
NOTE

THE VULNERABILITY OF ASYLUM ADJUDICATIONS TO SUBCONSCIOUS CULTURAL BIASES: DEMANDING AMERICAN NARRATIVE NORMS

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INTRODUCTION

This Note explores how various factors unique to asylum adjudications—(1) substantial obstacles to obtaining corroborating evidence of persecution; (2) the high stakes of credibility determinations; (3) vague statutory guidelines for making such determinations; and (4) exceedingly limited judicial review—combine to make particular groups of asylum applicants distinctly susceptible to subconscious cultural biases.

Although there is a growing body of research on the ways implicit biases impact judges' and juries' factual determinations,¹ few articles have sought to address how cultural narrative norms influence judicial expectations of "credible" testimony. Such scholarship is increasingly essential in the aftermath of the REAL ID Act of 2005 ("REAL ID Act"),² which created a substantial risk that not what asylum applicants say but rather the way in which they say it will definitively determine their right to remain in the United States.

The primary purpose of this Note is to shed light on a subject matter that is often neglected despite academia's recent fascination with implicit racism, sexism, and homophobia.³ We must remember that such issues are merely the tip of the iceberg. Countless forms of subconscious biases, both independently and in conjunction, currently impede judicial objectivity in modern American jurisprudence. Acknowledging that we will likely never be able to entirely eliminate such biases, this Note proposes various ways to address one group of subconscious cultural biases—those stemming from culturally imposed narrative expectations.

I. BACKGROUND

"Asylum is an immigration benefit [granted by the U.S. Department of Homeland Security⁴] that allows certain foreign nationals who fear persecution to remain lawfully in the [United States] indefinitely."⁵ In addition to providing

¹ See, e.g., Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 565 (2012) (examining gender-based stereotypes regarding mothers and fathers in family court); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139, 141 (2010) (examining the effect of implicit bias in criminal trials "where the defendant's race is different from that of some jurors"); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 407 (2014) (examining the role of "attitudes toward same-sex sexuality and LGBT issues" in jury voir dire).

² REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8 U.S.C.).

³ See *Take a Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> [<https://perma.cc/4DV8-LLBZ>] (last visited Dec. 6, 2016).

⁴ 8 U.S.C. § 1158(b)(1)(A) (2012).

⁵ *Applying for Asylum*, IMMIGR. EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum/> [<https://perma.cc/P2G7-PG3B>] (last

protection from forcible deportation, for many asylum is a pathway to U.S. citizenship.⁶

Yet the road to asylum is not an easy one. Asylum applicants face numerous obstacles to obtaining a legal grant of asylum. They are forced to navigate a complex legal system and to satisfy an exceedingly high burden of proof.⁷ At the same time, many applicants must undergo immigration proceedings without any legal representation. Nationally, 14.6% of asylum seekers are unrepresented.⁸ Women with children are disproportionately unrepresented in immigration courts, with more than 70% lacking legal representation.⁹ In the highly subjective system of asylum adjudications, such representation can often mean the difference between legal protection and forcible deportation, because unrepresented litigants are often left without any assistance to navigate complex cultural expectations that subconsciously impact immigration judges' credibility determinations.¹⁰ In fact, a study of more than 26,000 immigration cases throughout the United States involving women with children found that 98.5% of individuals *without* representation were forcibly deported while only 73.7% of individuals *with* representation were forcibly deported.¹¹ Yet, because the

visited Oct. 24, 2016).

⁶ See Petra Cahill, *For Asylum Seekers, Path to Citizenship Is Paved with Peril*, NBC NEWS (Apr. 17, 2013, 1:40 AM), http://usnews.nbcnews.com/_news/2013/04/11/17708693-for-asylum-seekers-path-to-citizenship-is-paved-with-peril?lite [https://perma.cc/E3US-BPWT] (“The United States guarantees asylum—and a path to citizenship—to individuals who are in the country and can prove they have suffered persecution or have a legitimate fear that they will suffer persecution if they return to their home country, as a result of their politics, race, nationality or membership in a particular social group.”).

⁷ *Id.* (“The burden of proof is high: 86,053 applicants sought asylum in the U.S. in 2012, but only 24,969—about 29 percent—received it, according to U.S. Citizenship and Immigration Services.”).

⁸ Judge Steven R. Abrams, TRAC IMMIGR., <http://trac.syr.edu/immigration/reports/judgereports/00134NYC/index.html> [https://perma.cc/52KP-SK8M] (last visited Oct. 10, 2016). Overall, 43.5% of noncitizens were unrepresented in immigration court proceedings. OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2012 STATISTICAL YEAR BOOK, at G1 (2013), <http://www.justice.gov/sites/default/files/eoir/legacy/2013/03/04/fy12syb.pdf> [https://perma.cc/JQH7-5V4T].

⁹ *Representation Is Key in Immigration Proceedings Involving Women with Children*, TRAC IMMIGR. (Feb. 18, 2015), <http://trac.syr.edu/immigration/reports/377/> [https://perma.cc/PRE2-4HCR].

¹⁰ See SELF-REPRESENTED LITIG. NETWORK, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A NATIONAL BENCH GUIDE FOR JUDGES 10-7 (2007), <https://courts.mt.gov/portals/113/selfhelp/docs/benchguide.pdf> [https://perma.cc/9KT4-U27H] (“[T]he possibility of implicit bias may arise more in cases with self-represented litigants with no intermediary lawyer to facilitate or carry out the communication . . .”).

¹¹ See *Representation Is Key in Immigration Proceedings Involving Women with Children*, *supra* note 9.

Supreme Court has explicitly held that deportation is not “punitive,”¹² despite recognizing that “deportation is a drastic measure and at times the equivalent of banishment or exile,”¹³ asylum applicants cannot invoke the Sixth Amendment right to effective assistance of counsel, which is reserved for only criminal proceedings.¹⁴

In addition to the difficulties of navigating the American legal system as a foreigner, often without representation, many asylum applicants face substantial obstacles to obtaining corroborating evidence of their persecution. The systemic lack of documentation evidencing incidents of persecution coupled with vague statutory guidelines for making credibility determinations in the absence of such evidence make asylum adjudications susceptible to subconscious biases.¹⁵ Biases stemming from immigration judges’ and asylum applicants’ differing perceptions of time, tendencies regarding explicit and implicit communication, and observational norms can adversely impact such determinations.¹⁶ Coupled with a long tradition of virtually unlimited judicial discretion and highly limited judicial review, asylum credibility determinations based upon subconscious cultural biases are often left unchecked.¹⁷

Targeted cultural training for immigration judges must be implemented in already-existing judicial training programs to combat the subjective tendencies of asylum adjudications. Furthermore, regulations must be promulgated to shed light on the vague statutory guidelines for making credibility determinations in asylum adjudications, particularly when objective evidence of persecution is not reasonably available.

This Note does not seek to address every form narrative biases may take or to explore every potential solution to such issues. Nor does it address the many ways in which such biases impact legal determinations outside of the asylum context. It aims only to begin a conversation.

¹² *Galvan v. Press*, 347 U.S. 522, 531 (1954).

¹³ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (explaining that in an immigration removal proceeding “the stakes are considerable for the individual”).

¹⁴ U.S. CONST. amend. VI (containing the introductory clause “[i]n all criminal prosecutions”); *see also Galvan*, 347 U.S. at 531 (holding that deportation is not a form of criminal punishment); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mental Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023, 1039 (2016) (“Despite recent Supreme Court decisions that have acknowledged the devastating consequences of removal proceedings and immigration judges’ own admissions that removal proceedings are akin to trying ‘death penalty cases’ in ‘traffic court,’ immigration removal proceedings have long been characterized as civil, rather than criminal in nature.” (footnotes omitted) (quoting *Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law of the H. Comm. on the Judiciary*, 111th Cong. 59 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges))).

¹⁵ *See infra* Section III.A.

¹⁶ *See infra* Sections III.B, III.C.

¹⁷ *See infra* Part IV.

II. THE IMPORTANCE OF CREDIBILITY DETERMINATIONS IN THE ASYLUM CONTEXT

In the path towards gaining formal recognition of asylee status, an asylum applicant's greatest hurdle is often establishing past persecution or a well-founded fear of future persecution.¹⁸ To clear this hurdle, the asylum applicant must present a credible narrative of past experiences in the applicant's home country and clearly show how these experiences amounted to persecution or would lead a reasonable person to—and did lead the applicant to—fear future persecution.¹⁹ For a number of reasons, asylum applicants are often unable to present corroborating evidence of past persecution and, as a result, are left to rely on their narrative alone to convince immigration judges of the validity of their claims.²⁰ The REAL ID Act made it clear that immigration judges cannot presume that asylum applicants' testimony is credible.²¹ In the absence of persuasive corroborating evidence of persecution, an immigration judge's finding that an asylum applicant's narrative is not sufficiently credible statutorily compels denial of the applicant's petition for asylum.²² As a result, obtaining a favorable credibility determination from the immigration judge has become a crucial step in the legal process for obtaining asylum.²³

A. *The Legal Process for Obtaining Asylum*

A noncitizen can obtain formal recognition of asylee status in the United States either by affirmatively applying for asylum or by using asylum as a defense against removal.²⁴ Under either process, to be eligible for asylum, the applicant must establish by a preponderance of the evidence²⁵ that the applicant:

¹⁸ See, e.g., David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 250 (1988).

¹⁹ *Mendez-Efrain v. INS*, 813 F.2d 279, 282 (9th Cir. 1987) (holding that to establish a "well-founded fear of persecution," an asylum applicant "must introduce credible, direct, and specific evidence of facts that would support a reasonable fear of persecution"); 8 C.F.R. § 1208.13(b)(1) (2016) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.").

²⁰ See *infra* Section II.A.

²¹ 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

²² *Id.* § 1158(b)(1)(B)(ii); see also Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003).

²³ Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 191 (2008).

²⁴ *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<https://perma.cc/UUP4-SLCD>] (last updated Oct. 19, 2015) (comparing the affirmative and defensive asylum processes).

²⁵ *Acosta*, 19 I. & N. Dec. 211, 211 (B.I.A. 1985), *overruled in part by* *Mogharrabi*, 19 I.

(1) is “physically present” in the United States or seeking entry into the United States at a border or port of entry;²⁶ (2) has applied for asylum in accordance with the established requirements and procedures;²⁷ and (3) fits within the statutory definition of a “refugee” under the Immigration and Nationality Act (“INA”).²⁸ While establishing these first two elements often requires little effort, in many cases establishing the third element can prove quite challenging.²⁹

1. The Affirmative Asylum Process

To obtain asylum through the affirmative asylum process, a noncitizen must first submit Form I-589, *Application for Asylum and for Withholding of Removal*, to United States Citizenship and Immigration Services (“USCIS”).³⁰ Although the majority of asylum applicants “speak little if any English,”³¹ USCIS requires this form “be completed in English” and warns applicants that any “[f]orm[] completed in a language other than English will be returned.”³² Struggling to answer questions they often do not fully comprehend in a language that they are not accustomed to using, many asylum applicants unintentionally misrepresent facts or omit details in their asylum applications, creating a substantial risk that they will be denied asylum due to perceived inconsistencies between their paperwork and their later testimony during the asylum interview.³³

Along with Form I-589, the asylum applicant is strongly encouraged to submit supporting documentation of persecution, for example: a written declaration elaborating upon the applicant’s past experiences in the applicant’s home

& N. Dec. 439 (B.I.A. 1990).

²⁶ 8 U.S.C. § 1158(a)(1).

²⁷ *Id.* § 1158(b)(1)(A); *see also id.* § 1158(a)(2) (listing exceptions to noncitizens’ right to apply for asylum in the United States).

²⁸ *Id.* § 1158(b)(1)(B)(i).

²⁹ *See Rempell, supra* note 23, at 191-92.

³⁰ *Obtaining Asylum in the United States, supra* note 24.

³¹ Bruce J. Einhorn & S. Megan Berthold, *Reconstructing Babel: Bridging Cultural Dissonance Between Asylum Seekers and Adjudicators*, in *ADJUDICATING REFUGEE AND ASYLUM STATUS: THE ROLE OF WITNESS, EXPERTISE, AND TESTIMONY* 27, 48 (Benjamin N. Lawrance & Galya Ruffer eds., 2015).

³² U.S. CITIZENSHIP & IMMIGRATION SERVS. & U.S. EXEC. OFFICE FOR IMMIGRATION REVIEW, OMB No. 1615-0067, I-589 APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: INSTRUCTIONS 4 (2014), <https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf> [<https://perma.cc/L7VD-9BRP>].

³³ Telephone Interview with Sarah R. Sherman-Stokes, Lecturer in Law, Bos. Univ. Sch. of Law (Aug. 16, 2016). One young woman who was a victim of egregious racial violence in Russia, and filed her initial asylum application pro se, resorted to using Google Translate to complete her Form I-589, resulting in a number of mistranslations and incomplete answers to questions that later contributed to a finding by USCIS that her testimony was not credible. *Id.* After a hearing on the merits with legal representation, the asylum applicant’s testimony was in fact found to be credible, and she was ultimately granted asylum. *Id.*

country, witness affidavits, government records, newspaper articles.³⁴ However, many asylum applicants are unable to obtain substantial documentation.³⁵

After the asylum applicant submits to fingerprinting in a mandatory biometrics appointment,³⁶ USCIS will schedule the applicant for an interview with an asylum officer at an asylum office or a USCIS field office.³⁷ The asylum applicant may bring an attorney or accredited representative to the interview, as well as any witnesses the applicant has to testify in support of the applicant's claims.³⁸ Any asylum applicant who does not "speak English fluently" must obtain, at the applicant's own expense, an interpreter who speaks both English and the applicant's primary language.³⁹ "USCIS does not provide any interpreters during the asylum interview."⁴⁰ Additionally, due to potential conflicts of interest, neither the asylum applicant's attorney—or other representative—of record nor a witness testifying on the applicant's behalf may serve as the interpreter.⁴¹

After the interview is complete, if the asylum officer determines that the asylum applicant qualifies as an asylee under the applicable law and merits an exercise of discretion, USCIS will formally grant the applicant asylum.⁴² However, if the asylum officer determines that the asylum applicant does not qualify as an asylee or does not merit an exercise of discretion, USCIS will place the applicant in removal proceedings before an immigration judge (unless, of course, the applicant already has some form of current legal immigration status).⁴³ Because of this potential consequence for pursuing the affirmative asylum process, many noncitizens living in the United States without legal immigration status are reluctant to apply for asylum, even when they would

³⁴ U.S. CITIZENSHIP & IMMIGRATION SERVS. & U.S. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 32, at 7.

³⁵ *See infra* Section III.A.

³⁶ *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> [<https://perma.cc/2BQY-YT9L>] (last updated Feb. 23, 2016); *Fingerprints*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/forms/fingerprints> [<https://perma.cc/RX92-MTA7>] (last updated Sept. 23, 2016).

³⁷ *The Affirmative Asylum Process*, *supra* note 36.

³⁸ *Id.*

³⁹ *Questions and Answers: Asylum Eligibility and Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-and-answers-asylum-eligibility-and-applications> [<https://perma.cc/C7AN-FSJS>] (last updated Sept. 3, 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Types of Asylum Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> [<https://perma.cc/F62P-R3A5>] (last updated June 16, 2015); *Questions and Answers: Asylum Eligibility and Applications*, *supra* note 39.

⁴³ *Obtaining Asylum in the United States*, *supra* note 24.

likely qualify.⁴⁴ Once placed in removal proceedings, the asylum applicant can again assert asylum—this time as a defense against imminent removal from the United States.⁴⁵

2. The Defensive Asylum Process

If a noncitizen attempts to enter the United States without proper legal documentation or is found in the country without current legal immigration status, U.S. Customs and Border Protection (“CBP”) or U.S. Immigration and Customs Enforcement (“ICE”) may refer the noncitizen to the Executive Office for Immigration Review (“EOIR”) for removal proceedings.⁴⁶ As previously discussed, an affirmative asylum applicant found not eligible for a grant of asylum by a USCIS asylum officer will also be placed in removal proceedings before EOIR.

Once in removal proceedings, the noncitizen can assert—or in the case of an affirmative asylum applicant, re-assert— asylum as a defense against imminent removal from the United States.⁴⁷ To do so, the asylum applicant must first file Form I-589, *Application for Asylum and for Withholding of Removal*, with EOIR.⁴⁸ As with affirmative asylum applicants, the defensive asylum applicant is strongly encouraged to submit supporting documentation of the applicant’s claim of persecution.⁴⁹ However, an affirmative asylum applicant need not resubmit Form I-589 or any accompanying documents, as USCIS automatically forwards such documents to EOIR when referring the applicant for removal proceedings.⁵⁰

After the asylum applicant submits to fingerprinting in a mandatory biometrics appointment,⁵¹ an immigration judge will hold an adversarial hearing

⁴⁴ See IMMIGRATION EQUALITY, ASYLUM MANUAL § 26.1 (3d ed. 2006), <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/> [<https://perma.cc/9HZ8-UVPF>] (“[T]he idea of possibly being placed in removal proceedings is terrifying.”).

⁴⁵ *Obtaining Asylum in the United States*, *supra* note 24.

⁴⁶ *Who Ends Up in Removal Proceedings*, LAW OFFICES OF RICHARD HANUS: RICHARD’S BLOG (Mar. 9, 2013), <http://www.usavisacounsel.com/articles/who-ends-up-in-removal-proceedings.htm> [<https://perma.cc/8WJ8-N2KN>]; *Obtaining Asylum in the United States*, *supra* note 24.

⁴⁷ *Obtaining Asylum in the United States*, *supra* note 24.

⁴⁸ *Asylum Eligibility and Applications FAQ*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/faq-page/asylum-eligibility-and-applications-faq#t12802n40015> [<https://perma.cc/2VTH-J24N>] (last updated Oct. 19, 2015).

⁴⁹ U.S. CITIZENSHIP & IMMIGRATION SERVS. & U.S. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 32, at 7.

⁵⁰ *Types of Asylum Decisions*, *supra* note 42.

⁵¹ See *Asylum Background and Security Checks FAQ*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/faq-page/asylum-background-and-security-checks-faq#t12818n40251> [<https://perma.cc/T6D3-2AJ6>] (last visited Oct. 17, 2016); *Fingerprints*,

on the merits of the applicant's asylum claim.⁵² During this hearing, the immigration judge will hear arguments from both the asylum applicant—and the applicant's attorney, if the applicant has one—and an attorney from the Department of Homeland Security, representing the federal government.⁵³ “[T]he [asylum] applicant and any other witnesses [may] testify and are subject to questioning by their own attorney and government counsel, as well as by the immigration judge.”⁵⁴ The asylum applicant may also present documentation in the form of exhibits “to corroborate [the applicant’s] story.”⁵⁵

After the hearing is complete, if the immigration judge determines the asylum applicant qualifies as an asylee under the applicable law and merits an exercise of judicial discretion, EOIR will formally grant the applicant asylum.⁵⁶ However, if the immigration judge determines the asylum applicant does not qualify as an asylee or does not merit an exercise of judicial discretion, EOIR will issue the applicant an order of removal—unless the applicant is eligible for some other form of relief against forcible deportation.⁵⁷ Either party can appeal the immigration judge's decision to the Board of Immigration Appeals (“BIA”) and then to the U.S. Court of Appeals for the corresponding circuit.⁵⁸ However, as explained in Part I, an asylum applicant is not entitled to free legal representation in any immigration court proceeding.

3. Applicable Law

The INA is the controlling federal law for the purposes of obtaining asylum in the United States⁵⁹ and defines a “refugee” as:

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account

supra note 36 (“USCIS requires applicants and petitioners for certain immigration benefits to be fingerprinted for the purpose of conducting FBI criminal background checks.”).

⁵² *Obtaining Asylum in the United States*, *supra* note 24.

⁵³ *Id.*

⁵⁴ Rempell, *supra* note 23, at 192.

⁵⁵ *Id.*

⁵⁶ 8 C.F.R. § 208.14(a) (2016); *Obtaining Asylum in the United States*, *supra* note 24.

⁵⁷ 8 C.F.R. § 208.14(a) (2016); *Obtaining Asylum in the United States*, *supra* note 24.

⁵⁸ 8 U.S.C. § 1252(b)(2) (2012); *see also* AM. BAR ASS'N, TIPS FOR APPEALING TO THE BOARD OF IMMIGRATION APPEALS (BIA) 2 (2006), http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/tips_bia_appeals2006.authcheckdam.pdf [<https://perma.cc/4X93-SEAZ>]; *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (reviewing a BIA decision regarding an asylum adjudication).

⁵⁹ *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws/immigration-and-nationality-act> [<https://perma.cc/9HEN-2DLH>] (last updated Sept. 10, 2013).

of race, religion, nationality, membership in a particular social group, or political opinion.⁶⁰

To obtain asylum, an applicant must fit within this narrow statutory definition of “refugee.”⁶¹ The asylum applicant must present persuasive evidence that: (1) the applicant suffered from past persecution or has a “well-founded” fear of future persecution in the applicant’s country of nationality;⁶² (2) “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for” such persecution;⁶³ and (3) the applicant “is unable or unwilling to return to” the applicant’s country of nationality due to this persecution or fear of persecution.⁶⁴ Additionally, because a grant of asylum is discretionary, the asylum applicant must present persuasive evidence that the applicant merits such an exercise of judicial discretion.⁶⁵

Although there is no statutory definition of “persecution” for asylum purposes,⁶⁶ the Court of Appeals for the Ninth Circuit has defined the term as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.”⁶⁷ Although persecution need not involve physical harm,⁶⁸ “it must rise above the level of mere ‘harassment.’”⁶⁹

If an asylum applicant is unable to establish past persecution, the applicant must establish a “well-founded fear of [future] persecution” to be eligible for

⁶⁰ 8 U.S.C. § 1101(a)(42)(A).

⁶¹ *Id.* § 1158(b)(1)(B)(i). Many foreign nations have a more expansive definition of “refugee.” *See, e.g.*, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, June 20, 1974, 1001 U.N.T.S. 14691 (“The term ‘Refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”).

⁶² 8 U.S.C. § 1101(a)(42)(A).

⁶³ *Id.* § 1158(b)(1)(B)(i).

⁶⁴ *Id.* § 1101(a)(42)(A).

⁶⁵ *See* 8 C.F.R. § 208.14(a) (2016) (“[A]n immigration judge *may* grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee . . .” (emphasis added)).

⁶⁶ *See* 8 U.S.C. § 1101 (defining key terms used in the INA but omitting a definition for the term “persecution”).

⁶⁷ *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)); *see also* *Laipenieks*, 18 I. & N. Dec. 433, 457 (B.I.A. 1983) (defining “persecution” as “infliction of suffering or harm, under government sanction, . . . in a manner condemned by civilized governments”) (quoting H.R. REP. NO. 95-1452, at 5 (1978)), *rev’d on other grounds*, 750 F.2d 1427 (9th Cir. 1985).

⁶⁸ *See* *Borca v. INS*, 77 F.3d 210, 216 (7th Cir. 1996) (concluding that “substantial economic disadvantage” is a form of persecution); *Laipenieks*, 18 I. & N. Dec. at 457 (“The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.” (quoting H.R. REP. NO. 95-1452, at 5)).

⁶⁹ *Borca*, 77 F.3d at 214.

asylum.⁷⁰ Although there is no statutory definition of “fear” for asylum purposes,⁷¹ the BIA has defined the term as “a genuine apprehension or awareness of danger in another country.”⁷² Because an asylum applicant’s fear must be “well-founded” to qualify, the applicant must prove that: (1) the applicant “subjectively fears persecution”;⁷³ and (2) a “reasonable person in [the applicant’s] circumstances would fear persecution.”⁷⁴ Thus, the burden of proof on asylum applicants—to prove, by a preponderance of the evidence, not merely subjective fear of persecution but also that a reasonable person in their circumstances would also experience such fear and that this fear is intricately tied to one of the designated protected categories—is particularly challenging, especially taking into consideration the large percentage of applicants who must present their case without any legal representation.⁷⁵

B. *The Necessity of a Favorable Credibility Determination*

Credibility is “[t]he quality that makes something (as a witness or some evidence) worthy of belief.”⁷⁶ In the asylum context, a “[c]redibility assessment is a determination of whether . . . testimony should be accepted as evidence” that the asylum applicant in question meets the statutory definition of a “refugee.”⁷⁷

While “[t]he burden of proof is on the [asylum] applicant” to establish that the applicant in fact suffered past persecution or has a well-founded fear of future persecution, “[t]he testimony of the applicant, *if credible*, may be sufficient to sustain [this] burden . . . without corroboration.”⁷⁸ The REAL ID

⁷⁰ 8 U.S.C. § 1101(a)(42)(A).

⁷¹ See *id.* § 1101 (defining key terms used in the INA but omitting a definition for “fear”).

⁷² *Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985) (defining the term “fear” for asylum purposes), *overruled on other grounds by* *Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

⁷³ *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

⁷⁴ *Mogharrabi*, 19 I. & N. Dec. at 439 (rejecting the notion that an asylum applicant must prove future persecution is “clearly probable” in order to establish a “well-founded fear” of future persecution), *overruled on other grounds by* *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); see also *Acosta*, 19 I. & N. Dec. at 212 (“[T]his requires [a noncitizen] to show his fear has a solid basis in objective facts or events . . .”).

⁷⁵ See, e.g., Tina Bay, *Ninth Circuit Rejects Asylum Claim of Chinese Christian Man: Divided Panel Rules Credible Hearsay Testimony Not Weighty Enough to Establish Threat of Future Persecution*, METRO. NEWS-ENTERPRISE (July 24, 2006), <http://www.metnews.com/articles/2006/guux072406.htm> [<https://perma.cc/NM6W-CUSS>] (discussing the “insurmountable burden” asylum seekers must “overcome” to prove their claims, given that “[p]ersecutors usually don’t leave a note with the persecuted person documenting the persecution that has transpired”).

⁷⁶ *Credibility*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁷⁷ *Kagan*, *supra* note 22, at 371; see also *Forgue v. U.S. Att’y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005) (“If the [asylum] applicant produces no evidence other than [the applicant’s] testimony, an adverse credibility determination is alone sufficient to support the denial of an asylum application.”).

⁷⁸ 8 C.F.R. § 208.13(a) (2016) (emphasis added); see also 8 U.S.C. § 1158(b)(1)(B)(ii)

Act makes clear that an immigration judge cannot presume such credibility but rather must make a factual determination of whether the asylum applicant's narrative is in fact credible.⁷⁹ Because asylum applicants are often unable to present corroborating evidence in the form of documentation of their past experiences,⁸⁰ the immigration judge's assessment of the credibility of an applicant's narrative is "often the single most important step" in establishing past persecution or a fear of future persecution.⁸¹ As a result, immigration attorneys "often find that establishing and defending the credibility of their clients becomes the focus of their work."⁸²

On the other hand, the stakes for failing to establish credibility are exceedingly high. Without persuasive corroborating evidence, such failure compels a denial of asylum⁸³ and—unless the asylum applicant already has some form of current lawful immigration status—may result in imminent deportation.⁸⁴

III. THE EFFECTS OF SUBCONSCIOUS NARRATIVE BIASES ON CREDIBILITY DETERMINATIONS

Due to the substantial obstacles that asylum applicants face in obtaining corroborating evidence of persecution as well as the vague statutory guidelines for evaluating the credibility of their testimony when such documentation is unavailable, credibility determinations in asylum adjudications are often highly subjective. As a result, such determinations are particularly susceptible to immigration judges' subconscious cultural biases, including biases resulting from varying cultural perspectives regarding: (1) the intrinsic value of time; (2) whether time is linear or circular; (3) the extent to which communication should be explicit or implicit; and (4) observational tendencies. Such implicit cultural biases likely contribute to the widely varying asylum grant rates both between and within immigration courts across the country. Additionally, they have resulted in a body of case law interpreting the INA's statutory guidelines on asylum credibility determinations often to make strict demands regarding the form and content of "credible" testimony.

(2012) ("The testimony of the [asylum] applicant may be sufficient to sustain the applicant's burden without corroboration . . ."); *Diallo v. INS*, 232 F.3d 279, 284, 287 (2d Cir. 2000) ("[T]he precedent of the BIA and of this court would sustain a petition for asylum . . . based on credible testimony alone . . ."). Of course, even if the asylum applicant is able to produce corroborating evidence of all claims, the applicant still bears the burden of proving all claims by a preponderance of the evidence. *Acosta*, 19 I. & N. Dec. at 211.

⁷⁹ 8 U.S.C. § 1158(b)(1)(B)(iii).

⁸⁰ See *infra* Section III.A.

⁸¹ Kagan, *supra* note 22, at 367.

⁸² *Id.* at 369.

⁸³ *Id.* at 368.

⁸⁴ *Obtaining Asylum in the United States*, *supra* note 24.

A. *The Subjective Nature of Credibility Determinations*

Asylum applicants often lack substantial external documentation to corroborate their claims of persecution. Victims of persecution are “unlikely to have access to extensive sources of specific evidence” regarding their persecutors or the treatment they suffered.⁸⁵ “Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution”⁸⁶ and “in many countries, public sector records are difficult to locate and to trust.”⁸⁷ Asylum applicants who once had access to such evidence in their home countries are unlikely to have had the time necessary to gather documentation of “every central aspect of their claims” before fleeing for their safety.⁸⁸ Those able to gather such documents back home may have been compelled to leave them behind when fleeing to avoid the substantial risk of retaliation by their persecutors for gathering evidence of their persecutors’ criminal acts.⁸⁹ Once in the United States, it is often impracticable for asylum applicants to obtain records from their home countries, as this would require convincing family members or friends to track down and mail such evidence to the asylum applicant or the applicant’s attorney,⁹⁰ a process that is often both time-consuming⁹¹ and expensive.⁹² Additionally, asylum applicants are often reluctant to make such requests of their family and friends, knowing such

⁸⁵ Kagan, *supra* note 22, at 371.

⁸⁶ Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984).

⁸⁷ Transparency & Accountability Initiative, *Records Management*, OPEN GOV’T GUIDE, <https://web.archive.org/web/20160407045738/http://www.opengovguide.com/topics/records-management/> [<https://perma.cc/P4DP-6ZXE>] (last visited Oct. 25, 2016).

⁸⁸ Kagan, *supra* note 22, at 372.

⁸⁹ Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 122 (2006) (“[P]ersons escaping persecution may leave behind important documents (such as identity cards, birth certificates, medical records, etc.) when fleeing their countries . . . in an attempt to conceal their identities from persecutors.”); *see also* Rempell, *supra* note 23, at 191 (“Individuals fleeing persecution . . . may fear traveling with any documentation adverse to repressive governments.”).

⁹⁰ *See* IMMIGRATION EQUALITY, *supra* note 44, § 27.2.8.

⁹¹ *See, e.g.*, Vladímir Erkovich, *Russian Post Office: Why So Slow?*, RUS. BEYOND HEADLINES (Jan. 23, 2013), http://rbth.com/society/2013/01/23/the_russian_post_does_not_deliver_22127.html [<https://perma.cc/P78B-A2KL>] (“The Russian Post takes weeks or months to deliver parcels.”).

⁹² *See, e.g.*, Mail, FODOR’S TRAVEL, <http://www.fodors.com/world/mexico-and-central-america/guatemala/travel-tips/mail-2468626> [<https://perma.cc/XNK2-G3KJ>] (last visited Oct. 25, 2016). “[In Guatemala, mail] [d]elivery within two to three business days for a 1-kg. (2.2-lb) package starts at about Q500.” *Id.* Based on recent exchange rates, Q500 (Guatemalan *quetzales*) is more than six times the minimum daily wage in Guatemala. *Minimum Wages in Guatemala with Effect from 01-01-2016 to 31-12-2016*, WAGEINDICATOR.ORG, <http://www.wageindicator.org/main/salary/minimum-wage/guatemala> [<https://perma.cc/U3Z6-38KQ>] (last updated Jan. 28, 2016).

cooperation could put their loved ones at risk of harm by the asylum applicants' persecutors.⁹³ Due to these obstacles to obtaining corroborating evidence of persecution, an asylum applicant's credibility "often depend[s] on the value of [the applicant's] word alone."⁹⁴

The INA's statutory process for making a credibility determination regarding an asylum applicant's in-court testimony in the absence of such corroborating evidence of persecution is highly subjective.⁹⁵ The REAL ID Act, which amended the INA's credibility guidelines, states that in making such a determination, immigration judges should consider:

- (1) "the demeanor, candor, or responsiveness of the applicant";
- (2) "the inherent plausibility of the applicant's . . . account"; and
- (3) "the consistency between the applicant's . . . written and oral statements . . . , the internal consistency of each such statement, . . . and any inaccuracies or falsehoods in such statements."⁹⁶

The key terms within these factors are largely ill-defined or overly broad. For example, the term "demeanor" can encompass any aspect of "[o]utward appearance or behavior."⁹⁷ The Court of Appeals for the Eleventh Circuit has acknowledged that the lack of any statutory or regulatory definition of the term has led to the use of "stereotypes about how persons belonging to a particular group would act, sound, or appear" as "a substitute for [real] evidence."⁹⁸ This issue is particularly salient in asylum cases involving applicants who have been persecuted for their sexual identity.⁹⁹

Likewise, the term "candor" can refer to either the "[t]he quality of being open, honest, and sincere"¹⁰⁰ or simply "frankness," a synonym for

⁹³ Cianciarulo, *supra* note 89, at 122-23 ("By attempting to obtain the documents later, an asylum seeker risks interception of [the] mail, potentially exposing family and friends to harassment by the persecuting entity."); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 25 (2001) ("Very often, persecuting governments intercept the mail and tap the telephones of families of persons known to have been dissidents, especially if the dissidents have fled the country.").

⁹⁴ *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 193 (2011) (statement of Dana Leigh Marks, President, National Association of Immigration Judges) [hereinafter *Improving Efficiency and Ensuring Justice in the Immigration Court System*]; Kagan, *supra* note 22, at 367.

⁹⁵ Kagan, *supra* note 22, at 398.

⁹⁶ 8 U.S.C. § 1158(b)(1)(B) (2012).

⁹⁷ *Demeanor*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁹⁸ *Todorovic v. U.S. Att'y Gen.*, 621 F.3d 1318, 1324-27 (11th Cir. 2010) (finding that an observation that "this gentleman does not appear to be overtly gay" goes beyond permissible uses of "demeanor" to determine credibility); *see also* 8 U.S.C. § 1101 (defining key terms in the INA and lacking a definition of the term "demeanor").

⁹⁹ *See, e.g., Todorovic*, 621 F.3d at 1324-27.

¹⁰⁰ *Candor*, BLACK'S LAW DICTIONARY (10th ed. 2014).

“bluntness.”¹⁰¹ Yet there is no statutory definition of “candor” to indicate whether Congress intended that an asylum applicant be considered “candid” if the applicant honestly answers all questions or only if the applicant’s answers, in addition to being truthful, are also blunt or direct.¹⁰² Even if these enumerated credibility factors were well-defined, there is “little [statutory] guidance about how [they] should be weighed against each other to reach a final decision.”¹⁰³ As a result, credibility determinations in asylum cases “still depend critically on personal judgment,”¹⁰⁴ which is often based on such subjective factors as “[e]motional impressions” and “gut feelings.”¹⁰⁵

Given that the same federal statutory law governs asylum adjudications in all immigration courts across the United States,¹⁰⁶ the wide variance in asylum grant rates throughout the country is likely attributable, at least in part, to the high level of subjectivity involved in credibility determinations.¹⁰⁷ For example, in 2013 the asylum grant rate for the immigration court in Ulster, New York was 0%, while the asylum grant rate for the immigration court in New York City was 84%.¹⁰⁸ Even within the same immigration court, the probability that an asylum applicant will be granted asylum depends largely upon which judge is assigned to the case. For instance, “Colombian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court’s judges [but] an 88% chance of prevailing before another judge in the same building.”¹⁰⁹ Likewise, in Chicago, one immigration judge granted asylum to 82.9% of applicants, while another judge within the same building granted asylum to just 4% of applicants.¹¹⁰ In fact, a

¹⁰¹ *Frankness*, MERRIAM-WEBSTER THESAURUS, <http://www.merriam-webster.com/thesaurus/frankness> [<https://perma.cc/36NX-EJW2>] (last visited Sept. 10, 2016) (listing as synonyms for “frankness” as “bluntness, candidness, [and] directness”).

¹⁰² See 8 U.S.C. § 1101 (defining key terms in the INA and lacking a definition for “candor”); *Frank*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/Frank> [<https://perma.cc/JV2N-V4AH>] (last visited Oct. 15, 2016) (defining “frank” as “speaking or writing in a very direct and honest way”).

¹⁰³ Kagan, *supra* note 22, at 368 (characterizing credibility determinations in asylum adjudications as highly subjective).

¹⁰⁴ *Id.* at 398.

¹⁰⁵ *Id.* at 375 (analyzing various factors that influence immigration judges’ credibility determinations).

¹⁰⁶ 8 U.S.C. §§ 1101(a)(42), 1158(a)(1).

¹⁰⁷ Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 306 (2007).

¹⁰⁸ OFFICE OF PLANNING, ANALYSIS, & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK, at K2 tbl.12 (2014), <http://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf> [<https://perma.cc/W2Q2-76GD>].

¹⁰⁹ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 107, at 296.

¹¹⁰ See *Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2009-2014*, TRAC IMMIGR., <http://trac.syr.edu/immigration/reports/361/include/denialrates.html>

study analyzing 140,000 decisions by 225 immigration judges over a four-and-a-half-year period found “amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country.”¹¹¹

Thus, a key factor influencing whether an asylum applicant will ultimately be granted asylum—varying judicial interpretations of vague statutory guidelines—is entirely outside of the applicant’s control.¹¹²

B. *Cultural Narrative Norms*

Due to the highly subjective nature of credibility determinations in asylum adjudications,¹¹³ such determinations are susceptible to subconscious cultural biases,¹¹⁴ which “make[s] it difficult . . . to determine accurately the [asylum] applicant’s credibility.”¹¹⁵ In particular, biases resulting from varying narrative norms influence judicial expectations of “credible” testimony.¹¹⁶ Such biases are the inevitable result of the clashing of cultural perspectives¹¹⁷ regarding: (1) the

[<https://perma.cc/6NRP-UR9M>] (last visited Oct. 15, 2016) (listing asylum grant and denial rates for immigration judges across the United States).

¹¹¹ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 107, at 296.

¹¹² *See id.* (“Yet in asylum cases, which can spell the difference between life and death, the outcome apparently depends in large measure on which government official decides the claim. In many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge.”).

¹¹³ *See supra* Section III.A.

¹¹⁴ *See* ISSUES IN PSYCHOLOGY AND PSYCHIATRY RESEARCH AND PRACTICE 591 (Q. Ashton Acton ed., 2013); Melanie A. Conroy, *Real Bias: How REAL ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 3 (2009) (discussing how the REAL ID Act credibility guidelines “creat[e] significant impediments by inviting bias”); Kagan, *supra* note 22, at 378 (concluding that credibility determinations are “highly dependent on the adjudicator’s and the applicant’s personal and cultural dispositions”); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) (discussing how fact finders are naturally biased in favor of speech patterns that are consistent with or similar to their own).

¹¹⁵ Kagan, *supra* note 22, at 374 (quoting DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 153 (3d ed. 1999)); *see also* Rand, *supra* note 114, at 4 (“[T]he inability of most observers to detect deception accurately—has even greater implications in cases where [factfinders] have to overcome racial and cultural differences in determining a witness’ credibility.”).

¹¹⁶ *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 306 (2013) (“[N]arrative form creates expectations that guide how listeners participate in the construction of meaning.”).

¹¹⁷ Kelley L. Meeusen, *Recognizing & Understanding Stereotypes and Bias*, CLOVER PARK TECH. C. (Mar. 18, 2013), http://www.cptc.edu/stereotype/bias/lessonbuilder_files/Stereotypes_and_Bias_print.html [<https://perma.cc/FBZ7-UZ6F>] (“We react to behaviors based on our own cultural norms; and in fact, seldom recognize that there may be other cultural norms, or that they are as valid as

intrinsic value of time; (2) whether time is linear or circular; (3) the extent to which communication should be explicit or implicit; and (4) observational tendencies. As discussed below, these implicit cultural biases have resulted in a body of case law narrowly interpreting the INA's statutory guidelines on asylum credibility determinations often to make strict demands regarding the form of "credible" testimony. But before delving into the customary statutory analysis shaped by these implicit cultural biases, it is necessary to understand the anthropological basis for such biases.

1. The Intrinsic Value of Time

Time is a social construct,¹¹⁸ and perceptions of time vary widely across cultures.¹¹⁹ Heavily industrialized societies, including those of most of North America and Northern Europe, are largely "monochronic."¹²⁰ People within those cultures tend to perceive time as "fixed and unchanging."¹²¹ To them, time is a tangible object that must constantly be reckoned with.¹²² As a result, they have an acute awareness of time¹²³ and consider it "an unconscious determinant or frame on which everything else is built."¹²⁴ Because "[t]ime is so thoroughly woven into the[ir] fabric of existence,"¹²⁵ they customarily punctuate their narratives with periodic references to the framework of time (e.g., next week, on April 2, for twenty minutes).¹²⁶

our own. Our own culture, and how we were raised within that culture - the things we are taught to respect as acceptable behavior - also contribute to our biases. People who behave like we do are the same as us and are therefore good, while people who do not behave as we do are different and may not be good. Sociologists call this in-group and out-group bias.").

¹¹⁸ Joshua Keating, *Why Time Is a Social Construct*, SMITHSONIAN MAG., Jan. 2013, at 11, 11; Anne-Marie Dingemans, *Sequential vs Synchronic Time Perception*, GLOBALIZEN (Feb. 15, 2011), <http://www.globalizen.com/sequential-vs-synchronic-time-perception/> [<https://perma.cc/G8J3-ZX2P>] ("[T]ime is an idea, not an object, and therefore subjective and open to interpretation.").

¹¹⁹ GERI-ANN GALANTI, *CARING FOR PATIENTS FROM DIFFERENT CULTURES* 51 (4th ed. 2008).

¹²⁰ Keating, *supra* note 118, at 11; *see also* GALANTI, *supra* note 119, at 49 ("It is only in industrialized nations that clock time is important because the performance of everyone's job depends on all others doing theirs.").

¹²¹ Keating, *supra* note 118, at 11; *see also* EDWARD T. HALL, *BEYOND CULTURE* 18 (1977) ("In fact, [the Western man's] social and business life, even his sex life, are apt to be completely time-dominated.").

¹²² *See* HALL, *supra* note 121, at 19 ("[T]hey speak of [time] as being saved, spent, wasted, lost, made up, accelerated, slowed down, crawling, and running out.").

¹²³ *See id.* at 17 ("[Monochronic time] emphasizes schedules, segmentation, and promptness."); Keating, *supra* note 118, at 11 ("In monochronic societies . . . people tend to complete tasks sequentially.").

¹²⁴ HALL, *supra* note 121, at 19.

¹²⁵ *Id.* at 18.

¹²⁶ *See* Michael Scheffel, Antonius Weixler & Lukas Werner, *Time*, *LIVING HANDBOOK*

On the other hand, predominantly agricultural societies, including those of much of Latin America, Southern Europe, and the Middle East, are largely “polychronic.”¹²⁷ People within those cultures tend to perceive time as fluid.¹²⁸ To them, people and events naturally take precedence over time.¹²⁹ As a result, when narrating an event, they tend to emphasize *what* occurred and *who* was involved and are less concerned about *when* specific events took place.¹³⁰

One extreme example of a polychronic culture is that of the Pirahã tribe in Brazil. Because the language of that isolated community lacks any words to express numbers,¹³¹ the Pirahã people cannot linguistically express the exact date when an event occurred. Likewise, they cannot linguistically express on which day of the week¹³² or at what exact time something transpired.¹³³ Although anthropologists have made multiple attempts to encourage the Pirahã people to incorporate time-reference words into their language, the Pirahã people have repeatedly refused to accept such a dramatic linguistic change¹³⁴

NARRATOLOGY (Apr. 19, 2014), <http://www.lhn.uni-hamburg.de/article/time> [<https://perma.cc/8HR9-5NUH>] (“[T]ime . . . is considered by some [Western] theoreticians to be a necessary condition for narrativity.” (citations omitted)); *Transitions*, WRITING CTR. UNC-CHAPEL HILL, <http://writingcenter.unc.edu/handouts/transitions/> [<https://perma.cc/5B3T-WBSG>] (last visited Oct. 26, 2016) (advising American college students to use periodic references to time to create a clear narrative).

¹²⁷ HALL, *supra* note 121, at 17-18; Keating, *supra* note 118, at 11 (classifying most Latin American and Asian cultures as polychronic); *see also* GALANTI, *supra* note 119, at 49 (“[Polychronic] cultures are usually based on agriculture, which does not require adherence to a clock.”).

¹²⁸ Keating, *supra* note 118, at 11; *see also* HALL, *supra* note 121, at 18 (explaining that in polychronic cultures “[n]othing seems solid or firm, particularly plans for the future, and there are always changes in the most important plans right up to the very last minute”).

¹²⁹ *See* HALL, *supra* note 121, at 17 (“[Polychronic] systems are characterized by several things happening at once. They stress involvement of people and completion of transactions rather than adherence to preset schedules.”); Keating, *supra* note 118, at 11 (“In polychronic societies . . . people adapt more easily to changing circumstances and new information.”).

¹³⁰ *See* Chris Ezech, *Monochronic Versus Polychronic Cultures*, EUROAFRICACENTRAL NETWORK, <http://www.euroafrica-multiculture.com/index.php/key-concepts/126-monochronic-versus-polychronic-cultures> [<https://perma.cc/U45H-MGZ7>] (last visited Oct. 26, 2016) (“In a polychronic culture, people tend to focus more on what they are doing than the timeframe in which it is happening.”).

¹³¹ Daniel L. Everett, *Cultural Constraints on Grammar and Cognition in Pirahã: Another Look at the Design Features of Human Language*, 46 *CURRENT ANTHROPOLOGY* 621, 623 (2005).

¹³² *Id.* at 631 (concluding that the only words in the Pirahã language to express the day on which an event occurred are the equivalents of “already,” “now,” “another day,” and “full moon”).

¹³³ *Id.* (concluding that the only words in the Pirahã language to express the time when an event occurred are the equivalents of “early morning before sunrise,” “day,” “during the day,” “noon,” “sunset/sunrise,” “night,” “low water,” and “high water”).

¹³⁴ Mike Vuolo, *What Happens When a Language Has No Numbers?*, SLATE: LEXICON

and have attempted to explain to the anthropologists their “lack of concern with quantifying time.”¹³⁵

2. The Shape of Time: Linear or Circular?

In addition to classifying cultures as “monochronic” or “polychronic” based on their varying perceptions of time, anthropologists have traditionally classified them as “sequential” or “synchronic.” Predominantly industrial societies, like those in most of North America and Northern Europe, are considered largely “sequential.”¹³⁶ People within those cultures tend to perceive time as “progressive.”¹³⁷ To them, “time is linear and segmented like a road or a ribbon extending forward into the future and backward to the past.”¹³⁸ They mentally compartmentalize memories according to the framework of time.¹³⁹ As a result, their narratives are usually built around a sequential structure, as is clearly evidenced by the American educational system. For example, in a common lesson plan for high school students in the United States, students learn how crucial sequencing is to communication in English by instructing their teacher step-by-step how to make a peanut butter and jelly sandwich.¹⁴⁰ If the students accidentally state the instructions out of order, a wholly undesirable product results, leaving the teacher holding a goopy mess.

VALLEY (Oct. 16, 2013, 2:00 PM), http://www.slate.com/blogs/lexicon_valley/2013/10/16/piraha_cognitive_anumeracy_in_a_language_without_numbers.html [<https://perma.cc/SC9B-VAZV>] (“Attempts over the years to teach number words and basic arithmetic to the Pirahã have met with little success, in large part because they’re uninterested.”).

¹³⁵ Everett, *supra* note 131, at 631.

¹³⁶ See Carol Kinsey Goman, *Communicating Across Cultures*, ASME (Mar. 2011), <https://www.asme.org/engineering-topics/articles/business-communication/communicating-across-cultures> [<https://perma.cc/MV3K-2DG3>].

¹³⁷ Dingemans, *supra* note 118; Goman, *supra* note 136; see also FONS TROMPENAARS, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN BUSINESS* 110 (1993) (observing that people in sequential cultures tend to perceive time as “a line of sequential events passing us at regular intervals”).

¹³⁸ HALL, *supra* note 121, at 19; accord Dingemans, *supra* note 118 (“Sequential cultures see time as one line consisting of equal building blocks. Activities are placed along that line in a sequential order, in a logical, efficient way.”).

¹³⁹ HALL, *supra* note 121, at 11-12.

¹⁴⁰ *Lesson Plan: How to Make a Peanut Butter and Jelly Sandwich*, CONTRA COSTA COUNTY OFF. EDUC., https://www.cccoe.k12.ca.us/stsvcs/newteacher/high/curr_high_sandwich.html [<https://perma.cc/RNW2-ES4U>] (last visited Oct. 26, 2016) (containing a lesson plan designed to fulfill the “English-Language Arts standard/objective of being able to organize one’s thoughts in a logical pattern in order to inform a particular audience about a certain topic”); see also *Transitions*, *supra* note 126.

On the other hand, heavily agricultural societies, like those of much of South America, Southern Europe, and Asia are largely “synchronic.”¹⁴¹ People within those cultures tend to perceive time as a “sort of circle, with the past, present, and future all interrelated.”¹⁴² As a result, they customarily organize the events within their narratives according to some notion other than time (e.g., perceived importance or emotional impact).¹⁴³

One extreme example of a synchronic society is that of Haiti, where Haitian Creole is the predominant spoken language.¹⁴⁴ Haitian Creole speakers commonly “demonstrate [a] strong tendency to narrate all stories . . . in the present progressive—that is, using the gerund form of verbs (e.g., ‘I am going over here, now I am doing this’).”¹⁴⁵ Although Haitian Creole has the “grammatical capacity to express the full range of verb tenses present in other Romance languages,” many Haitian Creole speakers consciously use the present progressive to tell stories due to a “cultural preference for a particular performative style, in which the story is enacted as though it were happening in that moment.”¹⁴⁶ Additionally, rather than narrating past events in a strictly chronological order, Haitian Creole speakers often interject background information into their narratives.¹⁴⁷ For example, in one linguistic study a Haitian woman recounted how she became involved in a physical fight in her neighborhood: “And one Sunday morning, because you know we had uniforms. We dressed for church, very nicely dressed, things like that. And while I’m walking, I am going to the church, the girl comes very close to me”¹⁴⁸

3. Explicit Versus Implicit Communication

Norms regarding how essential information is communicated also vary by culture.¹⁴⁹ In “high-context” cultures, such as those of Africa, Central Europe, and Latin America,¹⁵⁰ the speaker traditionally leaves much of the message to

¹⁴¹ See Goman, *supra* note 136.

¹⁴² *Id.*; accord Dingemans, *supra* note 118 (explaining how people in synchronic cultures perceive time).

¹⁴³ Latin American authors frequently use “magical realism” to interweave relevant aspects of events that happened centuries apart. See, e.g., Lee A. Daniel, *Realismo Mágico: True Realism with a Pinch of Magic*, 42 SOUTH CENT. BULL. 129, 129-30 (1982).

¹⁴⁴ Tempii B. Champion et al., *Performative Features in Adults’ Haitian Creole Narratives*, 34 IMAGINATION, COGNITION AND PERSONALITY: CONSCIOUSNESS THEORY, RES. & CLINICAL PRAC. 378, 380 (2015).

¹⁴⁵ Adam M. McGee, *Dreaming in Haitian Vodou: Vouchsafe, Guide, and Source of Liturgical Novelty*, 22 DREAMING 83, 86 (2012).

¹⁴⁶ *Id.* at 86-87.

¹⁴⁷ See Champion et al., *supra* note 144, at 386-87 (analyzing linguistic markers in Haitian Creole narratives).

¹⁴⁸ *Id.* at 386.

¹⁴⁹ See Goman, *supra* note 136 (classifying cultures as “high-context” or “low-context”).

¹⁵⁰ *Id.*

be communicated “unspecified, to be understood through context, nonverbal cues, and between-the-lines interpretation of what is actually said.”¹⁵¹ As a result, rather than explicitly convey how a particular event was emotionally impactful, a high-context speaker will often “talk around and around [the speaker’s feelings], in effect putting all the pieces in place except the crucial one.”¹⁵²

On the other hand, in “low-context” cultures, generally those of Germanic and English-speaking countries,¹⁵³ the speaker customarily verbalizes any and all details the speaker perceives as particularly important.¹⁵⁴ As a result, when a speaker in a low-context culture is describing a past experience, the speaker is much more likely to verbalize his feelings regarding that experience than the speaker’s high-context counterpart, who believes such details should be inferred by the listener rather than explicitly stated by the narrator.¹⁵⁵

4. How Observations Are Encoded and Recalled

Scientists have also found marked differences in the way people from different cultures mentally encode observations.¹⁵⁶ People from Western

¹⁵¹ *Id.*; accord HALL, *supra* note 121, at 91 (“A high-context (HC) communication or message is one in which most of the information is either in the physical context or internalized in the person, while very little is in the coded, explicit, transmitted part of the message.”); Shoji Nishimura, Anne Nevgi & Seppo Tella, *Communication Style and Cultural Features in High/Low Context Communication Cultures: A Case Study of Finland, Japan and India* 784-85 (Jan. 2008) (unpublished manuscript), <http://www.helsinki.fi/~tella/nishimuranevgitella299.pdf> [<https://perma.cc/9V5N-5LBJ>] (analyzing narrative expectations in “high-context” cultures).

¹⁵² HALL, *supra* note 121, at 113 (“When talking about something that they have on their minds, a high-context individual will expect his interlocutor to know what’s bothering him, so that he doesn’t have to be specific.”); accord Nishimura, Nevgi & Tella, *supra* note 151, at 784-85.

¹⁵³ Goman, *supra* note 136.

¹⁵⁴ See HALL, *supra* note 121, at 91; Nishimura, Nevgi & Tella, *supra* note 151, at 784-85.

¹⁵⁵ Scientists have found biological evidence that people from “high-context” cultures are particularly reluctant to explicitly convey their emotions. Heejung S. Kim, *Culture and Self-Expression*, PSYCHOL. SCI. AGENDA (June 2010), <http://www.apa.org/science/about/psa/2010/06/sci-brief.aspx> [<https://perma.cc/ZS7E-GX84>] (“In one experiment, Asians/Asian American and European American participants were randomly assigned to either explicit social support salience condition (i.e., writing a letter to a close other about their stress) or implicit social support salience condition (i.e., writing about the important aspects of the group or close others) prior to going through an acute lab stressor of speech giving. Indeed, Asians/Asian Americans experienced lower distress and showed lower cortisol response to the task following priming of implicit social support than of explicit social support; the reverse was true for European Americans.”).

¹⁵⁶ Peter R. Millar et al., *Cross-Cultural Differences in Memory Specificity*, 1 CULTURE & BRAIN 138, 138 (2013).

cultures tend to focus on the isolated details of an event¹⁵⁷ (a process called “analytic processing”), while people from Eastern cultures tend to fixate on the context in which the event occurred (a process called “holistic processing”).¹⁵⁸ Such tendencies are evidenced by brain scans charting increased brain activity when people from Western cultures attempt to engage in holistic processing and when people from Eastern cultures attempt to engage in analytic processing.¹⁵⁹ Scientists hypothesize that such observational differences are the result of Eastern cultures’ traditional focus on “the collective group” and Western cultures’ emphasis on “personal agency.”¹⁶⁰

That is, having a social orientation where the self is seen as tightly interconnected with others may be associated with adopting a cognitive perspective where one observes . . . events holistically, placing them in a broader context. In contrast, a social perspective in which the self is seen as independent might lead to a cognitive perspective in which . . . events are considered in isolation.¹⁶¹

These “information processing biases” impact the way in which people from Eastern and Western cultures recall their past experiences.¹⁶² Although people from Eastern cultures are generally adept at remembering the context in which an event occurred (that is, recalling “general memory”), they may find it particularly difficult to remember specific details of the event itself (that is, recalling “specific memory”).¹⁶³ The opposite is true of most people from Western cultures.¹⁶⁴ For example, in one scientific experiment, “[w]hen asked to describe animated vignettes of underwater scenes from memory, Americans focused on the prominent fish in the scene, whereas Japanese incorporated more contextual details.”¹⁶⁵ As a result of these differences, people from Western

¹⁵⁷ *Id.* (explaining that “independent Western cultures” prefer an “object-based feature analysis”).

¹⁵⁸ *Id.* (explaining that “interdependent Eastern cultures” prefer a “context-based holistic analysis”).

¹⁵⁹ *Id.* at 139 (“Neuroimaging studies corroborate the contribution of attentional networks to cultural differences, with greater engagement of a frontal-parietal attentional system when individuals complete tasks with their non-preferred strategy (i.e. Americans using relational processing).”).

¹⁶⁰ *Id.* at 140 (“The emphasis of Chinese culture on the collective group and social obligations may have led to a holistic orientation in East Asian cultures whereas the emphasis of Greek culture on personal agency may have contributed to an analytic orientation in Western cultures.” (citation omitted)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 139.

¹⁶³ *See id.* at 140 (“Asians remember more general event information.”).

¹⁶⁴ *See id.* (“Americans recall more specific ‘one-moment-in-time’ episodes, events, and details . . .”).

¹⁶⁵ *Id.* at 139.

cultures are better able to narrate the “visual details”¹⁶⁶ of their past experiences, while people from Eastern cultures can more accurately convey how an isolated event was influenced by surrounding circumstances.¹⁶⁷

C. *Manifestations in Credibility Determinations*

So why do these differing cultural perspectives matter? Because while the law often treats the courtroom as if it were a perfect vacuum—separated from all external influences,¹⁶⁸ the implicit cultural biases resulting from these clashing perspectives inevitably sneak in the door any time a judge, party, or witness enters. As a result, the current asylum credibility guidelines in the United States—both in theory and in practice—favor the narrative norms of monochronic, sequential, and low-context cultures, as well those of cultures particularly adept at analytic processing. Thus the guidelines likely favor asylum applicants from cultures most similar to that of the United States, placing an unequal burden on asylum applicants from cultures that fundamentally differ in their narrative tendencies.

In practice, immigration judges generally consider chronology and specificity to be positive factors in demonstrating credibility, while they perceive a sporadic timeline and vagueness as signs of disingenuous testimony.¹⁶⁹ As a result, asylum applicants from synchronic cultures, who are unaccustomed to telling their narratives in a chronological fashion;¹⁷⁰ those from cultures that favor holistic processing, who have difficulty recalling the isolated details of events;¹⁷¹ and those from high-context cultures, who believe the audience should intuit key

¹⁶⁶ *Id.* at 147.

¹⁶⁷ *See id.* at 139 (“East Asians allocate their attention more broadly than Americans, which in turn increases their chances of detecting changes in visual arrays when change occurs in the periphery rather than the center.”).

¹⁶⁸ *See* SIMON STATHAM, *REDEFINING TRIAL BY MEDIA: TOWARDS A CRITICAL-FORENSIC LINGUISTIC INTERFACE* 109 (2016) (“Jury researchers and legal commentators have more or less implicitly treated jurors as blank slates on which the law is written; it is assumed that jurors’ only source of information about the law is the judge’s instructions and that the aim of the instructions is to create legal concepts where none exist.” (quoting Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 *J. PERSONALITY & SOC. PSYCHOL.* 857, 858 (1991))).

¹⁶⁹ Kagan, *supra* note 22, at 384, 398.

¹⁷⁰ *See, e.g.*, Donald G. MacGregor & Joseph R. Godfrey, *Arab Cultural Influences on Intertemporal Reasoning* 9 (Nov. 30, 2011) (unpublished manuscript), <http://testing.macgregorbates.com/Resources/3%20-%20Arab%20Cultural%20Influences%20on%20Intertemporal%20Full%20Text.pdf> [<https://perma.cc/3EM8-JYAV>] (describing a scientific study of Lebanese villagers in which the villagers remembered past events “more in terms of sentiment and contentment than with temporally-specific detail”).

¹⁷¹ *See* Millar et al., *supra* note 156, at 140.

details without the narrator having to explicitly state them,¹⁷² face unique challenges to establishing credibility in immigration court proceedings.

1. Demanding Chronology

American culture is extraordinarily monochronic and sequential.¹⁷³ Because “[t]ime is so thoroughly woven into the fabric of existence” in the United States, it subconsciously molds Americans’ narrative expectations.¹⁷⁴ Due to their acute awareness of time,¹⁷⁵ Americans naturally expect credible narratives to include specific details about precisely when events occurred and their duration.¹⁷⁶ Additionally, because Americans perceive time as progressive,¹⁷⁷ they naturally expect credible narratives to “proceed in a linear, chronological way, from a beginning and middle to an end.”¹⁷⁸ This subconscious preoccupation with the perceived importance of time and its perceived linear nature frequently causes immigration judges in the United States to demand that an asylum applicant’s testimony follow a tight chronological framework.¹⁷⁹

Such fixation on the *sequence* of events within an asylum applicant’s testimony rather than the *content* of the testimony itself disadvantages asylum applicants from polychronic and synchronic cultures.¹⁸⁰ As explained above, persons from polychronic cultures are not accustomed to interjecting time

¹⁷² See HALL, *supra* note 121, at 113 (“When talking about something that they have on their minds, a high-context individual will expect his interlocutor to know what’s bothering him, so that he doesn’t have to be specific.”).

¹⁷³ See *id.* at 17 (“[T]here are social and other pressures that keep most Americans within the monochronic frame.”); CHARLES HAMPDEN-TURNER, FONS TROMPENAARS & DAVID LEWIS, *BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES* 297-99 (2000) (concluding that American culture is particularly sequential after analyzing the results of an experiment in which persons from different cultures were asked to draw their spatial perceptions of the past, present, and future).

¹⁷⁴ See HALL, *supra* note 121, at 18 (explaining how American perceptions of time adversely affect interactions with individuals from other cultures).

¹⁷⁵ *Id.* at 17; see also Keating, *supra* note 118, at 11.

¹⁷⁶ See Scheffel, Weixler & Werner, *supra* note 126 (“[T]ime . . . is considered by some [Western] theoreticians to be a necessary condition for narrativity.”).

¹⁷⁷ HALL, *supra* note 121, at 19; see also Dingemans, *supra* note 118.

¹⁷⁸ MATTI HYVÄRINEN, LARS-CHRISTER HYDÉN & MARJA SAARENHEIMO, *BEYOND NARRATIVE COHERENCE* 1 (2010); see also HALL, *supra* note 121, at 20 (“Because [chronology] is so thoroughly learned and so thoroughly integrated into our culture, it is treated as though it were the only natural and ‘logical’ way of organizing life.”).

¹⁷⁹ See IRIS BERGER ET AL., *AFRICAN ASYLUM AT A CROSSROADS: ACTIVISM, EXPERT TESTIMONY, AND REFUGEE RIGHTS* 10 (2015) (recommending that, for a noncitizen to obtain asylum in the United States, the noncitizen’s “version of the events that led to . . . seeking political asylum ought to maintain a clear, consistent chronology”).

¹⁸⁰ See HALL, *supra* note 121, at 89 (“[L]inearity can get in the way of mutual understanding and divert people needlessly along irrelevant tangents.”).

references into their narratives and may have great difficulty doing so.¹⁸¹ Likewise, those from synchronic cultures are not accustomed to organizing the events within their narratives according to some perceived progression of time, but rather they tend to describe them in order of perceived importance or relevance.¹⁸² As a result, persons from those cultures have greater difficulty providing chronological testimony and, therefore, are more likely to be found not credible by immigration judges.¹⁸³

Even when persons from polychronic or synchronic cultures overcome the substantial hurdle of providing a chronological narrative, in accordance with the REAL ID Act, any minor error in their chronology can result in an adverse finding of credibility. The Act explicitly states that an immigration judge may base a credibility determination on “the internal consistency” of the asylum applicant’s “oral statements” and “any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.*”¹⁸⁴ In practice, immigration judges have done just that. For example, in *Bah v. Gonzales*,¹⁸⁵ the Court of Appeals for the Tenth Circuit found that an asylum applicant’s misstatement that his third arrest occurred in 1996 when it had in fact occurred in 1995 was persuasive evidence that his entire testimony lacked credibility.¹⁸⁶ Likewise, in *Chen v. BIA*,¹⁸⁷ the Court of Appeals for the Second Circuit found that an asylum applicant’s statement that a claimed act of persecution occurred in March when he had previously stated that the act occurred in February was sufficient to sustain a finding that his testimony was not credible.¹⁸⁸ Because persons from polychronic and synchronic cultures are not accustomed to avoiding such minor discrepancies regarding the timing of events,¹⁸⁹ they are highly susceptible to an adverse credibility finding.

2. The Sufficient Detail Requirement

The United States is considered “the epitome of low-context systems.”¹⁹⁰ Because explicit communication is so thoroughly integrated into U.S. culture,

¹⁸¹ See Ezeh, *supra* note 130 (“In a polychronic culture, people tend to focus more on what they are doing than the timeframe in which it is happening.”).

¹⁸² See RAPHAEL PATAI, *THE ARAB MIND* 74 (2007) (explaining that in Arabic culture “it is of relatively little concern whether two past actions, events or situations recalled were simultaneous or whether one of them preceded the other”).

¹⁸³ See Kagan, *supra* note 22, at 385 (“Asylum-seekers strengthen their cases if they are able to explain their experiences . . . in chronological order.”).

¹⁸⁴ 8 U.S.C. § 1158(b)(1)(B)(iii) (2012) (emphasis added).

¹⁸⁵ 158 F. App’x 959 (10th Cir. 2005).

¹⁸⁶ *Id.* at 961.

¹⁸⁷ 230 F. App’x 52 (2d Cir. 2007).

¹⁸⁸ *Id.* at 54.

¹⁸⁹ See PATAI, *supra* note 182, at 74.

¹⁹⁰ HALL, *supra* note 121, at 107.

most Americans naturally expect narratives to include what other cultures may perceive as inappropriate or minute details.¹⁹¹

In fact, level of detail is “[o]ne of the most commonly referenced criteria for assessing credibility” in asylum adjudications conducted in the United States.¹⁹² The INA explicitly states that an immigration judge “may base a credibility determination on the . . . candor . . . of the [asylum] applicant.”¹⁹³ In practice, many immigration judges operate under the assumption that “detail indicates credibility while vagueness indicates lack thereof.”¹⁹⁴ The BIA has indicated support for such a reading of the statute, repeatedly stating that an asylum applicant’s testimony must be “sufficiently detailed” to be found credible.¹⁹⁵ Several circuit courts have affirmed this sufficient detail requirement.¹⁹⁶ Accordingly, the BIA has repeatedly found vagueness and delayed revelation of details to be key indicators that an asylum applicant’s testimony is disingenuous.¹⁹⁷ As a result, the more details an asylum applicant provides in his testimony the greater the probability that the assigned immigration judge will find the applicant’s testimony credible.¹⁹⁸

As previously discussed, persons from high-context cultures are often unaccustomed to providing such a high level of detail in their narratives,

¹⁹¹ See *id.* at 123 (“[W]hichever way we Westerners turn, we find ourselves deeply preoccupied with specifics . . . to the exclusion of everything else.”); PATAI, *supra* note 182, at 74; Goman, *supra* note 136 (explaining that Americans generally “expect messages to be . . . specific”).

¹⁹² Kagan, *supra* note 22, at 385 (discussing factors that affect immigration judges’ credibility determinations).

¹⁹³ 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

¹⁹⁴ Kagan, *supra* note 22, at 385.

¹⁹⁵ See, e.g., *M-D-*, 21 I. & N. Dec. 1180, 1182 (B.I.A. 1998) (holding that an asylum applicant’s testimony must be “sufficiently detailed to provide a plausible and coherent account of the basis of [his] alleged fear”).

¹⁹⁶ See, e.g., *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000) (holding that an asylum applicant’s testimony must be “direct and specific” to be found credible), *overruled on other ground by* *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999) (holding that an asylum applicant’s testimony must be sufficiently “detailed” to be found credible).

¹⁹⁷ Kagan, *supra* note 22, at 385; see, e.g., *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000) (upholding an immigration judge’s denial of an application for asylum on the grounds that the applicant’s “‘inability or unwillingness to provide supporting documentation . . . seriously undermine[s] the plausibility of his account, particularly since he has not offered . . . specific, credible detail about the circumstances’ of his detention . . . or residence at the refugee camp”); *M-D-*, 21 I. & N. Dec. at 1181-82.

¹⁹⁸ Kagan, *supra* note 22, at 385 (“Asylum-seekers strengthen their cases by providing as much information as possible about the central events that justify their fears of persecution. . . . [For example,] [a]n applicant who describes having been arrested by four men in civilian uniforms, one with a mustache, and one carrying a machine gun, has a stronger case for credibility than one who simply says, ‘I was arrested.’”).

preferring to leave many facts unstated—to be inferred by the audience. Likewise, persons from cultures with a predisposition towards holistic processing may be unable to recall such details, never having encoded them into memory.¹⁹⁹ As a result, asylum applicants from these cultures face a greater risk of being found not credible.²⁰⁰

IV. COMPOUNDING THE PROBLEM: LACK OF JUDICIAL REVIEW

Because of the vague statutory language that comprises the REAL ID Act's credibility guidelines and the lack of any statutory or regulatory instruction regarding how to weigh the enumerated credibility factors within these guidelines against one another,²⁰¹ immigration judges have a great deal of discretion in determining what makes an asylum applicant's testimony "credible."²⁰² If an immigration judge, using a personalized interpretation of the statutory guidelines, determines that an asylum applicant's testimony is disingenuous, the judicial deference accorded by the *Chevron* doctrine²⁰³ and the classification of credibility as a question of fact²⁰⁴ make it highly improbable that such a finding will be overturned. This is especially true in light of the long tradition of immigration judges rendering oral—rather than written—judgments on asylum cases, leaving the BIA to hypothesize about an immigration judge's specific reasons for reaching a negative credibility determination.²⁰⁵ As a result, even when an immigration judge's credibility determination is based largely on subconscious narrative biases, such a decision will likely stand.²⁰⁶

¹⁹⁹ See Millar et al., *supra* note 156, at 140.

²⁰⁰ See Kagan, *supra* note 22, at 385 (explaining that cultural differences regarding the level of specificity appropriate to answer an open-ended question can cause an asylum applicant to appear evasive).

²⁰¹ See *supra* Section III.A.

²⁰² Kagan, *supra* note 22, at 367 (“Despite [their] importance, credibility-based decisions in refugee and asylum cases are frequently based on personal judgment that is inconsistent from one adjudicator to the next . . . [and] unreviewable on appeal . . .”).

²⁰³ *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); see also *infra* Section IV.A.

²⁰⁴ See *infra* Section IV.B.

²⁰⁵ *Improving Efficiency and Ensuring Justice in the Immigration Court System*, *supra* note 94, at 197 (“The present system relies almost exclusively on oral decisions rendered immediately after the conclusion of proceedings: written decisions are the exception to this rule.”). When the decision to deny an application for asylum is rendered orally, the applicant is only entitled to “a memorandum summarizing the oral decision.” 8 C.F.R. § 1003.37 (2016). Such a memorandum does not contain specific details regarding the rationale for the immigration judge's decision. *Id.*

²⁰⁶ Kagan, *supra* note 22, at 367.

A. *Chevron Deference*

The *Chevron* doctrine is the guiding principle for determining the extent to which courts must defer to an agency's interpretation of "the statute which it administers."²⁰⁷ Under the *Chevron* doctrine, if the statute is "silent or ambiguous with respect to the specific issue" and the agency's interpretation is "reasonable," then the court must defer to that interpretation.²⁰⁸ Because Congress implicitly delegated authority to EOIR to administer the REAL ID Act's credibility guidelines, and because the INA does not define key terms within the enumerated credibility factors or delineate their boundaries, the Courts of Appeals must defer to EOIR's reasonable interpretation of such terms.²⁰⁹ As a result, immigration judges—EOIR agents²¹⁰—have a great deal of discretion in determining what makes an asylum applicant's testimony credible. As long as the immigration judge's credibility determination is based on "specific and cogent" reasons that "have a legitimate nexus" to that determination, such a finding cannot be overturned.²¹¹

B. *Credibility as a Question of Fact*

According to the Code of Federal Regulations (the "C.F.R."), the BIA cannot "engage in *de novo* review of findings of fact determined by an immigration judge."²¹² Rather, such findings may only be overturned if found to be "clearly erroneous."²¹³ That is, if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."²¹⁴ The C.F.R. goes on to classify "findings as to the credibility of testimony" as "findings of fact."²¹⁵ Thus, the BIA and the Courts of Appeals for each circuit must give substantial deference to an immigration judge's credibility determinations, and may only overturn such findings if the available evidence compels a decision to the contrary. As a result, immigration judges' credibility

²⁰⁷ *Chevron*, 467 U.S. at 842.

²⁰⁸ *Id.* at 843-44.

²⁰⁹ Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 512-13 (2013).

²¹⁰ Exec. Office for Immigration Review, *About the Office*, JUSTICE.GOV, <http://www.justice.gov/eoir/about-office> [<https://perma.cc/7MXV-UUKY>] (last updated Sept. 8, 2015).

²¹¹ Exec. Office for Immigration Review, *Immigration Judge Benchbook*, JUSTICE.GOV, <http://www.justice.gov/eoir/immigration-judge-benchbook-section-241b> [<https://perma.cc/XW5P-V6PL>] (last updated Feb. 4, 2015).

²¹² 8 C.F.R. § 1003.1 (2016).

²¹³ *Id.*

²¹⁴ *Mei Qin Xie v. Att'y Gen.*, 343 F. App'x 774, 777 n.2 (3d Cir. 2009).

²¹⁵ 8 C.F.R. § 1003.1(d)(3)(i).

determinations, even when substantially based on subconscious cultural biases, are rarely overturned.²¹⁶

V. PROPOSED SOLUTIONS TO REDUCE THE IMPACT OF NARRATIVE BIASES

Given the prevalence of subconscious narrative biases and their lasting impact on asylum adjudications, how can EOIR improve the accuracy of its credibility determinations? How can the agency take steps to eliminate such biases or, at least, attenuate their affects?

The first step is education. To minimize their subconscious narrative biases, immigration judges must first become aware of such biases.²¹⁷ This self-awareness can be achieved through targeted cultural training.²¹⁸ Congress has explicitly acknowledged that cultural training is necessary for immigration judges to be able to accurately assess asylum applicants' claims.²¹⁹ However, current federal law only mandates cultural training on "the extent and nature of religious persecution" in various countries.²²⁰

The extent to which EOIR provides cultural training beyond that legally required is largely unknown. Although USCIS provides public access to some of its asylum officer training modules,²²¹ there is no public access to immigration judge training materials. The Transactional Records Access Clearinghouse, "a data gathering, data research and data distribution organization at Syracuse University,"²²² was able to obtain all training materials provided to new immigration judges in their week-long orientation in 2008 pursuant to a Freedom of Information Act ("FOIA") request,²²³ raising hopes that such material would

²¹⁶ See Kagan, *supra* note 22, at 367-68 ("Appellate tribunals often accept negative credibility findings with very light scrutiny . . .").

²¹⁷ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1150 (2012).

²¹⁸ See, e.g., *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> [<https://perma.cc/TW46-R29Z>] (last visited Oct. 27, 2016) (using self-testing to "educate the public about hidden biases").

²¹⁹ 22 U.S.C. § 6473(c) (2012) ("The Executive Office of Immigration Review of the Department of Justice shall incorporate into its initial and ongoing training of immigration judges training on the extent and nature of religious persecution internationally, including country-specific conditions, and including use of the Annual Report. Such training shall include governmental and nongovernmental methods of persecution employed, and differences in the treatment of religious groups by such persecuting entities.").

²²⁰ *Id.*

²²¹ *RAIO Training Materials*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate/raio-training-materials> [<https://perma.cc/JL7H-8T7S>] (last updated Aug. 1, 2013).

²²² *About Us*, TRAC, <http://trac.syr.edu/aboutTRACgeneral.html> [<https://perma.cc/38AV-2TH3>] (last visited Oct. 15, 2016).

²²³ *EOIR Training Materials for New Immigration Judges*, TRAC IMMIGR., <http://trac.syr.edu/immigration/reports/211/> [<https://perma.cc/YEE6-8HWB>] (last visited

become more publicly accessible in the future. However, due to EOIR reluctance, subsequent FOIA requests for such materials have been largely unsuccessful.²²⁴

One of the only insights into what cultural training EOIR actually provides its immigration judges is the National Association of Immigration Judges' Stress and Burnout Survey, which was given to ninety-six immigration judges throughout the country in June 2007.²²⁵ In response to a series of questions regarding their training, several immigration judges criticized the "lack of [EOIR] training in country conditions."²²⁶ Although most immigration judges independently research country conditions in preparation for asylum adjudications, as one judge explained, "[t]here is not enough time to do [adequate] research" for each case.²²⁷ As a result, many immigration judges are often forced to rely solely on State Department reports to educate themselves about current country conditions.²²⁸ Although such reports are often helpful in providing a general overview of recent current events, they fail to address cultural narrative norms and observational tendencies.²²⁹

Because immigration judges are unlikely to come to the bench with such cultural knowledge²³⁰ and, as many immigration judges admit, they are not given adequate cultural training once appointed,²³¹ EOIR should implement a training

Oct. 9, 2016).

²²⁴ *Lawyers' Committee for Civil Rights of the San Francisco Bay Area et al v. Executive Office for Immigration Review et al*, FOIA PROJECT, http://foiaproject.org/case_detail/?title=on&style=foia&case_id=28098 [<https://perma.cc/6555-Q3PA>] (last visited Oct. 27, 2016) (describing ongoing litigation against EOIR for failure to respond to FOIA requests).

²²⁵ Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *GEO. IMMIGR. L.J.* 57, 80-81 (2008).

²²⁶ *Id.* at 81.

²²⁷ *Id.* at 66; see also *Improving Efficiency and Ensuring Justice in the Immigration Court System*, *supra* note 94, at 194 (explaining how "increased pressures to complete more cases at a faster pace without sufficient law clerks" prevents immigration judges from performing necessary research for their cases).

²²⁸ See *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) ("We and other courts have expressed concern about the immigration service's chronic overreliance on such reports.").

²²⁹ Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 *NW. J.L. & SOC. POL'Y.* 1, 6-7 (2007); see, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, *ECUADOR 2014 HUMAN RIGHTS REPORT* (2014), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236686> [<https://perma.cc/Z8BC-R9MX>].

²³⁰ *Improving Efficiency and Ensuring Justice in the Immigration Court System*, *supra* note 94, at 193.

²³¹ *Id.* at 4 (explaining that the annual Immigration Judge Training Conference has been cancelled twice since 2007 and that chronic "lack of training for [immigration] judges" is contributing to the creation of "a court system that is incapable of handling the cases before

program that explicitly addresses these topics. While it would not be feasible to address narrative and observational tendencies for every culture, this training program should analyze the most prevalent asylum applicant cultures and provide immigration judges with the necessary tools to research those cultures not explicitly addressed.²³² Because judges are “most receptive” to education at the beginning of their judicial careers, this training should “commence early, starting with [the week-long] new-judge orientation” program.²³³ While implementing such targeted cultural training for immigration judges nationwide will be costly, the time and money saved in litigating appeals based on erroneous credibility determinations will substantially outweigh the costs.²³⁴

However, education alone is not sufficient. Although education programs regarding implicit biases “can increase motivation . . . to engage in some behavioral modifications,” many judges who are “persuaded that implicit bias is a legitimate concern” often “do not know quite what to do about it.”²³⁵ To minimize the impact implicit biases have on credibility determinations, EOIR should implement regulations to provide further guidance to immigration judges presiding over asylum adjudications.

First, these regulations should advise immigration judges to explicitly inform asylum applicants of their narrative expectations at the commencement of individual merits hearings. More specifically, immigration judges should warn asylum applicants that it is important they describe past experiences in the order in which they occurred and that failure to provide a clear chronological timeline may result in the judge finding their story implausible. Additionally, the regulations should advise immigration judges to inform asylum applicants that they must share as many details as they can about each relevant event and that failure to do so may result in the judge finding their story lacks the requisite specificity.

Making asylum applicants aware of these judicial expectations prior to giving their testimony will increase the likelihood that they will be able to meet such

it in an efficient and competent fashion”).

²³² Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1036 (2007).

²³³ Kang et al., *supra* note 217, at 1176.

²³⁴ See *Improving Efficiency and Ensuring Justice in the Immigration Court System*, *supra* note 94, at 197 (“Additional resources . . . would have the enormous collateral benefit of reducing the number of immigration cases that are appealed to the federal circuit courts of appeals.”); see also JOHN D. MONTGOMERY, NERA ECON. CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 4 n.3 (2014), http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf [<https://perma.cc/TUK9-9NP4>] (estimating that it costs the federal government \$1240 to litigate an average BIA appeal, taking into account both court costs and prosecution); OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 8, at A2 (“There were 24,824 pending cases before the BIA at the end of FY 2012.”).

²³⁵ Kang et al., *supra* note 217, at 1176, 1127.

expectations, as studies have shown that knowledge of expectations increases the likelihood of success.²³⁶ Although many immigration attorneys provide such advice to their clients during prehearing preparation, the 14.6% of asylum applicants who are left unrepresented in immigration court hearings will likely be entirely unaware of these judicial tendencies.²³⁷

Second, the regulations should inform immigration judges of the proper method for questioning asylum applicants in individual merits hearings.²³⁸ Many immigration judges still use leading questions—questions that suggest the desired answer—to inquire about the timing of events,²³⁹ despite several scientific studies showing that this method of questioning increases the likelihood of inaccurate reporting.²⁴⁰ Additionally, immigration judges often find applicants' testimony not credible due to lack of sufficient details without first asking probing questions regarding these apparently essential details.²⁴¹ Given the weight clarity of timeline is given in an immigration judge's credibility evaluation, as well as recent scientific studies proving that open-ended questions promote more accurate memory retrieval,²⁴² immigration judges should be strongly advised to use open-ended questions when questioning asylum applicants about the timing of events. Likewise, given the high level of specificity immigration judges demand to find an asylum applicant's testimony credible,²⁴³ they should be advised to ask multiple probing

²³⁶ See, e.g., Richard L. Miller, Philip Brickman & Diana Bolen, *Attribution Versus Persuasion as a Means for Modifying Behavior*, 31 J. PERSONALITY & SOC. PSYCHOL. 430, 439-40 (1975).

²³⁷ See Judge Steven R. Abrams, *supra* note 8; see also OFFICE OF PLANNING, ANALYSIS, & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 8, at G1.

²³⁸ Even when an asylum applicant is represented, the presiding immigration judge can interrupt the applicant's testimony to ask questions. See, e.g., *Apouviepsekoda v. Gonzales*, 475 F.3d 881, 887 (7th Cir. 2007) (holding that even when the immigration judge asked "a majority of the questions" in the asylum applicant's hearing, these "frequent interruptions" were not a violation of due process, because the judge's motivation for asking them was "to focus the hearing" on relevant issues).

²³⁹ See, e.g., *id.* ("So, when he goes to work in the morning you don't know where he's going, is that what you're saying?").

²⁴⁰ Jean R. Sternlight & Jennifer K. Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 480-81 (2008) ("[U]se of a cross examination-style . . . may create mistaken memories . . .").

²⁴¹ See, e.g., *Kaita v. Att'y Gen.*, 522 F.3d 288, 299 (3d Cir. 2008) (rejecting an immigration judge's finding that an asylum applicant's testimony was not credible due to lack of detail when the immigration judge did not make any attempts to elicit such details and prevented counsel's attempts to do so).

²⁴² Martine B. Powell, Ronald P. Fisher & Rebecca Wright, *Investigative Interviewing*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 11, 19 (Neil Brewer & Kipling D. Williams eds., 2005).

²⁴³ See, e.g., *Xiao Mei Lin v. Gonzales*, 193 F. App'x 29, 30 (2d Cir. 2006) ("The

questions to elicit such details prior to finding the applicant's testimony not credible for lack of specificity.

Third, immigration judges should be advised that they must take into consideration the narrative tendencies of asylum applicants' cultures when evaluating whether the applicants' testimony follows a clear chronology or is sufficiently detailed. Although immigration judges frequently cite to the statutory language requiring that they consider "candor" and "inherent plausibility" when making credibility determinations, they often overlook the statutory provision's modifying phrase: "[c]onsidering the totality of the circumstances."²⁴⁴ A natural reading of this provision would require immigration judges to consider asylum applicants' cultural predispositions when determining to what extent chronology and depth of detail are relevant to evaluating the applicants' credibility.²⁴⁵

Finally, immigration judges should be required to issue written decisions detailing the rationale for their credibility determinations. Forcing immigration judges to articulate the rationale for their decision-making will compel them to consciously confront their cultural biases and acknowledge when the record lacks sufficient evidence to support their decision.²⁴⁶ Such documentation will also prove invaluable to reviewing courts deliberating over whether the weight of the evidence compels reversal of a credibility determination.²⁴⁷

In conjunction with one another, these training programs and regulations will efficiently and effectively improve the cultural objectivity of immigration judges' credibility determinations. In this way, EOIR will be able to shift the focus of individual merits hearings to the validity of applicants' claims rather than their verbal form and put a stop to the game of "Refugee Roulette."²⁴⁸

CONCLUSION

This Note has explored a layer of implicit bias that is often ignored—cultural narrative biases—and how the unique circumstances of asylum adjudications

[Immigration Judge] determined that portions of [the asylum applicant]'s testimony lacked a sufficient level of detail, specificity, and plausibility.").

²⁴⁴ 8 U.S.C. § 1158(b)(1)(B) (2012).

²⁴⁵ See *Totality-of-the-Circumstances Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁴⁶ See *Improving Efficiency and Ensuring Justice in the Immigration Court System*, *supra* note 94, at 197-98 (concluding that written, as opposed to oral, decisions will increase the quality of those decisions); NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 11 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx [<https://perma.cc/GF6V-FDRM>] ("By prompting decision makers to document the reasoning behind a decision in some way before announcing it, judges and jurors may review their reasoning processes with a critical eye for implicit bias before publicly committing to a decision.").

²⁴⁷ See *supra* Sections IV.A, IV.B.

²⁴⁸ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 107, at 295.

make such biases particularly influential in determining whether an asylum applicant is found statutorily eligible for asylum. This is an area of the law that remains underexplored. In order to build the case for reform, legal academics must further address what practicing immigration attorneys have known for decades—how subconscious narrative biases unduly hinder the ability of asylum applicants to obtain the protection they so desperately need. Nevertheless, this Note proposes several possible ways that EOIR can begin to cure the unique problems posed by subconscious narrative biases to more accurately determine whether asylum applicants have suffered past persecution or have a well-founded fear of future persecution. First, by incorporating targeted cultural training into the week-long orientation program for new immigration judges. Second, by implementing regulations that advise immigration judges to: (1) inform asylum applicants of their narrative expectations at the commencement of hearings; (2) alter their methods of questioning asylum applicants to accord with recent scientific studies; and (3) take into consideration asylum applicants' cultural norms when making credibility determinations, as required by federal law. And, finally, by mandating written decisions reflecting the rationale behind such credibility determinations. While further research and greater understanding of cultural narrative biases is necessary, the adoption of these proposals would represent a modest step in the direction of more just asylum adjudications.