

IMPROVING ASYLUM-SEEKER CREDIBILITY DETERMINATIONS: INTRODUCING APPROPRIATE DISPUTE RESOLUTION TECHNIQUES INTO THE PROCESS

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I. INTRODUCTION

In an asylum hearing in 2002, an immigration judge (IJ) took over the questioning of Ms. Lorraine Fiadjoe from the government attorney.¹ She was seeking asylum in the United States after escaping religious slavery in West Africa.² The IJ aggressively questioned Ms. Fiadjoe about being sexually abused by her father when she was age seven.³ He demanded to know the year and the range of dates in which the abuse took place. Because she became flustered by the IJ's hostile questioning, she was unable to provide what the IJ referred to as a "simple calculation."⁴ The IJ continued in an abusive tone and started examining Ms. Fiadjoe about her father's murder of her fiancé.⁵ The IJ was particularly interested in whether Ms. Fiadjoe had told her fiancé "about the sexual aspect of the abuse she had suffered."⁶ Ms. Fiadjoe was drilled about the most minor details of her claim that her father forced her into religious and sexual slavery.⁷ At the end of the hearing, the IJ issued an adverse credibility determination against her; in other words, the IJ thought Ms. Fiadjoe's story was a mere fabrication.⁸

Ms. Fiadjoe appealed this decision to the Board of Immigration Appeals (BIA). The BIA affirmed the IJ's decision, relying on an inconsistency regarding the date on which Ms. Fiadjoe had been raped by her father and that Ms. Fiadjoe did not establish her claim that the government was unwilling to control her father's abuse.⁹ On review, the Court of Appeals for the Third Circuit

¹ *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 142–45, 154 (3d Cir. 2005). Ms. Fiadjoe arrived in the country on a fake passport and when she refused to return to Ghana, she was placed in detention. *Id.* at 137. Prior to the asylum hearing, she spent almost a month in detention. *Id.* An asylum officer who examined her determined that she had a potential claim for asylum. *Id.* Two months later, an immigration judge heard Ms. Fiadjoe's case. *Id.*

² *Id.* at 137. Ms. Fiadjoe's father was a Trokosi priest. *Id.* at 139. In accordance with the Trokosi cult's practice, her father "sought to make her his slave, working for him and the shrine and submitting to him sexually." *Id.* She was, after a few months, able to escape and live in Accra with a family member. *Id.* This situation did not last for Ms. Fiadjoe due to a number of additional unfortunate events, and she was forced to return to her father's house. *Id.*

³ *Id.* at 154.

⁴ *Id.*

⁵ *Id.* at 155.

⁶ *Id.*

⁷ *Id.* at 142–45. There was corroborating evidence, in the form of a State Department report, to support that such a practice was still occurring in Ghana despite government efforts to limit it. *Id.* at 138.

⁸ *Id.* at 145–46 (the IJ said, "I don't believe your testimony").

⁹ *Id.* at 149.

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found, “No adverse credibility assessment derived from a hearing conducted under the circumstances and in the manner that the IJ conducted the . . . hearing could survive review.”¹⁰ The Third Circuit observed that the IJ’s “tone was hostile and at times became extraordinarily abusive. If not by design, in effect, he produced the very atmosphere that . . . would cause memory loss, blocking, dissociating and breakdown.”¹¹ Further, the Third Circuit noted that a psychologist found Ms. Fiadjoe to be experiencing not only Post-traumatic Stress Disorder, but also Postpartum Depression at the time of her hearing.¹² According to the psychologist, these factors, together with the IJ’s cultural ignorance, could have contributed to Ms. Fiadjoe’s inconsistency.¹³ The court found that adverse credibility determinations of the IJ and BIA were not supported by substantial evidence and remanded the case back to the BIA where it would be heard by a different IJ.¹⁴

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

¹⁰ *Id.* at 157.

¹¹ *Id.* at 154.

¹² *Id.* at 150.

¹³ *Id.* The psychologist included a number of observations in a letter to the court:

It is my professional opinion that Posttraumatic Stress Disorder, Ms. Fiadjoe’s own mannerisms, and the Immigration Judge’s lack of awareness of Ghanaian culture contributed to Ms. Fiadjoe’s responses to questioning by opposing counsel and, in particular, to the Judge. It is extraordinarily difficult for sexual abuse victims to discuss specifics of their abuse experiences. Given the extreme shame that surrounds these issues in general they are difficult for both men and women to discuss. With the addition of the cultural factors surrounding Ms. Fiadjoe’s experiences in particular, it should be of no surprise at all that she would be reluctant to discuss these issues with anyone, most specifically with a male or in the presence of several males. It is very typical of victims of sexual abuse to not be able to accurately recall dates, ages, number of abuse occurrences and time lines in general. In addition, I believe cultural factors played a role. In many cultures the specifics of dates, time, and ages are not valued as significantly as they are in western, industrialized cultures. The combination of cultural factors and traumatic stress reactions would be expected to impede one’s memory of dates, times and ages.

Id.

¹⁴ *Id.* at 163.

and politics.”¹⁵ Recently, however, IJs and the BIA have been subject to considerable criticism over adverse credibility determinations.¹⁶ This is partly the result of a recent BIA streamlining procedure that has resulted in less administrative review and greater federal court exposure for asylum cases.¹⁷

In criticizing the IJs, scholars have pointed “to the high error rate, the lack of legal representation, and inconsistency in adjudication as evidence of the lack of fairness in the process.”¹⁸ Judge Jon Newman of the Second Circuit testified before Congress that “the IJs decide their high volume of cases hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process.”¹⁹ Judge Richard Posner of the Seventh Circuit has commented, “[T]he adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”²⁰

This Note will examine some of the difficulties IJs experience in making credibility determinations. Specifically, this Note will explore the issues of cross-cultural communication, trauma, and institutional interactions. The Note proposes that techniques from the field of Appropriate Dispute Resolution (ADR) can help restore procedural protections for the asylum-seeker by giving him a voice in sharing his narrative and shaping the process. These procedural protections would improve the adjudicatory environment and also reduce immigration appeals to the federal courts. Professor David A. Martin believes that “[t]o the extent that litigants feel that their claims were fully and fairly heard, judicial appeals will

¹⁵ DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 153 (3d ed. 1999).

¹⁶ This criticism has not only been leveled by federal court judges as discussed *infra* Part II.B.2., but also by scholars and the media. See Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 *STAN. L. POL'Y REV.* 481, 484 (2005); Nina Bernstein, *In New York Immigration Court, Asylum Roulette*, *N.Y. TIMES*, Oct. 8, 2006, at 11; Carlyn Kolker, *System Overload Swamped with Asylum Cases, Federal Appeals Judges Take Aim at Immigration Courts*, 28(2) *AM. LAW.* 72 (2006); and Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, *N.Y. TIMES*, Dec. 26, 2005, at A1.

¹⁷ See *infra* Part II.B.2.

¹⁸ Cruz, *supra* note 16, at 484.

¹⁹ *Immigration Litigation Reduction: Hearing of the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Jon O. Newman, Judge, U.S. Second Circuit Court of Appeals) [hereinafter “*Newman Testimony*”].

²⁰ *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

recede, and courts will also be more likely to defer to the administrative result.”²¹

Part II of this Note provides background on the administrative process for asylum applications from the filing of an application to appeal in the federal courts. This Part also explains the causes and effects of the shift in asylum cases from the BIA to the federal circuit courts. Part IIIA examines the obstacles to making credibility determinations in the asylum context. Part IIIB proposes reforms to the Department of Justice (DOJ) asylum adjudication process that would incorporate models from the ADR field.

II. BACKGROUND

A. *The Administrative Process*

An individual initiates his claim for asylum in the United States by filing an application.²² There are two types of applications. Though their forms are the same, their paths are different; there is an affirmative application and a defensive application. An affirmative application is filed by the asylum-seeker with an Asylum Officer of the United States Citizenship and Immigration Service (USCIS), a division of the Department of Homeland Security (DHS).²³ A defensive application is offered to an immigration court with appropriate jurisdiction after the alien has been ordered removed by the DHS or referred by a USCIS Asylum Officer.²⁴ The DHS may order an alien removed for immigration violations

²¹ *Immigration Litigation Reduction: Hearing of the S. Comm. on the Judiciary*, 109th Cong. 28 (2006) (statement of David A. Martin, Warner-Booker Distinguished Professor of International Law, University of Virginia).

²² The application consists of Form I-589 along with other materials required by the form. The I-589, Application for Asylum and for Withholding of Removal, form is available on the USCIS website at <http://www.uscis.gov/files/form/I-589.pdf>. There is currently no filing fee for an application for asylum or withholding of removal. *Id.*

²³ The federal government's immigration functions have been shifted from agency to agency and even across agencies historically. See David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1294–98 (1990). Currently, USCIS adjudicates asylum and refugee applications, a function that belonged previously to the Immigration and Nationality Service. U.S. Citizenship and Immigr. Services, About Us, <http://www.uscis.gov/aboutus> (last visited Oct. 27, 2007). USCIS exists as an agency within the United States Department of Homeland Security (DHS).

²⁴ A basic description of the two procedures and the differences between the two is available on the USCIS website. U.S. Citizenship & Immigr. Services, Obtaining Asylum in the United States: Two Paths, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=E3f26138f898d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD> (last visited Oct. 27, 2007).

or attempting to enter the United States without appropriate documentation.²⁵

The two paths for asylum do not only start at different points, but also offer different procedures. An affirmative application results in an interview with an asylum officer that is non-adversarial and may be private.²⁶ The purpose of the interview is to “elicit all relevant and useful information” related to the asylum-seeker’s claim.²⁷ The asylum-seeker may have an attorney, interpreter, or other supporting witness present during the interview.²⁸ At the end of the interview, the asylum-seeker, or his counsel, may make a closing statement or “comment on the evidence presented.”²⁹ A defensive application goes to immigration court and is adjudicated by an IJ, a DOJ employee.³⁰ The hearings are adversarial and public.³¹ A DHS attorney represents the US government in these hearings. An asylum-seeker who does not succeed in his claim with an asylum officer may also end up in immigration courts and proceed with defensive procedures.³²

In order to qualify for asylum in the United States, an individual must meet the definition of a “refugee” as defined by federal statute.³³ 8 U.S.C. 1101(a)(42)(A) defines a refugee as:

any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁴

²⁵ *Id.*

²⁶ 8 C.F.R. § 1208.9(b) (2008).

²⁷ *Id.*

²⁸ 8 C.F.R. § 1208.9(b), (g) (2008). Being represented by counsel has been described as “fundamental” to the fairness of a removal proceeding. REGINA GERMAIN, A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 119 (2d ed. 2000).

²⁹ 8 C.F.R. § 1208.9(d) (2008).

³⁰ 8 C.F.R. § 1003.10 (2008).

³¹ 8 U.S.C. § 1229(a) (2008); 8 C.F.R. § 1003.27 (2008).

³² 8 C.F.R. § 1208.14(c) (2008). The process through which an asylum-seeker is heard by both an Asylum Officer and an Immigration Judge has been referred to as “two bites at the apple.” Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 696 (1996). The issue is further discussed *infra* in Part III.B.2.

³³ See Regina Germain, *Seeking Refuge: The U.S. Asylum Process*, 35-OCT COLO. LAW. 71, 72 (2006).

³⁴ 8 U.S.C. § 1101(a)(42)(A) (2008). The federal definition of “refugee” is modeled on the United Nations’ definition. See Germain, *supra* note 33, at 71. Refugee law is derived

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The burden of proof is on the asylum-seeker to prove that he falls within the definition of a refugee.³⁵ An asylum-seeker may satisfy this burden with nothing more than his testimony, “but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”³⁶ The requirement for credible testimony has been cited as the “single biggest substantive hurdle before applicants beginning the refugee status determination process.”³⁷ Producing credible testimony is essential for asylum-seekers because “the applicant’s testimony is often the critical core of the asylum determination, since refugees generally are unable to produce external corroborative evidence.”³⁸

In making credibility determinations, IJs are guided by statutory rule, case law, and agency guidelines.³⁹ They are, however, given significant freedom to depart from the traditional rules of evidence.⁴⁰ The IJ makes his determination “[c]onsidering the totality of the circumstances, and all relevant factors”⁴¹ 8 U.S.C. § 1158 lists the factors that an IJ is allowed to consider. These in-

from international treaties governing the global movement of persons. *Id.* Relevant treaties include the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees. *Id.* Germain notes that the inclusion of persons forced to undergo abortions or sterilization in the definition of a refugee by way of a 1996 amendment is “one example in which U.S. asylum law is broader in scope than international law.” *Id.* at 72. One of the largest classes of cases to reach the Second Circuit from appeal of administrative adjudications is Chinese family planning, which is also one of the classes of which adjudicators are most skeptical. *See generally* John R.B. Palmer, *The Second Circuit’s “New Asylum Seekers”*: Responses to an Expanded Immigration Docket, 55 CATH. U.L. REV. 965, 977–78 (2006).

³⁵ 8 U.S.C. § 1158(b)(1)(b)(i) (2008).

³⁶ 8 U.S.C. § 1158(b)(1)(b)(ii) (2008).

³⁷ Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003).

³⁸ ANKER, *supra* note 15, at 150. *See also* 8 C.F.R. § 1208.13(a) (2008).

³⁹ Relevant statutory provisions include 8 U.S.C. . § 1158 (2008) and 8 C.F.R. § 1208 (2008). Regina Germain cites a number of cases relevant to the interpretation of credibility provisions in AILA’s Asylum Primer. REGINA GERMAIN, A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 61 n. 379 (4th ed. 2005). Other sources available to Asylum Officers and IJs include DHS Field Manuals; USCIS, ICE, and EIOR Policy Directives and Memoranda; the Asylum Officer Basic Training Course; and the INS’s *Basic Law Manual*. *Id.* at 2. The *Basic Law Manual* does not have the effect of law. *Id.* at 19.

⁴⁰ As is the case in many administrative adjudications, IJs are given discretion to receive into evidence any oral or written statement that is relevant. 8 C.F.R. § 1240.7(a) (2008). Hearsay evidence is generally permissible, and the Federal Rules of Evidence do not control. *See* Matter of D-, 20 I. & N. Dec. 827, 831 (B.I.A. 1994); Matter of Grijalva, 19 I. & N. Dec. 713, 721–22 (B.I.A. 1988).

⁴¹ 8 U.S.C. . § 1158(b)(1)(b)(ii) (2008).

clude the asylum-seeker's demeanor, the inherent plausibility of his account, the consistency between the asylum-seeker's written and oral statements, the consistency of these statements internally and as compared to other evidence in the record, and any inaccuracies that go "to the heart of the applicant's claim."⁴² If the IJ finds the asylum-seeker to be credible, he may use the asylum-seeker's testimony in determining whether the applicant meets the substantive requirements for asylum, i.e. whether the asylum-seeker has demonstrated past persecution or well-founded fear of persecution as part of a protected class. If the IJ finds the asylum-seeker not to be credible, his claims fail and the asylum-seeker is ordered removed from the country. The IJ must articulate a specific reason for his negative credibility ruling.⁴³

When the IJ issues a negative credibility ruling, the asylum-seeker may appeal to the BIA.⁴⁴ The BIA functions as an appellate body for adjudications heard by IJs and also issues precedential decisions to guide the actions of IJs and other immigration officers.⁴⁵ While the BIA has other functions, review of decisions by IJs constitutes the "bulk of the BIA's work."⁴⁶ The number of judges on the BIA was originally five. In the mid-1990's it rose to as many as 21 but then was cut down to eleven in 2002.⁴⁷ While the BIA may conduct a *de novo*, or independent, review of an IJ's credibility ruling,⁴⁸ it often shows significant deference to the IJ's findings.⁴⁹ The BIA grants this deference because it is the IJ that personally observes the petitioner's testimony.⁵⁰

⁴² *Id.*

⁴³ See *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006); *Zhang v. INS*, 386 F.3d 66, 74 (2d Cir. 2004).

⁴⁴ 8 C.F.R. § 1003.1 (2008). The IJ must give notice to asylum-seekers who are entitled to appeal. 8 C.F.R. § 1003.3(a)(1) (2008). If the asylum-seeker does not appeal the IJ's decision, it becomes final. See *Matter of L-V-K-*, Int. Dec. 976, 978 (B.I.A. 1999). The BIA is not limited to reviewing negative credibility determinations, it may review most orders issued by the immigration court. 8 C.F.R. § 1003.1(2)(3)(ii) (2007).

⁴⁵ 8 C.F.R. § 1003.1(d)(1) (2008).

⁴⁶ John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions In Federal Court? An Empirical Analysis of The Recent Surge in Petitions For Review*, 20 GEO. IMMIGR. L.J. 1, 19 (2005).

⁴⁷ *Id.* at 18.

⁴⁸ See *In re Kasinga*, 21 I. & N. Dec. 357, 364 (B.I.A. 1996) (finding that the BIA panel "like the Immigration Judge, can determine from the record whether the applicant's testimony is 'rational, plausible, and consistent'").

⁴⁹ See *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (B.I.A. 1998) (recognizing that the BIA "accords deference to the Immigration Judge's findings concerning credibility . . .").

⁵⁰ *Id.*

B. *A Shift to the Federal Courts*

Federal circuit courts have the jurisdiction to review BIA decisions.⁵¹ Similar to the BIA review of IJ decisions, federal courts show significant deference to the IJ's credibility determinations.⁵² The BIA's factual findings, including credibility determinations, are reviewed under the substantial evidence standard, under which "a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole."⁵³ Recently, however, two striking changes have occurred in the federal circuit courts with respect to immigration: 1) federal courts are handling a record number of asylum cases; and 2) federal judges are taking a greater interest in, and have been more critical of, adverse credibility decisions.

1. *Greater Volume of Immigration Appeals in Federal Circuit Courts*

Since 2002, the federal circuit courts have seen an incredible surge in the number of immigration appeals from the BIA.⁵⁴ While the circuit courts as a whole have experienced an increase in total volume of appeals, the Courts of Appeals of the Second and Ninth Circuits have seen the greatest increase in the number of immigration appeals.⁵⁵ More than 40 percent of BIA decisions in these cir-

⁵¹ 8 U.S.C. § 1252(b) (2008). Over the last decade, Congress has restricted judicial review of immigration decisions. Both the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) severely restricted judicial review by limiting the venue in which cases can be heard, the procedures by which removal may be stayed and parties are served, and by eliminating judicial review of expedited removal cases, except in extraordinary circumstances. The REAL ID Act of 2005 went further and eliminated federal court review of habeas corpus cases of removal and exclusion. *See generally* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2006–2007).

⁵² *See Zhang*, 386 F.3d at 73 n.7 (2d Cir. 2004) (noting that federal law requires this deference as codified by the IIRIRA at 8 U.S.C. § 1252(b)(4)(B)); *see also* Hartooni v. INS, 21 F.3d 336, 342 (9th Cir. 1994) ("The immigration judge is in the best position to make credibility findings because he sees the witness as the testimony is given.").

⁵³ *Secaída-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003) (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)).

⁵⁴ *See Palmer*, *supra* note 34, at 968. From 2001 to 2005, the number of appeals from the BIA to the Circuit Courts has increased from 1,760 to 12,349. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR 114 tbl. B-3 (2006) *available at* <http://www.uscourts.gov/judbus2005/contents.html>.

⁵⁵ *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 54, at 114 tbl. B-3 (reporting a total increase in appeals from 57,464 in 2001 to 68,473 in 2005, and a notable rise in appeals

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cuits are appealed.⁵⁶ The Second Circuit now receives more immigration appeals than any other category of cases.⁵⁷

This is partly the result of a streamlined procedure introduced by the DOJ to clear the BIA’s backlog of cases.⁵⁸ The Attorney General introduced the new procedures in 2002 when there were over 57,000 cases pending before the BIA.⁵⁹ Briefly, the streamlining shifted the agency’s reliance to “single Board members in lieu of three-member panels to decide cases, and it allowed these single Board members to summarily reject appeals through affirmances without opinion (AWO) and summary dismissals.”⁶⁰ As a result and almost immediately following the streamlining, the BIA began deciding twice as many cases per month as it previously had.⁶¹ As would be expected, more BIA decisions were being challenged simply because there were more BIA decisions issued. The procedures, by their design, were intended to speed up BIA review, and thus the rate at which cases reached the federal circuits necessarily increased from pre-streamlining levels. Perhaps not as expected, however, a “larger proportion of these decisions are actually being challenged.”⁶²

from “Administrative Agencies,” like the BIA, in both the Second and Ninth Circuits); see also John R.B. Palmer. *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2006–2007) (“increases have been felt in courts of appeals around the country, with the heaviest volume in the Second and Ninth Circuits”); Symposium, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 288 (2005) (stating that the increase in the number of administrative appeals from the BIA has led to “extraordinary” changes in the caseloads of the Second and Ninth Circuits).

⁵⁶ Palmer, Yale-Loehr & Cronin, *supra* note 46, at 53.

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⁵⁷ In the Second Circuit, petitions for review of BIA decisions have gone from 4% of all the court’s filing before 2002 to about 36% in 2006, making this the largest single category of cases the Second Circuit receives. Palmer, *supra* note 34, at 970. There are fears that if the BIA appeals continue at current rates, the circuit court’s adjudication of “non-BIA” cases will be “negatively impacted.” COMMITTEE ON FEDERAL COURTS ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS* [hereinafter ABCNY REPORT] 13–14 (2004). The appeals have also had a significant impact on U.S. Attorney’s Offices causing alterations in the staffing and processing of immigration cases. *Id.* at 16.

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⁵⁸ Palmer, Yale-Loehr & Cronin, *supra* note 46, at 8. See also Newman Testimony *supra* note 19 (“the BIA . . . has adopted a so-called streamlined procedure whereby hundreds of appeals from decisions of IJs are decided by one judge of the BIA, usually in a one-line ruling that merely says ‘Affirmed.’”).

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⁵⁹ Palmer, *supra* note 55, at 18–19.

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⁶⁰ Palmer, Yale-Loehr & Cronin, *supra* note 46, at 3–4.

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⁶¹ Palmer, *supra* note 55, at 20.

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⁶² *Id.*

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Numerous reasons have been given as to why asylum-seekers now more frequently challenge final administrative decisions in the federal courts. One reason may be that the procedural reforms work to the asylum-seeker's advantage. He now has "appellate review at a favored venue, the circuit courts of appeal."⁶³ Another reason is that there may have been a qualitative change in administrative decisions and review of those decisions.⁶⁴ Still another reason may be that even if there has not been an actual qualitative change in decision-making, there exists a perceived change because of procedural insufficiencies.⁶⁵

The Executive Office for Immigration Review (EOIR) has maintained that asylum-seekers are challenging final expulsion orders at a higher rate to delay being expelled.⁶⁶ In a recent Fact Sheet, the EOIR continued to express the belief that "[i]t is possible that eliminating BIA adjudication delays has increased the incentive to file petitions for review in the federal courts in order to postpone deportation and remain in the United States for as long as possible."⁶⁷

A broader view points to a shift in the behavior of immigration lawyers and their clients. It is possible that the procedural changes in the BIA and the resulting increased volume of final expulsion orders "triggered a shift in the dynamics of immigration litigation by leading more immigration lawyers to focus their practices on petitions for review and by generating increased interest among many communities of non-citizens."⁶⁸ Explanations for the shift range from a change in the economics of federal court litigation for immigration cases to the possibility that "many lawyers felt a deep sense of injustice at the BIA's procedures and were probably eager to challenge them as a matter of principle."⁶⁹

⁶³ ABCNY REPORT *supra* note 57, at 14.

⁶⁴ Palmer, Yale-Loehr & Cronin, *supra* note 46, at 5.

⁶⁵ *Id.*

⁶⁶ See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: BIA STREAMLINING 2 (Sept. 15, 2004), <http://www.usdoj.gov/eoir/press/04/BIASstreamlining2004.pdf>.

⁶⁷ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: BIA RESTRUCTURING AND STREAMLINING PROCEDURES (Mar. 9, 2006), <http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.htm>.

⁶⁸ Palmer, Yale-Loehr & Cronin, *supra* note 46, at 85–86.

⁶⁹ *Id.* at 87.

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2. *Federal Criticism of Adverse Credibility Rulings*

The result of an increased caseload and more BIA affirmances without opinions is increased judicial exposure to IJ decisions and records. When the BIA affirms without opinion, the court directly reviews the IJ's decisions and the grounds for it.⁷⁰ This increased review has consequently led courts of appeals to question the quality of immigration courts.⁷¹ John R.B. Palmer observed that from 2002 through July 2006, the Second Circuit issued forty-one opinions in which it reviewed adverse credibility determinations.⁷² He noted, "While most of the court's asylum cases turn on the applicants' credibility, it is nonetheless significant that the court has chosen to address this issue so frequently in published opinions rather than nonprecedential summary orders."⁷³

In *Wang v. Attorney General*, the Third Circuit observed "[a] disturbing pattern of IJ misconduct" not only in that court's circuit, but in sister circuits as well.⁷⁴ In *Wang*, the court registered its discontent by noting, "Time and time again, we have cautioned IJs against making intemperate or humiliating remarks during immigration proceedings."⁷⁵ The Third Circuit compared the *Wang* case to other cases in which they warned judges of inappropriate and

⁷⁰ See *Secaida-Rosales*, 331 F.3d at 305; *Gao v. Gonzales*, 424 F.3d 122, 124 (3d Cir. 2005).

⁷¹ See generally *Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596-98 (2006).

⁷² Palmer, *supra* note 34, at 977.

⁷³ *Id.* This is an unusual set of actions for the circuit courts because determining the credibility of witnesses is not new to the American legal system. See *id.* It is also unusual because immigration cases often turn on the specific facts of each case. See *id.* Looking past these peculiarities, it is interesting how forceful and directive these written decisions have been. It is difficult to ignore the power dynamics that are being played out in this drama over asylum cases. The executive-administrative branch of government effectively shifted the responsibility of the BIA backlog to the federal courts with the enactment of the streamlining measures. One can also not ignore that Congress has been stripping the federal courts of their power to hear many immigration cases, including habeas corpus petitions. While not the subject of this note, increased judicial criticism of these administrative hearings may be a significant assertion of judicial power meant as a response to executive and congressional actions in the field.

⁷⁴ *Wang v. Attorney General*, 423 F.3d 260, 268 (2005).

⁷⁵ *Id.* at 267.

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hostile behavior towards asylum-seekers.⁷⁶ The Sixth and Ninth Circuits too have warned of IJ hostility to asylum-seekers.⁷⁷

Judge Richard Posner issued a blunt criticism of IJs, clearly placing the blame on the agencies of the executive branch in *Benslimane v. Gonzales*.⁷⁸ He commented:

[I]t cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration law for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.⁷⁹

III. ANALYSIS

A. *Difficulties in Credibility Determination Communication*

Credibility determinations in the asylum-hearing context are difficult to make. A number of factors undermine the IJ's ability to communicate with the asylum-seeker. These factors include, "differences in cultural norms, the effect of an asylum seeker's past traumatic experiences and flight on her ability to recall events, language barriers, the adversarial nature of the hearing, the asylum seeker's limited access to legal counsel, and the adjudicator's sometimes inaccurate perceptions of foreign culture and politics."⁸⁰ In

⁷⁶ *Id.* at 267–68 (citing *Zhang v. Gonzales*, 405 F.3d 150 (3d Cir. 2005), *Fiadjoe*, 411 F.3d 135, *Korytnyuk v. Ashcroft*, 396 F.3d 272 (3d Cir. 2005), and *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003)).

⁷⁷ See *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1059 (9th Cir. 2005) (the Court pointed out that "the agency must give the [asylum-seeker] a fair hearing in front of a neutral decision-maker . . . [and concluded that] the IJ's disbelief of Petitioner rested on personal speculation, bias, conjecture, and prejudice"); *Hassan v. Gonzales*, 403 F.3d 429, 436–37 (6th Cir. 2005) (describing the IJ's language toward the asylum-seeker as "brusque"); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003) (stating that the "IJ behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate").

⁷⁸ 430 F.3d 828, 830 (7th Cir. 2005).

⁷⁹ *Id.* at 830.

⁸⁰ ANKER, *supra* note 15, at 153. Professor Nienke Doornbos similarly observed that communications within the asylum hearings context are different from everyday communication because of the presence of an interpreter, the barriers of intercultural communication, and the context of institutional interaction. Nienke Doornbos, *Evidentiary Assessment Through Asylum Interviews*, in PROOF, EVIDENTIARY ASSESSMENT AND CREDIBILITY IN ASYLUM PROCEDURES 103, 106–08 (Gregor Noll ed., 2005). While Doornbos' assessment focuses on the communication problems that occur between an interviewer and

the mid-nineties, the Immigration and Naturalization Service produced *The Basic Law Manual* to guide IJs through the adjudication process. The guide provided IJs with some direction in how to deal with these difficulties of communication.⁸¹ *The Basic Law Manual*, however, does not carry the force of law, and it has become less clear that IJs and the BIA are following its recommendations as they continue to deal with a higher volume of cases.⁸²

1. Culture and Experience

Intercultural communication is one of the most significant barriers in correctly assessing the asylum-seeker's credibility.⁸³ Intercultural communication is uniquely the norm in asylum hearings. The IJ's job is to judge the actions of individuals who are from different countries, cultures, and backgrounds. Often these individuals may express themselves in different ways from those with which an IJ may be familiar.⁸⁴ A credibility determination based

an asylum-seeker, Anker includes the important factor of past traumatic experiences, which acts as an internal inhibitor for the asylum-seeker. The difference should be noted because factors such as intercultural communication, institutional interaction, and communication through a third-party *distort* communication, while trauma may cause *destruction* of the subject of the communication by causing asylum-seekers to forget facts or make them unable to talk about them without severe emotional discomfort and pain. Such a difference may mean that an IJ should take a different approach in these two instances.

⁸¹ U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, *THE BASIC LAW MANUAL* (1994) [hereinafter "BASIC LAW MANUAL"]. *The Basic Law Manual* provides a description of the cross-cultural challenges in evaluating an asylum-seeker's demeanor.

An applicant who provides direct, clear and immediate answers to questions is likely to be seen as more credible than the person who hesitates before responding. An applicant who is well-groomed and dressed will probably more readily be believed than the applicant who is unkempt. Nervousness and the extent of eye contact are also likely to factor into one's assessment of a person's credibility. However, the asylum officer should be cautious in letting these factors dictate his or her assessment of an applicant's credibility. Like "logic," the relation of demeanor to truthfulness varies from culture to culture. A Central American peasant is far less likely to look a person in the eye than is a scientist from the Soviet Union.

Id. at 109.

⁸² GERMAIN, *supra* note 39, at 17 n.379.

⁸³ See Kagan *supra* note 37, at 367-79.

⁸⁴ Jane Herlihy, *Evidentiary Assessment and Psychological Difficulties*, in PROOF, EVIDENTIARY ASSESSMENT AND CREDIBILITY IN ASYLUM PROCEDURES 123, 124 (Gregor Noll ed. 2005). Jane Herlihy, a psychologist familiar with refugee populations, recounted a discussion she had with Kosovar Albanians about culture. *Id.* The Albanians expressed that in their culture, if you are not getting what you need from an official, you must act angry, shout, and behave aggressively. *Id.* These behaviors are signs of seriousness and genuineness. *Id.* Ms. Herlihy offers that in the United Kingdom, "where politeness with calm

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on demeanor involves testimonial inferences drawn from the asylum-seeker's behavior.⁸⁵ Without the same cultural reference point, there is a significant risk that the IJ and the asylum-seeker will misunderstand each other.⁸⁶

In *Guan v. I.N.S.*, the Second Circuit ruled that the IJ's adverse credibility ruling was "compromised by factual error" and was thus not a proper ground for denying relief.⁸⁷ The IJ based his decision upon the asylum-seeker's failure to make eye contact, hesitancy in answering questions, defensiveness in addressing inconsistencies, and an incorrect count of how many times the asylum-seeker requested a water break.⁸⁸ While the circuit court did not

persistence are more the cultural norm, it is easy to see where this group of people might alienate themselves from the officials with whom they are interacting." *Id.* Ms. Herlihy's example touches upon a variety of other concerns that involve cross-cultural communication. The interactions described are variants of institutional communication. Not only are asylum-seekers often confronted with new Western cultures, but they are also faced with navigating Western legal and bureaucratic cultures. This topic is further discussed *infra* Section III.A.3. Another concern is that asylum-seekers often come from countries in which they claim to have been persecuted by official authorities. An asylum-seeker may feel uncomfortable speaking with an asylum officer or immigration judge because he may be unable to trust government officials after his prior experiences. *See infra* Part III.A.2.

⁸⁵ *The Basic Law Manual* defines demeanor as "all those subtle aspects of a person's self-presentation that affect one's judgment [sic] of that person's statements." *BASIC LAW MANUAL*, *supra* note 81, at 109. Joanna Ruppel elaborates, "Credibility evaluations based on demeanor involve an assessment of a person's general physical appearance, composure or lack of composure, maintenance of eye contact, and manner of speech, including intonation, speed and fluency." Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 *COLUM. HUM. RTS. L. REV.* 1, 7 (1992).

⁸⁶ "Eye contact" is frequently cited as one example of how judges may misinterpret the intentions of asylum-seekers. In Western cultures, maintaining eye contact with another person means you are telling the truth. In the alternative, failure to make eye contact means that you are lying and untrustworthy. Ruppel, *supra* note 85, at 12-13. In many cultures, however, maintaining eye contact is not an indication of truth, and avoidance of eye contact is a sign of respect. Included in the INS Gender Guidelines is a caution:

In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility.

Memorandum from Phyllis Coven, Office of Int'l Affairs, to All INS Asylum Officers [and] HQASM Coordinators, Consideration for Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995) *reprinted in* Deborah Anker, *Women Refugees: Forgotten No Longer?*, 32 *SAN DIEGO L. REV.* 771, 801-02 (1995).

⁸⁷ *Guan v. INS*, 453 F.3d 129, 140 (2d Cir. 2006).

⁸⁸ *Id.* at 134.

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specifically mention cross-cultural communication, it noted some of the IJ's concerns are frequently cited as cultural miscues.⁸⁹

Cultural differences lead to misconceptions of how other societies and political systems operate. An American IJ who is used to a functioning police force and relatively uncorrupt democratic government may have a difficult time understanding why asylum-seekers take certain actions in their countries of origin. In *Secaida-Rosales v. INS*, the Second Circuit faulted the IJ for an "unsupported opinion as to how an authoritarian government operates."⁹⁰ The IJ questioned how the asylum-seeker could continue working at his job when he claimed that death squads were trying to kill him.⁹¹ Within the IJ's worldview, these two factual claims were incompatible. According to the court, the IJ ignored the fact that "groups like the death squads operate underground and in a shadow manner that avoids intersection with legitimate governmental institutions."⁹² The Second Circuit also faulted the IJ for her view that Secaida's ability to procure a new national identity card was at odds with his claim that the government was trying to kill him, when the issuance of a national identity card had nothing to do with the behavior of extra-governmental death squads.⁹³ While IJs may try to view a situation from an asylum-seeker's perspective, they often are unable to abandon their own experiences and expectations in determining whether the asylum-seeker is telling a credible story about his experience.⁹⁴

⁸⁹ The Second Circuit included in its decision the following finding of the IJ:
[The asylum-seeker] would continue searching with his eyes when confronted with inconsistencies and conflicting statements concerning his claim for relief. [The asylum-seeker] had taken two or three water breaks during his testimony, which did not appear to be an attempt to quench the thirst, but appeared to [have] been used as an opportunity to formulate a response when confronted with a conflicting inconsistency. Moreover, each time that [he] was confronted with an inconsistency or conflict, he became defensive with regard to his testimony.

Id.

⁹⁰ *Secaida-Rosales*, 331 F.3d at 309 (citing *Gao v. Ashcroft*, 299 F.3d 266).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 310.

⁹⁴ See Deborah Anker, *Determining Asylum Claims in the United States: A Case Study in the Implementation of Legal Norms on an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 516-18. Anker concludes, based on interviews and IJ observations, that "immigration judges tended to project their own political and cultural experiences onto the applicant." *Id.* at 516. In the article, she includes a conversation she had with an IJ about a claim from a Salvadoran asylum-seeker and general observations about other claims from Latin America. Even though this article was published in 1992,

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Another relevant cultural concern is gender. Although most of the world's refugees are women, there are significant barriers that prevent women from succeeding in their asylum claims.⁹⁵ One of those barriers is the difficulty of discussing certain topics with a male interviewer or judge. Because the persecution of women often involves sexual assault, a woman may be "reluctant" to discuss it or may have additional difficulty in proving such a claim. Additionally, the woman may be made to repeat her story over and over again to different officers and interpreters or be subjected to cross-examination about her experience. While telling the story of one's flight from persecution is often traumatic for a refugee, this trauma is potentially amplified for a woman recounting her experience of rape.⁹⁶ Additionally, "few countries have female staff involved in their refugee determination procedures," which would make a woman more comfortable in making a gender-based claim. To further compound the problems, there are additional difficulties for "women who, for cultural or religious reasons, will be ostracized by their families or communities if the sexual assault becomes known."⁹⁷ Currently, there are no regulations or guidelines that specifically address female asylum-seekers.⁹⁸

Cross-cultural differences in time perception can also endanger an asylum-seeker's testimony and application. Professor Walter Kalin has written that officials who are unaware that different cultures have different notions of time will be inclined to reject an asylum-seeker if he gives contradicting statements about the time and duration of events.⁹⁹ He notes a variety of reasons why an

IJs still seem to be continually challenged by the alien nature of Central American politics and state culture, as evidenced by *Secaida-Rosales*. See generally *Secaida-Rosales*, 331 F.3d at 297.

⁹⁵ See Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 625 (1993). "Women are much less likely than men to be found to meet the eligibility criteria for refugee status because of the absence of explicit recognition of gender-based persecution, and because of the social and political context in which the claims of women are adjudicated." *Id.* at 627.

⁹⁶ See Herlihy, *supra* note 84, at 125 (citing Cleo Van-Velsen, C. Gorst-Unsworth & S. Turner, *Survivors of Torture and Organized Violence: Demography and Diagnosis*, 9 J. TRAUMATIC STRESS 181 (1996)).

⁹⁷ Kelly, *supra* note 95, at 630. There is a narrow provision for IJ hearings to be held in private in the case of domestic violence. 8 C.F.R. § 1003.27(c) (2008). But, there are many more gender-related claims of persecution involving sexual assault that extend beyond the realm of domestic violence.

⁹⁸ Kelly, *supra* note 95, at 633-34.

⁹⁹ Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230, 237 (1986).

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asylum-seeker may provide contradictory statements concerning the time and duration of events.¹⁰⁰ These include the use of non-western calendars, punctual as opposed to durational time-reckoning systems, and structural differences in time systems that rely more heavily on activities and events than in segmented time units.¹⁰¹

2. *Limitations on the Asylum-Seeker*

Refugees are often trapped in a Catch-22 because of their traumatic experiences. By definition, a refugee has undergone some type of persecution that puts him in need of asylum. In order to prove that he does in fact deserve this right of asylum, he must be deemed credible by providing specific and consistent statements about his experience. The refugee's experience, however, may prevent him from providing a coherent statement that the IJ will believe. Two limitations that may inhibit a refugee from accurately sharing his story with an IJ are the effects of trauma on memory and a distrust and fear of official authorities.

Traumatic memories are stored differently in the mind than regular memories.¹⁰² They are kept as fragments and usually as sensory memories.¹⁰³ This presents a problem for an asylum-seeker because the experiences "do not seem to carry a 'timestamp'" and cannot be evoked at will like normal memories; they require triggers.¹⁰⁴ In the immigration court setting, absent these triggers, an asylum-seeker may be unable to set up a chronological narrative for the IJ, which will likely result in an adverse credibility determination.¹⁰⁵ Furthermore, some asylum-seekers demonstrate Posttraumatic Stress Disorder (PTSD), which is the inability to recall memory on command.¹⁰⁶ Asylum-seekers with PTSD may recall different parts of their narrative in different interviews, depending upon whether the trigger for a particular part of the story was hit. Discrepancies in narratives offered in different inter-

¹⁰⁰ *Id.* at 236.

¹⁰¹ *Id.* at 236–37.

¹⁰² Herlihy, *supra* note 84, at 126.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ IJs often press asylum-seekers for chronologies of events with discrepancies, often resulting in adverse credibility judgments. See *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 137 (3d Cir. 2005).

¹⁰⁶ In a recent study of Kosovan Albanian refugees, a sample showed that just under 50 percent were diagnosed with PTSD. See Herlihy, *supra* note 84, at 129.

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views are another significant reason for negative credibility determinations in the immigration courts.¹⁰⁷ Other medical conditions that result from traumatic events, including depression and dissociation, have similar fragmenting effects on memory,¹⁰⁸ which can also lessen an asylum-seeker's credibility in an IJ's view.

When dealing with an asylum-seeker who claims persecution that included torture, there is a good chance that the asylum-seeker will mistrust any government official, including an asylum officer or IJ.¹⁰⁹ The effect of the state-sponsored torture could cause the asylum-seeker to withhold information from an interviewer until the asylum-seeker feels comfortable sharing information with that particular authority. The danger is that “[t]his would lead to a reluctance to give a complete disclosure and may lead some people to gloss over parts of their story.”¹¹⁰

3. *Institutional Interaction*

The communicative context in which the asylum-seeker presents his claim influences how he presents his claim and how the IJ perceives it.¹¹¹ Communication in a courtroom takes place under the control of the judge. The judge decides who speaks, the length of the speeches, what questions are appropriate to ask and answer, and what documents and testimony will be entered into

¹⁰⁷ The two problems of time-stamping and discrepancies actually become mixed when there is significant time between interviews with asylum officials. *See id.* at 127–28. This is because discrepancies are more likely to occur with “peripheral” details of the traumatic event. *Id.* at 127. Herlihy notes in her study that “for many interviewees the date, and the day of the week . . . were not central details.” *Id.*

¹⁰⁸ *See id.* at 132–33.

¹⁰⁹ *See id.* at 124. It seems reasonable that if an asylum-seeker experienced a traumatic event at the hands of a state official, he would be reluctant to trust any state official, even if from a different country. A Westerner might draw a distinction between a bad state officer and a good one. The asylum officer or even the IJ himself might want to ascribe to that view. A torture victim, however, is likely to see the similarities between state officials, the chief similarity in both cases being the incredible power the state officer, has over the asylum-seeker. Other similarities may include adherence to a bureaucratic protocol and hierarchical chain of command, the institutional dynamic of questioning, uniform dress, and often interview rooms may have the same physical appearance as a torture room. *See id.* at 125 (“Clients report immigration interviews which have been conducted in a small, bare room sometimes with the same number of people in attendance as were in the small, bare room in which they were tortured.”).

¹¹⁰ *See id.* at 124.

¹¹¹ Professor Doornbos writes that communication in asylum cases can be characterized as an “institutional interaction: communication within a strictly organized, often bureaucratic context. The context structures the content, the duration, and the type of interaction.” Doornbos, *supra* note 80, at 108.

evidence. These and other details may be codified in rules and regulations, or they may be at the judge's discretion. For an asylum-seeker, this context is foreign and confusing.¹¹² In the immigration court, credibility determinations may be influenced by institutional factors such as the adversarial nature of the hearing, the frame in which the asylum-seeker presents his narrative, the role of the judge and government attorney, the presence (or lack thereof) of counsel, and the availability of a proper translator.

The immigration hearing for an asylum-seeker has transformed over time from a non-adversarial proceeding to an adversarial one that closely resembles the setup and procedures of a civil court.¹¹³ One feature that stands out as distinct to the immigration court is the judge's freedom to choose between acting as a passive adjudicator or a proactive examiner of the asylum-seeker.¹¹⁴ Deborah Anker notes that in asylum cases, "judges regularly admonished applicants or witnesses to limit their testimony by directing them to 'answer the question,' [and] to use the 'translator.'" ¹¹⁵ By interrupting asylum-seekers as they attempt to develop their narrative, judges actually prevent asylum-seekers from telling their full story. Guiding documents suggest that the judge should use this freedom, but avoid acting as the asylum-seeker's adversary, to work with the asylum-seeker to fully develop his story.¹¹⁶

In *Pang v. Bureau of Citizenship and Immigration Servs.*, the court saw value in the judge "giving a petitioner the opportunity to explain purported testimonial flaws," holding that the IJ has the positive "obligation to help develop the record in immigration proceedings" and "to give petitioner a chance to clarify non-dramatic

¹¹² Trained lawyers or judges may find formalized sets of rules and procedures comforting because they have been taught how to operate within the legal context. In a sense, the institutional interactions that occur within the asylum system introduce yet another culture into the mix. This puts asylum-seekers at a disadvantage because they "are mostly laymen regarding the procedures. For them, the procedure is a once-only experience in which decisions directly affect their personal lives and futures." *Id.*; See also Kagan, *supra* note 37, at 379–80.

¹¹³ Anker, *supra* note 94, at 488–89. The shift in hearing structure was intended to free IJs (once called special inquiry officers) from their connection to the INS. *Id.* at 489. The shift has now been fully realized; the IJs are part of the DOJ, and the INS has been absorbed into DHS.

¹¹⁴ 8 U.S.C. § 1229(b)(1) (2008).

¹¹⁵ Anker, *supra* note 94, at 499.

¹¹⁶ ANKER, *supra* note 15, at 153.

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contractions and implausibilities.”¹¹⁷ Generally, the courts have also suggested the IJ take a more active role in developing the applicant’s narrative;¹¹⁸ a court’s interest is not only to assist the applicant in making his case, but also to more accurately assess doubts about an applicant’s credibility. The Second Circuit has “encouraged the IJ (along with the INS) to ‘probe for incidental details, seeking to draw out inconsistencies that would support a finding of lack of credibility.’”¹¹⁹

In many cases, however, judges aggressively cross-examine asylum-seekers and their witnesses.¹²⁰ In one such case, an IJ’s questions included why the applicant did not work, why the applicant lived in a Hispanic neighborhood, skepticism about all Chinese witnesses, and the IJ’s disapproval of the applicants placing his daughter up for adoption.¹²¹ The Court of Appeals for the Second Circuit, which heard the appeal of this case and remanded it to a different IJ, characterized this line of questioning by the IJ as “at least inappropriate and at worst indicative of bias against Chinese witnesses.”¹²² In another Second Circuit decision, the court criticized an IJ for resting his adverse credibility finding on an appli-

¹¹⁷ *Pang v. Bureau of Citizenship and Immigration Servs.*, 448 F.3d 102, 111 (2d Cir. 2006).

¹¹⁸ *Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 122–23 (2d Cir. 2006).

¹¹⁹ *Id.* (quoting *Qui v. Ashcroft*, 329 F.3d 140, 152 (2d Cir. 2003)).

¹²⁰ *Anker*, *supra* note 94, at 498.

¹²¹ *Huang v. Gonzales*, 453 F.3d 142, 148–50 (2d Cir. 2006). In order to get a feel for the tone of the questions Immigration Judge Chase asked of the applicant, here are some of IJ Chase’s questions and statements that the Second Circuit quoted from the record of the hearing:

Q: I have heard many stories of people throwing away the child.

Q: Are baby girl’s entitled to human rights?

Q: If she [the applicant’s daughter] came to you today [and said] you have no human rights, you gave me away just because I was a girl, what would you answer to her?

Q: Is this about you or is this about your children’s happiness?

Q: In this country, it’s not about the parents. It’s about the kids. Here it is we worry about their future and their happiness, not about our own. But it seems like you are more interested in your own comfort and well being than what happens to the child. A girl isn’t entitled to have parents’ love.

Id. at 150. The Court continued, “IJ Chase pressed [applicant] further on his conception of human rights, asking him to come up with his own way of solving China’s population problem. Not surprisingly, [the applicant] had no helpful solution.” *Id.*

¹²² *Id.* at 148.

cant's purported failure to pass the IJ's quiz on Christian doctrine.¹²³

B. *Reformatting the Process*

1. *Alternative Dispute Resolution*

a. Use of ADR in Administrative Agencies

Dispute resolution has been embraced by the federal government in dealing with problems that it previously only dealt with through litigation and administrative action.¹²⁴ All three branches of the federal government have put their support behind dispute resolution because of the potential for “more creative, efficient, and sensible outcomes.”¹²⁵ The benefits of dispute resolution, when used by the government and private parties, include “time savings, money savings, greater predictability and self-determination, greater creativity, improved relationships, and increased satisfaction.”¹²⁶ Even law school texts appreciate the potential for dispute resolution. As a popular Administrative Law textbook notes, “Informal, nonadversary procedures may be more appropriate in those situations where objective decisions are difficult, where an answer cannot be reached by simply applying a specific rule, and where many of the issues are subjective value-laden and best left to the judgment of knowledgeable and responsible officials.”¹²⁷ Federal administrative agencies, by congressional directive, became leaders in the field of ADR.¹²⁸ The United States Postal Service's REDRESS mediation program is one of the best examples of utilizing ADR to increase the efficiency of intra-agency dispute

¹²³ *Rizal v. Gonzales*, 442 F.3d 84, 88 (2d Cir. 2006). The IJ asked Rizal about the biblical figure Moses, but Rizal was confused and did not give a correct answer. Rizal then went on to describe his baptism. The IJ expressed his displeasure and frustration with Rizal's story and issued an oral decision based on “grounds that Rizal had ‘provided no evidence to corroborate his purported identity as a Christian.’” *Id.*

¹²⁴ JEFFREY M. SENGER, *FEDERAL DISPUTE RESOLUTION* 1–2 (2004).

¹²⁵ *Id.* at 2 (citing 5 U.S.C. § 571 (2008) (historical and statutory notes and congressional findings)).

¹²⁶ SENGER, *supra* note 124, at 3.

¹²⁷ STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES* 677 (6th ed. 2006).

¹²⁸ In the 1990's Congress enacted a number of statutes aimed at incorporating ADR practices into administrative agencies. *See* Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2008) (Supp. IV 1998); Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (2008) (1994 & Supp. IV 1998); Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584 (2008) (amended 1996).

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resolution systems.¹²⁹ The program mediates over 11,000 cases annually.¹³⁰ Other agencies that use ADR include the Department of Health and Human Services, the Air Force, and the Environmental Protection Agency.¹³¹

ADR is not new to the DOJ, the agency that adjudicates immigration cases and represents the government in immigration cases in the federal courts.¹³² The DOJ is the most active party in the federal courts, and it settles far more cases than it tries.¹³³ A study by the DOJ showed that even when cases do not settle, ADR provides benefits to the government and makes litigation more efficient.¹³⁴ The use of ADR in the immigration field, whether by mandatory mediation or other methods, seems a logical next step with which the DOJ should experiment.

b. Use of ADR in Immigration Context

i. Second Circuit Mediation Program

Mediation is being utilized in a number of circuit courts in response to the increase in the volume of immigration cases.¹³⁵ The

¹²⁹ The REDRESS program is offered to USPS employees as part of the equal employment opportunity complaint process. See USPS, REDRESS, <http://www.usps.com/redress/welcome.htm> (last visited Mar. 15, 2007). The program uses a transformative model of mediation and utilizes an independent mediator to assist the parties discuss their situation and potentially reach a resolution. *Id.* Transformative mediation is different from the evaluative or directive models of mediation because it does not move the parties to settlement. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

¹³⁰ See USPS REDRESS Mediations Mediation Chart, http://www.usps.com/redress/_pdf/MediationChart.pdf (last visited Mar. 15, 2007).

¹³¹ See Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709, 719–23 (2001). The Air Force has used ADR mechanisms with contractors Boeing and Northrup Grumman to settle contract cases over hundreds of millions of dollars. *Id.* at 719–20. Health and Human Services uses ADR to manage workplace disputes and also to settle Medicaid claims with state agencies. *Id.* at 720–21. The EPA has used mediation to facilitate settlement in the cleanup of rivers. *Id.* at 721–22. Many other agencies also utilize ADR procedures. Mediation also plays a significant role in the resolution of Equal Employment Opportunity cases. See generally The US Equal Employment Opportunity Commission, Mediation, at <http://www.eeoc.gov/mediate/index.html> (last visited Mar. 15, 2007).

¹³² See Marcus & Senger, *supra* note 131, at 710–17.

¹³³ *Id.* at 712.

¹³⁴ Jeffrey M. Senger, *Evaluation of ADR in United States Attorneys' Cases*, ADR ISSUES, Nov. 2000, at 25, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4804.pdf.

¹³⁵ Mediation may be used in immigration cases in the Second, Sixth, and Ninth Circuits. See Palmer, *supra* note 54, at 971 n.37.

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Second Circuit, even before the surge in BIA appeals, regularly included immigration cases in its mediation program.¹³⁶ The program has been very successful in achieving settlements; over 60 percent of BIA appeals are resolved and do not require further judicial attention.¹³⁷ In the Second Circuit there are four possible outcomes after a mediation conference:

- (i) the [asylum-seeker] withdraws and dismisses the case;
- (ii) the parties agree to remand the case;
- (iii) the parties agree to suspend the case pending either pursuit of other administrative relief or the resolution of another matter raising substantially similar issues; or
- (iv) the parties conclude a stipulated resolution is not appropriate and the appeal is scheduled for briefing and argument to the court.¹³⁸

The mediation process has proven valuable even when the cases do not settle. Allowing postponement, as in outcome (iii) above, also helps to achieve efficiency in the court system. Cases can be heard together, settled, or disposed of more quickly if certain issues are resolved before the court hears the case. It has been suggested that even when a case does not settle, as in outcome (iv) above, the mediation process is useful in “identifying issues already pending before the court.”¹³⁹ While the Second Circuit’s mediation program proved a great model, it too was overrun by the surge of immigration appeals.¹⁴⁰ Eventually, the court abandoned mandatory mediation, and it now occurs only when one party requests it or the court thinks it is valuable in a specific case.¹⁴¹

¹³⁶ *See id.* at 971.

¹³⁷ ABCNY REPORT, *supra* note 57, at 12. Court staff attorneys administer the mediation conferences. The mediation program includes the government attorney, the asylum-seeker, and his attorney. Cases are only included in the mediation program when the asylum-seeker is represented by an attorney. *See id.* at 11-20.

¹³⁸ *Id.* at 11-12.

¹³⁹ Palmer, *supra* note 54, at 972.

¹⁴⁰ *See id.* at 972-73.

¹⁴¹ The Second Circuit put additional resources behind the mediation program by hiring a part-time mediator and utilizing private volunteer mediators from the summer of 2004 to the summer of 2005. *See id.* at 973. It seems that the Second Circuit only used mediation when it would not cause a delay in the overall proceedings. *See id.* When administrative records started arriving more quickly from the DOJ and the cases could be briefed in a matter of months, mediation seemingly lost its appeal as a time-saving measure. *See id.*

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ii. ADR and the Canadian Immigration Appeal Division

The Second Circuit has not been alone in addressing immigration challenges through dispute resolution. The Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada is also experimenting with dispute resolution techniques to address new challenges.¹⁴² Starting in 1998, the IAD ran a very successful pilot project using dispute resolution to manage sponsorship appeals in Toronto. It was later expanded nationwide.¹⁴³ The IAD's stated goal was to employ

[t]he use of Alternative Dispute Resolution (ADR) [as] an informal, less confrontational and more consensual approach to dealing with sponsorship appeals, which essentially concern the appellant's desire to reunify his or her family. ADR is consistent with the Immigration and Refugee Board's vision to deal with matters 'simply, quickly and fairly.'¹⁴⁴

The program involves a dispute resolution officer who assists the government and the private party in settling the sponsorship appeal by agreement.¹⁴⁵ The IAD reports that about half of the cases processed by ADR reach a final result without having to proceed to an oral hearing.¹⁴⁶

In 2005, the IAD was faced with a similar problem as the one that now confronts American immigration authorities and the federal circuits. The IAD "was facing significant growth in its caseload and increases in the average case processing time."¹⁴⁷ Building on its success with the Toronto pilot program, the IAD began to holistically "re-examine and re-think how [it] functions as an administrative tribunal."¹⁴⁸ In its "Innovation Plan," the IAD has committed to incorporating dispute resolution throughout its procedures to "deliver administrative justice more simply and quickly, with the same high standard of fairness."¹⁴⁹

¹⁴² See IMMIGRATION APPEAL DIVISION, IMMIGRATION AND REFUGEE BOARD OF CANADA, IAD INNOVATION PLAN (Mar. 2006), http://www.irb-cisr.gc.ca/en/about/tribunals/iad/innovation/plan_e.htm [hereinafter INNOVATION PLAN].

¹⁴³ IMMIGRATION APPEAL DIVISION, IMMIGRATION AND REFUGEE BOARD OF CANADA, ALTERNATIVE DISPUTE RESOLUTION AT THE IMMIGRATION APPEAL DIVISION (Oct. 2003), http://www.irb-cisr.gc.ca/en/about/tribunals/iad/adr/index_e.htm.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ INNOVATION PLAN, *supra* note 142.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The Plan looks at three areas: (1) an early information-gathering stage, (2) mechanisms for early resolution, and (3) procedures for hearing readiness. *Id.* The early infor-

2. *Proposal for Incorporation of ADR in Asylum Adjudications*

Dispute resolution in the immigration context does not need to be a full-fledged mediation to positively affect outcomes. Professor Carrie Menkel-Meadow suggests that the acronym “ADR” stands for “appropriate dispute resolution” rather than “alternative dispute resolution” and that, in designing systems to replace adversarial models, different methods of dispute resolution are appropriate for different contexts.¹⁵⁰ ADR includes a spectrum of procedural models including mediation, mini-trials, settlement conferences, early neutral evaluations, reg-neg, fact finding, and third party neutraling.¹⁵¹ A system for evaluating the claims of asylum-seekers should address both the adjudicative quality concerns raised by the federal courts of appeals as well as the perceived procedural unfairness of the BIA streamlining procedures. This type of effective, fair system should also be sensitive to cross-cultural concerns, potential trauma affecting the asylum-seeker, and institutional interactions.¹⁵² In order to incorporate this type of system, the DOJ should implement the following changes to agency adjudications:

- 1) Replace the two-path system of affirmative and defensive applications with a two-step process that includes a preliminary Fact-finding / Early Neutral Evaluation (ENE) Session for all applicants followed by a hearing with an immigration judge.
- 2) Reform the immigration hearing to include specialized adjudicators, re-position the judge as a neutral evaluator, require reasoned and written opinions, and provide court appointed interpreter and counsel to an asylum-seeker when deemed necessary after ENE.
- 3) Incorporate settlement proceedings after the BIA issues its decision, but before a final order is issued by the agency.

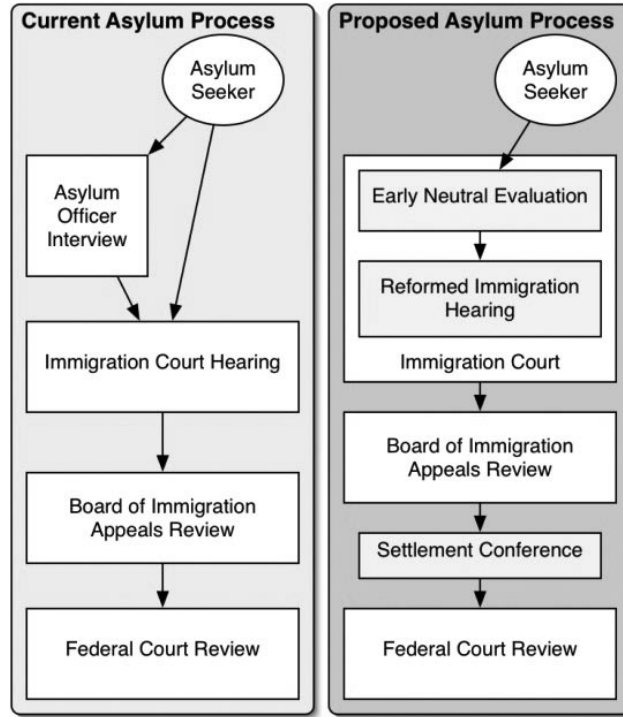
A revised framework would look like this:

mation-gathering stage specifically includes a directive to maintain and expand ADR programs and to pilot a new mediation-arbitration model for the resolution of immigration cases. *Id.*

¹⁵⁰ See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 36–38 (1996).

¹⁵¹ *Id.* at 37.

¹⁵² There are many dimensions of the asylum adjudication process that perhaps deserve redesign. However, because this note focuses only on credibility determination, the recommendations are limited to only improving this aspect of the system.



a. Preliminary Fact-Finding and Early Neutral Evaluation

Currently, agency procedures offer asylum-seekers “two bites at the apple.”¹⁵³ They first receive an informal adjudication by an asylum-officer and then, if the application is not approved, asylum-seekers get a second chance with a more formal *de novo* evidentiary hearing.¹⁵⁴ Professor Martin has argued that the “two-bite” system should be eliminated because the IJ is no more likely to reach a correct decision than the asylum officer.¹⁵⁵ Professor Legomsky, on the other hand, argues that each of the two different styles of adjudication “complements” the other.¹⁵⁶ A more reasonable solution than either of these two would be to join the hearings in a single process.¹⁵⁷ The first part of the process would be

¹⁵³ Legomsky, *supra* note 32, at 696.

¹⁵⁴ *Id.*; see also *supra* Part II.A.

¹⁵⁵ Martin, *supra* note 23, at 1344.

¹⁵⁶ Legomsky, *supra* note 32, at 697.

¹⁵⁷ Professor Martin does not view the adversarial asylum hearing very highly; his opinion is that it adds no value and should be scrapped. See Martin, *supra* note 23. Further, because the adversarial system produces such poor results, it is difficult to see exactly how pairing a non-adversarial and adversarial adjudicative system together “complement” each other as Professor Legomsky proposes. Legomsky, *supra* note 32, at 697. By eliminating

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modeled on the ADR procedures referred to as Preliminary Fact-Finding and Early Neutral Evaluation.

Fact-Finding and Early Neutral Evaluation focus on sharing legal information between the parties and exploring the likelihood of certain outcomes. The process involves the use of a neutral evaluator to evaluate the strengths and weaknesses in a case.¹⁵⁸ This non-binding evaluation may be used by parties to facilitate a settlement, or the neutral evaluator “may assist the parties with other matters, such as developing a discovery schedule, streamlining issues for trial, or planning other settlement events.”¹⁵⁹ Early Neutral Evaluation does not use judges, but rather evaluators with specific expertise in the relevant area of law.¹⁶⁰ Asylum officers who currently conduct the informal adjudications of the affirmative application procedure could be ideal candidates to provide this evaluative role.

Early Neutral Evaluation could benefit asylum-seekers and the government in properly managing asylum applications. A neutral evaluation that takes place before an immigration hearing could inform asylum-seekers of the likelihood that they will receive a favorable determination before the IJ. The neutral evaluator could also help the asylum-seeker determine what is lacking in his application or what corroborative evidence may strengthen his application. Just as the neutral evaluator helps in planning for the management of the trial, an evaluator could determine what procedural modifications might be helpful in properly disposing of the particular application. A neutral evaluator might find, for instance, that an interpreter from a particular cultural background is inappropriate, or that a particular IJ should be assigned to the case because of gender differences, or that because the asylum-seeker displays symptoms of trauma, a less adversarial procedure might be

the adversarial nature of immigration-court hearings and using a preliminary hearing to gather facts, evaluate the asylum-seeker's situation, and provide some reality testing to the asylum-seeker, the overall system becomes more efficient; it is no longer duplicating adjudications through *de novo* applications from the affirmative to the defensive application system. See *MEDIATION: PRACTICE, POLICY, AND ETHICS* 400–401 (Carrie Menkel-Meadow, Lela P. Love, Andrea K. Schneider eds., 2006) [hereinafter *MEDIATION TEXTBOOK*] (describing how an Early Neutral Evaluation, or ENE, may “provide a ‘reality check’ for clients and lawyers” in addition to facilitating other time-saving practices).

¹⁵⁸ *MEDIATION TEXTBOOK*, *supra* note 157, at 400.

¹⁵⁹ *Id.* The California court in which Early Neutral Evaluation started does not view settlement as a major goal, but recognizes that settlement is a possibility. *Id.* at 401.

¹⁶⁰ See N.D. Cal. ADR L.R. 2-5 (Jan. 2003).

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more appropriate. Further, an evaluation that is kept on the record and may be used by the IJ may be helpful in determining the asylum-seeker's credibility.¹⁶¹

A non-binding neutral evaluation of the asylum-seeker's case would also help an asylum-seeker determine whether pursuing his claim through litigation would be worthwhile. An asylum-seeker's decision whether to continue litigation to the federal courts is not only dependent on whether he feels he has received procedural justice, but also on whether he can afford each step of litigation. While asylum cases are sometimes portrayed as a matter of life and death, they are often also subject to practical considerations of cost.¹⁶² In addition to cost concerns, asylum-seekers may be concerned about "the collateral repercussions of an expulsion order, which include a period of admissibility and the possibility of criminal prosecution if the person re-enters without permission."¹⁶³

b. The Judicial Hearing

The Early Neutral Evaluation should provide information as to the qualifications and training the IJ should possess, any special requirements of the asylum-seeker, and the principal facts of the case. Flexibility in assigning judges could provide sensitivity to certain cultural, gender, and medical issues that are not addressed under current procedures. As recommended by Professor Legomsky, the IJ should have access to a written record of what occurred in the prior interview.¹⁶⁴ More than 15 years ago, Professor David Martin suggested that immigration hearings should build on a non-adversarial model. He wrote, "It could hardly be thought unfair to the applicant to replace such interrogation (designedly adverse) with questioning done instead by an examiner who has been instructed that her role is to develop a full record and not to strive

¹⁶¹ For reasons discussed *supra* Part II.A.2, caution should be exercised when using discrepancies in refugees' narratives and interviews to determine credibility. At the same time, however, providing an asylum-seeker additional opportunities to explain his narrative may make him more comfortable in the interview setting and more likely to provide coherent testimony.

¹⁶² See Palmer, *supra* note 34, at 972. Palmer specifically mentions that an asylum-seeker would be interested in "sav[ing] the costs of briefing a losing case." *Id.* It is possible to imagine other costs that the asylum-seeker would also be interested in avoiding in a losing case, including attorney costs for preparation and court appearances.

¹⁶³ See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *supra* note 46, at 12.

¹⁶⁴ Legomsky, *supra* note 32, at 697-98.

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zealously for a negative outcome.”¹⁶⁵ Based upon current federal court opinions, it seems Professor Martin may be partially correct in that the judge has replaced the government attorney as chief examiner of the asylum-seeker. It is difficult, however, to imagine that the IJs today are less adversarial than the INS was in the early 1990’s. While the DOJ should accept Dr. Martin’s long overdue suggestion of eliminating the adversarial posture of the hearing, IJs will have to be retrained in how they conduct hearings. One of the ways in which IJs could better develop the record and search out the truth in an applicant’s claim is to ask questions the right way.

In asylum hearings, IJs (no matter whether they are in an adversarial or nonadversarial system) should ask questions that are culturally sensitive,¹⁶⁶ either open-ended¹⁶⁷ or standardized,¹⁶⁸ and utilize the ADR techniques of *active listening* or *looping*.

The IJs’ use of these ADR techniques may be more appropriate than the types of questions used by the IJs in, for example, the *Huang* and *Rizal* cases. Active listening “is the process of picking up . . . messages and sending them back in reflective statements that mirror what have you heard.”¹⁶⁹ Similarly, looping is intended

¹⁶⁵ Martin, *supra* note 23, at 1349.

¹⁶⁶ Professor Walter Kalin suggests,

It is important to avoid an atmosphere of intimidation during the hearing which makes the already confused and anxious asylum-seeker even more nervous and unconvincing and to use an interrogation technique which lets the asylum-seeker determine what he or she regards as relevant statements. The official’s questions should not be framed in a way directly reflecting his or her legal concepts and cultural values.

Kalin, *supra* note 99, at 239. Both Professors Kalin and Doornbos note that the way an official asks a question to an applicant may deter the applicant from answering freely and completely. *Id.* at 232; Doornbos *supra* note 80, at 107. Professor Kalin writes that sometime this need to speak freely is derived from culture. Kalin *supra* note 99, at 232.

¹⁶⁷ Research has shown that open-ended questions are less likely to impair the accuracy of a statement than are closed questions. Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT’L J. REFUGEE L. 293, 296 (2001). This is especially important in asylum cases where asylum-seekers are often asked on multiple occasions similar, but different questions. The research has shown that closed questions cause shifting responses. Shifting responses are a serious problem for asylum-seekers as “negative credibility rulings can be based upon internal inconsistencies in the applicant’s testimony, or inconsistencies between the testimony and the written affidavit or asylum application.” ANKER, *supra* note 15, at 164 n.375.

¹⁶⁸ Juliet Cohen advises that “standardising questions and formats of all interviews would go some way to improving consistency.” Cohen, *supra* note 167, at 309. Such an approach might help if, for efficiency purposes, immigration judges preferred closed-ended questions.

¹⁶⁹ DAVID BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL K. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 41–43, 48–49, 55–56 (2d ed. 2004) *re-*

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“to develop understanding systematically, authentically and compassionately”¹⁷⁰ Looping, however, takes the process one step further than active listening. It involves the following steps between the Questioner (Q) and the Interviewee (I). Q asks I about *x*. I responds and asserts an answer. Q will then demonstrate and confirm her understanding of I’s answer. That is where the active listening process would end. Looping requires a response by I that he feels understood. If I responds in a positive way, that means he feels understood and Q has correctly understood I’s statement. However, if I responds that he does not feel understood, then Q asks I: “What am I missing?” I will then have a chance to clarify what he has said. Then, Q can take another chance at demonstrating understanding and seeking confirmation. The goal of the process “is not to convince, nor to contradict, nor to take exception to, nor explain away. The point is to understand.”¹⁷¹

These two techniques may be appropriate in an asylum hearing because they accommodate cultural concerns regarding the ability of individuals to speak freely. They also encourage trust between the adjudicator and the applicant, which may result in a more honest discussion of the events that led to the applicant’s arrival in the United States. Further, the techniques provide a check on the IJ’s understanding of a particular applicant’s situation. Such a technique allows the applicant to direct the hearing and allows him to speak on what he thinks is important to his case. Lastly, looping discussions would produce more detailed records from which appellate panels and the courts could not only get a more complete picture of the applicant’s situation, but also a better understanding of the IJ’s decision-making process and the tenor of the dialogue that would take place in the hearing.

c. Requirement of Mandatory Mediation
Settlement Conference

The final building block of the proposal is that if the asylum-seeker chooses to appeal to a federal court after a BIA decision, a

printed in MEDIATION TEXTBOOK, *supra* note 157, at 167–70 (in which the authors point out the benefits of active listening for lawyers working with clients). The skill of active listening, however, should be used not only by lawyers with clients, but by mediators, judges, and individuals in their everyday interactions.

¹⁷⁰ Gary Friedman & Jack Himmelstein, *The Loop of Understanding*, in MEDIATION TEXTBOOK, *supra* note 157, at 225–26 (2004).

¹⁷¹ *Id.* at 227.

mediation settlement conference would be mandatory. The mediation session would give both the government and the asylum-seeker a chance to reap the benefits that parties saw in the Second Circuit's immigration mediation program.¹⁷² In addition to these benefits, a mandatory mediation conference would provide an additional benefit to both the asylum-seeker and the government.

The mediation process would provide asylum-seekers with another layer of procedural justice. If an asylum-seeker feels that he has been treated fairly by the system and provided with an opportunity to be heard, he may choose not to file an appeal in federal court.¹⁷³ One of the core values of mediation is allowing the parties to address conflict while giving them the power to retain control over the processes.¹⁷⁴ "Parties in adjudicative processes must fit their story within the narrow frame of a legal 'cause of action' . . . [and] confine themselves to evidence that the decision-maker will consider relevant and persuasive Because of these constraints, parties often do not feel they have had a chance to be heard."¹⁷⁵ While it may be impractical to give an asylum-seeker the same level of control in his asylum hearing as he would exercise in a civil litigation settlement, allowing him the power to narrate his story could go a long way towards satisfying his appetite for procedural justice. As a result, the asylum-seeker may accept the determination of the IJ and the BIA without seeking federal court review.

The DOJ would also benefit from this arrangement because it could retain control over the mediation, instead of it taking place under the purview of a federal court, and would see the results sooner. Because the DOJ would not issue a final order until after the mediation, the agency would have more flexibility if it wished to stay the removal or gather more information. The entire process would continue under the discretion of the Attorney General without the involvement of the federal judiciary. Additionally, because the mediation would take place sooner than it would under a fed-

¹⁷² See *supra* Part III.B.1.b.i.

¹⁷³ A study for the American Bar Association found that asylum-seekers are increasingly seeking review in the federal courts because they are dissatisfied with the quality of procedural justice they are receiving. See DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 39–41 (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

¹⁷⁴ MEDIATION TEXTBOOK, *supra* note 157, at 94.

¹⁷⁵ *Id.*

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eral court program, there would be additional cost savings to the government.¹⁷⁶

IV. CONCLUSION

Asylum hearings pose a unique set of challenges. Asylum-seekers are not only unfamiliar with the adversarial American legal system, but they are foreigners to American culture. Their ability to present their cases for asylum is challenged by the difficulties of communicating with judges who are from a different culture, are trained in the institutional procedures of the hearing, and have had considerably different life experiences. Additionally, refugees often undergo traumatic experiences that limit their ability to communicate about those issues most relevant to the IJs' credibility determinations.

At the same time, IJs and the agencies that administer immigration policies are confronted with a potentially "unlimited" number of potential immigrants.¹⁷⁷ At the end of the day, it is up to the IJ whether an asylum-seeker gets to stay in the country or is expelled. Such a serious and weighty decision should not be taken lightly, and it is commendable that IJs have taken up the responsibility of trying to sort through valid and false claims. Perhaps in an ideal world, the issue of migration across borders would be insignificant and not require any paperwork or processing. However, limited social resources and political dynamics drive Congress and administrative agencies to make immigration policies that limit the flow of individuals into this country. These policies, including the adversarial nature of immigration hearings and the BIA streamlining, make it even more difficult for asylum-seekers to tell their stories and be understood.

While ADR has gained a hold in federal administrative agencies in settling workplace discrimination cases and in federal courts

¹⁷⁶ US Attorneys David Marcus and Jeffrey Senger write:

We are now encouraging our lawyers to consider settlement earlier in the life of a case. Too many of our settlements have occurred on the courthouse steps, after we have spent years in attorney time and tens of thousands of dollars in litigation costs. If we could settle cases even several months earlier, that would represent a tremendous savings in time and money given the hundreds of thousands of cases the government handles each year.

Marcus & Senger, *supra* note 131, at 713.

¹⁷⁷ See Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 *CATH. U. L. REV.* 999, 1050 (2006).

through mediation and court-annexed arbitration programs, there is still reluctance to experiment with dispute resolution techniques and settlement in many areas of the law,¹⁷⁸ including immigration decisions.

ADR can reconcile the government's desire to limit asylum to worthy applicants and its need to discern the truth in the asylum-seeker's narrative. These desires are not in opposition to each other. In fact, a more accurate determination of the asylum-seeker's credibility will ensure that only the most worthy asylum-seekers gain asylum. The government should not grant asylum to the individuals who make favorable impressions on the IJs, but to those applicants who have genuinely experienced past persecution. Through an unprecedented number of published opinions, the federal courts have made clear that the quality of immigration adjudication needs to improve. ADR can provide more accommodating procedures that will make asylum-seekers not only more comfortable in telling their story of persecution, but will also help them to tell it more accurately. One of the core strengths of dispute resolution is that the process is made to fit the parties, instead of the parties being made to fit the process. This Note concludes with the proposal that a careful re-examination of asylum adjudication procedures with an eye towards ADR and non-adversarial techniques could provide more accurate determinations, greater levels of procedural justice, and fewer asylum cases in the federal circuit courts.

¹⁷⁸ See generally Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073. Fiss believes that settlement can be highly problematic and that the use of ADR may entail problems that litigation does not. He points to imbalances of power in ADR processes. *Id.* This Note recommends techniques that would rebalance the power in the adjudicative process in a way that would be fairer to the asylum-seeker. Fiss' second major argument is that by taking litigation out of the public sphere through private ADR processes, the public is robbed of the future value of the judgment as precedent. *Id.* The ADR processes recommended do not eliminate precedent. Rather, the proposals attempt to facilitate fact-finding. Because of the fact intensive nature of asylum cases and its execution through an administrative agency, precedent may have less value in immigration law than it would in civil litigation.