began. The applicant has testified that she was arrested, imprisoned, and raped. If her testimony is true, the odds are extremely high that she suffers from psychological trauma: rape, like torture or prolonged detention, is the sort of event that typically results in trauma. But the applicant has no evidence to corroborate her testimony, and thus her claim for asylum will turn almost entirely on whether the judge believes she is credible.

186. A detailed discussion of legal and judicial responses to trauma in domestic violence cases is beyond the scope of this article. For a general overview of the challenges presented by domestic violence cases and responses to those challenges, see, e.g., Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 Ky. L.J. 483, 542 (2013); LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2002) ; Lisa A. Goodman & Deborah Epstein, *LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE* (2008). On the specific issue of addressing the effects of trauma, Carolyn Copps Hartley has proposed various reforms grounded in principles of therapeutic jurisprudence. Carolyn Copps Hartley, *A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials*, 9 VIOLENCE AGAINST WOMEN 410 (2003).

If she filed an affirmative application and has a lawyer, she will tell her story orally no fewer than five times over a period spanning more than one year.¹⁸⁷ At a minimum, the applicant will tell her story when she first meets with her lawyer, during her asylum interview and the immigration court hearing, and while she and her lawyer prepare for both the interview hearing. In addition, very early in the process, the applicant will sign a written version of her story drafted by the lawyer.

In the end, a judge will consider at least two versions of her story: the first version, as retold in writing by a lawyer, and the last version, as told orally by the applicant herself. In the process of making a credibility finding, the judge will assess whether the two versions are internally consistent and consistent with each other, and whether the applicant's story is detailed, plausible, and coherent. A negative credibility finding will be fatal to the applicant's claim, and the deck will be stacked against her in three distinct ways.

First, *nearly all* of the criteria used to assess credibility are unreliable when applied to the stories told by trauma survivors. As dictated by Congress, an immigration judge's credibility assessment will be based on the applicant's demeanor, candor, and responsiveness, as well as on the inherent plausibility of her story, the consistency between her written and oral statements, the internal consistency of each statement, and the consistency of her statements with other evidence.¹⁸⁸ Many of these factors are a matter of discourse rather than story, and if the applicant is a trauma survivor, only the final factor—the consistency of her statements with other evidence—has any real bearing on the truth of her claim.

As emphasized earlier, adverse credibility findings are frequently based on inconsistencies in the applicant's story, and yet such inconsistencies are routine—and should be

187. In fiscal year 2014, the immigration courts received 225,896 new cases and completed 184,322 cases. EOIR 2014 Yearbook, *supra* note 71, at B1-B2. At the end of that year, the immigration courts had a backlog of 418,861 pending cases. *Id.* at W1. As those figures make clear, many cases are not completed in a year's time; some will take many years. *See, e.g., Zeru*, 503 F.3d at 64 (asylum claim denied seven years after immigration court proceedings began, and over four years after testimony was first taken).

188. 8 U.S.C. §§ 1158(b)(1)(B)(iii).

expected—when trauma survivors tell their story. Moreover, factors such as demeanor, vagueness, responsiveness, and even “plausibility” are not reliable measures of truthfulness when applied to trauma survivors. In *Sanga v. Gonzales*, for instance, an asylum applicant testified that government soldiers came to his family’s home, shot his father, and raped his sister while he hid in the bathroom with his mother. In the course of finding that he was not credible, the judge opined that it was not a “logical human response” for the applicant to remain hiding in the bathroom for an hour after the shooting had stopped.¹⁸⁹ In fact, given the traumatic quality of the events described by the applicant, it was quite plausible for him to remain hiding for an hour or even longer.

Second, the deck is stacked against survivors because key traits of the adjudication process greatly increase the chances a survivor will tell inconsistent versions of her story. An early version will be frozen in writing, while the final version (her testimony) will be told in a starkly intimidating setting, where the applicant will be subjected to adversarial (and often aggressive) cross-examination. For survivors, simply telling the story is emotionally challenging. The experience of testifying in court can provoke intrusive symptoms, and a survivor’s first concern (if only subconsciously) will be to “manage” her testimony in a way that minimizes trauma symptoms, even if the result is inconsistent with earlier statements.¹⁹⁰ And because government lawyers rarely have evidence of their own, their primary strategy will be to challenge the applicant’s credibility and highlight discrepancies—or even induce them.

In this context, the distinction between story and discourse again becomes useful. Most factors used to assess credibility, including demeanor and things like “vague” or “evasive” answers, relate to the *discourse* of the applicant’s narrative. They are deemed relevant to credibility, but they have no real bearing on whether the story is *true*—on whether it accurately conveys what happened. But

189. *Sanga v. Gonzalez*, 121 Fed. App’x 841, 843 (10th Cir. 2005).

190. See HERMAN, *supra* note 1, at 180 (“In order to resolve her own doubts or conflicting feelings, the patient may sometimes try to reach premature closure on the facts of the story”); Almog, *supra* note 119, at 298–301 (discussing the tension between the demands made on narrative in the context of therapy and of law).

inconsistencies regarding the number of times an applicant was raped or the details of other central events are aspects of *story* rather than discourse. There is a widespread belief that symptoms of trauma effect discourse but not story; that they have an impact on how a story is told, but not on details of the story itself. But empirical research has proven that premise to be false: when a witness is a trauma survivor, inconsistencies in the witness's story cannot be taken as evidence that the witness is not credible.

And yet, in the context of asylum adjudication, immigration judges continue to rely on lay assumptions rather than proven empirical knowledge when they make credibility findings. The First Circuit's decision in *Zeru v. Gonzales*¹⁹¹ provides a striking example of both judicial *chutzpah* with regard to expert evidence on trauma and the egregious delays sometimes produced by the U.S. government's byzantine system for adjudicating asylum claims.

Zeru filed an affirmative application for asylum in 1995; after an interview, an asylum officer initiated removal proceedings, and she renewed her application in immigration court. An immigration judge heard testimony on five occasions between January 1999 and March 2002.¹⁹² Her case was then transferred to a new judge, who held an additional full day of hearings before denying her application in December 2003.¹⁹³ In 2006, the Board of Immigration Appeals rejected Zeru's direct appeal and a subsequent motion to reopen.¹⁹⁴ And in 2007—*twelve years* after her application was first filed—the First Circuit affirmed the second judge's conclusion that Zeru was not credible, as well as the decisions to deny both her asylum claim and her motion to reopen.¹⁹⁵

Zeru testified she had been arrested and raped by Eritrean officials, and the judge's negative credibility finding was based largely on Zeru's inconsistent statements regarding the number of times she was raped. During 1998 interviews with Dr. Melissa Wattenburg, a clinical

191. *Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007) .

192. *Id.* at 63.

193. *Id.* at 64–65.

194. *Id.* at 67–68.

195. *See id.* at 69–72.

psychologist who specialized in PTSD, Zeru said she was raped three times. An assessment by Dr. Wattenberg concluded that Zeru “meets criterion for current moderate PTSD, and moderate depression.”¹⁹⁶ During direct examination at the 2003 hearing, however, Zeru testified that she was raped only once, at the start of her imprisonment. On cross-examination, she testified that she had also been raped a second time, just before her release.¹⁹⁷ Her statements were also inconsistent in other respects. For instance, in 1999, she testified that Eritrean security officers interrogated her for ten hours, and the encounter “terrified” her. In 2003, she “described the episode as a four-hour interrogation, and stated that she did not take the officers’ warnings seriously.”¹⁹⁸

During the immigration court hearing and her direct appeal to the BIA, Zeru presented evidence that she suffered from PTSD, but her attorney did not assert the discrepancies in her story were caused by trauma.¹⁹⁹ Her motion to reopen, however, was filed by a different lawyer and was replete with evidence to support that conclusion. In support of her motion, Zeru submitted evidence that her PTSD had worsened in advance of her impending deportation, including a letter from a psychiatrist who treated her after she was admitted to a hospital for “depression and suicidal thoughts.”²⁰⁰ Three additional letters accompanied the motion. In one, a psychiatrist explained that Zeru had flashbacks to her rapes and imprisonments, and used dissociation and denial to avoid re-experiencing trauma. In a second, a psychologist who met

196. *Id.* at 64.

197. *Zeru*, 503 F.3d at 64.

198. *Id.* at 70. Zeru also gave inconsistent testimony on several points that were irrelevant to her asylum claim, including the place where she first met a witness, the number of grades she completed in school, and the length of time she had owned a business in Eritrea. *See id.* At the time of the hearing, some federal circuits would have barred the judge from considering such matters as part of a credibility finding. *See, e.g., Kaur v. Gonzales*, 418 F.3d 1061, 1064 (9th Cir. 2005) (“It is well settled in our circuit that minor inconsistencies that do not go to the heart of an applicant’s claim for asylum cannot support an adverse credibility determination.”). Following enactment of the REAL ID Act, however, a judge is authorized to consider any inconsistency, no matter how remote it may be to an applicant’s claim. [FN, SUGGEST: *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).]

199. *See Zeru*, 503 F.3d at 73–74.

200. *Id.* at 67.

with Zeru in 2006 wrote that she was “too tearful and distressed” to discuss the details of her rapes.²⁰¹ A third letter, written by a forensic psychologist, provided an extensive literature review regarding the symptoms of trauma.²⁰² Despite that evidence, the BIA denied Zeru’s motion.

The immigration judge’s negative credibility finding made it clear that the judge relied on ill-informed lay assumptions regarding the symptoms of trauma. Without supporting evidence, the judge opined that “it would not be unusual for a victim of trauma to confuse dates or sequences of events, but it would be very unusual . . . to simply forget that an event occurred.”²⁰³ The word “forget” is deeply problematic here, and a reasonable judge familiar with the research on trauma would not make such a claim. There are other reasons why a rape survivor might give differing accounts of the number of times she was raped, ranging from her psychological state at the time of her statements to a perceived need to “embellish” the severity of the trauma she suffered for certain audiences—as if being raped once isn’t enough. Given that Zeru undisputedly suffered from trauma, the fact that she gave inconsistent statements concerning the number times she was raped cannot be taken as evidence that she was not raped at all.

Nonetheless, the First Circuit affirmed both the negative credibility finding and the judge’s decision to deny asylum. In doing so, the court emphasized that an immigration judge’s credibility findings “demand deference”²⁰⁴ and should not be reversed unless “any reasonable adjudicator” would be *compelled* to disagree.²⁰⁵ Because the immigration judge did not ignore Dr. Wattenberg’s conclusion that Zeru was suffering from PTSD, the First Circuit held the judge did not err.²⁰⁶ The court also affirmed the BIA’s decision to deny Zeru’s motion to reopen, largely on the grounds that Zeru

201. *Id.* at 68.

202. *Id.* at 67–68.

203. *Id.* at 65.

204. *Id.* at 69–70.

205. *See Zeru*, 503 F.3d. at 71 (quoting 8 U.S.C. § 1252(b)(4)(B) (2012)).

206. *See id.* at 71. It should be noted that the court first held that Zeru had waived these issues by failing to raise them on direct appeal to the BIA. The court then addressed them anyway, and concluded that it would have affirmed the negative credibility findings even if Zeru had raised the issue below. *See id.*

failed to prove ineffective assistance of counsel or offer material evidence that was previously unavailable.²⁰⁷

The First Circuit's decision reflects a common belief that expert evidence related to credibility is both irrelevant and prejudicial. Both state and federal courts have held that a party may not use expert testimony to argue that inconsistent statements resulted from symptoms of PTSD. For instance, in *Westcott v. Crinklaw*, a civil rights case, the Eighth Circuit held that "[a]n expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."²⁰⁸ The court reached that conclusion even though the expert did not directly testify that the witness's inconsistent statements were, in fact, caused by PTSD. Rather, the expert simply testified that the witness was suffering from PTSD, and that PTSD "may cause a person to make inaccurate, unreliable and incomplete statements."²⁰⁹ In other words, the appeals court wrongly assumed that an untrained layperson is capable of accurately assessing the credibility of a witness under any and all circumstances, even when the witness is suffering from PTSD.

B. The Impact of a Written Declaration

The discrepancies in *Zeru* were limited to the applicant's oral statements. But in asylum cases, the routine practice of filing a declaration drafted by a lawyer or community group adds a further layer of complexity. If the person who drafts the declaration is not well-informed about the effects of trauma and the most effective practices for working with survivors, that person may unwittingly increase the likelihood that the applicant is deemed not credible.

To understand how a lawyer or community representative may make matters worse, it is useful to compare the procedures for testimonial therapy with the way most lawyers typically work with their clients. In both situations, the applicant will be asked to tell her story, and a

207. *See id.* at 71–72.

208. *Westcott v. Crinklaw*, 68 F.3d 1073, 1076 (8th Cir. 1995) (quoting *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981), *cert. denied*, 454 U.S. 829 (1981)).

209. *Id.* at 1075 (emphasis added).

version of her story will be reduced to writing. The differences, however, are stark.

During testimonial therapy, the therapist will typically meet with a client six to twelve times, for as much as ninety minutes at a time, over a period of many weeks.²¹⁰ During those sessions, the therapist will begin with a detailed account of the client's life before the trauma, thereby putting the traumatic events in a larger context, and integrating those events into the applicant's full life story. While discussing the traumatic events, the therapist will carefully probe for additional details, while being sensitive to the client's emotional state. If necessary, the therapist will back away from difficult moments, then probe for details again when the client is better able to provide them.

All of this requires a level of attention, care, and training that immigration lawyers can rarely bring to their meetings with clients. Private lawyers must bill for time spent with a client, and even lawyers who work for non-profit agencies have limited time for client interviews. Very few lawyers will be willing or able to spend sufficient time interviewing a client who has experienced trauma.

Moreover, many lawyers may feel uncomfortable with the emotions that can surface while interviewing a trauma survivor, and thus they may back away from—and never fully probe—the most traumatic aspects of a client's story. As a result, the written declaration may be based on an incomplete version of the story, one that omits critical events or other important details. As Herman notes, during therapy a survivor “may insist that the therapist validate a partial and incomplete version of events without further exploration”²¹¹ The same thing may happen during meetings with a lawyer—indeed, it seems more likely to happen. If it does, the odds that an applicant's testimony will differ from her declaration are high. In the British study of refugees who suffered from PTSD, when refugees were asked to describe a traumatic event twice, the discrepancy rate for even central details was roughly 30%, and it increased as

210. See, e.g., Weine, et al., *supra* note 170, at 1721 (six sessions of ninety minutes each); Van Dijk et al., *supra* note 171, at 363 (twelve sessions); Agger, et al., *supra* note 172, at 211 (four sessions of 90–120 minutes each).

211. HERMAN, *supra* note 1, at 180.

more time passed between the first and second interview.²¹²

The drafting of the declaration itself introduces further complications. When a survivor talks about the trauma she experienced, her statements are likely to be both logically and chronologically fragmented as well as incomplete. The applicant's lawyer or representative will then try to fashion those statements into a coherent and chronological account of the events. The danger in doing so is that the story as told by the lawyer may differ in important ways from the applicant's testimony at trial, and a judge may believe those differences to be evidence of untruthfulness. Once again, narrative theory is a useful tool for understanding the nature of the challenge.

When an applicant testifies at a hearing, both the *story* and the *discourse* are the work of the applicant. A lawyer can shape the testimony through her questions, but in the end the applicant will not only supply the characters and events, but will also determine how the story is told. The process of drafting a written declaration is quite different: while the applicant still supplies the story, *the discourse is almost entirely the work of the person who drafts the declaration*. That person, and not the applicant, will decide how much detail to include, whether certain things should be omitted entirely, what words should be used, and in what order the events will be presented.

Both before and during trial, a trauma survivor may have difficulty telling a coherent, well-ordered, chronological story. Instead, her testimony may be fragmented, disjointed, and out of sequence, and she may omit important details in an effort to manage the symptoms of trauma and avoid intrusive flashbacks. And yet when drafting the declaration, a competent, well-meaning lawyer or representative may reshape an applicant's story with the aim of telling the story in a way that conforms to a judge's expectations. In doing so, the drafter may literally create a declaration that goes *beyond* an applicant's ability to testify, and thereby increase the chances that an immigration judge will find an applicant's testimony to be inconsistent with her declaration.

The challenges faced by the applicant are further

212. See Herlihy & Turner, *supra* note 158, at 88–89. Because the data are presented as a graph rather than a table, a more precise figure is not available.

compounded by the context in which the hearing takes place. The immigration courts face an enormous, multi-year backlog, and the typical judge completes 144 asylum claims each year in the course of completing nearly 1,000 removal cases—an average of roughly nineteen or twenty completed cases a week.²¹³ Professor Stacy Caplow has succinctly explained the practical consequences of this caseload:

Most [judges] are intelligent, patient, and respectful under quite stressful conditions. They listen to people tell tales of difficult lives, sacrifices, fears, and hopes, hour after hour, day after day. This repetition and volume has an inevitable, inuring effect on their attitudes. While they must be objective, they also are listening carefully for inconsistencies, mistakes, or inaccuracies, in other words, a reason to deny relief.²¹⁴

Caplow also notes that judges “sometimes even seem to be trying to trap or trip up the applicant, or they may be aggressive in their questioning and probing.”²¹⁵ The truth of that point is even greater for government lawyers, whose cross-examination of asylum applicants is often aggressive and ultimately intended to “trip up” the applicant by highlighting—or even inducing—inconsistencies in the applicant’s story.²¹⁶

The combative, free-swinging style of many government lawyers was evident in a research study in which trained observers watched and reported on immigration court hearings.²¹⁷ Though some government lawyers conducted cross-examination in a way that was “professional, respectful,

213. The average number of cases per judge is not published and must be calculated from other data. On June 15, 2015, the website of the Executive Office for Immigration Review listed 253 immigration judges nationwide. See *EOIR Immigration Court listing*, DEPT. OF JUSTICE (Feb. 2016), <http://www.justice.gov/eoir/eoir-immigration-court-listing> (last visited June 15, 2015). Collectively, those judges completed 248,078 cases in fiscal year 2014, of which 36,614 were asylum cases. EOIR 2014 Yearbook, *supra* note 71, at A2, K4. Thus, the average immigration judge completed 981 cases during that year, of which 144 were asylum cases. It should be noted that not every completed asylum case requires a full hearing: some 7,306 asylum claims were “withdrawn” or “abandoned.” See *id.* at K4.

214. Caplow, *supra* note 6, at 263.

215. Caplow, *supra* note 6, at 263.

216. See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 493 (1992/93).

217. See *id.* at 433.

and efficient,” others engaged in lengthy, aggressive cross-examinations that often focused more on the respondent’s character than the merits of the case. Observers noted that the manner of these attorneys was often “hostile, sarcastic, or disbelieving.”²¹⁸ At times, government lawyers attempted to block applicants from explaining their answers, and their tactics seemed to have no purpose other than portraying the applicant as “evasive.”²¹⁹

In the face of such tactics, it is hardly surprising that a trauma survivor might give testimony inconsistent with the story she told many months earlier in the relative safety of meetings with a lawyer or representative. As the research on asylum cases demonstrates, the most common form of inconsistency—one relied on by judges in 57% of cases—is an inconsistency between the applicant’s testimony and the written declaration. Thus, the process by which a declaration is drafted is critical, and this Article now turns to that topic, with a detailed account from one asylum clinic as an exemplary example of how that work might be done most effectively.

C. The Challenges of Drafting An Effective Declaration

An asylum declaration is simply a detailed account of the applicant’s story, a written statement of the facts underlying her claim. There are books and articles advising what a lawyer *should* do when drafting one, almost all of which focus on the end product; on the final document itself and not the often “messy” process by which a declaration is drafted.²²⁰ But Professor Stacy Caplow, director of the asylum clinic at Brooklyn Law School, has written a superb account of the process her students follow.²²¹ The work of those students is exemplary, and a review of Caplow’s account underscores the ways in which a lawyer can unwittingly impede (or even torpedo) a trauma survivor’s chances for success, by “overwriting” the declaration, failing to probe for difficult details, or failing to spend sufficient time with an applicant to

218. *Id.* at 493.

219. *Id.* at 493.

220. *See, e.g.,* REGINA GERMAN, AILA’S ASYLUM PRIMER 353 (Am. Immigration Lawyer’s Assoc. 4th ed. 2005); ROBERT JOBE, ET AL., WINNING ASYLUM CASES §§ 13–19 (Immigrant Legal Resource Center 2004).

221. *See* Caplow, *supra* note 6.

fully develop the applicant's story.

For Caplow and her students, the declaration is the "central evidence" in the case, and the factfinder's "first exposure to the heart of the claim."²²² The declaration "previews the facts, establishes the case theory, introduces the client, and sets the stage" for the hearing.²²³ The ultimate goal, as Caplow describes it, is to "translate facts" into a "riveting narrative"—"a story that compels the desired result."²²⁴ Students are taught to strive for a "comprehensive, creative, and painstakingly detailed document that delicately balances case theory and the client's voice but also tells a story of courage, suffering, loss, sacrifice, and exile."²²⁵ And in doing so, they seek to "empower" the applicant to testify "confidently and believably" during a later interview or hearing.²²⁶

The underlying facts—the characters and events that form the story—must be elicited from the client, and Caplow describes the process of doing so as "messy, arduous, and lengthy."²²⁷ Students conduct multiple interviews over a period of weeks or months, in which they typically follow a "rough chronology" of the client's life, from background information through the central facts underlying the claim and the client's ultimate flight from her country of nationality to the United States.²²⁸ Students ask open-ended questions, and many clients first tell their story in a "burst of information" in which they "gallop through years of troubles."²²⁹ In doing so, clients tend to "omit details, go off on tangents, and drift between time frames."²³⁰ In Caplow's words, the "process usually resembles a looping conversation," a process of moving forward then circling back to verify, elaborate, and explain.²³¹ The process requires persistence, and a willingness to push the client. As one client told Caplow's students: "You are asking me about things I

222. Caplow, *supra* note 6, at 249.

223. Caplow, *supra* note 6, at 249.

224. Caplow, *supra* note 6, at 252, 258.

225. Caplow, *supra* note 6, at 256–57.

226. Caplow, *supra* note 6, at 257.

227. Caplow, *supra* note 6, at 257.

228. Caplow, *supra* note 6, at 272.

229. Caplow, *supra* note 6, at 266.

230. Caplow, *supra* note 6, at 266.

231. Caplow, *supra* note 6, at 272–73.

have been trying to forget.”²³²

For Caplow’s students, the work is ultimately a process of “trust-building between lawyer and client that slowly yields more nuanced and specific information.” And—just as critically—it is a process of “case-building during which the client’s memory, confidence, and eloquence improve and grow so that by the time the hearing occurs, he or she truly understands” what must be articulated and explained.²³³ It is also a “cycle of rehearsals,” in which the applicant “is transformed into a more comfortable storyteller before an audience other than sympathetic law students.”²³⁴

This Article quotes Caplow at length for two distinct reasons. First, the exemplary process she describes is one that rarely happens outside the setting of a law school asylum clinic. Lawyers in private practice must charge for their time, and even lawyers who work for a non-profit agency are constrained by budgets and caseloads. As a result, outside the context of an asylum clinic, few if any immigration lawyers are able to give an asylum applicant the time and attention the applicant would receive from Caplow’s students. The same is undoubtedly true for the community groups that assist unrepresented applicants. And yet, if the client is a trauma survivor, a lawyer or representative who does anything less than Caplow’s students is unlikely to elicit the full details of the survivor’s story, and thus the applicant is more likely to face a negative credibility finding and the denial of asylum.

Beyond that truth, the work of Caplow’s students is remarkable because *it very closely resembles the process of testimonial therapy*. The similarities are striking: among other things, students meet with their client multiple times over a period of weeks or months; they work to build trust; and they put the core of the applicant’s claim into the broader context of the client’s life.²³⁵ They also probe for details and fill in gaps until they obtain a complete account of the client’s story. And the end “product” of that process—just as in testimonial therapy—is a thorough written account of the

232. Caplow, *supra* note 6, at 266.

233. Caplow, *supra* note 6, at 265.

234. Caplow, *supra* note 6, at 265.

235. See *supra*, text accompanying notes 161 to 178 for a detailed discussion of testimonial therapy.

client's story, one signed by the client and shared with others.

Caplow's students are not therapists, but it is not an exaggeration to suggest that their work with a client may be no less therapeutic than the work performed by a trained counselor during testimonial therapy. This observation is consistent with the experience of mental health professionals who work with torture survivors. In an article on the therapeutic effects of evaluating asylum seekers, two such professionals emphasize that "the process of organizing the torture story into a coherent narrative" has specific therapeutic benefits that will help a survivor gain asylum.²³⁶ In their words, "[t]he [evaluation] process can empower the survivor to testify in court and to cope with the anxiety and stress of the asylum process."²³⁷ And because all of this happens *before* the client's story is committed to writing and filed with the asylum office or the court, the chances that the client's testimony will be inconsistent with the declaration are greatly reduced.

But the process of eliciting facts from an applicant is simply the background for drafting an affidavit: in the language of narrative theory, the process is focused on the *story*. The drafter must then craft the *discourse*, must still shape the raw material of the story into a narrative text. And it is here, too, that Caplow's clinical students excel in ways that may not be common among practicing immigration lawyers.

At various points, Caplow describes the ideal declaration as one that is "consistent," "detailed," plausible," and "coherent"²³⁸—precisely the same adjectives immigration judges often use when they speak of the testimony needed to establish an applicant's claim without the benefit of corroborating evidence.²³⁹ Caplow's students are encouraged "to give texture and vitality to their client's voice," but they are also cautioned about the dangers of going too far. Many

236. Gangsei & Deutsch, *supra* note 20, at 83–84.

237. Gangsei & Deutsch, *supra* note 20, at 84.

238. See Caplow, *supra* note 6, at 252 ("The facts need to be detailed, plausible, and consistent . . ."), 265 (an attorney should prepare a "coherent and moving client narrative").

239. In reviewing the decisions of immigration judges, the Board of Immigration Appeals has long used these words. See, e.g., *In re S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

applicants tell their stories in language that is “colorless and repetitious,” and it can be tempting for a lawyer to “embellish and overstate facts”—for instance, by substituting “torture” when the client said “hurt.”²⁴⁰ Students are taught that “[a]uthenticity is critical,” and that “[l]anguage, phrasing, and imagery unsuitable to the education, articulation and imagination of the client might have a devastating impact” on the client’s credibility by creating the impression that the declaration was “the product of lawyer manipulation.”²⁴¹ And while Caplow’s students are taught to draft a detailed declaration,²⁴² they are also cautioned about the potential dangers of too much detail. As Caplow notes, “[t]here is a concern that the [declaration] not be so detailed as to risk possible inconsistencies when the affiant relates the facts under the pressure of oral testimony.”²⁴³

Obviously, an immigration judge must still point to specific inconsistencies between an applicant’s testimony and declaration to support a negative credibility finding. Nonetheless, a lawyer who is less cautious than Caplow’s students and not attuned to the challenges faced by trauma survivors can easily draft a declaration that is too detailed, and too much in the voice of a lawyer—so much so that the declaration goes beyond the client’s ability to testify. And as Caplow recognizes, a lawyer who does so may create the impression that the testimony and declaration are inconsistent, and thereby increase the likelihood that a judge will find the applicant not credible.

V. STRATEGIES FOR REFORM

In recent decades, federal courts, legal scholars, and immigration advocates have harshly criticized the asylum adjudication process and the immigration court system more broadly. The Seventh Circuit has been a particularly harsh critic. In *Niam v. Ashcroft*, for instance, one panel declared “the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board [of

240. Caplow, *supra* note 6, at 283.

241. Caplow, *supra* note 6, at 283–84.

242. See Caplow, *supra* note 6, at 280–81.

243. Caplow, *supra* note 6, at 257 n.32.

Immigration Appeals] in this as in other cases.”²⁴⁴ This chorus of criticism has been accompanied by numerous proposals for reform. Some are far-reaching while others are modest; but with one notable exception, none would effectively address the challenges faced by trauma survivors who seek asylum.

A. The Scope of Reform Proposals

The most comprehensive proposal follows from an exhaustive study of asylum cases published in 2007 under the title *Refugee Roulette*. In that study, the authors found widespread and troubling inconsistencies in the percentage of applications granted or denied by individual immigration judges, even when judges heard cases in the same city with applicants from the same countries.²⁴⁵ For instance, two immigration judges in Miami granted asylum to 5% and 6% of applicants from Colombia, while two different judges in Miami granted asylum in 77% and 88% of such cases.²⁴⁶ The study also found widespread inconsistencies among decisions by individual asylum officers, and in the results of appeals to both the BIA and the federal circuit courts.²⁴⁷

Eight years have passed since *Refugee Roulette* was published, but recent immigration court statistics suggest widespread problems persist. In fiscal year 2014, immigration court judges granted 49% of the 17,997 asylum claims that received a full adjudication.²⁴⁸ However, the grant rate varied sharply depending on a claim’s procedural posture: judges granted 75% of affirmative claims, compared to just 28% of defensive claims.²⁴⁹ In other words, claims *previously* adjudicated (but not granted) by an asylum officer were nearly *three times* more likely to be granted by an immigration judge than claims first filed with the

244. *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2003).

245. *See generally* *Refugee Roulette*, *supra* note 43.

246. *Refugee Roulette*, *supra* note 43, at 338. The mean grant rate for Colombian cases among Miami’s 22 judges was 30%. *See id.* Notably, each judge in Miami heard at least 162 Columbian cases during the period under study (most heard more than 300), and cases were assigned to judges randomly. *See id.*

247. *See* *Refugee Roulette*, *supra* note 43, at 372-74.

248. EOIR 2014 Yearbook, *supra* note 71, at K2.

249. EOIR 2014 Yearbook, *supra* note 71, at K3.

immigration court.²⁵⁰

The disparities between courts in different cities were equally stark. In El Paso, Texas, judges adjudicated 120 claims and granted none. In Atlanta, judges granted two claims out of 137. Grant rates were also low in Cleveland (18%); Detroit (14%); Las Vegas (7%); and New Orleans (16%).²⁵¹ At the opposite end of the spectrum, judges in New York City granted 84% of the claims they adjudicated.²⁵² The grant rate was also higher than average in Arlington, Virginia (71%); Honolulu (74%); Philadelphia (59%); and San Francisco (59%).²⁵³

The source for these figures—EOIR’s Statistical Yearbook—does not break down the grant rates by the applicant’s country of origin within each court. Thus, direct comparisons to the discrepancies found by the authors of *Refugee Roulette* are not possible without more data. Nonetheless, the EOIR data compel the conclusion that troubling disparities remain.

Despite these disparities, the authors of *Refugee Roulette* do not question the wisdom of adjudicating asylum cases in an adversarial hearing, nor do they recommend streamlining the existing two-track system of asylum interviews and

250. EOIR 2014 Yearbook, *supra* note 71, at K3. This gap has grown wider in recent years: between fiscal years 2010 and 2014, the grant rate for affirmative claims climbed steadily from 61% to 75%, while the grant rate for defensive claims declined from 34% to 28%. *See id.* But the disparity between affirmative and defensive claims is more stark than these numbers suggest: in 2014, asylum officers granted 47% of the affirmative claims they adjudicated, while referring roughly 50% to the immigration courts. *See supra*, note 63. Because cases referred by the asylum office in one year may not be completed by an immigration court until the following year (or several years later), and some affirmative claims received by the immigration courts are not adjudicated, it is not possible to calculate a precise overall grant rate for affirmative claims. Nonetheless, for affirmative claims that are fully adjudicated, the grant number is certainly more than 80% and probably near 90%.

251. EOIR 2014 Yearbook, *supra* note 71, at K2. Grant rates were also low at various immigration detention centers, *see id.*, but because the demographics of persons held in those centers differ from the demographics of other courts, they are not included here. In particular, many cases adjudicated at detention centers involve persons who are barred from asylum because they have been convicted of any aggravated felony.

252. EOIR 2014 Yearbook, *supra* note 71, at K2. The disparity between New York City and the rest of the nation is striking. Judges there adjudicated 5,750 claims, which amounts to 32% of all claims adjudicated nationwide. And yet those judges granted 55% of all claims granted nationwide. *See id.*

253. EOIR 2014 Yearbook, *supra* note 71, at K2.

immigration court hearings. Instead, the *Refugee Roulette* authors recommend comprehensive and hugely expensive reforms to the immigration court system, including a substantial increase in the resources available to immigration courts (more judges and clerks, better interpretation) as well as court-appointed and publicly-funded lawyers for indigent applicants.²⁵⁴ They also recommend that immigration courts should “be insulated from politics” by making them independent from the Department of Justice,²⁵⁵ that hiring standards for judges should be “more rigorous,”²⁵⁶ and that asylum officers and judges should receive better training.²⁵⁷

With the exception of improved training, none of these changes would directly impact the concerns detailed in this Article. That aside, the recommendations of these scholars are impractical: given the federal government’s finances and the position of many conservative lawmakers on immigration reform, their plea for a huge increase in resources is politically unviable, both now and in the foreseeable future.

Other scholars, most notably Professor Stephen Legomsky, have called for a broad restructuring of the process by which immigration cases are adjudicated.²⁵⁸ Professor Legomsky’s plan would attempt to insulate the immigration courts from political and budgetary pressures by converting immigration judges to administrative law judges housed in an independent executive branch tribunal, and would also establish an Article III immigration appellate court.²⁵⁹ On the other hand, both the National Association of Immigration Judges and the ABA propose to convert the immigration court system into an Article I court.²⁶⁰ Meanwhile, Bruce Einhorn, a former immigration judge, has called for the creation of a new “U.S. Asylum Court” whose

254. *Refugee Roulette*, *supra* note 43, at 383–84.

255. *Refugee Roulette*, *supra* note 43, at 387.

256. *Refugee Roulette*, *supra* note 43, at 380.

257. *Refugee Roulette*, *supra* note 43, at 381.

258. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010).

259. *Id.* at 1686.

260. See Executive Office for Immigration Review: Oversight Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int’l Law of the H. Comm. on the Judiciary, 111th Cong. 9-10 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges); ABA Comm’n On Immigr., *Reforming The Immigration System* § 6–35 (2010).

judges would consider only claims for asylum.²⁶¹

Still other critics have proposed modest reforms aimed directly at credibility. For instance, Professor Ilene Durst recommends that applicants should be given “the benefit of the doubt,” and that courts should adopt a “presumption of credibility” that could be rebutted only by “clear and convincing evidence of material misrepresentations or other material distortions.”²⁶² Professor Michael Kagan rejects that approach and proposes instead that courts should adopt a standard used by the UNHCR, one that relies on whether a claim is “coherent and plausible,” does not contradict “generally known facts,” and is “on balance, capable of being believed.”²⁶³ Under that standard, an applicant would ultimately be found credible if there is any “reasonable basis” for believing the applicant’s claim.²⁶⁴

But none of these proposals gets to the heart of the problem presented here: a decision-maker cannot assume an applicant suffering from trauma will tell their story consistently, even with regard to critical details, and especially not when subjected to adversarial cross-examination.²⁶⁵ Remarkably, virtually all commentators

261. Einhorn, *supra* note 21, at 161.

262. Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 RUTGERS L. REV. 127, 127–28, 131 (2000). Durst fails to explain precisely what she means by “material misrepresentations or other material distortions,” or how a court would decide whether that standard has been met. A student note likewise recommends a presumption of credibility, but only for women who claim to have been raped or sexually assaulted. Katherine E. Melloy, Note, *Telling Truths: How the REAL ID Act’s Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 673 (2007).

263. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEORGETOWN IMM. L. J. 367, 381–82 (2003).

264. *Id.* at 403. Arguably, this “reasonable basis” approach is simply a presumption of credibility cloaked in a different name.

265. One student note does recommend replacing the existing system with various procedures borrowed from alternative dispute resolution, including early neutral evaluation before a non-adversarial hearing as well as mandatory mediation in any case appealed to the federal courts. Daniel Forman, Note, *Improving Asylum Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process*, 16 CARDOZO J. INT’L & COMP. L. 207, 232–39 (2008). However, the proposed process would include multiple interviews with the applicant, and the final decision-maker would have access to a written record of the applicant’s prior statements to help assess the applicant’s credibility. *Id.* at 235–36.

seem to accept that an adversarial hearing is a fair, accurate, and efficient way to adjudicate asylum claims—even though some countries (Australia and Canada, for instance) use a process that is at least partially non-adversarial,²⁶⁶ and the U.N. High Commissioner for Refugees officially takes no position on which approach is preferable.²⁶⁷

One scholar—Professor Won Kidane—has argued directly and in detail that the United States should adopt a non-adversarial adjudication system for *all* immigration cases, including asylum claims.²⁶⁸ In doing so, he divides the advantages of a non-adversarial system into four categories.

First, Professor Kidane emphasizes that the current system is enormously wasteful. For each full-time immigration judge, there are *four* full-time lawyers who represent the Government in cases heard by that judge, including appeals.²⁶⁹ Professor Kidane surmises that these lawyers add little to the accuracy of adjudications, at least in asylum cases. In most such cases, the role of government lawyers is limited to the adversarial cross-examination of the applicant and delivery of a short closing statement.²⁷⁰

Second, Professor Kidane emphasizes that the *accuracy* of immigration decision-making would be improved if money now spent on Government lawyers were spent instead on adding more judges. Beyond the obvious fact that judges would have more time to consider each case, Professor Kidane emphasizes that judges would be free to make decisions without the burden of Government lawyers who, in his words,

266. The procedures followed in other countries are too complex to merit discussion here, but Prof. Peter Billings has analyzed the systems of four common law countries in detail, and he ultimately concludes that the goals of asylum adjudication would best be served by “a broadly inquisitorial [i.e., non-adversarial] approach” at the trial level. Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253, 273–80, 296–97 (2000).

267. See United Nations High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ¶ 189 et seq. (reissued Dec. 2011), available at <http://www.unhcr.org/3d58e13b4.html> (last visited Feb. 5, 2016) (hereinafter “U.N. Refugee Handbook”).

268. Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647 (2012).

269. *Id.* at 709 (citing Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1701 (2010)).

270. See Anker, *supra* note 216, at 489–95.

do little more than “spray pepper” in the eyes of the judges.²⁷¹

Professor Kidane’s third point centers on fairness. Citing *Refugee Roulette* and other sources, he contends that the “overwhelming majority” of respondents in removal proceedings are unrepresented.²⁷² In fact, EOIR statistics show that the percentage of unrepresented respondents has fallen over the past four years, from 60% in 2010 to 45% in 2014.²⁷³ Nonetheless, Professor Kidane’s point is important: an adversarial hearing is “fair” only when both sides have a comparable arsenal of legal “weapons.” But in immigration court, the table is tilted very heavily in the Government’s favor. The problem is compounded by the awkward position of immigration judges, who frequently cross-examine witnesses themselves.²⁷⁴ Thus, an unrepresented applicant may feel he or she is confronted by two government lawyers.²⁷⁵ Professor Kidane’s final point in favor of a non-adversarial model is simply that a fair, efficient, and less expensive system would be more acceptable politically.²⁷⁶

Professor Kidane’s points apply with great force to the adjudication of asylum claims filed by trauma survivors. For the reasons discussed earlier, a system that relies on the adversarial cross-examination of trauma survivors is destined to be both grossly inaccurate and fundamentally unfair. As a study conducted by Deborah Anker emphasized, the cross-examination of asylum applicants by Government lawyers tends to focus on credibility and character rather than substance. Observers noted that the manner of trial attorneys was often “hostile, sarcastic, and disbelieving,” and

271. Kidane, *supra* note 268, at 710–11. After working for three years as an INS trial attorney, I can attest to the fact that Prof. Kidane has accurately described the way many of my former colleagues approached their work.

272. Kidane, *supra* note 268, at 714–15.

273. EOIR 2014 Yearbook, *supra* note 71, at F1.

274. Kidane, *supra* note 268, at 714–15 (citing Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 489–90 (1992)). After observing nearly 200 deportation cases, Prof. Anker concluded that judges often did not appear to be neutral. In her words: “Instead of an independent adjudicator and an opposing counsel, the perception arose in many cases that applicants faced two, instead of one, opposing counsels.” Anker at 489.

275. Kidane, *supra* note 268, at 714–15.

276. Kidane, *supra* note 268, at 716. The truth of that claim, of course, assumes the political beliefs of most citizens and politicians are rational.

they concluded that the often-extensive cross-examination added very little to the effective resolution of a case.²⁷⁷ In such circumstances, it is not an exaggeration to say that government trial lawyers rarely do more than “throw pepper” in the judge’s eyes. Paying them to do so at taxpayer expense is inordinately wasteful and inefficient. Still, it is difficult to imagine Congressional support for an entirely non-adversarial immigration system, especially when, as in recent years, the Government’s focus has been on the deportation of non-citizens who have a criminal conviction, however minor.²⁷⁸

B. The Non-Adversarial Adjudication of Claims for Asylum

If the United States is genuinely committed to the fair, accurate, and efficient adjudication of claims for asylum, the existing adversarial system should be abandoned. And in the absence of a fully inquisitorial immigration court, the only way to accomplish that result would be to remove the adjudication of asylum claims *entirely* from the existing immigration court system.

Thus, the existing two-tiered system of informal interviews with asylum officers and adversarial hearings in immigration court should be replaced with a single adjudication, one that is relatively formal, non-adversarial, and separate from the immigration courts. In contrast to immigration court hearings, the hearing officer should conduct the questioning instead of a government lawyer. In the great majority of cases, the government should not (and need not) be represented, and prior versions of the applicant’s story should not be considered. Exceptions to these last two points could be made in compelling circumstances: for instance, if there are serious reasons to believe the applicant assisted in the persecution of others or was involved in terrorism or other serious criminal activity. Within this framework, further details should be left to discussions

277. Anker, *supra* note 216, at 49–95.

278. See, e.g., Julia Preston, *Report Finds Deportations Focus on Criminal Records*, THE NEW YORK TIMES (April 29, 2014), available at <http://www.nytimes.com/2014/04/30/us/report-finds-deportations-focus-on-criminal-records.html> (last visited Feb. 5, 2016).

between government officials, immigration advocates, and experts on psychological trauma.

There are two ways by which a non-adversarial system could be implemented. The easier approach would be to expand the existing network of asylum offices, and to adjudicate all claims for asylum there. For applicants who file an asylum claim after a removal case has begun, removal proceedings could be continued pending a separate assessment of their eligibility for asylum,²⁷⁹ and the removal case could then be terminated if asylum is granted. Certain changes to the asylum offices would be needed. Officers and staff should be added, professional interpreters should be hired, and a formal record (including a transcript) should be created. But all of these changes could almost certainly be made through executive action, without the involvement of Congress.

The potential downside of that approach, as Professor Legomsky suggests, is that any adjudication conducted within existing federal agencies may be subject to both budgetary and political pressures.²⁸⁰ The alternative, then, would be to create an entirely new administrative tribunal, one independent from both the Justice Department and the Department of Homeland Security. In that scenario, the existing asylum offices would be eliminated, and personnel could be shifted to the new tribunal. In contrast to the first approach, however, an independent tribunal could be created only through an act of Congress.

Any move to a purely non-adversarial system for adjudicating asylum claims need not be prohibitively expensive. The workload of the immigration courts would be diminished by more than half,²⁸¹ and new positions could be

279. An immigration judge has discretion to postpone removal proceedings for good cause on the motion of either party. 8 C.F.R. § 1240.6.

280. Prof. Legomsky makes the same point at length when he argues for a new immigration tribunal outside the Department of Justice. *See* Legomsky, *supra* note 258, at 1665–1671.

281. The remaining system would still decide, among other things, whether aliens are subject to removal from the United States, and whether they are eligible for other forms of relief from removal such as adjustment of status, cancellation of removal, or the relief provided under INA section 212(c) to certain immigrants convicted of a crime. *See* 8 U.S.C. § 1229b (authorizing the cancellation of removal for certain permanent residents); 8 U.S.C. § 1182(g) & (h) (authorizing the discretionary waiver of certain grounds of inadmissibility

filled by drawing qualified personnel from the ranks of immigration judges and the corps of lawyers who now represent the government in immigration court. And if the Board of Immigration Appeals were eliminated—as Professor Legomsky recommends—personnel could also be drawn from the ranks of government lawyers who now work for the BIA.

In either scenario, the end result would be an adjudication system that is more efficient, better staffed, more consistent with U.N. recommendations and the refugee adjudication practices in other countries, and more responsive to both the spirit of refugee law and the challenges faced by trauma survivors who seek asylum.

C. Other Trauma-Related Reforms

Implementing the proposed reforms will require time, money, and substantial political will. In the long run, it may never happen. In the short run, important changes could easily be made to the existing adjudication process. Most notably, key participants in process should be thoroughly trained in the nature and symptoms of trauma, and the effects of trauma on the ways in which survivors tell their stories. In addition, the claims of trauma survivors could be adjudicated more fairly if small changes were made to immigration statutes.

On most fronts, existing training is inadequate or nonexistent. For instance, the section of EOIR's Immigration Judge Benchbook dealing with "mental health issues" includes an extensive discussion of issues relating to competence, but no discussion at all on the effects of trauma.²⁸² The section of the Benchbook dealing with evidence and testimony is likewise silent on the challenges faced by trauma survivors.²⁸³ The guidance and training given to Government lawyers is not available online, but

for specified persons); 8 CFR § 1245.2(a)(1)(i) (granting immigration judges exclusive jurisdiction over applications for adjustment of status filed by persons in removal proceedings).

282. EOIR, *Immigration Judge Benchbook, Mental Health Issues*, available at <http://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues> (last visited June 15, 2015).

283. EOIR, *Immigration Judge Benchbook, Evidence*, available at http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Evidence_Guide.pdf (last visited June 15, 2015).

given their behavior and practices, there is every reason to think that they are not trained well—if at all—in the symptoms of trauma and the challenges faced by trauma survivors.

Unfortunately, the same shortcomings are typically true for materials aimed at lawyers who represent asylum seekers. For instance, a book-length “Asylum Primer” published by the American Immigration Lawyers Association includes a detailed appendix with advice on preparing and presenting a claim. That appendix says virtually nothing about trauma, beyond noting that “[i]ndividuals who have experienced or witnessed traumatic events may have difficulty remembering.”²⁸⁴

A manual on “Winning Asylum Cases” published by the Immigrant Legal Resource Center is more helpful but still falls short of giving a full account of the challenges presented by trauma survivors who seek asylum. After noting that PTSD is “perhaps the most common mental condition suffered by victims of torture,”²⁸⁵ the manual explains that trauma survivors may block out all or part of a traumatic event, and may display “inappropriate behavior” during a hearing, such as a “tendency to relate horrifying events in a flat, emotionless voice.”²⁸⁶ These concerns, the manual cautions, may affect an attorney’s ability to prepare, the applicant’s ability to recall events, and “the judge’s likelihood of reaching a favorable decision.”²⁸⁷

The manual goes on to recommend that attorneys who represent asylum applicants should meet with their client at least twice before a hearing,²⁸⁸ and should consider obtaining an assessment and testimony from a mental health expert if the client exhibits symptoms of trauma.²⁸⁹ The manual’s treatment of the subject is accurate as far as it goes, but it falls far short of giving practicing lawyers a full understanding of the effects of trauma, the challenges faced

284. REGINA GERMAIN, AILA’S ASYLUM PRIMER 353 (Am. Immigration Lawyer’s Assoc. 4th ed. 2005).

285. ROBERT JOBE, et al., WINNING ASYLUM CASES §§ 13–20 (Immigrant Legal Resource Center 2004).

286. *Id.* at §§ 13–21.

287. *Id.* at §§ 13–21.

288. *Id.* at §§ 13–23.

289. *Id.* at §§ 13–21.

by survivors who seek asylum, the impact of the attorney's work on a survivor's ability to tell her story, and the ways an attorney might inadvertently introduce discrepancies into the record of proceedings. And this manual, of course, is simply a manual, one that most immigration lawyers undoubtedly have not read. Any person licensed to practice law may represent an asylum seeker; there is no mandatory training for those who wish to do so.

Unfortunately, manuals for lawyers who work with trauma survivors in other situations are often of no greater help. For instance, the National Center on Domestic Violence, Trauma and Mental Health has created a detailed, sixty-seven page handbook for attorneys who represent domestic violence survivors.²⁹⁰ The advice in that handbook is thorough and sound, but it devotes only six pages to the process of interviewing the survivor and preparing her for court, and it does not discuss in detail the impact of trauma on a survivor's ability to tell a consistent, "credible" story.²⁹¹

Perhaps most remarkable, even the UNHCR's "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" is silent on the issue. There are sections dealing with "mentally disturbed persons" and unaccompanied minors,²⁹² but there is no discussion of psychological trauma or post-traumatic distress disorder.

The Asylum Division of USCIS is the lone exception to this pervasive lack of training on the ways that may trauma effect a litigant's testimony. As part of their five-week "basic training," asylum officers complete a unit on "interviewing survivors." The twenty-page lesson plan for this unit is thorough and detailed.²⁹³ Among other things,²⁹⁴ it covers the nature of torture and other types of trauma; the physical and

290. Mary Malefyt Seighman, et al., *Representing Domestic Violence Survivors Who Are Experiencing Trauma And Other Mental Health Challenges* (December 2011), available at http://csaj.org/document-library/mental_health.pdf (last visited July 15, 2015) (hereinafter "Representing Survivors").

291. *Id.* at 5–8, 41–44. Other topics discussed in the handbook include client counseling (8 pages); discovery and evidence (10 pages); custody and mental health evaluations (10 pages); and working with expert witnesses (6 pages).

292. U.N. Refugee Handbook, *supra* note 267, ¶¶ 206–219.

293. USCIS, *Refugee, Asylum, and International Operations, Asylum Officer Basic Training Course, Interviewing Part 5: Interviewing Survivors* (hereinafter "AO Training: Interviewing Survivors").

294. *See id.* at 4 (table of contents).

psychological effects of trauma; the process of recovery; the ways in which trauma can “inhibit applicants from fully expressing an asylum claim”;²⁹⁵ and suggested techniques for interviewing survivors. The lesson plan emphasizes that an interview may trigger intrusive flashbacks or other symptoms of PTSD, and that survivors may avoid discussing certain events, have difficulty remembering events, be confused about details, lose composure, avoid eye contact, be unresponsive, or have difficulty following questions or answering coherently.²⁹⁶ The training urges officers to “treat the applicant with humanity,” and provides suggestions on ways to “be thorough but sensitive” and “help the person feel safe and in control.”²⁹⁷

All of this is commendable, but the training falls short on one critical point: it fails to emphasize that discrepancies in an applicant’s story may be evidence of psychological trauma rather than untruthfulness. The training simply stresses instead that a survivor may respond in different ways “when confronted with discrepancies in his or her story.”²⁹⁸ A separate lesson on “decision writing” emphasizes that officers must make an assessment of the applicant’s credibility, and in doing so must note any *material* “discrepancies, inconsistencies, or lack of details in the applicant’s claim.”²⁹⁹ But that lesson does not advise officers on the conclusions they can properly draw from inconsistencies. Unless they are introduced as evidence in a removal case, the decisions of asylum officers are not public. Thus, it is impossible to assess how well officers apply the advice they are given, and the extent to which their negative credibility findings may be based on inconsistencies in an applicant’s story.³⁰⁰

295. *Id.* at 6.

296. *Id.* at 16–19.

297. *Id.* at 19–22.

298. *Id.* at 22.

299. AO Training: Decision Writing Part I at 10.

300. An article by mental health professionals who work with torture survivors provides an antidote that may be typical. During an asylum interview, a Guatemalan applicant testified that she had been raped. Because she did not mention the rape in her declaration, the asylum officer referred her case to an immigration court. During the immigration court hearing, however, she presented expert testimony concerning the symptoms of PTSD, and an immigration judge granted her application. See Gangshei & Deutsch, *supra* note 20, at 82.

The need for improved training of immigration judges, attorneys, and asylum officers is clear and compelling. In conjunction with that training, Congress should also revise the standards for credibility assessment to make it clear that immigration judges *must* consider the consequences of psychological trauma and the possibility that any perceived problems with the applicant's testimony are the result of trauma rather than untruthfulness. But even if the law is not changed, judges can and should consider those issues: as now framed, the statute permits judges to consider "all relevant factors," and the possible effects of trauma are indisputably relevant.

In addition to better training, the adjudication of claims involving survivors would benefit from modest amendments to asylum-related statutes. Under existing law, an asylum application must be filed within one year after an applicant's arrival in the United States unless the applicant demonstrates either "changed circumstances" that materially affect the applicant's eligibility or "extraordinary circumstances" related to the delay in filing.³⁰¹ In addition, the standards for credibility make no reference to the effects of trauma on an applicant's ability to present her case.³⁰² The statute should be amended to expressly recognize that psychological trauma is an "extraordinary circumstance," and should further direct that possible effects of trauma must be taken into account when an applicant's credibility is considered.

Finally, just as the Government now funds and maintains a Forensic Document Laboratory to review questioned documents in immigration cases,³⁰³ Congress should consider providing psychological evaluations for indigent asylum seekers who exhibit symptoms of trauma. Doing so would benefit not only the asylum seekers themselves, but also the accuracy and integrity of the adjudication process.³⁰⁴

301. 8 U.S.C. § 1158(a)(2)(B), (D).

302. 8 U.S.C. § 1158(b)(1)(B)(iii).

303. See Department of Homeland Security, *Forensic Document Lab (ICE)*, available at <http://www.dhs.gov/external/forensic-document-lab-ice> (last visited July 15, 2015).

304. For a detailed discussion of the benefits of psychological evaluation in this context, see *generally* Gangshei & Deutsch, *supra* note 20.

D. Potential Objections and Other Comments

The most vocal objections to any changes, of course, will come from those who are deeply—and rightly—concerned about fraudulent claims for asylum. Accurate statistics on fraud would be impossible to compile, but anecdotal evidence suggests the problem is serious. Over the past several decades, there have been repeated instances in which immigration officials have broken up criminal schemes to perpetuate asylum fraud, some of them involving immigration lawyers.³⁰⁵

Nonetheless, the possibility of fraud should not deter the proposed changes. The existing system's primary check on fraud consists of adversarial cross-examination, but without evidence to contradict an applicant's testimony, that strategy is inaccurate and ineffective. By substantially reducing the waste in the current system, resources and personnel could be devoted to the factual investigation of key facts in many cases.

An example from my own experience illustrates the possibilities. An asylum applicant from the Ivory Coast testified she was a founding member of an opposition political party and helped organize the party's first public demonstration, during which police killed six party members. The applicant was adamant that this demonstration took place in the city of Abidjan. In fact, reports from the media and human rights groups proved the demonstration took place in a different city more than 200 miles away—a city the applicant had never visited. Given their current workload, government lawyers rarely have time to search for this sort of evidence, but a streamlined process would allow for a more thorough investigation of the facts underlying many cases, and any evidence found could be provided to an asylum officer without a formal appearance by government counsel.

305. See, e.g., *Maryland lawyer convicted in asylum scheme*, AP Alert – DC Daybook (Feb. 12, 2009); *Five guilty in immigration asylum scam*, UPI Newstrack (June 29, 2009); *Lawyer charged in smuggling case: U.S. plans to review status of thousands of Chinese immigrants*, Dallas Morning News 6A (Sept. 21, 2000). For a detailed account of the challenges faced by immigrants caught up in these schemes, see Frances Robles, *Tamils' Smuggling Journey to U.S. Leads to Longer Ordeal: 3 Years of Detention*, available at http://www.nytimes.com/2014/02/03/us/tamils-smuggling-journey-to-us-leads-to-longer-ordeal-3-years-of-detention.html?_r=0 (last visited Feb. 5, 2016).

There is a second and more compelling reason why concerns about fraud should not deter the shift to a non-adversarial system of adjudication. If a legitimate refugee is denied asylum, the stakes are enormous: the applicant's safety and life may literally be in danger. On the other hand, the stakes are minimal in most cases involving fraud: the government—and society at large—would lose little if asylum is incorrectly granted to someone who is not a refugee. In cases where the stakes are higher—for instance, if there is reason to think an applicant has been involved in terrorism, the persecution of others, or serious criminal activity—the procedures could easily allow for government lawyers to participate in hearings, present evidence, and cross-examine the applicant.

CONCLUSION

The shortcomings of our current asylum procedures have been decades in the making. In the Refugee Act of 1980, Congress enacted sweeping changes to U.S. refugee laws. As Sen. Edward Kennedy (the lead sponsor) explained, the changes were intended to “reform the discriminatory and outdated refugee provisions” then in place, and to “insure greater equity in our treatment of refugees.”³⁰⁶ But at that time, the dynamics of psychological trauma were not yet well understood, and the procedures envisioned by the Refugee Act's sponsors did not account for the needs of trauma survivors. Later amendments to the law—most notably the statutory provisions related to credibility and corroboration—have made matters worse, not better.

Beneath the laws themselves are deep misunderstandings about the character of “true” stories, the truthfulness of storytellers, and the supposed power of cross-examination to distinguish between truth and falsehood. For trauma survivors, the system remains both discriminatory and outdated, and the Refugee Act's full promise cannot be met without further reform.

Some might suggest that it would be enough to provide better training for everyone involved in the process, and that further changes are unnecessary. To do so would be an

306. 125 Cong. Rec. S2630 (daily ed. March 13, 1979) (statement of Edward Kennedy).

improvement over the current state of affairs, but it would leave the United States with an expensive, unwieldy system that remains ill-equipped to assess the credibility of the asylum applicants who are most vulnerable and most in need of the safety that asylum offers.

Adversarial systems of adjudication are grounded in the premise that the “truth” benefits from a contest of wills in which competing sides present evidence and “test” the evidence offered by the other side. But when the witness is a trauma survivor, adversarial cross-examination is not an “engine of truth,” but rather a cudgel by which both the witness and the truth are likely to be beaten and broken.

Isak Dinesen once suggested that “[a]ll sorrows can be borne if you put them into a story or tell a story about them.”³⁰⁷ But for trauma survivors, simply telling the story is not enough: others must believe the story to be true. This Article is intended to point the way forward, from the broken procedures that now exist toward a more humane system for adjudicating asylum claims.

307. Those words were attributed to Dineson by Hannah Arendt, but Arendt provided no source. See Lynn R. Wilkinson, *Hannah Arendt on Isak Dinesen: Between Storytelling and Theory*, 56 *COMPARATIVE LITERATURE* 77, 77 (Winter 2004).

APPENDIX

TABLE 1

Federal Appellate Decisions that Review a Negative Credibility Finding in an Asylum Case: 2010

For this study, researchers examined 369 decisions* issued by the Circuit Courts of Appeals in 2010. Each of these cases reviewed an immigration judge's negative credibility finding in an asylum case. Table 1 breaks down those cases by circuit, and includes both the raw number of cases remanded in each circuit and the percentage of cases affirmed. Of the 369 cases, 15 were remanded, and the remaining 354 cases were affirmed.

<i>Circuit</i>	<i>Number of Cases</i>	<i>Cases Remanded</i>	<i>Percentage Affirmed</i>
First Circuit	4	0	100.0%
Second Circuit	130	1	99.2%
Third Circuit	55	0	100.0%
Fourth Circuit	2	0	100.0%
Fifth Circuit	14	0	100.0%
Sixth Circuit	24	0	100.0%
Seventh Circuit	6	0	100.0%
Eighth Circuit	7	0	100.0%
Ninth Circuit	84	12	85.7%
Tenth Circuit	3	0	100.0%
Eleventh Circuit	40	2	95.0%
Total	369	15	95.9%

* An additional 44 cases were reviewed but were not included because the decision does not clearly identify grounds for the negative credibility finding. Also, cases involving a single appellate decision for two or more family members with related claims were treated as a single case.

TABLE 2

*Factors Identified By Immigration Judges As Support for
a Negative Credibility Finding*

In most cases, judges listed two to four factors in support of the negative credibility finding. For the 369 cases reviewed, Table 2 lists the number of decisions that mention each of various factors. The first category listed includes inconsistencies in the applicant's testimony at the asylum hearing, as well as inconsistencies between the testimony and the applicant's prior statements. This category is broken down further in Table 3.

Applicant's story was inconsistent	318 (86.2%)
Other aspects of testimony (vague, implausible, etc.)	84 (22.8%)
Applicant's demeanor	65 (17.6%)
Applicant's story was inconsistent with other evidence	171 (46.3%)
Applicant failed to corroborate story	158 (42.8%)
All other factors	36 (9.8%)

TABLE 3

*Breakdown of Decisions That Relied on Inconsistencies in
the Applicant's Story*

As noted above, 318 of the 369 cases (86.2%) relied on one or more inconsistencies in the applicant's story as grounds for a negative credibility finding. Table 3 breaks that group down further into combinations of three distinct types of inconsistency.

The testimony was:

	<i>Number</i>	<i>Percentage of All Cases</i>
(A) Internally inconsistent	172	46.6%
(B) Inconsistent with the declaration	210	56.9%
(C) Inconsistent with other prior statements	104	28.2%

(A) only	67
(B) only	81
(C) only	26
(A) + (B)	77
(A) + (C)	15
(B) + (C)	39
(A) + (B) + (C)	24

TABLE 4

*Breakdown of Cases that Relied on Inconsistencies
between the Testimony and Other Prior Statements as
Grounds for a Negative Credibility Finding*

In 104 cases (28.2% of the total) the immigration judge relied on inconsistencies between an applicant's testimony and the applicant's prior statements other than a written declaration. Table 4 breaks this down to separate out the cases in which the judge relied on a record of the applicant's statements during an asylum interview.

Total cases	104
Testimony inconsistent with asylum interview only	39
Testimony inconsistent with other prior statements	51
Testimony inconsistent with both asylum interview and other statements	14

TABLE 5

*Breakdown of Factors Considered in Cases for Which the
Applicant's Story Was Not Inconsistent*

In 51 cases (13.3% of the total), the immigration judge did not mention inconsistencies in the applicant's story, but nonetheless found the applicant not credible for other reasons. Table 5 identifies the factors the immigration judge relied on in these cases.

	<i>Number</i>
(A) Story was inconsistent with other evidence	44
(B) Applicant failed to corroborate testimony	21
(C) All other factors, including demeanor	13

(A) only	22
(B) only	4
(C) only	1
(A) + (B)	7
(A) + (C)	5
(B) + (C)	2
(A) + (B) + (C)	10

TABLE 6

*Cases that Combine External Factors with Inconsistencies
in the Applicant's Story*

As noted above, in most cases immigration judges relied on two to four factors to support a negative credibility finding. Table 6 lists five factors that do not involve inconsistencies in the applicant's story. For each of those factors, the table demonstrates that judges rarely relied on such factors alone. Instead, these factors were usually combined with an inconsistency in the applicant's story.

(A) Applicant's story inconsistent with other evidence	171	
Applicant's story was also internally inconsistent	120	70.2%
(B) Applicant failed to corroborate story	158	
Applicant's story was also internally inconsistent	135	85.4%
(C) Demeanor	65	
Applicant's story was also internally inconsistent	57	87.7%
(D) Other aspects of testimony (vague, implausible, etc.)	84	
Applicant's story was also internally inconsistent	73	86.9%
(E) Other grounds for negative credibility finding	36	
Applicant's story was also internally inconsistent	34	94.1%

TABLE 7

*Factors Considered in Conjunction with Inconsistencies
Between the Applicant's Testimony and the Written
Declaration*

As noted above, in 210 cases (56.9% of the total) an immigration judge relied on inconsistencies between the applicant's testimony and a written declaration prepared by the applicant's lawyer. In most of those cases, the judge also relied on other factors. Table 7 identifies the number of times each of these other factors was relied on.

Inconsistency between testimony and declaration only	21
Testimony itself was also inconsistent	90
Testimony was inconsistent with other prior statements	63
Applicant's demeanor	31
Also other aspects of testimony (vague, implausible, etc.)	51
Testimony was inconsistent with other evidence	79
Applicant failed to corroborate testimony	81
Also other factors	23

TABLE 8

The Number of Factors Cited In Each Decision

<i>Factors</i>	<i>Cases</i>
1	64
2	95
3	122
4	62
5	17
6	7
7	1
8	1