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# Memory and Its Implications for Asylum Decisions<sup>1</sup>

Jessica Chaudhary, M.D.<sup>2</sup>

## Introduction

The following excerpt is taken from the book, *Do They Hear You When You Cry*, authored by Fauziya Kassindja, who writes of her harrowing journey from Togo, Africa, to the United States of America:

“And you say you’re from Togo?” “Yes.” But I’d gone to school in Ghana. I’d told that to the lady officer. I was scared, confused. It didn’t occur to me to explain it again. He put a piece of paper in front of me and handed me a pen. “Can you draw the flag for me?” he said. I took the pen. My hand was shaking. I drew the flag: five horizontal stripes with a star in a box in the upper right hand corner. No, the left corner. I was always confusing that. I knew my flag, but I knew Ghana’s flag better. “That’s not Togo’s flag,” he pronounced accusingly. “I made a mistake. The star goes in the other corner.” “You don’t know your own flag?” “Yes, I know my flag!” “Tell me the colors.” “The stripes are green and yellow. The star is white and the box is red.” “Those aren’t the colors.” “Yes they are! Those are the colors!” I may have put the star on the wrong side, but I did know the colors of my own flag! “You don’t speak French, you don’t know

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<sup>1</sup> © Jessica Chaudhary, M.D. 2010.

<sup>2</sup> Yale University, Department of Psychiatry; B.A. Wellesley College with Honors (2002), M.D. University of Washington School of Medicine (2007). This article is the product of the author’s study on the role of memory and its impact on credibility in immigration and asylum proceedings conducted jointly with the Yale School of Medicine, Department of Psychiatry, and the Yale Law School, Immigration Clinic. Special thanks to Dr. Howard Zonana, my mentor and faculty advisor. I am also extremely grateful to the following individuals who provided suggestions and invaluable guidance: Dr. Madelon Baranoski, Attorney Lory Rosenberg, Professor Jean Koh Peters, Professor Stephen Wizner, Professor Carroll Lucht, Professor Karen Musalo, and Professor Carol Suzuki.

your own flag.” He snorted. “She’s not from Togo,” he said to the lady officer. “She’s lying. She’s probably from Nigeria.”<sup>3</sup>

This story is an all too common illustration of the impact a high-stress situation can have on memory, leading to confusion, fear, and possibly incorrect recall that can be interpreted as inconsistency or willful misrepresentation. The true story of Fauziya Kassindja, a young woman fleeing Togo and seeking asylum in the United States, illustrates just one conversation at the beginning of what became an agonizing journey. It highlights a specific problem with memory. While in the case of Kassindja, it was the inability to recall and draw correctly the flag of her home country, for others it can be an inability to recall peripheral details of central events, thought blocking, repression, dissociation, amnesia, inaccurate reconstruction of events, or psychiatric illness clouding an ability to remember clearly. These deficits can have serious and lasting ramifications on asylum decisions.

Kassindja’s inability to retrieve in her memory the flag of her home country, after a long and tiring flight, and a lack of preparation for possible questioning, led to concerns regarding her credibility. While Kassindja was fortunate ultimately to be granted asylum after a grueling ordeal, countless others face the same situation with potentially dire consequences.<sup>4</sup> While asylum officers often have little to rely on besides the story of an applicant when adjudicating an asylum case, determining credibility based solely on the asylum seeker’s memory of events or that person’s expected knowledge by interviewers who may not be sensitive to or aware of cultural norms of various countries can be limiting. One goal of this paper is to expand the repertoire available to triers of fact when considering asylum cases. Another goal of this paper is to raise awareness of the complicated role memory plays in important asylum decisions.

In Kassindja’s case, for example, one must consider the possibilities that at the moment of trying to recall the flag of her home country, she became nervous and

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<sup>3</sup> FAUZIYA KASSINDJA, *DO THEY HEAR YOU WHEN YOU CRY* 174-75 (Delacorte Press 1998).

<sup>4</sup> See Hope Lewis & Isabelle R. Gunning, *Essay: Cleaning Our Own House: “Exotic” and Familiar Human Rights Violations*, 4 *BUFF. HUM. RTS. L. REV.* 123, 128-30 (1998). Kassindja left her home in Africa in order to escape being forced to undergo genital mutilation. *Id.* at 131. She entered the United States seeking asylum as an undocumented immigrant and was detained for sixteen months at maximum security facilities. *Id.* at 130. During her detention, Kassindja and other undocumented immigrants were “shackled, kept in unsanitary conditions, and placed in isolation as a punishment for washing herself at dawn before her morning prayers according to her religious tradition.” *Id.* Additionally, Kassindja and others were “tear-gassed and beaten during an insurrection at one of the facilities in which she was being held.” *Id.*

anxious and simply could not remember the flag or became momentarily confused.<sup>5</sup> It is also possible that most people in her country may be unable to reproduce the flag with accuracy. One must also consider whether others in her place have never seen the flag of his or her native country and, ultimately, whether the asylum officer was incorrect.

The determination of whether an individual's circumstances merit the granting of asylum status is a challenging decision. An adjudicator often relies on intangible evidence, the applicant's story, and limited documentation.<sup>6</sup> This story can be filled with numerous inconsistencies and omissions, leaving an adjudicator inevitably questioning the veracity of the applicant's story. Because there is often minimal physical evidence to support an applicant's claim, what is left is the individual's recollection of the events, upon which the approval of asylum hinges. These events can be traumatic, and the consequences of witnessing the traumatic events, or experiencing unspeakable abuses, can lead to psychiatric disorders as well as difficulties in recall.

Inconsistencies in memory do not necessarily equate to willful misrepresentation, and must be considered carefully in the context of the applicant's entire story. The study of memory is extremely complicated, and while this paper will not address every condition that could lead to impairments in memory, it will discuss common misperceptions about memory as well as the role of common psychiatric diseases in memory impairments. Further, this paper hopes to be of assistance to attorneys representing clients seeking asylum and triers of fact adjudicating asylum cases.

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<sup>5</sup> Kassindja, *supra* note 3, at 168-69. In her situation, Kassindja had been going to school in a neighboring country and may have blended the flags of the two countries. *Id.* at 45-46.

<sup>6</sup> See, e.g., *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (2002) (demonstrating type of intangible evidence relied upon by adjudicators). "All aspects of the witness's demeanor—including . . . how he sits or stands, whether he is inordinately nervous, his coloration during critical examination . . . the pace of his speech and other non-verbal communication—may convince the observing trial judge" of the witness's truthfulness. *Id.* Immigration judges rely on intangible aspects of an asylum seeker's testimony to decide whether the testimony is credible. See Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly—Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 265-66 (2008). The adjudicator is positioned to "observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth." *Id.*

## I. The Malleability of Memory

During important asylum decisions, which can involve life or death for the refugee, the possibilities of memory loss, memory subjectivity, change of events due to confusion, repression or dissociation, psychiatric disease, and cultural norms are among the numerous factors that should be taken into consideration. An asylum interviewer or administrative judge often is a sole trier of fact.<sup>7</sup> The challenge to this daunting responsibility, however, lies in resisting the natural reaction that the slightest inconsistency or inability to recall equates to willful misrepresentation.

Memory is malleable and complex; it is not a fixed entity.<sup>8</sup> For example, intellectual capacity and emotional capacity can have an impact on a person's ability to retrieve events from memory, both at the time the event occurs and at the time of the retelling. In terms of long-term memory, "visual, verbal and auditory information is thought to be coded by meaning, and then linked to related information and associations."<sup>9</sup> As a result, "what is recorded is not an accurate copy of the data but an interpretation. What we remember is influenced by what we already know."<sup>10</sup> Who the audience is also plays a role in how an event is told and what details of an event are told.

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<sup>7</sup> See U.S. Citizenship & Immigration Serv., Obtaining Asylum in the United States (last visited Mar. 15, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>. In an affirmative asylum process, an asylum interviewer would be the finder of fact to make the asylum determination. See *id.* On the other hand, in a defensive asylum process, an immigration judge with the Executive Office for Immigration Review would be the finder of fact. See *id.*; see also U.S. CITIZENSHIP & IMMIGRATION SERV., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (2007), available at <http://www.uscis.gov/files/nativedocuments/AffrmAsyManFNL.pdf> (providing overview of affirmative asylum procedure).

<sup>8</sup> Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 294-95 (2001) (discussing short-term and long-term memory). Memory is not fixed and instead tends to deteriorate over time, unless there is something done to correct this loss of short-term memory. *Id.* The major complexities are the conversion of short-term memory into long-term memory and the ability to recall certain aspects of a memory depending on what one already knows and understands. See *id.* Additionally, long-term memory recollection operates on several levels depending on the significance of the information collected. See *id.*

<sup>9</sup> *Id.* at 295 (discussing findings from studies of long-term memory recollection and what is believed to occur). Information can obtain longer lasting preservation by attaching "meaning and significance to the information." *Id.* Memory is also influenced by the interactions with the interviewer and what the person may believe the interviewer wants to hear. See *id.*

<sup>10</sup> *Id.* (noting details tend to be lost over time, becoming generalized and merging with other similar memories).

For example, how a massacre may be spoken of among village friends is different from how that massacre is told in front of a judge, particularly if the story is told by a young woman in front of an older, male adjudicator and the woman feels shame over the event.<sup>11</sup>

## II. Flashbulb Memories

The psychological importance of events determines how they are remembered. For example, the way in which one remembers his wedding day is different from how he remembers what he did last week, which is different from remembering what he ate for breakfast that morning. Memory relating to emotions and emotional events can be particularly complex and challenging to understand, particularly if they are negatively stressful emotional events or events related to trauma.<sup>12</sup> How one copes with stress and trauma depends on how one remembers that stress or trauma. It can be argued that emotional memory, by its very nature, can be vivid and detailed, as the emotional events in our lives are typically linked to greater sensory perception, arousal, and subsequent intricacy of recall.<sup>13</sup>

The term “flashbulb memory” refers to emotional memories as photographic memories, implying that they can be remembered in great detail.<sup>14</sup> In a study conducted in 1992 involving interviewing people one day after the 1986 Space Shuttle Challenger disaster, participants were asked to recall, among other things, where they were and how they learned of the disaster.<sup>15</sup> About three years later, the same participants were asked the same questions. The degree of agreement between the original and

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<sup>11</sup> See *id.* at 299 (noting when people retell events, they take different perspectives for different audiences). In addition, when a person is asked to repeat a story he has already told, he assumes his first rendition was insufficient and alters the narration to supply more or different details. *Id.*

<sup>12</sup> Roger Brown and James Kulik, *Flashbulb Memories*, 5 COGNITION 73, 75 (1977) (noting unexpected events involving nationally prominent persons, such as the assassination of President John F. Kennedy, as well as private events, such as the unexpected death of a friend or parent, cause flashbulb memories).

<sup>13</sup> *Id.* at 74. For example, in regard to the news of President John F. Kennedy’s assassination, “[i]t is not the memory of the tragic news that invites inquiry, but the memory of one’s own circumstances on first hearing the news.” *Id.*

<sup>14</sup> See generally *id.* The definition of flashbulb memories is “memories for the circumstances in which one first learned of a very surprising and consequential (or emotionally arousing) event.” *Id.* at 73.

<sup>15</sup> See ULRIC NEISSER & NICOLE HARSCH, PHANTOM FLASHBULBS: FALSE RECOLLECTIONS OF HEARING THE NEWS ABOUT CHALLENGER, in AFFECT AND ACCURACY IN RECALL: STUDIES OF “FLASHBULB” MEMORIES 14-19 (Eugene Winograd & Ulric Neisser eds., Cambridge University Press 1992).

subsequent responses was near zero; however, the participants were quite confident of their recall.<sup>16</sup> This study showed that memory, even from flashbulb instances, can be erroneous. While this study led to controversy, subsequent studies also demonstrated memory inaccuracies in flashbulb memories.<sup>17</sup> While in this example, the participants involved in the study were not direct eyewitnesses of the event, for those who are a witness to or a victim of a crime or a traumatic event, such as many asylum applicants, understanding the process of recall can be even more challenging, as high levels of emotion affect how a memory is encoded and later retrieved.<sup>18</sup>

A reason why flashbulb or emotionally charged memories may be erroneous stems from the Easterbrook Hypothesis, which suggests that, when someone is emotionally aroused, attention gets narrow and the subject can take in limited information.<sup>19</sup> That which falls outside this scope of limited information may be excluded from memory, though central events can be remembered with greater clarity.<sup>20</sup> One issue in studying traumatic memory is determining what is central and what is peripheral or, in other words, determining what is remembered and what is forgotten.<sup>21</sup> Specific events and how they are remembered by certain people depend a great deal on that individual's own sense of personal relevance—what is important to him versus what he may forget.<sup>22</sup> Two people who experience the same trauma at the same time may have very different peripheral memories and accounts of their experiences, though the recollection of the central events may be similar. To fill in the gaps between what is remembered and what is forgotten, an individual may try to piece together a timeline that makes sense, not from sheer memory, but from a logical outline.<sup>23</sup> It is conceivable

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<sup>16</sup> See *id.* (explaining how study participants were questioned thirty-two to thirty-four months later and nearly all were confident with their recollections).

<sup>17</sup> See, e.g., Jane Herlihy & Stuart Turner, *Asylum Claims and Memory of Trauma: Sharing Our Knowledge* 191 BRIT. J. PSYCHIATRY 3-4 (2007) (noting study “that explored the experiences of 27 asylum seekers of interviews at the UK Home Office” and identifying “the importance of the behaviour of interviewers as well as the impact of claimants’ feelings of shame and efforts to avoid their memories”).

<sup>18</sup> See *id.*

<sup>19</sup> See generally J.A. Easterbrook, *The Effect of Emotion on Cue Utilization and the Organization of Behavior*, 66 PSYCHOL. REV. 183 (1959).

<sup>20</sup> See generally *id.*

<sup>21</sup> See generally *id.*

<sup>22</sup> See generally *id.*

<sup>23</sup> See Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering From Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L. J. 235, 255-64 (2007) (discussing how post-traumatic stress disorder may result in inaccurate recall of memory). The author further suggests that refugees with severe post-traumatic stress disorder are more likely to have slight inconsistencies in their stories over time, not for lack of credibility,

that, from one recounting of the events to another, the peripheral details may change, not because the person is attempting to deceive or misrepresent, but because an individual's emotional state at the time of the re-telling can also impact what is stated. This can even cause the individual to believe that his present emotions of the event may be part of the initial event. Confabulation or filling in the blanks is not unusual if it allows the individual to make sense of an event.

#### Flashbulb Memories versus Easterbrook Hypothesis

“Flashbulb Memories”: the term used to describe emotional memories as photographic memories

Easterbrook Hypothesis suggests, with emotional memory, attention narrows and the individual can only remember central information

**Table 1: Flashbulb Memories versus Easterbrook Hypothesis**

A two-year study published in the American Journal of Psychiatry in 1997 asked fifty-nine National Guardsmen from two separate units to complete a nineteen item trauma questionnaire about their combat experience one month and again two years after their return from the Gulf War.<sup>24</sup> Responses were compared for consistency. The responses revealed that 88% of reservists changed their response on at least one of the nineteen responses, while 61% changed their responses on two or more items.<sup>25</sup>

rather because the subjects became less accurate in recalling the peripheral details because of their traumatic experience. *Id.* at 255-59. In addition, it is only after the passing of time and from retelling the story that those who suffer from traumatic events are able to remember the dissociated elements. *Id.* at 264.

<sup>24</sup> Steven M. Southwick et al., *Consistency of Memory for Combat-Related Traumatic Events in Veterans of Operation Desert Storm*, 154 AM. J. PSYCHIATRY 173, 174-76 (1997) (describing general methodology of the study). The Desert Storm Trauma Questionnaire “referred specifically to the veterans’ experiences in the Persian Gulf and included extreme threat to personal safety, seeing others killed or wounded, death of a close friend, sitting with the dying, being stationed close to enemy lines, and witnessing bizarre disfigurement of bodies as a result of wounds.” *Id.* at 174. The total score of the responses was further composed of the number of positive responses, with a range between zero to nineteen. *Id.* Forty-six (78%) of these subjects were men, and thirteen (22%) were women. *Id.*

<sup>25</sup> *Id.* at 174. Moreover, the most commonly changed responses over the course of two years was “extreme threat to personal safety (36% of the subjects), bizarre disfigurements of bodies as a result of wounds (34%), seeing others killed or wounded (27%), being stationed close to enemy lines (17%), and mine or booby traps (15%).” *Id.* at 175. No subjects changed their responses to being in an aircraft that was shot down or being responsible for someone else’s death. *Id.*

Findings were correlated with level of symptoms for post-traumatic stress disorder (PTSD).<sup>26</sup> The results indicated that traumatic memories were neither fixed nor indelible and, as PTSD symptoms increase, so does the amplification for memory.<sup>27</sup> Asylum applicants are also frequently witnesses to traumatic events, including combat, and witnessing such events may affect individual memories, which becomes more complicated with concomitant psychiatric disease.

### III. Psychiatric Disorders and Trauma

A number of conditions can affect memory, including organic disorders, aging leading to various dementias including Alzheimer's disease, and traumatic brain injury. For the purposes of this paper, however, only certain common psychiatric disorders will be discussed, such as PTSD, depression, and anxiety, which are associated with aspects of memory encoding, retrieval, and recall and can affect working memory.<sup>28</sup> Depression can lead to negativity and a biased, overly pessimistic view of events relating to a person's sense of self, affecting autobiographical memory.<sup>29</sup>

A case example of a psychological evaluation conducted by the Law and Psychiatry Division at Yale, in conjunction with the Yale Law School immigration clinic, described a seventeen-year-old woman from Eastern Europe who was evaluated with psychological testing as a part of her asylum application.<sup>30</sup> She was found to be suffering from depression that led to the creation of a barrier—"a lack of the energy needed to work through inconsistencies or discrepant memories. [She] often gave up when she was not initially understood or when there was an inconsistency. She simply conceded to whatever was said. For example, there was a report that she had fallen off a roof at thirteen years of age. When asked about it, she simply agreed without being able

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Therefore, there were many inconsistent recalls for events that were highly traumatic in nature. *Id.* at 175. This supports an inference that these results demonstrate the unreliable nature of combat memory. *Id.*

<sup>26</sup> *Id.* at 175. The correlation between the Mississippi post-traumatic stress disorder scale and the number of responses on the questionnaire changed from a yes at one month, to a no at two years. Southwick et al., *supra* note 24, at 175. Accordingly, this change was not statistically significant. *Id.*

<sup>27</sup> *Id.* at 175-76.

<sup>28</sup> See generally Andrew Budson & Bruce Price, *Memory Dysfunction*, 352 NEW ENG. J. MED. 7 (2005).

<sup>29</sup> See generally A.D. Brittlebank et al., *Autobiographical Memory in Depression: States or Trait Marker*, 162 BRIT. J. PSYCHIATRY 118 (1993).

<sup>30</sup> Jessica Chaudhary, Case File One 10-11 (2008) (unpublished case file, on file with author). The facts of this case have been changed for confidentiality purposes.

to give any further detail. Only with persistent questions and asking for details, was the account clarified. [The client showed] a lack of the psychological energy needed to make herself understood” and focus attention, taking stories as fact without questioning.<sup>31</sup>

Anxiety can affect attention and concentration, restricting one’s ability to process or comprehend an event fully, thereby remembering it incompletely.<sup>32</sup> As people become anxious in a stressful situation, it is more likely that their reasoning can become disrupted, memory can become clouded or confused, and answers can become impulsive, spoken without thought.<sup>33</sup> PTSD can lead to hyper-arousal, an overgeneralization of memory, or the overwhelming intrusion of traumatic memory into daily life.<sup>34</sup> Remembering a painful past may force the individual to avoid any situation that could trigger the memory and cause one to repress, disassociate, avoid recalling, or forget the memory altogether.

Another psychological evaluation conducted by the Law and Psychiatry Division at Yale University, in conjunction with the Yale Law School immigration clinic, described a forty-six-year-old woman from Africa, found to be suffering from recurrent Major Depressive Disorder and PTSD secondary to witnessing the shooting and killing of people in her neighborhood as well as undergoing female genital mutilation.<sup>35</sup> Furthermore, she was found to be suffering from memory deficits. Her long-term memory was decreased, as evidenced by her difficulty in remembering important personal information, and her short-term memory was decreased as evidenced by the fact that, after five minutes of unrelated activity, she could only remember one of three objects though she was able to remember the second object with a prompt. Her overall memory deficits found her being unable to recall sequences of events, details, or dates. She further stated that she could not recite her prayers because she was unable to recall them, suggesting that even embedded memory can become affected by trauma.

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<sup>31</sup> *Id.*

<sup>32</sup> J. MARK. G. WILLIAMS ET AL., COGNITIVE PSYCHOLOGY AND EMOTIONAL DISORDERS 50-51 (John Wiley and Sons Ltd., 1997).

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* at 164, 184-85.

<sup>35</sup> Jessica Chaudhary, Case File Two 8-10 (2009) (unpublished case file, on file with author). The facts of this case have been changed for confidentiality purposes.

**Depression:**

***Negativity and a biased, overly pessimistic view of events relating to a person's sense of self***

**Anxiety:**

***Attention and concentration may be affected, restricting one's ability to process or comprehend an event fully, thereby remembering it incompletely***

**Post-Traumatic Stress Disorder:**

***Hyper-arousal, an overgeneralization of memory, or the overwhelming intrusion of traumatic memory into daily life***

**Table 2: Manifestations of Psychiatric Disease**

It has been hypothesized that in the instance of trauma, there is a flood of sensory information that can be overwhelming to the brain.<sup>36</sup> In this instance, the brain can store memory in fragmentary pieces as opposed to storing memory in a logical sequence.<sup>37</sup> When traumatic information is later recalled, it can be in the form of “dissociated mental imprints of sensory and affective elements.”<sup>38</sup> A traumatized individual can suffer from global memory impairment, or amnesia, following a traumatic event.<sup>39</sup> The amnesia can be of the whole event or of parts of the event.

A study published in 2003 concluded that “brief, irreversible memory gaps are common in trauma survivors, whereas longer, progressive, and potentially reversible

<sup>36</sup> See Bessel A. van der Kolk & Rita Fisler, *Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study*, 8 J. TRAUMATIC STRESS 505, 505-06 (1995).

<sup>37</sup> *Id.* at 505-08 (discussing trauma victim's memory as potentially scattered, remembering some details while forgetting others).

<sup>38</sup> *See id.* at 505-13 (discussing effects of traumatic experiences on memory and global memory impairment of individuals).

<sup>39</sup> *Id.* at 509 (explaining PTSD victims, while often remembering vividly traumatic experiences, sometimes lose memories or have absences of memory of those instances). The time span for amnesia from such traumatic experiences ranges from hours to weeks or even years. *See id.* at 509. Recall is triggered when stimuli (sensory or affective) match the elements of sensory or affective elements associated with the causing trauma. *See id.* Individuals whom experience such traumatic events can often function “quite well” as long as associated feelings to the traumatic memory are not triggered. *Id.* at 510.

amnesia occurs among survivors who develop PTSD.”<sup>40</sup> The most important predictor for PTSD is dissociative experience at the time of trauma.<sup>41</sup> Dissociation and repression of experiences can serve as protective mechanisms, as they “refer to a compartmentalization of experience . . . stored in the memory as . . . sensory perceptions.”<sup>42</sup> Dissociation can also lead to illogical sequence of memory and inconsistent recall, as can repression, which may also serve as a protective mechanism after a traumatic event.<sup>43</sup>

Though repression and dissociation are sometimes used interchangeably, there is a fundamental difference between the two. In *Trauma: Explorations in Memory*, Bessel van der Kolk and Onno Van der Hart state:

Repression reflects a vertically layered model of mind: what is repressed is pushed downward, into the unconscious. The subject no longer has access to it . . . . Dissociation reflects a horizontally layered model of mind: when a subject does not remember a trauma, its “memory” is contained in an alternate stream of consciousness.<sup>44</sup>

Either through repression or dissociation, the mind has tried to compartmentalize the memory.<sup>45</sup> Through subsequent therapy, the individual can attempt to retrieve repressed or dissociated memories, though this can be a difficult and grueling process and often an impossible one. While repression and dissociation still

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<sup>40</sup> See Yoram Yovel et al., *Amnesia for Traumatic Events Among Recent Survivors: A Pilot Study*, 8 CNS SPECTRUMS 676, 683-85 (2003) (discussing difference between memory gaps and amnesia).

<sup>41</sup> ARE HOLEN, A LONG-TERM OUTCOME STUDY OF SURVIVORS FROM A DISASTER: THE ALEXANDER L. KIELLAND DISASTER IN PERSPECTIVE (University of Oslo 1990). See also Arieh Y. Shalev et al., *Predictors of PTSD in Injured Trauma Survivors: A Prospective Study*, 153 AM. J. PSYCHIATRY 219, 224 (1996) (noting the association between dissociative experience and PTSD). Dissociation is an indicator of prior trauma. *Id.* Dissociation is also a stress-related behavior, where traumatic experiences are split from other parts of the experienced individual’s self, which impairs the ability to reprocess and integrate the trauma. *Id.*

<sup>42</sup> See van der Kolk & Fislser, *supra* note 36, at 510.

<sup>43</sup> See Yovel et al., *supra* note 40, at 676 (describing repression as driven by unconscious need to forget traumatic experience).

<sup>44</sup> Bessel A. van der Kolk & Onno Van der Hart, *The Intrusive Past: The Flexibility of Memory and the Engraving of Trauma*, in *TRAUMA: EXPLORATIONS IN MEMORY* 168 (Cathy Caruth ed., Johns Hopkins University Press 1995).

<sup>45</sup> See Constance Dalenberg, *Recovered Memory and the Daubert Criteria: Recovered Memory as Professionally Tested, Peer Reviewed, and Accepted in the Relevant Scientific Community*, 7 TRAUMA, VIOLENCE, & ABUSE 274, 289-91 (2006) (reviewing results of neurobiological studies and psychoanalytical theories of how the brain deals with trauma).

provide some organizational framework for the mind, a diagnosis of PTSD may indicate the mind has been unable to compartmentalize memory and the memories then may manifest themselves as disorganized nightmares, flashbacks, and intrusive thoughts.<sup>46</sup>

The difference with traumatic memory, especially in comparison to normal memory, is that it is “not a simple memory,” and the complexity stems, in part, from the very nature of a traumatic memory and the many forms in which it may be recalled.<sup>47</sup> Because, in PTSD, the nature of the recall can be through nightmares, flashbacks, and/or intrusive thoughts, these can be persistent and all-encompassing.<sup>48</sup> A traumatic event defies logical sense; therefore, it can be difficult to compartmentalize and organize within the mind and subsequently difficult to recall consistently. The inability to integrate traumatic memory into consciousness and understanding leaves the memory without an organizational framework.<sup>49</sup> In *Trauma: Explorations in Memory*, Cathy Caruth states that the “history that a flashback tells . . . is, therefore, a history that literally *has no place*, neither in the past, in which it was not fully experienced, nor in the present, in which its precise images and enactments are not fully understood.”<sup>50</sup> This leaves the individual who experienced the trauma and received a diagnosis of PTSD with not only the confusion surrounding the event but also the confusion surrounding its incomprehensibility.<sup>51</sup> While repression and dissociation can serve as protective mechanisms, PTSD can occur when those protective mechanisms are broken down, which can eventually lead into the development of disorders.<sup>52</sup>

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<sup>46</sup> See generally Anke Ehlers & David M. Clark, *A Cognitive Model of Post Traumatic Stress Disorder*, 38 BEHAV. RES. & THERAPY 319 (2000) (positing cognitive model for contribution of poorly processed memory to maintenance of flashbacks).

<sup>47</sup> See CATHY CARUTH ET AL., *TRAUMA: EXPLORATIONS IN MEMORY* 151 (Cathy Caruth ed., Johns Hopkins University Press 1995) (examining relationship between traumatic events and their effects on memory).

<sup>48</sup> See Ehlers & Clark, *supra* note 46, at 324-25 (proposing intrusion and patterns of retrieval characteristic of persistent PTSD are due to way trauma is laid down and encoded in memory).

<sup>49</sup> See CARUTH ET AL., *supra* note 47, at 151-53 (describing psychology behind PTSD). Although the recollections are accurate, they are often inaccessible to conscious recall or control. *Id.* at 151. Thus, flashbacks provide “a form of recall that survives at the cost of willed memory,” which is what causes flashbacks to be such an overwhelming experience. *Id.* at 152.

<sup>50</sup> See *id.* at 153 (emphasis in original). The trauma thus seems to invoke “the difficult truth of a history that is constituted by the very incapacities of its occurrence.” *Id.*

<sup>51</sup> See CARUTH ET AL., *supra* note 47, at 153.

<sup>52</sup> See *id.* at 151-53 (describing repression and dissociation related to PTSD); see also van der Kolk & Van der Hart, *supra* note 44, at 168 (explaining protective mechanisms of repression and dissociation).

When people are asked to recall a traumatic event or series of traumatic events consistently, sometimes they cannot do so. This is not because they have PTSD or due to repression or dissociation but because they have simply forgotten the details of the event or have filled in the gaps of a traumatic event through the creation (confabulation) of details that may sound logical to them as they are retelling the experience.<sup>53</sup> They also may be unwilling to divulge the details of a trauma for reasons often associated with embarrassment or shame, which are sometimes related to cultural norms and expectations. If individuals are asked to recall an event during a situation that is stressful to them, they may be more likely at that time to become amnesic or incapacitated by the situation and less likely to recall the event accurately or consistently.<sup>54</sup> Those who suffer from severe forms of PTSD may be especially prone to inconsistencies in recount.

A study published in 2002 in the *British Medical Journal* found that twenty-seven refugees from Kosovo and twelve refugees from Bosnia, suffering from high-levels of PTSD, were inconsistent with their recall of events related to past persecution.<sup>55</sup> The investigations were conducted by both psychologists and psychiatrists, and the refugees had already received asylum status. The study involved interviewing the refugees twice, between three and thirty-two weeks apart, with the help of an interpreter. Each participant recalled a traumatic event and a non-traumatic event and rated each detail as central or peripheral. The results indicated discrepancies in the retelling of the story, and the discrepancies were more likely related to peripheral events and involved no significant difference with regard to whether the experience was a traumatic or a non-traumatic one.<sup>56</sup> Refugees with high levels of PTSD were more likely to have a greater number of discrepancies the longer time that elapsed between interviews, and those participants who were concomitantly depressed, while also suffering from PTSD, had difficulty recalling even central details.<sup>57</sup>

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<sup>53</sup> See Bessel van der Kolk, *Posttraumatic Stress Disorder and Memory*, PSYCHIATRIC TIMES, Mar. 1, 1997, available at <http://www.psychiatrictimes.com/display/article/10168/1158311?verify=0> (outlining effect of PTSD on memory).

<sup>54</sup> See *id.*

<sup>55</sup> Jane Herlihy et al., *Discrepancies in Autobiographical Memory—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, 324 BRIT. MED. J. 324, 324-27 (2002) (impact of PTSD on consistency of recall during asylum proceedings).

<sup>56</sup> *Id.* at 326-27.

<sup>57</sup> See *id.* at 324-27. “Patients with depression and with post-traumatic stress disorder can have difficulties in retrieving specific autobiographical memories.” *Id.* at 325. Discrepancies are common among individuals suffering from post-traumatic stress disorder when they have to wait a long time between recounting their experiences in interviews. *Id.* at 327. Discrepancies are also more likely to be present when the content is traumatic to the interviewee and when the details themselves are peripheral to the interviewee’s experience. *Id.* See also Herlihy & Turner, *supra* note 17, at 3 (stating people who experience emotional events remember central details at

Refugees are prone to particularly high levels of trauma and subsequent PTSD development by the very nature of their experiences, which often include, broadly, loss of home, loss of country, loss of family, and subjection to violence, abuse, fear, retaliation, and persecution. Many refugees have witnessed war and other forms of civil strife. Upon arrival in a foreign country, refugees are subjected to unfamiliar laws; they often lack knowledge of the language or the expectations of the authorities. In the United States, arriving refugees are sometimes detained and held in custody in county jails or Department of Homeland Security detention facilities while they go through the process of applying for asylum.<sup>58</sup> The complexity of the process generally requires effective legal representation that many refugees may not be able to afford or obtain.<sup>59</sup> Further, they can be without an income and have little or no moral or emotional support, as their families may be in their home countries.

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expense of details peripheral to event).

<sup>58</sup> See Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 49 (2001). Refugees often declare they “suffered atrocities, including torture, beatings, and rape,” or have “witnessed the torture, beating, rape, or murder of others.” *Id.* Individuals seeking asylum can be detained until they are deemed to warrant asylum protection by an immigration judge; however, this process varies and on average takes fifty-seven days. *Id.* at 70-71. Refugees’ unfamiliarity with a new legal system may bring about confusion regarding their understanding of their rights. *Id.* at 48. Refugees are often subject to traumatic events and addressing them “may raise feelings of terror, sadness, fear, loss, shame, and guilt.” Suzuki, *supra* note 23, at 267-68. “Malicious and deliberate acts, such as torture and other forms of persecution, tend to imprint the most intense emotions.” *Id.* at 267. An individual seeking asylum files an affirmative application if a credible fear interview indicates the applicant has a reasonable fear of persecution. *Id.* at 244-25. The statistics from 2002 conclude that for affirmative applicants, the average length of time spent in detention was 32.6 days. Alexandria J. Innes, Detention of Asylum Seekers in the United States 11 (Oct. 9, 2007) (unpublished manuscript, available at [http://allacademic.com//meta/p\\_mla\\_apa\\_research\\_citation/2/6/8/4/4/pages268446/p268446-1.php](http://allacademic.com//meta/p_mla_apa_research_citation/2/6/8/4/4/pages268446/p268446-1.php)).

<sup>59</sup> See Pistone & Schrag, *supra* note 58, at 8-9. Applicants for asylum sometimes realize the importance of being represented by counsel during the asylum process, “but if they lack resources to pay for an attorney, they often have to wait for many months to be represented by a non-profit organization or pro bono lawyer.” *Id.* See also U.S. Dep’t of Just., Executive Off. for Immigr. Rev., EOIR Legal Orientation and Pro Bono Program, <http://www.justice.gov/eoir/probono/legresources.htm> (last visited Mar. 15, 2010) (listing associations and foundations providing pro bono assistance through “legal research, asylum documentation and mentoring”). But see Carolyn P. Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERKELEY J. INT’L L. 38, 49 (1997) (arguing U.S. law deviates from international refugee law). “Inexpensive or free legal services for asylum seekers are scarce and are unavailable through government-funded programs” because Congress did not include individuals seeking asylum in Legal Services Corporation funds. *Id.*

Because of these complicating factors, they may suffer not only from undiagnosed high levels of PTSD but other psychiatric diagnoses as well, such as major depressive disorder or generalized anxiety disorder. All of these conditions affect how a refugee tells his or her story, particularly if the refugee does not have access to medical care or psychiatric treatment or does not even know what resources exist or how or whom to ask for help. Furthermore, disclosure of a traumatic event or an emotional problem and acceptance of treatment may threaten cultural norms or perpetuate stigma and may be avoided. These limiting factors are further complicated by the length of the asylum process, and the number of times a refugee has to repeat his or her story, each time reliving what can be an excruciating experience and precipitating a recurrence of symptoms.

#### IV. Credibility

Given the circumstances of separation, loss, escape, secrecy, and flight that characterize the situation of most refugees seeking asylum and the likelihood that perpetrators will be unwilling to admit to having engaged in atrocities and abuses, objective third party documentation of the persecution that was suffered or is risked by a refugee in her home country is often unavailable. Many cases rely on the testimony of the applicant.<sup>60</sup> The applicant's memory and ability to tell a specific, detailed, and consistent story plays an integral role in the refugee being granted asylum. If an adjudicator feels that the refugee is being inconsistent or omitting key details without reason, he may conclude that the refugee is intentionally trying to deceive or willfully misrepresent her circumstances, calling the refugee's credibility into question. The importance of memory and organized recall, therefore, cannot be overstated. At the same time, however, it is critical to point out that it may not be the refugee's intent to misrepresent and there are inherent flaws in relying solely on an applicant's memory, though that may be the only means by which to adjudicate a case, with the exception of looking to general country conditions and patterns of persecution to evaluate if the asylum seeker's claim is consistent with patterns in their home country.<sup>61</sup>

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<sup>60</sup> See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 306-16 (2007) (explaining asylum process and comparing rates of grants of asylum between asylum officers). The authors state:

Asylum decisions, whether by asylum officers or immigration judges, involve both a judgment about whether the applicant's story, if true, would render the applicant eligible for asylum under American law and an assessment as to whether the applicant is telling the truth about his or her personal experiences of actual or threatened persecution.

*Id.* at 306.

<sup>61</sup> See Mira Jang, *The Lottery: Seeking Asylum in U.S. Immigration Courts is all in the Luck of the Draw*,

As the study described above regarding the Kosovan and Bosnian refugees illustrates, those who were interviewed had already been granted asylum status and, therefore, had no reason to misrepresent or distort their answers.<sup>62</sup> Yet, there were discrepancies found in these narratives, which were attributable to the length of time that elapsed between each interview.<sup>63</sup> Often, these discrepancies were noted in the peripheral details and not in the central events.

Another case from the Law and Psychiatry Division at Yale involved a gentleman in his thirties from Africa seeking asylum in the United States.<sup>64</sup> He underwent a detailed forensic psychological interview to illuminate whether or not he showed significant impairment as a result of trauma he had incurred while in captivity in Africa. Though he had some university education, he was found to name dates incorrectly, giving the year as a decade earlier, giving his birth date as 1990 instead of 1970 and, then later, as 2000 instead of 1970. He was not able to recognize his errors and expressed surprise by his mistakes. He had difficulty recalling the names of his siblings and was distressed by this. He did not show evidence of malingering either in his presentation or on the formal tests of malingering. He did not have neurologic findings on imaging but was found to have impairments in attention and concentration, impaired flexibility in thinking and problem solving, vulnerability to depression, and disorganized thinking. This client was found to have an impaired ability to stay on task and work toward accuracy and have an impaired ability to integrate information stored in memory. He also had impaired memory about the sequence of events and rather than trying to recall the events, he filled in the gaps with what might have been so he would not have to relive a traumatic experience. According to the psychological report, the cause of his inconsistency, particularly with respect to peripheral events, was linked to his depression and PTSD.

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L.A. CITY BEAT, Sept. 18, 2008, at 12 (explaining immigration judges' reliance on their personal knowledge of conditions in certain countries). The author states:

As immigration judges attempt to figure out how to interpret country conditions based on a variety of sources, immigration courts have at times turned into battlegrounds where American foreign policy is litigated for the purpose of granting or denying asylum. And as judges decide the fate of asylum-seekers based on their knowledge and belief of a country's political, social, and economic state, they are simultaneously influenced by U.S. foreign policies that govern America's relations with other countries. The result is a muddy confluence of subjective interpretations and personal beliefs.

*Id.*

<sup>62</sup> See Herlihy et al., *supra* note 55 and accompanying text.

<sup>63</sup> See *id.*

<sup>64</sup> Jessica Chaudhary, Case File Three 9, 15-18 (2004) (unpublished case file, on file with author). The facts of this case have been changed for confidentiality purposes.

The memory of peripheral events, including dates and sequences, can depend largely on an individual's own sense of what is important and relevant and the individual's own emotional state at the time of recounting. This is not to say that there are not individuals who may intentionally try to misrepresent or deceive for the purpose of obtaining asylum. It can feel nearly impossible to differentiate between someone who is lying or malingering and someone who is traumatized and has repressed memory or amnesia surrounding the events of a traumatic situation. The fact that there may be limited access to physical evidence in an asylum case and sometimes even a lack of basic documentation, such as a birth certificate, only muddles the matter further, leaving a decision-maker with little on which to base his decision other than the narrative told by the refugee or other medical professionals.

#### V. Malingering or Just Confused?

It is necessary to understand that while one may not be malingering, it is possible that one can reconstruct an event to make meaning of it or confuse what *really* happened with what one *thinks* may have happened. Again, this is not to say an individual is lying—but rather suggesting that a fantasy can become a memory, feeling real to the person. Psychologist and author, John Kotre, describes this phenomenon in a well-studied example of reconstruction from John Dean's testimony at the Watergate hearings:

In June 1973, Dean testified before the Senate committee investigating the Watergate coverup regarding a meeting he had had with then-President Nixon nine months before, on September 15, 1972. Dean prefaced his testimony by saying that he believed he had an excellent memory. After hearing him testify, the press began to call him “a human tape recorder.” When it was later revealed that an actual tape recorder had been playing during the meeting about which Dean testified, an experiment of nature was created. Psychologist Ulric Neisser compared the transcript of Dean's testimony with the transcript of the actual tape-recorded meeting. He found rampant reconstruction. In a literal sense—who sat where, who said what—Dean's testimony wasn't close to being accurate . . . Surprisingly, Neisser did not conclude that Dean was lying. In the larger scheme of things, what he said was all true. Nixon had the knowledge Dean attributed to him; there *was* a coverup. In Dean's mind, a single event—his meeting with the President—symbolized a pattern of repeated events. This symbol was so compelling that Dean

“remembered” specifics that never took place on the occasion in question.<sup>65</sup>

This example suggests that the mind can potentially organize details to give meaning, not for the purposes of deception necessarily, but perhaps for the simple purpose of fulfilling the desire to reconstruct events as one hopes for them to have occurred.

In instances where a client concomitantly has a diagnosis of PTSD or other psychiatric disease, discerning malingering from genuine memory loss is all the more complicated. In the case of *U.S. v. Ahmed Omar Abu Ali*,<sup>66</sup> the defendant was charged with rendering or conspiring to render assistance or support to a designated terrorist organization when he was arrested by Saudi Arabian officials while in Saudi Arabia in connection with the 2003 Riyadh bombings.<sup>67</sup> The defendant claimed that he had been tortured while in Saudi custody and any statements made by him during that time were involuntary.<sup>68</sup> As a part of his defense, a psychiatrist was called as an expert witness to clarify the possibility of PTSD as well as malingering:

On cross-examination, Dr. Gaby testified that PTSD diagnoses are particularly susceptible to malingering—a person’s attempt to fabricate a diagnosis for some secondary gain (e.g. financial gain or a favorable legal outcome). On direct examination, Dr. Gaby testified that she was aware of the possible secondary gain for Mr. Abu Ali if he is diagnosed as suffering from PTSD, but that she is also aware of a possible secondary gain from her interviews with people seeking asylum . . . . The government asked Dr. Gaby about two tests for malingering—the MMPI and Sears [sic] tests—and Dr. Gaby testified that they are not “gold standards,” although they are widely used. She did not use either test, and testified that the MMPI is used by psychologists, not psychiatrists.<sup>69</sup>

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<sup>65</sup> JOHN KOTRE, *WHITE GLOVES: HOW WE CREATE OURSELVES THROUGH MEMORY* 37-38 (Free Press Hardcover 1995).

<sup>66</sup> 395 F. Supp. 2d 338, 365-66 (E.D. Va. 2005).

<sup>67</sup> *See id.* at 341.

<sup>68</sup> *See id.* at 343-44.

<sup>69</sup> *Id.* at 366. *See generally* State v. Quillen, No. E2001-01411-CCA-R3-CD, 2003 WL 59764, at \*26 (Tenn. Crim. App. Jan. 8, 2003) (exemplifying usage of the Minnesota Multiphasic Personality Inventory (MMPI) and the Structured Interview of Record Symptoms (SIRS) to determine malingering).

The psychiatrist also noted that the client's ability to recall past events improved from her initial interview with him, after the client had spent more time preparing with his attorney.<sup>70</sup> While the court denied the defendant's motion to dismiss, the points raised by the case are important ones.<sup>71</sup> For example, preparation with an attorney for an immigration interview may result in memory improvements. As the client retells his or her story repeatedly, it is possible certain details may emerge or become recovered in memory, which were initially forgotten or lost. Thinking back to the Kassindja case at the beginning of this paper, one can only speculate if her answer would have been different had she had the opportunity to prepare with an attorney.<sup>72</sup>

Different ranges of legal services are available to asylum applicants. While some law schools offer clinics, there are also attorneys in private practice as well as services available to asylum applicants through legal aid and internet based sites. A client's preparation for his or her case can vary depending on which legal service that client has or can obtain. Psychiatric assessments can help to sort out specific diagnoses and discuss less well known indicators of specific psychiatric diseases, such as avoidance of recollection in PTSD. Both psychological testing and psychiatric assessment can potentially build a client's case for asylum.

## VI. The Role of the Attorney

As attorneys are preparing a case, they should be cognizant of the possibility of malingering and keep this in mind when evaluating whether there are veracity problems or indications of memory problems associated with trauma. Psychiatrists and psychologists frequently work together in the care of a patient. While psychiatrists, having a license to practice medicine, focus more on the psychotherapeutic or psychopharmacologic needs of a patient as they are related to the psychiatric condition, psychologists can conduct testing and have developed specific tests for the detection of malingering and effort toward testing, though no test is a lie detector. In the case of *U.S. v. Ahmed Omar Abu Ali*, the possibility of using a MMPI was mentioned.<sup>73</sup> Other tests also exist, such as the VIP malingering test, the 48-Pictures Test, a forced-choice recognition test, in detecting exaggerated memory impairments, and the test of memory

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<sup>70</sup> *U.S. v. Ahmed Omar Abu Ali*, 395 F. Supp. 2d 338, 366 (E.D. Va. 2005).

<sup>71</sup> *See id.* at 384 (denying motion to dismiss where government behavior did not "shock the conscience").

<sup>72</sup> Kassindja, *supra* note 3, at 168-69. Kassindja might have been able to identify her home flag easier after having been put at ease by meeting with an attorney who could have explained the confusing process to her. *Id.*

<sup>73</sup> *Abu Ali*, 395 F. Supp. 2d at 366.

and malingering (TOMM), a test designed to detect feigned memory difficulty.<sup>74</sup> There is also the Rey Auditory Verbal Learning Test (RAVLT), the Rey Complex Figure Test (RCFT), and the Rey 15-item Visual Memory Test, all of which test memory impairments and possible malingering.<sup>75</sup> While these tests cannot be administered by attorneys, and are usually not part of a psychiatrist's examination, they are available should the need arise.

Psychological reports, written to help the adjudicator understand what the client has gone through and the ramifications of those ordeals, usually comment in some way on malingering and the likelihood of malingering in a certain candidate, also providing the psychiatrist and attorney information about the validity of symptoms and an

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<sup>74</sup> See Richard I. Frederick & Ross D. Crosby, *Development and Validation of the Validity Indicator Profile*, 24 LAW HUM. BEHAV. 59, 59 (2000) (explaining Validity Indicator Profile (VIP) is a test consisting of 100 problems assessing "nonverbal abstraction capacity and 78 word-definition problems," attempting to establish whether an individual's performance in such circumstances to reflect his or her true overall capacity and determined either valid, reflecting a high effort to respond correctly, or invalid, reflecting little effort to respond correctly or high effort to respond incorrectly); Marie-Josée Chouinard & Isabelle Rouleau, *The 48 Pictures Test: A Two Alternative Forced-Choice Recognition Test For the Detection of Malingering*, 3 J. INT'L NEUROPSYCHOLOGICAL SOC'Y 545, 545-46 (1997) (explaining the 48-Pictures Test is a two-alternative forced-choice recognition test to determine exaggerated memory impairments). Forced-choice recognition tests present the subject with two or more images at a time during the test, one of which being the test image, which forces the subject to point out the test image, which are then used to weed out biases of the subject. See Surendra N. Singh & Catherine A. Cole, *Forced Choice Recognition Tests: A Critical Review*, 14 J. ADVERTISING 52, 54 (1985); see also MHS Psychological Assessments and Services, TOMM Test of Memory Malingering, <http://www.mhs.com/product.aspx?gr=cli&prod=tomm&id=overview> (last visited Mar. 15, 2010) (describing TOMM as a visual recognition test, noted as being sensitive to malingering but insensitive to a variety of neurological impairments, making the test reliable for testing malingering but not "as transparent" as other malingering tests).

<sup>75</sup> See OTFRIED SPREEN & ESTER STRAUSS, *A COMPENDIUM OF NEUROPSYCHOLOGICAL TESTS: ADMINISTRATION, NORMS, AND COMMENTARY* 326 (Oxford University Press 1998) (noting RAVLT is administered to assess verbal learning and memory by "measuring immediate memory span, new learning, susceptibility to interference, and recognition memory" by reading words aloud to the test subject and testing the subject's recall ability over time). The RCFT is used to assess the visual memory of an individual by presenting the individual with a complex image which the individual copies, then is asked to draw by recall three minutes and thirty minutes later to determine the accuracy of the individual's memory. See *id.* at 341. The Rey 15-item Visual Memory Test is used to assess exaggeration or feigning of memory complaints in subjects by presenting the subject with card containing fifteen items in three columns of five for ten seconds and asking them to redraw the items. *Id.* at 671. The number "fifteen" is stressed to make the test seem difficult, but it is actually only based on three to four ideas (such as the letters ABC or numbers 123). *Id.*

objective measure about the client's effort toward specific testing. The use of further testing for malingering, however, raises not only the question about the reliability of the tests but also concern regarding the effect on rapport between the attorney and the client should the attorney specifically seek specific testing for malingering. Therefore, if this is done, it should be done with great caution and a clear reason for suspected malingering.

It is clearly a difficult task to distinguish those who are lying from those who are suffering from genuine memory impairments. Attorneys can become familiar with certain characteristics that may be seen in malingerers, such as when an individual's story is completely inconsistent from the conditions of the country from where he or she fled. Of course, determining whether one may be malingering or not can be very subjective, and there is no set formula that an attorney can follow.

Given the numerous complicating factors in recall, it may be difficult to determine the role of the attorney in preparing his client's asylum claim, particularly if the story initially told to the attorney contains inconsistencies, as most do. The role of the attorney is a sensitive one in that it is the attorney's responsibility to gather accurate data, articulate a truthful story, and attempt to develop a case to the best of the attorney's ability and within the confines of the law without fostering misrepresentations. If possible, the attorney must do this without causing the client to become retraumatized during the retelling of what can be, and often is, a traumatic story.

First and ideally, an immigration attorney handling refugee cases should be familiar with certain symptoms that can be indicative of an underlying psychiatric disorder. These include, but are not limited to, flashbacks, nightmares, hyper vigilance, thought intrusions or thought blocking, lack of sleep or increased sleep, lack of appetite or increased appetite, distractibility, lack of interest, feelings of guilt, lack of concentration, and finally memory impairment. An attorney should know if the client is taking any medications that can impair or alter memory and/or behavior and consult with a physician if necessary.

*Lack of sleep or increased sleep*

*Lack of appetite or increased appetite*

*Distractibility*

*Lack of interest*

*Feelings of guilt*

*Lack of concentration*

*Memory impairment*

*Flashbacks*

*Nightmares*

*Hyper vigilance*

*Thought intrusions or thought blocking*

**Table 3: Symptoms of Psychiatric Disease**

Psychiatric medications, such as SSRIs, can lead to memory loss, as can the diseases themselves.<sup>76</sup> Therefore, it is important for an attorney to understand that a client's performance may be altered or complicated by the medications he or she is taking. It is possible a client's psychiatric disease may worsen during the period of asylum proceedings, as proceedings can precipitate depression and anxiety.

Another case from the Law and Psychiatry Division at Yale described a middle-aged woman from Africa who underwent psychological evaluation for difficulty recalling and relating the details of significant events in her life after being kidnapped herself and

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<sup>76</sup> See, e.g., *People v. Ranteesi*, No. A11531, 2009 WL 13970, at \*1 (Cal. Ct. App. Jan. 2, 2009) (explaining appellant viciously murdered his estranged wife and defense included claim that antidepressant he was taking at time of the murder, Paxil, a selective serotonin reuptake inhibitor (SSRI), caused manic state). A psychiatrist was called as an expert witness and was asked whether one of the side effects of Paxil was memory loss. *Id.* at 9. The psychiatrist responded, "Memory loss can occur short-term and long-term." *Id.*

witnessing the kidnapping of her family.<sup>77</sup> The case notes show that asylum proceedings themselves can exacerbate psychiatric symptoms and affect outcome, as highlighted below:

her depression is likely to increase as the activity around her immigration case intensifies . . . [her] level of depression as indicated on the psychological testing is likely to have an impact on her functioning during her asylum case. Specifically she is likely to have the following difficulties: reporting accurate historical detail. With depression, concentration is impaired. This interferes with a focused recall of past events; what is more likely is approximate reporting of detail. She is also likely to recall details about her children more accurately than other detail[s]; however thinking about her children produces more emotional distress which in turn causes her to avoid the recall of more detail[s]. Providing an accurate account of her history [and] difficulty shifting focus from one topic to another. Shutting down and failing to provide information [because of] decreased mental energy and ruminative thought consistent with depression . . . . She may seem distracted and have difficulty focusing on detail, dates, and even sequence of events. She may have difficulty sustaining her focus and therefore may give contradictory detail from one session to another. Her accounts may be sparse and lack appropriate emphasis. [She] may abruptly shut down.<sup>78</sup>

The memory problems described in this individual may be augmented by the patient's baseline personality. The case notes go on to state that:

by her own report, [she] has always been a person who had difficulty attending to details, but she was able to compensate for this in the past by keeping written schedules and relying on family members to remind her about important things. She has lost these supports since moving to the US and her recent depression has only made her cognitive functioning worse. Psychological testing not only confirmed the presence of severe depression in this case, but also found no evidence of faking or exaggerating memory problems.<sup>79</sup>

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<sup>77</sup> Jessica Chaudhary, Case File Four 10-12 (2008) (unpublished case file, on file with author). The facts of this case have been changed for confidentiality purposes.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

Given an increased possibility of psychiatric disease in asylum applicants, including a worsening of symptoms during the process of asylum, an immigration attorney should be aware of local clinical and therapeutic resources in the community available to clients if they are manifesting psychiatric symptoms.<sup>80</sup> If a client is severely traumatized or impaired, the attorney may wish to include a forensic psychological or psychiatric evaluation with the asylum application to explain, through presentation of testing and other assessment results, the applicant's memory lapses, distortions of affect, and other abnormal responses that may interfere with the ability to present a credible case. In severe cases, with a persuasive diagnosis, it may be possible to focus and structure the applicant's testimony and cross-examination by prior agreement with the immigration judge and government counsel.<sup>81</sup> Interestingly, it is possible that those who are the most traumatized or have suffered the greatest persecution may be the "worst" witnesses because their trauma overwhelms their ability to recall coherently. If an attorney recognizes trauma clouding a client's ability to explain his life story, it may be beneficial to consult a psychiatrist to assess and treat the patient.

As an attorney builds the client's case for asylum, it is also important initially to establish a timeline of events, which can serve as an anchoring point if there are inconsistencies in memory. Building a timeline, however, carries its own challenges, as John Kotre points out in *White Gloves*, where he argues that memory is alive and fluid:

You yourself can probably remember what you did this past summer; but you would have a hard time recalling the events of three or four summers ago, unless you thought of them, say, as vacations or projects or episodes in a faltering relationship. Few of us are calendar calculators when it comes to the long-term organization of our memories.<sup>82</sup>

If one tries to place these statements into context and understand that even for an ordinary person without extenuating circumstances to remember the details of events, sometimes even pivotal events, from long ago can be a challenging task. For a

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<sup>80</sup> See, e.g., UBM Medica, Psychiatric Times, <http://www.psychiatrictimes.com/resources?verify=0> (last visited Mar. 15, 2010); U.S. Dep't of Health and Hum. Services, National Mental Health Information Center, <http://mentalhealth.samhsa.gov/> (last visited Mar. 9, 2010); see also, U.S. Dep't of Health and Hum. Serv., Mental Health Services Locator, <http://mentalhealth.samhsa.gov/databases/> (last visited Mar. 15, 2010) (noting several local resources for locating information about mental health services).

<sup>81</sup> See Herlihy & Turner, *supra* note 17, at 4 (noting importance of explaining cross-cultural differences to decision makers).

<sup>82</sup> KOTRE, *supra* note 65, at 86.

refugee involved in an immigration case, which may span the course of years, particularly from the time of leaving a country to the time of an asylum interview, to remember enough events to recreate a logical and consistent time line may be quite a difficult task.<sup>83</sup>

## **VII. Tips for Attorneys and Take Home Points for Triers of Fact**

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### **Points of Consideration for Attorneys When Preparing a Client's Case:**

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**Be an empathic listener.**

**Do not rush the client.**

**Avoid extremely sensitive topics during the first encounter, as the first encounter should be focused on rapport building.**

**Create a timeline of events to serve as an anchor.**

**Be flexible. If an interview becomes overwhelming to the client, be prepared to stop.**

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<sup>83</sup> See U.S. Citizenship & Immigration Serv., Obtaining Asylum in the United States (last visited Mar. 15, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (discussing two ways of obtaining asylum in United States). In the affirmative asylum process, the individual affirmatively seeks asylum and is interviewed by United States Citizenship and Immigration Services within forty-three days of application and a final decision is rendered two weeks thereafter. *Id.* With the defensive asylum process, an individual requests asylum as a defense against removal from the country and his or her case is heard before an immigration judge. *Id.* The average length of asylum cases is three months. HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 6 (2009), available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>.

Be aware of local resources and know when to refer for psychological testing or psychiatric care. For example, if there are irreconcilable differences in a client's story, consider psychological testing. If the client appears to show signs/symptoms of depression, anxiety, and/or PTSD, consider psychiatric referral.

Be mindful of retraumatization.

Be aware of your own feelings as well as vicarious trauma.

Consider interviewing an applicant in small segments as one long interview may be overwhelming and lead to re traumatization.

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#### Table 4: Tips for Attorneys

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#### Take Home Points for Triers of Fact:

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Inconsistencies do not necessarily equate to willful misrepresentation.

Be sensitive to cultural norms and language barriers.

Translation can be inaccurate or lack nuance of meaning, even with the use of interpreters.

Psychiatric disease, even unrecognized, may impact memory.

Medications may impact memory.

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#### Table 5: Important Points for Triers of Fact

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#### Conclusion

As has been suggested, memory is complicated, is very difficult to understand and can become all the more difficult to understand with concomitant psychiatric disease. Inconsistencies in memory can develop over time, and the burden is placed upon the attorney to help the client place as many events as possible into a logical context with a plausible explanation during the pursuit of asylum. This is done by

eliciting relevant information and asking the right questions, while paying attention to seminal details and respecting the sensitive nature of each individual's story as well as the confines of the law. Psychological testing can be helpful. Immigration officers, judges, and others triers of fact must have some appreciation of memory's complexity when determining whether or not to grant asylum. While even normal memory has variability, memories of highly charged emotional events with possible superseding psychiatric illness can be even more flawed and become all the more challenging to recall in a stressful situation, such as during an asylum interview. Numerous other factors, such as language barriers and the use of interpreters, can further complicate matters. Determining credibility based solely on one's ability to tell a consistent story is not an accurate or complete measure by which to decide asylum status and must be taken in context with respect to the applicant's entire story and the inherent flaws in recall.

