TRUTH AND TRAUMA: EXPLORING THE MERITS OF NON-ADVERSARIAL ASYLUM HEARINGS

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INTRODUCTION

Immigration issues have received increasing public attention, most notably in the context of border security and enforcement measures.[1] However, immigration enforcement is not the only site of injustice for immigrants and asylum-seekers in particular. This Note examines the shortcomings of the current asylum adjudication system—particularly as they relate to asylum applicants who have suffered prior trauma—and argues for the adoption of a non-adversarial format for asylum hearings. The Note argues that transitioning to inquisitorial asylum hearings would mark an important step towards building a system that reliably leads to the fair, accurate, and efficient adjudication of asylum claims. The Note concludes that in the absence of political will to initiate fundamental change to the immigration system, smaller-scale changes like the implementation of robust trauma-informed training for Immigration Judges (IJs) and government attorneys can make a meaningful difference for asylum-seekers.

The Note proceeds in five parts. Section I lays the necessary foundation for the analysis by providing background on the affirmative and defensive asylum procedures and the prominent role of trauma in asylum cases. Section II highlights the most troubling shortcomings of the current system, while Section III explains how a non-adversarial format for asylum hearings would work to create a system that is better suited to truth-finding and fairness. Section III also explores the inherent normative value of a non-adversarial system. Section IV examines the most promising proposal for reform, and Section V concludes with a brief summary.

I. BACKGROUND: PATHWAYS TO ASYLUM AND THE ROLE OF TRAUMA

To provide context for the potential benefits of adopting non-adversarial asylum hearings, the Note will first lay out the two pathways towards asylum: affirmative asylum and defensive asylum. Next, the Note will elaborate on trauma's unique role in asylum cases and provide an overview of the current system's most serious flaws that create a pressing need for reform.

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1. *See, e.g.*, Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 7:00 AM), https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291 (reporting on immigrant deaths in ICE custody); Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, VOX (Aug. 14, 2018, 1:29 PM), https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents (providing an overview of the Trump administration's family separation policy); Abigail Hauslohner, *During First Two Years of 'Muslim Ban,' Trump Administration Granted Few Waivers*, WASH. POST (Sept. 24, 2019, 6:21 PM), https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0_story.html (reporting on the travel restrictions often referred to as "Muslim ban").

A. *The Current Asylum System*

Asylum is available to individuals coming to the United States to seek protection from persecution in their home country, either because they have been persecuted in the past or because they fear being persecuted in the future.[2] The conditions to apply and be eligible for asylum are laid out in 8 U.S.C. § 1158.[3] The statute authorizes the Secretary of Homeland Security or the Attorney General to grant asylum to a noncitizen who can establish that they meet the definition of "refugee."[4] To meet their burden, the noncitizen must show that they are 1) unwilling or unable to return to their country of origin and 2) unwilling or unable to avail themselves of the protection of their home country, because of 3) persecution or 4) a well-founded fear of persecution 5) on account of race, religion, nationality, membership in a particular social group, or political opinion.[5] There are two possible pathways to asylum in the United States: the affirmative asylum process and the defensive asylum process, which are discussed in turn below.[6]

1. *Affirmative Asylum*

The affirmative pathway to asylum is available to applicants already present in the United States.[7] An individual can affirmatively apply for asylum within one year of entering the country.[8] The affirmative asylum process begins when the noncitizen files Form I-589, Application for Asylum and for Withholding of Removal, with U.S. Citizenship and Immigration Services (USCIS).[9] Upon receipt of the application, USCIS will send the applicant a notice of receipt and a second notice instructing the applicant to visit their nearest application support center for fingerprinting.[10] USCIS will then schedule the applicant for a non-adversarial interview with an asylum officer (AO). The interview takes about an hour, and the applicant is allowed to bring legal representation and/or any witnesses to testify on the applicant's behalf.[11] If the noncitizen is unable to conduct the interview in English, they must bring an interpreter.[12]

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2. *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum (last updated Oct. 30, 2020).
3. 8 U.S.C.A. § 1158 (West).
4. 8 U.S.C.A. § 1158(b)(1)(A).
5. 8 U.S.C.A. § 1101(a)(42) (West).
6. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states (last updated Sept. 22, 2020).
7. 8 U.S.C.A. § 1158(a)(2)(B) (West).
8. *Id.* A noncitizen may file their asylum application after the one-year deadline if they can show "[c]hanged circumstances that materially affect [their] eligibility for asylum or extraordinary circumstances relating to the delay in filing" and that they filed the application in a reasonable amount of time in light of those circumstances. *Obtaining Asylum in the United States*, *supra* note 6.
9. *Obtaining Asylum in the United States*, *supra* note 6.
10. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process (last updated Sept. 22, 2020).
11. *Id.*
12. *Id.*

Based on the interview, the asylum officer will determine whether the noncitizen meets the requirements to be granted asylum.[13] The AO's decision is reviewed by a supervisory officer before the applicant is informed of the officer's decision.[14] The officer may grant asylum, or, if they are unable to approve the application, refer the matter to an Immigration Judge (IJ) at the Executive Office for Immigration Review (EOIR) for further review.[15] This referral is not a denial, and the hearing before the IJ is independent of the asylum officer's decision.[16] The proceeding before the IJ is also known as "defensive asylum processing," and it is the same type of proceeding that takes place in the defensive asylum process.[17]

2. *Defensive Asylum*

Defensive asylum describes an application for asylum that is brought in defense against removal from the United States.[18] The defensive asylum process usually begins in one of three ways: 1) the applicant is referred to an IJ after his or her affirmative application for asylum could not be granted, as discussed above; 2) the applicant is placed in removal proceedings after being apprehended within the U.S. or at a port of entry without proper legal documents or in violation of their immigration status; or 3) the applicant is placed in removal proceedings after they were caught attempting to enter the U.S. without proper documentation, were placed in the expedited removal process, and were found to have a credible fear of persecution or torture.[19] The proceeding before the IJ takes the form of an adversarial hearing, in which the parties are the United States, represented by an Immigration and Customs Enforcement (ICE) attorney, and the noncitizen applicant, often not represented by counsel.[20] If the applicant testifies during the hearing, he or she may be cross-examined.[21] The IJ then decides what, if any, relief to grant, and either party can appeal the decision to the Board of Immigration Appeals (BIA).[22] In the event of an adverse ruling by the BIA, the applicant can appeal the decision to the appropriate federal circuit court.[23]

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13. *Id.*
14. *Id.*
15. *Id.*
16. *Obtaining Asylum in the United States*, *supra* note 6.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*; *see also* Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic*
Asylum Representation, 48 U. MICH. J.L. REFORM 1001, 1002 (2015).
21. U.S. DEP'T OF JUST., IMMIGR. COURT PRAC. MANUAL 80 (Nov. 16, 2020), https://www.justice.gov/eoir/page/file/1258536/download.
22. *Id.* at 81.
23. *Appeals*, JUSTIA, https://www.justia.com/immigration/appeals/#:~:text=BIA%20rulings%20are%20the%20final,to%20the%20Federal%20District%20Court (last updated Apr. 2018).

B. *The Role of Trauma in Asylum Cases*

As explained above, asylum is a form of immigration relief that offers refuge to individuals who are fleeing from past persecution or who can otherwise demonstrate a well-founded fear of suffering harm upon return to their country of origin.[24] By definition, many asylum-seekers come to the United States having experienced profoundly traumatic events.[25]

This trauma can prevent the applicants from testifying about their past experiences in a way that aligns with the criteria IJs look to in support of an applicant's credibility.[26] Research has shown that exposure to trauma can—and often does—impact both an individual's memory of the event itself, as well as the manner in which they relay that experience to others.[27] In the words of Stephen Paskey: trauma affects both the *story* and the *discourse* concerning the individual's traumatic experiences.[28] In the context of asylum hearings specifically, applicants' trauma can affect their in-court testimony and can often lead to inconsistencies between the applicant's oral account and their prior written declaration.[29] In addition, the effects of trauma on the applicant's demeanor and on the content of their testimony can lead to adverse credibility findings, resulting in a denial of asylum, even in cases in which the applicant would otherwise meet the statutory eligibility requirements.[30]

In determining an applicant's credibility, IJs consider the totality of the circumstances, including 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 . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record, 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.[31]

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24. 8 U.S.C.A. § 1158 (West 2009); *see also* 8 U.S.C.A. § 1101(a)(42) (West 2014) (defining refugee).

25. *See* Annie S. Lemoine, *Good Storytelling: A Trauma-Informed Approach to the Preparation of Domestic Violence-Related Asylum Claims*, 19 LOY. J. PUB. INT. L. 27, 39 (2017); Daniel Forman, *Improving Asylum Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process*, 16 CARDOZO J. INT'L & COMP. L. 207, 224 (2008).

26. *See* Lemoine, *supra* note 25, at 39–40; Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez-Ferreira v. Lynch: Re-assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 LAW & INEQ. 315, 322 (2018).

27. Mosley, *supra* note 26, at 316, 322; Forman, *supra* note 25, at 224.

28. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 495–96 (2016).

29. *Id.*

30. *Id.*; 8 U.S.C.A. § 1158 (West) (explaining eligibility criteria).

31. 8 U.S.C.A. §1158 (West).

An adverse credibility finding will almost certainly lead to a denial of asylum.[32]

Internal inconsistencies between the applicant's written statement and her in-court testimony, as well as the IJ's perception of the manner in which the testimony is given (*e.g.,* "vague," "unresponsive," "evasive"), are some of the primary reasons for adverse credibility determinations.[33] The applicant's credibility is thus directly tied to their ability to recount their traumatic experiences in a linear and consistent manner in the courtroom setting. However, the effects of trauma on memory and demeanor can make this an exceedingly difficult task for many asylum-seekers.

First, memories of traumatic events are stored in a different part of the brain than regular memories, making a chronological recounting of the events difficult.[34] Applicants often have trouble readily accessing the details of the traumatic experience, let alone bring them into a comprehensive and coherent narrative that they can then recite on the spot without any inconsistencies.[35] Second, as a result of their trauma, some asylum-seekers may suffer from Posttraumatic Stress Disorder (PTSD), which can further complicate recollection of the traumatic events and may also impact the applicant's perceived demeanor when giving their in-court testimony.[36] The psychological effects of trauma fall into three categories: "hyperarousal," "intrusion," and "constriction."[37] These symptoms may lead to the applicant appearing "skittish" and "irritable" or, in case of constriction, "detached."[38] It is not difficult to imagine how these effects might make it more difficult for the asylum-seeker to demonstrate her credibility in the courtroom.

Against this backdrop of applicants' traumatic experiences and the lack of trauma-informed training for IJs, some scholars have advocated for the adoption of non-adversarial asylum hearings, as the adversarial process is ill-suited to produce accurate credibility determinations—and ultimately asylum decisions.[39] However, the current adversarial system's failure to consistently elicit coherent narratives on which the IJ can base their decision is only one of several flaws scholars have identified in asylum proceedings and in the U.S. immigration system at large.

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32. Paskey, *supra* note 28, at 474.

33. *Id.*

34. Forman, *supra* note 25, at 224; Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 149 (2000).

35. *See* Forman, *supra* note 25, at 224–25.

36. *Id.*

37. Lemoine, *supra* note 25, at 41 ("Hyperarousal is a state of constant vigilance in which 'the human system of self-preservation seems to go onto permanent alert.' . . . Intrusion occurs in the form of unwelcome memories of the traumatic event, often triggered by '[s]mall, seemingly insignificant reminders.' . . . Constriction, or numbing, manifests as 'a state of detached calm, in which terror, rage, and pain dissolve.'").

38. *Id.*

39. Paskey, *supra* note 28, at 499, 512; Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 652 (2012).

II. SHORTCOMINGS OF THE CURRENT SYSTEM

Past research and scholarship in the immigration and asylum field have revealed troubling shortcomings in the current immigration system, including in asylum hearings. First, as indicated above, asylum hearings as they exist today are unlikely to effectively elicit coherent information from traumatized asylum-seekers, thereby undermining the quality and quantity of information on which IJs base their decisions.[40] Second, the present adversarial model results in an inequality of arms between the parties that renders the proceedings inherently unfair to the applicant. Third, the current system has resulted in vast disparities in asylum outcomes between individual IJs, suggesting a concerning degree of arbitrariness in the asylum process.[41] Lastly, the current immigration system, including the asylum process, is riddled with inefficiencies, which further strains an already over-burdened and under-resourced system.

A. *Inaccuracy*

Because the current system is ill-equipped to deal with the effects of applicants' past trauma, it is more likely to lead to inaccurate outcomes. As explained above, trauma plays a uniquely important role in asylum cases given that by the very nature of the relief sought, the applicants are likely to have either suffered first-hand or witnessed traumatizing experiences prior to their arrival in the United States. Because trauma's psychological effects already hinder an individual's ability to recall and relay the traumatizing events in a manner that is comprehensive, cohesive, and consistent, it is all the more important that the proceedings themselves do not further compound these negative effects on an applicant's ability to give coherent and comprehensive testimony.

Unfortunately, the adverse setting of asylum hearings achieves exactly that. In removal proceedings, the IJ has a statutory obligation to "receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."[42] In a study of asylum proceedings, Deborah Anker noted that in cross-examining the applicant, the judges were often "aggressive" and the government lawyers frequently "hostile, sarcastic, or disbelieving."[43] This dynamic, Anker observed, often created the appearance that the applicant was going up against not one but two government lawyers.[44] The

40. *See, e.g.*, Forman, *supra* note 25, at 224–25.

41. *See* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE—DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009) [hereinafter REFUGEE ROULETTE].

42. Notably, the judge has no statutory obligation to assist the applicant. *See* 8 U.S.C.A. § 1229a(b)(1) (West); *see also* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 489 (1992).

43. Anker, *supra* note 42, at 489, 493.

44. *Id*. at 489.

confrontations between the traumatized applicant, the IJ, and the zealous government lawyer can heighten the psychological stressors on the applicant, thus exacerbating the detrimental effects of trauma on their ability to testify in congruence with their written declaration.[45]

By creating an environment that actively makes it more difficult for the applicant to testify to the best of her ability, the adversarial process limits both the quantity and quality of information elicited from the asylum-seeker. As a result, the IJ is left to make her credibility determination, and ultimately the decision whether to grant asylum, based on flawed information—a poor basis for accurate eligibility determinations.

B. *Lack of Fairness*

In addition to the counterproductive environment created by the adversarial hearings, the current asylum system permits a staggering imbalance between the parties, rendering the proceedings inherently unfair to the applicant.[46] The unique procedures governing asylum hearings distinguish these proceedings from other types of adversarial settings, such as criminal trials.

First, most asylum-seekers do not have the benefit of legal representation.[47] While asylum-seekers have a statutory right to be represented by counsel, the U.S. government has no obligation to provide or appoint legal representation to applicants who cannot afford to hire a lawyer.[48] As a result, many asylum-seekers are forced to proceed *pro se* against a comparatively well-resourced and experienced government lawyer. Although an IJ can try to equalize this imbalance to a degree, for example, by asking the applicant questions to elicit favorable information or by explaining procedures and requirements to the applicant, this alone cannot remedy the unfairness created by a lack of legal representation.[49]

Second, applicants often deal with significant language barriers, cultural differences, past trauma, and a general lack of resources to help them address these disadvantages.[50] This further undermines the fairness of the proceedings and negatively impacts an applicant's ability to make her case effectively.[51] Having the help of a legal professional in preparing for the proceeding can make a deciding difference in the applicant's chances of success. In fact, data concerning success rates in removal proceedings showed

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45. *See* Paskey, *supra* note 28, at 501–03.

46. *See* Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1551–54 (2011).

47. *See, e.g.*, *id.* at 1552.

48. 8 U.S.C.A. § 1229a(b)(4)(A) (West).

49. Ardalan, *supra* note 20, at 1004.

50. *See* ARNOLD & PORTER LLP, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, 2 A.B.A COMM'N ON IMMIGR., 2–24–2–25, 5–7 (2019) [hereinafter ABA Report].

51. *See* Chapman, *supra* note 46, at 1551–54; Kidane, *supra* note 39, at 714–15.

that represented noncitizens were 10.5 times more likely to prevail in their removal proceedings than those appearing *pro se*.[52]

Third, unlike in traditional adversarial proceedings like criminal trials, the asylum applicant does not receive the benefit of certain procedural safeguards to ensure a level playing field.[53] Unlike in asylum proceedings, the government faces a high burden of proof (beyond a reasonable doubt) in criminal trials and must comply with strict evidentiary rules.[54] Although the relatively loose evidentiary rules governing asylum proceedings are intended to benefit unrepresented applicants, they do not necessarily work this way in practice.[55] The result is a proceeding in which the deck is automatically stacked against the applicant, who—often unrepresented and traumatized—is forced to go toe to toe with an experienced, potentially hostile ICE attorney.

C. *Discrepancies in Outcomes*

A 2007 study by Jaya Ramji-Nogales, Andrew Schoenholtz, and Phillip Schrag revealed vast discrepancies in outcomes between individual IJs, even within the same court.[56] Immigration Judges who shared certain characteristics were observed to grant relief at higher rates than those IJs who did not share the trait. For example, female IJs consistently had higher grant rates than their male counterparts.[57] This disparity in grant rates might be explained in part by the different backgrounds and prior work history of female IJs, as women were more likely than male IJs to have worked in the public interest/NGO field or academia—areas that are generally considered more immigrant-friendly than the male-dominated field of immigration enforcement.[58] Another theory for female judges' higher grant rates was that because female judges were more likely than their male counterparts to have experienced discrimination, they were more likely to believe and side with asylum applicants.[59] The reason individual characteristics have the power to create such disparate outcomes can be explained by the high degree of discretion afforded to IJs, especially with respect to credibility determinations.[60]

Although an IJ looks at several factors in assessing credibility, a study of BIA adjudications of adverse credibility findings showed that inconsistencies in the applicants' story have the greatest impact on whether an IJ will find an

52. *See* ABA Report, *supra* note 50, at 5–3.
53. Chapman, *supra* note 46, at 1552.
54. *Id*.
55. *Id*.
56. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 332 (2007).
57. *Id*. at 342.
58. *Id*. at 344–45.
59. Carrie Menkel-Meadow, *Asylum in a Different Voice: Judging Immigration Claims and Gender*, in REFUGEE ROULETTE, at 217 (2009).
60. *See* Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 377 (2003).

applicant to be believable.[61] As discussed previously, for many asylum-seekers, the impacts of trauma can make it exceedingly difficult to recount the events surrounding their persecution in a manner that is conventionally associated with authenticity and truthfulness—even where they should be eligible for asylum based on their past experiences. The data suggests that an IJ's subjective perception of an applicant's credibility is impacted not only by the possible effects of trauma on the applicant's ability to testify but also by the IJ's individual background and past experiences.[62] This introduces another layer of arbitrariness into the process and calls into question whether asylum hearings, as they exist today, lead to consistently accurate eligibility determinations.[63]

The wildly varying immigration outcomes cast doubt on the accuracy and fairness of the current system—especially in light of the significant impact of trauma on an applicant's memory and demeanor when testifying. The IJs' subjective and inconsistent decision-making is particularly alarming given the life-or-death stakes in asylum proceedings.[64]

D. *Inefficiency*

The current immigration system has been widely decried as inefficient, even "irredeemably dysfunctional and on the brink of collapse," with multiple layers of appellate review and a large number of government lawyers who spend their time arguing against (mostly) unrepresented applicants before the IJ.[65] The lack of representation for applicants further creates inefficiencies and delays.[66] Legal representation generally helps courts adjudicate cases more efficiently, in part because the presence of counsel avoids the need for the IJ to go "beyond their traditional judicial duties" by providing additional explanations to the *pro se* applicant.[67]

In addition, immigration courts are struggling to adjudicate a substantial backlog of cases. There were over 1.2 million pending cases in the U.S. immigration courts as of December 16, 2020.[68] This backlog only worsens the situation in the nation's immigration courts, whose funding and staffing have not kept pace with the recent increase in immigration enforcement.[69] Immigration Judges are struggling to keep up with their ever-growing

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61. Paskey, *supra* note 28, at 462, 524.
62. Kagan, *supra* note 60, at 367–77.
63. *See, e.g. id.*; *see also* ABA Report, *supra* note 50, at 6–9.
64. Kagan, *supra* note 60, at 377.
65. ABA Report, *supra* note 50, at 2–3.
66. *Id.* at 5–3.
67. *Id.* at 5–4 (quoting VERA INST. OF JUSTICE, EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 34 (Nov. 2017)); *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651–53 (2010).
68. *Backlog of Pending Cases in Immigration Courts*, TRAC IMMIGR. (2020), http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Dec. 16, 2020).
69. *See* ABA Report, *supra* note 50, at 6–9.

caseload while giving each case the attention it deserves.[70] Some scholars have pointed out that the crushing caseload with which IJs have to grapple on a daily basis may lead some judges to approach applicant testimonies and cross-examinations not as an opportunity for truth-finding but primarily for finding reasons to deny relief.[71] As will be discussed in more detail below, some reform proposals argue that government resources would be more efficiently spent on increasing the number of adjudicators to reduce the overall caseload per judge, while others see the creation of a new Article I court as the only solution to the current broken system.[72]

III. BENEFITS OF A NON-ADVERSARIAL SYSTEM

In light of the significant weaknesses in the current system, there is a clear need for reform to ensure that asylum hearings effectively serve their purpose: to accurately ascertain the applicant's eligibility for asylum in a fair and efficient proceeding. This Note posits that an inquisitorial format for asylum hearings would create the necessary (though not necessarily sufficient) foundation for a system that is more conducive to truth-finding and fairer to applicants. Additionally, there is an intrinsic value in designing asylum hearings to be non-adversarial, as it would promote more positive attitudes towards asylum and asylum-seekers.

A. *Truth-Finding*

First, unlike the current adversarial hearings, an inquisitorial approach would be more likely to elicit coherent narratives from traumatized applicants, allowing IJs to make their decisions based on more comprehensive information. As explained above, the asylum hearing's adversarial environment—and the cross-examination of the applicant in particular—are likely to exacerbate the negative effects of past trauma on the asylum-seeker's ability to testify coherently and in congruence with prior statements.[73] A non-adversarial approach to asylum hearings could create a less intimidating environment that would be more conducive to eliciting complete and coherent narratives from a traumatized asylum-seeker, and thus lead to more accurate credibility determinations.[74]

In addition, the inquisitorial model has been argued to be a more effective means of determining truth in legal proceedings. Many other countries rely on inquisitorial methods in their judicial systems to ensure accurate truth-

70. *See* Legomsky, *supra* note 67, at 1653.
71. *See* Paskey, *supra* note 28, at 502.
72. *See, e.g.*, ABA Report, *supra* note 50, at 6–3.
73. Lemoine, *supra* note 25, at 37–45; Mosley, *supra* note 26; Paskey, *supra* note 28, at 462; Forman, *supra* note 25, at 226.
74. Paskey, *supra* note 28, at 462; Forman, *supra* note 25, at 235.

finding.[75] Several scholars have discussed the shortcomings of adversarial proceedings in facilitating truth-finding by the adjudicator. One notable example was the late Judge Marvin E. Frankel, who pointed out that while in theory the ultimate goal of the trial should be finding the truth and arriving at the correct result, in practice, the adversary system often fails to serve these two goals effectively.[76] The main reason for this discrepancy is that the parties, rather than the adjudicator, primarily drive the adversarial truth-finding process. The court's role in the adversarial system is to rule on the evidence presented to it by the interested parties. The fundamental flaw, as Judge Frankel notes, is that the parties' goal is, first and foremost, to win.[77] Truth-finding is thus only a motivating factor to the extent that it is compatible with the primary objective of winning.[78] As Judge Frankel succinctly puts it: "[T]he truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time."[79] Leaving the investigation of truth primarily in the parties' hands is unlikely to lead to detached and neutral fact-finding.[80]

Though IJs are generally more actively involved in the truth-finding process (in part because of the absence of legal representation for applicants), the basic principle of Judge Frankel's argument still applies. In an effort to win in adversarial proceedings, including asylum hearings, advocates will use all legal tools in their arsenal, even if that means undermining the credibility of witnesses who are testifying truthfully.[81] While tactics like aggressive cross-examination can certainly be useful in weeding out false testimony, Judge Frankel warns:

> [T]o a considerable degree[,] these devices are like other potent weapons, equally lethal for heroes and villains. It is worth stressing, therefore, that the gladiator using the weapons in the courtroom is not primarily crusading after truth, but seeking to win. If this is banal, it is also overlooked too much[.][82]

In the inquisitorial model, there would be no need for a government lawyer (because there would be no opposing parties), and the adjudicator, in this case the IJ, would be in charge of uncovering the facts and determining the truth. Giving wider latitude to the adjudicator to engage in truth-seeking—rather than having to rely on evidence provided by parties whose objective is

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75. France and Germany are two examples of such countries. *See, e.g.*, Chapman, *supra* note 46, at 1537.
76. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035–36 (1975).
77. *Id.* at 1038.
78. *Id.*
79. *Id.* at 1037.
80. *Id.* at 1038.
81. Paskey, *supra* note 28, at 502–03.
82. Frankel, *supra* note 76, at 1039.

to prevail, not expose the truth—would likely result in more well-informed, accurate decisions.

B. *Fairness*

An inquisitorial format for asylum hearings would eliminate the uneven playing field of today's adversarial hearings and become more compatible with applicants' due process rights.

1. *Opportunity to Be Heard and Equality of Arms*

Noncitizens' due process rights are admittedly quite limited. The scope of due process protections to which a noncitizen is entitled under the Fifth Amendment depends on the type of legal proceeding, the noncitizen's ties to the United States, and their status as initial entrants (*i.e.,* individuals seeking initial admission to the United States), or their continuing presence in the country.[83] In the context of asylum proceedings, applicants have a due process right to receive "a meaningful opportunity to be heard" and to present evidence on their own behalf.[84] Despite the potential for life-or-death decisions in the asylum proceeding, indigent applicants do not have a right to appointed counsel—a fact that is often criticized by scholars and practitioners.[85] Unlike the majority of asylum applicants who do not have representation, agency lawyers always represent the United States.[86]

As explained in Section III, the lack of guaranteed legal counsel for asylum-seekers, in addition to the IJ's statutory obligations, can create conditions for the IJ to take on a more active role in the courtroom than would otherwise be the case. For example, IJs will participate in the cross-examination process and are likely to ask questions and guide the testimony.[87] In light of the lack of court-appointed legal counsel for indigent applicants, it is all the more important that the procedures in the courtroom not undermine the applicant's due process rights. Especially in the case of traumatized applicants, an overly abrasive tone and aggressive cross-examination by the judge and/or the government attorney creates an atmosphere that undermines the applicant's opportunity to be heard and tell their story.[88]

An inquisitorial system, in which the adjudicator works with the applicant to determine the facts and uncover the truth (similar to the non-adversarial interview in affirmative asylum cases), would create an environment that is less confrontational, less stressful, and thus less likely to exacerbate the

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83. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020).
84. *See* Kerciku v. INS, 314 F.3d 913, 917 (7th Cir. 2003).
85. *See* INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT (American Immigration Council 2016); Ardalan, *supra* note 20, at 1004; *see also* 8 U.S.C.A. § 1229a(b)(4)(A) (West).
86. *See, e.g.*, EAGLY & SHAFER, *supra* note 85, at 1.
87. *See* Legomsky, *supra* note 67, at 1653; Anker, *supra* note 42, at 496.
88. *See, e.g.*, Paskey, *supra* note 28, at 462; Forman, *supra* note 25, at 226.

negative effects of trauma on the applicant's memory and ability to communicate their experiences to the court. By creating an environment that is more conducive to complete and coherent testimony by the applicant, the inquisitorial model would provide a more meaningful opportunity for the applicant to be heard, in line with the due process requirements as recognized in the federal courts.[89]

Additionally, there is no need for a government attorney in the inquisitorial system, as the point is not for two parties to compete for victory, even at the expense of the truth. This transition away from the adversarial model where unrepresented applicants often have to defend their claim against seasoned ICE attorneys would help counteract the inequality of arms as it currently exists. The result would be a fairer proceeding overall.

2. *Fairness in Practice: VA Benefits Hearings*

While there are several reasons that support transitioning to a non-adversarial model for asylum hearings, what looks good on paper does not necessarily translate neatly into practice. The Department of Veterans Affairs (VA) benefits system serves as an apt illustration of an outwardly non-adversarial model that disadvantages the applicant in practice. To access VA disability benefits, a veteran must first file a claim with the VA.[90] The VA then reviews the claim and may ask the applicant for additional evidence if needed.[91] If the applicant disagrees with the VA's decision regarding the claim, he or she can choose between three possible paths forward:[92] 1) filing a Supplemental Claim, 2) requesting Higher Level Review, or 3) appealing to a Veterans Law Judge at the Board of Veterans' Appeals (BVA).[93] In addition, upon choosing to appeal to the BVA, an applicant can once again choose between three types of review: 1) a direct review, in which the applicant does not submit any additional evidence, and there is no hearing before the judge; 2) submit additional evidence to the Veterans Law Judge; or 3) request a hearing before the Veterans Law Judge with the option to submit additional evidence at the hearing or within 90 days of it.[94] These hearings can take place virtually at the applicant's home, via videoconference at a nearby VA location, or in person at the BVA in Washington, DC.[95]

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89. *See* 314 F.3d at 917.

90. *Eligibility for VA Disability Benefits*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/disability/eligibility/ (last updated Sept. 22, 2020).

91. *The VA Claim Process After You File Your Claim*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/disability/after-you-file-claim/ (last updated Oct. 8, 2020).

92. This procedure applies to decisions filed February 19, 2019 or later. *See VA Decision Reviews and Appeals*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/decision-reviews/ (last updated Nov. 17, 2020).

93. *Id.*

94. *Board Appeals*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/decision-reviews/board-appeal/ (last updated Sept. 29, 2020).

95. *Id.*

Unlike asylum hearings before an IJ, hearings before the BVA are always optional.[96] Furthermore, as mentioned above, applicants have the option of submitting additional evidence either at the hearing itself or within 90 days of the hearing date.[97] Applicants are encouraged to seek assistance from a trained and authorized representative to prepare for the hearing, and they may also have this representative present to help them during the hearing.[98] During the meeting, the judge will swear in the applicant and then engage in a "conversation" in which the judge will listen to the applicant's testimony and may ask additional questions.[99] Hearings normally take about thirty minutes.[100] In its description of the hearing, the VA clarifies that while the judge may ask questions of the applicant, "it won't be like a cross-examination."[101] Unlike asylum hearings, these procedures make the VA benefits system—at least on paper—decidedly non-adversarial. The reasoning for this format is that Congress did not want veterans and the country they served to be pitted against one another.[102]

However, some scholars have pointed out that this outwardly non-adversarial, veteran-friendly system actually leads to fewer procedural protections for applicants.[103] For example, disability benefits cases rely heavily on expert testimony by VA medical examiners who can speak to the nexus between the applicant's claimed disability and her military service.[104] There exists a rebuttable "presumption of competency" of VA medical examiners.[105] However, applicants have no access to the procedural means to obtain information to rebut this presumption, as cross-examination and interrogatories are not permitted in the non-adversarial system.[106] In this way, the non-adversarial format actually has the effect of preventing applicants from meaningfully challenging expert testimony, thus undermining its veteran-friendly, protective purpose and intent.[107]

The VA benefits procedures illustrate that even proceedings that are non-adversarial on paper are not guaranteed to be so in practice. In fact, where agency adjudicators make credibility determinations relying on evidentiary standards traditionally used in adversarial proceedings, any purported

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96. *See Board of Veterans' Appeals (BVA) Hearing*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/disability/file-an-appeal/board-of-veterans-appeals/ (last updated Apr. 30, 2020).

97. *Board Hearings with a Veterans Law Judge*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.va.gov/decision-reviews/board-appeal/veterans-law-judge-hearing/ (last updated Apr. 30, 2020).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Board of Veterans' Appeals (BVA) Hearing*, *supra* note 96. The source at the link describes the hearing requested pursuant to now-outdated procedures. However, the substance and procedures of the hearing itself have not changed.

102. Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. Rev. 277, 294–95 (2019).

103. *See, e.g.*, *id.* at 309–10.

104. *Id.* at 291.

105. *Id.* at 289.

106. *Id.* at 290.

107. *Id.*

benefits of a non-adversarial system to the applicant are severely undermined.[108] That is because the non-adversarial proceeding in the context of the veteran benefits does not provide the applicant with the same opportunities to defend their credibility as an adversarial one would.[109]

Transitioning from the current adversarial model for asylum hearings to an inquisitorial one without making any additional changes to the evidentiary standards imposed on the applicant would likely similarly lead to a mismatch between the procedures of the hearing and the outwardly non-adversarial, applicant-friendly premise. To avoid this, any change to a non-adversarial, inquisitorial proceeding likely would have to go hand-in-hand with concurrent adjustments of procedural safeguards to ensure a fair proceeding in practice. Nevertheless, the non-adversarial model would offer an opportunity to create a fair and balanced system that meets due process requirements.

C. *Intrinsic Value*

The way the United States structures its immigration system holds meaning that goes beyond the practical implications for the government and the applicants. How asylum hearings are structured sends a message to the American public, potential asylum-seekers, and to the rest of the world. In other words, the current system itself and the way it characterizes the applicant can shape public opinion on what type of hearing would be most appropriate. Conversely, public sentiment regarding immigrants also determines what kind of proceedings are deemed acceptable and appropriate. The increasing conflation of criminal law and immigration law (commonly referred to as "crimmigration") illustrates this dynamic well, as immigrants are often framed as criminals, deserving of increasingly harsh punishment.[110]

Adversarial systems do not fit or represent all values equally well. Professor Won Kidane notes that "judicial procedures often reflect society's fundamental values and sensibilities."[111] He further explains that there is "intrinsic value" commonly associated with adversarial hearings.[112] This inherent value consists of the political and cultural arguments in favor of such an adversarial system, including "distrust of government and respect for individual autonomy."[113] However, the values associated with adversarial proceedings vary from culture to culture.[114] In proceedings where applicants come from all over the globe, the cultural arguments in favor of an

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108. *See* Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 U. MEM. L. REV. 887, 891 (2015).

109. *Id.* at 900.

110. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006).

111. Kidane, *supra* note 39, at 654.

112. *Id.* at 683 (citing Samuel G. Gross, *The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 745 (1987)).

113. *Id.*

114. *Id.* at 684.

adversarial system are thus less convincing. Nor do they conclusively point towards the superiority of adversarial systems in general.[115]

Adversarial proceedings are unlikely to create the appearance of justice in the eyes of the applicants. However, proponents may contend that they may be more acceptable to the American public than inquisitorial hearings, given the uptick in anti-immigrant sentiment and a consistent concern about national security.[116] As the legislative record of the Immigration and Nationality Act (INA) reflects, concern about fraudulent asylum applications is an undercurrent running through much of the U.S.'s modern immigration legislation.[117] Based on the conference reports from the passing of the REAL ID Act and prior measures, many of the nation's lawmakers appear to have been particularly concerned about individuals abusing the asylum system to gain entry to the United States to commit acts of terror.[118] In light of these concerns about fraudulent asylum claims as a threat to national security, the adversarial system may be a deliberate attempt to deter false claims and signal to the American public and potential wrongdoers that abuses are taken seriously.

While the asylum system as it currently stands may be more acceptable to some, there is substantial intrinsic value in adopting non-adversarial asylum proceedings. In addition to promoting fair proceedings and accurate outcomes, inquisitorial hearings would signal a more positive view of asylum and a more welcoming attitude towards asylum-seekers. This messaging would be more in line with a primary concern about ensuring applicants' fundamental right to seek asylum[119] rather than a concern about deterring fraudulent asylum claims. Though cultural and political attitudes towards immigrants, including asylum-seekers, have become increasingly polarized, the preservation and protection of human rights have historically been an American value.[120] Because the design of the proceeding can impact societal attitudes, shifting to non-adversarial hearings would help prevent the further vilification of immigrants by subjecting them to criminal trial-like proceedings.

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115. *See id.*

116. *See, e.g.*, Faiza Patel, *Deference to Discrimination: Immigration and National Security in the Trump Era*, A.B.A. HUM. RTS. MAG. (Apr. 28, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/deference-to-discrimination/; SOUTHERN POVERTY L. CTR., *Anti-Immigrant*, https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-immigrant (last visited Mar. 26, 2021).

117. *See, e.g.*, H.R. REP. NO. 109–72, at 167 (2005).

118. *Id.*

119. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

120. *See, e.g.,* Press Release, Michael R. Pompeo, Sec'y of State, *On U.S. Dedication to Human Rights* (Nov. 9, 2020), https://2017-2021-translations.state.gov/2020/11/09/on-u-s-dedication-to-human-rights/index.html.

IV. PROPOSALS FOR REFORM

The immigration system is overloaded. IJs are overstretched and often work with limited resources.[121] Without reform, the current immigration and asylum system is unsustainable. The problems in the current system are manifold, but the goals of a successful reform proposal can be summarized as follows: efficiency, accuracy, fairness, and consistency.[122]

Scholars have made a variety of proposals for reform, from demanding a presumption of credibility[123] to advocating for the incorporation of alternative dispute resolution (ADR) techniques,[124] or calling for a non-adversarial system for all asylum claims,[125] or even all immigration hearings.[126] Unfortunately, none of the proposals seem to strike the right balance between being realistically attainable given financial limitations and lack of political will to undertake substantial reform efforts and making a meaningful, practical difference for asylum-seekers.

Nevertheless, they provide a solid foundation for the development of a workable solution. Possibly the most promising proposal is that of Stephen Paskey, which builds on the suggestions for reform made by Professors Stephen Legomsky and Won Kidane. Paskey presents two options for reform: an easier one that can be achieved through executive action alone and a more far-reaching, difficult one that would require Congress to act.[127] Both proposals would serve the goals of accuracy and fairness by adopting a non-adversarial format.

Paskey's first proposal would be to expand the existing network of Asylum Offices and adjudicate all asylum claims there.[128] For applicants in defensive asylum proceedings, the removal proceedings would be continued, pending an eligibility determination for asylum, such that the removal proceeding would be terminated if the applicant was found to be eligible.[129] This reform proposal also includes the addition of officers and staff, the hiring of professional interpreters, and the creation of a formal record, including transcripts.[130] Though this sounds anything but easy, the reason this is the less involved proposal is that it could be accomplished solely through executive action.[131]

The second option would be to eliminate existing Asylum Offices and create a new, independent administrative tribunal entirely that shifts personnel

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121. *See, e.g.*, ABA Report, *supra* note 50, at 2–26.
122. *See* Legomsky, *supra* note 67, at 1645.
123. *See generally* Durst, *supra* note 34.
124. *See generally* Forman, *supra* note 25.
125. *See generally* Paskey, *supra* note 28.
126. *See generally* Kidane, *supra* note 39.
127. Paskey, *supra* note 28, at 515.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

from the ranks of IJs and current government lawyers to the new tribunal.[132] This proposal would reduce the workload and preserve resources in the long run, meeting the efficiency goal. However, unlike the first option, this proposal would require congressional action. Preservation of scarce judicial resources had been a motivating factor in a variety of both congressional and agency actions in the immigration context.[133] However, transitioning to such a model would likely require significant expenses in the short- and medium-term, making lawmakers unlikely to support this course of action.

Additionally, any proposal for reform would have to be refined to include mechanisms to ensure more consistent outcomes and less variance between individual IJs, including more robust training and guidelines for credibility assessments.[134] Without such micro-level reforms, it is unclear how a transition to a non-adversarial format by itself would effectively address the issue of discrepancies in immigration outcomes.

V. CONCLUSION

The current asylum system is plagued by inefficiency, lack of fairness, and vast disparities in outcomes. It is ill-suited to produce reliable credibility determinations of traumatized applicants and thus unlikely to lead to accurate asylum decisions. An inquisitorial format for asylum hearings, if implemented properly, would make the proceedings fairer, more accurate, and more efficient. However, the details of what a proper implementation of an inquisitorial asylum system would look like are unclear. There have been many proposals for reform and none of them appear to provide a realistically workable solution that would still bring about meaningful change. Ultimately, Stephen Paskey's proposal to adjudicate all asylum claims in non-adversarial proceedings before an Asylum Officer likely offers the best foundation for future plans for reform. Although any amount of reform will be an uphill battle in the absence of political will, we should not underestimate the possible impact of smaller-scale changes as a first step, particularly more robust trauma-informed training for IJs and government attorneys.

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132. *Id.*

133. *See, e.g.*, H.R. REP. NO. 109–72, *supra* note 117, at 174.

134. *See* Paskey, *supra* note 28, at 510; Kagan, *supra* note 60, at 368. For a comprehensive reform proposal to address discrepancies in outcomes, see REFUGEE ROULETTE, *supra* note 41, at Chapter 6.B.