

# Commentary: The Role of Forensic Psychiatry in the Asylum Process

Howard Zonana, MD

There has been a substantial growth of law school clinics and law firms doing *pro bono* work to aid individuals seeking asylum in the United States. At the same time, the federal government has been placing in detention more individuals who are here illegally. The number of immigration cases awaiting resolution has surpassed 200,000. The absence of a clear U.S. immigration policy contributes to this development. The conflicts in Iran and Afghanistan have resulted in an increase in the number of individuals seeking asylum. Psychiatric evaluations and psychological testing that provide organized life histories coupled with diagnostic evaluations of the effects of past trauma are relevant to the criteria needed for refugee status. Courts have found them useful, and attorneys and clinics are requesting them. Several forensic training programs have set up consultation agreements with these programs and are finding them to be excellent training experiences for fellows who can help not only with the formal evaluations but also in educating law students in relation to their interviewing techniques and boundary problems that arise in a professional relationship.

**J Am Acad Psychiatry Law 38:499–501, 2010**

The two articles in *The Journal* from California<sup>1</sup> and Oregon<sup>2</sup> describe the roles that forensic psychiatrists are taking in the asylum-seeking process for refugees who are attempting to provide evidence of significant persecution or a well-founded<sup>3</sup> fear of persecution should they be returned to their country of origin. The credibility of that evidence forms the substance of an applicant's legal case that is presented to asylum officers in the eight regional USCIS asylum offices<sup>4</sup> or before an immigration judge in the Department of Justice. This role has been increasing as denial rates have risen and interest in immigration policy has attracted national and international attention.

By way of background, the United States is by far the largest resettler of refugees in the world. The U.S. resettles more refugees each year than all other countries combined. In 2009, for example, according to the Department of Homeland Security, 74,602 refugees arrived in the United States. Asylum is granted to 25,000 to 30,000 people a year.<sup>5</sup>

---

Dr. Zonana is Professor of Psychiatry, Yale University School of Medicine, and Adjunct Clinical Professor of Law, Yale Law School, New Haven, CT. Address correspondence to: Howard Zonana, MD, Yale Department of Psychiatry, Connecticut Mental Health Center, 34 Park Street, New Haven, CT 06519. E-mail: howard.zonana@yale.edu. The author acknowledges fiscal support from Connecticut's Department of Mental Health and Addiction Services.

Disclosures of financial or other potential conflicts of interest: None.

Worldwide, according to the United Nations High Commissioner for Refugees (UNHCR) Report in 2009, Afghans topped the list of asylum applicants with 26,800 submissions, representing a 45 percent increase over 2008. Iraqis dropped to second place with some 24,000 claims, while Somalis moved to third position with 22,600 asylum applications.<sup>6</sup> Among the other top countries of origin were the Russian Federation, China, Serbia, and Nigeria.

The number of cases awaiting resolution before the immigration courts reached a new all-time high of 242,776 by the end of March 2010, according to records obtained by the Transactional Records Access Clearinghouse. (TRAC was established in 1989 as a research center jointly sponsored by the S.I. Newhouse School of Public Communications and the Martin J. Whitman School of Management at Syracuse University. It has offices at Syracuse University and in Washington, D.C., and a branch office on the West Coast. TRAC's work has been supported by numerous foundations such as the Rockefeller Family Fund, the New York Times Company Foundation, the John S. and James L. Knight Foundation, the Carnegie Foundation, Ford Foundation, JEHT Foundation, Haas Foundation, the Beldon Fund, Herb Block Foundation, and the Open Society Institute.) Wait times have also continued to inch upward. The average time before pending cases are

heard in the immigration courts of the Executive Office for Immigration Review (EOIR) is now 443 days.

Collectively, asylum officers, immigration judges, members of the Board of Immigration Appeals, and judges of U.S. Courts of Appeals render about 79,000 asylum decisions each year. There seems to be remarkable variation in decision-making from one official to another, from one office to another, from one region to another, from one court of appeals to another. From 2000 to 2005, for example, one Miami judge had the highest proportion of asylum denials: 96.7 percent of his 1,118 decisions in represented cases. The judge with the smallest proportion of denials was in New York. She declined 9.8 percent of her 1,638 asylum requests in represented cases. Even when controlling for cases from the same country, the disparities remain.

With wide disparities, only about 35 percent of adjudicated cases in recent years are granted asylum by the asylum officer in a regional office. As an illustration of the disparities, Chinese applicants granted asylum by the regional offices varied from 20 to 72 percent in the eight regions. If the asylum officer does not recommend approval, a referral is made to the immigration court, where the applicant has another chance to prove his case. Referral usually occurs when the officer does not believe that the applicant has carried his burden of proving facts that meet the definition of a refugee (usually on credibility grounds), accepts the proffered facts as true but does not believe the applicant qualifies as a matter of law, or does not find an adequate explanation for missing the one-year filing deadline after arriving in the United States. Asylum officers' interviews of applicants generally last no longer than one hour, and this interview often is the deciding factor in determining credibility. The allotted time is very short for making a complicated decision and may account for many of the disparate findings among officers. For a detailed description of the asylum office process, a *PBS Frontline* documentary is one of the best sources.<sup>7</sup>

The single most important factor affecting the final outcome of a case has consistently been whether an attorney represents the asylum seeker. Represented asylum seekers were granted asylum at a rate of 45.6 percent, nearly three times the 16.3 percent rate for those without representation.<sup>8</sup> These statistics do not take into account the quality of the representation. Asylum applicants represented *pro bono*

by large law firms cooperating with Human Rights First had a success rate of about 96 percent in the 479 cases they handled to conclusion from about 2000 to 2004.<sup>8</sup> In addition, several law schools have developed immigration clinics where law students represent clients under supervision by faculty attorneys. These clinics also enjoy very high success rates (e.g., Georgetown University, 89%,<sup>8</sup> and Yale University, 95%; Koh-Peters J, Yale Legal Services Office, personal communication, 2010). Students in these clinics devote much of their time to tracking down corroborating evidence, including documents, affidavits from family members and friends, country condition reports, and newspaper reports. They also take detailed life histories, attempt to reconcile discrepancies, and review the direct and cross-examination questions that are likely to arise during testimony. Application packets frequently contain 500 or more pages of indexed documents and legal summaries.

Both papers in the Journal refer to the role of the expert in gathering data, writing reports, and making appropriate diagnoses of PTSD when it is present; clarifying how some discrepancies in memory may be accounted for by the symptoms of the disorder. De Jesús-Rentas *et al.*,<sup>2</sup> the Oregon group, focused on the treating physician expert versus the forensic evaluator. In Oregon, attorneys ask for treaters rather than independent experts, believing that they have more credibility. The authors warn about the harm of becoming an advocate, meaning a loss of objectivity rather than advocating for one's opinion, which is an acceptable practice. The diagnosis of PTSD is highly dependent on self-report, as are most psychiatric diagnoses, and in and of itself does not verify applicants' accounts of the events that they have put forth as the basis for their asylum claims.

Meffert *et al.*,<sup>1</sup> from California, focused on countertransference as a concern for both experts and attorneys. Aside from the traditional meaning of countertransference, which refers to factors from an individual's past that can impair objectivity, the literature is now making more refined distinctions and discussing the additional factors of burnout and compassion fatigue. These are two different types of reactions that can affect a professional's experience and are not encompassed in the meaning of countertransference.<sup>9</sup> These concepts often have better resonance with attorneys as well as medical professionals. The authors lumped both under their discussion of vicarious trauma.

Burnout results from stresses that arise from the clinician's interactions with the work environment, while compassion fatigue evolves from the interaction between the clinician and the patient or client. Burnout is a form of distress in normal individuals who experience decreased work performance resulting from negative attitudes and behavior. These are often a result of frustration, feelings of powerlessness, and inability to achieve work goals. These effects can be related to workload, rewards, and perceptions of fairness in the work setting, among others.

Compassion fatigue, on the other hand, has been described as "the cost of caring"<sup>10</sup> for others in emotional pain, something that has led professionals to abandon their work with traumatized people. It is also known as vicarious traumatization and is characterized by many of the symptoms of PTSD, such as hyperarousal, irritability, avoidance, intrusive thoughts, and dreams. It applies to those affected by the trauma of another, rather than one's own trauma. In my experience, vicarious traumatization can be especially problematic for law students in clinics, because they are less experienced, have very few cases, and become heavily involved with their clients.

Meffert *et al.*<sup>1</sup> also emphasize the important distinction between forensic psychiatrists who serve as expert report writers and witnesses and those who are consultants to legal teams. The consultant role can be very helpful with law school clinics (e.g., training law students in basic interviewing techniques with their clients). It is especially useful when students have to deal with clients who have been severely traumatized, where the mere recounting of traumatic events may be a stimulus for the re-emergence or exacerbation of PTSD symptoms as well as inducing functional regressions. Reviewing with clients what they may ex-

perience and how to deal with their reactions is an important part of creating a good alliance.

Both of these articles are timely and suggest that training programs near regional asylum offices or immigration courts where these cases are heard should consider forming affiliations with clinics or firms that undertake this work. Forensic fellows have the skills to perform these evaluations and to consult with attorneys and law students to mutual advantage. The fellows will also emerge with a better understanding of the collaborative process and legal criteria.

## References

1. Meffert SM, Musalo K, McNiel DE, *et al*: The role of mental health professionals in political asylum processing. *J Am Acad Psychiatry Law* 38:479–89, 2010
2. De Jesús-Rentas G, Boehnlein J, Sparr L: Central American victims of gang violence as asylum seekers: the role of the forensic expert. *J Am Acad Psychiatry Law* 38:490–8, 2010
3. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1) (2000)
4. U.S. Customs and Immigration Services. Washington, DC: Department of Homeland Security. Available at <http://www.uscis.gov/portal/site/uscis>. Accessed October 31, 2010
5. Department of Homeland Security: 2009 Yearbook of Immigration Statistics. Washington, DC: DHS, August 2010. Available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf). Accessed October 31, 2010
6. UN News Centre: Afghans top global list of asylum applicants in 2009: UN agency. Available at <http://www.un.org/apps/news/story.asp?NewsID=34163&Cr=asylum&Cr1>. Accessed October 31, 2010
7. Shop PBS: Well-Founded Fear. DVD. Available at <http://www.shoppbs.org/product/index.jsp?productId=3262799>. Accessed October 31, 2010
8. Ramji-Nogales J, Schoenholtz A, Schrag P: Refugee roulette: disparities in asylum adjudication. *Stan L Rev* 60:295, 2007
9. Kearney MK, Radhule B, Weininger ML. *et al*: Self-care of physicians caring for patients at the end of life: "Being Connected . . . A Key to My Survival." *JAMA* 301:1155–64, 2009
10. Figley CR (editor): *Compassion Fatigue: Coping With Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized*. New York: Brunner/Mazel, 1995, p 7