

UNPACKING PANDORA'S BOX: INNOVATIVE TECHNIQUES FOR EFFECTIVELY COUNSELING ASYLUM APPLICANTS SUFFERING FROM POST-TRAUMATIC STRESS DISORDER

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One need not be a chamber to be haunted –
One need not be a house –
The brain has corridors – surpassing
Material place.¹

– *Emily Dickinson*

Mohamed Ada Osman: A Composite Client

Mohamed Ada Osman² is a refugee from Darfur who is afraid that he will be killed if he is forced to return to his home country of the Sudan.³

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1. EMILY DICKINSON, *THE COMPLETE POEMS OF EMILY DICKINSON* 333 (Thomas H. Johnson ed., Little, Brown & Co. 1960) (1890).

2. Mohamed Ada Osman is a composite client whose story is derived from those of asylum applicants from Darfur and other countries devastated by civil conflict.

3. The official name is Republic of the Sudan. See Bureau of African Affairs, U.S. Dep't of State, *Background Note: Sudan* (2006), <http://www.state.gov/r/pa/ei/bgn/5424.htm>.

In my law office, Mohamed tells me that the people from Darfur, a region of the Sudan typically populated by non-Arabs, called "black Africans," suffer from extreme persecution. Mohamed says the Sudanese government, in concert with the Janjaweed,⁴ a militant, nomadic Arab group, engages in ethnic cleansing of black Africans in Darfur.⁵

Mohamed says that last year, government security men broke into his house in the middle of the night, blindfolded him, and drove him to a prison-like building. The men told him that he was heard plotting against the government with other black Africans while he was sitting on the stoop in front of his house. For one week he was kept in a dark, damp cell, with only a pot of water to drink from and some flour mixed with water to eat. He could not tell if it was day or night. About twice a day Mohamed was blindfolded, dragged out of the cell to another room, and interrogated about the supposed plot. Mohamed says that he used to sit on his stoop and talk to his friends about their safety concerns due to the attacks on black Africans by the Janjaweed in Darfur. He did not, however, plan anything to counter the attacks. After about one week, he was taken blindfolded in a car and dumped on the edge of his village. As he lay on the ground, one of the men told him, "We will never leave you alone."

Mohamed tells me about the morning the Janjaweed attacked

4. The Janjaweed are militia forces in Darfur who traditionally travel the country on horse or camelback. Literally, "Janjaweed" means "devil on horseback." The Janjaweed, in concert with the Sudanese government, have been engaging in ethnic cleansing of black Africans in Darfur since late spring 2003. This genocide is the most recent development in a long-standing and violent struggle between the Sudanese government and rebel Darfuri forces, called the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), who feel the Sudanese government has engaged in active policies of marginalization, discrimination, and exclusion of Darfurians for many years. See Samantha Power, *Dying in Darfur: Can the ethnic cleansing in Sudan be stopped?*, NEW YORKER, Aug. 30, 2004, at 56 (Samantha Power is a professor of practice in public policy at Harvard University's John F. Kennedy School of Government. She specializes in human rights policy and foreign policy.).

5. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SUDAN 2004, (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm> ("The conflict in Darfur has roots in both government neglect of the region and ethnic tensions between nomadic pastoralists and sedentary farming communities, exacerbated by scarce resources and the Government's support of the nomad militias. The fighting intensified dramatically in 2003 and during the year when the SLA and JEM attacked government bases, and the Government intensified its support of the nomad militias. Reliable reports indicated that Government and Arab militia forces destroyed a large number of villages of African tribes, and there were tens of thousands of deaths. At year's end, there were more than 1.5 million IDPs [internally displaced persons] in Darfur, and another 200,000 civilians fled into Chad where the U.N. High Commissioner for Refugees (UNHCR) coordinated a massive refugee relief effort. More than 70,000 people reportedly died as a result of the violence and forced displacement. The Government continued to support the largely Arab nomad militia, known as Janjaweed, which terrorized and killed civilians and burned, raped, and pillaged the region.").

his village, the incident that made him realize he could not stay in Darfur. The Janjaweed came armed with AK-47s, on camels, set fire to his entire village, and opened fire on anyone they found. Mohamed describes frantically running out of his home with only the clothes he was wearing. On a hillside about a mile from the village, Mohamed and a few others watched throughout the afternoon as the Janjaweed destroyed their homes and lives. First, they killed everyone they could find, then they set fire to the entire settlement, and finally, late in the day, Sudanese government helicopters flew overhead and sprayed the entire area with machine-gun fire and grenades. When Mohamed awoke the next morning, there was almost no evidence that his village had ever existed.

Mohamed fled Darfur. With a little luck and lots of help from strangers he met on his way from the Sudan to Chad to Nigeria, Mohamed found his way to the United States and eventually to my law office.⁶ He has retained me as his lawyer to help him obtain asylum so that he can stay in the United States legally as a refugee and start a new life free from oppression. As part of my legal representation of Mohamed, I will file an application for asylum with the United States Citizenship and Immigration Services,⁷ detailing the persecution he suffered and showing why Mohamed is eligible for asylum. I will also write an affidavit containing Mohamed's story, which I will present to the asylum officer who will interview Mohamed and determine whether he is eligible for asylum.

The next time I see Mohamed, I ask him a few more questions about the morning he fled his village, to make sure that I have

6. Unfortunately, it is incredibly difficult for asylum applicants who successfully flee persecution in their home countries and escape to the United States to obtain legal representation. 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 433, 459 (1992) (citing a 1987 study of the Government Accounting Office finding that an asylum applicant who is represented by an attorney in an asylum hearing is three times more likely to be granted asylum than an applicant who is not); see also Andrew I. Schoenholtz & Jonathon Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 743 (2002) (finding that affirmative asylum applicants are more than six times more likely to be granted asylum if they are represented in Immigration Court, while those in defensive proceedings are more than four times more likely to be granted asylum if they have representation). But see U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2004 STATISTICAL YEAR BOOK K2 (Mar. 2005), <http://www.esdoj.gov/eoir/statspub/fy04syb.pdf> (finding that among the 66,164 asylum cases which were resolved before an immigration judge in 2004, less than 40 percent were granted asylum).

7. A bureau of the U.S. Department of Homeland Security established after September 11, 2001, by the Homeland Security Act of 2002, the United States Citizenship and Immigration Services (USCIS) carries out many of the functions of the former Immigration and Naturalization Services. See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *INS into DHS: Where is it now?*, <http://149.101.23.2/graphics/othergov/roadmap.htm> (last modified Jan. 20, 2006).

enough detail to adequately explain in the affidavit the level of devastation he experienced at the hands of the Janjaweed. He replies, "When the two other men and I went back to the village the next day to see if there was anything left, we were stopped by two Janjaweed on camels."

At this point in our interview, I stop and check my notes from our previous meetings. The last time we spoke Mohamed said that the attack occurred at the beginning of the day, and today he said that it happened while he was on his way home from work in the early evening. Mohamed told me in an earlier interview that as the Janjaweed set fire to the village, he ran away and did not see any more of the massacre until he returned the next day to look for survivors. Today he said that he ran away as the Janjaweed set fire to the village, and then he sat on a hill and watched the helicopters fly overhead and spray the village with machine gunfire. The story is changing in small increments, and I am confused. "Wait," I say, "last time we talked you said there were four Janjaweed on camels. Were there two, or four?"

Introduction

Mohamed's story, and its inconsistencies, raise many central and difficult issues attorneys face when representing asylum applicants. In order to qualify for asylum, an applicant must prove that he⁸ is a refugee, a person unable or unwilling to return to his home country or place of last habitual residence because of past persecution, or a well-founded fear of persecution, on the basis of race, nationality, membership in a particular social group, religion, or political opinion.⁹ In Mohamed's case, the persecution he suffered in his native Darfur is the basis of his claim of well-founded fear. He must tell a consistent and highly detailed story of his past

8. For purposes of clarity in this article, the asylum applicant will be referred to in the male gender, and the attorney will be referred to in the female gender. In reality, most individuals granted affirmative asylum in the United States are male, as are most attorneys in the United States. See OFFICE OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SECURITY, 2005 YEARBOOK OF IMMIGRATION STATISTICS 46 (2005), available at <http://www.dhs.gov/ximgrtn/statistics/publications/yearbook.shtm>; ABA Comm. on Women in the Profession, *A Current Glance at Women in the Law 2006*, at 1 (2006), available at <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf>.

9. "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101 (a)(42)(A) (2005).

persecution in order to persuade the asylum officer, who will read his application and interview him, that he is credible and eligible for asylum.¹⁰

However, the severe trauma an asylum applicant experiences can lead him to develop post-traumatic stress disorder ("PTSD"). PTSD can profoundly affect the ability to tell consistent and detailed stories of past persecution. An applicant suffering from PTSD may be unable to tell a story that a factfinder would find credible. This is because the applicant cannot tell a story that is consistent and highly detailed such that a factfinder would find it credible. There is an inescapable and cruel paradox evident when one considers the ramifications of PTSD on an asylum claim—those who suffer from PTSD because of their traumatic experiences, and who are deserving of asylum in the United States, may be denied asylum as a direct result of the symptoms of their affliction.¹¹

As his attorney, I need to consider how Mohamed's trauma affects all aspects of his claim for asylum. The traumatic experiences he survived in Darfur both constitute the past persecution of his asylum claim and form the basis of the required well-founded fear of future persecution he would face if returned to the Sudan. His own government was complicit in, if not responsible for, the decimation of his village and supports the Janjaweed's terror campaign in Darfur. He therefore cannot count on the government's protection if he is forced to return. Moreover, it is quite possible that Mohamed may be suffering from PTSD, in which case a diagnosis would be evidence in support of Mohamed's story of persecution. Therefore, diagnosing a PTSD sufferer can be very important to his asylum application.

When preparing Mohamed for his application and asylum interview his trauma and mental state must be taken into account. Inconsistencies in his story that may be caused by his PTSD will hurt his chances at gaining asylum, and talking to Mohamed about his ordeal in such a way that causes him to relive his days of persecution may further traumatize him. Thus, I need to use interviewing techniques that both help him remember his story of persecution in a truthful, consistent, and detailed way, and that avoid unnecessary mental anguish.

My experience with Mohamed is not unique. It is indicative of the challenges that all advocates for asylum seekers face. There are millions of refugees all over the world fleeing horrific violence and persecution. The United States, for a multitude of reasons, is a

10. 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii) (2005).

11. PHYSICIANS FOR HUMAN RIGHTS, MEDICAL TESTIMONY ON VICTIMS OF TORTURE: A PHYSICIAN'S GUIDE TO POLITICAL ASYLUM CASES 19-21 (1991).

major destination for many of these individuals. In 2004, the United States Citizenship and Immigration Services received 32,682 applications for asylum.¹² Whether they are granted or denied asylum, these individuals are living in U.S. cities or in detention centers at the mercy of the U.S. government to decide their fate. As a major world leader with a government based on a foundation of democracy and freedom, the United States has an international and humanitarian obligation to provide a safe haven to those whose own governments are unable or unwilling to do so.

The overwhelming process that asylum seekers must navigate in the United States is the subject of ongoing analysis and debate.¹³ In response to problems with credibility determinations, practitioners propose a variety of frameworks for assessing the credibility of the testimony of asylum seekers. Some frameworks involve using objective criteria,¹⁴ considering trauma-related symptoms,¹⁵ requiring a rebuttable presumption of credibility of political asylum applicants on due process grounds,¹⁶ or adopting a "benefit of the doubt" standard because of the emphasis on testimony and the lack of corroborating evidence when an individual flees his home country with little or no documentation.¹⁷ Not only has Congress failed to act on these recommendations, but since September 11, U.S. asylum laws have become increasingly

12. OFFICE OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS 51 (2004), available at <http://www.dhs.gov/ximgtn/statistics/publications/yearbook.shtm> (cases newly filed and cases reopened in 2004).

13. In this article, I offer techniques for assisting clients working within the confines of the current asylum process. This article is not meant to be a critique nor an endorsement of the current asylum laws. For an in-depth look at laws affecting the asylum process, see, e.g., Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349 (2005); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1 (2001). See also Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367 (2003). See Human Rights First, *Refugees, Asylum Seekers, and the Department of Homeland Security: One Year Anniversary – No Time for Celebration* (2004), available at <http://www.humanrightsfirst.org/asylum/OneYearFinalApril.pdf>; The United States Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal* (Feb. 8, 2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/execsum.pdf; Press Release, American Civil Liberties Union, *ACLU Urges Conferees to Remove "REAL ID" from Funding Measure; Proposal Attacks the Persecuted, Harms Immigrants* (Apr. 26, 2005) (on file with author).

14. Kagan, *supra* note 13.

15. Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO IMMIGR. L.J. 155 (2001).

16. Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 145 (2000).

17. Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1 (1991-92).

more stringent and the process more arduous.¹⁸

The subject of this article, the effects of PTSD and the ability of an individual to give a credible account of an event, is applicable to legal issues beyond asylum.¹⁹ The counseling techniques I offer may be used by professionals who work in multidisciplinary settings, including lawyers, domestic violence counselors, and mental health expert witnesses. This article addresses how PTSD alters an asylum applicant's detail and consistency of memory, thus affecting the applicant's credibility and chance of being granted asylum. In response to the effects of PTSD, this article offers innovative techniques for interviewing and counseling a client suffering from PTSD in order to increase an applicant's chance of being granted asylum. Part I discusses U.S. asylum law and its origins in international law, and explains the asylum process and the myriad obstacles applicants with PTSD face in regard to credibility determinations. Part II defines PTSD and its role within the context of asylum law, relates PTSD in asylum applicants to existing research on other trauma survivors, and explains how PTSD may affect an asylum applicant's memory. Finally, Part III offers effective techniques an attorney may use when working with an asylum applicant suffering from PTSD in order to assist him in telling a consistent, detailed, and therefore credible, story of his persecution.²⁰

I. Overview of Asylum Law and the Affirmative Asylum Process

Currently, over ten million people worldwide have been forced to leave their home countries because of war, civil unrest, famine, persecution and torture based on religion, politics, ethnic and

18. See, e.g., REAL ID Act, 109 Pub. L. No. 13, 119 Stat. 231 (2005).

19. While this article discusses how physical and psychological trauma effects memory, it does not explore the realm of repressed and recovered memories often associated with child sexual abuse, or even trauma in general. Children are a unique and complex group, and an adequate discussion of the effects of trauma upon them requires an entirely separate article. See, e.g., RICHARD J. McNALLY, REMEMBERING TRAUMA 3-4, 66-77 (2003); Judith L. Alpert, Laura S. Brown, & Christine A. Courtois, *Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 PSYCHOL. PUB. POL'Y & L. 941 (1998); Stephen J. Lepore, *Child Witness: Cognitive and Social Factors Related to Memory and Testimony*, 3 INST. FOR PSYCHOL. THERAPIES 2 (1991); Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 LAW & CONTEMP. PROBS. 149 (2002).

20. These techniques may be useful in counseling and interviewing trauma survivors who do not meet the criteria for a PTSD diagnosis.

cultural differences among peoples of a particular region or country, and natural disasters.²¹ Of those who escape their home countries, some will seek shelter in refugee camps along the border of a neighboring country, while others will travel around the world in search of protection. Seeking protection through asylum, 27,551 people who fled to the United States filed new applications in 2004.²²

A. Laws Which Affect Asylum Seekers

The United States is a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees,²³ which incorporates some articles of the 1951 United Nations Convention Relating to the Status of Refugees.²⁴ As a signatory to the United Nations Protocol, the United States is obligated to protect refugees seeking asylum from persecution.²⁵ Congress legislated the United States'

21. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 2004 GLOBAL REFUGEE TRENDS: OVERVIEW OF REFUGEE POPULATIONS, NEW ARRIVALS, DURABLE SOLUTIONS, ASYLUM-SEEKERS, STATELESS AND OTHER PERSONS OF CONCERN TO UNHCR (June 17, 2005), <http://www.unhcr.org/statistics>. Twenty-five million people have been forced out of their homes, yet continue to live within their native countries. See INTERNAL DISPLACEMENT MONITORING CENTER (formerly the Global IDP Project), INTERNAL DISPLACEMENT: GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2004 (2005), available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/5136B3B276CF8B9580257090004E66A8/\\$file/Global_overview_2004_final_low.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/5136B3B276CF8B9580257090004E66A8/$file/Global_overview_2004_final_low.pdf).

22. U.S. DEP'T OF HOMELAND SECURITY, *supra* note 12, at 55.

23. 1967 U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (*entered into force* Nov. 1, 1968).

24. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (Apr. 22, 1954).

25. The United States cannot expel or return a refugee to a country where his life or freedom would be at risk on account of a protected characteristic under the refugee definition. 8 U.S.C. § 1231(b)(3) (2006). This standard is in keeping with the principle of nonrefoulement. See *I.N.S. v. Stevic*, 467 U.S. 407 (1984); See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987). See also *In re S-M-J-*, 21 I. & N. Dec. 722, 723 (B.I.A. 1997) ("Although we recognize that the burden of proof in asylum and withholding of deportation cases is on the applicant, we do have certain obligations under international law to extend refuge to those who qualify for such relief. See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Congress incorporated the international obligation into domestic U.S. law when it enacted the withholding of deportation provision of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, prohibiting the refoulement of refugees.").

The Immigration and Nationality Act (INA) does not define persecution. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). *But see* *Balazoski v. I.N.S.*, 932 F.2d 638, 642 (7th Cir. 1991) (noting that threats to life or freedom have been uniformly found to be persecution, and that even non-life threatening physical abuse constitutes persecution if it amounts to more than mere harassment); *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988); *Matter of Acosta*, I. & N. Dec. 211, 222

obligations under the United Nations Protocol when it enacted the Refugee Act of 1980. Under the Refugee Act of 1980, which codifies the definition of "refugee" from the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, foreign nationals are permitted to apply for asylum in the United States.²⁶ The U.S. government also has an obligation under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT")²⁷ to not return an individual to a country where he will be tortured.²⁸

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Congress enacted significant changes to immigration law in the United States.²⁹ IIRAIRA increased, sometimes drastically, the penalties for immigration violations in an attempt to address illegal immigration in the United States. Included in this legislation was the introduction of expedited removal, which exposes a person seeking entry into the United States to possible lifetime exclusion from admission without right to counsel, administrative hearing, or review.³⁰

The path to gaining asylum in the United States has become even more difficult to navigate in the wake of September 11. Because of the government's concern that foreign terrorists were using the asylum process to gain a legal right to remain in the United States, Congress passed the REAL ID Act of 2005,³¹

(B.I.A. 1985) (finding that federal courts and the Bureau of Immigration Appeals (BIA) have broadly defined persecution as "the infliction of suffering or harm upon those who suffer . . . in a way that is regarded as offensive"); *Regalado-Garcia v. I.N.S.*, 305 F.3d 784, 787 (8th Cir. 2002) (noting that persecution has also been defined as "the infliction or threat of death, torture, or injury to one's person or freedom" by either applicant's government or a group the applicant's government is unwilling or unable to control, on account of one of the five statutory grounds (race, religion, nationality, political opinion, and social group)).

26. 8 U.S.C. § 1158(a) (2005).

27. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT]. The CAT was signed by the United States on April 18, 1988 and ratified on October 21, 1994. Article 33 of the 1951 Convention Relating to the Status of Refugees prohibits the forced return of refugees who fear their life or freedom will be threatened if they are forced to return to their country of origin under the principle of *refoulement*.

28. CAT, *supra* note 27, Art. 3.

29. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRAIRA] (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48 and 50 U.S.C.).

30. *Id.* See also 8 U.S.C. § 1182(a)(6)(C), (a)(7) (2006). For a review of IIRAIRA and recommendations for its reform in order to protect deserving refugees, see Pistone & Schrag, *supra* note 13.

31. REAL ID Act, 109 Pub. L. No. 13, 119 Stat. 231 (2005) (codified in scattered

amending sections of the Immigration and Nationality Act relating to asylum. Although an asylum seeker already had the burden of proving refugee status prior to the changes,³² he must now prove that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."³³

B. The Process of Seeking Affirmative Asylum

A refugee seeking asylum in the United States must prove he has a well-founded fear of persecution in his home country.³⁴ If an asylum seeker is not in immigration proceedings to be removed from the United States to his native country,³⁵ then he may file an

sections of 8 U.S.C.). The provisions in section 101, *inter alia*, permit denial of asylum to otherwise credible applicants who do not furnish "corroborating evidence," require applicants to prove their persecutor's "central" motive, and explicitly grant discretion to deny asylum based on demeanor. These provisions apply generally to all asylum seekers and not only to those otherwise suspected of terrorism.

32. 8 U.S.C. § 1158(b)(1)(B)(i) (2006). See 8 C.F.R. § 208.13(a) (2006). See also *In re S-M-J-*, 21 I. & N. Dec. 722, 724 (B.I.A. 1997) (citing *Matter of Dass*, 201 I. & N. Dec. 120 (B.I.A. 1989)).

33. 109 Pub. L. No. 13, 119 Stat. 231. Centrality of the motive for the persecution is difficult to prove. Proving the motive of the torturer unreasonably increases the burden on the applicant. By adding a centrality requirement, intent of the torturer becomes a factor for the applicant to prove, decreasing the discretion of the finder of fact. For case law regarding nexus, see, e.g., *I.N.S. v. Elias-Zacharias*, 502 U.S. 478 (1992); *In re S-P-*, 21 I. & N. Dec. 486 (B.I.A. 1996).

34. 8 U.S.C. § 1101(a)(42)(A) (2005).

35. There are other paths through which a person fleeing persecution may seek asylum. For example, if an individual is stopped at the airport or other port of entry while attempting to gain entry to the United States, and he tells the immigration officer he is seeking asylum or fleeing persecution, he should be granted a credible fear interview. A trained asylum officer will conduct a "credible fear" interview to determine whether he has a claim for asylum. 8 U.S.C. § 1225(b)(1)(A)(ii) (2006). If he passes because he is found to have a "credible fear," he will be put into removal proceedings before an immigration judge but may apply for asylum. If he does not pass, upon his request, he should be given an expedited review before an immigration judge. See 8 U.S.C. § 1225(b)(1)(B) (2005). If the asylum seeker enters the United States and he is found within the U.S. borders without permission or inspection, the individual will have a removal hearing before an immigration judge but may apply for asylum as a defense. He will have the opportunity to submit evidence on his own behalf and be represented by a lawyer or accredited representative at his expense. See 8 C.F.R. §§ 292.1, 292.2, 1292.1, 1292.2 (2006). One study found that asylum seekers in the United States were much more likely to be successful in their plea for asylum if represented by a lawyer than not (twenty-five percent versus two percent). See Nina Bernstein & Marc Santora, *Asylum Seekers Treated Poorly, U.S. Panel Says*, N.Y. TIMES, Feb. 8, 2005, at A1 (citing U.S. Comm'n on Int'l Religious Freedom, *Asylum Seekers in Expedited Removal: A Study Authorized by Section 605 of the International Freedom Act of 1998* (2005)). Individuals

affirmative asylum application³⁶ to the United States Citizenship and Immigration Services ("USCIS") within one year of his entry into the U.S. borders. Within forty-five days of his application submission, USCIS will schedule an asylum interview for the applicant before a USCIS asylum officer.³⁷ At this interview, the applicant has the right to bring with him a legal representative and may present documentation supporting his claim for asylum.³⁸ If the applicant needs or would prefer the services of a foreign language interpreter during the interview, the applicant has the burden of arranging for this interpreter.³⁹

During this interview, the asylum officer will ask the applicant about his background and the facts underlying his asylum claim. An individual seeking asylum must establish that he is a refugee under 8 U.S.C. § 1101(a)(42)(A), by showing that he is unwilling or unable to return to his home country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁰ Although past persecution and torture is not necessary in order to claim eligibility for, or to obtain, asylum,⁴¹ many applicants

who do not request asylum at the port of entry who are suspected of using false documents or misrepresenting facts in order to gain entry into the United States are subject to expedited removal procedures, and may be summarily removed. See IIRAIRA, *supra* note 29; INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

36. The I-589 Application for Asylum and Withholding of Removal must be completed in English. See 8 C.F.R. § 103.2(b)(3) (2006).

37. 8 U.S.C. § 1158(d)(5)(A)(ii) (2005). The Asylum Corps was established in 1990 as part of the final regulations of the Refugee Act of 1980. U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *History of the United States INS Asylum Officer Corps and Sources of Authority for Asylum Adjudication* 4 (1999), <http://uscis.gov/graphics/services/asylum/history.htm>. Training to become an asylum officer includes completion of a ten-and-a-half week basic training course, which covers international law, country conditions, immigration law and asylum-specific training, and a score of seventy percent or better in each major area of study during this program. See 8 C.F.R. § 208.1(b) (2005). See also U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Core Occupations* (Jan. 21, 2006), <http://uscis.gov/graphics/workfor/careers/core.htm>.

38. 8 C.F.R. § 208.9(b) (2005). The asylum interview is conducted in English.

39. 8 C.F.R. § 208.9(g) (2005). For an examination of cross-cultural problems which occur when using an interpreter, see Angela McCaffrey, *Don't Get Lost In Translation: Teaching Law Students to Work With Language Interpreters*, 6 CLINICAL L. REV. 347 (2000); Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230, 233 (1986).

40. 8 U.S.C. § 1101(a)(42)(A) (2006). See also 8 U.S.C. § 1231(b)(3)(A) (2006), 8 C.F.R. § 208.3(b), 208.16 (2006). See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Diallo v. I.N.S.*, 232 F.3d 279, 284 (2d Cir. 2000) ("An alien's fear may be well-founded even if there is only a slight though discernible, chance of persecution."); *Matter of Mogharrabi*, 19 I. & N. Dec. 4439 (B.I.A. 1987).

41. 8 U.S.C. § 1101(a)(42) (2006). A well-founded fear of persecution may establish the basis for asylum eligibility without past persecution. For example, an applicant may

will have suffered in their home countries at the hands of their governments or by those against whom their governments were unwilling or unable to protect.⁴² A showing of past persecution creates a rebuttable presumption that well-founded fear exists.⁴³ An individual who demonstrates that he suffered severe past persecution may be granted asylum without proving a well-founded fear of future persecution.⁴⁴

At the interview, the asylum officer will evaluate the testimony and other evidence before her in determining whether to grant asylum. If the asylum officer does not find that the applicant is eligible for asylum, he will be deemed removable and the case will be referred to an immigration judge of the Executive Office for Immigration Review ("EOIR"), an agency of the Department of Justice, for further and de novo consideration of the claim through removal.⁴⁵ A removal hearing is conducted to determine whether the

be able to show a pattern and practice of persecution of individuals in his home country on account of one of the enumerated characteristics. See 8 C.F.R. § 208.13(b)(2)(i) (2006); *In re S-M-J-*, 21 I. & N. Dec. 722, 731 (B.I.A. 1997).

42. An asylum applicant does not have to prove that he would be singled out for persecution if he can show a pattern and practice of persecution of those similarly situated to the applicant on account of one of the groups to which the applicant claims to belong. See 8 C.F.R. § 208.13(b)(2)(i) (2006); *In re S-M-J-*, 21 I. & N. Dec. 722, 731 (B.I.A. 1997).

43. IIRAIRA expanded the factors that may be considered to rebut the presumption of well-founded fear. See 8 C.F.R. § 208.13(b)(1) (2006). Factors include a fundamental change in circumstances such that well-founded fear no longer exists, and whether an applicant could avoid future persecution by relocating to another part of the home country or country of last habitual residence. *Id.* See also 8 C.F.R. § 208.13(b)(3) (2006).

44. 8 C.F.R. § 208.13 (2006). See *Matter of Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989); *Acewicz v. I.N.S.*, 984 F.2d 1056 (9th Cir. 1993); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988).

45. See 8 C.F.R. § 208.14(c)(1) (2006). The initial proceeding in the removal process before the immigration judge is a master calendar hearing ("MASH"), when the applicant can admit that he is removable and request asylum. An applicant will receive a Form I-862 Notice to Appear, notifying him that he has been found removable, and giving him notice of the date and time of the master calendar hearing that he is required to attend. See 8 C.F.R. § 208.14(c)(1) (2006). See also EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *Fact Sheet: Immigration Court Process in the United States: Immigration Proceedings, Bond Redeterminations, Asylum, Convention Against Torture* (Apr. 28, 2005). The immigration judge will confirm that the asylum seeker understands his rights. See 8 U.S.C. § 1229(a)(1) (2005). The applicant is given information about his right to have legal representation at his expense, and is scheduled for an individual removal hearing. See *id.*

If the asylum seeker has other status permitting him to remain legally in the United States, he will be given a Notice of Intent to Deny the asylum application. He will have an opportunity to submit a response. After reviewing the response, the asylum officer will approve or deny the asylum application. A denied application is not referred to the immigration judge if the applicant is lawfully in the United States and not otherwise subject to removal. See 8 C.F.R. § 208.14(c)(2) (2005).

applicant can be found to be removable from the United States. At the hearing, the applicant may be able to establish eligibility to remain in the United States on the basis of asylum, withholding of removal,⁴⁶ or other reasons allowed under U.S. laws.⁴⁷ The removal hearing is a merits hearing which is prosecuted by an attorney of the Department of Homeland Security ("DHS") and defended by the applicant's attorney or accredited representative,⁴⁸ if he has one. The proceedings are conducted in English. If the individual needs the assistance of an interpreter, one is furnished by the EOIR.⁴⁹

Generally, the immigration judge enters a ruling on the record at the conclusion of the hearing. If the immigration judge denies the request for asylum, the applicant can appeal the judge's decision to the Board of Immigration Appeals ("BIA"), which is part of the EOIR.⁵⁰ The asylum applicant may appeal an adverse BIA decision

46. Withholding of removal "requires that the applicant show that it is 'more likely than not' that he will suffer persecution on account of a protected ground if we force him to return." *Maini v. I.N.S.*, 212 F.3d 1167 (9th Cir. 2000) (citing 8 C.F.R. § 208.16(b)(2)). "Demonstrating eligibility for withholding of deportation requires carrying a higher burden: [an alien] must establish a clear probability that his 'life or freedom would be threatened in [a] country on account of' his race. However, if the applicant shows that he or she suffered 'persecution in the past such that his or her life or freedom would be threatened,' then it is presumed that his or her life or freedom would be threatened upon return 'unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted there.'" *Diallo v. I.N.S.*, 232 F.3d 279, 284-85 (2d Cir. 2000) (citations omitted).

47. An applicant may be permitted to remain in the United States if he can establish eligibility under the CAT. Article 3 of the CAT prohibits the return to any country where it is "more likely than not" that the applicant would be subject to torture. 8 C.F.R. §§ 208.30, 208.16, 208.17 (2005). CAT eligibility does not entitle an applicant to become a permanent resident or citizen of the United States.

48. See 8 C.F.R. §§ 292.1, 292.2, 1292.1, 1292.2 (2005).

49. 8 C.F.R. § 1003.42(c) (2005). Mistakes in interpretation do occur, and the immigration judge may not have the language fluency to know that a mistake has been made. See Anker, *supra* note 6, at 449-51, 505-15; Durst, *supra* note 16, at 159-60.

50. To appeal to the BIA, the applicant must file a notice of appeal and may file a brief in support of his claim. Although oral argument may be heard by the BIA, it is rarely granted. No new testimony is taken. DHS may also appeal a decision adverse to the government. 8 U.S.C. § 1158(d)(5)(A)(iv) (2006). An appeal of an adverse immigration court decision to the Board of Immigration Appeals can be reviewed by only one Board member and be summarily affirmed without an opinion. 8 C.F.R. § 1003.1(e)(4) (2006). The expedited appeals process has been subject to criticism. See Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005 (Dec. 19, 2005). The Board will not take on a de novo review of the facts. 8 C.F.R. § 1003.1(d)(3)(i) (2006). The C.F.R. specifically exempts credibility findings by the immigration judge from review when setting forth that findings of fact will only be reviewed to determine if they were clearly erroneous. *Id.*

to the appropriate federal circuit court of appeals.⁵¹ Finally, an adverse court of appeals ruling may be appealed to the U.S. Supreme Court.⁵²

C. Credibility is Fundamental to an Asylum Claim

As noted above, an asylum claim must be supported by credible testimony.⁵³ A credible story must include sufficient detail that demonstrates that the applicant actually lived through and experienced the story he tells.⁵⁴ Documentation or other evidence of persecution that corroborates his testimony may help an asylum applicant establish credibility. Because asylum seekers are often forced to flee their home countries with either very little time to prepare or under some guise of secrecy, it is not unusual for them to have little or no documentation of their identities or lives in their home countries.⁵⁵ The testimony of the applicant, if "believable, consistent, and sufficiently detailed,"⁵⁶ can meet the burden of proving well-founded fear without other corroborative evidence.⁵⁷ A number of factors go into an individual's credibility finding, which is almost entirely within the discretion of the presiding immigration official. While credible testimony, without corroboration, can be sufficient to meet the burden of proof,⁵⁸ the recent changes to U.S. immigration laws have raised the bar

51. A BIA decision will be upheld if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 480 (1992) (quoting 8 U.S.C. § 1105a(a)(4)). DHS may ask the U.S. Attorney General to certify the case for review, or the Attorney General can, on its own, review the case. 8 C.F.R. § 1003.1(h)(i-iii) (2006).

52. The U.S. Supreme Court has taken up such a matter three times. *See Elias-Zacarias*, 502 U.S. 478; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *I.N.S. v. Stevic*, 467 U.S. 407 (1984).

53. 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii) (2005).

54. *See Diallo v. I.N.S.*, 232 F.3d 279, 284 (2d Cir. 2000) ("Where an applicant gives very sparse testimony . . . the IJ or the INS may fairly wonder whether the testimony is fabricated.").

55. *See* Virgil Wiebe, Serena Parker, Erin Corcoran & Anna Marie Gallagher, *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, IMMIGRATION BRIEFINGS 1 (Oct. 2001).

56. *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). *See* 8 C.F.R. §§ 208.13(a), 208.16(b) (2006). *See also Diallo v. I.N.S.*, 232 F.3d 279 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997).

57. "While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected." *Diallo v. I.N.S.*, 232 F.3d 279, 285 (2d Cir. 2000).

58. 8 C.F.R. § 1208.13(a) (2005).

considerably for asylum seekers.

An asylum applicant whose affirmative asylum claim is based upon past persecution or whose past persecution forms the basis for the well-founded fear of future persecution may need to repeat his story of torture to U.S. government officials at different stages of the asylum process. In an affirmative asylum case, where the applicant is not a subject of removal proceedings at the time of application, these iterations may include the asylum application, supporting affidavits and other evidence, answers to questions during the asylum interview, supporting affidavits and other evidence in defense of a removal proceeding, and direct and cross examination before an immigration judge.

The asylum process provides many opportunities for the applicant to tell his story, as well as many opportunities for him to make mistakes or misstatements.⁵⁹ He must answer questions requiring a recitation of facts that form the basis of the claim. Sometimes the answers within the application are repetitious. The applicant might submit an affidavit which sets forth his story of persecution in greater detail than that required by the application. The asylum officer will ask the applicant questions regarding his asylum claim, some of which may require him to repeat his story.

If the case is referred to an immigration judge for removal proceedings, the application is forwarded to the court for a *de novo* hearing. The respondent asylum seeker may submit a legal brief plus another affidavit which would accompany the brief. He may also submit documents including State Department Reports, news

59. An asylum applicant's story of persecution must be detailed. Studies suggest that fabricated stories tend to contain fewer details than real stories. See Jeffrey T. Hancock, Lauren E. Curry, Saurabh Goorha & Michael T. Woodworth, *Lies in Conversation: An Examination of Deception Using Automated Linguistic Analysis*, PROCEEDINGS OF THE 26TH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 535 (2004) (noting that accounts of fabricated stories contain fewer details than true stories) (citations omitted). When a person tells a story that is made up or is not his story, he will offer fewer details than when he relates details of an event in which he was a participant or observer. The reasons for this discrepancy may be that a person who lived through or observed an event can recall different facets of an event and relate this story more fully and with nuances that a person who makes up a story cannot. See Jane Herlihy, Peter Scragg & Stuart Turner, *Discrepancies in Autobiographical Memories - Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, BRIT. MED. J. 324, 327 (2002) ("Our study shows the danger of concluding that asylum seekers are fabricating their histories, solely on the basis of discrepancies between interviews Discrepancies are common, especially (although not exclusively) when the person has post-traumatic stress disorder and has to wait a long time between interviews. Discrepancies are more likely to arise when the details required are peripheral to the interviewee's experience and when the content is traumatic to the interviewee. All of these factors are present in many asylum applications, and they may be increasing the risk of incorrect judgments.").

articles, and human rights reports, as evidentiary support of his persecution. If he is represented by an attorney or other legal representative, he will tell his story during direct examination. He will also be subject to cross-examination by the DHS attorney. Furthermore, the Immigration Judge has the opportunity to ask the asylum applicant additional questions if she is uncertain about particular facts of the case. In practice, adjudicators who hear inconsistent accounts of torture are more likely to deem the applicant to be incredible.⁶⁰ Applicants or respondents who are found not credible are denied asylum.⁶¹ However, these denials of asylum can be unjust when applicants telling inconsistent accounts of traumatic events are suffering from PTSD.⁶² Often, asylum officers and courts do not take this possibility into account.

D. Relevant Recent Changes in Asylum Law to Credibility and Corroborating Evidence

An asylum applicant should provide available corroborating evidence to support his claim.⁶³ The evidence may include personal

60. See Herlihy, Scragg & Turner, *supra* note 59.

61. There are reasons other than the symptoms of PTSD that may cause a story to differ over time. For example, an initial asylum application must be written in English. If the applicant is not fluent in written English, another person might write it, with an attestation by the applicant that the contents are true. Since the applicant is not fluent in English, he may not be able to point to any mistakes, even though he signs the form and attests to its accuracy.

Also, at some point during this asylum/removal process, an applicant may obtain an attorney or other legal representative. For example, it is important that I, as Mohamed's attorney, explore in depth all aspects of his claim. The significance of elements of the claim demand my attention and discussion with Mohamed. In assisting Mohamed to submit an affidavit or prepare testimony, I will explore the theory of the case with him. I may develop a theory that emphasizes something different from what Mohamed initially considered important about his claim. If there is prior testimony or documentation, the facts and details may present what appears to be a different story because a different emphasis is placed on the details with the different theory of the case.

Furthermore, during the interview, the asylum officer may ask questions that place a different emphasis on descriptions of past events and thus make the facts presented at the interview appear to be inconsistent from the asylum application or affidavit. Basing a credibility determination on an asylum seeker's "[d]emeanor, candor or responsiveness" is also vulnerable to subjective errors due to language and cultural differences which an asylum officer or judge may not be competent to evaluate. See Durst, *supra* note 16, at 159.

62. See Herlihy, Scragg & Turner, *supra* note 59, at 325. See also Hancock, Curry, Goorha & Woodworth, *supra* note 59.

63. An asylum applicant is entitled to bring in witnesses to testify on his behalf, if they meet the evidentiary standard for admissibility. 8 U.S.C. § 1229a(B)(4)(B) (2005). A witness may include an expert. An expert on the conditions of Darfur may be able to

documents such as identity papers, photographs of family members, medical records, and travel documents. Evidence may also include arguably less-personal documentation such as newspaper clippings and reports of political conditions in the applicant's home country. Where the applicant's testimony is the only evidence to support a claim of past persecution or the reasonable fear of future persecution, then the applicant's testimony may be enough if it is "credible, persuasive and specific."⁶⁴ Where an application for asylum is denied based upon a lack of corroborating evidence, the person evaluating the application must "(a) identify the particular pieces of missing, relevant documentation, and (b) show that the documentation at issue was reasonably available to the [applicant]."⁶⁵

The amendments to the Immigration and Nationality Act contained in the REAL ID Act of 2005 include provisions that make proving asylum eligibility more difficult.⁶⁶ The Act broadens the

corroborate the persecution of black Africans by the Janjaweed, the collusion between the Janjaweed and the Sudanese government, or perhaps even the massacre and burning of Mohamed's village. A mental health expert could provide evidence in regard to PTSD. First, she could provide a PTSD diagnosis, which is evidence corroborating Mohamed's claim of past persecution. Second, a mental health expert could provide testimony as to the effects of PTSD on memory. See Rachael Keast, *Using Experts for Asylum Cases in Immigration Court*, in 82 INTERPRETER RELEASES 1237 (Aug. 1, 2005). See also Katherine J. Eder, *The Importance of Medical Testimony in Removal Hearings for Torture Victims*, 7 DEPAUL J. HEALTH CARE L. 281 (2004).

An expert should not be mandated as part of a claim, as PTSD is not needed in order to prove a credible fear of torture or death. However, proof of PTSD is evidence to be weighed by the fact finder in determining credible fear. A PTSD diagnosis is evidence supporting the applicant's claim that he experienced a traumatic event. This diagnosis may be relevant evidence corroborating the applicant's story of persecution. For information regarding the use of psychological experts at asylum hearings, see Sven-Åke Christianson, Jane Goodman & Elizabeth F. Loftus, *Eyewitness Memory for Stressful Events: Methodological Quandaries and Ethical Dilemmas*, in THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY 217, 228-33 (Sven-Åke Christianson ed., 1992) [hereinafter *Eyewitness Memory for Stressful Events*].

64. Matter of Mogharrabi, 19 I. & N. Dec. 439, 444 (B.I.A. 1987); see also *id.* at 446 ("In general, the assessment of the application for asylum should be a qualitative, not a quantitative, one.").

65. *Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003) (citing *Diallo v. I.N.S.*, 232 F.3d 279, 285-290 (2d Cir. 2000)).

66.

(ii) SUSTAINING BURDEN- The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible

definition of “terrorist activity” and “guilt by association” grounds for deportation and admissibility, and raises the defense to a “clear and convincing evidence” standard. The Act also applies these new regulations retroactively to long-term lawful permanent residents.⁶⁷ There are many legitimate reasons why an asylum applicant may not possess much evidence to support his personal claim as a refugee, even if he can provide evidence that generally corroborates his story that similarly situated individuals in his home country are subjects of persecution. For example, an individual fleeing home to escape a sudden, potentially deadly situation, is primarily concerned with personal safety and safety for his or her loved ones. There may be no time to gather documentary evidence of one’s identity or other evidence that would support a claim for asylum under the clear and convincing standard. As another example, an individual may flee his home country and enter the United States using identity papers and a passport of another individual. The individual may have feared that if he had shown his true identity, he would have been detained and perhaps tortured and killed by his own government.⁶⁸ This additional burden means that an otherwise credible applicant, who does not have corroborating evidence that an asylum officer or immigration judge believes is obtainable, can be denied asylum based on the presumed reasonable availability of that evidence.

The REAL ID Act codifies subjective factors to be considered when making a credibility determination. The elevation of the burden of proof for asylum applicants creates significant obstacles. The REAL ID Act has the potential to deny valid claims in four major areas: motive, credibility, corroboration, and discretion. It requires the applicant to prove that the protected characteristic forming the basis for his refugee status is the central reason for persecution.⁶⁹ Further, giving factfinders the discretion to make

testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

67. See 8 U.S.C. § 1158(b)(2) (2006); 8 U.S.C. § 1182 (2006).

68. See Wiebe, Parker, Corcoran & Gallagher, *supra* note 55.

69.

(iii) CREDIBILITY DETERMINATION- Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence or record (including the reports of the Department of State on country

credibility determinations based solely on demeanor potentially allows a subjective prima facie decision while ignoring a legal basis for the asylum claim. Denial of asylum based on a lack of corroborative evidence disregards the applicant's specific, detailed testimony and places unreasonable demands on asylum applicants who are often fleeing horrific situations with little or no warning and no time to consider gathering documentation and other evidence to support a future asylum claim. Moreover, the elimination of review of discretionary judgments undermines the foundation of the legal system.

II. Post-Traumatic Stress Disorder and Its Effect on Credibility

As noted above, asylum seekers who were persecuted in their home countries or country of last habitual residence may suffer mentally and physically as a result of that persecution.⁷⁰ Mental health researchers are still discovering how the mind experiences trauma and how memory is affected by trauma. The injuries suffered by tortured individuals may result in diagnosable mental disorders including PTSD. Research on refugees and other trauma survivors has been conducted to study how PTSD and other mental disorders could affect an individual's ability to accurately recall traumatic events. This section discusses the symptoms of PTSD and

conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

Individuals subject to removal proceedings are subject to the same burden of proof and credibility determinations as a result of the passage of the REAL ID Act of 2005. 8 U.S.C. § 1229c(4)(C) (2005). Reliance on demeanor evidence to determine whether a witness is lying is not supported by research. See KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 847-49 (2d ed. 2002) (quoting Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1162-63 (1993)).

70. Asylum seekers may be suffering from various psychiatric disorders whose symptoms have an adverse or harmful effect on their ability to be granted asylum, ranging from inability to submit a timely application to the ability to tell a credible story. See Piwowarczyk, *supra* note 15. See also J. Mark G. Williams, *Autobiographical Memory and Emotional Disorders*, in *THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY* 451 (Sven-Åke Christianson ed., 1992).

the memory process. It reviews mental health research on PTSD and traumatic memory, focusing on relevant studies about the accuracy of traumatic memory conducted on refugees and on veterans of Desert Storm. While this article focuses on asylum applicants, research on PTSD has been conducted on populations including veterans of the Vietnam War,⁷¹ the Gulf War,⁷² and the war in Iraq,⁷³ as well as civilian victims of war,⁷⁴ survivors of natural disasters,⁷⁵ and survivors of rape⁷⁶ and domestic violence.⁷⁷

71. See, e.g., John W. Mason, Sheila Wang, Rachel Yehuda, Sherry Riney, Dennis S. Charney & Steven M. Southwick, *Psychogenic Lowering of Urinary Cortisol Levels Linked to Increased Emotional Numbing and a Shame-Depressive Syndrome in Combat-Related Posttraumatic Stress Disorder*, 63 PSYCHOSOMATIC MEDICINE 387 (2001).

72. See, e.g., Charles A. Morgan III, Susan Hill, Patrick Fox, Peter Kingham & Steven M. Southwick, *Anniversary Reactions in Gulf War Veterans: A Naturalistic Inquiry 2 Years After the Gulf War*, 11 J. OF TRAUMATIC STRESS 165 (1998); Steven M. Southwick, C. Andrew Morgan III, Andreas L. Nicolau & Dennis S. Charney, *Consistency of Memory for Combat-Related Traumatic Events in Veterans of Operation Desert Storm*, 154 Am. J. Psychiatry 173-77 (1997) [hereinafter *Consistency of Memory*]; Charles A. Morgan, Christian Grillon, Steven M. Southwick, Michael Davis & Dennis Charney, *Exaggerated Acoustic Startle Reflex in Gulf War Veterans With Posttraumatic Stress Disorder*, 153 Am. J. OF PSYCHIATRY 64-68 (1996); Steven M. Southwick, Charles A. Morgan, Adam Darnell, Douglas Bremner, Andreas L. Nicolau, Linda M. Nagy & Dennis S. Charney, *Trauma-Related Symptoms in Veterans of Operation Desert Storm: A 2-Year Follow-Up*, 152 Am. J. OF PSYCHIATRY 1150-55 (1995); Steven M. Southwick, Andrew Morgan, Linda M. Nagy, Douglas Bremner, Andreas L. Nicolau, David R. Johnson, Robert Rosenheck & Dennis S. Charney, *Trauma-Related Symptoms in Veterans of Operation Desert Storm: A Preliminary Report*, 150 Am. J. PSYCHIATRY 1524 (1993).

73. See, e.g., Erica Goode, *Treatment And Training Help Reduce Stress of War*, N.Y. TIMES, Mar. 25, 2003, at F1.

74. See, e.g., R. Yehuda, J. Schmeidler, L.J. Siever, K. Binder-Brynes & A. Elkin, *Individual Differences in Posttraumatic Stress Disorder Symptom Profiles in Holocaust Survivors in Concentration Camps or in Hiding*, 10 J. TRAUMATIC STRESS 453 (1997); E.B. Carlson & R. Rosser-Hogan, *Cross-Cultural Responses to Trauma: A Study of Traumatic Experiences and Posttraumatic Symptoms in Cambodian Refugees*, 7 J. OF TRAUMATIC STRESS 43 (1994); A.Y. Shalev, S.P. Orr & R.K. Pitman, *Psychophysiological Assessment of Traumatic Imagery in Israeli Civilian Patients with Posttraumatic Stress Disorder*, 150 Am. J. OF PSYCHIATRY 620 (1993); Emanuel Tanay, *Initiation of Psychotherapy With Survivors of Nazi Persecution*, in MASSIVE PSYCHIC TRAUMA (Henry Krystal ed., 1968), in JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR 139 (1997).

75. See, e.g., Julia Perilla, Fran H. Norris & Evelyn A. Lavizzo, *Ethnicity, Culture and Disaster Response: Identifying and Explaining Ethnic Differences in PTSD Following Hurricane Andrew*, 21 J. OF SOC. AND CLINICAL PSYCHOL. 20 (2002).

76. See, e.g., Nader Amir, Jane Stafford, Melinda S. Freshman & Edna B. Foa, *Relationship Between Trauma Narratives and Trauma Pathology*, 11 J. TRAUMATIC STRESS 385 (1998); Charles A. Morgan III, Christian Grillon, Hadar Lubin & Steven M. Southwick, *Startle Reflex Abnormalities in Women With Sexual Assault-Related Posttraumatic Stress Disorder*, 154 Am. J. PSYCHIATRY 1076 (1997).

77. See, e.g., Mary Ann Dutton & Lisa A. Goodman, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215 (1994).

A. Post-Traumatic Stress Disorder May Result in Inaccurate Recall of Traumatic Memory

Post-Traumatic Stress Disorder is identified and defined in the revised fourth edition of the Diagnostic and Statistical Manual ("DSM-IV-TR").⁷⁸ The DSM-IV-TR, developed by the American Psychiatric Association, provides a psychiatric nomenclature for clinicians and researchers for diagnosis, treatment, study, education and statistics.⁷⁹ Post-traumatic stress disorder is classified as an Anxiety Disorder⁸⁰ in the DSM-IV-TR.⁸¹ Symptoms of PTSD may develop after an individual experiences or witnesses actual or threatened death or serious injury, a threat to physical integrity to himself or to others, or learns of the unexpected or violent death, serious harm, or the threat of death or injury occurring to a family member or close associate.⁸² The individual's response may include intense fear, helplessness, or horror.⁸³ Characteristic symptoms include persistent re-experiencing of the traumatic event, avoidance of stimuli associated with the traumatic event, and symptoms of increased arousal, such as hypervigilance or difficulty concentrating.⁸⁴ The symptoms must persist for longer than one month and result in social or occupational functional impairment for a PTSD diagnosis to be sustained.⁸⁵

The survivor may re-experience the traumatic event in the form of intrusive distressing recollections,⁸⁶ recurring nightmares,⁸⁷ or intense psychological distress or physiological reactions when exposed to internal or external cues that remind him of the event. A person with PTSD may suffer from periods of dissociation, when

78. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 429 (4th ed. 2000) [hereinafter DSM-IV-TR].

79. See *id.* at xxiii-xxxv. There are criticisms that PTSD is a Western social construction and that diagnosing survivors of torture shifts the focus of the problem toward Western forms of medical treatment of the victims and not toward resolving the survivors' larger problems. See MCNALLY, *supra* note 19, at 282-85. In the interest of assisting clients from all over the world who seek asylum, the author acknowledges these controversies and submits that PTSD research is applicable to counseling goals in the legal context.

80. Anxiety is a sense of apprehension and fear. An anxiety disorder develops from a complex set of biological and environmental factors. See 1 Comprehensive Textbook of Psychiatry 1768 (Benjamin J. Sadock & Virginia A. Sadock eds., 8th ed. 2005).

81. DSM-IV-TR, *supra* note 78, at 429.

82. *Id.* at 463.

83. *Id.*

84. *Id.* at 463, 468.

85. *Id.*

86. Intrusive thoughts are the most common re-experiencing symptom of PTSD. MCNALLY, *supra* note 19, at 106.

87. Persistent nightmares are a symptom specific to PTSD. *Id.* at 108.

parts of the events are relived. These occurrences are more commonly known as “flashbacks.”⁸⁸ As a result, the survivor may avoid stimuli that he associates with the traumatic event by refusing to think about the event and avoiding places, activities, situations and people that remind him of the event. Further, the survivor may have a marked diminished interest in activities that used to be significant to him, he may be unable to recall an important aspect of the traumatic event, and he may feel detached from others. He may also have a restricted range of affect, and have feelings of a foreshortened future. Finally, he may experience persistent symptoms of hyperarousal, including difficulty sleeping or concentrating, hypervigilance, anger, and irritability.

Not everyone who is exposed to a traumatic event will develop PTSD. The length, immediacy, and seriousness of the traumatic event are the principal aspects of the exposure that influence whether PTSD develops.⁸⁹ Also, one’s psychobiological response to stimuli and coping strategy will differ from another’s.⁹⁰ Among the U.S. population, about ten percent of women and five percent of men will experience PTSD at some point in their lives. Of the Americans who suffer a traumatic experience, ten to fourteen percent of women and five to six percent of men will develop PTSD.⁹¹

Extensive research has focused on asylum seekers and refugees from countries affected by war and related persecution.⁹² There is variation in rates of PTSD among immigrants, especially those in countries affected by war.⁹³ “Individuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder. Such individuals may be especially reluctant to divulge experiences of

88. DSM-IV-TR, *supra* note 78, at 464.

89. *Id.* at 466.

90. Charles A. Morgan, III, Sheila Wang, Ann Rasmusson, Gary Hazlett, George Anderson & Dennis S. Charney, *Relationship Among Plasma Cortisol, Catecholamines, Neuropeptide Y, and Human Performance During Exposure to Uncontrollable Stress*, 63 PSYCHOSOM. MED. 412 (2001). Dissociation by the victim at the time of the event is a predictor of PTSD. Bessel A. van der Kolk & Rita Fisler, *Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study*, 8 J. OF TRAUMATIC STRESS 505, 511 (1995) [hereinafter *Dissociation and the Fragmentary Nature of Traumatic Memories*].

91. See Rachel Yehuda, *Post-Traumatic Stress Disorder*, 346 NEW ENG. J. MED. 108, 109 (2002).

92. See Pistone & Schrag, *supra* note 13, at 49 n.272.

93. Among refugees from countries affected by war, the rate of PTSD is as high as eighty-six percent. See Zachary Steel & Derrick Silove, *The Psychosocial Cost of Seeking and Granting Asylum*, in INTERNATIONAL HANDBOOK OF HUMAN RESPONSE TO TRAUMA 421, 423 (Arieh Y. Shalev, Rachel Yehuda & Alexander C. McFarlane eds., 2000) (citing E.B. Carlson & R. Rosse-Hogan, *Trauma Experiences, Posttraumatic Stress, Dissociation, and Depression in Cambodian Refugees*, 148 AM. J. PSYCHIATRY 1548 (1991)).

torture and trauma due to their vulnerable political immigrant status.”⁹⁴ Additionally, PTSD sufferers often suffer from other mental disorders, including depression and drug and alcohol dependence.⁹⁵

The plight of individuals who seek asylum, but are denied safe haven because they cannot prove refugee status, has come to the attention of mental health researchers who study trauma and its effects on memory. Recognizing that telling a credible story of persecution is integral to gaining asylum, studies have focused on the consistency and detail of traumatic memory. Many people assume that consistency in the recall of details is evidence of credibility, and that someone who has accurate recall of details is more credible.⁹⁶ This assertion, however, is not supported by research on trauma survivors.

For example, a study published in the *British Medical Journal* on Kosovan and Bosnian refugees conducted in 1999 and 2000 found that refugees with PTSD are inconsistent in their accounts of past persecution.⁹⁷ This study concluded that refugees with severe PTSD are more likely to be inconsistent in details over time; that inconsistency tends to occur in recall of details peripheral to their stories; and that inconsistency does not mean that the refugee lacks credibility.⁹⁸

The investigating psychologists and psychiatrists for this study interviewed twenty-seven Kosovan and twelve Bosnian refugees who had been granted refugee status in the United Kingdom and were thus allowed to remain in the United Kingdom under procedures of the United Nations High Commissioner for Refugees.⁹⁹ The participants, who had been asked to participate in a study of memory, were not receiving on-going clinical treatment as a result of their participation in this study.¹⁰⁰ Because they had already been granted refugee status and thus were allowed to remain in the United Kingdom, they had no incentive to be intentionally untruthful during the course of the study.¹⁰¹

94. DSM-IV-TR, *supra* note 78, at 465.

95. See Bonnie L. Green & Stacey I. Kaltman, *Recent Research Findings on the Diagnosis of PTSD*, in *POSTTRAUMATIC STRESS DISORDER IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT* 19, 22-23 (Robert I. Simon ed., 2003).

96. See Herlihy, Scragg & Turner, *supra* note 59, at 325.

97. See *id.* at 324.

98. See *id.*

99. See *id.* at 325. The United States and the United Kingdom have distinctive asylum and refugee programs, differences which will not be discussed here. However, the results of this study on refugee subjects have validity for the focus of this article, PTSD in asylum seekers.

100. See *id.*

101. See *id.* at 326.

The study participants were interviewed twice, with an interpreter, between three and thirty-two weeks apart.¹⁰² They were assessed for PTSD and for depression.¹⁰³ Each participant recalled a traumatic event from his or her experiences and recalled a non-traumatic event.¹⁰⁴ As part of the inquiry about each traumatic event and non-traumatic event, the participant was asked a series of fifteen predefined questions to elucidate details of the event. The participant rated each detail as either central or peripheral to his or her experience.¹⁰⁵ A central detail is one that is autobiographical¹⁰⁶ in nature, such that it can be reconstructed from general knowledge of the event, while a peripheral detail is an element of a specific event that cannot be reconstructed from general knowledge.¹⁰⁷

The results of the study on Kosovan and Bosnian refugees indicate that the refugee participants had discrepancies in their first-hand accounts.¹⁰⁸ The discrepancies were more likely to involve those details that were peripheral to the experiences than those that made up the central gist of the event.¹⁰⁹ Although a subject was more likely to have accurate recall of central elements of an experience when the experience had a high level of emotional impact on the subject rather than a neutral impact,¹¹⁰ the subject became less accurate in the recall of peripheral details of the experience.¹¹¹ There was no significant difference regarding whether the experience recalled was a traumatic event or a non-traumatic event.¹¹² Refugee participants with high levels of traumatic stress were more likely to have a greater number of discrepancies the longer the time between interviews.¹¹³ Therefore, discrepancies in recall over time do not necessarily indicate lying. Also, subjects who were depressed and who suffered from PTSD had difficulty recalling central details.¹¹⁴ Furthermore, the results

102. *See id.* at 325.

103. *See id.*

104. *See id.*

105. *See id.*

106. For more discussion of autobiographical memory, see REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY (David C. Rucin ed., 1996).

107. *See* Herlihy, Scragg & Turner, *supra* note 59, at 325.

108. *See id.* at 326-27.

109. *See id.* at 326.

110. *See id.* at 324.

111. *See id.* at 325. *See also* Sven-Åke Christianson, *Remembering Emotional Events: Potential Mechanisms*, in THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY 307, 313-17 (Sven-Åke Christianson ed., 1992) [hereinafter *Remembering Emotional Events*].

112. *See* Herlihy, Scragg & Turner, *supra* note 59, at 326.

113. *See id.*

114. *See id.* at 325.

indicated that the level of detail conveyed in the subjects' response was dictated in part by how the question was worded.¹¹⁵

The researchers developed some hypotheses to explain how such discrepancies exist beyond the length of time between interviews. One possible reason is that the participant's emotional state at the time of the interview may affect the description of an event's details. For instance, an individual suffering from depression will tend to view events more negatively and recall negative events rather than positive events.¹¹⁶ Furthermore, once an interviewee recalls an event, he or she may have engaged in reminiscence, or the gathering of new information over repeated recall.¹¹⁷ There may have been a subconscious search to remember more details of an event, and the interviewee may have checked with others who were present in order to gather more details.¹¹⁸ This refugee study raises doubts that an individual who relates an inconsistent account of a traumatic experience is necessarily fabricating the story.

Other studies also show that memory of the details of a traumatic event are not recalled consistently over time. A study of Gulf War veterans, for instance, found that even details that seem immutable, generally objective and highly traumatic—such as whether a soldier saw other soldiers killed or wounded—often shift or change after two years have passed.¹¹⁹ In this study, fifty-nine veterans of Operation Desert Storm completed a questionnaire regarding potential traumatic stressors faced by Desert Storm personnel.¹²⁰ These subjects were also evaluated for PTSD.¹²¹ The study concluded that subjects with PTSD are more likely to have difficulty remembering details of traumatic events and their stories are more likely to become inconsistent over time.¹²² There were inconsistencies in recall of events that were generally objective and highly traumatic in nature.¹²³ This study found a positive correlation between high levels of PTSD in subjects and inconsistency in memory of traumatic events.¹²⁴

115. *See id.*

116. *See id.* at 326-27.

117. *See id.* at 327.

118. *See id.*

119. *See Consistency of Memory, supra* note 72. The subjects were also evaluated for PTSD symptoms six years after the Gulf War. Charles A. Morgan III, Susan Hill, Patrick Fox, Peter Kingham & Steven M. Southwick, *Anniversary Reactions in Gulf War Veterans: A Follow-Up Inquiry 6 Years After the War*, 156 AM. J. PSYCHIATRY 1075 (1999).

120. *Consistency of Memory, supra* note 72, at 174.

121. *Id.*

122. *Id.* at 176.

123. *Id.* at 175.

124. *Id.* at 176.

B. Trauma Influences All Phases of the Memory Process

Researchers are continuing to study and learn about the process of memory. Memory is the encoding, storage and retrieval of past experience.¹²⁵ This cognitive process is not focused on the preservation of a record, but rather centered on survival and understanding surroundings.¹²⁶ With a significant non-traumatic event, people take in sensory fragments and unconsciously store them into a personal narrative.¹²⁷ The data is encoded, or integrated on a linguistic level.¹²⁸ The reconstructive process of autobiographical memory results in a recollection of the past that is subject to distortion. It is not a literal recording of the past. Memories are shaped by related experiences of the individual, as well as by the individual's emotional state at the time of recall.¹²⁹ Research shows that the memory process decays over time as it is influenced by a number of factors that affect recall.¹³⁰ As a result, memory is never perfect.

There are two parts of the brain that affect memory of traumatic events, the amygdala and the hippocampus. The amygdala stores highly charged emotional memories.¹³¹ It anchors the memory in emotional significance and is important in the recall of emotional

125. J. Douglas Bremner, John H. Krystal, Steven M. Southwick & Dennis S. Charney, *Functional Neuroanatomical Correlates of the Effects of Stress on Memory*, 8 J. TRAUMATIC STRESS 527, 529 (1995). See A.W. Melton, *Implications of Short-Term Memory for a General Theory of Memory*, 2 J. VERBAL LEARNING & VERBAL BEHAV. 1 (1963). Memory is fallible because of the nature of its origins. It comes from the perspective of an individual who is affected by the circumstances and other influences at the time of encoding, storage, and recall. See Daniel L. Schacter, *The Seven Sins of Memory: Insights from Psychology and Cognitive Neuroscience*, 54 AM. PSYCHOL. 182 (1999).

126. See Ralph Norman Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL., PUB. POL'Y & L. 1057, 1065-66 (2000).

127. See Bessel A. van der Kolk, *Trauma and Memory*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 279, 289 (Bessel A. van der Kolk, Alexander C. McFarlane & Lars Weisaeth eds., 1996) [hereinafter *Trauma and Memory*].

128. See *id.*

129. See *Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 507. False memories may develop from post-event suggestions and contamination. See Haber, *supra* note 126, at 1068-71.

130. See *Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 507.

131. See Joseph E. Ledoux, *Emotion as Memory: Anatomical Systems Underlying Indelible Neural Traces*, in THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY 269, 274-79 (Sven-Åke Christianson ed., 1992).

events.¹³² It is stimulated by cues that remind the individual of the experience, such as questions related to a traumatic event.¹³³ The amygdala causes trauma-related memories to be retrieved from the neural network holding the memories.¹³⁴ A different part of the brain, the hippocampus, stores memory of time and space.¹³⁵ The hippocampus brings together memory fragments when explicit memory is retrieved.¹³⁶ Under traumatic stress, however, the hippocampus fails to properly store and anchor the memory.¹³⁷ As a result, the encoding process is derailed, and memories of traumatic events are not stored in an organized manner.¹³⁸ Instead, traumatic memory is stored as sensory fragments.¹³⁹ Because of this phenomenon, individuals with PTSD have higher rates of short-term memory problems and dysfunction in learning and memory.¹⁴⁰ High doses of adrenaline, produced during extremely traumatic events, can further lead to the impairment of memory storage.

There is a popular belief, termed "flashbulb memory," that details of a traumatic event are etched in a survivor's mind and that these details are therefore immutable.¹⁴¹ After all, the traumatic experience was highly significant and had a large impact on the

132. See Bessel A. van der Kolk, *The Body Keeps the Score: Approaches to the Psychobiology of Posttraumatic Stress Disorder*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 230 (Bessel A. van der Kolk et al. eds., 1996) [hereinafter *The Body Keeps the Score*].

133. See *Trauma and Memory*, *supra* note 127, at 295.

134. See *id.* at 293-94.

135. See *The Body Keeps the Score*, *supra* note 132, at 231.

136. Bremner, Krystal, Southwick & Charney, *supra* note 125, at 536 (citing S.M. Zola-Morgan & L.R. Squire, *The Primate Hippocampal Formation: Evidence for a Time-Limited Role in Memory Storage*, 250 SCIENCE 288-90 (1990)).

137. See *Trauma and Memory*, *supra* note 127, at 295. PTSD may cause malfunction in the ability of the hippocampus to bring together sensory fragments into a narrative. See Bremner, Krystal, Southwick & Charney, *supra* note 125, at 545.

138. See Amir, Stafford, Freshman & Foa, *supra* note 76, at 386.

139. See *Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 518. See also Bessel van der Kolk, Onno van der Hart & Charles R. Marmar, *Dissociation and Information Processing in Posttraumatic Stress Disorder*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 303, 312 (Bessel A. van der Kolk et al. eds., 1996) [hereinafter *Dissociation and Information Processing in Posttraumatic Stress Disorder*].

140. See J.D. Bremner, et al., *Deficits in Short-Term Memory in Posttraumatic Stress Disorder*, 150 AM. J. PSYCHIATRY 1015 (1993).

141. This view has been found not to be entirely accurate. See *Eyewitness Memory for Stressful Events*, *supra* note 63, at 223-24 (citing R. Brown & J. Kulik, *Flashbulb Memories*, in 5 COGNITION 73 (1977)). See also Sven-Åke Christianson & Martin A. Safer, *Emotional Events and Emotions in Autobiographical Memories*, in REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY 218, 223 (David C. Rubin ed., 1996) ("'[F]lashbulb' or 'video-camera' metaphors are misleading in suggesting the potential for perfect accuracy in remembering emotional events."); McNALLY, *supra* note 19, at 53-57.

survivor's life. However, the traumatic nature of the event affects the entire memory process. During a traumatic event, an individual responds to the situation and does not focus on attempting to remember details of the event as it happens. The traumatic experience is a time for reaction, not reflection. The brain prepares for an extreme traumatic threat by releasing hormones to react defensively, or to cope with the threat.¹⁴² The body's nervous system response is to survive through fighting, fleeing, or freezing. The individual may experience dissociation, which many describe as an "out of body" experience, a separation of one's consciousness from one's body.¹⁴³ Psychiatrists believe this to be a defense mechanism, a way of coping with the extreme emotional stress of trauma.¹⁴⁴ A person's focus becomes narrow, and attention becomes intense, yet limited to central details.¹⁴⁵ This neurochemical coping response affects memory and memory storage, and reduces the retention of peripheral details.¹⁴⁶

Traumatic memory is stored differently than non-traumatic memory. Unlike explicit memory, traumatic events are stored as implicit memory, which are sensory, emotional, reflexive, or conditioned responses.¹⁴⁷ A person who experiences a traumatic event processes the event in terms of the senses of sight, sound, touch, taste, and smell. As noted above, during the traumatic event, the brain becomes overwhelmed with all of the information it absorbs and stores the information as fragments.¹⁴⁸ These fragments become associated with other, similar memories of possibly unrelated events.¹⁴⁹ Retrieval of the memory of the traumatic event

142. See *Trauma and Memory*, *supra* note 127, at 291. See also J. Douglas Bremner, "The Invisible Epidemic: Post-Traumatic Stress Disorder, Memory and the Brain" (Mar. 2000), <http://www.lawandpsychiatry.com/html/PTSD%20Memory%20and%20Brain2.pdf>.

143. See *Dissociation and Information Processing in Posttraumatic Stress Disorder*, *supra* note 139, at 307.

144. See *id.*

145. See *Trauma and Memory*, *supra* note 127, at 285 ("As people are being traumatized, this narrowing of consciousness sometimes seems to evolve into a complete amnesia for the experience.").

146. See Herlihy, Scragg & Turner, *supra* note 59, at 325. See also *Remembering Emotional Events*, *supra* note 111, at 313-17.

147. See Schacter, *supra* note 125 (citing D.L. Schacter, *Implicit Memory: History and Current Status*, 13 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 501 (1987)).

148. See *Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 518. See also *Dissociation and Information Processing in Posttraumatic Stress Disorder*, *supra* note 139, at 312.

149. See *Trauma and Memory*, *supra* note 127, at 296-97. Non-traumatic memory is also subject to errors on recall "based on remaining memories, general schematic knowledge, and the demands of the remembering context." Ira E. Hyman, Jr. & Elizabeth F. Loftus, *Errors in Autobiographical Memory*, 18 CLINICAL PSYCHOL. REV. 933, 933 (1998).

may also retrieve fragments of these unrelated events. A person who has suffered repeated, and similar traumatic events, such as numerous jailings and beatings, may blend the different occurrences together and not remember details from a particular event.¹⁵⁰

Unlike in a legal setting where consistency and detail may be essential to reaching a legal goal, mental health treatment may not require accuracy of details in order to achieve therapeutic goals. In treatment for PTSD, a patient may work to recall details of the event he experienced. In a therapeutic setting, the effort to put the fragments together in a way that makes sense may result in incorrect factual conclusions.¹⁵¹ The memory fragments can be skewed by dissociation, or distortion by the brain's effort to recall the event in a different way because the truth is too painful for the patient. A mental health professional can assist a patient in therapy to resolve PTSD but cannot confirm the accuracy of recall.¹⁵² In fact, the very goal of mental health therapy may be to help the patient reframe memories, so that events, initially perceived as threatening or persecutory, seem less so.¹⁵³ The goal of therapy is to decrease anxiety and psychic disturbance.¹⁵⁴ Critical to therapy is giving the memory of trauma personal meaning, not merely preserving its accuracy.¹⁵⁵ Memory is extremely fluid. People who suffer traumatic events do not have the details etched into their minds, and the intrusive thoughts they have about the incident are not exactly the same. When memories of traumatic events are first retrieved, they are "experienced always as fragments of the sensory components of the event: as visual images, olfactory, auditory, or kinesthetic sensations, or intense waves of feelings . . ."¹⁵⁶ It is only over time, and probably from telling and retelling the story, that

150. See McNALLY, *supra* note 19, at 36.

151. See Bessel A. van der Kolk & Alexander C. McFarlane, *The Black Hole of Trauma*, in *TRAUMATIC STRESS* 3, 19 (Bessel A. van der Kolk et al. eds., 1996) [hereinafter *The Black Hole of Trauma*]. See also Hope E. Morrow, *Understanding Traumatic Events and PTSD* (1998), <http://home.earthlink.net/~hopefull/about.htm>.

152. See Morrow, *supra* note 151.

153. For example, with Eye Movement Desensitization and Reprocessing ("EMDR"), one approach to PTSD treatment, the patient engages in rapid rhythmic eye movements while focusing on a mental image of the traumatic event and associated feelings. The goal is to reduce anxiety when thinking about the event, not to confirm accuracy of the mental image. See Bessel A. van der Kolk, Alexander C. McFarlane & Onno van der Hart, *A General Approach to Treatment of Posttraumatic Stress Disorder*, in *TRAUMATIC STRESS* 417, 435 (Bessel A. van der Kolk et al. eds., 1996) [hereinafter *A General Approach to Treatment of Posttraumatic Stress Disorder*].

154. See *The Black Hole of Trauma*, *supra* note 151, at 17-19. See also *A General Approach to Treatment of Posttraumatic Stress Disorder*, *supra* note 153, at 419-20.

155. See *The Black Hole of Trauma*, *supra* note 151, at 19.

156. *Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 513.

explicit memory, or a personal narrative, emerges from the dissociated elements.

III. Connecting the Dots: Best Practices for Interviewing Asylum Applicants Who Suffer from Post-Traumatic Stress Disorder

An attorney representing an asylum applicant suffering from PTSD must be mindful of the impact of PTSD on the client so that she can strategize from the beginning of representation how to best counsel her client. She must also be mindful that it is essential for an asylum applicant whose well-founded fear is based on past persecution to tell his story of persecution with detail and consistency in order to be found credible. An attorney does not have to be a mental health professional and does not have to have her client evaluated for PTSD¹⁵⁷ in order to conclude that talking

157. Issues regarding whether to have a client evaluated for PTSD, or therapeutically treated for PTSD or other mental health-related problems are raised briefly but not discussed in this article. Even though a positive diagnosis for PTSD may corroborate a claim of past persecution because an asylum applicant may not have finances or insurance to cover treatment, the cost of evaluation may be prohibitive. See PHYSICIANS FOR HUMAN RIGHTS, *supra* note 11.

Evaluation of a patient for PTSD is distinct from therapeutic treatment for it. A client may want to seek treatment for his PTSD from a mental health professional. Accurate, consistent, and detailed recall of memory may not comprise therapeutic treatment. The goal of therapy for a patient suffering from PTSD is to reduce the fear associated with the memories. In terms of the memory, because the goal is fear-reduction, in general the accuracy of the memory is not significant. Therapy may provide safety, remembrance and mourning, and reconnection with the ordinary. JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR* 154 (1997). In fact, testimony has been used in therapy as a form of treatment of Chileans persecuted by the government on account of their political opinion. See Ana Julia Cienfuegos & Cristina Monelli, *The Testimony of Political Repression as a Therapeutic Instrument*, 53 AM. J. ORTHOPSYCHIATRY 43 (1983). See also Patricia K. Robin Herbst, *From Helpless Victim to Empowered Survivor: Oral History as a Treatment for Survivors of Torture*, 13 WOMEN & THERAPY 141 (1992) (relating to treatment of Cambodian women).

For example, as Mohamed's attorney, my role as a legal representative of a client seeking asylum differs from that of a mental health professional who may treat that same individual for PTSD in a therapeutic setting. My interviews with Mohamed are directed toward eliciting details from him so that I can prepare his asylum application and his testimony. An issue to consider when representing a client suffering from PTSD is whether to refer a client to a mental health professional for therapy to assist the client in resolving his PTSD. Even if Mohamed could afford or otherwise obtain treatment, he and I need to consider whether therapeutic treatment may have a negative effect on his testimony or the legal claim. Treatment, if successful, may influence Mohamed's affect when retelling his story because the element of fear will have dissipated. Mohamed may not appear to possess or reflect the amount or existence of fear that an asylum officer or immigration judge might expect of an asylum applicant and thus find

about past traumatic events will be painful for her client.¹⁵⁸ If her client indeed suffers from PTSD, he may have trouble telling a detailed and consistent story. This may make interviewing her client and preparing him for the asylum process more difficult. Also, the symptoms of PTSD, such as avoidance of engaging in thoughts about the traumatic event, may make the counseling process more difficult. A competent attorney representing an asylum applicant must assist her client to integrate the sensory fragments which make up traumatic experience, connecting them to develop a consistent and detailed account of persecution.

Practices and results of studies in the medical and health disciplines are helpful tools to consider when representing a client with PTSD in the legal setting. The literature of the mental health discipline is rich in the study of individuals who have experienced traumatic events and suffer from PTSD. Whereas a therapist may work with her patient to lower his anxiety relating to the trauma and PTSD symptoms, a lawyer helps her client to establish his refugee status and eligibility for asylum. Although the ultimate goals of the patient/client in seeking assistance from different disciplines reflect the varying needs of the patient/client, drawing on the perspectives and experiences of mental health professionals can provide guidance to lawyers in their work.

The process of counseling and interviewing that an attorney undertakes in order to represent a client with PTSD must be sensitive to the difficulties faced by the client and the pain he suffers. This section discusses elements of the interviewing and counseling process that an attorney should consider when working with a client who may suffer from PTSD. Bearing in mind the way traumatic memory is stored, mental health professionals with patients suffering from PTSD have developed some techniques that

Mohamed lacking in well-founded fear.

In the role of an advisor, it is appropriate for me to raise the issue of therapeutic treatment with Mohamed. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006). The decision of whether to obtain treatment for PTSD is his choice. I should raise the issue with Mohamed, and discuss the impact treatment may have on his health and on his asylum matter, so that he can begin to make an informed decision about seeking treatment.

For a discussion of potential conflicting goals of service providers in a multidisciplinary setting, see J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337 (2002).

158. Mohamed's affect as he talks about his persecution may inform me of his suffering in recalling the experience. However, the pain will not necessarily be apparent. Some PTSD sufferers will relate traumatic events with a flat affect, a result of avoidance of thinking about the emotions associated with the trauma or numbing that occurs often in PTSD.

take into account the research indicating that traumatic memories are stored differently and need to be elicited sensitively and systematically. This section suggests interviewing techniques that a lawyer representing a client suffering from PTSD should consider using in order to assist her client in recall of traumatic memory.

A. Issues to Consider in the Establishment of an Effective Client Relationship

In terms of how to approach a relationship with a client suffering from PTSD, an attorney might consider using a client-centered model for counseling her client.¹⁵⁹ A client-centered approach to legal counseling focuses on the process of communicating with and responding to a client to assist him in identifying possible outcomes and selecting and reaching goals. There is a deliberate method to the relationship developed between the lawyer and the client. She must, however, bear in mind that there may be reasons that a client-centered approach may not work in this particular relationship. In the asylum context, there may be a perceived power imbalance between the attorney and her client. Also, significant cultural differences between the attorney and her client may exist that must be negotiated in order to achieve legal success. Other critiques of the "client-centered approach" to interviewing and counseling are that its value-neutrality in regard to empathy is formulaic and inappropriate in some contexts,¹⁶⁰ its informality validates power-imbalanced relationships,¹⁶¹ and its normative routines constrict an organic and dynamic relationship.¹⁶² Peter Margulies suggests a focus on "empathetic engagement,"¹⁶³ which "enlists the lawyer on the side of people who are subordinated, belittled, and impoverished,"¹⁶⁴ like many asylum applicants.

No matter what approach to interviewing and counseling a lawyer employs, it will probably be difficult for her client to describe painful events.¹⁶⁵ Addressing an event of past persecution

159. See generally DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

160. See Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 *CLINICAL L. REV.* 605, 609-10 (1999) (discussing an example of counseling a political asylum client).

161. See *id.* at 613.

162. See *id.* at 614.

163. See *id.* at 615-19.

164. See *id.* at 616.

165. See generally ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

may raise feelings of terror, sadness, fear, loss, shame, and guilt. Malicious and deliberate acts, such as torture and other forms of persecution, tend to imprint the most intense emotions.¹⁶⁶ In a therapeutic relationship, treatment for PTSD requires a trusting collaboration between the patient and the therapist.¹⁶⁷ In building this relationship, the patient and the therapist must overcome the difficulty in the ability to trust that has developed due to the trauma experienced by the patient. In a legal setting, trust between the attorney and client is also essential and must be developed.

In establishing a trusting relationship with a client, a lawyer should be mindful of developing rapport.¹⁶⁸ An attorney must be friendly and personable with her client in order to effectively advocate for him. Thus, she must develop a level of comfort in order for her client to feel comfortable and trusting enough to disclose very personal and difficult information.¹⁶⁹ They should meet in a place that is accommodating to the client as well as the attorney. They should avoid locations that are loud, busy, and filled with distractions so that they may focus on the client's goals.

The attorney should acknowledge the difficulty the client may have in speaking about traumatic events.¹⁷⁰ She needs to inform her

166. See Cleo Van Velsen, Caroline Gorst-Unsworth & Stuart Turner, *Survivors of Torture and Organized Violence: Demography and Diagnosis*, 9 J. TRAUMATIC STRESS 181, 182-83, 189-90 (1996) (citation omitted); Susan Levy, *Containment and Validation: Psychodynamic Insights Into Refugees' Experience of Torture*, in REFUGEES: PERSPECTIVES ON THE EXPERIENCE OF FORCED MIGRATION 236, 240-42 (Alastair Ager ed., 1999).

167. See Margulies, *supra* note 160, at 616.

168. A lawyer must be mindful of building rapport from the first interview. See Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321 (1998).

169. Also, the lawyer must be able to acknowledge that a conversation is difficult for her if her client asks. Whether she volunteers this information should be considered thoughtfully. A disclosure like this must be handled delicately as she does not want to place her client in the position of feeling guilty for making her feel bad.

Working with a language interpreter adds another layer of complexity to the attorney/client relationship, which could also be the subject of its own article. Briefly, issues of building trust, whether inconsistencies in a story arise because of the interpretation, dialect, the culture/identity of the interpreter vis-à-vis the client, and funding, all need to be considered. See Durst, *supra* note 16, at 159; McCaffrey, *supra* note 39, at 350-55; Kevin Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory Into Practice and Practice Into Theory*, 51 S.M.U. L. REV. 1423, 1439 (1998). The problem of interpretation in immigration hearings is widespread. See *El Rescate v. E.O.I.R.*, 959 F.2d 742 (9th Cir. 1992) (immigration hearings should be fully interpreted); Anker, *supra* note 6, at 505-15.

170. A client with PTSD may have difficulty discussing the past because of the traumatic nature of past events, symptoms of PTSD, and the client's cultural prohibitions. See Marten W. deVries, *Trauma in Cultural Perspective*, in TRAUMATIC STRESS: THE EFFECT OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 398, 400 (Bessel A. van der Kolk, Alexander C. McFarlane & Lars Weisaeth eds., 1996). See

client that the interview may upset him and that he may feel worse when he leaves the office. The attorney should also inform her client of this phenomenon prior to their discussion of traumatic details so that after the client leaves, he can attribute negative feelings to the difficulty of the discussion and more appropriately deal with those feelings. Despite the negative feelings, the client will need to return to speak with his attorney about additional unpleasant details with the goal of obtaining asylum. In a therapeutic environment, it is important for the therapist to acknowledge not only the patient's feelings, but his experience.¹⁷¹ Similarly, in a legal setting, the attorney should express that she is able to listen to and absorb what her client will tell her.¹⁷²

Early in the legal process, the lawyer should establish and define the client's goals, the goals of the interviews, and her role in assisting her client.¹⁷³ She needs to discuss the parameters of the interview process over time. The attorney must establish some guidelines that she and her client will try to follow during the interview process. At the beginning of each interview, she should discuss with him the goals for this particular meeting and its expected duration. She should review her notes of the past interviews with her client. She should also remind her client to let her know when he wants to take a break. She needs to ask him how he feels during the interview and should offer that they may want to take a break when it seems appropriate or when the client wants one. The client and attorney should agree in advance as to how long they plan to meet for an interview. The attorney may want to talk to her client about this matter as he schedules interviews.

also Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 *CLINICAL L. REV.* 369 (2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33 (2001).

171. In assisting Mohamed with recall of the event, I am exposing him to those memories, but am not helping him to cope with feelings, or resolve any anger or guilt associated with the trauma. Although Mohamed may be interviewed in a safe environment, examination of the therapeutic needs of the client is not typically a component of the legal interview.

172. See Levy, *supra* note 166, at 245.

173. For example, Mohamed might not understand that I am his advocate and am not a part of the government. An individual who is referred for removal proceedings will be given a list of organizations and attorneys that provide free legal services, approved by the chief immigration judge of the Immigration Court in which the case is to be heard. See 8 C.F.R. §§ 1003.61, 1003.64 (2005). It may be confusing to an individual in immigration proceedings that although the list is furnished by the court, the attorneys listed on that document are not part of the court system. An attorney needs to explain the asylum application process as well as the attorney's role in the scheme. The attorney also needs to discuss the confidentiality of the information that the client will tell the attorney vis-à-vis USCIS as well as the confidentiality of the information given to USCIS vis-à-vis the client's home country.

There also needs to be an acknowledgment of the enormous time expenditure of the entire process of developing a relationship, helping the client to feel comfortable to talk about his past trauma, and developing the case and the claims. In a therapeutic setting, building a rapport, eliciting details of a traumatic event, and situating a patient to begin the recovery process takes time. Unfortunately, clients may not have the luxury of time because of the one-year filing deadline for asylum, and because some asylum seekers only contact lawyers when the immigration judges allow an adjournment of a removal hearing for the applicants to retain counsel.

There may be a temptation to meet for a long time per interview if the client travels a long distance to meet with the attorney, if he must pay for transportation but does not have much income, if he works or has family members to care for, or if an interpreter is involved, because that lengthens the interview process. The client may want to rush through the interviews, however, because they cause stress during and after the meetings. Scheduling frequent, shorter sessions can also be difficult for clients who may have to travel far and long to get to each interview. Long interviews should be avoided, however, because an interview will be emotionally draining for both the attorney and her client. Because of its emotional toll, long interviews tend to be less efficient and less successful. More frequent, shorter sessions are preferable to marathon sessions. The attorney and client should discuss whether they should plan to commit a full day to interviewing, but with significant breaks to separate sessions during the day.

Additionally, an attorney representing a client suffering from PTSD who has been persecuted by his own government must be mindful of the possibility of transference in the client-lawyer relationship.¹⁷⁴ It is essential that the attorney be aware of her power and control relative to that of her client.¹⁷⁵ She may approach lawyering as a collaborative relationship, but she must be mindful that a client and an attorney do not enter into a relationship with equal strengths and weaknesses. Her client entered into this relationship because he seeks asylum and believes that the attorney can assist him in obtaining asylum. An asylum applicant may have experienced persecution in his home country. This act of betrayal by someone in power placed the applicant in a subservient position,

174. HERMAN, *supra* note 157, at 136.

175. See Michael G. Wessells, *Culture, Power, and Community: Intercultural Approaches to Psychosocial Assistance and Healing*, in HONORING DIFFERENCES: CULTURAL ISSUES IN THE TREATMENT OF TRAUMA AND LOSS 280 (Kathleen Nader, Nancy Dubrow & B. Hudnall Stamm eds., 1999).

and may make him question his ability to trust people and to feel safe.¹⁷⁶ Trauma survivors may come to see subsequent relationships through the lens of dominance and submission.¹⁷⁷ An attorney needs to inform her client that she is not part of the government, that what he says is confidential and will not be forwarded to the U.S. government or to the government of the country from which he fled without his permission. This arrangement is not always apparent to an asylum seeker.¹⁷⁸

A different dynamic may develop if a client views his attorney as his only hope for survival, so he may be tempted to say what he thinks will please his attorney. This development in a relationship would be detrimental to an applicant's legal goal of asylum, as the applicant would not focus his efforts on remembering his story, but on what he assumes his attorney would like to hear. It may cause him to exaggerate some facts, and omit or even make up others. By being mindful of the phenomenon of transference in her relationship with her client, a lawyer can better understand what provokes her client and can better deal with the problem as it relates to the legal matter and to the attorney/client relationship.¹⁷⁹

An attorney with a client suffering from PTSD must also be careful to avoid re-traumatizing her client through her approach to interviewing and counseling.¹⁸⁰ As discussed earlier, a number of

176. See HERMAN, *supra* note 157, at 136-37. (Finding that a high level of trust should not be presumed. In the therapeutic context, a traumatized patient generally comes to the relationship with distrust of the therapist's ability and willingness to help.)

177. Bessel A. van der Kolk, *The Complexity of Adaptation to Trauma: Self-Regulation, Stimulus Discrimination, and Characterological Development*, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 182, 197 (Bessel A. van der Kolk, Alexander McFarlane & Lars Weisaeth eds., 1996). In a therapeutic relationship, a patient can develop idealized expectations and come to see his therapist as an "omnipotent rescuer," who inevitably and eventually fails her patient. See HERMAN, *supra* note 157, at 137. In reaction to this seeming betrayal and because of the patient's feelings toward his torturer, he redirects these feelings for the torturer toward his therapist. He may even subconsciously attempt to redirect the therapeutic relationship to one of dominance and submission. See *id.* at 139.

178. Asylum seekers in removal proceedings are given a written list of free legal services lawyers furnished by the Executive Office of Immigration Review (EOIR). It may be unclear to the applicant that the legal services providers on the list are independent of the EOIR.

179. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 24-25, 190-93 (1990).

180. See Steel & Silove, *supra* note 93, at 424; Bernstein & Santora, *supra* note 35 (citing a United States Commission on International Religious Freedom Report on Asylum Seekers in Expedited Removal with findings that detainees are subject to "[s]evere psychological damage" while in custody while awaiting immigration hearings. None of the guards at the facilities holding detainees had had training on working with victims of torture or repression).

refugees will develop PTSD as a result of their persecution.¹⁸¹ In terms of diagnosis, intrusive thoughts and hypervigilance are thought to be universal symptoms, but avoidance and dissociative symptoms are not.¹⁸² These phenomena may affect the interview process. There is also a risk of re-traumatizing asylum applicants during the process of preparing an asylum application or for an asylum interview.¹⁸³ As part of the process, the applicant will need to recall the events of persecution that occurred. The act of recall can cause the applicant to relive the events of torture. Some applicants were detained and interrogated by their persecutors before they fled their home country as part of the persecution. As a result, the process of working with an attorney on an asylum application, where the attorney asks many detailed questions during the interviews, may mirror some aspects of an interrogation.¹⁸⁴

It is of the utmost importance that an attorney works to lower her client's anxiety during the interview process because she needs to avoid further traumatizing her client. She needs to be mindful about how to help her client remain calm. Otherwise, she runs the risk that her client will dissociate, which can be manifested in a flashback. Asking questions that make the client recall traumatic events may lead to dissociation.¹⁸⁵ A person suffering from PTSD will experience raised levels of physiological responses to thoughts and stimuli related to the traumatic event. He tends to respond to the stimulus with a flight-or-fight reaction, not taking into account the context of the stimulus.¹⁸⁶ He may be in chronic overarousal,

181. There are other psychiatric disorders common to victims of torture and persecution. See Piwowarczyk, *supra* note 15 (discussing the Istanbul Protocol in the 1999 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

182. B. Hudnall Stamm & Matthew J. Friedman, *Cultural Diversity in the Appraisal and Expression of Trauma*, in INTERNATIONAL HANDBOOK OF HUMAN RESPONSE TO TRAUMA 69 (Arieh Y. Shalev, Rachel Yehuda & Alexander C. McFarlane eds., 2000).

183. Randall D. Marshall, Rachel Yehuda & Stanley Bone, *Trauma-Focused Psychodynamic Psychotherapy for Individuals with Post-Traumatic Stress Symptoms*, in INTERNATIONAL HANDBOOK OF HUMAN RESPONSE TO TRAUMA 347, 353.

184. Re-traumatization may occur for reasons other than interview techniques. For example, it may occur in asylum applicants detained at the border who were held as prisoners in their home countries. In a therapeutic setting, doctors must be cognizant of avoiding re-traumatization of patients whose persecution included the complicity of doctors. Michael W. Smith, Orlando J. Cartaya, Ricardo Mendoza, Ira M. Lesser & Keh-Ming Lin, *Conceptual Models and Psychopharmacological Treatment of Torture Victims*, in CARING FOR VICTIMS OF TORTURE 149, 152 (James M. Jaranson & Michael K. Popkin eds., 1998).

185. Marshall, Yehuda & Bone, *supra* note 183, at 356.

186. *The Body Keeps the Score*, *supra* note 132, at 214.

focused on any potential threats he may perceive.¹⁸⁷ This inability to process the stimuli may cause him to shut down, or dissociate.

A dissociative state, which is the condition of split awareness or the compartmentalization of experience into its elements,¹⁸⁸ can cause an altered sense of time.¹⁸⁹ Dissociation can occur during the traumatic event, as well as after it, as a way of coping with the trauma.¹⁹⁰ Even non-traumatized individuals may display symptoms of dissociation in stressful situations.¹⁹¹ This lack of connection between thoughts and feelings, memories, actions, and identity, can lead to inconsistent memories of traumatic events.

Furthermore, trauma sufferers may not want to discuss their experiences and may have difficulty remembering events. The intrusive thoughts that may continually plague them are unpleasant and unwelcome reminders of the past persecution. Preparing an asylum application forces the client to delve into the reminders, emotions, and pain that the client associates with the traumatic event. At the same time, the mind attempts to shut out thoughts of persecution as a means of protecting the individual from painful memories. The client may even become so uncomfortable that he avoids future appointments set up to prepare the client and his asylum application. If an asylum applicant becomes anxious during client interviews, the attorney must acknowledge her client's anxiety and attend to it. They should pause the interview and explore the client's anxiety. If continuing the interview causes her client to feel extreme stress, they need to consider ending the interview and resuming it at a later time.¹⁹² A more successful working relationship can develop if attention is paid toward the difficulty of talking about traumatic events and of the effects of PTSD.

187. *Dissociation and Information Processing in Posttraumatic Stress Disorder*, *supra* note 139, at 305.

188. *See Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 510.

189. *Trauma and Memory*, *supra* note 127, at 295 ("Traumatic memories are timeless and ego-alien").

190. *Dissociation and Information Processing in Posttraumatic Stress Disorder*, *supra* note 139, at 306. Dissociative amnesia, a symptom of PTSD which is "an inability to recall important personal information, usually of a traumatic or stressful nature that is too extensive to be explained by normal forgetfulness," may result in the inability to recall details of a traumatic event. DSM-IV-TR, *supra* note 78, at 520. Dissociation has been caused by the abusive questioning of an immigration judge. *See Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 145 (3d Cir. 2005).

191. Charles A. Morgan, Gary Hazlett, Sheila Wang, E. Greer Richardson, Paula Schnurr & Steven M. Southwick, *Symptoms of Dissociation in Humans Experiencing Acute, Uncontrollable Stress: A Prospective Investigation*, 158 AM. J. PSYCHIATRY 1239, 1244-45 (2001).

192. *See Ronald P. Fisher & R. Edward Geiselman, MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW* 37 (1992).

B. Techniques for Asking Questions That Elicit a Detailed and Consistent Story¹⁹³

Credibility is essential to an asylum claim and can only be established through consistency and detail of an asylum applicant's experiences. In preparation for an asylum interview or removal hearing, an attorney must help a client to tell a factually detailed and consistent story of persecution in a manner that is credible and with sufficient merit to meet the burden of proof. In the therapeutic realm, treatment of PTSD often involves converting the memory of the traumatic event from its sensory characteristics and into a narrative. This treatment involves not only verbal recall of the event, but also the application of the event's personal meaning to the patient.¹⁹⁴ The mind works to integrate the memories of the traumatic event with the individual's other memories and sense of self in order to gain some control over the past trauma.¹⁹⁵ A therapist may counsel a patient in the recall of details and the formation of a narrative that allows him to consider the narrative without high anxiety. In the legal setting, a lawyer should counsel her client to develop a detailed and consistent narrative from the sensory elements of the memory. She should question her client using various techniques that are mindful of the sensory fragments which make up traumatic memory.

During an interview, the attorney should ask open-ended questions and pause, realizing that some of her questions may elicit strong negative and painful emotions from her client.¹⁹⁶ A client may be suspicious and feel threatened by questions from his attorney.¹⁹⁷ A lawyer should be mindful of not repeating a situation

193. The author thanks Dr. Madelon Baranoski at Yale University School of Medicine, Department of Psychiatry, for her guidance regarding interviewing techniques.

194. Morrow, *supra* note 151; Cienfuegos & Monelli, *supra* note 157 (noting that the audio recording of testimony of traumatic events and subsequent revision by a patient with a therapist has been found to have therapeutic benefits).

195. Chris R. Brewin, Tim Dalgleish & Stephen Joseph, *A Dual Representation Theory of Posttraumatic Stress Disorder*, 103 PSYCH. REV. 670, 679 (1996).

196. Memory is subject to influence by post-event elements, such as the way questions are posed about an event. See Herlihy, Scragg, & Turner *supra* note 59, at 325. Children are more susceptible to post-event contamination. See Haber, *supra* note 126, at 1087-88. See also *The Body Keeps the Score*, *supra* note 132, at 227-28; *Trauma and Memory*, *supra* note 127, at 289-91; MCNALLY, *supra* note 19, at 58-62 (discussing children and stressful memories).

197. Questions which raise the issue of client credibility can seem threatening to a client, even where a trusting relationship has been developed. See BINDER, BERGMAN & PRICE, *supra* note 159, at 192-95.

that resembles an interrogation to the client, as some refugees fled persecution that included interrogations under inhumane conditions.

In terms of the form of the responses, because of the trauma he suffered and as a coping mechanism, an asylum applicant may be able to recount the traumatic memories if he were to describe them in the third person.¹⁹⁸ As a survival strategy, an asylum applicant may have dissociated, or detached his mind from his emotional state during the traumatic event. The applicant's dissociation may have been experienced as an "out of body" incident. Relating the event to his lawyer, he may recount the incident as a dissociated experience.

At the time of the persecutory event, the client most likely focused on his own survival, saving a loved one, escape, flight, or fending off the persecutors. His focus was not likely on trying to store details for future reference or on weaving the experience into a verbal narrative. The fewer links one has to the events in one's mind, the more difficult it is to remember later the order of events and other details. An attorney may have a basic outline of her client's story that allowed her to determine that her client's claim for asylum was meritorious. With this basic outline, she needs to consider whether to proceed by gathering more details of a period of time or to put the facts she knows into chronological order and to ask her client to fill in the details. She and her client should ultimately do both. Some lawyers will feel more organized by attempting to first order events chronologically.

Chaining is a technique that an attorney can use to assist her client in remembering the order of events during a traumatic incident with detail and consistency. Chaining uses questioning as a way for the client to make connections in his mind to help him to remember the order of events. The attorney can start with a question pinpointing one memory elicited from her client, and then ask what he remembers happening next. Asking the client to focus on the "chain" or order of events may help him to remember the order and also details associated with the event. For example, "You said that you were at home when you heard gunshots in the distance. What do you remember after that? And right after that?"

Varying the order of information retrieval can also assist an asylum applicant in recalling other details. Peripheral details are recalled better when retrieved in reverse chronological order.¹⁹⁹ As an example, "You said that you were at home when you heard gunshots in the distance. What do you remember just before that?"

As discussed in Section II, traumatic memory begins as sensory

198. See Fisher & Geiselman, *supra* note 192, at 35.

199. See *id.* at 110-12.

fragments that have been stored and encoded without a narrative.²⁰⁰ A traumatized person forms a narrative in order to explain the sensory fragments. One problem with memory of traumatic events is that there are fewer links between such memories and other signals which one uses to recall events because the memory is encoded as fragments. In a study of traumatic memory, subjects initially had no narrative memories of the traumatic events.²⁰¹ Their memories were somatosensory flashback experiences (sensations received in the skin or in internal organs) in sensory modalities that did not combine to form a narrative memory. These sensory modalities are visual, olfactory, affective, auditory, and kinesthetic. "As the trauma came into consciousness with greater intensity, more sensory modalities were activated, and the subjects' capacity to tell themselves and others what actually had happened emerged over time."²⁰²

Segmenting is an approach that assists a client in recalling traumatic events that accounts for encoding of those memories as sensory fragments. With segmenting, a lawyer would take one portion of the traumatic experience that her client has related and focus questions on that one period. Segmenting aims at recalling traumatic details in the manner that the mind processes those details. Focusing a client on his memory involving all elements of sensory perception²⁰³ may help the client to recall details that he would not remember had he only focused on the idea of remembering what happened, or what he saw or heard. Also, an asylum applicant suffering from PTSD may, because of the symptom of dissociation, focus on central details and be unable to give a narrative of the traumatic event.²⁰⁴

Since traumatic memory is the sum of sensory fragments that have not yet formed into a narrative, an attorney can assist her client to recall a traumatic event by asking questions focused on each of the senses. She should ask open-ended questions that reach beyond what the client saw and what he heard, although those may be two logical senses with which to start. The attorney can inquire as to any physical or mental pain to which the client was subjected. She can ask the client what he remembers smelling in order to try to help her client make connections in his mind and to recall an event with greater detail. It is not the smells, per se, that would be

200. See *Dissociation and the Fragmentary Nature of Traumatic Memories*, *supra* note 90, at 518; see also *Dissociation and Information Processing in Posttraumatic Stress Disorder*, *supra* note 139, at 312.

201. *Trauma and Memory*, *supra* note 127, at 288-89.

202. *Id.* at 289.

203. See Fisher & Geiselman, *supra* note 192, at 111.

204. See *Trauma and Memory*, *supra* note 127, at 285.

compelling to recall, but remembering a smell could trigger memories of what a client saw or heard.²⁰⁵ Parsing events into sensory perceptions coincides with how traumatic memory is stored and may lead to the recall of greater detail.

Combining the techniques of chaining and segmenting may assist a client in determining whether inconsistencies exist in traumatic memory, and elicit other details that cannot be remembered through one approach alone. Chaining assists a client in recall of various events over time or with the sequence of details during a traumatic event. Segmenting assists a client with remembering details at a particular moment in time. An attorney should integrate the memories derived from chaining with those derived from segmenting to develop a consistent and detailed chain of events. Where there are inconsistencies, the attorney and client will need to confer to resolve them, if possible.²⁰⁶

Beyond questioning techniques, a lawyer whose client suffers from PTSD may want to consider creating a timeline as a visual representation of the traumatic memory, integrating sensory details providing cues that the client finds helpful.²⁰⁷ Memory recounted in chronological segments is generally essential in the asylum context. With all of its details and perhaps with numerous acts of persecution, an asylum applicant's traumatic experience may be lengthy. As an aid to an asylum applicant, an attorney may consider distilling the facts into a timeline for her client and for herself to reference as they continue to prepare for an asylum interview or immigration hearing. After helping the client recall details of the traumatic experience, the attorney will have a set of facts set out in chronological order from which the answers to the asylum application can be written, as well as an affidavit for submission on behalf of the asylum applicant. It can be offered to an asylum officer in support of the application, as the timeline was developed from the applicant's memory. A timeline may be especially useful if the client is from a culture where perception of time and chronology of events are not emphasized. Although an

205. The sense of smell can be significant in recall. See S. Chu & J.J. Downes, *Proust Nose Best: Odors are Better Cues of Autobiographical Memory*, 30 *MEMORY & COGNITION* 511 (2002).

206. See *infra* Part III.C for a discussion of dealing with inconsistency in a client's story.

207. The Western notion of time is not a universally shared concept. Alexandra Argenti-Pillen, *The Discourse on Trauma in Non-Western Cultural Contexts: Contribution of an Ethnographic Method*, in *INTERNATIONAL HANDBOOK OF HUMAN RESPONSE TO TRAUMA* 87, 97 (Arieh Y. Shalev, Rachel Yehuda & Alexander C. McFarlane eds., 2000). See also Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *Clinical L. REV.* 373, 395-96 (2002); Kalin, *supra* note 39, at 236-37; MUSALO, MOORE & BOSWELL, *supra* note 69, at 875-76.

asylum applicant may not think in terms of dates and events, in order to set forth an event of torture or persecution, the story should be anchored in terms of dates and details of particular events. Of course, the value of this suggestion will be affected by whether an asylum applicant and his attorney are visual learners, a client's literacy, and differences in language. However, if a client suffers any dissociation that causes him to be inaccurate in time valuation, then a timeline may help him to remember the length of each experience and the specific order in which they occurred.²⁰⁸

Another approach to the recall of traumatic experiences is creating a diary. An attorney can assign homework to her client, asking him to keep an account of memories, details, and emotions he recalls when he is not meeting with his attorney. These memories may even come in the form of nightmares related to past persecution that trigger memory of details. Also, once the client begins the process of recall with his attorney, it may trigger reflections of the traumatic events. Writing about the traumatic event can expose some details that otherwise would not be recalled. It can assist the asylum applicant in forming a coherent narrative of the traumatic event.²⁰⁹ One study found that survivors of trauma write well and vividly. Of relevance here is that when instructed to explore their emotions related to the traumatic experience in their writing, the subjects had better recall of details.²¹⁰

C. Techniques for Counseling a Client Suffering from PTSD Regarding Inconsistencies

Accepting that a client suffering from PTSD may inconsistently relay details of traumatic memories, it is important to be prepared to deal with any inconsistencies that arise. The attorney needs to consider the methods for working with her client in order to sift

208. Errors in recall of time, or when an event occurred, increases as the event becomes more distant in the past. Time tends to be reconstructed based on remembering landmark events and temporal schemata (i.e., day, week) to which to compare or place the event at issue as opposed to being retrieved directly from memory. See Steen F. Larsen, Charles P. Thompson & Tia Hansen, *Time in Autobiographical Memory*, in REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY 129 (David C. Rubin ed., 1996). The notion of "week" is also a western concept that may not be shared by all cultures. See *id.* at 154.

209. See Kent D. Harber & James W. Pennebaker, *Overcoming Traumatic Memories*, in THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY 359, 373 (Sven-Åke Christianson ed., 1992).

210. *Id.* at 379. Emotional writing also helps the subject to integrate the traumatic memory into the subject's experiential network. *Id.*

through the details, and the legal ethics involved in preparing the client to tell a detailed and consistent story under oath.

Dealing with client inconsistencies takes patience and trust on both sides of the relationship. The attorney interviewer may have made significant efforts to develop a trusting relationship with her client with the goal of eliciting details of traumatic memories. Perhaps she has asked her client countless questions about a single moment in the course of a traumatic experience in an attempt to help her client recall every detail. With each detail elicited, she may have asked numerous follow-up questions to try to chain together the details into a coherent narrative. It is likely that inconsistencies will arise in trying to chain together segments of a traumatic experience. In addressing inconsistencies in details, the attorney must point out the discrepancies in the facts presented by her client and ask that her client confront and consider them. Addressing inconsistencies may be uncomfortable for both the attorney and her client.

Counseling a client regarding inconsistent details raises critical ethical issues. Under the American Bar Association's Model Rules of Professional Conduct, an attorney has an obligation of candor toward the tribunal.²¹¹ An attorney may not offer evidence that she knows to be false and she cannot counsel her client to lie about traumatic events. It is more difficult, however, when a client is unsure or inconsistent about the details. An attorney may need to counsel her client when conflicts arise in providing testimony that is both consistent and detailed. Providing details may make a witness more believable, so a lawyer will assist her client in recall of details. However, the more details he gives, the more chances arise for him to be inconsistent. Inconsistencies in peripheral details may add up to a story lacking credibility in the eyes of the factfinder. However, testimony that is consistent but lacking in detail may also be viewed as not credible. The lawyer and client need to have a candid conversation about the necessity of giving honest answers.²¹² When confronted with a question where he cannot give an accurate answer, he needs to say so.²¹³

211. A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2006).

212. Take as an example the number of camels on which the Janjaweed arrived in the story at the beginning of this article. Whether there were two camels or four, the fact that the Janjaweed returned to further torture Mohamed and the other members of his village continued and underscored the level of fear under which Mohamed lived. Although Mohamed may consider the number of camels to be a peripheral detail, the factfinder may consider that detail central to someone who experienced the event. Even if I note an inconsistency while preparing Mohamed for the asylum process, I cannot counsel him to pick a set of facts and stick with it if he does not know which is correct.

213. A mental health expert may be able to educate the factfinder that the lack of

Careful preparation may bring out some inconsistencies in a client's story during his client interview sessions. In counseling an asylum applicant to prepare for an asylum interview or removal hearing, an attorney may be able to note an inconsistency, point it out to her client, and discuss it with him. Focusing on that detail, the client may be able to recall other details of that event and determine which memory is accurate. However, no matter how much an attorney and her client prepare, they will not be able to deduce every potential inconsistent detail which may be elicited by an asylum officer or immigration judge or that may be recalled and testified to by an asylum applicant. The attorney and her client must recognize that inconsistent memory may be a result of PTSD, and that it is natural to forget details and for memory of details to shift, or disappear, over time. A lawyer should counsel her client to not guess at an answer, to inform the factfinder if he does not remember a detail, and to move on to the next question or issue at hand.

Conclusion

Recall Mohamed's story of fleeing the Sudan and seeking refuge in the United States. If Mohamed suffers from PTSD as a result of the persecution which forms the basis for his asylum claim, he faces tremendous hurdles in the asylum process. In order to show eligibility for asylum, he will need to tell a consistent and detailed story of persecution. Mohamed must recount the devastation of his village with accuracy and detail. However, the symptoms of PTSD may prevent him from being able to tell such a story and may result in Mohamed's being found removable. An individual like Mohamed, who comes to the United States seeking protection, can be profoundly assisted in his quest for asylum by assistance from professionals who are knowledgeable about the effects of PTSD on memory and trained in best practices for preparing an applicant to recount his experiences of persecution. An attorney who is responsive to PTSD and its effects will better understand her client and can greatly support her client throughout the asylum process. Her counseling skills may be vital to helping her client tell a credible story that shows well-founded fear.

Beyond the challenge of preparing an asylum applicant to tell a

consistency and detail in testimony may be caused by PTSD. An attorney with a client suffering from PTSD also needs to be mindful when working with a client with diminished capacity. See A.B.A. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2006). A lawyer may need to take protective action if, for example, her client dissociates while attending an asylum interview or even while meeting in her law office.

detailed and consistent story is the difficulty in persuading the fact finder to believe the applicant's story. Law reform that considers the memory process and the effects of PTSD on an asylum applicant's testimony would greatly benefit deserving applicants. Also, education of the factfinder as to the nature and impact of PTSD on memory is essential to improving the asylum process. Drawing out a client's traumatic memory may seem like opening a Pandora's Box of troubles, but the process also raises hope that the client will find a safe haven through asylum.