

# Introduction

Asylum seekers arrive in the United States to face a complex and difficult reality. They fled their home country because they and/or their families were persecuted there and are in danger of future persecution. They might be wounded or otherwise sick. Their past persecution was a traumatic experience and they may suffer from Post Traumatic Stress Disorder (PTSD). Sometimes they are in the process of coping with the death of loved ones which was part of the persecution. They might experience an ambiguous loss<sup>1</sup> with respect to missing family members. They enter a new country and they do not always know its language. They are often alone, separated from their family, friends, community – from their primary support system. They can not work in the U.S and usually lack financial means, and so they are immediately relegated to poverty. They lack access to physical and mental health professionals. They have difficulties finding housing since renting an apartment often requires things they lack, like a social security number, credit history, and financial resources.

The lawyer with whom the asylum applicant will meet if she is fortunate enough to get representation faces her own set of difficulties. She might be working in a law firm and take the case of the asylum seeker as *pro bono* work; she might be working in a law firm which does immigration law and take this case as part of her regular caseload; she might be working in a human rights organization and specialize in asylum law; or she might be a law professor in an immigration clinic. In any context, her professional life is stressful; she has pressing time concerns and will often find the work with the asylum seeker to be frustrating because of the cultural differences, language barriers, and the client's inability to trust her. The culture of the organization

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<sup>1</sup> Pauline Boss, *Ambiguous Loss in Families of the Missing*, THE LANCET Supplement, vol. 360 December 2002. Ambiguous loss, according to Boss, occurs when there is a dissonance involved in the loss of a close person. For example, if a person is missing the sense of loss is ambiguous because the person is not there and yet is not considered dead so there is no ability to mourn her death and process the loss. In such cases mourning might be considered a loss of faith or hope that the missing is still alive, thus a betrayal.

in which the lawyer works, and her perceptions of what conduct is considered professional by her, her peers, and her supervisors is another set of factors which influence (and potentially stress) her. Naturally, the lawyer also brings with her an emotional context – her past experiences, her traumas, the history of her family and their traumatic experiences, vicarious traumatization<sup>2</sup> from work done with former clients, and, perhaps, burnout.

The asylum seeker and her client step into this intense context as they start their work together. The heart of the legal claim in asylum cases is the existence of past persecution (and the well founded fear of future persecution). Thus, the traumatic experiences of the client – her persecution – are the subject she and her lawyer focus on. The client must describe her trauma in detail and her lawyer must then translate it to fit the legal categories. For the client, relating her trauma and being exposed to questioning and sometimes doubts about her narrative, entails natural emotional impact. The lawyer is (potentially) exposed to vicarious traumatization.

This paper explores the manner in which lawyers doing asylum work cope with the emotional and psychological difficulties arising from the asylum seeking client's narration of her traumatic past persecution, espousing a therapeutic jurisprudence approach to law. Therapeutic jurisprudence is an interdisciplinary approach to law which operates under the assumption that law, as a social force, impacts the psychological well being of its subjects. It suggests that these psychological impacts should be explored with the tools of behavioral sciences and that "consistent with considerations of justice and other relevant normative values, law be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones."<sup>3</sup> Part of the exploration therapeutic jurisprudence suggests entails identification of psycholegal soft-spots, i.e.,

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<sup>2</sup> secondary trauma due to late or indirect exposure to a traumatic event

<sup>3</sup> Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION, 5-44, 7 (Stolle et al. eds., 2000).

places where legal procedures or work done by lawyers and her clients to satisfy these procedures, produces negative or positive psychological consequences.

The questions posed by this research are twofold. First, are lawyers handling asylum cases aware of and prepared to deal with the barriers and difficulties that traumatic past experiences might cause in preparation of asylum claims and in their relationship with their client? Second, how does hearing traumatic narratives influence the lawyers and their willingness to engage in asylum lawyering?

In addition to the basic concern for psychological well-being they reflect, the importance of these questions stems from their practical implications. The practicality of the first question results from the fact that people tend not to trust “the others”, hence the question of how can lawyers help asylum seekers deal with those barriers and gain asylum officer’s trust is of extreme importance. Asylum seekers are often denied asylum because of their traumatic otherness, i.e., gaps in or loss of memory of traumatic past experiences, emotional “inappropriateness”, difficulties concentrating, and difficulties in narrating traumatic events.<sup>4</sup> All these symptoms of Post Traumatic Stress Disorder (PTSD)<sup>5</sup> position traumatized asylum seekers as ultimate “others”: hard to understand and strange in the eyes of people (e.g., the asylum officer<sup>6</sup> or the attorney) who are not traumatized and have the power of deciding whether the asylum applicant is trustworthy.

The second question, of how traumatic narratives effect lawyers, has important practical implications as well. Because representation dramatically increases the chance of an asylum seeker

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<sup>4</sup> Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 Rutgers L. Rev. 127. (Hereinafter “Durst”); THOMAS SPIJKERBOER, *GENDER AND REFUGEE STATUS* (2000) (Hereinafter “SPIJKERBOER”); Neal P. Pfeiffer, *Credibility findings in INS Asylum Adjudications: A Realistic Assessment*, 23 Tex. Int’l L.J. 139. (Hereinafter “Pfeiffer”).

<sup>5</sup> JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1992) (Hereinafter “HERMAN”).

<sup>6</sup> an immigration officer specially trained for interviewing asylum seekers

being granted asylum,<sup>7</sup> it is important that lawyers who are willing to do this extremely difficult and challenging work are not deterred from it because of the emotional price involved.

Identifying psychological difficulties in the context of asylum-claim-preparations creates a typology of psycholegal soft-spots in the asylum field, contributing to their predictability by asylum lawyers. Awareness and training about potential psycholegal soft spots has the potential of improving the psychological well being of asylum seekers and asylum lawyers.<sup>8</sup> In addition, and some might argue more importantly, identifying psycholegal soft spots in the field of asylum law can improve the ability of asylum seekers to gain asylum and of asylum lawyers to stay in the profession – a profession in which representation makes a life and death difference to victims of persecution.

The purpose of this research is to identify psycholegal soft spots in the field of asylum lawyering and examine how Bay Area asylum lawyers handle them. The first chapter of this paper is an overview of the asylum process in the US, with primary focus on elements of the process and adjudicating standards which are inconsistent with PTSD symptoms and/or impact the nature of asylum claim preparation. The second chapter is a typology of psycholegal soft spots in preparation of asylum claim pertaining to the narration of the client's traumatic past persecution. Derived from this typology is the model of asylum lawyering I then introduce in chapter 3. The model is parsed to the different roles lawyers should assume in the context of asylum representation in order to overcome and cope with the aforementioned psychological pressure points. The fourth chapter consists of the interviews I conducted with Bay Area asylum lawyers. The fifth chapter introduces the conclusions I reached from the interviews I conducted and from observing the training seminar of Lawyers' Committee for Human Rights. The chapter also

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<sup>7</sup> Mary Meg McCarthy, *Asylum May Be a Matter of Life and Death*, 86-DEC A.B.A. J. 63. (“asylum seekers represented by counsel are six times more likely to prevail in their cases than those without legal representation.”)

<sup>8</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 48 (Stolle et al. eds. 2000)

includes my recommendations. Chapter six introduces an application of therapeutic jurisprudence to the context of asylum lawyering. It emphasizes the healing potential preparation of asylum claims can have if lawyers will be more attuned to trauma and its effects. I also offer ways by which lawyers can avoid re-traumatization of asylum seekers during the legal work. The seventh chapter is a recognition of the research's limitations and description of future plans for extending this work.

Before I proceed I want to situate my personal perspective with respect to my research. As a student intern in the U.S., I represented asylum seekers in different stages of the asylum process. This work led me to consider the emotional dimension of asylum work. I think of myself as an advocate of asylum seeker and refugee's rights, but I am also someone who, though a foreigner in the country in which I write, is not a refugee or an asylee herself. I would like to note the problematic of my claim to represent the interest of asylum seekers since, as noted by Spijkerboer, I probably won't be checked by them.<sup>9</sup>

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<sup>9</sup> Spijkerboer argues that because asylum seekers have no political nor social power, little or no money, hardly any access to information about the system that process their claim, and no impact on lobbyist and lawyers who claim to represent them, they do not have much influence, if at all, about the manner in which decisions about them are made. The people who represent asylum seekers will not be checked by them. For example, the likelihood that many asylum seekers will read my work is low. See SPIJKERBOER at 6. a good example for the problematic of this is the fact that asylum seekers do not receive work authorization until they are granted asylum, and scholars such as Aleinnikoff et al., in reviewing this policy argue that “[n]o litigation challenged this feature of the regulation, despite precedents like *Alfro-Orellana* – a sign that the advocacy community recognized that some decoupling was needed in order to deter fraud and, in the long run, preserve the asylum system.” See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 839 (fifth edition, 2003) (hereinafter “ALEINIKOFF”). It is not clear who is the advocacy community but it is pretty clear that as far as asylum seekers are concerned this is a problem and that the advocacy community does not represent their needs in this respect, even though it is considered to be doing so by the scholars who wrote this book.

# Chapter 1: The Asylum Process<sup>10</sup>

An essential backdrop to an analysis of the experience of asylum seekers<sup>11</sup> in the U.S is a description of the legal process they experience. The initial stage of the path to political asylum consists of submission of an application and subsequent interview by an asylum officer.<sup>12</sup> In this chapter I provide both an overview and an assessment of the asylum process and the adjudicating standards. I focus on areas where existence of trauma becomes a barrier to a successful asylum claim.

## *1. Background: Asylum Process and the Adjudication Standard*

### *A. Definition of Asylee*

Under American law, an asylum seeker is a foreigner present in the United States who applies for political asylum.<sup>13</sup> Under The Immigration and Nationality Act<sup>14</sup> “The Attorney General may grant asylum to an alien who has applied for asylum [...] if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).” Refugee is a person who meets the following conditions:

- (1) she is outside any country of her nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and
- (2) she is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of that country
- (3) because of persecution or a well-founded fear of persecution

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<sup>10</sup> In this paper I will use the terms “asylum” and “political asylum” as synonyms, a general practice in the field. See ALEINIKOFF at 831-836.

<sup>11</sup> For the purpose of clarification, an asylum seeker is a person in the process of applying for asylum; an asylee is a person who was granted asylum status; a refugee is a person who meets the definition for a refugee and was screened for that status outside the US.

<sup>12</sup> This paper focuses on the affirmative path to asylum application as I elaborate later in this chapter.

<sup>13</sup> 2003 Yearbook of Immigration Statistics *available at* <http://uscis.gov/graphics/shared/aboutus/statistics/Asylees.htm>

<sup>14</sup> Immigration and Nationality Act (1980)[hereinafter INA] paragraph 208(b)(1)

(4) on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>15</sup>

The statutory basis for granting asylum, established in the INA, is consistent with the international standard set forth in the United Nations Convention relating to the Status of Refugees.<sup>16</sup>

### ***B. The Application Process***

An asylum application can be processed in two main avenues: the affirmative avenue and the defensive avenue.<sup>17</sup> In the year 2003, 46,272 asylum applications were filed with United States Citizenship and Immigration Services (USCIS), covering 61,660 asylum seekers, spouses and children. 11,434 applications - less than a third - were approved that year.<sup>18</sup>

This paper focuses on the affirmative avenue.<sup>19</sup> Nevertheless, the results of my analysis are also relevant for representation of asylum seekers facing the defensive process since the aspect of the work on which I concentrate, i.e., the narration of the client's traumatic past, is relevant to both, despite some structural differences between the processes themselves.

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<sup>15</sup> INA Section 101(a)(42)(A)

<sup>16</sup> In 1968, the United States acceded to the *1967 United Nations Protocol Relating to the Status of Refugees*, which incorporates the *1951 United Nations Convention relating to the Status of Refugees* (Refugee Convention). Article 33 of the Refugee Convention prohibits a State party from expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of a protected characteristic in the refugee definition (“*non-refoulement*”). A “refugee” is defined as any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country...” (Refugee Convention, Art. I.A(2), United Nations Treaty Series No. 2545, Vol. 189, p. 137; *1967 United Nations Protocol Relating to the Status of Refugees*, Art. I.2, United Nations Treaty Series No. 8791, Vol. 606, p. 267)

<sup>17</sup> It is more accurate to say that there are three different paths which can be followed by the asylum applicant: the first two are the affirmative and defensive applications and the third one which applies to applicants at ports of entry (not available once in the U.S. and outside port of entry), and to some narrow classes of applicants who entered the U.S without inspection. Because the last option is not really open to those who were inspected and are already in the U.S I only mention the two avenues available for them.

For a description of the development of American asylum law See Sharon A. Healey, *The Trend Toward the Criminalization and Detention of Asylum Seekers*, 12 NO. 1 Hum. Rts. Brief. 14, 14-16. See also ALEINIKOFF at 831-836.

<sup>18</sup> 2003 Yearbook of Immigration Statistics available at <http://uscis.gov/graphics/shared/aboutus/statistics/Asylees.htm>

<sup>19</sup> *Id*

I will describe the different stages of the affirmative avenue by following a fictive character– Dikla. Dikla arrives to a U.S. port of entry with proper documents (forged or genuine) and is admitted to the country on a visitor/student/business visa. If she wants to claim political asylum she has to do it within one year of her arrival.<sup>20</sup> The way to file for asylum is by submitting Form I-589, entitled *Application for Asylum and Withholding of Removal*<sup>21</sup> to USCIS.<sup>22</sup> The form includes questions about Dikla’s reasons for applying, including “Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threat in the past by anyone?,” “Do you fear harm or mistreatment if you return to your home country?,” and “Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?”<sup>23</sup> Dikla must answer each of these questions in great detail.

After Dikla submitted her application for asylum, USCIS will schedule a “nonadversarial” interview in which she will be interviewed by an asylum officer.<sup>24</sup> The asylum officer will determine whether Dikla meets the definition of a refugee.<sup>25</sup>

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<sup>20</sup> 8 C.F.R § 208.4(2). For criticism of that deadline from different perspective, including its implications from a mental-health prism, *See* Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 *Geo. Immigr. L. J.* 95.

<sup>21</sup> 8 C.F.R § 208.3(a)

<sup>22</sup> The main federal agency charged with administrating and enforcing the INA is the Department of Homeland Security (DHS), with lesser roles for the Department of Justice and the Department of State. Until 2003, the key agency was the Immigration and Naturalization Service (INS), located within the justice Department. The 2003 Homeland Security Act charged two separate agencies with the enforcement and administrative powers the INS had until then. BCIS is the agency in- charge of administrating immigration services: “BCIS’ functions cover the full range of applications for naturalization and for immigration benefits, including asylum and the overseas refugee resettlement program.” *See* ALEINIKOFF at 244.

<sup>23</sup> Application for Asylum and For Withholding of Removal *available at* <http://uscis.gov/graphics/formsfee/forms/files/i-589.pdf>

<sup>24</sup> The asylum officer will conduct a nonadversarial interview (8 C.F.R. § 208.9). In 1990 INS, recognizing the uniqueness of decisionmaking in asylum applications, created a special unit of full-time professional asylum officers (55 Fed.Reg. 30674 (July 27, 1990)). These officers are trained in “international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles.” (8 C.F.R § 208.1(b)). *See* also ALEINIKOFF at 837.

<sup>25</sup> There is another element not relevant to the purpose of this paper which are the grounds for exclusion. The asylum seeker has to meet the definition for a refugee and not meet any of the grounds for exclusion. Under INA § 208(b)(2) grounds for exclusion are: (A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the

During the interview, the asylum officer asks Dikla about her reasons for applying and compares her answers with the ones she provided on the application form and in the affidavit.<sup>26</sup>

Discrepancies in dates, names, and order of events, among other things, will have to be accounted for and preferably announced in writing prior to the interview.<sup>27</sup>

### ***C. The Asylum Officer's Decision***

Asylum officers base their decision of whether to grant asylum on the “application form, the information presented during the interview, and possibly other information from the State Department or other credible sources such as international organizations, private voluntary agencies, news organizations or academic institutions.”<sup>28</sup> The question of whether Dikla meets the definition of a refugee has two dimensions: one is whether her experience falls under one of the applicable legal categories (establishing past persecution on enumerated grounds), and the second is the question of Dikla’s credibility, and the credibility of her story about her past experiences.

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alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States. (B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States. (C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied. (D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

<sup>26</sup> “Oftentimes asylum seekers have submitted their own *pro se* applications before seeking Minnesota Advocates assistance, and these may have substantial errors. For example, many clients have unwittingly filed boilerplate applications prepared by others and signed applications whose contents they know nothing about. Additionally, some clients initially file applications containing asylum claims that they believe are more acceptable to U.S. Judges and lawyers, but which subsequently turn out to be fabrications. If this is the case, you should offer correct information and a strong explanation for the inconsistencies as early as possible before the hearing by means of a detailed affidavit from the client if possible or at the outset of the hearing and through the client's own testimony.” Minnesota Advocates for Human Rights, *Basic Procedural Manual For Asylum Representation* 36 (2004)

<sup>27</sup> Such discrepancies will otherwise usually be interpreted as lack of reliability and will lead to a denial of the application. In *Hassan v. Ashcroft*, the immigration judge found the applicant not credible because “alien’s rape was not mentioned in her asylum application, [...]and] there was inconsistency between her asylum form and testimony as to the number of attackers.” Kurtis A. Kemper, *Necessity and Sufficiency of Evidence Corroborating Alien’s Testimony to Establish Basis for Asylum or Withholding of Removal*, 179 A.L.R Fed. 357. The Lawyers’ Committee Manual too notes that “[t]he client must testify in a manner consistent with the declaration. If the declaration is not correct, a corrective sheet should be submitted at the interview (or mailed in before the interview) so there is no question as to your client’s credibility.” (p.79).

<sup>28</sup> ALEINIKOFF at 837.

#### ***D. Persecution: The Doctrinal Focal Point***

Eligibility for asylum status is established when an applicant qualifies as refugee “either because he or she suffered past persecution or because he or she has a well-founded fear of future persecution.”<sup>29</sup> Doctrinally speaking, this is the key question in asylum determination. U.S. law does not, however, provide a clear definition of “persecution”.

In *McMullen v. INS*<sup>30</sup> the court interpreted persecution as “a threat to life or freedom” in accordance with the language of INA § 241(b)(3) and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>31</sup> In *Cardoza-Fonseca v. INS*,<sup>32</sup> the courts provided a wider definition of persecution, following the UN’s approach, which includes “other serious violations of human rights.”<sup>33</sup> In practice, the standard is extremely narrow. In *Prasad v. INS*<sup>34</sup> the 9<sup>th</sup> Circuit failed to find past persecution where the applicant was detained for six hours, interrogated, beaten and kicked.<sup>35</sup> In *Kapcia v. INS*,<sup>36</sup> the 10<sup>th</sup> Circuit decided that past persecution did not occur “where applicants had been detained, beaten on occasion, fired from a job, and subjected to house searches.”<sup>37</sup>

The relationship between past and future persecution was determined in *Matter of Chen*<sup>38</sup>, which is considered by commentators to be “the fountainhead of past persecution analysis.”<sup>39</sup> The Board of Immigration Appeal (BIA) held that “discretion might appropriately be exercised to grant

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<sup>29</sup> 8 C.F.R § 208.13(b)

<sup>30</sup> *McMullen v. INS*, 658 F.2d 1312 (9<sup>th</sup> Cir. 1981)

<sup>31</sup> *Id* at 1315

<sup>32</sup> *Cardoza-Fonseca v. INS* F.2d 1448, 1452 (9<sup>th</sup> Cir. 1985)

<sup>33</sup> *Id* at 1452

<sup>34</sup> *Prasad v. INS*, 47 F.3d 336 (9<sup>th</sup> Cir. 1995)

<sup>35</sup> *Id.*

<sup>36</sup> *Kapcia v. INS*, 944 F. 2d 702 (10<sup>th</sup> Cir.1991).

<sup>37</sup> *Id* at 705

<sup>38</sup> *Matter of Chen*, 20 I & N Dec. 16 (BIA 1989)

<sup>39</sup> ALEINIKOFF at 926

asylum, even if there were no risk of future persecution, to persons who had in the past ‘suffered under atrocious forms of persecution.’”<sup>40</sup>.

When past persecution has been demonstrated, the asylum seeker “is considered to have established eligibility for asylum both on account of the past persecution which has been demonstrated and the well-founded fear of future persecution which is presumed.”<sup>41</sup> Thus, establishing past persecution in effect ascertains eligibility for asylum.<sup>42</sup>

## ***2. Credibility and Its Critique***

*...It is not because I cannot explain that you won't understand, it is because you won't understand that I can't explain.*<sup>43</sup>

A necessary but not sufficient condition for gaining asylum is to be found credible by the asylum officer who conducts the asylum interview.<sup>44</sup> Finding a person credible has much to do with intuition and unconscious processes but the courts also attempt to provide certain criteria for the type of narrative that should be considered credible or for the components a credible testimony consists of.

To gain the asylum officer's trust by establishing credibility is the main challenge faced by asylum seeker in her quest for political asylum. In this chapter I shortly introduce the credibility standard. I then offer an elaborated critique on that standard, arguing that a combination of factors which is out of the asylum seeker's control might prevent the asylum seeker from succeeding in meeting it. From the asylum seeker's perspective, her lingual, cultural and traumatic otherness

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<sup>40</sup> *Id.* Fear of future persecution can be established without the existence of past persecution but this does not happen ordinarily.

<sup>41</sup> *Id.* at 920.

<sup>42</sup> 8 C.F.R § 208.13(b)(1)

<sup>43</sup> Elie Wiesel, Interview, Academy of Achievement, 1996. in MAGGIE SCHAUER ET AL., NARRATIVE EXPOSURE THERAPY: A SHORT TERM INTERVENTION FOR TRAUMATIC STRESS DISORDERS AFTER WAR, TERROR OR TORTURE 2 (2005). (Hereinafter “NET”)

<sup>44</sup> 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, 515. [Hereinafter “Anker”]

constitutes a barrier for being understood by the asylum officer. From the asylum officer's perspective, the psychological structure "naïve realism" explains why she will find it hard to find the asylum seeker credible.

As my focus in this work is on trauma as a barrier for successful asylum application, this chapter has the same focal point. I introduce the credibility standard and difficulties to meet it which can be the result of PTSD because these difficulties are a psycholegal soft spot in the asylum process, and, hence, in the relationship between the lawyer and her asylum seeking client, since the former has to assist the latter in overcoming these barriers.

### ***A. The Court's Definition of Credibility***

The most important task facing an asylum seeker during the interview is to gain the trust of the asylum officer who will adjudicate the case (i.e., establish credibility).<sup>45</sup> The only proof most asylum seekers have of persecution is their own testimony.<sup>46</sup>

Since in Western society trust is gained by ability to look one in the eyes, tell a consistent and coherent story (with Western connections of causality), and remember details such as dates, it is important that the asylum seeker will be able to provide these trust-enhancing elements in the asylum interview. In order to stand alone as the reason for granting asylum, the applicant's testimony must be "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."<sup>47</sup>

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<sup>45</sup> *Id.* ("[i]mmigration judges cited credibility as a factor explicitly in negative asylum rulings in forty eight percent of the decisions rendered in the course of this study.")

<sup>46</sup> Durst at 136. 8 C.F.R § 208.13(a) ("[t]he testimony of the applicant, **if credible**, may be sufficient to sustain the burden of proof without corroboration.")

<sup>47</sup> *In re Mogharrabi*, 19 I. & N. Dec. at 445.

## ***B. Critique of Credibility: Barriers to Asylum Seekers Ability to Be Considered Credible***

### *1. PTSD, Language and Culture as a Barrier to Establishing Credibility*

Decision makers in the immigration field's determination regarding the asylum applicant's credibility are based on four main types of information: the asylum seeker's demeanor, her testimonial consistency, her ability to provide specific details about her persecution, and consistency between her claim of persecution and the known human rights record of her homeland.<sup>48</sup> Different scholars noted the ways in which language, culture and PTSD constitute a barrier to establishment of credibility. PTSD, cultural differences, stress and lingual difficulties influence judgments of demeanor, testimonial consistency, and specificity about discrete instances of persecution.<sup>49</sup>

Anker identified that problem in her study of asylum adjudications in American Immigration Courts: "immigration judges tended to project their own political and cultural experiences onto the applicant. Thus, one judge, in an interview, described his view of the "reasonable person" standard.<sup>50</sup> Anker noticed that immigration judges failed to "consider the political and sociological context of the events important or relevant in the evaluation of the asylum claim."<sup>51</sup> Too, "[o]n a deeper level, the judge was not able to comprehend living in an environment of limited choices, of taking risks which no rational, middle-class North American would assume."<sup>52</sup>

Thomas Spijkerboer's research on asylum adjudication in the Netherlands also confirms that the adjudicating officer's perceptions and cognitions regarding the world is a key issue in the determination of credibility. He argues that in order to receive the legal status, asylum seekers have

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<sup>48</sup> Pfeiffer at 142.

<sup>49</sup> *Id* at 143-150. See also Durst at 24.

<sup>50</sup> Anker at 516. ("The way I think about it, I think I'm a reasonable person and how would I react to that situation.")

<sup>51</sup> *Id* at 517

<sup>52</sup> *Id*

to conform to their western adjudicators' predetermined notions of persecution and credibility. Asylum seeker's powerlessness in the hosting society is the reason they need to conform to its legal discourse and cultural codes.<sup>53</sup>

## *2. Naïve Realism as a Barrier to Establishing Credibility*

The tendency to attribute objectivity to our subjective perceptions was termed “naïve realism” by Ross and Ward. Naïve realism is a psychological phenomenon which can account for an adjudicator's failure to relate to an asylum seeker's narrative and find it “credible.” People believe about themselves that they “see entities and events as they are in objective reality, and that [...] [their] social attitudes, beliefs, preferences, priorities, and the like follow from a relatively dispassionate, unbiased, and essentially “unmediated” apprehension of the information or evidence at hand.”<sup>54</sup> Thus, people tend to identify “truth” in views and behaviors which resemble their own, and consider different behaviors and views as wrong or false, not making enough allowances to subjectivity<sup>55</sup>

I am applying the concept of naïve realism to the context of political asylum because it serves to explain the challenges faced by asylum seekers during the asylum interview. One of these difficulties is that the asylum officer will find it hard to identify the truthfulness of the asylum seeker's story because they have different experiences, culture, and language.

When lawyers and clients prepare the asylum application and later in the asylum interview, a member of one culture asks a member of a different culture to hear and confirm as plausible and reliable her experiences. Asylum seekers have to story<sup>56</sup> events which took place in a certain socio-political reality, in a manner which the asylum officer (and the lawyer), who operates in a

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<sup>53</sup> SPIJKERBOER at 8.

<sup>54</sup> Lee Ross & Andrew Ward, Naïve Realism: Implications for Social Conflict and Misunderstanding, Working Paper no. 48 (May 1995).

<sup>55</sup> Krech & Crutchfield, cited at *Id.*

<sup>56</sup> I am using “story” as a verb throughout this paper.

completely different reality, will find trustworthy and believable. Application of naïve realism in the context of political asylum will suggest that for that to happen, her story must meet the officer's pre-conceived cognitive patterns.

### 3. *Contextual Credibility – a Barrier to Establishing Credibility*

In this work I apply the concept of “contextual credibility” in the context of political asylum because this concept captures the tension between psychological structures such as naïve realism and judicial practices such as the need to determine another person’s “credibility.” The theory of contextual credibility explains that “it is difficult to establish the credibility of a person when one does not know, or cannot understand, the context of their claim.”<sup>57</sup> This theory was developed in response to identification of the difficulty of (male) judges and (male) juries to understand and relate to women’s responses to traumatic realities such as being a battered woman, being raped, and being sexually harassed. Women’s voices were not heard in the public sphere and their stories seemed strange to men who encountered them in the judicial realm.<sup>58</sup>

To summarize, asylum procedure has two focal points: a doctrinal one and a human relations one. The first is the existence of (past) persecution (on certain grounds). The second is credibility. Theories such as Naïve Realism and Contextual Credibility can serve to explain why asylum officers have difficulties identifying credibility in stories of persecution narrated by

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<sup>57</sup> Lynn Hecht Schafran, *Credibility in the Courts: Why is there a Gender Gap?* The Judges Journal, Winter 1995 at 6.

<sup>58</sup> David K. Reinert, *Rape Shield: Immigrants Deserve the Same Protection We Give Our Citizens*, 13 S. Cal. Rev. L. & Women’s Stud. 355, 357. The role of expert testimony on issues such as battered women syndrome and rape trauma syndrome served to educate adjudicators about the physical and psychological realities of women’s lives and eliminate prejudices (e.g., if she didn’t leave it means he didn’t abuse her) by contextualizing their experiences. Men were only familiar with their own responses to traumatic experiences (such as attack or robbery) which led them to establish defenses in criminal law to match those responses, but they were not familiar with women’s responses to the traumatic experiences which prevail in their worlds. Pfeiffer suggests that asylum lawyers need to learn to identify PTSD in order to send traumatized clients to psychologists who will testify “that certain behavior or testimony is not evidence of deception, but rather the result of emotional problems caused by trauma.” This suggestion is in fact an application of contextual credibility theory to the context of political asylum.

individuals whose traumatic experience, cultural context, and language, relegate to otherness. The asylum seeker has to contend with these focal points in the procedure and the role of her lawyer is to assist her in doing so. Lawyers need to help their clients to bridge their traumatic otherness in order to prevent it from interrupting their chances to gain asylum. As this research explores psycholegal soft spots in the asylum process, identifying the barriers posed by traumatic experience to gaining credibility is an important part of it.

## Chapter 2: Psycholegal Soft Spots in the Field of Asylum Lawyering

The concept of Psycholegal soft spots is a broad one, aimed at capturing the ways in which the law (e.g., legal proceedings, laws, attorney-client relationships) influences the psychological well being of the person encountering it. Psycholegal soft spots are pressure points which have the potential to improve or damage the emotional situation of actors in the legal field: clients, lawyer, and judges. Therapeutic jurisprudence holds that psycholegal soft spots need to be taken into account when contemplating the use of a legal instrument in order to avoid situations in which legal processes have distressing effects on their subjects. Identifying the psycholegal soft spots in a certain legal field allows legal actors in the field to anticipate the challenges they may face. It makes it easier for them to reflect on the psycholegal pressure points when contemplating a legal strategy in a manner oriented to psychological well-being.

This chapter is a typology of psycholegal soft spots related to asylum seeker's traumatic past and present experiences. Many (if not most) asylum seekers fled their home country because they were persecuted, i.e., went through traumatic experiences. But even the relatively few asylum seekers who base their claims on fear of future persecution alone are going through an experience – seeking asylum in a foreign country – which is traumatic in and of itself.<sup>59</sup> The combination of traumatized persons and a legal standard requiring an elaborate report of one's traumatic past experience creates several potential psychological difficulties.

One difficulty is the challenge for the client of meeting the requirement of narrating her past in depth and breadth. This psycholegal soft spot is addresses in a limited manner in existing literature, in which scholars identify the existence of traumatic past experiences as an obstacle for

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<sup>59</sup> Steve Maddern, *Post Traumatic Stress Disorder in Asylum Seekers* 18 Nursing Standards 36 - 39, 37.

a successful asylum claim. I review and organize this literature and thicken it with literature from the field of trauma studies.

The second psycholegal soft spot is the potential impact of preparing the asylum claim on traumatized asylum seekers, i.e., the influence on the client of the dynamic between the client and the lawyer. This is an important issue since re-victimization and re-traumatization of the asylum seeker during the preparation process may amplify the first psycholegal soft spot I mentioned – the asylum seeker’s ability to subsequently narrate her story during asylum adjudications. On the other hand, as I suggest below, the work asylum lawyers engage in with their clients may have a healing effect on their clients.

The third psycholegal soft spot is the impact of hearing an asylum seeker’s traumatic narrative on the lawyer who works on her case. The risks involved – vicarious traumatization and burnout<sup>60</sup> – can and do deter lawyers from working with asylum seekers. Such deterrence from assisting this underrepresented population has severe consequences of life and death because representation in the field dramatically increases the chances of winning, while an erroneous judgment (which is often the result of a lack of representation) leads to the deportation of a vulnerable person to a place in which she is in danger.<sup>61</sup>

To date, no research has been done to explore vicarious traumatization and burnout among asylum lawyers. The only research ever to explore these issues among lawyers was conducted in 2003 and focused on criminal and family law attorneys. In view of the fact that asylum law is a

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<sup>60</sup> Burnout is a syndrome which “develops gradually due to the accumulation of stress and the erosion of idealism resulting from intensive contact with clients.” Physical symptoms characteristic of the syndrome are fatigue, poor sleep and headaches. Emotional transformations typical of the syndrome are anxiety, irritability, depression and hopelessness Behavioral expressions include “aggression, cynicism, and substance abuse, leading to poor job performance, deterioration in interpersonal relationship, and significant attrition among professionals working with traumatized populations.” See Andrew Levin and Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 Pace L.Rev. 245.

<sup>61</sup> Mary Meg McCarthy, *Asylum May Be a Matter of Life and Death*, 86-DEC A.B.A. J. 63.

new domain<sup>62</sup> and well established practices were not explored until two years ago, it is not surprising, that this field lags behind. U.S. immigration authorities do recognize the psycholegal pressure points which pertain to the narration of trauma, and train asylum officers accordingly.<sup>63</sup> Asylum lawyers are yet to gain such awareness.

This chapter begins by defining traumatic event and PTSD, then proceed to an identification of the role of PTSD in the context of asylum claims, creating a typology of the psychological difficulties which might arise from the legal work.

## ***1. Background: Trauma and Post Traumatic Stress Disorder***

### ***A. Persecution as Trauma***

Asylum claims are usually based on persecution and mistreatment.<sup>64</sup> Baron and her colleagues maintain that persecution on account of ethnic, religious, or racial affiliation is included in the group of stressor factors i.e., “a series of factors, which may cause a traumatic event for people targeted.”<sup>65</sup>

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<sup>62</sup> INA was enacted on 1980.

<sup>63</sup>Leslie Knowlton, *Bellevue's Torture Survivors Program Aids Victims*, XVII(12) Psychiatric Times.

<sup>64</sup> Cécile Rousseau et al., *The Complexity of Determining Refugeehood: a Multidisciplinary Analysis of the Decision Making Process of the Canadian Immigration and Refugee Board*, 15 J. Refugee Stud. 43 [Hereinafter “Rousseau”].

<sup>65</sup> Nancy Baron et al., *Refugees and Internally Displaced People in TRAUMA INTERVENTION ON WAR AND PEACE: PREVENTION, PRACTICE AND POLICY* 243, 246 (Bonnie, L. Green & Mathew J. Friedman Eds.). DSM IV describes an extreme traumatic stressor consisting of 4 components. First, it involves “direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1).” In addition, it involves a *subjective* element, which is the person's feelings with respect to the event they experienced: “The person's response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behavior) (Criterion A2).” Socio-economic hardship / poverty; exposure to psychological / physical violence; exposure to sexual abuse or other sexual violence; exposure to war or other civil / military conflicts, and immigration are all stressor factors as well. MICHAEL B. FIRST ET AL., DSM-IV-TR GUIDEBOOK (2004).

## ***B. Post Traumatic Stress Disorder***

Responses to traumatic events are not uniform. People constantly experience traumatic events and/or stressor factors. Such an experience, when accompanied by feelings of intense fear, helplessness, or horror, usually causes distress. Such distress can be fully recovered from without professional intervention.<sup>66</sup> However, sometimes, a person's response is "severe, incapacitating, and characterized by nightmares, *pathological avoidance*, and other symptoms."<sup>67</sup> When such symptoms persist over a month, the person may meet the criteria for PTSD.<sup>68</sup> A person who suffers from PTSD will exhibit at least one symptom from each of the three groups of symptoms characterizing PTSD: reexperiencing,<sup>69</sup> numbing,<sup>70</sup> and hyperarousal.<sup>71</sup> At times these symptoms can be amplified by their interrelationship.<sup>72</sup>

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<sup>66</sup> The question why some people develop symptoms of PTSD and some not, i.e., what accounts for resilience in the face of traumatic events, is answered in interesting ways by different scholars. One such explanation is the existence of balancing "protective factors" which can minimize stress, aid coping, and prevent PTSD and other mental disorders. Safety / security, family strength and support, social network, future life possibilities, and ideological / political / religious consciousness are considered protective factors. Unfortunately, in the case of asylum seekers there is a combination of multiple stressor factors and a lack of protective factors. This can account for the high rates of PTSD symptoms PTSD among asylum seekers. See Baron at

<sup>67</sup> MATTHEW J. FRIEDMAN, POST TRAUMATIC STRESS DISORDER: THE LATEST ASSESMENT AND TREATMENT STRATEGIES 3 (2003).

<sup>68</sup> *Id.* DSM IV offers a diagnosis of PTSD which includes three elements: First, a person who must have experienced a traumatic event. Second, the traumatic event must be accompanied by intense fear, helplessness, or horror. Third, the person must suffer from the three characteristic groups of symptoms for this syndrome: reexperiencing symptoms (intrusive recollections, traumatic nightmares, flashbacks, trauma-related stimulus-evoked physiological reactions), avoidant/numbing symptoms (effort to avoid trauma-related thoughts, feelings, activities, places and people; psychogenic amnesia for trauma related memory; diminished interest; feeling detached or being estranged; restricted range of affect; sense of foreshortened future), and hyperarousal symptoms (insomnia, irritability, difficulty concentrating, hypervigilance, exaggerated startled response).

<sup>69</sup> HERMAN at 36 Reexperiencing, which Lewis-Herman refers to as "intrusion", is connected with the special nature of traumatic memories "[t]he traumatic moment becomes encoded in an abnormal form of memory, which breaks spontaneously into consciousness, both as flashbacks during waking states and as traumatic nightmares during sleep. Small, seemingly insignificant reminders can also evoke these memories, which often return with all the vividness and emotional force of the original event." HERMAN at 37.

This nature of the traumatic memory causes the reexperiencing of the traumatic event and breaks the time frame of the event – the event is not experienced as an event in the person's past but rather as part of the present. The fact that intrusion can be provoked by almost anything turns every environment into an unsafe place and contributes to the continuity of the traumatic event in time and place.

<sup>70</sup> Numbing, which Lewis Herman refers to as "constriction," results from the persistence of a defense mechanism which it is no longer needed. In situations of inescapable danger, "[p]erceptions may be numbed or distorted [...]. The person may feel as though the event is not happening to her, as though she is observing from outside her body, or as though the whole experience is a bad dream from which she will shortly awaken." *Id.* at 42 – 43 This defense mechanism, highly effective during the traumatic event because it prevents the person from fully experiencing things which are too awful to experience, becomes maladaptive when danger is past: "Because these

In the following section, I argue that symptoms of PTSD influence certain cognitive and emotional abilities in a way that impairs the ability of people with PTSD to story their traumatic experiences in a manner that establishes credibility. I identify these psycholegal soft spots and argue that preparing asylum claim of a traumatized person can impact the psychological well-being of both the asylum seeker and the lawyer.

## ***2. Psycholegal Soft Spot 1: PTSD as a Barrier to a Successful Asylum Claim***

Different scholars note the hurdles faced by asylum seekers due to the traumatic events they experienced.<sup>73</sup> Post traumatic psychological reactions influence asylum seeker's ability to testify as well as the content of their testimonies.<sup>74</sup> In addition, "PTSD may distort an applicant's emotional responses and demeanor"<sup>75</sup> as well as her ability to remember things in general and the events which constituted persecution in particular.<sup>76</sup>

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altered states keep the traumatic experience walled off from ordinary consciousness, they prevent the integration necessary for healing. Unfortunately, the constrictive or dissociative states, like other symptoms of the post-traumatic syndrome, prove to be remarkably tenacious." HERMAN at  
As with reexperiencing, the persistence of the mental state (i.e., the defense mechanism) in the post traumatic situation construct the traumatic experience as an event which is not confined within the past, but is rather omni present in time and space.

<sup>71</sup> Hyperarousal stretches the traumatic event beyond the original limitation of time and space within which it occurred. Like numbing, hyperarousal is a product of an effective defense mechanism which, if not restricted to the time of the traumatic event, becomes maladaptive. "After a traumatic experience, the human system of self-preservation seems to go onto permanent alert, as if the danger might return at any moment. Physiological arousal continues at unabated." *Id* at 35

<sup>72</sup> Lewis Herman describes the relationship between reexperiencing and numbness as "the dialectic of trauma." This dialectic of opposing psychological states is perhaps the most characteristic feature of the post traumatic syndromes. Since neither the intrusive nor numbing symptoms allow for integration of the traumatic event, the alteration between these two extreme states might be understood as an attempt to find a satisfactory balance between the two. But balance is precisely what the traumatized person lacks. This pendulum movement adds to the traumatic person's sense of instability and of life's unpredictability, thus perpetuating PTSD symptoms. However, the oscillating rhythm of intrusion and numbness is not stable in itself. Intrusion is more dominant right after the event while numbness take a "leading role" after intrusive elements diminish. HERMAN at

<sup>73</sup> Durst at 151.

<sup>74</sup> Rousseau at 48-49.

<sup>75</sup> Pfeiffer at 146.

<sup>76</sup> *Id* at 149.

### ***A. Memory and Concentration***

The nonverbal nature of traumatic memories and post traumatic symptoms, such as repression and dissociation of traumatic memories, affect asylum seekers' ability to convey their past persecution to asylum adjudicators. Researchers in the trauma field provide different explanations for the difficulties remembering and narrating traumatic experiences. Some argue that the difficulties result from the physical nature of traumatic memories.<sup>77</sup> Trauma scholars agree that traumatic memories "are encoded by processes, such as repression and dissociation, that make them difficult to retrieve as coherent, verbal narratives."<sup>78</sup> Difficulty to concentrate, which is another symptom of PTSD, also interferes with asylum seekers' ability to narrate their traumatic experiences.<sup>79</sup>

### ***B. Expressiveness***

Some symptoms of PTSD, such as detachment from one's emotions, especially from emotions related to the traumatic event, can interfere with creating reliability.<sup>80</sup> Spijkerboer observed that "appropriateness" of the level of emotionality displayed by the applicant when she tells her narrative of persecution is a determinative factor in the adjudicating officer's perception of the applicant's reliability.<sup>81</sup> Bopp noticed that lawyers too use similar criteria when working

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<sup>77</sup> Susan J. Brison, *Outliving Oneself: Trauma, Memory and Personal Identity* in FEMINISTS RETHINK THE SELF, 13, 17 (Diana Meyer et al. Eds. 1997) [Hereinafter "Brison"]. ("Traumatic memory is not narrative. Rather, it is experience that reoccurs, either as full sensory replay of traumatic events in dreams or flashbacks, with all things seen, heard, smelled and felt intact, or as disconnected fragments. ... The main change in the modality as well as in the content of the most salient traumatic memories is that they are more tied to the body than memories are typically considered to be.")

<sup>78</sup> Katharine Krause Shobe & John F. Kihlstrom, *Is Traumatic Memory Special?* at <http://ist-socrates.berkeley.edu/~kihlstrm/special.htm>. Shobe and Kihlstrom maintain that adopting this position entails "that one reject laboratory evidence as irrelevant to cases of clinical trauma, and accept instead evidence from clinical case studies of actual trauma victims." The reason that many prominent trauma scholars reject laboratory evidence (which suggests that the adrenalin released during a traumatic experience enhance memory rather than damage it) is that it is impossible to artificially manufacture the core element of a traumatic experience, i.e, the feeling of threat to one's life or physical safety due to an uncontrollable force, by exposing people to videotapes of scary events.

<sup>79</sup> Rousseau at 48-49.

<sup>80</sup> SPIJKERBOER

<sup>81</sup> *Id* at 64.

with their clients.<sup>82</sup> A Bay Area lawyer I interviewed about two asylum cases she did as *pro bono* work mentioned that one of her clients told her about his persecution in an aloof and detached manner; that made her wonder whether he was being truthful. She found it much easier to believe and sympathize with her other client who cried the whole time she was narrating her trauma. Both of her clients' reactions can be symptoms of PTSD<sup>83</sup>, and both can, depending on the listener, interfere with perceptions of credibility.

### ***C. Social Denial of Trauma***

Brison suggests that trauma survivors find it difficult to relate their stories because of the audience's (in)ability and (un)willingness to listen to them.<sup>84</sup> This explanation is of particular importance in the context of asylum adjudications, because asylum officers might be emotionally deterred from acknowledging the stories of asylum seekers. Social denial of trauma can be rooted in fear to recognize one's own vulnerability in the face of traumatic accounts.<sup>85</sup>

Katherine Lusby reinforces the argument that the stories of some (women) asylum seekers might be rejected by society. According to her, men (and society as a whole) erase the voices of

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<sup>82</sup> Andrea E. Bopp. *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender Specific Persecution*, 11 *Geo. Immigr. L.J.* 167, 186. ("an attorney may expect the client to be extremely upset and distraught when recounting traumatic information but many suffered of PTSD become subdued and numb when trying to recall past difficult experiences.")

<sup>83</sup> Durst at 150. Even the most extensive and sensitive preparation of the client may not overcome difficulties which result from PTSD. "The traumatized person may experience intense emotion but without clear memory of the event, or may remember everything in detail but without emotion." In addition, Professors Kevin Johnson and Amagda Perez recount the story of a law school clinic client who cried uncontrollably whenever she was asked why she feared returning to Guatemala. The woman had been separated from her parents as they fled the country when she was only five years old. Students worked with the client over three semesters to develop her trust and prepare her for the asylum hearing. By doing so, they obtained the facts necessary to substantiate her asylum claim. Despite careful preparation, as she was about to testify at the hearing, the client began to cry uncontrollably." Reaching a safe country does not erase the storytelling difficulties created by the trauma. A Chinese poet, before his asylum interview, said, "I do not dare to remember my past." He wept often during his interview. Durst, at 151.

<sup>84</sup> Brison at 21. ("[A]dditional reason why trauma survivors are frequently unable to construct narratives to make sense of themselves and to convey what they experienced is [...] other's refusal to hear survivor's stories, which makes it difficult for survivors to tell them even to themselves. [...] In order to construct self-narratives, then, we need not only the words with which to tell our stories but also an audience able and willing to hear us and to understand our words as we intend them.")

<sup>85</sup> *Id*

victims of political rape.<sup>86</sup> This kind of war violence is not recognized in the framework of international and national U.S immigration laws. It is considered a manifestation of passion or personal rage, when in fact “[w]omen are raped in war because the perpetrator wants to attack the men or the community on the other side of her body.”<sup>87</sup>

### ***3. Psycholegal Soft Spot 2: The Impact of the Relationship with the Lawyer on the Asylum Seeker’s Psychological Well Being***

The work that has to be done for the purpose of constructing the legal claim and the client’s relationship with her attorney have a potentially negative impact on the traumatized client’s psychological well-being. Some of the negative impact can be avoided if lawyers are better advised. Some cannot be avoided because of the nature of the asylum procedure. This unavoidable impact can and should be addressed at the legislative level. I will now turn to explore potentially negative factors in the preparation of an asylum claim and in the relationship between the asylum seeker and her lawyer.

#### ***A. Evoking the Traumatic Experience***

The relationship between the lawyer and the client might evoke the traumatic experience and catalyze intrusion symptoms. Certain characteristics of the therapist-patient relationship might echo the torture experience for clients who are victims of torture. The relationship is dyadic. Two people meet privately in a room. One of them is licensed by the state or appears to represent it or the larger society; the other person is in a vulnerable position, while the person of (perceived)

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<sup>86</sup> Katherine Lusby, *Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story*, 25 U. Tol. L. Rev. 911, 952.

<sup>87</sup> *Id*

authority asks the vulnerable person questions about extremely personal issues in an interrogative and intrusive manner.<sup>88</sup>

The same description amplified is applicable to the attorney-client relationship in the context of asylum lawyering. The lawyer is undoubtedly considered by the client to be, at the very least, a representative of the hosting society.<sup>89</sup> The client is extremely vulnerable since her life is in the lawyer's hands. Often she is subject to the lawyer's benevolence, unable to rely on payment to secure the lawyer's assistance. The nature of the work done to obtain the client's legal status is extremely intrusive. It probes into the most difficult experiences of the client's life in an inquisitory manner.

Four barriers to effective communication with victims of human rights violations in a therapeutic setting are: environmental, physical, sociocultural, and mimesis of abuse situation.<sup>90</sup> For example, using a male interpreter or interviewer in the case of women who were sexually abused can be a barrier to communication with them.<sup>91</sup> Spending time in a waiting room might pose a "mimesis barrier" by mimicking the torture experience and evoking traumatic memories.<sup>92</sup> A bottle or other external probe in the therapist's room might evoke traumatic memories in the case of women who were sexually abused with the use of similar objects.<sup>93</sup> An interrogative mode

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<sup>88</sup> Keneth S. Pope & Rosa E. Garcia-Peltoniemi, *Responding to Victims of Torture: Clinical Issues, Professional Responsibilities, and Useful Resources*, 22(4) *Professional Psychology: Research and Practice*, 269-276.

<sup>89</sup> As a volunteer for a Legal Services Organization, I once did an intake of a client with the help of an interpreter. At an early point in the intake we took a short break at the interpreter's request. I then interviewed the potential client for two hours and failed to understand what made her flee her home country. I sensed she was persecuted but the story never came out. I gave her the phone number of the interpreter and said that if she feels she would like to speak with me again she should call him. The next day the interpreter called me and told me the client contacted him and explained that she was sure he was a government agent. She thought he asked for the break because he wanted to call the police and have her arrested. Under the circumstances, she was afraid to tell us her story. Luckily, the person with whom she was staying, who was represented by our organization and knew the interpreter, explained the situation to her.

<sup>90</sup> Jack Saul, *Collecting Oral History of Survivors – Strategies and Challenges*, Oral History Association Annual Meeting, October 17-21, St. Louis, MO

<sup>91</sup> BCIS adopted this principle in a memorandum it published on 1995. Dept. of Justice Mem. *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* which was issued by INS's office of International Affairs (May 26, 1995).

<sup>92</sup> See source cited *supra* note 88.

<sup>93</sup> See source cited *supra* note 82 at 13.

of conversation combined with a lack of attention to the client's basic needs for water, air, time, rest, or even the need to use the bathroom, might also echo the client's traumatic experience.<sup>94</sup>

### ***B. Stressing Lack of Security***

The asylum seeker has to prove to the hosting society that she is still in danger. Thus, until the asylum process is over, acquiring a sense of security will damage the applicant's chances of actually being secure. This means that the lawyer must press her client into proving that she is still in danger, thus perpetuating PTSD symptoms and preventing the client from feeling safe, which is an important step towards recovery. This part of the lawyer-client relationship is unavoidable under existing asylum policy.

### ***C. Inquisitory Questioning***

Another important issue is the tension which seemingly exists between properly representing the client and taking a non-judgmental, compassionate, supportive approach towards her. Several good examples for this problem can be found in Steven Forester's paper on representing Haitian asylum seekers. The following is a piece of advice he provides in connection with the need to understand the client's story in depth and breadth:

Soldiers stomped on your client's left leg, rebreaking it, while he was lying on the floor on his right side in the djak torture position. Ask him to demonstrate. If he is reluctant or slow, get on the floor on your right side in the djak position to check with him if that is how it was, or have someone else do so. Do not hesitate out of decorum or shyness.<sup>95</sup>

I agree that neither decorum nor shyness should prevent a lawyer from obtaining information which might ultimately save her client's life, but from the perspective of protecting the client's psychological well being, which is no less essential for a successful claim, this kind of activity might be problematic, precisely because it has the potential to bring back feelings and

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<sup>94</sup> *Id*

<sup>95</sup> Steven Forester, *Haitian Asylum Advocacy: Questions to Ask Applications and Notes on Interviewing and Representation*, 10 N.Y.L. Sch. J. Hum. Rts. 351, 414.

symptoms associated with the traumatic experience. This might explain why some of Forester's clients were "reluctant or slow" to demonstrate, i.e., re-live the traumatic event.

A somewhat more prevalent manifestation of the same issue is the interrogative nature of the work done by asylum seekers and their lawyers. The interrogative mode picks at the moot-interview/trial stage. A caring, investing, good lawyer will make sure her client is well prepared for the interview/trial and will "[p]lay the role of a skeptical INS officer: cross-examine, mix-up, focus, doubt, politely but with no holds barred."<sup>96</sup> The moot interview/trial might be more extreme than the rest of the preparation work with the lawyer avoiding compassionate gestures she might otherwise use to balance the situation. Asylum lawyers have to interrogate their client thoroughly in order to properly understand her story and help her convey it to the adjudicating body. What is the effect of such a procedure on the traumatized asylum seeking client?

Feminist scholars and victim's rights advocates have longed noted the emotional hardship and psychological damages which result from cross-examination of violence victims.<sup>97</sup> Doubts expressed toward traumatic narratives have the ability to retraumatize<sup>98</sup> Retraumatization leads to strengthened symptoms of PTSD and deterioration in the client's emotional well being, which will make the client's ability to participate in the legal work and subsequently in the legal procedure more difficult, and sometimes impossible. The lawyer's interrogative role might also impair the client's ability to trust her – an element which is at least as essential for the purpose of having the client tell her story in depth and breadth as the task of asking questions.

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<sup>96</sup> *Id* at 429.

<sup>97</sup> See source cited *supra* note 82

<sup>98</sup> *Id.* See also Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. Pub. L.* 317, 342 (comparing testimony about rape to a second rape).

## ***4. Psycholegal Soft Spot 3: The Impact on the Lawyer of Hearing a Traumatic Narrative***

### ***A. Witnessing***

The relationship between an asylum lawyer and her client is one of witnessing. While the client is the victim of violence, the attorney serves as a psychological witness.<sup>99</sup> A witness of violence is “in a position to observe the interaction between the perpetrator and the victim. Sometimes the witnessing happens at the exact moment of the interaction, and sometimes it happens far into the future.”<sup>100</sup> The consequence of witnessing is “common shock.”<sup>101</sup>

There are two forms of witnessing: active and passive.<sup>102</sup> Passive witnessing lacks acknowledgment of the fact that one just witnessed violence (responses such as: ‘it is none of my business’, ‘so what’, ‘no big deal’, ‘it’s not my responsibility’), while active witnessing incorporates compassionate acts in response to violence or violations.<sup>103</sup> These acts need not be dramatic or continual<sup>104</sup> and can be as simple as telling the victim you are sorry they had to go through such an experience. Intentional compassionate witnessing positively affects the emotional well-being of the victim and the witness and improves the community as a whole. It creates a community in which violence and violations are neither silenced nor unseen by witnesses, and victims are treated empathically.<sup>105</sup>

Weingarten dedicates special attention to professionals who witness violence daily as part of their work. Educators, health care professionals, police, clergy, and journalists are the

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<sup>99</sup> KAETHE WEINGARTEN, COMMON SHOCK: WITNESSING VIOLENCE EVERY DAY, HOW WE ARE HARMED, HOW WE CAN HEAL (2003). (Hereinafter “WEINGARTEN”)

<sup>100</sup> *Id.* at 23

<sup>101</sup> *Id.* at 3-4. (“It is *common* because it happens all the time, to everyone in every community. It is a *shock* because, regardless of our response [to the violence we witness] – spaciness, distress, bravado – it affects our mind, body and spirit.”)

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 11.

<sup>105</sup> *Id.*

professional groups she considers in her book. What these professionals have in common is that “in caring for the people they serve they expose themselves daily, repeatedly, and cumulatively to the violence and violation that permeate the lives of their constituents.”<sup>106</sup> Weingarten fails to include lawyers in this group, perhaps because some lawyers do not engage in daily witnessing. I consider the group of asylum lawyers part of the group prone to double jeopardy of vicarious traumatization.<sup>107</sup>

The importance of including lawyers in the group of professionals who are understood to be in double jeopardy is that as a society “we expose those who serve us to high levels of violence and violation”<sup>108</sup> In addition “we are vulnerable to how these professional groups manage their reactions to witnessing violence and violation.”<sup>109</sup> In other words, the situation of witnessing violence influences the emotional well being of the client as well as the lawyer. The lawyer constantly encounters violence and violation and is thus exposed to the danger of vicarious traumatization. The client meanwhile is vulnerable to the lawyer’s reaction to her story because in the client’s eyes the lawyer represents the hosting community and because the client is disconnected from her organic support system. Weingarten’s work serves to highlight the dual impact of storying the client’s traumatic narrative in the context of the attorney-client relationship.

### ***B. Vicarious Traumatization***

“Trauma is contagious.”<sup>110</sup> People who listen to detailed traumatic narratives “may begin to develop symptoms of post-traumatic stress disorder.”<sup>111</sup> It is well established that therapists who work with traumatized people “experience lasting alterations in their cognitive schemas, having a

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<sup>106</sup> *Id.* at 93.

<sup>107</sup> These professionals are in double jeopardy of traumatization because in addition to the violence we all witness on a daily basis the very essence of their work is to witness additional violence.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> HERMAN at 140.

<sup>111</sup> *Id.*

significant impact on the therapist's feelings, relationships, and life.”<sup>112</sup> Therapists are not the only group of professionals exposed to detailed trauma narratives and, consequently, to vicarious trauma.<sup>113</sup> Asylum lawyers’ work also entails listening to their clients’ detailed traumatic narratives.<sup>114</sup>

Therapists might have maladaptive responses to hearing their patients’ traumatic narratives, and these might highly influence their clients. Withdrawal, “rescue attempts, boundary violations, or attempts to control the patient”<sup>115</sup> are all examples of maladaptive responses. The most prevalent responses are “doubting or denial of the patient's reality, dissociation or numbing, minimization or avoidance of the traumatic material, professional distancing, or frank abandonment of the patient.”<sup>116</sup>

The same maladaptive coping mechanisms might be employed by lawyers who suffer from vicarious traumatization in their relationship with their asylum seeking clients. The consequences of it might be detrimental in that context because, as I mentioned before, representation in the field makes life and death differences.

Without a reliable support system which contains her responses, the therapist (and the lawyer) will not be able deal with these PTSD symptoms and the effect on her ability to assist her client will be deficiencies in her ability to communicate with her client in a manner which encourages trust and confidence.<sup>117</sup> The impact working with trauma has on professionals is, thus, of consequence to society as a whole because those who encounter “impacted professionals” are bound to be influenced by their vicarious traumatization.<sup>118</sup>

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<sup>112</sup> *Id*

<sup>113</sup> WEINGERTEN

<sup>114</sup> *See infra* chapter 2 and 3

<sup>115</sup> HERMAN at 150

<sup>116</sup> HERMAN at 150.

<sup>117</sup> *Id* at 151.

<sup>118</sup> *Id*.

### *C. Vicarious Trauma and Burnout in Lawyers*

In 2003 Andrew Levin and Scott Greisberg conducted the first research on vicarious trauma in lawyers.<sup>119</sup> Their research focused on lawyers who work with victims of domestic violence and criminal defendants, because the clients in these practices tend to be traumatized.<sup>120</sup> The findings were that “[c]ompared with mental health providers and social services workers, attorney’s [sic] surveyed demonstrated significantly higher levels of secondary traumatic stress and burnout.”<sup>121</sup> The researchers attribute this difference to “the attorney’s higher caseloads and lack of supervision around trauma and its effects.”<sup>122</sup>

Given the information about the prevalence of trauma among asylum seekers and the level of exposure to this trauma on the attorney’s side, I believe it is safe to assume that similar findings will appear in research on vicarious trauma among asylum lawyers, but such research is yet to be conducted. The closest thing to such a research was conducted by Survivors International in San Francisco. A lawyer I interviewed, who is a former asylum officer, told me that Survivors International checked asylum officers from San Francisco’s INS office (in which he worked) for vicarious trauma. Despite the worker’s union struggle to see the report issued by Survivors International on that research, the INS refused to release it to its employees. One can only assume that it was not an incredibly low rate of PTSD symptoms among asylum officers that prevented the publication.

Levin and Greisberg checked lawyers for symptoms of burnout as well. As aforementioned, lawyers had high levels of burnout, higher than those of their mental health providers and social workers counterparts.<sup>123</sup>

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<sup>119</sup> Andrew Levin and Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 *Pace L.Rev.* 245.

<sup>120</sup> *Id*

<sup>121</sup> *Id*

<sup>122</sup> *Id*

<sup>123</sup> *See infra* footnote 60

To summarize, clients who suffer from PTSD are in danger of being further traumatized by the preparation of the asylum claim. If that happens, their ability to gain asylum diminishes. Lawyers are at risk of burnout and vicarious traumatization which, if not addressed, might have negative impacts on their clients. They might also cause the lawyers to withdraw from representation – another negative consequence for asylum seekers.

## Chapter 3: The Lawyer's Role

The political asylum procedure in the U.S. focuses on asylum seekers' testimony about their past persecution. In the previous chapter, I established that PTSD is a barrier for providing that testimony. Lawyers' professional responsibility is to zealously represent their clients.<sup>124</sup> Thus, an asylum lawyer's responsibility towards her clients must be defined in a way that will promote the client's ability to story the narrative of her past persecution in a manner which will ultimately secure the immigration status she seeks.

This chapter offers a new understanding of the roles lawyers should assume in the context of asylum representation. These roles take into account the psycholegal soft spots I identified in the previous chapter but do not address all of them since I distinguish at this point between two perspectives. One is the perspective of professional responsibility, according to which the fact that asylum seekers have to narrate their traumatic past in a certain manner to the asylum officer and that PTSD will stand in their way of doing that, leads to the conclusion that the lawyer, as part of her professional responsibility towards her client, must help her to cope with these barriers. The second perspective is the one of therapeutic jurisprudence, which incorporates the former perspective and adds to it an aspiration for improving the psychological well being of the client. The description of lawyers' roles in this chapter is done only from the narrow perspective of professional responsibility. I argue that every lawyer, whether she espouses therapeutic jurisprudence or not, should assume these roles.<sup>125</sup>

This chapter starts with a technocratic description of the lawyers' role and proceeds to a critical analysis of it. I argue that lawyers need to operate as narrative facilitators, cultural

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<sup>124</sup> Canon 7, ABA Model Code of Professional Responsibility

<sup>125</sup> In chapter six I offer an extended asylum lawyering model which *does* incorporate therapeutic jurisprudence approach.

translators, and acculturation agents in order to assist asylum seekers seem credible in the eyes of the adjudicating officer.

### ***1. Current Understanding of Lawyer's Role in the Context of Asylum Lawyering (A Technocratic Description)***

Prior to the asylum interview<sup>126</sup>, the lawyer's role is to assist the asylum seeker in filling the application form and in preparing for the asylum interview. This will usually involve constructing the client's story in an affidavit/declaration<sup>127</sup> to be submitted to the asylum officer prior to or in the beginning of the interview. In addition, the lawyer will need to write a brief. The brief incorporates the legal argument (case's theory) and information about the conditions in the asylum seeker's home country – both meant to corroborate the client's narrative by providing context. The attorney may be present in the asylum interview and take notes (for the purpose of a potential future appeal), but her role during it is limited.<sup>128</sup> At the end of the interview the attorney may comment on the interview or make a closing statement.<sup>129</sup>

### ***2. Towards a New Understanding of Asylum Lawyering***

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<sup>126</sup> See *infra* chapter 1 section B.

<sup>127</sup> MINNESOTA ADVOCATES FOR HUMAN RIGHTS, BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 24 (2004) [hereinafter "Minnesota Manual"] ("A detailed affidavit, providing a chronological narrative of your client's claim, is essential to accurately presenting the claim to the adjudicator. The affidavit should be prepared carefully, and special attention must be paid to ensuring that the affidavit and the Application for Asylum are consistent with one another and with all supporting evidence. Preparation of the affidavit, with its narrative form, often reveals gaps in your client's story or other inconsistencies that need to be explored prior to submission of the claim.")

<sup>128</sup> *Id.* at 28. ("The attorney may interrupt the interview if she feels that the applicant did not understand the question or if a question is inappropriate. The attorney should ask to stop the interview and speak to a supervisor if the interviewing officer's behavior is inappropriate or offensive.")

<sup>129</sup> 8 C.F.R. § 208.9(d). See also Minnesota Manual at "During the closing statement, it is important that the attorney explain to the asylum officer why the client is eligible for asylum and what are the enumerated grounds applicable to the client's claim. It is important for the attorney to direct the Asylum Officer to any document that is particularly supportive of the applicant's case or that the attorney believes should be given particular attention."

The following is a classification of the different responsibilities lawyers have when preparing asylum claims— some more symbolic than others. This classification is normative more than descriptive, for I am not suggesting that lawyers consciously assume these roles, are trained to do them, or are even aware of them. However, I do believe that lawyers ought to be trained to assume these responsibilities and that “the ideal asylum lawyer” will fulfill these roles in order to further her client’s ability to succeed in her claim and promote her client’s emotional well being.

### ***Narrative Facilitator***

“Interviewing the client, either in the process of preparing the I-589 and affidavit or in preparation for hearing testimony, is the most difficult and critical part of handling an asylum case.”<sup>130</sup> In order to write the client’s affidavit, the attorney must become intimate with the client’s life story.<sup>131</sup> The lawyer’s role is to facilitate the client’s narration of her life story and the traumatic experiences which led her to seek asylum in the U.S. To do that, the client must feel comfortable enough to open up and tell her story in breadth and depth. If the client does not feel comfortable, her affidavit will not be elaborate and detailed enough to convince the asylum officer of her story.<sup>132</sup>

As narrative facilitator, the lawyer has to earn her client’s trust.<sup>133</sup> In addition, the lawyer must create an atmosphere that promotes candidness and openness. This might be difficult. As the Minnesota Manual notes, “[L]awyers in this country often have a style of interviewing that can be threatening to Minnesota Advocates clients. An intense, rapid-fire approach, bearing down hard on

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<sup>130</sup> *Minnesota Manual* at 20.

<sup>131</sup> *Id* at 5

<sup>132</sup> Durst at 151.

<sup>133</sup> *Minnesota Manual* at 21. (“Establishing trust with your client is essential in asylum cases. The great majority of Minnesota Advocates clients come from countries whose legal systems are corrupt and inept. They may be unfamiliar and suspicious of the legal proceedings that they find themselves in. This suspicion makes it difficult for asylum seekers to trust their attorneys, let alone the judge rendering a decision in their case. Part of your job is attempting to overcome this built-in distrust.”)

minor inconsistencies, may be very frightening to clients seeking asylum.”<sup>134</sup> The lawyer will have to encourage the client to trust her and to avoid conversation style that will intimidate the client and discourage confidence.

### *Narrative Translator*

The asylum lawyer serves as a processing link between the client’s story and the asylum officer, and her knowledge about the receiving culture is as vital for her work as her legal skills are.<sup>135</sup> Trauma, culture, and language are the three main barriers asylum seekers have to overcome in order to produce a narrative which will meet the asylum seeker’s notions of plausibility, coherency and consistency; the lawyer has to help them in doing it. As a member of the receiving society who is fluent in the language and in the culture, the lawyer can “translate” the asylum seeker’s narrative to make it intelligible for the adjudicating body.

There are two stages in which the lawyer has to serve as narrative translator during the preparation of the claim: one while the client narrates her story to the attorney (the preparation phase) and the other when the lawyer helps the client construct her narrative through writing the affidavit and preparing the client to testify.

Understanding the client’s culture can enable the lawyer to understand the way a client behaves towards her. Instead of, for example, considering her unreliable because of the fact she didn’t immediately revealed her real story and her real claim, realize the cultural normativity of such behavior for the client.<sup>136</sup>

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<sup>134</sup> Minnesota Manual at 21.

<sup>135</sup> The asylum lawyer’s work can also be considered as subordination of the applicant’s culture to the lawyer’s (since the lawyer is part of the hosting society). For that reason, it is important that lawyers be aware of the inevitable choices embodied in every work of interpretation, choices which in this context have the negative potential to enforce degrading stereotypes about the “other”. I expand this criticism later in this chapter.

<sup>136</sup> Minnesota Manual at 20. (“Often, a client’s only experiences in dealing with well-dressed interrogators sitting behind desks in business offices have been unpleasant and threatening. They may withhold information at first or may modify their story, or concoct one completely, based on their assumptions about what you want or expect to hear. For example, a client from Central America may start out by telling staff and volunteers that they fear guerrilla persecution. While in many cases this is in fact true, in other cases it eventually becomes clear that the

Cultural understanding may help the lawyer in translating her client's story to the adjudicating officer who is a member of the receiving society and is accustomed to expect certain things, such as an ability to identify a linear sequence of events in one's life.<sup>137</sup>

As narrative translator, the lawyer engages in cultural interpretation as she helps the client identify the elements in her story which will be considered important by the receiving culture, and then organize them according to the local norms of story-telling. It is important to remember the flip side of the interpretational work which is that "knowledge (in our case: knowledge of the applicant and her "culture") [...] [is] inseparable from power."<sup>138</sup> Cultural interpretation's flip side is cultural oppression, and it is important to bare in mind that the need to translate is not because the client's culture and way of thinking, behaving, and building stories is inferior to that of the receiving society. The translation is for pragmatic reasons. It enables the asylum officer to understand the asylum seeker's story.

The issue of lingual translation is no less important and pertains not only to literal translation, which is often something the lawyer will use a translator for, but also to the cultural meaning of words. When persons from different countries and regions in the world are asked whether they or any of their families members or friends were "mistreated" or "harmed" in the past "by anyone," they might have their own understanding of what any of these concepts mean. Indeed, differences in naming grievances and being able to blame someone for them exist *within* cultures and states because of differences in socio-economic status, gender, religious affiliation

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client invented the claim because he/she thought it was the one most palatable to North American ears. With patient interviewing and a careful building of trust, a quite different and much more credible story may emerge.")<sup>137</sup> Minnesota Manual at 20. ("some Minnesota Advocates clients are rural peasants and many are poor and have limited education. They frequently come from cultural settings in which, for example, calendars or clocks have little value. Clients frequently may not be able to remember what month an event happened--or even what year. Since such gaps can create serious credibility problems, you may have to be creative about establishing a foundation for specific testimony. For example, occurrences may need to be tied to whether or not it was the rainy season or other events that the client can relate the occurrence too.")

<sup>138</sup>SPIJKERBOER at 8.

and so on. In the context of *different* cultures and different states one can only imagine how they are amplified.<sup>139</sup>

### ***Acculturation Agent***

In portraying the lawyer's role as a translator, I focused on lingual and cultural barriers facing the asylum seeker. I choose to distinguish that role as translator from the lawyer's function with respect to the client's traumatic otherness. In that latter function, the lawyer serves as an acculturation agent, engaging in a more profound and sustainable form of helping the client to be received by the hosting society. The cultural and lingual translations are ad-hoc in the sense that if the asylum seeker will stay in the U.S. she will have to keep translating her language and culture on a daily basis (in the work place, with the teacher of her child, in the grocery store). The lawyer cannot save her that need nor can the lawyer do it for her on a regular basis. The lawyer's translation is confined to the framework of the representation and with respect to the specific narrative the client has to story for the purpose of her application. Relating the traumatic narrative in the ears of agents of the receiving society will usually be a singular event which will mark the acceptance (or exclusion) of the asylum seeker into that society. Thus, unlike the temporal translation of the client's narrative on the lingual and cultural levels, the lawyer's translation of the client's trauma is permanent. This single process of narration-translation-testimony will be the only time in which the asylum seeker's trauma will be exposed to the hosting society and the manner in which it will be received has substantial emotional effects.

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<sup>139</sup> William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & Soc'y Rev. 631. As Durst also note, "language itself is culture-bound. Words, although directly translatable into English, may carry different connotations or concepts from the Western or United States linguistic equivalent. Concepts such as 'country' or 'politics' and relationships such as 'brother' or 'cousin' have different connotations in Africa and the Middle East. For example, the Swiss government denied a Turkish worker's asylum application for lack of credibility because in his written application, he referred to himself as a 'member' of an illegal political party, and then testified he was only a 'supporter' who distributed propaganda. The denial ignored the reality that, against the background of the situation in Turkey, membership and support were synonymous in such illegal underground organizations, which do not maintain formal membership rolls. Durst at 155.

Making the asylum seeker's story intelligible to the receiving community has a problematic aspect of cultural oppression,<sup>140</sup> but it can also have a healing aspect according to communitarian approaches to healing from trauma. Neimeyer and his colleagues' discussion of narrative construction of identity might be insightful in this context.<sup>141</sup> They argue that "[a]s a social as well as personal action, storying one's experience also entails (1) learning to attribute meaning in terms intelligible to one's community, and (2) positioning oneself (or, sometimes, being positioned) in the context of such accounts."<sup>142</sup> Employing this argument to the context of asylum lawyering positions the lawyer in the role of an acculturation agent who assists the asylum seeker in assimilating into the receiving society by offering frames of meaning to her story which are intelligible to her new society.

In other words, according to the communitarian narrative approach to healing, the survivor needs to story her trauma to her community and receive acknowledgment from it in order to heal. The lawyer assists the asylum seeker to story her experience to the representatives of the receiving society (i.e., asylum officer/immigration judge) in terms intelligible to their culture (i.e., their law) and thus facilitate her recovery.

In short, lawyers' responsibility in representation of asylum seekers cannot be reduced to technical procedures. The asylum seeking client struggles to narrate her story. As the next chapter elaborately describes, to do that she needs to overcome the alienation inherent in trauma and trust the lawyer despite the fact that "[i]n the moment in which pain and harm is purposefully inflicted by one human being onto another, breach of humanity has occurred."<sup>143</sup>

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<sup>140</sup> SPIJKERBOER at .8.

<sup>141</sup> Robert A. Neimeyer et al., *The Meaning of Your Absence: Traumatic Loss and Narrative Reconstruction*, in *LOSS OF THE ASSUMPTIVE WORLD, A THEORY OF TRAUMATIC LOSS*, 13-30 (Jeffrey Kaufman Ed., 2002).

<sup>142</sup> *Id* at 33

<sup>143</sup> NET at 1.

# Chapter 4: Interviews with Bay Area Asylum Lawyers

## *1. Methodology*

In this research I chose to conduct interviews with Bay Area lawyers who represent or represented political asylum seekers. The reason I came to do this research is that I represented asylum seekers on the East Coast prior to my arrival to Stanford. While doing this work I noticed the traumatic nature of my client's narratives of past persecution and the fact that this issue was not addressed by my mentors in any manner. Most of my clients were sent to psychiatric evaluation which was submitted as part of the evidence we used for the claim, but I was not instructed on how to work with traumatized people in a manner which guards their psychological well being, nor was I able to protect myself from vicarious traumatization, even though one of the professors with whom I worked gave a lecture on it, and told us to make sure we do not neglect ourselves.

Given that background, I certainly did not conduct this research objectively. My own experiences were continuously shaping my understanding of the field and motivating my work. Because of the introspective process I went through with respect to political asylum work, I felt a need to engage in interpretive understanding of the lawyers I interviewed. I wanted to access not only the manner other lawyers who worked with asylum seekers dealt with these issues but also the meaning they gave their own behavior. This understanding of my research locates me within the "idealist approach" and, according to Sciarra, dictates my qualitative methodology.<sup>144</sup>

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<sup>144</sup> Daniel Sciarra argues that the decision to use a qualitative or quantitative research methodology is about philosophy of knowledge and epistemology more than it is a question of suitability of a certain method to the task at hand. Unlike theorists who consider qualitative and quantitative methodologies complimentary, Sciarra suggests that considering the philosophical ground in which each methodology is rooted prevents the complimentary approach.

Quantitative research stem from positivism. Comte, Mill, Durkheim and others "put forth the argument that social relationships are to be regarded as "facts", "things" to be investigated in an objective manner." The relationship between the researcher and the subject of knowledge under this paradigm "is the relationship of the knower (the researcher) to the known (the subject of research, who is really an object to be known)." This

I aim to describe and identify the problems (i.e., psycholegal soft spots) which arise from the presence of a traumatic past in the context of asylum work, looking at the internal world of lawyers who represented political asylum seekers. In this chapter I introduce the findings of my research, i.e., the interviews I did with nine bay area asylum lawyers.<sup>145</sup> Three of them are full time immigration lawyers, three of them represented their clients pro-bono, two work for a legal NGO, and one is a clinical professor in a local law school.

I organize the interviews around the three psycholegal soft spots I identified in chapter 2. I also address the roles I suggested earlier that lawyers should assume in view of these psycholegal soft spots. My aim is to explore three points: (1) are lawyers aware of the psycholegal soft spots I identified? (2) are lawyers trained to deal with these pressure points? (3) how do lawyers cope with the psycholegal soft spots I identified when they encounter them?

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position is in line with “the philosophy of realism, which holds that something can be known independent of the knower, that its “reality” has little, if anything, to do with the knower’s process of coming to know that reality.”

Qualitative research stem from idealism. Dilthey was an idealist who challenged positivism on several levels. First, he argued for the impossibility of divorcing the observer from the observed and of subjectivity of knowledge: “[b]ecause the object of study in the social sciences is the product of thought or mind, it cannot be separated from the thought and mind of the investigator.” Knowing someone else is thus, argued Dilthey, inherently connected to knowing oneself, “a process sometimes referred to as “heuristic inquiry””. Under this approach, every scientific investigation has a dual nature: it investigates the investigator and the investigated. Secondly, Dilthey challenged positivism’s objective, which is “the discovery of laws regarding human behavior and interaction.”<sup>144</sup> According to him, the objective of social science is to “strive to describe as accurately as possible the actions of another and attempt to understand those actions through interaction.” To him, understanding was “interpretive understanding”(*verstehen*): “the understanding of another must access the *meaning* associated with a particular action, and meaning must be understood within a context.” Max Weber expended Dilthey’s notion of *verstehen*, stating that “understanding of another involves two levels: “the “what” of an action and the “why” of an action, understood as the difference between descriptive and explanatory understanding.” The latter “involves accessing the meaning an individual gives to her or his actions, and this meaning must be understood within context.” See Daniel Sciarra, *The Role of Qualitative Researcher*, in USING QUALITATIVE METHODOLOGY IN PSYCHOLOGY 37-48, 37 (1999). For a different approach from Sciarra regarding the complimantarity of qualitative and quantitative methodology see JENNIFER MASON, QUALITATIVE RESEARCHING 2-4 (2002).

<sup>145</sup> This work can be considered action research. Qualitative research provides “more holistic information about the mental health needs of people, their coping resources, and the types of interventions that are helpful in facilitating problem solving.” Aiming to identify a problem and not only to offer a way to solve that problem, this work can be considered “action research”. According to Hoshmand in action research “problem finding is just as important as problem solving. Descriptive and discovery research conducted with the help of qualitative methods of inquiry fall within the realm of action research as far as facilitating problem identification and illumination.” See Lisa Tsoi Hoshmand, *Locating the Qualitative Research Genre*, in USING QUALITATIVE METHODOLOGY IN PSYCHOLOGY 15-24, 18 (1999).

In presenting the interviews I do not introduce the answer each of the lawyers I interviewed provided. Rather, I choose to closely analyze one of the interviews, while intertwining the other interviews to highlight issues, explain certain points and identify differences in approaches among the lawyers. The interview I selected for close description and analysis is the interview of a woman lawyer who has been in the field for thirteen years. I found her to be uniquely compassionate and sensitive to the emotional needs of her clients, and very aware of her own emotional processes. I think Andrea's<sup>146</sup> approach to lawyering is interesting to focus on because she is psychologically sensitive and deals with psycholegal dilemmas in a creative, even if non-systematic or non-informed, manner. She is not, however, the representative asylum lawyer even within the small sample I interviewed.

Andrea's sensitivity is accompanied by an impressive record. In thirteen years she represented hundreds of asylum seekers and lost only one or two cases. Even if one could not conclude from that data that her compassion and sensitivity enables her success (which is what I attempt to argue in this work), at the very least it serves to show that being compassionate despite lawyer's prevalent dichotomy between compassion and professionalism, does not contradict nor interfere with professional success.

## ***1. Lawyers and Psycholegal Soft Spot 1: Trauma as a Barrier to Gaining Asylum***

### ***A. Awareness***

#### *Dealing with the Need to Be Narrative a Facilitator to Traumatized People*

Andrea described a difficulty that many lawyers I interviewed expressed:

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<sup>146</sup> Andrea is a pseudonym as are the names I use for the other lawyers I interviewed. Andrea is a woman in her 40s, a partner in a small immigration law firm with two other women. Prior to becoming an immigration lawyer she was a tax attorney. She did an asylum case pro bono and was drawn into immigration law because of it. Andrea has been in the immigration field since 1992 and did numerous asylum cases. She found the interplay of practice and theory, as well as the multicultural nature of the work, fascinating and stimulating. She says she loves the immigration field, and that asylum cases are, to her, the most important work she does. It gives meaning to her life. She finds asylum work challenging on both legal and emotional levels. Currently, however, she is not doing as many asylum cases as she used to, and not as many as she would like to.

I wasn't really very sure how to get the information and be sympathetic but at the same time be professional. Certainly as a young lawyer, it is hard not to get too involved with your clients, particularly immigrants. You are their only contact to the world...and you have to create some distance and define what your role is. Your job is to win their case and to present it legally, and if you get too involved with them and don't keep that distance, than you're not going to be an effective advocate. But you are who you are, and I am sympathetic to my clients and I think it has not compromised my ability to represent them.

When lawyers encounter the difficult narratives of asylum seekers, since they are not trained to listen to and work with emotional (and often traumatic) stories, they find themselves attempting to negotiate and understand their role. None of the lawyers I spoke with ever consulted their mentor or colleagues with respect to that question, nor, as I mentioned, was their training oriented towards helping them find this balance.

Kitty, A young lawyer who represented two asylum seekers *pro bono* told me that before her first asylum case she did a different pro bono case and got really stressed out while working on it. At some point, she said, "I suddenly told myself 'I am a lawyer now. I am THE lawyer now. This is my job I have to do it.'" She continued:

When I started working with asylum clients I was sort of...I don't want to say detached as it implies I don't have feelings...but I have a role and I need to focus on what I need to get done.....if I were to react emotionally to that kind of story I would...there is a need to maintain a balance between being sympathetic and acting that way but also acting in a way of 'yes, I am going to be able to get this done for you'... not cold.

Kitty expresses discomfort with two possible emotional positions she identifies. One is being detached, which is something she does not want to be "as it implies I don't have feelings." The other is being emotional. She does not state implicitly the difficulty with the latter but implies that it contradicts professionalism which. She will not be able to give her client this reassuring promise unless she finds a balance in the dichotomy she identifies between sympathy and professionalism.

Because making the asylum seeker sympathize with the client is necessary, the asylum lawyer has to be able to sympathize as well. If she does not feel inside the client's skin, she will

not be able to bring the asylum officer there. As a result, Andrea finds that “asylum lawyering is the most intensive relationship. More than in any other realm, you need to get to know your client intimately in order to win a case. It is more intensive and the results are of life and death, like a death sentence to an innocent person.” Andrea is aware that the asylum seeker cannot win the case by herself: “Unlike other areas of law, representation in this context makes a huge difference. I won almost every case I represented except one or two. When you are represented, it’s a different world.” The reason representation makes such a difference in that context is that “you need someone to translate your case for you because you don’t know the legal requirements ...the lawyer has to hear the case and use the aspects which they don’t necessarily identify as urgent concerns, use them for claiming asylum, which ultimately solves their pressing concerns.”

### ***B. Training***

The lack of training in general and the lack of training around psychological issues in particular is a repeating theme in all of the interviews I conducted. Some of the lawyers who participated in immigration clinics while in law school were given limited training on the effects of PTSD on testimony. One attorney said that she “was in UC Berkeley’s asylum law clinic. Someone from Survivors International talked about psychological consequences of the asylum procedure for the immigrant.” This training did not instruct the lawyers on how to such effects translate into relationship with their client (i.e., not recognizing certain clients’ behavior to be the result of trauma, and not knowing how to respond to it).

### ***c. Coping***

Andrea shares the reason for her conduct with her clients:

I try to explain to them why it is I need to ask the questions that I need to ask. That it’s important to make it detailed so that the officer and the judge can be inside their skin and will understand what it was like. I give them the legal framework but more than that I focus on credibility – the more detailed it is the more they are going to be in your shoes and the more they will believe you.

Sensitive to the fact that she is being intrusive and asking her clients to speak about things she might not want to share, Andrea explains to her client why it is that she needs to invade their privacy; the closer the officer or the judge will feel to her story, the more likely she is to find the asylum seeker reliable.

## ***2. Lawyers and Psycholegal Soft Spot 2: The Impact of the Relationship with the Lawyer on the Asylum Seeker's Psychological Well Being***

### ***A. Awareness***

Andrea is very much aware of her own feelings with respect to the work she is doing. As she explained, "I always feel like 'what am I doing? Am I harming someone on the long term, psychologically'? But to be honest, I have never gone to a professional because I know the professional will tell me not to do that and I can't not do that." The concern Andrea expresses is something I can deeply relate to. As a student of NYU's International Trauma Studies, I was, at a certain point, ready to leave the asylum field out of guilt with respect to the psychological damage I knew I was inflicting on my clients. There I was, listening to my professors talk about the importance of not pushing people into narrating their traumatic experiences before they feel they want to, about the importance of allowing clients to choose the pace of the narration, and I was overwhelmed with guilt and shame. I knew I was pushing my clients to tell me *everything* and could not allow them to choose the pace because we had to meet deadlines. At some point, I raised this concern in class. My professor and my classmates were very supportive. They were quick to acknowledge the necessity of the work I was doing, and the lack of choice embodied in it. The strength and comfort they provided me led me to think that if lawyers were trained by psychologists and psychiatrists to handle the psychological impact of asylum work, they might not feel so guilty about some of the elements involved in it. As Andrea put it, "What to me is most important for my client is to get this peace of mind. .... If I don't go there and don't ask those

questions and act so sensitive about it, they will not win their case. And that's just a decision I make." Psychologists understand the necessity of gaining the legal status for the asylum seeker's well being. They recognize the power of reality. In the conclusion chapter, I suggest that in fact working towards the peace of mind which comes with a stable immigration status is an important first step, which promotes emotional recovery from traumatic experiences.

### ***B. Training***

Andrea thinks that lawyers can benefit from training about PTSD despite her personal reluctance to consult with mental health professionals. When asked if she thinks lawyers can profit from getting information about PTSD and how to deal with it, Andrea said the following:

I think it can be beneficial for lawyers to get information about PTSD, about people's responses to trauma. Some psychological tools would have been useful for me had they been introduced to me when I started practicing. I learned some of this information from the psychological reports professional experts wrote about my clients. Psychologists sometimes manage to hear from the client information I didn't manage to get from them. They can get this information but on the other hand they have the responsibility to improve their emotional condition which is something that we as lawyers can't do because of legal demands. Many clients resist going to a psychologist and as your counselor you are often the closest thing they are willing to accept. As lawyers we do a lot of psychological work. Immigration lawyers use the law to help other people and people stands as first priority for them.

Andrea recognizes that something about the methodology used by psychologists is beneficial for the legal process because "psychologists sometimes manage to hear from the client information I didn't manage to get from them." She feels that this ability is connected with a responsibility to improve the client's emotional well-being. In other words, being a narrative facilitator holds a promise for emotional relief. A lawyer cannot expect another human being to open up to her without offering that person solace, which she feels is outside the scope of her profession. Andrea feels that the demands of the legal process stand in opposition to improvement of psychological well being. This can explain her fear of consulting with psychologists about her

work, which she considers contradictory to theirs. It can also explain her guilt: “There are days when I come in and I feel like I spend my whole day making people cry.”

### *C. Coping*

Andrea told me about the things she does in order to avoid unnecessary re-traumatization of her clients:

When we are preparing in order to get the story on the first time, I do a lot of the detailed narration. On the second and the third time, I back off because I know what they are going to say but during the hearing I will go there again. I will say ‘I am not going to go through this part today’. And I know that coming to me is worse than going to a dentist for a root canal because it’s a horrible thing to have to go through.

Andrea feels that the work with her is a horrible thing which her clients undergo. She seems to go through a struggle, for she knows her work is important but she also say “I know that coming to me is worse than going to a dentist.” In other words, Andrea feels she causes pain to people with whom she works. She explains that she is trying to minimize the pain she causes by minimizing the number of times her clients have to repeat their traumatic narrative.

Andrea invests a lot in creating an inviting environment for her clients, and in making them feel safe and understood by not trivializing their concerns. “If they [her clients] have children I make sure the children are out of the room” She also “go to extreme in making sure there is a female officer or that they understand that it’s confidential and not mention it in the declaration if they feel very uncomfortable and I try to be sensitive to how sensitive they are to the content of the testimony... I don’t want somebody to come out of the experience ruined by it. But I have to...”.

She gives the following example to an incident in which she guarded her client from unnecessary emotional hardship:

After meeting with a client many times, we were able to figure out that what psychologically harmed her the most was an incident and she was very reluctant to talk about it and very emotional speaking about it. She never talked to anybody about it and was scared to death that, if it was ever disclosed, her family in her home country will be harmed. It was very very sensitive but without that incident I couldn’t frame her

claim...Everything that she had and everything that she suffered seemed minor compared to it because it happened so early when she was an adolescent. It was critical to disclose and frame it as the cause for her activism. And so we mentioned it but didn't mention details and when the officer started to poke around I said 'look she is very uncomfortable. If you don't have to have a name don't make her give a name cause she is very sensitive about that particular incident'.

Again, Andrea feels that the work she does with her clients, having them tell her about their traumatic experience, has the potential of ruining them. She struggles with the legal requirements and with the authorities in order to minimize the pain caused to her client by the process. Andrea respects her clients' fears and does not minimize them or take them lightly. She finds a way to reassure the client while not jeopardizing her legal claim: "we mentioned it but didn't mention details."

After she finished describing that example she said, "I couldn't be an asylum officer – its too hard. There are days when I come in and I feel like I spend my whole day making people cry. It makes me sad. I know that I need to do it but you don't want to make people suffer." Even though she managed to spare her client the need to talk about the incident she did not want to, Andrea expressed guilt. She also expresses sympathy towards the asylum officer, recognizing the officer's humanity and difficulties.

### ***3. Lawyers and Psycholegal Soft Spot 3: The Impact of Hearing a Traumatic Narrative on the Lawyer***

Another asylum lawyer I interviewed, Mike, asks his clients to write a rough draft of their declaration and uses it as the basis for their affidavit. He reviews what they wrote and uses his meetings with them to edit and rewrite their draft. Mike is aware of the peril of vicarious trauma and considers his technique to be an attempt to avoid that risk: "I think the way that I practice asylum law helps to shield me a little but by not doing the interviews myself and have my clients write their declarations." Mike feels that the fact he does not hear his clients' stories but rather

reads them on the first time he encounters them might protect him from vicarious traumatization. However, he also says “I don’t know if I have been successful in balancing between being compassionate and not getting traumatized. I think I have been traumatized myself. and I don’t know if it’s possible to avoid that entirely.” Nevertheless, beyond the time saving element embodied in it, his method reflects a need to avoid the stories in order to defend himself from the unavoidable.

Schauer and her colleagues suggest that “[t]he therapist should be aware of the behavior s/he might employ unwillingly to protect her-/himself from the horror s/he is listening to.”<sup>147</sup> One of the reasons therapists should be aware of their defense mechanisms is that “[s]urvivors are likely to feel emotionally rejected by the therapist. Patients quickly realize the inability of the interviewer to cope with the emotionally shocking facts of the traumatic incident.”<sup>148</sup> If the client feels emotionally rejected, the lawyer’s role as narrative facilitator is compromised since “[i]n order not to harm, overwhelm, or appall the therapist, victims tend to unconsciously minimize their version to a more socially acceptable story.”<sup>149</sup> This tendency is especially problematic in the context of asylum cases, where minimizing the story can cost the client her life. “It is the therapist’s responsibility to make sure that s/he realizes her/his own mental state and ability to cope. The therapist should receive adequate supervision provided by the team to overcome such mechanism.”<sup>150</sup>

In other words, clients, especially traumatized clients, can sense when the person with whom they converse cannot contain their story. This problem was prevalent after the Holocaust, when survivors didn’t tell their therapists about when they went through because they sensed their therapist would not be able to contain it and cope with it. This phenomenon has the bitter

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<sup>147</sup> NET at 50.

<sup>148</sup> *Id* at 51.

<sup>149</sup> *Id.*

<sup>150</sup> *Id* at 52.

consequence of further isolation and seclusion of the survivors, but in the context of asylum work not sharing the traumatic story with the lawyer out of sensing the lawyer cannot contain it or cope with it can have life and death consequences for the client.

When asked whether she thinks about clients' stories outside of work, Andrea said that she "dream about it." She also identifies the different points in the representation in which her reaction to their trauma has more affect on her: "When I am preparing for an immigration hearing, three or four days before I don't sleep very well, right before it I get sick to my stomach. That's more because I'm stressed but its also because of the re-living of [my client's] trauma." In the post-representation stage "I can let it go after the case is done although my clients are my clients and for years longer I still worry about different aspects – whether they will be able to move on. And I always, when I am thinking about a client, I will always identify them by the most traumatic thing they have been through."

Relief workers and mental health professional often cope with the difficulties they encounter by way of denial.<sup>151</sup> Two forms of denial were identified by De Waal: (1) rejection of responsibility, which is a conscience decision "not to take responsibility for the suffering of people or for the effectiveness and result of the treatment interventions."<sup>152</sup> (2) Incorrect rationalization of the truth. For example, the therapist will convince herself that her African client does not suffer from death of loved ones in the same manner she would have suffered in her shoes because the client is used to such experiences<sup>153</sup>

After describing her efforts to facilitate her client's traumatic narration, Andrea said "I am definitely affected by it, when I go home I am affected by it, when I am working on it I have to get in the mind set and I get worked out about it. But ultimately I cannot save the world, I cannot

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<sup>151</sup> NET at 50.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

change things, I cannot make it better. All I can do is my little part which is to get them peace of mind and legal status.”

When asked how she protects herself from being overwhelmed by her client’s stories Andrea said: “If I am doing too many cases and its just too much I just won’t do anymore. I will give myself a break. I monitor. I can see when I have got too many of those cases.” As an experienced lawyer, she can recognize the different stages she went through her career and the difference between her responses now and in its beginning: “I was totally over exposed for about five years. ... It was harder in the beginning because you don’t want to turn cases away (financially) and it is hard to define what is a good case and what is a bad case and how to define when is a case too much for you.” She later added:

You want to help people and you try to figure out what is your role in helping them and how am I going to help them best. You also have to protect yourself. I do that through exercise, diet, scheduling vacations. I am very aware that you have to pace yourself, and you cannot over do it or you’ll get sick or you break down or burnout or all of those things. I am really looking to the long term, and try to protect and say no to a lot of things.

When Andrea feels overwhelmed by her asylum cases she withdraws – refraining from taking additionalcases. This response, although it embodies a healthy self -recognition of one’s boundaries and emotional needs, is exactly the thing I am hoping lawyers will not have to resort to because of the immense importance of their work for the asylum seeker and the scarcity of asylum lawyers. When I started looking for lawyers I could interview, I received the following email from a Bay Area lawyer: “Hello, I am an attorney who represents an asylum seeker now. The client's narration for me was so traumatic that I've not decided if I will ever do it again.” Unfortunately, this lawyer later avoided the interview and so I do not have her story. Andrea told me that “many lawyers left the profession because they could not handle the stress and depression after 9/11. Ever since there is an organizational culture of rejecting asylum claims and it is very difficult for lawyers to cope.” This is disturbing because the culture of rejection which interferes with lawyers’

ability to find meaningfulness in their work also puts asylum seekers in greater need for representation.

Andrea told me that if she shares emotions about her cases she shares them with the paralegal but not with other lawyers.<sup>154</sup> During office meetings, the lawyers in the office only discuss the details of cases and the doctrinal questions that might be challenging. When asked whether they shared with other lawyers emotions which arose in them because of the asylum cases they represented, some lawyers offered an interesting response. They said they do not think that lawyers are discouraged to talk about the emotional and psychological aspects of their work. They claimed doing so would not be considered unprofessional, but at the same time they do create a dichotomy between professional behavior and the discussion of feelings. There seems to be a divide between a cognitive resolution not to disparage expressions of feelings and an intuitive divorce of feelings from professional life.

Kitty described the dynamic she had with an even younger attorney who worked with her on one of her cases. “The other attorney had a much harder time and she would get emotional. We lost with the judge and she was crying and my reaction was ‘we did what we could, the judge is going to do what he’s got to do, there is nothing I can do about it except do a good job.’” This is a manifestation of the first form of denial De Waal recognized and which I discussed earlier.<sup>155</sup> When describing their dynamic, Kitty also made it clear that she considers some issues to be a professional, relevant part of the work. Other issues, i.e., emotional reactions, are not in that category. However, she never explicitly asserts that expressing emotions is unprofessional. When asked if the emotions which arose in them because of the case were discussed by them she replied: “we [the other lawyer and I] must have just talked about the case. I think it was mostly

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<sup>154</sup> For a fascinating description of the emotional role of paralegals in the corporate world, see JENNIFER L. PIERCE, *GENDER TRIALS : EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* (1995).

<sup>155</sup> See *infra* p.51

professional stuff.” When asked if they talked about her colleague being so emotional in response to the case, Kitty answered,

not that I recall. We talked about how to prepare the client for losing. Our main focus was just keeping the client on track and not nervous. We kind of joked about the other lawyer’s emotional response to the case, because you know, I am sure I came off as cold, and she was very emotional about it. I wasn’t falling apart because falling apart wasn’t going to help anyone. I think she felt she can fall apart because I was so together. We kind of joked about it. I don’t think it helps anyone if you get emotional. We’re friends so I never mentioned to her that this is what I think.

Kitty seemed concerned about appearing to be a cold person. She insisted on the ineffectiveness and un-professionalism of emotional expressions, not distinguishing between being emotional and falling apart. She also referred to emotional reactions as something that is and should be under the person’s control without distinguishing between *being* emotional and *acting* emotional. In other words, the possibility of being emotional, yet not acting too emotional with the client, was outside the repertoire of emotional positions she recognized.

Another concern Kitty had was that the client might think that she and her colleague were not capable of doing the work because of the manner in which her colleague expressed her emotions. “I didn’t want the client to see that the other lawyer was getting really upset, I wanted the client to think that we knew what we were doing, and that we are in control of the situation.”

I then asked Kitty to describe the general atmosphere in the office with respect to that issue. She said that “when we talk in the office about asylum cases we do it’s always **very professional – we don’t talk about emotional things**. I don’t remember anyone ever talking about emotional implications of the work. I don’t think they will think it unprofessional if anyone will talk about emotions. They are very supportive here. I think it’s ok if you are incapable of handling certain clients.” (emphasis added). In other words, being professional is differentiated from talking about emotions, and talking about emotions implicates an inability to handle a client. She continued by saying, “[I]f I wanted to talk about stuff I am sure I could but people here talk

about work. That's kind of how it is." In other words, the emotional aspect of the work is not recognized as part of work.

Mike is a solo practitioner, so I asked him about peer support in two contexts: (1) among other immigration practitioners and (2) in the context of mentoring relationship with lawyers who do pro bono work with the Lawyers' Committee for Human Rights. As for the former, his response was the following:

I haven't discussed psychological issues that come up in asylum cases with other immigration attorneys. Usually we talk about our experiences in representing cases or tell war stories about judges or officers... I don't get the impression that I think others in the immigration field will consider it unprofessional. They will consider it a regular response to the situation with your client. It's a very cooperative bar. We are not competing against one another. It's us against the government. I never had that experience, but I don't think anyone would think that it was unprofessional if someone brought up that issue. But it's not discussed. There are some small groups within the immigration bar who might talk about it – there is a group of gay and lesbian attorneys, and a women attorney group – they might talk more about the psychological aspect of immigration process more openly.

In other words, Mike's experience was that lawyers do not share the psychological and emotional aspects of legal work. He did however refer me to two sub-groups of lawyers who might be interested in this sort of discourse: gay attorneys and women. Is there a stereotype involved in that referral? Why would these groups be more interested in talking about emotional aspects of asylum work than other groups? Is that a good thing?

As for the group of mentored attorneys who volunteered to do asylum cases through Lawyers' Committee for Human Rights, it seems that the mentoring attorney was willing to listen to concerns with regard to emotional difficulties but that he felt helpless to assist them. More importantly, he did not initiate conversations on the issue when he knew his mentorees had an emotionally charged case: "I have talked about it with some of the mentored attorneys I got through the Lawyers' Committee, where I have been a mentor to *pro bono* attorneys and sometimes the issue has come up there, but they don't ask too much about it. I think they are a bit overwhelmed by the process as well and it's only afterwards that the psychological impact

becomes more apparent to you. Most of the time they are just asking legal questions or procedural questions and its very rare that someone will bring it up and say ‘I am getting too emotionally involved in this case and how can I separate myself’ (he laughs). A lot of time all you can do is lend a sympathetic ear.”

The “they didn’t say, I didn’t ask” policy is problematic because the mentor is suppose to train the mentoree. The mentor is also the one with the experience and the power of knowledge. If she does not raise the psychological aspect of the case, it is hard for the mentoree to ask about it and suggest that this is part of the work. For example, Anna told me that “In the relationship with the mentor from Lawyers’ Committee the focus was on legal questions and the need for support on that level. I didn’t feel justified to ask her for more than that – for emotional support.” A dynamic between mentors and mentorees, where the former avoid certain issues and the latter do not ask for help is not confined, according to Susan Daicof, to the context of asylum lawyering “the majority of law students will not seek help from others in dealing with their problems suggests a profile of individuals who de-emphasize interpersonal skills and relations and tend to rely exclusively on logical analysis and rational thought to solve their problems.”<sup>156</sup>

These behavioral patterns are, according to Daicof, the result of a combination of factors: 1) “law students disproportionately rely on analytic, rational thought to make decisions, rather than focusing on the emotional or humanistic consequences of their decisions (e.g., Thinking vs. Feeling).”<sup>157</sup> 2) “because legal education does not assist or encourage students to acquire interpersonal skills and often concentrates exclusively on the development of analytic skills, students may ignore the social and emotional consequences of decision-making. ...[L]aw school's exclusive emphasis on "objective thought, rational deduction and empirical proof" likely

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<sup>156</sup> Susan Daicoff, *Lawyer, Know Thyself: a Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1381.

<sup>157</sup> *Id*

exacerbates these tendencies, perhaps resulting in the emotional distress present throughout law school and for years thereafter.”<sup>158</sup>

In light of this analysis of lawyer’s disposition towards avoiding emotional consequences of their actions, it is not surprising that it is not normative in the community to ask about emotions or speak about them, nor to ask for help in situations which are emotionally difficult. Indeed, some of the other lawyers I interviewed who participated in Lawyers’ Committee mentoring program reported that no communication regarding PTSD and vicarious trauma took place.

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<sup>158</sup> *Id*

# Chapter 5: Conclusions

The interviews I conducted with the Bay Area asylum lawyers who participated in my research lead me to three conclusions. First, The lawyers I interviewed were not trained to deal with any of the implications of PTSD – not with the effect it might have on their relationship with their clients, not with the effects it might have on their client’s ability to narrate their story during the asylum interview, and not with respect to the impact it might have on them. Lawyers are struggling to understand and define their role in the representation, seeking a balance between compassion and legal roles. Second, lawyers engage in different levels of avoidance in order to handle the traumatic story of their clients, a strategy that is problematic for the client in all of its forms. Third, lawyers do not have emotionally supportive environment to assist them in handling their client’s and their own psychological challenges. In addition, lawyers did not utilize existing mentoring mechanisms such as the mentoring system of Lawyer’s Committee in order to seek advice regarding psychological difficulties, not even when the difficulties were those of their clients.

## ***1. The Need for Training***

The interviews I conducted reveals that Bay Area asylum lawyers were not trained to do any of the roles I described earlier in this work. In addition, the lawyers I interviewed were (mostly) unaware of any of these roles. Lack of training on PTSD and its applicability to the preparation of asylum claims caused lawyers to take protective measures which could not protect them and were not beneficial (at best) for their clients, ranging from avoidance within representation to avoidance of representation.

An analysis of training materials for asylum lawyers supports the conclusion I reached from the interviews, i.e., that lawyers are not trained to handle any of the psycholegal soft spots I

identified earlier. On September 20-21, 2004 I attended an asylum training seminar held by Lawyers' Committee for Human Rights in San Francisco. As a participant, I received the manual designed to accompany the seminar. The issue of clients' traumatic past experiences and their influence on the preparation of the case, on the ability of the client to testify, and on the attorney who handles the case were not addressed during the seminar. The same is true for the training manual that was provided.<sup>159</sup>

I also examined the training manual of Minnesota Advocates for Human Rights. This training manual addresses some of the psycholegal soft spots I identified, but it mainly mentions the possible manifestations of PTSD and does not provide any explanations which will normalize these behaviors in the lawyer's eyes, nor does it include any information on PTSD and on how to contend with its symptoms when they appear. In addition, it does not provide any information on the third psycholegal soft spot, i.e., vicarious trauma.<sup>160</sup>

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<sup>159</sup> Minnesota Manual at 21-22. In the manual there are two comments concerning these issues. Both are in the part entitled *The Volunteering Team: Preparing the Case (Practical Tips from Pro Bono Mentors Kirsten Schlenger and Kelly McCown; Volunteer Attorneys Jonathan Westen and Janice Strong; and Interpreter Volunteers Jennifer Stead and Dina Austin, 2003)*. The first comment is "save sensitive client issues for later meetings (after trust is established)." The second is "[T]alk to mentor about how to make your client as good a witness as possible (e.g., what if client shows no emotion or has trouble remembering, addressing inconsistencies)." *The Volunteering Team: Preparing the Case (Practical Tips from Pro Bono Mentors Kirsten Schlenger and Kelly McCown; Volunteer Attorneys Jonathan Westen and Janice Strong; and Interpreter Volunteers Jennifer Stead and Dina Austin, 2003)* 101. These two comments hide more than they reveal. It is not clear what sort of sensitive issues might arise, how to save it for later, how to establish trust, or why it is necessary to "establish trust." The advice of talking to the mentor if the client has difficulty witnessing could be good but is mainly problematic: It is given in the context of preparing for the interview, i.e., in the stage of the claim which comes after the affidavit is fully constructed and has to be rehearsed. If the client has difficulties with narrating, this problem should be addressed at a much earlier stage otherwise the narrative might not include the details which might be the basis for the claim. Furthermore, from talking to lawyers who serve as mentors, they don't know much, if anything, about PTSD and its symptoms (such as the ones mentioned in the comment: "shows no emotion or has trouble remembering, addressing inconsistencies"). Surely they know not how to "transform" those symptoms. On the discursive level, this advice is problematic because the lack of explanation for such behavior on the client's part stresses the client's otherness – she is described as strange, yet no explanation is offered to "normalize" and "legitimize" or at least clarify the possible roots of her behaviors. These are the only comments in the 235 page long manual provided by the Lawyers' Committee.

<sup>160</sup> The manual does a good job of informing lawyers that their clients might suffer from PTSD: "a more difficult and surprisingly prevalent problem may be the presence of psychological barriers, which make case preparation and presentation difficult. A substantial percentage of Minnesota Advocates clients have been found to be suffering from Post Traumatic Stress Disorder (PTSD) or other psychiatric disturbances, as a result of what they have witnessed or suffered in their home country." Though it "warns" lawyers that many of their clients might suffer from PTSD, the manual does not provide any definition or explanation about the syndrome, nor does it

Lawyers should be trained for coping with traumatic narratives on different levels. As narrative facilitators, they should be advised on how to build the relationship with the client in a way which would induce trust, confidence, and openness on the client's part. For example, lawyers should be trained on how to identify when a client starts touching a traumatic experience and how to encourage clients to touch this issue despite her natural reluctance to discuss pain with a stranger. In addition, lawyers should be instructed about how to end a meeting, how far apart should the meetings be, etc.

Manuals for asylum lawyers should include instructions such as the following:

One of the important steps about gathering the information from the narrative is developing the ability to recognize when the patient is discussing a traumatic event. ....These are some cues to look for: *a) The Person's report may begin to be more fragmented and incoherent.* When the thoughts are fragmented or incoherent, you might have difficulties understanding what the person is trying to tell you about that time period. Sometimes a traumatic event might even be completely skipped or left out of the narration. However, oftentimes the patient will drop a subtle hint about the trauma while attempting to avoid it or having difficulty expressing it. For example, a patient might say: "Then, in 1998, the war came to our town. I lost my brother, we had to flee". If a patient gives this kind of vague description with missing details, you should always ask for more information. In this case, you might ask the patient if he/she personally witnessed how

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provide reference to professional materials about PTSD. Subsequently, it aims to identify some of the barriers PTSD might pose for working with the client: "From the lawyer's point of view, these problems may manifest themselves in a variety of ways. For example: The client may simply block out an entire traumatic event, or significant parts of one. The client may have witnessed or endured something that would clearly make him/her eligible for asylum but may be unable to testify about it in any credible fashion, or even remember it at all." This description, though accurate, is problematic in the context in which it appears, for the manual is silent on the point of how such barriers can and should be dealt with. While identifying the problem: clients might have difficulties to narrate, it does not offer that lawyers should function as narrative facilitators. In fact, it is not clear what the lawyer should do when encountering such difficulties – Should she withdraw from representation? Clients may experience avoidance, but the description portrays this behavior as unavoidable and disconnects it from the relationship with the attorney. Furthermore, the manual stresses the otherness of the trauma i.e., the unpredictable responses of traumatized people, instead of offering a way to prevent this from occurring. The same problematic attitude is expressed in the following paragraph: "The client may display inappropriate behavior or affect while talking about things that happened to him/her. The most obvious and best-known example is the tendency of many people to relate horrifying events in a flat, seemingly emotionless voice;" This phenomenon, as I mentioned earlier, brings asylum officers and asylum lawyers to doubt the credibility of asylum seekers. Thus, more elaboration with respect to it is needed. For example, if the lawyer wants to help the client overcome this barrier to credible impressions she should be more inclined to use the preparation process in a therapeutic way, which will enable the client to process her traumatic experience, thus enabling her to story it with "appropriate" emotional response.

his/her brother was dying or if there were moments at that time when his/her own life was in danger.<sup>161</sup>

This kind of detailed suggestion regarding how to overcome clients' psychological barriers, as well as suggestions regarding how to end a session, how to schedule a new session, and in what ways the lawyer should intervene in the narration in order to facilitate it can prevent the occurrence of a negative experience. Lawyers must strive to avoid the following scenario which appears in the Minnesota Advocates for Human Rights Manual: "The client may be able to remember traumatic events and describe them to the attorney, but may find the experience so distasteful that s/he simply does not show up at the next appointment or resists efforts to go over the story again."<sup>162</sup>

To summarize, analysis of the lawyer's interviews and the materials used to train lawyers for doing asylum work lead to the same conclusion I reached from the interviews: lawyers are not trained to act as narrative facilitator, cultural translator or acculturation agents. Some creative lawyers with good instincts have awareness of some of the cultural and traumatic impediments faced by their clients, but most lawyers are completely unformed and are not working in the direction of finding ways for their clients to overcome these impediments. In some of the cases the lawyers themselves doubt their clients because of their otherness – a position from which none of the roles I described can be filled. My conclusions are that lawyers need to be trained for working with traumatized people. Asylum officers receive information and training on PTSD, and lawyers, who should function as narrative facilitators, cultural translators and acculturation agents, need to receive elaborate training on the issue as well. Their training should include information about PTSD; The possible impact of PTSD on traumatized asylum seekers' capability to narrate their story and appear credible;

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<sup>161</sup> NET at 51.

<sup>162</sup> Minnesota Manual at 21.

The ways in which they can prevent the preparation of asylum claim from having a re-traumatizing effect on the client; The ways in which the legal work can be utilized to improve the client's psychological well-being; vicarious traumatization; burnout; how to treat vicarious trauma and burnout. In addition, lawyers should be trained to witness violence actively and compassionately. However, if we aim to avoid the severe consequence of lawyers withdrawing from the profession or from representation of asylum seekers due to vicarious traumatization, training will not suffice. It has to be complimented with a change in organizational and professional culture. Lawyers must have support systems, and emotional difficulties must be recognized to be an integral part of doing asylum work. Lawyers should not feel or be secluded because of their vicarious traumatization. It has to be recognized and treated within the workplace.

### ***3. The Need in Institutional Support System for Lawyers (Legitimizing Emotional Responses)***

Support systems for lawyers need to be established or utilized (in the case of an existing mentoring structure) for the purpose of coping with psycholegal soft spots. It is important that support not be conditioned on a lawyer's willingness to ask for it but rather considered a necessity which stems from the professional demands. An argument might be made that the current lack of demand for emotional support represents a lack of need for it. These arguments can be refuted on different grounds. First, people tend to underestimate resources they never had access to. Second, lawyers have a natural tendency to underestimate the emotional dimension of their lives – thus they resort to maladaptive coping mechanism instead of to adaptive ones such as social and emotional support. Third, asylum seekers are negatively influenced when working with lawyers

who suffer from vicarious trauma and/or burnout. Thus, even if not for the lawyers' emotional well being, lawyers' psychological responses should be treated.

The problem of vicarious trauma is gaining acknowledgment from many human rights oriented institutions, including the International Criminal Court<sup>163</sup>, the U.N.<sup>164</sup> and non governmental organizations such as Human Rights Watch. These organizations take responsibility for the emotional well being of their workers, and because their workers are exposed to traumatizing narratives and sights, they provide them with support groups, self-help manuals, and most of all, recognition of the emotional difficulties embodied in their work. The most important aspect of this acknowledgment is the normalization and legitimization it gives to workers' reactions. As Lewis-Herman asserts, "just as no survivor can recover alone, no therapist can work with trauma alone."<sup>165</sup> The isolating nature of trauma can be reinforced by an environment which scorns workers' difficulties. It is vital that people who work with traumatized persons have a safe, structured support system which "offer[s] permission to express emotional reactions to the treatment of patients with history of trauma."<sup>166</sup>

To prevent deterrence of lawyers from the profession because of emotional difficulties and their consequences, methods for asylum lawyering which provide emotional support to lawyers both inside and outside the attorney-client relationship must be developed. In this paper I argue

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<sup>163</sup> As noted on the ICC's web site, "learning from the experience of the two ad hoc International Penal Tribunals, article 43 paragraph 6 of the Statute has foreseen that the Registrar shall set up a Victims and Witnesses Unit within the Registry. [...] The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence." Furthermore, "[t]he Victims and Witnesses Unit shall also be in charge of the negotiation of agreements with States concerning the resettlement on State territory of witnesses or victims that are traumatised or threatened." See Victims and Witnesses Protection available at <http://www.icc-cpi.int/witnessprotection.html>

<sup>164</sup> Staff Welfare Unit, UNHCR Head Quarters, *Managing the Stress of Humanitarian Emergencies* (2001) at [http://www.the-ecentre.net/resources/e\\_library/doc/managingStress.PDF](http://www.the-ecentre.net/resources/e_library/doc/managingStress.PDF). See also MISSION READINESS AND STRESS MANAGEMENT, United Nations Office of Human Resources Management New York, March 1995 at <http://www.un.org/Depts/OHRM/stress.htm>

<sup>165</sup> HERMAN at 141.

<sup>166</sup> *Id* at 151.

that current self-care tools offered to lawyers do not provide such tools and do not address the institutional failure in addressing these issues. I also suggest that self care need to be done (1) in the relationship with the client (active witnessing) and (2) in the framework of the workplace – there should be an organizational support system which will also serve to send a clear message: vicarious traumatization is not a private problem.

In suggesting that we need to take care of lawyers and create support mechanisms for them, I am not implying that equilibrium exists between the client's trauma and the lawyer's vicarious traumatization. Lawyer and human rights workers tend to belittle their emotional experiences as witnesses of violence. Weingarten argues that

While it is absolutely essential that we be capable of registering differences in scale ...it isn't useful to use that appreciation of the difference to trivialize our distress if it comes from a lesser cause. Critical judgments about whether or not we are "entitled" to feel distress make us less aware of our own common shock. The goal is to care about all kinds and degrees of suffering, mindful that they are not the same.<sup>167</sup>

The reason it is important to legitimize and recognize all distresses (among other means, by creating institutional mechanisms for treating it) is that, as Weingarten suggests, there are serious consequences to ignoring our experience of common shock.<sup>168</sup> People will not be able to act the way people did in Milgram's experiments (giving electric shocks to screaming people) if they allow themselves to compassionately witness other people's pain and to be aware of their own pain while doing so.<sup>169</sup> If our emotional edges are dull because we do not allow ourselves to feel pain when our experience does not involve extreme violence, we lose the ability to identify with suffering people. Kitty, for example, did not allow herself to feel pain when she heard her client's narrative because she had a preconceived scale of suffering and in her mind her client did not experience violence which was severe enough to induce empathy. In other words, her client's

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<sup>167</sup> WEINGARTEN at .14

<sup>168</sup> *Id* at 15.

<sup>169</sup> *Id* at 14-15.

suffering were not located on the extreme end of Kitty's inner "suffering scale", thus it did not "deserve" that she will feel pain while she hears it.

The question of whether professionals' vicarious trauma will be "destructive to the helper and to the therapeutic process depends, in large part, on the extent to which the therapist is able to engage in a parallel process to that of the survivor-client, the process of integrating and transforming these experiences of horror or violation."<sup>170</sup> I argue that the same variable will influence the impact of listening to trauma on lawyers and on the legal work. Thus, lawyers need emotional support system to accompany them in the challenging task of representing asylum seekers.

Law firms and legal NGOs are as far from providing support system for their lawyer workers as can possibly be. As demonstrated by the interviews I did and the training materials I reviewed, the current tendency is to expect people to deal with these "personal" issues by themselves. This norm is not an uncommon response to trauma – an attempt to silence and privatize it is all too prevalent. Unfortunately the little literature which deals with vicarious traumatization and burnout among lawyers suffers from the same attitude.<sup>171</sup> However, these emotional responses are NOT a private issue nor should they be ignored by the work place in which they were created. Thus, responsibility for self care should not only be part of lawyer's professional responsibility to their clients as Portnoy and Koh-Peters suggest, it should also be part of their organization's responsibility towards their clients, their impacted workers and all who are influenced by the working environment.

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<sup>170</sup> *Id*

<sup>171</sup> See STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (1999); Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 Wash. U. J. L. & Pol'y 17, 26; JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS §§ 6-1- 6-8 (2<sup>d</sup> ed. 2001).

Institutionalized support systems should be created for lawyers who engage in asylum work. The same efficient structures and networks which serve to provide legal support (e.g., staff meetings; mentoring programs such as the one operated by Lawyers' Committee for Human Rights; immigration bar association meetings) for the purpose of providing information about vicarious traumatization and for peer support. Caring for lawyer's emotional well being should be implemented by the heads of organizations and firms for the purpose of normalizing and legitimizing emotional and psychological reactions to trauma.

My second point is that we need to help lawyers (ourselves) to manage our reactions to our clients so we won't re-traumatize them, silence them or violate them. Thus as asylum lawyers we should strive to adopt a stance of compassionate active witnessing which can open a positive cycle of compassion in lawyer-clients relationships.<sup>172</sup>

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<sup>172</sup> WEINGERTEN

# Chapter 6: Applying Therapeutic Jurisprudence in the Field of Asylum Law

In this chapter I offer an application of therapeutic jurisprudence to asylum lawyering i.e., I offer a model for asylum lawyering which is therapeutically oriented. I open with reviewing the single article that has such application and my criticism of it. I then proceed by exploring different models of healing from trauma and the manner in which asylum lawyers who are interested in a therapeutically oriented practice can utilize these approaches to healing in their work with their asylum seeking client.

## *1. Existing Literature on Therapeutic Jurisprudence in the Context of Asylum Law*

Ingrid Loreen argues that therapeutic jurisprudence should be applied in the context of an asylum clinics.<sup>173</sup> However, Loreen warns that practicing therapeutic jurisprudence in the field of asylum lawyering exposes lawyers to a greater risk for vicarious traumatization than the current model of lawyering, under which empathy and consideration of feelings are absent.<sup>174</sup> This

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<sup>173</sup> Ingrid Loreen, *Therapeutic Jurisprudence and the Law School Asylum Clinic* (Forthcoming).

<sup>174</sup> Loreen widely cites Lynda Murdoch's paper *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies*, when attempting to apply therapeutic jurisprudence in the field of asylum lawyering. Alas, her understanding of Murdoch's argument is questionable. Murdoch argues that "[e]xploring emotional and psychological issues with another human being is an intimate contact, not typical in a legal practice."<sup>174</sup> Murdoch argues that because lawyers' work does not usually expose them to psychological issues and emotional narratives, adopting therapeutic jurisprudence, which advocates that lawyers explore such issues with their clients, exposes lawyers to certain risks. "The process of becoming more therapeutic in orientation also involves risk." She identifies four "potential pitfalls:" overidentification, not being able to manage the balance between empathy and professionalism, transference and countertransference, and secondary trauma.

As I established earlier, exploring emotional issues with clients is the core of asylum lawyering. Thus, it can be understood why Murdoch's argument, though correct in other contexts, does not apply to the context of asylum lawyering and should not have been adopted by Loreen in the manner it was. What Murdoch suggests is that engaging in therapeutic jurisprudence will expose lawyers to the kind of emotional content which asylum lawyers are exposed to whether they choose to or not. This exposure, she argues, involves an emotional risk which is the same emotional risks asylum lawyers are exposed to as it is (burnout and vicarious trauma). In other words, Murdoch errs when she assumes that psychological and emotional contents are not part of lawyers' work unless they choose to engage in therapeutic jurisprudence. She is right in identifying the impact of such contents on

argument demonstrates a sharp misunderstanding of trauma and vicarious traumatization. Loreen blunders in thinking that it is lawyers' care for their client's emotions and not the mere fact that lawyers are exposed to detailed stories of traumatic experience, which makes them vulnerable to vicarious traumatization. In fact, if anything, awareness to emotions might serve as a protective rather than hazardous practice with respect to vicarious traumatization, since, as mentioned previously,<sup>175</sup> the only way to treat vicarious trauma is by talking about it in an emotionally supportive environment. It is the lawyer who attempts to exclude her and her client's feelings from the framework of legal work who is in greater danger of vicarious traumatization as result of hearing traumatic narratives.

Loreen misses an extremely important aspect of therapeutic jurisprudence, namely that practicing it has a healing potential for the lawyer AS WELL AS the client. Acknowledging emotions does not put the lawyer at an emotional risk for the sake of the client's emotional well being but rather liberates both of them. Lawyers who listen to traumatic narratives are at risk of vicarious traumatization simply because of the exposure to trauma. It is only awareness to this risk, which is part of practicing therapeutic jurisprudence, that can protect the lawyer from vicarious trauma.

Another point is that if indeed, as Loreen argues, practicing therapeutic jurisprudence in the context of asylum lawyering jeopardizes lawyer's psychological and emotional well being, she should provide a good reason for lawyer to engage in this dangerous practice. If her argument is true the principle of Pareto-optimism is not being met when lawyers practice therapeutic jurisprudence and lawyers are to be convinced to "work against themselves". An argument which can convince them to do that is not provided by her.

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lawyers. Loreen errs in understanding Mardoch to argue that engaging in therapeutic jurisprudence exposes lawyers to emotional risks, not acknowledging what it is about that approach which brings the risk.

<sup>175</sup> See *infra* chapter 2 section 4

Third, while Loreen brings her personal experience with representing *an* asylum seeker, her paper falls short providing any original contribution to the field. She does not make contextual adjustments of therapeutic jurisprudence in the field of asylum law. While creating a synthesis between some articles in the field of therapeutic jurisprudence, she offers no novelty in her argument.

## ***2. Therapeutically Oriented Asylum Lawyering***

The focus of this work is on the potentially salutogenic (health creating) aspects of asylum work. Acknowledging, as I do, the potential danger of that work is important, but understanding its healing potential is even more important. If lawyers will be oriented to the healing elements, the client's psychological well being can improve, and the barriers posed by PTSD to a successful asylum claim will diminish.

The main concern regarding this therapeutic approach to law, which was voiced by lawyers I interviewed and will probably be joined by others, is that lawyers are not therapists. Factually speaking this assertion is certainly correct and is somewhat tautological in nature. The more important question in my view are those that deal with the distinction: What makes the difference between lawyers and therapists?

True, lawyers lack training and knowledge regarding psychological issues but at the end of the day, therapeutic relationships are about empathic listening and willingness to contain. There is nothing inherent in psychologists which enables them alone to heal people and which lawyers lack. Lawyers are not therapists but ignoring the psychological dimensions of the client's case might interfere with the lawyer's ability to represent her since the client will lose trust in the lawyer.<sup>176</sup>

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<sup>176</sup> Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 32 (Stolle et al. eds. 2000). ("A sense that a lawyer lacks empathy may diminish client trust and

In addition, there is an element of denial in ignoring the psychological aspects of the legal work. “Lawyers are not analysts and clients are not in the law office for analysis. But people who come to law offices are troubled, and the lawyers who talk to them – whether they admit it or not – are also troubled”<sup>177</sup> For that reason, “[a]lthough lawyers are not clinicians, they can learn much from how clinicians deal with patients in similar circumstances”.<sup>178</sup> In the context of asylum lawyering, it is even more important that lawyers will assume a therapeutic role because of the circumstances of the asylum seeking clients. As noted by the lawyers I interviewed, asylum seekers have neither the financial ability nor the cultural inclination to seek the assistance of mental health professionals.<sup>179</sup>

Furthermore, even those asylum seekers who will turn to psychological care in the hosting country will not necessarily benefit from it. Cultural differences and language barriers often lead to misdiagnosis and (culturally) inappropriate treatment methods<sup>180</sup> While there is a need to improve the treatment available for PTSD in refugees, “the longer-term fortune of most asylum-seekers will depend on what happens in their social rather than their mental worlds.”<sup>181</sup> The lawyer is part of

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confidence, with possibly negative effects on the attorney – client relationship and its ability to achieve positive client outcomes.”)

<sup>177</sup> Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 395 (Stolle et al. eds. 2000)

<sup>178</sup> Bruce J. Winick, Client Denial and Resistance in the Advanced Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 335 (Stolle et al. eds. 2000)

<sup>179</sup> Many asylum lawyers know that even though theoretically the ideal solution is for their client to process the traumatic events prior to or during the preparation of the asylum claim (i.e., within a year from their arrival), this solution is often not feasible. For some it is culture that retards or prevent the healing process. Andrea, one of the lawyers, describes her experience as follows: “I have referred people over the year to psychologists but because of their cultures they wouldn’t go. I always try to at least give them the number and say ‘look I know culturally this is difficult but they might help you out’. But maybe I am wrong – I don’t know. There are cultural difference which gets in the way particularly in case of sexual abuse.” For some it is money that prevents them from obtaining help. Mike told me: “When I get clients that I think were traumatized I go through the process and encourage them to go to a psychiatrist to help them through the process and stabilize the situation a little bit. The real difficulty is that most of them can’t afford to pay and that makes it very difficult to get them the kind of help that they need. They definitely don’t have insurance.”

<sup>180</sup> Steve Maddern, *Post-traumatic Stress Disorder in Asylum Seekers*, 18 Nursing Standard, 14, 37.

<sup>181</sup> *Id*

the client's social world and the need to help the client cope with her trauma is necessary for the success of the legal claim.

In addition, the lawyer has most of the tools necessary for assisting the asylum seeker. Narrative Exposure Therapy (NET) – An effective method for treating PTSD, resembles the process of preparing an asylum claim. Part of the process in NET “is similar to that of creating a legal testimony. The logic of this part follows the testimony therapy procedure.”<sup>182</sup> Testimony therapy, effective treatment for trauma developed in Chile, is rooted in the work done by lawyers in Chile who documented human rights violations after Pinochet's regime ended.

There are different approaches to what can facilitate healing from PTSD. In this chapter I review several theories of recovery. I offer ways in which each theory/model can be applied to the work done by asylum lawyers and their clients. The application is twofold: (1) identifying the manner in which recovery and the legal work coincide (2) suggesting ways in which legal work can be attuned to better serve therapeutic goals.

### ***A. Application of Lewis Herman's Model of Recovery to the Asylum Field***

Lewis Herman's model of recovery is comprised of three stages. The first stage is establishment of safety. The second stage is remembrance and mourning. The third stage is reconnection with life.<sup>183</sup> Although Lewis Herman identifies three stages, she discourages any attempt to enforce a linear, well-constructed model on the turbulent and oscillating process of recovering from traumatic experiences. The three stages are instead a loose framework. There should be in every process of recovery a shift from sense of erratic danger toward a sense of safety, from dissociation to an integrative, acknowledged memory, and from a sense of isolation and disconnection to a sense of connectedness with other human beings. In this essay I argue that the work done by asylum lawyers and their client might have positive and negative impacts on the

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<sup>182</sup> NET at 3.

<sup>183</sup> HERMAN at 155.

Lewis Herman's first stage of recovery, but that those impacts coincides with Lewis Herman's second stage of recovery.

### *1. The First Stage of Recovery*

#### **a. Establishing Safety**

In Lewis Herman's model establishing safety is the first and most important stage of recovery.<sup>184</sup> She focuses on the traumatized person's feeling that her body is not a safe place, a place (i.e., a place she cannot control), and on the traumatized person's feeling that the world is not a safe place because other people are dangerous. Thus, to Lewis Herman establishing safety means recovering the traumatized person's sense of control over her body and mobilizing the survivor's support system to recover trust in people.

In the case of asylum seekers, a sense of safety cannot be gained until they receive legal status because that will prevent the government of the hosting country from deporting them to their home country to face death or torture.<sup>185</sup> Thus, according to Lewis Herman's model, the fact that asylum seekers have to narrate their traumatic experiences in order to gain safety is problematic and dangerous for their psychological well being. In other words, the legal process is built in a way that does not take the client's emotional well being into account.

#### **b. Recovering Trust Through the Survivor's Support System**

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<sup>184</sup> *Id* at 160.

<sup>185</sup> Durst at 152. ("A Middle Eastern woman speaks of not sleeping through the night once during the nine months she spent in a transit country, saying "I was always afraid someone would come and knock on the door and take my husband and my son. Years may pass before the dread is controllable and, for some, that control never returns. This is life in the space of terror. Power can force entry any time and no boundaries are safe.") Karunakara similarly notes that "[n]o matter where refugees or internally displaced people flee to after war and persecution, most exiles are not safe or accommodating." *See* NET at 7

Asylum seekers experience the isolation embodied in trauma in an acute manner because they are disconnected not only secluded by the trauma<sup>186</sup> but also disconnected from their home and community.<sup>187</sup> An asylum seeker's sense of alienation and isolation can be reinforced by the foreignness of the hosting society (e.g., industrialization and urbanization) and its culture.<sup>188</sup>

The dual isolation – literal and symbolic – of traumatized asylum seekers gives a special meaning to the relationship between her and her attorney, for the attorney, although naturally a part of the persons' ancillary support system, carries emotional significance in this context. The lawyer is the person who can help the asylum seeker gain safety. Because the lawyer shares the story of the asylum seeker's trauma and serves as a social agent to the foreign culture in which the asylum seeker finds herself. Building a positive, trusting, supportive relationship with the lawyer can be an important step towards healing because it can assist in recovering the traumatized client's distrust in people and make her feel she is not completely isolated in her new environment. An important part of safety is the existence of social support, and the lawyer can be a provider of such support. It is important, however, that the lawyer not make promises she cannot keep. In addition, the lawyer must be completely honest and direct about the things she can provide. The client is in the process of recovering her ability to trust people and disappointment from the lawyer could be detrimental. Thus, for example, the lawyer must be realistic and explain to the client that she cannot promise her the immigration status she seeks, though she will do all that is in her power to help the client gain it.

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<sup>186</sup> For many asylum seekers migration “involves separation from their previous social world, from family, community and culture. [...] Many political asylees are socially isolated. They do not join their ethnic community because of factionalism within the community or an ongoing fear of reprisal by agents of repressive regimes.”

<sup>187</sup> NET at 1. (“loneliness and social isolation are recurring themes among survivors. Unable to talk about the horrors of the past, unable to even comprehend “this other side, this crazy side” in oneself, the feeling become a part of and seem to control the behavior of the new and altered person.”)

<sup>188</sup> Judith Landau-Stanton, *Issues and Methods of Treatment for Families in Cultural Transition*, in THE SOCIAL AND POLITICAL CONTEXTS OF FAMILY THERAPY 257 (Mirkin ed., 1999) (“[m]igrants are prepared for the conformation with a new language but are rarely aware of the enormous adjustments that are necessary in their daily living.”)

## 2. *The Second Stage of Recovery*

The second stage of recovery, which according to Lewis Herman must begin only after the survivor established her safety, is narrating the trauma.<sup>189</sup> Clearly, the asylum procedure is not built in a manner which aims to promote asylum seekers' psychological well being, for the process requires the client to tell her story over and over again not only before she can gain safety but as a condition for gaining it. Given this unhealthy legal framework, the longer the lawyer invests in creating a trusting, stable relationship with the client prior to asking her about her traumatic past, the more she counteracts and softens the dangerous move to processing the trauma without a sense of safety or a support system.

Narration of the trauma, framed by Lewis Herman as remembrance, is at the heart of the preparation of a political asylum claim. This stage in healing involves storying the trauma in depth and breadth.<sup>190</sup> Traumatic memory is depicted as “prenarrative”—a series of still snapshots by different observers.<sup>191</sup> Accordingly, “[t]he survivor’s initial account of the event may be repetitious, stereotyped, and emotionless.”<sup>192</sup> The narration transforms the non-verbal static traumatic memory into a normal, verbal, dynamic memory.<sup>193</sup>

Narrating the traumatic experience prematurely can result in “a fruitless and damaging reliving of the trauma.”<sup>194</sup> Unfortunately, Lewis Herman advises that “[a]ctive uncovering work should not be undertaken at times when immediate life crises claim the patient’s attention or when other important goals take priority.”<sup>195</sup> As mentioned above, the legal process’ disregard of the applicant’s emotional well being prevents a situation in which such emotional availability to processing the trauma will be feasible for the asylum applicant. However, the lawyer in the asylum

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<sup>189</sup> HERMAN at 150.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 175.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 176

<sup>195</sup> *Id.*

process is situated in a unique position. While the lawyer cannot provide the client with the ultimate source of empowerment, i.e., the ability to choose if she wants to confront her horrors, when, and to what extent, the lawyer can mitigate the damage involved. The lawyer should prepare the client in advance that the work they will be doing can be emotionally difficult. “The patient should also expect that she will not be able to function at the highest level of her ability, or even at her usual level, during this time. Reconstructing the trauma is an ambitious work. It requires some slaking of ordinary life demands, some “tolerance for the state of being ill.””<sup>196</sup> Subsequently, when the client story her trauma, the lawyer can try to provide a limited amount of control for the client by telling her to take her time when storying, take as many breaks as she needs and stop the session if she wants.

### ***B. Application of Liberation Psychology to Asylum Lawyering***

Liberation psychology’s application in the trauma field focuses on the power of narratives to heal traumatized people while contributing to the healing of their community. Since the asylum application process concentrates on production of the asylum seeker’s traumatic narrative while locating it in the socio-political context in which it occurred, I find this theory to be especially appealing for the therapeutically oriented lawyer.

The Latin American Liberation Psychology (PSL)<sup>197</sup> movement is part of a broader intellectual and political movement which emerged in Latin America during the 1960s and 1970s. The movement’s underlying philosophy is that there is a need to re-think and re-construct certain disciplines (psychology included) “from the perspective of the poor, the excluded, marginalised [sic], or oppressed, and through engagement and solidarity with them.”<sup>198</sup> Liberation philosophy

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<sup>196</sup> *Id.*

<sup>197</sup> *Psicologia Social de la Liberacion*

<sup>198</sup> Mark Burton, *Liberation Psychology: Learning From Latin America*, available at <http://homepages.poptel.org.uk/mark.burton/PSLarticle.pdf>

does not consider liberation to be an action locked in time, nor is it something that is given to people. Liberation is a movement, a dynamic process, resulting from the interaction between two agents: (1) an external catalyst and (2) the oppressed groups themselves.<sup>199</sup> This cooperation is the result of a call from self-aware victims of oppression and exclusion to “those with ethical conscience within the system.”<sup>200</sup> Together, the victims and those in the system will work on the project of liberation: identifying and rejecting societal wrongs and on constructing alternative social reality.<sup>201</sup> [U]ltimately this entails the liberation of the oppressor too.<sup>202</sup> PSL’s commitment to liberation, and the moral stance it espouses in relation to liberation, differentiates it from other streams of psychological thought, such as ‘critical psychology’.<sup>203</sup>

The three areas in which PSL is applied are community social psychology, social analysis, and work with victims of state oppression. For the purpose of my paper I will focus on the third category. The work of ILAS (Instituto Latinoamericano de Salud Mental y Derechos Humanos), an NGO working with survivors of Pinoche’s regime in Chile, is an example of an application of PSL to victims of state oppression. ILAS emphasizes making “suffering a social, shared, thing, rather than secret distress, and on again taking up active social roles,”<sup>204</sup> an approach Agger and Buus Jensen coined “de-privatization”.<sup>205</sup> Testimony Therapy is a therapeutic model which is highly socially and societally oriented. Some of the following objectives of ILAS demonstrate this commitment: “linking of the traumatic experience to existential meaning in the life of the person, regarding of role as social being, restructuring of the (person’s) existential project: continuity between past, present and future, regarding of collective ties.”<sup>206</sup> The origins of the contextualized approach to recovery which appears in the works of Lewis Herman, Landsman and Neimeyer and

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<sup>199</sup> *Id* at 9.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id* at 10.

<sup>204</sup> *Id* at 14.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

his colleagues, can be traced in the work of Lira and Weinstein, which, perhaps because it was never translated to English, was not acknowledged in their writings. As mentioned above, this approach highlights the therapeutic potential of preparing an asylum claim, which is all about contextualizing and framing past persecution within an asylum seeker's life and society.

Lira and Weinstein also emphasise [sic] the need of the therapist to be able to interpret experiences sociopolitically, in order that the affected person can in answering the questions 'why torture? and why me?' discover the rationality in a situation so often characterized by arbitrariness and confusion.<sup>207</sup>

This is a crucial point in the context of my work, for offering a sociopolitical interpretation to the asylum seeker's story of past persecution is exactly what the lawyer does in the framework of the brief she writes in support of her client's claim. In fact, in offering such an interpretation lawyers might have an advantage over therapists, since the essence of legal work is taking people's narratives and translating them/organizing them in legal categories. Indeed, testimony therapy was developed because Lira and Weinstein noticed the healing effect of testimonies which were collected by lawyers in Chile for the purpose of documenting violation in preparation for legal actions against perpetrators.

In the context of asylum law, what the law requires is that the person's experience be organized under a certain sociopolitical category. In addition, there is an overlap between the questions asked by the tormented asylum seeker (e.g., 'why me?') and the hosting society and in answering the hosting society's question in a manner grounded in the politics and history of the asylum seeker's country. As a result of the process the asylum seeker's quest can be rewarded.

### ***C. Application of Narrative Exposure Therapy to Asylum Lawyering***

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<sup>207</sup> *Id* at 15.

Narrative Exposure Therapy is a method for treating people with PTSD which, like liberation psychology, focuses on the power of speech in healing. For that reason, and because of the great similarity between this method and the work done by asylum lawyers and their client in preparation of their claim, I find this approach useful for the therapeutically oriented asylum lawyer.

VIVO, an NGO based in Italy and Germany, which gather professionals in fields such as psychotraumatology, international health, humanitarian aid, and human rights advocacy, “works to overcome and prevent traumatic stress and its consequences within the individual as well as the community, safeguarding the rights and dignity of people affected by violence and conflict.”<sup>208</sup>

VIVO developed Narrative Exposure Therapy (NET), which is an intervention for reduction of PTSD symptoms “in survivors of organized violence, torture, war, rape, civil trauma, and childhood abuse.”<sup>209</sup> As suggested by its name, NET focuses on narratives – the testimony of traumatic persecution “NET is a form of exposure that encourages traumatized survivors to tell their detailed life history chronologically to a skilled counselor or psychotherapist who will record it, read it back, and assist the survivor with the task of integrating fragmented traumatic memories into a coherent narrative.”<sup>210</sup>

The treatment was “developed for refugees from diverse backgrounds who live in unsafe conditions.”<sup>211</sup> Advocates of NET reject Lewis Herman’s hierarchy which places safety as a condition for psychological healing and argue that “treatment for psychological problems cannot be addressed as long as the basic need of nutrition and safety are pressing, our investigation show

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<sup>208</sup> VIVO foundation homepage, *available at* <http://www.vivofoundation.net/>

<sup>209</sup> NET at 3. See also Narrative Exposure Therapy – NET Vivo's Treatment Approach *available at* [http://www.vivofoundation.net/eng\\_narrative\\_exposure\\_therapy.php](http://www.vivofoundation.net/eng_narrative_exposure_therapy.php)

<sup>210</sup> NET at 3.

<sup>211</sup> *Id.*

that survivors see their mental health as having the highest priority and that mental functioning is the prerequisite for self-efficacy and meeting one's basic needs."<sup>212</sup>

Application of this approach to the asylum field results in the understanding that preparation of the asylum application, if the lawyer is conscience of and aims towards therapeutic goals, can improve asylum seeker's psychological well being while also helping them gain legal stability. Both achievement are necessary for facilitating a new beginning.

Based on Testimony Therapy, NET shares Liberation Psychology's commitment to political activism. Thus, "narrative exposure serves not only therapeutic purposes but also a social and political agenda."<sup>213</sup> The narrative process creates a documentation of human rights violations which can be used, if the patient so chooses, for prosecuting the perpetrators. "[T]he core intention of creating NET has been to form a method of psychological treatment that will simultaneously heal while directly contributing to the fight against torture and persecution."<sup>214</sup>

Conscience of dilemmas pertaining to cross-cultural work, VIVO experimented with its method, which is Latin American in origin, in a refugee camp in Africa, so as to examine its applicability to African survivors of political violence. VIVO report that its "first controlled study in Uganda demonstrated both, the applicability and the efficacy of Narrative Exposure Therapy (NET) under the harsh conditions of an African refugee settlement."<sup>215</sup> In their work with refugees who survived political violence, Agger and Soren Jensen too noticed "the universality of testimony as a ritual of healing."<sup>216</sup> The cross-cultural success of this methodology is important for my argument because of the diverse cultural background of asylum seekers who look for refuge in the U.S. A culture-specific benefit from giving testimony will be problematic if incorporated into a model of lawyering which aims at a population of lawyers who work with diverse clients.

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<sup>212</sup> *Id* at 23.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> HERMAN at 181.

A positive element which can be built into the preparation of the asylum claim is that the work of reconstructing the trauma has to begin with a review of the patient's life prior to the trauma. The traumatized client will often have difficulties placing her persecution, or at least traumatic parts of it, in the context of her own life.<sup>217</sup> Since both the application form and the affidavit should include details about the asylum seeker's past,<sup>218</sup> starting the work by filling the biographical details section in the application form and asking the client general questions about her past, where she came from, her family, and so on, is a good starting point for the task of contextualizing her traumatic narrative within her life story. This stage is important for pure legal concerns as well, since the more the lawyer understands the client's life – the set of beliefs and connections which defined her life prior to the event(s) which made her flee her country – the better the lawyer will be able to construct the case's theory.<sup>219</sup>

This stage of the preparation work, dictated by the asylum procedure, is similar to the first step of NET. The typical narrative/testimony of a refugee treated with NET begins with the refugee's "personal background and individual history prior to the first traumatic event or persecution."<sup>220</sup> This first stage forms the foundation of the process and enables the client and the lawyer to generate good rapport.<sup>221</sup> The same is true in the context of asylum lawyering. The initial stages of collecting data about the asylum seeker's past can be utilized for the purpose of creating a connection and building trust – tools necessary for the lawyer's role as narrative facilitator.

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<sup>217</sup> NET at 25. ("the survivor often cannot report the related experience in a consistent, chronological order and thus this person has no explicit link between the various events, life experiences, and the context within which the events occurred.")

<sup>218</sup> Application for Asylum and Withholding of Removal *available at* <http://uscis.gov/graphics/formsfee/forms/files/i-589.pdf>

<sup>219</sup> See source cited at *supra* note 120

<sup>220</sup> NET at 26.

<sup>221</sup> *Id.* ("[t]he first [stage], a pre-trauma period of the therapy may be used as the time during which a foundation for the process is being laid and good rapport between therapist and patient is established.")

#### ***D. Application of Theories of Meaningfulness to Asylum Lawyering***

Some theories of coping with traumatic events stress the importance of creating meaningful interpretation of the event as means for healing. Landsman suggests that after experiencing a traumatic event, survivors face the challenge of understanding it: what happened and how.<sup>222</sup> This stage of acquiring cognitive mastery over the event is necessary for the subsequent stage of contextualizing the event in the survivor's life.<sup>223</sup> Creating the account also contributes to the survivor's sense of safety and control which are essential for adjustment.<sup>224</sup> The asylum claim is constructed in a way which requires the client to provide a detailed description of the traumatic event she experienced. Thus, the process of writing the affidavit is in fact identical to acquiring cognitive mastery over the traumatic event. If the lawyer will avoid practices that potentially reduces the client's sense of mastery (such as over stressing her professionalism and the client's marginality in the process), this stage has a strong healing potential.

After discussing the client's life prior to the traumatic event, the lawyer will work with the client on turning the frozen traumatic memory into a verbal narrative. "Out of the fragmented components of frozen imagery and sensation, patient and therapist slowly reassemble an organized, detailed, verbal account, oriented in time and historical context."<sup>225</sup> In the case of asylum seekers, the account should be oriented in place as well as in time, and by place I mainly mean in culture.<sup>226</sup>

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<sup>222</sup> Irene Smith Landsman, *Crises of Meaning in Trauma and Loss* in LOSS OF THE ASSUMPTIVE WORLD, A THEORY OF TRAUMATIC LOSS, 13-30, 15 (Jeffrey Kaufman Ed., 2002).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* ("as a starting point in placing the experience of major loss in the context of one's life, it seems necessary to create a basic narrative that includes some plausible casual explanation, and provides an explanation that does not leave important questions unanswered.")

<sup>225</sup> HERMAN at 177

<sup>226</sup> Forester writes that in the context of representing Haitian asylum seekers, "[a]mong the many obstacles (e.g., cultural shock, failor to use phrase-by-phrase interpretation, fear of you as an authority figure, fear of your interpretor as a possible Haitian spy, etc.) to obtaining the full story from your client, which is necessary for a well-developed claim, one instrumountable obstacle is your own ignorance of the historical and social context of Haitian political events over the last decase, an obstacle which you must overcome by learning about it before you ever sit down with your client." *See* Forester at 351.

The importance of contextualizing the clients' narrative in time (history) and place (culture) is beneficial on two levels. First, it facilitates the client's healing by pointing out the meaningfulness of her traumatic experiences, i.e., persecution. Second, it is required in order to make the client's story intelligible for the adjudicating body. As these points are highly important, I will elaborate on each.

Landsman describes the second step of healing as "scheme and illusion."<sup>227</sup> "When we experience events that don't fit our schemes, violate our assumptions, or shatter our illusions, we experience a crisis in meaning."<sup>228</sup> In our context, this is true for the client *and* the lawyer, since both experience, directly or vicariously, an event that shatters their perceptions of the world (as a safe, just place organized by a clear reward and punishment system).<sup>229</sup> The penetration of disturbing information requires reorganization of one's assumptive world, by means of assimilation or accommodation.<sup>230</sup> "Either an event must be interpreted and explained in such a way as to fit our schemas, which is a difficult and painful task, or our schemas must be altered, an even more daunting task."<sup>231</sup>

The political asylum system offers much help in that stage. It has already several identified bases for persecution, and the client and her lawyer must organize the client's experience into one of these categories. By so doing, the lawyer and her client in-fact interpret the traumatic event in a way that fits into already established schemas (i.e., they engage in assimilation). They build an interpretational framework, in which the traumatic event was not random but rather the result of one's political affiliation, religious affiliation, family affiliation, gender, and/or ethnic affiliation. This also situates the traumatic event in the context of the client's life and helps in the creation of meaningfulness.

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<sup>227</sup> <sup>227</sup> See source cited at *supra* note 231 at 18

<sup>228</sup> *Id*

<sup>229</sup> See Appendix for data from the interviews regarding the lawyers' assumptive world

<sup>230</sup> *Id*

<sup>231</sup> *Id*

Contextualizing the client's story also provides an answer to a question often asked by trauma survivors: 'why me.' The immigration authorities ask the same question: why you? Providing an answer which situates the client in the context of her history – the history of her country and of her family – eliminates the arbitrary element which makes the world a scarier place to live in. As noted by Lewis Herman, "[t]he arbitrary, random quality of her fate defies the basic human faith in a just or even predictable world order. In order to develop a full understanding of the trauma story, the survivor must examine the moral questions of guilt and responsibility and reconstruct a system of belief that makes sense of her undeserved suffering."<sup>232</sup>

### ***E. Application of Communitarian Approach to healing in Asylum Lawyering***

As I argued above, making the asylum seeker's story intelligible to the receiving community has a problematic aspect of cultural oppression, but it can also have a healing aspect according to communitarian approaches to healing from trauma. Neimeyer and his colleagues' discussion of narrative construction of identity might be insightful in this context.<sup>233</sup> They argue that "[a]s a social as well as personal action, storying one's experience also entails (1) learning to attribute meaning in terms intelligible to one's community, and (2) positioning oneself (or, sometimes, being positioned) in the context of such accounts."<sup>234</sup> Applying this argument to the context of asylum lawyering positions the lawyer in the role of an acculturation agent who assists the asylum seeker in assimilating into the receiving society by offering her frames of meaning to her story which are intelligible to her new society. In other words, according to a communitarian narrative approach to healing, the survivor needs to story her trauma to her community and receive acknowledgment from it in order to heal. The lawyer assists the asylum seeker to story her

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<sup>232</sup> HERMAN at 178.

<sup>233</sup> Robert A. Neimeyer et al., *The Meaning of Your Absence: Traumatic Loss and Narrative Reconstruction*, in LOSS OF THE ASSUMPTIVE WORLD, A THEORY OF TRAUMATIC LOSS, 13-30 (Jeffrey Kaufman Ed. 2002).

<sup>234</sup> *Id* at 33.

experience to the representatives of the receiving society (i.e., asylum officer/immigration judge) in terms intelligible to their culture (i.e., their law) and thus facilitates her recovery.

The community has an important role in the healing of a victim from a traumatic event.<sup>235</sup> As Brison argues, victims of human-inflicted trauma are de-humanized and objectified by their tormentors. As a result, their sense of connection to humanity is impaired. They no longer believe that they can be themselves in relation to others nor in relation to themselves.<sup>236</sup> In defining “the self”, Brison adopts feminist positions which consider the self to exist in relation to others.<sup>237</sup> Because the self is relational, the re-construction of it subsequent a shattering event is also relational.

Perceptions of “the self as narrative” (a continuous set of memories) stress the importance of constructing the narrative of the traumatic event in order to recover the self (i.e. the continuous memory).<sup>238</sup> Integrated with perceptions of the relational-self, this approach emphasizes the importance of healing through narration of the trauma to understanding listeners (i.e. the community).<sup>239</sup> In the context of political asylum work, the lawyer is a representative of the community who is in a position to be an understanding listener and acknowledge the asylum seeker’s narrative. Moreover, the lawyer can assist the asylum seeker to construct her narrative and relate it to *the* representatives of the community – the asylum officer and the asylum judge – who are entrusted with the power to accept the client’s narrative (symbolically and materially) by accepting her into the community or to reject her narrative by excluding her from the community and deporting her to her home country.

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<sup>235</sup> *Id* at 15-32.

<sup>236</sup> *Id* at 14.

<sup>237</sup> *Id* at 14. (“[S]uch accounts view the self as related to and constructed by others in an ongoing way, not only because others continues to shape and define us throughout our lifetimes but also because our own sense of self is couched in descriptions whose meanings are social phenomena.”)

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

## **Chapter 7: Research Limitations and Further Research Plans**

The group of lawyers I interviewed was self-selected for the interviews which were voluntary, and is thus not a representative group in any manner. My plans for future expansion of this research also imply some of its current shortcomings.

This research is intended as part of a larger research project which will be conducted in the future. The larger project will include interviews with asylees from different cultures in order to develop a culturally sensitive response to culturally-based psychological needs. It will also include interviews with more asylum lawyers in order to detect gender-based differences in psychological needs, interviews with more creative lawyers to learn how psychologically sensitive attorneys deal creatively with the emotional challenges of asylum lawyering, interviews with psychologists who work with asylum seekers and asylum lawyers in order to gain the perspective of a psychologically sensitive outsider and interviews with interpreters who work with asylum seekers and asylum lawyers in order to get the perspective of an intimate outsider who enjoys a comparative perspective.