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## Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process through Adjudicators

Kate Aschenbrenner  
*Barry University School of Law*

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## RIPPLES AGAINST THE OTHER SHORE: THE IMPACT OF TRAUMA EXPOSURE ON THE IMMIGRATION PROCESS THROUGH ADJUDICATORS

Kate Aschenbrenner\*

*Immigration is currently a hot topic; discussion of immigration reform and the problems in our current system appear in the news virtually every day. There is widespread consensus that our current immigration system is “broken,” but there is little agreement on why and even less on what should be done to fix it. These are difficult and important questions, involving many complex interrelated factors. While I do not hope and cannot aim to answer them completely in this Article, I will argue that in doing so we must consider an often overlooked and generally understudied issue: the effects of trauma exposure in our immigration process and specifically on our immigration adjudicators, that is, immigration judges, Board of Immigration Appeals members, and United States Citizenship and Immigration Services officers.*

*Despite the little attention paid to the effects of trauma exposure, this is a topic of great importance. If our goal is to have an immigration system that not only operates fairly and efficiently but also has a positive effect on all participants—noncitizens, attorneys, adjudicators, and other officials, among them—we must consider the ways that our current system causes psychological harm to those involved. Evidence of this harm in our legal system is abundant. It can be seen in the stories of noncitizens caught up in our immigration process, in the high levels of distress suffered by attorneys and judges, in the criticism of immigration judges and other officials, and in the general dysfunction of our immigration system. At the same time, the causes for this harm are only infrequently discussed. This Article will highlight one cause of such harm: trauma exposure.*

*I have multiple goals for this Article. First, I want to continue the important work begun by the many others cited throughout the article of normalizing the discussion of the emotional dimension of lawyering and its impact in and on our legal system. Second, I want to highlight the very significant impact of a particular aspect of this emotional dimension, trauma, on the immigration process by exploring its effect on immigration adjudicators. Finally, I intend to set the stage for a future Article that*

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\* Assistant Professor of Law, Immigration Clinic, Barry University School of Law, Orlando, Florida; LLM with distinction, Georgetown University Law Center; J.D., cum laude, New York University School of Law; B.A., magna cum laude with honors, Knox College. I am particularly grateful to Beryl Blaustone, Paula Galowitz, Susan Hazeldean, and Catherine Klein for inspiring this article through our presentation on *Teaching Students to Manage Stress Effectively and Minimize Vicarious Trauma* at the 2012 American Association of Law Schools Conference on Clinical Legal Education. I would also like to thank Leticia Saucedo and the participants at the 2013 Emerging Immigration Law Scholars and Teachers Conference and Anjum Gupta for their helpful comments on earlier drafts and Alice Clapman, Jennifer Koh, and Rachel Settlage for their insights during the conceptual stages of this article.

*will consider reforms to the immigration system to better manage the impact of trauma exposure.*

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## INTRODUCTION

Immigration is currently a hot topic; discussion of immigration reform and the problems in our current system appear in the news virtually every day. There is widespread consensus that our current immigration system is “broken,” but there is little agreement on why and even less on what should be done to fix it. These are difficult and important questions, involving many complex interrelated factors. While I do not hope and cannot aim to answer them completely in this Article, I will argue that in doing so we must consider an often overlooked and generally understudied issue: the effects of trauma exposure in our immigration process and specifically on our immigration adjudicators; that is, immigration judges, Board of Immigration Appeals members, and United States Citizenship and Immigration Services officers.

Despite the little attention paid to the effects of trauma exposure, this is a topic of great importance. If our goal is to have an immigration system that not only operates fairly and efficiently but also has a positive effect on

all participants<sup>1</sup>—noncitizens,<sup>2</sup> attorneys, adjudicators, and other officials, among them—we must consider the ways that our current system causes psychological harm to those involved. Evidence of this harm in our legal system is abundant. It can be seen in the stories of noncitizens caught up in our immigration process, in the high levels of distress suffered by attorneys and judges, in the criticism of immigration judges and other officials, and in the general dysfunction of our immigration system. At the same time, the causes for this harm are only infrequently discussed. This Article will highlight one cause of such harm: trauma exposure.

I have multiple goals for this Article. First, I want to continue the important work begun by the many others cited throughout the article of normalizing the discussion of the emotional dimension of lawyering and its impact in and on our legal system.<sup>3</sup> Second, I want to highlight the very significant impact of a particular aspect of this emotional dimension, trauma, on the immigration process by exploring its effect on immigration adjudicators. Finally, I intend to set the stage for a future article that will consider reforms to the immigration system to better manage the impact of trauma exposure.

Part I of this Article first introduces the concepts of trauma and trauma exposure and discusses their effects generally. Part II then shifts to

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1. A similar approach is sometimes described as therapeutic jurisprudence: “Therapeutic Jurisprudence calls for an examination of the therapeutic and anti-therapeutic consequences of laws, legal systems and practices, with the goal of increasing psychological well-being, consistent with protecting legal rights.” Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 *CLINICAL L. REV.* 259, 293 (1999) [hereinafter Silver, *Love*] (citing David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 *PSYCHOL. PUBL. POL’Y & L.* 220, 228 (1995)); see also Lynda L. Murdoch, *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies*, 24 *SEATTLE U. L. REV.* 483, 484 (2000) (quoting Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 35 *CAL. W. L. REV.* 15, 17 (1997)) (describing therapeutic justice as “an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects”).

2. This Article will use the term noncitizen to refer to all those who are not citizens of the United States, regardless of their immigration status. The term noncitizen therefore includes, *inter alia*, legal permanent residents, refugees and asylees, nonimmigrant visa holders, individuals granted temporary protected status, individuals granted deferred action or some other form of prosecutorial discretion, and those who are undocumented, including those with removal orders. The commonly used term “alien,” like the terms “illegal alien,” “illegal immigrant,” and their various abbreviations, are unnecessarily dehumanizing, imprecise, and in many cases inaccurate. See, e.g., Jose Antonio Vargas, *Immigration Debate: The Problem with the Word Illegal*, *TIME* (Sept. 21, 2012), available at <http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/?iid=op-main-lede>.

3. Like many if not most attorneys, I am not a trained mental health professional. While I was far luckier than most in this regard, psychological and sociological topics still played only a secondary role in my legal education. My intent then, is not to provide new psychological insights, but rather to collect and translate the available information in a forum and language that will be accessible to attorneys.

focus on trauma exposure in the immigration system specifically: Part II.A explains the numerous ways in which noncitizens may experience trauma and Part II.B identifies immigration adjudicators that may be exposed to this trauma and how that contact occurs. Part II.B also considers various structural issues within the relevant agencies, the Executive Office for Immigration Review and the Department of Homeland Security, that may affect or be interrelated with the impact of trauma exposure. Finally, Part III explores evidence of just how such trauma exposure affects the immigration process and all participants in it, including identifying areas in which further study would be particularly beneficial. The Article concludes that exposure to trauma and the impact of that exposure on the immigration process is a significant aspect of the psychological harm to all participants caused by the immigration system. Continuing to overlook the impacts of this trauma exposure will be detrimental to the immigration adjudicators themselves, to other participants, and to the immigration system as a whole.

## I. TRAUMA AND TRAUMA EXPOSURE

Trauma and trauma exposure are not concepts that have broad-based understanding or use in the legal field. Even in the mental health context, where trauma is considered to be a more central idea, different experts use varying terminology and definitions. Before considering the impact of trauma exposure in the immigration process, then, it is important to be clear on what we are talking about. Part I.A considers existing definitions of trauma and problems with those definitions before reaching working language and definitions for purposes of this Article. The remainder of Part I expands on this understanding of trauma to set the stage for a discussion of trauma's impact in the immigration system. Part I.B explains the effects of trauma on those who are directly exposed. Part I.C explores how wide-ranging those effects are, that is, the extent to which trauma exposure impacts not only those who experience it first-hand but also those who experience it indirectly through their work with those exposed directly. This expanded understanding of trauma and trauma exposure will be used to frame the Article's discussion in subsequent sections of noncitizens' experiences of trauma and the impact of such experiences on those charged with adjudicating noncitizens' immigration cases.

### A. *What is Trauma?*

There is no comprehensive agreement on what constitutes trauma, or even on how to define the term. Basic dictionary definitions illustrate the complexity of the concept, defining trauma as both “a deeply distressing or disturbing experience” and an “emotional shock following a stressful event

or a physical injury, which may lead to long-term neurosis.”<sup>4</sup> The word trauma thus clearly has multiple components; it is used to refer to a negative event itself, to an individual’s experience of that event, and to the impact the event has on the individual.<sup>5</sup> This is sometimes referred to in shorthand as the “three Es” of trauma: event, experience, and effect.<sup>6</sup>

Diagnostic definitions also reflect differing conceptions of trauma, in particular with respect to how extreme an experience must be to qualify. The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders, the DSM-IV-TR, adopted a relatively narrow definition of trauma in the context of posttraumatic stress disorder (PTSD). The DSM-IV-TR defines trauma as the:

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.<sup>7</sup>

In the context of PTSD, the individual experiencing the trauma must also react with “intense fear, helplessness, or horror.”<sup>8</sup> Potentially traumatic events under this definition include “military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.”<sup>9</sup>

However, the prior version of the DSM, the DSM-III, more broadly defined what qualified as trauma, including threats to psychological integ-

4. *Definition of trauma in English*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/trauma> (last updated 2013).

5. Cf. JOHN BRIERE & CATHERINE SCOTT, *PRINCIPLES OF TRAUMA THERAPY: A GUIDE TO SYMPTOMS, EVALUATION AND TREATMENT 3* (2006) (“Often, *trauma* is used to refer both to negative events that produce distress and to the distress itself.”).

6. See *Trauma Definition: Part One: Defining Trauma*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, <http://www.samhsa.gov/traumajustice/traumadefinition/definition.aspx> (last updated Dec. 10, 2012).

7. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, at sec. 309.81 Posttraumatic Stress Disorder (4th ed., rev. 2000) [hereinafter DSM-IV-TR], available at <http://dsm.psychiatryonline.org/book.aspx?bookid=22>. The DSM-IV-TR is published by the American Psychiatric Association and is the standard classification of mental disorders used in the mental health field in the United States. For each classified disorder, the DSM-IV-TR contains a set of diagnostic criteria, which indicates which symptoms must and must not be present in order to make a diagnosis of that particular disorder.

8. *Id.*

9. *Id.*

rity in addition to life-threatening stressors in its definition.<sup>10</sup> In the DSM-IV, these less extreme threats would be included under the diagnosis of Adjustment Disorder.<sup>11</sup> Adjustment Disorder also includes threats to life that would otherwise qualify for a diagnosis of PTSD but where the individual does not exhibit the other symptoms necessary for a PTSD diagnosis.<sup>12</sup> Outside the formal diagnostic context, many professionals, at least in some contexts, do not limit trauma to serious threats to life but instead also include less extreme threats within the meaning of trauma.<sup>13</sup>

A second part of this question involves whether the magnitude of a threat should be judged by some outside standard or by the subjective experience of the individual affected. Jean Koh Peters, a clinical professor who has studied and written extensively on trauma exposure, explained this part of the issue as follows:

There are two widely accepted definitions of trauma. One is that someone has been confronted with or experienced a potentially dangerous situation that could lead to a grievous loss and feels helplessness and powerlessness. That is sometimes called the objective definition, which talks about the objective standard requiring an experience where death or grievous harm was involved and a sense of helplessness. The second definition, called the subjective definition, is where people say that the event that was confronted was non-normative, and the person felt subjectively overwhelmed by it. This type of trauma does not require serious harm or risk of death.<sup>14</sup>

An additional complicating factor in trying to define trauma involves its relationship to other environmental impacts such as stress. At its essence, stress is “a disrupted interaction between environmental demands on the

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10. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed., rev. 1987); BRIERE & SCOTT, *supra* note 5, at 4.

11. DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder.

12. *Id.* An individual can of course be exposed to trauma without developing either PTSD or an Adjustment Disorder. According to the DSM-IV-TR, studies have yielded variable findings but show that between one-third and one-half of individuals exposed to a specific traumatic incident develop PTSD. DSM-IV-TR, *supra*, note 7, at sec. 300.21. Likewise, up to fifty percent of individuals exposed to a certain stressor may develop some form of Adjustment Disorder. *Id.* at sec. 309.81 Posttraumatic Stress Disorder. These diagnoses are included here not to imply otherwise but solely for purposes of discussion of the definitions of trauma they employ.

13. See, e.g., BRIERE & SCOTT, *supra* note 5, at 4; LAURIE ANNE PEARLMAN & KAREN W. SAAKVITNE, TRAUMA AND THE THERAPIST: COUNTERTRANSFERENCE AND VICARIOUS TRAUMATIZATION IN PSYCHOTHERAPY WITH INCEST SURVIVORS 45 (1995); JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 456 (3d ed. 2007) [hereinafter KOH PETERS, REPRESENTING CHILDREN].

14. Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 853 (2004) [hereinafter Silver et al., *Stress*].

one hand, and the needs and skills of the individual on the other.”<sup>15</sup> That is, stress occurs under circumstances where an individual’s needs are not being met or where environmental demands are beyond the current skills of an individual to handle. Just as there is little agreement on what actually constitutes trauma, there is no consensus on how to differentiate trauma from stress.<sup>16</sup> Jean Koh Peters again explains this part of the debate:

Some suggest that stress is the large category of which trauma is one extreme subset. This camp suggests that “stress and trauma are not two independent concepts, but rather two overlapping concepts; stress has a much broader meaning.” Others suggest that stress and trauma are on a continuum but are distinct in kind.<sup>17</sup>

The same question of relationship can be raised for other related psychological phenomena, including burnout, anxiety, and depression. This is a particularly difficult question; given our current knowledge of trauma, stress, and these other phenomena, it may not be possible to answer it definitively and comprehensively. We do know that exposure to non-traumatic stressors may make an individual more vulnerable to the effects of trauma and vice versa.<sup>18</sup> Furthermore, it is important to recognize that all of these possible descriptions of these relationships share a common identifying factor: they are fuzzy at the boundaries. It is not possible to pinpoint with any kind of precision just where the effects of trauma leave off and the effects of stress or burnout or anxiety begin.<sup>19</sup>

For purposes of this Article, there is no need to conclusively answer any of these questions. It should be clear that events that are less than life threatening can nevertheless have a significant influence on individuals that are affected, both directly and indirectly, by them and that this impact on any given individual will differ based on a myriad of possible factors. Furthermore, for all practical purposes, it will be difficult if not impossible to draw clear lines between the impact and effects of trauma and those of stress and other psychological phenomena regardless of how we understand the relationships among them. Since this Article is focused on the impact

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15. KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 453 (quoting ROLF J. KLEBER & DANNY BROM, COPING WITH TRAUMA: THEORY, PREVENTION AND TREATMENT 21 (1992)).

16. *Id.* at 455.

17. *Id.* (quoting KLEBER & BROM, *supra* note 15, at 21 on the first interpretation and citing B. Hudnall Stamm, *Introduction to SECONDARY TRAUMATIC STRESS, SELF-CARE ISSUES FOR CLINICIANS, RESEARCHERS, AND EDUCATORS*, at xix–xx (B. Hudnall Stamm ed., 1995) for the second).

18. See, e.g., Andrew P. Levin, & Scott Greisbert, *Introductory Remarks: Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250–252 (2003) [hereinafter Levin & Greisbert, *Vicarious Trauma*].

19. See *supra*, notes 69–75 and accompanying text.



on the immigration process and its participants, and not on formal mental health diagnoses, it will consider trauma and associated psychological phenomena in the broadest sense discussed above. That is, for purposes of this Article, trauma will be understood to include events that threaten life and both physical and psychological integrity and events that are subjectively experienced as posing such risks even in circumstances where such a response may not be objectively reasonable. Where the effects of stress and other related disorders and issues cannot be precisely delineated from those of trauma, or stress and other related disorders may make an individual more likely to be impacted by trauma, the Article will err on the side of including consideration of those effects.

### B. *What are the Effects of Trauma?*

Exposure to trauma may manifest itself in a number of symptoms, but these symptoms typically follow a particular and predictable pattern. In fact, “[r]esearchers have noted that the range of human response to overwhelming and uncontrollable life events is remarkably consistent.”<sup>20</sup> Jean Koh Peters summarized this pattern of response as follows:

Survivors of trauma are expected to experience a wide range of emotions oscillating between two poles: a tendency, on one hand, to re-experience the trauma with overwhelming reactions to the traumatic material and a general hyper-reactivity to stimuli and, on the other hand, numbing through avoidance of stimuli related to the trauma. This “bimodal” oscillation creates a sense of disruption or disintegration within the trauma survivor who literally feels too much at some times and nothing at others.<sup>21</sup>

For the purposes of this Article, one of the most important aspects of this common response to trauma is that it is disorienting. That is, trauma disrupts our commonly held schema, our frames of reference, or ways of organizing and understanding the world around us.<sup>22</sup> As Koh Peters explains, “trauma disrupts and attacks the self. It disintegrates your sense of who you are, what you hold dear, and what you believe.”<sup>23</sup> Furthermore, “[t]rauma directly attacks the ideas of good in human nature and safety in

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20. KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 457 (citing Bessel A. van der Kolk, *The Body Keeps the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress*, 1 HARV. REV. PSYCHIATRY 254 (1994)).

21. KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 457 (quoting BESSEL A. VAN DER KOLK, PSYCHOLOGICAL TRAUMA 3–4 (1987)).

22. *Id.* at 456 (citing LISA MCCANN & LAURIE ANNE PEARLMAN, PSYCHOLOGICAL TRAUMA AND THE ADULT SURVIVOR: THEORY, THERAPY, AND TRANSFORMATION 10 (1990)).

23. Silver et al., *Stress*, *supra* note 14, at 854.

the world.”<sup>24</sup> Trauma may also decrease a belief in one’s own efficacy and control in those exposed, negatively affecting confidence in self and destabilizing one’s sense of the future.<sup>25</sup>

Responses to trauma may manifest physically as difficulty in falling or staying asleep, an exaggerated startle response, angry outbursts, or physiological responses when exposed to reminders of the traumatic event.<sup>26</sup> Other physical symptoms may include chronic pain, problems with the digestive and cardiopulmonary systems, and effects on one’s sexual life.<sup>27</sup>

Symptoms may also exhibit themselves psychologically. Such psychological symptoms may be obviously related to the traumatic event, such as recurrent and intrusive recollections of the event, including flashbacks, dissociation, or nightmares; intense psychological distress when exposed to stimuli associated with the trauma; or avoidance of such stimuli. Psychological symptoms may also manifest more generally. At the one pole, these symptoms may include increased anxiety and arousal generally, hypervigilance, irritability, and inability to concentrate or complete tasks. At the other pole, general symptoms may manifest as overall psychological numbing, including loss of interest in previously enjoyed activities, detachment from others, and restricted emotional affect.<sup>28</sup> Some have also noted an effect on the spirituality of those exposed to trauma, which relates back to

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24. Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J.L. & POL’Y 17, 26 (2001) [hereinafter Koh Peters, *Habit, Story, Delight*]; cf. LAURA VAN DERNOOT LIPSKY & CONNIE BURK, TRAUMA STEWARDSHIP: AN EVERYDAY GUIDE TO CARING FOR SELF WHILE CARING FOR OTHERS 30 (2009) (quoting TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY (Bessel A. van der Kolk et al. eds., 1996)) (“Reason and objectivity are not the primary determinants of society’s reactions to traumatized people. Rather . . . society’s reactions seem to be primarily conservative impulses in the service of maintaining the beliefs that the world is fundamentally just, that people can be in charge of their lives, and that bad things only happen to people who deserve them.”).

25. Madelon Baranoski, *Vicarious Trauma: A Workshop for Attorneys*, REBLAW CONFERENCE (Feb. 18, 2012).

26. DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder. Although these symptoms are those identified in the DSM-IV as associated with PTSD, my concern here is to identify possible manifestations, not to limit consideration to those meeting the specified criteria for PTSD, an Adjustment Disorder, or any other diagnosis of a mental disorder. While an individual exposed to trauma may ultimately be affected by and diagnosed with one or more of a number of mental disorders included in the DSM-IV, an individual may qualify for none of these diagnoses and still be profoundly impacted by a traumatic experience or event. Because this Article is concerned with the practical impacts of exposure to trauma on the immigration process, any and all manifestations actually displayed without regard to formal diagnosis or possibility thereof are relevant.

27. KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 457 (citing David Pelcovitz et al., *Development of Criteria Set and a Structured Interview for Disorders of Extreme Stress (SIDES)*, 10 J. OF TRAUMATIC STRESS 3, 11 (1997)). Koh Peters also notes the well-founded criticism that far more attention and research has been devoted to the psychological aspects of response to trauma over the physical. *Id.*

28. DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder.

trauma's disorienting effect.<sup>29</sup> Spirituality, defined broadly as faith in and understanding of a connection with something beyond one's own self, may be challenged by evidence that the world is not always just, that bad things happen to good people, and that we cannot always control what happens to us.<sup>30</sup>

Physical and psychological manifestations of trauma may differ culturally, which is particularly important to remember in the context of immigrants and refugees. Culture, as used here, not only refers to the obvious impact of ethnicity, race, and nationality, but also to all aspects of a person's background and life that may affect his or her outlook on the world or behavior in a particular situation, including such things as age, birth order, gender, sexual orientation, marital status, socio-economic status, level of education, language, religion, physical characteristics, and a variety of other factors.<sup>31</sup> As a result of one or more of these factors, noncitizens may describe or exhibit what they are experiencing differently than we would expect based on the possible symptoms listed above. For example, individuals from some cultures may be more likely to express strong emotions as physical complaints rather than psychological manifestations.<sup>32</sup> Illustrating how cultural differences may impact responses to trauma, Posttraumatic Stress Disorder itself has been criticized as an irrelevant and unhelpful Western social construct, in part because of its focus on Western medical treatment rather than on addressing an individual's situation holistically.<sup>33</sup>

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29. See KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 458–59 (citing KAREN W. SAAKVITNE & LAURIE ANNE PEARLMAN, TRANSFORMING THE PAIN: A WORKBOOK ON VICARIOUS TRAUMATIZATION 32 (1996)). The DSM-IV also discusses as one symptom “a sense of a foreshortened future.” DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder.

30. See KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 459 (quoting KAREN W. SAAKVITNE & LAURIE ANNE PEARLMAN, TRANSFORMING THE PAIN: A WORKBOOK ON VICARIOUS TRAUMATIZATION 28 (1996)) (“Trauma in its violence, suddenness, and annihilating nature . . . tends to destroy one's sense that there are forces to be trusted in the world. Trauma therefore implicates directly one's views of good and evil, and the beliefs that compromise ‘the lens through which [one] views the world and interprets [one's] experiences.’”).

31. See, e.g., Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, AND LAW 47–62 (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33, 41 (2001).

32. See, e.g., Laurence J. Kirmeyer, *Cultural Variations in the Clinical Presentation of Depression and Anxiety: Implications for Diagnosis and Treatment*, 62 J. CLINICAL PSYCHIATRY 22, 22–28 (2001).

33. Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 255 n.79 (2007) (citing RICHARD J. McNALLY, REMEMBERING TRAUMA 282–285 (2003)) (“There are criticisms that PTSD is a Western social construction and that diagnosing survivors of torture shifts the focus of the problem toward Western forms of medical treatment of the victims and not toward resolving the survivors' larger problems.”).

Even setting aside these cultural differences, not all individuals who experience a traumatic event will be affected in exactly the same way or with the same intensity. For example, the DSM-IV explains that only up to between one-third and one-half of those exposed to a specific traumatic incident will develop PTSD.<sup>34</sup> Interestingly, the DSM-IV does also note that “[i]ndividuals who have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of Posttraumatic Stress Disorder . . . [and] may be especially reluctant to divulge experiences of trauma and torture . . . .”<sup>35</sup> It is also important to remember that, as previously noted, an individual may be impacted, sometimes profoundly so, by exposure to trauma even when their response does not meet the diagnostic criteria for PTSD, an Adjustment Disorder, or another defined diagnosis. Regardless of formal diagnoses, it is highly likely that all individuals affected by trauma will display some set of the symptoms laid out above; exactly which ones, their intensity and duration, and when and how they are displayed will vary from person to person.<sup>36</sup>

Given the nature of these effects of exposure to trauma, then, it should be clear that trauma may profoundly affect the way an individual relates to others in all aspects of his or her life. The fundamental and potentially wide ranging impact of such effects highlights why it is so critical to recognize and address the role that trauma plays in our legal system and specifically in the immigration process.

### C. *How Wide-Ranging is the Impact of Trauma Exposure?*

Because the effects of experiencing a traumatic event are so significant, it is important to consider whether and how these effects extend beyond an individual directly exposed, beyond the primary victim. In order to provide a basis for the subsequent examination of trauma exposure in immigration adjudicators, this subsection will begin to explore existing work on secondary or vicarious exposure to trauma generally and its effects on those so exposed.

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34. DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder. The highest rates are found in “survivors of rape, military combat and captivity, and ethnically or politically motivated internment and genocide.” *Id.*

35. *Id.*

36. KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 459 (“It is vital to note that although the *repertoire* of symptoms of post-traumatic affects is predictable, *any individual person’s reaction* forms a unique profile for that person. Therefore, although it borrows components from a pool of possible effects on which experts can agree to a large extent, no individual person’s trauma response is predictable.”); Peter G. Jaffe et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. & FAM. CT. J. 1, 2–3 (2003) (citing KAREN W. SAAKVITNE & LAURIE ANNE PEARLMAN, TRANSFORMING THE PAIN: A WORKBOOK ON VICARIOUS TRAUMATIZATION (1996)) (“There are three overlapping spheres of experience that are thought to influence a person’s vulnerability to vicarious trauma: individual factors, organizational factors, and life situation factors. The likelihood of experiencing VT is assumed to be related to the unique characteristics of individuals and their circumstances.”).

Individuals who work with primary trauma victims may begin to demonstrate some of the very same physiological and psychological symptoms as the victims themselves, in both the short term and the long term. This phenomenon was first considered and written about in the mental health field.<sup>37</sup> It is still most commonly described as an effect that occurs to those working in “helping professions” such as psychologists and other mental health workers, social workers, and law enforcement.<sup>38</sup> Its applicability and impacts are now being explored in other fields as well, including the legal field. As awareness of the issue has grown, the literature from both the mental health and the legal perspective has expanded significantly. Particularly in the legal field, however, where even the effects of trauma on a primary victim gets insufficient recognition, the idea that trauma might also have some secondary effects has not gained mainstream acknowledgment or support.

Before continuing this discussion, I think it is important to pause to note that recognizing that those who work with victims of trauma in some capacity may be affected by indirect exposure to that trauma should not be seen as in any way minimizing or discounting the experiences of those who suffer primary exposure to trauma. Nothing in this Article is intended to suggest that the effects of secondary exposure to trauma approach even remotely the experience of the effects on those who experience trauma more directly. However, secondary trauma remains a critical topic in itself. In the legal context, awareness of and attention to the effects of indirect trauma exposure is necessary in order to provide effective assistance to primary victims, to fairly and justly adjudicate all legal matters, and to avoid unnecessarily increasing the negative effects of trauma on primary victims. As Koh Peters explains:

The lawyer’s and the client’s interests here are not at odds; they run parallel. The lawyer who fails to mitigate the negative effects of stress and vicarious traumatization in his or her life and practice ends up harming the client as well as himself or herself. The lawyer who addresses these occupational hazards and har-

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37. Andrew Levin says that, even in the mental health community, the effects of working with victims of trauma on the helping professional were not recognized until around 1990, a decade after PTSD was first included as a diagnosis in the DSM-III. Andrew Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who Are Victims of Domestic Violence and Abuse*, 214 PLI/CRIM 103, 105 (2008) [hereinafter Levin, *Secondary Trauma*] (citing Lisa McCann & Laurie Anne Pearlman, *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3 J. OF TRAUMATIC STRESS 131–149 (1990)); Charles R. Figley, *Compassion Fatigue As Secondary Traumatic Stress Disorder: An Overview*, in *COMPASSION FATIGUE: COPING WITH SECONDARY STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED* 1–20 (Charles R. Figley, ed., 1995) [hereinafter Figley, *Compassion Fatigue*].

38. See, e.g., Jaffe et al., *supra* note 36, at 2; Levin & Greisbert, *supra* note 18, at 245, 247 (2003).

nesses the positive effects, particularly of vicarious traumatization, can benefit both himself or herself and the client.<sup>39</sup>

### 1. Terminology

At the core of the idea that trauma has secondary effects is an understanding that we are affected by others' pain and the experience(s) that caused that pain.<sup>40</sup> These effects may manifest themselves in different ways and have been given different names by those who study them.<sup>41</sup> Dr. Charles Figley, a psychologist, professor of social work, and expert in traumatology, is widely regarded as one of the first and still preeminent scholars in the field of secondary trauma exposure.<sup>42</sup> His works discuss "secondary traumatic stress disorder"<sup>43</sup> and "compassion fatigue."<sup>44</sup> Figley defines secondary traumatic stress disorder as "the natural consequent behaviors and emotions resulting from knowing about a traumatizing event experienced by a significant other—the stress resulting from helping or wanting to help a traumatized or suffering person."<sup>45</sup> It is a syndrome similar to PTSD, with similar, although often less severe, symptoms that result from indirect, rather than direct, exposure to trauma.<sup>46</sup> These two terms remain frequently used in the mental health field, while "Secondary Traumatic Stress" has also been adopted in the legal context: an article by Ann E. Freedman, a professor of law and public interest lawyer, addressed its occurrence in those who work on civil domestic violence cases.<sup>47</sup>

Other experts, such as Lisa McCann, Laurie Anne Pearlman, and Karen W. Saakvine, clinical psychologists and trauma experts who are also pioneers in this field, as well as Jean Koh Peters, instead use the term "vicarious trauma" or "vicarious traumatization."<sup>48</sup> Pearlman and Saakvine define vicarious trauma as "the transformation in the inner experience of

39. KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 452.

40. See LIPSKY & BURK, *supra* note 24, at 4–6.

41. See, e.g., *id.* at 6.

42. See *Curriculum Vitae*, CHARLES FIGLEY (Apr. 1, 2013, 10:11 AM), <https://sites.google.com/site/charlesfigley/Home/credentials/cv>.

43. See, e.g., COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED (Charles R. Figley ed., 1995).

44. See, e.g., TREATING COMPASSION FATIGUE (Charles R. Figley ed., 2002). Compassion fatigue will be defined and discussed in greater detail, see *infra* Part I.C.2, but for now, I understand it to include responses to factors in a relationship between a client and a helping professional that go beyond trauma.

45. COMPASSION FATIGUE, *supra* note 43, at 7.

46. See Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U.J. GENDER SOC. POL'Y & L. 567, 573 n.16 (2003).

47. See generally *id.*

48. See KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 447–505; Koh Peters, *Habit, Story, Delight*, *supra* note 24, at 26–28.

the helper as a result of empathic engagement with survivor clients and their trauma material.”<sup>49</sup> “Secondary trauma” is also sometimes employed.<sup>50</sup> Laura van Dernoot Lipsky and Connie Burk propose an alternative framework for describing these effects, labeling them “trauma exposure response” and advocating for what they call “trauma stewardship.”<sup>51</sup> Van Dernoot Lipsky describes trauma exposure response as follows:

I reached a deep understanding of how our exposure to the suffering of others takes a toll on us personally and professionally. The depth, scope, and causes are different for everyone, but the fact that we are affected by the suffering of others and of our planet—that we have a *trauma exposure response*—is universal.<sup>52</sup>

Trauma stewardship, then, means managing this response in a responsible way that minimizes the harm that our trauma exposure may cause to both to our self and to others and instead strives towards having a positive, healing impact. It “refers to the entire conversation about how we come to do this work, how we are affected by it, and how we make sense of and learn from our experiences.”<sup>53</sup> Lipsky and Burk emphasize that stewardship encompasses a concept of “taking care ‘in a way that takes full and balanced account of the interests of society, future generations, and other species, as well as of private needs, and accepts significant answerability to society.’”<sup>54</sup> This means that “as stewards, we create a space for and honor others’ hardship and suffering, and yet we do not assume their pain as our own.”<sup>55</sup>

I understand both vicarious trauma and secondary trauma as somewhat broader, less clinical, concepts than “secondary traumatic stress” and “secondary traumatic stress disorder.” They are accurate and useful descriptions. In several respects, however, for purposes of this Article, trauma exposure and trauma exposure response are more appealing labels. They encompass all levels and types of reactions, not necessitating a judgment as to whether a particular reaction is severe enough or meets the definition to be qualified as a clinical manifestation of a defined diagnosis. Furthermore,

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49. LAURIE ANNE PEARLMAN & KAREN W. SAAKVITNE, TRAUMA AND THE THERAPIST: COUNTERTRANSFERENCE AND VICARIOUS TRAUMATIZATION IN PSYCHOTHERAPY WITH INCEST SURVIVORS 25 (1995); see also KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 26.

50. See, e.g., Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION 36, 36 (2010); see also LIPSKY & BURK, *supra* note 24, at 6.

51. LIPSKY & BURK, *supra* note 24, at 6.

52. *Id.* at 4.

53. *Id.* at 6.

54. *Id.* (quoting Richard Worrell & Michael Appleby, *Stewardship of Natural Resources: Definition, Ethical and Practical Aspects*, 12 J. OF AGRIC. AND ENVTL. ETHICS 263 (2000)).

55. *Id.* at 6.



they are straightforward and non-technical, which makes them more likely to be meaningful to a more general audience of immigration attorneys and adjudicators.

Perhaps most importantly, these labels emphasize more clearly than the alternatives that there is not a bright line between direct and indirect, primary and secondary, exposure to trauma. The DSM-IV itself recognizes a continuum along which trauma exposure may lead to PTSD, including the witnessing of traumatic experiences of others—for example, experiencing, observing, and learning about a violent personal assault are all given as possible triggering traumatic stressors.<sup>56</sup> Those who write about trauma frequently use the imagery of a boulder dropped into a river,<sup>57</sup> or a stone thrown into a still pond,<sup>58</sup> and the resulting ripple effect to illustrate how trauma may affect even those at some remove from the initial impact, or primary exposure. While the ripples further away from the boulder or stone may be somewhat less in speed and intensity, they are not different in nature or kind.

Using the term “trauma exposure” further helps to avoid making a faulty, and possibly damaging, division between noncitizens and helping professionals. There is an already problematic phenomenon of depicting the non-citizen as different, or “other,”<sup>59</sup> that the subject matter, and even the organization, of this Article could inadvertently reinforce. Avoiding imposition of such arbitrarily drawn distinctions is a particularly important factor in the immigration context at the heart of this Article, especially when those distinctions are between noncitizens and a helping professional. Using the term “trauma exposure,” then, helps avoid making this faulty and damaging division by not drawing an explicit distinction between the trauma suffered by clients and the trauma suffered by those who help them—while the effects may differ in intensity and appearance, they do not differ in kind.

Because of the comparative advantages of these two descriptions, I have chosen to primarily use trauma exposure and trauma exposure response throughout this Article. Because of the prevalence of the use of the

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56. DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder; *see also* KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 463 (discussing the fact that professionals serving traumatized clients are “confronted with” trauma within the meaning of the DSM-IV and may fit the DSM-IV definition for PTSD). While experiencing a violent personal assault may be more likely to result in developing symptoms consistent with PTSD and a greater severity of those symptoms than either observing or learning about such an attack, likelihood of developing and the severity of symptoms may also be affected by other factors about the event itself and the personal background and characteristics of the individual who experienced, observed, or learned about it.

57. *See, e.g.*, KOH PETERS, REPRESENTING CHILDREN, *supra* note 13, at 452–53; Silver et al., *Stress*, *supra* note 14, at 857.

58. *See, e.g.*, LIPSKY & BURK, *supra* note 24, at 17.

59. *See, e.g.*, Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996–97).



terms vicarious and secondary trauma in the legal context, and the fact that I understand the meaning of all three to be essentially the same, however, I will also occasionally employ them as well. As discussed above, I am concerned with the impact of trauma in an expansive sense, not just in its more narrow clinical manifestations. My use of any of these terms, then, should be understood in that sense.

## 2. The Nature of Trauma Exposure Response

This subsection will introduce both the individual and the systemic effects of trauma exposure response to lay the foundation for the discussion of the impact of these effects on adjudicators in the immigration process and on the process itself. As previously mentioned, trauma exposure response is most commonly acknowledged as a phenomenon affecting professionals tasked explicitly with helping individuals cope directly with traumatic events such as mental health professionals, social workers, and law enforcement officials.<sup>60</sup> These helping professionals share certain core characteristics, specifically, as the name suggests, a professional duty to assist trauma victims and a concomitant responsibility for particular outcomes. Because attorneys and adjudicators<sup>61</sup> also share these same core characteristics, they have, and will for the purposes of this Article, be considered part of this group of helping professionals.<sup>62</sup> Like with any trauma exposure, helping professionals who are exposed to trauma will not all be affected in the same way. Nevertheless, certain general conclusions can be drawn about the impact of trauma exposure on attorneys, including adjudicators, and on the legal system.

Individually, the symptoms and impact of trauma exposure response mirror the response pattern for more direct trauma discussed previously. That is, affected individuals will swing between the poles of hyper-reactivity/hyper-arousal and avoidance/numbness.<sup>63</sup> It may seem surprising, or even an over-exaggeration, to say that individuals who are vicariously exposed to trauma may suffer some of the very same symptoms as those who are directly exposed. In fact, however, existing research supports just this conclusion.<sup>64</sup> Trauma exposure does not divide neatly into two groups: those exposed directly and those exposed secondarily. Instead, as discussed in the previous subsection, it is better understood as occurring along a spectrum ranging, for example, from the direct victim of a violent crime

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60. See *supra* introduction to Part I.C.

61. While adjudicators would typically be considered a subset of attorneys, in the immigration context that is not the case. See *infra* Section III.B. While there is overlap between the groups of attorneys and adjudicators, not all adjudicators are attorneys.

62. See, e.g., Linda Albert, *Keeping Legal Minds Intact: Mitigating Compassion Fatigue Among Government Professionals*, 22 *PASS IT ON* 1, 1 (2012).

63. KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 463–64.

64. See, e.g., Levin & Greisbert, *Vicarious Trauma*, *supra* note 18, at 246; KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 450–51, 463–64.

through a witness to that crime and close family members of the victim to the law enforcement officer who investigates the case and the prosecutor of the perpetrator. Again, this is not intended to minimize the effects of traumatic experiences on those who are exposed to trauma more directly.<sup>65</sup> Less direct exposure may, and often will, result in symptoms that, while the same in kind, are much lesser in degree and cause significantly less impairment.

In helping professionals, this response pattern to trauma exposure frequently manifests as anxiety, intrusive thoughts, difficulty concentrating, prolonged feelings of sadness or grief, a sense of futility or pessimism about people, lethargy, isolation, anger, aggression, irritability, avoidance of or over-involvement in work, fatigue or sleep disturbance, and physical complaints such as headache, hives or rashes, heartburn, other gastrointestinal symptoms, or frequent illness such as colds or the flu.<sup>66</sup> These symptoms affect the helping professional within and beyond the work context in which the symptoms originated.<sup>67</sup>

As previously mentioned, I intend to concentrate on the impact of trauma in this Article, but because it is impossible to completely separate out the impacts of each phenomenon on any given individual some consideration of these other stressors will also inevitably occur.<sup>68</sup> Just as in the

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65. See *supra* introduction to Part I.C.

66. See, e.g., Albert, *supra* note 62; Catanese, *supra* note 50, at 37; KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 457–59, 463–64; Mary L. Pulido, *The Costs of Caring: Managing Secondary Traumatic Stress in the Domestic Violence Arena*, 214 PLI/CRIM 113, 116 (2008). Christian Pross, MD, offers a different way of describing the signs and symptoms of trauma exposure in helping professionals:

[N]ightmares, sleeplessness, intrusions, avoidance behaviour, irritability, denial of client's trauma, overidentification with client, no time and energy for oneself, feelings of great vulnerability, insignificant daily events are experienced as threatening, feelings of alienation, social withdrawal, disconnection from loved ones, loss of confidence that good is still possible in the world, generalized despair and hopelessness, loss of feeling secure, increased sensitivity to violence, cynicism, feeling disillusioned by humanity, disrupted frame of reference, changes in identity, world view, [and] spirituality, diminished self capacities, impaired ego resources, [and] alterations in sensory experiences (intrusive imagery, dissociation, depersonalization).

Christian Pross, *Burnout, Vicarious Traumatization and its Prevention*, 16 TORTURE J. 1, 3 (2006), available at [http://www.irct.org/Files/Filer/TortureJournal/16\\_1\\_2006/page\\_1-9.pdf](http://www.irct.org/Files/Filer/TortureJournal/16_1_2006/page_1-9.pdf).

67. Levin, *Secondary Trauma*, *supra* note 34, at 105 (“Research in this area has also revealed a correlation between STS and VT and general psychological distress, and there is a consensus that STS and VT degrade the professional’s ability to perform his or her task and function in daily life beyond the job.”).

68. Many of the studies that do exist in this area have tested symptoms of both trauma exposure and burnout or stress generally for this same reason. See, e.g., Jaffe et al, *supra* note 31, at 2 (“Burnout results in a vulnerability to [vicarious trauma], whereby the individual may not have the personal resources to combat the impact of VT effectively. Although stress may be normal and even motivational, excessive stress leading to burnout would likely magnify the im-

discussion of trauma itself, trauma exposure has a great deal of overlap with other stressors that impact helping professionals like attorneys and adjudicators. Attorneys and adjudicators are of course regularly confronted with stress—that is, circumstances that outstrip their skills or resources or otherwise result in their needs not being met.<sup>69</sup> More specific manifestations of these stressors are variously labeled as compassion fatigue or burnout. Compassion fatigue is “the cumulative physical, emotional, and psychological effects of being continually exposed to traumatic stories or events when working in a helping capacity.”<sup>70</sup> Similarly, burnout, while a somewhat “imprecise term,”<sup>71</sup> has been defined as “[t]he cumulative effect of . . . chronic everyday stress and chronic everyday strain”<sup>72</sup> or “the accumulation of stress and the erosion of idealism resulting from intensive contact with clients.”<sup>73</sup> Compassion fatigue and burnout differ from trauma exposure in a number of important ways.<sup>74</sup> First, they are triggered by multiple, broad ranging stressors and not just by trauma specifically. Second, they are focused on the impact of these stressors over an extended period of time, while trauma exposure may have an effect after just a single experience.<sup>75</sup> Attorneys may also be diagnosed with other mental health

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part of VT.”); Levin & Greisbert, *Vicarious Trauma*, *supra* note 18, at 248–49; Stuart Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008) [hereinafter Lustig et al., *Narrative Responses*].

69. See KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 453 (quoting KLEBER & BROM, *supra* note 15) (defining stress).

70. Albert, *supra* note 62.

71. Susan Bades, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 350 (2006). *But see* Levin, *Secondary Trauma*, *supra* note 37, at 105 (citing Sharon Rae Jenkins & Stephanie Baird, *Secondary Traumatic Stress and Vicarious Trauma: A Validation Study*, 15 J. TRAUMATIC STRESS 423, 423–32 (2002)) (“Although this mixture of symptoms has led some to criticize burnout as an imprecise construct, Jenkins and Baird observe that burnout is supported by multiple statistical analyses and, in fact, has been more rigorously studied than secondary trauma.”).

72. KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 454 (citing CHRISTINA MASLACH, BURNOUT: THE COST OF CARING 11 (1982)).

73. Levin, *Secondary Trauma*, *supra* note 37, at 105; *cf.* Jaffe et al., *supra* note 36, at 2 (“Farber (1991) offers a slightly different definition, which posits burnout as a syndrome that stems from a perceived discrepancy between an individual’s effort in his or her work and the reward received for that work.”); BARRY A. FARBER, CRISIS IN EDUCATION: STRESS AND BURNOUT IN THE AMERICAN TEACHER 24 (1991) (“Burnout is a work-related syndrome that stems from an individual’s perception of a significant discrepancy between effort (input) and reward (output) . . . . It occurs most often in those who work face to face with troubled or needy clients . . . .” (emphasis omitted)).

74. See Jaffe et al., *supra* note 36, at 2 (emphasizing the importance of making a conceptual distinction between burnout and vicarious trauma).

75. *Cf.* LIPSKY & BURK, *supra* note 24, at 11 (“[Trauma stewardship] . . . applies equally whether the trauma we encounter is glaring or subtle, sudden or prolonged, isolated or recurring, widely recognized or barely perceived.”).

disorders, including depression and anxiety, which are both impacted by and have an effect on their work.

On a systemic level, the impact of trauma exposure is somewhat more difficult to trace. In her book on trauma stewardship, Van Dernoot Lipsky starts from a belief, “rooted in life experience and years of study and professional practice, that our capacity to help others and the environment is greatest when we are willing, able, and even determined to be helped ourselves.”<sup>76</sup> The converse, then, is also true—when any individual has unaddressed trauma exposure his ability to help others and positively impact the world around him is reduced. As the number of individuals with unaddressed trauma exposure increases, the negative impact on our society, the systems within it, and all those who encounter those systems multiply. The harms of trauma exposure radiate just like its effects,<sup>77</sup> but as the distance from the initial impact increases it becomes somewhat more difficult to ascribe those effects to trauma rather than some other factor or combination of factors. However, as the discussion in Parts II and III will demonstrate, trauma exposure is causing harm in the immigration system through its effect on adjudicators.

## II. TRAUMA EXPOSURE IN THE IMMIGRATION SYSTEM

Part II of this Article will apply the above discussion of the nature and range of trauma exposure to the immigration system and specifically to immigration adjudicators. Part II.A will survey the various traumatic experiences that noncitizens may be exposed to. Part II.B will then discuss the structure and functions of portions of two of the federal administrative agencies charged with executing U.S. immigration law to show how adjudicators in the immigration process are exposed to the traumatic experiences of the noncitizens appearing in front of them. This framework will provide the basis for the examination in Part III of the ways in which this trauma exposure affects individual adjudicators and, through them, the immigration system.

### A. *Noncitizens Experience Trauma*

Studies have shown that around fifty percent of the general population in the United States has been exposed to at least one traumatic event.<sup>78</sup> While no specific studies on this point have been done, there is no reason to suspect that the percentage of the population of noncitizens in

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76. *Id.* at 16.

77. *Cf. id.* at 17 (“The harms of trauma exposure response radiate in this way, but so do the benefits of trauma stewardship.”).

78. BRIERE & SCOTT, *supra* note 5, at 4 (“Surveys of the general population suggest that at least half of all adults in the United States have experienced at least one major traumatic stressor.”). It is likely that these statistics understate how widespread the experience of trauma is, as trauma is frequently underreported. *Id.*

the United States that have been exposed to trauma is any smaller. In fact, depending on the circumstances in a noncitizen's home country as well as the manner of the noncitizen's migration, the percentage of the noncitizen population with at least one traumatic experience may be higher than the percentage of the citizen population.<sup>79</sup> Regardless, noncitizens in the United States, just like any other segment of the population, are likely to have experienced some form of trauma in their lives. Various authors have addressed the trauma experiences of various groups of immigrants—particularly refugees and asylees,<sup>80</sup> victims of domestic violence, and unaccompanied or abandoned children. Because little has been written about the trauma experiences of noncitizens outside these relatively limited groups, however, this section will survey various ways in which trauma arises in the lives of noncitizens more generally.

In some cases, trauma is an integral part of the individual's participation in the immigration process. Trauma can be the reason that an individual is allowed to enter the United States or the basis itself for an application for an immigration benefit or relief from removal. Traumatic experiences may lead to permanent immigration status in the United States. For example, refugees and asylees come to the United States fleeing from persecution or a fear of persecution in their home countries.<sup>81</sup> Persecution by definition means "the infliction of suffering or harm," and often involves traumatic experiences such as forced imprisonment, sexual assault, beatings, and other forms of torture.<sup>82</sup> Women or men who were battered or subjected to extreme cruelty by their legal permanent resident or United States citizen spouse or parent may seek to self-petition or request cancellation of removal under the Violence Against Women Act.<sup>83</sup> The phrase battery and extreme cruelty also encompasses trauma, as it "includes, but is

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79. Studies have focused more on what percentage of an immigrant population suffers from PTSD rather than what percentage of that population has been exposed to trauma. While "[t]here is variation in rates of PTSD among immigrants," the rate of PTSD may be as high as eighty-six percent among refugees from countries affected by war. Suzuki, *supra* note 33, at 256 n.93 (citing Zachary Steel & Derrick Silove, *The Psychosocial Cost of Seeking and Granting Asylum*, in INTERNATIONAL HANDBOOK OF HUMAN RESPONSE TO TRAUMA 421, 423 (Arieh Y. Shalev, Rachel Yehuda & Alexander C. McFarlane eds., 2000)). Additional support for this proposition may be found in the remainder of this subsection, which discusses a wide variety of ways in which noncitizens in particular may be exposed to traumatic events.

80. See, e.g., *id.*; Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155 (2001).

81. See Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101 (2013); INA § 208(b)(1)(A), 8 U.S.C. § 208.13(a) (2013).

82. Matter of Laipenieks, 18 I. & N. Dec. 433, 456–57 (B.I.A. 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985); 5 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 33.04(2) (Matthew Bender, rev. ed. 2011). Note that the various Circuit Courts of Appeal each have their own definitions of persecution that vary slightly in the severity and type of behavior required. *Id.*

83. INA §§ 204(a)(1)(A)(iii)–(iv), (vi), 8 U.S.C. § 1154 (2013); INA § 204(a)(1)(B)(ii)–(iii), (v), 8 U.S.C. § 1154 (2013); INA § 240A(b)(2), 8 U.S.C. 1154 (2013).

not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.”<sup>84</sup> Children seeking Special Immigration Juvenile Status (SIJS) must have been abused, abandoned, or neglected by their parents.<sup>85</sup>

Some temporary immigration statuses are also based on traumatic experiences. T visa holders, for example, must be present in the United States as a result of a severe form of trafficking in persons in order to qualify.<sup>86</sup> “Severe forms of trafficking in persons” include both sex trafficking and trafficking for purposes of forced labor.<sup>87</sup> Similarly, victims of violent crimes such as rape and other sexual crimes, torture, trafficking and related offenses, domestic violence, female genital mutilation, false imprisonment and similar crimes, manslaughter, murder, or felonious assault who assist in the investigation or prosecution of the offender may apply for U visas for themselves and their derivative spouses and children.<sup>88</sup> In order to obtain a U visa, an applicant must prove that they have “suffered substantial physical or mental abuse” as a result of the relevant crime.<sup>89</sup> Beneficiaries of temporary protected status are allowed to remain in the United States because of a natural disaster or civic unrest in their home countries.<sup>90</sup> Noncitizens seeking any one of these named statuses, then, have necessarily been directly exposed to at least one, and potentially many, traumatic events.

An experience of trauma may be a motivating factor in a decision to come to the United States even when it is not directly related to an application for immigration status. Historically, even outside of the refugee context, migration to the United States is frequently driven by the desire

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Parents who are “battered or subject to extreme cruelty” by their adult United States citizen son or daughter may also self-petition. INA § 204(a)(1)(A)(vii), 8 U.S.C. § 1154.

84. 8 C.F.R. § 204.2(c)(1)(vi).

85. INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101 (2013).

86. INA § 101(a)(15)(T), 8 U.S.C. § 1101 (2013); 8 C.F.R. § 214.11.

87. 8 C.F.R. § 214.11(a) (“*Severe forms of trafficking in persons* means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion . . . or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”).

88. INA § 101(a)(15)(U), 8 U.S.C. § 1101 (2013); 8 C.F.R. § 214.14.

89. INA § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101 (2013).

90. INA § 244, 8 U.S.C. § 1254 (2013). While in some cases beneficiaries of TPS are required to have been in the United States at the time the disaster or unrest occurred, in others many beneficiaries experienced the disaster or unrest in their country and fled to the United States as a result. Examples in this latter category include TPS for Haitian nationals who entered the United States up to a year after the devastating earthquake that occurred in their country in January 2010 and for Syrian nationals who left their country after civil unrest there began. See *Extension and Redesignation of Haiti for Temporary Protected Status*, 76 Fed. Reg. 29000, 29000–02 (May 19, 2011); *Extension and Redesignation of Syria for Temporary Protected Status*, 78 Fed. Reg. 36223, 36225–36226 (June 13, 2013).

to have a better life than would be available in one's country of birth or current residence. Often, that means migration from countries with ongoing economic, social or political challenges or some other situation that creates profound instability for citizens and residents.

Noncitizens, and particularly those without legal documentation, may experience trauma en route to the United States; the trip itself can be extremely harrowing and dangerous. Individuals traveling by land through some Central American countries and Mexico often travel as essentially stowaways riding on the roofs of trains or with the help of smugglers, also known as coyotes.<sup>91</sup> The train taken by many migrants is known as the "Train of Death" and poses its own risks.<sup>92</sup> The trains themselves are treacherous. Migrants are caught beneath the wheels of the train; they are seriously injured and even killed when they unsuccessfully try to jump on to the train; and they fall from the roof of the train where they ride to their death due to hunger, dehydration, and fatigue. Criminal gangs and immigration and law enforcement officials target the migrants throughout their journey, robbing, kidnapping, beating and raping them. Traveling with smugglers is no safer, as smuggling operations are increasingly controlled with impunity by the major Mexican drug cartels and subject to the serious risk of violence, rape, and trafficking with which these cartels operate. None of these migrants are safe until they reach the border to the United States.

Entering the United States by land through the Southern border is not the only route of entry that may entail traumatic experiences. Cubans, Haitians, and some other Caribbean migrants may travel to the United States by boat from their home country or other Caribbean nations. These boats are often small and ill equipped for the conditions and weather they will face en route; migrants die as a result of exposure, weather conditions, or starvation or dehydration before they even reach the United States. The boats may also be run by smugglers or drug or human traffickers and rife with the violence and intimidation used to control such operations. Chinese migrants also historically entered the United States via boat, smuggled by individuals known as snakeheads. For example, passengers on the infamous Golden Venture faced terror and life threatening conditions on their way to the United States; ten died when the ship was deliberately run aground three hundred yards offshore from a beach in Queens, New

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91. It is worth noting that not all those who attempt to enter the United States through its Southern border are Mexican or Central American nationals; increasing numbers come this way from Haiti and other countries. See UNITED STATES BORDER PATROL, SECTOR PROFILE – FISCAL YEAR 2012, available at [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy12\\_stats/usbp\\_sector\\_profile.ctt/usbp\\_sector\\_profile.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/usbp_sector_profile.ctt/usbp_sector_profile.pdf) (noting that in fiscal year 2012, Customs and Border Patrol apprehended 94,532 "other than Mexicans" as compared to 356,873 Mexicans attempting to enter the United States in the Southwest Border Sectors).

92. See, e.g., SONIA NAZARIO, ENRIQUE'S JOURNEY: THE STORY OF A BOY'S DANGEROUS ODYSSEY TO REUNITE WITH HIS MOTHER (2007); SIN NOMBRE (Scion Films 2009).



York.<sup>93</sup> Migrants entering the United States from further away may face traumatic journeys before even reaching the American continent. For example, a group of young men who were part of a group known as the lost boys of Sudan walked thousands of miles as children to escape ethnic extermination, confronting starvation, dehydration, and disease, attacks by natural predators such as lions, threats from enemy soldiers, and death along the way.<sup>94</sup> Their experience may be an extreme example, but such traumatic experiences in a lesser degree are not uncommon.

To some degree *all* noncitizens have experienced trauma. They have left their homes, families, cultures, and all that was familiar and have had to adjust to a new, and often very different, country. Jean Koh Peters, commenting on children being removed from their home by child protective services, talks about the profound impact that leaving home can have, describing it as “an extreme subjective sense of tragic loss, loss of all that is familiar, loss of a sense of home, safety, identity, and meaning.”<sup>95</sup> While children being forcibly removed from their homes and parents may in some respects be more vulnerable and more affected by this experience, these same impacts may occur for noncitizens voluntarily leaving home, even when the transition is in large part positive and welcomed.<sup>96</sup> The impacts may be magnified by the cultural and other differences faced by immigrants trying to adjust to the United States, and by the lack of support that they may have here in dealing with them. In fact, in a study done of Iraqi refugees, a lack of social support was a stronger predictor for the development and severity of PTSD than even such things as trauma factors and depression.<sup>97</sup> While of course not all citizens will experience permanently leaving home for a new life as a traumatic event, and the impact on those who do will vary widely, for many this means “their sense of integrity is being assaulted” and “their sense of home is disintegrating or being destroyed.”<sup>98</sup> Such effects are sufficiently disorienting that simply leaving one’s home should be treated as a traumatic event.

For all participants, even those whose applications are not based on any kind of traumatic event, the immigration process itself can be traumatic. Immigration law and procedure are difficult and complex, and there is a lack of transparency for even the informed observer. Noncitizens may not have, or know whether they have, any available immigration options. Those without options face a choice between remaining undocumented in the United States with the attendant serious difficulties of having no legal

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93. GOLDEN VENTURE (New Day Films 2006).

94. See GOD GREW TIRED OF US (Newmarket Films 2006).

95. KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 461.

96. Of course, not all migration is purely voluntary.

97. Piwowarczyk, *supra* note 80, at 161 (citing C. Gorst-Unsworth & E. Goldenberg, *Psychological Sequelae of Torture and Organized Violence Suffered by Refugees from Iraq: Trauma-Related Factors Compared with Social Factors in Exile*, 172 BRITISH J. PSYCHIATRY 90, 90 (1998)).

98. KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 460.



status or returning to their home country, which may mean separation from family, economic deprivation—or worse. Even for those who are lucky enough to have a route to remain in the United States legally, there is a high degree of uncertainty in the process, with no guarantees that any application for legal status or to remain in the country will be approved. While immigration law is federal law, and in theory will apply identically throughout the country, in practice there are significant differences in the way the federal circuits interpret the law; the law may thus differ, even radically, depending on geographical location or origination of the case. The consequences of the outcome of the process are life changing, potentially determining how, where, and with whom one will live the rest of his or her life. This insecurity can drag on for extended periods of time. While the process is ongoing, a noncitizen may be separated from and unable even to see their family. They may be unable to work or drive legally and struggling to find a way to support themselves. They may even be detained, a particularly traumatic consequence of removal proceedings: “[D]etention causes severe mental and physical anguish. One study found that 86% of detainees exhibited symptoms of depression, 77% exhibited symptoms of anxiety, 50% exhibited symptoms of post-traumatic stress disorder, and approximately 25% reported suicidal thoughts.”<sup>99</sup>

Despite the complexity and harsh consequences of immigration law and procedure, noncitizens have no right to counsel at government expense and thus will be represented only if they are able to find and, in most cases afford, an attorney or other authorized representative.<sup>100</sup> Even with legal representation, the immigration process can be profoundly frustrating, degrading, and dehumanizing for noncitizen applicants and respondents.

Finally, a noncitizen, just like other members of the population, may have experienced trauma entirely unrelated to the immigration process. For example, he or she may have served in the military during times of conflict, may have been affected by a terrorist attack, may have survived a natural disaster like a tornado or hurricane, may have lost his or her home to a fire or other manmade disaster, may have been in a serious automobile or other transportation accident, or may have been diagnosed, or had a

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99. RUTGERS SCHOOL OF LAW—NEWARK IMMIGRANT RIGHTS CLINIC AND AM. FRIENDS SERV. COMM., FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 3 (2012), available at <http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf>.

100. Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2012). 8 C.F.R. § 292.1 and 8 C.F.R. § 1292.1 allow for representation of individuals appearing before United States Citizenship and Immigration Services and the Executive Office for Immigration Review by attorneys barred in any state, certain law students and law graduates, accredited representatives, accredited officials of foreign governments, and, on an individual case basis, any reputable individual. 8 C.F.R. § 292.1 (2013); 8 C.F.R. § 1292.1 (2013).

family member diagnosed, with a life-threatening illness.<sup>101</sup> Noncitizens are not immune to these general traumatic events that affect many without regard to country of origin and citizenship status.

In addition, particularly for indigent noncitizens, the circumstances of their daily lives may themselves be traumatic or closely approach trauma. As Koh Peters explains:

The client in the center of the raging river may experience stress as a result of his interactions with any one of a number of factors, ranging from specific factors such as his familial economic situation and interactions with his family, the legal system, and the social service system, to larger factors including poverty, racism, and violence in his community. The client feels the rigors of living in such a challenging, chaotic, and hard-to-control environment, day to day. For many of our clients, daily life itself can challenge their full capacities to the extreme.<sup>102</sup>

This is one example of where the line between stress generally and trauma specifically is particularly difficult to draw. Such circumstances will not always meet even a broad definition of trauma, but in some, perhaps many, situations and settings they will in fact present very real threats of death, injury, or other serious damage to physical or psychological well-being.

#### B. *Immigration Adjudicators Are Exposed to Noncitizen Trauma*

Given the prevalence of traumatic experiences of noncitizens as discussed in the previous subsection, it would be difficult for an attorney, a law student, or another legal representative to take on even a small number of immigration clients and not be exposed to trauma. Although the same is true for attorneys who work for the government on immigration cases in various capacities, this fact is somewhat less commonly acknowledged and explored. These government actors might be judges in the Immigration Courts, board members at the Board of Immigration Appeals, adjudicating officers from United States Citizenship and Immigration Services (USCIS),<sup>103</sup> attorneys from the Office of the Chief Counsel for USCIS, or other attorneys in the Department of Homeland Security, among other positions.<sup>104</sup>

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101. See DSM-IV-TR, *supra* note 7, at sec. 309.81 Posttraumatic Stress Disorder (describing events that can trigger Posttraumatic Stress Disorder).

102. KOH PETERS, REPRESENTING CHILDREN, *supra* note 15, at 453.

103. Some, but not all, USCIS Adjudications Officers are attorneys. See generally, *Careers at USCIS*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/careers> (last visited Nov. 15, 2013).

104. The roles and functions of individuals in each of these positions will be discussed in greater detail below.

Despite the high likelihood that trauma exposure will occur for any attorney working in the immigration field, few studies have been done on trauma exposure in this context. In fact, the number of studies on trauma exposure in attorneys in general is comparatively limited.<sup>105</sup> In response to this lack of data and his informal observations while working with attorneys, Dr. Andrew Levin, a professor of psychiatry specializing in psychological trauma, undertook a survey of secondary trauma and burnout in legal and mental health professionals that included attorneys working in the family and criminal law fields.<sup>106</sup> In addition to Dr. Levin's initial survey, studies have been done on prosecutors working on cases involving domestic violence and incest<sup>107</sup> and on several groups of judges.<sup>108</sup> Dr. Levin himself also did a follow up study on law students who were representing victims of domestic violence in a law school clinical program.<sup>109</sup> None of these studies, however, involved attorneys working on immigration cases. Only a single study has been done specifically on immigration judges; in 2007, several psychiatrists and other mental health professionals collaborated with two immigration judges on a study and subsequent articles focused on stress, trauma, and burnout in immigration judges.<sup>110</sup>

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105. Levin & Greisbert, *Vicarious Trauma*, *supra* note 18, at 246–48 (footnotes omitted) (“Quantitative research efforts on the secondary effects of trauma have focused predominantly on workers who have brief contact with the victim, e.g., disaster workers, firefighters, and relief workers, and to a lesser extent on professionals with prolonged contact with victims, e.g., therapists. . . . A small number of studies have focused on professionals in the legal arena. . . . Although studies have characterized substance abuse and mental illness among attorneys under stress, there are no studies addressing secondary trauma symptoms or the effects of work with traumatized clients.”); *see also* Levin, *Secondary Trauma*, *supra* note 37, at 106 (finding the number of studies regarding professionals in the legal field still small, although some additional studies were done following Dr. Levin's initial article in 2003).

106. Levin & Greisbert, *Vicarious Trauma*, *supra* note 18, at 249. Levin describes his study's goals and participants as follows:

To explore these phenomena further, we undertook a preliminary questionnaire survey to determine the presence of these symptoms among attorneys working with traumatized clients, compare those responses to other professionals, and identify possible risk factors. . . . Participants were drawn from a variety of legal and mental health agencies. Attorneys were recruited from agencies specializing in domestic violence and family law as well as legal aid criminal services. The mental health professionals, recruited from community agencies, fell into two groups: mental health professionals providing treatment and social services workers providing concrete and case management services to the mentally ill.

*Id.*

107. *See* Levin, *Secondary Trauma*, *supra* note 37, at 106 (citing I.M. Gomme & M.P. Hall, *Prosecutors at Work: Role Overload and Strain*, 15 J. CRIM. JUST. 191, 191–200 (1995)).

108. *See* Jaffe et al., *supra* note 36; *see also* Levin, *Secondary Trauma*, *supra* note 37, at 106.

109. *See* Levin, *Secondary Trauma*, *supra* note 37, at 108–09.

110. Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 22–23 (2008) [hereinafter Lustig et al., *Burnout and Stress*] (“While STS and burnout are well documented among therapists, first responders, and even

A number of reasons have been posited for the relatively limited attention paid to trauma exposure in the legal field. First, recognition that working with clients who have suffered trauma affects helping professionals is a relatively new phenomenon in any field.<sup>111</sup> It is not surprising that this concept would take longer to gain traction and acceptance in a field like the law than in a mental health field already well versed in the effects of trauma generally. Marjorie Silver, a professor of law, offers a deeper possible explanation of this phenomenon:

[W]hereas those working in helping professions such as psychotherapists and social workers are trained to expect transference and countertransference reactions in their relations with their clients, lawyers are trained to assume that the only things relevant to their relationships with their clients are how well they know the law and how well they can read and apply it. . . . [N]either legal education nor the profession do anything in any way to counteract that in training lawyers to think they don't have to worry about those psychological issues and those emotional issues.<sup>112</sup>

In short, “[t]he emotional costs of lawyering are rarely considered worthy of mainstream legal discussion.”<sup>113</sup> Lawyers may underreport their own symptoms of trauma exposure because, consciously or unconsciously, they see attention to the role of such emotional factors as “not merely weak, but downright unlaywerlike”<sup>114</sup> or simply because they are not trained to recognize such symptoms for what they are.<sup>115</sup> Such underreporting could obscure the need for additional studies on trauma exposure in the legal field.

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attorneys and other types of judges, there is no documentation of symptoms among Immigration Judges whose uniquely heavy docket often includes several cases a day containing horrific material.”); Lustig et al., *Narrative Responses*, *supra* note 68. For a greater discussion of the results of the survey, see *infra* Part III.A.

111. See Levin, *Secondary Trauma*, *supra* note 37, at 105 (citing Charles R. Figley, *Compassion Fatigue As Secondary Traumatic Stress Disorder: An Overview*, in *COMPASSION FATIGUE: COPING WITH SECONDARY STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED* 1–20 (Charles R. Figley ed., 1995)); Lisa McCann & Laurie Anne Pearlman, *Vicarious Traumatization: A Framework for Understanding the Psychological Effects of Working with Victims*, 3 J. TRAUMATIC STRESS 131, 131–49 (1990) (providing some of the first works in this area).

112. Silver et al., *Stress*, *supra* note 14, at 849. Transference and countertransference are somewhat complicated psychological concepts that have been given a variety of definitions, but they refer basically to a client's and a helping professional's emotional reactions to each other. Silver, *Love*, *supra* note 1, at 262–65.

113. Bades, *supra* note 71, at 340.

114. *Id.* at 342.

115. *Id.* at 340 (“There may be no other profession whose practitioners are required to deal with so much pain with so little support and guidance.”).

These reasons do not explain, however, why, even within the legal context, focus has been primarily on the practice of family law, particularly in the area of domestic violence, and criminal law, while relatively little attention has been paid to trauma exposure in the immigration field. This is somewhat surprising, given the obvious incidence of trauma in well-known areas of immigration law like refugee and asylum law. A qualitative study on the backgrounds and careers of private immigration lawyers in New York City suggests that little is known about immigration lawyers generally because of their perceived low stature: “Immigration lawyers help some of the most marginalized and subordinated members of society. And despite working in, and through, a complex area of administrative law, these lawyers tend themselves to receive little respect within the legal profession.”<sup>116</sup> Popular perception of immigration attorneys alone, however, cannot completely explain this neglect.

In any event, despite the relative paucity of formal, empirical studies in the legal, and particularly the immigration law context, enough information does exist to draw some conclusions about the effect of trauma exposure on attorneys who have a role in immigration cases and thus are involved with the immigration process as a whole.<sup>117</sup> Dr. Levin suggests that there are two valuable strands of work to consult for this purpose.<sup>118</sup> The first is a rich clinical legal literature addressing topics such as the role of the attorney and other legal actors, the attorney–client relationship, and trauma.<sup>119</sup> These works contain anecdotal accounts of the impact of

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116. Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private U.S. Immigration Lawyers*, 34 *LAW & SOC. INQUIRY* 399, 400 (2009) (internal citations omitted) (“Immigration lawyers traditionally have been considered low in the lawyer status hierarchy because they are thought to deal primarily with personal plight matters . . . . Indeed, in their 1995 study of Chicago lawyers, Heinz et al. placed the immigration field second to last (41 of 42) in terms of prestige. Perceptions of prestige are affected by types of clients served, and since immigration lawyers’ clients are often not US citizens—and some have criminal records—immigration lawyers’ status within the profession is low.”).

117. Additional research and study in this field would be extremely valuable. See, e.g., Levin, *Secondary Trauma*, *supra* note 37, at 109–10 (“Future research should focus on clarifying the nature and extent of secondary traumatic responses, understanding their relationship to PTSD, and delineating the risk factors for their development in attorneys, judges, and allied professions. This work would then form the basis for identifying the most effective interventions for reducing secondary trauma among legal professionals in order to enhance the delivery of legal services to victims of trauma.”). Suggestions for particular questions and topics for further exploration are offered throughout this section. Multiple authors also identify the possible causal connection between trauma exposure and identified high rates of substance abuse, mental illness and other distress in attorneys as another area in which further research would be fruitful. See, e.g., Levin, *Secondary Trauma*, *supra* note 37, at 106; Murdoch, *supra* note 1, at 484.

118. Levin, *Secondary Trauma*, *supra* note 37, at 106.

119. *Id.* at 106 (internal citations omitted) (“With an eye to secondary trauma, the clinical law literature has raised issues regarding the lawyer–client relationship and resultant identification and counter–transference in attorneys representing domestic violence victims.”). The literature in this genre most relevant and helpful to this article is cited throughout. There are countless other excellent articles on these topics, far too many to be cited here. It is important, however,

trauma exposure and burnout on immigration and other attorneys.<sup>120</sup> The second is literature (also largely from the clinical legal context) addressing substance abuse, mental illness, and other distress in attorneys.<sup>121</sup> While the work in this second strand primarily either attributes these mental health issues to legal work generally or discusses them without reference to causation, they may, at least in some instances, also be manifestations of unaddressed trauma exposure. Finally, I will also draw on my own experiences as a practicing public interest immigration attorney and as a clinical professor and fellow in several immigration clinics. In conjunction with the studies referenced above and the psychological literature discussed in Part I, these sources together reveal much about trauma exposure of attorneys working in various capacities within the immigration system.

It should be noted that there are also many non-attorneys working on behalf of noncitizens or for the government in an immigration capacity who are exposed to trauma. For purposes of this Article, however, I will focus on trauma exposure in attorneys and others acting in quasi-attorney roles. I define “quasi-attorney” roles as those in which an individual must apply the law to the facts of a noncitizen’s case in order to either argue for or decide on a particular outcome.<sup>122</sup> This focus will help begin to highlight and fill the gap identified above and will allow a particular focus on facets of the legal profession and characteristics of legal practitioners that may impact the effects of trauma exposure.

As the single formal study on the trauma exposure of immigration judges highlights, less attention has been focused overall on adjudicators than on attorneys representing immigrants. I will thus further focus in this Article on attorneys working for the government in an adjudicatory capac-

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to note that while the clinical legal literature is an extremely valuable and insightful source of information,

[t]his marginalization is problematic. Questions about how we lawyers do our jobs cannot be neatly divided into intellectual and emotional spheres, or into doctrinal, strategic, ethical, and emotional quadrants. Such divisions manage to short-change every aspect of lawyering: the intellectual as well as the emotional; the scholarly as well as the practical.

Bandes, *supra* note 71, at 341.

120. See, e.g., Bandes, *supra* note 71; Tehila Sagy, *Even Heroes Need to Talk: Psycho-Legal Soft Spots in the Field of Asylum Lawyering* (bePress Legal Series, Paper No. 1014, 2006), available at <http://law.bepress.com/expresso/eps/1014/>.

121. See Levin, *Secondary Trauma*, *supra* note 37, at 106 (citing as examples D. Brooke, *Impairment in Medical and Legal Professionals*, 43 J. PSYCHOSOM. RES. 27 (1997) and L. Klingen, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157, 157–90 (2002)).

122. Discussion of USCIS Adjudications Officers, *infra* Part II.B.2, includes examples of individuals acting in these quasi-attorney roles.

ity because there is insufficient awareness of and appreciation for the effects of trauma exposure on them.<sup>123</sup>

While immigration judges, board members, and adjudicating officers and counsel for USCIS may not meet the usual definition of a helping professional as obviously as, for example, a mental health counselor or a social worker, they nevertheless should be understood as fitting within this category when considering trauma exposure and its effects—as adjudicators, they must elicit and understand traumatic experiences from the noncitizens who appear before them, and they have a responsibility to “help” those noncitizens by determining whether they meet some legal standard that would allow them to remain legally in the United States.<sup>124</sup> These adjudicators’ position as a helper is somewhat complicated by the fact that they cannot simply decide who they would like to allow to stay in the United States or who would benefit by being allowed to do so. They are constrained by the law, and the law does not provide for relief from removal for all noncitizens, even those who have suffered traumatic experiences.<sup>125</sup> As a result, adjudicators must send some noncitizens back to countries where they have suffered trauma and others back to countries where they certainly will. Nevertheless, the exposure to and effect of trauma on Immigration Judges (IJs) can usefully be compared to that of other helping professionals due to the similarities in their functions and roles at the most basic level.<sup>126</sup>

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123. Cf. Jaffe et al., *supra* note 36, at 8 (“There is an immediate need for broader discussions of VT in judicial circles and consideration of prevention and intervention strategies. Addressing this critical issue will allow the judiciary to continue to conduct its essential business with the concomitant public trust and confidence it deserves.”).

124. Cf. *id.* at 3 (“On one hand, judges may not be considered ‘front-line’ workers in the same sense as child protection and shelter staff; on the other hand, judges are increasingly exposed to graphic medical evidence, tapes of 911 calls, photographs and videotapes of injuries, victim impact statements, victim testimony at trial and sentencing, and statements of surviving family members.”).

125. In fact, some Immigration Judges (IJs) report that this is an additional significant source of stress in their work. Lustig et al., *Burnout and Stress*, *supra* note 110, at 27 (“[We] did hear anecdotally that, had the definition of client-related burnout been broadened to include all individuals in proceeding before the court, rather than just asylum seekers, several judges would have registered significantly higher levels of stress because their inability to favorably exercise discretion in cases they believed were deserving but for which no remedy exists in the law is a considerable source of stress.”).

126. Others would classify IJs in a separate category of professionals along with humanitarian workers and journalists. See Lustig et al., *Burnout and Stress*, *supra* note 110, at 24 (citing J.H. EHRENREICH, *Bibliography to MANAGING STRESS IN HUMANITARIAN, HEALTH CARE, AND HUMAN RIGHTS WORKERS* (2002), available at [http://www.headington-institute.org/Portals/32/resources/AntaresLiteratureReview\\_revformat3-11-03\\_.pdf](http://www.headington-institute.org/Portals/32/resources/AntaresLiteratureReview_revformat3-11-03_.pdf)). Despite the somewhat imperfect fit, I believe IJs should be considered more similar to helping professionals such as counselors, other mental health workers, and attorneys who represent traumatized individuals because of IJs’ responsibility to make decisions that will directly affect noncitizens’ lives. Ultimately, however, given the similarities of these and the limited data available these narrow distinctions likely have little practical significance.



The impact of unaddressed trauma exposure in government attorneys working in adjudicative capacities is also particularly important to address precisely because of the role that such attorneys play—they encounter significant numbers of noncitizens on a daily basis, and their decision making capacities in immigration cases give them extraordinary power and control over the lives of noncitizens.<sup>127</sup> In fact, because there is no right to representation at government expense for noncitizens in the immigration process,<sup>128</sup> the adjudicator may be the only helping professional that the noncitizen encounters. As the first article about the 2007 Lustig Study on immigration judges points out, while “[i]n an ideal world, an applicant’s likelihood of obtaining asylum would depend only upon the merits of the case,” in reality a considerable number of other factors influence this outcome.<sup>129</sup> While not yet studied, trauma exposure response may be another factor influencing asylum grant rates for several reasons pointed out by the Lustig article:

The ability of judges to hear cases empathically is critically important to a fair asylum hearing, but may be made difficult or impossible by high rates of secondary traumatic stress (STS) caused by the huge volume of human misery . . . to which Immigration Judges are subjected . . . . Symptoms of stress and burnout include cynicism and detachment which could affect judges’ perceptions of asylum seekers’ credibility.<sup>130</sup>

While only asylum claims have been studied at any length, it is reasonable to extrapolate that factors outside the merits of a claim, including trauma exposure response, will also affect outcomes in other types of applications for immigration benefits.

Even if trauma exposure response is not shown to statistically affect outcomes in immigration cases, however, managing its effect on the immigration process remains important. First, the impact on the IJs themselves personally and professionally is profound and worthy of attention alone.<sup>131</sup>

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127. This is not intended to convey an impression that this is the only category for which we need to be concerned about trauma exposure in the immigration process. While I have chosen for the above reasons to focus on government adjudicators in this piece, there is also much need for a potential benefit to additional focused attention on trauma exposure response in other attorneys working for the government in the immigration area, particularly attorneys in ICE’s Office of the Chief Counsel, and in attorneys, law students, and other representatives who represent noncitizens before the Executive Office for Immigration Review, the Department of Homeland Security, and the federal courts.

128. See Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2012) (providing that noncitizens “shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”).

129. Lustig et al., *Burnout and Stress*, *supra* note 110, at 22.

130. *Id.* at 23.

131. See *infra* Part III.



Furthermore, as the Lustig study suggests, “court proceedings would be more efficient and stress free for the parties involved if burnout and stress among judges were reduced.”<sup>132</sup> Reducing the impact of secondary traumatic stress on adjudicators could help to eliminate some of the more egregious examples of intolerance toward noncitizens discussed below as well as some less easily traceable and less publicized negative effects of the immigration process discussed above.<sup>133</sup>

In order to more fully explore exposure to trauma and other relevant factors, I have divided government attorneys working in an adjudicative capacity in to several different categories based first on the agency that they work for and second on the attorneys’ respective roles and functions. Those categories are: (1) The Executive Office for Immigration Review (EOIR), focused on (a) immigration judges and (b) Board of Immigration Appeals members; and (2) USCIS, focused on (a) adjudicating officers and (b) attorneys in the Chief Counsel’s Office. In discussing each category, I will begin by explaining the context that the attorneys work in and the tasks that they are likely to perform on a regular basis. Next, I will provide any available information about the exposure to trauma of attorneys in each category. Finally, after discussing each of the individual categories, I will address the effect of trauma exposure on this group as a whole, both on the individual attorneys and the particular portion of the system that they work within. Where limited information is available, I will extrapolate likely effects based on the numerous sources discussed in the introduction to this section. This discussion will highlight just how significant the effects of trauma exposure on immigration adjudicators are and lay the groundwork for Part III’s consideration of the impact these effects may have on the immigration system as a whole.

#### 1. Department of Justice—Executive Office for Immigration Review

Immigration judges (IJs) and members of the Board of Immigration Appeals (BIA or “Board”) are part of the Executive Office for Immigration Review (EOIR) in the Department of Justice and are designated their power by the Attorney General of the United States. Immigration judges preside over removal proceedings in Immigration Court, which are hearings to determine whether noncitizens charged as either inadmissible or deportable by the Department of Homeland Security may remain in the United States or must be removed to their country of citizenship or origin. Board Members hear appeals of IJ decisions in removal proceedings as well as certain other appeals at the BIA. Simply speaking, then, immigration

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132. Lustig et al., *Burnout and Stress*, *supra* note 110, at 29.

133. See *infra* Part II.B.1.a. and *supra* Part II.A; see also, e.g., Lustig et al., *Burnout and Stress*, *supra* note 101, at 10 (“[A]t least one of the short term symptoms of vicarious trauma or stress has been identified as ‘intolerance’ of others. A handful of Immigration Judges have been identified in circuit decisions as displaying this demeanor in court towards applicants. . . . [T]his condition could explain these problems with a few judges.”).

judges sit in courts that function essentially as trial level courts, while the Board of Immigration Appeals acts as the appellate court for their decisions. Despite their names and appearances, however, Immigration Courts and the BIA are not Article III or even Article I courts, but are instead administrative agencies within the executive branch.<sup>134</sup>

a. *Immigration Judges*

As of April 2013, there are 260 immigration judges that sit in fifty-nine Immigration Courts across the United States.<sup>135</sup> Approximately seventeen of these Courts and thirty-eight of these IJs are located physically within immigration detention facilities or state, local, or county jails that are contracted with the federal government to hold U.S. Immigration and Customs Enforcement (ICE) detainees and/or hear exclusively cases of detained noncitizens.<sup>136</sup> Because a number of the non-detained Courts also hear detained cases by videoconference, it is difficult to calculate exactly how many IJs regularly preside over removal proceedings for detained noncitizens.<sup>137</sup> Detained cases represent a significant portion of the Immigration Courts' caseload, however; 36 percent of case completions in fiscal year 2012 involved detained noncitizens.<sup>138</sup>

In addition to the IJs, thirteen Assistant Chief Immigration Judges ("ACIJs") work under the Chief Immigration Judge to supervise and di-

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134. See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); COMM'N ON IMMIGRATION, AMER. BAR ASSOC., REFORMING THE IMMIGRATION SYSTEM (2010); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 1 (2008).

135. U.S. DEP'T OF JUSTICE, OFFICE OF THE CHIEF IMMIGRATION JUDGE (2013), available at <http://www.justice.gov/eoir/ocijinfo.htm>; see also U.S. DEP'T OF JUSTICE, EOIR IMMIGRATION COURT LISTING (2013) [hereinafter EOIR IMMIGRATION COURT LISTING], available at <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last updated Aug. 2013) (listing IJ and contact information by court).

136. EOIR IMMIGRATION COURT LISTING, *supra* note 135. Additional information about each of these facilities where detained noncitizens are held can be found on the individually linked pages for Eloy, Florence, East Mesa, El Centro, Miami Krome, Chicago Detained, Oakdale, Elizabeth, Batavia, Fishkill, Ulster, Varick Street, York, El Paso SPC, Houston SPC, and Port Isabel. These numbers are difficult to report accurately, as the EOIR webpage does not specifically identify all detained courts (for example, the East Mesa Immigration Court, which is identifiable only by the CCA abbreviation—standing for Corrections Corporation of America—in its address) and some detained courts (for example, the Broward Transitional Center in Pompano Beach, Florida) are not listed. *Id.*

137. U.S. DEP'T OF JUSTICE, OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 60–61 [hereinafter OCIJ, PRACTICE MANUAL], available at [http://www.justice.gov/eoir/vll/OCIJPracManual/ocij\\_page1.htm](http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm). For a list of detained cases completed in fiscal year 2012 by Immigration Court, see U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FISCAL YEAR 2012 STATISTICAL YEARBOOK O3 tbl.13 (2013) [hereinafter EOIR, FY 2012 STATISTICAL YB], available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf>.

138. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at 1 fig.24.

rect the work of the Immigration Courts.<sup>139</sup> Discussion of trauma exposure in this subsection will not focus on the ACIJs as their responsibilities are primarily administrative in nature and they do not regularly hear cases.

Immigration judges come to the bench through a variety of different routes and have somewhat diverse backgrounds.<sup>140</sup> Most IJs have some (many significant) government work experience, primarily federal but some state as well. Many have worked as government attorneys in removal proceedings through the Office of the Chief Counsel or its predecessor. They may also have been employed by some other subcomponent of the Department of Homeland Security such as Immigration and Customs Enforcement (“ICE”), ICE Enforcement and Removal Operations (“ERO”) or Customs and Border Protection (“CBP”) or the former Immigration and Naturalization Service. Others were military attorneys or judges or worked for the government in some other non-immigration related capacity. Some IJs come from careers in private practice or even nonprofits representing noncitizens. It is important to note, however, that political hiring of immigration judges has almost certainly affected the composition of the immigration judge corps.<sup>141</sup>

New immigration judges may have significant immigration experience from their prior work in private practice or for the Department of Homeland Security, but they may also bring with them virtually no knowledge of immigration law and practice. They may have substantial experience working with traumatized individuals, or none at all. They may already accept that emotions in general and trauma exposure in particular may affect not only them on a personal level but also their work as judges, or they may never have been exposed to this concept. It is important that any analysis of this group and implementation of reform, then, not simply treat immigration judges as a monolithic group, but take into account their differing backgrounds, personal and professional experiences, and personalities and individual characteristics.

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139. EOIR IMMIGRATION COURT LISTING, *supra* note 135; U.S. DEP’T OF JUSTICE, OFFICE OF THE CHIEF IMMIGRATION JUDGE, BIOGRAPHICAL INFORMATION (2013), available at <http://www.justice.gov/eoir/fs/ocjbio.htm> (containing biographies of the ACIJs).

140. See *Immigration Judge Reports - Asylum*, TRAC IMMIGRATION, 2011, available at <http://trac.syr.edu/immigration/reports/judgereports/> (providing access to biographies for all immigration judges); JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 47–60 (2009).

141. See, e.g., U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 69–124 (2008) [hereinafter DOJ, POLITICIZED HIRING], available at <http://www.justice.gov/oig/special/s0807/final.pdf>; PENN STATE LAW’S CENTER FOR IMMIGRANTS’ RIGHTS, *Playing Politics at the Bench: A White Paper on the Justice Department’s Investigation into the Hiring Practices of Immigration Judges* [hereinafter PENN STATE, *Playing Politics*], [http://www.nationalimmigrationproject.org/legalresources/cd\\_rep\\_White%20Paper%20-%20Politics%20of%20IJ%20Hiring.pdf](http://www.nationalimmigrationproject.org/legalresources/cd_rep_White%20Paper%20-%20Politics%20of%20IJ%20Hiring.pdf).

An immigration judges' job is highly stressful for a variety of reasons, including the nature of the work as well as the structure and context in which it occurs. IJs spend the vast majority of their time in court physically presiding over removal proceedings, making decisions about whether noncitizens should be released on bond, whether they are removable as charged, and whether they are eligible for some form of immigration benefit or other relief from removal—all high-stakes decisions for the noncitizens involved.<sup>142</sup> These decisions are made in a relatively formal and constrained setting. The size and appearance of immigration courtrooms varies, but they typically resemble a smaller state or local courtroom. For example, the IJ wears a robe and sits at his bench. The proceedings are adversarial in nature, with a government attorney appearing to argue the government's position against the noncitizen. The front portion of the courtroom is divided by a bar from a small gallery with benches for those who are waiting for their hearings or the public when permitted to sit; the courtrooms are often overcrowded and may be somewhat chaotic.

There are three different types of hearings in Immigration Court: bond hearings, master calendar hearings, and individual hearings.<sup>143</sup> Bond hearings allow detained noncitizens to ask the IJ to set a bond or reconsider the bond set by the Department of Homeland Security that, if paid, would allow them to be released from detention while their removal proceedings are ongoing. Master calendar hearings most resemble an arraignment, where the noncitizen pleads to the charges of removal against her in the Notice to Appear and requests relief from removal if any is available or sought, or a status hearing, where applications for relief may be filed and the scheduling and logistics of the individual hearing can be discussed, but other matters may be addressed as well. During a single morning or afternoon block set aside for master calendar hearings, an IJ may have numerous noncitizen respondents scheduled for hearings.<sup>144</sup> Individual hearings proceed like a bench trial or evidentiary hearing in state or federal court.<sup>145</sup> Depending on the type of case and complexity of the issue presented, these hearings may last anywhere from as short as under an hour

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142. Immigration judges also hear and decide related oral and written motions in bond and removal proceedings, review credible fear and reasonable fear determinations made by USCIS, review status determinations made by DHS for noncitizens otherwise subject to expedited removal, preside over asylum and withholding only proceedings, adjudicate certain applications filed under NACARA, and conduct rescission proceedings. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at C1–C2.

143. OCIJ, PRACTICE MANUAL, *supra* note 137, at r.4.15, 4.16, 9.3. Master calendar and individual hearings are considered to be hearings in removal proceedings, while bond hearings are treated as a separate proceeding with their own record. *Id.*

144. Numbers vary between courts, different areas of the country and even among IJs within individual courts.

145. There are certain differences between such trials in Immigration Court and a trial or hearing in state or federal court; perhaps most notably the rules of evidence do not apply in Immigration Court. See U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION RE-

to as long as days and even weeks. In a typical week, an immigration judge will have a single morning or afternoon block free for all preparation and follow up work on cases, including making decisions on numerous written motions, reviewing voluminous document submissions in support of applications before the court, researching complex questions of law, and writing decisions in some of their cases. The remainder of the work days will have hearings scheduled essentially back to back for the vast majority of the day, meaning that even on days when an IJ is scheduled for individual hearings he may see and render decisions in cases for multiple respondents.

The caseload and backlog in the Immigration Courts continue to grow.<sup>146</sup> During the first three months of 2013, the average time that an individual currently in removal proceedings has been waiting on a decision in his or her case has grown from 550 days<sup>147</sup> to 555 days.<sup>148</sup> Cases in which a removal order is eventually entered now take an average of 261 days to complete, while cases in which relief from removal is ultimately granted now are pending before the Immigration Court on average 839 days, or more than two and a quarter years.<sup>149</sup> IJs have only quite limited support staff to assist in the completion of their work. In most courts, each immigration judge has a non-attorney legal assistant who performs primarily administrative tasks. Immigration judges do not have individual career or term attorney clerks; instead each Immigration Court is assigned recent law graduate clerks for two year terms through the Honors Program.<sup>150</sup> An Immigration Court may also have several short term law student interns or externs.

The federal government sequester is likely to have a significant negative impact on these already existing issues. As Attorney General Holder explained in a recent letter to the Senate Appropriations Committee:

The sequestration would cut over \$15 million from EOIR's current budget. EOIR would be forced to cease all hiring of

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VIEW, *Evidence*, in IMMIGRATION JUDGE BENCHBOOK, available at <http://www.justice.gov/eoir/vll/benchbook/tools/Evidence%20Guide.htm>.

146. *Wait Times in Immigration Courts Increase in March*, TRAC IMMIGRATION (2013), [http://trac.syr.edu/immigration/reports/latest\\_immcourt/](http://trac.syr.edu/immigration/reports/latest_immcourt/).

147. *Id.*

148. *See id.* (showing an increase in wait times over 531 days at the end of the fiscal year 2012).

149. *Id.* For a more detailed (and regularly updated) breakdown of these figures, see *Immigration Court Backlog Tool*, TRAC IMMIGRATION (2013), [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/).

150. The number of judicial law clerks assigned to each court through the Honors Program has decreased, likely as a result of the federal government's budget issues. For example, the Orlando Immigration Court, a Court with six immigration judges, used to be assigned two judicial law clerks and is now assigned only one. *See generally* U.S. DEP'T OF JUSTICE, ENTRY LEVEL ATTORNEYS: THE ATTORNEY GENERAL'S HONORS PROGRAM, <http://www.justice.gov/careers/legal/entry.html>.

key critical positions for EOIR's immigration courts, including Immigration Judges, likely increasing pending caseloads to well over 350,000 (an increase of 6 percent over September 2012 levels). EOIR would also be forced to reduce contracts for critical services, such as interpreters, legal support, and information technology. Sequestration would require the rescheduling of immigration cases for aliens who are not in detention even further into the future (into 2017). It would also result in delays for aliens in immigration detention and individuals seeking asylum protection.<sup>151</sup>

Doris Meissner of the Migration Policy Institute estimates that if judges and court clerks are required to take a furlough one day each week it will reduce productivity for EOIR by about 20 percent.<sup>152</sup>

Despite the high caseload and limited support, there is pressure on immigration judges to complete cases quickly. Prior to January 2010, immigration judges were subject to general case completion goals.<sup>153</sup> These goals were widely criticized as "unrealistic and arbitrary" and were cited by immigration judges as a particularly difficult aspect of their work.<sup>154</sup> They were eliminated in January 2010 purportedly in order to focus resources on detained and asylum claims.<sup>155</sup> The Office of the Inspector General for the Department of Justice and others have recommended that some form of completion goals be reinstated for non-detained cases.<sup>156</sup>

The elimination of the system of case completion goals did not remove all time pressure on IJs. Two specific types of cases—the complicated system of expedited asylum claims created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and all cases involving noncitizens detained at the expense of the federal government—are still subject to explicit time constraints. Removal proceedings involving all detained noncitizens operate on an expedited docket.<sup>157</sup>

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151. Letter from Attorney General Eric H. Holder, Jr. to Barbara A. Mikulski, Chairwoman, Committee on Appropriations, United States Senate (Feb. 1, 2013), available at <http://www.appropriations.senate.gov/ht-full.cfm?method=hearings.view&id=17d3dc99-c065-4bec-a7c8-cfd374bf41a3>.

152. Ted Hesson, *How Sequestration Could Impact the Immigration System*, ABC NEWS (Feb. 26, 2013), [http://abcnews.go.com/ABC\\_Univision/Politics/sequester-cuts-impact-immigration-system/story?id=18600283#.UXvYdStAT0A](http://abcnews.go.com/ABC_Univision/Politics/sequester-cuts-impact-immigration-system/story?id=18600283#.UXvYdStAT0A).

153. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ii (2012) [hereinafter DOJ OIG, MANAGEMENT EOIR], available at <http://www.justice.gov/oig/reports/2012/e1301.pdf>.

154. Lustig et al., *Narrative Responses*, *supra* note 68, at 64–65.

155. DOJ OIG, MANAGEMENT EOIR, *supra* note 153, at ii.

156. *Id.*

157. OCIJ, PRACTICE MANUAL, *supra* note 137, at r.9.1(e).

Some applications for asylum must also be expedited. In an attempt to cut down on allegedly baseless asylum claims filed for the purpose of obtaining employment authorization, IIRIRA established a system whereby asylum applicants are not entitled to employment authorization until their claims have been pending for 180 days, exclusive of any delay caused by them, and administrative adjudication of asylum claims must be completed within that 180 day period absent exceptional circumstances.<sup>158</sup> 33,881 of the 44,170 asylum claims completed in fiscal year 2012 fell into this expedited category.<sup>159</sup> The system to calculate the 180 day time frame, and therefore which cases fall into this category, is known as the “asylum clock.”<sup>160</sup> Even when general case completion goals were still in effect, immigration judges identified the asylum clock as a particular source of stress in their work.<sup>161</sup>

Even setting aside trauma exposure, then, IJs work in difficult conditions and under high amounts of stress. Their decisions on a daily and hourly basis have life changing, and sometimes life threatening, consequences for the immigrants that appear before them.<sup>162</sup> These non-traumatic stressors may make IJs more vulnerable to the impact of trauma exposure and may increase the effect of trauma exposure on individual IJs and on the immigration process.<sup>163</sup> On top of these other stressors, IJs are unquestionably exposed to trauma through the life stories of the noncitizens who appear before them. First, traumatic experiences may arise in the course of an IJ’s decision with regard to whether a noncitizen before the IJ is removable as charged. Noncitizens may be charged as removable, both inadmissible and deportable, as the result of certain criminal convictions.<sup>164</sup> While typically this decision is made on the basis of the conviction and criminal statute alone, without any reference to the underlying

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158. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at L1; Immigration and Naturalization Act § 208(d)(2), 8 U.S.C. § 1158 (2013).

159. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at L1.

160. See, e.g., Memorandum from Brian M. O’Leary, Chief Immigration Judge, Exec. Office for Immigration Review, U.S. DEP’T OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM 11-02: THE ASYLUM CLOCK (2011), available at <http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf>; PENN STATE LAW’S CENTER FOR IMMIGRANTS’ RIGHTS AND THE AMERICAN IMMIGRATION COUNCIL’S LEGAL ACTION CENTER, *Up Against the Asylum Clock: Fixing the Broken Employment Authorization Asylum Clock* (2010), [http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum\\_Clock\\_Paper.pdf](http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf).

161. Lustig et al., *Narrative Responses*, *supra* note 68, at 69.

162. See, e.g., *Woodby v. INS*, 385 U.S. 276, 285 (1966) (“This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.”); see also *Fong Haw Tang v. Phelan*, 333 U.S. 6, 10 (1948) (labeling deportation “the equivalent of banishment or exile”).

163. See *infra* Part III.

164. Immigration and Naturalization Act § 212(a)(2), 8 U.S.C. § 1182 (2013); INA § 237(a)(2), 8 U.S.C. § 1227 (2013); INA §240A(b)(2), 8 U.S.C. § 1229b (2013).



facts of the offense, there are some exceptions to this rule.<sup>165</sup> IJs deciding whether someone is removable for a crime of domestic violence,<sup>166</sup> or in some circuits and cases a crime involving moral turpitude,<sup>167</sup> will have to inquire into the circumstances of the crime and the victim, thus exposing the IJ to the trauma of those circumstances. As described above, trauma is also the basis for some applications for relief from removal made before IJs. Among other types of cases, IJs hear applications for asylum and VAWA cancellation of removal, and review USCIS decisions on applications for temporary protected status.

Publicly available statistics of cases heard by the Immigration Courts do not allow for precise identification of how many cases before each individual immigration judge involve applications for relief based on trauma exposure.<sup>168</sup> For example, applications for cancellation of removal generally are tracked, but are not separated out into the various different bases for the application, including under VAWA.<sup>169</sup> Some relevant quantitative observations can still be made, however—particularly with regard to claims for asylum, which are tracked separately.

Only a very small number of temporary protected status (TPS) applications are reviewed by immigration judges; for fiscal year 2012, only 2,080 applications for TPS were completed.<sup>170</sup> The numbers for asylum claims are much higher. While overall numbers of asylum applications filed with the Immigration Court decreased last fiscal year,<sup>171</sup> IJs continue to hear a significant number of asylum and related claims. Nationally during fiscal year 2012, 44,170 cases were received by the immigration courts and

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165. See, e.g., Mary Holper, *The New Moral Turpitude Test, Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1241 (2011) (discussing the Bush Administration's reversal of the traditional categorical approach for the new moral turpitude test, which "potentially subjected many more noncitizens to removal for a crime involving moral turpitude").

166. See, e.g., *Matter of Velasquez*, 25 I. & N. Dec. 278, 280–81 n.1 (B.I.A. 2010).

167. See, e.g., *Matter of Silva Trevino*, 24 I. & N. Dec. 687, 687 (Att'y Gen. 2008); Holper, *supra* note 165, at 1251–52, 1295–96.

168. See generally EOIR, FY 2012 STATISTICAL YB, *supra* note 137. These statistics also do not encompass all of the types of trauma discussed *supra* Part II.A, that do not lend themselves to particular forms of immigration relief. Because immigration judge decisions are not published, no independent statistical analysis of publicly available information regarding these types of trauma can be conducted. Even if these decisions were available, such an analysis likely would be of limited utility because immigration judges might not find the trauma relevant enough to be included in his or her decision.

169. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at R3 tbl.16. In fact, the Statistical Yearbook does not mention VAWA Cancellation at all. See EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at R2.

170. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at D3.

171. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at I1 fig.14. Affirmative receipts decreased by eleven percent while defensive receipts decreased by seven percent. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at I2.



44,282 were completed.<sup>172</sup> If each immigration judge heard an equal number of claims for asylum, this case completion number works out to be approximately 170 cases per IJ, or about one asylum case each working day and half all year.<sup>173</sup>

However, claims for asylum are not distributed evenly across the fifty-nine Immigration Courts and 260 immigration judges.<sup>174</sup> Just six of the fifty-nine Immigration Courts—New York, New York; Los Angeles, California; San Francisco, California; Newark, New Jersey; Miami, Florida; and Orlando, Florida—handled the majority of the claims for asylum and for relief under the Convention Against Torture decided throughout the country during fiscal year 2012.<sup>175</sup> The caseloads of asylum claims carried by individual IJs within these courts also varies. For example, from fiscal year 2007 through fiscal year 2012, the six immigration judges currently sitting on the Orlando Court decided from between 142 to 1,327 asylum applications each.<sup>176</sup> Those IJs at the higher end of this range must decide on average more than one claim for asylum every working day; given an IJ's typical schedule of master calendar and individual hearings and allowing for time not on the bench, this likely works out to be several asylum cases per day of work. Because of the large amount of asylum claims received by the Orlando Immigration Court, the IJs there necessarily decide a higher than average number of asylum cases.<sup>177</sup> Even with a more typical figure of, for example, 400 asylum applications completed over five fiscal years, an IJ would have to complete an asylum case every

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172. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at I2 fig.15. Because asylum claims on average take well more than a year to reach completion, there is likely only minimal overlap between the cases received and the cases completed during the fiscal year. I am not making any distinction here regarding the manner of completion of the case, because any asylum claim may expose an IJ to trauma regardless of manner of completion.

173. This calculation assumes a five-day workweek and takes into account public holidays, but not vacation, conferences, or any other time that an IJ might be out or not hearing cases. Claims for asylum represent only a portion of an immigration judge's caseload.

174. See EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at I3 tbl.7 (listing asylum receipts by Immigration Court for fiscal year 2012).

175. *Id.* at A1. The New York, New York; Los Angeles, California; San Francisco, California; Newark, New Jersey; and Miami, Florida, immigration courts received 58 percent of asylum applications filed with the courts in fiscal year 2012. *Id.* at I3 tbl.7. The New York, New York; Los Angeles, California; San Francisco, California; Miami, Florida; and Orlando, Florida, immigration courts combined received 52 percent of the total CAT cases filed in FY 2012. *Id.* at M2 tbl.11.

176. *Immigration Judge Reports - Asylum*, TRAC IMMIGRATION (2013), available at <http://trac.syr.edu/immigration/reports/judgereports/>. These numbers are likely strongly affected by how long the IJ has been on the bench, with the lowest number for the Orlando Court belonging to the newest IJ assigned there and gradually increasing over time with a rough correspondence to number of years as an IJ. *Id.*

177. See *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2007–2012*, TRAC IMMIGRATION (2013), available at <http://trac.syr.edu/immigration/reports/306/include/denialrates.html>.

three days or a case and a half every workweek with no allowance for vacation or illness.

Furthermore, claims for asylum are not the only forms of fear-based relief heard by immigration judges—the Immigration Courts also have jurisdiction to decide applications for withholding of removal and relief under the Convention Against Torture. Nationwide in fiscal year 2012, IJs heard at least 1,910 requests for withholding of removal<sup>178</sup> and 643 requests for relief under the Convention Against Torture.<sup>179</sup> Functionally, then, on an almost “daily basis, U.S. Immigration Judges nation-wide are entrusted with the equivalent of capital cases, and the stakes are high for all parties.”<sup>180</sup>

The types of trauma that IJs encounter are not limited to those that lend themselves to specific forms of relief from removal such as these. They run the gamut of those discussed in Part II.A. On any given day or week, an immigration judge may face a wide range of other trauma. On one day, an IJ may be exposed to extreme and systemic trauma, such as the removal proceedings for the former Defense Minister of El Salvador, found to be removable for his participation in torture and extrajudicial killings during El Salvador’s civil war, which included more than a week’s worth of testimony and extensive evidence regarding severe state-sponsored violence and multiple murders.<sup>181</sup> On the next day, the same IJ may be exposed to trauma as personal and heart-rending as a long-term legal permanent resident single mother who is ineligible for a waiver of two more than a decade old misdemeanor convictions and therefore must choose whether to take her United States citizen child to a country where she will likely be unable to receive the medical care she needs for a chronic health condition or place the child into the foster care system in the United States.<sup>182</sup>

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178. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at K4 fig.20A. I have not included the 10,269 applicants denied withholding of removal in this figure because it appears that at least some of these applicants were probably also denied asylum and therefore considered in the figures discussed for asylum above; the text accompanying Figure 20A explains that applicants who were granted asylum and withholding of removal were excluded from the withholding grant figures but says nothing about the withholding denial figures. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at K4 fig.20A.

179. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at M1 tbl.10. I have not included the 29,153 CAT claims that were disposed of in ways other than a grant—labeled as denials, withdrawn, abandoned, and other—to avoid double counting those applicants who also applied for asylum and withholding of removal, but it is likely that at least some percentage of that number are unique applicants that should be counted. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at M1 tbl.10

180. Lustig et al., *Burnout and Stress*, *supra* note 110, at 22.

181. Matter of Vides Casanova, IJ Removal Proceedings (Aug. 16, 2012), available at [cja.org/downloads/Vides%20Casanova%20Removal%20Proceedings.pdf](http://cja.org/downloads/Vides%20Casanova%20Removal%20Proceedings.pdf).

182. See, e.g., *Poveda v. U.S. Att’y Gen.*, 692 F.3d 1168 (11th Cir. 2012) (holding that stand-alone 212(h) waivers are not available to legal permanent residents charged as deportable in removal proceedings).

The combination of high case-loads of cases involving trauma heard under stressful circumstances has a very real effect on the individual IJs and on the system as a whole. As will be discussed in more detail in Part III, understandably but unfortunately individual IJs have not always handled the responsibilities, trauma exposure, and stress of their work in an ideal manner. Some IJs have even been criticized by the federal courts for the manner in which they conducted some specific cases.<sup>183</sup> Among other issues, IJs have been criticized for failing to allow the noncitizen respondent to present evidence,<sup>184</sup> reaching unsupported or unexplained conclusions of fact,<sup>185</sup> making repeated intemperate and hostile remarks to the noncitizen respondent,<sup>186</sup> and relying on irrelevant character evaluations of the noncitizen.<sup>187</sup> Interestingly, many of these criticisms arise out of claims for asylum, which inherently involve testimony regarding the noncitizen respondent's traumatic experiences or fears.<sup>188</sup> While the extreme conduct described in these cases is surely the exception and not the rule, it nevertheless highlights the importance of considering the impact of trauma exposure on individual immigration judges and on the immigration process as a whole.

b. *Board of Immigration Appeals Members*

By regulation, there are fifteen members who sit on the Board of Immigration Appeals (BIA), located at a single facility in Falls Church, Virginia.<sup>189</sup> Fourteen regular Board members and several temporary Board members actually currently serve.<sup>190</sup> Four of the fourteen regular Board members are prior IJs, and all have prior government experience—all but two in the immigration context.<sup>191</sup> A few also have experience representing noncitizens in private practice or in a pro bono capacity.<sup>192</sup>

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183. See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005); Stacy Caplow, *After the Flood: The Legacy of the Surge of Federal Immigration Appeals*, 7 Nw. J.L. & Soc. POL'Y 1, 27–28 (2012); Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 29–30 (2008); Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases: Pattern of Bias Alleged*, N.Y. TIMES, Dec. 26, 2005, at A1, A26.

184. See, e.g., *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005).

185. See, e.g., *Soumahoro v. Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005); *Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005).

186. See, e.g., *Qun Wang v. U.S. Att'y Gen.*, 423 F.3d 260, 263–66 (3d Cir. 2005); *Fiadjoe v. U.S. Att'y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005).

187. See, e.g., *Qun Wang*, 423 F.3d at 269; *Fiadjoe*, 411 F.3d at 154–55.

188. See Liptak, *supra* note 183, at A26.

189. 8 C.F.R. § 1003.1(a)(1).

190. See U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS (2013), available at <http://www.justice.gov/eoir/fs/biabios.htm>; see also 8 C.F.R. § 1003(a)(4) (giving the director of EOIR the authority to appoint certain individuals as temporary Board members).

191. See U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS BIOGRAPHICAL INFORMATION (2013), available at <http://www.justice.gov/eoir/fs/biabios.htm>.

192. See *id.*

Like immigration judges, Board members must make high-stakes decisions while working under stressful circumstances. Controversy has plagued the staffing of the BIA, beginning with Attorney General John Ashcroft's "streamlining" regulations in 2002.<sup>193</sup> In addition to reforms ostensibly designed to reduce the backlog such as making single member decisions and affirmances without opinion the presumptive default, Ashcroft also cut the size of the Board from twenty-three to eleven Members.<sup>194</sup> The Board Members who were reassigned as a result of this purge were among "the most 'liberal' members of the BIA, as measured by the percentages of their rulings in favor of noncitizens" and their selection cannot be explained by the traditional criteria previously announced by Ashcroft.<sup>195</sup> As with the immigration judges, political and ideological affiliations were also improperly considered for a period of time during the selection and interview process for BIA positions.<sup>196</sup>

The fifteen Board members hear appeals of immigration judge decisions from throughout the United States and its territories in removal, bond, and asylum-only proceedings brought by both noncitizen respondents and attorneys for the government from the Office of the Chief Counsel, and appeals of family petitions denied by USCIS among other matters.<sup>197</sup> Board members may hear and render decisions on appeals as single members, in three member panels, or en banc.<sup>198</sup> Staff attorneys assist Board members in their work.

The vast majority of decisions made by the Board are non-precedential; only between approximately thirty to forty decisions are designated as precedential each calendar year. The Board makes its decision based on the written record of the proceedings before the immigration judge, including a written transcript of all hearings before that judge, and any briefs submit-

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193. PENN STATE, *Playing Politics*, *supra* note 141, at 7–8.

194. *Id.*

195. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 376 (2006) (citing Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1155–56, 1164 (2004)); *see also* Penn State, *Playing Politics*, *supra* note 141, at 7–8.

196. DOJ, *POLITICIZED HIRING*, *supra* note 141, at 69–124; PENN STATE, *Playing Politics*, *supra* note 141.

197. 8 C.F.R. § 1003.1(b). Appeals of removal orders make up the vast majority of the Board's work. *See id.*

198. 8 C.F.R. §§ 1003.1(a)(3), (5); 8 C.F.R. §§ 1003.1(e)(4)–(6). Single Board Members may affirm a decision without opinion or issue a brief order. 8 C.F.R. §§ 1003.1(e)(4)–(5). An appeal will presumptively be heard by a single member unless certain specified conditions are met to be referred to a three member panel. 8 C.F.R. § 1003.1(e)(6). En banc consideration occurs only rarely and under exceptional circumstances. 8 C.F.R. § 1003.1(a)(5). The Attorney General may also certify any immigration case pending before the Board to himself for decision. 8 C.F.R. § 1003.1(h). Because of the very small number of cases actually so certified and the tiny percentage those cases make up of the Attorney General's overall workload, the effects of possible trauma exposure on the Attorney General will not be considered in this Article.

ted to them by the parties or their representatives. It never hears testimony on appeals of removal or bond orders and they rarely ever even hold oral argument.<sup>199</sup> This means that the Board Members virtually never have in-person contact with the noncitizen whose case they are deciding or even his or her attorney or the attorney for the government assigned to the case. It should be noted that, while this places Board members further away from the traumatic experience on the continuum of trauma exposure discussed in Part I and may of course therefore affect the nature of their response, it does not mean that Board members are not exposed to or impacted by trauma.

Like immigration judges, Board members are affected by a high caseload and inadequate resources. In fiscal year 2012, the BIA completed 36,396 cases.<sup>200</sup> Assuming an equal work load and no vacations or time out of the office, this means that each of the fifteen regulatory Board members would have to decide about nine cases every day, or more than one case every hour.<sup>201</sup> In the wake of Attorney General Ashcroft's reforms, the Los Angeles Times reported that some Board members admitted deciding up to fifty cases per day,<sup>202</sup> that is, spending less than ten minutes per case. Despite the somewhat frightening speed of these decisions, the high caseload and limited resources have led to a backlog of cases before the BIA. At the end of fiscal year 2012, 24,824 cases remained pending before the Board.<sup>203</sup> Almost eight hundred of those cases were filed with the Board in fiscal year 2010 or earlier, including some prior to fiscal year 2008.<sup>204</sup>

Appeals to the federal courts skyrocketed in the wake of the streamlining reforms.<sup>205</sup> At least one study suggests that this is a result of increasing dissatisfaction with the quality of the BIA's decisions.<sup>206</sup> The Circuit Courts of Appeal that have criticized particular immigration judges have

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199. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 747 (5th ed. 2009).

200. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at S1 fig.26.

201. This calculation assumes a work year of two hundred sixty days (five days/week times fifty-two weeks/year) and a workday of eight hours with no breaks.

202. LEGOMSKY & RODRIGUEZ, *supra* note 199, at 747 (citing Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003).

203. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at Y3 fig.34.

204. *Id.*

205. See, e.g., John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006–2007); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37 (2006–2007).

206. See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMGR. L.J. 1, 5 (2005).

also denounced the Board for failing to take the opportunity to correct the IJs errors themselves.<sup>207</sup>

EOIR does not release statistics regarding the grounds for appeals heard by the Board.<sup>208</sup> Nevertheless, it is safe for a number of reasons to conclude that Board members are exposed to trauma through the cases they hear. First, the BIA hears cases already adjudicated by IJs. Unless only cases not involving trauma are appealed, which is improbable, this means that if IJs are exposed to trauma Board members who review the record created before the IJ will be exposed to that trauma as well. Second, both the published and unpublished decisions issued by the Board include descriptions or other indication of traumatic experiences of noncitizens. Out of the thirty-eight precedential decisions issued by the Board in calendar year 2012, nine had something to do with asylum, asylees or refugees; five related to a crime that likely involved a traumatic experience; four included the hardship of family separation, and one concerned a noncitizen victim of crime.<sup>209</sup> At least nineteen, then, or half of the Board's precedential decisions issued in 2012, involved some kind of traumatic experience.

## 2. Department of Homeland Security—USCIS Adjudicating Officers and Office of the Chief Counsel

United States Citizenship and Immigration Services, or USCIS, is a sub-agency of the Department of Homeland Security and operates under the authority and supervision of the Secretary of Homeland Security. Among other tasks, USCIS adjudicating officers and attorneys in the Chief Counsel's Office make decisions on whether to grant various affirmative applications for immigration benefits.<sup>210</sup> USCIS is similar to EOIR in several respects. First, they are also a federal administrative agency. Second, like immigration judges, USCIS officers and attorneys decide applications for immigration status and, by extension, determine whether or not a noncitizen applicant may remain in the United States legally.<sup>211</sup> In fact, IJs

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207. See, e.g., LEGOMSKY & RODRIGUEZ, *supra* note 199, at 747–48.

208. EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at S1–W2. Numbers are provided on the source of the appeal (DHS or IJ), the type of appeal (removal, motion, bond, etc.), the nationality of the respondent, whether the respondent is represented before the BIA, and whether the respondent is detained. *Id.*

209. U.S. DEP'T OF JUSTICE, VIRTUAL LAW LIBRARY: ATTORNEY GENERAL AND BIA PRECEDENT DECISIONS 25–26, available at [http://www.justice.gov/eoir/vll/intdec/lib\\_intdecitnet.html#dec](http://www.justice.gov/eoir/vll/intdec/lib_intdecitnet.html#dec).

210. USCIS also fulfills other functions, but for purposes of this Article I will concentrate on their adjudicatory function, as it is the most likely to result in trauma exposure.

211. Other DHS officials also perform adjudicatory functions affecting noncitizens, although the context and outcome of their decisions are of a slightly different nature. For example, Immigration and Customs Enforcement officials decide which noncitizens to detain, if and how much bond to set, whether to reinstate removal orders, and who to place in removal proceedings. See U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT,

and USCIS officers make decisions on some of the very same categories of claims; which agency that has jurisdiction in any particular case is typically determined by whether or not the noncitizen applicant is in removal proceedings or other procedural factors.

Outside of these similarities, however, USCIS is structured and operates quite differently than EOIR, though the organization, staffing, and work of USCIS is somewhat more difficult to describe accurately for a number of reasons: its structure has more components and is more complex; responsibilities and functions are frequently shifted and restructured to try to achieve greater efficiency; and somewhat less information is publicly available. These descriptions, then, are as current and accurate as possible given the information obtainable. In any event, barring a large scale re-organization, even if some details of USCIS's internal organization change, those relevant for this discussion are highly likely to remain the same overall because USCIS's major functions remain constant.

USCIS conducts its operations through several different types of offices located throughout the United States—service centers, the National Benefits Center, local field offices, asylum offices, the National Records Center, and application support centers.<sup>212</sup> There are four service centers nationwide—in California, Texas, Nebraska, and Vermont<sup>213</sup>—that review and adjudicate applications that are decided solely based on the paperwork submitted. The Vermont Service Center (“VSC”) has a unit of officers specifically trained to adjudicate applications filed by victims of

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ENFORCEMENT AND REMOVAL OPERATIONS, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited Nov. 15, 2013). Customs and Border Patrol officials decide who to admit into the United States, who to allow to voluntarily return to his or her country of origin, and who to order removed through expedited removal procedures. See U.S. DEP'T OF HOMELAND SECURITY, CUSTOMS AND BORDER PATROL, ABOUT CBP, <http://www.cbp.gov/xp/cgov/about/> (last visited Nov. 15, 2013). This Article will not discuss the trauma exposure response of these other DHS officials explicitly, although to the extent these officials are exposed to trauma, the effects are likely to be similar to those on USCIS officials.

212. USCIS moves some applications from office to office depending on current workload and shifts its operational structure frequently in an attempt to process its caseload more efficiently. See, e.g., U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, WORKLOAD TRANSFER FOR VARIOUS FORMS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=405247ce85e50410VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD> (last updated Aug. 8, 2013).

213. These service centers were formerly known as the Eastern Adjudication Center (Vermont), the Western Adjudication Center (California), and the Southern Regional Center (Texas). The abbreviations in receipt numbers issued by these service centers still reflect their former names; receipts issued in Vermont begin with initials EAC, in California WAC, and in Texas SRC. Receipts issued in Nebraska begin with the initials LIN for Lincoln, the city in Nebraska where the service center is located. See U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, USCIS UPDATE: CASE STATUS INQUIRIES WITH THE SERVICE CENTERS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c561767d005f2210VgnVCM100000082ca60aRCRD&vgnnextchannel=8750aca797e63110VgnVCM1000004718190aRCRD> (last visited Nov. 15, 2013).



violence and crime—specifically self-petitions under the Violence Against Women Act, U visas, and T visas; all applications of these types filed from anywhere in the country are handled by the VSC.

The National Benefits Center<sup>214</sup> receives and conducts preliminary processing on applications that will ultimately require in-person interviews.<sup>215</sup> These include applications for adjustment of status to legal permanent residence, naturalization, and asylum. Once the National Benefits Center has finished their preliminary review of the evidence, background and security checks, and other preparatory steps, interviews are scheduled at the local field office or asylum office closest to the applicant's place of residence and the applicant's file is sent on to that office. There are a total of eighty-five field offices in the United States and abroad.<sup>216</sup> Adjudication officers, also known as immigration services officers or ISOs, at these offices handle all applications for immigration benefits where an in-person interview is required or optionally scheduled with the exception of asylum claims. The eight Asylum Offices throughout the country work on asylum claims only; asylum officers located there conduct interviews and make decisions on all affirmative applications for asylum.<sup>217</sup> The USCIS Office of the Chief Counsel, among other responsibilities, provides legal advice to these other USCIS components on the applications they adjudicate.<sup>218</sup>

The National Records Center (NRC) and application support centers (ASC) do not directly adjudicate applications for immigration benefits. The NRC manages storage of and requests for all A files, or the file that DHS maintains on each noncitizen applicant for benefits. ASCs exist solely to collect biometric information—fingerprints and photographs—from noncitizens with pending applications in order to conduct background checks on them.

Very little information is available about the background and characteristics of USCIS officers generally. It is safe to say, however, that we are talking about a large number of attorneys and those acting in quasi-attorney

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214. The National Benefits Center is also known as the Missouri Service Center; receipt notices issued by the National Benefits Center therefore begin with the initials MSC. *The National Benefits Center: What It Is and What It Does*, THE BEACON: THE OFFICIAL BLOG OF USCIS (June 5, 2012, 3:11 PM), <http://blog.uscis.gov/2012/06/national-benefits-center-what-it-is-and.html> (last visited Nov. 15, 2013).

215. *Id.*

216. *USCIS Service and Office Locator*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, [https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office\\_type=LO](https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=LO) (last visited Nov. 24, 2013).

217. *Id.* An application is “affirmative” when it is filed by someone still in legal status or out of legal status but has not yet come to the government’s active attention, that is, by anyone who is not in removal proceedings. An application is “defensive” when it is filed by a noncitizen applicant who is already in removal proceedings. See EOIR, FY 2012 STATISTICAL YB, *supra* note 137, at K2.

218. *Office of the General Counsel*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/office-general-counsel> (last visited Nov. 24, 2013).

capacities. Although there are only eight regional asylum offices, the number of asylum officers is still significant; from 1999 to 2005, 928 asylum officers decided asylum claims in these eight offices.<sup>219</sup> While numbers of adjudicating officers at the local field offices and in the VAWA Unit at the Vermont Service Center are not available, given the amount of offices and applications adjudicated each year, the count must be high.<sup>220</sup> Given the size of the group being discussed, then, it is even more important than with immigration judges not to treat USCIS officers as a uniform group, but instead to gather more information regarding their differing backgrounds, personal and professional experiences, and personalities and individual characteristics to better understand and manage their trauma exposure.

Proceedings before USCIS do not look or function like a court. In some cases, USCIS officers make decisions solely based on the paperwork submitted in support of the application and never have personal contact with the applicant himself. Where an interview is required or requested, the applicant will be called in to the USCIS Field Office closest to their residence and interviewed by a USCIS officer in a small office. The non-citizen applicant, along with her attorney or other representative if she has one and her translator if necessary, sit across a desk from the USCIS officer. There is no opposing counsel and no legal assistant or others present in the office during the interview, as there would be in the immigration courtroom. The USCIS officer controls the interview virtually completely, including by questioning the applicant herself.<sup>221</sup> Proceedings before USCIS are conducted considerably less formally than proceedings before the Immigration Court.

Because USCIS is primarily self-funded through the fees charged for the applications it processes and is not subject to the congressional appropriations process, it is unlikely to be particularly negatively affected by sequestration. The agency has actively worked to reduce its case processing times, and, while some applications still take an extended period of time to process,<sup>222</sup> overall USCIS does not have the same caseload and backlog problems as EOIR. USCIS is not without its particular institutional issues,

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219. RAMJI-NOGALES ET AL., *supra* note 140, at 18.

220. See, e.g., *Service-wide Receipts and Approvals for All Form Types (FY 2012)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES [hereinafter *USCIS All Form Types Data FY 2012*], [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all-form-types-performance-data\\_fy2012\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all-form-types-performance-data_fy2012_qtr4.pdf) (last visited Nov. 24, 2013).

221. In Immigration Court, the opposing counsel usually conducts the cross examination of the noncitizen applicant and the immigration judge may interrupt with questions at any time; however, the noncitizen's attorney or other representative questions the applicant through direct examination to elicit the facts underlying the application for immigration relief. See OCJ, PRACTICE MANUAL, *supra* note 137, at r.4.16.

222. See *USCIS Processing Time Information*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://egov.uscis.gov/cris/processTimesDisplayInit.do>.

however. Chief among them is an overemphasis on fraud.<sup>223</sup> Among other indications of this problem, USCIS is implementing a new performance evaluation process for its immigration services officers that appears to incentivize finding fraud.<sup>224</sup>

Just like the other categories of government attorneys already addressed, in addition to the institutional issues confronting them, USCIS officers are also exposed to trauma in the course of their work. For purposes of this Article, I will focus on the several offices and categories of officers discussed here that are most likely to experience trauma exposure—specifically officers in the VAWA Unit at the Vermont Service Center, asylum officers, and adjudication officers at the local field offices and the attorneys in the Chief Counsel’s Office who provide legal advice to these officers. Officers in the VAWA Unit and Asylum Officers have a docket that consists solely of noncitizen applicants who have suffered or fear significant trauma. Both groups of officers adjudicate significant numbers of cases based directly on trauma. In fiscal year 2012, the Vermont Service Center adjudicated 868 principal T visa applications for victims of trafficking and 12,988 principal U visa applications for victims of crime, and approved 3,346 self-petitions for victims of domestic violence.<sup>225</sup> This is a total of at least 17,202 applications adjudicated by a single service center directly involving traumatic experiences. Numbers of asylum applications approved and denied by the eight regional asylum offices are not provided by USCIS, but 76,081 asylum applications were received by USCIS during this same fiscal year.<sup>226</sup> Given the expedited system for hearing

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223. See, e.g., Eleanor Pelta, *Senator Grassley: The Puppetmaster?*, AILA LEADERSHIP BLOG (Jan. 9, 2012), <http://ailaleadershipblog.org/2012/01/09/senator-grassley-the-puppetmaster/>; *Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers*, U.S. DEP’T OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL (Jan. 5, 2012), [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_12-24\\_Jan12.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan12.pdf) [hereinafter DHS OIG, FRAUD DETECTION].

224. Pelta, *supra* note 223; DHS OIG, FRAUD DETECTION, *supra* note 223, at 11 (“In FY 2011, 50% of an ISO’s overall performance rating was based on fraud detection and national security identification.”).

225. *Form I-914 - Application for T Nonimmigrant Status and Form I-918 - Petition for U Nonimmigrant Status (FY 2002-2013)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914T-I918U-visastatistics-2013-Oct.pdf> (last visited Nov. 15, 2013); USCIS All Form Types Data FY 2012, *supra* note 220. The numbers of T and U visa applications adjudicated used here are derived from adding the number of applications for principal applications that were approved to the number of such applicants that were denied. I have included the numbers of applications denied because, at the very least, even denied applicants must have alleged a traumatic experience in order to file the application. It is also very possible that these applicants were denied for some reason other than having not actually experienced trauma—for example, because the applicant at some stage in the process refused to cooperate with the investigation or prosecution of the crime or trafficking. Only approvals of self-petitions are provided because numbers of denials were not included in the USCIS statistics.

226. USCIS All Form Types Data FY 2012, *supra* note 220.

affirmative asylum applications, it is likely that a similar number of asylum applications were adjudicated over this period of time.

Officers at the local field offices are also likely to be exposed to noncitizens' traumatic experiences in the course of their work. While all applications adjudicated by these officers do not necessarily directly involve trauma, some of them may. For example, these adjudications officers may hear and decide applications to adjust status filed by noncitizens with approved self-petitions as victims of domestic violence, applications to adjust status filed by juveniles who were abused, abandoned, or neglected by their parents, and naturalization applications with requests for disability exceptions filed by refugees or asylees whose ability to learn English and United States civics and government has been negatively impacted by PTSD. Other noncitizen applicants interviewed at the local field offices are likely to have faced one of the other traumatic experiences discussed in Part II.A, at a minimum their migration to the United States and consequent loss of their prior home.

### III. TRAUMA EXPOSURE IMPACTS THE IMMIGRATION PROCESS

This section will explore how the trauma exposure explained in Part I and laid out in Part II affects individual immigration adjudicators and through them the immigration process as a whole. To aid in this process, it considers the existing single study of immigration judges as well as studies done on other judges and attorneys generally. Where possible, it will reach conclusions that can be drawn from this research and where not, it will point out additional research that would be helpful in better understanding and therefore better managing trauma exposure response.

#### A. *The 2007 Lustig Study of Immigration Judges*

The 2007 Lustig survey of stress and burnout in immigration judges provides the most direct evidence of the impact of trauma exposure on any of the categories of adjudicating government attorneys.<sup>227</sup> That survey administered two different scales measuring stress and burnout to ninety-six immigration judges: the Secondary Traumatic Stress Scale (STSS) and the Copenhagen Burnout Inventory (CBI).<sup>228</sup> On the STSS, the responding IJs demonstrated mild to modest symptoms of secondary traumatic stress on the STSS on all three subscales, reporting intrusion, avoidance, and arousal symptoms.<sup>229</sup> Female IJs reported statistically significant higher

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227. Lustig et al., *Narrative Responses*, *supra* note 68.

228. *Id.* at 59. 212 IJs, all non-supervisory immigration judges at the time, were invited by email to participate. *Id.* at 60. Ninety-six IJs completed the stress and burnout questionnaires, and fifty-nine of those ninety-six respondents also provided narrative comments. *Id.* at 63.

229. Lustig et al., *Burnout and Stress*, *supra* note 110, at 27; Lustig et al., *Narrative Responses*, *supra* note 68, at 59.

levels of secondary traumatic stress than male IJs.<sup>230</sup> On the CBI, the IJs overall demonstrated higher levels of burnout “than any other group of professionals to whom the CBI had been administered, including prison wardens and physicians in busy hospitals.”<sup>231</sup>

In addition to these two scales, the survey allowed immigration judges to provide narrative responses to the prompt: “Please let us know anything else that would help explain the occupational challenges faced by immigration judges.”<sup>232</sup> Fifty-nine of the total ninety-six responding immigration judges provided such a narrative response.<sup>233</sup> Of those, twenty-seven, or slightly less than half, specifically mentioned mental health and well-being.<sup>234</sup> A number of these responses focused on the emotionally draining nature of the work as a result of the exposure to trauma it entails.<sup>235</sup> For example, one immigration judge said:

As an Immigration Judge, I have to hear the worst of the worst that has ever happened to any human being, particularly in asylum cases. I have to listen to the trauma suffered by individuals. I have to hear it on a daily basis. It’s emotionally draining and painful to listen to such horrors day in and day out.<sup>236</sup>

A number of others echoed a similar theme regarding the horrific nature of asylum seekers’ testimony and the difficulty in having to listen so closely to the details of such inhumanity: “I have heard testimony about torture that I never wanted to know about, and I wish I hadn’t heard.”<sup>237</sup> Several immigration judges acknowledged the impact on their own mental well-being: “I have a great deal of experience with depression and anxiety. Aside from coping with that personally, I have to deal with the depression, anxiety, and emotional problems of the individuals who appear before

230. Lustig et al., *Burnout and Stress*, *supra* note 110, at 27.

231. *Id.* at 22; Lustig et al., *Narrative Responses*, *supra* note 68, at 60.

232. Lustig et al., *Narrative Responses*, *supra* note 68, at 60. The authors do note that the fact that the IJs were informed that one purpose of the survey was to advocate for them could have affected their narrative responses. *Id.* at 81.

233. *Id.* at 63.

234. *Id.* at 73.

235. *Id.* at 74. Other themes from these responses on mental health and well-being include feeling a responsibility for the lives and well-being of the asylum seekers appearing in front of them, dissatisfaction with the job and work environment, and infringement on the judges’ personal lives. *Id.* at 73–76. The judges themselves recognized the difficulty of separating out the impact of trauma exposure from these and other aspects of their work. *Id.* at 74 (“I have been here for five years so it is difficult to make distinctions between the nature of the cases I hear as they may relate to psychological and emotional challenges versus the nature of my work environment and the challenges that stem from a prison environment.”).

236. *Id.* at 74.

237. *Id.* at 74–75.

me.”<sup>238</sup> At least one immigration judge specifically recognized the impact on his or her worldview of this trauma exposure: “I have lost most of my faith in humankind, and I fear deeply for the future.”<sup>239</sup> Another noted the effect when cases are remanded by the BIA or Circuit Courts: “[W]e are ‘re-traumatized’ by having to hear the same cases again.”<sup>240</sup> Several mentioned the lack of institutional support, or their need to rely on support from outside the agency, in dealing with this exposure to trauma.<sup>241</sup> Importantly, narrative responses labeled with this metacode were significantly associated with scores on both the stress and burnout scales previously discussed.<sup>242</sup> This result reinforces the reality of the impact of trauma exposure on immigration judges, and the importance of addressing it both for the immigration judges themselves and for the immigration system as a whole.

Some of the responses of the immigration judges that were coded in to other categories reveal additional, deep-seated trauma exposure response. The responding immigration judges, and possibly even the authors of the study, did not recognize (or at least explicitly acknowledge, in the case of the authors) the connection of trauma exposure to these responses, but the content of the comments can be directly traced to the symptoms of trauma exposure previously discussed. One telling example is the existence of a category for responses referencing noncitizen fraud during removal proceedings.<sup>243</sup> Fraud seems to be used here, and in general in discussions of the immigration laws and procedure in the United States, to mean completely and intentionally made up, with no basis whatsoever in fact. In reality, truth and falsehood are much more complicated concepts for many reasons—among them, an applicant may omit or exaggerate or alter a portion of his or her story without rendering the whole story false; differences in perception may cause two different observers to experience and therefore describe the very same event differently but still truthfully; and issues with memory will affect the way an experience is remembered and retold. This oversimplification of the concept of fraud is one indication that something is going on beyond an actual widespread prevalence of completely false claims for immigration benefits.

Many of the symptoms of trauma exposure response may cause immigration judges (and other adjudicators) to overestimate the number of

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238. *Id.* at 66. This comment was discussed in the article under the sub-theme of mentally ill respondents, but because of the content, the comment presumably also would have been coded in the mental health and well-being category.

239. *Id.* at 75.

240. *Id.* at 70. This comment was discussed in the article under the sub-theme of other government agencies, but because of the content, the comment presumably also would have been coded in the mental health and well-being category.

241. *Id.* at 73–76.

242. *Id.* at 64, 78.

243. *Id.* at 76–77.

fraudulent claims they see.<sup>244</sup> Irritability, anger, loss of trust, and pessimism about people are all factors that might cause an immigration judge to disbelieve a truthful applicant. Anxiety, intrusive thoughts, difficulty concentrating, and trauma-related physical complaints may result in an immigration judge being inadvertently less attentive than he or she would otherwise be and therefore misunderstanding or failing to fully inquire in to the details that would reveal a genuine claim.<sup>245</sup>

Other responses also indicate symptoms of trauma exposure response. Anger and irritability were evident in a number of responses. For example, one IJ wrote: “The dynamics in the courtroom do get quite intense on occasion, and we need to be able to adjourn, take a breather and get perspective. Our calendars don’t allow that and we judges have to grovel like mangy street dogs to get exemptions from unrealistic completions goals and general workload expectations.”<sup>246</sup> Many comments showing irritability were focused on the perceived incompetence of attorneys on both sides and other personnel in the courtroom.<sup>247</sup> For example, one IJ voiced frustration at “walking into the courtroom and seeing very difficult and SLOW attorneys on both sides and knowing the day is shot at the first case.”<sup>248</sup> Hyper-arousal,<sup>249</sup> including overreaction to more minor annoyances, also appeared in IJ comments: “I get cranky when attorneys argue with me about the clock or send in letters to try and have the clock changed.”<sup>250</sup> Finally, isolation and powerlessness were featured in multiple responses, including compellingly in a comment depicting “as a frame of

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244. Other possible explanations that may contribute to this overestimation have been offered. See, e.g., *id.* at 80. (“Jaffe refers to a psychological term, the ‘availability heuristic,’ which postulates that exposure to an event (in this case, a fraudulent asylum claim) can lead to an overestimation of the event’s frequency. According to this principle, IJs’ comments about fraud might be based on an overestimation of its occurrence, an estimation which could also affect their rulings.”).

245. This is not intended to say that there is no fraud in the immigration process. However, it is impossible without additional extensive investigation into a very large number of cases to even begin to assess which cases are fraudulent and the prevalence of those fraudulent cases within the total number of immigration cases. I believe that, due to the discussed impact of the trauma exposure response along with other systemic incentives and distortions, the incidence of intentional fraud in the immigration process is not nearly as great as these immigration judges’ comments (and other accounts) would indicate.

246. Lustig et al., *Narrative Responses*, *supra* note 68, at 65. (“What traumatizes me is . . . the drip-drip-drip of Chinese water torture that I hear in my head (i.e. in my mind, hearing my boss saying: ‘more completions, more completions, bring that calendar in, you are set out too far, you have too many reserved decisions, why has that motion been pending so long, too many cases off calendar.’)”).

247. *Id.* at 68 (“Private attorneys are seldom sanctioned for even the most outrageous of behavior while IJs are subject to intense and often one-sided scrutiny and taken to task for demanding from attorneys that which would be expected in a non-immigration court.”).

248. *Id.* at 67.

249. *Id.* at 66 (“There is not enough time to think.”).

250. *Id.* at 69.



reference” for an IJ’s situation “the character in a cartoon who is seen sitting alone on a very small island while surrounded by endless ocean.”<sup>251</sup>

By identifying these otherwise coded narrative responses as related to trauma exposure, I do not mean to minimize the immigration judges’ complaints or suggest that they are not well-founded. As should be clear from this discussion and the previous discussion in this section of the IJs role and constraints, these are very real systemic issues.<sup>252</sup> As the study itself points out, “it is not surprising to hear of instances of judicial intemperance or a lack of uniformity in how cases are handled, given the stress under which IJs are working.”<sup>253</sup> I do mean to say, however, that an IJ whose trauma exposure response is better managed would have the capability to respond differently, and hopefully more productively, in terms of both individual impact and small- and large-scale organizational reform.

No comparable study has been done of USCIS adjudicating officers and attorneys, or of BIA members. Further research regarding the effects of trauma exposure in these groups, and comparing and contrasting among the groups, would be tremendously valuable in a discussion of how to better manage the evident trauma exposure response. However, there are sufficient commonalities among the groups to conclude that the impact of trauma exposure is likely to be similar.

Many USCIS officers are similarly situated to immigration judges in that they must read, listen to, and sometimes elicit testimony regarding noncitizens’ traumatic experiences and then decide whether or not those noncitizens will be granted some status authorizing them to stay legally in the United States. As a result of these similarities in role, the impact of trauma exposure on USCIS adjudicating officers can likely be analogized to the impact on immigration judges previously discussed. Anecdotal evi-

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251. *Id.* at 70.

252. The first article on the Lustig study suggests that these systemic factors actually have a greater impact on IJs than trauma exposure:

[J]udges reported suffering from burnout symptoms more than from trauma-induced stress. Consistent with the overall finding of greater burnout compared to stress is that, on the CBI subscales, burnout specifically related to clients is actually lower than personal burnout or work-related burnout. These findings suggest that judges are burned out not so much as a result of the asylum seekers whose stories they hear, as we had postulated would be the case, but because of other job-related stresses that were not specifically inquired about in this study.

Lustig et al., *Burnout and Stress*, *supra* note 110, at 28. While this is an important finding worthy of further investigation, given the evidence of trauma exposure throughout the IJs narrative responses discussed here, an alternative explanation is that the IJs themselves do not fully appreciate or recognize the impact trauma has on them. Even if trauma is somewhat less significant than burnout driven by other stressors, however, that does not mean that it is unimportant.

253. Lustig et al., *Narrative Responses*, *supra* note 68, at 58.

dence of the effect of trauma exposure in USCIS adjudicating officers suggests that this comparison is apt.<sup>254</sup>

Other USCIS adjudicating officers such as those in the Vermont Service Center who adjudicate domestic violence related petitions, attorneys in USCIS's Office of the Chief Counsel and Board Members perform essentially the same adjudicatory functions but do not have or rarely have direct contact with noncitizens because they make decisions based solely on review of paperwork. This does not mean, however, that these attorneys are not impacted by the trauma that they are exposed to. While proximity to the traumatic experience may affect the strength and significance of symptoms of an individual's trauma exposure response, other factors are also relevant. Structural issues such as high caseloads appear to exacerbate trauma exposure response. In addition, many of these attorneys have also been exposed to other traumatic experiences and lack of structural support in their workplaces—for example, the streamlining reforms and political considerations in hiring and firing for the Board of Immigration Appeals. These structural issues and other sources of trauma along with other case-by-case factors may, at least for some individuals, combine to create a more significant trauma exposure response than might otherwise be expected. With some attention to the greater distance that they are removed from the direct experience of trauma, then, trauma exposure responses of these attorneys can also be analogized to that of immigration judges.

#### B. *The Jaffe and Other Studies of Judges Generally*

The impact of trauma exposure on adjudicators and attorneys in different subject matter areas also provide some additional insight into possible considerations in the immigration context. Earlier studies of judges confirm and add details to Lustig's survey of immigration judges. In one of the most significant of these studies, Dr. Peter G. Jaffe and colleagues conducted a survey of 105 total judges attending one of four workshops and representing "a cross-section of urban and rural centers across the United States, different levels of court, and a range of criminal, civil, and specialized courts."<sup>255</sup> Overall, 63 percent of the judges surveyed reported one or more symptoms of trauma exposure.<sup>256</sup> The most commonly reported symptoms, short and long term, were sleep disturbances, intolerance of others, physical complaints, depression, and a sense of isolation.<sup>257</sup> Other relevant symptoms described included anxiety, sadness, feelings of helplessness, feelings of hopelessness, fatigue, anger, irritability, frustration, cyni-

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254. See, e.g., WELL-FOUNDED FEAR (POV: Documentaries with a Point of View 2000).

255. Jaffe et al., *supra* note 36, at 3–4; see also Levin, *Secondary Trauma*, *supra* note 37, at 106 (discussing the Jaffe et al. study).

256. Jaffe et al., *supra* note 36, at 4. The judges in this study were asked open-ended questions; they were not given a scale or other list of symptoms to endorse or deny. *Id.* at 7.

257. *Id.* at 4.

cism, fear, difficulty concentrating, hypervigilance, “guilt” flashbacks, nightmares, cognitive flooding, hypersensitivity, and feeling overwhelmed.<sup>258</sup> Female judges and judges who had been on the bench for more than six years were more likely to report at least one symptom and to report greater numbers of symptoms.<sup>259</sup>

The percentage of judges in the Jaffe study suffering from trauma exposure is significant, particularly because not all judges surveyed were part of specialty courts with “a steady diet of highly emotional cases” like the immigration courts and USCIS.<sup>260</sup> As the article on the study itself points out, further study focused on additional possible contributing factors such as the nature and workload of the court and particular steps already taken to combat trauma exposure would be helpful in explaining and therefore managing adjudicators’ trauma response in the immigration process.<sup>261</sup> Additional exploration of the different rates of trauma exposure response reported based on gender and experience will also be important.<sup>262</sup> In particular with regard to the gender differential, which was also evident in the Lustig study, “the extent to which this is a real difference versus one in reporting [or awareness] needs to be addressed.”<sup>263</sup>

The study’s focus on self-reported symptoms<sup>264</sup> is helpful in that it allows some conclusions to be drawn about how the adjudicative process in the immigration system might be affected by judges’ and other adjudicators’ trauma exposure. In addition to the possible overestimation of fraud in the system discussed earlier, trauma exposure response may have multiple other negative affects on immigration proceedings. An immigration

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258. *Id.* at 4–5. The article describing the study also grouped the symptoms as follows: “The surveyed judges indicated a wide range of symptoms that they identified as stemming from their work, including cognitive (e.g., lack of concentration), emotional (e.g., anger, anxiety), physiological (e.g., fatigue, loss of appetite), PTSD (e.g., flashbacks), spiritual (e.g., losing faith in God or humanity), and interpersonal (e.g., lack of empathy, sense of isolation from others) symptoms.” *Id.* at 5.

259. *Id.* at 4.

260. *Id.* at 3.

261. *Id.* at 7. The authors suggest that judges in specialty courts experience lower levels of trauma exposure response, but this hypothesis has not been tested. *Id.* While the Lustig study of immigration judges tends to cast some doubt on this conclusion, it is possible that non-specialized adjudicators hearing immigration cases would demonstrate greater trauma exposure response than the specialized immigration judges and/or that other characteristics of the immigration courts worsen trauma exposure response. See Lustig et al., *Burnout and Stress*, *supra* note 110; Lustig et al., *Narrative Responses*, *supra* note 68; cf. Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1503 (2010) (“[T]he impact of judicial specialization is complex and contingent on other conditions. Specialization potentially has major consequences for legal decisionmaking, but these consequences are not uniform and straightforward.”).

262. The article also suggests briefly that age may also be a relevant factor and should be further explored. Jaffe et al., *supra* note 36, at 3, 6.

263. *Id.* at 8.

264. *Id.* at 4.

adjudicator experiencing intolerance of others, anger, irritability, frustration, hypersensitivity, and feeling overwhelmed will likely conduct proceedings with less patience and less empathy than one who is not. Cynicism, particularly combined with feelings of helplessness and hopelessness, may result in particular intolerance towards noncitizens and their attorneys. These symptoms will also likely result in a much higher number of denials than an immigration adjudicator whose worldview has not been so affected would issue. Difficulty concentrating, sleep disturbances, fatigue, and other physical complaints may result in an immigration adjudicator who is unable to pay sufficient attention to the details of the facts or law in cases before them. Unmanaged depression and anxiety have also been shown to negatively affect performance in the workplace.

The fact that the research was designed around open-ended questions, however, does present some limitations as it relies on the ability of the participants to identify the effects of trauma exposure on themselves.<sup>265</sup> In fact, a workshop conducted by one of the studies' authors demonstrated that many judges may lack this amount of personal insight into their trauma exposure response: "[I]ndividual judges greatly underestimated the impact of their stress and work on their personal functioning, compared with the stresses and changes noticed by their spouses."<sup>266</sup> Other participants in the study "noted that they had not been aware of the profound impact of their work until after they changed assignments and were able to gain more perspective."<sup>267</sup> Further research on this phenomenon could be particularly fruitful, as it might help to convince those more skeptical members of the legal profession of the very real effects of trauma exposure.<sup>268</sup>

### C. *Studies of Attorneys*

Dr. Andrew Levin's 2003 survey, while focused on attorneys and not on adjudicators, also provides at least two valuable points and highlights important areas for additional exploration and study.<sup>269</sup> Dr. Levin surveyed three groups of helping professionals likely to be exposed to the traumatic experiences of their clients through their work—attorneys "from agencies specializing in domestic violence and family law as well as legal aid criminal services," mental health providers from community agencies who provide mental health treatment, and social service workers from community

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265. *Id.* at 7 ("For example, if an individual does not make the connection between work-related stressors and interpersonal difficulties, then he or she will not provide that as an example of a VT symptom. However, that same individual might recognize the link if 'interpersonal difficulties' were listed as one of several possible VT symptoms.").

266. *Id.* at 8.

267. *Id.*

268. *Id.* ("Research that includes other key informants in the data collection process will help disentangle this issue.").

269. Levin & Greisbert, *Vicarious Trauma*, *supra* note 18, at 249–50.

agencies who provide “concrete and case management services to the mentally ill.”<sup>270</sup> The three groups displayed similar characteristics in many important respects—age, experience, gender (predominantly female), history of childhood trauma, and history of prior mental health treatment.<sup>271</sup> First, the survey results demonstrated that the attorneys experienced more symptoms of secondary trauma than either the mental health providers or social service workers and scored consistently higher on each of the subscales of secondary trauma surveyed. In terms of the symptoms demonstrated, this means that “the attorneys demonstrated higher levels of intrusive recollection of trauma material, avoidance of reminders of the material and diminished pleasure and interest in activities, and difficulties with sleep, irritability, and concentration.”<sup>272</sup> Second, Dr. Levin’s results showed that increased caseloads were correlated with greater levels of trauma exposure response for the helping professional.<sup>273</sup>

Dr. Levin’s finding that attorneys experience greater rates and symptoms of secondary traumatic stress than either of his two control groups is obviously of great significance and points to the particular importance of addressing trauma exposure response in any group of attorneys. In addition to further research to connect these conclusions to immigration attorneys generally and adjudicators specifically, additional study and exploration of the causes behind a greater trauma exposure response in attorneys would be helpful. The attorneys surveyed in Dr. Levin’s study had higher caseloads of trauma survivors than the non-attorneys, suggesting that this might be one possible explanation.<sup>274</sup> His survey was only a preliminary one, however, and did not reach this question of causation or explore possible alternative explanations.<sup>275</sup>

## CONCLUSION

The impact of trauma exposure on the immigration system and process through its effect on immigration adjudicators is clearly significant and pervasive. It impedes our ability to have a fair and just immigration system

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270. *Id.* at 249.

271. *Id.* at 250. The groups of attorneys displayed a higher rate of adult trauma, but adult trauma was found in the study not to be predictive of higher levels of secondary traumatic stress or burnout. *Id.* at 250.

272. *Id.* at 250–51.

273. *Id.*

274. *Id.* at 252.

275. *Id.* (“As to the origin of the increased secondary trauma and burnout responses among the attorneys, higher case loads alone may explain the difference. The preliminary nature of our study requires a follow-up to indicate if other factors play a role in the difference. Attorneys responding at the ‘Think Tank’ felt that in addition to their high case loads the lack of systematic education regarding the effects of trauma on their clients and themselves and the paucity of forums for regular ventilation were significant contributors to development of secondary trauma and burnout.”).