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## "A Truthful Accounting of Events": The Roles of Linguistic Strategy, Narrative, and Performance in United States Asylum Hearings

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“A Truthful Accounting of Events”: The Roles of Linguistic Strategy, Narrative, and Performance in  
United States Asylum Hearings

Senior Project submitted to  
The Division of Social Studies  
of Bard College

by  
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Annandale-on-Hudson, New York

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## Chapter 1: An Introduction to the Asylum Hearing

Thousands of immigrants apply for asylum in the United States every year. They come from countries torn apart by civil war (such as El Salvador, Honduras, and Guatemala), countries ruled by totalitarian regimes (Ethiopia, Eritrea, and China being some of the most common), and countries where gang violence is rampant and police forces are underpaid, poorly trained, and ineffective (El Salvador, Mexico)<sup>1</sup>. In spite of the increasing numbers of immigrants entering the U.S. (legally and illegally) to escape violence and persecution, there is little public knowledge about the asylum process and the difficulties immigrants face in going through it. This is because the process is closed, and many of its procedures work against the asylum applicants, who usually have little to no knowledge of the legal system (in the U.S. or their country of origin), often have little to no education, and may not speak English. In this project, I hope to introduce readers to the asylum process and illuminate some of the more pressing dilemmas faced by all of its participants. This chapter will introduce readers to the asylum process with the narrative below (Hearing #1), which is an example of one asylum hearing I observed as described by my fieldnotes. It tells the story of a respondent (the legal term for an asylum applicant in court) who came from a gang-ridden Central American country to seek refuge for herself and her family. After the narrative, I describe the main ideas of and rationale for my project, explain my methodology, and provide descriptions of the immigration court and the process of applying for asylum. I then explain how the immigration court differs from the criminal court, and conclude with a section on the history of asylum policy in the U.S. and a description of some of the most pressing problems asylum applicants face.

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<sup>1</sup> Information obtained from Amnesty International Country Condition Reports. See bibliography for full citation.

March 23, 2011. The Central American woman is dressed carefully, wearing a dark blazer over a white t-shirt, dark blue jeans, and white sneakers. Her dark hair is pulled back from her face. She follows her attorney (a Hispanic man, dressed in a pristine navy blue pinstriped suit, white shirt, dark tie, and dress shoes) through the barrier that separates the observers' benches from the attorneys, the respondent (the person applying for asylum), the interpreter (a tall, thin Hispanic man dressed in a light blue sweater, khaki slacks, and dress shoes), and the judge. I cannot see her face, but the interpreter greets her (in Spanish, their native language), and her attorney speaks to her quietly, also in Spanish.

The trial attorney (of Immigration and Customs Enforcement, or ICE) enters next. She is a white woman, of medium height, dressed in a dark blue skirt suit and low heels. She wheels a cart, bearing the files she needs for this particular case. She sits at the table across the aisle from the respondent and the respondent's attorney.

This is my first hearing, and it strikes me simultaneously as both unthreatening (probably more so for me than for the respondent and her family) and asymmetrical (for the respondent). I had no idea what to expect, as my only experience with courtrooms came from watching crime dramas on television. Once I settled into the courtroom, however, I was pleasantly surprised to find that the attorney, the interpreter, and the judge were fairly relaxed, although still professional. The judge in particular made no attempt to use his position to intimidate the respondent and her family or to create a hostile atmosphere in any way.

While I quickly felt at ease in the courtroom, I realized that the respondent and her family might not feel the same way. She is from a country whose justice system is practically in shambles and is incapable of stopping the massive human rights violations perpetrated by gangs and cartels. Furthermore, as a non-English speaker, she could not understand what was happening during the hearing without assistance. It was fortunate that she had help from the interpreter, who used simultaneous interpretation<sup>2</sup>

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<sup>2</sup> A form of interpretation where the interpreter sits next to the respondent and translates as the words are being spoken. The other, more commonly employed form, is consecutive interpretation: the interpreter translates after a party has finished speaking.

throughout the entire hearing, translating everything except for the judge's formal oral decision at the end (which came after his brief statement of his decision in the case). However, I wondered how she could understand the more complex legal concepts involved, such as credibility. I could only hope that her attorney had explained some of the legal concepts to her beforehand.

At the precise time the hearing is designated to start, the judge enters from a door behind his bench. He is a tall, thin, white man with short gray hair. The top part of a white button-down shirt and a red tie emerge from his floor-length black robe. He briefly confirms the evidence with each attorney, referring to "exhibits". This occurs mainly to make sure all the parties have the same materials in their file, and to make sure one side isn't holding back something from the other side. He also gives the attorneys an opportunity to submit last-minute materials for the file. Asylum cases do not always function similarly to criminal courts—instead of surprising the other side with new information, the trial attorney and the respondent's attorney typically let each other know what evidence and information is in their respective files and provide copies if needed (at least, in the cases I observed). After the judge dispenses with confirmation of the evidence, he begins the hearing by stating the type of hearing (asylum), the respondent's name, the respondent's A-number, or alien number (the number respondents receive at the beginning of any type of immigration proceeding or application), the location of the court (a mid-sized mid-Atlantic city), and his (the judge's) name. He then invites the respondent's attorney to begin the questioning.

The respondent's attorney forms his questions very broadly, presumably to give the respondent space to respond and expand on her testimony. The most common types of questions are ones beginning with "who", "what", "when", "where", "why", and "how", which give the respondent the maximum space to elaborate. He asks questions that are very specific to the details of the events that led the respondent to fear for her and her family's lives. The questions eventually manage to elicit the following story:

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The respondent fled her country of origin with her two children after receiving threats from gang members in her hometown. She rejoined her husband, who was already in the U.S. and had been sending money home to support his family. The problems she faced in her country of origin began after her husband left. She was using the money her husband sent to maintain her house and send her children to school, and she didn't have a job. In her testimony, she stated that she believed this behavior may have indicated to the gang members that she had money. The gang members attempted to break into her house one night, and she called the police and made noise so that her neighbors would come over and help. When the police came, they claimed that there was no evidence that the gang members were trying to break into the respondent's house and no action was taken.

Shortly after, the respondent ran into one of the gang members, a woman, after the respondent had dropped her (the respondent's) children off at school. The female gang member threatened the respondent. Within weeks, the gang members attempted another break in, and the respondent and her children escaped to the U.S.

The narrative is not as straightforward as I, or someone else, might have anticipated—the respondent sometimes jumps ahead in the story, or makes a remark that implies something rather than explicitly stating the needed information, and in these cases the attorney has to jump backwards slightly to bring out the missing pieces of the event. Although his questioning process eventually manages to start producing a coherent narrative (albeit rather slowly), the attorney's questions become more “leading” (i.e. questions that seem to put words in the respondent's mouth, or already suggest what the respondent is going to say) and the trial attorney raises an objection, which the judge sustains. The respondent's attorney backtracks slightly and continues to ask open-ended questions, but with more caution. During the entire period of the respondent's attorney's questioning, the trial attorney's objection to the leading questions is the only interruption.

In her questioning, the trial attorney uses declarative questions, which typically start with “And you said...” and ended with “Is that correct?” At first, the respondent limits herself to yes and no answers, but because the trial attorney is allowing her time to respond, the respondent begins to elaborate on her



answers, which evolve from “yes” and “no” to “yes, but...” or “no, but...”. The trial attorney’s questions repeat the process of going through the details of the same events, but also include questions about whether the respondent had been arrested or tortured and the nature of her family’s current immigration status. Neither the respondent’s attorney nor the judge interrupts the questioning.

Next, the respondent’s attorney brings in the respondent’s son, who has been sequestered in the court’s waiting room (witnesses are not allowed to be in the courtroom while the respondent is testifying). He is fifteen years old, speaks excellent English, and aspires to join the U.S. military. He enters the courtroom wearing his junior ROTC uniform.

The questioning of the respondent’s son does not follow the same narrative framework as the questioning of the respondent. It is instead intended to show how well the respondent’s children have integrated into American society (Because they were also in the U.S. illegally, they could be eligible to be placed in deportation proceedings). The respondent’s attorney asks the son mainly for corroborating details of the events the respondent has described, and the son provides mostly “yes” and “no” answers, which seem to satisfy the attorney. Again, there are no interruptions.

During the course of the questioning, the judge is very silent. So far, he has only spoken to open the hearing, ask the attorneys to state their names for the record, and sustain the trial attorney’s single objection. He has also spoken to call recesses between the questioning of the respondent, as both the respondent’s attorney and the trial attorney spend a long time on their questions (one hour and 30 minutes, respectively). After the respondent’s son’s testimony is concluded, the judge states his decision in the case: the respondent’s application for asylum is denied.

I did not fully understand the judge’s reasoning at the time, but now, one year, 8 more hearings, and 11 interviews with attorneys later, I now know that the respondent’s claim was not credible. She could not identify herself with a persecuted group. She could not identify the affiliation (if any) of the gang members who threatened her and her family. Because she could not identify their affiliation, associates, or organization, she could not determine their motives, and therefore could not adequately prove past persecution, which has to be shown to be organized, continuous, and coming from a clearly

identifiable, potentially government-sanctioned source in order for an asylum claim to have a chance in court.

The respondent is, naturally, upset over the outcome of her hearing, but she keeps her emotions under control. And, like all applicants for asylum whose cases are denied, she has the right to appeal the judge's decision within 30 days. The Board of Immigration Appeals will make the final decision as to whether or not she gets to stay in the country.

### **Studying the Asylum Hearing**

The hearing described above presents a pivotal example of the problems asylum seekers face. The respondent is not alone in being unable to identify the affiliations and motives of her persecutors—in fact, my interviews with attorneys have taught me that this is a common situation for other respondents from the same country, and from other Central American countries with violence from rampant, non-centralized gangs. Much of asylum law focuses on political persecution, although applicants can apply on other grounds as well (religious persecution, gender-based, persecution, etc). This is due to the fact that, with the exception of countries such as Mexico and El Salvador, where the governments (although corrupted) do not necessarily condone the actions of gangs and cartels but don't have the resources to stop them, most respondents come from other regions of the world, such as Africa and East and Southeast Asia, where many countries (Ethiopia, Eritrea, and China being some common examples) are ruled by authoritarian governments that authorize the systematic persecution of individuals who oppose them or who are part of a minority that is out of favor<sup>3</sup>. As a result, it becomes necessary for *all* respondents (even those from Mexico and El Salvador) to prove that their persecution arises from a concrete, hierarchical source (i.e. a government). Since such a source does not always exist for Central American respondents (except those from Guatemala and Honduras, where the government plays a more active role in persecution, and those who are victims of the more centralized drug cartels in Mexico), it becomes much harder for them to make a claim that can be seen as credible.

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<sup>3</sup> *Ibid.* 1

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This project is about the way language and linguistic strategies are used in the asylum hearing—a type of hearing fraught with ambiguity, secrecy, and asymmetry. There are no clear written standards by which judges make decisions on a claim. The process is entirely closed, unless the prospective observer has an attorney’s permission. There is no jury. Many respondents do not have the education or knowledge necessary to understand what happens during the hearing and how they can most effectively testify. Respondents are not entitled to an attorney, so if they cannot find one (even a free or low-cost one) they are obliged to speak in their own defense. In regard to the linguistic strategies used, questions in particular are inherently asymmetrical, since they function most basically as demands for an answer or a type of response. The choice to ask a question in a particular way can lead a respondent to provide a comprehensive, structured, linear narrative, but another type of question (often a hostile or confusing one) can cause the respondent to freeze, frustrated or panicked, as he/she tries to pull together a narrative free of inconsistencies. Legal professionals, as the individuals asking the questions, ultimately have the advantage. As a result, when questions are used in an asymmetrical setting such as the asylum hearing, their inherent inequality becomes increasingly problematic.

In spite of these obstacles, it is essential that the respondent in the asylum hearing translate his/her differing cultural experience into a narrative that can be understood by the legal professionals of the court, including the judge. This is more difficult than it may seem: most of the legal professionals in the courtroom (unless they themselves have come from the same countries as the respondents) are accustomed to the freedom of speech and freedom from fear that comes with being a citizen or legal resident of the U.S. As a result, the idea that someone from another country spends each day living in fear of imprisonment, torture, and/or murder is difficult to comprehend. Yet the respondent must transcend

these cultural boundaries in order to be granted asylum and, by extension, have his/her narrative of experience validated as being credible by his/her legal, westernized audience.

Scholars also pay little attention to the asylum hearing: academic literature on asylum (in the social sciences, and possibly other disciplines as well) is minimal. Most literature on hearings, including legal anthropological literature, comes from scholars who have done observation in criminal courts (Mertz 2007; Mileski 1971; Danet 1980), which are consistently open to the public. Mertz's 2007 work focuses on legal education, while Mileski's and Danet's work focuses on lower criminal courts, where minor crimes are tried. Mertz compiles a description of the ways in which law students learn to think like attorneys and become acculturated (adapted to) the culture surrounding the law. Mileski provides a detailed description of the proceedings in lower criminal court trials, while Danet focuses on linguistic strategies, providing a comprehensive overview of types of questions used, their consequences, and what strategies are most effective.

Clearly, then, the asylum hearing is an area that requires considerable attention. Given the lack of mainstream knowledge on asylum, I see this project as having the potential to raise public awareness of the problems and processes involved in asylum hearings. I also anticipate that my project could contribute uniquely to the body of legal anthropology literature on the courtroom setting and processes, as well as adding to the literature in linguistic anthropology, since the literature that exists in these subfields in relation to the courts is exclusively centered on the criminal court. Additionally, I intend to contribute to human rights literature as I demonstrate that the concept of evidence is less solid than it first appears.

In the end, I hope that my project will benefit attorneys, judges, and respondents, and I hope that this project will benefit the general public by providing a thorough, accessible account of the asylum process and ultimately adding to knowledge of another side of the judicial system. Respondents could learn how the process works and how the attorneys and judges think about cases, while the attorneys and judges could learn things about the way they practice law that they might not otherwise have known. For instance, I have become increasingly aware of the asymmetry that exists between attorneys (both the respondent's attorney and the trial attorney), judges, and respondents. While attorneys and judges are

highly educated, with specialized training that has allowed them entrance into their profession, many (although not all) respondents have little to no education. Less educated respondents are less likely to speak English and typically have little to no knowledge of the legal system in either the U.S. or their country of origin. As a result, they lack the communicative competence<sup>4</sup> needed to testify effectively in court because they don't understand what standards the trial attorney and judge will use to decide the credibility of their testimony. Respondents with competent attorneys can get past this block because these attorneys will help them prepare to testify, but for respondents without attorneys, or with incompetent attorneys, the difficulties may be insurmountable.

Throughout this project, I hope to explore two main questions: How do the linguistic strategies (questioning strategies, decision-making processes, etc.) and ways of interpreting narrative testimony, as viewed and used by attorneys and judges, interact with the respondent's testimony? Do they form performative rituals<sup>5</sup>, and, if they do, what does this mean for a process that is typically seen as being objective, impartial, and based entirely on the validity of the evidence? Performance and objectivity seem to be at odds, since factors such as political affiliation and personal opinions on immigration may, inadvertently or otherwise, influence the opinion of the audience for the performance (the judge). Furthermore, given that the asylum hearing is a highly structured setting, where participants may be evaluated according to how well they conform to standards of performance<sup>6</sup> (or evidentiary validity), and given that many respondents survive events that may be so traumatic as to be unspeakable, how can respondents testify to their experiences while meeting the standards set by the hearing and its participants?

## **Methodology**

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<sup>4</sup> I define this term as the knowledge of how to communicate in a way that is understood and accepted, according to both linguistic and cultural norms.

<sup>5</sup> I would define these as rituals that possess some theatrical qualities, in that the participants engage in ritualized (repetitive, formal, predictable, precise) actions with the intent to impress a message upon an audience.

<sup>6</sup> I would define these as the standards for evaluating how well the participants convey their message(s) (i.e. make their cases), and, in the case of the respondent, if they manage to meet the standards the judge and trial attorney hold for credibility.

For this project, I observed eight individual asylum hearings in one court near my home in the mid-Atlantic, and two sets of master calendar hearings (the respondent's first appearance before the immigration judge) at another court in the same region. I interviewed eleven immigration attorneys who were listed by the American Immigration Lawyers' Association (AILA)<sup>7</sup> as taking cases related to asylum or withholding of removal<sup>8</sup>. I also read one transcript of a withholding of removal case, which my internship supervisor at Catholic Charities DC Immigration Legal Services allowed me to xerox with names redacted. This transcript was the only instance where I got to "observe" a hearing where the respondent did not have an attorney. My interview questions attempted to elicit information on the nature of effective questioning strategies, what constitutes good/valid evidence, and what constitutes good or bad testimony (For a full listing of questions, see the Appendix).

As I conducted my research, I had the advantage of learning about asylum while interning at two major human rights organizations, Amnesty International (in the Refugee and Migrant Rights' Division) and Catholic Charities DC (Immigration Legal Services). While I had not yet started research during my internship at Amnesty, my work there provided me with my introduction to, and subsequent interest in asylum matters. My internship at Catholic Charities was contemporaneous with the fieldwork I conducted from June through August of 2011, and my supervisor was extremely helpful at answering my questions about immigration law and policy. Both supervisors referred me to several of my interviewees.

During my research, I was hindered by the fact that I was only able to talk to the attorneys representing asylum applicants in court. I contacted two chief counsels' offices<sup>9</sup> in my attempts to request interviews with trial attorneys—one responded negatively, and the other did not respond at all. To get permission to interview the judges, I had to go through the Executive Office of Immigration Review

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<sup>7</sup> [www.aila.org](http://www.aila.org). Attorneys can be found by state and category in the "Find a Lawyer" search.

<sup>8</sup> Withholding of removal is similar to asylum, but is generally used in cases where a respondent is not eligible to apply for asylum. The most common examples of its use occur in cases of incarcerated respondents, as criminal convictions prevent respondents from applying for asylum. The standards used for determining withholding eligibility are extremely similar to those used in asylum cases—however, there is extra pressure on the respondent and his/her attorney (if he/she has one) to produce evidence of a credible fear of persecution, due to the stigma associated with criminal convictions and incarceration.

<sup>9</sup> The supervisory offices where trial attorneys are based. They are usually located in the vicinity of the immigration court.

(EOIR)'s Office of Legislative and Public Affairs, and after waiting a month for a response I called and found out that it was against EOIR policy for the judges to do interviews with members of the public, in spite of the fact that I had promised confidentiality. As a result of these constraints, the information I provide on trial attorneys and judges is either based on my own observations of cases, interview responses from respondent's attorneys, and some literature on the courtroom (Bohmer and Shuman 2007; Grussendorf 2010).

This project contains very few lengthy quotes from hearings, and this is due to the fact that recording devices and computers are not permitted in the immigration courtroom. For all the hearings I observed, I had to take very good notes by hand, and I tried to be as descriptive as possible in my fieldnotes. Any exchanges in this project that are quoted at length come from whatever written documentation I was able to obtain. I was not, however, able to look at any transcripts other than the one I obtained at Catholic Charities; access to transcripts is normally restricted to attorneys and judges.

I do not mention specific countries or court locations in this project because I promised not to do so when I contacted attorneys asking to observe their cases. One reason for the privacy of the asylum hearing is the fear respondents often have of their persecutors finding them and their families, particularly if individual persecutors manage to come to the U.S. I chose to take this fear seriously, and, while I realize now that a country of origin by itself may not be a sufficient to reveal an asylum applicant's identity, I feel ethically bound, as an anthropology student, to uphold my original promise.

### **The Immigration Courtroom**

Immigration courts vary in size and structure depending on the type of building in which they are located and the number of judges. The court where I did my observation was of a modest size, with six judges presiding. The court was on the top floor of an office building, and before entering it was necessary to go through a metal detector. There were two security guards at the metal detector. I then walked a short distance down the hallway to the waiting room, where there were four rows of about 10-15 chairs. On one wall, bulletin boards corresponding to each courtroom held printouts with the schedule of

the cases taking place in each courtroom. Each case listed the respondent's name, A-number<sup>10</sup>, and the respondent's attorney (if any). The sign above each bulletin board held the number of the courtroom and the name of the corresponding judge. There were six courtrooms—one for each judge.

On another side of the waiting room was a reception desk. I had to go to the reception desk, present my student ID, and explain that I was observing an asylum hearing with the permission of the respondent's attorney, and I was given a badge that read "EOIR Visitor". Once I got the badge, I could either stay in the waiting room or go into the courtroom, as the courtroom doors were kept open when they were not in use. Before entering the courtroom, I had to turn off my cell phone.

The courtrooms themselves tended to resemble each other. In two of the three courtrooms where I observed cases, there were no windows. The floors were entirely covered in red carpeting and two of the walls were dark blue, which made the rooms darker than they might have been otherwise. The courtrooms were lit with fluorescent lights. As I soon found out, the complete lack of natural lighting or any sense of the weather outside made it easy to lose track of time, or even what was going on outside the courtroom, particularly when hearings lasted 3-4 hours.

There were three brown wood benches in two aisles, each of which could seat 3-4 people. The benches were behind a wooden fence, which had a gate and entered into the part of the courtroom where the respondent, the respondent's attorney, the interpreter, the trial attorney, and the judge would sit. There were two tables on each side. The trial attorney sat at one table, while the respondent's attorney, the respondent, and the interpreter sat at another table. There were signs on the tables to indicate where each party should sit. On the right hand side of each courtroom, there was a television with a camera, which was available to use for videoconference hearings. Next to the television and opposite the benches where the audience could sit was the chair and podium for the respondent. Like all the other parties in the courtroom, the podium where the respondent and witnesses would testify held a microphone. Behind the respondent's/witness's chair there was an American flag.

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<sup>10</sup> Also known as the alien number, this is the number assigned to each individual with any type of immigration case.



The respondent would sit next to the judge's bench, which was raised above the other parties by a step. The judges used the computers at their desks as tape recorders, and to take notes. There was a desk next to the judge's desk, which also had a computer, and while I assumed this was for a clerk, I never observed a case where a judge actually required a clerk's assistance in the courtroom. In the very back of the room, on the wall behind the judge's bench, there was a large seal of the Department of Justice/Executive Office for Immigration Review.

### *Interactions*

Respondents usually stayed in the waiting room talking to their families and/or their witnesses while they waited for their attorneys. Attorneys in the waiting room talked with other attorneys or with their clients. The trial attorney would come into the courtroom very close to the time the case was scheduled to start, and usually did not make conversation with the respondent's attorney (although if they didn't know each other they would introduce themselves). Attorneys who were familiar with the court often knew the interpreters, and would make conversation with them. Only on one occasion did I observe a trial attorney making conversation with the interpreter. Once the hearing began, all interactions were mediated (structured/dictated) by the judge, and the fact that the hearing was on the record (being recorded).

I had little interaction with the participants in the hearings. On a few occasions, the interpreters talked to me during a recess, and on one occasion (when the attorney was nearly 15 minutes late) the judge asked me about my presence directly (instead of through the attorney). Two of the hearings I observed were with attorneys I had previously interviewed, and in these cases they initiated conversations with me while waiting for the case to start and introduced me to their clients.

### **The Process of Applying for Asylum<sup>11</sup>**

Asylum is a form of immigration relief sought by refugees who are fleeing persecution in their country of origin (the country where they lived previously—usually also where they were born and/or

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<sup>11</sup> I learned the information in this section during the course of my internship at Amnesty International (Summer 2010).

hold citizenship). Asylum is also known as “political asylum” because the process of applying for asylum most often centers on whether or not the applicant was persecuted based on his/her political beliefs. However, the determinations in asylum claims are based on the UN definition of a refugee<sup>12</sup>, so the categories under which people apply for asylum are quite broad. A grant of asylum ultimately results in the individual’s right to remain in the U.S. as a permanent resident (who can eventually apply for citizenship).

The asylum process begins when the refugee, entering through one of the U.S. borders or coming into an airport, meets an official of the Department of Homeland Security (DHS). Depending on how the applicant enters the country, this official is from one of two offices within DHS: either Customs and Border Patrol (CBP)<sup>13</sup> (at the border) or Immigration and Customs Enforcement (ICE)<sup>14</sup> (at the airport). When the refugee meets the DHS official, he/she [the refugee] may request asylum. The DHS official is then required to give the applicant the application for asylum, along with a list of low-cost legal service providers available in the state (the list is maintained by the U.S. Department of Justice). If the applicant wants to obtain an attorney, an interpreter, or find someone to help prepare his/her application, it is entirely the applicant’s responsibility—DHS is under no obligation to provide assistance.

The asylum applicant must apply for asylum within one year of entering the country. While applicants who cross the borders are often detained due to false passports, or other problems that hinder verification of their identity, most other applicants are not. Non-detained applicants, however, cannot get work authorization unless their case has been pending for at least 150 days (5 months). During that time, they have to rely on family members to support them (if they have any in the U.S.) or work illegally. In addition, days may be accrued towards the 150 mark if the trial attorney has to request a continuance to

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<sup>12</sup> A person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (1951 Convention Relating to the Status of Refugees; available at <http://www2.ohchr.org/english/law/refugees.htm>).

<sup>13</sup> Responsible for border patrol and protection and ensuring that customs regulations are upheld.

<sup>14</sup> Responsible for enforcing immigration regulations and supervising the detention and/or deportation of illegal immigrants, or immigrants who lose their cases and are ordered to leave the country.

put together a file or get more information, but if the respondent requests a continuance no days are accrued. The idea behind this process, which was implemented in 1996, was that it would be an incentive for the DHS to process claims more quickly so as to avoid issuing employment authorizations (Personal communication, Lory Rosenberg, 5 December 2011).

After submitting the asylum application and documentation that can verify the applicant's claims, the applicant must submit to a credible fear interview. This interview takes place at U.S. Citizenship and Immigration Services (USCIS), which is a branch of DHS responsible for processing paperwork and documentation related to all types of immigration cases. The credible fear interview, as the name suggests, is conducted to determine whether or not the applicant's fear of persecution is valid and credible. The decision of the asylum officer, who conducts the interview, is based on all the documents the applicant has submitted, along with the application for asylum and the U.S. Department of State's report on human rights and other conditions in the applicant's country of origin. If the asylum officer approves the application for asylum, the applicant may become a legal permanent resident (LPR). If the asylum officer does not grant the application, the applicant is scheduled for a hearing in the immigration court.

### *The Immigration Court*

The immigration court is not affiliated with DHS. The court system and its judges are under the supervision of the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice. In all cases, DHS is represented by a trial attorney, whose position is similar to that of the prosecutor in a criminal court. If the applicant (known in the court as the "respondent") has an attorney, he/she is present with the attorney. If not, the applicant must represent him/herself ("*pro se*")<sup>15</sup>. The court provides interpreters as needed. There is no jury, and asylum hearings are not open to the public: if the court allows observation at all, it is only if the prospective observer has obtained the consent of the respondent's attorney (the attorney, presumably, gets the consent of his/her client as well). The judge makes his/her decision based on the testimony of the respondent, documentary evidence, and the

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<sup>15</sup> In these instances, the judge asks many of the questions that an attorney for the respondent might ask.

testimony of witnesses (if any). The respondent bears the burden of proving his/her case by testifying effectively and providing other types of evidence (documents, photographs, medical records, etc).

The hearing process begins with a master calendar hearing. This is the respondent's first appearance before the court. The master calendar hearing functions to make sure the respondent understands the purpose of the hearing and the (potential) consequences of his/her immigration status (usually most applicable when the respondent has no attorney) and to schedule the respondent's individual hearing. If the respondent has an attorney, the attorney speaks on behalf of the respondent and the respondent typically does not have to do anything besides state his/her name for the record. The trial attorney, when requested by the judge, states DHS's position on the case. If the respondent does not have an attorney, the judge questions the respondent to make sure the respondent understands the purpose of the hearing. This questioning often takes place through an interpreter<sup>16</sup>.

The individual hearing is the hearing at which a final decision is made in the respondent's case. By the time of the individual hearing, the respondent's attorney (or the respondent him/herself, if there is no attorney) must present all the evidence relating to the respondent's fear of persecution in his/her country of origin. This includes evidence to prove the occurrence of the events surrounding the respondent's fear. The trial attorney must also collect evidence to support DHS's case (which is, by default, that the respondent should be deported).<sup>17</sup> The judge may or may not review the evidence prior to the hearing.

If the respondent loses his/her case, he/she has 30 days to file an appeal. The appeal takes place before the Board of Immigration Appeals (BIA), which is also part of the Department of Justice. Its decision is final.

### *Detention*

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<sup>16</sup> I found in my fieldwork that respondents who were less educated were less likely to speak English and less likely to have enough money to hire an attorney.

<sup>17</sup> I did observe a few cases that suggested the possibility of occasional exceptions to this rule—presumably, if the evidence is so thorough that there can be no doubt of its, and/or the respondent's, credibility.

In some cases, the respondent is incarcerated. The type of incarceration varies: respondents with no criminal record who have simply entered the U.S. illegally and been caught are placed in immigration detention centers, which are supervised by ICE (although in many cases run by private contractors). They may also be detained in regular prisons, mixed in with criminal offenders. Respondents who have criminal convictions are usually incarcerated in state or local prisons. When detained or incarcerated respondents have their hearings, the facilities are usually too far away from the immigration court to make transportation a viable option. Respondents with criminal convictions may also be seen as a security risk if they are removed from the facility. As a result, detained/incarcerated respondents have their hearings via videoconference.<sup>18</sup>

The attorneys I interviewed told me that criminal convictions can severely damage a respondent's chance of winning any kind of immigration case, and it can also be harder for these respondents to obtain attorneys (some attorneys won't represent detained respondents or respondents with criminal records). The loss of credibility that follows from a criminal conviction often leads judges to suggest the option of voluntary departure, in which the respondent arranges the purchase of his/her one-way plane ticket back to the country of origin and allows him/herself to be escorted to the airport by DHS officials. Voluntary departure is also an option for respondents who are not detained or incarcerated, but it is less commonly used.

### **Differences between Criminal Courts and Immigration Courts**

Criminal courts and immigration courts share some similar features, but some differences are pivotal to the ways in which I interpret the workings of the immigration court in this project. Criminal courts have a clerk, one or more police officers, a public defender (when needed), and an interpreter (as needed), the judge, the *defendant's* attorney (if he/she has hired one), the prosecutor (employed by the state), the defendant, and the *jury*. Immigration courts, by contrast, only have a judge, trial attorney,

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<sup>18</sup> Much of my knowledge of immigration detention comes from my internship at Amnesty International in the summer of 2010.

respondent's attorney (if the respondent can obtain one), respondent, clerk (as needed), and an interpreter (as needed; provided by the court). While there are security guards who guide people through the metal detector when they enter the court, there are no security guards or police officers in the courtroom itself. The exception to this situation occurs in the case of respondents detained for criminal convictions, whose hearings are held via videoconference. In these instances, a guard is present in the same room as the respondent (in the detention facility) or just outside. If the respondent in these cases has an attorney, the attorney is in the courtroom, not in the facility with the respondent. A final difference is that, while the criminal court operates based on state law (or federal law, at higher levels), the immigration court system is exclusively federal. This difference is helpful because it gives respondents more options in finding an attorney, as the locations within the U.S. where the attorney is authorized to practice law make no difference in an immigration case.

One key difference between the two court systems is that, in the immigration court system, *the respondent is not entitled to an attorney*. As a result, if the respondent cannot afford to hire a private attorney or obtain the assistance of a legal aid organization, he/she will ultimately have to represent him/herself. While financial difficulties in obtaining attorneys may be equal among different respondents, detained respondents have a particularly hard time, as quite a few attorneys and legal aid organizations refuse to represent detained/incarcerated respondents or will not accept collect calls (the only way a respondent can make calls from a prison). Additionally, all respondents may face problems finding low-cost, or even private legal assistance in some locations where immigration attorneys are scarce. Some states only have a handful of legal aid providers, and these providers are vastly overburdened by the cases they already have. Respondents living/detained in or near large cities are more likely to be able to obtain representation, as major cities often have many private immigration attorneys and legal aid providers<sup>19</sup>.

Mileski (1971) says that "court-funded counsel not only protects the defendant from the state, it also protects the state from the potential disruption of defendants in serious cases" (489). This means that in an asylum hearing, if the respondent is *pro se* (does not have an attorney), he/she is essentially at the

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<sup>19</sup> <http://www.justice.gov/eoir/probono/states.htm>

mercy of the state. If the *pro se* respondent does not have an attorney to protect him/her from the state, and to protect the state from the respondent, it is also not clear what happens if the *pro se* respondent decides to disrupt the hearing. Verbal disruption, by not following the usual standards of acceptable testimony (more on this later), can probably be handled by the judge, but physical disruption (although I have not heard of such cases in my interviews, it does not seem impossible) is another matter entirely, and there are no security guards in the courtroom.

Another key difference that sets the immigration court apart is the lack of a jury. In fact, the asylum hearing is closed to the public, with the exception of the respondent's family members (who must be sequestered in the waiting room if they are going to testify), and interested observers who have obtained the permission of the respondent's attorney to observe the hearing (such as myself)<sup>20</sup>. As I will discuss in this project, the lack of an active, decision-making audience that a jury would provide significantly changes the nature of interaction in this particular courtroom setting, as the evidence provided by the attorneys and the testimony of the respondent is weighted (in theory) purely on the basis of accuracy and credibility, and not at all on emotional appeal.

There are similarities between the two court systems as well. In the lower criminal court, where minor crimes are tried (as described in Mileski 1971), heavy caseloads lead to rapid handling of cases, with defendants sometimes coming before the judge in groups rather than one by one. While respondents in the immigration court come before the judge individually, the system is also extraordinarily backlogged, with judges setting dates for individual hearings one to two years (sometimes more) after the master calendar hearing. In the individual hearings I observed, the judges seemed (with the possible exception of one) to take their time hearing all the evidence—several hearings lasted three, sometimes four hours. However, I have been told by several attorneys that some courts (although not the one where my observation took place) try to rush through cases in order to process them as quickly as possible.

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<sup>20</sup> An observer, does, however, need to have some reason for observing the hearing, so student status is helpful. Attorneys and court staff might be inclined to turn away a member of the general public. I always had to explain myself when requesting to observe a case.

In both courts, the two attorneys usually cooperate with each other. Several of the attorneys I interviewed told me that they usually talk to the trial attorney beforehand to find out if the trial attorney has any evidence that they don't know about, or to discuss what parts of the case the trial attorney is going to focus on most. The respondent's attorney is also expected to submit copies to the trial attorney of whatever evidence he/she is submitting to the judge. I also saw this cooperation continue in the courtroom, especially in some of the longer hearings. If the questioning had been going on for a while, during the recess the trial attorney would tell the attorney (generally) what he/she intended to ask about for the remainder of his/her questioning. In one very short hearing, it appeared that so much credible evidence had been presented that the judge had already come to a conclusion about the case and there was very little for the trial attorney to ask, and she (the trial attorney) ultimately agreed that the respondent had the right to a grant of asylum.

Other similarities include the connection between stigma attached to previous arrests, and the mannerisms displayed by the judge. In asylum hearings, respondents who have or have had criminal convictions tend to be looked upon less favorably, and thus have to make extra efforts to prove their credibility. The one exception to stigmatizing prior arrests occurs when the respondent has been arrested in his/her country of origin one or more times, and that arrest has led to the respondent's fear of future persecution. Of course, in these instances, the respondent still has to provide evidence and testimony to prove that the arrests were persecutory, and convince the judge that he/she (the respondent) would be arrested again, or killed, if returned to the country of origin.

### **A Brief History of United States Asylum Legislation**

The U.S. did not have legislation related to asylum prior to 1980. Before the 1970s, immigrants came in small numbers, and many of them were Europeans seeking family reunification and employment opportunities. This situation began to change as early as the 1950s and 60s. When the Cold War began, the American government was inclined to be sympathetic to any immigrants fleeing communism. This sympathy took its earliest and most prominent form in the presidential paroling (allowing legal entrance to) of Cuban immigrants who fled to Florida in boats in an attempt to escape the Castro regime. The U.S.



government's leniency towards them allowed the Cuban migrants to settle in the U.S., find jobs, and integrate into American society. At this time, the legal limit on the amount of visas to be given to refugees, per year, was 50,000 (Reimers 1992).

In the 1970s, U.S. involvement in fighting communism ultimately led to an upsurge in asylum applicants. When the Vietnam War ended, Vietnamese citizens who had assisted American soldiers fled to the U.S. Civil wars in Central American countries, including El Salvador and Honduras, also led people from these countries to flee to the U.S. seeking asylum. However, while the Vietnamese who sought asylum in the U.S. were generally able to obtain it, the U.S. government's backing of the Central American governments (which were what the asylees from this region were fleeing) meant that many Central American asylum applications were denied. Asylum policy at this time centered on Cold War politics, and the new immigrant groups were beginning to stretch the 50,000 visa quota to its limits (Graham 2004; Reimers 1992).

In 1980, Congress passed the Refugee Act as a response to the continuing flow of immigrants. The Act defined the 50,000 ceiling as a "normal flow", thereby legitimizing a certain amount of immigration. Under the Act, 5,000 visa slots were reserved for refugees, which the Act defined according to the UN definition (see page 14). The Refugee Act did not change the way in which decisions about asylees were made (Reimers 1992).

The Immigration Reform and Control Act of 1986 (IRCA) took immigration control a step further. Although it instituted an agricultural worker program and allowed illegal immigrants who had been living in the U.S. since 1982 to obtain temporary residence (presumably to facilitate the supply of inexpensive manual labor), the Act also imposed employer sanctions to discourage the hiring of illegal immigrants and increased border inspections (Reimers 1992; Yang 1995).

The Immigration and Nationality Act of 1990 increased the asylum quota to 10,000, in recognition of the ever-increasing numbers of refugees. At the same time, the end of the Cold War meant that asylum decisions had to be made on some grounds other than the relationship between the U.S. and a given country of origin (Reimers 1992).

With the end of Cold War politics as a standard for determining asylum eligibility, INS (Immigration and Naturalization Service) employees were obliged to start viewing asylum applications through the lens of credibility. At the same time, the breakdown of the Soviet Union triggered an influx of refugees from that region, further increasing the numbers of asylum applicants and the backlog of applications for legal permanent residency filed by asylees. The Immigration Act of 1990 was passed to address some of this backlog, doubling the number of grants of legal permanent resident (LPR) status from 5,000 to 10,000 (Wassem 2005).

However, this legislation failed to address what some Americans saw as a growing problem—the increase in frivolous applications, delays in the hearing process (all applicants for asylum were entitled to a hearing before an immigration judge at this time), and concerns about potential terrorists entering the country under false pretenses. In order to address these concerns, in 1996 Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA). While it did not change the number of asylees who could receive LPR status, it significantly altered the situation of asylum applicants entering and living in the U.S. INS officers, if they determined that an immigrant was not really going to apply for asylum, could summarily deny that immigrant entrance to the country and remove that immigrant (expedited removal). In addition, if an applicant arrived without proper documents, the Act stated that the applicant must be detained while his/her case was pending (mandatory detention). The Act also instituted the one-year bar (the requirement that applicants must apply for asylum within one year of their entering the U.S) (Wassem 2005).

These measures have remained in place to the present, but with one important change: in 2002, the Department of Homeland Security was created. In the process, INS was removed from the Department of Justice, placed in DHS, and broken up into three separate organizations: Immigration and Customs Enforcement (ICE), Customs and Border Patrol (CBP), and United States Citizenship and Immigration Services (USCIS). Under the Bush administration, in the aftermath of 9/11 and increased fear of further terrorism, DHS continued to implement the immigration restrictions instituted in 1996, but

with increased force. Their efforts inflicted substantial hardship on Muslim Americans, immigrants, and visitors, as Muslims were seen as potentially tied to Al-Qaeda (Gourevitch 2003).

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As I explore the language, linguistic strategies, and cultural practices that constitute the asylum hearing, I would like to re-emphasize some of the main ideas I raised earlier in this chapter. The asylum hearing does not have a jury, so the decision in the respondent's case is not being made with the active participation of his/her peers, as it would be in a criminal case. Nevertheless, performative characteristics persist, but without the accountability their users would face before the audience of a criminal court (i.e. the public, the press). If the judge is indeed influenced by something other than the evidence, there is little that the respondent or his/her attorney can do to change the situation because the process is so closed.

Furthermore, the process of testifying may be complicated by the witnessing of traumatic events. When the evidence of a crime is erased, it is easier for the government of the country of origin to deny that it happened. However, unless the country of origin is widely known for committing human rights violations and is not friendly towards the U.S. government, the respondent is usually expected to provide some documentation from the country of origin, at the very least to prove his/her identity. Lack of this documentation, and an inability to explain the lack, or to even explain events clearly, can be severely damaging to a respondent's credibility in the eyes of the trial attorney and the judge, and may ultimately be damaging to a respondent's performance. Although decisions in immigration cases are not as heavily based on national interests as they were in the Cold War era (see previous section), the facts and the evidence are still not the only factors that influence an asylum decision, as I will demonstrate throughout this project.

In chapter 2, I explore the performative aspects of the asylum hearing and the question of what it means to have a limited and/or ambiguously defined audience. Chapter 3 describes the ways in which respondents communicate their experiences through testimony. It also introduces some of the factors

(such as linguistic ideology) that govern different parties' communications and interpretations (of testimony) within the hearing. Chapter 4 concludes the project with a discussion of the ways different parties in the asylum hearing interpret each other's communications, and how the roles of truth and mediation (through the interpreter) influence the processes of interpretation. Elicitation of experience (chapter 2), communication of experience (chapter 3), and interpretation of experience (chapter 4) are essential components of the asylum hearing, and at the end of the hearing they all come together to factor into the judge's decision in the case.

## **Chapter 2: Speech and Performance in the Asylum Hearing**

The asylum hearing is constituted, in part, by its capacity to enact social structure. Throughout each hearing, both attorneys (and sometimes the judge) attempt to elicit information from the respondent using patterns of linguistic strategies designed to draw out the information they need in the most effective manner possible. As a result, all parties involved in the questioning pull together a performance that facilitates an asymmetrical relationship between themselves and the respondent (and, consequently, re-emphasizes the existing social structure of the hearing). If the respondent can understand how the performance is being created, he/she may complete his/her performance successfully by having his/her testimony accepted as credible. When the respondent fails to respond (or fails to respond appropriately) to attempts to elicit his/her experience, the performance, and the ritual that accompanies it, is incomplete. This chapter will describe the performative aspects of the asylum hearing in more detail, and will also explain the consequences that can ensue from the enactment or use of different performative characteristics.

### **The Ritual of the Asylum Hearing**

In her ethnography of elderly Jews in Los Angeles, Barbara Myerhoff (1978) presents some characteristics of ritual that seem to apply to the asylum hearing. She says that “rituals are conspicuously artificial and theatrical, yet designed to suggest the inevitability and absolute truth of their messages” (1978: 86), and that characteristics of ritual include precision, accuracy, predictability, formality, and repetition. The asylum hearing does seem to possess all of these characteristics.

Each asylum hearing begins with a set of standard procedures. The judge enters the courtroom in his/her black robe, all the parties in the courtroom rise, and then they seat themselves when the judge asks them to do so. The judge then begins the hearing by saying, “This is an asylum hearing in the case of [respondent’s full name], A-number [respondent’s A-number], in the [city where the immigration court is located] Immigration Court, Judge [judge’s last name] presiding”. The judge asks the respondent to state his/her (the respondent’s) name for the record, asks the attorneys to “enter their appearances” (state their names for the record), and asks the interpreter, if present, to state his/her (the interpreter’s) name for the

record. After this the judge accounts for all the parties present in the courtroom behind the barrier (if there are any). Family members or witnesses who are going to testify must be sequestered outside the courtroom, and the judge must verify the legitimacy of the presence of any observers. Next, the judge goes over the documentary evidence submitted and asks if the attorneys have anything to add. Finally, the judge invites the respondent's attorney to begin questioning, and the respondent swears to tell the truth and takes the stand.

The progression of the hearing after this beginning is somewhat unpredictable, since respondents' and witnesses' testimony varies. However, the hearings follow the same general structure: the attorney questions, the trial attorney questions, the attorney has another opportunity for questioning (if needed). Sometimes the judge may interject his/her own questions or comments, and sometimes one of the attorneys may object to something the other attorney chooses to ask. If the testimony of a witness is considered vital, the witness is brought into the courtroom to testify. However, due to the time constraints immigration judges face (the courts are backlogged, and some of the hearings I observed lasted as long as 4 hours), the attorneys and the judge often decide that the witness's affidavit will suffice in lieu of their testimony.

Questioning strategy can be predictable, although not necessarily in terms of content. The respondent's attorney will generally use open-ended questions, since it is in the respondent's interest to be able to convey as much of the story as possible. The trial attorney generally uses very restrictive questions that prevent the respondent from elaborating. The judge does not follow a pattern in his/her questioning.

If the asylum hearing is (similar to) a ritual, the lack of a jury is significant. The asylum hearing clearly shares the characteristics of a ritual as described by Myerhoff, and most (possibly all) rituals are performances in that they are undertaken for an audience. But who is the audience here? If there are observers, they are passive, so it is pointless to direct the ritual towards them. The judge may be an audience, since he/she has to evaluate the testimony and evidence, as elicited by the attorney's efforts. The respondent may also be viewed as an audience, in which case the attorneys (and the judge, if applicable) would be demonstrating their skills and their superior knowledge of the legal system. This

reading makes sense, given the asymmetry of the respondent's positioning vis-à-vis the attorneys and the judge. However, a final problem arises if the judge chooses to involve him/herself in the questioning, because then (unless the respondent is the audience) it becomes difficult to tell what his/her role is in the ritual and for whom he/she is performing.

### **Language and Performance**

According to Richard Bauman, "performance represents a transformation of the basic referential uses of language" (Bauman 1975: 292). In this section, I intend to explore the ways in which the asylum hearing is similar to and/or different from performance as described by Richard Bauman, John Austin (1962), and John Searle (1965).

Bauman states that "performance sets up, or represents, an interpretive frame within which the messages being communicated are to be understood, and...this frame contrasts with at least one other frame, the literal" ( Bauman 1975: 292). The literal frame seems obvious. Quite simply, it would likely refer to whatever is being said, plus the most basic denotative meanings. The interpretive frame, on the other hand, could refer to the functions and parts of the speech act (as described in the previous sections). In the context of the asylum hearing, it could also refer to the rules and laws that make some forms of speech better than others. A particular example that comes to mind here is the ways in which different manners of testifying are received or not accepted as valid.

Bauman also discusses the frames of "insinuation,...limitation, [and] translation" (Bauman 1975: 293). In the asylum hearing, insinuation functions as it does in other contexts, but limitation and translation differ slightly. Limitation encompasses the ways in which the attorneys and the judge limit testimony. In the case of the respondent's attorney, this would probably take place prior to the hearing, when the attorney talks to the respondent about what can and can't be said and what ways of testifying are or are not appropriate. The trial attorney limits by forcing yes-no answers to questions, thereby taking away the respondent's opportunity to provide context. The judge sometimes (but doesn't always) limits the testimony by cutting off tangents, telling the respondent to answer "yes" or "no," sustaining objections, and saying that a line of questioning or part of the respondent's testimony is irrelevant.

Translation can be translation by an interpreter, but it can also occur in cases where one party (usually the trial attorney or the judge) takes a statement or answer by the respondent and re-states it with a new interpretation.

In Bauman's analysis, performance is equated with communicative competence (Bauman 1975: 294). This is one aspect that may call the performative qualities of the asylum hearing into question. While some respondents are well-educated and speak English fluently, many others have little to no education and/or require the assistance of the interpreter. In these latter cases, the respondents are unable to understand the language in which the hearing is conducted, let alone the nuances of interactions taking place in the courtroom. So if there is a performance of some sort going on, who is it for? What form does it take: is it an exposition of a particular ideological position, or simply an attempt to do a job successfully by making a convincing argument to the judge? And who ultimately understands it?

Additionally, Bauman says, "a not insignificant part of the capacity of performance to transform social structure...resides in the power that the performer derives from the control over his audience afforded to him by the formal appeal of his performance" (Bauman 1975: 295). But does the hearing transform social structure? Here, the lack of an audience (a public one, anyway) certainly makes a difference. In a criminal case, it is clear that the attorneys have control over the jury, who they can sway with emotional appeals. However, in the asylum hearing, the observers (if there are any) are passive, and the judge will only accept appeals based on the evidence obtained through oral testimony and documentation, along with the attorneys' well-reasoned arguments. Since there is wide variation in the extent to which judges grant asylum claims, though, it seems that they must be influenced by other factors, even if they are unable or unwilling to admit to this. What does the judge respond to? And if he/she responds to something other than solid evidence, how does he/she evaluate the attorneys and respondents?

Austin discusses the concept of the performative utterance, in which a sentence or statement accomplishes something concrete. In the legal realm, he says, attorneys' language can be "operative" when it accomplishes a legal action (Austin 1962: 223). Operative language is distinct from a preamble



(in written documents), which states facts and circumstances. In the asylum hearing, operative language would occur when the judge declares the decision. This takes several forms, although it depends on the judge. All judges will at least informally state their intent to deny or grant the case. Some judges, in addition to this, will also dictate a formal oral decision that becomes part of the record. The formal oral decision is typically quite structured and includes legal precedent. Finally, all respondents receive written copies of the decision.

Operative language is usually restricted to the judge, but I would suggest that in some cases it comes from respondents as well (although unintentionally). Some respondents, when they testify in an ineffective manner, ultimately render themselves not credible in the eyes of the trial attorney and the judge. This most frequently occurs when the respondent cannot remember dates, or when there is a discrepancy between the dates he/she provided in his/her application and the dates on file with the Department of Homeland Security (DHS) (which the trial attorney knows going into the case).

Rules for performative utterances are as follows: “The convention invoked must exist and be accepted” and “the circumstances in which we purport to invoke this procedure must be appropriate for its invocation” (Austin 1962: 224). In the asylum hearing, the respondent and witnesses swear to tell the truth, the interpreter swears to translate accurately, and the judge makes a binding decision (binding unless the respondent appeals *and* the Board of Immigration Appeals overturns the previous decision). These speech acts carry out specific legal actions, but they would have no meaning if they took place outside the courtroom. The setting forms a *constitutive* part of their performative nature.

Searle (1965) discusses the distinction between constitutive and regulative rules. Constitutive rules are rules without which the activity of which they are a part would not exist. Regulative rules govern a pre-existing activity. The asylum hearing, interestingly, is mainly bound by regulative rules. There is very little that forms a constitutive part of an asylum hearing, except for the application for asylum and the appropriate supplementary materials that the attorney and the respondent are expected to submit. Most basically, the respondent in an asylum case is expected to be claiming a well-founded fear of future

persecution if returned to his/her country of origin, and in most cases he/she is expected to fear future persecution based on past experiences.

Searle's distinction between perlocutionary and illocutionary acts once again calls into question the performative qualities of the asylum hearing. While the illocutionary act simply defines what a statement does, the perlocutionary act is the way in which the statement persuades the addressee to take action. In the asylum hearing, the judge is, at least on the surface, only persuaded by the statement of facts, so everything said in the courtroom in terms of testimony, closing statements, and possibly questioning takes on perlocutionary characteristics.

### **The Hearing as Performance**

One of the earliest hearings I observed (Hearing #2) possesses some of the characteristics described by Bauman, Austin, and Searle. In the interpretive frame, the interpreter translated the respondent's testimony into English, and the judge evaluated the case based on the evidence (to all appearances). In the case of the trial attorney, he understood the respondent's literal lack of information (in this case, documentary/video evidence) about the events described in the testimony as meaning that the respondent was not credible.

There was not much insinuation, except in one instance where the trial attorney forced an answer to a contradictory question and said "oh, now you remember," as if the respondent was to blame for the confusion and could not hold a story together (although the trial attorney could also have been simply attempting to point out the contradiction in the respondent's answers to the judge). Limitation was apparent through the trial attorney's questions, which routinely forced yes-no answers, and the judge cut off some lines of questioning when he felt that their relevance was not apparent to the case. Translation was literal, and conducted by the interpreter.

A unique feature of this hearing was that the communicative competence of all parties might have been nearly equal. The respondent had been a law student in his country of origin, and it seemed quite possible that he understood a great deal of what was going on in the courtroom *interactions*. His English was also fairly adequate (I conversed with him and his attorney while we were waiting for the hearing to

begin), so not only would he have understood what was being said, but he may also have understood the tone in which it was being said, and possibly *the intent of the trial attorney*, due to his legal background. However, the fact that the respondent's testimony was being mediated by the interpreter (whose translations he sometimes corrected) may have hindered his ability to fully display his communicative competence.

The respondent did not speak in any way that could be considered "operative." He testified clearly and appropriately, responding to all the questions without going on tangents. In the end, the judge was most likely persuaded by the facts (albeit those presented by the trial attorney). I had observed this judge before, and I think it is unlikely that he would have been swayed by other concerns (such as political and/or personal views), as he displayed his usual tendency to listen to all the evidence on both sides with very little intervention or questioning on his part.

Another hearing with a different judge (Hearing #3) presented a striking contrast. The respondent was from a country in sub-Saharan Africa, which he left because of political unrest. He then went to study in Western Europe. During his time in Europe, he made several trips to the U.S. to visit friends and met the woman whom he would eventually marry. He moved to the U.S. in 2004 to get married, and remained there for several years, until, in Washington, D.C., he met some members of the political party he had belonged to in his country of origin. These party members asked him to take some documents to the respondent's country of origin for them. When the documents were found in his luggage at the airport in the country of origin, he was arrested, held for several days, and beaten by his captors, who also set dogs on him. He managed to return to the U.S. and did not return to his country of origin. He applied for an adjustment of status based on his marriage (possibly to a U.S. citizen). When he went to check on the status of his application, he learned that his wife was already married to someone else. He said that he was held by immigration officials for 8 or 9 hours and questioned, as they claimed not to believe that he didn't know about his wife's prior marriage and were convinced that he had paid her to marry him. He said that the immigration officials told him that they would put him in jail unless he told the truth, and since they didn't believe that he was being truthful, he started telling them what they wanted to hear, as he

was afraid to go to jail. He was given a statement to sign, which he thought would allow him to leave. However, he was arrested and held in detention until he was released after a bond payment. Now that he could not adjust his status based on his marriage, the respondent chose to apply for asylum.

The respondent's initial questioning began well enough. His attorney asked him fairly straightforward, open-ended questions, which he answered clearly. At the few times he went off-topic in his responses, he came back to the question when directed to do so by the judge. However, his case fell apart when he was questioned by the trial attorney, and his testimony took on operative characteristics. The trial attorney spent 35 minutes of his questioning asking the respondent about dates (entering and leaving the U.S.), as there were discrepancies between the dates the respondent had put down in his application and the dates the trial attorney had listed in the government's file. Although the respondent claimed to have lost his passport, he was not very convincing, and he was not able to provide an explanation that would adequately satisfy the trial attorney. As a result, he lowered his own credibility, and possibly invalidated it altogether.

The judge in this hearing was far more active than the judge in Hearing #2. There was one instance of insinuation where the judge said that the respondent "fiddled around with his testimony," in reference to the fact that the respondent was providing him and the trial attorney with inconsistent information. The judge also limited the respondent's testimony along with the trial attorney by reminding the respondent that the trial attorney had asked a yes-no question. The respondent spoke fluent English, so there was no need for literal translation, but the judge re-interpreted the respondent's behavior at the end of the hearing. The respondent had said that the immigration officials who detained him made him swear to tell the truth, and, although he had testified in this hearing that he had been coerced, the judge didn't seem to believe this part of the testimony. In his concluding remarks, the judge re-worded this part of the story: "he's told me that oaths don't mean much to him, that he lied under oath." However, the respondent had not said anything about his feelings or opinions regarding oaths. In the end, the judge was probably persuaded mostly by the facts, but also (potentially) by the respondent's demeanor, in terms of his (the respondent's) inability to answer questions or provide consistent information. After 4 hours of questions

from both sides, several recesses, and an opportunity for closing statements, the judge told the attorney that she had ten days to submit further evidence for her client's case and that he [the judge] would make a decision after reviewing this supplementary evidence.

### **Asymmetry**

The hearings described above represent some of the asymmetry inherent in the asylum hearing, and the questioning process in particular. The respondent in the first hearing (Hearing #2) is placed in an asymmetrical relationship as his testimony is mediated by the interpreter and then reinterpreted by the trial attorney, who sees his responses as having entirely different meanings. When the trial attorney interprets the respondent's testimony, the respondent is powerless to stop him. In the second hearing (Hearing #3), the respondent's testimony is reduced to a random conglomeration of dates and times as the trial attorney presses unceasingly for consistency. Without an adequate explanation for the lack of consistency, and no help from his attorney, this respondent is also powerless to salvage his credibility in the context of the hearing.

The ultimate situation of asymmetry occurs in the case of a *pro se* respondent (Hearing #4), detained in a contract detention facility in the southern United States, a region of the country that possesses a mere handful of already overburdened legal aid providers, some of whom refuse to represent detained respondents<sup>21</sup>. He attempts to explain his case to three different judges over an eight-month period, but with no knowledge of the English language, little to no knowledge of any legal system, and no

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<sup>21</sup> The immigration courts in the southern U.S. have the highest asylum denial rates in the country (<http://trac.syr.edu/immigration/reports/judgereports/>). Respondents in detention in this region are in even more difficulty: in addition to the fact that asylum denial rates at all U.S. immigration courts in immigration detention facilities reach nearly 100 percent, with most respondents being unrepresented, most of the facilities in the south are run by the Corrections Corporation of America (CCA), a private prison contractor which is notorious for underpaying and under-training the employees who staff the prisons. As a result, inmates in these facilities (which are sometimes taken up in part by the local jail population) are often housed with inmates with criminal records, and there are often complaints filed regarding abuse by prison personnel (<http://www.detentionwatchnetwork.org/dwnmap>). Additionally, even if immigrants are detained in these facilities solely on the basis of their lack of legal status, their incarceration possesses a stigma that may make them undesirable in the eyes of some legal aid providers—it can certainly be much harder to prove that a respondent deserves to remain in the U.S. if he/she has criminal convictions or has committed other illegal activity here. Collect calls are also the only way for prisoners to make phone calls, and some legal aid providers refuse to accept collect calls.

attorney, he cannot combat the advantages faced by the trial attorney and the judge. My analysis of this case is based on the copy of the transcript I obtained from my supervisor at Catholic Charities DC.

The respondent emigrated illegally to the U.S. from Central America and had been living in the U.S. for at least 10 years. His testimony implied that he left his country of origin due to a lack of employment opportunities. He married a U.S. citizen and they had three children, who automatically received citizenship. The respondent continuously worked various odd jobs, where the employers did not check for immigration papers and paid cash. During his time in the U.S., the respondent received several convictions for various minor offenses, including DUI and driving without a license. The latter is common among illegal immigrants, particularly in rural areas, but the circumstances surrounding the former were unclear. The latest of the convictions led to the respondent's incarceration at the time of his hearings.

The respondent's case centered on proving that his wife and children would face "exceptional and extremely unusual hardship" (the court's words) if he were to be deported back to his country of origin. However, at the time of the hearings the respondent's wife was institutionalized (whether she was in prison or in a rehabilitation facility was not clear) and could not come to court to testify. Without the wife's testimony, the respondent could not prove his case adequately, and his claim was denied.

While the judges involved in these hearings tended to ask the respondent fairly open-ended questions, they also used their superior legal knowledge and command of legal language to build an asymmetrical relationship between themselves and the respondent.

The judge builds the asymmetrical relationship in steps, and the first step is to firmly establish the place of legal language in the hearing and within the questioning process. Consider the following exchange:

Judge to Respondent: Were you inspected at the border by an immigration officer and either admitted or paroled into the United States?

Respondent to Judge: No, I entered *voluntarily*.

Judge to Respondent: You entered *illegally*?

Respondent to Judge: Yes.

Judge for the Record: I will sustain the 212(a)(6)(A)(i) charge and find the Respondent removable from the United States (emphasis added).

It is not entirely clear how the respondent understood the judge's initial question, but it could have had a negative connotation for the respondent (although this is, in fact, a standard question in an asylum or withholding of removal hearing). The judge could have broken the question down into its two component parts ("inspected at the border by an immigration officer/either admitted or paroled into the United States"), but he chose not to do so. As a result, it may have been harder for the respondent to process the question. On the one hand, he would have heard "Were you inspected at the border by an immigration officer..." and possibly thought that an inspection would have criminal connotations, and he might not have understood that "admitted" and "paroled" are simply legal terms—the former refers to being given the freedom to enter the country, and the latter refers to being given permission to enter the country under certain conditions.

The contrast between the uses of "voluntarily" and "illegally" is also striking because it shows two diametrically opposed views of the choice the respondent made to enter the United States. "Voluntarily" suggests that the respondent entered freely, of his own volition, without needing the permission of the immigration officers at the border—perhaps he even felt entitled to seek refuge in the U.S. The judge, on the other hand, sees the situation from his own legal perspective—clearly, the respondent did something that was against the law. The judge chooses to emphasize this perspective in the way he frames his question: it attempts to clarify the respondent's meaning, but it deprives the respondent of his capacity as an agent and reinforces the criminalized nature of his action. In addition, the question is framed so narrowly that the respondent can only give a yes/no answer with no opportunity for further explanation.

The second step in building the asymmetry occurs in the judge's conversations with the trial attorney, of which there are many throughout the transcript. The judge often turns to the trial attorney for pages at a time, completely ignoring the respondent, and discusses minute details of the case with the trial attorney on the record with the respondent still present and waiting for his turn to speak. In some of these

instances, it is not at all apparent what the judge and the trial attorney are even discussing, as shown in the following example:

Judge to Trial Attorney: Yeah, I would be interested in that because—and I don't know what the evidence is going to show. We certainly have the Respondent and any evidence he may give. He's given a little now. We may or may not have evidence from the other two witnesses.  
Trial Attorney to Judge: Right.  
Judge to Trial Attorney: And so you could—yeah, I guess...  
Trial Attorney to Judge: But it doesn't appear that there are going to be any medical people showing up. That's [*sic*] sort of thing...  
Judge to Trial Attorney: That's correct. There won't be any...

This exchange seems as if it might be related to the prospective role of medical evidence in the hearing, but the cut-off sentences and interruptions make it so unclear that the trial attorney and the judge are the only people who could possibly comprehend the topic of this conversation. Essentially, the two of them are intuiting each other's meanings, and because they are able to do this and the respondent is not, they increase the distance between themselves and the respondent. Furthermore, the longer the trial attorney and the judge talk in each exchange, the more apprehensive and confused the respondent is likely to feel, since it is unlikely that he is receiving continuous consecutive interpretation and he has no attorney of his own to explain what is occurring in the room. If the hearing is occurring by videoconference (as at least some of these hearings are), the distance is increased still further by the mediation of the camera, which limits who the respondent is able to see.<sup>22</sup>

Finally, the judge solidifies the asymmetrical relationship by using a logic-based linguistic construction to reinforce the respondent's status as (what the judge perceives to be) a criminal alien. In fact, in the following exchange, the respondent does not have an attorney because he has not been able to get one, not because he hasn't tried hard enough (as the judge insinuates).

Judge to Respondent: ...If you wanted [an attorney], one would be here. And the fact that one isn't here means that *you're going to speak for yourself*. Is that correct? That's correct? You're speaking for yourself?  
Respondent to Judge: Yes.

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<sup>22</sup> See chapter 1 for an explanation of the difference between consecutive and simultaneous translation. In a videoconference hearing, the interpreter is not with the respondent, but sits in the courtroom with the judge and the attorney and translates consecutively as needed (i.e. when the respondent is being spoken to). In some cases (usually with languages that are less commonly spoken in the U.S.), a telephonic interpretation service is used. Although the facility where the respondent is detained has a small immigration court, it is not clear from the transcript whether or not the hearings were taking place via videoconference, with the judge and interpreter at the larger metropolitan immigration court, or if the hearings were taking place in the detention facility.



Judge to Respondent: *And so* you give up your *right* to a lawyer?

Respondent to Judge: Yes, because I don't have the money to pay for a lawyer.

Judge to Respondent: I understand, sir. I won't hold that against you. We'll make sure that you get every bit as good a hearing as if you had a lawyer... (emphasis added)

In his first statement, the judge implies that the respondent does not really want an attorney, and that he [the respondent] didn't try hard enough to get one. He then equates the non-presence of an attorney with the fact that the respondent must speak in his own defense. The judge reinforces his point further when he repeats his statement in a restrictive questioning form. The first "is that correct" forces the respondent into a yes/no answer, but the judge repeats the question twice without waiting for a response. The "that's correct" further reinforces the judge's re-interpretation of the respondent's actions, and the final question, in tag format ("You're speaking for yourself"?) essentially re-appropriates the respondent's voice. Although the respondent can now answer the question, the judge has re-shaped the respondent's intent so fully that the respondent can only answer "yes".

With the next question, the judge makes a further effort to back the respondent into a corner. "And so" is a perfect example of a declarative construction. It continues the progression of the judge's logic-based argument, as he equates the respondent's presumed lack of desire for an attorney with the intention of presenting a *pro se* defense, and, by extension, a desire to permanently waive his right to legal representation and assistance. However, the respondent seems to be slightly aware of what the judge is trying to do: instead of responding with a simple "yes," he elaborates on his response by pointing out that he doesn't have the funds for an attorney. Perhaps the word "right," which occurs in so much human rights discourse and political discourse around the world, prompted the respondent to realize that he needed to put forward some explanation to make sure his intentions were not completely misunderstood. As the judge takes this cue, his tone changes to a more gentle and respectful one, as he addresses the respondent as "sir" and makes an effort to sound reassuring. However, by definition, it is impossible for the respondent to "get every bit as good a hearing as if [he] had a lawyer" because, without the assistance of someone familiar with the system in which the court operates, the respondent has no way of adequately defending himself against whatever linguistic or other actions the judge chooses to take.

The three exchanges described in this section, and others like them, took place throughout the eleven hearings that became necessary to complete the respondent's case. Throughout the process, the respondent answered questions as well as he could given the situation, and occasionally asked clarification questions of the judge, which were usually (but not always) answered. In the end, though, the respondent's lack of an attorney, combined with the circumstances surrounding his case, contributed to an inevitable denial.

### **The Ethnography of Speaking**

The hearings described above present examples of some of the factors that not only may make the asylum hearing a performance, but also constitute it as a speech event. In this section, I return to Hearing #2 and re-examine it as a speech event, based on the framework provided by Dell Hymes (1974) and Ronald Wardhaugh (2006). I intend to demonstrate through this analysis that each hearing includes recognizable patterns in the procedures and strategies (linguistic or otherwise) used by participants, and that, as a result, the asylum hearing can always constitute a speech event.

It is important to consider in this analysis that, according to Hymes, "not all behavior is communicative, from the viewpoint of the participants; not all communication is linguistic; and linguistic means include more than speech" (Hymes 1974: 256). In the asylum hearing, testimony may be considered to be non-communicative behavior if it fails to follow the prescribed norms. One of the most commonly cited examples from the attorneys I interviewed was that of the respondent who goes off on tangents<sup>23</sup> and/or provides (overly) lengthy answers to the questions asked by an attorney or the judge. While the respondent may be trying to provide cultural context that he/she feels is necessary to answer the question, this is rarely recognized by the judge and trial attorney as appropriate linguistic behavior, and is frequently viewed as being irrelevant. So in these instances, failure to respond to a question in a manner considered acceptable may render the response entirely non-communicative altogether.

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<sup>23</sup> For the purposes of this project, a tangent is an elaboration or addition to a response that bears no (apparent) relation to the question that has been asked or the topic being discussed; an elaboration is a relevant extension of a response.

Non-communicative behavior may come from other participants as well. In Hearing #2, the trial attorney asks numerous questions that bear no apparent relevance to the case. As a result of his questioning, he disrupts, even prevents, the narrative flow of the respondent's testimony, increases the respondent's frustration, and distorts the case that the respondent and his attorney try to present to the judge. However, the trial attorney's questioning, while hostile, did not convey any clear intention or goal, and therefore failed to communicate.

Hymes also mentions the existence of speech situations and non-speech situations (Hymes 1974: 257). Speech situations would involve whatever the participants consider to be speech. In most cases, participants might recognize speech situations as involving what is actually said, and perhaps how it is said as well, but I would suggest that speech situations might also involve other forms of communication, such as body language and silence, which are often linked to what the participant is saying. I would consider a non-speech situation, in contrast, to involve writing. In the asylum hearing, then, the non-speech situation would occur in the act of filling out, submitting, verifying, and testifying based on written documents (asylum application, affidavit, human rights reports, medical and psychological evaluations, etc).

Parts of a speech event are "sender, receiver, message form, channel, code, topic, [and] setting" (Hymes 1974: 258). The sender can be any participant in the speech event. The receiver can also be any participant, as long as the participant in question is being addressed. The message form is the form in which the message, or content, is conveyed to the receiver. This can be the medium of the content (speech or writing), or factors associated with the medium, such as styles and registers. Channel is the method of communication used. Code is the way in which participants choose to speak (or write). And setting encompasses both the participants and the scene in which their speech and actions occur.

All speech events, according to Hymes, have several functions: "expressive, directive, poetic, ...referential, [and contextual]" (Hymes 1974: 258). Every speech event, Hymes says, contains all of these functions, but depending on the speech event, some functions have greater priority than others. An asylum hearing would be most likely to demonstrate its directive, referential, and contextual functions

the most. Unlike criminal trials, where the expressive (and sometimes poetic) function is often used by the attorneys to appeal to the jury (as can be seen in any episode of “Law and Order”; also, Mileski 1971), emotive speech has no place in the asylum hearing, most likely because there is no jury. Attorneys instead appeal directly to the judge, who decides the case (at least in theory) based on the facts presented through testimony and documentation.

## **SPEAKING**

Ronald Wardhaugh takes Hymes’s analysis one step further, in his SPEAKING formula (Wardhaugh 2006: 247-251). The components are similar: setting/scene, participants, ends (“the conventionally recognized and expected outcomes”), act sequence (“actual form and content of what is said”), key (the tone and manner in which something is said), instrumentalities (channels and registers), norms of interaction and interpretation, and genre. The following section presents my analysis of Hearing #2, based on this formula.

The setting is a medium-sized court (6 judges) in a mid-sized mid-Atlantic city. The courtroom contains three wooden benches on either side of the door, where witnesses and observers sit. Each bench seats three people comfortably. At the front of the three rows is a podium with a clipboard, where the respondents and/or their attorneys sign in when master calendar hearings are held. A waist-high wooden barrier with a gate separates the witnesses/observers from the attorney, respondent, interpreter, trial attorney, and the judge. The trial attorney sits at a table in front of the barrier, while another table is reserved for the respondent’s attorney, the respondent, and the interpreter (if needed). In the front of the room, there is a platform with a chair for the respondent and witnesses to sit in as they provide testimony. Next to this chair is the bench, where the judge presides over the courtroom. The judge has a computer on which he makes notes and transcribes the testimony. There is another chair with a computer next to the judge’s bench, in case a clerk is needed. Behind this chair is the door that the judge uses to enter and exit the courtroom.

At this hearing, the participants were the respondent (a former law student from Eastern Europe), the respondent’s attorney (who I had interviewed about a week before this hearing), the trial attorney, the

judge, and the interpreter, while I and two court employees were permitted observers. The respondent understood and spoke English reasonably well, but it was not his best language, so the interpreter was present to translate. However, the interpreter was expected to mediate all the questioning and testimony, even if the respondent understood what was going on (and he seemed to understand a considerable amount). The judge said very little, and only interrupted a handful of times.

The ends seemed to be different for some of the participants. On the most basic level, the respondent wanted to receive asylum so that he could be safe from persecution in his country of origin. The respondent's attorney wanted to help her client obtain asylum. Some immigration attorneys pursue activist agendas as well (McKinley 1997), but I don't think this attorney or the firm she worked for took any particular activist stance. The trial attorney, as an employee of the DHS, took a trial attorney's typical position of wanting to prove that the respondent had no claim to asylum and should go back to his country of origin. The interpreter was there to help the respondent understand the proceedings, and the judge sought to make a just decision on the basis of all the evidence presented to him.

I think there may be variation from these ends for at least one participant. The trial attorney was quite hostile, and while this is not unusual, it made me wonder if he had a particular personal stance that was factoring into his argument and ways of asking questions. While respondents' attorneys (at least the ones I interviewed) seem to be politically liberal, this respondent's attorney didn't seem to factor any personal stance into her questions, as they were clear, straightforward, and designed to construct a narrative of events.

The act sequence consisted of the respondent's story, and how the attorneys revealed it and interpreted it through the questioning process. The respondent was a law student in his country of origin. In his final year of school, he received a notice of expulsion a few weeks before he was to take his final exams. No reason was given. About a month before this happened, an explosion killed four students who lived with the respondent. The explosion was covered by radio and television stations, but nothing was printed. The cause and motivations for the explosion were unclear. The respondent and many of his fellow students were angered by the media's refusal to provide adequate information, and, a few days

after the explosion, they walked to the main regional government building to demand answers from their representatives. As they walked, more students and dissatisfied residents of the area joined the march. When they reached the building, a government official came out to talk to the crowd and asked for eight volunteers to come inside. The respondent was one of those eight. When he and the others entered the government official's office, they met eight other government officials. The main government official asked the respondent and his fellow students about their studies and made general conversation.

When he was expelled, the respondent's parents attempted to speak with the Dean, but they were never able to get an appointment. But a few days after the respondent was notified of his expulsion, soldiers arrived at his home and took him to a military conscription center, where he was asked to sign a paper stating his desire to join the army. The respondent declined and left the building to go back home. A few days later, he was dragged away by soldiers a second time. They took him to a military facility, shaved his head, ordered him to change into a military uniform, and beat him when he tried to disobey their orders. The next day, he was forced onto a train, where he spent most of the time in the restroom due to the illness brought on by his beating. When the train stopped in a town, he managed to leave the train undetected and escaped into the crowd. He called his parents, and they picked him up. After going to a hospital for treatment of his injuries, his parents brought him to his grandmother's house, an hour outside the respondent's home town, where he hid until he escaped to the U.S.

The respondent thought these three parts of the story were related. He was from a country that is unwilling to admit to unfair elections and limits free speech, and, although not quite as repressive as other countries in the same region, the government of the respondent's country does not go out of its way to protect its citizens' rights (Amnesty International 2011). Thus, he concluded that the only possible reason for his expulsion was his involvement in the protest, as he did not have anything in his student record that would otherwise lead to expulsion. The other connection, although less clear, might have been between the conclusion of his education and his conscription into the army. It may also have been caused by the view that his involvement in the protest went against government policy, or else by his perception that the racial minority that he is part of is treated poorly by citizens of the majority racial group.

The attorney began the questioning with standard queries, such as where and when the respondent was born and how he entered the U.S. After going through these basic questions, the attorney asked a very broad “what happened” question in relation to one of the parts of the respondent’s story. Here, the trial attorney interrupted to object, and the judge told the attorney to direct the respondent to specific questions rather than tell the whole story. The attorney complied, and the respondent’s story slowly began to emerge. On one difficult question, the judge intervened to suggest an alternate way of asking the question, which was ultimately helpful to the attorney.

After a long period of slow but orderly and straightforward questions, the attorney switched to asking the respondent about his ethnic group. Immediately, the trial attorney objected. The judge denied the objection and said that he would allow the attorney to proceed. As the attorney continued her questions, it became clearer that she was trying to see if there was a connection between the respondent’s status as a member of a stigmatized minority group and his expulsion and/or military conscription. However, the connection was still tenuous, so the judge eventually guided the attorney back to the main line of questioning. The attorney concluded by asking questions about what would happen if the respondent returned to his country.

The trial attorney’s lines of questioning were haphazard. He used the standard “is that correct” questions that trial attorneys often use, and when he used other types of questions, he tried to cut off the respondent’s answers by forcing the respondent to answer “yes” or “no”. He did not keep this up for the rest of the questioning. Instead, he started using the phrase “the reason I’m asking you this,” supposedly in an attempt to explain his questions. However, it was still unclear what connections he was trying to make. After asking a question that allowed the respondent to express his opinion, the respondent answered, and the trial attorney switched lines of questioning. He began the new line of questioning by asking the respondent why he didn’t have proof that the explosion had occurred. He had, he said, been searching the internet for two days and could find no record of such an event. The respondent tried to explain that there was no newspaper coverage. The trial attorney revealed that he didn’t see why the respondent couldn’t provide audio-visual evidence of the explosion. The respondent tried to explain that

the kind of audio-visual evidence the trial attorney wanted did not exist. This went on for several minutes, and only when the attorney objected did the judge intervene and steer the trial attorney off that line of questioning.

The trial attorney then asked the respondent why he hadn't obtained his student file from the Dean's office. The respondent had received a letter notifying him of his expulsion and he had admitted it as evidence because he could tell that the school was not going to reveal the reason for his expulsion. However, the trial attorney continued to press for a response. At the conclusion of the hearing, the judge denied the case.

Key refers to the tone and/or manner used in speech. In this particular hearing, the most notable key occurred in the trial attorney's speech during the act sequence. As I have mentioned, the trial attorney was extremely hostile in his questioning. In one instance, he managed to cause the respondent to give contradicting answers to a question that was not clearly asked the first time. Upon receiving an affirmative response, the trial attorney said, "oh, now you remember" as if the respondent was to blame for the confusion and could not hold a story together. In addition, the tone of interaction between the trial attorney, interpreter, and respondent changed throughout the hearing. Before the hearing started, it became apparent that the trial attorney and the interpreter knew each other when they greeted each other cordially. When the trial attorney questioned the respondent, he gradually switched his gaze from the respondent to the interpreter. However, by the end of the trial attorney's first objectionable line of questioning, he and the interpreter were facing each other and glaring at each other from their respective tables. The respondent and the trial attorney had not had any interaction at the beginning of the hearing, but at this point the respondent joined the interpreter in glaring at the trial attorney. The judge eventually re-directed the questioning.

Instrumentalities were consistent with most of the other hearings I had observed. Written (affidavits) and documentary evidence had been submitted beforehand, and the channel used in the courtroom was exclusively verbal (testimony and questioning). All parties used formal registers, with no use of casual speech.



In most of my interviews, attorneys have spoken about inappropriate ways of testifying (going off on tangents, etc) and how inappropriate testimony can lead to a respondent or witness being found not credible. As a result, in-credible testimony would defy the norms of interaction and interpretation in most hearings. However, I think that the respondent in this hearing, having studied law, had some sense of what was going on in the hearing and understood how to behave and testify appropriately. Instead, the trial attorney was the one to defy the norms, as the majority of his questions were entirely unrelated to the line of questioning established by the respondent's attorney and the story told by the respondent. While he did ask questions that attempted to verify the events that the respondent had described, I would suggest that the methods he used to do so (asking for information that the respondent would not have reasonably been able to obtain) were outside the norms. One attorney I interviewed said that, if documentary evidence is not available, the attorney should "document everything [he/she] has done to try to get [the documents]". While the respondent's attorney did not mention specific difficulties in acquiring evidence, if she had submitted documentation describing these efforts, or documentation explaining why it would be impossible to obtain the kinds of documentary evidence the trial attorney was asking for, then the trial attorney would definitely have acted outside the norms.

Genres included questions, statements, and statements in the form of testimony (sometimes in narrative form). Genre can also be equated with performance, which, I have argued, may be part of every asylum hearing. All communicative utterances have an audience, even if that audience is not immediately clear. The attorney performs for the judge by mediating the creation of a story. The trial attorney performs for the judge by interpreting and re-presenting the respondent's story from the perspective of DHS. The judge (if he/she speaks) performs for the attorneys and the respondent by asserting his/her control over the hearing. If the judge refrains from active participation throughout the hearing, his/her decision at the end is stated (or, if it is a formal oral decision, performed) for the attorney and the respondent. The respondent performs naturally, simply through the act of telling a story.

## **Conclusion**

While the analyses of Bauman and Hymes work well in considering the structured nature of a hearing, they lose some of their value in the asylum hearing due to the lack of emotive performative characteristics, and the fact that the asylum hearing is constituted by fixed texts (affidavits, documentary evidence) and the lack of play that normally occurs during a performance (i.e. creative manipulation of speech). A criminal hearing, which takes place in the public eye, has the capacity to *transform* social structure—an asylum hearing, which takes place in a closed, usually windowless courtroom, merely *enacts* it. As the respondent is cut off and isolated from the community of which he/she is a part, he/she is obliged to frame his/her utterances in terms that are understood by the other parties in the room in order to be released from the space. Because the respondent (with the exception of family members) is the only individual in the room who does not necessarily understand the norms of the legal system and the immigration courtroom, the remaining participants in the hearing are able to continually enact and enforce what they perceive to be the preferred and accepted sociolinguistic structure by means of questions, interruptions, interpretations, and (in the case of the judge) the decision in the case.

In contrast, public awareness, observation, and active participation (via the jury) transform social structure because people can speak about what they have seen and experienced, express dissatisfaction, and push for change. Without this knowledge and awareness, the performance and concurrent procedures of the asylum hearing must continually remain the same, unless change comes from within the system. Since the capacity for change in the asylum hearing is limited, it is vital that each respondent have an attorney, for, without an attorney, they cannot navigate the asylum hearing as speech event, which is constituted both by linguistic characteristics (relating to the English language) and by the specialized knowledge of legal professionals. In other words, the attorney acts as a *cultural mediator*, bridging a nearly incommensurable gap between the knowledge and power of the legal world, and the world of the asylum applicant, who is merely seeking a safer, better life. In the following chapter, I will examine how respondents, with the assistance of their attorneys, attempt to communicate their experiences in a manner that enables their testimony to be understood and accepted by the judge.

### **Chapter 3: Language, Ideology, and Respondents' Testimonial Narratives**

In the previous chapter, I demonstrated that the asylum hearing is a speech event with some of the characteristics of a performance. Like the criminal court, attorneys and judges make their arguments and decisions based on internalized ideas about the ideal use and function of language, and on the ways their legal training has taught them to interpret texts (such as legislation) and oral testimony. Unlike the criminal court, however, there is no room for verbal creativity since emotion plays no (active) role<sup>24</sup>. In this chapter, I will demonstrate that the structure that results from this lack of emotion places increased emphasis on the respondent's oral testimony and submitted documentary evidence. Not only must the respondent conform to attorneys' and judges' expectations of appropriateness in his/her testimony, he/she must also communicate using what I term a "successful narrative". A successful narrative, as I will explain in more detail, is a narrative that impresses the judge (and sometimes the trial attorney) with its credibility and leads to a grant of asylum; an unsuccessful narrative is unclear and unconvincing and will lead to a denial of the claim unless there is a witness or substantial documentary evidence that can corroborate the respondent's narrative. Finally, respondents may face the problem of attempting to testify to events so traumatic that they do not fully understand their significance or know how to speak about them in accordance with the expectations of appropriateness. In the criminal court, a defendant always has an attorney to guide him/her through these difficulties and members of the public can raise an outcry if they feel that the defendant has been treated unfairly by the active participants (i.e. attorneys, judge, jury, interpreter); in the immigration court, the respondent may not have an attorney to guide him/her, but he/she is still expected to conform to the attorneys' and judges' expectations of appropriateness, and there is no one to press for change if the respondent is treated unfairly and/or cannot meet the expectations.

#### **Linguistic Ideology**

According to sociologist Brenda Danet, the "language of the professions is both a symbol and a tool of power, creating dependence and ignorance on the part of the public" (Danet 1980: 452). This

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<sup>24</sup> Respondents may become emotional during their testimony, but this does not form part of the argument during the hearing except where the judge uses it to evaluate the respondent's demeanor (if he/she decides this is important to the decision).

power is inherent in linguistic ideology, which is an important influence on the actions and behavior of attorneys, judges, and even respondents in the asylum hearing. Some key thinkers discussing linguistic ideology, particularly in relation to the setting of the court, are Danet (1980) and anthropologists Kathryn Woolard and Bambi Schieffelin (1994). Danet and Woolard and Schieffelin focus on criminal courts, and to my knowledge there is no literature on the role of linguistic ideology (or other ideologies) in immigration courts.

Much of linguistic interaction, in the courtroom and elsewhere, is implicitly governed by linguistic ideologies. Woolard and Schieffelin (1994) put forward several possible definitions, which they see as being mutually exclusive. Based on my fieldwork and my reading of literature relevant to asylum hearings, I would suggest that ideology in the asylum hearing is best defined as “the cultural system of ideas about social and linguistic relationships, together with their loading of moral and political interests” (Woolard and Schieffelin 1994: 57). This definition seems to encompass general cultural ideas about the relationship between society and language, and the various factors that affect that relationship. When applying it to my research, it suggests that linguistic ideology can be viewed as a set of lived, inherent ideas that are endemic to the participants in the asylum hearing. These ideas may vary slightly according to each participant, depending on what “moral and political interests” they bring to the process.

All forms of ideology represent assumptions or desires regarding the *ideal* use and functions of language. Ideology is not necessarily consciously expressed—more often, it is an ideal that is lived, meaning that it functions as a natural part of everyday interactions. In the asylum hearing, therefore, ideology is reflected in the ways respondents’ attorneys choose to ask questions of their clients, in the ways the trial attorneys choose to frame their questioning and elicitation strategies, and in the ways the judge listens to, questions, interprets, and makes a decision about whether or not the evidence is credible enough to warrant a grant of asylum. Furthermore, linguistic ideology is also inherent in the ways respondents testify. However, I would argue that linguistic ideology is culturally specific—after all, respondents come from different cultures with different ideas about the ideal use and function of

language. These ideas may lead the respondents to testify in a manner that they consider to be acceptable, even ideal, but that does not match the ideal of their audience.

Linguistic ideologies play out in the asylum hearing (and other hearings as well) because of the highly structured nature of a hearing. Woolard and Schieffelin say that “structure conditions ideology, which then reinforces and expands the original structure, distorting language in the name of making it more like itself” (Woolard and Schieffelin 1994: 70). This means that the structure of the hearing provides a *mechanism* for ideology to work. With a strict set of rules in place, decision-makers can dictate what counts as acceptable speech and what speech is inadmissible. The hearing dictates what constitutes appropriate language because the judge expects the respondent to testify in a manner that will be recognized by him/her (the judge) as credible, which means that the respondent has to avoid any seemingly extraneous content, even if it could potentially be helpful to his/her (the respondent’s) case. In addition, non-English speaking respondents’ speech may be incorrectly translated by an interpreter, if the interpreter speaks a different dialect or has trouble hearing what the respondent is saying. Linguistic ideology also functions as an essential component of the performance-like characteristics of the asylum hearing—since it is endemic, it inevitably factors into the processes of communication, elicitation, and interpretation, all of which are, to some extent, guided by fixed procedures.

### **Legislation and Ideology**

The two primary pieces of legislation that discuss asylum—the United States Code (Title 8, Chapter 12) and the Code of Federal Regulations (Title 8)—are sufficiently ambiguous that they leave considerable room for the influence of linguistic ideology in the interpretation and elicitation of testimony. Consider the following passage:

Considering the totality of the circumstances, and all relevant factors, the immigration judge *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...* (U.S. Code, Title 8, Chapter 12, 1229a[c][4][C], emphasis added).

To begin with, the use of “may” at the beginning of the passage (“the immigration judge may base a credibility determination on...”) implies an option. The judge may use the criteria described to make his/her decision, but the process of deciding what makes a respondent’s testimony credible is sufficiently ambiguous as to inadvertently allow the judge to make his/her decision based on factors outside the evidence, such as his/her personal opinion of immigrants from a given respondent’s country of origin. The phrase “inherent plausibility” can be problematic for respondents, as it leaves room for the judge to decide on the plausibility of the account without sufficient consideration of the circumstances behind the account or the events described (the writer of the legislation could have inserted “based on the available evidence” at the end of the phrase, which might give the judge a more solid grounding on which to base a determination of plausibility). Furthermore, the statement that the judge may evaluate inconsistencies “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim” fails to consider the fact that some judges (as described to me by attorneys) make credibility determinations based heavily on inconsistencies that may be the result of post-traumatic stress disorder, other mental health problems, or an incompetent interpreter.

The Code of Federal Regulations (CFR) is a slightly firmer in its standards regarding the rules of decision-making in asylum cases. There is a statement regarding the process of conducting asylum interviews (“the asylum officer shall conduct the interview in a non-adversarial manner and, except at the request of the applicant, separate and apart from the general public” [208.9]), which seems to display a concern for the rights and privacy of the respondents. Another section describes what sources of information are considered reliable: the Department of State, the Office of International Affairs, other branches of DHS, international organizations, private volunteer/human rights groups, news organizations, and academic institutions (208.12). However, the legislation again leaves room for the influence of linguistic ideology when it raises the issue of burden of proof:

The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the

Act does not relieve the alien of the additional burden of establishing eligibility for asylum (208.13[a]).

According to this passage, the applicant for asylum is expected to take full responsibility for proving his/her case. If the asylum officer (and/or an immigration judge) believes that the testimony is credible, the applicant may not need to do more than testify—however, the type or manner of testimony that would meet this standard is not clear. Additionally, proving a fear of persecution may only get the applicant a deferral of removal, especially if there is evidence that the applicant may be able to eventually relocate to his/her country of origin, or a safe country other than the U.S. The applicant’s next step is to show that he/she needs asylum, which will provide more solid relief from persecution and will permit him/her to seek work and become a permanent resident.

Applicants also face the problem of potentially having their application judged as frivolous. In the language of asylum legislation, a frivolous application is one that contains, or is believed to contain, false information. The legislation states that an application for asylum will be considered frivolous if “during the course of the proceedings, [the applicant] has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim” but is unable to do so (8 CFR 208.20). However, there may be many reasons for discrepancies that do not necessarily entail a frivolous application. The applicant may, as I have already mentioned, have been through an experience so traumatic that he/she has mental health problems that prevent him/her from providing an account of events that is seen as being truthful. The applicant’s responses may be cut off by an impatient asylum officer, trial attorney, or immigration judge (see Chapter 2 for examples). The applicant may also have an attorney who is incompetent or not knowledgeable enough to prepare the applicant adequately<sup>25</sup>. In the end, the legislation suggests that much of the decision-making process is at the discretion of the judge and/or the asylum officer.

### **Legal Language and Linguistic Strategy**

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<sup>25</sup> This may have been the case in Hearing #3, but since I didn’t have a chance to speak with the attorney at length it wasn’t clear.

The language used in the immigration legislation, and in other legal documents and procedures, creates “dependence and ignorance” because, as a professional language, legal language sets itself and its users apart from everyday life. The law and legal language contain rules, specialized terms, and documents (legislation) that define the ways in which testimony and documentation constitute evidence. In this realm, definitions of fact may already be pre-determined. However, Brenda Danet states that facts are constructed through interaction, and, in spite of some pre-existing rules, the questioning process is pivotal in legal practitioners’ attempts to determine the facts (Danet 1980).

Although Danet writes about the criminal court, her analysis of the role of questions applies to immigration courts equally well. Danet says, “a question is a summons to reply, a means to compel, require, or demand a response, though the extent to which a question is perceived as requiring an answer is culturally variable” (1980: 515). Indeed, all hearings require the addressee (typically the respondent or the witness) to answer the question that is put to them. However, based on the responses of nearly all the immigration attorneys I interviewed, I would concur with Danet’s statement about cultural variability. Most attorneys mentioned problems of cross-cultural misunderstandings and differing ideas about how to interact with other participants in the asylum hearing as part of their responses to the questions I asked them. The act of asking and answering questions has different meanings across cultures, and failure to understand this may result in, at best, tangential responses (deemed “irrelevant” by the judge) or, at worst, complete silencing of the respondent’s story.

Additionally, how the question is asked changes how the addressee responds (Danet 1980: 526). In my observations, respondents seemed to be most comfortable with open-ended questions (who, what, why, how), and their responses to these questions tended to be freer, more relaxed, and full of context for the events they described (unless the judge thought they were going off on a tangent and cut them off<sup>26</sup>). In contrast, the yes-no questions and declarative questions asked by the trial attorney severely limited the respondent’s answer, and respondents tended to display more tension in their body language, and sometimes displayed fear, anger, or frustration in their voices as they attempted to wrestle with the

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<sup>26</sup> See the descriptions of Hearing #3 in chapter 2 for an example.



constraints of the questions (as with the respondent in Hearing #2, Chapter 2). The limitations posed by a trial attorney's questions mean that, if they cause the respondent's story to fall apart (as in Hearing #3), the respondent may not have a chance to re-negotiate his/her identity (as a credible respondent) through language and narrative, as the trial attorney often has the last word.

### **Respondents' Communications**

When respondents are prepared by their attorneys and have substantial quantities of evidence (usually documentary) to support their claims, they may be able to communicate their experience in a manner that can be understood by the audience of the trial attorney and the judge. Two of the hearings I observed (Hearings #5 and 6) support this argument: in both cases, the respondents testified clearly, with no hesitation and used a linear narrative to tell their stories. As their testimony supported the documentary evidence provided (in the opinion of the judge and the trial attorney), the judge deemed both of them credible and granted their claims to asylum.

Both respondents were from the same country in the Horn of Africa, and, although their hearings were separate and unrelated, both had been through similar experiences in their country of origin, had the same attorney for their hearings, and the hearings took place before the same judge and trial attorney. The first respondent had been arrested and detained for nearly four years due to his involvement in political activities against the government in his country of origin. During his detention he was forced to engage in hard manual labor and was taken for interrogation multiple times. His interrogators tortured him through beatings, stress positions, and, once, with the use of a hot iron. One day at the end of his detention he was taken out of the prison compound in a van and released—his uncle had bribed the police to let the respondent go. The respondent hid in a town where the police would be less likely to find him, and since he had no legal status there (such as residency), he could only support himself doing day labor.

While this was going on, his family continued to receive threats. When he was first taken for detention, he had emerged from his hiding place after the police officers began beating his mother and were threatening to kill her. In spite of the respondent's detention, his inability to provide the information

the police wanted during the interrogation sessions led the police to continue to threaten the respondent's family.

The respondent managed to escape to the U.S. via Dubai by paying a smuggler. He applied for asylum within a year of entering the country, and used no false documents, so questions of identity, credibility, and the one-year bar were not problematic in this hearing.

While this respondent was testifying, his voice, which was already quiet, became still quieter and threatened to break. He was looking towards the interpreter, but was not actually making eye contact with anyone in the room. As the story continued, his responses became increasingly succinct, requiring further prompting from the attorney. However, the attorney persevered, and, although the respondent started to tear up as he continued his testimony, he pushed through without hesitations, interruptions, or tangents to complete the story.

After both attorneys had completed their questioning, the judge turned to the trial attorney and asked him what he [the trial attorney] thought of asylum "in this case". The trial attorney said that DHS had no objection. The judge then announced that he would grant the respondent asylum, and commented that he believed that the respondent had really undergone torture, "not what some people claim is torture". Based on this remark, and the rest of the judge's decision, it is clear that the judge found the respondent's testimony and the manner in which it was given to be credible and authentic.

The second respondent had been a university student in his country of origin, but his education was interrupted after two years when he was arrested for participating in the protests surrounding the 2005 elections in his country. He was detained for 18 months. During that time, he was housed in an overcrowded cell and was beaten during interrogations. On a trip to the police hospital for medical treatment, he was left alone in a room with the guards outside the door. When he went to the bathroom, he found that the window was partially open, and he was able to escape and hide in the church next door, where his uncle picked him up.

After the respondent's escape, he hid in his uncle's house. His family saved money in order to pay for the smugglers who could help the respondent leave the country. With the assistance of a

smuggler, the respondent went to a country in southern Africa and lived with an uncle who had previously migrated there. He worked in his uncle's shop, as the country's government had given him a renewable work permit when he asked to apply for asylum. However, his uncle was murdered, and the respondent strongly believed this to be a result of prevailing xenophobia in the country. He continued to live in the country after his uncle's death, but when he and his family had saved enough money, he hired a smuggler to take him to the U.S. Upon arrival, he was intercepted by DHS, and then applied for asylum.

During his testimony, the respondent spoke clearly and maintained a calm demeanor. He mainly looked at the interpreter as he spoke, and he moved his hands in a conversational manner. He was also willing to show his physical injuries to the court—he started to pull up his shirt to show a bruise left over from being punched in the stomach (of which photographs had already been submitted) and pulled up the leg of his slacks to show a bruise on his knee from being forced to engage in hard labor.

The judge was convinced by the respondent's testimony, and, although the trial attorney started a line of questioning regarding the possibility of the respondent moving to the country in southern Africa where he had lived before coming to the U.S., the judge upheld the respondent's testimony and the submitted evidence, which (most likely) included information about the country conditions in the proposed country of resettlement and the respondent's lack of ties there. The judge concluded that the respondent's testimony was credible and granted him asylum.

### **Attorneys' and Judges' Expectations of Appropriate Testimony**

Although these respondents were successful in reaching their audience through their narratives, some respondents provide narratives that are non-linear and/or tangential. Attorneys I spoke with were emphatic about the importance of consistency and clarity in the testimony, and they generally agreed that going on tangents or not providing a direct answer to a question could lead to a failure of credibility on the part of the respondent. One attorney expressed some frustration with the fact that objections to leading questions may prevent crucial parts of the story from coming through. While he was clear that he didn't think coaching the respondent in the courtroom was appropriate, he pointed out that, at times, respondents become nervous and forget parts of their affidavit, or answer questions (such as questions about dates and

times) incorrectly. The attorney may be able to ask about this information if it is included in the affidavit, since the affidavit often serves as the basis for the attorneys' questions, but if information is not contained in the affidavit and the respondent fails to mention it, a crucial part of the case can be lost.

Another attorney mentioned that clients should testify "as naturally as possible without getting too emotional", and also that their testimony should be "as detailed as possible, sort of like you're telling a story". In order to give this level of testimony, nearly all the attorneys said that they always meet with the client to prepare the affidavit and then go over the affidavit and supporting documentation to make sure the respondent understands it and to ensure that any necessary changes are made to the documents before they are submitted to the court. Although the attorneys had little to say about more specific guidelines for respondents' testimony, one attorney did mention that the respondent should make eye contact when answering questions. Another attorney mentioned that voluntarily admitting to problems or inconsistencies in the claim could be helpful to the respondent's credibility. For instance, she said, she asks her undocumented clients to pay taxes if they have not done so already, as this is an action that tends to be viewed favorably by the trial attorneys and judges.

### **Corroboration of Testimony**

One respondent whose hearing I observed (Hearing #7) gave testimony that failed to meet attorneys' and judges' standards of appropriateness, but the witness to his case provided a perfect corroborating narrative. This respondent had moved to the U.S. with his family and became involved with a group of individuals from his country of origin who were engaging in visa fraud. When he realized that one of the leaders of the group was trying to have him killed, he went to the FBI and gave up the names of all the individuals he knew in the organization. As a result, many of the group members were caught and were either still in prison or were deported back to the respondent's country of origin. Since he gave their names to the U.S. government, the respondent feared that he would be killed if he returned to his country of origin.

The respondent was applying for withholding of removal under the Convention Against Torture (CAT), which meant that the attorney had to prove through the questioning that the respondent had a fear

of torture, rather than a broader fear of political persecution. It was, however, difficult for the attorney to obtain answers to his questions, as the respondent had a tendency to go off on lengthy tangents, sometimes going off topic and other times expanding the answer to a question more than was necessary.

The witness, however, answered the questions perfectly. He was a government agent from the respondent's country of origin, and had moved to the U.S. to work for the U.S. government. He was instrumental in helping the respondent contact the FBI when the respondent realized that his life was in danger. The witness's testimony was extremely clear, concise, and responsive to all the questions posed by both the respondent's attorney and the trial attorney. In effect, he told the same story as the respondent, but without backtracking, going off on tangents, or losing focus at all. The testimony was a completely straight narrative, with a coherent beginning, middle, and end. In other words, the *witness* told the respondent's story.

### **Respondents' Unsuccessful Narratives**

In other cases, narratives, or the attempts to provide them, fail. A failed narrative, according to Diana Eades (who writes about reparations claims brought by Australian Aboriginals) (2000: 181), involves "confusion about the facts, unclear referents, excessive interruptions, interference by the court, [and] heightened levels of frustration". Some of these factors may be caused by the respondent or witness trying to provide cultural background or context for the narrative which the judge and prosecutor (or trial attorney) are unwilling to accept. Both sides, of course, would be at fault here, for the interruptions of the judge and the trial attorney only add to the confusion. In asylum cases in particular, trial attorneys sometimes ask questions that seem to have no relation to the respondent's claim, and this can cause the respondent's narrative to become muddled and confused unless the judge interrupts or the respondent's attorney objects and is supported by the judge.

One instance of this occurred in a hearing I observed with a respondent from the Horn of Africa (Hearing #8). As a university student, the respondent had participated in several demonstrations advocating for political and academic freedom. He was arrested and detained three times, and in each

instance he was interrogated and beaten. He came to the U.S. with a student visa that he managed to obtain from his country of origin.

The attorney got to the central issues in the case quite efficiently, as the judge had asked him to refrain from asking for biographical information. There were, however, a number of problems. First of all, this was a classic case of political persecution. At the time I observed this hearing, several of the attorneys I had interviewed had told me that, in an asylum case centered on political persecution, it is crucial to prove that the applicant holds the political views he/she claims, is part of the political group associated with those opinions, **and** that the group and all its members are persecuted **specifically** due to their opinions and membership in the group. While the respondent provided what seemed to be a straightforward answer when his attorney asked him about his political opinion, the importance of proving these three characteristics of political persecution became clear when the judge began his questioning. The judge used the photographic evidence submitted, combined with the respondent's testimony that he (the respondent) was not enrolled in any political groups, to suggest that the respondent's claim to be a victim of persecution on the specific basis of political opinion was not credible. Additionally, when his attorney asked him how he (the respondent) had felt after being beaten, the respondent interpreted the question as referring solely to physical feeling, not emotional feeling. I found this problematic, as one attorney had been particularly emphatic in his conviction that, in order to prove credibility, applicants for asylum must convince the judge that they fear for their lives if returned to the country of origin. However, this respondent's testimony was calm and unemotional, and his feelings regarding his treatment in detention were not discussed.

At the conclusion of the hearing, the judge denied the claim. He said that there was not enough corroborating evidence to support the respondent's claim and stated that "the client seems to be a minimalist as an activist." While the judge told the attorney that the case could probably be won on appeal, the respondent's narrative was, for the time being, a failed narrative.

### **Respondents' Successful Narratives**

What made the first three narratives so successful? Hannah Woodbury says:

One way of thinking of a trial is as a story-telling contest in which contrasting interpretations of one or more events are presented as facts. Each [attorney] is charged with the task of convincing the jury (a set of nonspeaking participants) that his side's version of the story is the correct, or, at the least, the more plausible one. *But he must not tell the story himself* (1984: 206, author's emphasis).

Ultimately, the attorney must prepare his/her client to describe his/her (the client's) experiences by teaching the client the rules of a successful narrative. According to Alisoun Neville (2005), who writes about reparations claims brought by Australian Aboriginal peoples, successful testimony (and narratives) comes from respondents who understand that they have to frame their testimony from the perspective of an asymmetrically privileged audience of decision-makers. Providing a narrative that can be understood by the decision-making audience, rather than one given in terms familiar to the respondent's culture, makes the narrative more likely to be understood in court (Neville 2005: section VI). Additionally, oral testimony by a "legitimate" witness (i.e. one whose testimony/provides information that is in line with courtroom procedure) may have more weight than testimony by another witness (Neville 2005: VI).

Successful testimony also relates to the role of stories and narrative. According to Paul Gewirtz (1996), "storytelling is, or is made to function as, argument" (5). While the respondents don't exactly *argue* their cases (unless they are *pro se*), I would suggest that their attorneys, in the questioning process, attempt to shape their clients' stories in such a way that the stories *become* the argument (supplemented by documentary evidence). Additionally, Martha Brooks (1996) states that "narrative has a unique ability to embody the concrete experience of individuals and communities, to make other voices heard, [and] to contest the very assumptions of legal judgment" (16).

In order for the narrative to be successful, it has to *make* its audience respond, and one way of doing this is simply by persuading them to listen. As respondents, with the assistance of their attorneys, persuade their audience to listen, the testimony becomes the narrative. It takes the events that the respondent has experienced and shapes them into a coherent, linear form that can only be made possible through the testimonial process. Brooks states that "if you listen with attention to a story well told, you are implicated by and in it" (1996: 16).

One way of understanding the act of being implicated in a story is to consider Thomas Keenan's analysis of interpellation (1997). Most basically, interpellation is the act of calling to someone else. Keenan takes this simple act a step further by arguing that the act of interpellation creates a "frontier" in which the addressee may be coerced into responding, may feel coerced into responding, or may respond of his/her own free will. Additionally, the frontier is a space in which the addressee (and perhaps the addresser as well) takes responsibility for the utterance(s) involved in the exchange. In order to cross the frontier, the addressee supplies the "password", which is the response that the addresser considers to be most acceptable (Keenan 1997). The equivalent example in an asylum hearing would be the provision of testimony in a manner that the judge is capable of understanding as sensible and credible evidence.

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### **Learning the Law**

How do the attorneys and judges involved in the interpellative questioning process learn to interpret the law and decide whether or not a respondent is providing credible testimony? For attorneys and judges, linguistic ideology plays a role in their communications, elicitations, and interpretations, but their training teaches them to practice law as if ideology and other social, political, and moral concerns are of no importance.

Elizabeth Mertz writes about the process of law school teaching in her ethnography on legal education (2007). In her ethnography, Mertz and her research assistants observed first-year Contracts classes (a standard course required for all first-year law students) and analyzed the linguistic interactions. Although Mertz's research focuses on criminal courts, her ethnography explains that all law students, regardless of their future areas of practice, are required to take a particular set of courses in their first year of law school, and it is in these courses that they learn how to read, write, and think like attorneys.



One of the first things Contracts students learn to do is to select the facts of the case that they are taught are relevant. Emotional and moral concerns have no place. Instead, the professors use the Socratic method (asking one student, or a handful of students, very focused questions for an entire class period) to “dissect” each case the students study. As a result of the concentrated questions they have to answer in class, the students learn “fact gathering, [the] capacity to marshal and order facts to apply concept[s], and [the] ability to understand and interpret opinions, regulations, and statutes” (Mertz 2007: 28). By learning to think about and analyze cases from an attorney’s perspective, students also learn to “read, talk, and write like a lawyer” (Mertz 2007: 42).

One of the most important aspects of Mertz’s ethnography is that it displays a (seemingly) uniform, perhaps even ideal, legal culture. When attorneys go into practice, this legal culture applies regardless of the type of law they practice or any differences between types of law (i.e. criminal, civil, etc. vs. immigration). All first-year law students take the same classes, are taught using similar methods, and learn to interpret texts from a legal perspective. As they become immersed in their legal education, says Mertz, their training produces “a language that appears to be able to effect a nearly universal translation of events, people, and actions into a common language” (2007: 95). This language gives law students the unique ability to re-interpret legal events, or even everyday events. It also changes how they view events that they might previously have seen through a more emotional or moralistic lens: “As students are drawn into this new discursive practice, they are drawn away from the norms and conventions that many members of our society, including future clients, use to solve conflicts and moral dilemmas” (Mertz 2007: 99). However, even as these prospective attorneys learn to look at a case based solely on the facts, they are developing a new kind of ideology—one that lives within their professional lives and guides the ways in which they interpret texts and testimony and assist clients.

Interestingly, when I asked the attorneys I spoke with about how their training prepared them to practice immigration law, they uniformly felt that their law school education had not been very helpful. Some of them had decided fairly late in their legal educations that they wanted to focus on immigration and ended up going into firms where they literally had to learn on the job. Others participated in

immigration law clinics, which they found very helpful in preparing them to practice immigration law. However, none of them found their core law school classes very helpful in the long term. While a few attorneys mentioned that their core law school classes taught them how to think critically about evidence, all of the attorneys generally agreed that the practice of immigration law is fairly detached from the training attorneys receive in law school, unless they had been through an immigration clinic. Unlike the regular law school classes, the immigration clinic gives law students the opportunity to work with clients first-hand, thus giving the students insight into the problems (legal and otherwise) their clients face. The clinic then forces the students to confront their newly learned ideology of fact-based textual interpretation and to reconcile it with the culturally relative, highly nuanced claims of immigrant clients.

### **Applying Questioning Strategies in Court**

When attorneys begin practicing law, they learn to use linguistic strategies to achieve their desired goals. Hannah Woodbury, speaking about criminal courts, focuses on the ways speakers, attorneys included, “exploit” the features of questions and questioning strategies in order to achieve particular ends (Woodbury 1984: 197). She says, “codified rules enumerate and classify participant roles; they specify not only the rights and obligations of participants, but also how participants may interact verbally with one another” (1984: 198). Some of these “codified rules” include the asymmetrical relationship between addresser and addressee in the courtroom setting and the inability of attorneys to ask leading questions (attorneys for the respondent or the defendant). While attorneys are able to ask open-ended “wh-questions” (who, what, when, where, why, how), “wh-questions...deprive the [attorney] of control over the flow and the form of the testimony” (Woodbury 1984: 210). In addition, “the law, ignoring the interactive properties of speech act sequences uniquely associates the production of evidence with the participant role of [the] witness [or respondent]” (Woodbury 1984: 215). However, it is not just witnesses and respondents who produce the evidence through their speech: the role of the attorneys can be important as well, especially where questions are asked in a more restrictive fashion:

Yes-no questions deflect the law’s intent: whenever these occur, witnesses’ [or respondents’] affirmations or denials *transform [attorneys’] utterances into evidence*. Thus these questions

enable [attorneys] to speak to the jury directly rather than through the witness [respondent]-intermediary (1984: 215, emphasis added).

In the criminal court, the jury is directed to ignore certain types of evidence (such as that provided by attorneys' utterances), and to pay close attention to other kinds of evidence (the testimony of the defendant and witnesses). The criminal court is also guided by state law, which varies across the nation, and the Federal Rules of Evidence. In contrast, the attorneys' only audience in the asylum hearing is the judge (and even this is questionable), the immigration court is part of a federal system with uniform standards, and the Federal Rules of Evidence *do not apply*. Thus, the question of how to evaluate attorneys' utterances is left open to the judge's discretion. Without a strict set of guidelines on the "rights and obligations of participants," the ways in which participants relate to one another are (to some extent) open to interpretation.

### **Testimony and Witnessing**

Interpretation, elicitation, and testimony are sometimes at odds in the asylum hearing, particularly if the respondent has gone through a traumatic event. Some traumatic events, particularly ones where the perpetrators erase their traces, make it harder for those outside the event, such as the attorneys and the judge, to believe that anything has happened at all.

In discussing this phenomenon, Jean-François Lyotard (1988) uses the term *differend*, which he defines as "a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments" (xi). When a *differend* occurs, the respondent may be unable to testify to a traumatic event, and the respondent's inability to testify may be misinterpreted by the judge as a failure to provide credible evidence. Lyotard says that "the perfect crime [consists]...in obtaining the silence of the witnesses, the deafness of the judges, and the inconsistency (insanity) of the testimony" (1988: 8).

While Lyotard analyzes experiences that are quite different from those of asylum applicants, his analysis of the Holocaust provides a pivotal example of the *differend* in action. Lyotard opens his book (*The Differend: Phrases in Dispute*) with a discussion of the view of some revisionist historians that,

because there was no one who could testify from experience regarding the gas chambers, the deaths either did not occur or there were fewer of them than conventional histories claim, in spite of the fact that the Jews who were assigned to work at the gas chambers and crematoria saw the deaths with their own eyes (as described in Lyotard 1988). A significant driving force in this particular view is the fact that the Nazis liquidated the camp when they were aware of the approaching Allied forces, killing the remaining Jews (except those who escaped or managed to fake their deaths), burning the buildings to the ground, and planting trees where the camps had once stood. As they made the evidence disappear, they took away the referent, which was what the survivors had to rely on when they testified to their experiences years later (Lyotard 1988:8).

For some years, however, there was a period of silence surrounding the Holocaust, and survivors had to attempt to go on with their lives without being able to talk about their experiences. This silence made eventually talking about the events more difficult as survivors began to doubt the reality of their own experiences, for, as Dori Laub says, “the longer the story remains untold, the more distorted it becomes in the survivor’s conception of it, so much so that the survivor doubts the reality of the actual events” (1992: 79).

Part of the reason for this doubt is the fact that respondents who suffer through a traumatic event have witnessed that event from the *inside*. In the juridical tradition, witnesses tend to be people who have seen the event from outside the event without actually taking part in the event. These witnesses tend to be objective. However, witnesses from the inside have not only taken part in the events (generally out of fear for their lives), but also become part of the events in question through taking part in them. In other words, the events create these witnesses (Laub 1992).

In the example of the Holocaust, as described by Laub and Shoshana Felman, the witnesses from inside are the Jewish workers who were forced to clean up the bodies from the crematoria and from the mass graves. As they were surrounded by death, death became a normal part of their existence, and truth as we know it (that is, what happened and the way most of us feel about it) did not exist. With no truth, there could be no awareness, and with no awareness, no knowledge. As Felman says, “inside the

crematorium...there is loss: of voice, of life, of knowledge, of awareness, of truth, of the capacity to feel, of the capacity to speak. The truth of this loss constitutes precisely what it means to be inside the Holocaust” (Felman 1992: 231).

In the end, “reality is always the plaintiff’s responsibility” (Lyotard 1988:8). In the asylum hearing in particular, respondents often face the burden of having difficulties talking about past events, usually due to shame, embarrassment, or stigma. However, the law dictates that they are expected to provide the evidence to back up their claim, and the hearing operates on a “guilty until proven innocent” philosophy, where the trial attorney and the judge assume that the respondent’s claim is not credible unless the respondent can demonstrate otherwise. The catch here is that the trial attorney will often use government documents (usually U.S. government ones) to try to prove that the respondent’s claim is invalid, but the respondent also needs some of those same government documents, as well as government documents from the country of origin (which usually can’t be obtained if government persecution was what led the respondent to flee) to prove his/her identity and the truth of events, both of which are central to any consideration of the claim. And even if the respondent can succeed at proving these two basic credibility determinations, he/she must still indicate that his/her case is unique, and that he/she fears for his/her life if returned to the country of origin. However, the nature of what has happened to the respondent may make this impossible. As Lyotard says, “if your lived experience is not communicable, you cannot testify that it exists; if it is communicable, you cannot say that you are the only one able to testify that it exists” (1988: 84).

## **Conclusion**

I have attempted to demonstrate that, while respondents can and do convey their experiences to the judge in a convincing manner, their testimony is being filtered through linguistic ideologies that influence a judge’s belief as to what constitutes a credible asylum claim. My examination of what constitutes a credible narrative leads me to conclude that most credible, successful testimony shares common features. Typical successful testimonial narratives are succinct: they address the questions asked in the precise manner in which they require a response, and provide exactly the right amount of

information. They have a beginning, middle, and end, and therefore constitute a linear narrative. Finally, all narratives of asylum-seeking (successful or otherwise) are constituted by the communication of a journey: what led the respondent to fear for his/her life, what led him/her to leave his/her country of origin, and how and why he/she came to the U.S. The narrative of journey is, therefore, the shared form which respondents use to communicate experience, and the most successful narratives of journey are those which are clear, precise, and linear. In the next chapter, I will describe the role that interpretation (by attorneys, judges, respondents, and interpreters) plays in evaluating respondents' narratives of journey and the ways in which they communicate those narratives.

## **Chapter 4: The Interpretation of Experience**

Interpretation is an essential part of a speech event, since interpretive processes create the meaning of the speech event for each participant. This chapter explains the role interpretation plays in the asylum hearing as it mediates testimony, synthesizes the roles of all participants' communications and attorneys' and judges' elicitation, and contributes to a decision in the asylum case. I will begin by providing some possible definitions of interpretation, and continue with detailed analyses and case studies describing the various ways in which each participant in the asylum hearing employs interpretation.

Interpretation has several definitions. In the case of the asylum hearing, it can be defined as the outcome of the case (i.e. the listening to, reading of, and judgment of all the evidence combined), the ways in which oral testimony or other participants' utterances are understood, the way documentary evidence is understood, and the way utterances are literally translated between English (the official language of the court) and the respondent's native language. The communications and elicitation strategies used by each participant in the asylum hearing enable participants to begin to interpret each other's utterances, although interpretations are often conflicting. Due to participants' differing objectives and stances, each participant's interpretation is different, and at the conclusion of the hearing it is the judge's duty to synthesize his/her own interpretation, and what he/she perceives to be the interpretations (of evidence) of the attorneys, the respondent, and the interpreter. Because the act of interpretation is irrevocably linked to the act of questioning (the person interpreting is either the person who asked the question or the person who must interpret and/or respond to the answer to the question), interpretations will always be asymmetrical.

### **Attorneys' Interpretations**

For the attorney, the process of interpretation begins before the hearing. When the respondent walks into the attorney's office as a client, the attorney asks the respondent to tell his/her story so that the attorney can write it into an affidavit. The affidavit is supposed to be an account of the events leading up to the applicant's decision to apply for asylum, as told in the applicant's own words, but it is a legal document, which means that some degree of interpretation has to occur in its creation. If the respondent

does not speak English, the attorney has to either work with an interpreter (if he/she does not speak the respondent's language) or has to listen to the respondent's story and then translate it literally as he/she (the attorney) writes. The written document states facts, which also means that the attorney, as the respondent tells the story, must extract whatever he/she thinks is most relevant to the case. As the attorney does this, he/she leaves behind contextual details that could be vital to understanding the applicant's claim to asylum. However, the affidavit must present a version of the respondent's story that is comprehensible to a legal audience.

While many attorneys, such as the ones I interviewed, prepare their clients' affidavits with the intention of representing the facts as accurately as possible, other attorneys sometimes must confront the fact that their client's narrative as it is told to them does not present a case that can be won. Michelle McKinley's article on a Zimbabwean asylum seeker (1997) presents a pivotal case study of this dilemma, in addition to showing how the individualized goals of some law firms (which may be at odds with what the client wants) can factor into the interpretive process.

Michelle McKinley's case study is based on her work with a major New York asylum law firm specializing in gender-based asylum claims<sup>27</sup>. One of the firm's clients was a Zimbabwean woman who had been forced into an arranged polygamous marriage according to the customs of her tribe. She was abused by her new husband, and she was unable to obtain assistance from her family or the Zimbabwean authorities. She finally fled to the U.S. as a last resort and applied for asylum.

As McKinley helped the attorneys prepare the client's affidavit, she began running into problems. The client did indeed come to the U.S. as a last resort. She had not wanted to leave Zimbabwe, and she had no objection to the culture in which she had been raised and the associated practices—she was simply seeking the only form of relief available to her because of the way her marriage (part of the cultural practices) had affected her *as an individual*. The client's story as it stood before the completion of the affidavit would not have won her case: as I have explained previously, membership in a persecuted group

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<sup>27</sup> Although McKinley worked for the law firm, she did not, at the time, have the credentials of an attorney.



is an essential component of a potentially successful asylum claim. It was therefore necessary for McKinley's firm to re-shape the client's claim to be in line with the standards for positive credibility determinations.

Throughout this process, the firm had an advantage: its focus on gender-based asylum claims. As McKinley explains, the attorneys at the firm often felt that it was necessary to play on stereotypes of victimization in order for their clients to win their cases. This attitude was in direct contradiction to the client's own view of her case. From the time she began attempting to seek redress for her situation, she became an agent, not a victim: she asked her family for help, she asked the authorities for help, and she made the decision to come to the U.S. and apply for asylum. Naturally, the client was outraged when McKinley began drafting the affidavit, since it bore little resemblance to the actual story. As the attorneys at the firm persuaded her that they had the best knowledge of how to put together her case, however, she accepted that the angle the firm had taken on her case would help her win. In the end, McKinley had the impression that the client came out of the process with little respect remaining for the attorneys.

### *Eliciting Life Stories*

How can we understand this case in the broader context of life story elicitation? According to McKinley,

Life story elicitation is ineluctably coercive in the legal context—it is neither intimate nor dialogic. Most refugee women have no evidentiary 'proof' of their persecution besides their narratives. As such, the credibility of their narratives is pivotal in adjudicating their cases. Moreover, lawyers are ethically bound to represent their clients solely on the basis of their clients' narrative rendition of their lives. 'Truth', therefore, is immaterial in legal representation (1997: 70).

In cases such as the one McKinley describes, narrative is everything. This applies throughout much of the asylum process: applicants who leave their homelands as quickly as possible to escape certain death simply cannot take the time to risk their lives obtaining travel documents that their government (especially if it's the persecuting agent) is unlikely to grant. Trial attorneys, however, are rarely willing to sympathize with this situation unless conditions in the country of origin are extremely well-known (as in the case of Afghanistan or Somalia). Therefore, the applicant's best chance comes from being able to

present a clear, linear, comprehensive narrative that presents his/her entire story to the judge. If the narrative is presented in a manner that is familiar and acceptable to the court, it is more likely to be considered credible.

The presentation of a clear, linear narrative may seem like a simple task, but in reality it is considerably more complex. Asylum applicants may speak about their experiences in ways that contradict attorneys' assumptions, or their narratives may not fit into any category that would lend them eligibility for asylum. In such instances, it becomes necessary for the attorney to exercise his/her asymmetrical knowledge and experience (i.e. power) and transform the narrative into a hypothetical version of the truth.

When McKinley met her client, she had doubts about the client's credibility. She says, "I expected her narrative to mirror the *totality* of her emotional experience" (1997: 74) and is shocked to learn that the client did not actually resent the society in which she had been raised. In addition, the client's lack of emotion baffled McKinley, and left her wondering how she could shift the client's narrative while maintaining some degree of truth.

As it turned out, she couldn't. The attorneys McKinley worked for wanted to fit the client's narrative into their firm's frame of gender-based violence and victimization, and the client's story and perspective on her own experiences was far too nuanced to accurately fit this mold. "In the end", McKinley says, "her narrative was not the least bit like what it was before. It became transformed into an ego-centered, plaintive and apolitical testimonial....It was an effective appropriation of voice—indeed, she would most likely not have been granted asylum on the basis of her original narrative. But the point is, *whose narrative was it?*" (1997: 75)?

Whose narrative, indeed? When this client, and others like her, walk into an attorney's office to prepare an affidavit, they leave their experience in the attorney's hands. While all competent immigration attorneys confer extensively with their clients on the affidavit, writing the affidavit is still a task of interpretation, and thereby "appropriation of voice". The affidavit is a document in the western legal tradition, and it must transform what may be a non-linear, complex, multi-faceted story into a linear, ego-centered plotline with a beginning, middle, and end. The "story", as it then becomes, must be further

interpreted by the attorney throughout the questioning process (during the hearing) and shown, for the audience of the judge, that the story reflects a set of experiences that is unique to the individual on the stand. If this interpretation is successful, the judge is likely to grant asylum.

In order to persuade the judge to grant asylum, the attorney must, during the course of the hearing, present a convincing argument through his/her questions and closing statement. The questions are usually based on the affidavit, and attempt to draw out the most important parts of the respondent's story. One attorney told me that it is very important for the attorney to only ask questions to which he/she (the attorney) knows the answer—otherwise, the attorney can be hindered by an unexpected revelation from the trial attorney, or the respondent's disclosure of some previously unknown information that ultimately harms the case. Successful interpretation, through questioning, should make clear to the judge what the respondent is escaping, what the respondent fears, and the extent of the respondent's fear. The attorney has a chance to summarize these points in the closing statement, which is his/her last chance (prior to an appeal) to convince the judge of his/her client's credibility.

### **Respondents' Interpretations**

During the hearing, the respondent may base his/her answers to questions on the way he/she understands the questions from both attorneys and the judge, and the ways in which those questions are asked. The parts of a speech event discussed in chapter 2 play an important role here, as they can give the respondent some idea of how one of the attorneys feels about the case, or why a question is being asked. For instance, a respondent who does not speak English might not understand a particular decision regarding a question's structure on the part of an attorney, but key (see chapter 2) can surpass linguistic boundaries. Since key encompasses factors that are not traditionally linguistic, such as body language and tone of voice, an attorney who uses a key that is distinct from that of other participants may signal his/her stance to the respondent (e.g. the trial attorney in Hearing #2). Of course, this understanding cannot be entirely guaranteed, as some respondents might have different cultural perspectives on the key being used, but communicative factors that transcend conventional linguistic boundaries still provide a useful starting point for reaching mutual understanding.

## **Trial Attorneys' Interpretations**

As the respondent testifies, the trial attorney evaluates and interprets the testimony, usually to fit the Department of Homeland Security's position favoring deportation, although if DHS thinks that the evidence is credible and the respondent deserves a grant of asylum, the trial attorney will interpret the testimony as corroboration. However, trial attorneys who clearly see the respondent as being in-credible and meriting deportation (such as the trial attorneys in Hearings #2 and #3) will systematically interpret the respondent's testimony, along with the evidence submitted, and often re-appropriate the respondent's voice when they form their questions. As I demonstrated in chapter 2, this occurred quite often throughout Hearing #2, as the trial attorney on numerous occasions re-interpreted the respondent's utterances and insinuated that, because the respondent could not provide the information he (the trial attorney) wanted or answer his questions in a manner he saw as consistent, the respondent was not credible.

Similar situations may occur in the credible fear interview as well, which takes place prior to the asylum hearing (although the hearing only occurs if the respondent fails the interview). In fact, according to Carol Bohmer and Amy Shuman, the trial attorneys' re-interpretations can be made more explicit by their espousing of political goals (i.e. prioritizing national security). According to Bohmer and Shuman's article, which is based on observations of asylum interviews in the U.S. (2007), "the political asylum process is designed not to actually 'find facts' but to use interrogation as a deterrent to admitting unworthy applicants" (604). Bohmer and Shuman speak of a "culture of disbelief" (2007: 605) that exists within DHS and increases the difficulty applicants face in attempting to prove their fear of persecution. They also note several factors that contribute to the "culture of disbelief". For instance, asylum officers who have held their jobs for a long period of time may find a story "too familiar" (2007: 613). They may also not recognize some categories of trauma, or have different ideas about what counts as torture. Compounding this difficulty is the fact that the doubts and stigma that surround torture in many countries make it difficult to discuss torture, let alone produce a coherent narrative of trauma that indicates clearly that what the applicant has been through constitutes torture (2007: 617). Bohmer and Shuman argue that these factors are pivotal in asylum officers' failure to understand the difficulties asylum applicants face in

proving the credibility of their narratives. Because the asylum officers don't understand the situation, their questioning and treatment of asylum applicants is hostile and unaccommodating. In cases where national security is at stake, the asylum officers' difficulties in believing an asylum applicant may lead them to give priority to national security interests (2007: 623).

While I have seen some of Bohmer and Shuman's arguments in action in my observations of trial attorneys, their arguments are not entirely consistent with what I have been told about DHS employees generally. According to several attorneys I spoke with, the overwhelming majority of asylum officers are actually very polite, courteous, and efficient at handling interviews. Additionally, while some trial attorneys I observed were very hostile and were unwilling to consider respondents credible if their testimony was inconsistent or if they couldn't provide a type of evidence that the trial attorney wanted, I also observed several trial attorneys who were very polite and were willing to move the hearings along without too much complaint, especially in cases where the respondents had substantial credible evidence to prove their claims. Perhaps Bohmer and Shuman provide some rarer, incidental examples, but my observations ultimately suggest that trial attorneys interpret respondents' testimony in conjunction with the evidence submitted.

### **Judges' Interpretations**

Judges must synthesize their interpretations of the respondent's testimony (as mediated by the attorney and/or interpreter), the attorney's and respondent's submissions of documentary evidence, and the case the trial attorney makes through his/her questions and closing statement. As the judge reaches a final decision on how to interpret the evidence and the testimony, he/she comes to a conclusion about whether or not the respondent has a credible claim.

In some cases, the judge has to weigh not only the evidence, but also extenuating circumstances surrounding the respondent's case. In one hearing I observed (Hearing #9), the respondent was a legal permanent resident (LPR), originally from a country in the Horn of Africa, but he had lost his LPR status after being convicted of theft. At the time of the hearing, he was incarcerated in a county jail in the mid-Atlantic for his offense, and his hearing was held by videoconference. While the judge, attorney, and trial

attorney were discussing the best way to resolve the case, the judge mentioned that the case had already been through six hours' worth of hearings, and he wanted to find a solution. The trial attorney and the respondent's attorney conferred, and the trial attorney said that DHS was willing to concede the respondent's right to withholding of removal. As it turned out, in the attorneys' discussion of the resolution with the judge, I learned that the respondent had bipolar disorder, which the attorney (who was a relation of the respondent's) and the judge seemed to think might be related to the respondent's tendency to commit theft. The judge agreed to the grant of withholding, provided he could be assured that the respondent would be taken care of by his family members and would be put on medication to control his illness.

While some judges, such as the one I describe above, consider all factors of the case, extenuating circumstances included, other judges are unreasonable and read inconsistencies in the testimony as frivolous claims. Paul Grussendorf, a retired immigration judge, describes a judge in a northeastern immigration court "who was notorious for putting words in the mouths of respondents in his courtroom and then ordering them deported based on testimony that he had created for them" (Grussendorf 2010: location 2286). According to Grussendorf, this judge was reprimanded numerous times by the BIA, and was eventually removed. An excerpt from the transcript of one of his hearings was published in the *Philadelphia Inquirer*:

J: Mr. [Respondent's last name], the question is a rather basic question. When were you born? You said in English, 1978. You said to the interpreter in the Wolof language, 1979—or at least that was interpreted as 1979. I just brought that to your attention. Now, we're back to 1978. When were you born, Mr. [Respondent's last name]? Give me your date of birth.

R: I, I cannot count it in Wolof. That's the reason why I'm a little confused.

J: I want to know the date you were born, sir.

R: 1978.

J: What date? Give me a month.

R: September. September 28.

J: And please—

R: I'm sorry, sir. I'm sorry.

J: Would you, please, remain in the Wolof language. I don't know why you're doing this. I'm giving you instructions to speak only in Wolof and you keep intermingling English and Wolof. So, what's your date of birth, now? Sir, the questions are going to get progressively more difficult. We're two minutes into the hearing and already you're having difficulty with a simple question (Bahadur 2006).

This example presents a rather extreme case of a judge interpreting a respondent's manner of speaking. While the respondent in this case came to the U.S. in 2001, he was from a prominent political family in his country of origin, and was likely highly educated, which could make him more accustomed to speaking English rather than Wolof. As an educated, fluent English speaker, the respondent would also be more accustomed to using English in official situations, courtrooms included. It would, therefore, be difficult for him to speak in a language that he would not normally use formally. However, the judge fails to consider this, and he continues to pester the respondent, making it seem as if the respondent's inability to testify correctly (in the judge's view, this entails testifying in his "native" language) is the respondent's fault. Furthermore, he denigrates the respondent's ability to take on an agentive role by testifying in a non-mediated manner: while the respondent's ability to speak English, which is not the majority language of his country of origin (in west Africa) sets him apart from other citizens of that country, the judge forces the respondent into a more vulnerable position by silencing his voice and forcing him to use a language that, for the respondent, is more typical of informal, everyday (and perhaps lower-class) situations. Finally, the judge implies in the last two sentences that the respondent won't be able to adequately complete the hearing, since he can't answer a "simple question" in the way the judge desires. This case was, eventually, overturned by the BIA (along with many other cases from the same judge) because the judge's reasons for denial, from a judicial perspective, were ultimately nonsensical (Grussendorf 2010).

Another problem with the interpretive decision of the judge described above, as well as other judges, is cultural insensitivity. In the asylum hearing, cultural insensitivity is typically constituted by the judge's (or other parties') failure to consider cultural and/or linguistic differences that might account for a respondent's difficulty in testifying or accounting for inconsistencies in an application. The judge described in the previous paragraph is culturally insensitive because he fails to consider the differing roles that English and Wolof most likely play in the respondent's daily interactions, and the fact that the restrictive, mediatory role of the interpreter only enhances the respondent's linguistic confusion and frustration. The trial attorney in Hearing #2 displays cultural insensitivity as well: although he does not denigrate the respondent's intelligence, he is either unwilling or unable to consider the politics in the

respondent's country of origin surrounding freedom of information. This failure to consider the country's restrictions on freedom of speech and crackdowns on the dissemination of dissenting viewpoints leads the trial attorney to believe that, rather than being unable to obtain evidence due to circumstances beyond his control, the respondent is lying and obstructing the progression of the case.

### **The Role of the Interpreter**

In cases where the respondent does not speak English, it is the interpreter's responsibility to pull all the testimony together into a coherent narrative, assisted by the attorney's questions, so that the judge can interpret the oral testimony and use it to make his/her decision. In some cases, such as those of minors who apply for asylum, the interpreter's work begins before the hearing. Volunteer interpreters such as Viviana Cristian, of Kids in Need of Defense (KIND)<sup>28, 29</sup>, must navigate the relationship not only between their clients, who may or may not be accompanied by parents, and the attorney, but also between the interpreter herself and the client. According to Cristian, attorneys who work with interpreters such as herself see the interpreter as an "asset" or "partner", and they assume that she knows the meaning of the legal terminology they use. Attorneys send her notes from the meetings with clients, asking her advice. This collegial attitude could be quite helpful to the interpreter-client-attorney relationship. However, Cristian also states that, while the attorneys seem to trust her abilities and judgment, this is not always the case with clients. Even though she speaks their language, she is still seen as a stranger who is helping the attorney. The fact that she was born in the U.S. further increases the clients' alienation. As a result, she says, she does not always get information from clients right away, which means that an attorney might not find out about complications in a case, such as arrests or pregnancies, until it is almost time for the hearing. While Cristian can never completely break down this lack of trust, as an interpreter she can attempt to mediate the attorney-client relationship, in which attorneys (in KIND's case) see "clients" and parents see "children". This is not an easily resolved dichotomy, but since the attorneys trust Cristian, she

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<sup>28</sup> Presenter at the 2012 Annual Meeting of the Society for Applied Anthropology. See bibliography for complete citation.

<sup>29</sup> KIND is a non-profit organization that represents minors in asylum and other types of immigration proceedings.



is in a position to give them advice that might enable them to handle the relationship in a way that puts the child applying for asylum at ease (Cristian 2012).

During the hearing, the interpreter is always one appointed by the court. Court interpreters face certain requirements in the performance of their duties, and these requirements do not always make it possible to translate as accurately as possible. Perhaps this is why one judge I observed would swear in the interpreters not by asking them to translate “truthfully” or “accurately” but rather used this question: “Do you swear to translate from the English to the [other language] and from the [other language] to the English to the best of your knowledge and ability”?

Elena De Jongh provides some insight into the difficulties court interpreters face. Interpreters are required by federal courts to be fluent in both the “source language” (English) and the “target language” (the language they are translating), have the ability to sight translate (translate written documents instantly) and interpret consecutively and simultaneously, be familiar with courtroom and legal procedure and terminology, have the ability to understand and use formal and colloquial speech, and have familiarity with the cultures and legal systems of the countries where the language(s) they interpret is spoken (De Jongh 1991: 293). In other words, court interpreters must possess *bicultural communicative competence*. I see this as entailing the need for cultural and sociolinguistic knowledge of both the country where the target language is spoken and the country where the translation is being performed (in this case, the U.S). However, De Jongh says that “each language is composed of a different set of metaphors, based on cultural and personal assumptions and experiences that can be very similar, or remarkably different, at the cultural or personal level” (1991: 288). While I think it is possible (although difficult) to acquire bicultural communicative competence, I would suggest that these differences make it impossible to translate biculturally. De Jongh’s argument indicates that each language has unique features, many of which can only exist in that language, and perhaps act as *constitutive* elements of that language. If certain aspects of a language cannot exist outside it, then they become untranslatable if the respondent chooses to use them, and the interpreter must find another way to communicate the respondent’s utterances to the judge.

## **Conclusion**

All of the interpretive relationships described here (except, perhaps, the one between the trial attorney and the respondent) attempt to mediate evidence and testimony (in other words, the respondent's narrative of experience) and enable it to translate between participants so that it can be interpreted and decided upon by the judge. None of these relationships are perfect: they often have different ends, and may be hindered by cross-cultural misunderstandings, or the failure of the (literal) interpretive process. However, without interpretation, it is impossible to come to any conclusion at all about the asylum claim: the evidence cannot independently speak for itself.

As acts of interpretation occur, they also mediate the asymmetrical relationships between participants, which exist along a continuum. On one end of the continuum is a hearing where all the participants understand each other equally well. In this type of hearing, all parties would also possess equal communicative competence and would therefore have no need for a translator. To my knowledge, this level of equality among participants does not actually exist in any asylum hearing. The next marker of asymmetry is a hearing where all participants have equal competence in the language of the hearing, but not necessarily in their knowledge of how to interact appropriately in the courtroom. This occurs in Hearing #3, where the respondent spoke English but periodically went off on tangents and was unable to account for inconsistencies in his documentation when asked to do so by the trial attorney. In Hearing #9, the respondent also speaks English, but his incarceration and mental illness have made it harder for his attorney to prove that he has a good case for staying in the U.S. The respondent in Hearing #2 is the first respondent along the continuum to not speak English fluently, but he speaks some English and comes from a legal background in his country of origin. However, the mediation of the interpreter and the interference of the trial attorney prevent him from communicating his story clearly and accurately. The respondents in Hearings #5, 6, 8, and 1 have similar levels of communicative competence relative to each other, but they do not speak English and do not have prior experience with the U.S. legal system (although their testimony [with the exception of #1] is in line with the standards of appropriateness I describe in chapter 3). Finally, the other end of the continuum of asymmetry is represented by the

respondent in Hearing #4, who has no attorney, no knowledge of English, and, in spite of prior and current incarcerations, very little understanding of the way the legal system works. These factors combine to lead to an inevitable denial of his case.

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This project has sought to address in detail the ways in which the experience of asylum applicants is elicited, communicated, and interpreted. The evaluation of experience takes place in a perpetually asymmetrical series of relationships, and, unless extremely credible evidence is submitted before the hearing, the respondent is always seen as guilty until proven innocent. Entering the country illegally is a crime. The desire to apply for asylum and remain in the country may be seen as a threat to national security. To combat these perceptions, the respondent's attorney must act as a mediator for his/her client and teach the client about the law, its function, its culture, and the ideal ways of acting (testifying) within it. By teaching the respondent how to function in the hearing, the attorney can help the respondent to cross the linguistic frontier that separates the respondent from the attorneys and the judge and is created by the inherently asymmetrical question, or the inherently asymmetrical utterance in a language not familiar to the respondent.

What would the asylum hearing look like if the respondent whose hearing was presented at the beginning of this project had won her case? As the asylum hearing exists now, this respondent, and others from her country of origin, have an extraordinarily difficult time providing a reasonable claim for asylum, based on the emphasis on political persecution. While immigrants from this country of origin, and one other country in the same region, are eligible for Temporary Protected Status (TPS)<sup>30</sup>, a form of relief given to immigrants from countries with continuous warfare and corrupt, ineffective, or nonexistent

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<sup>30</sup> TPS designations are renewed every 12-18 months by DHS, and TPS holders must renew their status (and the employment authorization that comes with it) each year. The current list of TPS-designated countries is El Salvador, Honduras, Nicaragua, Haiti, Sudan, South Sudan, Somalia, and Syria.

governments, they may not be able to obtain the more definitive relief offered by a grant of asylum. A respondent from Mexico, on the other hand, could conceivably argue a good case for asylum if he/she were being persecuted by the drug cartels, as they are more centralized and engage in systematic rather than isolated terroristic activities.

Respondents should not, however, have to attempt to prove a centralized source of persecution in order to be granted asylum. While TPS is a good interim measure, definitions regarding persecution need to become broader and more flexible. It is also perfectly reasonable for trial attorneys to argue for a respondent's relocation to a different part of the country of origin, or to a safe third country, but other factors must be considered. In all of the Central American countries from which asylees flee, whether the persecution is gang/cartel-related or government-directed, the persecution occurs *throughout each country*. As a result, there is no way to escape from persecution by hiding in another part of one of these countries, particularly as some of the sources, such as the cartels, gain more power and influence and spread throughout the region. Safe third countries (non-persecuting countries other than the U.S.) can provide a better option, but their suggestion to judges and respondents fails to consider the reasons a respondent might have for applying to the U.S. Many immigrants who come to the U.S. work, pay taxes, raise their families, and become involved in their communities during their time in this country, and they may have chosen the U.S. because they see it as a place where they can build a new, better life in a safe environment that purports to welcome diversity. If an immigrant who has raised a family and developed ties to their community is deported, the consequences can be devastating—children can grow up without a parent, and the community to which the immigrant belonged loses part of its identity.

In addition to considering the problems described above, it is essential to make the asylum hearing itself more hospitable to asylum applicants. One basic change to be considered is the setting. While it is unlikely that the hearing could ever be held outside the confines of an office building, it could make an enormous difference if each courtroom had windows. As I have mentioned, I experienced a disconcerting loss of my sense of time when I spent hours at a time in windowless courtrooms, and at times I felt tired and restless, although I knew I could leave at any time. For the respondent, though, this

setting may be much more unpleasant. The respondent has to be at his/her hearing in order to have a chance at asylum—the hearing may take place without the respondent, but if it does the judge ends up simply deciding to remove the respondent by default. With no sense of time, no natural lighting, the general darkness of the room, and the pressure being placed on the respondent to provide credible testimony, the respondent may feel trapped. In addition, if the respondent was arrested and detained in his/her country of origin (as many respondents are), the windowless immigration courtroom *may resemble the conditions of their detention*. This (potential) resemblance could further heighten anxiety in individuals who have already undergone severe stress, first in being persecuted, then in leaving the country to come to the U.S., and finally in going through the asylum process. By moving the hearing to a space with windows and natural light, respondents may feel more relaxed and be able to more easily tell their stories, in spite of the pressure placed on their narratives of experience.

It is also essential to make trial attorneys and immigration judges more aware of the conditions in which respondents have lived prior to their entry into the U.S., as well as the cultures from which they come. A basic (and probably easily instituted) starting point for this cultural sensitivity training, as I will call it, would be to require all trial attorneys and judges to read the country reports on the countries that produce the highest numbers of asylum applicants. There are several country reports: the reports by Amnesty International and Human Rights Watch, and the reports by the U.S. Department of State. While the first two generally provide similar information, the State Department report sometimes diverges. This report is usually the one that is emphasized most in the asylum documentation, even if other reports are submitted, but it may be colored by national security interests. Trial attorneys and judges should read all three reports and, rather than prioritizing the government one, which is more likely to contain political bias, they should decide for themselves on how to interpret the reports as evidence.

Another way to increase cultural sensitivity might be to include a language component in the trial attorneys' and judges' training. Training periods could be extended to include an immersion course in at least one language commonly spoken by asylum applicants. In my experience, learning to speak a language provides a humbling insight into how difficult it is to fully translate our own experiences when

we are bereft of the words and idioms of the culture we have been born into. I am certain that if the judge mentioned earlier in this chapter had been introduced to the Wolof language, and required to study it, he would have behaved quite differently.

DHS and the Department of Justice might also consider requiring immigration judges and trial attorneys to travel to some of the countries respondents come from. Seeing the living conditions of people in these countries, as well as potentially witnessing acts of persecution, could fundamentally change the ways trial attorneys and judges view respondents. They would also experience the asymmetry respondents face in reverse: rather than being in control of a setting with which they are familiar, they would instead be in an unfamiliar environment, most likely without the necessary linguistic proficiency to communicate adequately, and would be heavily reliant on the people around them for help. This is perhaps the only way trial attorneys and judges can understand the fear the respondents face in their daily lives—not just in the persecuting countries of origin, but also when they come to the U.S. (if undocumented) and/or when they go through unfamiliar immigration proceedings in a language they may not understand at all.

The proceedings of the courtroom can change as well, starting with increased linguistic flexibility. I would define this as enabling the respondent to display his/her full communicative competence. In several instances, respondents I observed were hindered by the mediation of the interpreter, since (although it was not their best language) they spoke English fairly well but were not allowed to use it. If respondents who have some fluency in English are given the opportunity to use it, they may be able to avoid problems that come from an interpreter's confusion or use of a different dialect (as may have been the case in Hearing #1). Their use of English also demonstrates their acquisition of bicultural communicative competence, which indicates that they are learning the communicative skills they need to live in the U.S. As a result, English-speaking respondents, if they are allowed to speak English during their hearings, may impress the trial attorney and the judge more easily with their shared linguistic ties to the U.S.

Additionally, the immigration court system should have an attorney position equivalent to that of a public defender. There does not seem to be any benefit at all to a lack of entitlement to an attorney

(except, perhaps, for trial attorneys who want respondents deported), and the approval process for all types of immigration proceedings would likely go faster if all respondents had attorneys, since the attorney helps to guide the client through their legal proceedings. Once a respondent has an attorney, he/she should *also* be able to decide whether or not he/she wants the hearing to be public—while it is true that some respondents may genuinely fear the presence of former persecutors in the U.S. (as some attorneys mentioned), others may not have this fear, and may want more people to know what they have experienced in their countries of origin so that there can be more public debate and pressure placed on countries that violate their citizens' rights. Without an attorney, however, a respondent may not be able to make this decision, since he/she wouldn't be advised of the risks and benefits of a public hearing, and I would argue that this *should* be the respondent's decision. The structure of the hearing and the questions that come with it are asymmetrical enough in themselves—but the relief administered by the hearing can only be strengthened if respondents are given more ways to be agents rather than victims, display their linguistic competence, and have the potential to be respected by the other participants in the hearing as prospective citizens of and contributors to their communities in the United States.

## Appendix A: Hearings

### Hearing #1

Region: Central America

Interpreter: Yes

Description: The female respondent fled to the U.S. with her family after being persecuted by gang members in her country of origin. The gangs did not appear to have any centralized source.

### Hearing #2

Region: Eastern Europe

Interpreter: Yes

Description: The respondent was a former law student who had been expelled for no apparent reason prior to taking his final exams. Prior to his expulsion, he had been involved in protests regarding the lack of media coverage of an explosion and had met with local government officials. After his expulsion, he was conscripted into the military but managed to escape and went into hiding until he was able to leave for the U.S.

### Hearing #3

Region: Sub-Saharan Africa

Interpreter: No

Description: The respondent had been arrested and detained in his country of origin for participating in demonstrations against the government. He was arrested again after being persuaded to return, but managed to escape.

### Hearing #4

Region: Central America

Interpreter: Yes

Description: The respondent was incarcerated and unable to obtain an attorney. He came to the U.S. for economic reasons, and was trying to prove in his case that his wife and children would face hardship if he were to be deported.

### Hearing #5

Region: Horn of Africa

Interpreter: Yes

Description: The respondent had been detained for several years after being involved in protests against the government. During his detention he was beaten and tortured during interrogations multiple times. His case was distinct from those of other respondents from this region in that he was openly emotional during his testimony.

### Hearing #6

Region: Horn of Africa

Interpreter: Yes

Description: The respondent had been detained for a year after being involved in protests against the government. During his detention, he was beaten and tortured during interrogations. He managed to escape from a hospital after receiving medical treatment, and lived in southern Africa before migrating to the U.S.

### Hearing #7

Region: Caribbean

Interpreter: No



Description: After moving to the U.S., the respondent had become involve with a group of individuals from his country of origin who were practicing visa fraud. When he found out that one of the group's leaders wanted to have him killed, he went to the FBI and gave up the names of many individuals in the group. He was incarcerated for a criminal offense, but was applying for withholding of removal on the ground that the deported individuals who he had given up to the FBI would likely kill him if he returned.

Hearing #8

Region: Horn of Africa

Interpreter: Yes

Description: The respondent had been detained for his involvement in protests against the government. His case was most distinct in that he was unable to adequately prove his connection to a political group, and as a result lost his individual hearing.

Hearing #9

Region: Horn of Africa

Interpreter: No

Description: The respondent was a legal permanent resident who had lost his status due to a criminal conviction, for which he was incarcerated at the time of his hearing. Part of the respondent's claim to withholding centered on the fact that he had bipolar disorder and would not be able to adequately function in his country of origin because he would not have access to appropriate medical treatment.

## **Appendix B: Interview Questions for Immigration Attorneys**

1. What are the various kinds of evidence that you consider to be most important in an asylum or withholding of removal case?
2. Specifically how do you acquire this evidence? Are there any particular challenges in obtaining evidence? Who assists you in this task?
3. What, if anything, do you do to determine whether or not the evidence is valid and not falsified?
4. What role do documents play in relation to oral testimony? Do they act as supplements, or can they supersede the testimony if a party thinks that the testimony is not persuasive?
5. Do your clients typically understand the documents involved in their case and the role these documents play? If not, how do you assist them in understanding them?
6. What role do newer media, such as online newspapers and blogs, play as evidence? Do they carry the same weight as other, more traditional, types of evidence, or do they require further explanation in order to be taken seriously?
7. Specifically what steps do you take to prepare your client for his/her individual hearing? Which clients are most receptive to the preparation you provide? Has this changed over time based on your experience as an attorney? Do you let your client know in advance what kind of questions you, the trial attorney, and judge may ask?
8. Is there an ideal way to testify, and, if so, do you talk to your client about the best way to testify and provide the information the court wants? What ways of testifying and responding to questions might be problematic?
9. What connections, if any, do you see between a client's level of intelligence, a client's experience in parallel settings, or the client's education, and how they respond to questions in court? What else might influence the way a client responds to questions?
10. Did any aspect of your training teach you how to ask questions and develop strategies for preparing your clients' cases? How did you learn to function in the courtroom setting? What has changed for you since you began to practice this kind of law?

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