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# Distant Voices Then and Now: The Impact of Isolation on the Courtroom Narratives of Slave Ship Captives and Asylum Seekers

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# DISTANT VOICES THEN AND NOW: THE IMPACT OF ISOLATION ON THE COURTROOM NARRATIVES OF SLAVE SHIP CAPTIVES AND ASYLUM SEEKERS

*Tara Patel**

> "Individual voices do not necessarily yield the truth, but a multiplicity of voices from different points of view can serve to sharpen and improve the story, perhaps moving it toward truth."
>
> —Jonathan Bryant,
> Dark Places of the Earth:
> Voyage of the Slave Ship Antelope

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## INTRODUCTION

The truthfulness of a story does not guarantee credibility in status determination hearings,[1] whether for slave ships captives two centuries ago or for asylum seekers today. Lived experiences, without filtration, are often messy, tangled, and incoherent to a listener and adjudicator.[2] A narrative gains its credibility only after it "passes a certain threshold of coherence, fidelity, and conformity to the listener's perception of the world."[3] The narratives of slave ship captives emerged with power and persuasiveness when sought by judges, the public, and counsel.[4] The narratives disintegrated when captives were isolated and removed from judges, the public, and counsel.[5] Similarly, in the present day, the narrative truths of asylum seekers become most persuasive when asylum seekers are given the opportunity to interact with counsel and the public and remain less persuasive when asylum seekers are isolated in detention centers.[6]

Part I compares the nineteenth century cases of the *Antelope*[7] and the *Amistad*[8] to identify why they resulted in different outcomes despite having similar fact patterns. The *Antelope* concerned the fate of approximately 280 African captives discovered on a slave trade ship upon its interception by a U.S. revenue cutter.[9] Since the slave trade in the United States was illegal at the time, the captives were transported to Savannah for trial through which their status—free or slave—would be determined.[10] After a lengthy trial and appeals process in which Spain and Portugal laid claim to the captives,[11] the Supreme Court determined that those captives claimed by a non-U.S. nation were slaves.[12] The Court reasons that however "abhorrent" the slave trade was, the United States was obligated to recognize the rights of other nations to participate in it.[13] In comparison, the *Amistad* concerned the fate of captives aboard a slave trade ship in which the captives committed mutiny, attempted to sail to Africa, but were captured by a

1. Jessica Mayo, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 Wash. U.L. Rev. 1485, 1496 (2012).

2. *Id*.

3. *Id*.

4. *See infra* Part I.

5. *Id*.

6. *See infra* Part II.

7. The Antelope, 23 U.S. 66 (1825).

8. U.S. v. Schooner Amistad, 40 U.S. 518 (1841) [hereinafter Amistad]

9. Jenny S. Martinez, *International Courts and the Constitution: Reexamining History*, 159 U. Pa. L. Rev. 1069, 1108 (2011); A revenue cutter is an armed government vessel employed specially to enforce revenue laws.

10. *See id.*; *see also The Antelope,* 23 U.S. at 68.

11. *The Antelope,* 23 U.S. at 124.

12. *Id*. at 126-27.

13. *Id*. at 114-15.

U.S. vessel.[14] The Supreme Court ordered them free despite the Spanish government's claim that the captives were its property.[15] Part I explores these different outcomes and argues that the absence of *Antelope* captives' stories in the litigation process was partly due to the decision to isolate captives in slavery before their status was determined. In particular, it argues that this isolation affected the outcome of the *Antelope* by preventing captives from sharing their anecdotes and translating them to a format that would resonate with their legal counsel, the public, and judges. In contrast, the *Amistad* captives, while also detained, were situated close to those who could help them. They were able to transform their truths into a winning narrative for the court by understanding and leveraging the talents and expertise of counsel, and the biases of judges and the public.

Part II argues that 200 years later, a similar environment of isolation suppresses the stories of another group with undetermined legal status: asylum seekers. Although slave ship captives were forced into the country with chains, while asylum seekers are driven into the country by fear, the legal status of both groups in their respective time periods was undetermined upon their arrival. Both groups deserved, by legal and moral standards, the opportunity to present the truth behind their arrival and to prove their legal status. Part II argues that the detention of asylum seekers mirrors the isolation of the *Antelope* captives by removing detainees from those most able to help them develop a persuasive narrative truth. Detention silences important voices, aggravates ineffective representation, damages public perception, and ultimately harms case outcomes.

## I. Comparing the Antelope and the Amistad

### A. *A Slave Trade History Snapshot*

Congress chipped away at the slave trade from 1794 to 1825 (the year the *Antelope* was decided),[16] yet captives continued to be illegally imported. Congress began regulating the slave trade in 1794,[17] increased fines for violations in the next decades,[18] and prohibited the slave trade in 1807 (to take effect in 1808).[19] At that point, violations were met with harsher

14. Amistad, 23 U.S. 518, 124 (1841).

15. *Id.* at 520.

16. *The Antelope*, 23 U.S. 66 (1825).

17. Paul Finkelman, *Slavery in the United States: Persons or Property? in* The Legal Understanding of Slavery: From the Historical to the Contemporary 105, 120 (Jean Allain ed., 2012) (noting that Congress prohibited the use of U.S. shipyards to be used in trade); *see also* Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 Cornell L. Rev. 1806, 1097 (1993) (noting that in 1974, Congress passed the first national law to restrict international slave trade by prohibiting the export of slaves from the United States to other nations).

18. Finkelman, *supra* note 17, at 121.

19. *Id.*

punishments, such as extensive jail time and five-digit fines.[20] Congress then passed the 1819 Slave Trade Act, which provided that captives brought into the United States illegally would come under the authority of the U.S. president who would then arrange to return the captives to Africa.[21] In 1820, Congress passed legislation considering intercontinental slave trade as piracy, punishable by death.[22] In theory, Congress seemed to be making strides in taking a stand against the international slave trade.[23] However, captives continued to be illegally imported into the United States and sold as slaves[24] due to lax federal enforcement and enormous profits benefitting the U.S. government, Southern states, and individual Southerners.[25] Americans were complicit in this venture, not only as consumers but also as financiers, sailors, and government officers.[26]

### B. *Litigation over the Status of Slave Ship Captives*

African captives were historically treated as slaves in the United States before their status was legally determined.[27] For example, in 1818, the U.S. Navy intercepted three American schooners—the *Constitution*, *Marino*, and *Louisa*—and found 107 captives onboard.[28] The resulting cases were drawn out over approximately six years in an Alabama district court.[29] During that time, the captives were handed to three bondsmen.[30] The captives were most likely treated as slaves given that they were sold

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20. *Id*.

21. The Act in Addition, ch. 101, 3 Stat. 532 (1819). This statute contrasts with earlier statutes that left the "disposition" of illegally imported Africans to individual states. *See* Holden-Smith, *supra* note 17, at 1098; *see also* W.E.B, Du Bois, The Suppression of the African Slave-Trade to the United States of America, 1638-1870, 5-9 (2007) (covering the individual restrictions states imposed on the slave trade prior to federal laws and enforcement).

22. Holden-Smith, *supra* note 17, at 1098; Act of May 15, 1820, 3 Stat. 600 (1820).

23. *See generally* Finkelman, *supra* note 17, at 121-22.

24. Jonathan M. Bryant, *"By the law of nature, all men are free": Francis Scott Key and the case of the slave ship Antelope*, Salon (July 11, 2015), http://www.salon.com/2015/07/11/%E2%80%9Cby_the_law_of_nature_all_men_are_free%E2%80%9D_francis_scott_key_and_the_case_of_the_slave_ship_antelope/.

25. *See* Holden-Smith, *supra* note 17, at 1098; *see also* Finkelman, *supra* note 17, at 122.

26. *Id*.

27. *See, e.g.,* H.R. Res. No. 54, 21st Cong., 2nd Sess. (1831) (illustrating the formal process for transferring captives to slavery pre-trial by revealing correspondence on what to do about the capture, by a U.S. vessel, of the Spanish ship *Fenix* with African captives on board).

28. *See* 163 S. 10, *Expenditures Under the Appropriation for Prohibition of the Slave Trade*, 20th Cong. (1827); *see also* Slave Ships Marino, Constitution, and Louisa, Hearing on H.R. 231 *Before the Committee on the Suppression of the Slave Trade* (1826); *see also* Du Bois, *supra* note 21, at 80.

29. See Du Bois, *supra* note 21, at 80.

30. *Id*.

and hired[31] and that many died from "various causes" before litigation concluded.[32] Eventually, the Supreme Court condemned the vessels but did not penalize the slave traders.[33] In spite of prohibitions against the slave trade, the captives of the *Marino* and the *Louisa* were sold at auction for the benefit of the State.[34] Captives from the *Constitution* were most likely also sold, though Congress never officially tracked their outcomes.[35] In another case, the U.S. ship *Hornet* captured a French slave ship, *La Pensee*, which had 240 captives on board.[36] As the captives awaited their fate, they were placed in the hands of a U.S. marshal,[37] and also likely treated as slaves given that only 160 captives survived between their apprehension (December 1821) and the decision to return the captives to France (July 1822).[38]

Although often overlooked,[39] the *Antelope* was perhaps the most important and complex case litigating the status of captives.[40] Near the end of June 1820, a U.S. Treasury revenue cutter captured a ship, the *Antelope*, off the coast of Florida.[41] Over 280 chained captives were on board, most likely destined for illegal sale in a Southern market.[42] The captives' journey

31. *See id*. (noting that before the Supreme Court decision, Spanish claimants were paid $650 per captive and that an individual later petitioned Congress for "reimbursement for the slaves sold, for their hire, for their natural increase, for expenses incurred, and for damages").

32. DU BOIS, *supra* note 21*,* at 80.

33. *Id*.

34. *Id*.; DU BOIS, supra note 21, at 80; *See also* Dept. of Treasury, Letter from the Secretary of the Treasury, Transmitting the Information Required by a Resolution of the House of Representatives, of the 4th Instant, in Relation to the Rights of Certain Persons to the Cargoes of the Slave Ships Constitution, Louisa, and Marino, H.R. Doc. No. 19-163, at 35 (1826) (U.S. Attorney for Mobile, William Crawford, arguing that the "negroes. . .may be condemned to be sold, and the proceeds of such sale be distributed according to law.").

35. *See* DU BOIS, *supra* note 21, at 80 (noting that although the case of the *Constitution* faded "in a very thick cloud of official mist" and that information on the final disposition of the slaves were never printed, an individual later stepped forward and claimed reimbursement for "the slaves sold, for their hire, for their natural increase, for expenses incurred, and for damages.").

36. *Cruise of the Hornet*, ALEXANDRIA GAZETTE, Jan. 1, 1822, at 2, World Newspaper Archive, Doc. No. 12F7FEA751F7DE68.

37. *See* John Quincy Adams, Message from the President of the United States, Transmitting, in Compliance with a Resolution of the Senate of 19th February Last, a Report from the Secretary of the Navy Showing the Expense Annually Incurred in Carrying into Effect the Act of March 2, 1819, for Prohibiting the Slave Trade, S. Doc. No. 20-3, at 10-1 (1827) (expenditure form noting that Marshal John Nicholson paid $4,246.72 for the "clothing and maintenance" of the captives).

38. *See* JONATHAN M. BRYANT, DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP ANTELOPE 182-84 (2015).

39. *Id*. at xviii.

40. *Id*. ("[B]y affirming that while slaves might be human beings, at law slaves were property, John Marshall's Court shaped American jurisprudence on these issues for the next thirty-five years.").

41. JOHN T. NOONAN, JR., THE ANTELOPE 1 (1990).

42. *Id*.

started long before the interception by the revenue cutter. Six months earlier, a ship called the *Columbia* sailed from Baltimore under the Venezuelan flag, but with a crew of primarily American citizens.[43] Once at sea, the sailors changed the name of the ship to the *Arraganta*, and headed toward Africa.[44] It then captured several vessels—one American, several Portuguese, and one Spanish (the *Antelope*)—and took African captives from each.[45] The crew of the *Arraganta* wrested control of the *Antelope* and the two vessels sailed across the Atlantic to the coast of Brazil.[46] When the *Arraganta* wrecked off the coast, the crew and cargo were transferred to the *Antelope*.[47] The *Antelope* was on its way to the United States when the revenue cutter captured the ship and brought the captives and crew to Savannah, Georgia for trial.[48]

Thus, the eight-year litigation saga of *the Antelope* began, drawing in several attorneys, all of whom formulated arguments devoid of captives' stories. The Spanish and Portuguese (represented by Senator John Macpherson Berrien, District Attorney Charles Ingersoll, and Congressman Henry Wilde)[49] argued that those captives taken from Spanish and Portuguese vessels were slaves and should be returned to their respective nations.[50] They argued that the United States had intercepted the *Antelope* illegally, that international law required the United States to recognize other countries' laws and titles to property, and that any ethical argument for freeing the captives was diminished by the country's historical and contemporaneous slavery practices.[51] The United States (represented by attorneys Richard Habersham and Francis Scott Key, and U.S. Attorney General William Wirt) argued for the freedom of the captives under the theory that the captives had been transported by American citizens in violation of the 1819 Slave Trade Act, that international law condemned the slave trade, and that the captives were not property.[52] A federal district court ruled that the African slave trade continued under the laws of some countries even if others prohibited it.[53] The court found that the captives should therefore be restored to Spain and Portugal, except for those taken from the American vessel who were to be released from slavery.[54] An ap-

43. The Antelope*,* 23 U.S. 66, 68 (1825).

44. *Id*. at 67.

45. *Id*. at 67-68.

46. *Id*. at 123.

47. *Id*. at 68, 123.

48. *Id*. at 68.

49. Noonan, *supra* note 41, at 95, 129.

50. *The Antelope*, 23 U.S. at 68.

51. *See* Noonan, *supra* note 41, at 99-102; *see also* Bryant, *supra* note 38, at xix.

52. Bryant, *supra* note 38, at 136-138; *see also* Noonan, *supra* note 41, at 97-98.

53. Bryant, *supra* note 38, at 141.

54. *Id*. at 141-42.

peals court affirmed[55] and directed the parties to use a lottery to determine the fate of the captives because no records revealed which captives came from which ship.[56] Habersham appealed to the Supreme Court.[57] Justice John Marshall writing for the majority held that the slave trade did not violate the law of nations and that the captives originally onboard the Spanish ship should be returned to Spain.[58] Because no Portuguese claimant had materialized, the Court held that the Portuguese share would be reduced to zero.[59] However, the Court never formed a process for determining exactly which captive came from which boat and pushed the decision to the lower courts.[60] There, the captives were arbitrarily divided through a lottery-style system.[61] Ninety-three captives were determined to be Spanish property[62] and of those, the thirty-seven individuals still surviving[63] were later sold within the United States,[64] solidifying the United States' participation in the illegal slave trade. The rest were determined to be free,[65] either because they were captured illegally from an American ship[66] or from the Portuguese ship, which still had no claimant.[67] They were transported to Africa,[68] though by the end of the eight-year litigation period more of the free captives had died than survived.[69]

Fifteen years later,[70] a similar series of events, this time involving the *Amistad,* led to a different outcome. In 1839, fifty-four Africans, who were being illegally transported along the shore of Cuba on the ship *Amistad*, managed to seize control of the vessel.[71] They killed the captain and crew,

55. *See id.* at 149-51 (showing that in contrast to the district court ruling, Justice Johnson increased the number of captives considered free and demanded that Portugal provide proof for their claimant).

56. *See* NOONAN, *supra* note 41, at 65 ("[T]he lot must direct their fate; and the Almighty will direct the hand that acts in the selections.").

57. *Id.* at 74.

58. *Id.* at 112-13.

59. The Antelope, 23 U.S. 66, 79-81 (1825); *see also* NOONAN, *supra* note 41, at 113-114.

60. NOONAN, *supra* note 41, at 116.

61. *Id.* at 119-32; BRYANT, *supra* note 38, at 249-56, 160.

62. NOONAN, *supra* note 41, at 116; *but see id.* at 122 (noting that the number was reduced to 50 to take into account those who had died since arrival).

63. *See id.* at 140 (noting that the number actually sold was 37, again due to death).

64. *See id.* at 139 (noting that a U.S. purchaser bought the Spanish property).

65. *Id.* at 123, 125.

66. BRYANT, *supra* note 38, at 149-50.

67. *Id.* at 237-39.

68. *Id.* at 261.

69. NOONAN, *supra* note 41, at 156; *Cf. id.* at 141 (220 captives were, given the court ruling, free at the time of capture) *with id.* at 135 (approximately 120 of the captives on board the ship heading to Africa were among those aboard the *Antelope).*

70. Amistad, 40 U.S. 518, 518 (1841).

71. *Id.*

except for two crewmembers who were ordered to navigate the ship to Africa.[72] The crew deceived the Africans and sailed instead toward the United States, where the ship was intercepted.[73] U.S. officials freed the two crew members and imprisoned the Africans.[74] A federal district court judge ruled that the Africans were not liable for their actions because they had been enslaved illegally.[75] The case then proceeded on appeal to the Supreme Court, where former president John Quincy Adams defended the Africans and advocated for their freedom.[76] The Court concluded that because the international slave trade was illegal, the captives should be recognized as free under American law.[77]

Several theories may explain the different outcomes of the *Antelope* and the *Amistad*, including a shift in societal attitudes toward slavery and the slave trade in the years between the cases, different political climates, and new legislation.[78] The rest of Part I explores a different explanation that is perhaps both reflective of and causally related to the others: the treatment of the captives before and during the litigation of the trials.

### C. *Impact of Isolation on the Narratives of Slave Ship Captives*

Although many voices contributed to the *Antelope* litigation,[79] the stories of the captives themselves are missing, despite seven years of litigation, are missing. A translator was hired several times[80] and many of the captives had learned English.[81] Yet the documents contain no records of anything said by a captive.[82]

Instead, the captives were presumptively treated as slaves before their status was determined.[83] They were "hard at work in homes and on plantations in farthest Georgia. . .isolated and indistinguishable from the enslaved people working with them."[84] They had already suffered trauma through violence, separation from family, and in some cases, sexual as-

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 519.

76. Bryant, *supra* note 38, at 299.

77. *Amistad*, 40 U.S. at 519-21.

78. *See e.g.* Bryant, *supra* 38 ("The *Antelope* predated the nationally coordinated and vocal abolitionist organizations that would merge out of the growing conflict over slavery during the 1820s and 1830s).

79. Noonan, *supra* note 41, at 1-2, 95.

80. Bryant, *supra* note 38, at xix.

81. *Id.* at 160.

82. *Id.* at xix- xx; *but see id.* at 159 (noting that a translator was used to translate directions to the captives when they were working under Morel and other Georgia elite).

83. *Id.* at xx.

84. *Id.; see also id.* at 164 ("While the legal status of the captives remained uncertain, working, living, and suffering like slaves on a Georgia plantation was their daily experience.").

sault.[85] Many were children: 41 percent of the captives were between five and ten years old, and at least eight were between two and five years old.[86] They were handed to U.S. Marshal John H. Morel during the court proceedings and were then exploited by Morel and farmed out to the city of Savannah and various other Savannah elite.[87] Their work was unpaid, brutal, and occurred during a health epidemic—in just the first six months, one-fifth of the captives died.[88]

Morel—not the attorneys—would have the "greatest physical impact upon [the captives'] lives."[89] He was found to be such a brutal slave master that he was charged with murder, and the captives were temporarily removed from his care.[90] Morel had also found a way to game the system. He had little use for the longevity of the captives' lives in the same way that he did for his own slaves because the captives would be taken from him after the litigation.[91] He therefore worked them while also charging the government for their "care."[92] Each of the three slaves that personally worked in his house died.[93] By the end of litigation, 116 of the captives, or approximately 46 percent had died.[94] Not only did Morel and some of the citizens of Savannah reap the benefits of the captives' labor under cruel conditions and a pretense of care,[95] but Morel also became wealthy from the affair.[96]

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85. *See id*. at 164; *see also id*. at 102 (inferring that women and girls were sexually assaulted by White sailors during the voyage).

86. BRYANT, *supra* note 38, at 73.

87. *Id*. at 165-66 (noting that captives not working for Morel and the city worked for members of Savannah elite, allowing the elite to enjoy their lives on the backs of the captives' free labor); *see also id*. at 196 (noting that Senator Berrien also held twenty captives as slaves, despite his involvement advocating for Spain and Portugal).

88. NOONAN, *supra* note 41, at 46; *see also* BRYANT, *supra* note 38, at 163, 167-78 (noting that Morel forced the captives to perform grueling labor and that all the captives suffered violence at the hands of their masters).

89. NOONAN, *supra* note 41, at 45.

90. *Id*. at 78-79.

91. BRYANT, *supra* note 38, at 185.

92. *Id*. at 185; *see also* NOONAN, *supra* note 41, at 79 (noting that that Secretary of War and President were told by the Postmaster of Savannah that "the Marshal. . .was now accumulating a fortune of at least thirty thousand a year by working a number of Africans who are in his possession as Marshal of the District. . .and that he intends to swamp the negroes – that is to work them to death – before they shall be finally adjudicated out of his possession.").

93. NOONAN, *supra* note 41, at 123.

94. *Id*. at 122.

95. *See id*. at 46 (noting that fifty captives—"The primest of the gang"—were sent to work for an overseer for the City of Savannah, a few were rented out to householders in Savannah, and 100 worked on Morel's plantation).

96. *See* Sec. of Navy, S. Doc. No. 20-3, at 10 (1st Sess. 1827) (Morel paid $20,286.98 between 1820 and 1822); NOONAN, *supra* note 41 at 45-46; BRYANT, *supra* note 38, at 283 (noting that the captives must have made Morel at least $50,000, well over a million dollars

In comparison, in the case of the *Amistad* the captives were not held in isolation, indistinguishable from slaves. They were jailed in New Haven, where abolitionists, journalists, and the general public flocked to visit the jail.[97] The jail itself was sparse and dirty, but the captives were able to use their spare time to craft their case, build alliances with anti-slavery groups, and study reading, writing, and religion.[98] Perhaps most importantly, the captives were in frequent contact with those outside the jail.[99] The jail became a meetinghouse for advocates, abolitionists, and the captives' counsel.[100]

The next sections argue that the isolation and resulting treatment of captives before status determination impacted both representation and public perception in the cases of the *Antelope* and the *Amistad*, which in turn led to their different outcomes.[101] In the *Antelope*, isolation and enslavement led to ineffective representation, for it impacted counsels' ability to persuasively construct and incorporate captives' stories to bolster their arguments.[102] On the other hand, in the *Amistad,* frequent interaction between advocates and the captives allowed counsel to develop a persuasive account, bolstered with strong evidence, for the court.[103] Isolation shaped a public perception of the *Antelope* captives as an undifferentiated mass, which in turn led to fewer champions to the captives' cause and the eventual acceptance of a decision to arbitrarily divide the slaves by lottery.[104] In comparison, frequent interaction with the American public helped the *Amistad* captives build alliances with abolitionists, understand the cultural workings of American society, and create a coherent narrative that was persuasive to the public and the court.[105]

### 1. Effects on Representation: The Antelope

The attorneys advocating for the captives' freedom (Key, Wirt, and Habersham) could have benefitted from interacting with captives given their own background and biases. Key was from the American Coloniza-

today); David S. Reynolds, *Worse than Dred Scott*, The Wall Street Journal ( Aug. 7, 2015), http://www.wsj.com/articles/worse-than-dred-scott-1438979854.

97. Howard Jones, Mutiny on the Amistad 65 (1987) (noting that in just a few days after being transferred to the jail, visitors to the jail totaled approximately four thousand).

98. *See* Marcus Rediker, The Amistad Rebellion: An Atlantic Odyssey of Freedom and Rebellion 8 (2012).

99. *Id.* at 110.

100. *Id.*

101. *See infra* Part I.C.

102. *See infra* Part I.C.i.

103. *See infra* Part I.C.ii.

104. *See infra* Part I.C.iii.

105. *See infra* Part I.C.iv.

tion Society[106] and both Key and Wirt owned slaves.[107] Wirt had also upheld the states' tradition of selling illegally imported slaves in market[108] and had stated that he was troubled by the emancipation and deportation plan proposed by the Colonization Society because it would cause domestic danger and "excitement among the slaves."[109] Habersham fought on behalf of the captives and it is perhaps due to his work that the legal battle was protracted.[110] But even he owned slaves both pre- and post-trial.[111] Although opposition to the slave trade and opposition to slavery were separate threads of political affiliation during the *Antelope* time period, the attorneys' relationship with general slavery practices undoubtedly colored the attorneys' perception of the captives and perhaps prevented them from formulating the best arguments possible.

In fact, no documented effort was made by counsel to understand and utilize the captives' stories.[112] Eliciting captives' accounts would have shed a light on the conditions of the ship, the conditions of the plantation, and the captives' geographical journey. It would have helped counsel develop a narrative that would resonate with the public and the justices.[113] Attorney Habersham asserted that the "United States was a mere nominal claimant" and that the "negroes are the actual party."[114] Yet, Habersham made no requests for an interpreter so that the captives could participate in their fate by sharing their stories and, importantly, identifying the ships they had sailed on.[115] None of the captives ever appeared in court[116] and their attorneys never consulted them for direction.[117] The first time any

106. *See* NOONAN, *supra* note 41, at 15; *see also* BRYANT, *supra* note 38, at 97 (noting that the goal of the American Colonization Society was not abolitionism, but to establish an American colony in Africa where the United States could transport "problematic" free Blacks).

107. NOONAN, *supra* note 41, at 22.

108. *Id.* at 17.

109. *Id.* at 24.

110. *Cf. id.* at 40 ("Habersham framed the case for the freedom for the Africans which, for the next seven years, was to occupy the courts of the United States."), *with* BRYANT, *supra* note 38, at 97 (inferring that although Habersham fought fiercely for the freedom of the captives, he was likely motivated by a duty to law and enforcing the slave trade acts, rather than the individual lives of the captives).

111. BRYANT, *supra* note 38, at 96, 282.

112. *See generally* BRYANT, *supra* note 38, at xix; NOONAN, *supra* note 41, at 138.

113. *See generally* NOONAN, *supra* note 41, at 72-74. Justice Story was outwardly sympathetic to the inhumane conditions on slave trade ships and could likely have been influenced by first-hand accounts from captives. His disdain for the slave trade is what motivated him to "convert[ ] ugly facts and moral outrage into a legal holding" for the case of *Jeune Eugenie*, and to later rule favorably for the captives in the *Amistad*. *Id.*

114. *Id.* at 55.

115. *Id.*; *see generally* BRYANT, *supra* note 38, at 136 (detailing Habersham's arguments, which are devoid of the captives' personal stories).

116. NOONAN, *supra* note 41, at 55.

117. *Id.* at 138.

names were mentioned was a year and a half after the start of proceedings, and the names were used only for lottery purposes to determine which captives, arbitrarily, would be considered free.[118] Officials only inquired into the status and health of the captives in order to charge the government for their care.[119] Instead of relying on the captives' accounts, Habersham's legal conclusions were drawn from testimony of the Americans on the revenue cutter and of the crew of the *Columbia* (the initial ship that set out from Baltimore).[120]

The legal arguments used by the captives' counsel fell short because there was no face or voice to give substance to the claim that the captives were not property and should not be arbitrarily divided through a lottery. The *Antelope* opinions discuss international law and general theories of slavery, but lack captives' anecdotes or discussion of their personal stake in the outcome of the trial and the lottery.[121] In the first *Antelope* case before the Supreme Court, Key argued that neither Spain nor Portugal had identified which captives came from their respective ships, that a lottery disregarded the captives' statuses as individual human beings, and that the lottery was therefore an inadequate substitute for proof of identification.[122] However, there is no evidence that counsel used the captives' stories to substantiate their individuality or that counsel even asked the captives to identify which boat initially carried them.[123] The lower court "did not have before it the persons whose lives it was touching"[124] and approved the lottery, seemingly referring to the captives as "things which could be divided as things in bulk are divided."[125] Habersham appealed once more to the Supreme Court on the grounds that the Spanish proof was inadequate and that all the captives, including the thirty-nine designated to Spain, were free.[126] Key again argued on behalf of the captives and stated "there is no credible and competent evidence to identify them."[127] But again, Key produced no evidence to emphasize that the captives were individuals and not interchangeable.[128] Because the captives' counsel had done little to show that the claimants' arbitrary identification was misleading, there was a low bar for the Spanish claimants to prove that the thirty-nine captives

118. *Id.* at 66.

119. *See id.* at 49-50, 122-23.

120. *See id.* at 55.

121. *See* The Antelope, 25 U.S. 546, 552 (1827); *see generally* The Antelope*,* 23 U.S. 66 (1825).

122. Noonan, *supra* note 41, at 98-99.

123. *See id.* at 93-117.

124. *Id.* at 116.

125. *Id.* at 116-17.

126. *Id.* at 128.

127. Noonan, *supra* note 41, at 129.

128. *See generally id.* at 93-117.

came from the Spanish ship.[129] The Supreme Court majority sided with the Spanish claimants, writing that "under the peculiar and special circumstances of the case, the evidence of identity is competent, credible, and reasonably satisfactory, to identify the whole thirty nine."[130]

### 2. Effects on Representation: The Amistad

In contrast to the sparse number of attorneys willing to fight for the *Antelope* captives, a slew of attorneys raced to support the cause of the *Amistad* captives.[131] Lawyers such as John Quincy Adams and Roger Baldwin were motivated to defend the lives of the captives by the injustice of the situation, rather than a legal obligation.[132] Attorney Baldwin would question the very imprisonment of the Africans in his arguments ("This is a strange process – imprison them, in order to ascertain they are free!"),[133] an inquiry never pursued by *Antelope* captives' counsel despite the captives' seven-year enslavement.

Access to the captives allowed advocates to seek and gather crucial evidence to build their case. For example, a political activist named Dwight Janes boarded the ship when it arrived and gathered facts such as ship officers' fabricated papers and the names of the captives and crew.[134] He also conducted interviews with the captives on board to learn their stories, much of which would be useful testimony in future trials.[135]

Interaction with the captives also allowed advocates to understand the preparation necessary for a successful trial. For example, one advocate noted that the language barrier would hinder the captives' success in litigation.[136] He and other anti-slavery activists and lawyers searched extensively for translators to foster communication and dialogue between the captives and their allies.[137] The translators served more than just an interpretive role—they also allowed the captives to develop their truth through another

129. *See id.* at 55, 127-28; *see also id.* at 125-26 (noting that the only proof of identification offered by the Spanish was testimony from two individuals that the Spanish ship's second mate recognized some of the captives working on the plantations and that when he clapped his hands and called out a foreign word, some of the captives approached him. No testimony confirmed that those whom the second mate recognized were those identified as Spanish property).

130. The Antelope, 25 U.S. 546, 552 (1827).

131. *See* JONES, *supra* note 97, at 66.

132. *See id.* at 155-57. However, it is important to note that Adams was virtually silent throughout the case of the *Antelope,* despite his position of power. *See generally* NOONAN, *supra* note 41.

133. JONES, *supra* note 97, at 70.

134. REDIKER, *supra* note 98, at 104.

135. *See id.* at 104.

136. *See id.* at 118-19.

137. *See id.* at 119.

lens, "building into [their] narrative[s], human connection and humor."[138]

Counsel also ensured captives and witnesses testified at trial (a situation barred by law at the time of the *Antelope*[139]), which allowed the captives to detail their stories to the court. In the district court, Fuli, a male captive, and Margru, a nine-year-old female captive, described their families and their heart-wrenching captures.[140] Cinqué, the leader of the mutiny, had conversed so frequently with translators, the public, and counsel that he was able to testify in English.[141] Counsel also secured the testimony of a well-known British abolitionist, Dr. Richard Madden, which proved influential:[142] Dr. Madden testified that by spending considerable time with the captives, he could definitively say that the captives had come directly from Africa rather than Cuba.[143]

Unlike counsel for the *Antelope* captives, counsel for the *Amistad* captives visited and communicated with the captives and used those interactions to bolster their legal arguments.[144] For example, attorney Baldwin wove the stories of the captives into his arguments when asserting that the captives were free persons and not property.[145] The Supreme Court reflected these arguments in its opinion by emphasizing the individuality of the captives, naming the captives throughout its opinion[146] and incorporating their individual stories and testimony into its decision.[147]

### 3. Effects on Public Perception: The Antelope

During the late 1700s and early 1800s, public perception of Africans, even among abolitionists, was callous. The public knew little of the horrors of the *Antelope* voyage or the humanity of the captives. In fact, adjudicators and political leaders before and during the litigation process consistently referred to the *Antelope* captives as "slaves" even before their slave status was determined.[148] The few newspapers that covered the case did not

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138. *Id.* at 119, 125.

139. Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 Mo. L. Rev. 471, 473 (1966) ("However, the rule was well established in the slave states, and in several of the free states, that no Negro or mulatto could testify in cases in which white persons were parties. Variations of this rule existed from state to state. In most states, the rule was a statutory one. . .").

140. *See* Rediker, *supra* note 98, at 13-15.

141. *See* Jones, *supra* note 97, at 123.

142. *See id.* at 106-09.

143. Amistad, 40 U.S. 518, 533 (1841).

144. *See* Jones, *supra* note 97, at 154-58.

145. *Id.* at 70, 103.

146. *See generally Amistad*, 40 U.S. 518.

147. *See, e.g.*, *id.* at 538, 558, 591.

148. *See* Bryant, *supra* note 38, at 104 (noting that the Mayor requested the labor of the captives in the same manner as requesting slave labor), 127 (noting that Justice Davies of the

interview or provide personal accounts of the captives.[149] The press instead chose to comment "on the quality of the arguments and the power of their presentation."[150] No cadre of abolitionists rose to advocate for the captives.[151] Rather, most of Savannah society "looked at the *Antelope* captives, black Africans, and saw slaves."[152]

The view of the captives as a giant mass of "slaves" also perpetuated the fear that their release would bring havoc and danger to society.[153] Even their advocates were wary of turning captives into free men.[154] Contemporary political leaders echoed this sentiment.[155] President Jefferson, during the domestic and international slave trade debate, analogized free Blacks to societal "pests"[156] and feared freeing illegally imported Blacks.[157] Attorney General Wirt questioned: "Should they have been turned loose as free men by the State? The impolicy of such a course is too palpable to find an advocate in anyone who is acquainted with the condition of slave-holding states."[158] Wirt would ironically later tap into this fear in his first and "least controversial" set of arguments before the Supreme Court on behalf of the United States and the captives.[159] He argued that the captives should be freed and returned to Africa because "our national safety requires that there be no increase in this species of population within our territory."[160] The American Colonization Society too, was built on a desire to both free Blacks and ensure that freed slaves were transported back to Africa, rather than mixing into American society.[161]

If the captives were seen and described as an undifferentiated mass by the public and counsel,[162] it is not surprising that adjudicators across the

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district court assumed that the captives were slaves before hearing the case and making a judgment).

149. *See id.* at xx.

150. *Id.* at 228.

151. *See id.* at xx.

152. *Id.* at 136.

153. *See id.* at xv (citing Jefferson's writing "we have a wolf by the ear, and we can neither hold him, nor safely let him go").

154. *See generally* BRYANT, *supra* note 38.

155. *See infra* notes 156-161 and accompanying text.

156. *See* Paul Finkelman, *The Monster of Monticello*, N.Y. TIMES (Nov. 3, 2012), http://www.nytimes.com/2012/12/01/opinion/the-real-thomas-jefferson.html ("Jefferson told his neighbor Edward Coles not to emancipate his own slaves, because free blacks were "pests in society" who were "as incapable as children of taking care of themselves.").

157. *See* BRYANT, *supra* note 38, at xv.

158. NOONAN, *supra* note 41, at 17.

159. *Id.* at 96.

160. *Id.*

161. *See id.* at 16-17, 20.

162. Senator Berrien's arguments echo this perception of the indistinguishable nature of the captives working alongside slaves in southern plantations and homes. *See id.* at 101 (describ-

federal court system viewed the captives as divisible property and consistently upheld a determination of freedom or slavery through an arbitrary lottery system.[163] It is not surprising that the captives, even when determined to be free, were arbitrarily torn from each other and the relationships and families they had developed.[164] And, it is not surprising that even after some of the captives were determined to be free, they were still held in slavery for an additional two years before the lottery took place.[165]

#### 4. Effects on Public Perception: The Amistad

The *Amistad* captives escaped the undifferentiated mass mold that plagued the *Antelope* captives.[166] As historian Jonathan Bryant writes,

> The slave trade tried to create a faceless, anonymous mass of laborers for the plantations, but the *Amistad* Africans can be known as individuals—who they were, where they were from, what nations and ethnic groups they were part of, what sorts of work they had done, what kinds of families they had lived on, how old and tall they were, and finally, how they were enslaved.[167]

In comparison to the *Antelope* captives, the *Amistad* captives had the benefit of time and close physical proximity to the public.[168] The abolitionist movement burgeoned during the decade and a half after the *Antelope*.[169] The captives' city-centered location helped galvanize support for the *Amistad* cause because it allowed captives to interact frequently with counsel, journalists, artists, and the general public.[170] Through these interactions, the captives were seen and depicted as individuals with agency.[171] Frequent meetings and interviews enabled the captives to understand the cultural norms of American society and develop their story to fit those norms.[172] Even when the captives' case faltered and was appealed, the cap-

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ing the captives as "an undivided mass which must be distributed in shares by some convenient method").

163. *See supra* Part I.B.

164. *See* Bryant, *supra* note 38, at 196 (noting that when dividing up captives to relocate them for work, the captives "had no choice in the matter and were split up with no regard for relationships or familial ties"); *see also id.* at 263 ("Some reportedly did not want to go. . .[i]t didn't matter; wives, husbands, and children would have to be left behind.").

165. *Id.* at 239.

166. Rediker*, supra* note 98, at 21.

167. *Id.*

168. *See* Amistad, 40 U.S. 518, 518 (1841).

169. *See* Bryant, *supra* note 38, at xx.

170. *See generally* Rediker, *supra* note 98, at 100-60.

171. *Id.* at 21.

172. *See generally id.*

tives leveraged the revolving door of the jail to remain present in the public eye and to strengthen their ties with abolitionists.[173]

Stirred by the story of the *Amistad* and the meetings of the captives and American reformers, newspapers jumped to cover the story in detail. Coverage was by turns sympathetic, inflammatory, harsh, insightful, sensationalized, and thought-provoking.[174] Most importantly, it depicted the captives as individuals, training the public eye to view them as humans, rather than as an undifferentiated mass.[175] At worst, the captives were rebellious and dangerous individuals upsetting the natural order.[176] At best, they were heroic individuals—political prisoners actively fighting for the freedom that had been unjustly stolen from them.[177]

Artists, too, played a key role in representing the captives as powerful individuals and drawing public sentiment and activism to their cause. Artists drew and distributed lifelike sketches of the captives,[178] and a wax figurine artist replicated twenty-nine life-size figures, organized in the scene of the mutiny.[179] Another artist painted a 135-foot panorama of the captives seizing their liberty on the ship as they overtook the captain and crew.[180] Three days after the *Amistad* captives arrived in the New Haven jail, a theater company began a series of performances titled "The Black Schooner," which reenacted a sensationalized version of the mutiny, sympathetic to the captives' plight.[181]

Communicating with advocates, counsel, interpreters, journalists, and the general public also allowed the captives to develop their narratives and couch them in the language, customs, and culture of American society.[182] For example, the captives learned how to emphasize aspects of their stories that aligned with Christian ideals and to deemphasize aspects that did not, such as polygamy.[183] A coherent, compelling story of the rebel-

173. *See* JONES, *supra* note 97, at 79; *see also* REDIKER, *supra* note 98, at 153.

174. *The New York Sun*, for example, sensationalized the stories to meet reader appetite, the *Emancipator* ruminated on anti-slavery theories, the *Charleston Courier* tracked the outcomes of the mutiny leader, Cinqué, in great detail, *The New Morning Herald* offered an outsider, and often racist, analysis, and the *Richmond Enquirer and Southern Patriot* severely condemned the actions of the prisoners. *See generally* REDIKER, *supra* note 98.

175. *See generally id.*

176. *See id.* at 128, 141.

177. *See id.* at 103-04.

178. *See id.* at 100 (illustrating how the captives were depicted, and how the sketches were titled with words such as "leader" and "brave."); see *id.* at 113 (noting that one artist's sketches were known for their "variety, intimacy, depth, and complexity").

179. JONES, *supra* note 97, at 149.

180. *See* REDIKER, *supra* note 98, at 116.

181. *Id.* at 114.

182. *See, e.g., id.* at 158-59.

183. *See id.*

lion emerged, "in an interaction that featured abolitionist questions and captive answers."[184]

The combination of effective counsel, strong evidence, positive public engagement, and persuasive narratives bore heavily on the Supreme Court justices, in a manner absent in the *Antelope* litigation. Justice Story adopted compelling stories that the captives repeatedly gave throughout litigation: "[t]hey were natives of Africa, and were born free, and ever since had been, and still of right were and ought to be, free and not slaves. . .[t]hey were, in the land of their nativity, unlawfully kidnapped. . .for the unlawful purpose of being sold as slaves, and were there illegally landed for that purpose."[185] Justice Story had also served as a justice for the *Antelope* litigation, though the *Antelope* Court did not integrate such stories into its opinion.[186] For how could the Court have adopted such stories? The stories were never sought or told.

## II. Asylum Seekers

In present day, the U.S. government suppresses the voices of another group of people whose status has yet to be determined: asylum seekers. Like the isolation of the *Antelope* captives, the isolation of asylum seekers in detention centers far removed from counsel and the public causes a silencing effect that leads to or aggravates ineffective representation and harmful public perception, which in turn harms the outcomes of cases and hearings. Modern-day detained asylum seekers live 200 years apart from the *Antelope* captives but are similarly prevented from developing narratives that will resonate with judges and the public.

### A. *Many Asylum Roads Lead to Detention Centers*

Asylum seekers are individuals who flee to the United States seeking to prove that they are refugees as defined by the United States as part of its commitment to human rights.[187] To attain refugee status, asylum seekers must prove that they are unable to return to and avail themselves of the protection of their home 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.[188] Regardless of the asylum application process that asylum seekers use, detention

184. *Id.* at 127.

185. Amistad, 40 U.S. 518, 525-26 (1841); *see also* Rediker, *supra* note 98, at 190.

186. *See generally* The Antelope, 23 U.S. 66 (1825).

187. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 305 (2007).

188. *See* 8 U.S.C. §§ 1158(b)(1), 1101(a)(42)(A) (2000).

centers remain a common holding point for many during the process.[189] Asylum seekers who are placed in detention can be divided into:

1) Those who present themselves at the border without valid documentation[190]
2) Those apprehended at the border without valid documentation[191]
3) Those who have entered the United States legally but have overstayed their visas and are later apprehended[192]
4) Those who have entered the United States without inspection and are apprehended at a later date while in the United States[193]
5) Those who are in the United States and have filed an asylum application within one year of their last legal entry[194]
6) Those who seek asylum on their own initiative by filing an application with the Department of Homeland Security (DHS) (e.g. individuals who maintain valid nonimmigrant visas, individuals who overstayed their visa, or individuals who entered the United States without being formally processed by immigration officials)[195]

Individuals in groups one and two are typically placed into an expedited removal process upon arrival at a U.S. port of entry.[196] These individuals immediately enter a defensive, adversarial process[197] in which they must first claim an intention to apply for asylum or a fear of persecution.[198]

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189. *See* Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 270, 271-77, fn. 15 (2008) (noting that many asylum seekers are held in detention but that those who have been given the official designation by the U.S. prior to entering the country are not subjected to detention and are instead allowed into the U.S via official resettlement programs).

190. *Id*. at 274-78.

191. *See id*. at 274.

192. *See id*. at 275.

193. *See id*.

194. INA § 208(a)(2)(B).

195. Ramji-Nogales, *supra* note 187, at 305.

196. *See* Skinner, *supra* note 189, at 275; *see also* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002) (delineating the procedures for expedited removal and detention of inadmissible aliens).

197. 8 C.F.R. § 235.3.

198. 8 U.S.C. § 1225 (2000); *see also Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Oct. 19, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states.

They are held in detention during this process.[199] An immigration officer then holds a hearing to determine if the asylum seeker has a credible fear of persecution.[200] If the officer determines that the asylum seeker does not have a credible fear, he or she is immediately removed from the United States without further hearing or review.[201] If the officer determines that the individual does have a credible fear, the individual is detained for further consideration[202] and awaits a hearing before an immigration judge.[203] During the time the credible fear determination is pending, which could take months, individuals are ineligible for bond.[204] Those who do not pass this initial test can appeal their asylum determination and are subjected to detention throughout the process, which could last several years.[205] Although these individuals are eligible for parole, it is difficult to meet the parole standards.[206]

Individuals in groups three and four are apprehended by the U.S. Immigration and Customs Enforcement (ICE), placed in detention, and must also go through the defensive process.[207] Although they have an opportunity to post bond (unless they are convicted of certain crimes), the amount of money required by the bond is often so high that it "effectively result[s] in ongoing detention."[208]

Those in groups five and six (affirmative asylum applicants) are rarely detained by ICE and may live outside detention centers while their applications are pending.[209] They undergo a non-adversarial interview with an asylum officer.[210] If the asylum officer does not grant them asylum, the asylum officer may refer the case to an immigration judge.[211] While their

199. 8 C.F.R. § 235.3(b)(2)(iii) (2017).

200. 8 U.S.C. § 1225(b)(1)(B) (2009); *see also* Skinner, *supra* note 189, at 275.

201. 8 U.S.C. § 1225(b)(1)(B)(iii) (2009).

202. 8 U.S.C. § 1225(b)(1)(B)(ii) (2009).

203. Skinner, *supra* note 189, at 275; *see also Obtaining Asylum in the United States*, *supra* note 198.

204. 8 C.F.R. § 235.3(b)(4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained. Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."); *see also* Skinner, *supra* note 189, at 274.

205. *See* Skinner, *supra* note 189, at 275-76.

206. 8 C.F.R. § 235.3(b)(4)(ii) ("Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."); *see also* Skinner, *supra* note 189, at 275.

207. Skinner, *supra* note 189, at 276-77.

208. *Id*.

209. *Obtaining Asylum in the United States*, *supra* note 198.

210. Ramji-Nogales, *supra* note 187, at 306.

211. *See id*.

application is pending, the asylum seeker may remain in the United States.[212] However, they too may be placed in detention if they are considered a flight risk.[213]

### B. *Conditions of Detention Facilities*

Although detention for asylum seekers is decidedly different than early 1800s slavery, the plight of some asylum seekers begins to become comparable to the plight of the *Antelope* captives due to the United States' increasing use of detention centers for asylum seekers, the length of detention, and the conditions of the centers.

Use of detention for asylum seekers sharply increased in the past decade,[214] due in part to an increase in asylum seekers interested in coming to the United States,[215] Congress's demand that ICE fill nearly 34,000 detention beds,[216] and an expanded use of mandatory detention for anyone entering the country without proper paperwork.[217] ICE detained 44,270 asylum seekers in 2014, an approximate threefold increase from the 15,769 asylum seekers detained in 2010.[218]

Detention length is significant though difficult to track.[219] An analysis of the Transactional Records Access Clearinghouse in 2015 found that, as of December 2015, 400,000 cases were pending in immigration courts, leading to an average wait time of 659 days for a hearing.[220] A 2003 study found that asylum seekers who were eventually granted refugee status had spent an average of ten months in detention with the longest being detained for three and one-half years.[221] A 2009 Migration Policy Institute report found that the average length of detention for those in formal re-

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212. *Obtaining Asylum*, *supra* note 198.

213. *See* Jacob Oakes, *U.S. Immigration Policy: Enforcement & Deportation Trump Fair Hearings—Systematic Violations of International Non-Refoulement Obligations Regarding Refugees*, 41 N.C. J. Int'l. L. 833, 873 (2016).

214. *Life on Lockdown*, HUM. RTS. FIRST 11-12 (July 2016), http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf.

215. *See* Stephen Meili, *Do Human Rights Treaties Matter?: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom*, 48 N.Y.U. J. INT'L L. & POL. 209, 211 (2015).

216. *See Life on Lockdown*, *supra* note 214, at 30.

217. *See* Meili, *supra* note 215, at 232.

218. *Life on Lockdown*, *supra* note 214, at 5.

219. *See* U.S. IMMIGR. AND CUSTOMS ENF'T, DETAINED ASYLUM SEEKERS: FISCAL YEAR 2009 AND 2010 REPORT TO CONGRESS (2012), https://www.ice.gov/doclib/foia/reports/detained-asylum-seekers2009-2010.pdf (noting that "[t]he average length of stay statistics and proportions in various outcome classes are not strictly comparable because elapsed time in a case has a significant impact on the status of the case.").

220. LINDA RABBEN, SANCTUARY AND ASYLUM: A SOCIAL AND POLITICAL HISTORY 200 (2016).

221. PHYSICIANS FOR HUMAN RIGHTS AND BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, *From Persecution to Prison: The Health Consequences of Detention for Asylum*

moval proceedings was approximately three months, while 13 percent had been detained for three months or longer.[222]

Numerous studies highlight the deplorable conditions of many detention facilities and some argue that the conditions fail to meet human rights guarantees.[223] Studies report on the lack of access to basic medical care, the lack of privacy, use of solitary confinement, and separation from family.[224] An anthropology professor documented several stories of immigrant detainees' detention center experiences, underscoring that 143 individuals have died in custody since 2003, and highlighting the punitive nature of the centers:

> Centers. . .are built and run according to the correctional model, in defiance of the UN Refugee Convention. It could be said that immigrant detainees are treated even worse than criminals since many have not been charged with a crime, do not understand why they are detained, and have no idea how long they will be held or what will happen to them after detention ends. Frequent transfers far away from families or lawyers, lack of medical attention or treatment for chronic or serious conditions, isolation from fellow language speakers, and lack of recreational or organized activities make detention a hellish experience, especially for traumatized survivors of torture, war, or civil conflict.[225]

The stories also describe detainees being "abused physically and psychologically by guards. . . and punished for calling attention to abuses."[226] A more recent description of a family detention center in New Mexico depicts the center as filled with sick and malnourished children, often stuffed eight to a room, with no activities to occupy their time.[227]

The next two sections focus on the grave effects of detention on two factors that were similarly affected by the isolation of the *Antelope* captives

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*Seekers* 15 (2003), https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf.

222. Donald Kerwin & Serena Yi-Ying Li, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, Migration Pol'y Inst. 16 (2009) http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

223. *See generally* Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 Geo. Immigr. L.J. 147, 160-62 (2008).

224. *Id*.

225. Rabben, *supra* note 220, at 199-00.

226. *Id*. at 202.

227. Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. Times, (Feb. 4, 2015), https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0.

two centuries ago: access to effective counsel and the ability to tap into and influence public perception.

### C. *Isolation Prevents Asylum Seekers from Securing Effective Counsel to Navigate Asylum Laws*

Asylum seekers suffer many of the same hindrances as the *Antelope* captives. Notably they are far removed—often hundreds of miles—from counsel best able to help them develop persuasive stories and secure successful case outcomes.[228] The use of effective representation to successfully wield evidence and filter stories to fit the worldview of the adjudicator is particularly important when recognizing that cross-cultural and psychosocial needs of asylum seekers, similar to the needs of the captives on both the *Antelope* and the *Amistad*, can serve as barriers between the narrative lived, the narrative communicated, and the narrative heard.[229]

#### 1. Detained Asylum Seekers Lack Effective Counsel

Approximately a third of asylum seekers are unrepresented in immigration court, according to a 2007 analysis.[230] The use of detention centers increases that percentage.[231] A 2015 University of Pennsylvania Law Review article[232] reveals marked inequality in representation by detention status: from 2007 to 2012, only 14 percent of detained respondents were represented,[233] whereas 66 percent of non-detained respondents were represented.[234] Of immigrant detainees who were represented, attorneys were present in only 70 percent of hearings, and in 11 percent of cases, attorneys did not attend any hearing.[235] Moreover, detained immigrants were less likely than non-detained immigrants to be granted additional

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228. *See generally* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 36-44 (2015); *Cf.* BRYANT, *supra* note 38, at xx ("The *Antelope* captives, instead of sitting in jail only a day's journey from New York [the location where the *Amistad* captives were held], were hard at work in homes and plantations in farthest Georgia.").

229. See Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1034 (2015).

230. Ramji-Nogales et al., *supra* note 187, at 325.

231. *See infra* notes 232-34 and accompanying text.

232. Eagly & Shafer, *supra* note 228, at 32. The study is based on an independent analysis of over 1.2 million immigration removal cases decided during the six-year period between 2007 and 2012. This dataset was obtained from the Executive Office for Immigration Review (EOIR), the division of the Department of Justice that conducts immigration court proceedings.

233. *See id.* at 6. The authors note that these numbers may be inflated because "only 45% of immigrants we count as 'represented' had an attorney appear at all of their court hearings."

234. *Id.* at 8.

235. *Id.* at 20.

time to find counsel[236] and were less likely than non-detained respondents to obtain counsel when given additional time to do so.[237]

Detained asylum seekers meet several barriers to securing and receiving high-quality representation. First, asylum seekers must pay for their representation—a difficult requirement given the shortage of low-cost representation and federal funding restrictions that limit the availability of legal services for asylum seekers.[238] Their stay in detention also prevents them from earning money to pay for representation.[239] Second, the location and closed nature of detention centers creates a physical barrier to representation.[240] Legal representation and immigration services are scarce in rural and remote areas, where many detention centers are located[241] and where almost one-third of detained cases are adjudicated.[242] Only 2 percent of immigrants facing removal proceedings receive counsel from large law firms, law school clinics, or non-profits.[243] Data shows that long distances may dissuade lawyers from spending time and money traveling to meet their clients:[244] immigrants with court hearings in cities with over 600,000 people had a 47 percent representation rate compared to the 11 percent of representation for immigrants with hearings in cities under 50,000.[245] Third, counsel are deterred by other restraints such as long wait times at detention centers, lengthy security clearances, and bans on laptops and other electronics.[246] Detention centers also lack consistent telephone access, making it difficult for counsel to communicate with detainees and thereby build a successful case.[247]

The unique needs of detainee immigrants multiply the impact of these barriers on effective representation. Asylum cases require several

236. *Id*. at 33 ("[O]nly 14% of detained immigrants in our study were granted time to find counsel, compared to 29% of nondetained immigrants").

237. *Id*. at 34 ("Overall, only 36% of detained respondents seeking counsel actually found counsel, versus 71% of respondents who were never detained and 65% of respondents who were released.").

238. *See* Ardalan, *supra* note 229, at 1015-16.

239. *See id*. at 1015; Eagly & Shafer, *supra* note 228, at 35.

240. "Like these detained immigrants, the captives in the *Antelope* were far removed and closed off from the public." *See generally* Bryant, *supra* note 38.

241. *See Detention Facilities Locator*, U.S. Immigr. and Custom Enforcement http://www.ice.gov/detention-facilities (last visited Nov. 26 2016); Eagly & Shafer *supra* note 228, at 36 ("Representation rates dip sharply in rural areas and small cities, where the supply of practicing immigration attorneys is almost nonexistent."); *Cf.* Ardalan, *supra* note 229, at 1015 n. 50 (noting that location is also partly due to restrictions on federal funding for legal services that help asylum seekers).

242. Eagly & Shafer, *supra* note 228, at 43.

243. *Id*. at 8.

244. *See id*. at 35.

245. *Id*. at 40-41.

246. *Id*. at 35.

247. *Id*. at n. 131.

types of professionals due to language barriers, mental health issues stemming from experiencing trauma, and an ever-increasing burden of proof required by adjudicators to corroborate testimony.[248] The same barriers that prevent lawyers from accessing detainees also prevent other professionals from reaching detainees, which in turn harms counsels' ability to best represent their clients.[249]

Like most asylum seekers, both the *Antelope* and *Amistad* captives were detained. But, it is detention centers' geographic locations—far removed from the public—and their general inaccessibility to counsel and the public that cause the plight of detained asylum seekers to more closely parallel the plight of the *Antelope* captives (situated on a Georgia plantation) rather than the plight of the *Amistad* captives (situated in a city-center).[250]

### 2. Lack of Effective Counsel Leads to Poor Case Outcomes

For asylum seekers, lack of representation can mean removal from the country—a possible death sentence for those with a credible claim.[251] Data shows that asylum seekers without representation were only one-fifth as likely to win in immigration court compared to asylum seekers with representation.[252] In addition, representation can often mean more for detained immigrants than non-detained immigrants. Detained immigrants with representation were ten and one-half times more likely to succeed than their pro se counterparts.[253] Never-detained immigrants with representation were three and one-half times more likely to succeed than their pro se counterparts.[254]

Effective counsel is essential because the structure of asylum law requires trained professionals to analyze multiple complex factors including the substance of the law, the evidence required, the background of the

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248. *See* Ardalan, *supra* note 229, at 1004, 1013 ("Collaboration among lawyers, psychological and medical professionals, and human rights experts is paramount to ensuring the high-quality representation that asylum seekers need.").

249. *See id*. *See also* Eagly, *supra* note 228, at 36-44. The same analysis concerning geographic barriers for lawyers would hold true for other professionals as well.

250. *See generally* BRYANT, *supra* note 38.

251. *See generally* Ramji-Nogales, *supra* note 187, at 302; *see also Fact Sheet: Asylum Reform and Border Protection Act Would Return Persecuted Refugees to Danger*, HUM. RITS. FIRST (July 2017), http://www.humanrightsfirst.org/sites/default/files/hrf-asylum-reform-and-border-protection-act-would-return-persecuted-refugees-to-danger.pdf.

252. Ardalan, *supra* note 229, at 1003.

253. Eagly, *supra* note 228, at 49. This study shows correlation, but not necessarily causation. *Id*.

254. *Id*. at 49, 57 (noting that at every stage in immigration court proceedings, across every nationality, "representation was associated with dramatically more successful case outcomes for immigrant respondents. . .the significance of immigration representation persisted when we examined all removal cases together, as well as when we looked at detained and non-detained cases separately").

client, the legal process, and the attitudes of adjudicators.[255] Navigating such complexities is difficult, even for experienced lawyers.[256] Asylum seekers must prove that their experiences with actual or threatened persecution are true and would be eligible for asylum under U.S. law.[257] Asylum representation requires highly technical legal arguments revolving around knowledge of the relevant statutes, awareness of changing country conditions, and an understanding of how case law deciphers vague terms such as "social group" and "credible fear."[258] For example, in one case, a female asylum seeker testified persuasively during a preliminary hearing, describing her husband's murder and threats of sexual assault against her from gangs.[259] Judges have interpreted "social group" to include victimhood on the basis of sex or sexual orientation.[260] However, when the judge asked the woman whether she felt targeted as a member of a "social group," the woman said "no."[261] The woman's claim was denied and she was deported.[262] "[Social group] is a legal term of art. . .[s]he had no idea what the heck it means," an immigration lawyer later explained.[263]

Knowledge about what evidence will be most persuasive is also important, particularly because asylum seekers often do not know—and have little way of knowing—which aspects of their experiences are most relevant.[264] For example, a client of the Harvard Immigration Clinic did not realize that his brother's murder was a key piece of evidence substantiating his fear of return to his home country.[265] Another client of the clinic shared that she had been detained and beaten for her work with an opposition political party, but failed to recognize that her experience with female genital mutilation was key evidence given that it is a recognized basis for asylum.[266] The asylum seeker must also gather enough evidence to meet his burden of proof—a burden that is difficult to prove because "[m]any asylum seekers often flee their home country with little other than the clothes on their backs."[267] A lawyer is more likely to have the capacity and

255. *See* Ardalan, *supra* note 229, at 1002-03 n.53.

256. *See id*. at 1016 n.53.

257. Ramji-Nogales, *supra* note 187, at 305.

258. *See id*. at 311 (noting that the issues surrounding asylum law shift frequently: in regional asylum offices, asylum officers undergo an intensive five-week training course with testing, as well as weekly four-hour trainings on "new legal issues, country conditions, procedures, and other relevant matters").

259. Hylton, *supra* note 227.

260. *Id*.

261. *Id*.

262. *Id*.

263. *Id*.

264. Ardalan, *supra* note 229, at 1012-14.

265. *Id*. at 1019-20.

266. *Id*. at 1020.

267. *Id*. at 1013.

knowledge to pinpoint and present the evidence that will be important for the claim.[268] This reality mirrors the case of the *Amistad* in which advocates were able to gather relevant facts, such as fabricated ship papers, because they knew what judges would look for when making their decision.[269]

Navigating asylum law also requires knowledge of legal processes (including familiarity with the court systems and the appeals process), the ability to complete cumbersome and complex legal tasks such as compiling supporting affidavits, and the wherewithal to adapt to abrupt changes in hearing dates.[270] In fact, the actual process in immigration court changes depending on whether the asylum seeker is represented.[271] For unrepresented asylum seekers, the immigration judge takes on the task of building the factual record and questioning the asylum seeker.[272] In order to fulfill that role, immigration judges must mine the asylum seeker's history and experiences for relevant information.[273] This information can be difficult to gather due to the trauma inflicted on the asylum seeker, language barriers, lack of access to important documents, and the fact that the information is sensitive given the dangers associated with their home countries.[274] In contrast, represented asylum seekers receive a more traditional court hearing.[275] Supporting witnesses testify and attorneys on both sides conduct direct- and cross-examinations, as well as opening and closing arguments.[276] Hearings for asylum seekers turn on strength of evidence, given that the law requires solid evidence to prove applicants' claims[277] and that the immigration court remains the last and often only place to present evidence in support of their case before deportation.[278] Unlike the unrepresented asylum seeker, the represented asylum seeker has an advocate who can form a persuasive narrative and leverage testimony and other strong evidence to corroborate their account.[279]

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268. *Id*. at 1034.

269. *See* REDIKER, *supra* note 98, at 104.

270. *See* Ramji-Nogales, *supra* note 187, at 384; *see also* Ardalan, *supra* note 229, at 1017 (noting that "immigration courts often schedule hearings with little warning" and that "courts sometimes send hearing notices to prior addresses and asylum seekers might not even realize that they have missed their court dates").

271. Ramji-Nogales, *supra* note 187, at 325.

272. *Id*.

273. Ardalan, *supra* note 229, at 1017.

274. *Id*.

275. Ramji-Nogales, *supra* note 187, at 325.

276. *Id*.

277. *See* Ardalan, *supra* note 229, at 1014, 1022.

278. Ramji-Nogales, *supra* note 187, at 326.

279. *See* Ardalan, *supra* note 229, at 1034 ("Attorneys elicit the applicant's testimony—the lynchpin of the case—and gather corroborating evidence where possible and reasonably availa-

Effective counsel ensures that asylum seekers craft narratives that not only have legal merit, but that are coherent and align with particular judges' preferences.[280] Asylum decisions involve a subjective judgment about whether the applicant's story is true.[281] Two individuals may be equally eligible for asylum, yet face different outcomes simply based on the type of and manner in which evidence is presented.[282] Narrative truths do not always "guarantee a believable and credible story."[283] The power and persuasiveness of a story requires asylum applicants to untangle their "stream-of-consciousness reactions" and complex experiences and counsel to "take this story. . . and fit[ ] it into the necessary form required for an asylum application."[284] The type of evidence gathered and the way it is developed into a narrative produce different outcomes for asylum seekers, just as they drove the different outcomes of the *Antelope* and *Amistad* cases. Moreover, immigration law contains particularly high variance in case outcomes depending on court, region, and judge.[285] This variance could be due to differing political biases, implicit biases,[286] gender biases,[287] and previous work experiences[288]—factors a keen attorney could take into account when counseling asylum seekers.

### D. *Isolation Prevents Asylum Seekers from Dispelling Harmful Public Stereotypes and Developing a Successful Narrative*

When asylum seekers are isolated in detention centers, they are to the public much like the "undivided mass" that attorney Berrien uses to describe the *Antelope* captives, who were isolated and enslaved in plantations far removed from the broader public.[289] This isolation inflicts harm that is broader and perhaps more long-lasting than the harm done to their

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ble. The attorney then works with the asylum seeker to create a timeline to sort through the claim and presents the claim in a compelling manner persuasive to a Western adjudicator.").

280. *See id*. at 1034; *see also* Jessica Mayo, *supra* note 1, at 1497 ("[J]udges are not immune from the power of narrative, in which [n]arrative coherence and fidelity, not truth, is what makes a story believable. Success of an asylum claim may therefore turn less on merit than on storytelling skills.").

281. Ramji-Nogales, *supra* note 187, at 306; *see also* Mayo, *supra* note 1, at 1497.

282. *See* Ardalan, *supra* note 229, at 1034.

283. Mayo, *supra* note 1, at 1496.

284. *Id*.

285. *See* Ramji-Nogales, *supra* note 187, at 301-02 (arguing in the abstract section that the variance in asylum law can be exceedingly stark: ". . .a situation in which one judge is 1820% more likely to grant an application for important relief than another judge in the same courthouse. . .where one U.S. Court of Appeals is 1148% more likely to rule in favor of a petitioner than another U.S. Court of Appeals. . .Welcome to the world of asylum law.").

286. *See* Fatma Marouf, *Implicit Biases and Immigration Courts*, 45 New Eng. L. Rev. 417, 431 (2011).

287. *See* Ramji-Nogales, *supra* note 187, at 346-48, 376-77.

288. *See id*. at 345-46.

289. Noonan, *supra* note 41, at 101.

ability to secure effective counsel. It perpetuates enduring stereotypes of asylum seekers, decreases the ability of asylum seekers to create and use national advocates, and hinders detainees in developing narratives that are persuasive to voters, advocates, legislators, and judges.

### 1. Isolation Perpetuates Stereotypes

The depiction of refugees as an undivided mass or "tide" is harmful to public perception,[290] just as the depiction of free Blacks as dangerous and as "pests" was harmful to public perception in the *Antelope* era.[291] Conversely, the depiction of refugees as individuals is helpful.[292] A 1993 public opinion poll found that Americans "are much more willing to welcome immigrants when the issue is couched in personal terms."[293] Similarly, the illustration of refugees flooding the United States en masse is harmful in comparison to an illustration of refugees living within individual communities.[294] A 1957 Harris poll that asked whether respondents "favored or opposed 130,000 Vietnamese refugees coming into the United States" found 49 percent opposed and 27 percent in favor in contrast to 40 percent opposed and 48 percent in favor of the question that asked, "Would you, yourself like to see some of these people come to live in this community or not?"[295] On a cultural level, an article analyzing the popular film *Casablanca* argues that the film's sympathetic and personalized depiction of refugees positively influenced the growth of America's international refugee protection post-World War II.[296] The article states that "the refugees in Casablanca are clearly the 'good guys,' better even than the more conflicted nominal hero, Rick Blaine. . .they appear in a favorable light: they are likeable, nice people; they are generally well educated, well spoken, and well dressed. . .[t]hey do not exist as an undifferentiated mass, but appear as individual human beings, an effect which certainly enhances their appeal."[297]

The dangers of broad-based stereotypes are further illustrated in post-9/11 policy shifts and in the 2016 presidential election. Following the September 11th terrorist attacks, the United States tightened its borders and issued orders to remove asylum seekers and to assert more stringent mea-

290. Seth Mydans, *Poll Finds Tide of Immigration Brings Hostility*, N.Y. TIMES, June 27, 1993.

291. Finkelman, *supra* note 147; NOONAN, *supra* note 41, at xv.

292. *See infra* notes 293-97 and accompanying text.

293. Seth Mydans, *supra* note 290.

294. RITA J SIMON & SUSAN H. ALEXANDER, THE AMBIVALENT WELCOME: PRINT MEDIA, PUBLIC OPINION, AND IMMIGRATION 38 (1993).

295. *Id*. at 38-39.

296. *See generally* Daniel J. Steinbock, *Refuge and Resistance: Casablanca's Lessons for Refugee Law*, 7 GEO. IMMIGR. L.J. 649 (1993).

297. *Id*. at 678.

sures during immigration hearings.[298] The attacks gave political leaders a way to tap into the fear of the public for political gain: "terrorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution who have been unable to press meritorious claims for refugee status and other forms of relief."[299] The same holds true for the political response to Syrian asylum seekers during the 2016 election season. Donald Trump stated that Syrian refugees are part of a "Trojan Horse" plot,[300] while Donald Trump Jr. compared Syrian refugees to a bowl of poison-laced skittles with the message "If I had a bowl of skittles and I told you that just three would kill you, would you take a handful? That's our Syrian Refugee Problem."[301] These types of dehumanizing analogies perpetuate a harmful stereotype that asylum seekers are dangerous and illegal, and they obstruct the understanding that U.S. law welcomes asylees into the country, provided that they go through the designated legal process. Isolation aggravates these stereotypes. As an immigration paralegal described, residents on the other side of the detention wall in Artesia, New Mexico "don't understand the law. They think [refugees] should be deported because they're 'illegals.' So they're missing a very big part of the story, which is that they aren't breaking the law. They're trying to go through the process that's laid out in our laws."[302]

Isolation from the public also makes more believable the alternate stereotype that immigrants are helpless victims. When journalists visit detention centers, most share the harrowing experiences of those held there and emphasize the powerlessness of immigrants in the face of a ruthless immigration system.[303] While these stories are well-meaning, the isolation

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298. James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 B.U. Int'l L.J. 1, 42-44 (2012).

299. Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education's Responses to Terrorism*, 60 J. Legal Educ. 373, 375 (2011).

300. Maggie Haberman, *Donald Trump Questions Whether Syrian Refugees Are a 'Trojan Horse,'* N.Y. Times (Nov. 16, 2015), https://www.nytimes.com/politics/first-draft/2015/11/16/trump-questions-whether-syrian-refugees-are-trojan-horse/.

301. Christine Hauser, *Donald Trump Jr. Compares Syrian Refugees to Skittles that 'Would Kill You,'* N.Y. Times (Sept. 20, 2016), https://www.nytimes.com/2016/09/21/us/politics/donald-trump-jr-faces-backlash-after-comparing-syrian-refugees-to-skittles-that-can-kill.html. Donald Trump Jr. also added the caption "This image says it all. Let's end the politically correct agenda that doesn't put America first." *Id.*

302. Hylton, *supra* note 227.

303. *See* Loren Siegel, *Immigration and Gender: Analysis of Media Coverage and Public Opinion*, The Opportunity Agenda (Dec. 2012), http://toolkit.opportunityagenda.org/documents/immigration-and-gender:-analysis-of-media-coverage-and-public-opinion_1378929028.pdf (an analysis of mainstream media, based on the content of articles in 20 national, regional, and local print outlets, that exposes a disconnect between how immigrant women are portrayed in the media, and how they themselves define their lives, priorities, and aspirations).

of the centers often causes journalists to neglect covering the agency of the immigrants they profile:

> In this narrative, instead of exercising stewardship, she is powerless to prevent her family's dissolution, even though she struggles mightily to keep her family together. In her life outside of the family, she is almost always depicted as the victim of exploitation at the hands of employers, traffickers, or violent partners. The immigrant woman's role as the family steward and civic leader is missing from this dominant media narrative.[304]

This depiction of helplessness reinforces stereotypes of otherness and dependency, which in turn reinforces the popular belief that immigrants are a burden on the country.[305] This message can unwittingly perpetuate anti-immigrant feelings and suppress meaningful policy reform, given that "[i]t's very hard to pivot from victim to valuable members of society."[306] In the *Antelope* era, groups such as the American Colonization Society similarly used victim-based language to argue against slavery.[307] However, they simultaneously argued that the aggression of free Blacks would necessitate removal from the United States.[308] Both messages—immigrants as burdensome and Blacks as aggressive—perpetuate stereotypes that are inconsistent with many Americans' ideal version of society.

It becomes difficult for immigrants to escape from these harmful stereotypes. For example, if women are categorized as submissive, voiceless victims, then a woman who flees persecution due to her political activism may face the additional hurdle of persuading the judge she has a credible fear.[309] Alternatively, if children are portrayed as defenseless victims with little agency, then an entrepreneurial child who has organized her own flight may have difficulty fitting into the "child" category.[310]

#### 2. Isolation Prevents Asylum Seekers From Developing Persuasive Narratives

Developing a narrative is crucial to receiving asylum, as discussed earlier in this Note and in the cases of the *Antelope* and *Amistad*. In addition, a successful narrative is shaped not just by effective counsel, but also through interactions with the broader public. Asylum seekers must know

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304. *Id*. at 10.

305. *Id*. at 24.

306. *Id*. at 24, 44.

307. NOONAN, *supra* note 41, at 16-20.

308. *Id*.

309. Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 162-63 (2002).

310. *Id*. at 163.

which features of their journey to highlight and which to omit.[311] They must be able to sift through their tangled webs of experiences and translate them into a comprehensible and coherent record.[312] The degree of consistency, structure, and fidelity of a narrative has considerable influence on adjudicators,[313] because they must judge the trustworthiness or credibility of another human being.[314] Emotional impressions of a person and gut feelings can have a substantial impact, and the ability to develop a certain demeanor that resonates with decision-makers can be vital.[315] Eliminating inconsistencies is also important. Although studies indicate that "inconsistency does not always indicate fabrication" and that "human beings are generally not capable of repeatedly reporting events with perfect consistency," adjudicators are still instructed to take inconsistencies into account when making their asylum determination.[316]

Detention severely hinders the ability of a detainee to develop and deliver a persuasive narrative. The only way to craft and communicate a story convincingly and credibly is to tell it and refine it—with counsel, outside advocates, and other same-language speakers.[317] Throughout the process of listening and asking questions, "the attorney distills the truth from the client's version of his or her story into an acceptable format for the legal system. This requires the construction of narrative truth. . .a narrative constructed through the joint efforts of both client and attorney, an amalgamation of both voices and points of view."[318] This benefit is also achieved by honing anecdotes with advocates and peers, in the same way that the *Amistad* captives were able to leverage the public and advocates to form their winning narratives.[319] For example, speaking with journalists and advocates is helpful in practicing an anecdote, ironing out inconsistencies, reordering events into a digestible timeline, dispelling nervousness, adjusting body language, and tapping into the public perceptions that resonate with judges. The asylum seeker is left in the end with a reconstructed narrative, true to the individual's lived experiences while also coherent to immigration judges or officers who are far removed from them.[320]

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311. *See generally* Mayo, *supra* note 1.

312. *See id.* at 1496.

313. *See id.* at 1497.

314. *See id.*

315. *See* Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 408 (2003).

316. *Id.* at 387-88.

317. *See* Mayo, *supra* note 1, at 1501-02.

318. *Id.* at 1501.

319. *See supra* Part I.

320. *See* Mayo, *supra* note 1, at 1501.

## CONCLUSION

The lessons from the *Antelope* and the *Amistad* are instructive for immigration policymakers and advocates today. The eventual *Antelope* decisions were driven by the presumption of status and the isolation of the captives in conditions equivalent to slavery. For how could lawyers, the public, and adjudicators judge the captives fairly when they had already isolated and enslaved the captives for years? For the *Amistad*, success rested in large measure on the ability of captives to interact with counsel, advocates, and the public. Through this interaction, they were able to alter public perception about Africans, cultivate advocates, and tell a coherent story that resonated with their many listeners. The fate of those on the *Antelope* and *Amistad* can seem distant and inconsequential in our present lives—a troubling result of the prejudices of the time, outdated national security demands, and an archaic belief that humans could be property. However, nearly 200 years later, our current environment bears many similarities—xenophobia and national security demands still command public perception and rationalize isolated detention of those with a legal right to be in the United States. The facts look different, but the patterns of isolation and its outsized effect on representation and public perception remain the same. The comparison of the effects of isolating the *Antelope* captives on slave plantations before their status determination mirrors the effects of isolating asylum seekers in detention centers before their status determination. Perhaps these parallels are not surprising if it is indeed true that "[t]hose who think in terms of power, of abstract national interests, of human beings in bulk, will always have a major role in governments."[321] However, historians have concluded that the case of the *Antelope* was wrongly decided and that the treatment of the captives was cruel and inhumane.[322] If we could do it over, we would.[323] Perhaps we can prevent its distant descendant. The parallels of our current treatment of asylum seekers with our past treatment of the *Antelope* captives should prompt legislators to change detention conditions or at least combat proposals that would lengthen detention terms and further restrict federal funding for legal counsel.[324] The parallels should also influence judges interpreting federal immigration law, such as when deciding whether aliens seeking U.S. ad-

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321. NOONAN, *supra* note 41, at 159.

322. *See id.* at 156-59.

323. *See* NOONAN, *supra* note 41, at 155-157 (noting that John Quincy Adams, just twenty years later, wished for a do-over and emphatically questioned in his *Amistad* arguments why three hundred Africans were kept prisoners in the United States, instead of being liberated and immediately returned Africa).

324. *See Fact Sheet: Asylum Reform and Border Protection Act Would Return Persecuted Refugees to Danger*, HUM. RTS. FIRST (July 2017), http://www.humanrightsfirst.org/sites/default/files/hrf-asylum-reform-and-border-protection-act-would-return-persecuted-refugees-to-danger.pdf (stating the outcomes of the proposed Asylum Reform and Border Protection Act of 2017 (H.R. 391)).

mission who are subject to lengthy mandatory detention must be afforded bond hearings.[325] Broadly, the parallels should convince the public that it is irresponsible to chalk up the pervasive use of isolated detention to national security demands, without also recognizing and eliminating the added harm and increased barriers that detention imposes on each individual who steps through the asylum system.

325. *See Jennings v. Rodriguez*, SCOTUS Blog (October 1, 2017), http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/ (providing details on an upcoming Ninth Circuit case).