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Judicial Ethnocentrism vs. Expert Witnesses in Asylum Cases

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ABSTRACT:

Recent statistical analyses provide overwhelming evidence for substantial injustice in immigration court decisions. The writers also explore the data for evidence of bias, and several end with recommendations for more legal training for judges and more professional appellate review. This assumes that the problem is in the interpretation of the law and conduct of the trial. Actually, it is in the interpretation of facts. Courts provide for translators, but merely verbal translation is not enough. Cultural translation is required. In this paper I illustrate what cultural translation is with instances from five different asylum cases that I have been involved in as an expert witness.

CONTENTS

Judicial Ethnocentrism vs. Expert Witnesses in Asylum Cases 1
Abstract: 1
Contents 2
Judicial Ethnocentrism vs Expert Witnesses in Asylum Cases 3
Introduction 3
Confidentiality 6
The Courts 7
Method 8
My Role as an expert witness 8
Judicial ethnocentrism 9
The Cases 10
Noori 12
Mirza 17
SS 20
Dhala 22
V 24
S 29
Immigration law in cross-cultural perspective 30
Conclusion and Recommendations 33
Bibliography 35

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Judicial Ethnocentrism vs. Expert Witnesses in Asylum Cases

INTRODUCTION

There is very widespread agreement that the United States asylum courts are not implementing US asylum law in a way that is consistent with the basic ideals of rule of law or with the specific intent of the asylum legislation. Analyses describing the problem represent two main disciplines: law itself and political science. In law, the most comprehensive study is by Jaya Ramji-Nogales, Sharon Holtz, and Philip G. Schrag (2007). Their title reflects their conclusion: "Refugee Roulette." Their study used a data-base of over 133,000 reported decisions at all levels from initial hearings to federal appeals courts. They showed that applications from the same countries at the same times are denied at very different rates in the different regional courts in the United States, and even more dramatically by different judges in the same regional courts. There is no way to attribute the variations to the cases; they must reflect the judges. A person from a given place in a given year will have virtually no chance of being granted asylum by one judge, and an 80% chance by another. Evidently, immigration judges in the initial hearings are deciding arbitrarily and the appeals courts are upholding them.

Ramji-Nogales et al. are concerned with describing the magnitude of the arbitrariness and suggesting remedies. They measure variation in the denial rates between courts and between judges. Their measure is the proportion of judges whose decisions are more than 50% higher or lower than the averages in a number of categories including all cases in their own courts, cases of that type in a given year in their own courts, and cases of that type in a given year nationally.

They also sought to determine if there were any characteristics of the judges or the cases that would explain some of this variation. They identify nine characteristics, although their statistical computation gave only a rough sense of the magnitude of the relationships. The measure was bivariate cross-tabulation; the value it provides is a measure of the difference between an actual mean and predicted mean, hence a measure of non-randomness or unexpectedness. The characteristics that they looked at were: whether the asylum-seeker was represented by an attorney, the number of dependents of the asylum-seeker, whether the asylum-seeker had representation, the gender of the judge, whether the judge had previously worked for the government, whether the judge had previous military experience, whether the judge had previous experience working for nongovernmental organizations, whether the judge had been in private practice in immigration law, and whether the judge had taught in a law school. They found that the single most important variable by far was whether the applicant was represented by attorney. The next most important was whether they had dependents with them and the third was is the gender of the judge. Female judges were more likely to grant asylum.

The authors conclude with a plea for more comprehensive training for judges and for independent and more professional appellate review. They do not say what the content of this training should be, except that it should be more frequent and should be aimed at greater "quality control" and uniformity, and should include "judicial temperament" (p. 381). Another focus would be courtroom decorum, "impartiality, avoiding stereotyping, and not taking personally the

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misconduct that the judges sometimes encounter from people who are desperate to remain in the United States (p. 382)."

These recommendations were expanded by Margaret H. Taylor (2007) and Montag and Chea (2010). The former argues for removing the entire immigration court system from the Department of Justice. Montag and Chea's article, titled "The Immigration Judge War," is one of the few that focuses on inappropriate or injudicious behavior of immigration judges and tries to prepare attorneys to deal with it. Their recommendations for judicial training also emphasize showing more respect for applicants and maintaining a more impartial courtroom decorum.

In Political Science, the primary focus has not been on the magnitude of the apparent arbitrariness or on providing institutional remedies so much as using the asylum courts to develop a long-standing interest in defining and measuring judicial bias. A recent study that synthesizes and advances this literature uses a database very much like that of Ramji-Nogales et al. This is "Explaining Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach," by Linda Keith, Banks Miller, and Jennifer Holmes (2013). Their method was to use a multilevel correlational analysis to relate the attitudes of judges to their rates of denial based on characteristics of the countries the applicants were from. "Attitudes" were characterized as "liberal" or "conservative," or more precisely "immigration liberalism" and "immigration conservatism." Immigration liberalism means a greater likelihood to respect the ideas of immigrants' rights and a right to asylum. The attribution was based on characteristics of the judges professional career like those identified by Ramji-Nogales et. al: whether they had been previously employed only in the INS, in the Department of Human Services, elsewhere in the EOIR, been a prosecutor, worked for an NGO, worked for an Immigration NGO, been in the military, taught in a law school, been in private practice, had other judicial experience, or had corporate experience. employed in academics, as an attorney for asylum applicants, or in other private practice(Keith et al,: 272; See also Ramsey-Nogales p. 501 n. 137).

Each attribute was dichotomous—yes or no. They derived an overall liberalism score by factor analysis, taking the first factor as the score for each judge. Scores ranged from 0 (least liberal) to 3.8 (most liberal). They then asked if correlations between the liberalism scores and country characteristics could predict the judge's rate of denial given various objective features of the country the applicant was from, as well as several features the case itself, including the gender of the judge, whether the applicant had legal representation, and whether the applicant spoke English or Arabic. They found that such correlations did indeed exist although they varied in strength for different country characteristics. The argument is too complex to summarize adequately here, but there is no need to do so. For my purposes, they key point is that while they clearly show that that such biases are salient, they do not come close to explaining the enormous variations described by Ramji-Nogales et al. For example, one basic conclusion is that "increasing the liberalism of the judge, increases the predicted probability of a vote to grant asylum by twenty-five percentage points in the unconditional model" while another is that the classification accounts for just a little over 14% of the variance in IJ decisions (2013: 278). Therefore:

> The evidence here suggests that it is does matter which judge hears an applicant's claims, particularly when material and security concerns may be an issue for an applicant, and the potentially combined effect can substantially alter the applicant's odds of a grant or denial. (p. 283).

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My concern is with judicial error, not just differences in priorities that might be debatable. It is with injustice. My purpose is to describe how factual and logical errors appear in the judgments of asylum cases and are preserved and supported in the appeals process, not only by the BIA but also by the US courts of appeals. My focus is therefore on argument. The problem is to distinguish good arguments from bad. My data is, or comes from, cases I have been involved in personally as an expert witnesses. If I could get transcripts of other cases that I had not participated in personally, I would have used them as well. But such records are not available.

I agree with the lawyers that these courts represent "asylum roulette." Justice is a matter of chance. Every immigration attorney I have met has said the same. The method of Ramji-Nogales et al. underestimates the problem. While it is safe to infer that an IJ who denies cases of a given type at more than twice the average rate is being arbitrary in some way, nothing precludes the possibility that an IJ deciding cases at almost precisely the statistical average is being equally arbitrary. I will describe one such IJ. I have also seen some of the inappropriate and injudicious behavior described by Montag and Chea, which I will describe, although I should also say that it is not the rule.

I do not know whether the kind of arbitrariness that concerns me would be addressed by the kind of additional training and emphasis on quality control that Ramji-Nogales and others seem to envision. It certainly would not be addressed by a primary emphasis on increasing uniformity *per se*.

I also agree with the political scientists that the outcomes represent "bias." In a general sense, this is true by definition. "Bias" can be said to be involved whenever the material in a case is interpreted in ways not fully specified in the material itself. Bias is also necessarily involved in the more specific way that Keith et al. have defined it, insofar as a professional career path necessarily reflects professional priorities. But bias in the sense of a professional orientation is not necessarily a source of outright arbitrariness.

The kind of bias that leads to arbitrariness is not an orientation toward weighing different aspects of the case differently; it is rationale for ignoring certain aspects entirely or for imputing features that do not actually exist. This is the kind of bias that leads to arguments in which the conclusion is not at all predictable from the facts and the law, and incoherent argument in this sense is the only thing that can explain the extreme differences in denial rates that Ramji-Nogales et al. have pointed to. Keith et al. show that immigration liberalism may in some kinds of cases account for the difference between an average denial rate of about 20% and an average rate of about 50%. It cannot account for one judge having a denial rate hundreds of times that of another.

My argument here is that there are two very important additional sources of arbitrariness beyond bias in the sense that Keith at al. describe and beyond what the training and procedural recommendations Ramji-Nogales et al. seem to address. The first and most important source is errors in the interpretation of the facts of the cases. The second concerns the proper scope of judicial discretion in arriving at the understanding of these facts in relation to the law. My main proposed remedies involve greater and more efficient use of expert witnesses. Better training of a certain kind could also be relevant. It would depend on whether "quality control" is the same thing as assuring that the interpretations of the law are actually correct in a jurisprudential sense rather than only in a narrowly literal sense. Every IJ "knows" the law in the sense that they can use its language consistently and plausibly, and not be overturned on appeal. Yet a substantial number of them do not interpret the law correctly in the sense of construing key features in ways

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that recognize the international treaties that lie behind it, and from which it draws key phrases and concepts. Neither, apparently, do the members of the BIA. Nor do they recognize, or acknowledge, the historical problems the treaties and the American law were manifestly intended to recognize and address. I will return to these issues in the section titled Immigration Law in Cross-cultural perspective, after I have described some cases.

The central problem in interpreting facts is that the facts in asylum cases almost always arise in cultural contexts that the judges are not familiar with. All meaning is context-dependent, and all contexts are cultural. This means they involve shared understandings. The legal training required for a judge does not focus on the ability to think cross-culturally and judges vary enormously in their sensitivity to the problems involved in doing so. They usually have no way to know what in their own experience is universal and what is local. Additional legal or procedural training could not overcome this. More detached or more legally competent appellate review under present rules would not help either, for two reasons. The first is that in the appellate review, new evidence cannot be introduced to correct factual errors in the original record. The second is that even in the absence of new evidence, the BIA has been historically reluctant overturn the original interpretation by the IJ. In one way, this makes good methodological sense: the IJ was the person "on the spot" and could observe much more about the behavior of the applicant than appears in the record. In another way, however, it make extremely bad methodological sense, in that it removes in principle consideration of cultural ignorance or prejudice on the IJ's part. This reluctance was solidified into a rule when the "streamlining" introduced by Attorney General Ashcroft explicitly prohibited whatever reviews of "factual determinations" there were except those "that appear to be clearly erroneous." (Ashcroft and Kobach, 2006:1994). Ashcroft and Kobach wrote as though clearly erroneous determinations were unusual and easy to distinguish. In my experience, they are pervasive and tenacious. Scott Rempell argues that Ashcroft's rule is ill-conceived and confusing (2011: 319). It assumes a naive notion of "fact" that does not comport with the actual complexity of interpreting experiences cross-culturally. I agree.

THE PROBLEM OF CONFIDENTIALITY

The statistical methods of Ramji-Nogales et al, Keith et al. and those they build upon are constrained by the kind of information they have had to work with. They rely on what the Executive Office for Immigration Review (OIER) makes available. This is very limited. It is simply the type of action called for, the country of the applicant, the date, the court, and the decision. Attorney's names are available, but the applicants' names are not. The information includes nothing of what facts were adduced and what was argued about them. The stated reason is to protect applicant confidentiality.

IJ hearings involve briefs and documentary evidence submitted as exhibits in the same matter as Title III courts. All IJ hearings are electronically recorded. The recordings are retained as part of the file. IJ decisions are often given orally at the end of the proceeding, included in the same recording. Although the hearings are held in open court and are public while they are occurring unless the IJ closes them for a stated reason, the recordings and other documents are confidential under OIER rules. Transcripts can only be obtained by application under the Freedom of Information Act. Records of the application process preliminary to a case being heard by an Immigration Judge are similarly confidential and cannot be made public without written permission of the applicant. The only exceptions are that records may be provided to other government agencies, mainly security agencies, under defined conditions.

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The stated purpose of this confidentiality is to protect the applicants in the event they are returned to their countries of origin, and to protect their relatives and associates who may still be in those countries. Such concern is often justified, especially in cases where asylum is not granted when it was merited. However, as several writers have pointed out, the confidentiality also creates a de facto veil of secrecy and impunity. Montague and Chea describe the way the confidentiality requirements and the policies of the BIA and the federal courts in hearing appeals protect judges who make arbitrary and *prima facie* unjustifiable decisions. These requirements reinforce and are reinforced by the attorney's fear of endangering their clients by angering the judges they must appear before. A further protection for unjust judgments is that when an IJ denies an application in error, the victim is almost by definition removed from public view, either by being deported or driven into hiding to avoid deportation.

IJ decisions do not only involve denying asylum to foreigners; they also include deporting legal residents and American citizens. Montague and Chea describe the situation for foreigners. Jacqueline Stevens, writing in *The Nation* October 20, 2010, described how this happens for legal residents and citizens.

Records of appeals from the immigration courts to the federal courts are not confidential and do identify the applicants. There are also some cases from the Board of Immigration Appeals that are published openly as designated precedents. While these latter still use an alias for the names of the individuals who made the applications, they certainly contain enough detail for any interested party in the country that they come from to know who they are.

Although the regulations do not apply to individuals who are not government employees, I am bound by lawyer-client confidentiality. Accordingly, I will not use anyone's name unless they are a public figure, they have been named in an appeal to Court of Appeals, or I am sure that their travel to the US and application for asylum is already known to those who might threaten them. I will also avoid describing anything from a conversation with the attorney and client outside of the courtroom unless I have also described it in court.

THE COURTS

"Immigration courts" in the United States are the courts of the Executive Office for Immigration Review (OIER), formerly part of the Immigration and Naturalization Service (INS). Since all the cases I will describe here were heard before the reorganization of March 1, 2003, I will refer to the organization as the INS. These courts are not part of the independent judiciary guaranteed by Title III of the U S Constitution. Nor are they exactly the same as administrative courts, such as those established under the National Labor Relations Act. Formerly called "special enquiry officers," an Immigration Judge (IJ) is an employee of the U. S. Department of Justice, subject to the authority of the Attorney General. They are, however, required to have law degrees and to be admitted to practice in the states where they serve. While the procedures and decorum of immigration courts generally parallel those of Title III courts, immigration judges have much more power to question witnesses directly and thereby to lead the direction of courtroom discussion. Attorneys also note that immigration cases often turn on the IJ's judgment of the applicant's credibility.

The attorneys who oppose the applicant before these judges are also employees of the INS/EOIR. The attorneys are not under the supervision of the judges, but both attorneys and judges are under the supervision of the Attorney General. There is no parallel to this in the Title III courts. There is no provision for a jury.

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The Transaction Records Access Clearinghouse at Syracuse University, a non-profit project, maintains a website titled *TRAC Immigration* with information on denial rates of all individual judges, by year, at: http://trac.syr.edu/immigration/reports/judge2006/166/index.html

METHOD

I am an anthropologist, not a lawyer, although law is one of my areas of anthropological interest, in two ways. First, legal theory is the ancestor to modern organizational theory in ethnology and contains considerations of many topics that any complete ethnological theory must also include, such as theories of authority, sanctions, consensus, the relation between law and morality, the relation between law and the judicial function, and the relation between morality and reason. Second, my major substantive geographical area has been South Asia and one of my major interests in South Asia has been in social and economic development. In this, I have found that understanding the system of laws and courts has been indispensable. What the laws are and how law is implemented is pervasively important in the ways people live their lives. It will also be integral to the future course of its social and economic development.

The first asylum case I was involved in as an expert witness was in 1994. For about four years before that I had been asked a few times each year but had declined. I teach in the University of Texas at Dallas. There is an immigration court in Dallas. Most of the calls were from Pakistanis, apparently due to appear before this court. There are very few South Asianists in the area. As the calls continued it became clear that those calling were often in desperate situations and had no one else to turn to. So I realized I could not continue to refuse, for two main moral reasons. First, while it is often said that we are a nation of immigrants, it is even truer to say that we are a nation of refugees. We are a nation guaranteeing freedom and safety for all who would do the same for others, and even for some who would not. Each wave of refugees that has reached our shores has been helped by some who came before. In addition, my life as a South Asianist would not have been possible if many people in South Asia had not gone out of their way to welcome me into their lives and thoughts. I had an obligation to return the considerations.

As of 2014, I have been involved in more than 40 cases with 19 different attorneys. The courts have been Dallas, Los Angeles, Denver, and Miami. I have testified personally everywhere but Denver. I say, “more than 40” because there are other cases in which my participation was minimal, such as giving an attorney my first impression of the meaning of the claims and referring them to someone else. I usually do not keep a record in such instances.

Once I began, I never refused to help in a case that seemed legitimate. When I have declined, the reasons were either that I did not have relevant knowledge or that what I knew did not support the applicant’s claims. Most of what I have described in court testimony has also been described in my peer-reviewed publications.

MY ROLE AS AN EXPERT WITNESS

Immigration courts provide for translations but the translators are not are not allowed to explain the significance of what they translate. Nor, in many cases, would they be able to do so even if it were allowed. The resulting translations are often misleading. What is actually required is not just verbal translation but cultural translation. This includes re-contextualization: one has to explain what the events are by comparing them to the closest possible analog in the

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cultural context familiar to the attorneys and the judge. The appropriate mechanism for this is the expert witness.

An expert witness is not a party to the dispute but is rather intended to provide background information to the court. In practice, I have spent much more time and effort providing background and context information to the attorneys than to the judges. In lawyers' language, what I do in most cases is to help them develop a theory of the case. I do this with a commitment to the "whole truth" and not just to some part of it suitable to my client's side.

For the court, before the hearing I usually provide testimony in the form of a chronology of major relevant events into which I have inserted events of this particular case and a statement that explains how these events lead to an understanding of the applicant's documentation. If I appear in court, I often repeat the high points of my deposition but the most important function is to answer questions of the opposing attorney, to answer questions of the judge, and to listen to the testimony and the responses of the judge and attorneys to see when cultural misunderstandings are building up. Misunderstandings usually involve assimilating events, ideas, or processes described in the applicant's country to the wrong analogs in the United States. Confusion never works to the advantage of an applicant with a just claim. So when I see it I find a way to communicate to the attorney I am advising and suggest what questions he might ask to expose the errors and possibly correct them.

Fortunately, in a hearing the expert witnesses is usually called after the other witnesses. So I can adjust what I say to address misunderstandings in previous testimony.

JUDICIAL ETHNOCENTRISM

I have appeared before nine different immigration judges. The kind of behavior that I am describing as judicial ethnocentrism was exhibited by just two of them. By ethnocentrism, I do not mean simply ignorance of country conditions; that is expectable and common. What I mean is unwillingness to recognize that one's own assumptions may be inappropriate for interpreting testimony that describes events in other cultures, and that one must make an effort to search within that testimony for the assumptions that organize it.

Ethnocentrism is not confined to judges. It is also a problem with attorneys and with applicants themselves. It is also to an extent built into the application and review procedure. But judicial ethnocentrism is what permits ethnocentrism in the other participants of the asylum process to lead to injustice.

Although ethnocentrism is the most powerful and consistent source of error, is not the only one. Another important source is the inflexibility and sometimes inappropriateness of the court procedure itself (Tebo, 2006).

Once a person applies for asylum there is an administrative hearing. The hearing officer is assigned at random. These hearings are not adversarial. The asylum officer usually has no particular training in the applicant's cultural background, although as a group they get periodic training that reviews country conditions. If a translator is required, one can be provided, but from the records I have seen it appears that the translator is often unable to explain to the applicant either the nature of the proceeding or what his testimony will be used for. I do not know how transcripts of the proceedings are made, but more often than not proper names are mis-recorded and key terms that have no exact English counterparts are mis-transcribed and mis-rendered.

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The hearing results in an initial finding, which the applicant can accept or reject. The finding can be to grant or deny asylum. If it is denied and the applicant accepts the finding, they are deported. If they reject this denial, they are referred to the Immigration Judges. Most decisions are referrals (Ramji-Nogales et. al 2007: 307). Few of these can afford attorneys. The applicant's chances of being denied are very much greater without one. A study by TRAC of cases from 1994 to late 2004 found that 64% of applications for asylum with attorneys were denied, while 93.4% of those without attorneys were denied (Tebo 2006: 39). There is no right to an attorney in asylum courts, but there are some private charities that provide help. One of these was *Proyecto Adelante*, in Dallas, who have sponsored the attorneys in about a fourth of the cases I have been involved with. About five more cases had attorneys from law firms doing their work as part of their *pro bono* ethical obligations.

I have never been involved in a case where there has been no attorney. Nor have I ever been consulted by the INS/OIER itself. So I have only seen a subset of cases where the initial hearing was adverse, where the applicant felt that they would have a reasonable chance of having it reversed by a judge, and where they could find or hire an attorney. It is reasonable to think that a person who felt that they were seriously misunderstood and misrepresented in the first hearing would believe that a judge might reverse. In almost every case I was involved with, the initial hearing had such errors. My own testimony, therefore, virtually always included pointing them out and correcting them. It was natural, then, that the opposing INS attorneys would try to affirm those initial findings. I should also add that INS/OIER attorneys often appeared to have received the case files only a day or two before the hearing.

THE CASES

I describe decisions of four judges. Two demonstrate judicial ethnocentrism; two do not. I describe the examples of ethnocentrism first.

Cary Copeland of the Dallas court was not a statistical outlier. For the period 2000-2005, his denial rate was 64.8 The national denial rate in this period ran from 63.4 to 60.0 %. I appeared before him in 10 cases[1]. In these, I described many different kinds of background conditions that are generally consistent across all of South Asia. These included conventions of South Asian English, issues in translation from South Asian languages to English, the role of factions in village and supra-village politics, different religious ideologies, M. K. Gandhi's political philosophy and the meaning of "non-violence," inheritance laws, criminal laws, general administrative organization and practice, police organization and practices, and political ideologies. Copeland clearly found my testimony on some of these topics much more believable than others. The testimony that he found the most unbelievable, and apparently annoying, concerned factions.

Factions are most commonly called "parties" in the languages of North India. This is the English word, naturalized. But it does not have the English meaning. Parties in the factional sense are defined as secret alliances within associations or communities, most especially within villages. These are not the same thing as political parties in the sense of the legally recognized organizations bodies that contend in elections at the regional and national levels, but they are

[1] Of the ten cases before Copeland that I have been involved in, I know of the decisions in seven. Of these seven, application was granted in four. In my view, it should have been granted in all.

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related. Parties in the factional sense reach out to the organized parties and support them or oppose them in elections on a quid pro quo basis. But they are not identified by those linkages, nor do they keep them consistently from year to year or election to election. Rather they shift them adventitiously for whatever might provide local advantage.

Parties in the factional are sense are defined primarily by opposition to one another. They are alliances of men who form to defend their interests, meaning actually the interests of their families. Since they are defined as being secret, they are spoken of in ways consistent with this definition. No one in them will admit to being in them; those not involved will say that they do not "know about" them. If an outsider asks a villager if there are parties in his village, the answer will be either "no" or "I don't know about parties." And if anyone asks about parties they must be an outsider. All those in one party are described as "friends" of each other and "enemies" of everyone in the other. There are no degrees or shadings. The reason is that parties are described as contending for "dominance." Either one or the other will win, not both. So there can be no compromise. Stereotypically, what they fight about is characterized in a phrase that translates as "women, land, and water." In fact, however, they fight about many other things as well.

The reason that parties in the factional sense are secret is that they are considered shameful, in the way that fighting a family in the West is considered shameful. It is not something you speak about to outsiders. The reason they are shameful was that they deal in violence. Violence is shameful. For over 2000 years the major philosophical systems of South Asia, in Jain philosophy, Buddhism, and Hinduism, have condemned violence and praised nonviolence. Nonviolence is identified with being a cultivated person; violence with lack of cultivation.

There is no reasonable way to doubt that factions actually exist. The literature describing them is voluminous. They are reported in virtually every village study. They are described by both foreigners and indigenous writers. In the writings by South Asian authors, they are very often described as a kind of social pathology, as "cleavages" or "breakdown" in the traditional social organization, and as associated with corruption and immorality. This reiterates the idea that they are shameful, but does not make sense as social theory. Factions are far too universal and appear far too regularly to simply be a "cleavage" in something else. If, for example, factions were cleavages in family relations you would expect them to be restricted to family relations; yet the same configurations of individuals identified as in opposed factions identified in a family context, such as wedding, will reappear in an entirely different context, such as court case involving an allegation of assault. In fact, factions are a distinct organization in their own right, with a distinctive purpose. It is, as Jhering said of the purpose of law itself, to organize a preponderance of force on the side of right.

Faction-like organizations appear in many societies for many reasons. In South Asia they have a distinctive administrative basis. Throughout the region, going back to British times, villages have been defined as "cadastral units" only. They are not legal persons. They cannot sue or be sued. They cannot have their own courts, police, or government agencies otherwise capable of imposing sanctions except in a few minor matters. All of these functions are assigned to centralized administrations whose offices are in cities. Yet disputes do arise that individuals involved cannot or will not resolve peacefully. When this happens and it becomes necessary to think of imposing a solution by force, people turn to the idea of factions.

People in the same faction are described as "friends." Those in opposed factions are "enemies." The terms translated with the English "friend" and "enemy" have no clear use

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outside of this specific context. When people are “enemies,” the other kinds of relationships are said to be “broken.” So if one encounters two villagers who address each other in the expected modes of religion, kinship, or occupation, depending on context, everything is normal. But if they do not address each other when such an address would be expected, another villager will surely read this as signifying factional opposition.

The covert symbolism of factional support or opposition carries over into press reports of public gatherings involving the legal parties. If a politician appears in public, for example to endorse a project or campaign in a village, it is very unlikely that the account in the press will provide much detail about what he or she said. But it will report fully on who was present in the ceremony and who was conspicuously absent. It is assumed (but not said) that all those present were friends in a party sense, and all those absent were enemies. To a culturally knowledgeable readership, such a report describes both the issues and who supported the speaker’s position on them.

Parties contend for dominance in many different arenas. In villages, a party will attempt to assert its dominance by controlling village ceremonies. If the ceremony involves public performances, such as singers, the dominant party sponsoring it will bring in singers whose message will be consistent with their own perspective. If a person sponsors a wedding for his daughter or son, those who attend will be close relatives and party supporters. Often, a person invited to a wedding may have to choose between attending as a relative or staying away as a party enemy.

Village parties also contend in elections and in courts—but covertly. In an election, if one party in a village supports one leading candidate or slate, the other will surely support their opponent. To an outsider, it would appear that the external parties have representatives in the village. To a villager, however, it would be clear which village party is supporting which external party and why. In the courts, members of one party regularly bring charges, true or false, against prominent people in the other party in an effort to get them incarcerated, fined, tortured or possibly even killed by the police. They also file disputes against each other in the revenue courts and in irrigation courts, because the records of such courts are also the records of land rights. Occasionally, if tempers run exceptionally high, parties may confront each other violently, sometime leading to deaths. Such confrontations usually occur either during elections, going to and from courts, or at large celebrations such as weddings or religious fairs.

Parties also form within cities and in many regional organizations. In cities in Pakistan and Bangladesh it is common to see political party flags flying from houses in a neighborhood, and slogans written on walls and balconies. These do not usually mean that all the people in those houses or apartments are of one faction and support that political party. Rather, they mean that the dominant faction in that neighborhood or apartment building does. In Punjab, India, parties often form within Gurudwaras (Sikh temples). Parties in the factional sense often form within political parties in the legal sense, sometimes as incipient splits or temporary conflicts, and sometimes as secret subgroups that seek to back up the legal activities of the overt party with illegal ones, again including physically attacking or murdering members of the opposing party. For many years the faction within the Indian Congress Party that supported Indira Gandhi was described in the press as “Cong (I).” Eventually, it began to function as a separate formal party. A Western parallel is the IRA in relation to the Sinn Fein.

Noori - Pakistan

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Noori was associated with the MQM party in Pakistan. He was elected to the City Council of Hyderabad in November of 1987. The term of office is four years. In English, MQM stands for Muttahida National Movement. This is often rendered more descriptively as Mohajir National Movement. The term "mohajir" literally means foreigner or wanderer. In Pakistan, it designates a group of people who came from India at the time of partition and who speak Urdu. They now form a distinct ethnic group. Although Urdu is the national language of Pakistan, it is not the local language in any of its provinces. This means it is not the language of any of Pakistan's rural populations. So the MQM, alone among Pakistan's major parties, has no rural constituency that it can call upon and offer benefits to in provincial and national elections. It is also the only major party that is not dominated by a few very wealthy families who have huge rural landholdings with many tenants.

The Mohajirs came from Indian cities and settled in Pakistani cities, mainly Karachi and Hyderabad. These are the first and third largest cities of Pakistan, respectively. Both are in the province of Sindh. They make up majorities of the populations in both places and the MQM is generally the strongest party in city elections. The other major party in Sindh is the PPP, Pakistan People's Party. It was founded by Z. A Bhutto and then headed by Benazir Bhutto, his daughter. Its membership is primarily Sindhi and its aim is to protect the interests of Sindhis. The third major party is the Muslim League, founded by M. A. Jinnah in pre-partition India. But while Jinnah was a Gujarati and not particularly religious, in Pakistan the party is predominantly Punjabi and dominated by a few Punjabi families. In Pakistan as whole, Punjabis are the largest linguistic/cultural group, about 50%. Sindhis are about 14%, Mohajirs about 7%. There are many other smaller groups. Sindhis speak Sindhi. Punjabis speak Punjabi. The languages are mutually intelligible but they have different sound patterns and are associated with quite different traditions of literature and art.

At the time Noori was elected, the MQM was politically allied with the PPP for the national elections. The alliance had recently won a majority of seats in the national parliament, defeating the Muslim League. It began to fall apart as soon as the election was completed.

Noori testified that he had an auto-parts shop in a neighborhood of the city. On May 17, 1988 the police raided his shop and sought to arrest him on the charge that he was selling liquor. A crowd assembled including another MQM Councilor, Abdul Moeed Shaikh. No alcohol was found and the police left. Two months later, on July 17, another councilor as well as a former member of the executive committee of the Hyderabad Chamber of Commerce were killed in an attack on the mayor of Hyderabad. These were also MQM politicians. Police responded with indefinite curfew.

Noori further testified that on May 30, 1990, the police issued a First Information Report (FIR) charging him and other councilors with leading a procession that turned into a riot at the police station. In the course of this, a bomb was thrown and one policeman was injured. An FIR is a criminal complaint, an allegation that a crime has been committed. It may be lodged by member of the public or the police themselves. Police cannot investigate without an FIR. Once an FIR has been filed, in theory, they must investigate. This one was lodged by the police officer in charge of the station at the time and purported to describe events that he had witnessed. The law cited went back to British times and had been promulgated to suppress antigovernment political demonstrations. It made every participant in a demonstration guilty of any crime or any injury to a public officer that resulted from the demonstration. Under it, the events described would have allowed Noori to be charged with civil insurrection and murder. According to Noori they did not occur. There was a riot on that day, largely as a spontaneous

and widespread public reaction police abuses, but he did not take part. He was home. Pakistani press reports supported Noori's version of what happened. Noori cited the FIR as one of the reasons for seeking asylum in the US.

On December 3, a different MQM councilor and another person were attacked with automatic weapons in the councilor's office. The councilor died in the hospital. Later that month, Aftab Ahmad Sheikh, described in Noori's testimony as the mayor of Hyderabad (also MQM), warned Noori that the army had prepared a list of wanted MQM workers and leaders, and his name was on it. He advised Noori to leave the country. Noori applied for a visa and waited in hiding. He testified that he would not sleep at home at night although he would attend his store in daytime.

Noori finally succeeded in leaving and arrived in the United States on January 17, 1992. Less than a month later, yet another MQM councilor was shot by persons unknown while sitting in front of his dairy[2]. On February 10, 1996, According to Noori, at 2:00 am, Police Rangers Constabulary raided his house, harassed his wife and children, and forcibly inquired as to his whereabouts. This was part of a much larger crackdown on MQM including not only local officials but members of the national assembly.

In July, 1997, I provided the court with a chronology of events and a deposition explaining it. I quote from the deposition:

> The background to this is that an alliance between the MQM and the PPP to fight the elections held in November 1988 resulted in the PPP coming to power in the National Assembly and Provincial Assembly, and the MQM in Karachi Hyderabad municipal governments. By July, 1989, however, this alliance had broken down, apparently largely over quotas for Sindhi as against Mohajir positions in government service, admission to schools, and the like. As I recall, but cannot now document, the MQM wanted quotas in Karachi and Hyderabad based on their strength in those cities (about 85%), while the PPP wanted them based on MQM strength in the province as a whole (about 15%). This would have cost MQM control of Karachi and Hyderabad. The MQM called a general strike on February 7th, 1990 that forced Bhutto to sack the state's Chief Minister on February 26. Violence accelerated and the economy spiraled downward. The day in question, May 27, was an apogee. What the Washington Times called the "worst ever" violence broke out in Karachi and Hyderabad among people demanding food, and in Hyderabad according to the Washington Times account attached, troops fired on the crowd killing about 40 people out of about 65 in all killed that weekend. The army was sent in the next day.
>
> This FIR, entered on May 30th, appears to refer to exactly the same event as the press story and to be an attempt by the police to lay the blame on the civil leadership and not themselves. The attempt was apparently not successful. The Bhutto government was removed by President Ishaq Khan not long afterwards, on August 6, 1990. The grounds were in part that she could not maintain order.

[2] A "dairy" in a city in Pakistan and India is usually a small number of buffalo kept in an open area. The milk is sold raw to households nearby.

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In January 1992, the difference was that Nawaz Sharif's Muslim League was in power in the national government, Bhutto's PPP and the MQM were both in opposition and were engaged in an increasingly bitter struggle locally. MQM had won overwhelmingly in Karachi and Hyderabad municipal elections a few months before, but PPP, the Muslim League, and apparently the Army, according to press reports, resented being shut out. The result was a campaign of intimidation by indictment, apparently some justified and some of this sort, to force the elected leadership of the MQM and of the municipal government into exile, as indicated in the second attached article, from the Washington Post downloaded from Dialogue information service on CompuServe. The most relevant portion is highlighted. In addition, since the mid-1980's there has been an ongoing series of armed attacks against Mohajirs generally and MQM leadership in particular by a militant Sindhi-nationalist group called Jiye (or Jeay) Sindh, apparently with PPP support.

In addition to being notified that the FIR had been revived as indicated in his original affidavit, Mr. Noori on questioning said he had also been advised by the Mayor at the same time that his name was on a list to be arrested or killed. This is a credible claim, supported by testimony in cases recently brought before the Sindh provincial High Court and the Supreme Court of Pakistan (news accounts attached). In the Supreme court case, former President Leghari is the defendant and is accused of complicity in extra-judicial killings. His attorney denies his active approval but does not deny that the central government put out lists of people to be arrested or "eliminated" and offered "head money" as rewards. The actions were carried out mainly by the Pakistan Rangers, behind the cover of the local police. While specific dates mentioned appear to go back only to 1995, both sides concede that the practices went back at least to the first term of Nawaz Sharif, which is to say October 1990 to November 1993. Testimony in the case before the Sindh High Court indicates that such killings have included the deaths of one MQM councilor and one former councilor while in police custody.

It cannot be maintained that the level of violence experienced by Mr. Noori as an MQM councilor is part of normal life in Karachi or Hyderabad. Since the formation of the MQM, MQM councilors in Hyderabad have been murdered at the rate of about one every two years, giving an average risk in any given year of about 1 in 60 (assuming about 28-29 MQM councilors on the council). In Karachi and Hyderabad as a whole, based on press accounts that put the murder rate for Karachi at about 2,000 a year, the comparable average would be 1:6,250.

Therefore:

7. Conclusion. Based on the evidence, I conclude that Mr. Noori has a reasonable fear of persecution based on his political opinion and ethnic identification, based on the following facts:

1) Questionable charges arising out of events caused by attempts to disenfranchise the duly elected government that Mr. Noori was part of were revived one and half years after the alleged events, after political circumstances

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> had changed and opposition parties had established a widely recognized pattern of using such charges to drive MQM officials into exile.
>
> 2) The motivation lays in the efforts of several opposition groups that are strong at the provincial and national level, but not at the municipal level, to attain control of municipal government in Karachi and Hyderabad and to be able to use urban jobs and resources for rewarding political supporters and raising political funds.
>
> 3) The charges are likely to result in Mr. Noori's incarceration, and given the nature of treatment of prisoners in Pakistan, this carries a certainty of harsh treatment and a credible threat of physical injury or death. To underline the key point: this threat is a direct result of his prominence and status not only as supporter of the MQM but as a person who was properly and legally elected as a municipal councilor on the basis of that association.

Copeland denied the application on the ground that Noori's testimony was not believable. He cited two main instances. First, he did not believe that the police would act this way toward a member of the City Council, since he was then in power. Second, he found it incredible that Noori could attend his store safely during the day but not go home at night. Copeland had questioned Noori about his this pattern of attendance but did not indicate the importance he was assigning it. Nor did he ask Noori to explain *why* he was safe during the day but not at night. Copeland's closing remarks also cited changed conditions. He noted that at the time of the hearing, the US Department of State report on human rights in Pakistan said that the MQM was in alliance with the Muslim League in the last election and in consequence the MQM had been given the office of Governor of Sindh and several ministries. Copeland asserted that this would therefore stop the kinds of threats that Noori had previously experienced. In actuality, all of Copeland's claims were false. The explanation was implicit in the description of the first visit by the police to Noori's store when they left empty-handed after a crowd appeared. One aspect of the explanation concerned the structure of the administration. The other involved the idea of factions.

First of all, at the Provincial level, Pakistan has a parliamentary system. The Governor is distinguished from the Chief Minister (CM). The CM is the counterpart of the Prime Minister at the national level, the actual chief executive. The Governor is the counterpart of the national President. Like the English monarch, the Pakistan President's functions are largely ceremonial except that after an election he has the power to recognize a Prime Minister and invite him or her to form a government. A Governor has the same power at the provincial level. He can also recommend to the national President that the current provincial government be removed.

Second, the City Council of Hyderabad was not like a City Council in an American city and the mayor is not like an American mayor. Hyderabad is not a municipality in the American or European sense. It is not even a single entity. The urban area of Hyderabad is administered under four "districts." The district has been the principal administrative unit of state government going back to early British times, comparable to an American county. The head of a district at the time Noori was a Councilor was the District Commissioner, nominated by the Pakistan Administrative Service (part of the Civil Service of Pakistan) and appointed by the government. The Council Noori belonged to was actually a District Council, not a city council in an American sense. Hyderabad had four of them. They were only advisory, concerned with making suggestions for local uses of various kinds of funds from the central and provincial government.

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The chair of a council was called the Mayor in English, but the Urdu term was *nazim*, meaning "organizer" or "convener." He was not an administrator.

A continuing point of contention between the MQM and the PPP turns on the MQM demand that Hyderabad become a municipality, as I noted. That is, its governmental form would be changed from that of four roughly coordinated district administrations to a single municipal corporation. This demand is closely related to the MQM's history of forming alliances alternately with the PPP or the Muslim League, winning, and then having the alliance break up.

Another constant demand of the MQM is for greater democracy and less of what it calls "feudalism." Feudalism meaning rule by the entrenched wealthy families. The problem is that both PPP and Muslim League are feudal in this sense, and the leading families will not give up their landholdings. A major reason for them to seek political power is to prevent land reform. Greater democracy includes municipal status for Hyderabad and Karachi, in which municipal councils would have authority comparable to municipal councils in America or Europe, including substantial taxing authority and spending autonomy. This would necessarily reduce provincial and national power over city taxes and spending programs, hence also patronage in city employment. Ethnic quotas for government positions and school admissions would also change. If Hyderabad were an autonomous municipality, the quotas would be based on the proportions in the municipal population rather than the provincial population. While Mohajirs are about 80% of the population of Hyderabad, they are only about 14% of the total provincial population. So if Hyderabad was an autonomous municipality, Mohajirs would get 80% of the positions. As long as it is under district administration, they only get 14%.

The reason Noori could attend his store during the day but had to hide at night, is that the situation was essentially that of factional conflict. There was no serious likelihood that the overt claims of the police to be looking for illicit liquor were their real motivation. Their action was recognized in factional terms as an attempt to get him out of the way, either for their own advantage or someone else's. They supported the PPP. By the same token, bystanders were not simply bystanders but witnesses and supporters for Noori, hence the MQM. Accordingly, once a crowd appeared, the police did not dare provoke a confrontation. At night, however, violence is easier to conceal and it is far more difficult for supporters to mobilize. The same considerations applied to the actions of the Pakistan Rangers. They, too, are a national organization not under local control. Ethnically they were almost entirely Sindhi and Punjabi.

US law gives immigration judges wide latitude in deciding what evidence is credible and what is not. It also gives them wide latitude to take an investigative role on their own behalf during the trial. It is not intended, however, to give them license to arrive at conclusions without investigation. Copeland's method in this hearing was replicated in many others. The conclusion at the end did not flow from the evidence but from erroneous assumptions he brought to the evidence but did not check against it.

Mirza - Pakistan

This was another case Copeland denied on grounds of lack of credibility. His denial was subsequently appealed to BIA, who upheld. The BIA decision was then appealed to the Fifth Circuit, who also upheld. In the appeal to the Fifth Circuit, Mirza argued that the BIA had: "abused its discretion in not finding that there was substantial evidence to support his claim for asylum. Specifically, Mirza asserts that: "the BIA did not give adequate consideration to the testimony of designated expert, Professor Murray J. Leaf." (5th Circuit Jan 27, 1999, No. 98-60090 Summary Calendar). The Fifth circuit did not base its conclusions on the finding that

Mirza's original claims were not true or believable, however, but rather on the finding the BIA had considered the IJ's arguments "at length." Copeland had held that Mirza had not met the burden of proof to show persecution on any of the five enumerated grounds. Copeland also said that, "he did not "think that [Mirza] is in any more danger in Pakistan than anybody else over there." (p. 3).

As usual, once I was engaged I went over the testimony and documentation with the attorney and the client. Mirza spoke good English, as did his family members. Also as usual, I found and corrected misstatements and avoidable ambiguities in the record. I then provided the attorney with a chronology of events putting Mirza's narrative in its political/historical context and my own assessment and explanation. The attorney included both in his evidence for the court.

Mirza grew up in Karachi. He was both a Shia Muslim and a Mohajir. He became a banker. He and his family moved to Kuwait in 1976. Evidently, his work in Kuwait was well-paid. While working in Kuwait, Mirza also became an officer in the Jamia-al-Sadiq, an important Shia charitable trust that sent donations from wealthy Kuwaitis to 32 Shia organizations in Pakistan. The purpose was to provide assistance to poor members of the community, especially orphans and widows. The amount of money involved was very substantial. Mirza's file had abundant and impressive letters of support from senior colleagues and associates in Kuwait attesting to his banking career, character, and responsibilities in the Jamia-al-Sadiq,

In August, 1990, Kuwait was invaded by Iraq. Mirza was imprisoned but escaped, and he and his family returned to Karachi by an indirect route. Mirza attempted to return to Kuwait after the Iraqi incursion was ended, but a change in the law regarding expatriate workers made this impossible. His work for the trust continued. This involved reviewing expenditures. In this, he discovered evidence of substantial cheating by Pakistani recipients of the trust money. This led to a lawsuit to recover assets that local officers had made over to their own names.

Perhaps as a result of this activity, or simply as a result of his prominence, Mirza evidently came to the notice of a Sunni terrorist group in Pakistan called Sipahi-i-Sahaba. The first indication was a menacing encounter in which Mirza's son was threatened by several young men he did not know. As one would expect, their self-identification was implied rather than openly stated. The details of the encounter, which included the charge that "you" stole Sunni orphans in order to convert them, could only be interpreted as an accusation by the young men that Mirza's son belonged to an opposed Shia group, the Tehrik-I-Nifaz-I-Fiqh-I-Jafariyya (TNSFJ). It was the Shia opposite to the Sunni Sipahi-i-Sahaba. Its declared public purpose was to propagate Shia Islamic law and prevent Shias from becoming subject to Sunni Islamic law. Its secret purpose was known to be terror and intimidation. The TNSFJ and its splinter and successor organizations have from time to time been banned by the Government of Pakistan and placed on the US list of terrorist organizations. Stealing orphans is a charge that extremist spokesmen of each group commonly level at the other. It is wild and unfounded, but this is precisely what allows one to identify its source. Such an accusation is also an implied threat. Mirza testified that this was followed with three more explicit threats to, and attempts on, his own life and that of his family. These were:

1). In May 1993 a trailer truck ran over his family car with his family in it, going around a roundabout in the city. They were saved by the intercession of a crowd who pulled the driver out of the vehicle and held him for the police. The police took him away. The next day the police did not have the person in custody and claimed to have no record of the incident.

2) Over a seven month period he received about 1,400 threatening phone calls. The calls demanded money from him and also demanded that he stop supporting the Shia organizations. From what was said, he identified the phone calls as coming from the Sipahi-i-Sahaba.

3). When leaving the Shah-e-Korasan mosque on October 17, 1994, he and others near him were the targets of an assassination attempt. Several were killed. Two days later, on October 19, a local newspaper, *The Leader*, described this attack as background to a subsequent confrontation between the Police and a judge (SDM - Subdivisional Magistrate) in which "a mob" in the Soldier Bazaar area was "protesting the killing of four workers of the TNFJ by sniper fire yesterday" and "chanting slogans against a sectarian party." Although the papers did not name the "sectarian party," readers would have understood that it was the Sipahi-i-Sahaba, because the "mob" was supporting the TNFJ. The clear implication is that the attack on Mirza was publicly recognized as part of the ongoing violence between these two groups. Copeland asked Mirza why he did not regard the attack as simply random. Mirza responded that he did not normally attend Mosque in public; he had done so on this day because it was his birthday. moreover, the shooting began just when he came outside.

My assessment for the court regarding Mirza's situation was in part:

> 8. It thus appears that Sarwat Mirzas' activity in assisting in the management of the Jamia-al-Sadiq, including his appearance as a principle in the lawsuit noted in item 5, has led to his being identified by the Sipahi-i-Sahaba as a supporter of the TNFJ or, perhaps, simply a prominent Shia that they could make an example of.
>
> …
>
> 10. The violent actions of the Sipahi-i-Sahaba and the TNFJ are usually carried out by young men, between the ages of 18 and about 25. Therefore such young men are the most likely to be suspected to be members of such groups and to know who other members are. If the Mirzas had been taken as supporters of the TNFJ by members of the Sipahi-I-Sahaba, it was highly likely that Mr. Mirza's son, …, would also have been the subject of threats and/or efforts at intimidation, as he is said to have been.
>
> …
>
> 12. In short, there has been at least one attempt on their lives (the truck) and most probably two (the mosque — since there seems clearly to have been a direct targeting of TNFJ workers rather than just a generalized attack on Shiites). These have been accompanied by credible threats to try again. I have no doubt that the Mirzas are in immanent physical danger in the event that they should return…

Copeland's response was self-contradictory and dismissive. He began by saying that he did not doubt the testimony. He then went on to say he thought the number of phone calls Mirza reported was "substantially exaggerated." During the hearing, Copeland had asked Mirza why he did not simply have his telephone shut off. Mirza replied that this would make his work impossible, including his work to support the Shia charities. Copeland evidently did not consider that this outcome would be entirely consistent with what the callers said their purpose was. The other two events, Copeland said, had not been shown to "rise to the level of persecution." He did not accept the idea that the shooting at the mosque was aimed at Mirza in particular, and therefore concluded it was not aimed at Mirza at all. He dismissed the collision with the truck as simply an "accident," although in response to questions Mirza had described in considerable detail the way the truck had driven directly at him, trapped his car beneath the trailer, and

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attempted to drag it into a crushing collision with a pile of rocks. The action of the crowd that Mirza described implies that they saw it the same way. Such willingness to intervene is quite normal in all of South Asia.

The appeal to the BIA reviewed the testimony and Copeland's response in detail to show the many points that Copeland had ignored in arriving at his interpretation and the way they supported the opposite conclusion. The BIA still supported Copeland's original interpretation.

The appeal to the Fifth Circuit made the same arguments. The Fifth Circuit then found that "The BIA also considered and approved of the IJ's conclusions that Mirza had not shown that the traffic accident was an attempt on his life, Mirza had not shown that the attack at the mosque was direct at him personally, and that Mirza's allegations of the telephone threats were not credible." In this, however, the court specifically argued that the standard of evidence required for withholding of deportation was that an alien "must demonstrate a clear probability of persecution upon return" and recognized that this was a higher standard than the "well-founded fear of persecution" required for asylum in the IJ court. The logical effect of this reasoning is assure that the IJ court can misread evidence with virtual impunity. Or, putting the same result a different way, the appeal court thereby affirmed that there was no appeal genuine from injustice based on factual errors in the IJ courts.

If you construe all the events generically, they are not persecution by definition, because by definition whether they are persecution depends on whether they are aimed a specific individual and "on account of" one of the categories named. But you cannot see that without paying attention to the details and interpreting them in their cultural context. Copeland's argument for construing them generically was his assertion that this represents life as usual in Pakistan. This had no basis in the evidence. It was also false.

SS - Nepal

SS was a Nepali, born in Kathmandu in 1970. He became member of the Nepal Congress Party (NCP) while he was in college, in the 1990s. The Nepal Congress Party grew out of the Nepali independence movement and has always promoted strengthening democratic forms of government, but it made only slow and irregular headway in reducing the powers of Rana monarchy that had held power since 1846. From 1960 to April 1990, it mainly operated in exile in India. It was then restored when the king re-established parliamentary government in response to massive pro-democracy demonstrations. Until 1995 the other major party was the United Marxist Leftists. In 1995 the CPM(Maoist) was formed as a radical faction of United Marxist Leftists and began a campaign of "People's war." This included murdering local officials and workers for opposed political parties. This campaign began in remote rural areas and gradually spread and began to close in on Kathmandu. Political instability increased.

On June 1, 2001, the king, queen, and seven other members of the royal family were murdered by one of the king's sons, Prince Dipendra. Dipendra apparently then fatally wounded himself. He died three days later. Although Dipendra's brother, Gayanendra, succeeded as king, this made it patently necessary to end monarchial government and go to some sort of electoral system. The question was only what kind. But the immediate effect was not to provoke movement toward compromise but to intensify the disagreements between the remaining two major urban parties. In the countryside, The violence of the Maoist campaigns also increased, as did the Army's efforts to suppress them. But clearly everything was heading for some sort of climax.

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After college, SS had a business in Katmandu and continued to be associated with the Nepali Congress Party. The Maoists continued to come closer. In 2003 he received his first threats from them. These included demands for "donations and support," which means he should pay them money and stop supporting the Nepali Congress party. SS left for the United States. He visited a sister in the Dallas area. In June 2004, he returned to Nepal and again received calls and threats. These include a form letter in Nepali from the local Maoist head. The operant parts of the letter are a statement that "now the country is divided into two political paths," and a demand for 500,000 rupees. The last line says they are "offering" their help in donating this and that "our party will highly appreciate your continuous help in the near future and will keep a fraternal behavior toward you." This is a threat, invoking the idea of parties as covert organizations such that those in one's own party are one's friends, while those in the other party are one's enemies. The implication is that if he does not comply he will be killed. SS received a similar letter in July.

He reported the letters to the Nepal Congress party and to the press. The file contained a news story on SS in the Gorka weekly dated October 14, 2004. There was further documentation in the form of letters from the Nepali Congress party to the Nepal administration and a public letter directed to the Maoists. The purpose of the latter is to document the Maoist practices in a public way in order to gain public support against them. Implicitly it amounts to SS shedding the veil of secrecy that might otherwise have afforded some protection—not in the sense that the Maoists would not know where to find him, but that they would not know for sure that he was not an actual or possible supporter. These were acts of considerable courage on the part of SS. In January 2005, he received another letter from the Maoists containing only a death threat and saying, "It is not just the money," we will kill you with or without it. It follows logically. Since there was no doubt that the Maoists were in fact killing NCP workers after judging them people's enemies or class enemies, this was to be taken seriously. In March 2005 SS was attacked on the road by several Maoists on motorcycles, but saved by a passing military squad. SS and his wife entered the United States on April 19, 2005 and promptly applied for asylum.

Copeland rejected the application as not credible. He gave two major reasons. The first was "you have said exactly what you think I want to hear." The second was that he noticed that all of the events recounted occurred after SS first visit to the United States in 2002. SS's credibility was also damaged, evidently, when Copeland asked him if he had liquidated his business before leaving for the United States and SS said that he had. Copeland evidently assumed that if he had time to do this he was not really in fear of his life. Finally, Copeland did not believe that armed men on several motorcycles could stop an automobile on the road.

Copeland did not check any aspect of these assumptions with SS or with me in the courtroom. In fact, the obvious reason for the threats beginning in 2002 was the increase in disorder following the death of the royal family in June of 2001. This radically changed the dynamics of Nepali political parties. It turned an unstable three-way contest between monarchists, republicans, and Maoists in which no-one could get a decisive upper hand into a direct two-way opposition between republicans and Maoists that was inherently more resolvable. One side or the other would have to win. The murders were followed by a cease-fire between the Army and the Maoists and then a collapse of the cease-fire on 23 November 2001. This was followed by the collapse of the government in October 2002. Meanwhile, the Maoists were taking over more of the hinterlands and building strength in Kathmandu. The level of violence on all sides was increasing. On October 23, 2003, the Maoists were placed on a

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United States terrorist list. On November 29, 2003, they issued an open threat to kill informants and to attack and extort money from opponents. The first threats that SS received were at this time. They were evidently part of this campaign.

Copeland's concluding remarks also dismissed my testimony, saying I was not an expert. I should be embarrassed to claim to be an expert, having never set foot in Nepal, not speaking the language, and getting all my information from the internet. Did I not know there was a lot of unreliable material on the internet? Also, while I cited material from the web, I disparaged the information in the US Department of State Country Report for 2005.

In fact, I had not seen this Country Report. My focus and testimony had been on the period covered by SS's claims. The INS attorney produced it while I was testifying and Copeland asked me if it did not say that in 2005 there were 256 civilian deaths. Since I could not read the rest of report at that moment to determine what this meant, I refused to comment on it and said that 256 deaths was not consistent with other figures. In fact, the Department of State reports are usually based on the same information I use, namely, local press and government reports.

As with Copeland's other assumptions, his claims about my testimony could have been made testable during the hearing but were not. If he had doubts about the validity of the sources I cited, he could have asked and I would have responded. Local papers are available in English. I can also read Nepali. It is written in to the Dev Nagri script, which I can read, and closely related to Hindustani, which I can understand. But there are differences in grammar and vocabulary and many local terms for governmental organizations and processes that differ from India. So I need a dictionary. I also did not claim to be an expert on Nepal, but rather South Asia, and confined my testimony to the kind of knowledge that the scholars of the region generally share—such as the political system but not local poetry or art. Although Nepal had been legally independent and not part of British India, it was under British suzerainty. The British Government of India managed its foreign policy and central bank. Its king was subject to the advice of a British "resident" in substantially the same way as monarchies within British India. The history of Nepal is integral to the history of South Asia.

In fact, Copeland's reason for not believing SS seems to have been that his case met the requirements for asylum too well. He also, again, did not like my description of the evidence for the use of the idea of factions as well-recognized secret groups that engage in violence.

Dhala - India

My second exemplar of judicial ethnocentrism is Mahlon Hanson, in the Miami court[3]. Unlike Copeland, he was a conspicuous statistical outlier. He had the highest rate of denials of all immigration judges. In the 2000-2005 period this was 96.7% of 1,114 cases.

Dhala was also denied on grounds of lack of credibility. This was appealed to the BIA and then to the 11th circuit. The BIA upheld Hanson and the 11th circuit upheld the BIA. This was the only trial where I was excluded from all testimony until called, and then excluded again after testifying.

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[3] Hanson retired in 2010 and subsequently served on the Board of Directors of the Immigration Reform Law Institute (IRLI). The IRLI is closely affiliated with the Federation for American Immigration Reform, firmly dedicated to reducing all immigration.

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Dhala was an Ismaili Muslim who had a business in Mumbai (Bombay), Maharashtra, India. He was also a Khoja, which is a distinctive ethnic group among Ismailis. He testified that he and other Muslims in the area had been systematically subject to extortion and threats by members of a right-wing Hindu nationalist organization called the Shiv Sena. They explicitly pattern themselves and their behavior after the Nazis, only in this case their target is Muslims. Their founder and leader at the time of Dhala's application, Bal Thackery, was regular referred to in the Indian press as their *Führer*. Their activity in fomenting violent religious/ethnic conflict was long-standing. I had encountered them and their reputation when I was working in Maharashtra from 1989 to 1991. Dhala further testified that the Shiv Sena were supported by the police. He specifically named Senior Police Inspector Pradeep Sharma.

Dhala said that had been delegated by other merchants to present their protest to the authorities. In response, he was arrested by the police on charges of heroin possession and tortured in custody. While in custody, he said, his sister was raped by the police when she came to visit. In response to this in turn, his wife miscarried their child.

There were some strange features in the record, noted in the appeal judgment. Dhala took a circuitous route to reach the United States and went back and forth to India twice after first arriving before seeking asylum. The route included the Bahamas, where he testified that his family owned land. While there he married a Bahamian woman without obtaining a divorce from his Indian wife. Under Muslim law in India this is legal, but unusual. Wives usually do not like it. In addition, he did not apply for asylum within the required time limit.

Ismailis are a division of the Shia tradition. They are stereotypically known for being progressive and wealthy. The head of the community is the Aga Khan; his wealth is used for community projects. They sponsor prominent institutions of higher education and hospitals in Pakistan and worldwide. When India gained independence and was divided into India and Pakistan, a substantial part of the Gujarati Ismailis went to Pakistan. There, they have been subject to persistent religious discrimination and accusations of blasphemy. Under current laws this could entail a death sentence. This is well known in India, so it is unlikely that any Indian Ismaili at present would consider moving to Pakistan an attractive possibility.

Dhala's testimony was weakened by overstated generalizations, such as saying flatly that Hindus hate Muslims and casting the Shiv Sena as representative of all Hindus. After becoming involved with the case, I worked with the attorney to show Dhala how to make his descriptions more accurate. I prepared a chronology of political developments in Mumbai including the communal conflicts that he described, the activities of the Shiv Sena, and press stories regarding Pradeep Sharma and the activities of the police squad that he led. I also provided a narrative explaining the chronology. Sharma and his squad were well known for engaging in "fake encounters" in which members of Muslim organized crime groups were murdered. But these organized crime groups were not only criminals. They also took upon themselves the task of fighting back against the Shiv Sena to protect Muslims in general. According to press reports and my personal knowledge, Dhala's descriptions of the situation in Mumbai was accurate.

I could not document Dhala's personal activities. Nor did I attest to anything about his family situation. It was not described in the material I had been asked to explain, and as far as I knew was not in the documentation for the court.

On the day of the hearing, Hanson did not allow me to hear the testimony either before or after I testified. I waited to be called in a nearby room. According to the record of the 11th circuit, Hanson adduced four main reasons for not believing Dhala. First, his wife submitted a statement saying that the charges of heroin possession were not false. She said he actually was a

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heroin dealer. Second, she denied that Dhala's sister had been raped in jail, or that she herself (the wife) had a miscarriage. Third, Dhala's sister did not testify although she could have. Fourth, although Dhala said he had scars from the beatings in jail, he did not provide medical testimony supporting this statement. Hanson also considered Dhala's pattern of travel to be "not consistent with someone fleeing political persecution." He did not note that Dhala's written submissions had said that he went to the Bahamas because his family had property there, nor did the 11th circuit notice this in its own summary. Nor did Hanson explain how he knew what travel would be consistent with fleeing persecution, since according to his own record almost no-one appearing before him was actually doing so.

Since I was not present in the courtroom I cannot comment on Dhala's testimony. Nor do I know what was in the statement of his wife. The record from the 11th circuit implies that they were in divorce proceedings. She had several related reasons to be embittered toward him, which I am not at liberty to describe. While this should have been evident to Hanson, the 11th circuit summary does not indicate that Hanson explained why he chose to believe the wife rather than Dhala.

In this case, I am not saying that the Hanson was wrong in his final judgment. I do not know. But I am saying that Dhala definitely did come from a situation in which Muslim merchants with some wealth were subject to persecution "on account of" their religion by anti-Muslim religious extremists supported by a police unit well known for engaging in extra-judicial murders. Hanson evidently entered the courtroom expecting to deny the application and viewed having me in the courtroom for the entire time as a possible impediment to doing so.

V

I now turn to two cases in which my role as an anthropological expert witness seems to have been welcome all around and significantly aided the court in arriving at a decision that appear to be just and consistent with the purposes of the immigration act. I will call the first the matter of V, since it was not appealed and has therefore not become publicly available.

I was asked to serve in this case in August 1997. The applicant was a woman from Sri Lanka. This was the second case from Sri Lanka that I had been involved in. The first had been before Judge Copeland. The applicant in that one was also a woman. Essentially, she had been caught between the Sri Lankan army and Liberation Tigers of Tamil Elam (LTTE). Copeland denied the application. In the audience at the time was a person not involved in the case. He introduced himself afterwards. He was a Sri Lankan who had been an attorney there. He had fled to the United States but was not licensed to practice US courts. He asked if I would be willing to be involved in other cases. I asked why, since Copeland had evidently not been convinced in this one. He said that applications from Sri Lanka were extremely difficult to get approved because of the ruling judgment of The Matter of T.

The Matter of T had been decided by the Board of Immigration Appeals on October 13, 1992. T was a man who had a grocery shop in the Jaffna area of Sri Lanka. This is a predominantly Tamil area in the North. In 1986, members of the LTTE began to visit his shop. They would take groceries and cigarettes. Since they were armed, he said, he did not object. He testified that he agreed with the pro-Tamil goals of the LTTE, but opposed their use of violence. As the LTTE strengthened its presence is the area, they also required him to work for them as a "process server," because of his knowledge of the people in the area. (This implies that the LTTE members who were threatening him were not themselves local.)

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In August, 1987, after the area was occupied by the Indian Peacekeeping Force (IPKF). The Indian Army arrested him and brought him to one of their camps. He was accused of supporting the LTTE and beaten by members of the Eelam People's Revolutionary Liberation Front (EPLF), another Tamil paramilitary group that was opposed to the LTTE and working with the Indian army. After three days his wife came to beg for his release. He was held for two more weeks and given medical treatment. When he finally returned he found his shop ransacked. According to the BIA transcript, what happened next was:

> The applicant related that in late October 1991, while returning to his home from a business trip, he encountered people fleeing the area. He indicated that he was informed that the Sri Lankan military had occupied the sector and that he should not return because of his work for the LTTE. He stated that, as a result, he went to stay with relatives in Jaffna. According to the applicant, he decided to leave Jaffna after 10 days because of the continued advance of the Sri Lankan military.
>
> The applicant testified that he traveled to Colombo, in southern Sri Lanka, where he found shelter with a relative. Members of the household were required to register his presence with the local authorities and that they did so on November 15, 1991. He explained that he was afraid to remain in Colombo because the EPRLF, as well as the Eelam National Democratic Liberation Front ("ENDLF"), were searching out LTTE supporters in conjunction with the Sri Lankan security forces. He related that he therefore obtained money from his brother in Canada and arranged to be smuggled out of the country on December 4, 1991. After his departure from Sri Lanka, the applicant learned from his brother, who had contacts in Colombo, that the police had come to search for him.

The BIA conclusion was:

> (1) The Government of Sri Lanka does not persecute ethnic Sri Lankan Tamils on the basis of their ethnicity or "on account of" their championing of Tamil interests or political rights.
>
> (2) Neither the relief of asylum nor of withholding of deportation provides for refuge "on account of" human rights abuses unconnected to the grounds enumerated in the Immigration and Nationality Act, i.e., race, religion, nationality, membership in a particular social group, or political opinion.
>
> (3) An ethnic Tamil alien from Sri Lanka who was forced to assist the Liberation Tigers of Tamil Eelam ("LTTE"), a separatist Tamil terrorist group, under threat of harm, did not establish that the LTTE was motivated to punish him because of his political views or persecute him on account of any of the other grounds enumerated in the Act.
>
> (4) In light of the historical context of the Sri Lankan civil war, an ethnic Tamil alien suspected of having ties to the terrorist group LTTE failed to demonstrate that the human rights abuses he suffered at the hands of the Sri Lankan security forces, Indian Peacekeeping Force, and allied Tamil

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> organizations in reaction to LTTE terrorism amounted to persecution on account of any of the grounds enumerated in the Act.

The BIA analysis does not describe the full hopelessness of T's situation. Being apprehended by the Sri Lankan army as a possible LTTE member or supporter in Jaffna at that time would very likely result in torture and possibly death. The LTTE was equally dangerous. In addition, the BIA's construction of the grounds for persecution as though they had to be assessed separately arbitrarily precluded recognizing that the danger he faced was precisely because of his ethnicity and political opinion conjointly—that he was Tamil *and* opposed the methods of the LTTE.

Sri Lanka had experience steadily increasing levels of civil violence and political instability since the early 1970s. If one looks only at the religious or political identification of the main groups involved, it could seem that the government is simply responding to ethnically diverse trouble-makers. Beneath this, however, there is a single cause and it lies in the increasingly authoritarian structure of the government itself. There has been a steady increase in the domination of the economy by the central government and an equally steady increase in the domination of the government by a very small and very wealthy urban elite headed by just three families, all of the numerically dominant Sinhalese Goyagama caste: the Senanayakes, the Banderanaikes and the Jayawardenes.

There were and are two main political parties in Sri Lanka. The Banderanaikes have dominated the leading left-communist party in its various forms. Initially, this was the Sri Lankan Freedom Party (SLFP). The Senanayakes and Jayawardenes have dominated the leading right-capitalist party, the United National Party (UNP)). Up to the time this case was finally decided, in 2001, the only Prime Minister not to be from one of these families was R. Premadasa[4], UNP, elected in 1988 and assassinated in 1993.

The governmental changes have been brought about by a series of ethnically divisive laws passed by the Sinhalese-majority parliament that the Sinhalese elite have promoted as in the interest of ethnic equality and fairness but that Tamils have seen as discriminatory. Soon after Sri Lanka became independent in 1948, the parliament passed the Citizenship Law. Tamils have long been conventionally divided between "indigenous" Tamils who have presumably been in Sri Lanka since early in its history and "Indian" Tamils who were brought to Sri Lanka by the British in the colonial period. The stated purpose of the Citizenship Law was to limit citizenship to "indigenous" Tamils. It required Tamils who wished to be citizens to demonstrate that their father and in some cases grandfather had been born in Sri Lanka. Since births in Sri Lanka, as in the rest of South Asia, are rarely noted officially and birth certificates are not normally issued, there was no way for most Tamils to do this, especially the rural poor. The effect of the act was therefore to deny citizenship to the great bulk of Tamil plantation workers, about 1 million people. Since these people also had no claim on citizenship anywhere else, they therefore became stateless. A further Act, in 1949, restricted voting rights to those defined as citizens in the Citizenship Act. This removed voting rights that the non-indigenous Tamils had previously held.

In 1956 Sinhalese alone was made the national language, meaning the language of instruction in schools and for passing examinations for government employment. Subsequently,

[4] Premadasa had, however, previously served as Prime Minister under J.R. Jayawardene.

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by a number of different laws, quotas were set for Tamils and Sinhalese on the basis of their proportions in the population. When applicants for jobs or university positions took examinations they were scored against others in their group only. After 1970, scoring systems for university positions university admissions required Tamil students to make higher marks than Sinhalese students in order to be admitted. Similar measures applied in other areas.

Ethnic and political conflict has been further exacerbated by the increasing use of direct political patronage to secure votes. This has happened in two ways. First, the elected officials have gained control of more and more of the educational and employment positions available. This includes all manner of direct government jobs, undermining what had been a competent and professional civil service. It also included employment in nationalized businesses and farmland allotments on former colonial plantations that the government has nationalized. The SLFP has led the way by nationalizing more and more kinds of businesses each time it came to power and then handing them out to their political supporters, but the UNP has maintained the positions that the SLFP had thus nationalized and used them the same way.

Second, a sequence of governmental changes has moved legislative power to the President and Cabinet while transforming the parliament into a body primarily concerned with dispensing patronage.

The greatest benefit from these changes accrued to the urban elite itself, who were both Sinhalese and well-prepared to compete in examinations. They were assured admission to educational positions and employment virtually without regard to ability. Urban elite Tamils could still get positions, but they had to be relatively more capable to do so and the positions available to them were cut by about half. The most frustrated group were the non-elite rural Sinhalese, who had less access to education and no patronage connections. Accordingly, the first major political violence was the JVC "youth rebellion" in 1971 of Sinhalese from rural areas and small towns in the south. This was suppressed by the Army in 1973. Reactions by a series of Tamil groups followed, each more violent and anti-democratic than its predecessor. The LTTE was the culmination, completely rejecting democracy, seeking an entirely separate state with a militaristic and totalitarian system of control.

V, my client, was Tamil but Christian by religion. She was an “Indian” Tamil, born in Sri Lanka. She graduated high school in a town on the west coast of Sri Lanka south of Colombo in 1975. In 1980 she and her family moved to Colombo. Her father managed an agricultural plantation. In 1983 she met Dr. Rajani Thiranagama, a medical doctor at that time working in the General Hospital in Colombo.

Thiranagama had formed the Legal Support Network for the Stateless in order to try to regain rights for Tamils who had been disenfranchised. V began working with the organization and became its executive secretary. In 1985, V’s father was killed in ethnic violence in Colombo. In January, 1987, V married. Her husband was an electrical engineer.

Thiranagama moved to Jaffna, the principal city in the predominantly Tamil northern part of Sri Lanka. She established the University Teachers for Human Rights with a few colleagues at the University of Jaffna. At the time that I was conducting my research to test V’s claims, they had website hosted on Geocities (USA) that gave a brief history. It said that the organization received funding from the European Commission on Human Rights among others. Although the organization continues to operate, it does not do so at the University of Jaffna. On September 21, 1989, Thiranagama’s house was broken into and she was shot dead. After the murder, the other founding members fled. (http://w\vw.geocities.corn/uthrj/history.htm. Accessed 24 May 2001). The murder was never solved. An LTTE affiliated website in the US attributed it to a

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Tamil group working with the Indian Army and said it was done behest at the behest of an Indian Colonel, Sasha Kumar. Others think it was done by the LTTE.

Thiranagama had been writing a book on events during the October, 1987, offensive on Jaffna by the Indian Peace Keeping Force. The title was *Bloody Palmyra.* It documented the crimes and atrocities of both sides. Amnesty International had described it in *Sri Lanka Briefing*.

Shortly after the murder, still in September 1989, Inspector of Police B. G. G. Devasurendra came to V's house in Colombo to search for Thiranagama's manuscript. Devasurendra was a high ranking officer in the Black Cats, a special police unit involved in extrajudicial murders and reporting directly to President Premadasa. The activities of this unit and Devasurendra's part in them were well attested, in part because in February 1990, Devasurendra[5] was charged with murdering a prominent newspaper reporter and actor, Richard Zoysa. This led to numerous press reports describing Devasurendra, this particular unit, and repeated occasions on which a scheduled trial was cancelled and a new date set.

On December 23, 1989, V's husband was arrested at a police checkpoint on the highway between Colombo and the place where he worked. V attested that she was later informed that he had been taken to a detention camp. It was feared that he would have "disappeared," meaning that he would have been murdered in custody with no record. The next day, Christmas 1989, Devasurendra came to her house with three other officers, entered, questioned V and her mother, accused V of supporting the LTTE, locked her mother in another room, and while the other officers were in the house, threatened V with a revolver, raped her, and threatened to kill her and have her husband disappear if she complained. He left taking documents and jewelry,

On the next day, December 25, V and her mother visited a priest. He directed them to a human rights attorney. The attorney said that although he would speak to the Attorney General and file an application for a Writ of Habeas Corpus on behalf of her husband with the Supreme Court, nothing would come of it and that she should flee the country. They took shelter in a Hindu temple until arrangements could be made, arranged travel by air to Mexico, and crossed the border from Mexico to the US with a party of illegal immigrants. She immediately declared her presence and asked for asylum.

Meanwhile, the application for the writ of *habeas corpus* was filed and the High Court granted it. In fact, the Attorney General issued about 6,000 writs. V's husband was released on August 17, 1990. Although ordered to remain in Sri Lanka he immediately went into hiding and left Sri Lanka, came to the United States, applied for asylum, and received it. V did not know this while she was traveling.

I provided the court with a chronology of relevant events leading up to and surrounding those described by V and a nine-page deposition explaining their significance. I argued that that she was persecuted "on account of" three of the five protected grounds, namely race, membership in a particular social group and political opinion, and that it was reasonable to fear that the danger of persecution on these same grounds would continue into the foreseeable future.

In relation to the BIA opinion in the Matter of T, the most important points in my argument concerned her Tamil identification and her political identification. For her Tamil identification, I argued that it did not matter that there were Tamils in the government or that not all Tamils were persecuted. What mattered was that her identification was clearly a reason for singling her out and accusing her of belonging to the LTTE. This accusation would have made

[5] Also charged was Senior Superintendent of Police Ronnie Gunasinghe.

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no sense for a non-Tamil. But since she was Tamil, it was a death threat. For political opinion, my argument was that from the point of view of the government in Sri Lanka at that time—a government committing massive human rights abuses—being a member of a human rights organization was a political opinion, and, again, it was clearly the basis of the assault on her person, the detention of her husband, and the threat to her life.

I attended the initial immigration hearing. I was told that my appearance was not necessary but the hearing officer allowed me to address him as a courtesy. I could not hear the testimony otherwise. This assured that the file was free of initial misstatements. The case was not resolved until July 23, 2001, when I went back to Los Angeles and testified in the court of Judge Hrycenko. V's husband was also in the courtroom. Judge Hrycenko granted asylum at the end of the hearing. My impression was that the INS attorney agreed as well.

S

Another case from Sri Lanka I will call the matter of S. It, too, was not appealed and therefore has not become publicly available as a Title III court record.

S was a Sinhalese Buddhist associated with the United National Party (UNP). He said he conducted D. B. Wijetunga's campaign for President of Sri Lanka in the June, 1994, general election. The UNP lost, bringing the opposition People's Alliance (including the Sri Lanka Freedom Party) to power. In the course of the election, SLFP operatives under the control of D. M. Jayaratne had attacked and injured party workers of the UNP in S's constituency. S filed charges with the police, leading to Jayaratne and others being arrested. After the election, the People's Alliance government appointed Jayaratne Minister of Agriculture.

S's documentation included an endorsement from Wijetunga that said in part: " Mr. [S] was employed as an executive in the Peoples Bank, a state institution. He was also the President of Jathika Sevaka Sangamaya, a United National Party Affiliated trade union of the said Bank, and had to leave his employment due to political victimization when the present government was installed in 1994."

The hearing was in Los Angeles. I did not record the name of the judge.

After winning the 1994 election, the People's Alliance government appointed a new Board of Directors for the People's Bank, in which S worked. They included D. M. Jayaratne. The Directors ordered S to deny loans to businessmen who did not support their party. S considered this unethical and evidently objected, but did as ordered. Nevertheless, the Board in various ways increasingly put pressure on him to retire. These included physical threats. He was explicitly told, according to his statement, that a person from his party should not be such a high position. After two serious physical attacks, one home invasion at a time when he happened by chance to be elsewhere, and numerous verbal threats to his life and those of his family members, he fled and applied for asylum in the United States.

My testimony was based on a set of questions asked by his attorney on the assumption that they were what the court would ask. They included "Why not assume that the attack on S was simply criminal rather than political?" and whether the reported assaults and threats were not out proportion simply as retaliation for filing the charges against Jayaratne and his workers in the 1994 election.

As in the case of V, I provided a chronology and explained the progressive political domination of the administration and economy in an effort to control ever more political patronage, led by SLFP. As it had happened, I had been to Sri Lanka about a year before the 1994 election in connection with a consultancy for the United Nations Centre for Regional

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Development. We had talked to many administrative officials about the progressive erosion of administrative capacity. I had specifically asked about banks and the answers indicated that up to that time the banks were still operating professionally. But there was little left to take over, so it is perfectly logical that when the SLFP regained power they would do what S was describing.

S had obtained his position and held it on the basis of merit, when the bank made loans according to business, not political, criteria. S did not say that the SLFP had announced that they would take over the banks as part of their 1994 election campaign, but it was reasonable to suppose that they would eventually do so in the light of their previous history. So while he could be viewed as defending his economic interest by supporting the party that would allow him to keep his position, he was also opposing the further expansion of the destructive national spoils system. He also represented a substantial threat to Jayaratne's personal political prospects because of the possibility that the criminal charges S had filed would be sustained by the courts, which were still independent. It was also possible that S might use his very substantial support within the UNP to run for office himself. The threats and attempts on his life were therefore not just a matter of retaliating for filing charges in regard to the 1994 election but were "on account of" his political position more generally.

I flew to Los Angeles the day before the IJ hearing, met with S and the attorney, and stayed overnight at S's house. This was partly to save him the expense of paying for a hotel room and partly to do everything I could to explain what the court would view as appropriate documentation supporting his narrative, and to urge him to get it. There is a twelve hour time difference between California and Sri Lanka. He agreed to try and was on the telephone to associates in Sri Lanka until well after midnight asking them to fax testimonials to identify him and his past positions. I went to sleep before he finished. In court the next day, the opposing attorney asked how I knew these letters were authentic and pointed out that several of them appeared to be from the same typewriter, although they were on stationary from different offices. This was after S had testified. The attorney had not asked S. Since I had heard him on the telephone and knew the process, I had been confident that the letters were authentic and had not looked at them this closely. I therefore had not noticed this and had not asked S about it. I could only explain to the court that boilerplate language that appeared to come from a secretarial primer was normal and that I normally ignored it. What I looked at in the letters was the letterhead, the titles, the system of logging numbers, and the rubber stamps that are used to indicate the offices the correspondence comes from. Every official letter is logged and stamped, and these were all as they should have been. After the hearing, S explained to me that the officials writing those particular testimonials shared a secretary. Notwithstanding this problem, asylum was granted.

IMMIGRATION LAW IN CROSS-CULTURAL PERSPECTIVE

Copeland and Hanson have been repeatedly upheld by the BIA and by federal courts. The BIA and the courts have thereby also endorsed the methods of reasoning they represent. The methods are arbitrary. They do not constrain the judge to draw a conclusion from evidence by coming to understand contexts and concepts that are unfamiliar, but rather allow the judge to dismiss anything unfamiliar as not evidence at all. If this kind of reasoning had been used in domestic cases, in which the appeals courts had indigenous familiarity with what the events described would have signified in context, the reasoning would quickly have been rejected. Such arbitrariness has a much more direct causal relationship to the pattern of inconsistency that

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Ramji-Nogales *et. al*. describe than the judges gender and occupational history. What, then, can be done to correct it?

From the perspective of implementing the law itself, there are three key concepts that seem to me to be treated by attorneys and judges in asylum courts in a way that fails to place them in their proper historical and logical contexts. The first is how to construe the idea of "wide judicial latitude" in determining credibility. The second is how to construe the idea of persecution. The third is how to construe the phrase "on account of."

There are many reasons why judges in such cases must have wide latitude to decide credibility. First, it would be unreasonable to expect a person fleeing persecution to bring documentation of that persecution. It is often difficult for them even to obtain passports and visas. Second, the physical and documentary evidence that courts do have most often comes from the applicants themselves, not an independent agency. Third, while US embassies and other authorities in the applicant's country of origin can sometimes verify documents that have been presented, this is often not possible. And fourth, the reasons for fleeing often include the fact that the applicant has been charged with or even convicted for alleged crimes which either involved actions that would not be regarded as crimes in the United States or that the applicant says never occurred at all. An asylum judge cannot decide whether the applicant merits asylum without deciding on the authenticity of such provided documents or the truth or falsity of such charges. So the question is not whether discretion must be allowed, but what guidance can be provided for its lawful or rational use.

The most objective criterion for determining whether testimony is credible is consistency with documented local conditions. This is usually precisely what judges do not know and where the need for expert witnesses is clearest.

Absent local knowledge, the second criterion that judges and attorneys seem to rely on is internal consistency. If testimony is self-contradictory, either one or both of the opposed claims must be false. The problem is that while this may seem to be a purely logical matter it, actually it is not. It, too, usually depends on local knowledge. The case of Dhala presents one very simple example. To an American, the claim that a person has married one woman is inconsistent with the claim that he is married to another, hence affecting credibility. Seemingly, it was to judge Hansen. Under India's Muslim Marriage Act, however, there is no inconsistency. In a more complex example, in America to say that person was on the city Council of a major city and subject to police harassment may seem a self-contradiction. In Hyderabad, it is not. The reason for the difference is that in America the police are part of the city administration and the city administration is under the control of the city Council. It is self-contradictory to say a person persecutes himself. In Hyderabad the police are an independent bureaucracy and the city council threatens their autonomy and power.

The third kind of criterion for determining credibility is consistency with supposed human universals. One example is Copeland's evident belief that people living in a society where corruption is endemic cannot formulate the same clear personal standards of morality as people in a society without such corruption. Usually, as in this case, it is a short step from stating such a supposed universal openly to identifying evidence against it. One might as well say a slave cannot envision freedom, or a hungry person cannot imagine having enough to eat.

There are universals, but they are not of this simplistic sort. While no specific action or object will be universally agreed upon as good or bad within cultures or across cultures, it will always be agreed that it is good to do good, right to do what is right, correct to value what is valuable, and so on. To a shallow person this might seem to be tautologous, and therefore

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empty. But it is not. It is saying that cultural definitions must be applied consistently. To be applied consistently cultural ideas and values must actually be consistent, and in fact they always are.

Every human community has a variety of organizations of different kinds: kinship, religious, productive, political, and so on (Leaf, 2009; Leaf and Read 2013). Some of these correspond to what is familiar to us in America. Some are very different. All of them, however, are defined with distinctive systems of indigenous ideas. That is, they are all distinctive in relation to one another. Political ideas are distinguished from religious ideas, are distinguished from kinship ideas and so on. The ideas that define any one kind of organization must be consistent among themselves, and this consistency must be adhered to in their usage. The reason is that these are rational requirements for ordered communication and perception. This is very important to keep in mind when trying to decipher what testimony means and whether it is credible. So, for example, if relatives are defined culturally as people who share property rights and that one can count on for support to preserve that shared property, then we expect this definition to be used consistently in all contexts described as involving relatives. If a faction is defined as friends who one supports in the face of the possibility of physical danger, in opposition to one's enemies, then we expect this definition to be used consistently where the idea of factional conflict is used, and so on. To find self-consistency in testimony, one must first find the cultural premises of the testimony. Some judges and attorneys can do this; others evidently cannot.

The problem of determining what sort of behaviors or ideas can be taken as universals is directly related to the problem determining the grounds for persecution under US law. To anthropologists, who look at cultural ideas closely, it is obvious that there is no universal conception of the stipulated bases a persecution in the 1980 law: race, religion, or politics. Even "social group" is doubtful (Wagner 1972). But persecution is a complex idea, not a simple one. It is not just inflicting physical harm. Legislation and court opinions recognize that it also involves an idea of punishment and that this punishment must be undeserved by the person on whom it is inflicted. Every society has some ideas of punishment and reward, just as every society has some ideas of good and bad. So every society must also have some notion of punishment for those who do good, and therefore who do not deserve it, as distinct from punishment for those who are guilty of something and do deserve it. Persecution is, most basically, punishment of the innocent and is therefore very like the idea of injustice itself. There is no reason to doubt that some such idea is present everywhere, as is the further distinction between such punishment of the innocent that is accidental and that which is intentional. The operant question for American asylum judges is whether the law they are applying recognizes or intends to recognize the universality of persecution in this sense. The answer is that it does.

The *Refugee Act of 1980* was passed within living memory of World War II, the Korean War, and the Viet Nam war. It implements international treaties on the status of refugees and the right to asylum going back to the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol*. The American definitions of a refugee and the grounds of persecution come from the *Convention*. World War II included the Holocaust. The Korean war and the Vietnam war were both bitter civil wars in which the United States had taken sides, and were followed by waves of displaced persons from various ethnic, political, and social communities from the affected regions who had been our allies and could not remain where they were on that account.

During World War II, there were troubling questions about whether the United States should have done more to accept those fleeing Nazi persecution. After the war, as the extent of

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the persecution came to be more widely known, opinion in the United States and Europe solidified: "never again." United States efforts to accept refugees from Cuba, the USSR, and our allies from Korea and Southeast Asia represented different American forms of this new conception. With little debate, but also with no significant protest, national policy became substantially more universalistic and proactive. Former biases in favor of northern Europeans and against Southern Europeans, Jews, and Asians disappeared from the law.

The *Refugee Act of 1980* institutionalizes this shift. Its stated purpose is to "respond to the urgent needs of persons subject to persecution." There is no restriction for where those persons are. This has to be construed as comprehensive. Given this, it makes no sense to read the law as providing asylum for persecuted people from Asia and other regions outside of Europe while at the same time reading it to exclude distinctively non-European ways that such persecution has been organized.

In the European/American social and cultural context, the five "enumerated grounds" of the act, namely, race, religion, nationality, and membership in a particular social group, are actually comprehensive. They cover all the groups persecuted by the Nazis or otherwise historically subject to persecution in the West. There is no mention of caste, tribe, gotra, professional status, or whether one wears eyeglasses because they have not been similarly used in the West. But they have been used the same way in Asia. So should they be recognized by US courts? If we recognize the five enumerated grounds as intended to signify also any similar ascribed status that an entirely innocent person may bear and for which they may be unjustly punished, the answer is that they should be recognized. If we construe them only in European terms while applying them in non-European situations, then we are excluding non-European victims of persecution in a way that contradicts the stated intent of both the United States law and the international treaties that the law implements.

Similar reasoning clarifies the meaning of "on account of." This is not a well-established phrase in the philosophy of law, but there is a long history of argument concerning the closely related concept of "intent." The overwhelming consensus is that this cannot mean an inner psychological state. Criteria for legal judgment must be observable. For intent, in Holmes' language, this comes down to the "manifest tendency" of an action to produce predictable consequences. Applying the idea here, the clearest criterion for whether some injury is being done to a person "on account of" a given category would be whether the manifest tendency of the action is to injure only that individual or others in the category as well. If the latter, then the action should be construed as "on account of" that person's membership in the class. In the matter of Noori, for example, the attempts to arrest or injure him were manifestly likely to weaken the MQM as a political party and Mohajirs as a community within the Hyderabad system of administration. In the matter of Mirza, the threats were aimed at damaging the Shia community. In the matter of S in Nepal, the attack on S was aimed at increasing the power of the Maoists and weakening the Nepal Congress party. In the matter of V, the action aimed at V was intended to silence and suppress the human rights organization that V belonged to and weaken opposition to President Premadasa. In the matter of S in Sri Lanka, the action aimed at S was intended to strengthen the political position of the SLFP and to weaken and suppress the UNP.

CONCLUSION AND RECOMMENDATIONS

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Every year, for tens of thousands of people from around the world, the American immigration courts are the face of American justice. Many have reason to be disappointed with what they experience. When they are not treated fairly, it injures the reputation of America as whole and undermines the standard of justice that most Americans want the country to stand for and that genuine rule of law requires. It is no excuse to point out that they are not "real" Title III courts but are rather acting on behalf of the Attorney General.

Immigration Judges cannot become ethnologists, but they are obligated to decide according to the same ideas of a legal decision as guide ordinary courts. This is recognized in the language in which the 9th Circuit remanded Cheema v INS:

> As the Board did not reach the exercise of its discretion, we remand so that it may do so.The discretion to be exercised is, of course, not that of a despot. The Board may not use its discretion to issue a decision that is "arbitrary, irrational, or contrary to law." Lopez-Galarza v. INS, 99 F.3d 954, 960 (9th Cir. 1996). The Board must provide an objective basis for its holding. Rodriguez-Matamoros v. INS, 86 F.3d 158,161 (9th Cir. 1996). (US Ninth Circuit, Cheema V. INS (2004) 229)

To accomplish this, is reasonable to expect a solid grounding in the 1951 *Convention relating to the Status of Refugees* and its 1967 *Protocol* along with a serious introduction to the specific tradition of jurisprudential analyses that lies behind it. This is the line of analyses of the interrelations between law, reason, natural rights, and justice from Grotius through Montesquieu and Kant, and in the American case thence at least to Holmes and Cardozo. Such a grounding ought logically to lead to a more disciplined use of the wide investigative and interpretive discretion that the law gives them.

A more appropriate and far-reaching judicial perspective will not obviate the need for the increased use of expert witnesses to assure factual consistency and plausibility. It will, rather, facilitate it. Background information that expert witnesses can provide is of many kinds. First, what are the groups or categories that an individual may be placed in, and what do they mean? What are the organizations? A family in India is not the same thing as a family in the United States. Religion is not at all the same thing to a Hindu as to the Christian. Second, how does this apply in this case? What is a threat? What kind greetings are normal and friendly and what kind are upsetting? If someone says something threatening to X, how does X know whether to take it seriously? What is an insult? What is a complement? And very importantly in any given situation, what options does a person have?

I also have three specific procedural recommendations concerning expert witnesses. 1) To my knowledge, the INS/OEIR does not now use expert witnesses. They should. If there is no budget, it should be provided. 2) Cases usually go wrong at the initial interview stage. Normally, these hearing officers also do not use expert witnesses. They also should. Finally, 3) when an applicant comes to court, judges should be strongly encouraged to allow expert witnesses to hear all the testimony. If there are translators, the procedure should be flexible enough to allow expert witnesses to discuss their translations with them in a way that is recorded.

Unfortunately, however, it seems likely that if these recommendations were to be followed there would not be enough expert witnesses to meet the demand. In this eventuality, my further recommendation is to follow the practices of the Immigration and Refugee Board of

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Canada, and to share information with them[6]. Evidently, when they find that questions of fact and interpretation repeatedly come up in a group of cases from a region, they try to arrive at an authoritative understanding that they provide their courts. The procedure as I have experienced it involves an initial inquiry by email or telephone followed by a telephone conversation. I then write the statement addressing their questions, giving bibliography where possible. They usually follow up again with a further telephone conversation in which they describe their understanding of the answer. Their analyses are consistently balanced and mature. Perhaps I should add that they have not offered pay for this and I have not asked for payment. I consider it part of my duty as a scholar to help in this way and I am sure others would feel the same. If this kind of information were available to United States hearing officers at the point of the initial interviews, they probably would resolve many more cases before they get to court. This would be far better than what we have now.

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[6] The British Home Office also produces Country Information and Guidance notes that are accurate and up do date, but are focused on giving advice to judges regarding specific provisions of British law.

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