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## ACCESS TO JUSTICE FOR ASYLUM SEEKERS: DEVELOPING AN EFFECTIVE MODEL OF HOLISTIC ASYLUM REPRESENTATION

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Sabrineh Ardalan\*

Abducted, beaten, and tortured by government forces that accused him of supporting an opposition group, Matthew fled to the United States with the help of his church pastor.<sup>1</sup> The pastor lent Matthew money and helped him obtain a passport and a visa. The pastor also put Matthew in touch with an acquaintance in Boston, who gave him a place to stay for a short time and encouraged him to apply for asylum. The acquaintance sat down with Matthew and helped him fill out the asylum application form. He told Matthew to be as specific and detailed as possible since that was the advice from other asylum applicants. He instructed Matthew to write down the exact dates and times he was abducted, the number of guards who tortured him, what they were wearing, and the exact length of each prison detention. Highly traumatized and still reeling from the effects of brutal blows to his head, Matthew could not remember the details asked of him. The acquaintance insisted, however, that Matthew write specifics down, regardless of how certain he was of the exact times, dates, and other information.

When Matthew went to his Asylum Office interview, the officer questioned him about his abduction, detention, and torture.<sup>2</sup> Matthew tried to explain what had happened, but he became distraught as the officer forced him to relive his horrific experiences in detention. Since his arrival in the United States, Matthew had tried to block out the memories of his past in an effort to move forward with his life. As Matthew attempted to answer the officer's questions, the circumstances of each abduction, detention, and torture session blurred together. Terrified he would be forced to return to a country where he would likely be killed, Matthew's fears overwhelmed him. He could not recall the details the asylum officer asked him about, such as the circumstances leading up to each

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1. Names and identifying details have been changed to protect client confidentiality.  
2. Asylum seekers can apply for asylum affirmatively before the U.S. Citizenship and Immigration Service (USCIS) Asylum Office or defensively in immigration court. See *infra* Part II.A for further discussion of the asylum process.

detention and the length of time detained. Citing material inconsistencies between Matthew's asylum application and his testimony at the interview, the asylum officer rejected Matthew's claim.

Matthew's story demonstrates how important it is for asylum applicants to present their testimony in a clear and consistent manner that is compelling to U.S. adjudicators. But providing such testimony poses a significant challenge for many asylum applicants. Along with trauma, language barriers and cross-cultural differences can affect asylum seekers' abilities to recount their past experiences, as can a lack of understanding of the legal framework for asylum claims.

An immigration judge ultimately granted Matthew asylum, after the Harvard Immigration and Refugee Clinical Program (the Clinic) took on his case. Clinic attorneys and law students, working together with a forensic psychologist, medical doctor, and country expert, prepared Matthew to testify, gathered corroborating expert affidavits and evidence, and successfully represented Matthew in court.

But most asylum seekers do not have access to this kind of legal representation. The United States does not guarantee asylum seekers the help of an advocate or a lawyer.<sup>3</sup> This fact alone presents a serious barrier to access to justice given the complexities of the U.S. asylum system. A national study found that fewer than forty percent of immigrants facing removal were represented by an attorney in cases decided on the merits.<sup>4</sup> Additionally, approximately eighty-six percent of immigrants in detention facilities went unrepresented.<sup>5</sup>

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3. See notes 8–9; *infra* Part I.

4. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 6 (2016) (forthcoming) (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period.”).

5. *Id.* at 7; see also AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES: EXECUTIVE SUMMARY ES-7 (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration\\_reform\\_executive\\_summary\\_012510.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf). According to the Executive Office for Immigration Review (EOIR), defendants were represented by attorneys in fifty-six percent of the cases before U.S. immigration courts in fiscal year 2012. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR FY 2012 STATISTICAL YEAR BOOK G1 (2013), available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf>. Cf. JOAN FRIEDLAND, IMMIGRATION POLICY CTR., FALLING THROUGH THE CRACKS: HOW GAPS IN ICE'S PROSECUTORIAL DISCRETION POLICIES AFFECT IMMIGRANTS WITHOUT LEGAL REPRESENTATION 9 n.1 (2012), available at [http://www.immigrationpolicy.org/sites/default/files/docs/friedland\\_-\\_unrepresented\\_immigrants\\_051412.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/friedland_-_unrepresented_immigrants_051412.pdf) (“In FY 2010 and the years before, EOIR determined representation rates by looking at whether a particular respondent was represented at a particular proceeding. . . . In the FY 2011 Statistical Yearbook, EOIR determined representation rates by looking at whether a particular respondent was represented at any point of a particular

Such lack of representation has severe consequences for immigrants, as illustrated by another recent study finding that asylum seekers without legal representation were almost five times less likely to win in immigration court than those with representation.<sup>6</sup>

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case. Thus, if a respondent appeared pro se in FY 2007, but subsequently obtained counsel for a proceeding in FY 2008, the respondent would be considered ‘represented’ in both FY 2007 and FY 2008.”) (emphasis omitted). In 2013, EOIR changed its method of tracking representation in removal proceedings to an “initial case completion” method, which “reduces much of the over-counting problem, but is still higher than [the Eagly & Shafer] calculation because it includes ‘other completions’ [such as administrative closures] in the representation statistic.” Eagly & Shafer, *supra* note 4, at 14 n.66 (citing EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2013 STATISTICAL YEAR BOOK fig. 10 at F1, fig. 6 at C4 & fig. 5 at C2 (2014)). See also EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2014 STATISTICAL YEAR BOOK fig. 10 at F1 (2015) (noting that “the percentage of represented aliens has increased over the last five years, increasing from 40 percent in Fiscal Year (FY) 2010 to 55 percent in FY 2014”).

6. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, ASYLUM DENIAL RATE REACHES ALL TIME LOW: FY 2010 RESULTS, A TWENTY-FIVE YEAR PERSPECTIVE (2010), <http://trac.syr.edu/immigration/reports/240/> (“During FY 2010, for example, only 11% of those without legal representation were granted asylum; with legal representation the odds rose to 54%.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008) (“For both affirmative and defensive [asylum] cases, having representation was associated with more than a three-fold increase in the asylum grant rate compared to those without representation. The grant rate for affirmative applicants with representation was 39 percent, compared to 12 percent for those without representation. For defensive cases, the grant rate for applicants with representation was 27 percent, compared to 8 percent without. Representation generally doubled the likelihood of affirmative and defensive cases being granted asylum, after we controlled for the effects of the immigration court the case was heard in; the applicant’s nationality; the time period in which the decision was made; and whether the applicant claimed dependents, filed within 1 year of entry, and, among defensive cases, if the applicant was ever detained.”). The study conducted by Eagly and Shafer further underscores outcome disparities between those with counsel and those without, noting that “the chances of obtaining relief for those forced to defend themselves in court are dim: only 5% of the 272,352 immigrants who sought and were granted relief in our sample did so without an attorney.” Eagly & Shafer, *supra* note 4, at 61 n.148. The New York Immigrant Representation Study (NYIRS), published by a subcommittee of the Study Group on Immigrant Representation (led by the Honorable Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit), also emphasized that legal representation is a significant factor in the outcome of immigration cases. See N.Y. IMMIGRANT REPRESENTATION STUDY STEERING COMM., ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN REMOVAL PROCEEDINGS, THE N.Y. IMMIGRANT REPRESENTATION STUDY REPORT: PART I, 19–21 (2011), [hereinafter NYIRS I] available at [http://cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://cardozolawreview.com/content/denovo/NYIRS_Report.pdf). Individuals who were represented and not detained in the New York and New Jersey immigration courts had a success rate of seventy-four percent, while those who were not represented and not detained won only in thirteen percent of cases. Detained immigrants with counsel won eighteen percent of their cases, while detained, unrepresented individuals won only three percent of their cases. *Id.* at 19 (based on New York data of completed cases between October 1, 2005 and July 13, 2010); N.Y. IMMIGRANT REPRESENTATION STUDY STEERING COMM., ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDING 11–12 (2012), [hereinafter NYIRS II] available at [http://www.cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf).

This stark gap in representation is receiving national attention, as it should given the high stakes at hand. The consequences of deportation are often just as severe as, if not more severe than, the consequences of criminal conviction.<sup>7</sup> Asylum seekers can face detention, torture, or even death if forced to return to their home countries. Yet unlike indigent criminal defendants, indigent asylum seekers do not have a constitutionally-recognized right to government-appointed legal representation.<sup>8</sup>

Even when asylum seekers have lawyers, legal representation alone is often insufficient to provide asylum seekers with access to justice. As this Article discusses, collaboration among lawyers, psychological and medical professionals, and human rights experts is paramount to ensuring the high-quality representation that asylum seekers need. As policymakers around the country consider different models for expanding immigration representation, it is vital that representation is defined broadly enough to include the range of experts integral to an asylum seeker's case. Multidisciplinary representation is a functional requirement to ensure that asylum claims are fully developed and articulated to adjudicators.<sup>9</sup>

However heart-wrenching their stories, asylum applicants are often particularly difficult to represent. Individuals seeking protection from persecution often flee their home countries under dire circumstances without documentation to corroborate their claims. Many are traumatized and require counseling and support from mental health professionals in order to testify coherently about their past experiences. In addition, adjudicators increasingly demand proof beyond the applicant's testimony. As a result, asylum

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7. See generally Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *Death is Different and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361 (2009); Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Cases*, 20 B.C. THIRD WORLD L.J. 393 (2000); Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169 (2007).

8. See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4) (2015) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings . . . .”); 8 C.F.R. § 1003.16 (2015). Immigration proceedings are considered civil proceedings, and asylum seekers who face removal from the United States do not have the same constitutional protections as defendants in criminal proceedings. Scholars, bar associations, and advocates have repeatedly argued that due process requires the provision of counsel to indigent immigrants who cannot afford representation. See, e.g., NYIRS II, *supra* note 6, at 9–10; see also *infra* Part II.A.

9. See NYIRS II, *supra* note 6, at 22–23 (describing the need for legal and extra-legal services, including the assistance of interpreters, social workers, medical and mental health professionals, country experts, and investigators); see also *infra* Part III.

applicants require help from medical, psychological, and country condition experts, as well as attorneys, to effectively present their claims.

In this Article, I first explore the legal and financial barriers to accessing counsel. I then address the challenges that asylum seekers face when forced to present their cases without access to holistic representation, drawing on examples from my work with the Harvard Immigration and Refugee Clinical Program. Next, I discuss barriers to inter-professional collaboration in asylum representation. I conclude by recommending a model of holistic representation for asylum seekers.

Although the need for a multidisciplinary approach has received significant attention in other legal services contexts, such as in criminal defense and family law, it is rarely recognized in the immigration field. With calls for universal immigration representation gaining traction across the country, it is important to consider what high-quality representation entails in this setting. I propose a model that features lawyers working alongside medical and mental health providers, academics, and other professionals to present the strongest cases possible for asylum seekers.

This model builds on important steps taken by the federal government to expand representation in immigration proceedings for vulnerable populations, including children and the mentally ill. It also builds on local initiatives to increase access to justice for immigrants in New York, New Jersey, Massachusetts, California, and other states across the country. A number of law school clinics already incorporate a holistic approach to representation;<sup>10</sup> these clinics serve an important role in providing free legal assistance, alongside case management, counseling, and other services. But additional public and private investment in multidisciplinary representation is necessary to meet overwhelming demand. It is also critical that Congress adopt statutory changes to provide federal funding for holistic asylum representation.

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10. Although various law school clinics and legal services organizations are engaged in multidisciplinary representation, I will primarily discuss the work of the Harvard Immigration and Refugee Clinical Program since it is the clinic with which I am most familiar.

## I. WHY THE SYSTEM IS BROKEN: LEGAL AND FINANCIAL BARRIERS TO ASYLUM REPRESENTATION

Indigent asylum seekers do not have a constitutional right to government-appointed representation in removal proceedings.<sup>11</sup> The current statutory and legal framework, combined with a lack of political will to change the laws and to invest in immigration reform, are key barriers to representation.<sup>12</sup>

Under section 292 of the Immigration and Nationality Act (INA), “[i]n any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel . . . as he shall choose.”<sup>13</sup> Although section 239(b)(2) of the INA requires an immigration judge to provide a list of free or low-cost legal service providers in the area,<sup>14</sup> legal restrictions implemented in the 1980s and 1990s severely limit federal funding for indigent asylum seekers.<sup>15</sup> This Part addresses these legal and financial barriers to asylum representation.

### A. Legal Barriers to Indigent Asylum Representation

Scholars, practitioners, and advocates have long called for courts to recognize a constitutional right to counsel for indigent immigrants, and particularly asylum seekers, in removal proceedings.<sup>16</sup>

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11. For a general overview of the absence of constitutional or statutory protections for indigent immigrants, see Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 662–76 (2012) (calling for the expansion of representation by non-attorney advocates); Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2293–94 (2013) (discussing “the role that *Gideon*-appointed counsel now plays in supplementing the civil delivery system for immigration legal services,” particularly in the context of government-appointed criminal defense attorneys, and “exploring the potential for a legally mandated right to appointed counsel in immigration proceedings”).

12. For a general discussion of access to justice barriers in the civil system and proposals for reform, see Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227 (2014).

13. Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2015) (emphasis added).

14. *Id.* § 1229.

15. See Eleanor Acer, Jennifer Rizzo & Hiroko Kusuda, *Human Rights First, Louisiana and the Growing Crisis in Immigrant Representation* 13 (2014), available at <http://www.humanrightsfirst.org/sites/default/files/left-out-conference-paper.pdf> (providing a brief overview of the history of legal services funding for immigrants in the United States).

16. See, e.g., Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010); Anker on Immigration Rights: ‘We Need Civil Gideon,’ HARVARD L. BULL. 22 (2014) [hereinafter *Anker on Immigration Rights*], available at [https://today.law.harvard.edu/wp-content/uploads/2014/05/FINAL\\_WEB-HLB-SU14withoutclassnotes.pdf](https://today.law.harvard.edu/wp-content/uploads/2014/05/FINAL_WEB-HLB-SU14withoutclassnotes.pdf); Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for*

In *Gideon v. Wainwright*, the U.S. Supreme Court held that indigent criminal defendants have a constitutional right to government-appointed counsel under the Sixth Amendment.<sup>17</sup> But the U.S. Supreme Court has not categorically extended the reasoning in *Gideon* to the civil context,<sup>18</sup> despite widespread calls for a “civil *Gideon*.”<sup>19</sup> In *Lassiter v. Department of Social Services of Durham County*, the Court determined that the right to counsel in the civil context had to be evaluated on a case-by-case basis, applying the *Mathews v. Eldridge* balancing test.<sup>20</sup> Under that test, adjudicators consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest . . . , and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>21</sup>

In *Lassiter*, the Court weighed these factors and concluded that “[t]he pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such

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*Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012); Markowitz, *Barriers*, *supra* note 7; Markowitz, *Deportation*, *supra* note 7; Werlin, *supra* note 7; *see also* Linda Kelly Hill, *The Right To Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011); Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985); Miguel A. Gradilla, Note, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225 (2014); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J.C.R. & C.L. 113 (2008).

17. 373 U.S. 335, 343–44 (1963).

18. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 24–27 (1981) (declining to find a categorical right to counsel under the U.S. Constitution in civil proceedings, and noting instead that the right to counsel is determined on a case-by-case basis). *But see In re Gault*, 387 U.S. 1, 41 (1967) (extending the Sixth Amendment right to counsel to juveniles in civil commitment proceedings).

19. *See, e.g., Anker on Immigration Rights*, *supra* note 16; AM. BAR ASS’N, ABA BASIC PRINCIPLES OF A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf); John Pollock & Michael S. Greco, Response, *It’s Not Triage If the Patient Bleeds Out*, 161 U. PA. L. REV. 40 (2012).

20. *Lassiter*, 452 U.S. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

21. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)).



a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”<sup>22</sup> The Court explained that “it is the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel.”<sup>23</sup>

The U.S. Supreme Court has recognized a right to counsel for indigent civil litigants in only a few instances, including when a juvenile’s physical freedom is at stake in delinquency proceedings and when a mentally ill prison inmate faces civil commitment in a state hospital.<sup>24</sup> At least one dissenting circuit court judge has argued that the Supreme Court should extend a categorical right to counsel to immigrants.<sup>25</sup> But courts generally follow a case-by-case approach when considering whether appointment of counsel is necessary in immigration removal proceedings.<sup>26</sup>

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22. *Lassiter*, 452 U.S. at 25–27.

23. *Id.* (citing *In re Gault*, 387 U.S. 1, 41 (1967) (emphasis omitted)) (“[T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the juvenile has a right to appointed counsel even though proceedings may be styled ‘civil’ and not ‘criminal.’”).

24. *See Turner v. Rogers*, 131 S. Ct. 2507, 2516–17 (2011) (citing, *inter alia*, *Lassiter v. Dep’t of Soc. Servs of Durham Cnty.*, 452 U.S. 18 (1981); *In re Gault*, 387 U.S. 1 (1967); *Vitek v. Jones*, 445 U.S. 480 (1980)) (declining to find a categorical right to counsel in a case involving incarceration of a father following civil contempt proceedings for failure to pay child support, while at the same time recognizing the right to counsel in certain cases involving incarceration, but not “in *all* such cases”). For a discussion of the range of scholarly reactions to the Supreme Court’s decision in *Turner*, see generally Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. LAW & POL’Y REV. 31 (2013).

25. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J. dissenting) (“When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an *In re Gault* finding of delinquency. A resident alien’s right to due process should not be tempered by a classification of the deportation proceeding as ‘civil,’ ‘criminal,’ or ‘administrative.’ No matter the classification, deportation is punishment, pure and simple.”). Indeed, advocates have filed a class action lawsuit seeking representation for immigrant children based on violations of due process. *See* Part III.B *infra*; *see also* Compl., J.E.F.M. v. Holder, No. 2:14-cv-01026 (W.D. Wash. 2014), available at [http://legalactioncenter.org/sites/default/files/Counsel %20Complaint .pdf](http://legalactioncenter.org/sites/default/files/Counsel%20Complaint.pdf).

26. *Aguilera-Enriquez*, 516 F.2d at 568 (“The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness—the touchstone of due process.’”). *See also* Part III *infra*. It is important to note that the Due Process clause applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Agyeman v. INS*, 296 F.3d 871, 884 (9th Cir. 2000); *Jacinto v. INS*, 208 F.3d 725, 734–35 (9th Cir. 2000). *See infra* Part III; *see also* Compl., J.E.F.M., No. 2:14-cv-01026.

For asylum seekers, deportation can result in loss of personal freedom and physical liberty.<sup>27</sup> Appointment of counsel is therefore necessary for indigent asylum seekers to ensure fundamental fairness and to safeguard against errors that prejudice the outcome of the decision, including insufficient explanation of hearing procedures and failure to elicit facts pertinent to an asylum seeker's claim.<sup>28</sup>

The stark disparities in approval rates for asylum seekers with representation compared to those without demonstrate the significant risks associated with the lack of legal counsel. Under the *Mathews v. Eldridge* due process test, the government interest in cost-savings does not outweigh the other interests at stake.<sup>29</sup> Yet the U.S. Supreme Court and federal courts have thus far declined to recognize a universal right to appointed counsel for indigent asylum seekers, and instead maintain that immigration proceedings are civil in nature and thus outside of *Gideon's* scope.<sup>30</sup>

### *B. Financial Barriers to Asylum Representation*

Legal services agencies that provide asylum representation are generally prohibited from receiving federal funding. In 1996,

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27. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (“The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence . . . Return to his native land may result in poverty, persecution and even death.”); *Padilla v. Kentucky*, 130 S. Ct. 1477, 1481 (2010) (noting that “deportation is a particularly severe ‘penalty’ ”); see also Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 4 (2008) (emphasizing the importance of quality representation for immigrants, “not only because the stakes are often so high—whether individuals will be able to stay in this country or reunite their families or be employed—but also because there is a wide disparity in the success rate of those who have lawyers and those who proceed pro se.”).

28. See *Zadvyas*, 533 U.S. at 693; *Aguilera-Enriquez*, 516 F.2d at 568 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)); *Agyeman*, 296 F.3d at 884; *Jacinto*, 208 F.3d at 734–35. See *infra* Part III; see also Compl., *J.E.F.M.*, No. 2:14-cv-01026.

29. See generally Pitsker, *supra* note 7 (applying the *Mathews v. Eldridge* due process test to asylum proceedings).

30. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984); *Mantell v. U.S. Dep’t of Justice, I.N.S.*, 798 F.2d 124, 127 (5th Cir. 1986) (noting that immigration proceedings are civil in nature); see also *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) (“As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.”); *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) (“[T]here is no Sixth Amendment right to counsel in deportation hearings, so any claim of ineffective assistance of counsel advanced by Uspango must be based on the Fifth Amendment’s due process guaranty.”); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir. 2000) (“Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel.”).

under the direction of the Republican-led U.S. House of Representatives, Congress passed restrictions on legal services for immigrants as part of the Congressional appropriations bill.<sup>31</sup> The 1996 restrictions prohibited organizations representing asylum seekers and other immigrants from receiving funding from Legal Services Corporation (LSC), the largest funder of civil legal services in the country. Under these restrictions, organizations receiving LSC funds could not use any funds (including non-LSC funds) to represent asylum seekers and other immigrants ineligible for LSC funding.<sup>32</sup>

At that time, then-Representative Newt Gingrich's Contract on America spread the message that welfare, free legal services, and other government benefits served as magnets for undocumented immigrants.<sup>33</sup> Materials submitted to the 1996 House of Representatives subcommittee hearing claimed that " 'Legal Services Aids Illegal Immigration.' "<sup>34</sup> As some commentators have explained, the Legal Services Corporation "fell victim to the conservative revolution of the 104th Congress and its attempt to 'defund the left.' The conservative restrictions on the LSC were the culmination of hostilities that had been building since the early 1980s."<sup>35</sup> At the same time, Congress also restricted eligibility for food stamps and cash assistance to many immigrants.<sup>36</sup>

Since then, Congress has authorized legal services funding for limited categories of undocumented immigrants, such as victims of domestic abuse, human trafficking, and violent crimes, who have

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31. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(11), 110 Stat. 1321, 1354-55 (1996); Restrictions on Legal Assistance to Aliens, 61 Fed. Reg. 45,750 (Aug. 1996) (amending 45 C.F.R. pt. 1626) (interim rule). For an overview of the history of legal services for immigrants and the politics driving the increasingly restrictionist approach, see Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 653-54 (2011).

32. See Heeren, *supra* note 31, at 653 (citing Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134 § 504(a)(11), 110 Stat. 1321; Restrictions on Legal Assistance to Aliens, 61 Fed. Reg. 45,750 (interim rule Aug. 29, 1996) (amending 45 C.F.R. pt. 1626)).

33. See *id.* at 653-54, 669 (citing inter alia 8 U.S.C. § 1601(6) (2006) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.")).

34. See *id.* (quoting Reauthorization of Legal Services Corporation: Hearings Before the Sub-comm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 104th Cong. 47 (1996) (hearing of June 26, 1996)).

35. Steven Epstein, Eric B. Fields, Jack E. Pace III & Staci Rosche, *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 FORDHAM URB. L.J. 279, 279 (1998) (quoting 142 Cong. Rec. H8149-04, H8185 (remarks by Hon. Robert Dornan, R-CA)).

36. Heeren, *supra* note 31, at 669.

cooperated with law enforcement.<sup>37</sup> But given the complex restrictions on funding, many legal services attorneys still do not represent asylum seekers.<sup>38</sup> Moreover, although the government has expanded federal funding for certain categories of immigrants, this expansion has not generally included representation of asylum seekers.<sup>39</sup> Legal services providers representing asylum seekers must therefore pursue private, local, and state funding sources, which can be quite limited.<sup>40</sup>

## II. A FLAWED SYSTEM: CHALLENGES FACING U.S. ASYLUM SEEKERS

The immigration system is designed to adjudicate legal claims in order to determine who can stay in the United States and who is required to leave. The system is not designed to take into account the cross-cultural and psychosocial needs of asylum seekers. U.S. Citizenship and Immigration Service (USCIS) asylum officers and

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37. See Memorandum from Helaine M. Barnett, President, Legal Services Corporation, to All LSC Program Directors, Violence Against Women Act of 2006 Amendments (Feb. 21, 2006), available at <http://www.lsc.gov/sites/default/files/Grants/pdfs/progltr06-2.pdf>. For a history of legal services for immigrant victims of domestic abuse, trafficking and other crimes, see NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP), REPORT TO THE LEGAL SERVICES CORPORATION: IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND HUMAN TRAFFICKING AND ACCESS TO LEGAL SERVICES (2013), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/access-to-legal-services-for-immigrant-victims/civil-society/Appendix-I-LSC-Report.pdf/view>.

38. Heeren, *supra* note 31, at 656–57 (citing a survey of legal services managers, 87.5 percent of whom cited LSC restrictions as a reason for not handling immigration cases). See also Eagly, *supra* note 11, at 2290 (“[While] [o]ne area of recent liberalization in federal legal services is funding for immigrant crime victims . . . [i]n practice, [ ] LSC organizations dedicate only a tiny fraction of their resources to immigration matters.”).

39. Heeren, *supra* note 31, at 653–54. The newly-established “justice AmeriCorps” program, created by the Corporation for National and Community Service and the Justice Department to “enhanc[e] the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. Border without a parent or legal guardian,” allows justice AmeriCorps fellows to represent certain unaccompanied minors in their applications for asylum. Corp. for Nat'l & Comty. Serv., Press Release, Justice Dep't & CNCS Announce New P'ship to Enhance Immigration Courts & Provide Critical Legal Assistance to Unaccompanied Minors (June 6, 2014), <http://www.nationalservice.gov/newsroom/press-releases/2014/justice-department-and-cncs-announce-new-partnership-enhance>; see also JUSTICE AMERICORPS, 2014 JUSTICE AMERICORPS NOTICE OF FUNDING AVAILABILITY FREQUENTLY ASKED QUESTIONS (2014), available at [http://www.nationalservice.gov/sites/default/files/documents/justice\\_AmeriCorps\\_FAQ\\_FINAL\\_7914.pdf](http://www.nationalservice.gov/sites/default/files/documents/justice_AmeriCorps_FAQ_FINAL_7914.pdf).

40. In 1996, Greater Boston Legal Services (GBLS), the largest legal service provider in New England, “relinquishe[d] \$1,400,000 in federal funding due to major restrictions imposed by Congress,” including prohibitions on LSC-funding recipients engaging in “class action work, representing immigrants, or advocacy with state and federal agencies.” GBLS “determine[d] [that] we cannot fulfill our mission if we adhere to these restrictions.” *Significant Events in GBLS' History*, GREATER BOSTON LEGAL SERVS., <http://www.gbbs.org/about/history> (last visited Mar. 21, 2015).

immigration judges face large caseloads and backlogs that limit adjudicators' abilities to spend the time necessary to assess asylum applicants' claims.<sup>41</sup>

This Part first addresses the systemic hurdles faced by unrepresented or pro se asylum seekers. It next identifies the challenges confronting asylum seekers, even when represented by counsel. This Part concludes with a discussion of the cultural factors—including differences among attorneys, medical and mental health professionals, and country experts—that also present roadblocks to holistic representation.<sup>42</sup>

#### A. *Proving Asylum Eligibility: Legal Hurdles, Misinformation, and Lack of Representation*

In order to establish eligibility for asylum, applicants bear the burden of showing that they have suffered past persecution or have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>43</sup> Adjudicators are responsible for developing the record

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41. There are approximately 1.1 million cases on the immigration court docket nationally, which amounts to about 5,000 cases per immigration judge. *America's Deportation Machine, The Great Expulsion: Barack Obama has presided over one of the largest peacetime outflows of people in America's history*, THE ECONOMIST, Feb. 8, 2014, at 23. Asylum officers receive training on cross-cultural communication and trauma, but time constraints may hamper their ability to be sensitive to the trauma suffered. See U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, INTERVIEWING PART IV: INTER-CULTURAL COMMUNICATION AND OTHER FACTORS THAT MAY IMPEDE COMMUNICATION AT AN ASYLUM INTERVIEW (2002), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Interview-Part4-Intercultural-Communication-31aug10.pdf>; U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, INTERVIEWING PART V: INTERVIEWING SURVIVORS (2004), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Interview-Part5-Interviewing-Survivors31aug10.pdf>.

42. See *infra* Part II.C. Given resource and time constraints, attorneys may consider client legal goals narrowly, without addressing the full range of services needed to provide effective representation. In addition, attorneys traditionally consider themselves the “drivers” of the case and may not necessarily value collaboration with other professionals. See *infra* Part II.C; see also Sabrineh Ardalani, *Expert as Aid and Impediment*, in ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY (Benjamin N. Lawrance & Galya Ruffer eds., 2015).

43. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2015). In 1968, the United States ratified the 1967 Protocol to the 1951 Refugee Convention, and incorporated the refugee definition into U.S. law with the 1980 Refugee Act. See United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol] [together hereinafter U.N. Refugee Convention or Convention]. For an overview of U.S. asylum law, see generally DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES

and have a “duty to ascertain and evaluate all the relevant facts” in order to evaluate asylum applicants’ claims.<sup>44</sup> But, in practice, the burden falls on asylum applicants to develop and present their claims.<sup>45</sup>

Obstacles like language barriers, past trauma, limited legal knowledge, and restricted access to basic social services often impede asylum seekers from effectively telling their stories. These obstacles may also prevent asylum applicants from gathering the evidence necessary to carry their burden of proof. Many asylum seekers flee their home countries with little other than the clothes

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(2014). The U.S. Supreme Court has defined “well-founded fear” to mean a “reasonable possibility” or a one in ten chance that an applicant would face persecution if forced to return to his or her home country. *INS v. Cardoza Fonseca*, 480 U.S. 421, 440 (1987). Over 84,000 people sought asylum in the United States in 2013, an increase of nineteen percent as compared to 2012. U.N. HIGH COMM’R FOR REFUGEES, GLOBAL TRENDS 2013 27–28 (2013), available at <http://www.unhcr.org/5399a14f9.html>. In the first half of 2014, the United States received the second highest number of new asylum applications of any country in the world with 52,800 new asylum applications. U.N. HIGH COMM’R FOR REFUGEES, ASYLUM TRENDS 3 (2014), available at <http://www.unhcr.org/5423f9699.html>.

44. *In re S-M-J-*, 21 I. & N. Dec. 722, 727–29 (B.I.A. 1997) (“[T]he government wins when justice is done.”); see also U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 39–40 ¶ 196, ¶¶ 203–05 (1979, Rev. 1992) (“Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof.”).

45. In the affirmative process, an asylum seeker submits a Form I-589 (asylum application) to the U.S. Citizenship and Immigration Services. The asylum seeker then has the benefit of a non-adversarial interview with a trained asylum officer. See, e.g., 8 C.F.R. § 208.09–14 (2015); U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (2013), available at [http://www.uscis.gov/sites/default/files/files/natedocuments/Asylum\\_Procedures\\_Manual\\_2013.pdf](http://www.uscis.gov/sites/default/files/files/natedocuments/Asylum_Procedures_Manual_2013.pdf); U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART IV: BURDEN OF PROOF, STANDARDS OF PROOF AND EVIDENCE IN ASYLUM OFFICER BASIC TRAINING 4 (2006), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf>. Where an asylum seeker has been placed in removal proceedings, he or she must apply for asylum in an adversarial proceeding before an immigration judge in immigration court. See, e.g., 8 U.S.C. § 1229a (2015); 8 C.F.R. § 1208.10–14 (2015); U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR SUBMITTING CERTAIN APPLICATIONS IN IMMIGRATION COURT AND FOR PROVIDING BIOMETRIC AND BIOGRAPHIC INFORMATION TO U. S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf>. In immigration court, a government attorney from Immigration and Customs Enforcement can cross-examine the applicant and any witnesses, whereas in the Asylum Office context, there is no attorney for the government and no cross-examination. See U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 58–82 (2013), available at [http://www.justice.gov/eoir/vll/OCIJPracManual/Practice\\_Manual\\_1-27-14.pdf](http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf).

on their backs, so they may not have much proof to substantiate their asylum claims.<sup>46</sup>

Under U.S. and international law, an asylum applicant's testimony must be given the "benefit of the doubt," since it is often the only evidence an applicant can produce.<sup>47</sup> The Board of Immigration Appeals (Board) has emphasized that adjudicators should only require corroborating evidence where it is reasonably available.<sup>48</sup> But, in recent years, adjudicators have increasingly demanded extensive proof of applicant's claims—proof that can be extraordinarily difficult to obtain without legal representation.<sup>49</sup>

46. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 38 ¶ 196 (1979, rev. 1992) ("In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.").

47. *Id.* at 39–40 ¶ 196, ¶¶ 203–05 ("It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule . . . In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."); *see also* Dawoud v. Gonzales, 424 F.3d 608, 612–13 (7th Cir. 2005); *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) (noting that the applicant's "own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear"); U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: ASYLUM ELIGIBILITY PART IV, *supra* note 45, at 16, 21 (citing *In re Dass*, 20 I. & N. Dec. 120 (B.I.A. 1989); *In re S-M-J*, 21 I. & N. Dec. 722, 724 (B.I.A. 1997); *In re B-B*, 22 I. & N. Dec. 309 (B.I.A. 1998) ("The most common form of evidence that informs asylum eligibility is the applicant's own testimony.").

48. *See In re S-M-J*, 21 I. & N. Dec. at 724–25, 727–29; *see also id.* at 735, 738, 740 (Rosenberg, Bd. Mem., concurring). Under U.S. law, "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." REAL ID Act of 2005 § 101(a)(3)(B)(ii), Pub. L. No. 109-13, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter REAL ID Act]. An applicant's testimony may in principle carry the applicant's burden of proof, if it is specific, credible, and persuasive. REAL ID Act § 101(a)(3)(B)(ii). Particularly as issues of fraud in the asylum process gain greater attention in the national media, adjudicators may become warier of granting asylum to applicants based on testimony alone, without extrinsic evidence. *See, e.g.,* Suketu Mehta, *The Asylum Seeker*, NEW YORKER, Aug. 1, 2011. *See Asylum Fraud: Abusing America's Compassion?: Hearing before Subcomm. on Immigration and Border Security of the House Comm. on the Judiciary*, 113th Cong. 1 (2014) (Representative Goodlatte) ("Our Nation's record of generosity and compassion to people in need of protection from war, anarchy, natural disaster, and persecution is exemplary and easily the best in the world. . . . We grant asylum to tens of thousands of asylum seekers each year. We expect to continue this track record in protecting those who arrive here in order to escape persecution. Unfortunately, however, because of our well-justified reputation for compassion, many people are tempted to file fraudulent claims just so they can get a free pass into the United States. The system becomes subject to abuse and fraud when the generous policies we have established are stretched beyond imagination by the Administration."), available at [http://judiciary.house.gov/\\_cache/files/121ef25f-d824-448e-8259-cce4edc03856/113-56-85905.pdf](http://judiciary.house.gov/_cache/files/121ef25f-d824-448e-8259-cce4edc03856/113-56-85905.pdf).

49. Adjudicators may demand corroborating evidence where it is "reasonably obtain[able]." REAL ID Act § 101(a)(3)(B)(ii),(iii). The REAL ID Act states that an applicant's

Many asylum seekers cannot afford to retain private counsel. For detained asylum seekers, in particular, counsel can be both costly and difficult to obtain because detainees cannot work to pay legal counsel fees.<sup>50</sup> In addition, there is a shortage of free or low-cost legal representation for undocumented immigrants, especially in rural and remote areas where detention centers are sometimes located.<sup>51</sup> As noted above, federal funding restrictions limit the

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testimony alone “*may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.*” REAL ID Act § 101(a)(3)(B)(ii) (emphasis added). The Act’s credibility and corroboration provisions apply to applications initiated after May 11, 2005. REAL ID Act § 101(g)(2). The REAL ID Act of 2005 codified this “reasonable corroboration” rule, which the Board of Immigration Appeals, the administrative appeal body for immigration cases, had previously articulated in its 1997 decision *In re S-M-J*, 21 I. & N. Dec. at 741–42; *see also* H.R. Rep. No. 109-72, 2005, at 161–69 (2005) (“a lack of extrinsic or corroborating evidence will not necessarily defeat an asylum claim”).

50. *See, e.g.*, Human Rights Watch, *US: Halt Expansion of Immigrant Family Detention Problems with Detaining Children Evident in New Mexico Center* (July 29, 2014), available at <http://www.hrw.org/news/2014/07/29/us-halt-expansion-immigrant-family-detention> (“Detainees in Artesia also face nearly insurmountable obstacles in obtaining legal counsel. Under US law, the government does not pay for legal representation for asylum seekers and others in immigration proceedings. . . . Detainees spoke to Human Rights Watch about their inability to get legal assistance. Though they were given a list of three legal service providers, those providers were hours away from Artesia and unable to represent the hundreds of detainees at the facility.”). *See also* Harvard Law Review Ass’n, *Development in the Law: Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1661–62 (2013) (“Expensive and increasingly scarce detention space in California and the Northeast has required ICE to transfer detainees to facilities in ‘far-flung’ locations with surplus beds—often in ‘rural, geographically isolated’ areas. The rate of these transfers, like the frequency of detention, has increased dramatically in recent years. In 1999, 74,329 immigrants were transferred between detention facilities; by 2007, that figure had risen to 261,941. . . . Among the host of issues that detention and transfer policies raise is the profound impact of these practices on noncitizens’ ability to access counsel. A major impediment is financial: detention prevents immigrants from maintaining employment, and absent a source of income many detainees simply cannot afford to retain counsel. This and other constraints—the distant and often isolated locations of detention facilities, ICE transfers, detainees’ limited access to outside communication, and the psychological impact of detention—frustrate detainees’ ability both to retain counsel and to consult with a lawyer to meaningfully prepare a case. That immigrant detainees are especially ill-equipped for pro se representation—they have a far more limited ability to engage in fact finding or conduct research than non-detained noncitizens do—makes the presence of counsel in this context all the more crucial.”).

51. *See, e.g.*, AM. BAR. ASS’N COMM’N ON IMMIGRATION, *supra* note 5 (“More than half of respondents in removal proceedings, and 84% of detained respondents do not have representation. The lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by ‘immigration consultants’ and ‘notarios.’ A study has shown that whether a noncitizen is represented is the ‘single most important factor affecting the outcome of an asylum case.’ ”); U.S. DEP’T. OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR FY 2012 STATISTICAL YEAR BOOK G1 (2013), available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf> (explaining that “[m]any individuals in removal proceedings are indigent and cannot afford a private attorney” and noting that “the percentage of represented aliens increased



availability of legal services for asylum seekers.<sup>52</sup> The legal services organizations that represent asylum seekers are stretched thin, with many facing funding cuts. Similarly, law firm pro bono projects and law school clinics can only take on a limited number of cases given their competing responsibilities to clients and students, respectively.

Forced to represent themselves, pro se asylum applicants struggle not only to navigate the immigration system but also to win their cases.<sup>53</sup> Immigration courts often schedule hearings with little warning. Courts sometimes send hearing notices to prior addresses and asylum seekers might not even realize that they have missed their

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from FY 2008 (45%) to FY 2012 (56%)”); FRIEDLAND, *supra* note 5, at 9 n.1 (“According to the Executive Office for Immigration Review (EOIR), FY 2011 is the first year in which more than half of the immigrants in immigration proceedings were represented by counsel. EOIR recently revised its methodology for calculating the number of persons represented in immigration proceedings, however, and upwardly adjusted its calculations for FY 2007 to FY 2010. In FY 2010 and the years before, EOIR determined representation rates by looking at whether a particular respondent was represented at a particular proceeding. For example, if a respondent appeared pro se in FY 2007, but subsequently obtained counsel for a proceeding in in FY 2008, the respondent would be considered ‘unrepresented’ for the first proceeding but ‘represented’ for the second proceeding. In the FY 2011 Statistical Yearbook, EOIR determined representation rates by looking at whether a particular respondent was represented at any point of a particular case. Thus, if a respondent appeared pro se in FY 2007 but subsequently obtained counsel for a proceeding in FY 2008, the respondent would be considered ‘represented’ in both 2007 and 2008.”).

52. See *supra* Part I.

53. Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 56 nn.12–14 (2008) (noting that in a study of expedited removal cases, asylum seekers were 12.5 times more likely to succeed in their claims if represented) (citing Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 239, 232–80 (2005)). Another study found that asylum seekers with representation were three times more likely to win their cases. *Id.* (citing Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007)). Immigration court data from 1999 indicated that “represented asylum cases are four to six times more likely to succeed than pro se ones.” Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739 (2002) (citing EOIR data compiled internally and provided to the authors on May 2000). See also *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (noting that the immigration system is “a labyrinth that only a lawyer could navigate”); *Ardestani v. INS*, 502 U.S. 129, 138 (1991) (commenting that “the complexity of immigration procedures . . . make[s] legal representation in deportation proceedings especially important”); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (“The laws and regulations determining [an immigrant’s] deportability [a]re too complex for a pro se [immigrant]”). See also HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT, MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE U.S. IMMIGRATION SYSTEM 24–26, 54–56 (2010) (describing the challenges facing pro se immigrants who are mentally ill in immigration proceedings).

court dates.<sup>54</sup> These types of bureaucratic failures have serious consequences in asylum cases, where a missed court date can lead the court to issue an in absentia removal order. Under these circumstances, an asylum seeker could be deported to his or her home country where he or she suffered or fears grave human rights violations. Alternatively, an asylum seeker could attempt to reopen his or her case, which can be very challenging without legal representation. Many immigrants may not be aware of the legal options available to them. Some may not know about asylum protection, since asylum is a complicated and evolving area of law.<sup>55</sup>

Asylum seekers may also be too scared to reveal sensitive personal information to U.S. government officials, particularly given the dangers associated with government agents in their home countries. Immigration judges are tasked with advising pro se immigrants about potential immigration protections.<sup>56</sup> But to do so, judges need information about the immigrants' histories and experiences—information which may be difficult to elicit. In addition, even when pro se asylum applicants reveal why they are afraid to return to their countries of origin, they may not have access to the documentation necessary to substantiate their claims. Adjudicators and government attorneys often rely on U.S. State Department reports on human rights conditions in assessing asylum seekers' fears of return, but these reports may fail to address the particular human rights violations suffered or feared by the applicant.<sup>57</sup>

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54. In one case for example, an attorney representing unaccompanied children in Virginia received a hearing notice on Monday for a hearing scheduled the same day in Los Angeles, which is where the clients had moved from. Without the attorney's intervention, these unaccompanied children would have been ordered removed in absentia, even though they only received forty-eight hours' notice of the hearing and had moved across the country. Email from Simon Y. Sandoval-Moshenberg, Legal Aid Justice Center, Falls Church, Virginia, sent to the Immigration Professor Listserv (July 28, 2014) (on file with author).

55. For example, survivors of domestic violence and LGBT immigrants who fled or fear violence in their home countries may be unaware of their eligibility for asylum protection. Others may be too traumatized or embarrassed to share what they have endured. *See, e.g.,* BOSTON BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 28–29 (2008), available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjre\\_sourcecenter/downloads/gideons\\_new\\_trumpet\\_9\\_08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjre_sourcecenter/downloads/gideons_new_trumpet_9_08.authcheckdam.pdf) (noting that “asylum applicants represented by counsel win asylum five times more often in Immigration Court than those who are unrepresented”).

56. 8 C.F.R. § 1240.11(a)(2) (2015) (“The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter . . .”).

57. *See* Sabi Ardalán, *Country Condition Evidence, Human Rights Experts, and Asylum-Seekers: Educating U.S. Adjudicators on Country Conditions in Asylum Cases*, 13-09 IMMIGRATION BRIEFINGS 1, 11 (Sept. 2013).

Furthermore, unrepresented asylum seekers may have preconceived notions about the information they need to present to establish asylum eligibility. As was the case with Matthew, discussed earlier, these notions may, in fact, be detrimental to their claims. For example, one asylum seeker represented by the Clinic stated in the initial application he submitted pro se that he was college-educated, even though he was not, because he had heard that it would help his claim, and he was embarrassed to admit he was “uneducated.”

False rumors often circulate in immigrant communities about the requirements for asylum. A *New Yorker* article, for instance, described a woman with a legitimate asylum claim, who was coached by members of her community to embellish her story and to state that she was raped even though she was not. She was told that adjudicators would not believe her claim without that added detail.<sup>58</sup> Similarly, a recent *New York Times* article questioned the authenticity of letters from a civil servant in Mexico, submitted by asylum applicants at the border to establish a credible fear of persecution.<sup>59</sup> According to the article, nearly eighty percent of asylum seekers from Mexico presented a letter from this civil servant.<sup>60</sup> The *New York Times* reported that the letters “appear to have spawned a copying industry . . . .”<sup>61</sup> Such media coverage fuels the skepticism of adjudicators, government attorneys, and the public, alike. It also makes it even more difficult for asylum seekers, and particularly pro se asylum seekers, to establish credibility and to prove that they legitimately fear return to their home countries.

*B. Competence, Trauma & Psych-Social Needs: Obstacles to Effective Legal Representation*

Even if represented, indigent asylum seekers are often in the hands of “notaries” and incompetent counsel who may not provide effective representation and may make promises that they are unable to keep. According to a recent New York study, about fifty percent of immigration representation does not meet basic standards of competence and about fourteen percent is “grossly

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58. Mehta, *supra* note 48.

59. Damien Cave, *A Civil Servant in Mexico Tests U.S. on Asylum*, N.Y. TIMES, Dec. 28, 2013, at A1.

60. *Id.*

61. *Id.*

inadequate.”<sup>62</sup> Federal and state court judges frequently express concern over the standard of legal representation in immigration cases, noting that immigration is the area of civil practice with the “lowest” quality of representation.<sup>63</sup>

As Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit recently noted in testimony before the New York City Council: “I had the feeling that if only the immigrant had competent counsel at the very beginning of immigration proceedings, where the record is made and the die is cast, the result might have been different, and the noncitizen might have secured relief . . . .”<sup>64</sup>

Even asylum applicants who have competent counsel may not discuss certain aspects of their life stories for a variety of reasons, including erroneous information about asylum requirements. For example, a highly-educated client of the Clinic did not mention

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62. NYIRS I, *supra* note 6, at 388–93. At the 30th Anniversary Celebration of the Harvard Immigration and Refugee Clinical Program, C. Mario Russell, Senior Attorney at Catholic Charities and adjunct professor at St. John’s University School of Law in New York, recounted a time when he was in court and observed as “only after many minutes of questioning, the lawyer [appearing before the judge] realized and informed the judge that the woman sitting before the court was not his client. This case, for him, epitomized both the ‘quality and quantity’ problems that plague the immigration system.” HARVARD IMMIGRATION & REFUGEE CLINICAL PROGRAM, 30th ANNIVERSARY CELEBRATION: 30 YEARS OF SOCIAL CHANGE LAWYERING (2014), available at <http://today.law.harvard.edu/wp-content/uploads/2014/07/FinalReport.pdf>.

63. See, e.g., Harvard Law Review Ass’n, *Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1659 (2013) (“[W]hen noncitizens do retain counsel, that counsel can be of dubious quality: a 2008 survey, for example, reported federal and state judges’ belief that immigration is the area of civil practice ‘in which the quality of representation [is] lowest.’”) (citing Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011) (noting that federal appellate judges have found the greatest disparities in immigration representation)); Robert A. Katzmann, *Bench, Bar, and Immigrant Representation: Meeting an Urgent Need*, 15 NYU J. LEGIS. & POL’Y 585 (2012) (“In all too many cases, the dearth of adequate counsel for immigrants all but dooms the immigrant’s chances to realize the American dream.”); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009) (noting “[a] growing chorus . . . rising from circuit judges across the political spectrum, sounding a much needed alarm regarding the crisis of inept and unscrupulous attorneys in significant sectors of the private bar”) (citing *Aris v. Mukasey*, 517 F.3d 595, 601 (2d Cir. 2008); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1254 (9th Cir. 2003)); Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623 (2009) (“[A]ll too often the representation is mediocre. Some lawyers simply lack legal expertise. But there is also a kind of ennui that is widespread among lawyers who appear before me. Case theory is not developed. Necessary documents are not produced, nor are immigrants prepared to present reasonable explanations for why such documents are absent . . . .”). See also Adam Liptak, *The Verge of Expulsion, The Fringe of Justice*, N.Y. TIMES, Apr. 15, 2008, at A12 (noting that asylum seekers often cannot afford counsel, or competent counsel).

64. Robert A. Katzmann, Chief Judge, U.S. Court of Appeals for the Second Circuit, testimony delivered to the New York City Council Oversight Hearing (Feb. 25, 2014), quoted in Acer et al., *supra* note 15.

that his brother was killed for political reasons until right before the Clinic filed his claim. He did not realize that his brother's murder helped substantiate his own fear of return to his home country. Another client fled her country after being detained and beaten for her work with an opposition political party. She did not initially disclose that she had also been forcibly subjected to female genital mutilation, a recognized basis for asylum,<sup>65</sup> because she thought it was irrelevant to her asylum claim.

Asylum seekers are often traumatized, which may prevent them from opening up and telling their stories in a coherent, linear manner persuasive to U.S. adjudicators.<sup>66</sup> According to one study, over eighty percent of asylum seekers suffer from post-traumatic stress disorder (PTSD).<sup>67</sup> Avoiding painful topics is common among trauma survivors, and when asylum seekers do open up, their memories can flood together.<sup>68</sup> Applicants may conflate events, forgetting details like the frequency of being detained and tortured or the length of time the detention and torture lasted.<sup>69</sup>

Gaps and inconsistencies can undermine the credibility of an asylum applicant, like Matthew, whose memories blurred together and who became too emotional to remain coherent during his Asylum

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65. See generally ANKER, LAW OF ASYLUM IN THE UNITED STATES, *supra* note 43, §§ 4:17, 5:47–49 (2014); see also *In re A-T*, 25 I. & N. Dec. 4 (B.I.A. 2009); *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

66. See, e.g., BOSTON BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, *supra* note 55, at 28–29 (explaining that because a Haitian asylum seeker, who was attacked for supporting former President Jean Bertrand Aristide was traumatized and could not talk about being raped during her asylum office interview, she was determined not to be credible and her case was referred to the Immigration Court to begin removal proceedings, and noting that “[i]luckily, Marie was able to obtain legal representation and the Immigration Judge found her to be credible and granted her application for asylum. . . . Without representation, she would almost certainly have been denied asylum and ordered deported.”).

67. Lin Piwowarczyk et al., *Secondary Trauma in Asylum Lawyers*, 14 BENDER'S IMMIGRATION BULL. 1, 2 (2009) (“In a clinical sample of asylum seekers seeking mental health services in the United States, eighty-two percent of the sample were diagnosed with posttraumatic stress disorder (PTSD), and ninety-six percent suffered from some form of depressive disorder. Other diagnoses included anxiety disorder NOS (1.5%), adjustment disorder (0.7%), and psychotic disorder NOS (0.7%). Of note, none were found at intake to have an active alcohol or substance abuse disorder. Asylum seekers with a history of torture were more likely to suffer from PTSD (85%,  $p=.045$ ), depressive disorder NOS (17.7%,  $p=.037$ ) than those without a torture history, who were more likely to be affected by chronic dysthymia or low-grade depression of two or more years duration (9.5%,  $p=.05$ ).”).

68. See *infra* Part III.B.

69. Traumatic memories are often formed in a piecemeal, disjointed manner, and gaps and inconsistencies in recall are common among trauma survivors. See *infra* Part III; see also Uwe Jacobs & Stuart Lustig, *Psychological and Psychiatric Opinions in Asylum Applications: Ten Frequently Asked Questions by Fact Finders*, 15 BENDER'S IMMIGRATION BULL. 2 (2010) (citing Jane Herlihy, Peter Scragg & Stuart Turner, *Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interview Study*, 324 British Med. J. 324 (2002)).

Office interview. To evaluate an applicant's credibility, an adjudicator may consider any inconsistencies in the applicant's testimony. This includes inconsistencies between the account presented to the adjudicator and the account presented in the documentation submitted, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."<sup>70</sup> The REAL ID Act of 2005 instructs adjudicators to consider such inconsistencies in light of the "totality of circumstances" and "all relevant factors."<sup>71</sup> But adjudicators may improperly attribute inconsistencies to untruthfulness, even though they may be the product of trauma, language-barriers, cross-cultural differences, or other misunderstandings.

Trauma may also prevent asylum seekers from coming forward and applying for asylum during their first year in the United States, as required under U.S. law.<sup>72</sup> Asylum applicants who do not file within their first year must show "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing

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70. Under the REAL ID Act, adjudicators can consider any inconsistency in making an adverse credibility determination. The Act states that:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

8 U.S.C. § 1158(b)(1)(B)(iii) (2015).

71. *Id.*

72. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), asylum applications filed after April 1, 1998 must be submitted within one year of arrival unless an applicant can demonstrate changed or extraordinary circumstances that relate to the delay in filing. Applicants who are not eligible for asylum because of the one-year filing deadline may, however, still apply for withholding of removal and protection under the Convention Against Torture. The deadline only applies to asylum cases. Advocacy efforts have long attempted to repeal the one-year filing deadline. *See, e.g.*, NAT'L IMMIGRANT JUSTICE CTR., THE ONE-YEAR ASYLUM DEADLINE AND THE BIA: NO PROTECTION, NO PROCESS (2010), available at <http://www.immigrantjustice.org/repeal-one-year-asylum-deadline>. Senate Bill 744, the comprehensive immigration reform legislation passed by the U.S. Senate in 2013, included a provision repealing the one-year filing deadline; the bill did not, however, become law. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); *see also* IMMIGRATION POLICY CTR., A GUIDE TO S. 744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL (2013), available at <http://www.immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill>.

the application,” such as “[s]erious illness or mental or physical disability” or “[l]egal disability.”<sup>73</sup>

Proving that an applicant meets one of these exceptions can be challenging. An applicant may need a forensic psychological evaluation to document the existence of “extraordinary circumstances,”<sup>74</sup> such as PTSD. Alternatively, an applicant may need an affidavit from a human rights expert to show “changed circumstances,” such as a new, repressive political regime, to which the applicant fears return. Although “nothing in the INA or its implementing regulations requires that a petitioner produce ‘objective’ or ‘expert’ evidence,”<sup>75</sup> in practice, adjudicators may rely on such evidence in making determinations regarding the one-year filing deadline.<sup>76</sup>

Moreover, asylum seekers often cannot focus on their cases because they desperately need medical and mental health services. For example, a couple, represented by the Clinic, fled to the United States after government authorities targeted, threatened, and attacked them for opposing the ruling party in their home country. They suffered severe and persistent headaches due to head injuries sustained in their home country. But for months after they arrived to the United States, they were too scared to seek medical care for fear of deportation. Such fears are often common among immigrants because of their lack of status and/or their inability to pay medical bills. These applicants, in particular, also did not trust an unfamiliar medical system.<sup>77</sup> Counseling and social services may be

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73. Immigration and Nationality Act § 208(a)(2)(D), 8 U.S.C. § 1158 (2015); 8 C.F.R. § 208.4(a) (2015). The regulations explain that “extraordinary circumstances” comprise, *inter alia*, “[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival” and “[l]egal disability (*e.g.*, the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival.” 8 C.F.R. § 208.4(a)(5).

74. *See, e.g.*, Jacobs & Lustig, *supra* note 69, at 2. Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155 (2001).

75. *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1315 n.6 (9th Cir. 2012) (citing *Brucaj v. Ashcroft*, 381 F.3d 602 (7th Cir. 2004)) (no expert testimony required to substantiate the psychological trauma associated with a petitioner’s persecution); 8 C.F.R. § 1208.13(a) (2015) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”).

76. *See, e.g.*, PUBLIC COUNSEL LAW CENTER IMMIGRANTS’ RIGHTS PROJECT, ASYLUM MANUAL FOR PUBLIC COUNSEL’S VOLUNTEER ATTORNEYS 68 (2012), *available at* <http://www.publiccounsel.org/tools/publications/files/AsylumManual.pdf>; IMMIGRATION EQUALITY, ASYLUM MANUAL, IMMIGRATION COURT PROCEEDINGS § 27.2.4-5, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/27-immigration-court-proceedings/> (last visited May 13, 2015).

77. *See, e.g.*, Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Latino Immigrants*, 3 J. IMMIGR. HEALTH 151, 151–56 (2001); Esther Yu-Hsi, *NYC Mayor: Undocumented Immigrants Shouldn’t Hesitate To Seek Medical Care For Ebola*, THINK-PROGRESS (Oct. 24, 2014), <http://thinkprogress.org/immigration/2014/10/24/3584356/nyc-mayor-undocumented-immigrants-er-ebola/> (“Despite the fact that New York City has

difficult to access or unavailable to undocumented immigrants with limited health care coverage and eligibility for benefits.<sup>78</sup> In addition, at some detention facilities, authorities routinely overlook detained immigrants' medical and mental health needs.<sup>79</sup>

*C. Cultural Barriers to Holistic Representation: Professional Differences Among Lawyers, Mental Health Clinicians, Medical Doctors, and Country Experts*

As discussed further in Part III, medical and mental health treatment, as well as medical, psychological, and country condition expertise is often integral to the success of asylum claims, but such treatment and expertise can be difficult to find and prohibitively expensive to obtain. In addition, overburdened attorneys may not have the resources, time, or inclination to find non-legal professionals to provide treatment or offer expert testimony in support of their client's claims.

Even when multidisciplinary teams exist, holistic representation presents a series of additional obstacles that lawyers may be unprepared to address. Lawyers, doctors, mental health clinicians, sociologists, and anthropologists each bring different perspectives to an asylum applicant's case. Lawyers view themselves as zealous advocates for their clients. By contrast, doctors, mental health clinicians, sociologists, and anthropologists may view themselves as

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been especially welcoming to undocumented immigrants, it still remains a fear for such individuals, who often do not have social security numbers, to access health care out of deportation fears.”).

78. See MENTAL HEALTH CARE FOR NEW HISPANIC IMMIGRANTS: INNOVATIVE APPROACHES IN CONTEMPORARY CLINICAL PRACTICE 24, 110–12 (Manny J. Gonzalez & Gladys M. Gonzalez-Ramos, eds. 2011); DANIEL DAWES, FRANK RIDER & LISA LAMBERT, HEALTH REFORM AND IMMIGRANT CHILDREN, YOUTH, AND FAMILIES: OPPORTUNITIES AND CHALLENGES FOR ADVANCING BEHAVIORAL HEALTH 2, 12–16 (2013), available at [http://www.tapartnership.org/docs/Health\\_Reform\\_Immigrant\\_Children.pdf](http://www.tapartnership.org/docs/Health_Reform_Immigrant_Children.pdf); Lisa Zamosky, *Healthcare Options for Undocumented Immigrants*, L.A. TIMES, Apr. 27, 2014, <http://www.latimes.com/business/la-fi-healthcare-watch-20140420-story.html#page=1>.

79. See, e.g., *In re M-A-M*, 25 I. & N. Dec. 474, 475 (B.I.A. 2011) (noting that respondent told the immigration judge that he had been diagnosed with schizophrenia and needed medication, but his history of mental illness was not being treated in detention); HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 51–54 (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>; AM. CIVIL LIBERTIES UNION, DETENTION AND DEPORTATION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS 49–57 (2008), available at [http://aclum.org/sites/all/files/education/aclu\\_ice\\_detention\\_report.pdf](http://aclum.org/sites/all/files/education/aclu_ice_detention_report.pdf); Editorial, *Death by Detention*, N.Y. TIMES, May 6, 2008, at A26. See generally, HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 22 (2009), available at <http://www.hrw.org/reports/2009/03/16/detained-and-dismissed>.



objective experts, who simply describe existing conditions and human rights violations, rather than advocate for a certain position or outcome.<sup>80</sup> In addition, some lawyers, unfamiliar with multidisciplinary representation, may not see the benefit of collaboration. After all, there is little shared history of collaboration among lawyers, social workers, psychologists, medical doctors, sociologists, and anthropologists.

Legal and non-legal experts may also differ in how they perceive a client and what facts they find most important to the case. For example, in the case of a survivor of domestic violence represented by the Clinic, the forensic psychological evaluation described an asylum applicant as a “good historian” because she was able to describe what had happened to her in significant detail, but it did not address the fact that the applicant’s memories of the extensive violence she suffered often blurred together. The applicant could not describe what happened to her in a linear fashion, and she could not remember the sequence of events. Instead, memories came back to her in a piecemeal and disjointed fashion. For purposes of her asylum case, the applicant was not, in fact, a “good historian.” The inconsistencies in her testimony could have led an adjudicator to find her not credible. Her attorneys raised the client’s difficulty recalling past events with the evaluator and suggested that the psychological evaluator revisit his evaluation. But the psychologist declined to do so. He felt that the lawyers’ suggestions to change the evaluation violated his sense of integrity and ethics.

It is also clear that lawyers and medical and mental health professionals have different and conflicting ethical obligations. For example, mental health professionals are mandatory reporters, who have a duty to disclose abuse or neglect of children and elders to state authorities.<sup>81</sup> By contrast, attorneys are bound by professional rules to protect client confidentiality, unless the client consents to the lawyer revealing certain information.<sup>82</sup> A lawyer may only reveal confidential information under very limited circumstances, such as “to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or

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80. See Ardalan, *supra* note 42; Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J. L. & POL'Y 49, 76 (2004).

81. See Alexis Anderson, Lynn Barenberg & Paul Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 692 (2007).

82. See *id.* at 692–95.

property of another, or to prevent the wrongful execution or incarceration of another.”<sup>83</sup> Balancing these competing duties is a challenge, particularly because asylum seekers often view attorneys as their confidantes.<sup>84</sup>

In addition, mental health professionals, doctors, and country experts all receive different training from lawyers, and bring their own context and understanding to their assessments of asylum seekers’ claims.<sup>85</sup> For example, in the case of a gay asylum applicant from central Africa, a human rights expert and political scientist in France declined to provide expert testimony based on his understanding that LGBT individuals could live without fear of reprisal or attack in his home country if they kept their sexual orientation private. This opinion improperly assumed that the applicant could and should hide his identity and repress his beliefs. But U.S. asylum law and international standards do not require individuals to hide their sexual orientation. Asylum law recognizes that forced repression of a fundamental characteristic violates basic human rights and causes severe psychological harm.<sup>86</sup> Because the country expert was not trained in U.S. asylum law, he applied the incorrect legal standard and reached a flawed conclusion that did not support the asylum applicant’s legal case.

Such tensions naturally arise when professionals and experts with different training and methodologies work together. These tensions by no means present an insurmountable hurdle to cross-professional collaboration. Indeed, as discussed further below, the

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83. *Id.* at 693–95; Mass. R. of Prof. C., 1.6 (2013), <http://www.mass.gov/obcbbbo/rpcnet.htm>. See also Supreme Judicial Court Rule 3:07; Anderson et al., *supra* note 81.

84. An extensive discussion of the challenges that may arise in such interdisciplinary collaboration between lawyers and mental health professionals is outside the scope of this Article. For an in-depth analysis of this topic, see Anderson et al., *supra* note 81.

85. Sabi Ardalan, *supra* note 57 (citing Robert Thomas, *Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom*, 20 INT’L J. REFUGEE L. 489, 507 (2008); Anthony Good, ‘Undoubtedly an Expert’? *Anthropologists in British Asylum Courts*, 10 J. ROY. ANTHROP. INST. 113, 123 (2004); John Barnes, *Expert Evidence—The Judicial Perception in Asylum and Human Rights Appeals Prepared for the Joint ILPA/IARLJ Conference*, 16 INT’L J. REFUGEE L. 349, 354 (2004)); see also Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 152–54 (2002); *In re S-P*, 21 I. & N. Dec. 486, 492–93 (B.I.A. 1996) (“[A] grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question. . . . This distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused . . .”).

86. See generally Sabi Ardalan & Palmer Lawrence, *The Importance of Nonphysical Harm: Psychological Harm and Violations of Economic, Social, and Cultural Rights in U.S. Asylum Law*, 14-09 IMMIGRATION BRIEFINGS 1 (2014); ANKER, *LAW OF ASYLUM IN THE UNITED STATES*, *supra* note 43, at ch. 4; Deborah Anker & Sabrineh Ardalan, *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, 44 N.Y.U. J. INT’L L. & POL. 529 (2012).

benefits of cross-professional collaboration far outweigh these challenges. In fact, cross-professional collaboration is critical to providing holistic representation that is responsive to asylum seekers' legal and non-legal needs.

### III. RECOMMENDATIONS FOR AN EFFECTIVE MODEL OF HOLISTIC ASYLUM REPRESENTATION

In this Part, I explore some promising initiatives at the federal, state, and local levels that, if strengthened and expanded, would greatly improve fairness and equity in asylum representation. I begin by identifying initiatives to expand legal representation for immigrants in the United States and argue for these initiatives to include a universal right to counsel for asylum seekers. I then address the critical need for investment in a holistic model of asylum representation that includes medical and mental health professionals, country experts, as well as lawyers.

#### A. *Expand Access to Legal Counsel for Asylum Seekers*

As access to justice initiatives for indigent immigrants gain traction nationally, policymakers and courts should recognize a right to counsel for asylum seekers. In addition, Congress should expand access to counsel for asylum seekers and other vulnerable immigrant groups by removing the 1996 restriction on appropriations that bars LSC-funded lawyers from using LSC or non-LSC funds to represent most undocumented immigrants.<sup>87</sup>

#### 1. Federal Initiatives

Federal initiatives to expand access to counsel for vulnerable immigrants provide a helpful model for asylum seekers. For example, in 2013 the Senate passed an immigration reform bill that included provisions for appointment of counsel for immigrants with mental disabilities, as well as for immigrant children.<sup>88</sup> Although this comprehensive legislation reached an impasse, future legislative

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87. Harvard Law Review Ass'n, *Development in the Law: Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1681 (2013). See *supra* Part I.B.

88. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Congress § 3502(c) (2013); IMMIGRATION POLICY CTR., GUIDE TO S. 744, *supra* note 72.

initiatives should build on these provisions by mandating appointed counsel for indigent asylum seekers.<sup>89</sup>

DHS has recognized that “nothing in INA section 240(b)(4), INA section 292, or 5 U.S.C. section 3106 prohibits the use of discretionary federal funding for representation of aliens in immigration proceedings.”<sup>90</sup> Indeed, the Legal Orientation Program initiative, which provides legal advice to immigrant detainees, receives federal funding.<sup>91</sup> In addition, one federal court recently mandated appointment of government counsel to detained immigrants with mental disabilities,<sup>92</sup> and the Departments of Justice and Homeland Security issued “a new nationwide policy for unrepresented immigration detainees with serious mental disorders or

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89. Given Congress’ failure to pass legislation, the Executive Branch has taken steps to expand representation for immigrant children in response to the increase in unaccompanied child arrivals in the past year. *See infra* notes 94–97.

90. Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1, 30 (2013) (citing a December 2010 Department of Homeland Security memorandum, entitled “Views Concerning Whether It is Legally Permissible to Use Discretionary Federal Funding for Representation of Aliens in Immigration Proceedings”). Advocates and scholars have thus argued that “it would be inconsistent for the Department of Homeland Security to stand in the way of [immigration judges] appointing counsel for the mentally ill in order to guarantee due process.” *Id.* This same reasoning applies to the appointment of counsel for asylum seekers. *See also* Eagly, *supra* note 11, at 2305 n.127 (“The United States Department of Justice has confirmed that federal law permits the use of federal discretionary funding for immigration representation.”) (citing Letter from David A. Martin, Principal Deputy Gen. Counsel, Office of the Gen. Counsel, U.S. Dep’t of Homeland Sec., to Thomas J. Perrelli, Assoc. Att’y Gen., U.S. Dep’t of Justice (Dec. 10, 2010)).

91. NINA SIULC ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II 3 (2008); *Legal Orientation Program*, VERA INST. OF JUSTICE, <http://www.vera.org/project/legal-orientation-program> (last visited Feb. 24, 2015).

92. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, \*3–\*9 (C.D. Cal. Apr. 23, 2013); Press Release, U.S. Dep’t of Justice Exec. for Immigration Review, Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), *available at* <http://www.clearinghouse.net/chDocs/public/IM-CA-0067-0011.pdf>. Additional materials regarding the *Franco* decision are available at American Immigration Council Legal Action Center, <http://www.legalactioncenter.org/litigation/relevant-decisions>. *See also* *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2014 WL 5475097, \*3–\*11 (C.D. Cal. Oct. 29, 2014) (expanding on the initial order requiring the government to, *inter alia*, identify individuals with serious mental disorders and provide legal representation to those among them who are not competent to represent themselves and instituting a separate permanent injunction against the federal government that applies in Washington, California, and Arizona with detailed provisions requiring medical screenings of detainees, collection of mental health history from detainees and their family members, disclosure of information regarding serious mental illness to immigration judges to allow them to identify which detainees require appointment of counsel, as well as provisions detailing how immigration judges should assess mental competency).

conditions that may render them mentally incompetent to represent themselves in immigration proceedings.”<sup>93</sup> The Executive Office for Immigration Review laid out a “Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders,” ordering immigration judges to assess immigrants’ abilities to represent themselves. Under this plan, the Executive Office for Immigration Review will appoint counsel to immigrants who are incapable of representing themselves due to “serious mental disorders or conditions.”<sup>94</sup>

These measures build on *In re M-A-M-*, a 2011 Board of Immigration Appeals decision that first recognized the need to protect the rights of pro se immigrants who are not competent to proceed without representation.<sup>95</sup> The respondent in *M-A-M-*, a lawful permanent resident from Jamaica, appeared pro se in his removal proceedings even though he was diagnosed with schizophrenia. On appeal, the Board remanded the case to the immigration judge to assess the respondent’s competence. The Board also mandated appropriate safeguards, such as provision of time for the respondent to obtain counsel, if necessary.<sup>96</sup> The assessment and safeguards ordered by the Board in *M-A-M-* provide a roadmap for addressing the needs of other vulnerable immigrants in removal proceedings, including asylum seekers.

Federal law already requires the government to take steps to find counsel for unaccompanied immigrant children; this initiative could be expanded to include asylum seekers. The Trafficking Victims Protection Reauthorization Act of 2008 requires that the Secretary of Health and Human Services “ensure, to the greatest extent practicable” that “all unaccompanied alien children . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”<sup>97</sup> At

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93. Press Release, Dep’t of Justice Exec. for Immigration Review, *supra* note 92.

94. *Id.*; U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 15 (2013), available at <https://immigrationreports.files.wordpress.com/2014/01/coir-phase-i-guidance.pdf> (“Where the Immigration Judge finds the respondent is not competent to represent him- or herself in an immigration proceeding, the Immigration Judge shall consider the totality of the facts and circumstances and prescribe appropriate safeguards and protections to ensure the fundamental fairness of the immigration proceeding. . . . EOIR will provide a qualified representative to an unrepresented, detained respondent where the judge has found the respondent incompetent to represent him- or herself. The court should consider the examining mental health professional’s assessment of the respondent’s ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard and protection in a case.”).

95. *In re M-A-M-*, 25 I. & N. Dec. 474 (B.I.A. 2011).

96. *Id.* at 484.

97. 8 U.S.C. § 1232(c)(5)–(6) (2015).

least one court has noted that “[a]bsent a minor’s knowing, intelligent, and voluntary waiver of the right to counsel, the [immigration judge] may have to take an affirmative role in securing representation by competent counsel.”<sup>98</sup>

Advocacy groups are pushing to expand access to counsel for children even further, and recently filed a class action suit against the government, calling for appointment of counsel to all unrepresented immigrant children in removal proceedings.<sup>99</sup> The suit argues that the federal government is violating the Fifth Amendment Due Process Clause and INA provisions that require children receive a “full and fair hearing.”<sup>100</sup> Recent efforts to expand counsel for certain unaccompanied immigrant children, including through the new federal “justice AmeriCorps” program, can serve as a basis for expanding asylum representation, as well.<sup>101</sup>

The high stakes of removal from the United States are well-established, and the U.S. Supreme Court in *Padilla v. Kentucky* recognized “[t]he severity of deportation,” describing it as “ ‘the equivalent of banishment or exile.’ ”<sup>102</sup> The Court in *Padilla* noted “how critical it is for counsel to inform her noncitizen client [in criminal proceedings] that he faces a risk of deportation” and thereby underscored the importance of counsel to immigrants facing removal.<sup>103</sup> Advocates can use this recognition to argue for

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98. *Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004).

99. Press Release, Nw. Immigrant Rights Project, NWIRP and Partners Sue Federal Government over Failure to Provide Legal Representation for Children Placed into Deportation Proceedings (July 9, 2014), <http://www.nwirp.org/news/viewmediarelease/40062>.

100. *Id.*

101. *See, e.g.*, Press Release, U.S. Dep’t of Justice, Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors, June 6, 2014, *available at* <http://www.justice.gov/opa/pr/justice-department-and-cnsc-announce-new-partnership-enhance-immigration-courts-and-provide> (announcing the launch of “a strategic partnership to increase national service opportunities while enhancing the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. border without a parent or legal guardian” and explaining that the new “grant program that will enroll approximately 100 lawyers and paralegals as AmeriCorps members to provide legal services to the most vulnerable of these children, responding to Congress’ direction to the department’s Executive Office for Immigration Review (EOIR) ‘to better serve vulnerable populations such as children and improve court efficiency through pilot efforts aimed at improving legal representation’ ”). In addition to this new federal program, at least one state has taken steps to ensure that indigent immigrant children are appointed counsel in applications for special immigrant juvenile status. Eagly, *supra* note 11, at 2282, 2304 (citing Fla. Stat. § 39.5075).

102. *See* Wilson & Prokop, *supra* note 90, at 25 (“While *Padilla* does not explicitly mandate appointed counsel in removal proceedings, the language of the decision logically invites it.”); Eagly, *supra* note 11, at 2301 (noting that “[t]he logic that supports immigration counseling as part of the criminal process mandated by the Sixth Amendment may also require appointment of *Gideon* counsel in other contexts”).

103. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (quoting *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947)).

appointment of counsel in other contexts, including for asylum seekers.

## 2. State and Local Initiatives

At the state and local level, practitioners, federal judges, academics, and advocates have started initiatives to expand access to representation for indigent immigrants, including asylum seekers. For example, the American Bar Association and its Commission on Immigration has established several projects to expand access to counsel, including the South Texas Pro Bono Asylum Representation Project and the Immigration Justice Project in San Diego.<sup>104</sup> The Northern California Collaborative for Immigrant Justice is preparing to launch a pilot program for the region's detained immigrant population.<sup>105</sup> In Louisiana, The Oakdale Immigration Court Bond Project aims to increase representation for detained immigrants seeking release from immigration custody.<sup>106</sup>

In the Third Circuit, the Working Group on Immigrant Representation in New Jersey, led by Judge Michael A. Chagares of the Third Circuit Court of Appeals, conducts trainings for attorneys interested in pro bono immigration representation. The Group also launched a project to increase legal consultations and pro bono referrals at immigration detention facilities in New Jersey.<sup>107</sup> It hopes to raise funds to develop a project to increase legal representation for indigent immigrants in New Jersey immigration courts.<sup>108</sup>

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104. Acer et al., *supra* note 15; *see also* Schoenholtz & Bernstein, *supra* note 53 (describing the Immigration Justice Project of San Diego as “a new pilot project . . . [u]nder the leadership of two ABA entities, the Standing Committee on Federal Judicial Improvements, chaired by the Honorable Margaret McKeown of the Ninth Circuit Court of Appeals, and the Commission on Immigration, chaired by Mark D. Agrast” and explaining that “[t]he project will provide pro bono counsel in immigration matters before the Immigration Court in San Diego, and will be studied to assess the effects of representation on the immigration system”). Schoenholtz and Bernstein note that “asylum seekers who are represented are considerably more likely than unrepresented seekers to succeed in obtaining relief.” *Id.* (citing Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POLICY INSTITUTE, 5–6 (2005), available at [http://www.migrationpolicy.org/sites/default/files/publications/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/sites/default/files/publications/Insight_Kerwin.pdf)); Kuck, *supra* note 53, at 232–80.

105. N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA (2014), available at <https://media.law.stanford.edu/organizations/clinics/immigrant-rights-clinic/11-4-14-Access-to-Justice-Report-FINAL.pdf>.

106. Acer et al., *supra* note 15.

107. *Id.*; *see also* Katherina Obser & Andrea Guttin, *Building Justice – Key Stakeholders Look to Address Legal Representation Gaps for Immigrants in New Jersey*, HUMAN RIGHTS FIRST (Jan. 30, 2013), available at <http://www.humanrightsfirst.org/2013/01/30/building-justice-key-stakeholders-look-to-address-legal-representation-gaps-for-immigrants-in-new-jersey>.

108. Acer et al., *supra* note 15.

In Massachusetts, the Boston Bar Association (BBA) Task Force on Expanding the Civil Right to Counsel proposed an initiative in 2008 to provide counsel to indigent asylum seekers and other immigrants in removal proceedings.<sup>109</sup> In 2013, the BBA launched a Statewide Task Force on Civil Legal Aid in Massachusetts,<sup>110</sup> and in 2014, immigrant legal service providers, law school clinics, the Committee for Public Counsel Services, immigrant rights advocates, and the BBA gathered to discuss pilot initiatives to provide asylum seekers and detained immigrants access to counsel.

The most well-known and successful initiative to date is Chief Judge Robert A. Katzmann's Study Group on Immigrant Representation, which includes local practitioners, government officials, NGOs, law schools, bar associations, immigration judges, and others.<sup>111</sup> The Study Group reported on the availability and adequacy of counsel in New York immigration proceedings, highlighting gaps and offering a new model for representation.<sup>112</sup> As a result of the study, the New York City Council provided pilot funding to create the New York Family Unity Project, a public defender program for indigent immigrants facing deportation.<sup>113</sup> The Robin Hood Foundation also provided funding to establish an Immigrant Justice Corps for recent law school graduates to provide critical legal counsel for indigent immigrants and their families.<sup>114</sup>

### *B. Develop a System of Holistic, Multidisciplinary Asylum Representation*

The model proposed by Chief Judge Katzmann's Study Group on Immigrant Representation recognizes the importance of a holistic

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109. BOSTON BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 28–29 (2008), available at [http://www.americanbar.org/content/dam/aba/migrated/legal-services/sclaid/atjresourcecenter/downloads/gideons\\_new\\_trumpet\\_9\\_08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legal-services/sclaid/atjresourcecenter/downloads/gideons_new_trumpet_9_08.authcheckdam.pdf); see generally Russell Engler, *The Twin Imperatives of Providing Access to Justice and Establishing a Civil Gideon*, 93 MASS. L. REV. 214 (2010) (discussing broadly the efforts of the Boston Bar Association's Project on Expanding the Civil Right to Counsel).

110. *BBA Statewide Task Force to Expand Civil Legal Aid in MA*, BOSTON BAR ASS'N, available at <http://www.bostonbar.org/public-policy/statewide-task-force-to-expand-civil-legal-aid-in-ma> (last visited May 22, 2015).

111. For an overview of the Study Group's work including major conferences, studies, meetings with government officials, and pilot projects, see Robert A. Katzmann, *Bench, Bar, and Immigrant Representation: Meeting an Urgent Need*, 15 N.Y.U. J. LEGIS. & POL'Y 585 (2012).

112. NYIRS I & II, *supra* note 6.

113. *New York Family Unity Project*, VERA INST. OF JUSTICE, <http://www.vera.org/project/new-york-immigrant-family-unity-project> (last visited May 22, 2015); Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES, Jan. 29, 2014, at A19.

114. Semple, *supra* note 113.



approach to representation. Indeed, the study group's report emphasized that "[t]o provide adequate legal representation . . . a range of legal and extra-legal support, including: language services, social work and mental health services, expert services, and investigative services" are needed.<sup>115</sup> The Study Group's Accessing Justice II report explains that "[s]ervices of social workers and/or mental health specialists must be made available to provide adequate mental health assessments, to provide written and oral testimony, and to facilitate access to health and social services to individuals while in detention and after release."<sup>116</sup> The report notes that "[p]ersecution-based claims, such as asylum, routinely rely on mental health assessments to evaluate the impact of past persecution and the fear of future persecution."<sup>117</sup> In addition, the report emphasizes the importance of expert witnesses, such as country conditions experts, who "are a routine part of most adequate applications for persecution-based relief" and medical experts, who "are also frequently necessary to demonstrate past persecution."<sup>118</sup> The report calls for investigative services "to unearth relevant documents and locate witnesses."<sup>119</sup>

Following this report, New York City Council approved \$4.9 million in funding for representation of detained immigrants in removal proceedings.<sup>120</sup> The Bronx Defenders, one of the organizations that received this funding, engages in holistic immigrant defense, working across disciplines to provide clients with the treatment, services, and evidentiary support they need.<sup>121</sup> The four pillars of holistic defense developed by the Bronx Defenders are equally relevant to the asylum representation context: "seamless access to services that meet legal and social support needs; dynamic,

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115. NYIRS II, *supra* note 6, at 22. The study further emphasizes that "[s]uch support services enhance the quality of representation because staff perform services that attorneys are not trained for and also is cost-efficient because support staff can do work that does not require a law degree." *Id.*; see also Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472, 473 (2010) (calling for "access to full representation where basic human needs are at stake and lesser forms of assistance cannot protect those basic needs.").

116. NYIRS II, *supra* note 6, at 22–23.

117. *Id.*

118. *Id.*

119. *Id.*

120. Deepthi Hajela, *NYC Immigrant Public Defender System Breaks Ground*, ASSOCIATED PRESS (Sept. 7, 2014), <http://bigstory.ap.org/article/nyc-immigrant-public-defender-system-breaks-ground>.

121. The Center for Holistic Defense, established by the Bronx Defenders, provides comprehensive immigration legal services. *Explore Holistic Defense*, BRONX DEFENDERS, <http://www.bronxdefenders.org/who-we-are/how-we-work/> (last visited May 22, 2015).

interdisciplinary communication; advocates with an interdisciplinary skill set; and a robust understanding of, and connection to, the community served.”<sup>122</sup> These four pillars reflect the need for an integrated team approach to representation.

The Committee for Public Counsel Services (CPCS), the public defender service in Massachusetts, has established a similar system of holistic defense. For example, CPCS attorneys are trained to consider their in-house social workers as integral to the case and to the legal defense.<sup>123</sup> Both attorneys and social workers have ownership over cases.<sup>124</sup> By working together from the outset, CPCS lawyers and social workers can better share ideas and perspectives. This is helpful since lawyers and social workers often emerge from initial client meetings with different impressions and concerns.<sup>125</sup> CPCS has found that this type of holistic approach achieves the best outcomes.<sup>126</sup> These lessons learned about collaboration between legal and mental health professionals in the public defense context are equally relevant to asylum representation and should inform a holistic model of asylum representation.

By working closely with medical and mental health professionals and country experts, attorneys can present asylum seekers’ claims in the most effective manner possible.<sup>127</sup> Because asylum seekers often do not have much evidence to offer beyond their own testimony, experts can provide critical corroboration, filling in gaps in country condition information, explaining difficulties with memory and cross-cultural differences, and dispelling concerns about fraud. Medical doctors and mental health professionals can also provide much-needed treatment and support. Examples from the work of the Harvard Immigration and Refugee Clinical Program, described below, provide a model for holistic asylum representation.

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122. *Holistic Defense Defined*, BRONX DEFENDERS, <http://www.bronxdefenders.org/holistic-defense/> (last visited May 22, 2015).

123. Meeting with Sarah Derby and CPCS social workers in Boston, MA (Summer 2013 and Fall 2014).

124. *Id.*

125. *Id.*

126. *Id.*

127. Although there may be tensions between expanding access to counsel for asylum seekers and the development of a high-quality holistic service delivery system given the potential financial implications of such a model, discussion of the trade-offs that may be involved is beyond the scope of this Article.

### 1. Role of Attorneys

The lawyer on the team is responsible for analyzing the asylum seeker's claim and presenting the strongest legal case possible. Attorneys elicit the applicant's testimony—the lynchpin of the case—and gather corroborating evidence where possible and reasonably available.<sup>128</sup> The attorney then works with the asylum seeker to create a timeline to sort through the claim and presents the claim in a compelling manner persuasive to a Western adjudicator.

Without legal representation, many asylum applicants cannot effectively present their claims. In one case, for example, a bi-polar client was hospitalized and missed her initial notice to attend an Asylum Office interview. Lawyers at the Harvard Immigration and Refugee Clinical Program explained her situation to the Asylum Office and requested a new interview date, which allowed time to prepare her case. Without this intervention, the applicant would have been placed in removal proceedings, losing her opportunity to present her case in a non-adversarial proceeding before an asylum officer. In cases like these, attorneys must work together with mental health clinicians, doctors, and country experts to present strong applications for asylum seekers and help them win protection.

### 2. The Role of Mental Health Clinicians and Medical Doctors

Mental health professionals and medical doctors often work together to treat asylum seekers and to conduct forensic evaluations that attorneys can use to corroborate asylum seekers' claims. The mental health professional on the team provides critical therapeutic support to asylum applicants who must revisit traumatic past experiences in order to testify before asylum adjudicators. Mental health professionals also help asylum applicants navigate the complex bureaucracy of social services in the United States. They assist asylum seekers with applications for health care, housing, food stamps, and other benefits.

For example, with the help of a psychiatrist at the Boston Center for Refugee Health and Human Rights, the same bi-polar client described above was able to receive the medication she needed to stabilize and move forward with her application process. At first, the applicant was very reserved and avoided discussing her past trauma.

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128. See *supra* Part II; U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK, *supra* note 44, ¶¶ 196, 203–05.

With the support of her psychiatrist, however, she eventually opened up and explained that security forces in her home country raped her. The psychiatrist provided an extremely helpful forensic evaluation explaining her withdrawn demeanor and affect. Without the proper context, an adjudicator might have considered her avoidance of certain subjects a sign of evasiveness or lack of credibility.

Mental health professionals and medical doctors can also offer invaluable expert testimony and affidavits to bolster an applicant's testimony.<sup>129</sup> For example, medical doctors can document applicants' scars and explain how they are consistent with applicants' testimony regarding the manner in which the wounds were sustained.<sup>130</sup> Psychological professionals can diagnose and explain the ongoing psychological effects of trauma, including symptoms that affect applicants' testimony and ability to come forward and apply for asylum within their first year in the United States, as required under U.S. law.<sup>131</sup> Forensic psychological evaluations can show, for instance, how PTSD "may adversely impact an asylum seeker's capacity to file an application" during an asylum seeker's first year as required under U.S. law, thereby satisfying the extraordinary circumstance exception to the one-year deadline.<sup>132</sup>

Mental health professionals can also explain to adjudicators why asylum applicants have difficulty recalling traumatic events. Studies have shown that traumatic memories are stored in a manner different from "normal" autobiographical memories, which "have a

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129. See generally ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY (Benjamin N. Lawtance & Galya Ruffer, eds. 2015).

130. See generally PHYSICIANS FOR HUMAN RIGHTS, EXAMINING ASYLUM SEEKERS 37–61 (2001); see also David Rhys Jones & Sally Verity Smith, *Medical Evidence in Asylum and Human Rights Appeals*, 16 INT'L J. REFUGEE L. 381 (2004) (describing role of medical and psychological experts in documenting torture).

131. Piwowarczyk, *supra* note 74, at 156–60, 171; see Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2015) (requiring that an asylum applicant "demonstrate[ ] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States"); 8 C.F.R. § 208.4(a)(2) (2015). Cf. CARE FULL, AMNESTY INT'L—DUTCH SECTION, MEDICO—LEGAL REPORTS AND THE ISTANBUL PROTOCOL IN ASYLUM PROCEDURES 7 (2007) (emphasizing that "[i]nternational bodies—among others the European Court of Human Rights—have given weight to medico-legal reports in the processing of asylum claims"). Exceptions to the one year filing requirement are provided in the Immigration and Nationality Act § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) and 8 C.F.R. § 208.4(a)(4)–(5). See Maria Baldini-Potermin, IMMIGRATION TRIAL HANDBOOK §§ 6:11–14; 7:17–18 (2014); *Asylum and Withholding of Removal—A Brief Overview of The Substantive Law*, 205 PLI/NY 445 (Mar. 17, 2011) (providing practical guidance as to how to introduce medical and psychological evidence in immigration and asylum cases).

132. 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(5)(i); Piwowarczyk, *supra* note 74, at 156–57, 171; Uwe Jacobs & Stuart Lustig, *supra* note 69.

beginning, a middle and an end, [and] are recognized as being located in the past, and can be recalled at will.”<sup>133</sup> In contrast to “normal” memories, traumatic memories are formed “[a]t times of high emotional charge,” and are recorded as “sensory ‘snapshots,’ such as a smell, a shout, the image of face.”<sup>134</sup>

In addition, mental health professionals can help explain why applicants may forget certain details of the traumatic experiences they endured, but remember others. Studies show that traumatic memories “cannot be brought to mind by conscious attempts to recall, but instead are triggered by reminders that may be external (the sound of a firework) or internal (a feeling of shame).”<sup>135</sup> Psychological evaluations can explain why an applicant, like Matthew described above, might forget peripheral details, particularly when events are “highly distressing.”<sup>136</sup> An applicant’s description of events may change—for example, from “we were badly beaten” to “we were slapped around”—based on the applicant’s “mood state” at the time of recalling the events.<sup>137</sup> As noted, without adequate explanation, even minor inconsistencies can result in denials of applicants’ claims when adjudicators do not properly consider the inconsistencies in light of the “totality of the circumstances, and all relevant factors.”<sup>138</sup> Forensic psychological evaluations and testimony can thus serve a critical role in establishing an applicant’s credibility.

### 3. The Role of Human Rights Experts, Academics, and Anthropologists

Country experts—including anthropologists, human rights advocates, historians, and other academics with significant expertise in asylum applicants’ home countries—often provide invaluable context to an applicant’s story and can thereby help attorneys formulate the theory of a client’s case.

In one recent Clinic case, an asylum applicant described his fears of returning to his home country based on his father’s prominent role in his country’s politics. Despite extensive research, Clinic attorneys could not find evidence to corroborate the father’s position

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133. Jane Herlihy & Stuart W. Turner, *The Psychology of Seeking Protection*, 21 INT’L J. REFUGEE L. 171, 176–77 (2009).

134. *Id.*

135. *Id.*

136. *Id.* at 179.

137. *Id.* at 176.

138. Immigration and Nationality Act § 208(a)(2)(D), 8 U.S.C. § 1158(b)(1)(B)(iii) (2015). *See supra* Part II.

or prominence in the government. Numerous country experts discounted the applicant's claim. Still believing the client's story, Clinic attorneys reached out to other experts and ultimately contacted a professor who had heard of the applicant's father. This professor corroborated the father's position and his prominence in the country. He also gathered information about the father from sources on the ground. This information validated the applicant's claim and explained more fully the social, political, and cultural context of the case. It also revealed ethnic tensions that the applicant did not initially raise. These ethnic tensions nonetheless helped clarify why the applicant was afraid to return to his home country.

Country experts rely on their knowledge of human rights conditions to explain why applicants reasonably fear returning to their home countries.<sup>139</sup> As a result, they can provide adjudicators with an independent, objective basis for their decisions to grant asylum.<sup>140</sup> For example, in claims involving indigenous Guatemalans who suffered severe discrimination and violence during the Guatemalan civil wars, country condition evidence regarding the social and political dynamics of the wars is often indispensable.<sup>141</sup> In some cases, the asylum applicants themselves may have been too young to understand fully the reasons they were attacked and targeted. In such cases, human rights reports and experts can provide context and explain the racial and political reasons for the harm suffered and feared.<sup>142</sup>

Country condition expert testimony proved critical, for instance, in the case of an indigenous Guatemalan man who was facing deportation based on a prior removal order. He left his home for the United States when he was very young and had little information about his family's history of persecution during the country's civil wars. His mother, who remained in Guatemala, explained that several family members were killed, and others constantly feared being

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139. Sabi Ardanan, *supra* note 57; Lindsay M. Harris, *Expert Evidence in Gender-Based Asylum Cases: Cultural Translation for the Court*, 17 BENDER'S IMMIGRATION BULL. 1, 22 (2012).

140. See Anthony Good, 'Undoubtedly an Expert'? *Anthropologists in British Asylum Courts*, 10 J. ROY. ANTHROP. INST. 113, 120 (2004) (noting that " 'opinions as to what is likely to happen to [an asylum applicant]' . . . are precisely what solicitors seek when commissioning expert reports, and if experts could not 'extrapolate' in this way the value of their reports would be greatly reduced").

141. See *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012).

142. In a recent First Circuit case, *Ordonez-Quino v. Holder*, the Court emphasized the extensive country condition evidence in the record, including the Historical Clarification Report, demonstrating that "racism was an underlying cause of the Guatemalan Civil War and 'a basic explanatory factor for the indiscriminate nature and particular brutality with which military operations were carried out against hundreds of Mayan communities.' " *Ordonez-Quino v. Holder*, 760 F.3d 80, 89 (1st Cir. 2014).

attacked, because of their race. A professor with extensive knowledge of the long-standing persecution suffered by indigenous Guatemalans submitted an expert affidavit in support of a motion to reopen the case. Based on this affidavit, the immigration judge granted the motion, allowing the man to pursue his claim for asylum.

These three sets of professionals working closely together—lawyers, medical and mental health professionals, and country experts—are essential to effective asylum representation. Such cross-professional collaboration greatly enhances the quality of immigration representation and can serve as a model for asylum representation nationally.

#### CONCLUSION

The need for immigrant representation, particularly in the asylum context where return to an applicant's home country can mean torture or even death, is well-established. As federal, state, and local officials increasingly focus on funding representation for indigent immigrants, policy makers should adopt a holistic model of asylum representation that includes collaboration across multiple disciplines. Law school clinics, as well as some nonprofit organizations and other institutions, have successfully put this holistic approach into practice. But these programs only serve a limited number of asylum applicants. Additional funding is necessary to ensure high-quality, multidisciplinary representation for all asylum seekers.

It is also important for lawyers to educate themselves about the benefits of holistic representation. By working effectively with medical and mental health professionals, country experts, and others, attorneys can present the strongest case possible for asylum seekers. Investment in a holistic, multidisciplinary approach to representation, like the model put forward by the New York Immigration Study Group, is critical to ensure full and effective representation for asylum seekers. The stakes are too high to invest in anything less.