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What an Ethics of Discourse and Recognition Can Contribute to a Critical Theory of Refugee Claim Adjudication

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Abstract: Thanks to Axel Honneth, recognition theory has become a prominent fixture of critical social theory. In recent years, he has deployed his recognition theory in diagnosing pathologies and injustices that afflict institutional practices. Some of these institutional practices revolve around specifically juridical institutions, such as human rights and democratic citizenship, that directly impact the lives of the most desperate migrants. Hence it is worthwhile asking what recognition theory can add to a critical theory of migration. In this paper, I argue that, although its contribution to a critical theory of migration is limited, it nonetheless carves out a unique body of ethical insights related to diagnosing the interpretative and epistemic pathologies and injustices associated with the legal processing of migrants' claims for asylum. Going beyond discourse ethics, which mainly highlights procedural violations of legislative and judicial deliberation, it trains our gaze on the institutional biases that lead migrants to be misrecognized or under-recognized as credible witnesses to their own refugee status.

Introduction

In the past few years recognition theory has joined discourse theory in the arsenal of normative perspectives that critical theorists have brought to bear on the problem of migration (Ingram 2009, 2018; Thompson; 2019, Schweiger 2019). These theories provide important supplements to mainstream ethical approaches to migration studies. Human rights approaches, especially those varieties that focus on the abstract natural rights of persons, disregard or downplay the practical constraints imposed by legal, economic, and political institutions. Utilitarian approaches that aim to maximize global aggregate well-being of persons regardless of nationality do the same. Like familiar cosmopolitan applications of Rawlsian social contract theory (Carens 1987), these mainstream approaches generally endorse an ideal theory of "open borders migration."[1] Such cosmopolitan

[1] For his part, Rawls eschews any cosmopolitan application of his theory in his *Law of Peoples*. Arguing from the standpoint of ideal theory, he assumes, methodologically, that nations (or peoples) are territorially bounded (citizens enter at birth and exit at death), have a qualified right to protect their "political culture and constitutional principles," and that under ideal conditions of a "realistic utopia," individuals have no political or economic incentive to migrate. Appealing to Walzer's communitarian defense of territorially bounded states as essentially for fostering conditions of civic solidarity, he denies that migrants have a right to enter a people's territory without their prior consent (Rawls 1999, 39), but also notes that states have a qualified duty to assist refugees.

approaches must confront the communitarian challenge posed by institutional life, most basically, that nation states remain the primary addressees for legally securing human rights and welfare (Walzer 1983; Miller 2016; Buchanan 2013).

Critical theory insists that the normative basis of social critique cannot abstract from the values and norms commonly understood to underwrite institutional practices. Its reconstruction of normative ideals is fundamentally realistic, pragmatic, and democratic. Hence, the major proponents of discourse theoretic approaches to migration seek to balance cosmopolitan and communitarian perspectives. The ideals that regulate discursive deliberation on non-ideal circumstances are themselves realized within legal, political, and economic institutions that establish a necessary link between the human rights, welfare, and democratic self-determination of all who are significantly impacted, be they migrants or citizens (Benhabib 2006; Habermas 1998).

Recognition theory also attempts to balance the cosmopolitan and communitarian perspectives implicit in democratic legal order. Like discourse theory, it challenges the justice of extant national borders and domestic immigration policies without endorsing the abolition of national borders and democratic policymaking (Honneth 2015, 278). While endorsing less restrictive policies for the most vulnerable economic and political refugees, it reminds us of the costs that migration imposes on migrants who are forced to uproot themselves from institutionalized relationships in which they achieve recognition. Not only do migrants suffer loss of intimate love, respect from others, and esteem, which can batter their confidence and psychological well-being; they expose themselves to identity crises that diminish their very agency. (Ingram 2018b, 2020b).

Theories of recognition and discourse thus depart from a critical analysis of evolving institutional practices that reflect both cosmopolitan and communitarian values. What, aside from their different phenomenological groundings, distinguishes recognition theory from discourse theory is therefore difficult to discern. We might say that discourse theory principally concerns procedural justice, specifically regarding the justification and application of general norms, whereas recognition theory principally concerns the integrity of personal relationships. This tentative answer must be qualified by the fact that discourse theory emphasizes relational reciprocity as a procedural norm, just as recognition theory emphasizes procedural justice as a recognitive expectation implicit in democratic institutions (Honneth 2015, 271).

In fact, both discourse theory and recognition overlap and complement each other when applied to legal practices, none more important than the processing of migrants' claims to asylum. Recognition theory, I will argue, requires that judges reverse the institutional privilege accorded to officers of the state. In requiring that the state assume at least an equal (and perhaps higher) burden of proof in denying relief to migrants, recognition theory requires judges to exercise not only *epistemic justice* by conceding credibility and authority to applicants' stories; it requires a humble effort at understanding the totality of coercive circumstances that have compelled the individual applicant to seek refuge in the first place. Beyond providing secure and safe haven, it requires that court's devise solutions that recognize and protect migrants' psychological needs for love and intimacy, which familial reunification can provide, and for preservation of their cultural identity, commensurate with their social integration into the economic, political, social, and cultural life of the broader community. Most importantly, the court's proper *recognition* of the migrant's life circumstances *precedes* its discursive *application* of the law.

Discourse theory, I contend, is better equipped to illuminate the court's reasoning than its understanding. As Habermas and Günther understand it (Habermas 1996, 172, 220-32; Günther 1993; Ingram 2010, 206-211), judicial decision-making reflects a process of discursive reasoning that enters deliberation retrospectively. Choosing the most appropriate statutes, principles, and precedents requisite for doing complete justice to the unique circumstances of the case alters the meaning of this body of law.[2] Accurately describing the case depends on properly understanding, weighing, and combining different sources of evidence in a coherent narrative, with the first-person, eye-witness testimony of the asylum seeker ideally weighing most heavily. In this way, proper recognition of the asylum seeker as a credible witness to her circumstances can become the catalyst for a potentially far-reaching reinterpretation of law, as can be evidenced by changes in refuge, asylum, and deportation policy over the last 20 years (Ingram 2009).

The following defense of this thesis begins by rehearsing the ethical concerns that impact migration. I argue that contemporary critical theory differs from mainstream forms of normative social criticism. Mainstream ethical approaches to migration that depart from abstract philosophical speculation about the requirements for ideal justice tend to one-sidedly endorse one set of values over others and from one ---either cosmopolitan or communitarian perspective. By contrast, critical theory departs from concrete sociological evidence regarding a given society's actual institutional functioning. It describes how social institutions generate outcomes that violate their own normative expectations, thereby engendering forms of social discontent and dysfunctionality. Theories of discourse and recognition epitomize two iconic normative reconstructions that critical theorists have used to explain such reactions.

I argue that recognition theory, for the most part, does not offer a unique, free standing perspective from which to frame these concerns beyond what discourse theory offers; for discourse theory amply incorporates most of the cosmopolitan and communitarian concerns pertaining to human rights, fair cooperation, and welfare. I then defend what I regard as the singular contribution of recognition theory to a critical theory of migration. First, I show that discourse theory and recognition theory contribute to a critical theory of migration in rather different ways: discourse theory focuses on institutional procedures for justifying and applying general norms while recognition theory focuses on ethical practices that promote understanding of uniquely situated individuals as credible and authoritative witnesses to their lived circumstances. Second, I examine several cases drawn from American and Swedish immigration courts to illustrate how discourse theory and recognition complement each other in highlighting different aspects of institutional (in)justice as these apply to migrants.

Part I: Discourse Theory and Recognition Theory: A Preliminary Comparison of their Contributions to an Ethics of Migration

[2] For further discussion of this hermeneutical circle as it applies to judicial decision-making (application), see Hans-Georg Gadamer's *Truth and Method* (1960), Ronald Dworkin's *Law's Empire* (1986), and Ingram (2009, 2010).

Before I proceed to my main argument, I would like to briefly recall the most important ethical concerns that impact migration and ask whether recognition theory makes a unique contribution towards illuminating them beyond that made by discourse theory.

The ethical concerns that impact migration fall into two overlapping categories: Justice related (broadly construed) and welfare related. Justice related concerns further divide into the following sub-categories: human rights (and reciprocal duties) and rights (and duties) of association. By human rights I mean claims made by individuals on states and possibly other entities obligating them to provide said individuals with sufficiently secure access to the goods necessary for each person to live a minimally decent human life.[3] By duties and rights of association I mean duties and rights of persons and other associated beings (including nations) that reflect fair terms underwriting their cooperation with each other as free and equal beneficiaries of their association.

These justice related concerns invariably arise whenever we speak about the human rights of migrants whose lives are at risk. The system of nation states is duty bound, both morally and legally, to provide migrants with relief from their desperate circumstances so that they can exercise the full range of their basic rights conducive to achieving a minimally decent standard of human existence. We also speak about the duties that host nations have with regard to non-citizens. A nation has a *prima facie* duty to reward extra-territorial non-citizens with admission to its own territory if they have contributed significantly to that nation's well-being (especially if doing so has put their own lives at risk) or if their lives have been jeopardized by actions undertaken by that nation.

Welfare related concerns also fall into two branches: cosmopolitan and communitarian. By 'cosmopolitan welfare concerns' I have in mind consequentialist concerns about improving the aggregate well-being of humanity regardless of nationality, which may, but need not, require (or even accord with) respecting human rights and duties of association. By 'communitarian welfare concerns' I have in mind concerns about improving the aggregate well-being of particular communities and, especially, the cultural goods, values, and ways of life deemed essential to the good of the community by the majority of its inhabitants. These two types of welfare ethics affect our thinking about migration in familiar ways. For example, using marginalist reasoning, and assuming that poverty is the world's greatest threat to human well-being, many neo-liberal economists have advocated for the free flow of people as well as of goods across borders as the most efficient way to maximize aggregate global employment and prosperity (Goldin 2016). Conversely, communitarian ethicists who take their bearings from what a majority within a given community deems essential to its welfare and cultural identity emphatically resist this kind of reasoning.

Mainstream ethical theories often frame the above concerns in highly abstract ways, often carelessly conflating what ought to be recommended ideally for a world in which severe scarcity and inequality have been overcome and people are fully in compliance with their duties with what ought to be recommended for a non-ideal world in which these conditions do not hold. Often times they frame their concerns without taking into account extant institutional constraints.

[3] Elsewhere (Ingram 2018b) I defend the conceptual and practical legitimacy of including groups as irreducible agents of some human rights protections.

Critical theorists eschew forms of ethical idealism and philosophical rationalism that neglect the constraints and complexities of institutional existence and so it is no surprise that discourse theory and recognition theory provide nuanced perspectives on justice and welfare that straddle cosmopolitan and communitarian thinking about migration. Both offer themselves as reconstructions of the norms and values implicit in shared institutional practices; and both, in their own way, offer themselves as meta-ethical foundations for virtually all justice- and welfare-based forms of reasoning. For instance, discourse theory links the legitimacy of a law or any institutional norm to the voluntary consent of all who are significantly affected by it, after they have collectively discussed their own interests in light of the impact that accepting the norm will likely have on the welfare of others. Human rights, associational duties, and the common good are here seen as having their ultimate justification in on-going consensus-oriented dialogue that aspires to be ever more inclusive, egalitarian, and unconstrained by the effects of social power and internal bias. Recognition theory takes its bearings from a broader set of institutionalized practices---not just those associated with the communicative coordination of action---but likewise purports to provide a metaethical foundation for human rights, associational duties, and well-being. It justifies these rights and duties as necessary conditions for realizing two complementary aspects of human fulfillment: free agency, on one side, and psychological integrity (which depends on persons being accorded respect, care, and esteem for their humanity and individuality), on the other.

Notice that the metaethical claim to provide singular justification for the full range of ethical concerns---one that is at once necessary and free-standing---would not show (assuming it were true) that discourse theory and recognition theory provide *special* guidance in addressing the human rights, associational duties, and welfare-regarding concerns of migrants. Honneth, for example, offers recognition theory as a way to identify unethical forms of harm by linking them to actual *experiences* of disrespect**.** However, many unethical harms that persons suffer are not experienced by them as harms, let alone insults to their sense of self-respect, self-esteem, or self-confidence. And, as Nancy Fraser and others have pointed out in their criticism of Honneth (Fraser 2003), experiences of disrespect may not be ethically justifiable on the face of it, unless tied to independently observable shortfalls in the institutional distribution of goods.

Here, it would appear that discourse theory would have to supplement recognition theory by asserting that only feelings of disrespect that are rationally justifiable provide grounds for identifying institutional injustices. In the end, neither discourse theory nor recognition theory provide phenomenologically privileged foundations for ethics in any straightforward sense; rather they must present themselves as normative reconstructions of what counts as rationally justifiable or as reasonably respectful.

However, in that case neither theory provides an approach to assessing the standard range of ethical concerns that impact debate on migration policy apart from other mainstream theories, such as those pertaining to distributive justice and human rights, for instance.

Thus, neither discourse theory nor recognition theory provide unique forms of normative guidance in assessing wrongs pertaining to the institutional treatment of migrants caused by overt discrimination or neglect of need. Nevertheless, there do appear to be harms associated with migration---specifically pertaining to the harms inflicted on migrants who seek a fair hearing in courts that are responsible for adjudicating their claims---that are not well framed by most mainstream ethical theories. These hermeneutical and epistemic injustices involve not only a failure of judges and other administrators to adequately respond to the claims of migrants and their attorneys with reasoned counter-arguments---a

failure that discourse theory is eminently situated to condemn as unjust. They also involve a failure to understand these claims in the first place. By failing to properly respect the individuality of the migrants that appear before them; viz., by failing to properly attend to the stories they tell about themselves and the unique circumstances that mark their desperation, judges and administrators misrecognize and misunderstand those who plead before them. *This injustice may occur even when discourse ethical norms regarding fair procedures of argument are respected; indeed, they occur prior to formal argument, insofar as they reflect deep-seated prejudices*.[4]

Part II: Recognition Theory and Discourse Theory as Complementary Approaches to Assessing the (in)justice of Immigration Court Proceedings.

Recognition theory and discourse theory reconstruct the general normative expectations of persons in performing social roles embedded in social practices that are essential to social reproduction, social cooperation, and socialization. Discourse theory takes its bearings from social practices that aim to coordinate action based on voluntary mutual consent, what Habermas calls 'communicative action.' Communicative action involves the reciprocal raising of claims that arise whenever actors offer and accept invitations to cooperate with each other. Should any claim be challenged, cooperation must be restored by redeeming it with convincing justification or by re-establishing it based on an alternative claim that all parties find rationally compelling. The special kind of action associated with the argumentative disputation and redemption of claims ---what Habermas calls *discourse*---sets in motion mutual normative expectations regarding the freedom, equality, and impartiality of the participants to reach an unconstrained, viz., rationally motivated, agreement that would also include the perspective of all third parties who are also significantly impacted by the terms of the agreement. In sum, what distinguishes discourse theory from mainstream social contract theory is its emphasis on discourse as a collective medium for critical self-reflection and autonomous action (or rational self-determination).

[4] Earlier in his career Habermas defended therapeutic discourse as a privileged means for addressing the pathologies of 'systematically distorted communication' including ideologically biased forms of understanding that prejudice (constrain) argument subconsciously, despite outwardly conforming to procedures of rational dialogue (Habermas, 1971). This view, which Habermas has never abandoned, supports my contention that neither discourse theory nor recognition theory, here understood as specifying norms of undistorted understanding, can function independently of the other.

Recognition theory takes its bearings from a broader range of social practices that go beyond those associated with communicative action to include non-communicative forms of social interaction, such as relationships of care and concern among intimates and relationships requiring mutual understanding *simpliciter*. It bears a closer resemblance to virtue ethics, emphasizing the intrinsic psychological and agential good that is realized upon performing institutionalized social roles, insofar as the practices in which these roles are embedded live up to their implicit normative expectations.

Both discourse theory and recognition theory provide ample resources for framing social pathologies and social injustices. Their diagnosis of social injustices is relatively straightforward. Forms of "voluntary" cooperation whose consensual basis bears the trace of social domination are, on the surface, unjust; likewise forms of institutional recognition that misrecognize or fail to recognize persons' proper sense of self to the point of denying their agency and causing harm to their personal identity, are also, on the surface, unjust. Their diagnosis of social pathology is a great deal more complicated. Without delving deeply into the ways in which different institutionalized systems of action, or different institutionalized action spheres and their accompanying recognition orders, can clash with each other,[5] it suffices to note that forms of unjust cooperation and unjust recognition also often produce forms of distorted communication and distorted (self-) understanding, which can decrease a person's capability for exercising agency.

Let me begin by briefly addressing the contributions of discourse theory to migration ethics. Discourse ethics draws quasi-cosmopolitan implications from communitarian premises. It reflects a deep social fact about the ethos of mutual accountability informing modern and above all liberal democratic societies. Its reliance on face-to-face deliberation as a mutual check on unreasonable self-interest and cognitive bias provides a needed corrective and complement to mainstream forms of social contractarian reasoning that rely more heavily on personal introspection. However, in addressing ethical conflicts of widely different scope, both real *and* hypothetical dialogue find equal purchase in this ethics. Practically speaking, normative disagreements that occur within a bounded community can only be legitimately resolved through face-to-face deliberation, even if this process must be dispersed over many "publics" and "condensed" and "filtered" by mass media (Ingram 2014; 2019). Ideally speaking, however, some matters requiring deliberation affect everyone, including future generations. Deliberating on human rights law, for instance, may be spatially and temporally bounded but the universal scope of any claim advocated on behalf of individuals in their unbounded instantiation of humanity can only refer to an unlimited community, whose possible opinions about ideal justice only personal hypothetical speculation can entertain.

The importance of face-to-face dialog over personal speculation regarding immigration ethics, policy, and practical application varies considerably. Moral reasoning about meta-political questions concerning appropriate boundaries of deliberation and decision-making and universal human rights principles will rely on personal speculations (ideal theory) that abstract from time and place and imagine possible worlds. Political reasoning about domestic immigration policy will rely on situational discussions taking

[5] I discuss the clash of recognition orders and the prospects for persons becoming reconciled to any society that embodies this clash in Ingram (2020a).

place in parliament and public arena (non-ideal theory). Judicial reasoning in deportation and asylum proceedings will rely on private conversations between judge, defendant, and legal counsel. In some instances, all three types of reasoning may be elicited. Judges, for example, typically recur to policy rationales in applying the law to individual cases; in adjudicating cases that are recalcitrant to mechanical resolution they are often thrown back on their own moral intuitions.

Discourse ethicists have largely trained their thoughts on border ethics and immigration policy (Habermas 1998; Benhabib 2003; Ingram 2018; Thompson, 2019). Here I focus on the judicial processing of migrants' claims. But before proceeding to my topic, a few general comments about discourse ethics and immigration policy are in order. The most striking contribution discourse ethics makes to our reasoning about immigration consists in expanding the community of deliberation to include migrants. Most policy debates only take account of domestic opinion. Discourse ethics demands that policy debates take account of the interests of anyone who is significantly impacted by that policy, so that the debate proceeds "not just from the one-sided perspective of an inhabitant of an affluent region but also from the perspective of immigrants who are seeking their well-being there; [viz.] a free and dignified existence and not just political asylum" (Habermas, 1996: 511). A policy that spells the difference between life and death for some persons obviously impacts their human right to life, which explains why humanitarian arguments for asylum made by economic refugees —-- and not just political asylum seekers --- should carry so much weight.

Indeed, the "growing interdependencies of a global society that has become so enmeshed through the capitalist world market," which impose on all of us an "overall political responsibility for safeguarding the planet," also impose *special obligations* on affluent nations to compensate peoples of the developing world for "the uprooting of regional cultures by the incursion of capitalist modernization" (Habermas 1998: 231). Here we see the second contribution that discourse ethics makes to our reasoning about immigration. Not only must the claims of immigrants be factored into policy debates, but they must weigh equally. Indeed, they might weigh more than the claims of relatively affluent peoples who are trying to deny them entry into their country. This would especially be the case if the relative differences in standard of living separating these two groups stemmed from past and present injustices of colonialism and imperialism. Giving fair weight to migrants' claims shifts the burden of justification onto affluent nations. Thus, instead of expecting migrants to justify why they should be granted admission as privileged beneficiaries of charity, discourse ethics requires that affluent nations justify to migrants why their claims to compensation should not compel some form of

restitution. Thus, in discussing immigration quotas,[6] Habermas insists that the needs of migrants count as much (or more) than the economic needs of the host country "in accordance with criteria that are acceptable from the perspective of all parties involved" (232).[7]

Discourse ethics shifts the burden of justification from needy migrants to affluent peoples by insisting that the weightier claims of migrants for just compensation and humanitarian treatment under the law be factored into policy discussions. For most refugees, however, the only venue where they can press their claims with any hope of receiving an impartial hearing is before an immigration judge.

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[6] Quotas and queues contribute to irregular migration. The 1965 U.S. Immigration and Nationality Act (amended 1976) ended quotas based on national origin, race, and ancestry that reserved 70 percent of all slots to the UK, Germany, and Ireland and very few to Asia and Africa. At the same time, it extended per country quotas to the Western hemisphere for the first time (permitting a yearly total of 120.000 to that region, with a per country limit of 20,000). Unlimited family reunification visas with long queue lines extending over twenty years, combined with very low work visa quotas, fueled a wave of undocumented migration from Mexico to the U.S. from 1970 to 2008.

[7] The argument as presented here would require some qualification. The concept of compensation presupposes problematic conceptual and empirical criteria for identifying victims and beneficiaries. Furthermore, the argument in favor of balancing interests can only sensibly apply to the interests of immigrants who are actually trying to immigrate (and not the interests of potential immigrants, which would include all outsiders). In "balancing interests" it matters whether we are talking about balancing the interests of , say, an individual applicant to admission against the interests (individual or collective) of some subset of residents or whether we are balancing the interests of a large mass of applicants with respect to the interests (individual or collective) of some subset of residents. I thank Drew Thompson for this observation.

Adjudication of an appeal may be routine but often it involves judicial discretion in choice, interpretation, and application of statutes. Judges rely on open-textured constitutional principles in undertaking this endeavor. The principle mandating equal due process that often crops up in immigration cases, for instance, is not a rule that narrowly dictates a single correct application but a regulative ideal that requires interpretation in light of the relevant case history (past, present, and future) and the entire body of relevant law. The hermeneutical circle wherein legal precedents, executive priorities, constitutional principles, statutes, and case law mutually interpolate each other can produce new holdings that reverberate throughout the legal system.

Discourse ethics prescribes a judicial procedure requiring that all relevant perspectives bearing on the most comprehensive description of a case be considered and that all relevant principles (and statutory rules) be weighed in determining which rules and principles are most applicable. Crucial to this process is a courtroom procedure, which should not be structured simply as an adversarial contest, whereby all sides have equal opportunities to state their cases freely, cross-examine witnesses, and introduce evidence (Habermas 1996: 172; Ingram 2010: 210).

The requirement that a migrant be allowed to state his or her case freely brings into play normative considerations that, while tangentially pertinent to discourse theory, properly fall within the purview of recognition theory. In keeping with Habermas's characterization of judicial decision-making, judge's are properly equipped to apply, not legislate, the law, but applying the law requires choosing which parts of settled law and principled procedure best fit a comprehensive description of the case, which, in turn (and especially within the Anglo-American tradition of judge-made, case-based common law) can lead to the judicial re-interpretation of settled law and procedure. In this account, judges are institutionally privileged dialogue partners; it is their responsibility, as placeholders of public impartiality, to synthesize the testimony put forward by all litigants into a coherent and comprehensive description of the case. But of course, as Habermas himself observes, the "dialogue" in the court is constrained by an adversarial atmosphere which, in the case of asylum and deportation law, privileges the perspective of the government and places a burden of proof on migrants pleading their case. Deference to standing law, with its technical distinctions between different classes of asylum, coupled with severe time constraints, compels judges to describe the case before them in an over-simplified, partial way that does not do justice to the complexities of the migrant's own life circumstances.

The institutional realities posed by immigration courts places a severe strain on a discourse theoretic defense of modern legal systems. The theory can be used to criticize clear violations of courtroom procedure that deny clients a fair hearing of their claims, but it cannot be used to criticize the judge's institutional biases that invariably lead to misunderstanding testimony that has been freely given.[8] In short, it cannot criticize the institutional misrecognition of the migrant as a less than credible witness of his or her own life circumstances. This misrecognition leads to hermeneutical injustice, in which the migrant's perspective is not allowed to adequately inform the description of his or her legal case. This injustice is magnified by the fact that, in most asylum cases, discourse theory should require a

[8] The kind of injustice referenced here is similar to what Jean-Francois Lyotard designates as a *differend* (Lyotard 1988; Ingram 2018a).

reversal of the burden of the proof. Being an eyewitness to one's own injury as an asylum seeker should normally be accorded the same degree of respect as if one were a victim of assault testifying in a criminal court. Leaving aside any distortion of memory wrought by the experience of her injury, discourse theory should normally attach the greatest authority to an asylum seeker's eyewitness testimony whenever such testimony finds some independent support and is not contradicted by demonstrable facts. As I argue below, the court should also recognize the special authority of the asylum seeker if he or she happens to be fleeing from circumstances that the court knows have been created in part by the policies of its own government.

Part III. Case Studies

The kinds of injustices that recognition theory is pre-eminently equipped to illuminate in the legal processing of migrants' claims are essentially epistemic in nature. They involve a failure to recognize migrants as credible witnesses to their own circumstances, which excludes their knowledge from contributing to the court's knowledge of the case. The growing literature on epistemic injustice that followed in the wake of Miranda Fricker's eponymous book (Fricker 2007) is too vast to be summarized within the short space available here. Using Gaile Pohlhaus Jr's' taxonomies of epistemic injustice, I shall select just some of the most salient features of epistemic injustice that apply to immigration court proceedings.

To begin with, epistemic injustices arise from how epistemic institutions, such as courts of law, are structured. They consist of three kinds: (a) refusal to recognize particular knowers as knowers by disrespecting their testimony or by excluding them from epistemic resources; (b) causing epistemic dysfunction by distorting understanding and inquiry; and (c) concealing (a) and (b) behind the façade of institutional authority and epistemic hierarchy (Pohlhaus 2017 :13).

One of the dangers Pohlhaus mentions regarding (c) is defining the field of knowledge, and therewith the field of epistemic injustice too narrowly. Discourse ethics can be accused of this injustice to the extent that it defines truth, knowledge, and reality in terms of a procedure of argumentative justification, which privileges competencies related to analytic reasoning, theoretical abstraction, and oral argumentation that find preeminent institutionalization in philosophy departments and courts of law but not in other areas of life. By focusing attention on asymmetries in knowers' opportunities to participate freely in oral argumentation, discourse ethics neglects a very important epistemic field, that of everyday narrative understanding, whose virtuous exercise requires developing competencies for imagination, empathy, open-mindedness, and modesty.

Pohlhaus mentions several other lenses through which epistemic injustices come into focus. The first concerns the temptation to blend ideal social theory with non-ideal social theory in a way that legitimizes extant institutions as if they aspired to realize a just, that is to say, impartial social contract. Habermas's insistence that the ideal norms of discourse find institutional purchase in democratic institutions, including courts of law, is one example of this. By encouraging judges to believe that they are part of an impartial tribune of higher legal knowledge, the discourse theory of law unintentionally encourages their epistemic arrogance, close-mindedness, and mechanical lack of creativity and imagination. What José Medina (Medina 2013), with reference to Charles Mills' indictment of the white

racial contract underwriting *Herrenvolk* democracy (Mills 1997), describes as an institutional epistemic blindness to subaltern perspectives can just as easily be characterized as a kind of "willful hermeneutical ignorance," to use Pohlhaus's words (Pohlhaus 2017, 17).

A second lens that is useful for magnifying epistemic injustices concerns the interdependence of epistemic relationships, or the way in which knowledge is a social product built out of the contributions of both consenting and dissenting perspectives. Knowledge presupposes a relationship of social trust and of trustworthiness. Courts of law notoriously display mistrust towards witnesses they institutionally suspect of being untrustworthy and biased. This disrespect encourages witnesses to doubt their own testimony while also leading them to distrust institutional authority for its own breach of trust (Pohlhaus 2017, 19). The result is that applicants for asylum are excluded (and sometimes exclude themselves) from contributing to the production of expert knowledge that is relevant to describing their cases.[9]

A third lens through which the layers (or levels) of epistemic injustice come into view accordingly pinpoints three ways in which knowers are excluded from participating in systems of knowledge. Their credibility can be diminished owing to biases that are not institutionally mandated, such as when the norm of equitable participation is violated; at a second level, the institutional resources for understanding---such as the technical classifications within which judges must judge a case, the expert country-specific data bases available to them, and the time constraints imposed on giving testimony---can, by excluding, invalidating, or ignoring the applicant's sources of understanding, suppress or distort understanding of the applicant's case, thereby resulting in what Fricker dubs a "hermeneutical injustice." Finally, at a third level, the entire epistemic institution might structurally impose testimonial and hermeneutical injustices. In a trivial sense, this appears to be the case with all legal institutions, especially those that rely on adversarial argumentation for filtering legal facts, but it is uniquely applicable to asylum courts, whose default for processing claims reflects a defensive nationalism aimed at upholding and legitimizing restrictive entry in the name of national security and practical expediency.

A fourth lens for perceiving the systemic epistemic injustice inherent in judicial systems pertains to the unfair distribution of epistemic labor in the production of knowledge. What Pohlhaus calls *agential* injustice occurs when, given the default noted above, migrants pleading their cases are forced to assume a greater burden of proof than the state in arguing their cases. This systemic (or structural) injustice is magnified further by the burden of having to dispute the court's "controlling images" (Collins 2000 69-96) of migrants as, for example, economic opportunists. As David Coady points out (Coady 2017), although it may seem that credibility and understanding are not scarce resources that can be justly distributed (Fricker 2017, 19-20), the fact of the matter is that credibility and understanding are relative, scalar terms. As Fricker concedes, the weight given to the testimony of a black man like Harper Lee's fictional character Tom Robinson in *To Kill A Mockingbird* stands in inverse proportion to the

[9] Schweiger (Schweiger 2019, 56) notes that asylum seekers can exclude themselves for innocuous reasons owing to the distorting impact that their trauma has on their ability to remember the details of their situation accurately.

weight accorded the white woman who has accused him of rape (Fricker 2007, 25). In a parallel manner, the credibility of the migrant as expert witness is diminished when confronted by the credibility of the state's expert data banks; the descriptions available to the migrant for understanding his or her experiences compete with the technical legal descriptions available to the court and its fact finders. In this respect the epistemic labor of the migrant is not only made unreasonably burdensome but often ends up being wasted as "invalid." Finally, the epistemic labor of asylum applicants can be exploited, through coerced testimony, to produce knowledge favorable to the state, as when trafficked women are forced to betray their traffickers in exchange for asylum. Migrants also find themselves caught in a double-bind: to the extant that their testimony is credible and understandable according to the court's criteria for rational argumentation, it may be less persuasive to judges (Pohlhaus 2017, 22).

The structural misrecognition of asylum applicants has been documented by Hanna Wikström's study of gender-based asylum cases in Sweden. The UNHCR defines an asylum seeker as "an individual who has sought international protection and whose claim for refugee status has not yet been determined" (UNHCR 2014, 5n2). Article 1 A(2) of the 1951 Convention Relating to the Status of Refugees defines a refugee as anyone who "owing to a well-founded fear of being persecuted for reasons of race religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country . . . is unable or, owing to such fear, unwilling to return to it." Since 2002 the UNHCR has encouraged governments to include women who suffer gender violence under the category of a persecuted social group. Governments, of course, are free to reject the UNHCR's guidelines but those that accept them interpret and apply them differently, since what kind of gender-based discrimination amounts to persecution, what kind of government inaction counts as a lack of protection, what kind of harms arise specifically because of gender, and what it means to belong to a gender- or sexual orientation based group that merits recognition as deserving protection, are all conditions that are subject to interpretation.

Against this backdrop Wikström's study exposes the arbitrariness in the way Sweden's migration boards and appellate courts apply these guidelines in processing gender-based asylum cases. Using Fricker's model of testimonial and hermeneutical injustice, Wikström documents how applicants' credibility is routinely questioned by authorities in light of what is presumed to be more reliable country-specific and culture-specific data-bases and how failure to incorporate their testimony into the legal description of their cases results in misunderstanding their predicament. Citing Fricker, Wikström observes that the skepticism of Sweden's migration boards and courts directed toward applicants is fueled by cultural and gender-based stereotypes: "epistemic injustice becomes evident as the reasoning of authorities shows how arguments of culture are primarily used to negate individual claims," so that "resistance to and deviations from dominant cultural norms are not seen credible" (Fricker 2007; Wikstrom 2014, 14).

Ezgi Sertler's commentary on Wikström's study highlights several cases that illustrate the ease in which Sweden's migration boards and courts dismiss applicants' experiences of persecution, ignore available information, and selectively choose evidence in the course of inconsistently describing cases. One case involves a Kurdish women (Sara) who fled Iraq after both her brother and the police from whom she sought protection threatened violence against her for having sexual relations with a colleague at work, in violation of an impending marriage her family had arranged for her against her will.

In denying her asylum in favor of temporary subsidiary protection, the migration board argued:

> It is odd and not very likely that she would initiate a sexual relation with another man when she knows she is going to marry her cousin . . . . That she would be so blinded by love and disregard the consequences is not a reasonable explanation, with the culture that is prevalent in Northern Iraq and with

> her family traditions in mind . . . . Furthermore, it must be considered striking that, at her age, an arranged marriage has not occurred earlier (Verdict 15: 3 ---cited in Sertler).

Sertler comments that "when the board listens to Sara, they do so through a frame in which 'non-white' women seem intelligible insofar as they are without any agency, and their cultures seem intelligible insofar as they are all oppressive" (Sertler 2018 10). Because 'persecution' is understood as an extraordinary deviation from cultural norms, the board, in characterizing all of Kurdish culture as monolithically oppressive for both men and women who face criminal punishment for violations of family honor, can find no basis for Sara's claim to have suffered a *gender-based* form of persecution

Another case discussed by Wikström highlights the ease in which the migration board selectively ignores facts when presented to them. A Kurdish woman (Nesrin) flees Iraq after her family kills her lover, a man who proposed marriage to her, because she was promised to a cousin of hers. Because her brother, uncle, and cousin are members of the police force, she seeks help from a women's organization to arrange her escape. The written verdict of the board ignores these salient facts, arguing that "for abused women there is generally a possibility of good enough protection" and "Nesrin did not make contact with the police, other authorities or alternative mediation institutions in Iraq [for her protection] before seeking international protection" (Verdict 12: 4-5 ---cited by Sertler, 11). Again, because a man is the principal victim of honor violence, the board does not register her case as an example of gender-based persecution. Hence she is awarded only subsidiary protection.

A third case illustrates the inconsistencies in the way in which the migration board argues from case to case. Two Syrian women, Almas and Afya, apply for asylum at about the same time in their effort to escape from repeated acts of honor violence that have been directed against them. In the case of Almas, who is awarded refugee status, the migration court relies on six national and international reports to argue that "HV and murders take place all over Syria" and that Syrian law recommends "impunity or punishment mitigation in honour-related violations" (Verdict 21: 7). In Afya's case, by contrast, the migration court relies on only the board's internal report, which asserts that "the number of honour killings has gone down in the country in recent years" because "it is said that people have become more enlightened " and men know that "they will be sentenced to harsh prison terms" (Verdict 24:4). Not only does the same migration court use cultural and national stereotypes in rendering its verdicts, but it uses vastly different reports containing diametrically opposed assessments of the Syrian "culture of honor violence."

Other studies show that the women pleading gender-based asylum in the UK and the US experience similar kinds of testimonial, hermeneutic, and contributory injustice as those applying in Sweden. This leads Sertler to ponder whether the very institution of gender-based asylum contains structural obstacles preventing recognition of the way in which applicants make sense of their situations.[10] Her own examination of the entrenched nature of social

[10] By presuming the innocence of the accused until proven guilty, criminal trials in Anglo-American jurisdictions already impose a greater burden of proof on the state. As I noted earlier, this burden of proof still inclines courts to give exceptional weight to the eyewitness testimony of living victims. However, the scale of credibility can shift in favor of the accused in some circumstances. For instance, the standard of reasonable fear invoked in determining whether a woman with a long history of suffering spousal abuse can justifiably claim to have injured or killed her assailant in self-defense or out of "irresistible impulse" (as in the case of so-

stratification and epistemic hierarchy suggests a negative answer. As Pohlhaus notes, challenging the dominant epistemic resources poses a dilemma, for the only way this can happen would be if those in authority were to find intelligible the counter-knowledge that their own hermeneutical standpoint renders unintelligible (Pohlhaus 2012, 731). The willful hermeneutical ignorance thus lends itself to creating a third kind of epistemic injustice, what Kristi Dotson calls "contributory injustice," whereby marginalized persons are prevented from contributing to the production and revision of knowledge (Dotson, 2012, 32).

But the reason why gender-based asylum proceedings are structurally inclined to uphold and preserve the dominant epistemic resources at the disposal of the courts goes beyond this vicious hermeneutical circle. Asylum courts presume the legitimacy of the existing nation-state system which rests upon privileging national security. The default in the court's reasoning lies with the state's interest in protecting the freedom, prosperity, and cultural identity of its citizens (Rusen and Franke 2010). As Karen Musalo notes, this default in the court's reasoning finds support in a kind of textual fundamentalism: refugee law was only originally intended to apply to public forms of discrimination, not private domestic abuse, so that extending its application allegedly threatens to unleash a tidal wave of asylum seekers threatening to overwhelm the scarce economic, political, cultural, social, and legal resources of the state (Musalo 2010 47-8),

It is likely that similar structural critiques of the sort Sertler applies to gender-based asylum processing can be extended to virtually all cases of asylum using the tools of intersectional analysis. Even when government discrimination based on race, religion, nationality, and political opinion is not the grounds for seeking asylum, it is often the grounds for refusing it. Of course, asylum boards aren't monolithic in their deference to the dominant epistemic authorities. My own examination of gender-based asylum and temporary protection cases in the United States shows that judges can use their discretion to counter the privileged standpoint of national security with a more open-minded standpoint that attends to the narratives of oppressed women (Ingram 2018). Government administrators and lawmakers can sensitively protect national security without denying humanitarian relief to refugees and irregular migrants who pose no security risk.

In the concluding section, I will endeavor to show how, beginning with the court's proper recognition of the asylum seekers' narrative reconstruction of her situation, a more just reconstruction of her case can alter the discursive procedure and supporting rationale underlying the court's application of the law, which, in turn, can lead to reinterpreting the law itself.

Conclusion

I have argued that recognition theory uniquely contributes to illuminating the epistemic injustices suffered by migrants in pleading their cases before asylum courts. The testimonial and hermeneutical

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called battered women syndrome) has at times been understood to require courts to adopt the standpoint of the accused, given her unique circumstances as a victim. I discuss the advantages and disadvantages of adopting such a psychopathological conception of reasonableness in Ingram (2006). As I noted earlier, the impact of trauma can distort victim's memory of their circumstances which, in turn, can cast doubt on the credibility of their testimony (Schweiger 2019).

injustices experienced by women who seek gender-based asylum can be considered typical for all migrants whose lived experience of their situation is discounted by biases that are structural as well as personal. The structural biases have their basis in an international legal order that bestows prerogatives on governments and their agents to define who qualifies as a legal refugee. Using national security as a broad pretext for restricting asylum, they define legal refugees as simply those who are fleeing political persecution. Persons fleeing forms of domestic violence, economic violence, or climate-related violence do not count as political refugees, even if the violence they suffer is abetted and condoned by their governments and by the international order.

Recognition theory shows how this conceptual narrowing of who counts as a refugee reflects a vicious hermeneutical circle. The migrant whose testimony is discounted cannot contribute personal knowledge that could revise the very expertise that invalidates her knowledge. To paraphrase Jean-Francois Lyotard, the migrant's testimony cannot even enter into litigation as a form of dissent meriting argumentative rebuttal because it cannot be recognized as a legitimate truth claim (Lyotard 1988; Ingram 2018a). There is no common or neutral rule for adjudicating the disagreement between the state's epistemic resources and the migrant's because any rule that recognizes the authority of the state's claim disqualifies the authority of the migrant's claim, and vice versa. So one voice must go unrecognized and be effectively silenced, and that voice will be the less institutionally entrenched voice, which in the case before us is the migrant's. The injustice committed in silencing one of two "incommensurable" types of knowledge claims---what Lyotard calls a *differend* --- can be seen as "willed" insofar as it is structurally required in order to maintain the higher authority of the institutionalized, expertise-based, epistemic/interpretative frame of understanding.

Pre-interpreted through the cipher of binary legal categories, the exclusionary logic of the dominant recognition order is challenged by the personal experiences of those who stand accused by it. For instance, the distinction between private and public domains of life, between domains of life that should be left to individuals to work out among themselves and domains that properly fall under public and political regulation, is questioned by a feminist standpoint that interprets domestic violence as a public harm visited upon women as a politically vulnerable group. To take another example, the distinction between political persecution and economic oppression is questioned by a critical theory standpoint that interprets government negligence in securing the minimally decent standard of living vouchsafed by human rights as an act of political discrimination that endangers the basic freedoms and lives of marginalized groups no less than if it were officially mandated as a form of legal persecution. Finally, the distinction between asylum seekers fleeing natural disasters, such as climate change, and asylum seekers fleeing oppressive government is questioned by a globalizing standpoint that interprets climate change, poverty, and political oppression as the shared responsibility of the entire international and global legal order.[11]

Thus, the Salvadoran seeking asylum in the United States flees from a situation which an inhospitable nature, an impoverished economy, an oppressive society, an unresponsive and hostile government, and

[11] In fact, the Syrian refugee crisis implicates a climatological cause---drought--- as contributing to the economic and political causes of the Syrian civil war.

an irresponsible global order have conspired together to create. Criminalizing her for bypassing legal ports of entry or punishing her with confinement when she does not show the degree to which the legal system misrecognizes her. If she has voluntarily colluded with a trafficker she may be misrecognized as a simple accomplice, in total disregard for the coercive bargain and accompanying threats of retaliation leveraged by her trafficker, not to mention the violence compelling her to embark on such a desperate course of action in the first place. Or she may be misrecognized as a passive victim of non-consensual exploitation in total disregard for her agency. This misrecognition is compounded if she happens to be an unaccompanied minor, in which case she will be treated as an incompetent witness without agency and proper legal standing or as a blameworthy delinquent meriting summary deportation.[12]

If recognition theory provides a crucial lens for magnifying the epistemic injustices visited upon asylum seekers in the immigration system, it also provides a framework for appreciating how the system can be reformed. The relatively recent extension of refugee law to incorporate gender-based asylum under its aegis shows that dominant legal systems and their corresponding epistemic frameworks are not impervious to change, once epistemic insights drawn from alternative resources based on lived experience are given a fair hearing. Since 2016 the UNHCR has adopted an expansive definition of a refugee to include anyone living outside their country of residence who faces "serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order" and other "man-made disasters."[13] Serious and indiscriminate threats

[12] See the dilemma of misrecognition posed by unaccompanied minors seeking asylum in the United States from Central American gang-related violence (Heidbrink 2013). In defending a prima facie case for prioritizing children for asylum because of their vulnerability (among other reasons), Gottfried Schweiger notes that children are regarded as less reliable witnesses than adults to the circumstances bearing upon their case for asylum (Schweiger 2019, 56-57.

[13] This definition adopts the wording contained in the Organization of African Unity's Convention Governing the Specific Aspects of Refugees in Africa (1974). Te Cartegena Declaration on Refugees (1984), ad opted a non-binding resolution by Mexico and other Latin American countries, builds upon this definition to include "persons who have fled their countries because their lives, safety, and freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other disturbances which have seriously disturbed public order."

to life, physical integrity or freedom that count as “man-made disasters” include willful neglect of domestic abuse, poverty, and environmental devastation wrought by anthropogenic climate change. Simply reclassifying these refugees as endangered persons who do not merit legal protection under the legal definition of refugee, but who nonetheless merit “temporary” or “subsidiary” protected status, misrecognizes the degree, duration, and multiple causes of their endangerment.

Responsibility for correctly recognizing the multiple causes of endangerment facing the asylum seeker begins with the judge(s) who are tasked with a moral duty to listen with empathetic understanding as a necessary prelude to “thinking outside of the box.” Once the defense mechanisms of the state--in this case, the binary, analytic logic government officers use to describe and adjudicate cases---is broken down, the open-minded judge will be tasked with imaginatively reinterpreting legal categories in a way that cannot avoid challenging the structural, national security bias built into the international order. Once the totality of life-endangering circumstances comes into view in the personal narrative of the asylum seeker, the burden of proof will perforce shift. For, these circumstances have been engendered not by a poor or oppressive country, but by the entire international order whose creation and maintenance falls on the shoulders of the most affluent countries.

Deportation courts are another site where we would expect to see courts shifting their understanding. In most countries, deportation proceedings reflect administrative priorities. The record of deportations is filled with a long list of epistemic injustices that has resulted in the death, imprisonment, and torture of countless migrants who have been forcibly repatriated to their former “safe haven.” Sadly, the UNHCR has been all-too complicit in these tragedies as it tries to simultaneously recognize the competing demands of national sovereignty and humanitarian rescue; preferring “protective confinement” of displaced populations in lieu of protective resettlement for the sake of skirting incendiary political conflict invariably ends with refugees having to choose between forced repatriation to an uncertain existence or forced confinement to a miserable camp existence. As in the case of asylum courts, the decision to repatriate is often done without consulting those whose lives are at risk, and even when they are consulted, the testimony of government officials and experts often outweighs the testimony of eyewitnesses on the ground (Ingram 2018b, 141-44 ; Barnett 2010,).

Be that as it may, deportation proceedings in the United States, for instance, have not always been insensitive to migrants’ circumstances. Leaving aside the blanket amnesty that was offered to irregular migrants in 1986, the relatively enlightened administrative priorities ordered by Pres. Barack Obama in the aftermath of congressional failure to ratify Senate Bill 744, which would have provided conditional amnesty and a pathway to citizenship, marked a clear departure from prevailing policy. Obama issued three executive orders: Deferred Action for Childhood Arrivals [DACA], Deferred Action for Parents of Lawful Permanent Residents [DAPA], and the replacement of President George Bush’s Secure Communities policy, which criminalized unlawful entry, with a policy implementing deferred deportaton for virtually all undocumented persons who have not recently entered the country. The Obama administration created DACA in 2012 to provide temporary but renewable legal status to children who entered the U.S illegally prior to their 16th birthday and have resided in the U.S. for five years. In 2014 it created DAPA, which provides temporary but renewable legal status to undocumented parents of citizens or legal residents. A more far-reaching executive order put into force in mid- 2015 essentially

narrows enforcement of deportation proceedings to just three categories of persons: convicted criminals, recent arrivals apprehended mainly at ports of entry, and suspected terrorists. Homeland Security Secretary Jeh Johnson gave the following rationale for the change in policy: "We are making it clear that we should not expend our limited resources on deporting those who have been here for years, have committed no serious crimes and have, in effect, become integrated members of our society."[14]

It is noteworthy that Johnson expressly appealed to the relational circumstances that compel recognition of undocumented migrants as members of family and community and as contributors to the economy, political life, and military defense of their host country. In my earlier recounting of the unfinished story of Elvira Arellano, an undocumented mother of a cognitively disabled child and a pro-amnesty advocate who was deported back to Mexico but who has since successfully re-entered the United States with her teenage son as an asylum seeker fleeing drug-related violence(Ingram 2018, 167-69), I sought to show that her original deportation might well have been decided differently under the new Obama guidelines. Of crucial importance is that the rationales underlying these guidelines hinge on three principles that clearly reflect distinctive duties of recognition: duties to recognize social contribution, humanity, communal integration, and intimate, nurturing relationship.

P.1: No one who has resided sufficiently long in a country should be deported unless they have committed a serious crime.

P.2 Persons should not be deported, if doing so risks separating them from their parents, children, or persons who depend on or care for them.[15]

P.3 Persons should not be deported, if doing so endangers their lives in violation of international humanitarian legal practice.

By saying that duties of a specifically recognitive nature informed and qualified deportation judgements during the final years of Obama era I am also saying that these duties preceded the actual discursive process of policymaking and application. They reflect the prior moral authority of cumulative experience, garnered from migrants' own testimony about their circumstances. In their own way, they testify to the futility and counterproductivity of criminalizing undocumented entry and hence, of

[14] On June 23, 2016, a divided Supreme Court let stand a ruling by the 5th U.S. Circuit Court of Appeal in *United States v. Texas* that upheld an injunction against enforcing DAPA.

[15] P.2 and P.3 also find support in the official rationale for DAPA, CAM, and U.S. prioritization of visas emitted for family reunification..

punishing undocumented residence. Going further, they tacitly condemn the structural injustice of a global order that shields affluent nations from shared responsibility behind the bogus defense of national security. In this respect, every exemption from the normal, dominant paradigm for processing deportation represents a reversal in the burden of judgment. For, it is now agents of the state who are compelled to justify their preference for deportation above their basic humanitarian and communitarian recognitive duties.

To be sure, shifting the burden of argument from migrant to state is still the exception rather than the rule. But, as I have argued elsewhere (Ingram 2009), the cumulative impact of repeated exceptions, especially in a system of case law, has the power to create a new exemplar and a new interpretative lens for understanding migrants' testimony (Ingram 2009).

In closing this chapter, I would like to illustrate the point I am trying to make about the power of witness's personal testimony to set into motion a fundamental change in the procedure of legal argumentation by recounting a case I discuss in *World Crisis and Underdevelopment*.

32-year-old Alba Cruz and her 3-year-old had been detained at the Dilley, Texas trailer compound awaiting an immigration hearing. An Immigration and Customs Enforcement Official had determined that she and her daughter had a "reasonable fear" of being physically abused by her ex-boyfriend in El Salvador. Because of the high demand placed on immigration courts, her hearing took place in a compound trailer, by teleconference with Judge Lourdes de Jongh in Miami. Her attorney, who worked for a pro bono immigrant defense project, was seeking temporary asylum for her and her daughter, deferred removal, and a work permit for herself.

Judge Jongh began the questioning: "You're going to be telling me your story." Through a translator and with her lawyer by her side, Cruz began her story. She had been victimized twice by domestic violence, once in 2004, after she entered the U.S. the first time, and a second time, just before she re-entered the U.S. in 2014 with her daughter. The first time her alcoholic boyfriend threatened to stab her with a knife, followed her to work, and smashed the windows on her car (all of which was corroborated by a police report). After returning to El Salvador, she became pregnant by her second boyfriend, who demanded sex from her in return for a five dollar per diem living allowance to support herself and her baby. With prodding from her lawyer, Cruz recounted how her boyfriend screamed at their daughter, yanking her hair and slamming her down in a chair. He threatened to keep the child if Cruz tried to escape. When Cruz complained to her boyfriend's mother, she told her that she would have to suffer the abuse in order to "have a home." Cruz did not go to the police because she feared they would do nothing to protect her and that it would only make her boyfriend angrier, repeating what had happened in the U.S. the first time around.

Finally, the lawyer representing the government asked how she entered illegally. She answered that she had help from her relatives, who raised $5000 to pay a smuggler for the trip across the Rio Grande, from

Ciudad Acuna, Mexico. After a sympathetic hearing from the judge, Cruz emerged from the trailer, scooped up her daughter and announced, "We Won!" [16]

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[16] As narrated in "Lives on Hold in Holding Center," Chicago Tribune (July 1, 2015), sec 1: 18.

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