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# Putting the "I" in Wrtng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story

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# PUTTING THE “I” IN WR\*TING: DRAFTING AN A/EFFECTIVE PERSONAL STATEMENT TO TELL A WINNING REFUGEE STORY

*Stacy Caplow\**

## I. INTRODUCTION

For lawyers representing asylum seekers, a narrative told in the first person is the central evidence in the case. The story eventually will be related in oral testimony before either an asylum officer or an immigration judge, or both, but a written personal statement in affidavit format drafted by a legal representative will be the first exposure the fact finder has to the heart of the claim.<sup>1</sup> That affidavit, like an opening statement, creates a lasting first impression that previews the facts, establishes the case theory, introduces the client, and sets the stage for all subsequent proceedings.

The first person singular rarely has a place in legal writing during law school; indeed, it seems to be bred out of first-year students as they are introduced to this craft. So, when students in the asylum law clinic I teach are confronted by the task of drafting an affidavit, they are almost always unprepared to write in their client's voice. Law students are exposed to a wide range of legal documents—from client letters, to contracts, to appellate briefs—but the affidavit receives virtually no attention.

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\* © 2008, Stacy Caplow. All rights reserved. Professor of Law and Director of Clinical Legal Education, Brooklyn Law School. This Article metamorphosed out of a presentation at the Applied Legal Storytelling Conference: *Once upon a Legal Time*, July 18–20, 2007, in London, United Kingdom. I am grateful to the organizers and participants at the conference for stimulating me to think more about storytelling; to the Brooklyn Law School Summer Research Stipend; and to my colleagues, Elizabeth Fajans, Minna Kotkin, Dan Smulian, and Marilyn Walter. The clients of the Safe Harbor Project and the students who are their devoted advocates inspire me every day to be the best lawyer and teacher possible.

<sup>1</sup> An affidavit is a “voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.” *Black’s Law Dictionary* 62 (8th ed., Thomson/West 2004). Often a declaration is submitted instead of an affidavit since it can be completed without notarization. In asylum practice, many statements are submitted without notarization pursuant to 28 U.S.C. § 1746, especially when the declarant is outside of the United States.

There are, of course, different kinds of affidavits that call for different approaches in their composition. Some are written by a person with an interest or stake in the matter; others are written by non-party witnesses or experts. The goal or point of the affidavit likely will dictate its tone, degree of formality and objectivity, and level of detail. In litigation, affidavits usually are submitted in support of motions, such as summary judgment, or as part of discovery. In other forms of practice, affidavits might be submitted in connection with fairly routine matters such as a will for probate or an application for a search warrant. As one author concedes,

Most lawyers will need to prepare an affidavit at some time; many will write dozens, if not hundreds. For most lawyers, writing an affidavit is strictly routine: drag out an old form, duplicate it, and change the details.<sup>2</sup>

Despite the crucial, recurrent, if unheralded, role of the affidavit in legal practice, it receives little or no attention in legal writing texts. If it is discussed at all, the focus tends to be on form and organization rather than content.<sup>3</sup> As a result of this second-

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<sup>2</sup> Wayne Schiess, *Writing for the Legal Audience* 92 (Carolina Academic Press 2003). Today, the Multistate Performance Test (MPT), administered as part of the bar examinations of thirty-three states, might require students to draft an affidavit as a means of assessing the test-taker's ability to apply legal skills to a realistic factual situation. See Natl. Conf. B. Examiners, *Description of the MPT*, <http://www.ncbex.org/multistate-tests/mpt/mpt-faqs/description1/> (accessed Sept. 7, 2007).

<sup>3</sup> My search of legal writing texts turned up three chapters or sections of chapters addressing affidavit drafting. Each of these chapters offers some useful practical advice on how to write and organize an affidavit with tips about using boldface and headings, and avoiding legal jargon. They caution the writer to understand the goals of the affidavit and the procedural and evidentiary rules that apply. Elizabeth Fajans et al., *Writing for Law Practice* 108, 113–116 (Found. Press 2004); *The Redbook: A Manual on Legal Style* 375–381 (Bryan A. Garner ed., West Group 2002) [hereinafter *The Redbook*]; Schiess, *supra* n. 2, at 92–100. Another offers a skeletal example. Carol Ann Wilson, *Plain Language Pleadings* 88–89 (Prentice Hall 1996).

Most other legal writing texts contain no references to affidavits at all. See e.g. Susan L. Brody et al., *Legal Drafting* (Aspen Publishers 1995); Vida R. Charrow et al., *Clear and Effective Legal Writing* (3d ed., Aspen Publishers 2001); Linda H. Edwards, *Legal Writing: Process, Analysis & Organization* (4th ed., Aspen Publishers 2006); Thomas R. Haggard, *Legal Drafting* (2d ed., Thomson/West 2007); Michael D. Murray & Christy H. DeSanctis, *Legal Research & Writing* (Found. Press 2005); Richard K. Neumann, Jr., *Legal Reasoning & Legal Writing: Structure, Strategy and Style* (5th ed., Aspen Publishers 2005); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research and Writing* (4th ed., Aspen Publishers 2006); Diana V. Pratt, *Legal Writing: A Systematic Approach* (4th ed., West Publ. 1999); Deborah A. Schmedemann & Christine L. Kunz, *Synthesis: Legal Reading, Reasoning and Writing* (3d ed., Aspen Publishers 2007); Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* (4th ed., LexisNexis 2004); Helene S. Shapo et al., *Writing and Analysis in the Law* (4th ed., Found. Press 2003); Robin Welford Slocum, *Legal Reasoning, Writing & Persuasive Argument* (2d ed., Matthew Bender

class status, when advice is offered about affidavit-drafting, it tends to be perfunctory, and lacks the theoretical underpinnings developed to teach effective legal writing in other formats.<sup>4</sup> At most, the guidance is to be clear about the purpose of the affidavit, use straightforward language, explain the basis for the affiant's knowledge, and make the document readable.<sup>5</sup> The dearth of written materials authored by legal writing experts available to assign students to teach them the skill and the rhetoric of affidavit-drafting is especially frustrating in a clinic where this document plays such a leading role in the advocacy.

Materials written by asylum law advocates and immigration lawyers are slightly more helpful, largely because they understand and address the specific needs of these cases.<sup>6</sup> All recognize the critical importance of the asylum applicant's affidavit, as well as the contribution made by expert affidavits on such issues as physical and mental health, social and political conditions, or cultural practices. However, few offer much guidance about how to draft an affidavit beyond the superficial. The usual fall-back is to provide an example.<sup>7</sup>

This essay attempts to fill the void in legal writing texts and other materials and to amplify the usually wise, but often too general, advice of asylum advocates. After introducing briefly the asylum process and the role of the affidavit in it, I offer a model for

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2006). Even texts designed for advanced legal writing do not address affidavits. See e.g. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* (2d ed., Thomson/West 2003).

<sup>4</sup> Practitioners give affidavit drafting short shrift, too. A quick on-line search uncovered only a few practitioner-oriented "how-to" articles devoting some discussion to affidavit drafting. See e.g. David L. Lee, *Legal Writing: Summary Judgment: The Intersection of Legal Writing & Trial Practice*, 12 Chi. B. Assn. Rec. 16, 22 (Apr. 1998); Scott Moise, *The Scrivener: Affidavits*, 16 S.C. Law. 47 (2005); Jason Vail, *Legal Practice Tips: Attention to Detail: How to Draft Testimony*, 60 Or. St. B. Bull. 31 (1999). The advice offered by these articles was strategic (Lee: "Draft your affidavits and choose your affiants like you were preparing for trial."); stylistic (Vail: "Write like an ordinary person."); technical (Vail: "Get the *jurat* right." or Moise: "Affirmatively state in the affidavit that it is being made upon personal knowledge or . . . upon information and belief."); or ethical (Moise: "Be ethical . . . Lawyers may not . . . elicit improper and untrue testimony."). In Canada, lay persons are given the advice to follow the "S.O.S. Principle" (simple, organized, short). David Mossop, Q.C., *Drafting Affidavits: A Lay Person's Guide*, <http://www2.povnet.org/uploads/images/172/Drafting.Affidavits.GUIDE.4thd.Edition.pdf> (June 10, 2004).

<sup>5</sup> See *The Redbook*, *supra* n. 3; Schies, *supra* n. 2.

<sup>6</sup> Deborah E. Anker, *Law of Asylum in the United States* 102–112 (3d ed., Refugee L. Ctr. 1999).

<sup>7</sup> See e.g. Regina Germain, *Asylum Law Primer*, app. 2C (4th ed., Am. Immig. Lawyer's Assn. 2007); Charles Gordon et al., *Immigration Law & Procedure* vol. 9, app. B, 269–271 (Matthew Bender 1999).

teaching affidavit drafting in this admittedly rarified and even idiosyncratic practice area. While I cannot guarantee that lawyers, law teachers, or law students will be comfortable transferring this theory to other areas of practice, perhaps some helpful and adaptable common threads will emerge.

## II. ASYLUM LAW AND THE APPLICANT'S AFFIDAVIT

Asylum cases depend heavily on facts, both to meet the legal standard for eligibility and to establish credibility. The facts need to be detailed, plausible, and consistent, and the applicant must relate them convincingly in writing and orally. This is standard advice, unquestionably true, but so vague that it offers no usable guidance about how to translate facts into a story that compels the desired result.

An application for asylum has only one prerequisite: a timely-filed Department of Homeland Security form known as an I-589.<sup>8</sup> This form requires the asylum seeker to answer specific questions that, to the informed eye, mirror the essential elements of the statutory definition of "refugee," which have to be satisfied to be eligible for relief. A refugee is

[A]ny person who is outside any country of such person's nationality and . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .<sup>9</sup>

An asylee is a refugee who is physically present in the United States at the time of the application.<sup>10</sup>

On the form, the asylum seeker simply checks a box to answer: "I am seeking asylum or withholding of removal based on . . . race, . . . religion, . . . nationality, . . . political opinion, . . . membership in a particular social group, . . . Torture Convention." Another question asks, "Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in

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<sup>8</sup> 8 C.F.R. § 208.3. A copy of the form is available at on the United States Citizenship and Immigration Services web site, [www.uscis.gov](http://www.uscis.gov), on the Immigration Forms page.

<sup>9</sup> I.N.A. § 101(a)(42). The statutory refugee definition, promulgated in The Refugee Act of 1980, Pub. L. No 96-212, 904 Stat. 102 (1980), has its origins in the 1967 *United Nations Protocol Relating to the Status of Refugees* (Oct. 4, 1967) 606 U.N.T.S. 267.

<sup>10</sup> I.N.A. § 208.

the past by anyone?" Another question asks, "Do you fear harm or mistreatment if you return to your home country?" Other questions address possible bars or exceptions. For many questions, there is space provided to explain "in detail" any answer requiring elaboration.

Asylum can be granted solely on the basis of facts set forth in this application after an interview with an Asylum Officer<sup>11</sup> or a hearing in Immigration Court.<sup>12</sup> The asylum seeker bears the burden of proving a "reasonable possibility" that she or he will be persecuted on account of at least one of the protected grounds if forced to return to a particular country.<sup>13</sup> Like most administrative law adjudications, both the interview and the hearing are less formal than regular court proceedings.<sup>14</sup> Evidentiary rules such as hearsay are not in effect.<sup>15</sup> This allows the applicant to testify about threats or other statements made by a persecutor or other non-available witnesses, to offer conclusions and speculation about the intent and motive of the persecutor, and to submit affidavits that can be received into evidence despite the lack of opportunity to cross-examine the declarant. Notwithstanding this more lenient environment, usually considerable supporting evidence has to be submitted to meet even this fairly low burden of proof.

Many applicants are unrealistic about their chances of success and fail to appreciate the nuances of the law, the potential for misunderstandings about language and culture, and the role of credibility assessments. As the caption of one famous cartoon so aptly illustrates, however, success is elusive: The applicant ap-

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<sup>11</sup> Asylum Officers receive special training in international relations and law and also non-confrontational interviewing techniques. 8 C.F.R. § 208.1 Asylum offices nationwide are under the jurisdiction of the Department of Homeland Security. By regulation, the interview process is non-adversarial and confidential. 8 C.F.R. § 208.9.

<sup>12</sup> Immigration Judges conduct hearings under Section 240 of the I.N.A. and exercise the powers and duties delegated to them by the Attorney General of the United States. 8 C.F.R. § 1003.10. The Immigration Court is part of the Executive Office of Immigration Review, which is a branch of the Department of Justice. See U.S. Dept. of Just. Exec. Off. for Immig. Rev., <http://www.usdoj.gov/eoir> (accessed Nov. 29, 2007).

<sup>13</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

<sup>14</sup> 8 C.F.R. § 208.9(b) (interviews); 8 C.F.R. § 1240.7(a) (hearings); U.S. Dept. of Just., Immig. & Naturalization Serv., *Basic Law Manual* (1994); see also *Matter of Wahud*, 19 I & N Dec. 182, 188 (BIA 1984).

<sup>15</sup> The Federal Rules of Evidence do not apply to administrative proceedings. *Villegas-Valenzuela v. I.N.S.*, 103 F.3d 805, 812 (9th Cir. 1996). Immigration proceedings adopt the more generous approach of the Administrative Procedures Act. 5 U.S.C. § 556(d) (excluding only "irrelevant, immaterial, or unduly repetitious material"). An Immigration Judge, therefore, "may receive any oral or written statement that is material and relevant to any issue in the case." 8 C.F.R. § 1240.7(a).

pearing before an asylum officer asks, "What kind of evidence would be enough?" The asylum officer responds, "A note from your dictator."<sup>16</sup>

Undue optimism leads many applicants to try to navigate the process on their own, a choice that rarely pays off.<sup>17</sup> It is well documented that an applicant has a significantly greater chance of success if she or he has counsel or other qualified representation.<sup>18</sup> Unrepresented applicants usually rely only on their applications or may submit some additional materials that they hope will substantiate the claim such as identity documents, medical records, news articles, other official records of arrests, court proceedings, or organization membership cards if they are available. In many instances, the fact finder is dubious about the authenticity of these submissions particularly from countries where fraudulent documents are easy to obtain. Without the assistance of counsel, these documents are not woven into a coherent story, so the fact finder may not give much weight to their contents. Often the applicants have nothing to proffer other than their sworn testimony because they fled without time to gather documents or to compile their records. Indeed, the overall grant rate for asylum applications at the asylum office level is around 32 percent<sup>19</sup> and in immigration court around 24.5 percent.<sup>20</sup>

With the passage of the REAL ID Act of 2005,<sup>21</sup> the requirements for proof have become more stringent. Although it is still

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<sup>16</sup> Dan Wasserman, L.A. Times (1984) (reprinted in David A. Martin et al., *Forced Migration: Law and Policy* 146 (Thomson/West 2007)).

<sup>17</sup> An asylum applicant can be interviewed without any representative present although non-lawyers are permitted to appear on behalf of non-citizens in the asylum office and in immigration court if they are properly certified. 8 C.F.R. § 1292.1(a).

<sup>18</sup> According to a recent study, in immigration court "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, as compared to a rate of 16.3% without legal counsel—a difference of 180%." Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007). Earlier studies had confirmed this phenomenon. See Andrew I. Schoenholtz & Jonathon Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immig. L.J. 739, 739–740 (2002).

<sup>19</sup> The DHS reported the number of filings and the number of asylum grants at the Asylum Office through 2004. See Dept. of Homeland Sec., *2004 Yearbook of Immigration Statistics*, tbl.16, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf> (accessed Feb. 6, 2008). As of 2006, the DHS reported only the number of cases granted by the asylum office and immigration court, 12,873 and 13,240 respectively, not the percentage of those filed. Department of Homeland Security, *Annual Flow Report, 2006*, [http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee\\_AsySec508Compliant.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsySec508Compliant.pdf) (accessed Sept. 8, 2007).

<sup>20</sup> U.S. Dept. of Just., Exec. Off. of Immig. Rev., *Immigration Court, 2006 Asylum Statistics*, <http://www.usdoj.gov/eoir/foia/FY06AsyStats.pdf> (accessed Sept. 8, 2007).

<sup>21</sup> Pub. L. No. 109-13 at § 101(a)(3) (May 11, 2005).

possible to grant asylum solely on the testimony of the applicant,<sup>22</sup> when it is reasonable to expect corroborating evidence, the applicant must produce it or provide a convincing explanation for its absence.<sup>23</sup> Appellate review of this determination by the immigration judge is very limited as well.<sup>24</sup> Moreover, when making the all-important credibility assessment, inconsistencies may be invoked as a basis for denial without much fear of reversal by the Board of Immigration Appeals.<sup>25</sup> Small mistakes, a lack of access to resources such as expert witnesses, and unfamiliarity with the expectations and norms of the United States legal system, all contribute to the failure of pro se applicants to secure asylum, even when the facts of the case potentially might be strong enough to deserve relief.

Since legal representation alone makes such an enormous difference to the success of an asylum application, and since not all lawyers are equally proficient, it is vital to educate and train asylum advocates how to present the most effective and persuasive case.

As every experienced asylum advocate knows, the personal statement describing the grounds for asylum is the "centerpiece" of the asylum application.<sup>26</sup> A thorough lawyer also will submit a memorandum arguing and synthesizing all of the evidence, which might include both adjudicative (what actually happened) and leg-

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<sup>22</sup> "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. §§ 208.13(a), 208.16(b); see also *Matter of Mogharabi*, 19 I & N Dec. 439, 445 (BIA 1985) (If the applicant's "testimony is believable, consistent and sufficiently detailed to provide a plausible account of the basis of his fear," relief can be granted on the basis of the facts elicited.).

<sup>23</sup> "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." The REAL ID Act also toughened the standard governing inconsistencies. Before 2005, to discredit testimony based on an inconsistency had to be significant and relate to the heart of the claim. Now, the test allows the adjudicator to examine the totality of the circumstances on credibility matters. I.N.A. § 208(b)(1)(B)(iii).

<sup>24</sup> Section 208(b)(1)(B)(ii) of the I.N.A., as amended by the REAL ID Act, says that "[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."

<sup>25</sup> Although credibility determinations are subject to administrative and judicial review, since 2003 when standards of review tightened, the Board of Immigration Appeals can reverse the credibility findings of an immigration judge only if they are "clearly erroneous." 8 C.F.R. § 1003.1(d)(i). Judicial review of fact finding by federal circuit courts is similarly deferential, authorizing reversal only if the evidence compels a conclusion contrary to that of the fact finder. I.N.A. § 242(b)(4)(B).

<sup>26</sup> Kirsten Schlenger, *The Nuts and Bolts of Representing an Asylum Applicant* 8 (PLI 1998) (on file with Author).

islative (general conditions about the homeland) facts as well as the applicable law.<sup>27</sup>

Refugee adjudication is a specialized field, characterized by a particular set of procedures before fact finders who are professionals with experience and expertise in these cases. An asylum officer or immigration judge may preside over three to four cases a day. Asylum officers receive training about specific countries and issues.<sup>28</sup> Immigration judges are required by statute to be attorneys,<sup>29</sup> and the job description calls for experience in immigration law and trial procedures.<sup>30</sup> Unlike lay jurors, who listen to evidence in a single case and evaluate facts in isolation, they may hear similar claims from the same country on repeated occasions. This foreknowledge must be taken into account in presenting the case theory and evidence in order to both fit preexisting expectations of a stock story and to present the singularity of the individual.

Any affidavit crafted by a lawyer would improve a pro se application for no other reason than the attorney's presumed basic skills. Even affidavits written by lawyers, however, tend to be cautiously neutral, tracking closely to the conservative approach of a straightforward, direct, and unembellished chronological recitation of events.<sup>31</sup> Students in an asylum clinic, however, are taught to

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<sup>27</sup> Martin et al., *supra* n. 16, at 539–547. In addition to the application form and the applicant's affidavit, a typical evidence packet might include personal documents corroborating identity and the claim, evidence of general country conditions as well as specific materials relating to this claim, expert affidavits, and fact witness affidavits.

<sup>28</sup> "The Director of International Affairs shall ensure that asylum officers receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles. The Director of International Affairs shall also, in cooperation with the Department of State and other appropriate sources, compile and disseminate to asylum officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social groups, or political opinion, torture of persons in other countries and other information relevant to asylum determinations, and shall maintain a documentation center with information on human rights conditions." 8 C.F.R. § 208.1(b).

<sup>29</sup> I.N.A. § 101(b)(4).

<sup>30</sup> The job qualifications are not codified presently. In a recent posting by the Executive Office of Immigration Review, the description of the position included seven years of practice, substantial knowledge of the I.N.A. and its regulations, considerable litigation experience, ability to conduct administrative hearings, and knowledge of judicial practices. USAJOBS, <http://www.usajobs.gov/> (accessed July 2003). Section 703(a)(2) of the Comprehensive Immigration Reform Act of 2006, Senate Bill 2611, passed by the Senate on May 25, 2006, but never enacted into law, set forth the following qualifications for immigration judges: an attorney in good standing of a bar of a State or the District of Columbia with at least five years of professional or legal expertise or at least three years professional or legal expertise in immigration and nationality law.

<sup>31</sup> In Fajans et al., *supra* n. 3, the authors note favorably about their sample affidavit

strive for a more comprehensive, creative, and painstakingly detailed document that delicately balances the case theory and the client's voice but also tells a story of courage, suffering, loss, sacrifice, and exile.<sup>32</sup> They are taught that a well constructed asylum claim must relate a story that uses all of the persuasive tools of classical rhetoric (*logos*, *pathos*, and *ethos*) contained within a narrative structure to produce a story that is convincing to even the most dubious audience. The messy, arduous, and lengthy process of eliciting facts, figuring out how to organize and prioritize them, and then reduce them to writing is critical to the construction of the story, to its coherence and credibility, and to empowering the asylum seeker to communicate confidently and believably at the interview or hearing.

### III. EXPROPRIATING SELECTIVELY FROM THEORIES OF WRITING

All advocates know how consequential their written presentation of the case theory and the facts can be. In the case of refugee representation, where the stakes are so high, sometimes life-or-death, the pressure to tell a compelling story is enormous. Yet, even the most conscientious and expressive lawyer may simply be building a case from a template without necessarily understanding all of the tools and materials they are using.<sup>33</sup> It is critical to provide the means to liberate the affidavit drafter from the constraints of third-person objectivity, a degree of freedom comes from understanding the power of stories, voice, image, theme, and plot and a willingness to express forcefully and vividly the words that propel the reader to the desired conclusion.

One set of training materials for representatives of asylum seekers offers some excellent advice. The affidavit should

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that its drafter "has resisted the temptation to use intensifiers, instead providing a largely neutral, straightforward account." The authors comment that the single use of "overtly persuasive" language is all the more persuasive for its uniqueness. *Id.* at 115 n. 33.

<sup>32</sup> There is a concern that the affidavit not be so detailed as to risk possible inconsistencies when the affiant relates the facts under the pressure of oral testimony. For example, an adequately detailed affidavit might state that the person was at a party when the police arrived, but omit the nature of the celebration in case he or she forgets or gets confused on the witness stand.

<sup>33</sup> Many writers simply type away guided by the conventions of the particular document without being consciously analytical about the process itself. Like other skills, legal writers develop expertise with practice and reflection. See generally Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Bks., Inc. 1983).

tell the asylum officer why your client deserves asylum. It should be detailed, consistent and supported by country conditions documents. It should be a compelling, well written account which intrigues and involves the reader. It should horrify if your client suffered horrible persecution; it should offend the sense of what is right and wrong; it should reflect your client's strength of convictions and character and his determination to be who he is and not to be intimidated. By the end of the declaration, the reader should feel that there is no choice but to grant asylum.<sup>34</sup>

Probably because this writer is an experienced advocate who understands the process and the audience,<sup>35</sup> this instruction forcefully captures several theories of writing and advocacy. It sets forth all of the elements of classical argumentation proving that the best advocates, perhaps unwittingly, and in different proportions, insert time-honored rhetorical techniques into the asylum seeker's affidavit. As this advice also suggests, these rhetorical devices support what should become a riveting narrative that engages and influences the audience to reach a desired outcome. The final product emanates from a process of recursive writing to construct a story that fulfills the expectations of the fact finder.

The next Sections will break down and also build upon this sound advice. In thinking about affidavit drafting, I discovered a patchwork of related ideas that struck me as particularly germane to the work of asylum advocates. I will briefly describe aspects of several theories that seem particularly relevant to affidavit writing and that could be used to enhance and give texture to the asylum affidavit.<sup>36</sup> Moreover, they help explain to students how to create a forceful document. The following section will apply these theories to a specific fact pattern to demonstrate how revisions to a story to emphasize, deepen, and strengthen the facts, themes, language, and story progression can arrive at the "no choice but to grant asylum" result this commentator rightly posits as the ultimate goal for the affidavit writer. Along the way, this illustration will show a drafting process that enhances the writer's under-

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<sup>34</sup> Schlenger, *supra* n. 26.

<sup>35</sup> Kirsten Schlenger is a founder and managing partner of Weaver, Schlenger & Mazel, an immigration law firm in San Francisco. For a biography of Kirsten Schlenger, see <http://www.weaver-schlenger.com/kirsten-schlenger.html>.

<sup>36</sup> My understanding of the issues and debates in legal writing pedagogy is admittedly superficial. Thus, I selected those aspects of these theories that best advanced my thesis of how they can be applied to affidavit drafting.

standing of the facts, assists in the formulation of a coherent case theory, produces a more forceful written account, and fortifies the client for the eventual testimony.

### A. Classical Rhetoric

*Logos*, *pathos*, and *ethos* are the three pillars of classical rhetoric.<sup>37</sup> *Logos* is the process of using logic and reason to persuade. It is the most familiar approach for lawyers whose training prepares them to routinely argue about rules and policies and to draw inferences by analogy. *Pathos* persuades through the use of argumentation designed to stir an emotional response in the listener such as pity, horror, jealousy, patriotism, or pride. Unlike other areas of law where logic and reason dominate, emotions are at the core of asylum law and are at the forefront of argumentation even when camouflaged in arguments that sound like legal analysis.

The third type of persuasion is *ethos*, which refers to the relationship between the writer or speaker and the audience. Witnesses, the principal storytellers at a legal proceeding, need to make this connection so that the adjudicator is inclined to credit their version of the facts. Lawyers arguing to a jury always want to establish personal authority and credibility that bolster the arguments they make. Sometimes their positive personal connections with the jury camouflage less savory clients. In the context of legal writing, *ethos* can be conveyed in familiar ethical terms: accurate and honest recitations of fact and law, candor to the tribunal, zealous representation, and professionalism.<sup>38</sup>

It is easy to see each of these techniques reflected in the paragraph quoted above. The sentence "*It should be detailed, consistent and supported by country conditions documents*" appeals to reason and logic, as well as indirectly sets forth the relevant legal standard of proof. The direction that "*It should be a compelling, well written account*" also addresses the lawyer's craft. This, too, is *logos*. Appeals to emotion, *pathos*, are embodied in the phrases "*It*

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<sup>37</sup> This summary of classical rhetoric relies heavily on the user-friendly book, Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Legal Writing* 22-24, 94-99 (Aspen Publishers 2002). For articles about classical rhetoric over the centuries and its relationship to legal argumentation, see Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85 (1994), and Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. Cal. Interdis. L.J. 613 (1999).

<sup>38</sup> Smith, *supra* n. 37, at 103-122.

should horrify if your client suffered horrible persecution; it should offend the sense of what is right and wrong. . . ." The reader's sympathies about severe, inhumane mistreatment are invoked as is the consequent outrage against such injustice. Finally, *ethos*, a strong identification with the client as a heroic figure who deserves admiration and respect is found in the statement "[I]t should reflect your client's strength of convictions and character and his determination to be who he is and not to be intimidated." These are traits with which most people would like to identify.

The forceful conclusion of this advice-giver merits attention because it really is a version of *pathos* now directed at the audience of would-be refugee advocates: "By the end of the declaration, the reader should feel that there is no choice but to grant asylum." This exhortation motivates the listener by stating a clear goal for the written product.

How can this sound counsel be translated into the kind of affidavit that pushes the reader/fact finder to an inexorable conclusion? Obviously, as the advice suggests, a well-organized, readable, and emotionally engaging recitation of facts is the ideal. But putting meat on this skeleton is the hard part, requiring not only artful composition but also excellent storytelling skills. Both can be accomplished through a demanding spiral process of interviewing, drafting, fact investigation, legal research, more drafting, more interviewing, and so on.

### *B. Narrative Theory*

Lawyers have adopted narrative theory as applied legal storytelling in several contexts.<sup>39</sup> Legal stories and the documents that relate them are not simply factual recitations, but are powerful methods of communicating ideas and experiences, especially those that are either foreign to the experience of an adjudicator, or so familiar that they raise suspicions of appropriation. The engaging story clearly establishes the protagonists, their conflicts and struggles, finds themes and images, and thus supports the audience's mental models. A story also can challenge and provide al-

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<sup>39</sup> See generally Symposium, *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 Vt. L. Rev. 565 (1994); Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989).

ternative explanations to skeptics whose opinions are predetermined.<sup>40</sup>

Applied storytelling is most prominent at trial where stories are a powerful method of communicating with juries.<sup>41</sup> It also has a place in other lawyering tasks such as negotiation.<sup>42</sup> Storytelling also can serve as a post hoc method for explaining or understanding court decisions.<sup>43</sup>

Building on legal narrative theory,<sup>44</sup> and adding this approach to more standard chronological, linear, and elemental ways of organizing facts and connecting them to law,<sup>45</sup> clinical law teachers have embraced the concept of "case theory as story line."<sup>46</sup> Some discuss storytelling as a tool for raising ideological issues concerning client-centeredness,<sup>47</sup> or for fleshing out student (and perhaps audience) biases,<sup>48</sup> or for constructing evidence and drafting documents.<sup>49</sup>

<sup>40</sup> "Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place." Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2413 (1989).

<sup>41</sup> "It has long been recognized that storytelling is at the heart of the trial." Philip N. Meyer, *Will You Be Quiet, Please? Lawyers Listening to the Call of Stories*, 18 Vt. L. Rev. 567 (1994); see also Steven Lubet, *The Trial as a Persuasive Story*, 14 Am. J. Tr. Advoc. 77 (1990); Philip N. Meyer, *Making the Narrative Move: Observations Based upon Reading Gerry Spence's Closing Argument in The Estate of Karen Silkwood v. Kerr McGee, Inc.*, 9 Clin. L. Rev. 229 (2002).

<sup>42</sup> See e.g. Douglas W. Maynard, *Narratives and Narrative Structure in Plea Bargaining*, 22 Law & Soc. Rev. 449, 449–481 (1988).

<sup>43</sup> See generally essays collected in Peter Brooks & Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law* (Yale U. Press 1996).

<sup>44</sup> Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 110–142 (Harv. U. Press 2000); W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (Rutgers U. Press 1981); see also Eric Oliver, *Facts Can't Speak for Themselves: Reveal the Stories That Give Facts Their Meaning* 3–18 (Natl. Inst. Tr. Advoc. 2005).

<sup>45</sup> Stephan H. Kreiger & Richard K. Neumann, Jr., *Essential Lawyering Skills* 159–175 (3d ed., Aspen Publishers 2007).

<sup>46</sup> See e.g. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative*, 93 Mich. L. Rev. 485 (1994); Binny Miller, *Teaching Case Theory*, 9 Clin. L. Rev. 293 (2002). In clinical teaching, there is considerable discussion of storytelling as an aspect of client representation raising questions about who determines the nature of the story, how the advocate shapes it, and what happens if there are disagreements about inclusion, exclusion, or emphasis.

<sup>47</sup> See e.g. Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Gearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990).

<sup>48</sup> Peter Margulies, writing about how difficult it is to elicit compassionate responses to Haitian refugees, suggests framing their stories in terms of the more familiar and undeniably sympathetic Holocaust narrative might improve their reception. Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 St.

In the affidavit drafting process, that debate surfaces over questions of language, cultural competency, communication between client, lawyer (law student), and fact finder, and is played out in the quest for the creation of an authentic, believable “*compelling, well written account which intrigues and involves the reader.*” This admonition is basically a plea for a good story that draws in the reader quickly, that keeps the reader interested and involved, and that ultimately satisfies the reader’s highly developed expectations for factual and legal coherence and persuasiveness.

This can be accomplished by developing plot and character and articulating themes that are transmitted in an ascertainable narrative structure. The use of classical rhetorical techniques in service of a well-told tale in an affidavit results from a laborious process of questioning both the clients and the facts revealed, measuring those facts against other standards such as historical facts and common sense, and identifying truthful and accurate language to convey facts and emotions. To accomplish this, any mentor or instructor inevitably will employ the techniques of recursive writing, a hallmark of the New Rhetoric.

### C. New Rhetoric

Modern legal writing teaching and scholarship has been influenced heavily by New Rhetoric, a composition theory that offers an alternative to conventional legal discourse.<sup>50</sup> New Rhetoric sees reading and writing as a process of “creating knowledge, not merely a means for communicating it.”<sup>51</sup> Writing, thus, can be instrumental in thinking through a problem and in generating ideas

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Thomas L. Rev. 135, 152 (1993). His argument is strengthened by telling his own family’s World War II refugee story.

<sup>49</sup> There are other places where a good story can make a big difference. See e.g. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 Rutgers L.J. 459 (2001).

<sup>50</sup> Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 Leg. Educ. 155, 165–168 (1999); Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 Leg. Writing 57 (2000); Anne Lamott, *Bird By Bird: Some Instructions on Writing and Life* (Anchor 1995); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 52 (1994) (describing the development of process-model for teaching legal writing in the late 1980s).

<sup>51</sup> Berger, *supra* n. 50, at 156 (citing Ann E. Berthoff, *The Making of Meaning: Metaphors, Models, and Maxims for Writing Teachers* 69 (Boynton/Cook Publishers 1981)); see also Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986–1987).

for how to solve it.<sup>52</sup> This theory emphasizes writing to meet the expectations of the reader-audience rather than to simply record the findings, thoughts, and conclusions of the writer.<sup>53</sup>

The New Rhetoric approach offers two important lessons for affidavit drafting. First, it recognizes that writing can be a long and interconnected chain of fact-gathering, thinking, composition, reflection, and rewriting leading to identifying themes, locating gaps and inaccuracies, and connecting facts and law. Building the facts one block at a time is a means of discerning the best legal theory, constructing a factual case that tells a "compelling story" within the boundaries of the legal elements, and building attorney-client relationships. Thus, the task of affidavit drafting serves multiple goals in addition to a finished product.

Second, it is a process that is inextricably connected to a particular audience. Asylum officers and immigration judges, as noted above, often approach adjudication skeptically with an inclination to disbelieve the applicant. Most are intelligent, patient, and respectful under quite stressful conditions. They listen to many people tell tales of difficult lives, sacrifices, fears, and hopes, hour after hour, day after day. This repetition and volume has an inevitable, inuring effect on their attitudes. While they must be objective, they also are listening carefully for inconsistencies, mistakes, or inaccuracies, in other words, a reason to deny relief. They sometimes even seem to be trying to trap or trip up the applicant, or they may be aggressive in their questioning and probing.<sup>54</sup> In addition, decision-making by both asylum officers and immigration judges can be wildly disparate nationwide and even among the

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<sup>52</sup> Rideout & Ramsfield, *supra* n. 50, at 55.

<sup>53</sup> Sarah O'Rourke Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration between Clinics and Legal Writing Programs*, 14 Clin. L. Rev. 301 (2007).

<sup>54</sup> Recurrent offensive and abusive behavior by immigration judges has recently drawn fire from United States Circuit Court judges reviewing immigration court records on appeal. See e.g. *Ba v. Gonzales*, 2007 LEXIS 3976 (2d Cir. Feb. 21, 2007); *Guo-Le Huang v. Gonzales*, 453 F.3d 142, 148 (2d Cir. 2007); *Islam v. Gonzales*, 469 F.3d 53, 56 n. 3, 56-57 (2d Cir. 2006); *Shah v. Attorney General*, 446 F.3d 429, 430 (3d Cir. 2006); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (immigration judge's credibility assessment "skewed by prejudgment, personal speculation, bias and conjecture"); *Cham v. Atty. Gen.*, 445 F.3d 683, 685, 691 (3d Cir. 2006) (bullying and abusive judge); *Wang v. Atty. Gen.*, 423 F.3d 260, 270 (3d Cir. 2005); *Ghebremedhin v. Ashcroft*, 385 F.3d 116, 119-120 (7th Cir. 2004); *Gush-shenokov v. Ashcroft*, 366 F.3d 554, 556 (7th Cir. 2004) (immigration judge "missed the boat"). Spurred by this criticism, in mid-2006, former Attorney General Alberto Gonzales announced a series of reforms to address issues of competence, demeanor, and consistency. See Dept. of Just., *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals*, [http://www.usdoj.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html) (Aug. 9, 2006).

judges sitting on the same court.<sup>55</sup> Since the decision makers are so divergent, and in some instances statistically predictable in their inclination to deny relief, the affidavit must take into account this imbalance by drafting a document that will satisfy the most demanding, dubious, and least generous adjudicator.

Since there are enough similarities between teaching writing in a writing course and supervising student writing in a clinical course, the teaching methodology of the New Rhetoric is applicable to teaching in a clinical setting. The practice of providing extensive comments and feedback at each writing stage designed to teach students the rubrics necessary to engage in legal discourse is integral to learning to write an affidavit in a clinical setting with one critical difference. Clinical teaching situates its pedagogical goals in the midst of client-centered objectives. The client's needs and goals must surround, and sometimes supersede, those of the students. The demands of an actual case thus alter the relationship between teacher and student.

Moreover, the goals of clinical supervision and teaching extend far beyond the production of a single, high-quality document. A hallmark of clinical supervision is the development of independent critical thinking and performance skills by giving students responsibility for all aspects of the case. Comments on affidavit drafts are designed to raise questions about fact and case theory development rather than to impose a structure of legal analysis and argumentation. The finished product might even be imperfect, but it is much better than the first effort, benefits from extensive non-directive feedback, and belongs to the student as much as possible.

#### IV. WHAT THESE THEORIES CAN TEACH ABOUT AFFIDAVIT DRAFTING

Lawyers write and edit as "experts" (or as experts-in-progress) but without much regard for theories of writing. As their careers progress, their writing presumably becomes more competent, expressive, and persuasive. Even more accomplished writers are not particularly reflective about the task, however. Clinical teachers

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<sup>55</sup> See generally Ramji-Nogales et al., *supra* n. 18. One empirical study of asylum denial rates between 1999–2004 found four immigration judges in New York denied in more than 90% of the cases they heard while two granted in 90% of their cases. See Transactional Recs. Clearing House, Syracuse U., [http://trac.syr.edu/immigration/reports/160/include/judge\\_0005\\_name-r.html](http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html) (accessed Feb. 8, 2008).

generally feel responsible to novice students to help them develop long-term self-reflective skills by imparting advice that will increase their ability to be independent and creative learners and thinkers. Classical and New Rhetoric, as well as narrative theory, offer structures to help students to become better affidavit writers, and better lawyers generally.

If writing normally is a recursive process of acquiring knowledge, constructing meaning, and then communicating that meaning to an audience, then the interviewing-drafting-interviewing-fact-gathering-redrafting helix that continues almost up to the last minute before submission of an affidavit is a specialized sub-set of that process. It is an end—a document that adds flesh and substance to the bare bones of the form application. It is also a means to a more complex goal—drafting a document that contains a persuasive story that itself sets forth the legal and factual elements required to meet the burden of proof for asylum. This includes an accessible and understandable case theory, a coherent and moving client narrative, and a portrait of a sympathetic, even heroic, individual client that articulates the most convincing evidence submitted to prove the claim.

Even more importantly, affidavit drafting is a process by which the asylum case builds incrementally as the client is probed and questioned during interviews for the details that render a story credible. It is a process of trust-building between lawyer and client that slowly yields more nuanced and specific information. And, it is a process of case-building during which the client's memory, confidence, and eloquence improve and grow so that by the time the hearing occurs he or she truly understands both what has to be articulated and what has to be explained. Finally, it is a cycle of rehearsals for the asylum seeker who, after months of remembering and repeating, is transformed into a more comfortable storyteller before an audience other than sympathetic law students.

At the beginning, asylum-seeking clients usually have gathered some basic understanding of what facts are relevant to an asylum claim.<sup>56</sup> They also know what actually has happened to them. They believe, therefore, that they know what is important to reveal. Yet, they fail to appreciate the significance of the particu-

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<sup>56</sup> In their search for pro bono representation, asylum seekers often go to many agencies and offices where they provide their histories. Many cases are referred to law school clinics and other pro bono cases by other organizations such as Human Rights First or the Asylum Project of the New York City Bar Association. Those interviews are intake assessments for purposes of a referral to a volunteer lawyer.

lars so they omit details, go off on tangents, and drift between time frames.

Some interviewing texts suggest that initially the lawyer allow the client to talk about what is important to him or her without too much interruption or control.<sup>57</sup> This openness and lack of apparent judgment, while sometimes inefficient, usually assists the development of the client-attorney relationship and is an investment in its long-term success. Open-ended questioning is the preferred model for most initial interviews and is particularly suited to asylum seekers who are victims of recent traumas, are newcomers to United States legal practices, and are divulging very private details to strangers.

Given this lack of structure, many clients relate their stories in a burst of information regardless of the complexity and amount of facts involved. They gallop through years of troubles, sometimes incorrectly assuming the listener's familiarity with the history and culture and failing to realize how many holes need filling with details. There are several reasons for choosing to tell a story of victimization and fear in an abbreviated fashion as possible. First and foremost, the facts are painful to recall and relate to strangers however friendly and helpful. As one client told his student-lawyers, "You are asking me about things I have been trying to forget." Second, genuine trauma may interfere with recollection or with the ability to talk about the events. Third, the individual simply may lack the language to describe feelings or occurrences even when speaking in their native tongue. This deficiency is even more limiting when the facts are filtered through an interpreter.

A contradictory impulse also surfaces in many cases. Clients want to make their lawyers understand everything. They appreciate an audience that is attentive and respectful rather than interruptive and judgmental. They drift off onto tangents about history, culture, politics, and social organization. The advocate has to rein in this tendency while identifying which information is actually useful.

The paradoxical instincts to both abbreviate and elaborate reflect the clients' priorities but usually stray widely from the needs of the "law story." Their stories need both elaboration and editing. This is the task ahead as the students repeatedly interview the

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<sup>57</sup> Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling & Negotiation* 66-68 (Little, Brown & Co. 1990); David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* 18 (2d ed., West Publ. 2004); Krieger & Neumann, *supra* n. 45, at 100-102.

client and start to use the information to finalize the case theory and the affidavit that expresses it. This sifting and sorting of information is daunting enough; the task of reducing it to a persuasive written document is even more challenging.

## V. APPLYING THESE THEORIES TO THE CASE OF A TIBETAN ASYLUM SEEKER

The world is full of displaced persons fleeing war, carnage, pogroms, ethnic cleansing, starvation, disease, and other human misery.<sup>58</sup> Refugee receiving countries, such as the United States,<sup>59</sup> set limits on how many refugees they are willing to absorb.<sup>60</sup> Embodied in the framework of the refugee definition is the "paradigmatic refugee," in other words, the person for whom the law was written. Familiar examples are Jews during World War II, anti-Communist dissidents, and anti-Castro Cubans. Today, the borders of the refugee definition are being stretched to include gay men and women,<sup>61</sup> victims of domestic violence in some contexts,<sup>62</sup> or the physically disabled.<sup>63</sup> The harm that amounts to persecution can include female genital mutilation<sup>64</sup> or forced marriage.<sup>65</sup>

The job for the asylum advocate is much easier if the client's story fits the paradigm: the harm is unquestionably sufficient, the basis for persecution fits squarely into one of the five categories, and the nexus is clear. For the advocate, therefore, building a

<sup>58</sup> As of June 2007, there were 32.9 million refugees, asylees, internally displaced, or stateless people. UNHCR 2006 Global Trends, <http://www.unhcr.org.au/pdfs/globaltrends2006.pdf> (July 16, 2007).

<sup>59</sup> According to the United Nations High Commission for Refugees, 16 of 192 member states of the United Nations have established annual resettlement quotas, including Australia, Canada, Denmark, Finland, Ireland, New Zealand, the Netherlands, Norway, Sweden, the United Kingdom, and the United States. See United Nations High Commissioner for Human Rights, <http://www.unhcr.org/basics/BASICS/3b0280294.html#country%20quotas> (accessed Feb. 8, 2008).

<sup>60</sup> The President, in consultation with Congress, makes an annual determination for authorized overseas refugee admissions. I.N.A. § 207. In 2007, that number was 70,000, although far fewer actually were processed. There are no corresponding numerical limits on asylum seekers applying within the U.S.

<sup>61</sup> *Matter of Toboso-Alfonso*, 20 I & N Dec. 819 (BIA 1990).

<sup>62</sup> See e.g. *Matter of S-A-*, 22 I & N Dec. 1328 (BIA 2000); see also 65 Fed. Reg. 76588-98 (proposed regulations amending definitions of "membership in a particular social group" and "persecution" to be more amenable to claims of domestic violence).

<sup>63</sup> *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005), *vacated on other grounds*, 127 S. Ct. 57 (2006).

<sup>64</sup> *Matter of Kasinga*, 21 I & N Dec. 357 (1996).

<sup>65</sup> *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated and remanded by Keisler v. Hong Yin Gao*, U.S. LEXIS 10269 (Oct. 1, 2007).

foundation of a recognizable legal claim, even if it pushes the boundaries of existing law, is essential. But the soundness of the structure always depends on the credibility of the applicant. Even a perfect story may not result in a grant of asylum if the client submits false documents, delivers inconsistent testimony, or makes an unfavorable impression on the witness stand.

These two pieces of the claim—the legal and the personal—combine forces in the affidavit. Because the logical order of the fact finder is first to account for all, or discount some, of the legal elements of the claim, the affidavit must provide a forceful, legally comprehensive factual statement that also establishes quickly the *bona fides* of the applicant.

This Section will suggest techniques that assist the student to become a more accomplished affidavit writer and advocate generally. The setting is the Safe Harbor Project, a law school clinic that represents asylum seekers. Teams of two or three students work with a single client to prepare the case for either an interview or hearing. The standard materials we would submit in addition to the mandatory application form include the client's own affidavit, personal materials that would support the claims, information about the particular conditions in the native country, a memorandum of law, and, when available and relevant, statements in the form of affidavits, letters, or reports from experts or fact witnesses. This is a body of work that usually takes the entire semester to complete and can be several inches thick.

Since our clinic does not conduct general intake, we rely on referrals from various organizations that initially interview potential asylum applicants. Our clinic typically receives from the screening organization a referral letter or memo that summarizes the essential facts. This memo is both a help and a crutch because we prefer the students to begin with a clean slate and elicit the facts from scratch. But this memo does provide a good starting point to make some preliminary observations about the basic facts and to conduct some introductory legal and factual research. Then, the spiral of interviewing and writing begins.

### *A. The Referral Letter*

Human Rights First (HRF), formerly known as Lawyers Committee for Human Rights, was one of the original, and is certainly the best known, organizations to refer asylum cases to volunteer lawyers. Many law school clinical programs turn to them

for well screened and supported cases. Sometimes HRF sends out announcements to pro bono lawyers about pending cases in need of representation. Here is a recent case description that I post as an example of a well developed summary of a case that might be a base line for students interviewing a new client.

Mr. X is a twenty-year-old man from Tibet. His persecution at the hands of Chinese authorities arose out of his decision in early 2004 to assist a friend and distant relative to hang up two posters that supported the Dalai Lama and an independent Tibet. Later that year, Chinese authorities arrested Mr. X at his home and brought him to a police station, where they interrogated and tortured him. Despite his initial resistance, Mr. X confessed to having put up the posters with his friend when officers told him that his friend was already in custody and had confessed. As a result of his acts and subsequent confession, Mr. X was imprisoned at the local prison for 15 months. He was held in a crowded cell and survived on minimal food while being taunted, interrogated, and abused regularly.

After his release, Mr. X was required to check in to the local security bureau twice a week and was prohibited from leaving his area. Authorities regularly came to Mr. X's home, often searching it and questioning him. These officers would also order him to report to the local security bureau for further interrogation. During these interrogations, which lasted anywhere from two to five hours and occurred about twice a month, Mr. X was subjected to further physical and mental abuse. Authorities insisted that he was part of a larger pro-independence organization which they wanted information about.

Unable to deal with his state of virtual house arrest and the constant interrogations, threats and abuse, Mr. X fled Tibet in March 2007. He traveled through Nepal and finally made it to the United States in June. Upon his arrival at JFK airport, he was detained and brought to the Elizabeth Detention Center in New Jersey. If forced to return to his country, Mr. X fears that he will be killed or will be sent back to prison to serve an even longer term.<sup>66</sup>

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<sup>66</sup> E-mail from Ruthie Epstein, Refugee Prot. Program, Human Rights First, to N.Y. and N.J. Pro Bono Coordinators (July 24, 2007, 6:38 EST). Information about Human Rights First is available at <http://www.humanrightsfirst.org>.

A quick reaction to this “first draft”: It describes a straightforward case, a good first project for students.<sup>67</sup> The Chinese government’s brutal suppression of Tibetan dissidents, even those participating on such a low level, is well known. To an experienced eye, the potential legal theory is self-evident—past persecution on account of political opinion—but there are also some equally obvious potential pitfalls such as identity and corroboration. The summary is informative yet bare of humanizing detail or narrative thrust. As written it sets forth all of the elements of the refugee standard, but it does not satisfy the standard of a story that leaves “no choice but to grant asylum.”<sup>68</sup> It is a typical scenario, yet its very typicality means that it could be a “borrowed” story. The credibility hurdles will be significant.

### 1. First Assignment

The students’ first assignment is to circle every word, term, or concept in this letter that presents a fact and to indicate whether and how that fact is verifiable.<sup>69</sup> At the same time, they are told to identify facts that directly support the legal elements.<sup>70</sup> Finally, they are asked to brainstorm how the facts might be verified.<sup>71</sup> Below is an illustration of what might be their finished product. Frankly, most novice students, whether working collaboratively or alone, would not have spotted all of these possible factual questions, and there may even be more to spot, so this example is a bit idealized.

Mr. X is a **20-year-old man from Tibet**. His **persecution** at the hands of Chinese authorities **arose out of** his decision in **[early 2004]** to assist a **[friend]** and **[distant relative]** to hang up **[two posters]** that **[sup-**

Comment [ec1]: Does he have any identity documents (passport, birth certificate)? Do people in Tibet have these kinds of documents? How can we prove he is from Tibet?

Comment [ec2]: How does he know this chronology? Were his activities connected to some other events?

Comment [ec3]: Name? How did he recruit Mr. D?

Comment [ec4]: Are there one or two people involved here?

Comment [ec5]: What did the posters say?

<sup>67</sup> The referral letter is a good example of “authorial summary,” a form of “telling” rather than “showing.” Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 Leg. Writing 228, 241 (2007) (discussing the advice in David Lodge, *The Art of Fiction* 122 (Penguin 1992)).

<sup>68</sup> Schlenger, *supra* n. 26, at 8.

<sup>69</sup> The marginal comments represent the observations students might make as they read the statement for the first time. Since circling is impossible here, the terms they might have circled are in bold instead.

<sup>70</sup> These facts will be in bold italics.

<sup>71</sup> These ideas appear in marginal bubbles.

**ported the Dalai Lama and an independent Tibet.] Later that year, [Chinese authorities arrested Mr. X] at his home and brought him to a police station, where they [interrogated and tortured him.] Despite his initial resistance, Mr. X confessed to having put up the posters with his friend when officers told him that his friend was already in custody and had confessed. As a result of his acts and subsequent confession, Mr. X was [imprisoned at the local prison for 15 months.] He was held in a [crowded cell and survived on minimal food while being taunted, interrogated, and abused regularly.]**

After his release, [Mr. X was required to check in to the local security bureau twice a week and was prohibited from leaving his area.] Authorities regularly came to Mr. X's home, often searching it and questioning him. These officers would also order him to report to the local security bureau for further interrogation. [During these *interrogations*, which lasted anywhere from **two to five hours** and occurred about **twice a month**, Mr. X was subjected to further *physical and mental abuse.*] Authorities insisted that he was part of [**a larger pro-independence organization**] which they wanted information about.

Unable to deal with his state of virtual house arrest and the constant interrogations, threats and abuse, [Mr. X fled Tibet in **March 2007.**] He [traveled through **Nepal**]

<p><b>Comment [ec6]:</b> There must be lots of resources about the Dalai Lama and the Free Tibet movement.</p>
<p><b>Comment [ec7]:</b> Where is his home? Town name? Was anyone present when he was arrested? Can we contact them?</p>
<p><b>Comment [ec8]:</b> Details, details, details about conditions of confinement, torture, interrogations. Does he have any lasting consequences, physical, mental? Can we arrange medical examinations?</p>
<p><b>Comment [ec9]:</b> How does he know length of time in jail?</p>
<p><b>Comment [ec10]:</b> More descriptions of abuse.</p>
<p><b>Comment [ec11]:</b> What accounts for his release?</p>
<p><b>Comment [ec12]:</b> Does he have records of this? Is this typical after someone is released?</p>
<p><b>Comment [ec13]:</b> Do family members know about this?</p>
<p><b>Comment [ec14]:</b> What does this mean? Did they refer to a specific organization? What role does he have in something larger? What larger organizations exist?</p>
<p><b>Comment [ec15]:</b> How did he travel? Route? Cross border to Nepal?</p>
<p><b>Comment [ec16]:</b> Did he stay in Nepal? Where? How did he manage there? Did he have any rights to stay in Nepal? How did he get travel documents to the United States?</p>

and finally made it to the United States in June. Upon his arrival at JFK airport, [he was **detained.**] If forced to return to his country, [Mr. X *fears* that he will be *killed or will be sent back to prison to serve an even longer term.*]

**Comment [ec17]:**  
Did he have false passport? How did he procure it? What happened to it? How did he request asylum?

**Comment [ec18]:** Is there evidence that this would happen in human rights reports?

After this initial mark-up, the students are ready to prepare for their first client interview. They may decide to do some country or historical research, including some legal research or on-line investigations about any United States policies and practices regarding Tibetan asylum seekers. They create an interview plan or outline based on the models they encounter in assigned readings.<sup>72</sup>

## 2. The Initial Interview and Beyond

“Put away the intake statement,” I instruct the students before meeting the client. “You need to listen to the client without preconceived notions. The HRF interview is at best sketchy and at worst might even be inaccurate in places.” So, the students will let the client talk, establish a relationship, answer questions, and take the first of many steps toward formulating a final case theory.

In almost every case, students conduct multiple client interviews to elicit facts, identify a tentative case theory, and engage in the process of preparing the client to relate his own story aloud and in writing. Usually, their strategy follows a rough chronology of the client’s life beginning with background information, leading up to the central facts supporting the refugee elements, and ending with flight and entry into the United States. Sometimes language impedes comprehension; sometimes clients take detours through personal, social, or political history that may be very important to them but tangential to the claim; sometimes the emotion and trauma of their experiences inhibit their ability to talk about certain events.

This process usually resembles a looping conversation—forward movement, circling back, occasional tangents, reiteration, verification, elaboration, explanation—until finally, a full factual

<sup>72</sup> We assign Chapter 8 of Krieger & Neumann, *supra* n. 45, at 81–108. Other options include Binder et al., *supra* n. 57, at 80–111, or David F. Chavkin, *Clinical Legal Education: A Textbook for Law School Clinical Programs* 66–72 (2d ed., LexisNexis 2007).

cycle is completed. Then, the students believe they are ready to begin to write the affidavit. Fatigued by the endless rounds of questions and answers, they are eager to tackle the "real" first draft of their client's statement. At this point, they almost always believe that they have the facts and that the story just needs to be written down.<sup>73</sup>

### B. Beginning to Write the "I"

When students read or hear about a client's story from another source such as the referral letter, they encounter the facts from an objective distance created by the third-person voice. After talking with a client for many hours, however, students can make a transition from third to first person fairly easily. Indeed, the very small adjustment from "He" to "I" instantly transforms the facts into a more moving, poignant, disturbing personal account. This conversion has a decidedly liberating effect on the tone and language of the student's own composition. Already trained in the use of *logos*, they begin to introduce *pathos*.

Another important transformation comes from the students' personal contact with the client. First, Mr. X is telling them his story in his own words, terms, and expressions. The students have access to his vocabulary, his images, and his point of view. From their notes, they are able to incorporate his exact words and phrases into the story. Second, they are forming a sympathetic, supportive relationship with Mr. X. That compassion motivates creative energy and echoes in their writing.

But their first effort also exposes, sometimes painfully, how many assumptions, omissions, interruptions, and unfounded assertions plague the personal statement. An example of just one paragraph that might purport to "improve" on and "expand" the referral letter by adding details demonstrates the limits of their initial progress:<sup>74</sup>

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<sup>73</sup> Even this step can be complicated by different styles of clinical supervision since the determination of how to allocate and approach the work is part of the students' growing autonomy. Usually they just plunge into drafting. This often results in a few pages of facts that are only slightly more detailed and elaborate than the referral letter. This is an eye-opening teaching moment because they quickly realize that all of their hours of interviewing are not that easily captured in an effective statement.

<sup>74</sup> The balance of the facts developed represents a composite of several cases on which Safe Harbor Project students worked over the past ten years. Since many Tibetan asylum seekers present a fairly standard story, these facts are quite typical. Their frequency, however, should not detract from their individual courage and a justly horrified reaction to the

My friend [Tashi,] who is also the son of my wife's cousin, asked me to help him hang pro-Dalai Lama [posters] at the county fair. I [hung up] two posters. I helped because I disagree with the Chinese [government.] The government destroyed my country. Until then, I had never had a chance to show my [opposition.] I was [glad] to be able to express my beliefs through actions.

This revision earns a set of marginal notes that is a dose of cold water. It was one thing to have made lots of comments on the intake letter written by someone else, but seeing the work in which they enthusiastically and confidently engaged annotated so extensively is often a bit discouraging. Fortunately, clinic students are resilient, so they jump back into writing the next drafts.

After allowing them full control over their first effort, the second draft can benefit from a few techniques that allow the students to see what is missing, ineffective, or illogical. These techniques provide a structure for the multiple, subsequent re-readings and revisions of the affidavit, the number of which eventually can be reduced as the students' instincts for spotting weaknesses sharpen with experience.

Comment [ec19]: Does he have a full name? Is Mr. X afraid to expose his friend? Can we reassure him in any way?

Comment [ec20]: What did the posters say? How did he get them?

Comment [ec21]: Do we have any details about this event? Can we confirm that it occurred?

Comment [ec22]: Where did he hang them?

Comment [ec23]: Can he explain what he finds objectionable? Can we count on him to have any knowledge of the politics and history of the Chinese annexation? Is this enough to establish a political opinion?

Comment [ec24]: What does this mean? Why not?

Comment [ec25]: Can this emotion be stronger?

## 1. Creating a Time Line

Time lines are a standard technique for organizing and testing propositions and proof.<sup>75</sup> A time line is a very effective tool to fos-

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inhuman treatment they received as punishment for acting on their beliefs. Because the United States does not calculate statistics regarding asylum seekers from Tibet separately from China, there is no way to determine how many actually are granted asylum. A representative story is reported in Diana Britton, *Flight from Violence and Persecution—Tibetans Find Freedom in Brooklyn*, *Courier-Life* (June 9, 2007).

<sup>75</sup> The use of time lines in the information-gathering process is discussed extensively in Binder et al., *supra* n. 57, at 112–148, and Krieger & Neumann, *supra* n. 45, at 148–158. The format of a time line in Krieger and Neumann recommends the following categories: date/time, episode, source, gaps/internal consistency. Krieger & Neumann, *supra* n. 45, at 152–154. These categories usually are too limited for asylum cases since the events can transpire over years if not decades and often are not confined to one person's chronology.

ter an understanding of the entirety of a story, to uncover possible additional evidence, and to assure an eventual seamless story. In other settings, stories are not always told in basic chronological order—think about flashbacks, or parallel yet intersecting story lines, or psychological accounts—but most listeners feel comfortable with a temporal starting and ending point. Even if the final story is not told in strictly linear fashion, the time line is helpful in eliciting and ordering the story, but, because it is essentially objective, it offers fewer opportunities to appeal to emotion than does a narrative structure.

Given the context of the asylum claim within broader historical and social movements, many of which extend over long periods of time, students working with asylum seekers are wise to prepare parallel time lines. The first level, of course, establishes the client's chronology. This strand itself might have several tracks, tracing personal, political, or societal highlights in the applicant's own life.<sup>76</sup> The second would track the political and other events of relevance to the case in the applicant's homeland, or perhaps even more broadly geographically in the case of widespread trans-border conflicts, for example. Another line, if appropriate, would organize the important events in the applicant's family. Because dates and details are all-important to the fact finder, this exercise not only yields information for the advocate, but also allows the client to remember and then reinforce the chronology, acceding to American cultural expectations about how important milestones are recalled and often commemorated by documents.

After the time line is complete, a process that could require more evidence gathering from the client as well as other sources, examining the time line both horizontally and vertically is an excellent technique for understanding cause and effect, how events link together, and connecting the who, the what happened, the why, and the when of the story. Using the time line as a basis for questioning the applicant or for fact gathering from other sources is very productive, but this chronology needs to be plowed back into the affidavit's more dramatic narrative.

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<sup>76</sup> See Binder et al., *supra* n. 57, at 142–143.

## 2. *Highlighting to Categorize Facts*

Law students love highlighters—yellow for the facts, pink for the issue, green for the holding, blue for the dissent. This technique works for briefing cases, so why not import it into clinical supervision? The color-coding method assists the students to visualize the difference between asserting a fact and proving it. For example, in almost every asylum case, the last question posed to the applicant would be a version of “What do you think would happen to you if you went back to your homeland?” The response legally impelled by the refugee standard would refer to a genuine and reasonable fear of serious harm inflicted on account of one or more of the protected grounds. So, the applicant might say, “I am afraid I will be killed (or tortured or jailed or beaten up).” However dramatic this assertion, it does not make much of an impact on a fact finder who has heard that same claim repeatedly.

The drafter’s task, therefore, is to build a story leading up to this statement that makes its conclusion believable. “This is a person who actually will be killed.” First, lay a foundation of the legal frame, then add the factual structure, paint with rhetorical brushes the emotional impact of the story, and seal everything already set forth by eliminating any disputable or contested facts or inferences and corroborating enough facts to bolster the entire story.

### a. Identifying Gaps, Assumptions, and Inconsistencies

It is axiomatic that details, internal consistency, and consistency with external events, explanations for conduct, and recollection all bolster credibility.<sup>77</sup> To elicit this credibility-enhancing information, the interviewer must probe gaps and refuse to allow the audience to inject incorrect assumptions or conclusions to fill the blanks.

Take out that yellow highlighter to indicate every place where there is a factual gap concerning people, places, events, timing or appearance. Taking the paragraph above, the yellow highlights would demand answers to the following questions that provide motivation for and explanation of his choices and conduct that constitute his political opinion, which, so far, seems to be the ground on

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<sup>77</sup> *Id.* at 186–191; Chavkin, *supra* n. 72, at 99–100.

which the claim will be based. Moreover, by providing these answers, the affidavit will avoid gaps that lead to assumptions based on the fact finders' schemas and experiences:

*My friend Tashi:*

What is his full name? How do you know him? How long? Where does he live? How old is he? Did he get caught too? What happened to him?

*asked me to help him hang . . . :*

How did he know to ask you? What made him think you could be trusted? Had you ever expressed anti-China or pro-Dalai Lama views? Why did you trust him and agree to do something so dangerous? Where did he get the posters?

*pro-Dalai Lama posters:*

What did the posters say? How big were they? From whom did he/you get them?

*at the county fair:*

Where was the fair? What kind of fair? How did he get there? How many people attend? Why did Tashi pick this fair to hang posters? Were there a lot of police or authorities around? Was it particularly risky to hang posters at a large public event?

*I hung up two posters:*

Where did you hang them? What did you use to hang them? How did you hang them?

*I helped because I disagree with the Chinese government. The government destroyed my country:*

What is the basis of your disagreement? Explain your political views. Were any of your family members anti-Chinese? If so, what happened to them? What do you mean by "destroy?"

*Until then, I had never had a chance to show my opposition:*

Why had you been silent in the past? What made this opportunity such a turning point?

*I was glad to be able to express my beliefs through actions:*

Explain your beliefs. Why did you think that hanging posters would be effective? Weren't you afraid of being caught?

Little by little, as the blanks exposed by this paragraph and every other paragraph are filled, the students learn about his

childhood as the son and grandson of anti-Chinese resisters who died in prison and how his family was stigmatized as separatists. These outcasts even have a name, "the black hat class," a nice verifiable detail. We learn that he is illiterate because he was prevented from attending school, first because of his family's politics then because his mother was sent to live in a rural community where there were no schools.

Every paragraph and chapter of the story starts with sketchy descriptions and, after highlighting omissions and uncertainties, the students tease out the rest of the story. Mr. X also describes in detail his arrest, his incarceration, his daily beatings and interrogations. He uses words like torture and abuse, but it takes weeks of interviews for him finally to talk about the electrodes and the freezing cell where he stood naked for hours in between beatings. After a week, without a trial he was "convicted" of separatist activities. He draws a verbal picture of a broken, filthy body barely standing before a magistrate whose words he did not understand. He was delirious with hunger and fatigue. He was sent to a prison for two years (yes, the referral memo was incorrect) where he worked on road construction every day regardless of the weather. Although the students' questions force him to recall very painful times, he provides descriptions of how he was treated physically and how he survived psychologically. He relates how his demeaning probation requiring regular reporting to the police and repeated house intrusions sparked further rebellion. Despite enormous risk, he again distributed palm-card pictures of the Panchen Lama to villagers in disobedience of the law. After the authorities learned of his new defiance, he was warned that they would arrest him again. He describes his narrow escape from re-arrest and his month-long journey to Nepal in treacherous winter conditions. His story is full of poignant details like the photo a friend gave him that showed the Dalai Lama receiving the Nobel Peace Prize, his excitement at seeing a video of the Dalai Lama, and how he told his neighbor he wanted to watch a soccer match in order to borrow a television to watch the tape in secret.

The most dramatic episode in his story was revealed only in a much later interview when the students finally got around in their chronology to discussing his flight. Mr. X recounts how he joined a group of about fifteen pilgrims walking across the Himalayas to Nepal. As they trudged along, Chinese border guards opened fire on the group, killing three people, and capturing nine others. He and one other man were able to escape and cross the border into

Nepal by hiding in the camps of some European climbers until the guards left the area.<sup>78</sup> The details of this harrowing ordeal slipped into the interview almost accidentally. The students were just filling in the gaps about his journey when he told them about this. They certainly had no reason to suspect such an unusual occurrence so their questions were routine, based on the assumption that he had crossed the border, presumably with much physical difficulty, but without violence. His saga is unimaginable to the students given our legal system and the freedoms we take for granted. His resignation and acceptance, almost equanimity, is also a surprise, giving the students some clues about the internal differences between an illiterate Tibetan farmer and a Western law student.

b. Turning Disputed Facts into Undisputed Facts

Identifying gaps and inconsistencies is only one use for highlighters. Switch to the pink marker and indicate all facts that are not in dispute. Are there any? In some cases, for example, race, gender, or age may be undisputed simply based on the appearance of the asylum seeker. Wounds, scars, or other lasting physical effects are usually demonstrable, although their origins may be challenged. In some cases, identity is established by passports, national ID cards, or birth certificates, but in many the easy access to fraudulent documents in a particular country may well cast even identity in doubt.

In the case of Mr. X, it would seem that *every* fact is in dispute. He traveled on a Nepalese passport and has no Chinese identity documents in his own name. He has nothing to prove any of his activities concerning the posters at the county fair, his arrest, his prison term, his parole, his flight, or his time in Nepal. Some applicants may have medical, legal, or travel records; this client has none.<sup>79</sup>

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<sup>78</sup> I appropriated this true incident that happened to other Tibetans for its obvious impact in this hypothetical case.

<sup>79</sup> Even if he had documents, they might not be admissible, or they might be found fraudulent. There are formal rules concerning authentication of foreign documents, 8 C.F.R. § 1287.6, that some immigration judges apply rigorously. See Virgil Wiebe, *Maybe You Should, Yes You Must, No You Can't: Shifting Standards and Practices for Assuring Document Reliability in Asylum and Withholding of Removal Cases*, 06-11 Immig. Briefings 1 (Nov. 2006). Also, Immigration and Customs Enforcement (ICE) attorneys in Immigration Court often subject documents to forensic analysis to detect document fraud.

If pink is useless here, then take out green and mark any disputed fact that has the slightest chance of being corroborated, then think about possible sources. The students easily can put a big green circle around a few facts that seem promising:

*The border crossing incident:* There may be news accounts about it, or some reference to it in reports written by NGOs.

*Scars from his beatings or torture, or psychological damage consistent with his mistreatment:* Medical examinations could substantiate the abuse.

*The county fair:* Where did it take place? How often? Is this a well known event? Are there reports of incidents at this fair or others like it?

*His identity:* Is there someone (credible) in the United States who knew him in Tibet or who knew his family? Are the available documents from the Tibetan community in the United States? Does he know details about his religious practices, his farming, or the geography of his region that could be matched to other sources, including ethnologists? Are there any family photos in recognizable settings?<sup>80</sup>

Other aspects of his story that might be verifiable through outside reports that describe similar details include accounts of torture, prison and parole conditions, patterns of migration into Nepal, and reports about treatment of Tibetan refugees in Nepal.

All of this brainstorming has produced results in our clinic's cases, so that the final evidence packet might contain NGO reports, doctor's reports, news articles, or fact witness affidavits. Most spectacularly, the students uncovered a videotape made by climbers who witnessed the border slaughter.<sup>81</sup> The videotape begins with the unseen narrators saying, "They're shooting them like dogs."

### **3. *Identifying the Details that Really Make a Difference***

Most legal fact finders zero in on details for several reasons. Detailed testimony seems more truthful. Detailed testimony per-

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<sup>80</sup> Some fact finders can be pretty jaded and hardhearted, however. An Immigration Judge once commented to me about a Tibetan client's family photos that she had seen enough pretty pictures with beautiful mountains in the background to last a lifetime.

<sup>81</sup> *The Chinese Slaughter of Innocent Tibetans* (Ezbesh 2007) (available at <http://video.google.com/videoplay?docid=252605937461033729>).

mits the listener to make comparisons to other sources of knowledge. Detailed testimony contains the core information upon which to base a decision. Most advocates learn right away that consistent, plausible details are the key ingredients of success.

Some details matter more than others, especially when they directly relate to the legal elements. At early stages of the interviewing process, students are listening for those fine points, hoping to focus attention on them by including them in the affidavit.

At the beginning of the case, students are always enthusiastic and excited about the work that lies ahead, but they also can be overwhelmed by its unfamiliarity and what is expected of them. One technique that helps to overcome this anxiety is demonstration. Despite the legitimate pedagogical principle that they should learn from scratch (even though lawyers routinely use boilerplate), there is no reason to hide a good example of a finished product from them. The work of their predecessors will clarify expectations, provide models, and even inspire them.

Even more importantly, reading and reacting to the finished product of the affidavit drafting process in a case with which they are unfamiliar puts them in the shoes of the fact finder encountering the affidavit for the first time. They can experience the impact of details, language, and facts. They can assess the effectiveness of the story and the storytelling with untested eyes and ears. As receivers of information, they become better senders.

Our Tibetan client's initial story, particularly as summarized in the referral letter, describes his detention and beatings but is distant and fails to attract the reader to the individuality of Mr. X and the particularity of his story. Eventually he is able to convey this horrible episode with images that show the reader/listener uncomfortably tragic specifics that produce understanding, sympathy, and compassion, all desirable reactions in this context. In the completed affidavit,<sup>82</sup> his language is simple since he is a simple person who experienced these horrors in simple terms:

I was beaten by four or five officers. They beat me with their black colored batons. The officers randomly hit me everywhere. They kicked and punched me. They hit me with anything they

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<sup>82</sup> Hopefully, this illustration is not confusing. I have included extracts from the final affidavit of the Tibetan case example that not only illustrate this technique of showing, but also demonstrate the progress made from the beginning to end of the affidavit drafting process. In reality, current students would be examining the work of their predecessors on different cases.

could find. I would fall down on the hard floor and lose consciousness. I would wake up on the floor of my freezing cell but could not remember how I got back there. I was always bruised and swollen on my body and face after these encounters.

Small details like the color of the batons, the number of the officers, the temperature of his cell, the location of his bruises allow the reader to see the scene and almost feel the beatings and their aftermath. The writer adds details in the voice of the storyteller, not in the lawyer's voice or in terms bounded by legal expectations. This paints a picture that the reader can accept as fact.<sup>83</sup>

This paragraph brings to life the external, physical dimensions. The final affidavit also exposes nicely the client's psychological, internal motivations in simple yet evocative terms:

I ran into an old friend, Namko, who said he knew about my arrest and wanted to let me know that I had done nothing wrong, that I was courageous and correct in my beliefs. We talked about many things, and he made me feel proud that I had survived prison. A few days later, Namko gave me pictures of the real Panchen Lama and a video of the Dalai Lama giving a religious speech. He also gave me a present that was specially for me, a picture of the Dalai Lama getting the Nobel Peace Prize. I went home to start passing out the pictures. It was the first time people in my small village would have access to picture of the real Panchen Lama, so everyone was very excited. People were crying and putting the pictures in their hats or hanging them around their necks. I was scared but the happy reaction of the villagers gave me courage to continue.

The students can understand how personal values, courage, and pride account for his risk-taking. Most students are very impressed by the transformation from bland writing to more moving and convincing prose. They can see how minor additions make major improvements. By assuming the role of reader-decision maker, they become better writer-advocates.<sup>84</sup>

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<sup>83</sup> Experts in creative non-fiction writing urge the writer to "show" not "tell" the story through the use of description and voice. See e.g. Theodore A. Rees Cheney, *Writing Creative Nonfiction* 12 (Writer's Dig. Bks. 1987).

<sup>84</sup> This aspect of the writing process is influenced by the work of Susan Bryant on cross-cultural communication, which is usually assigned to clinic students for its framework for working with clients whose differences may pose challenges to the lawyer-client relationship. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clin. L. Rev. 33 (2001). By imagining how others in the legal system may react to and judge a client's story, the advocate can understand better how to present the facts. *Id.* at 68-70.

#### 4. *Unlocking the Client's (and the Writer's) Voice [but Ethically]*

Two related problems collide when students attempt to draft a first-person narrative. First, student writing is generally inhibited and restrained, conditioned by lessons from writing classes where objectivity and detachment are stressed. They learn to eliminate intensifiers (adjectives, adverbs, words that suggest the emotion the reader should feel) or at least use them sparingly. With the exception of an appellate brief, which has its own formalities, students rarely write persuasively. They worry about sounding "biased," "unprofessional," or "informal," so they stick in their insecurity with the practices they have barely begun to master. They have to be given explicit permission to relax and to write naturally and descriptively.<sup>85</sup>

The other problem derives from the clients who themselves frequently recount their stories in language that is colorless and repetitious. Their vocabularies limit their ability to capture the drama of their actual stories. For example, a client may use the word "hurt" to include a wide range of physical harm or the word "scared" to describe truly terrifying experiences. It is axiomatic that a lawyer would not insert facts in an affidavit unless the client articulates them, but when the drafter is confronted by their clients' vocabulary deficiencies, the temptation to embellish and overstate facts is hard to resist. Ironically, despite their usual writing inhibitions, here student writing starts to flower but must also prudently avoid hyperboles and inauthenticity.

It seems easy to substitute "torture" for "hurt" or "petrified" for "scared." But at the oral examination, these words, which are not natural to the client, probably will vanish, leaving the impression that the affidavit was exaggerated and the product of lawyer manipulation. To the adjudicator who is inclined to want to find reasons to deny relief, this incongruity may provide sufficient grounds.

Instead of taking the comparatively easy road of inflating meaning by substituting words, the student can take the more

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<sup>85</sup> James White urged lawyers to see "law as a process of imagination." James White, *Imagining the Law*, in *The Rhetoric of Law* 55 (Austin Sarat & Thomas R. Kearns eds., U. Mich. Press 1994). Students have to be given license to free their writing from mechanical constraints and formalisms and to use persuasive imagery and language that make sense to the audience in the context of the case in order to communicate their theories and achieve desired results.

demanding route of eliciting more details so that the client's own words actually are sufficient. By asking for more details, for explanations, for images that the client is capable of invoking, the affidavit can express more credibly the depth and intensity of events. For example, when Mr. X was hiking across the Himalayas, the strenuousness of that trip might not be apparent to an audience whose romanticized idea of this mountain range comes from *National Geographic* magazine. For example, he initially may have said nothing more descriptive than "It was snowing and very cold. We walked many miles each day." Probing questions to elicit images (the clouds, the quality of his breathing, his thoughts as he placed one foot in front of the other for hours) probably will result in words and phrases that the writer can adopt without manufacturing meaning or attributing vocabulary inappropriately.

It is important, however, not to get carried away by *pathos*. While encouraging students to give texture and vitality to their client's voice, they have to be aware of the risks to both their client's and their own *ethos*. Authenticity is critical. The fact finder's antennae are primed to detect a rehearsed story or manufactured emotions. Language, phrasing, and imagery unsuitable to the education, articulateness, and imagination of the client might have a devastating effect on credibility that might have been avoided by balancing the reality of the client's abilities against the need to be persuasive.

Exaggeration or appropriation of voice might damage the advocate's credibility also. The sincerity and trustworthiness of the lawyer are generally seen as central to his or her effectiveness.<sup>86</sup> Just as important in the clinical setting is the impressionability of the students. At this nascent stage of their careers, they have to be protected against excesses. Their storytelling enthusiasm has to be carefully monitored to avoid any impropriety or appearance of dishonesty. They must retain their *ethos* even at the expense of some *pathos*.

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<sup>86</sup> A leading authority on trial advocacy claims that a lawyer's most important asset is personal credibility and that credible people have three key attributes: trustworthiness (and impartiality), expertise, and dynamism (and confidence). Thomas A. Mauet, *Trial Techniques* 18–19 (7th ed., Aspen Publishers 2007) [hereinafter *Trial Techniques*]; Thomas A. Mauet, *Trials; Strategy, Skills and the New Powers of Persuasion* 2 (Aspen Publishers 2005) [hereinafter *Trials*].

## 5. *Telling the Story*

Knowing how important detail is to the fact finder, students devote tremendous energy to resolving doubts, closing gaps, and securing the chain of factual inferences. Sometimes developing a narrative takes a back seat to all of this concentration on detail and chronology. A conscious return to narrative thinking during the writing process should take place in order to frame and enhance the story. A few techniques can enhance the students' ability to tell a story using fiction writing conventions that help them see that there are formulas that writers use to introduce themes, to develop plots and characters, and to push forward the action of the story to resolution.<sup>87</sup>

### a. Writing a Short Story

Law students deal with "facts" and "rules" but not "stories." Most of them are not natural storytellers to begin with. They need an opportunity to practice storytelling to be convinced of the power of stories in advocacy.

At the beginning of the semester, Safe Harbor clinic students are assigned several immigration stories to read, both fiction and autobiographical.<sup>88</sup> They also write their own or their families' stories. These stories range from pre-Colonial migration by northern Europeans, mid-19th century migration by the Irish and Germans, early 20th century passages through Ellis Island, and the more recent arrival of Asian and South Asian professionals and Jewish refugees from Russia. Quite a few students are born outside the United States, some are not United States citizens, and many are representative of a multi-generational "melting pot." In writing

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<sup>87</sup> In *Writing for Law Practice*, the authors' chapter on persuasion references a formula developed by a fiction author that is a very useful template. Fajans et al., *supra* n. 3, at 183–184 (citing Lamott, *supra* n. 50, at 62, which in turn quotes Alice Adams, a novelist and short story writer who says, "You begin with *action* that is compelling enough to draw us in, make us want to know more. *Background* is where you let us see and know these people, so that we learn what they care most about. The plot—the drama, the actions the tension—will grow out of that. You move them along until everything comes together in the *climax*, after which things are different for the main characters, different in some real way. And then there is the *ending*, what is our sense of who these people are now, what they left with, what happened and what did it mean.").

<sup>88</sup> E.g. Nadine Gordimer, *The Ultimate Safari*, in *Jump and Other Stories* 33–46 (Farrar, Straus & Giroux 1991); *Five Stories: Rites of Passage from the Old World to the New*, Nat. History 50 (Mar. 1998).

their stories, many opt to write in the first-person voice of a relative they knew, while some whose immigration histories are less well known adopt the voice of an unknown ancestor and invent many facts. This exercise stretches their creative muscles to prepare them for the task of relating their client's case in a gripping and persuasive manner.

b. Locating Theme, Character, Plot, and Struggle

During the process of affidavit drafting, students should be able to identify the narrative components of their client's story since a compelling account usually can be identified and extracted easily given the fundamental nature of asylum relief. The theme is located in the essence of the refugee definition—nations must protect their citizens from harm inflicted on account of their essential characteristics and beliefs. The David v. Goliath parable in modern terms of the brave individual struggling for freedom and democracy against a vicious tyrant is often at the heart of the claim. Valiant, despised groups fighting for identity and survival offer another familiar plot. Resistance to or suffering at the hands of authorities are other possible themes. The protagonist will be trying to assert rights recognized universally as deserving protection—freedoms of identity, belief, expression, or action—that the governments of their native countries have failed to safeguard.

In Mr. X's case, the theme is very straightforward. The history of China's annexation and suppression of religion in Tibet and the pro-democracy movement is well-known in the West, especially to asylum adjudicators who have presided over many such cases. The Free Tibet movement itself provides a theme of freedom, independence, autonomy, and sustained resistance to oppression that strikes at the heart of Western ideals.<sup>89</sup> Many historical facts, therefore, are not disputed; only the bona fides (i.e., identity, actual participation in prohibited activities, ensuing punishment) of the particular asylum seeker are at issue.

Character—in both the literary and moral sense of the term—is vital to establish. The small details of childhood, family, education, environment, work, and Mr. X's personal qualities create a

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<sup>89</sup> See e.g. *Free Tibet Campaign*, <http://www.freetibet.org/info/facts/fact14.html> (accessed Sept. 11, 2007); *Students for a Free Tibet*, <http://www.studentsforafreetibet.org/article.php?list=type&type=78> (accessed Sept. 11, 2007); *Tibet Online*, <http://www.tibet.org/> (accessed Sept. 11, 2007).

portrait of a real person, not a paradigm, in whom the listener can endow positive attributes that enhance credibility. Dangerous choices of conduct that might incur violent costs are more understandable in light of principles, beliefs, and traits. Character development allows the fact finder to see the asylum seeker as a person not a prototype.

Mr. X is good "hero" material. He is an uneducated farmer who made a brave, life-changing choice to express his beliefs. He is basically an "everyman," not a leader. His so-called wrong-doing was neither original, momentous, nor particularly consequential. The brutality of his fate, therefore, is far out of proportion to the scale of his actions. His decision to continue political opposition in the face of near-certain punishment is another sign of his integrity. Moreover, his life-long vulnerability to further oppression is a permanent limitation on his choices and free will. His ultimate decision to flee is not a weakness but a courageous sacrifice of home and family.

The plot of his story is also gripping as he takes a brave step to free expression but then pays a tremendous price for this small act. The spectacular and tragic mountain journey, culminating in a murderous firestorm, provides a narrative climax for which asylum "must" be the only denouement. The freedom and safety provided by asylum bring his story of courage, suffering, and sacrifice to a satisfying conclusion.

### c. Finalizing the Case Theory—Fifty Words or Less

The first page of the affidavit is the "trailer" to the upcoming feature film. It is the hook that catches the reader's eye, and shapes expectations for the balance of the statement. On occasion, we have noticed that the asylum officer or judge has highlighted what we have termed "case theory in a nutshell" paragraphs. These one or at most two paragraphs efficiently capture the case theory in non-legal, narrative terms. The closest analogy is to an opening statement that effective trial lawyers use to provide an introduction to the plot and characters that follow, and thereby shape the jury's expectations about the forthcoming evidence.<sup>90</sup>

At the mid-point of the semester, the students usually have completed their interviewing, have tossed around many potential

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<sup>90</sup> Mauet, *Trial Techniques*, *supra* n. 86, at 64–67; Mauet, *Trials*, *supra* n. 86, at 95–96 (recommending storytelling in opening statements); Oliver, *supra* n. 44, at 319–329.

case theories, and have started to gather supporting evidence. It is time to articulate exactly why the client should be granted asylum so that the affidavit is drafted to confirm this theory. But students are almost always confused about how to knit together the legal elements and the narrative. A very helpful in-class exercise instructs students how to compose this lead-in.<sup>91</sup> “Set forth the case theory in 50 words or less and avoid legalese.” This simple assignment is harder than it seems. Here are a few examples of their efforts (with their inevitable legalese italicized):

Mr. X's case theory is *fear of persecution on account of his support for the Dalai Lama in Tibet in opposition to the official position of the Chinese government. He has been jailed and tortured so he fears persecution if he were to return to Tibet*

\* \* \*

Mr. X, a supporter of the Dalai Lama has hung posters picturing the Dalai Lama, has been jailed and tortured, and then escaped Tibet. He has a *well-founded fear of persecution* if he were to return of receiving similar treatment again.

\* \* \*

Our client is a supporter of the Dalai Lama. He left Tibet in order to escape prison, physical abuse, and torture. He has a *well-founded fear of persecution* based on his opposition to China if he is returned to Tibet.

\* \* \*

Mr. X has been arrested, beaten, tortured, and imprisoned for more than one year by the Chinese police for engaging in pro-Dalai Lama activities. *My client is in the United States and unable to return to Tibet because of a well-founded fear of persecution on account of his pro-democracy activities and his escape to the United States.*

These paragraphs demonstrate how difficult it is for the students to capture a story that bridges the law and the facts. Note how often they resort to terms like “persecution,” “well-founded fear,” or “on account of” that are found in the statute. They are indecisive about the voice, sometimes saying “my client,” or “our

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<sup>91</sup> My former colleague, Melissa Crow, introduced me to this very effective exercise.

client," sometimes referring to him by name, and others by pronoun. Indeed, they seem to never even consider using the first-person singular.

The next step in this exercise is to eliminate all of the legalese and conclusory language italicized above. Not much remains. Then, start over and complete this sentence: "I am entitled to asylum because . . ." This clause is a very effective springboard to a more robust iteration of the facts. A better version of the case theory might sound like this student's version:

Immediately after hanging posters of the Dalai Lama, I was arrested, severely beaten with sticks, shocked with cattle prods, and interrogated for many hours every day. I was imprisoned for two years in brutal conditions after which I was subjected to frequent detentions, house searches, and regular humiliation by Chinese authorities. Despite this horrible experience, I continued my activities until hearing that my rearrest was imminent; I fled to Nepal but, on the Himalayan peaks, Chinese soldiers murdered my companions. I was barely able to escape.

Admittedly, this paragraph cheats a little. The word count is actually 87, but quite a lot happened to Mr. X so the surplus is understandable. The reader has a clear picture of what would constitute the persecution (years of arrest, beatings, torture, interrogations, prison, detentions, house searches, and regular humiliations), the basis (his political and religious support for the Dalai Lama), the future fear (rearrest, murder), and the nexus between the persecution and the ground (immediately after hanging the offending posters). The paragraph also portrays a man of convictions and bravery who risked harm and who fled at great cost. *Logos, pathos, ethos.*

This efficient paragraph manages to establish themes and images without very much detail. It also provides explanations, motivations, and subjectivity. There is one striking question, however. Succinctness and excitement both may have been achieved at the expense of the client's authentic voice, another example of the difficult balance discussed above. The drafter might want to reconsider words the client is unlikely to utter like "brutal," "subjected," "humiliation," and "imminent," even at the sacrifice of brevity.

#### d. Crafting Engaging Chapter Titles or Headings

A section heading—indented, bolded, and descriptive—is a simple visual and literary device that organizes an affidavit to stress important topics, assist transitions, and break the reader’s attention into bite-sized pieces. Too often, however, headings are sterile transitions that lack argumentation. Instead, section headings can articulate the themes of the story and emphasize the qualities of the hero. The story of an affidavit thus might include chapters such as “The Tragic Consequences of My Family’s Resistance to Chinese Occupation” instead of “My Background.” Other chapters might be “My Difficult Decision to Join the Pro-Democracy Movement,” “I Am Tortured and Imprisoned for Two Years Because of My Political Activities,” or “My Terrifying Flight from Tibet That Almost Cost My Life.” Each of these headings may sound a bit melodramatic, but so is his story. Why not capture the heroic elements of his life, sound a theme of the individual struggling valiantly against a brutal military and political power, and the lengths to which he would go to both voice his principles and escape lethal harm.

## VI. CONCLUSION

Read, reflect, and revise. These are the polestars of any writer, and they guide affidavit drafters as well. The personal statement, however, demands special attention. It must be compelling, authentic, and convincing. The challenge is to instill in students instincts and abilities to be engaging and persuasive storytellers. By self-consciously stressing narrative elements, introducing exercises to flex that approach to writing, and using the personal statement to continuously question both the logic and the persuasiveness of the story, effectively writing the “I” can produce the single most important document in an asylum case. Even where the themes, characters, and storylines are less dramatic and emotional, these techniques can still be helpful to free the drafter to engage the audience to achieve the goals of the case.