

Nationality, Religion and Immigration: We Are All Children of Babel

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Abstract

The fair adjudication of asylum claims in the United States, and in particular the determination of an asylum seeker's credibility, has been made difficult by the cultural dissonance between the Immigration Judge or other government adjudicator on the one hand, and the foreign-born litigant on the other. Cultural factors of language, understandings of time and chronology, and differences in ethnic background combine to create a disconnection between legally-trained American lawyers and judge, armed with a democratic, Western orientation in communication and comprehension, and non-Western asylum seekers whose narratives are informed by the trauma of their persecution and the cognitive, demeanor-based, and social characteristics of the developing world. This disconnection causes frustration and suspicion between judges and asylum seekers which in turn occasion the former to discredit the testimony of the latter even when the truth has been told. Only when judges and other adjudicators are made sensitive to cross-cultural issues and their resolution through interdisciplinary tools shared among lawyers, anthropologists, sociologists, and therapists does the credibility or confabulation of asylum seekers become subject to fair resolution. Specifically, the creation of a United States Asylum Court, with judges specially trained in cross-cultural communication and with greater access to expert witnesses in the aforementioned fields of study, would be the best way of ensuring justice in credibility determinations regarding the allegedly persecuted.

Introduction

“Now the whole earth had one language and few words. And as men migrated from the east, they found a plain in the land of Shinar and settled there. And they said to one another, “Come, let us make bricks, and burn them thoroughly.” And they had brick for stone, and bitumen for mortar. Then they said, ‘Come, let us build ourselves a city, and a tower with its top in the heavens, and let us make a name for ourselves, lest we be scattered abroad upon the face of the whole earth.’ And the Lord came down to see the city and the tower, which the sons of men had built. And the Lord said, ‘Behold, they are one people, and they have all one language; and this is only the beginning of what they will do; and nothing that they propose to do will now be impossible for them. Come, let us go down, and there confuse their language, that they may not understand one another's speech.’ So the Lord scattered them abroad from there over the face of all the earth, and they left off building the city. Therefore its name was called Babel, because there the Lord confused the language of all the earth; and from there the Lord scattered them abroad over the face of all the earth.”¹

We today are the children of Babel, the progeny of the arrogant and sinful who must face the confusion that befalls our attempts to cross cultural divides and in so doing attempt a way of

¹ Genesis 11:1-9.

understanding one another despite differences of language, community, customs, memory, and psychology. No where is this attempt at a *rapprochement* of understanding more important than in the protection of the persecuted—the adjudication of asylum claims by those whose bodies and souls have been broken by the intolerant, the uncompassionate, and the homicidal who oversee many of the world’s nations. The challenge faced in the United States by judges and others who assess the credibility of asylum seekers is often a cultural one: Even an interpreter often does not cure the dissonance of people of radically different backgrounds and beliefs when they try to communicate and comprehend the most awful and embarrassing of stories—the threats, incarcerations, torture, rapes, and other humiliations that make the discovery of the truth of an asylum claim a matter of the greatest consequence. What can and should we do to ensure that our system of justice accommodates cultural differences in order to find that truth?

Asylum Adjudicators

During my almost seventeen years as a United States Immigration Judge (“IJ”) in Los Angeles, I often felt as if my colleagues and I were still smarting from the curse incurred by the hubris of our common ancestors (who apparently became among the first reported refugees). We were fellow judges and friends; we shared our lunches and reveled in our bull sessions caffeinated by twice-cooked coffee only a litigation-addict could love. Indeed, among the more than 200 IJs in courts across the United States, I counted many men and women whom I had known, respected, and liked from our days as lawyers to our time on the bench. Notwithstanding my close relations with my fellow judges, or perhaps precisely because of them, I was constantly confounded and confused by our conversations on the subject of asylum law.² I was even more lost for words (no small matter, given my nature) by the manner in which many of my colleagues approached asylum applicants and adjudicated their cases.³ In fairness, I note that my colleagues were just as unable to understand much of what I did in my courtroom in my own proceedings.

Trial judges experience the aloneness and autonomy of adjudication in a way appellate judges do not. The camaraderie that we IJs experienced at rest and in each other’s chambers was replaced by a constant scattering of our sensibilities about asylum law when we donned our robes and voluntarily departed to our separate corners of the world, our own tiny principalities, and our own courtrooms. We may have shared a taste for good food, bad coffee, and even worse jokes, but we seemed to speak very different legal languages when we heard and decided asylum

² Immigration & Nationality Act (INA) § 101 (a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (2006) (stating that an alien may receive asylum in the United States if he or she establishes that he or she is unable or unwilling to return to his or her home country because of “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”); *see, INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

³ Pursuant to INA § 240 (a)(1), 8 U.S.C. § 1229 (a)(1) and 8 C.F.R. § 1003.10(a) (2009), U.S. IJs of the Justice Department’s Executive Office for Immigration Review (EOIR) are charged with adjudicating whether aliens should be subject to removal from the United States. IJs are also charged with adjudicating whether such aliens should be granted Asylum in the United States. 8 C.F.R. § 208.2. The decisions of IJs are reviewable by EOIR’s Board of Immigration Appeals; Board decisions in asylum cases are in turn reviewable by the U.S. circuit courts of appeals. INA § 242 (a)(5), 8 U.S.C. § 1252 (a)(5); 8 C.F.R. § 1003.1 (b)(1)-(3).

claims. The curse of Babel was ever present in how we judged others and their alleged fears of persecution abroad.⁴

Our shared war stories, the tall tales we told of our judicial talents, made us seem very similar in our approaches to asylum; but then, people's golf games always improve with the telling of them, far from the fairways and greens and the balls lost in between. The truth was that far more often than not, we judges just did not reason or speak in the same language in the exercise of our role as asylum adjudicators.

The results of this dramatic diversity in the decision-making process was, and continues to be, made clear in the research and conclusions of Professors Ramji-Nogales, Schoenholtz, and Schrag in their exhaustive study, *Refugee Roulette: Disparities in Asylum Adjudication*.⁵ In that study, for example, the writers found that following the new millennium in New York City, one IJ had an 1820% greater chance of granting asylum to Albanian litigants than another IJ regarding the same nationality group of litigants in the same courthouse.⁶ In another example, the authors found that during this decade, Chinese asylum applicants before the U.S. Immigration Court in Atlanta had only a 7% chance of seeing their claims for relief granted, as opposed “to 47% nationwide.”⁷ I share their concerns about the serendipity of asylum adjudication, and admit to being an especially large stakeholder in the future of asylum availability. As a young lawyer with the U.S. Department of Justice, engaged in the prosecution of human rights violators,⁸ I was assigned to help draft what became the Refugee Relief Act of 1980 - the modern law of asylum, codified at Title 8, Sections 1101(a)(42) and 1158 of the Immigration and Nationality Act,⁹ as amended.¹⁰ I retain a strong parental interest in the continuing viability of asylum as a form of relief subject to relatively and reasonably consistent (and, I admit, compassionate) parameters of application by the Immigration Courts. I fear that without the changes and reforms proposed by the authors of *Refugee Roulette*, the curse of Babel will continue the crazy-quilt method of asylum adjudication for which neither the best prepared lawyers nor the most credible relief applicants could contemplate: that in each case, in each separate courtroom, the “law is what the judge ate for breakfast.”¹¹ Like any dutiful parent, I trust that my contribution to those changes

⁴ See *Genesis* 11:9

⁵ See generally, Jaya Ramji-Nogales et al., “Refugee Roulette: Disparities in Asylum Adjudication,” 60 *Stanford Law Review* 295 (2007).

⁶ *Id.* at 301, 339.

⁷ *Id.* at 329.

⁸ From October 1979 through June 1990, I served as a special prosecutor and then as Chief of Litigation in the Justice Department’s Office of Special Investigations (“OSI”), the unit responsible for seeking the identification, denaturalization, and deportation of Nazi war criminals who resided illegally in the United States. OSI continues its good work to this day.

⁹ INA §§ 101 (a)(42), 208; 8 U.S.C. §§ 1101 (a)(42), 1158 (2006).

¹⁰ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005). I make no claim to any revisions in the asylum law that occurred after its initial passage. I especially disavow any role in the drafting of the REAL ID Act, which I believe has made it more difficult to grant asylum to credible applicants without in any meaningful way enhancing the nation’s post-9/11 security.

¹¹ This less-than-cherished scenario is generally but falsely attributed to the late J. Jerome Frank of the Second Circuit, a philosopher in the school of legal realism. In fact, Frank urged a less flippant and more serious study of the various often extra-judicial elements that affect judicial decisions. In his work, Frank commented:

and reforms will help engender health and hardiness in asylum as a rightful remedy for those who seek protection from a broken world, confounded not just by the language, but the practice of persecution.

Credibility

In my experience, and in the frank and frequent conversations I have held with my colleagues from the court, the single most significant factor in an IJ's assessment of an asylum claim is credibility. It has also been my experience that credibility is the single most inconsistently assessed variable in asylum adjudication. In the complex chemistry of credibility determinations, there are a number of free radicals that bedevil and divide judges:

Credibility determinations in asylum hearings have always been difficult to make. Reasons for this difficulty include, but are not limited to, “differences in cultural norms, the effect of an asylum seeker's past traumatic experiences and flight on her ability to recall events, language barriers, the adversarial nature of the hearing, the asylum seeker's limited access to legal counsel, and the adjudicator's sometimes inaccurate perceptions of foreign culture...”¹²

An additional and constant aggravating element in determining credibility is the often crushing caseloads of IJs, particularly in large and multi-cultural cities like Los Angeles or New York, which cause even the best intentioned adjudicators to lose patience and perspective.¹³ It was not unusual for me, and remains standard operating procedure for many of my colleagues, to face “master calendar” sessions of well over twenty-five or thirty cases where preliminary but critical matters are resolved in removal proceedings (including language determinations, the sufficiency of time for the aliens¹⁴ to seek counsel, the admissions or denials made by aliens to

Many legal scholars, instead of giving serious consideration to that subject, [“the numerous non-rational factors in the decisional process”], resort to derision. Absurdly lumping together all the non-rational, non-logical elements, and describing them as the “state of the judge’s digestion,” these scholars often jeeringly speak of “gastronomical jurisprudence.” Under the heading of gastronomical ailments, one cannot subsume all the irrationalities of judges.

Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 161 (1949). This article is a small attempt to go beyond the glib analysis of such a theory of jurisprudence to a more realistic analysis of why and how IJs rule as they do in asylum cases.

¹² Daniel Forman, “Improving Asylum-Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the process,” *16 Cardozo J. Int’l & Comp. L.* 207, 209 (2008) (emphasis added).

¹³ See, Michele Benedetto, “Crisis on the Immigration Bench,” *73 Brook. L. Rev.* 467, 467-68 (2008) (citing, *Tun v. Gonzales*, 485 F.3d 1014, 1027-30 (8th Cir. 2007)).

¹⁴ The term “alien” is not one I would choose to use in immigration law. It implies beings of an extraterrestrial origin, instead of fellow flesh-and-blood humans. Unfortunately, the general term applied to the foreign-born who are in the United States but not citizens or nationals of the United States is that of “alien.” INA § 101 (a)(3); 8 U.S.C. § 1101 (a)(3) (2006). The immigration law’s selection of the term “alien” is, in my view, a powerful example of a long-running theme, that, “[a] citizen democracy can only work if most of its members are convinced that their political society is a common venture of considerable moment” that “requires... a special sense of bonding among the people working together.” Charles Taylor, *Why Democracy Needs Patriotism* 119, 120 (Joshua Cohen ed., 199). The theme was put more bluntly by Thomas Jefferson, on the subject of immigration, that newcomers to the United States would bring their “principles, with their language, [which] they will transmit to their children,” and that as to America, “[t]hey will infuse into it their spirit, warp and bias is direction, and render it a heterogeneous, incoherent, distracted mass.” Frederic G. Whelan, “Citizenship and Freedom of Movement: An

the allegations and charges made against them by the government in the court proceedings, and the submission of relief applications, like those for asylum), and “individual calendar” sessions of three or more hearings on the merits for the majority of litigants whose issues of removal, and especially relief, require more than a few minutes of discussion. To continue the metaphor, then, all of the free radicals described above make for a most combustible chemistry of credibility determinations that are grossly unpredictable to asylum seekers and their lawyers (should they have any), and injurious to asylum seekers and the reputation of IJs.

Take, for example, the recently decided case of *Mousa v. Mukasey*.¹⁵ Mousa, an Iraqi Chaldean Christian, was denied asylum by both an IJ and the Board of Immigration Appeals (BIA), despite her testimony “that she and her family members...had been harassed and pressured to join [Saddam Hussein's] Ba'ath Party, and that she and her brother [had been] imprisoned in a Ba'ath party compound for forty-seven days,” during which time she was raped by the party's representatives.¹⁶ Both the IJ and the BIA found, as a fatal flaw in Mousa's credibility, her failure to mention her rape on her pre-testimonial written asylum application.¹⁷ The Ninth Circuit Court of Appeals rejected that finding, however, noting that “the assumption that the timing of a victim's disclosure of sexual assault is a bellwether of truth is belied by the reality that there is often delayed reporting of sexual abuse.”¹⁸ In remanding the case and finding Mousa's claim of rape to be a credible one, the court of appeals added that “[m]any victims of sexual assault feel so upset, embarrassed, humiliated, and ashamed about the assault that they do not tell anyone that it occurred.”¹⁹ The Mousa court emphasized that the psychology behind the reluctance to report rape becomes more pronounced when the country of the sexual assault--in this case, Iraq--is one “where reported rapes often go uninvestigated, and where rape victims are sometimes murdered by members of their own families because they have ‘dishonored’ their families by being raped.”²⁰ In sum, the court of appeals concluded, in addition to her demonstrated psychological stress, “Mousa provided a compelling explanation for her failure to mention her rape at an earlier time in the proceedings: her cultural reluctance to admit the fact that it had occurred.”²¹

Open Admission Policy,” in *Open Borders? Closed Societies? The Ethical and Political Issues* 17, 18 (Mark Gibney ed., 1988). It is no great wonder that the chemistry of credibility determinations in asylum cases are poisoned by a culture of paranoia, aggravated by a culture of misunderstanding and caseload crunching.

¹⁵ *Mousa v. Mukasey*, 530 F.3d 1025 (9th Cir. 2008).

¹⁶ *Id.* at 1026-27

¹⁷ *Id.* at 1027-28

¹⁸ *Id.* at 1027 (quoting, *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002)); Citing, *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004).

¹⁹ *Id.* at 1027, 1030

²⁰ *Id.* at 1028 (citing European Council on Refugees & Exiles, “Guidelines on the Treatment of Iraqi Asylum Seekers and Refugees in Europe,” 18 *Int'l J. Refugee L.* 452, 458 (2006)). There is no evidence in the record of proceedings in Mousa that her attorneys ever submitted the above-cited journal piece, which the court of appeals understandably found so persuasive, and which it apparently found for itself. The failure of Mousa's counsel, particularly at her removal hearing, to address and advance the issue of culture as a basis for understanding her reluctance to admit her rape, clearly did not help her case for relief, and delayed her procurement of the same.

²¹ *Id.*

Another example of convoluted credibility determinations in asylum proceedings may be found in the case of *Zhou v. Gonzales*.²² Petitioner Zhou had applied for asylum because of his opposition to the Chinese government's policies of coercive population control.²³ The IJ and the BIA found against Zhou's claim and his credibility.²⁴ The IJ concluded that Zhou had testified inconsistently about whether he and his wife suffered forced sterilization in China.²⁵ The Second Circuit Court of Appeals disagreed, however, and in remanding the proceedings found that “this purported inconsistency appeared to be the result of a translation error rather than an attempt to mislead the IJ.”²⁶ More specifically, the Second Circuit cited to what it regarded as “a nonsensical translation of Zhou's testimony on this exact point: ‘I said they forced me to be sterilized and had not been sterilized.’”²⁷ The Second Circuit went on to criticize the IJ for relying on the translation to reject Zhou's credibility rather than reject the interpreter:

The IJ recognized that the translator was having difficulty, [but] dismissed the problem because Zhou had elected to speak in Mandarin instead of Foo Chow, and subsequently characterized the confusing translation as an example of Zhou's deceitfulness. Under these circumstances, the IJ's finding is based on an “inaccurate perception of the record” and thus is insufficient. Further, the IJ placed considerable weight on her misapprehension: what she perceived as a lie, as she set forth in her decision, “flavored the entire hearing.”²⁸

The Second Circuit also concluded that the IJ's adverse credibility determinations “seemed to reflect a lack of cultural sensitivity by treating what were obvious translation difficulties as evasiveness that ‘flavored the entire hearing.’”²⁹

As a last example, consider the case of *Agbor v. Gonzales*.³⁰ The female co-petitioner sought asylum based on her fear of female genital mutilation following her marriage in her native Cameroon.³¹ In denying her and her co-petitioning spouse asylum relief, the IJ found Agbor not to be credible, in part because of the “alleged implausibility that the petitioners only know Mr. Daniel--the man who provided them shelter and passports--by his first name.”³² By contrast, the Seventh Circuit cited to the testimony of another witness who told the IJ that Mr. Daniel was a “mere” business acquaintance and not a friend of the petitioners.³³ Furthermore, the circuit court noted the testimony of Ms. Agbor, “that in Cameroon it is customary only to know and refer to an acquaintance by his first rather than his full name.”³⁴ The Seventh Circuit vacated

²² *Zhou v. Gonzales*, 193 F. App'x 98 (2nd Cir. 2006).

²³ *Id.* at 99-100

²⁴ *Id.* at 99, 101

²⁵ *Id.*

²⁶ *Id.* at 99

²⁷ *Id.*

²⁸ *Id.* (citing *Tambadou v. Gonzales*, 466 F.3d 298, 302 (2nd Cir. 2006)).

²⁹ *Id.* at 101; see, *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003); see also, *Lin v. Ashcroft*, 385 F.3d 748, 756 n.1 (7th Cir. 2004).

³⁰ *Agbor v. Gonzales*, 487 F.3d 499 (7th Cir. 2007).

³¹ *Id.* at 500

³² *Id.* at 505

³³ *Id.*

³⁴ *Id.*

the decisions of the IJ and BIA to deny asylum and related forms of relief, and remanded the Agbors' proceedings.³⁵ Once again, an IJ's failure to incorporate cultural factors into his or her credibility assessment proved to be a fatal flaw that occasioned an Article III appeals court to question the credibility of the IJ rather than the asylum seeker.

The above-mentioned examples reveal that from coast to coast and in between, the inability or unwillingness of at least some IJs to let issues of individual psychology, language, lawyerly skills, and, above all, culture³⁶ inform the content of credibility determinations has created an atmosphere in asylum proceedings that often resembles the crap shoot of a casino more than that of a court of law.

In defense of my former workplace, I should add that some IJs have attempted to both recognize the reality of cultural diversity and the need to pay heed to it in resolving asylum claims. Frankly, the reality of culture clashes between the Byzantine labyrinth of immigration laws and regulations that govern asylum proceedings and the mindset of the asylum applicants was for me hard to miss. During the first term of the Clinton Administration in the 1990s, as the brave but failed efforts of the United States military to bring peace to Somalia became front page news, I had in my courtroom an asylum seeker from that poor and war-torn country. She was single and barely out of her teens with no knowledge of English and understandably no expertise in the workings of the Immigration Court. Despite my urgings to the contrary, the female respondent elected to represent herself and did so with the assistance of a court-contracted Somali language interpreter. In the course of the asylum phase of her deportation proceedings, she produced a document given to her in Kenya after she fled Somalia and before she arrived in the United States. The document appeared to identify the respondent as a refugee from potential persecution in Somalia on account of her tribal (i.e., national and ethnic) origin, and thus also appeared to corroborate her reasons for seeking asylum. Government counsel suggested, and I agreed, that respondent should provide a copy of the document to the court for possible introduction into the evidentiary record of the case. I thereupon asked the respondent whether she would be willing to “make a Xerox of the document” during a brief recess. In the most polite and straightforward way, respondent replied in the affirmative, but then added these revealing words: “Excuse me, Your Honor, but what is a Xerox?” This young woman, intelligent but indigent and barely familiar with the gadget-goofy and technology-dependent ways of the West, illustrated better than I ever could the cultural disconnect between her background of desperation—of drought, famine, and internecine tribal warfare unrestrained by the anarchy of the state—and mine. I promptly withdrew my request of her and made the photocopies myself, a

³⁵ *Id.* at 505-06

³⁶ By “culture,” I mean “all the customs, values, and traditions that are learned from one’s environment. [I]n a culture there is a “a set of people who have common and shared values, customs, habits, and rituals; systems of labeling, explanations, and evaluations; social rules of behavior; perceptions regarding human nature, natural phenomena, interpersonal relationships, time and activity; symbols, art, and artifacts; and historical developments.” Gargi Roysicar Sadowsky, E.W.M. Lai, and B.S. Plake, “Moderating Effect of Sociocultural Variables on Acculturation Variables of Hispanic and Asian Americans,” 70 *Journal of Counseling and Development* 194 (1991). It is sadly ironic that persecuted peoples may have an easier time making themselves clear to their tormentors in their homelands than to adjudicators in a democracy like the United States where they seek refuge.

practice that I, and indeed almost all of my Los Angeles court colleagues, continued in all pro se cases.

In another asylum case brought before my court, I was confronted by a Russian-speaking respondent, from the then newly independent state of Estonia. Like the young woman from Somalia, this respondent declined my invitation for her to take some time in order to seek counsel. She too represented herself and claimed that she had been harassed and mistreated by agents of the new government on account of her activities as an organizer and spokesperson for the ethnic Russian minority in Estonia who in turn complained that they became second-class citizens in their own country following the end of Soviet rule. In her written asylum application, prepared through an interpreter before the initiation of her removal proceedings, the respondent contended that Estonian government agents had “raped” her. However, in her courtroom testimony, respondent swore only that she had been “violated” by the government agents as they fondled her through her clothes. Government counsel argued that the inconsistency evidenced her lack of credibility on a matter central to her asylum claim. I was not persuaded that this was necessarily so; however, never before had I witnessed a case in which an asylum applicant had actually downgraded the degree of abuse she suffered because of her political activities. I therefore gently pressured government counsel to try to find the interpreter who had assisted respondent in the preparation of her asylum application. Fortunately, the interpreter was located and testified in my court that the Russian language word for rape—phonetically spelled in Latin letters as “*na-seal-a-veats*”—may also be used to denote a lesser violation of a woman's body. The interpreter's testimony resolved any reasonable doubts about the respondent's representations, and my grant of asylum to her was not appealed.

Another challenge to which some of my fellow judges and I have been sensitive is gauging the credibility of an asylum applicant through the latter's perception of time. Psychiatric and psychological studies have taught us that traumatic recollections are maintained by the mind in a different way than less jarring memories: the former are saved as fragments, contain a more sensory quality, “do not seem to carry a ‘time-stamp,’” and cannot be “evoked at will” as easily as more routine recollections.³⁷ The individual stressors that complicate temporally accurate recollections are often aggravated by cultural factors, like the application of non-Western (e.g., Persian and Ethiopian) calendars and systems that measure time based on specific events without reference to any standardized durational units.³⁸ Some IJs, particularly those without the benefit of expert psychological and cultural experts, but burdened by large and looming case loads, pounce on the difficulty victims of past persecution have in clearly dating their episodes of abuse and in doing so conclude that the asylum seeker's credibility is lacking. Some of us have resisted going in that direction, perhaps because some of us as lawyers propounded the testimony of

³⁷ Jane Herlihy, “Evidentiary Assessment and Psychological Difficulties,” in *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* 123, 126 (Gregor Noll ed., 2005)

³⁸ Walter Kalin, “Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing,” *20 Int'l Migration Rev.* 230, 236-37 (1986).

immigrant witnesses (in my case, Holocaust survivors)³⁹ with similar problems in temporal discussions, however accurate they were in describing people, places, and events critical to their credibility. Federal courts of appeals have often held that discrediting the testimony of a foreign-born asylum seeker because of the difficulty he or she evidences in dating important activities is often based as much on the psychological impatience and cultural ignorance of the IJ as on the weaknesses of the respondent's testimony.⁴⁰ Time, therefore, like language, must be considered with psychological and cultural care in assessing asylum seekers' credibility.

In fact, that some asylum seekers of non-Western origin perceive time in a different way, the insistence of judges and other asylum adjudicators on exact details and precise chronology of relevant events raises serious problems. Such asylum seekers face a difficult dilemma: Either she admits being unable to answer in the prescribed, Western manner and suffer the frustration and skepticism of the court, or she guesses or speculates at dates and a chronology that may not be correct. In a real sense, however unwittingly, she is being coerced to choose between troublesome truths and reassuring confabulation. “Thus cross-cultural differences of time-perception can seriously hinder the accurate assessment of credibility during the asylum hearing.”⁴¹

It is therefore difficult to overstate the extent to which culture differences create variables in credibility determinations that immigration judges, other asylum adjudicators, and even attorneys for allegedly persecuted persons, may not be sensitive. American judges and even defense counsel “filter” the stories of asylum seekers “through the lens of [their] own cultural identity and [their] bundle of preferences and values.”⁴² What one author has described as the “disciplined naïveté and informed not-knowing” of legally trained but not cross-culturally educated adjudicators and attorneys often give rise to frustration with non-Western asylum seekers: “The client story that seems to make little sense, the strategy direction that you cannot understand, that tactic that you see as self-defeating—each might be perfectly reasonable with

³⁹ As a prosecutor and as Chief of Litigation for the U.S. Justice Department’s Office of Special Investigations (“OSI”), I interviewed, deposed, and took the testimony of thousands of refugees from Nazi persecution and from Nazi collaborators who agreed to serve as witnesses against the subjects of my office’s investigations and court proceedings. Many of the most credible witnesses, especially among Holocaust survivors, described the murderous and/or violent actions of the OSI defendants as if those actions had been “frozen in time.” Oftentimes, the more convincing the recollections of the survivors, the more convoluted seemed their ability to “date-stamp” those memories. With the patience of the witnesses and the courts who heard them, and the aid of experts on psychology and on foreign cultures, the credibility of these brave and good survivors survived and even flourished in the course of the trials. OSI taught me much about building bridges of communication between individuals from other times and places and those lawyers and judges who dwell in the very different, more neat and tidy world of the Anglo-American courtroom. But for my work at OSI, I may well have become one of those overworked, insufficiently assisted IJs, who suffered excoriation at the hands of U.S. courts of appeals.

⁴⁰ See, e.g., *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 137, 145-47, 153-55 (3d Cir. 2005) (holding that the lower court’s conclusion regarding the credibility of plaintiff’s testimony was unsupported by reasonable evidence and after noting the cruel, crude, and insensitive nature of the IJ’s decision and interrogation of the plaintiff, remanding the case for review by a different IJ).

⁴¹ Walter Kalin, “Cross-Cultural Misunderstandings in the Asylum Hearing,” *International Migration Review*, vol. 20, no. 2, Special Issue: “Refugees: Issues and Directions” (Summer 1986) 230-41 at 237.

⁴² Paul R. Tremblay, “Interviewing and Counseling Across Cultures: Heuristics and Biases,” 9 *Clinical Law Review*, 373, 412 (2002).

another's lens and another's bundle of preferences and values."⁴³ In order to determine whether cultural dissonance or genuine fabrication is at work in such a situation, multi-cultural experts are essential to advise attorneys testify before courts on how asylum seekers and their powers of thought and articulation are informed by the forces of racism, sexism, ethnocentrism, and homophobia to which those allegedly persecuted were exposed in their homelands.⁴⁴

Therapists have come to recognize that in order to effectively understand and then counsel oppressed people from another society, they must appreciate and factor into their work the cultural indicators that would separate their clients from themselves. The vehicle often used in this regard by psychiatrists and psychologists is a conceptual framework that identifies five stages of development that oppressed people experience as they labor to understand themselves in terms of their own culture, the dominant racial, religious, ethnic, or political culture of their homelands, and the often violent relationship between the two: (1) conformity; (2) dissonance; (3) resistance and immersion; (4) introspection; and (5) integrative awareness.⁴⁵ This conceptual framework is known as the "Race/Culture Identity Model."⁴⁶ It recognizes a progression of consciousness about a persecuted person's racial, religious, and ethnic backgrounds, and anticipates the psychological implications of each of the five stages of development. Each member of an oppressed people "will constantly cycle through the five levels again and again as new issues are discovered... [T]here is no end to development of consciousness as a cultural being."⁴⁷ Such a complicated but invaluable conceptual framework needs to be imparted to asylum adjudicators and attorneys, through interdisciplinary training and the assistance of expert witnesses. Such a conceptual framework reveals to the bench and bar what therapists have known for some time: that truth is "experiential" and is relative to the narrator's social position, mental health and emotional state.⁴⁸ It is imperative to the fair resolution of credibility that adjudicators develop the capacity to imagine a world different than their own and in doing so better interpret and assess the value of narratives of identities and afflictions.

Finally, all of the problems that attach themselves to the difficulty in determining credibility in asylum proceedings are made worse by the newness of asylum seekers to the United States and its processes for resolving immigration disputes. While many applicants for relief from removal must establish a considerable number of years of uninterrupted presence in the United States,⁴⁹ asylum seekers tend to be more recent arrivals to this country. In fact, INA §

⁴³ *Id.*

⁴⁴ David Sue and Derald Wing Sue, *Counseling the Culturally Different*, (3d ed. 1999).

⁴⁵ David Sue and Derald Wing Sue, "Counseling the Culturally Different," (2d ed. 1990).

⁴⁶ *Id.*

⁴⁷ Harold Cheatham, Allan E. Ivey, Mary Bradford Ivey, Paul Pedersen, Sandra Ragazio-DiGilio, Lynn Simek-Morgan, and Derald Wing Sue, *Multicultural Counseling and Therapy II: Integrative Practice in Counseling and Psychotherapy* (4th ed.) 133, 163.

⁴⁸ Laurence J. Kirmayer, "Failures of Imagination: the refugee's narrative in psychiatry," *Anthropology and Medicine*, vol. 10, no. 2 (2003).

⁴⁹ For example, INA § 240A (b)(1)(A); 8 U.S.C. § 1229b (b)(1)(A) (2006) allows for the possible cancellation of an alien's removal (and his resulting procurement of lawful permanent residence) if, *inter alia*, he proves that he has maintained continuous physical presence in the United States for at least ten years from the date of his relief application.

208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006) creates a rebuttable presumption that an alien who has filed for asylum more than one year after his arrival in the United States is ineligible to receive the relief. Consequently, because they are newer to the country, asylum applicants tend to be even more “alien” to the psychology, culture, language, and legal profession they encounter than are other foreign-born respondents in Immigration Court. It is therefore not surprising that a significant disparity exists in the way asylum applicants respond to IJs and, more importantly, vice versa. Nevertheless, while the disparity is explicable, it is not acceptable: the nature and quality of an asylum decision is often literally a matter of life and death. It therefore behooves all of us involved in asylum law and adjudication to discern how best to correct the problems identified by the original authors of Refugee Roulette; in doing so, we must implement the reforms proposed by the authors regarding better appointments, improved training regimens, increased resources for IJs, and more and better counsel for asylum seekers.

United States Asylum Court

Old but persistent problems to the body of our legal institutions, and those who operate them, require new prescriptions. My new bromide is for a new and autonomous United States Asylum Court (USAC). While it would not contemplate or guarantee (because, indeed, no mortal solution could contemplate or guarantee) a complete uniformity of results from one trial judge to the next, it could put in place a set of procedures and methods designed to prevent problems of psychology, culture, and language from making it a Herculean task (rather than just a human one) for judges to better understand the newcomers in their courtrooms, and thus decide their cases more on the facts presented and less on the frustrations caused in immigration litigation. A new cure for the problems of Refugee Roulette can come only from a new court invested with new priorities and new resources. Justice, and the sanity of judges, calls for a court tailor-made to adjudicate credibility in cases unlike those which relate to factual issues relating more to events in this country and respondents who have lived here longer.⁵⁰

Essentially, I am calling for two courts to handle removal proceedings brought by the United States Department of Homeland Security: an Immigration Court of more general jurisdiction to handle cases that involve non-asylum based relief claims such as cancellation of

⁵⁰ For example, under INA § 240A(a)(1)-(3), 8 U.S.C. § 1229b(a)(1)-(3), a lawful permanent resident of the United States may obtain a grant of cancellation of his removal if, despite his or her criminal convictions (almost always ones recorded in the United States), he or she demonstrates that he or she:

- (1) has been an alien lawfully admitted [to the United States] for not less than 5 years,
- (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
- (3) has not been convicted of an aggravated felony.

Id. “Aggravated felony” is a term of art defined at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), which generally excludes all but the most serious offenses, like rape and murder. INA § 240A(b), 8 U.S.C. § 1229b(b) provides a form of relief within the sound discretion of an IJ to grant or deny, by weighing the criminal record of the alien in the United States against his or her time, family contacts, rehabilitation, personal and filial hardships, and the positive achievements he or she has accomplished here. Thus, the critical issues to be weighed are domestic ones well usually within the common understanding of the respondent, the attorneys for both sides, and the judge. The stress on asylum proceedings brought on by culture shock is therefore far less severe in a cancellation of removal case and other litigation that involves aliens who have lived in the United States for more significant periods of time.

removal under INA § 240A(a)-(b), 8 U.S.C. § 1229b(a)-(b), adjustment of status under INA § 245, 8 U.S.C. § 1255, and waivers of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h), and another handling all removal proceedings where asylum is requested, together with its companion claims of withholding of removal under INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A)⁵¹ and relief under the United Nations Convention Against Torture (CAT) pursuant to 8 C.F.R. § 208.16-18.⁵² Cases would be assigned to either the General Immigration Court or the USAC by judges at master calendars. Both the General Immigration Court and the USAC could still function within their current agency, the Justice Department's Executive Office of Immigration Review (EOIR), or, as is my preference, within an immigration judiciary independent of the Executive Branch by an act of Congress pursuant to Article I of the U.S. Constitution.⁵³ Regardless of the conditions for the divorce, a separate USAC would no longer overcook the judicial temperament of its judges by pouring on them all kinds of cases with all kinds of deadlines. The USAC, and for that matter the new General Immigration Court, would enjoy a lighter, if not light, case load to which it could give greater attention in a less hectic and exhausting atmosphere. My proposal would require additional IJ appointments so that each of the two courts would possess approximately the same number of judges as the present malfunctioning Immigration Court.⁵⁴ Thus, the USAC and the new General Immigration Court would possess the personnel to efficiently adjudicate each of its cases without prejudice to the workload of the other. Such a proposal would occasion a significant amount of money, but the problems and embarrassments caused by the current system of Refugee Roulette necessitate a commitment of additional funds and human resources.

⁵¹ INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) prohibits the removal of an alien to a country where “the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.” *Id.*; see *INS v. Stevic*, 467 U.S. 407, 429-30 (1984) (noting that eligibility for a withholding of removal must “be supported by clear and convincing evidence establishing that it is more likely than not that the alien [will] be subject to persecution”); *but see, INS v. Cardoza-Fonseca*, 480 U.S. 421, 423, 449 (1987) (stating that asylum eligibility may be proven by a lower standard of “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

⁵² 8 C.F.R. § 208.16(a) (2009) (“[A]n immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.”); *id.* § 208.16(c)(2) (specifying that relief from removal under CAT is available if the alien “establish[es] that it is more likely than not that he or she would be tortured if removed to the proposed country of removal”).

⁵³ It is unseemly for a supposedly impartial court of such consequence for hundreds of thousands of litigants to be subject to control by a litigation and law enforcement agency like the Department of Justice, particularly one that has been found to have illegally employed partisan politics in the appointment of Immigration Judges. See Bruce J. Einhorn, Op-Ed., “Tainted Justice,” *L.A. Times*, June 28, 2008, at A25. I would also elevate the Board of Immigration Appeals, which reviews the decisions of IJs, to a Court of Immigration Appeals that includes experienced and well-reviewed IJs from various regions of the country. Finally, I would eliminate the Board's policy of “streamlining [review of] routine [cases by] a single member adjudication process.” See U.S. Dep't of Justice, Board of Immigration Appeals: Final Rule 2 (2002), <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf>. Cursory review of removal decisions, especially life and death decisions regarding asylum eligibility, should not trump a thorough appellate examination in the purported interests of efficiency. In a democracy, safety must always take precedent over efficiency.

⁵⁴ Of course, adjustments in the number of new IJs assigned and appointed to each court should be adjusted to comport with rising and falling case loads.

Reassignments of current IJs to the USAC and new appointments to the new court would be made, or at least cleared, by a Merits Panel composed of current judges, leaders, specialists in the area of international human rights (both governmental and non-governmental), and prominent academics and practitioners (both government and private) in the field of immigration law. The result of such a selection system would be the appointment of USAC judges who are truly qualified for and dedicated to the challenges of asylum adjudication. Additionally, all USAC members would be required to participate in an initial and subsequent periodic training in asylum and refugee law, and the psychological, cultural, and other anthropological aspects of examining and assessing asylum claims. Such training would be conducted by incumbent asylum judges, legal scholars, and experts in the already mentioned and related disciplines. Such training would also include review of recent precedent-setting case law on asylum, and at least some review of the legal developments at the international level (e.g., the reports and guidelines provided by the United Nations High Commissioner for Refugees and his UNHCR Handbook on Procedures and Criteria for Determining Refugee Status),⁵⁵ and even review of the decisions of foreign courts in democratic adjudication systems like Canada.⁵⁶ Indeed, our adjudication system has much to learn from our neighbors to the north, particularly in the emphasis they accord psychology and culture in credibility determinations. For example, in *Zapata v. Canada* (Minister of Employment & Educ.), the Federal Court of Canada found that:

[An expert medical doctor's psychological] report [on an asylum applicant] cannot be rejected solely for the reason that the conclusion made therein is based on what was related to the doctor by the claimant, when it is clear from the report that the doctor's own professional observation of the claimant was material to the conclusion reached.⁵⁷

Canadian courts also emphasize that care be taken to understand that the asylum applicant's [a]bility to observe and recall events in the course of a hearing:

⁵⁵ See generally, Office of the U.N. High Comm'r for Refugees, U.N. GAOR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992), <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

⁵⁶ Canada's Immigration and Refugee Board (IRB) functions as that country's USAC. The IRB has published an Assessment of Credibility in Claims for Refugee Protection available to both its judges and practitioners, as well as the public at large. See generally Immigration & Refugee Bd., *Assessment of Credibility in Claims for Refugee Protection* (2004), http://www.irb-cisr.gc.ca/Eng/brdcom/references/legjur/rpdspr/cred/Documents/credib_e.pdf. The Assessment calls for judges in asylum cases to consider "all of the evidence, both oral and documentary [and] not just selected portions of the evidence." *Id.* at 11 (emphasis added). Adjudicators are admonished that they "should not selectively refer to evidence that supports its conclusions without also referring to evidence to the contrary." *Id.* The Assessment also warns that in cases "[w]here the claimant provides personal documentary evidence or medical reports, specific to and corroborative of his claim, it is not sufficient to simply make a blanket statement, without explanation, that no probative value was assigned to this evidence because of a general lack of credibility on the part of the claimant." *Id.* at 13. Finally, the Assessment cites a major Canadian appeals case, *Maldonado v. Canada* (Minister of Employment & Educ.), [1980] 2 F.C. 302, 305 (Can.), which held that "[w]hen [a claimant] swears to the truth of certain allegations [of persecution], this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness." *Id.* at 52 n.186. The Assessment is national in scope, and thus supports less deviation and eccentricity in judicial findings on credibility.

⁵⁷ Immigration & Refugee Bd., *supra* note 47, at 73 (citing *Zapata v. Canada* (Minister of Employment & Educ.), IMM-4876-93, [1994] 1994 F.T.R. LEXIS 2121 (June 24, 1994)).

nervousness caused by testifying before a tribunal; the claimant's psychological condition (such as post-traumatic stress disorder) associated with traumas such as detention or torture; the claimant's young age; cognitive difficulties and the passage of time; gender considerations; the claimant's educational background and social position; and cultural factors.⁵⁸

These admonishments comport with very recent studies, conducted both in North America and Europe that conclude as follows:

Cultural factors may strongly influence the types of information asylum seekers are comfortable sharing, as well as the pace of disclosure. In many cultures, victims of sexual abuse, rape, or sexual torture experience an overwhelming amount of shame. Because in many cultures it is important to not lose face, these painful experiences would be difficult to share with loved ones, let alone with strangers in a public setting, especially government officials who might evoke memories of the perpetrators in cases where applicants have been terrorized by the agents of the state...

Eye contact is another culturally variable pattern of behavior...Lewdness or aggression is associated with prolonged eye contact in many cultures, though not in the U.S....Thus, in U.S. culture, ironically, some asylum seekers may arouse suspicion by the aversion of gaze that to them is innately ingrained as a sign of respect or deference.⁵⁹

Thus, it is critical that the USAC have regular access to expert witnesses in the disciplines of psychology and culture to mediate between the court and the often difficult-to-understand asylum applicants.

To that end, the USAC should have access to its own court-appointed experts with “no dog in the fight,” no vested interests, financial or otherwise, in the outcome of asylum litigation. “In most of the rest of the world, expert witnesses are selected by judges and are meant to be neutral and independent. Many foreign lawyers have long questioned the American practice of allowing the parties to present testimony from experts they have chosen and paid.”⁶⁰ Moreover,

⁵⁸ *Id.* at 83-84. It is high time that we in the United States abandon our parochialism and look for guidance, if not precedent, from the actions of asylum courts in other parts of the democratic world, particularly those within the Anglo-American legal tradition. As former U.S. Supreme Court Justice Sandra Day O'Connor thoughtfully observed in a similar context:

I think that we ... will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same basic constitutional questions we have All of these courts have something to teach us about the civilizing function of constitutional law.

Sandra Day O'Connor, *The Majesty of the Law: Reflections of A Supreme Court Justice* 234 (Craig Joyce ed., 2003). What applies to constitutional questions should equally apply to asylum issues, all of which arise out of the 1951 United Nations Convention and the 1967 Protocol Relating to the Status of Refugees. See generally Office of the U.N. High Comm'r for Refugees, U.N. GAOR, Convention and Protocol Relating to the Status of Refugees 5-7 (2007), <http://www.unhcr.org/3b66c2aa10.pdf> (providing the text of the 1951 convention and the 1967 protocol).

⁵⁹ Stuart L. Lustig, “Symptoms of Trauma Among Political Asylum Applicants: Don’t be Fooled”, 31 *Hastings Int’l & Comp. L. Rev.* 725, 730-31 (2008)

⁶⁰ Adam Liptak, “Experts Hired to Shed Light Can Leave U.S. Courts in Dark,” *N.Y. Times*, Aug. 12, 2008, at A1.

by having the experts selected by and responsible to the court, the judges will find it easier and less threatening to inform the content of their decisions, and of the asylum law itself, with the various medical and social disciplines necessary for the proper adjudication of cases based on foreign events and often on complex psychological factors affecting witness credibility. Again, the proposal to have court-appointed experts will cost the government money—money indigent and poor asylum applicants often do not have to pay the same as witnesses under the current system. But if the quality and consistency of asylum decisions are to be increased, a capital investment of public funds is appropriate.

On the subject of funds, a new USAC (and for that matter, a separate General Immigration Court) should be allocated more human resources, in the form of additional law clerks, to allow for more research and written decisions regarding those cases that prove more complicated and demanding. Currently, the overwhelming majority of rulings made by IJs are by oral decisions delivered from the bench immediately after respondents' hearings are concluded. Although the immigration laws and regulations do not require oral as opposed to written decisions, the former are actively encouraged by EOIR as a way of accelerating the completion of the hundreds of thousands of pending removal and deportation proceedings. With additional law clerks, written decisions needed to flesh out difficult questions of asylum law and credibility resolution will become more likely.⁶¹ Moreover, judges should be given authority they currently do not have to publish some of their written decisions, even in cases that go unappealed. Then, at periodic training sessions, asylum judges could share and discuss their written rulings and what led to them. Additionally, in larger court jurisdictions like Los Angeles, Miami, and New York, IJs might adopt the suggestion of this author, that more complex asylum cases be heard and decided by panels of three IJs, who could collaborate in decisions while comparing their approaches to adjudication, and perhaps contribute to a more cohesive pattern and practice of decision-making. A true and deep dialogue could begin that would lead to a continuing legal education on asylum in general, and credibility resolution in particular, for judges and lawyers alike. A consistent methodology of credibility resolution would surely emerge, and with it a lessening of extremes in asylum rulings.

Lastly, it is time to allow for a rule that would release public funds for the representation of asylum applicants (and indeed, all indigent respondents) in federal removal proceedings.⁶² The better the preparation and representation on both sides in asylum cases, the better informed the asylum judge will be and the better the quality asylum decisions will have. I cannot count the many times my fellow IJs and I have lamented over the inadequacy or even absence of counsel in cases where a better preparation of asylum claims could prevent cultural misunderstandings and enhance the possibility that documentary evidence and corroborating witnesses would be

⁶¹ Given that the REAL ID Act now allows for adverse credibility determinations based on “demeanor” and on an array of misrepresentations that may arise in asylum hearings, the need for extra care in crafting asylum decisions and the need for expert witness testimony have become even more critical to a balanced appraisal of a respondent. See INA § 208 (b)(B)(iii); 8 U.S.C. § 1158 (b)(B)(iii) (2006).

⁶² See, *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963); Ramji-Nogales et al., *supra* note 5, at 340 (reporting that based on their statistical analysis, the existence or absence of legal representation for asylum seekers in Immigration Court proceedings was the single most important factor affecting the outcome of their cases).

discovered and introduced at trial. Given the time pressures under which most IJs operate, IJs are neither inclined nor encouraged to grant multiple continuances for respondents to seek counsel, or to slow down to a trickle the pace of merits hearings on the possibility that with the unlikely emergence of representation in the midst of proceedings, issues might emerge that could make a relief claim clearer or more credible. Given that the burden of proving asylum eligibility lies with the asylum applicant,⁶³ the absence of sufficient attorney resources is perceived by IJs as just another problem through which they must muddle and over which they lack control. A civil Gideon standard⁶⁴ would solve this problem, empower asylum applicants in their presentations, and allow IJs to adjudicate more thoroughly vetted relief claims in an efficient fashion. Frankly, an adequate supply of competent counsel would make it just as easy for even busy IJs to grant asylum as to deny it.⁶⁵

Individual Accountability

We in the West have been conditioned by our religious, political, and economic heritage to believe that all persons are possessed of free and unfettered will, and that all behavior, verbal and physical, should be judged under a theory of strict individual accountability. Thus, if an asylum applicant is unable to articulate his claims for relief from removal or deportation, or if his demeanor appears to denote a lack of confidence before a court, then she and she alone is responsible for failing to “measure up” to what a reasonably educated and experienced judge would expect from a reasonably credible litigant. We in the West generally reject the notion that there is a collective response to authority that may determine or at least grossly affect an individual’s ability to satisfy her burden of proof on matters of credibility. Our faith in rugged individualism makes it hard for us to embrace testimonial responses rooted in cultural nuances that are based on cultures far more communitarian than our own.

The fact is, however, that just as the Marxist theory that individuals and their behavior are the prisoners of their class is not the Rosetta Stone to a fair understanding of history, the Western and especially the American reliance on a triumphant individualism is by itself an insufficient guide to judging the responses of those from very different cultures who face judgment by even the most gifted and earnest robed guardians of our laws. As individual and national nuances must inform any analysis of class conduct, so collective conscience and

⁶³ See 8 C.F.R. § 208.13 (a) (2009). In busy jurisdictions where asylum cases are sometimes complicated, poorly elaborated, and even more poorly represented (if at all), the burden of proof becomes a convenient and justifiable excuse for expeditious denials of relief. Like Pontius Pilate, an overworked and overwrought IJ may wash his or her hands of an alleged target of persecution where no spirited defense has been advanced on the respondent’s behalf.

⁶⁴ See, 372 U.S. at 344

⁶⁵ Since 2000, according to its current website, EOIR has had a Legal Orientation Program and Pro Bono Program that include a BIA Pro Bono Project and an unaccompanied Alien Children Initiative. U.S. Department of Justice, Executive Office of Immigration Review, Pro Bono Program – Major Program Initiatives, <http://www.justice.gov/eoir/probobo/MajorInitiatives.htm> (last visited Nov. 8, 2009). While EOIR’s efforts in this regard are commendable, there is no substitute for a paid public defender program that would guarantee counsel to every ingredient respondent in Immigration Court proceedings, and thus ensure a more equal playing field for all asylum applicants.

national nuances should inform the analysis of an asylum seeker's credibility. We must educate and sensitize ourselves to the others in our midst, just as they must come to our courts of justice, follow our rules of evidence, and tell us the truth, whole truth, and nothing but the truth, in the most respectful and articulate way they can. Removal and deportation hearings in the United States are adversarial, but the testimonial relationship between the asylum seeker as witness and the court as arbiter of credibility should not be equated with the institutional struggle between the litigant (and his lawyer, if any) and the government and its counsel. Judges and other government adjudicators should make every effort to cross cultural divides and meet asylum seekers "on the 50 yard line."

Conclusion

In August 2008, the United Nations estimated that about 160,000 civilians have been displaced by warfare between Russian and Georgian armed forces on the territory of the former Soviet republic of Georgia.⁶⁶ As recently as this spring, some 1,000,000 refugees were reported to have fled the violence and civil unrest of the Maghreb in North Africa in a desperate effort to cross the Mediterranean and seek asylum in Europe.⁶⁷ The cold, hard reality faced by large numbers of refugees, and the humanitarian basis upon which the asylum law was predicated, are very much needed in our difficult world. The key to a more just application of that law and to greater consistency in assessing the credibility of asylum seekers, lies in an interdisciplinary approach to adjudication that gives recognition to the complexities inherent in modern human rights case work: "Let us look the facts of human conduct in the face. Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient....Let us not become legal monks."⁶⁸ In the interests of justice, let us shed our shrouds of piety for wisdom. For "[w]isdom is the principal thing; therefore get wisdom; and with all thy getting get understanding."⁶⁹

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⁶⁶ "Top UN Refugee Official Wraps up Mission to Georgia, Russia," *U.N. Daily News*, Aug. 22, 2008, at 1, <http://www.un.org/news/dh/pdf/english/2008/22082008.pdf>.

⁶⁷ Rights Monitoring News, May 30, 2011.

⁶⁸ Roscoe Pound, "Law in Books and Law in Action," 44 *Am. L. Rev.* 12, 35-36 (1910).

⁶⁹ Proverbs 4:7