SEARCHING FOR THE KEY IN THE WRONG PLACE: WHY "COMMON SENSE" CREDIBILITY RULES CONSISTENTLY HARM REFUGEES

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ABSTRACT

This article examines serious flaws in the asylum process, both in the United States and in other developed countries. Notwithstanding an affirmative obligation under international treaties to not return a refugee to his country of origin, legislatures in the United States, Australia, the United Kingdom and other receiving nations have, since the terrorist attacks of September 11, 2001, drafted laws that place a high burden on the asylum applicant to prove the credibility of his testimony. This primacy of credibility serves as a threshold issue: failing to establish credibility, the claimant has little chance that other evidence will be considered.

Despite a widespread belief in the intuitive ability of the ordinary person to judge a witness's reliability based on the consistency, completeness, and coherency of testimony, numerous psychological investigations, both concerning memory generally and the challenges affecting victims of trauma, have established that memory is, by its nature, plastic, inconsistent, and incomplete. Furthermore, studies conclusively show that people, regardless of special training, cannot distinguish between lies and the truth at a rate much higher than pure chance would produce.

While jurisprudence permits a certain degree of error in truth determination in exchange for expeditious resolution of controversies, the current unreasonably high standard of proof for refugees' credibility results in an unacceptable rate of wrongful denials, condemning those who fled harm to forced repatriation to their persecutors. And, because credibility determinations are considered findings of fact, they are exempt from appellate review in the United States and other common law countries, absent "clear error." After arguing that an asylum seeker should be compared to an alleged crime victim, rather than an alleged criminal, five solutions are suggested to lessen the hardships caused by the primacy of irrational credibility determinations.

How is an immigration judge to sift honest, persecuted aliens from those who are feigning?[1]

I. INTRODUCTION

While teaching in Shiraz, Iran in the mid-1970s, I learned of Mullah Nasreddin, a bumbling, mythical Sufi "friar" whose foolish antics made one laugh, but also revealed profound truths.[2] In a particularly engaging story, neighbors one night discover the Mullah on his hands and knees under a streetlight sifting through the sandy soil with his fingers.[3] "Mullah," they inquired, "What is the matter? Have you lost something?" "Yes," he replied, "My house key. I am so hungry and tired and it is so late, but I cannot get into my home." In sympathy, the others drop to their knees and begin searching for the key. After nearly an hour of hunting, one asked, "Mullah, exactly where did you lose the key?" "Oh, far out in the desert," he replied, then adding, "but it is too dark to find anything in the desert, so I decided to look here under the street light."

Like Mullah Nasreddin, immigration judges in the United States and in other receiving nations currently decide cases involving asylum seekers by looking for answers not in the confusing and challenging area of legal rights to asylum where the truth lies, but rather under the falsely bright light of unreliable and mechanical credibility determinations.

Throughout the world, people are persecuted due to religion, politics, race, ethnicity and membership in particular social groups. Some of these people flee their persecutors and seek asylum in other nations.[4] Under the terms of two United Nations treaties, the 1951 Convention Relating to the Status of Refugees[5] (Convention) and the 1967 Protocol Relating to the Status of Refugees[6] (Protocol), signatory nations promise they will not return refugees to their countries of origin. However, they have found it difficult to distinguish between refugees and opportunists seeing

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[1] Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008).

[2] *See, e.g.*, HOUMAN FARZAD, CLASSIC TALES OF MULLAH NASREDDIN (1989).

[3] There are many variations of this old story. One can be found at N. HANIF, BIOGRAPHICAL ENCYCLOPAEDIA OF SUFIS: CENTRAL ASIA AND MIDDLE EAST, 336 (2002).

[4] The United Nations High Commissioner for Refugees [hereinafter UNHCR] estimates that there are currently more than forty million refugees globally. Of these, 360,000 applied for asylum protection in 2010. UNHCR, Asylum Levels and Trends in Industrialized Countries 2010: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries 3 (2010), *available at* http://www.unhcr.at/no_cache/service/zahlen-undstatistiken.html?cid=3915&did=7980&sechash=dbbf 9ac1 (last visited Jan. 11, 2012).

[5] Final Act of the United Nations Conference of Plenipotentiaries on the Statutes of Refugees and Stateless Persons, art. 1, July 2-25, 1951, 189 U.N.T.S. 137.

[6] Protocol Relating to the Status of Refugees, art. 33, Jan. 31. 1967, 606 U.N.T.S. 267.

an easy way to enter and remain in a new country.[7] In each case, a government official must answer two questions: does the claimed persecution meet the legal requirements for protection, and does the refugee legitimately fear the claimed harm in the future? While the first is a question of law and can be determined by thoughtful analysis of case law precedent, the second is far more challenging. Because of the paucity of evidence presented in most asylum cases, the fact finder has special challenges in determining the truth. Since most of the evidence that does exist is in the form of the asylum seeker's testimony, the fact finder's troubles are magnified.[8] How can the fact finder determine if the asylum seeker's story is true? Does the official have a duty to investigate the claim, as would be done in response to a crime victim's claim?

In the United States, the burden of proof rests on the asylum seeker.[9] The asylum seeker must establish past persecution or fear of future persecution, without assistance from the government. In fact, since the asylum seeker is often presenting his claim in a removal proceeding before an Immigration Judge, he must advocate in an adversarial setting against a government attorney dedicated to and experienced in establishing that the refugee does not qualify for asylum, either due to the nature of the claim or to a lack of proof. Because much of the evidence comes from the refugee's own testimony,[10] it is incumbent upon the applicant to establish that he is a credible witness. Despite his concerns about his ability to present testimony, an asylum seeker cannot rely solely on corroborating evidence, such as testimony of witnesses, affidavits, published government reports, relevant news articles, and police and medical reports. He or she must testify under oath.[11] Because of the centrality in U.S. law of the refugee's own statement of facts, the judge considers carefully the credibility of the testimony.[12]

The asylum applicant has, of course, an extraordinarily high stake in the outcome of a hearing, since the grant of asylum will provide both physical safety and economic reward. Because of the many perceived benefits of immigrating to the United States, the lying, opportunistic applicant may have almost as much to gain, and therefore nearly the same bias as the genuine asylum seeker. In either situation, the appli-

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[7] Michael Kahan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367 (2002-2003).

[8] *See* Virgil Wiebe, Serena Parker, Erin Corcoran & Ann Gallagher, *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, IMMIGR. BRIEFINGS 1 (Oct. 2001).

[9] 8 C.F.R. § 1208.13.

[10] There is little chance of obtaining an affidavit from a foreign government official admitting persecution of the refugee.

[11] Fefe, 20 I. & N. Dec. 116 (BIA 1989).

[12] Tania Galloni, *Keeping It Real: Judicial Review of Asylum: Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1045 (2008).

cant/witness bears the burden of establishing the truth of his testimony and is faced with the possibility of impeachment by the government attorney and the immigration judge.[13] As is discussed below, the credibility of an asylum seeker is statutorily suspect under the Real I.D. Act of 2005, which states that asylum seekers are not presumed to be credible.[14] Thus the asylum seeker faces a much higher bar in establishing his claim to innocence than does a criminal defendant whose guilt must be proved beyond a reasonable doubt.[15]

How does a judge properly assess the credibility of a witness? In the context of asylum hearings, case law instructs that inconsistencies in testimony or between testimony and other evidence could be used to find the asylum seeker was not credible, but only where those inconsistencies concerned matters that went to the heart of the claim.[16] Thus, the judge must look at all the alleged facts in a heuristic manner.[17] As noted in one appellate case, "a person who provides inconsistent testimony on any one matter should still be presumed credible as to all other matters."[18] However, the holistic view of the credibility of the refugee's testimony was terminated in 2005. In that year, two provisions were inserted in the Real I.D. Act, a bill concerning enhanced driver's licenses, which extinguished the formerly balanced approach toward asylum determinations.[19]

This article first reviews the evolution of credibility determinations generally. Then it discusses the varying standards for credibility assessments in asylum cases in selected common law countries, including the United States. This analysis includes the changes to credibility determinations in the United States under the Real I.D. Act, which has caused

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[13] "Impeachment seeks to persuade the fact-finder that evidence which is legally admissible and has been received is not sufficiently trustworthy and should be utterly disregarded or given little weight in reaching a verdict, predicted on the unreliability of the evidence or its source." ROBERTO ARON, KEVIN T. DUFFY & JONATHAN L. ROSNER, IMPEACHMENT OF WITNESSES 56 (1990).

[14] Real I.D. Act of 2005 codified in amendments to 8 U.S.C. § 1158 (b)(1)(B)(iii).

[15] *See, e.g.*, Holland v. United States, 348 U.S. 140 (1954).

[16] *See, e.g.*, Singh v. Ashcroft, 301 F.3d 1109, 1111 (9th Cir. 2002); Bandari v. I.N.S., 227 F.3d 1160, 1165-66 (9th Cir. 2000) (stating that a minor inconsistency in identifying the location of a person's persecution, in light of otherwise consistent testimony, cannot form the basis of an adverse credibility finding, especially where "asylum hearings frequently generate mistranslations and miscommunications"). *See also* Hoxha v. Gonzales, 446 F.3d 210, 217 (1st Cir. 2006).

[17] *See* Jane E. Larson, *"A Good Story" and "The Real Story,"* 34 J. MARSHALL L. REV. 181, 184 (2000) (presenting a discussion of deductive v. heuristic legal reasoning).

[18] Jibril v. Gonzales, 423 F.3d 1129, 1134 (9th Cir. 2005).

[19] *See,* Marisa S. Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum Seekers*, 84 DENVER U. L. REV. 1121 (2007). Real ID Act, Pub. L. No. 109-13, 119, § 101, Stat 231, 303-04 (2005).

immigration judges to concentrate on inconsistencies in testimony, to the neglect of an analysis of the asylum seeker's claim itself. While the Real I.D. Act is a focus of concern in this article, many other scholars have already written about the flaws of this legislation and the resulting hardships on asylum seekers.[20] This article suggests that credibility determinations are of limited accuracy, regardless of the guidelines for assessment. Legislation such as the Real I.D. Act has unjustly raised the standard of proof for asylum applicants, while unfairly limiting their rights of appeal. It will be shown below that consistency in autobiographical testimony is unnatural, and that even if a story is retold without any changes, that does not mean that it is true. Thus, the stringent requirement for complete, consistent and coherent testimony is scientifically invalid. However, the brawny restrictions for review of credibility determinations constrain appraisal by appeals courts. The article concludes with proposed solutions to better yield the truth.

II. The Role of Credibility Determinations in Legal Proceedings

The credibility of testimony or of evidence refers to the credit or trust accorded to it, and thus, its truthfulness. While truth was formerly adduced by appeals to divinity or through trials by combat or by ordeal,[21] courts have come to look to the presentation of evidence of a claim as the best way to determine the reality of the matter at issue. As a result, complicated and complex rules of evidence have evolved. The function of these laws of evidence is, as proclaimed in the *Federal Rules of Evidence,* "to the end that truth may be ascertained and the proceedings justly determined."[22] Similarly, according to the U.S. Supreme Court, "[t]he basic purpose of a trial is the determination of the truth."[23] Thus, one would assume that rules of evidence should guide a judge in finding the

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[20] *E.g.*, Eric M. Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases,* 83 Notre Dame L. Rev. 2019, 2036 (2008); Scott Rempell, *Credibility Assessments and the Real Id Act's Amendments to Immigration Law,* 44 Tex. Int'l L.J. 185, 187 (2008); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 Hofstra L. Rev. 85, 118 (2007); Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers,* 26 Penn St. Int'l L. Rev. 383 (2007); Marisa Cianciarulo, *Terrorism and Asylum Seekers: Why the Real Id. Act Is a False Promise,* 43 Harv. J. on Legis. 101 (2006); Aubra Fletcher, *The Real Id Act: Furthering Gender Bias in U.S. Asylum Law,* 21 Berkeley J. Gender L. & Just. 111 (2006); Victor P. White, *U.S. Asylum Law Out of Sync with International Obligations: Real Id Act*, 8 San Diego Int'l L.J. 209, 254-58 (2006).

[21] *See, e.g.*, Robert Bartlett, Trial by Fire and Water: The Medieval Judicial Ordeal (1986); James Q. Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial (2008).

[22] Fed. R. Evid. 102.

[23] Tehan v. U.S. ex rel. Shott, 382 U.S. 406, 416 (1966).

truth.[24] This is not the truth of scientific confidence, but rather of a moral certainty.[25] As is discussed below, this moral certainty demands different standards of proof.

The law employs various levels of proof to determine whether to accept allegations.[26] In common law countries sophisticated standards of proof are used, which differ between and even within criminal and civil cases.[27]

In a typical legal dispute, documentary evidence provides significant weight to claims. In asylum hearings, however, such evidence is much harder to locate or might not exist.[28] Jailers and other persecutors do not generally make public records of their torturing. Treating physicians may limit comments about the cause of injuries in medical reports lest they themselves be punished by authorities. Record-making and record-keeping may also be limited, especially in countries experiencing civil unrest or under-funded institutions. For these reasons, the testimony of an asylum seeker is more important. It follows that the quality of that testimony is more critical.

Can a judge correctly decide which witness testimony is true and which is false? One way to determine the truth of testimony is by first deciding whether the witness is credible. Credible is not the same as truthful.[29] To make such determinations, judges and juries generally use a common sense approach. They rely on the general assumption that the ordinary individual is capable of recalling an event accurately, coherently, and comprehensively.[30] However, numerous studies have established that

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[24] Scholar Larry Laudan characterizes a criminal trial as "first and foremost an *epistemic* engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators." LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 2 (2006).

[25] Steven Shapin, *Cordelia's Love: Credibility and the Social Studies of Science*, 3 PERSPECTIVES ON SCIENCE 255, 259 (1995).

[26] *E.g.* preponderance of evidence; clear and convincing evidence; beyond a reasonable doubt; some credible evidence.

[27] In civil law countries, on the contrary, the judge simply must feel a deep conviction that the allegation is true. Christopher Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on A Conflict Between American and Continental European Law*, 33 VT. L. REV. 435, 440-41 (2009).

[28] Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008).

[29] "UNHCR sees credibility as an alternative to proof . . . . 'Being credible' is different both to 'being proven' and to 'being true.'" James Sweeney, *Credibility, Proof and Refugee Law*, 21 INT'L J. REFUGEE L. 700, 711 (2009).

[30] Former asylum officer Shoshanna Malett concurs in this belief: "If the event occurred, the client should be able to tell and retell the story in the same manner no matter how many times the Officer asks him or her to explain a particular event." Shoshana Malett, *Affirmative Asylum Claims from China Based on Coercive Family Planning*, IMMIG. BRIEFINGS 7, 8 (June 2006).

Judge Alex Kozinski echoes Malett's view on the issue of consistency as a sign of credibility in a dissenting opinion:

memories are neither holistic nor unchanging.[31] Studies have also ascertained that both laypersons and experts have little more than 50 percent accuracy in determining whether someone is intentionally lying.[32] Nonetheless, reliance on a judge's or jury's discernment about credibility is a fixture in American legal jurisprudence.

Reliance on intuitive credibility assessments has a long history. In writing on the history of Anglo-Saxon law, Sir William Blackstone, the legal compiler, noted that the judge, acting as a finder of fact in a non-jury trial, traditionally had the responsibility to "form in his own breast his sentence upon the credit of witnesses examined."[33] The practice of looking into one's heart to determine the truthfulness of a witness serves as the basis for current credibility decisions of immigration judges and asylum officers. In asylum procedures, it is buttressed by a "scientific approach" in which the judge keeps a checklist of inconsistencies and implausibilities, using these to justify his underlying heart-felt opinion on the believability of the asylum seeker.[34]

A central feature of current credibility assessments is their widespread appearance in many discrete components of evidence. Credibility tests are applied to testimony, to the witness himself, to documentary evidence and to the entire claim.

Why are statements based on genuine mistaken beliefs or faulty memory conflated with intentional misstatements and deemed to be lies? One answer is the belief that a harsh response to misstatements is necessary to

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> Because a witness will never testify exactly the same way twice, certain inconsistencies may reveal merely the limits of memory . . . . But while such inconsistencies may be innocent, they may also signal that the petitioner is telling a tale. When a petitioner fails to recall how he was tortured, when he mixes up the chronology of events, or when he embellishes his story with more details, the trier of facts may reasonably infer that the petitioner is fibbing.

Abovian v. I.N.S. 257 F.3d 971, 977 (9th Cir. 2001) (order denying a petition for rehearing *en banc*).

[31] In contrast to the comments of Malett *supra* note 30, *see* section V(a), *infra*, for a full discussion of inconsistent memory. *See, e.g.*, Ralph Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL., PUB. POLICY & L. 1057, 1065-71 (2000).

[32] In a large research study, for example, overall rates of the ability to tell truth from lies averaged less than 55%, barely better than chance. Michael G. Aamodt & Heather Mitchell, *Who can best catch a liar? A Meta-Analysis of Individual Differences in Detecting Deception*, 15 FORENSIC EXAMINER 6 (2006). Despite claims that some are more talented at detecting lies, accuracy rates vary little across studies. Charles F. Bond Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, PERSONALITY & SOCIAL PSYCH. REV. 214–34 (2006).

[33] 2 WILLIAM BLACKSTONE, COMMENTARIES *336. This standard is still clearly enunciated in continental law. *See,* Engel, *supra* note 27, at 457.

[34] James Sweeney, *The Lure of "Facts" in Asylum Appeals: Critiquing the Practice of Judges in* APPLYING THEORY TO POLICY AND PRACTICE, 19, 23 (Steven Smith ed., 2007).

deter witnesses from lying.[35] The knowledge that any falsehoods can serve as the basis for a denial confirms the importance to the community of truthfulness.[36]

According to American philosopher William James, "[t]rue ideas are those that we can assimilate, validate, corroborate, and verify. False ideas are those that we cannot. That is the practical difference it makes to us to have true ideas; that therefore is the meaning of truth, for it is all that truth is known as."[37] While the pragmatist may see that this is true for ideas, such a view omits facts and ideas that, although true, cannot be established to the required standard of proof in a court. Similarly, even as many spiritual institutions, such as the Catholic Intellectual tradition, hold that one can know the moral truth by internal reflection,[38] this does not mean that we can intuitively know whether someone is speaking the truth. Truth is a quality of a thing, of an idea, that addresses its validity. Very few statements are entirely true. For example, the statement "I am alive," ignores consideration of my hair, nails, and teeth, which are com-

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[35] *See, e.g.,* Barreto-Claro, 275 F.3d1334, 1339, (11th Cir. 2001) (confirming the Board of Immigration Appeals' "strict, no tolerance statutory interpretation, that applicants must tell the truth or be removed").

[36] Philosopher Harry Frankfurt presented this view with simple eloquence:

> We really cannot live without truth. We need truth not only in order to understand how to live well, but in order to know how to survive at all . . . . [T]ruth is not a feature of belief to which we can permit ourselves to be indifferent. Indifference would be a matter not just of negligent imprudence. It would quickly prove fatal.

HARRY G. FRANKFURT, ON TRUTH 37 (2006).

[37] WILLIAM JAMES, THE MEANING OF TRUTH: THE SEQUEL TO PRAGMATISM v-vi (1932). Would James, then, have considered inconsistent statements to be false or would he have gone further and determined that the speaker himself was false? He would, as a Pragmatist, have asked, what is the value of the overall testimony if true. What is the value if false? If true, its value is to the asylum applicant and to the nation in protecting him from persecution in his country of origin. If found to be false, the nation can rid itself of a liar. Unfortunately an asylum seeker standing before William James would be compelled to even more strictly corroborate his statements. James leaves no loophole, requiring corroborating testimony even if it is unreasonable to obtain. Nonetheless, he does allow a fair amount of judicial notice of allegations that *fit.* "Any idea that helps us deal, whether practically or intellectually, with either the reality or its belongings, that doesn't entangle our progress in frustration, that *fits*, in fact, and adapts our life to reality's whole setting, will agree sufficiently to meet the requirement." *Id.* at vi-vii.

[38] *See, e.g.*, Pope Benedict XVI, Conscience and Truth, Speech at the 10th Workshop for Bishops (Feb. 1991) (transcript available from ETERNAL WORLD TELEVISION NETWORK at http://www.ewtn.com/library/curia/ratzcons.htm). In the speech, then-Cardinal Ratzinger denied that anyone has "factual omniscience" and distinguished between superficial convictions based on social convention and "listening to the depths of one's soul." As Ratzinger writes, when one speaks of finding truth through conscience, one is more properly addressing personal moral issues than in appraising the truth of external facts, such as the credibility of a witness.

posed of non-living material. Similarly, the claim, "the world is spherical," ignores a subtle widening – of yards, not miles – south of the equator.

People also make mistakes in what they tell us. We ourselves sometimes forget what we hear or remember part of it incorrectly. And yet we navigate through life calmly relying on partial truths – to do otherwise would paralyze our behavior.

Federal and state court rules in the U.S. generally recognize the inherent imperfections in testimony and make allowances. In California, for example, Jury Instructions warn:

> You alone must judge the credibility or believability of the witness . . . . In deciding whether testimony is true and accurate, use your common sense and experience . . . . You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe . . . . Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether these differences are important or not. People sometimes honestly forget things or make mistakes about what they remember.[39]

Federal rules mirror these instructions, but emphasize the difference between innocent mistakes and intentional lying and provide fact-finders with the opportunity to accept those parts of testimony they believe to be credible.[40]

III. The Role of Credibility Determinations in Asylum Hearings

In response to the massive number of refugees and displaced persons in Europe following World War II and the Communist takeover of much of Eastern Europe, the United Nations decided to create uniform procedures for finding new homes for those who feared persecution in their homeland. Member states agreed to detailed rules for the processing of refugees *hoping for resettlement* in a third country, first in the 1951 Convention, and later in the 1967 Protocol. In contrast, the 1951 Convention

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[39] CALCRIM No. 105.

[40] You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial. But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

Eleventh Cir. Pattern Jury Instr. § 6.1 at 24 (2010) (criminal cases).

leaves to each Contracting State the establishment of procedures over the granting of asylum to refugees *who have already reached* a third country "that it considers most appropriate, having regard to its particular constitutional and administrative structure."[41]

A. *The United Nations*

While the Convention and the Protocol represent the international basis for all refugee rights, neither they, nor the Handbook, specify procedures for the determination of truth or credibility in refugee hearings.[42] Nonetheless, the High Commissioner has counseled that, whether the mechanism used is "administrative or judicial, adversarial or inquisitorial . . . the ultimate objective of refugee status determination is humanitarian."[43]

To clarify the intent of the Convention and Protocol, the United Nations High Commissioner on Refugees created the *Handbook on Procedures and Criteria for Determining Refugee Status*, a practical guide for "government officials concerned with the determination of refugee status in various Contracting States."[44] But even this left much of the procedural decisions to local control. While accepting the differences between States' procedures for refugee determination, the Executive Committee of the High Commissioner's Programme recommended that all procedures satisfy certain basic requirements. Unfortunately, the handbook is vague about these requirements, being content to provide abstract platitudes rather than explicit directions. For example, the examiner "must apply the criteria in a spirit of justice and understanding . . . ."[45] As for the significance of credibility determination as the threshold for investigation of persecution, the *Handbook* warns that an asylum seeker should only receive benefit of the doubt about facts when an examiner is satisfied as to the applicant's general credibility.[46] The handbook also states that an applicant's statements must be coherent and plausible, but warns that a victim of government-caused violence may be afraid to give a full and accurate statement about his case.[47]

Finding the truth is particularly difficult in cases concerning claims for asylum. Immigration judges in the United States and other countries face special difficulties in correctly assessing the truth of witness testimony

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[41] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees para. 189 (1992), http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf.

[42] UNHCR, Note on Burden and Standard of Proof in Refugee Claims 1 (1998), http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf.

[43] *Id.*

[44] UNHCR Handbook, *supra* note 41, at Foreword para. III.

[45] *Id.* at para. 202.

[46] *Id.* at para. 204.

[47] *Id.* at paras. 196, 204.

given cultural and language differences and psychological impairment caused by persecution. A member of the Board of Immigration Appeals reported that two-thirds of the reversals of BIA decisions in 2006 involved disapproval with immigration judges' credibility determinations.[48] Similar rates of reversal have been reported in Great Britain.[49] Nonetheless, as a review of asylum procedures in the United States indicates, credibility determinations are growing in significance, overshadowing serious judicial consideration of other aspects of asylum cases. In Europe as well, credibility assessments have become the central issue in asylum cases, with a growing legal presumption against the applicant's credibility.[50]

Does an adverse credibility determination give the examiner the right to deny a case, without examining its objective and subjective elements? The United Nations does not grant an examiner such an easy solution; rather, determination of refugee status requires "an understanding of the particular situation of the applicant and of the human factors involved."[51] Furthermore, the United Nations Handbook stresses that overall credibility of an applicant's claim "is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and is therefore, on balance, capable of being believed."[52] Determinations are therefore to be generous.[53] The failure of the UNHCR to clarify its own credibility standards in refugee determination has been seriously criticized.[54] Nonetheless, the increasingly high

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[48] Edward R. Grant, *Laws of Intended Consequences: IIRAIRA and Other Unsung Contributors to the Current States of Immigration Litigation*, 55 CATH. UNIV. L. REV. 923, 959 (2006).

[49] Asylum Aid, Unsustainable: the quality of initial decision-making in women's asylum claims 31-32 (2010) (UK) (finding that over 50% of asylum denials of women's claims were overturned on appeal).

[50] Robert Thomas, *Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined*, 8 EUR. J. MIGRATION & L. 79, 80 (2006). Thomas reported in 2006 that in the EU and UK "legislators have increasingly sought to guide the assessment of claimants' credibility and that the content of such assessment frameworks tend to favour the negative assessment of credibility." *Id.* at 81.

[51] UNHCR Handbook, *supra* note 41, at para. 222.

[52] *Id.* at paras. 196-97.

[53] The purpose of the 1951 Convention, according to UNHCR is "to ensure that protection of the life and freedom of refugees, and any limitation to its core provision of non-refoulment must be construed in the most restrictive fashion." Brief of UNHCR as Amici Curiae Supporting Petitioner, Ali v. Achim, 551 U.S. 1188 (No. 06-1346) (2007) WL 4205138.

[54] Michael Alexander, *Refugee Status Determination Conducted by UNHCR,* 15 INT'L J. REFUGEE L. 251 (1999).

standards for positive credibility assessments in signatory states severely limit the right of bona fide refugees to non-refoulment.[55]

The following brief analysis of the role of credibility assessments in Australia, Canada, the United Kingdom, and the United States reveals two commonalities: the promulgation by legislatures of increasingly restrictive standards for determining credibility and the increase in institutionalized cynicism toward asylum seekers. Referred to by one scholar as "presumptive skepticism"[56] and another as the "culture of disbelief,"[57] such negativity encourages distrust of asylum seekers. This distrust may be due to the perceived negative economic impact of the refugees' presence, the fear of immigrants generally, or the inability to fully understand different cultures and life stories. The result is an increasing stress on credibility determinations, with a countervailing decreasing emphasis on the underlying claim of persecution. As will be shown, immigration personnel routinely rule negatively on the applicant's credibility and, on that basis, deny the application, without seriously considering the legal claim.

B. *The United States*

Asylum seekers coming to the United States face challenges to non-refoulment that are higher than the United Nations' Convention envisioned. Part of this is due to the credibility standards that are the focus of this article. Another part, however, is due to the basic nature of U.S immigration procedures. It is often stated that the nation's current immigration system is broken.[58] In a decision from the Seventh Circuit, the court complained that "the adjudication of cases at the administrative level has fallen below the minimum standards of legal justice."[59] Reasons for this include the government's enforcement of the complex laws created since 1996 that harshly limit the rights of immigrants, both legal permanent residents as well as those with unlawful presence, and the

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[55] "A refugee's right not to be expelled from one state to another, esp. to one where his or her life or liberty would be threatened." BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

[56] Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 451 (1992).

[57] Amanda Weston*, A Witness of Truth: Credibility findings in asylum appeals*, 12 IMMIGR. & NAT'LITY L. & PRAC. 87, 89 (1998).

[58] Presidents Barack Obama and George W. Bush, as well as numerous politicians and pundits, both liberal and conservative have agreed with this assessment. Shailagh Murray, *Careful Strategy Is Used to Derail Immigration Bill*, WASH. POST, June 8, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/07/AR2007060702534.html; Steven Greenhouse, *Liberal Groups Planning to Rally on National Mall*, N.Y. TIMES, Sept. 26, 2010, http://www.nytimes.com/2010/09/27/us/politics/27rally.html.

[59] Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

caseloads given to immigration judges and the Board of Immigration Appeals.[60]

Nonetheless, until 2005, conditions for fair and just adjudication of asylum claims were more favorable than they are today.[61] Credibility was formerly presumed unless a judge made a detailed finding that a specific statement was not credible.[62] In addition, in at least three federal jurisdictions an immigration judge could not base a negative credibility determination on inconsistencies, contradictions or omissions that did not go to the heart of the claim[63] – "events central to petitioner's version of why he was persecuted and fled."[64] While a lack of specificity could make an applicant's testimony suspicious and thus raise the question of credibility,[65] generalized statements that did not identify specific examples of evasiveness or contradiction in the petitioner's testimony were insufficient to uphold an adverse credibility finding.[66] Courts also held that minor inconsistencies, such as discrepancies in dates "which reveal nothing about an asylum applicant's fear for his safety" did not provide an adequate basis for an adverse credibility finding.[67] Likewise, a minor inconsistency in identifying the location of a person's persecution, in light of otherwise consistent testimony, could not form the basis of an adverse

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[60] Dory M. Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 691 (2006). *See generally* Office of Plan., Analysis, & Tech., Exec. Office for Immig. Rev., FY 2010 Statistical Yearbook (2011).

[61] For a thorough and insightful analysis of pre-Real I.D. Act credibility determinations, *see* Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination,* 17 GEO. IMMIGR. L.J. 367 (2002-2003). Kagan's thoughts and conclusions about credibility determinations expressed in this article have guided most subsequent research and analysis on the topic.

[62] "[A]bsent an explicit finding that a specific statement by the petitioner is not credible we are required to accept that her testimony is true." Lukwago v. Ashcroft, 329 F.3d 157, 164 (3d Cir. 2003) (quoting Hartooni v. I.N.S., 21 F.3d 336, 342 (9th Cir. 1994)).

[63] *See, e.g.* Bojorques-Villanueva v. I.N.S., 194 F.3d 14, 16 (1st Cir. 1999); Senathirajah v. I.N.S., 157 F.3d 210 (3d Cir. 1998); Sylla v. Ashcroft, 388 F.3d 924, 926 (6th Cir. 2004); Kondakova v. Ashcroft, 383 F.3d 792, 796 (8th Cir. 2004); Singh v. Ashcroft, 301 F.3d 1109, 1111 (9th Cir. 2002).

[64] Singh v. Gonzales, 439 F.3d 1100, 1108 (9th Cir. 2006).

[65] Singh-Kaur v. I.N.S., 183 F.3d 1147, 1153 (9th Cir. 1999).

[66] Garrovillas v. I.N.S., 156 F.3d 1010, 1013 (9th Cir. 1998). For example, in *Singh v. Gonzales*, 204 F. App'x. 651 (9th Cir. 2006), the court reversed an immigration judge's negative credibility determination based on the asylum seeker's ignorance that two by-elections had taken place in India during a four year period, despite the statement of the political refugee that only village elections had occurred. The Court ruled, "Singh's lack of knowledge about these by-elections in districts other than his own does not go to the heart of his claim." *Id.* at 654.

[67] Vilorio-Lopez v. I.N.S., 852 F.2d 1137, 1142 (9th Cir.1988).

credibility assessment, particularly where "asylum hearings frequently generate mistranslations and miscommunications."[68] Even a number of discrete inconsistencies could not be added together to cumulatively support an adverse credibility determination unless those inconsistencies concerned the heart of the asylum claim.[69] All these safeguards and limitations on adverse credibility assessments disappeared in 2005 with the passage of the Real I.D. Act.

The Real I.D. Act codified stringent rules for credibility, rules that the circuit courts, particularly the Ninth Circuit, had been at pains to disallow. In particular, the Act permits immigration judges to deny asylum applications based on inconsistencies that are unrelated to the claim itself.[70] The Act was largely championed by James Sensenbrenner, a Republican congressman from Wisconsin, who almost annually submitted bills to limit both legal and illegal immigration.[71] The bill was first proposed in 2004 as a way to fight terrorism. It was originally part of the Fairness in Immigration Litigation Act[72] and then the 9/11 Recommendations Implementation Act.[73] Both bills failed to pass. The anti-asylum sections were then grafted onto a bill concerning enhanced driver's licenses, the Real I.D. Act, which was, in turn, attached to a must-pass piece of legislation, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act (P.L. 109-13). That bill was passed by both the House and the Senate, but the Senate version deleted the Real I.D. Act provisions. The differing drafts were then sent to a conference committee. Although there was widespread opposition to the reform and narrowing of asylum provisions, it was impossible to vote against the Real I.D. Act without voting against the entire appropriations bill.[74]

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[68] Bandari v. I.N.S., 227 F.3d 1160, 1165-66 (9th Cir. 2000).

[69] Pal v. I.N.S., 204 F.3d 935, 940 (9th Cir.2000).

[70] 8 U.S.C. § 1158 (b)(1)(B)(ii)-(iii) (explaining the "burden of proof" requirements of "sustaining burden" and "credibility determination" for aliens seeking asylum status).

[71] An exception to this was his support of an increase of the number of temporary visas available for highly-skilled workers in 2007. H.R. 4065, 110th Cong. (1st Sess. 2007).

[72] S. 2443, 108th Cong. (2004); H.R. 4406, 108th Cong. (2d Sess. 2004)

[73] H.R. 10, 108th Cong. (2d Sess. 2004).

[74] "Every member of Congress who supported providing much needed funding to our troops and relief to the Indonesia tsunami victims was forced to vote in favor of the REAL ID Act, an unrelated bill." Senator Daniel Akaka, Statement on the Real ID Act (Dec. 8, 2006) (transcript available at Senator's website) http://akaka.senate.gov/statements-and-speeches.cfm?method=releases.view&id=7380278b-9c5e-483d-994c-6f8b4aabf7fe). "Because H.R. 1268 is an emergency supplemental appropriation, it is considered 'must pass' legislation." RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 28 (2005).

Sensenbrenner and his colleagues saw asylum applications as a leading method for terrorists to enter the United States.[75] In fact, the section of the house conference bill concerning changes in asylum rules was entitled, "Title 1 Amendments to Federal Laws to Protect Against Terrorist Entry, Section 101 Preventing Terrorists from Obtaining Relief from Removal."[76] This is curious, because, unlike entry as a tourist or a student or secret entry without inspection, the asylum seeker immediately places himself in the FBI database, his biometrics (photo and fingerprints) are sent to the FBI and his address is registered with the USCIS. While asylum seekers in the early 1990's had more freedom, the Illegal Immigration Reform and immigrant responsibility Act (IIRAIRA)[77] and the Antiterrorism and Effective Death Penalty Act (AEDPA),[78] both

[75] "Mr. Chairman, I want to quote from the 9/11 Commission staff report entitled 9/11 and Terrorist Travel. The staff found that a number of terrorists have abused the asylum system and that once terrorists have entered the United States, their next challenge was to find a way to remain here. The *primary* method was immigration fraud, concocting bogus political asylum stories when they arrive." 150 CONG. REC. H8896, (statement of Rep. Sensenbrenner) (2004) (*emphasis added*). Sensenbrenner misquoted the report to make it appear that seeking asylum was a primary method used by terrorists to remain in the United States. The report, in fact, stated:

> Once in the United States terrorists and their supporters tried to get legal immigration status that would permit them to remain here, primarily by committing serial, or repeated, immigration fraud, by claiming political asylum, and by marrying Americans.
>
> Thus seeking asylum and marriage to American citizens were methods used to obtain permanent immigration status, in addition to immigration fraud. The report did find that terrorists abused the immigration system to remain in the United States, but contains no evidence that the pre-Real I.D. Act rules on credibility resulted in incorrect grants of applications. Throughout the report, numerous examples are given of the ways in which terrorists took advantage of lax monitoring and, especially, of lethargic case processing practices, which gave the terrorists years of presence while waiting for applications to be reviewed.

Nat'l Comm'n on Terrorist Attacks Upon the United States, 9/11 and Terrorist Travel: Staff Rep. at 45-61 (2004),

An example of the negligent managing of cases is that of Abdel Hakim Tizegha, who filed a claim for political asylum in the United States on the grounds that he was being harassed by Muslim fundamentalists. He was released pending a hearing, which was adjourned and rescheduled five times. His claim was finally denied two years after his initial filing. His attorney appealed the decision, and Tizegha was allowed to remain in the country pending the appeal. Nine months later, his attorney notified the court that he could not locate his client and a warrant of deportation was issued. *Id.* at 53.

[76] H.R. 418, 109th Cong. (1st Sess. 2005).

[77] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

[78] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

enacted in 1996, had already instituted many protections against the type of abuse previously practiced by fraudulent asylum seekers.[79]

Despite the 1996 protections, Sensenbrenner remained motivated by the stories of those terrorists involved in the 1993 World Trade Center bombing, a number of whom had applied for asylum. The Terrorist Travel Staff Report recounts the immigration history of each of these men, and it is disturbing reading.[80] Nonetheless, Sensenbrenner's analysis displays far more heat than light:

> There is no one who is lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheik who wanted to blow up landmarks in New York, the man who plotted and executed the bombing of the World Trade Center in New York, the man who shot up the entrance to the CIA headquarters in northern Virginia, and the man who shot up the El Al counter at Los Angeles International Airport. Every one of these non-9/11 terrorists who tried to kill or did kill law-abiding Americans was an asylum applicant. We ought to give our judges the opportunity to tell these people no and pass the bill.[81]

Despite Rep. Sensenbrenner's statement, not one of the terrorists he referred to, nor any of the terrorists discussed in the 9/11 Report, who applied for asylum received it.[82] Sensenbrenner's intentional misstatements ironically reveal that his own testimony lacks credibility.

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[79] These included mandatory detention for many applicants at time of entry, a requirement that applications be filed within one year of entry, expedited processing of asylum cases, and an eight-month delay for issuance of work authorization.

[80] Just one paragraph from TERRORIST TRAVEL STAFF REPORT establishes that the terrorists pursued strategies of prussian complexity:

> For example, Yousef and Ajaj concocted bogus political asylum stories when they arrived in the United States. Mahmoud Abouhalima, involved in both the [1993] World Trade Center and landmarks plots, received temporary residence under the Seasonal Agricultural Workers (SAW) program, after falsely claiming that he picked beans in Florida. Mohammed Salameh, who rented the truck used in the bombing, overstayed his tourist visa. He then applied for permanent residency under the agricultural workers program, but was rejected. Eyad Mahmoud Ismail, who drove the van containing the bomb, took English-language classes at Wichita State University in Kansas on a student visa; after he dropped out, he remained in the United States out of status.

Nat'l Comm'n on Terrorist Attacks Upon the United States, *supra* note 75, at 47.

[81] 151 CONG. REC. H460, (daily ed. Feb. 9, 2005) (statement by Rep. Sensenbrenner).

[82] This conclusion is confirmed by the Congressional Research Service. MICHAEL JOHN GARCIA ET. AL., CONG. RESEARCH SERV., RL 32754, IMMIGRATION: ANALYSIS OF MAJOR PROVISIONS OF THE REAL I.D. ACT OF 2005 4 (2005). Nor were the terrorists in Bali (2002), Madrid (2004) or London (2005) refugees or asylum seekers. Ninette Kelley, *International Refugee Protection Challenges and Opportunities,* 19 INT'L J. REFUGEE L. 401 (2007).

Nor was there any evidence discovered by congreesional staff studying immigration and terrorism that prior rules on credibility (granting asylum seekers a presumption of credibility and refusing to allow judges to find an applicant in credible due to inconsistencies and contradictions that do not go to the heart of the matter) assisted in the entry or permanent resident status of any terrorists.[83] Further, asylum law procedures were significantly revised prior to the passage of the Real I.D. Act. In 1995, a 150-day waiting period was instituted for work authorization requests of asylum seekers, replacing the prior policy of granting work authorization at the time of filing for asylum.[84] That, together with an expedited process for asylum determination, made asylum an unattractive option for a "sleeping terrorist."

One is reminded of The Immigration Marriage Fraud Amendments, which were enacted into law on the basis of a flawed survey that wrongly stated that 35% of all immigration marriages were fraudulent.[85] Subsequently, a federal district court evaluated the background of the legislation and found that high-ranking INS officials were aware of and even discussed the unreliability of the survey.[86]

In using the rules of the Real I.D. Act, Congress may have sought to provide a "scientific basis" for judicial decisions concerning the truthfulness of the asylum seeker by the analysis of data, with the understanding that even a minor error can render the testimony completely invalid. However, scientists themselves would never agree to such a regimen.

In fact, in the sciences, it is not unusual for discover some data that are discordant with the findings that satisfy expectations, fit a curve or fulfill a formula. Statisticians counsel scientists on whether to accommodate or reject discordant data, known as outliers, in order to safeguard the bulk of the data. An outlier is an observation that surprises the researcher, an extreme value compared to the other data values.[87] Thus, the decision to consider an observation to be an outlier is subjective: what might not surprise one researcher might startle another.[88] Typically, an outlier is extreme because it does not fit the assumptions of the researcher, based either on a hypothesis that may have been created prior to the analysis of data, or on an initial view of the assembled data.[89]

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[83] Nat'l Comm'n on Terrorist Attacks Upon the United States, 9/11 and Terrorist Travel: Staff Rep. at 46 (2004).

[84] 8 C.F.R. § 208.7.

[85] James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?* 24 FLA. ST. U. L. REV. 679 (1997).

[86] *Id.* at 699.

[87] VIC BARNETT & TOBY LEWIS, OUTLIERS IN STATISTICAL DATA 32 (3rd ed.) (1994).

[88] *Id.*

[89] For example, if all the data points but one sit on a certain curve in a graphed environment, the researcher is confronted with the challenge of how to deal with the outlying point. In the infancy of statistics, such points were summarily eliminated.

The Real I.D. Act, in contrast, counsels judges to reject a witness's entire testimony due to the presence of irrelevant conflicting statements.[90] This seems to flow from an expectation that asylum seekers will possess an ability to report facts with accuracy that rivals science. But this is too high a standard to hold anyone to. How then, are tribunals to decide the validity of asylum seekers' claims? Statistical recommenda-

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Contemporary practice emphasizes the importance of analyzing outliers for their source and validity and then determining how to accommodate the outlier into a revised hypothesis or reject it. Thus, in estimating the average educational attainment of undocumented immigrants, a social scientist might hypothesize that the subjects possess no post-secondary education. Data showing several informants with PhDs might easily "jar" the researcher and lead to labeling this data as outliers. At that stage, he or she would have several choices, such as retesting those subjects who were the sources of the alarming observations to determine whether there was an error in measuring or recording the information. Any flawed observations could then be replaced. If the observation could not be retaken or if the observation is not shown to be invalid, the researcher might choose to accept an outlier by revising his hypothesis to accommodate errors, without sacrificing the utility of his hypothesis, or to reject discordant observations that appear statistically unreasonable. F. J. Anscombe, *Rejection of Outliers,* 2 TECHNOMETRICS 123, 124 (1960).

The presence of the outliers might also suggest that his initial hypothesis should be revised to better explain the presence of the surprising data. In the case of undocumented immigrants, he might revise his hypothesis to account for individuals who entered without inspection as children and continued their education through college, as well as highly educated refugees who, lacking passports or visas, were smuggled into the United States. Thus, the hypothesis becomes more robust, as it is able to accept inherent variation in the data, rather than omit valid outliers. *Id.* It is also argued that it is preferable to design a hypothesis that tolerates flawed data, since human frailty suggests that errors will occur: "In no field of observation can we entirely rule out the possibility that an observation is vitiated by a large measurement or execution error." *Id.* at 127. For a discussion of the value of using statistical methodology to evaluate standards of legal proof, *see* David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiable Naked Statistical Evidence and Multiple Causation,* 7 L. & SOC. INQUIRY 487, 487 (1982).

[90] CREDIBILITY DETERMINATION – Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), 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. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

INA § 208(b)(3)(B)(iii) (2006 & Supp. II 2009).

tions about outliers suggest that certain errors or contradictions may be discarded, rather than abandoning the entire claim. This was the practice endorsed by the majority of circuit courts in the United States prior to the Real I.D. Act.[91]

Has the Real I.D. Act changed anything? Some authors deny it, seeing the act as merely the codification of prevailing case law.[92] As discussed below, however, the federal courts tended to have a more holistic approach to inconsistencies and contradictions. The asylum provisions of the Real I.D. Act vitiate commitments made under the United Nations Convention by unduly restricting the rights of refugees to protection. In the next section of this article, it will be established that the Real I.D. Act's heightened credibility test ignores current scientific understanding of the way the brain functions in recalling prior experiences. Most importantly, the detailed credibility provisions distract immigration judges from fully analyzing the asylum claim. Rather than using their best efforts to discover whether an individual is likely to suffer persecution if forcibly returned to his home country, the Act advises judges that they can exclude any applicant whose story has even minor inconsistencies, inaccuracies, contradictions or omissions "whether or not they go to the heart" of the asylum seeker's claim.[93]

As a result of the Real I.D. Act, immigration judges in the United States deny applications for asylum on the basis of credibility determinations that they would previously have granted. Ninth Circuit Judge Diarmuid O'Scannlain leaves no doubt about the impact of the Real I.D. Act in his opinion in *Jibril v. Gonzales*.[94] The successful asylum applicant in that case claimed he and his brother had remained in Somalia to collect family belongings while the rest of his family fled to Kenya. According to Jibril, the militia came to his home and shot and killed his brother; they then shot Jibril in the stomach, kicked him repeatedly, and left him for dead. The immigration judge found the testimony to be inconsistent, implausible, and evasive. Although Judge O'Scannlain complained that appellate courts should apply "the properly deferential standard of review set out in the statute, [rather than] picking at the minutiae underpinning of an adverse credibility finding,"[95] and although he applauded the prospective relief offered by the Real I.D. Act,[96] his careful review of the claimed inconsistencies revealed error in the immigration judge's analysis and in the weight given the inconsistencies that may have been

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[91] *See* cases cited in *supra* note 16.

[92] Deborah Anker, Emily Gumper, Jean C. Han, & Matthew Muller, *Any Real Change? Credibility and Corroboration After the Real I.D. Act*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 2008-09 EDITION 357 (Richard J. Link ed., 2008).

[93] INA § 208(b)(3)(B)(iii) (2006 & Supp. II 2009).

[94] Jibril v. Gonzales, 423 F.3d 1129 (9th Cir. 2005).

[95] *Id.* at 1136.

[96] *Id.* at 1138 n.1.

present. O'Scannlain concluded, "[t]he implications of this provision [the Real I.D. Act] . . . are clear: were it in effect today, we would be obliged to deny Jibril's petition."[97] These comments demonstrate not only the value of appellate oversight of credibility assessments, but also the dangers of placing too much weight on credibility determinations.

In another pre-Real I.D. Act case, this one before the Eleventh Circuit, the judges reversed an adverse credibility determination by an immigration judge, who found inconsistencies in the account of persecution involving membership in Falun Gong.[98] Since the inconsistencies were not material, they could not serve as the basis for an adverse credibility determination. However, the decision notes that under the Real I.D. Act (which did not affect this case, because it was filed prior to the enactment of the Act) no such relevance to the claim would be required for inconsistencies to sustain an adverse credibility determination.[99] Similarly, the BIA was compelled to sustain the appeal of an adverse credibility determination where an immigration judge in the Sixth Circuit mistakenly applied the credibility standards of the Real I.D. Act to a case that was filed prior its enactment.[100]

Despite widespread outcry from immigrant rights advocates, the Real I.D. Act has been fully accepted by the circuit courts, including the Ninth Circuit, which was the target of the law.[101] The court pointedly noted, "Congress thus made asylum litigation a little more like other litigation."[102] This is unfortunate because the evidentiary challenges facing refugees are not like those of plaintiffs, defendants, criminals, or other litigants. The new "business as usual" approach in the United States is regrettable.

There may, however, still be fight left in the Ninth Circuit. In *Shrestha v. Holder*,[103] the court presented its first detailed analysis of the Real ID Act's credibility requirements. This case concerned a college dropout from Nepal who, on being placed in removal, claimed that he was tortured by Maoist rebels and feared returning to his country. Because of inconsistencies, problems with demeanor, and lack of corroboration, the immigration judge ruled that Shrestha was not credible and denied his claims.[104] The BIA found no clear error in the credibility findings of the judge and affirmed the denial.[105]

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[97] *Id.*

[98] Zheng v. U.S. Attorney Gen., 171 F. App'x 799, 803 (11th Cir. 2006).

[99] *Id.* at 805 n.6.

[100] S-B-, 24 I. & N. Dec. 42, 42 (BIA 2006).

[101] Aden v. Holder, 589 F.3d 1040 (9th Cir. 2009).

[102] *Id.* at 1045.

[103] Shrestha v. Holder, 590 F.3d 1034 (9th Cir. 2010).

[104] *Id.* at 1038.

[105] *Id.* at 1038, 1039.

The Ninth Circuit similarly sustained the immigration judge's holding, but took the opportunity to enunciate a four-part test for analyzing the Real I.D. Act's credibility provisions. While the Real I.D. Act's "totality of the circumstances" standard permits all reasonable factors to be considered in making a credibility determination, the court concluded that this imposed the requirement that an immigration judge "not cherry pick solely facts favoring an adverse credibility determination while ignoring facts that undermine that result."[106] The court then revived the rulings of two pre-Real I.D. Act cases[107] from other circuits to caution that evidence should be selectively examined for credibility.

Because the court denied the appeal,[108] the discussion about credibility and the Real I.D. Act is dictum. However, it will likely guide the Ninth Circuit in its future analyses of the issues. Three interpretive rules were enunciated. First, unsurprisingly, "an utterly trivial inconsistency, such as a typographical error, will not by itself form a sufficient basis for an adverse credibility determination." Second, the asylum seeker's explanation for a perceived inconsistency must be considered. Third, the immigration judge must provide specific reasons for his or her adverse credibility determination.[109] A close analysis of the case reveals that immigration judges will not be challenged if they have provided detailed explanation for their adverse credibility determinations, including specific reference to inconsistencies and other evidence in the record that support the finding. The primacy of credibility remains intact, with the immigration judge having total authority over the issue absent clear error.

C. *Australia*

Australia's official stance on the issue of credibility provides a more benevolent view concerning inconsistencies, omissions, and contradictions than do the cases and statutes of the other nations surveyed. The Refugee Review Tribunal (RRT) is the statutory body which provides a final, independent, merits review of decisions made by the Department of Immigration and Citizenship to refuse to grant protection visas to non-citizens within Australia, or to cancel protection visas held by non-citizens in Australia. The official *Guidance on the Assessment of Credibility* states that, unless the Tribunal is able to make a confident finding that the applicant's account is not credible, "it must make its assessment on the basis that it is possible, although not certain, that the Applicant's account of past events is true."[110]

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[106] *Id.* at 1040.

[107] Hanaj v. Gonzales, 446 F.3d 694, 700 (7th Cir. 2006); Shah v. Attorney Gen. of U.S., 446 F.3d 429 (3d Cir. 2006).

[108] Shrestha, 590 F.3d at 1049.

[109] *Id.* at 1043-44.

[110] Migration Review Tribunal & Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, 1, para. 2.6 (2008), http://www.mrt-rrt.gov.au/Conduct-of-

In addition, the Tribunal is constrained to consider only those contradictions or inconsistencies in the evidence that are "material to an Applicant's claims and would lead to an adverse credibility finding."[111] This standard appears to accord closely to pre-Real I.D. Act U.S. rules that contradictions and inconsistencies must go to the heart of the asylum claim to serve as grounds for a finding against credibility. In addition, the Tribunal was constituted to conduct the review hearing in an inquisitorial, not an adversarial, environment. In fact, representatives of the Minister of Immigration are ordinarily not allowed to be present at the oral hearings.[112]

Finally, even if an applicant's testimony is deemed not credible, the government still has a duty to consider whether a well-founded fear of persecution exists on any other basis.[113] Section 420(2) of the Migration Act of 1958 directs the Tribunal, in its review of the case, to "act according to substantial justice and the merits of the case."[114] This was previously been interpreted to require a limited duty on Tribunals to search out evidence on it own, where it was in a better position to obtain such information and could do so without undue difficulty.[115] In 1999, this affirmative duty was greatly weakened.[116] The Tribunal is left with the right to investigate, but no express obligation to do so. Thus, despite val-

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reviews/Conduct-of-reviews/default.aspx. In the past government leaders have criticized the Tribunal for being too partial to asylum seekers. An immigration minister stated:

> The tribunals and courts may well see their role to defend the rights of individual applicants and I do not dispute that tribunals and courts do need to have regard to the rights of individual applicants. However . . . [t]he legislation not only establishes those rights but balances them against budgetary and other wider community interests.

Speeches to the 1997 National administrative Law Forum (Canberra, May 1, 1997) and Faculty of Law, University of Sydney, Continuing Legal Education Conference (Sydney, June 6, 1997) *quoted in* Susan Kneebone, *The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role?*, 5 AUSTL. J. ADMIN. L. 78, 79 (1998). This points out the tension as seen by politicians, between economics and the duty of non-refoulment.

111 Migration Review Tribunal & Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, 1, para. 5.1 (2008), http://www.mrt-rrt.gov.au/Conduct-of-reviews/Conduct-of-reviews/default.aspx.

112 Kneebone, *supra* note 110, at 84.

113 Abebe v Commonwealth (1999) 197 CLR 510 (Austl.) per Gummow and Hayne JJ at 578 and Kirby J at 584.

114 Migration Act 1958 (Cth) pt 7 div 3 s 420 (Austl.).

115 Sun v Minister (1997) 81 FCR 71 (Austl.), Minister v Singh (1997) 74 FCR 553 (Austl.).

116 Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611.

uable aspects of the Australian system, too much reliance appears to be placed on credibility assessments.[117]

D. *Canada*

Canada has, for many years, taken a sympathetic view toward asylum seekers and the role of credibility. While a tribunal is permitted to exclude an applicant's testimony based on a lack of credibility,[118] there is a well-recognized line of cases from the Federal Court of Appeal that a Refugee Board must not be zealous in making adverse credibility assessments.[119]

In contrast to U.S. courts which are bound by the Real I.D. Act, Canadian courts grant the asylum applicant a presumption that he is telling the truth.[120] Among the reasons to doubt the applicant's credibility, however, are an analysis by the fact finder of the witness's firmness of memory and his ability to resist modification of his recollection.[121] In contrast to U.S. denials of applications because a relevant fact has been fabricated, Canadian judges are urged not to reject such applications. In a precedential line of cases, the Federal Court of Appeal warned that a Refugee Board "must not be over-vigilant in its microscopic examination of the evidence of persons who testify through interpreters and tell tales of horror in whose objective reality there is reason to believe."[122] It is no surprise, then, that the most thoughtful analysis of the role of credibility

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[117] Guy Coffey, The Credibility of Credibility Evidence at the Refugee Review Tribunal, 15 INT'L J. REFUGEE L. 377 (2003).

[118] Dan-Ash v. Minister of Emp't & Immigration (1988), 93 N.R. 33, 35 (Can. F.C.A.).

[119] Attakora v. Minister of Emp't & Immigration (1989), 99 N.R. 168, 169 (Can. F.C.A.) (holding that "the Board's zeal to find instances of contradiction in the applicant's testimony"). *See also* Rajatnam v. Minister of Emp't & Immigration (1991), 135 N.R. 300, 307 (Can. F.C.A.).

[120] Ranjit Thind Singh v. Minister of Employment and Immigration, (1983) 52 N.R. 67 (F.C.A.) at 6 ("When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.").

[121] Graciano de Jesus de Almeida, IAB T87-9819X at 4.

[122] *See, e.g.,* Attakora v. M.E.I. (File A-1091-87 (1989)) at 4. Canadian federal courts have further concluded that inconsistencies found must be significant and be central to the claim, Mahathmasseelan v. Minister of Emp't & Immigration, 137 N.R. 1 (Can. F.C.A.), and must not be exaggerated. In *Djama v. The Minister of Employment and Immigration*, the judge concluded:

> In our opinion, the members of the panel clearly exaggerated the import of a few apparent contradictions, hesitations or vague statements which they succeeded in detecting in the comments of the claimant, and they could not on that basis alone treat his testimony as a whole as being the testimony of a liar. It seems to us that their fixation on the details of what he stated to be his history caused them to forget the substance of the facts on which he based his claim.

Djama v. The Minister of Employment and Immigration (A-738-90).

determinations in asylum cases was prepared by the Refugee Protection Division of Immigration and Refugee Board. "Assessment of Credibility in Claims for Refugee Protection," published in 2004, is a 125-page review of case law and expert opinions. The report makes clear that a board is not to search out inconsistencies or exaggerations "for evidence that [the claimant] lacks credibility, thereby 'building a case' against the claimant, and ignore the other aspects of the claim."[123] The conclusions, issued a year before the Real I.D. Act, present a stark contrast to emerging U.S. law and practice.

E. *United Kingdom*

As in the U.S., credibility determination is the paramount consideration in many asylum cases in the United Kingdom.[124] And as in the U.S., legislators in the United Kingdom have increasingly sought to restrict the admission of refugees by establishing guidelines that "tend to favour the negative assessment of credibility."[125] However, the intent of the applicant is more important for the decision maker in the United Kingdom. Thus, credibility assessments are to be based on evidence of intentional dissembling rather than on mistaken inconsistencies.[126] It is also recognized that inconsistencies drawn between initial interview notes and an

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[123] Refugee Protection Division, *Assessment of Credibility in Claims for Refugee Protection*, IMMIGRATION AND REFUGEE BOARD, 1, 12 (2004), *dsp-psd.pwgsc.gc.ca/collection_2007/irb-cisr/MQ21-42-2004E.pdf*. The report continues:

> Even if there are inconsistencies or exaggerations, the panel must still go on to assess the evidence which is found to be credible and determine the claim as the totality of the evidence warrants. In other words, the rejection of some of the evidence, or even all of the claimant's testimony, on account of lack of credibility does not necessarily lead to the rejection of the claim: the claim must still be assessed on the basis of the evidence that was found to be true, including documentation relevant to the claimant's situation and evidence regarding persons who are similarly situated.

Id. at 14.

[124] *See, e.g.*, SW v. Sec'y of State for the Home Dep't, [2004] UKIAT00037 1, [20] ("In some cases, but by no means all, the issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails.").

[125] Robert Thomas, Assessing Credibility of Asylum Claims: EU and UK Approaches Examined, 8 EUR. J. MIGRATION & L. 79, 80 (2006).

[126] Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004, c. 19, § 8 (U.K.). The act is surprisingly similar in many ways to the Real I.D. Act:

> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> (2) This section applies to any behaviour by the claimant that the deciding authority thinks—
>
> (a) is designed or likely to conceal information,
>
> (b) is designed or likely to mislead, or

applicant's testimony or the applicant's formal application, where a tribunal dwells on details and not on the substance of the claim, may lead to an inappropriate finding of incredibility.[127]

Of continuing importance is the 1994 *Chiver* case, which established the right of a judge to grant asylum despite significant inconsistencies.[128] The Immigration Appeals Tribunal ruled, "[i]t is perfectly possible for an adjudicator to believe that a witness is not telling the truth about matters, has exaggerated his story to make his case better, or is simply uncertain about matters, and still to be persuaded that the centre piece of the story stands."[129] Thus, such deficiencies are not a bar to an adjudicator believing other parts of an applicant's story.

Even where an asylum seeker is found to have acted in bad faith, he is entitled to asylum if otherwise qualified. The Court of Appeal in *Danian v. Secretary for the Home Department*[130] held that the principle of bad faith had no relevance in asylum cases. The Court found no support for any implied limitation in the Refugee Convention. Judge Buxton stated:

> It is very difficult to state what is the 'wrong,' in terms of fraud or breach of the law, committed by a person such as Mr. Danian; and . . . in any event . . . the Convention does not incorporate a judgmental or disciplinary element, so as to deprive a person who has once behaved fraudulently from further protection.[131]

Thus, the United Kingdom appears to provide more "benefit of the doubt" than the United States, including a distinction in practice between those who are deemed to have intentionally misstated facts and those whose errors are innocent. Nonetheless, credibility assessment remains a primary issue.

This review of increasingly restrictive rules for credibility assessments in the United States and other receiving nations illustrates the growing challenge for protection facing refugees. Because the United Nations treaties on asylum seekers remains silent on the details of selection procedures, each country receiving immigrants has the authority to determine how asylum applications are judged.[132] With each country having its own

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(c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.

[127] Tony Talbot, *Credibility and Risk: One Adjudicator's View*, 10 IMMIGR. L. DIGEST 29 (2004).

[128] SSHD v. Chiver, UKIAT 10758 (1994).

[129] *Id.* at 8.

[130] Danian v. Sec'y of State for the Home Dep't, [2000] Imm. A.R. 96 (U.K.).

[131] *Id.* at para 30.

[132] As international law scholar James Hathaway notes: "To the extent that a pervasive sense of obligation can be located within the agreed structure for the conduct of international relations or across systems of domestic governance, a universally binding legal standard may be declared to exist." JAMES HATHAWAY, RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 17-18 (2005).

rules for asylum determinations, it is no surprise that it is more difficult to receive asylum in some nations than in others.[133] As a result, countries with more restrictive policies may end up granting refugee status to a smaller number of refugees, thereby encouraging asylum seekers to prefer certain receiving countries. The Commission of the European Communities warned of this a decade ago, and recommended the establishment of uniform standards of proof to curtail forum shopping by asylum seekers.[134] To this end, the Qualifications Directive[135] and Asylum Procedures Directive[136] were promulgated and signed by a majority of EU member nations. Nonetheless five years later, according to a recent study by the UNHCR, those European nations are still disparate in their asylum procedures.[137] Of relevance to the present discussion, the UNHCR noted, "[a] common trend identified through the audit of decisions in several states was that negative decisions were often made on credibility grounds, and did not apply the criteria of the Qualification Directive to facts."[138]

Regardless of the disparate regulations between countries, all have set a high standard of proof for credibility, indicating that they view the mistake of wrongful approval of asylum costlier than the error of denial of

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[133] For an up-to-date comparison of diverse asylum approval rates among the twenty-seven members of the European Union, *see* the ongoing compilation of statistics by Eurostat, *available at* http://epp.eurostat.ec.europa.eu/statistics_explained/images/8/8d/Table_4_Decisions_instance_EU27_EFTA_2009.JPG. Each country has a different rate for positive decisions in asylum cases, ranging from a low of less than 4% for Ireland to 48% for Denmark.

The disparity in approvals among selected U.S. Immigration judges dwarfs the international distinctions. In New York City, for example, one immigration judge has denied 96.7% of the asylum claims submitted, while another in the same court has denied only 9.8%. The reader can keep track of the "odds" of approval on the website, Syracuse University, *Immigration Reports*, TRAC IMMIGRATION (Sept. 19, 2011, 8:17 PM), http://trac.syr.edu/immigration/reports, which regularly updates the scorecards of all immigration judges.

[134] Towards Common Standards On Asylum Procedures, SEC (1999) 271 final (Mar. 3, 1999).

[135] Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on minimum and procedures for granting and withdrawing refugee status, OJ L 326/13 (also known as Asylum Procedures Directive). Council Directive 2004/83, of the Council of the European Union on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC).

[136] Council Directive 2005/85, of the Council of the European Union on Minimum and Procedures for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13 (EC).

[137] U.N. High Comm'r for Refugees, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice 1 (2010).

[138] *Id.* at 14.

asylum to a true refugee. This is the result, not of epistemic considerations, but of "truth-thwarting rules."[139] Beyond these shortcomings, the credibility assessment policies embraced by the U.S. and most other nations discussed here are seriously flawed because they are based on a faulty understanding of the nature of memory and of the ability of judges to separate truthful witnesses from liars.

IV. Alternate Standards for Credibility

Scholars who have dedicated themselves to the topic of credibility have concluded that there is a disjunction between validity and credibility.[140] In other words, just because something is true does not mean that it is believed, and merely because it is believed does not mean that it is true. Underlying the common sense view of credibility is the misconception that the search for credibility is the search for the truth. For psychologists, however, credibility is generally considered as an element of persuasiveness, not of truthfulness. And the persuasiveness of a witness and his message is based on his standing, attractiveness, and power over the listener.[141] Skillful rhetoric can create credibility where none should be.[142] Given the typical racial, ethnic, educational, and economic differences between asylum seekers and judges, their testimony is likely to be judged as less persuasive. Similarly, if cultural norms do not favor a statement, it will not be recognized, even in the face of overwhelming proof.[143] Returning to our problem concerning the credibility of asylum applicants, this casts doubts on the primacy of credibility determinations as a mechanism for deciding the claims of refugees.

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[139] Laudan, *supra* note 24, at 213.

[140] Does the acceptance of a theory by a social group make it true? The only answer that can be given is that it does not. There is nothing in the concept of truth that allows for belief making an idea true . . . . But if the question is rephrased and becomes: does the acceptance of a theory make it the knowledge of a group, or does it make it the basis for their understanding and their adaptation to the world? — the answer can only be positive.

David Bloor, Knowledge and Social Imagery 43 (2d ed. 1991).

[141] Michael J. Saks & Reid Hastie, Social Psychology in Court 165 (1978).

[142] The recent exposure of swindler Bernard Madoff and the literary example of King Lear's preference for Goneril and Regan over his truthful daughter Cordelia both illustrate the common tendency to err in our trust of clever words. *See* Shapin, *supra* note 25, at 255.

[143] That human activity is the cause of climate change is energetically supported by 97 percent of established scientific experts in the field. The general public, however, is largely skeptical. *See* the detailed examination of the work of 1,372 climate researchers and their publications in William R. L. Anderegg, James W. Prall, Jacob Harold & Stephen H. Schneider, *Expert Credibility in Climate Change*, 107 PNAS 12107 (2010).

A. *Criminal Defendants*

The tests and the standard of proof for the credibility of asylum seekers vary in the United States from the standards for witnesses used in civil and criminal courts. In a criminal case, the defendant is presumed to be innocent. The prosecutor has a high standard of proof; he must provide evidence that convinces the jury beyond a reasonable doubt that the defendant is guilty. In civil cases, the suing party has a lower standard of proof; the preponderance of the evidence and the burden of proof may shift back and forth during the trial as each side produces new material evidence. Each side and each witness is presumed truthful on the basis of their oath to tell the truth. In an asylum case, however, the applicant is not presumed to be credible, bears the burden of establishing his claim to asylum, and must corroborate any oral testimony, with little right to require the government to divulge evidence in its possession that may support the applicant's claims.[144]

How are standards of proof for material facts in a criminal trial relevant to this discussion? In a criminal case, a high standard of proof, coupled with the exclusion of many categories of evidence,[145] favors the defendant. In contrast, the high standard of proof in an asylum hearing disadvantages the asylum applicant. In a criminal case, the apportionment of proof requirements is calculated to prefer an incorrect acquittal over an incorrect guilty verdict.[146] In an asylum case, the opposite is true: an incorrect denial of asylum is designed to be favored over an incorrect grant of asylum.

Asylum seekers with meritless claims and culpable criminal defendants both have a reason to lie. Therefore their credibility is relevant in determining the admissibility of their testimony. Cognizant of the human and structural frailties of our justice system and its inability to always detect the truth, *innocent* defendants and *valid* refugees may also decide to lie or at least exaggerate or minimize facts to be assured a verdict in their favor. Thus an innocent criminal defendant may manufacture an alibi, when he believes that an honest recounting of his activities may sound less convincing. Similarly, a refugee, fearing repatriation and a return to persecution, may embellish his story to gain sympathy because of concern his story of persecution may not be strong enough. There is, however, a salient difference in the legal response to these situations due to the role of credibility in the burden of proof.

The central issue in a criminal case is to determine whether or not to believe the prosecutor's claim that the criminal defendant is guilty. The prosecutor bears the burden of proving this beyond a reasonable doubt. In an asylum case, although each nation that is a signatory to the refugee

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144 8 C.F.R. § 1208.11(a) (2010).

145 Examples include spousal testimony and involuntary confessions. For a full discussion, *see* LAUDAN, *supra* note 24.

146 *Id.* at 10.

convention has accepted the duty not to return refugees to their countries of origin, the burden is on the asylum seeker to convince the receiving nation that he or she meets the requirements for refugee status. Whether or not the criminal defendant is credible, the prosecutor still bears the burden of proving criminal culpability.[147] In contrast, if an asylum seeker's testimony is found not to be credible, he is generally denied asylum.[148]

The distinction is made clearer by more closely examining the alternatives. There are, in both criminal trials and asylum cases, four outcomes in determining credibility: a correct finding about the credibility of the innocent defendant or deserving asylum seeker, an incorrect finding about the credibility of the innocent defendant or deserving asylum seeker, a correct finding of the lack of credibility of the culpable defendant or fraudulent asylum seeker, and an incorrect finding of the lack of credibility of the culpable defendant or fraudulent asylum seeker. The impact of each of these determinations varies for the defendant in a criminal case and the asylum seeker.

A correct finding of the credibility of an innocent defendant's testimony will likely result in a finding of innocence and freedom since the burden is on the prosecutor to establish guilt beyond a reasonable doubt. Similarly, a correct finding of the credibility of a valid refugee's testimony may well result in a grant of asylum, since credible testimony can be sufficient, on its own, for a grant.[149]

An incorrect credibility determination about an innocent criminal defendant does not alter the burden of proof.[150] Just because the defen-

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[147] As part of his argument in support of a precursor to the Real I.D. Act, Rep. Hostettler of Indiana misstated the burden of proof in criminal cases compared to asylum cases. "If a criminal jury can sentence a United States citizen who is a criminal defendant to life imprisonment or execution based on not believing the American [sic] citizen's defendant's story, certainly an immigration judge can deny asylum on the same basis." 150 Cong. Rec. H8897 (daily ed. Oct. 8, 2004) (comments re: the 9/11 Recommendations Implementation Act, HR 10 by Rep. Hostettler).

[148] There have been a few noteworthy exceptions to this. In *Camara v. Ashcroft*, (378 F.3d 361 (4th Cir. 2004)), the asylum seeker's testimony was found to be unworthy of credit. Her testimony was inconsistent and contradictory. Despite her lack of credibility, substantial evidence corroborated her claim that she had been persecuted, warranting approval of her claim for withholding of removal. Inspecting this case from another perspective, it appears possible that the claimant was not lying, but was suffering from trauma, which caused serious memory problems, as discussed in Section V of this article.

[149] The Real I.D. Act imposes severe corroboration requirements, even for credible testimony, if it is reasonable for the applicant to produce such evidence. Real I.D. Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2006 & Supp. II 2009).

[150] "The burden to prove the elements of the crime beyond a reasonable doubt never shifts; it remains on the prosecutor throughout the entire trial." AM. J. EVIDENCE § 185.

dant is a liar or has a poor memory the responsibility of the government does not lessen to prove that he is guilty of a specified crime. In sharp contrast a wrongful determination that a true asylum seeker is not credible will generally doom the chances of the applicant to avoid return to persecution. Thus, the outcome of error in credibility determinations may harm the valid asylum seeker more than it will hurt the innocent criminal defendant.

A correct finding of a lack of credibility concerning the testimony of a culpable defendant or an unqualified asylum seeker will result in imprisonment for the first and return to the country of nationality for the second. They both receive justice.

An incorrect finding of credibility for a culpable criminal defendant may result in his avoidance of punishment, while an unentitled asylum seeker may unfairly receive the right to remain in the receiving nation, to obtain social services specified for refugees, and, according to the sponsors of the Real I.D. Act, plan acts of terror.

What lessons can be learned from a comparison with the standards used to determine the truth in U.S. criminal law cases?[151] Larry Laudan, who has made a detailed study of standards of proof in criminal law, concluded that the current collection of evidence rules in criminal law, which exclude many facts establishing guilt, are conducive to false verdicts, generally resulting in incorrect acquittals.[152] In other words, rules concerning spousal witness privilege, the fruit of the poisonous tree doctrine, and other exclusionary doctrines make it far more likely that a culpable defendant will not be found guilty. In contrast, in removal proceedings in the United States and other common law countries, there are few exclusionary rules.[153] This allows the government to submit hearsay evidence, evidence about collateral matters, and other submissions, which might be inadmissible in a criminal trial, that will injure the credibility of the asylum seeker. Thus the asylum seeker is in a worse position than is a criminal defendant in establishing and preserving credibility.

B. *Crime Victims*

Instead of viewing an asylum seeker as an immigration violator who is seeking pardon, based on persecution, would it not be better to consider the asylum seeker the victim of a crime? Would an asylum seeker be treated better if he or she possessed the same protections as a crime victim? The comparison is sound when the asylum seeker claims to be the

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[151] A comparison to the specific standards used in civil and canon law is beyond the scope of this article.

[152] LAUDAN, *supra* note 24, at 10.

[153] Removal proceedings are civil in nature and do not strictly follow conventional rules of evidence. See Barcenas, 19 I. & N. Dec. 609, 611 (BIA 1988). Evidence is admissible as long as it is probative and its use is fundamentally fair. Ramirez-Sanchez, 17 I. & N. Dec. 503, 505 (BIA 1980).

victim of an unlawful act. A difference, of course, is that the defendant is the originating country, which faces no direct penalties if the asylum seeker's claim is judicially granted.[154]

Success in establishing the victim analogy might afford refugees a higher standard of credibility, though not necessarily. Although victims' rights protections have been instituted in many jurisdictions, they do not directly concern the presumption of the victim's credibility.[155] Instead they primarily provide opportunities for notification, participation, and treatment. While victims today are initially entitled to a presumption of credibility at trial, a prosecutor may be reluctant to authorize a case unless he or she is convinced that the victim will be able to stand up to the challenges of testifying in court, which includes being both a credible witness and able to withstand cross-examination, delays, plea bargaining, publicity, and so on.[156] There is, however, a major incentive for the prosecutor to treat victims and their claims with respect: the official's concern for re-election.[157]

Of closer similarity is the treatment given to alleged victims of sexual assault. Like the asylum seeker, much of the evidence of the crime may come from the complainant's own testimony.[158] And both are alleging violation of their very right to autonomy and personhood. If valid, both claims reveal violence upon a vulnerable individual. Inappropriate credibility attacks are used in both types of cases. Blackstone's precursor, seventeenth century British jurist Matthew Hale, commented on rape with language that could easily be applied to an asylum case:

> It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent . . . . [W]e may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with

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154 It is possible, in certain cases, for victims to sue foreign governments in U.S. federal court for harm pursuant to the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

155 Steven Joffee, *Validating Victims: Enforcing Victims' Rights thorough Mandatory Mandamus*, 1 UTAH L.R. 241, 245 (2009).

156 In an empirical analysis of prosecutors' decisions to charge a suspect, Celesta Albonetti found that prosecutors were reluctant to go forward if, in their consideration, the victim would not appear credible to jurors. Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y. REV. 291, 299-300 (1987).

157 Markus Dubber, Victims In The War On Crime 164 (2002).

158 Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CTLR 435, 441 (2009).

> so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.[159]

Doubt about the rape victim's credibility continues today, pushed by concerns for the fundamental freedoms of the defendant. Thus numerous rape shield laws that limit the right of a defendant to inquire into a rape victim's sexual history have been declared invalid in the United States and Canada.[160] The prosecution of sexual assault, unlike that of other offenses, focuses on the credibility of the complainant, with "a preoccupation with aspects of the complainant's behaviour which are not immediately related to the circumstances of the offence."[161]

Just as for those claiming asylum, credibility becomes the major issue in the search for the truth of sexual assault. Some writers have argued that the reason for the difference between the focus on credibility for a rape complainant and those alleging other crimes is based on the misogynistic view of women as sexual enchanters.[162] The credibility of complainants of sexual assault is questioned to protect the defendant from seductresses and the credibility of the asylum seeker is questioned to protect the citizens of the U.S. from terrorists. In each case, the nexus is flawed. In American culture, there is no legal command that women guard their modesty and prevent men from having feelings of temptation. And there is little evidence, despite the claims of Rep. Sensenbrenner, that terrorists would seek asylum as a primary means of remaining in the U.S.[163] The only true issue in the first case is one of consent and in the second, whether there was or will be persecution.

How is the credibility of victims attacked in rape cases compared to those in asylum cases? For complainants in a rape trial, in the past, it was not their reputation for truthfulness or inconsistencies in their statements that was considered as much their level of purity. Evidence of lifestyle was considered to determine whether they were credible in saying that they did not consent.[164] As a result, "rape shield" laws were passed in

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[159] MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635, 636 (1800).

[160] JAMES HODGSON & DEBRA KELLEY, SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA 108 (2002).

[161] Bruce A. MacFarlane, *Historical Development of the Offence of Rape*, *in* 100 YEARS OF THE CRIMINAL CODE IN CANADA: ESSAYS COMMEMORATING THE CENTENARY OF THE CRIMINAL CODE OF CANADA 174 (Woods & Peck eds., 1993).

[162] SUSAN S.M. EDWARDS, FEMALE SEXUALITY AND THE LAW 149-50 (1981) ("In a rape trial, it is invariably the case that a model of female sexuality as agent provocateur, temptress or seductress is set in motion.").

[163] To do so would subject them to fingerprinting, FBI oversight and frequent court visits, none of which would arise from using a tourist visa or any other form of entry.

[164] THOMAS GARDNER & TERRY ANDERSON, CRIMINAL LAW 293 (2008).

many jurisdictions to prohibit the introduction of evidence of the accuser's past sexual conduct.[165]

In the current legal climate, asylum seekers are not presumed to be credible and their credibility is judged by their ability to recite without deviation the claims in their declarations and to repeatedly provide dates of incidents that took place several years in the past. The presumed credibility of the accuser of sexual crimes has been strengthened by rape shield laws. As the discussion of memory processes below suggests, similar shield laws protecting asylum seekers from unreasonable attacks on credibility based on errors in testimony on collateral matters or on details would provide appropriate protections for these victims of persecution.

V. Psychological Insights into Memory and Credibility

Do the accumulated case law and statutory mandates, such as the Real I.D. Act, assist in determining whether a refugee's testimony is credible and whether the individual faces the risk of persecution if refouled? Psychological studies have revealed that the current primacy of credibility determinations is flawed for two reasons. First, recalled memories are not by nature necessarily coherent, consistent, or accurate and secondly, even when they are, neither laypersons nor experts have sufficient ability to correctly conclude whether the witness is telling the truth or lying. It is therefore injudicious to rely on credibility determinations as a primary tool for resolution of asylum petitions.

One writer on credibility opines that a computer can never replace a judge in determining the credibility of information submitted to the court.[166] However, the following summary of extensive psychological investigations into memory and into the assessment of credibility during the last twenty years imply that it would be most unusual for the average person's testimony to satisfy the high expectations of the framers of the Real I.D. Act and other asylum-related credibility standards. It is useful in examining such credibility assessments to divide the analysis of the credibility of refugee testimony into several sequential elements. The first concerns the capacity of the refugee to receive, store, and retrieve sensory information about an experience. The second focuses on the judge or immigration official and on his or her ability to elicit, receive, interpret, and evaluate the information stated by the refugee.

A. *Inconsistency of Memory*

Of the work reviewing psychological studies of memory, two stand out: one concerning memory issues associated with legal matters, and the second specifically concerning credibility determinations. In the most comprehensive study of memory and its role in forensic applications, a report

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[165] Andrew Karmen, Crime Victims: An Introduction to Victimology 285 (2008).

[166] Aron, *supra* note 13, at 55.

of the British Psychological Society concluded that "common sense" intuitive ideas about memory are inaccurate.[167] In an extensive literature review concerning credibility, Dr. Juliet Cohen found "credibility assessment by the determination of accuracy and reproducibility of an asylum seekers' recall is not a valid component of asylum decision making."[168]

The British Psychological Society's exhaustive literature review reported the following findings about memory that are relevant to the discussion of credibility:

Memories for experienced events are always incomplete and often inaccurate. "Memories are time compressed fragmentary records of experience."[169] Therefore it should be expected that witness testimony will exhibit gaps and will omit details. The guidelines caution that accounts that are complete are unusual. Gaps in recall of an event should not be considered an indication of accuracy or validity of the testimony. Cohen's review of studies of ordinary people's autobiographical memories during successive interviewing corroborates the conclusions of the British Psychological Society.[170]

Memories typically contain only a few highly specific details.[171] The guidelines reported that details of times and dates are normally limited, as are detailed recalls of spoken conversations. Repeated tests have strongly indicated that "vividness of mental imagery is poorly related to memory accuracy."[172] This may be because those with vivid memories are in fact individuals with more imaginative capabilities, who can facilely imagine details for generally remembered experiences. This is not to

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[167] The British Psychological Research Bd., *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (2010), http://www.psychiatry.ox.ac.uk/epct/emily_holmes/articles/bpsmemorylaw [hereinafter GML]. In summarizing the detailed report, the editors, after cautioning, "[c]urrent theoretical thinking is at a stage that supports probabilistic but not absolute statements," nonetheless strongly asserted, "[b]ecause they are based on widely agreed and acknowledged scientific findings they provide a far more rigorously informed understanding of human memory than that available from commonly held beliefs. In this respect they give courts a much firmer basis for accurate decision-making." *Id.*

[168] Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies, and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 309 (2001).

[169] GML, *supra* note 167, at 2.

[170] Cohen, *supra* note 168, at 294-97.

[171] GML, *supra* note 167, at 2.

[172] *See, e.g.*, S. J. McKelvie, *The VIIIQ as a Psychometric Test of Individual Differences in Visual Imagery Vividness: A Critical Quantitative Review and a Plea for Direction.* 19 J. OF MENTAL IMAGERY, 1–106 (1995); D. Reisberg, D., L.C. Culver, F. Heuer & D. Fischman, *Visual memory: When Imagery Vividness Makes a Difference*, 10 J. OF MENTAL IMAGERY, 51–74 (1986).

imply that such inaccuracies are necessarily created with malicious intent, but come naturally in response to questioning.[173]

Studies have also challenged widely-held beliefs in the accuracy of "flashbulb memories."[174] It is common to recall specific and vivid memories of surprising and emotionally powerful events, such as the death of John F. Kennedy or the 9-11 attacks. For this reason, many expect that a refugee will have an accurate indelible record of the experiences that have recreated within them a fear of return to their country of nationality.[175] However, numerous studies show that, while these experiences may give rise to memories that are vivid and consistent over time,[176] they are not necessarily factually valid recollections of what actually occurred.

Memories include both conscious and non-conscious comprehension of an experience.[177] Rather than a faithful video-capture of an event, the content of memory will often include a range of feelings, extraneous details, vague generalizations and certain memories of earlier experiences that were excited by the event, such as memories of similar experiences. And all of this content can change each time the event is recalled.

People can remember events that they have not in reality experienced.[178] Imagining something happening can lead to distortions in memory, with an individual confusing an imagined event for something that actually happened. In general then, the only way to establish the truth of a memory is with independent corroborating evidence.

This does not necessarily entail deliberate deception. For example, an imagined event may be a blend of different events, or include fictitious details that make the story more authentic.[179] Speakers may also create

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[173] Ira E. Hyman, Jr. & Joel Pentland, *The Role of Mental Imagery in the Creation of False Childhood Memories*, 35 J. MEMORY & LANGUAGE 101 (1996).

[174] Tiziana Lancianoa, Antonietta Curcia & Gün R. Seminb, *The Emotional and Reconstructive Determinants of Emotional Memories: An Experimental Approach to Flashbulb Memory Investigation,* 18 MEMORY 473-85 (2010).

[175] Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment,* 68 FORDHAM L. REV. 917, 943 (1999).

[176] *E.g.*, S.L. Hornstein, A.S. Brown & N. Mulligan, *Long-Term Flashbulb Memory for Learning of Princess Diana's Death*, 11 MEMORY 293-306 (2003).

[177] *Id.* at 294.

[178] *Id.*

[179] We often share the need to make sense of random occurrences as well as of our entire life path. Erik Erikson argued that this is a most important part of our lives: making sense through stories to achieve "integrity" by blending together one's accomplishments and failures into a meaningful life story. Is it therefore a surprise that largely truthful witness testimony sometimes diverges from the actual facts, or that judges expect the refugee's story to be coherent? For a further discussion of man's predilection for storymaking *see*, ERIK ERIKSON, CHILDHOOD AND SOCIETY 232 (1950) and MIHALY CSIKSZENTMIHALYI, FLOW 132-33 (1990).

false memories that seem more plausible to them.[180] Authors of an academic investigation into the accuracy of recall found that "human memory is subject to a considerable variety of influences giving rise to low accuracy and frequent distortion of target memory information.[181] In their experimentation into accuracy of recall, they found that only one-third of the subjects tested accurately recalled a target stimulus.[182] They concluded that "considerable caution should be maintained in accepting patients' long-term memory recall in the absence of external validation."[183]

Remembering is a constructive process.[184] "Memories are mental constructions that bring together different types of knowledge in an act of remembering. As a consequence, memory is prone to error and is easily influenced by the recall environment, including police interviews and cross-examination in court."[185] In other words, memories can change even during the course of examination in a courtroom.[186] Of profound significance is the result of the study of female refugees from Kosovo and Bosnia performed by Jane Herlihy and her colleagues at the Center for the Study of Emotion and the Law.[187] The women they interviewed had already received refugee status prior to arriving in the United Kingdom, as members of groups interviewed in Eastern Europe. They therefore had no reason to embellish their stories or to alter them. However, up to 65% of the details changed between interviews, with women suffering from Post-Traumatic Stress Disorder (PTSD)[188] showing the highest level of inconsistency in their testimony.

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[180] DAVID MIDDLETON. & STEVEN D. BROWN, THE SOCIAL PSYCHOLOGY OF EXPERIENCE: STUDIES IN REMEMBERING AND FORGETTING 19 (2005).

[181] Michael Kirch & Donald Levis, *An Assessment of Two Clinical Imagery Procedures to Elicit in a Non-Patient Population Recall of a Reportedly Forgotten Long-Term Memory: An Exploratory Study*, 25 J. OF MENTAL IMAGERY 63 (2001).

[182] *Id.* at 76.

[183] *Id.*

[184] GML, *supra* note 167, at 10.

[185] *Id.* at 2.

[186] Robert G. Winningham et al., *Flashbulb Memories? The Effects of When the Initial Memory Report was Obtained*, 8 MEMORY 209, 214-15 (2000).

[187] Jane Herlihy, Peter Scragg & Stuart Turner, *Discrepancies in Autobiographical Memories — Implications for the Assessment of Asylum Seekers: A Repeated Interviews Study*, 324 BMJ 324–27, (2002). For a carefully-designed and executed study of the effects of stressful situations on memory (during simulation of prisoner of war conditions as part of military training), *see* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. L. & PSYCHIATRY 265 (2004).

[188] For the complete definition of PTSD, *see* American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders § 309.81 (4th ed. 2002).

B. *The Inaccuracy of Credibility Assessments*

The second sequential psychological element in the analysis of truth and memory is ability of the listener to correctly elicit, receive, interpret and evaluate testimony about memory. It is acknowledged that some witnesses provide more veracity in their recounting of memories, either because they have better recall than others or because they are endeavoring to speak truthfully. But how does a judge or jury know what testimony is true? Civil, criminal, and administrative law procedures rely on the common sense of fact finders to determine whether witnesses' version of the past is accurate.

It is widely accepted that the average person has a remarkable ability as a "lie-detector."[189] According to the finding of one legal scholar, many prosecutors believe that determining credibility "is common sense."[190] However, detailed and repeated testing of evaluation of testimony has proven that laypersons and even experts are poor detectors of the truth.[191]

First, there are serious errors in the "common sense" views on credibility, including the common sense belief that a detailed, vivid recollection is more accurate than a vague statement of an occurrence. A witness who responds with detail is generally believed to be more accurate in his

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[189] The U.S. Supreme Court has restated this several times. A fundamental premise of our criminal trial system is that "the jury is the lie detector." United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, (1891); United States v. Scheffer, 523 U.S. 303, 313 (1998). *See generally*, Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 26 CARDOZO L. REV. 2557 (2008); Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165 (1990).

[190] Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment,* 68 FORDHAM L. REV. 917, 943 (1999).

[191] For a thorough discussion, *see* George Fisher, *The Jury's Rise as Lie Detector,* 107 YALE L.J. 575, 578-79 (1997). After a detailed examination of cases and psychological investigations, the author concludes:

> Our unguarded confidence that jurors are up to this task is the more remarkable for being so probably wrong. There is little evidence that regular people do much better than chance at separating truth from lies. We tend to rely on worthless clues and to misread others . . . . By permitting the jury to resolve credibility conflicts in the black box of the jury room, the criminal justice system can present to the public an 'answer' – a single verdict of guilty or not guilty – that resolves all questions of credibility in a way that is largely immune from challenge or review. By making the jury its lie detector, the system protects its own legitimacy.

Id.

memory than someone who only offers a general description.[192] However, "the recall of a single detail or of several highly specific details does not guarantee that a memory is accurate or even that it actually occurred."[193] Nonetheless, most people prefer a vivid anecdote over statistical evidence.[194] For example, responding to clear statistical proof that smoking endangers health, a person may defend the habit, saying, "I know a guy who smokes a pack a day and he's 90 years old." This preference for personal anecdote can pose real dangers, as discussed in a CIA study warning that intelligence analysts may disregard reliable aggregated data in favor of detailed individual accounts.[195] In the same way, fact finders are often persuaded by a vivid detail into making incorrect decisions about a witness's credibility.[196]

In determining credibility of testimony, fact-finders will often consider the inherent plausibility of the applicant's or witness's account. It is assumed that the layman can, in fact, judge the truth of a statement by how plausible it is to the listener.[197] However, what is implausible to one person may be another's dreadful memory of a real experience.[198] The extreme differences in culture, experience, and often economic and educational backgrounds make plausibility determinations even more suspect.

From the above conclusions and the exposition of the function and characteristics of memory, it is evident that the Real I.D. Act's requirement for coherent, unchanging, detailed testimony, coupled with the asylum seeker's burden of proof and presumption against credibility, create a barrier too high to be surmounted by many valid asylum seekers.

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[192] Brad E. Bell & Elizabeth F. Loftus, *Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details,* 56 J. OF PERSONALITY & SOC. PSYCHOL. 669, 669-79 (1989).

[193] GML, *supra* note 167, at 2.

[194] John Reinard, *The Empirical Study of the Persuasive Effects of Evidence: The Status After Fifty Years of Research.* 15 HUM. COMM. RES. 3, 26 (1988).

[195] RICHARDS J. HEUER, JR., PSYCHOLOGY OF INTELLIGENCE ANALYSIS 116 (1999).

[196] Due to the effect known as "trivial persuasion," the inclusion of a trivial or irrelevant but highly specific detail may markedly raise the perceived credibility of the evidence. GML, *supra* note 167, at 12.

[197] As Circuit Court Judge Alex Kozinski explained,

> Whether to credit the testimony of a witness always involves some uncertainty, yet we must constantly make decisions without full information. We often rely on common sense – our understanding of how the world works – to fill the gap. When you meet a man on the Brooklyn Bridge, you are much more likely to believe that he owns the clothes on his back than the bridge on which you are standing. The majority bars the BIA from drawing precisely this kind of inference when a petitioner testifies that the elected president of a foreign country is, in fact, a spy for the Russians.

Abovian v. I.N.S., 257 F.3d 971, 979 (9th Cir. 2001).

[198] *See, e.g.,* Fiadjoe v. Atty. Gen., 411 F.3d 135, 158 (3d Cir. 2005).

C. *The Effect of Trauma on Memory, Testimony, and Credibility*

While critical analysis has firmly established that memory is plastic for ordinary individuals, psychologists have found that individuals who have suffered trauma have much less ability to accurately encode, store, and retrieve memories.[199] Cohen's literature review details the challenges to memory recall and presentation by individuals suffering from maladies common to victims of persecution: weight loss, malnutrition, minor traumatic brain injury, stress, sleep loss, depression, and chronic pain.[200] Each of these conditions can impair accurate recall.

Those who have experienced significantly serious trauma may suffer from PTSD.[201] This can result in abnormal difficulty recalling specific autobiographical memories.[202] According to The United Nations High Commissioner, 39% to 100% of the refugee groups interviewed present with PTSD, compared to 1 % of the general population.[203]

A judge may discount his role in dealing sensitively with the victim of trauma by supposing that, if such a problem exists, health professionals will be assisting the asylum seeker with emotional, social, and psychological difficulties.[204] While Masindo Mambo, a Canadian psychologist, pleads for immigration judges and officials to "move beyond a formalistic law approach to a humanistic hearing policy that takes into account the deep human suffering experienced by refugees,"[205] such a change demands an entire restructuring of the asylum system, something so monumental that it is unlikely to occur.[206]

Even with expert testimony about PTSD, an asylum applicant is unlikely to establish that his or her testimony is credible. In *Zeru v. Gonzales*, for example, the immigration judge, the BIA and the First Circuit each considered reports of clinical psychologists, but concluded that the experts did not sufficiently establish that PTSD was the cause of each inconsistency.[207]

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[199] Victoria L. Banyard, *Trauma and Memory*, PTSD RES. Q., Fall 2011, at 2-3; Mambo T. Massinda, *Quality of Memory: Impact on refugee Hearing Decisions*, TRAUMATOLOGY, June 2004, at 131. Cohen, *supra* note 168, at 300.

[200] Cohen, *supra* note 168 at 300-07.

[201] *See e.g.*, Richard J. McNally et al., *Autobiographical Memory Disturbance in Combat-Related Posttraumatic Stress Disorder*, 33 BEHAV. RES. THER. 619 (1995).

[202] *Id.*

[203] U.N. Refugee Agency, UNHCR Resettlement Handbook, 233 (2002).

[204] Massinda, *supra* note 199*,* at 135-36.

[205] *Id.* at 132.

[206] The failure of the US Congress to pass the highly popular and appealing Dream Act illustrates the stalemate in immigration reform. For a discussion of the failure of the Dream Act, *see*, Joyce Adams, *Current Development: Development in the Legislative Branch: The Dream Lives on: Why the Dream Act Died and Next Steps for Immigration Reform,* 25 GEO. IMMIGR. L.J. 545 (2011).

[207] 503 F.3d 59 (1st Cir. 2007). The immigration judge admitted that PTSD could result in confusion about dates of events, but that "it would be very unusual to simply

Can attorneys overcome the challenges faced by victims suffering PTSD? Carol Suzuki has formulated detailed guidance to assist attorneys in understanding the effects of PTSD and in counseling their clients to achieve the best possible chance of receiving a positive credibility determination.[208] Through interview techniques such as chaining, asking open-ended questions, segmenting, and varying the order of information retrieval, attorneys can maximize the potential for eliciting a detailed, consistent story of persecution. [209] Even with the best counseling and preparation, however, the effects of PTSD may prevent refugees from presenting consistent and coherent testimony that satisfies the heightened credibility requirements established by the Real I.D. Act.

VI. JUSTIFYING THE PRIMACY OF A FLAWED TEST

If credibility assessments are inaccurate, why have immigration judges and appellate courts been willing to champion recitation-style credibility determinations as the mechanism for deciding cases, rather than seeking to decide whether the applicant has a well-founded fear of persecution after considering all admissible evidence? Similarly, if credibility assessment is such a poor determinate of the truth, why did the Real I.D. Act focus on heightened credibility requirements for asylum seekers? While it is argued here that the Real I.D. Act goes beyond the views of most judicial wisdom, it does not answer the central question of this article. Why do the U.S. and many other nations dwell on a mechanical tallying of minor discrepancies to make a determination about persecution? The usual answer is that credibility is accorded far more weight in judging asylum cases than in other cases because an asylum seeker's testimony is "often the only evidence the refugee can produce."[210]

The government, under the Convention and Protocol, has a duty to investigate and provide any evidence found that would be material to the

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forget that an event [in this case, a rape] occurred." *Id.* at 66. Other psychologists who interviewed Zeru failed in statements submitted on appeal to specifically address this, or they addressed forgetfulness of traumatic incidents but failed to specifically state that Zeru's confusion about the number of rapes was due to PTSD. *Id.* at 69. The courts were also unwilling to take seriously the psychologists' reports because they were based on interviews with Zeru and the immigration judge, having concluded that she was not a credible witness, gave little weight to expert opinion based on her testimony and demeanor. *Id.* at 71. The failure of the psychologists in *Zeru* provides an important lesson for forensic psychologists seeking to convince the legal fact finders of the bona fides of their client.

[208] Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering From Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235 (2007).

[209] *Id.* at 266-79.

[210] Anker, *supra* note 92, at 359.

asylum seeker's claim of persecution.[211] Thus, while the refugee may only have his testimony, the government may be able to produce additional evidence. Unfortunately, in the author's experience during the past ten years, the government has never offered into evidence before trial the evidence it holds concerning the asylum seeker's case, preferring instead to retain it for the sole use in impeaching the applicant's testimony. Given this unfairness and the lack of psychological evidence in favor of the accuracy of credibility assessments, why are such determinations growing in importance? At least four reasons can be identified: it is easy, it protects the judge from moral culpability, it furthers anti-immigration views and it limits the reviewability of the immigration judge's decision.

A. *Answering the Easy Question, Rather Than the Hard One*

Because there is not enough evidence in most asylum cases to be certain that an applicant will be persecuted on return to his country of origin, an immigration judge is called upon to "grapple with the more arcane elements of refugee status determination."[212] In contrast to considering the more challenging elements of asylum, credibility determinations are presumed to be disposable by common sense.[213]

Of particular weight in contemporary cases is the presence of internal inconsistencies. The appeal of such inconsistencies is their tangibility. They sit there in black and white in the record and are far clearer than the mystery of past events and "the more nebulous idea of prospective risk."[214] The current method used by U.S. immigration judges in determining credibility is simple to perform and easy to watch. Sitting with a yellow highlighter in hand, listening to the asylum seeker's testimony, the judge often follows the previously submitted declaration of the asylum seeker and marks over each inconsistency between the written declaration and the oral testimony.[215] Because the declaration may have been written down several years before the hearing, by an attorney or an English-speaking friend of the applicant, it is not surprising that there are

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[211] Each signing party has taken on an affirmative duty to refugee protection under Article 33 of the UN Convention and Protocol. *See supra* notes 4 & 5 and accompanying text.

[212] Sweeney, *supra* note 29, at 724.

[213] The contrast might remind the reader of the distinction described by Pascal between the intuitive and the mathematical mind. BLAISE PASCAL, PENSÉES 182 (Penguin Classics 1995).

[214] Sweeney, *supra* note 34, at 25.

[215] *See, e.g.,* Xiu Xia Lin v. Mukasey, 534 F. 3d 162 (2d Cir. 2008). And such inconsistencies can have little relevance to the claim: "[E]ven where an IJ relies on discrepancies or lacunae that, if taken separately, concern matters collateral or ancillary to the claim, the cumulative effect may nevertheless be deemed consequential by the fact-finder." Tu Lin v. Gonzales, 446 F.3d 395, 402 (2d Cir. 2006) (citation and internal quotation marks omitted).

inconsistencies. In addition, the government attorney, as part of his or her adversarial duties, often introduces, during cross-examination, conflicting facts that are collateral to the asylum claim, to compel the applicant to make inconsistent or contradictory statements.[216]

B. *Protecting Judges from Moral Responsibility*

Another reason that immigration judges may put so much emphasis on credibility determinations is that it offers the judge protection against the frightening possibility that his or her wrong determination might doom a refugee to future persecution, while a ruling based on the applicant's inconsistencies frees the judge from any moral responsibility. It is the applicant's fault for failing to recite testimony identically each time. Thus, the judge is blameless if he denies the application. Thomas Aquinas, writing in the thirteenth century, stated,

> Suppose that false witnesses have incriminated a man, but the judge knows that he is innocent. The judge must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this, he should remit him for judgment by a higher tribunal. Even if this is impossible, the judge does not sin if he pronounces sentence in accordance with the evidence. For in that case, it is not the judge who puts an innocent man to death. Rather, it is those who declared him to be guilty.[217]

In the asylum case, the applicant himself 'sins' due to his failure to accurately tell his story, causing his own banishment. It is not the judge's responsibility.[218]

C. *Furthering Anti-Terrorist Policies*

A third explanation for reliance on minor inconsistencies as a justification for denying asylum applications is a fear of admitting alien terrorists, which colors adjudication of many immigration cases.[219] In March 2002,

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[216] In federal courts, impeachment based on contradiction on "collateral matters" is prohibited under FED R. EVID. 403. Inferences that the witness is not credible because of minor contradictions are not allowed because the activity is "especially likely to waste time, create confusion, abuse witnesses, and inject prejudice." CHRISTOPHER MUELLER AND LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES 542-43 (2008). It is argued, however, that even the Federal Rules of Evidence provide "indifferent and incomplete treatment" of credibility issues, relying instead on flawed popular conceptions about memory and truthful testimony. Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 363-68 (2010).

[217] St. THOMAS AQUINAS, SUMMA THEOLOGICA, 2-2 q. 64 art. 6(1988).

[218] It deserves a footnote to point out the similarity between the asylum process with the credibility challenge and the ancient trial by ordeal. In both, the decision is largely random, but is approved of by the community.

[219] "[T]errorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution

following the September 11, 2001 terrorist attacks, the Director of the Immigration Service, with the guidance of Attorney General John Ashcroft, sent a memorandum to all regional and district directors "implementing a zero tolerance policy with regard to INS employees who fail to abide by Headquarters-issued policy and field instructions" and warning that INS officers, supervisors, and even district and regional directors who failed to abide by issued field guidance or other INS policy would be "disciplined appropriately."[220] The unwritten message was clear: if you are responsible for the admission of one more terrorist, you will face firing and possible criminal penalties. The effect was immediate and obvious. When an officer was given discretion to decide or when interpretation of an ambiguity in the rules might expose an INS employee to censure, the individual would deny the application or petition. Denying a valid application held no danger of administrative censure, while mistakenly granting entry or extension or change of status to an alien promised significant harm to the official. Although the INS was dissolved and its employees and activities reorganized when the Department of Homeland Security was created, the impact of the zero tolerance policy is still felt in the actions of the Departments of Homeland Security and Justice.[221]

D. *Limiting Appellate Review*

In evaluating an immigration judge's rulings, appeals courts are constrained by various standards of review. In reviewing an immigration judge's ruling on a legal issue, federal courts are free to consider the issue *de novo*.[222] In reviewing findings of fact, on the other hand, appellate courts are limited in their evaluation. Usually this means that reviewing courts will overturn a finding of fact only when the finding was "clearly erroneous."[223] The U.S. Supreme Court has advised appellate courts that administrative findings of fact are conclusive unless the failed asylum applicant can show "that the evidence he presented was so compelling

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who have been unable to press meritorious claims for refugee status and other forms of relief." Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education's Responses to Terrorism*, 60 J. LEGAL EDUC. 373, 375 (2011). The same holds true for public perceptions of asylum seekers and political response in other countries. Fiona H McKay, Samantha L Thomas & R. Warwick Blood, *'Any one of these boat people could be a terrorist for all we know!' Media representations and public perceptions of 'boat people' arrivals in Australia,* 12 JOURNALISM 607-26 (2011).

[220] James W. Ziglar, *Zero Tolerance Policy Memorandum*, ILW.COM (March 22, 2002), http://www.ilw.com/immigrationdaily/News/2003,0616-zero.pdf.

[221] Paige L. Taylor, Immigration Law: Still Constrained by the "Culture of No, 37 TEX. TECH L. REV. 857 (2005).

[222] *See, e.g.,* D-Muhumed v. U.S. Att'y Gen., 388 F.3d 814, 817 (11th Cir. 2004); Hernandez-Gil v. Gonzales, 476 F.3d 803, 804 n. 1 (9th Cir.2007).

[223] *See, e.g.*, United States v. Bennett, 908 F.2d 189, 192 (7th Cir.1990).

that no reasonable fact-finder could fail to find the requisite fear of prosecution."[224] In immigration matters, Congress has clarified the clearly erroneous standard, stating that findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude the contrary."[225]

The BIA is similarly constrained. It reviews *de novo* pure questions of law and the application of a particular standard of law to those facts, but must honor the factual findings of an Immigration Judge unless they are clearly erroneous.[226] Credibility determinations by immigration judges are considered to be findings of fact. The immigration judge's accuracy in assessing credibility is therefore presumed to be high and is subject to the most limited oversight.

There are thus strong incentives for continuing to appraise testimony using the strict credibility determination measures promulgated by caselaw, statutory law, regulation and administrative procedures. However, the above discussion has hopefully convinced the reader that the current approach used by immigration officers and judges in assessing credibility has little scientific basis and that the search for truth should be conducted differently if signatories to the United Nations Convention sincerely wish to protect victims of persecution from refoulment.

VII. RECOMMENDATIONS

The paramount role of recitation-based credibility determinations in asylum adjudications produces a system that favors erroneous denials over incorrect approvals. While suggesting solutions to the asylum systems in other countries goes beyond the scope of this article, the following recommendations for changes in law, regulation, and policy in the United States are put forward with the hope that this may encourage fur-

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[224] I.N.S. v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992).

[225] 8 U.S.C. § 1252(b)(4)(B) (2006). This is similar to the standard of review in Canada:

> It is settled law that credibility findings are findings of fact and that decisions based on findings of fact cannot be set aside unless they meet the criteria set out in section 18.1(4)(d) of the *Federal Courts Act, 1998* (the Act) which provides the tribunal may set aside a decision if that tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it which is a standard of review akin to patent unreasonableness.

Afonso v. Canada, 2007 F.C. 51 (Can.).

[226] 8 C.F.R. § 1003.1(d)(3) (2010). These standards marked a change from the previous *de novo* review powers that the BIA possessed for both rulings of law and of fact and represented another response to the 9-11 terrorist attacks. 8 C.F.R. § 1003.1(d)(3)(iv) (stating that BIA will not engage in fact-finding, "[e]xcept for taking administrative notice of commonly known facts such as current events or the contents of official documents"); 8 C.F.R. § 1003.1(d)(3)(i) (stating that BIA will review IJ findings of fact only to determine clear error).

ther conversation and advocacy for more just asylum procedures in all receiving nations.

A. *Amend Credibility Provisions*

The Real I.D. Act amendments to the Immigration and Nationality Act worsened the disconnect between adjudication and non-refoulment. Congress can bring about an end to the injustice by revising the applicable provisions on credibility. Changes to the asylum laws would best include alterations to the burden of proof and the credibility requirements. Together, these sections limit the ability of the asylum applicant to obtain evidence of persecution and accordingly place far too much weight on his or her ability to repeat the same story with each recitation.

Specific changes suggested are:

> §208(b)(3)(B)(ii) SUSTAINING BURDEN – . . . In determining whether the applicant has met the applicant's burden, the trier of fact ~~may~~ must weigh the credible testimony along with other available evidence of record . . . .
>
> §208(b)(3)(B)(iii) CREDIBILITY DETERMINATION – Considering the inherent difficulties in assessing witness credibility, the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), 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.

B. *Reassign the Burdens of Production and of Proof*

Following the established rules of evidence, the person who is making an assertion bears the burdens of proof, production, and persuasion. In other words, if someone makes a claim to a court, he or she must establish it and furnish any necessary evidence to establish the facts asserted. In civil cases in the United States, the standard required for such proof is rather low (preponderance of the evidence) and once a judge determines that one party has introduced sufficient evidence, the burden of proof shifts to the other party, who may similarly submit his own evidence in an attempt to shift the burden back to his adversary. This tennis game of proof varies from criminal trials in which the burden of proof remains with the prosecution and the standard of proof (beyond a reasonable

doubt) is far higher than in civil cases. As Larry Laudan has concluded from careful examination of criminal trials in the United States, criminal defendants dramatically benefit from this coupling of static burden of proof and high standard of proof, along with the inadmissibility of a wide variety of evidence, such as spousal testimony and confessions without Miranda warnings.[227] Society appears to strongly favor false innocent judgments to false guilty determinations, preferring that a criminal go free, rather than that an innocent person be punished.[228]

In the asylum context, as discussed elsewhere in this article, the United Nations High Commissioner for Refugees has urged a similar standard, giving the asylum seeker the benefit of the doubt where there are contradictions or inconsistencies, or where testimony is not corroborated with documentary or witness evidence.[229] The United Nations High Commissioner on Refugees has also recognized that the duty of fact investigation is shared between the applicant and the adjudicator.[230]

While other jurisdictions have adopted these policies, the U.S. holds asylum seekers to a higher standard, evincing a preference for incorrect denials of asylum applications, to false approvals. Each time the government mistakenly denies an application, it is failing in its treaty obligation to protect refugees from refoulment.

In the United States, the burden falls solely on the applicant.[231] This violates the nation's duty to protect refugees from refoulment. Therefore the burden of proof should be allocated to both the applicant and the government. This would conform to the way the burden is shared by those who claim to be crime victims. The government carefully reviews the victim's statement, then performs its own investigation to determine the strength of the claim. Because the government does not act as the advocate for a victim, it is not the adversary as it is in asylum cases.

Because the Department of Homeland Security and Immigration and Customs Enforcement are primarily concerned with domestic issues, it

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227 LAUDAN, s*upra* note 24, at 218-24.

228 "In a criminal case . . . the interests of the defendant are of such magnitude . . . that they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself." Addington v. Texas, 441 U.S. 418, 423-24 (1979).

229 Office of the United Nations High Commissioner for Refugees, *supra* note 41, at paras. 199, 203.

230 *Id.* at para. 2.

231 BURDEN OF PROOF – (i) In general the burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

Aliens and Nationality, 8 U.S.C. § 1158(b)(1)(B) (2006).

might not be appropriate for those organizations to be selected to assist in impartially investigating the asylum seeker's claim. The State Department, on the other hand, is perfectly suited for this activity. With its foreign focus and intelligence gathering presence is in nearly every foreign country, it has the resources and expertise to meaningfully evaluate the particular claim of the applicant. These claims can be impartially appraised with reference to the materials that are collected by the State Department for its annual Human Rights Reports for specific countries.[232]

The procedures for such a change are already largely in place. Pursuant to federal regulation 8 C.F.R. §1208.11, the Department of Homeland Security is required to submit to the Department of State a copy of each asylum application. The State Department, however, has no responsibilities to review the application, or to share specific information from its files that may clarify the validity of a claim. It may, "at its option . . . provide detailed country conditions information relevant to eligibility for asylum or withholding of removal."[233] The State Department does not usually take any meaningful role in delving into its own intelligence to determine the bona fides of an individual claim, but merely provides the copies of Country Condition reports that are accessible on its website.

At present, asylum officers and immigration judges may ask the State Department to provide specific comments on individual cases.[234] The applicant has no similar right. Thus, even if the Department has specific information that may assist in establishing that an applicant has a valid claim, it cannot be not compelled to produce that information.[235] Even worse, at present, applicants are specifically denied the right to conduct discovery toward the State Department or other government agencies to obtain information that might reveal evidence helpful to their claim.[236]

It would be practical for the State Department to refer asylum applications to Embassy officials and the officers in Washington responsible for the Country Condition Reports. They would be required to submit any relevant documentary evidence concerning the applicant or a statement indicating that, after good faith review of the materials available to them, they could identify no relevant evidence concerning the applicant.

In a further step, the State Department could be formally charged with a duty to investigate the asylum seeker's claim at the applicant's request. With its staff and expertise, the State Department's Bureau of Democ-

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232 The State Department's annual Human Rights Reports for most countries can be found at http://www.state.gov/g/drl/rls/hrrpt/.

233 8 C.F.R. § 1208.11(a) (2010).

234 8 C.F.R. § 1208.11(c) (2010).

235 In a recent unpublished case argued by the author's former clinic, the beating and imprisonment of the applicant was discussed in one of the Country Reports, but the State Department made no mention of this when asked for their input.

236 8 C.F.R. § 1208.12(b) (2010).

racy, Human Rights, and Labor could function as the government's investigators for individual asylum cases. At present, the Bureau claims that it "strives to learn the truth and state the facts in all its human investigations, reports on country conditions, speeches and votes in the UN and asylum profiles."[237]

Furthermore, the State Department has a vested interest in assuring that the United States observes its treaty obligations.[238] The right of the asylee for protection from refoulment is co-equal with the responsibility of the United States to not return a qualified refugee to his originating country. Recall that the asylum seeker is alleging that he or she is a victim of violence committed by a foreign government or by those whom a foreign government is unwilling or unable to control. To conform to its responsibilities under the Convention and the Protocol, the United States has a burden to ascertain whether the individual does have a well-founded fear of persecution. This burden goes beyond adjudicating a claim based solely on the investigative abilities of the applicant. It should extend to an active probe into the facts of the case.

Some might worry that the State Department will skew its comments based on international policy objectives. This was a key problem when the State Department was itself the adjudicator of asylum claims, until reforms were instituted in 1990 and the adjudication was moved to the Immigration and Naturalization Service. The State Department, because of the Cold War, previously refused to admit that anti-communist dictatorships in Central America persecuted their citizens. U.S. government officials therefore refused to grant asylum to refugees fleeing El Salvador, Guatemala, and other anti-Communist countries.[239] Policies have changed dramatically since that time, however, and there is no reason for such concern, as the candor of the detailed and critical Country Reports display.

Thus, the language of the first subsection of INA §208(b)(1)(B)(i) should be changed as follows:

> IN GENERAL – The burden of proof is ~~on~~ shared equally by the applicant and the Secretary of State to establish that the applicant is a refugee, within the meaning of section101(a)(42)(A).

Similarly, the applicable regulations should also be amended:

> 8 C.F.R. 1208.11 – Comments from the Department of State.

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[237] U.S. DEPARTMENT OF STATE, *Human Rights*, http://www.state.gov/g/drl/hr/index.htm (last visited Jan. 11, 2012).

[238] For a description of current rights and responsibilities for treaty observance by the State Department, *see* Harold Hongju Koh & Aaron Zelinsky, *Practicing International Law in the Obama Administration*, 35 YALE J. INT'L L. 4, 5 (2009).

[239] U.S. Churches, which provided sanctuary to refugees from El Salvador and Guatemala, brought a suit to protect themselves from criminal charges and to change government policy. The settlement of Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 810 (N.D. Cal. 1991) brought significant changes to asylum procedures.

(a) The Service shall forward to the Department of State a copy of each completed application it receives. ~~At its option,~~ At the request of the applicant, the Department of State ~~may~~ shall provide detailed country conditions information relevant to eligibility for asylum or withholding of removal and shall investigate the applicant's claims, while preserving the applicant's anonymity.

(b) ~~At its option,~~ The Department of State ~~may~~ shall also provide:

(1) An assessment of the accuracy of the applicant's assertions about conditions in his or her country of nationality or habitual residence and his or her particular situation;

(2) Information about whether persons who are similarly situated to the applicant are persecuted or tortured in his or her country of nationality or habitual residence and the frequency of such persecution or torture; ~~or~~ and

(3) Such other information as it deems relevant.

8 C.F.R.§1208.12 – Reliance on information compiled by other sources.

(b) ~~Nothing in this part shall be construed to entitle~~ tThe applicant is entitled to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State concerning any evidence that materially affects the applicant's asylum claim.

The above changes will encourage a more accurate determination of the validity of an asylum seeker's claim.

C. *Require That the ICE General Counsel Provide Relevant Evidence in a Timely Manner Prior to the Hearing*

Because of the premium placed on attacking credibility, ICE attorneys may choose to withhold evidence in their possession until trial, when they produce it during cross-examination solely to impeach the asylum applicant.[240] As discussed elsewhere in this article, most such evidence is not subject to Freedom of Information Act requests. The author has never received beneficial or corroborating evidence from government attorneys, which is understandable, given the adversarial stance.

An asylum seeker, nonetheless, has the statutory and constitutional right to obtain such evidence in a timely manner. 8 U.S.C. § 1229a(b)(4)(B) states, "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's behalf, and to cross-examine witnesses presented by the Government." To provide negative evidence at the tail end of a trial violates an asylum seeker's right to have a reasonable opportunity to examine such evidence

[240] For example: records from consular visa interviews, CBP admission records and USCIS officers' notes from affirmative asylum interviews.

and thus violates not only this statutory provision,[241] but also constitutional due process protection.[242]

Failure by the government to timely produce relevant evidence also violates regulatory requirements. 8 U.S.C. § 1240.1(c) provides, "the immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing." This implies that, for the asylum seeker to receive due process, the judge must receive pertinent evidence, not just from the applicant but also from the government. If the government withholds evidence that is helpful to the alien's claim, the trial does not meet the statute's requirement. Proceedings that do not satisfy this requirement violate the applicant's constitutional right to due process.[243] No regulatory or statutory changes would be required for this. It could be affected by direction from the Secretary of the Department of Homeland Security or by judicial decree.

D. *Shift the Standard of Proof for Testimony*

A judge should not lightly conclude that no word of a witness's entire testimony is credible because part of the testimony is not credible.[244] To do so is to resurrect the well-dead canon, *falsus in uno, falsus in omni* (false in one thing, false in all).[245] Before the Real I.D. Act this was not allowed. However, judges, in dictum, have fretted that the Real I.D.

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[241] *See e.g.*, Rehman v. Gonzales, 441 F.3d 506, 508 (7th Cir. 2006).

[242] The Fifth Amendment guarantees due process in removal proceedings. Reno v. Flores, 507 U.S. 292, 306 (1992).

[243] Rodriguez Galicia v. Gonzales, 422 F.3d 529, 538-39 (7th Cir. 2005).

[244] In another recent case represented by the author, the immigration judge ruled that the applicant exaggerated his experiences and was therefore not credible. However, the judge failed to consider whether an unexaggerated version of the declaration coupled with other evidence including country reports provided sufficient weight to satisfy the burden of proof for asylum. (unpublished written decision in the author's possession).

[245] Prevalent in the eighteenth and early nineteenth centuries in common law, only Georgia state law currently mandates this rule. 4 A.L.R 1077, 1078-83 (1949). *See also* Fisher, *supra* note 191. If repudiated by most jurisdictions, it is still an emotionally powerful guide for many. In the famous trial of O.J. Simpson, Detective Mark Fuhrman denied that he had used the word "nigger" in the ten previous years. The Defense then played an audio recording of Fuhrman frequently saying the word. Jurors, believing that Fuhrman, despite his sworn testimony, had planted the evidence of the murder at Simpson's house, found the defendant innocent. Several members of the jury said after the trial that after hearing the contradictions about the use of the epithet, they could not believe anything that Furman said. P. Thagard, *Why Wasn't O.J. Convicted? Emotional Coherence in Legal Inference,* 17 COGNITION & EMOTION 361–83 (2003).

Act's language would reinstitute it.[246] Any sections of testimony found credible, subject to corroboration requirements, should be accepted as fact. After discussing the evidence that is relied upon, the judge should then make a decision.

Current U.S. law requires that, to satisfy the burden of proving that the applicant qualifies as a refugee, he or she must present testimony that is credible, persuasive, and sufficiently refers to facts to establish persecution.[247] Given the challenges often faced by refugees in producing evidence and the duty of the government to protect a refugee from persecution, the burden of proof should be satisfied where any combination of country conditions, corroborating evidence, and credible testimony meets this burden. This change can be effected by an instruction from the Chief Immigration Judge to all other Immigration Judges to concentrate on the fundamental issue – whether the applicant has a well-founded fear of persecution, rather than whether the applicant can repeatedly recite the same story.

E. *Revise the Credibility Determination Guidance to Comply with Scientifically Accepted Understanding of Memory*

Immigration judges should not be allowed, as they are under the current rules of the Real I.D. Act, to eliminate from evidence all of an asylum seeker's testimony on the basis of minor inconsistencies, contradictions, or omissions, especially if they do not go to the heart of the claim. And even if the inconsistencies do go to the heart of the claim,

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[246] *See* Castañeda-Castillo v. Gonzales, 488 F.3d 17, 23 n. 6 (1st Cir.2007) (en banc) (a case in which the Real I.D. Act was not applicable, stating that under the Real I.D. Act a "fact-finder is entitled to draw the falsus in omnibus inference based on inaccuracies, inconsistencies, or falsehoods, without regard to whether they go to the heart of the applicant's claim") Jibril v. Gonzales, 423 F.3d 1129, 1138 n. 1 (9th Cir.2005). In contrast, in the dicta of a case decided after incorporation of Real I.D. Act provisions, the 7th Circuit in Kadia v. Gonzales, 501 F.3d 817, 821-22 (7th Cir. 2007) stated it doubted the Real I.D. Act reintroduced *falsus in unum. But see,* O-D-, 21 B.I.A. 1079 (1998), in which the BIA concluded that presentation by an asylum applicant of an identification document that was found to be counterfeit by forensic experts not only discredited the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicated an overall lack of credibility regarding the entire claim.

[247] The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

Aliens and Nationality, 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

it is very possible that a valid refugee is unable to provide the consistency the law demands. It is hoped that advocates will litigate for changes in the primacy and power of adverse credibility determinations, forcing the courts to acknowledge the fallacy of perfect recall and of the ability of persons to successfully act as lie-detectors. This change can also be effected by an instruction from the Chief Immigration Judge to limit reliance on credibility issues, looking instead to country conditions and the likelihood that the applicant's story is true.

F. *Admit Expert Testimony to Explain the Nature of Credibility*

As noted above, the jury, and the judge when acting as fact-finder, is not a reliable lie-detector. While expert witnesses are precluded from giving opinions about the truthfulness of a witness,[248] an expert can speak about credibility generally.[249] It is recommended expert testimony concerning credibility and memory be admissible in asylum cases

VIII. Conclusion

Removal from a country is a "harsh measure," especially for someone whose own country cannot or will not offer protection from persecution.[250] The issue before the officials of a host country is the determination of "whether the particular immigrant is a refugee or not."[251] Instead of asylum laws placing a prohibition on the state against removal of the immigrant, these laws, particularly those enunciated in the Real I.D. Act, prohibit the alien from remaining in the host country unless he is able to establish himself as a flawless storyteller. In particular, asylum and withholding of removal hearings should determine whether a person is entitled to protection under the UN Protocol Relating to the Status of Refugees, not whether the person has the perfect memory of a savant.[252] Above all, review of an asylum application should be conducted to determine whether the applicant is entitled to protection, not primarily a hunt for an excuse to remove him.[253]

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[248] Fed R. Evid 702, the rule holds that the expert's opinion in such a matter normally exceeds the scope of the expert's specialized knowledge. Appendix – Rules of Evidence, 28 U.S.C. Rule 702 (2006).

[249] Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 588-89 (1992).

[250] *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1986).

[251] Aleksandra Popovic, *Evidentiary Assessment and Non-Refoulment*, *in* Proof, Evidentiary Assessment, and Credibility in Asylum Procedures 29 (Gregor Noll ed., 2005).

[252] "In enacting the Refugee Act of 1980, Congress sought to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Id.* at 449.

[253] "The procedures for requesting asylum and withholding of deportation are not a search for a justification to deport." Senathirajah v. I.N.S., 157 F.3d 210, 221 (3rd Cir. 1998).

Despite the end of the Cold War and the continuing fall of violent dictators, persecution based on religion, politics, race, ethnicity and membership in particular social groups remains ever-present. While it is argued that the Refugee Convention was created solely to cope with European refugees following World War II and that it is inadequate by itself to deal with the massive global refugee crisis,[254] no other mechanism for international protection of refugees emerged. There will likely always be those among us who are willing to, or even desire to, inflict physical and emotional pain on others. Nations that encourage or tolerate such behavior deny the inviolate rights of human dignity to their citizens. And those nations that refuse to fulfill their duty of nonrefoulment by actively investigating the refugee's claims as they would for any other crime victim, cooperate with the persecuting country in denying the refugee justice.[255] Changing adjudicators' focus from disproving the credibility of asylum seekers to using all available evidence to determine the validity of their claims will provide "greater credibility to the fairness and efficiency of the asylum system overall."[256] Continuing, like Mullah Nasreddin, to look for the key in the convenient but wrong place will unjustly prevent those fleeing persecution from opening the door of their new home.

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[254] Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT'L J. REFUGEE L. 509, 523-25 (2006).

[255] An Australian commentator trenchantly characterized this complicity as "a failure to bear witness to the asylum seeker's experience of persecution, and consequently an unwitting completion of the persecutor's project — to render the victim of persecution discredited and silent." Guy Coffey, *The Credibility of Credibility Evidence at The Refugee Review Tribunal*, 15 INT'L J. REFUGEE L. 377, 417 (2003). The rejecting country also wrongs the other signatories to the Convention. *See* Popovic, *supra* note 251, at 28. António Guterres, UN High Commissioner for Refugees since 2005, expresses the frustration and the hope of those leaders who have accepted the challenge of helping the 42 million refugees and internally displaced persons in the world today:

> Just as the international community felt an obligation to spend hundreds of billions rescuing the international financial system, it should feel the same urgency to rescue some of the most vulnerable people on earth – refugees and the internally displaced. And the amount needed is only a fraction of that spent on financial bailouts. Finding solutions for more than 40 million people forced to flee their homes because of conflict and persecution is difficult, but not impossible. With the necessary political will and humanitarian support from the international community, we can ease the suffering of the world's uprooted people and finally bring their exile to an end.

António Guterres, *World Refugee Day: 42 Million Uprooted People Waiting to Go Home*, U.N, REFUGEE AGENCY, June 19, 2009.

[256] UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, 13 (2010).