Book Review

David Ngaruri Kenney and Philip G. Schrag, Asylum Denied: *A Refugee's Struggle for Safety in America*. Berkeley: University of California Press, 2008. Pp. 352.

Reviewed by Nancy Morawetz

Asylum Denied is a rare book that combines a powerful narrative with countless teachable moments for law students. Like books such as *A Civil Action* and *Storming the Court*,[1] it takes its reader through the history of a case with page-turning suspense. But unlike those books, *Asylum Denied* is very much about the extraordinary aspects of an ordinary case—one of the tens of thousands of asylum cases that works its way through the administrative system of adjudication each year and one of the thousands that reaches the federal circuit courts. Each of these cases is extraordinary in its own way—but they are the bread and butter of the immigration adjudication system. *Asylum Denied* therefore offers enormous lessons about our system of immigration law and the adjudicative processes through which individual claimants must travel in their quest for justice. Because it is jointly authored by a clinical professor and a former client, it also offers insight into the differing perspectives of lawyer and client and provides an opportunity for others to peer into the lawyer-client relationship and reflect on lawyering strategies. But most importantly, it is a highly readable work of non-fiction that draws the reader in and provides many opportunities for reflection on the law, legal institutions and lawyering.

My review touches on a few of the teaching opportunities presented by *Asylum Denied*. I focus on three settings: general introductions to the legal system, immigration law survey courses, and clinical courses that represent individual clients. This is not to say that these are the only settings in which the book can provide a useful introduction for students. Other possibilities include Administrative Law, Federal Courts, or first-year Administrative and Regulatory State courses. In any of these contexts, *Asylum Denied* offers the reader a real-life viewpoint for pondering legal and institutional questions.

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1. Brandt Goldstein, Storming the Court (New York, 2005); Jonathan Harr, A Civil Action (New York,1995).

I add some sober perspective on the place of this particular case in our asylum system. The subject of *Asylum Denied*, David Ngaruri Kenney, litigated his case with the help of students and law professors. Throughout the entire case, he lived as a free man, although sometimes limited by the lack of permission to work, and through part of his story as a man without a country trying desperately to pursue his immigration claims. Many asylum seekers, in contrast, must litigate their claims without the help of lawyers, without any social support, and from detention centers where they are held under lock and key. The most important lessons of *Asylum Denied* may lie in what it illustrates about the system faced by these other asylum seekers and not for the fortunate ones who have representation. As Kenney's story illuminates, there are enormous due process costs when we force so many asylum seekers to litigate their claims from a detention cell, without critical support to cope with the trauma of past persecution and with the daunting procedural requirements of our asylum adjudication system.

The Book

Asylum Denied takes the reader through the life and struggle of David Ngaruri Kenney. The opening scenes of the book introduce the reader to the horrifying torture Kenney experienced in Kenya after he led a boycott on behalf of tea farmers. The book then travels back to Kenney's youth and the harsh treatment he received at the hands of his older siblings. After years of homelessness, Kenney wins the right to a small portion of his father's land. But Kenney struggles to earn enough to support himself and his two young siblings for whom he serves as a de facto father. The injustice of the state system that controls costs and earnings for tea farmers leads Kenney to join together with other tea farmers in protest. As the protests and an economic boycott gain steam, Kenney is arrested. He is almost executed before his captors decide instead to subject him to torture and interrogation. He barely survives extreme torture, including days on end of being confined naked in a box in which he is regularly submerged in cold water. When he is finally released, it is under a firm injunction to not talk with groups of other Kenyans.

Kenney ultimately makes his way to America through the support and assistance of friends in the Peace Corps. These friends have the idea that Kenney can get to America on a student visa based on his potential as a basketball player. Kenney had never played basketball, but his sheer height—he is over seven feet tall—made him a good prospect. The book includes amusing scenes in which Kenney tried to learn the sport well enough to appear to be a respectable player.

Once in America, Kenney faces various setbacks. Delays in his visa mean that the coaches who were to help him were no longer with the same institutions. Eventually, he finds a school and manages to stay on after he breaks away from the demands of the basketball team. In the midst of his studies, he makes a brief trip back to Kenya to help his little brother who had been

arrested. After his return, he graduates with a business degree and gets a job with a technology company in the United States.

As students of immigration law know, the practical training option for student visa holders who have graduated is time limited, and Kenney runs out of time and is without a path to another visa. Faced with the prospect of returning permanently to the country where he was tortured, Kenney applies for asylum. Confident in the strength of his claim, he doesn't consider seeking an attorney. His claim is denied and he is placed in removal proceedings. Luckily for him, he stumbles on the law clinic at Georgetown and it takes his case.

Asylum Denied proceeds to chronicle the long and difficult path of Kenney's representation in the clinic through the immigration court, and later in appeals to the Board of Immigration Appeals and the United States Court of Appeals for the Fourth Circuit. Because of the book's joint authorship, the reader gets a rare look at the client's perspective on the course of the representation. At the start, for example, Kenney is mildly annoyed at his student lawyers for engaging in small talk about his height instead of addressing his asylum case. Later, as his student lawyers engage in increasingly detailed inquiries into the circumstances of his torture, Kenney begins to associate his student lawyers with his interrogators and torturers in Kenya. As he relives his most dire experiences, he becomes depressed and has trouble sleeping. His student lawyers try to be thoughtful and ask him about how he sleeps, but he covers up his troubles and pretends to be in better shape than he is. At his low points, he finds himself hitting his head against the wall to relieve his psychological pain. Eventually, his lawyers persuade him to work with a psychologist, which proves to be difficult but very helpful.

The book also shows well the difficulties of amassing a persuasive and well-supported case. As Kenney worries about his family and friends in Kenya, he despairs about how he can obtain documentation without placing others at risk. Meanwhile, his student lawyers face the task of explaining small discrepancies in the record that result from Kenney's prior effort to seek asylum without counsel.

But at the administrative level, Kenney's greatest obstacle is the judge to whom his case was assigned. As Schrag and others have persuasively shown in other work, the likelihood of a grant of asylum varies wildly among immigration judges. Kenney was unlucky and that fact, in itself, meant that he had little chance of success.

Ultimately, the immigration judge rules against Kenney because of his brief trip back to Kenya to obtain his brother's release from jail. The book explains the incredible frustration of the legal team over the immigration judge's refusal to consider a prior case that raised the same legal question about the consequences of such a brief trip. And it expresses the despair of Kenney who doubted from the start that justice could be achieved in front of this immigration judge.

The legal frustrations grow when the case is heard by the Board of Immigration Appeals, which adopts a different rationale for the result the Immigration Judge reached, without providing Kenney's lawyers with any opportunity to brief the questions raised by this new argument. The situation is made all the worse by administrative reforms that have limited the time the Board of Immigration Appeals devotes to each case, have allowed single members of the Board to dispose of large numbers of cases, and have stacked the deck by removing those members who were more pro-immigrant.

Despite the low prospects for success in the Fourth Circuit, Kenney pursues an appeal. Once again, he fails in a system that is stacked against him. As Schrag explains, the Fourth Circuit offered asylum applicants an extremely low chance of success.

Meanwhile, Kenney's personal situation changes dramatically. He is helped by the psychological counseling he receives and is accepted into law school. His path, however, is hardly linear. His psychological state goes up and down, particularly after a surprising win in the "diversity lottery," a peculiar immigration institution that hands out visa opportunities by lot to nationals of countries that have been underrepresented in American immigration. This opportunity proves chimerical, however, when Kenney seeks to obtain the documentation requested by his consulate in time for processing. Kenney likens his quest to that of a fairy tale prince who seeks to meet the test to win a princess's hand. Each time he brings the requested documents, the consular officer asks for something else. In the end, he cannot meet the challenge by the deadline. He returns to the United States both depressed and ill. On his return, he meets his future wife at a party hosted by his lawyer and his lawyer's wife, a professor at Catholic University's law school.

Once his asylum application is denied, Kenney is again relegated to the world of bureaucrats and constantly changing requirements. He leaves the United States for Madagascar and then Tanzania with the hope that he can re-immigrate based on his marriage to a United States citizen. He and his lawyers face the vagaries of consular processing in which officers yell at him not to consult his lawyer, while making errors that the lawyers had sought to avoid and tried to correct. Kenney once again runs out of time on a visa and is forced to leave Tanzania so that he can return legally. After a harrowing trip through Uganda, in which his life is once again at risk, he returns to Tanzania. Amazingly enough, after further efforts to obtain the elusive documents requested by the consulate, and with the dogged persistence of his American lawyers, Kenney obtains the visa and waiver that he needs to return to his life with his wife in America.

The book is compelling both as a legal story and as a personal saga. As the book ends, and we see Kenney joined with his wife in celebrating the birth of their first child, it is easy to be overwhelmed with the emotion of all the struggles he has faced and the sweet joy of a peaceful family life.

Asylum Denied and the Central Role of Legal Institutions

Asylum Denied offers a rich introduction to the central role of legal institutions in shaping the practical meaning of legal rules. Law students often expect legal institutions to play by the rules, to offer sound reasoning, and to assume heroic roles in the face of injustice. They have their highest expectations of the federal courts and the Supreme Court. *Asylum Denied* does not confirm these expectations. Instead, it shows how the institutions can identify and then ignore arguments, offer a pretense of impartial justice while stacking the cards, and set up endless bureaucratic obstacles. In Kenney's case, the favorable outcome results from perseverance of administrative advocacy at the agency level, and not from the Article III court in which so many law students would place their greatest faith.

The central obstacle to Kenney's asylum case was not the law itself but who administered the law. As Schrag and his colleagues have shown elsewhere,[2] there are enormous disparities between asylum adjudicators both at the agency and the court levels. Kenney's fate was sealed when his case was assigned to an extraordinarily low-grant immigration judge; and later to a mockery of an appeals process at the agency and a tough panel in a tough circuit. Students could read Schrag's statistical study and could consider the commentary that explores the problems with institutional structures that would avoid these disparities.[3] But Kenney's story makes the issue come alive in a way that captures the reader's attention and makes an otherwise dry institutional question deeply meaningful. That question—whether agency judges should be controlled, and if so, how—is central to any administrative system and is well-introduced by *Asylum Denied*.

Kenney's court experience sounds a similar theme about consistency in the administration of the law. But it also adds an important counterweight to assumptions about how courts work. The book captures well the frustration, and the reality, of court opinions that have ignored an important point identified at argument or otherwise failed to abide by the mythology of what courts promise—namely a reasoned response to the arguments of the parties.

Although set in asylum law, Kenney's story includes important general lessons about a court system that does not live up to its rhetorical image. The uncertainty whether a court will ever consider fairly the parties' arguments is part of what drives settlement decisions in any kind of case, or counsels against pursuit of litigation options. It may not be a pretty picture for students, but it is one that any practicing attorney would find familiar.

2. Jaya Ramji-Nogales, Andrew I. Schoenholz, and Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295 (2007).

3. See, e.g., Stephen H. Legomsky, Learning to Live With Unequal Justice: Asylum and the Limits to Consistency, 60 Stan. L. Rev. 413 (2007); Margaret H. Taylor, Refugee Roullette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudications, 60 Stan. L. Rev. 295 (2007).

Indeed, Kenney is ultimately most successful in the forum where students would expect the least institutional responsiveness. Although he has a very frustrating time with the consulate, in the end it is the consulate, rather than the federal court with three robed judges, that offers the remedy that allows him to return to the United States. It is quite clear from his story that this was itself unusual and that consulates are poor places to seek justice. But the fact that lawyers must pursue all fora and that the one that is least hospitable may prove to be the one that provides a route to the client's success, is a lesson that is valuable for all law students.

Kenney's struggle with the consulate also presents the reader with a close look at the frustrations of an unaccountable bureaucracy. He is yelled at when he tries to involve his lawyers in his case, even as the consular officials misunderstand the law. He is not allowed to pursue the right waiver at the right time, and pays dearly through a literally life-threatening delay. His finds it even difficult to attend an appointment at the consulate without the greater access provided to his white American wife when she comes to plead his case. The ultimate victory in his case seems almost miraculous.

In the end, the reader enjoys the sweetness of a happy ending, but not one that reinforces the heroic story of the American legal system. Instead, it is a victory that comes despite innumerable hurdles and injustices and, in the end, is produced by a bureaucracy that has elsewhere in the story proven itself to be arbitrary, unfair, and deaf to reasoning.

Asylum Denied and Immigration Law

Asylum Denied is also rich with opportunities for teachers of basic immigration courses. Most obviously, it presents basic legal questions about the standard for asylum law and how courts should think about the legal question that was at the heart of the case: how to treat an asylum seeker who has briefly returned to the country where he or she was persecuted. Unlike the facts of a case, as they might be reported in a legal opinion, the book provides a window into the complex emotions and reasons why an asylum seeker would do what can be done to help a family member in trouble. Similarly, the book presents the concrete question of the authority that courts should have over grants of voluntary departure. This issue is presented in complex ways since the book shows the strategic thinking that left Kenney without a formal stay of voluntary departure during the pendency of his appeal. Rather than appearing as an oversight the book shows how Kenney's lawyers were forced to give up the possibility of a stay of voluntary departure so as to protect their client from removal to the country of his persecution. Both of these legal issues, which could be discerned from the text of the Fourth Circuit's opinion,[4] are made more robust and accessible to students through Kenney's story.

Equally valuable for immigration law teachers are the aspects of the book that shed light on immigration law issues that never surfaced in the

4. 371 F.3d 192 (4th Cir. 2004).

appellate court. Kenney ultimately obtains status in the United States through the mechanism that is most familiar to lay persons—marriage to an American citizen. Along the way, he faces substantive and procedural bars to many other routes to status. Indeed, if Kenney's story were not real, one would think it was a highly implausible hypothetical for an issue-spotting exam. For example, Kenney faces a possible problem under the one year asylum rule, which limits eligibility for asylum. Readers in an immigration class can consider how the bar was circumvented through reliance on the duration of status principle for student visas. But once the issue is spotted, the text offers a rich context for thinking about the underlying rule. Kenney's story, about a person who did not want to seek asylum, but had a powerful claim to asylum, presents a vantage point for thinking about asylum seekers and whether it is right to expect them to assert their asylum status soon after they arrive.

Kenney's story also provides a helpful context for thinking about the three and ten year bars for admission to the United States. Through his story, students of immigration law can evaluate how the bars operate and whether they are appropriate. Although Kenney pursues his claim through various legal channels, he accrues "unlawful presence" that could doom his ability to reunite with his wife. Ultimately, through high quality representation, he is able to obtain a waiver. But immigration teachers can note the rarity of that waiver (and its extraordinary costs in this case) and encourage students to consider the underlying rule. Kenney's story is most surprising as an issue spotter when he wins the diversity lottery. But again, it provides a solid context for exploring the visa and the institutional nightmare of turning that victory into a path to status.

But as an introduction to immigration law, the book is probably most instructive in teaching the reader the importance of adjudicative institutions and procedures. In addition to the broader legal institution issues addressed above, the book introduces the reader to the importance of evidentiary rules in fulfilling the promise of substantive rules. Kenney and his counsel are required to obtain documentary evidence to corroborate Kenney's persecution. These rules, as students of immigration law will know, were enshrined into federal law in the REAL ID Act of 2005. Their supporters argue that corroboration is essential to prevent fraud. But in Kenney's case, where the persecution was extreme, the reader can see the cost of these requirements. Kenney was arrested without a warrant, tortured, and held for eight months. Not surprisingly, when he was finally released, he did not ask his persecutors for receipts to show his illegal arrest. Arrests without charges do not come with a fine paper trail. Through Kenney's story, students of immigration law can obtain a firsthand sense of what these corroboration requirements mean.

Despite its richness as an introduction to asylum law and its legal institutions, *Asylum Denied* has one significant limitation as an introduction to the institutional setting of immigration and asylum law. Throughout the book, Kenney must struggle with his past persecution and the threats to his future. But he

lives as a free man. Many seeking asylum or other forms of immigration relief do so from detention centers and without the benefit of counsel. They cannot proceed with their lives in any fashion, as Kenney does as he meets and marries his wife. They cannot develop evidence. They cannot sit and hear the arguments their lawyers present in the courts. Although no book can delve in depth into what didn't happen, some mention of detention, in the postscript or by those assigning the book, is important to prevent the reader from leaving with the misimpression that Kenney's story offers hope for the many asylum seekers whose cases fail each year.

Asylum Denied and Clinical Teaching

Finally, *Asylum Denied,* serves as a detailed exploration of the relationship between clinical students, their professor, and their client. In this exploration, we hear from the professor and the client, and not from the students. But we get to look up close at how the students' words were heard by their client, or how he remembers hearing their words, and can reflect on their choices they made in developing a productive relationship with their client.

The most basic objective of clinical teaching is to teach students to think carefully about the choices they face and then to reflect on how those choices fared in practice. Sometimes there is a problem with identifying options and strengths and weaknesses of choices. Sometimes there is a problem with execution of a good choice. And sometimes there are consequences that could not have been anticipated but from which it is possible to learn. Clinical professors seek to teach their students to differentiate between 20/20 hindsight, and the ability to learn afterwards about how to have better anticipated issues and better conducted the planning and execution phases of representation.

Any thoughtful case study can help clinical students learn to reflect. But a case study that offers a client's perspective is perhaps particularly useful in teaching the unintended consequences of one's choices of communication. In *Asylum Denied*, for example, there is a rich scene in which the students first meet Kenney. They seek to put him at ease with casual conversation. In doing so, they make two errors from Kenney's perspective. First, the persecution he has faced is deadly serious and he has little patience for chatter. Second, the students' choice of casual comments is especially irritating. They ask him about his height—exactly what others have long asked him and a subject that annoys Kenney as he worries about his case. The reader cannot help but be curious about the students' take on the situation, but even without it, one can ask what might have been a better way to begin a meeting with an asylum client.

Later, when the students are developing the evidence in the case, Kenney's mind begins to merge his lawyers with his persecutors. Again, we lack the students' perspective. But there is ample material to explore the choices the students had in going over painful past experiences. Just how can the lawyer account for the sensitivity of the material while developing a case that deals with possible inconsistencies and can withstand cross-examination?

Most poignant are the scenes where Kenney assures his students lawyers that he is fine despite his deep depression. The students become involved in finding a therapist who can help Kenney deal with difficult psychological issues arising out of his persecution and the uncertainty of his future.

The lessons for clinical students are not limited to the parts of the book where the students appeared. Indeed, they appear only at the hearing stage. At the appeals process before the agency, the federal court appeal, and the consular processing, the students are gone and Schrag, and later his colleague Diane Uchimiya, play the lawyer roles. By this stage, Schrag takes on a complex role in Kenney's life. He befriends Kenney, Schrag's wife becomes Kenney's professor, and Kenney ultimately meets his wife at a party hosted by Schrag and his wife. The basic question—whether and how one should become friends with a client—is presented in full force. The book does not explore the choices that went into this evolving relationship, and it is hard to question it when it led both to Kenney's personal happiness with his wife, his ultimate success with his case, and a highly successful collaboration in writing this book. But for students of lawyering, the development of friendships with clients is always complicated and worthy of discussion.

There are no easy answers to any of these issues. But as a case study, *Asylum Denied* provides material that could serve as a reference point for weeks of clinical classes.

Drawing Lessons

Asylum Denied concludes with a postscript from Schrag that presents some policy perspectives. Schrag rightly identifies several policy lessons from Kenney's case: the significant role of the luck of the immigration judge draw in immigration cases; the absence of adequate training of immigration judges; the lack of adequate representation; the poor quality of the agency review process in the wake of streamlining reforms; and the need for better oversight of consular decision. He also identifies two specific issues that arise in Kenney's case: the requirement that he go to the country that he feared to pursue his diversity visa, and the failure of the asylum system to recognize the risks that people will take in emergency situations. Each of these issues is worthy of attention and the book provides a powerful context in which to understand the issues involved.

Although each of the issues Schrag raises are extremely important, the reader would also benefit from understanding what worked in Kenney's case and does not work for so many asylum seekers. Throughout his case, Kenney was allowed to pursue his claim in relative freedom while so many asylum seekers are forced to litigate their claims from detention. The general policy of the United States, however, has been to detain asylum seekers when they first arrive in the United States.[5] Reading Kenney's case, one wonders whether

5. See, e.g., Human Rights First, Background Briefing Note, The Detention of Asylum Seekers in the United States is Arbitrary under the ICCPR (2007).

there would have been any chance of success in his case had he been detained. Imagine how the questioning by his student lawyers would have felt had he been wearing a jump suit and confined to a prison cell. Imagine how he would have coped with depression had he been detained each day. Imagine how he would have struggled to obtain documentation of his claim. Each of these thought experiments shows how detention would have seriously compromised a case that was plainly meritorious, even if Kenney had had the best judges on his case. And without any imagination, one can easily see that he never would have had a chance at the route to status that ultimately succeeded—his marriage to his American wife.

Detention is a fundamental part of the immigration removal system and is growing each year. Just by seeing how hard it was for Kenney to pursue his case without being in detention, the reader can see that detention makes success all but impossible for many with strong claims.

Conclusion

Schrag is a prodigious scholar and a compelling writer. Kenney is a new voice—and one we can hope to hear from more as he establishes himself as a lawyer and brings his rich experiences to bear on our systems of justice. In allowing his story to be told, and in telling it himself, he has provided a unique chronicle of the American legal system, and the asylum and immigration systems. And in being instructive, this book does not forget the value of being a very good read.