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David Ingram

Loyola University Chicago, [dingram@luc.edu](mailto:d Ingram@luc.edu)

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What an Ethics of Discourse and Recognition Can Contribute to a Critical Theory of Refugee Claim Adjudication: Reclaiming Epistemic Justice for Gender-Based Asylum Seekers 5/22/20

David Ingram

Department of Philosophy/Loyola University Chicago/ dingram@luc.edu

[David Ingram has written extensively on critical theory and its application to global development]

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Abstract: Using examples drawn from gender-based asylum cases, this chapter examines how far recognition theory (RT) and discourse theory (DT) can guide social criticism of the judicial processing of women's applications for protection under the Geneva Convention Relating to the Status of Refugees (1951) and subsequent protocols and guidelines put forward by the United Nations High Commissioner for Refugees (UNHCR). I argue that these theories can guide social criticism only when combined with other ethical approaches. In addition to humanitarian and human rights law, these theories must rely upon ideas drawn from distributive, compensatory, and epistemic justice. Drawing from recent literature on epistemic injustice, this chapter shows how DT and RT illuminate the failure of asylum courts to respect the credibility of women's testimony and understand their trauma. I argue that the institutional privileges accorded to asylum boards and the interpretative frameworks available within immigration law impose a burden of proof on women asylum applicants that they cannot meet. I maintain that this burden of proof is unjust because it violates the implicit discursive procedures of argumentative fairness and, in addition, disrespects women as privileged witnesses to their own criminal victimization. I conclude that this injustice need not reflect an irremediable tension between competing epistemic and hermeneutical standpoints.

Introduction

In the past few years recognition theory has joined discourse theory in the arsenal of normative perspectives that critical theorists have brought to bear on the problem of migration (Ingram 2009, 2018; Thompson 2019; Schweiger 2019). Critical theories provide important supplements to mainstream ethical approaches to migration studies. Human rights and value-maximizing approaches, when applied as a form of ideal, philosophical theorizing, disregard or downplay the practical constraints imposed by legal, economic, and political institutions. Like familiar cosmopolitan applications of Rawlsian social contract theory (Carens 1987), these mainstream approaches generally endorse an "open borders" policy of migration.¹ Such cosmopolitan approaches must confront the communitarian

¹ Interestingly, Rawls himself eschews any cosmopolitan application of his theory in his *Law of Peoples* and instead asserts that under ideal conditions of a "realistic utopia," individuals would have no political or economic incentive to migrate. Appealing to Walzer's communitarian defense of territorially bounded states as essentially for

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

Critical theories of discourse and recognition share this communitarian insight to the degree that they derive their normative standards from the values and norms commonly understood to underwrite institutional practices. However, unlike most communitarian theories, the values and norms they find to be regulative of liberal democracies straddle cosmopolitan and communitarian rationales. Critical theories of discourse and recognition thus postulate a link between universal human rights and local democratic lawmaking and adjudication that is simultaneously necessary and conflict-ridden (Benhabib 2006; Habermas 1998; Honneth 2015: 278). While endorsing less restrictive border policies for the most vulnerable migrants, these theories remind us of the costs that migration imposes on migrants who are forced to uproot themselves from institutionalized relationships in which they achieve recognition as givers and recipients of love and care, claimants to and co-legislators of rights of citizenship, and esteem-worthy contributors to society (Ingram 2018b, 2020b).

This preliminary discussion about the institutional ambivalence traversing theories of discourse and recognition needs further elaboration. Before undertaking this task, a good way to situate my argument is by asking how these theories might guide our critical thinking about one specific institutional practice that bears on the ethics of recognizing migrants: the judicial hearings in which women plead for refugee protection in fleeing various forms of gender oppression.

Gender Asylum Cases in the U.S.: Reconceptualizing Persecution and its Social Recognition

Should women who seek asylum from gender related domestic violence be recognized as refugees? The question is important, because being granted refugee status triggers the non-refoulement conditions of the 1951 Geneva Convention Relating to the Status of Refugees and provides more protection than lesser forms of temporary or qualified asylum that are extended to persons whose lives are endangered by natural disasters, civil wars, and other circumstances not related to the targeted persecution of specific groups.² The question thus hinges on whether women and indeed all persons who suffer

fostering conditions of civic solidarity, he denies that migrants have a right to enter a people's territory without their prior consent (Rawls 1999: 39), but also notes that states have a qualified duty to assist refugees.

² As a part of the Immigration Act of 1990, the United States began admitting asylum seekers entering from designated countries suffering from natural disasters or civil violence under its Temporary Protected Status Program (TPS). This program does not provide permanent refuge (beneficiaries must apply for extensions) and in 2017 the DHS decided to terminate TPS for six of

gender-related oppression can be recognized as distinctive, targeted groups within their nation and how this recognition is to be conceptualized in the absence of official government persecution.

To begin answering this question, I propose that we consider the following cases in American refugee law, as discussed by Karen Musalo, an attorney who represented some of the applicants:

Case 1. In the *Matter of Kasinga* (21 I. & N. Dec. 357 [BIA 1996]) the U.S. Board of Immigration Appeals (BIA) overruled an immigration judge (IJ) who had previously determined that a woman, Fauziya Kassindja (FK), who had entered the country seeking asylum from female genital cutting (FGC) and a forced marriage in Togo, should be deported (removed). The IJ had ruled that FK's testimony lacked "rationality," "internal consistency," and "inherent persuasiveness": FK had managed to avoid FGC until her father's death, despite her claim that FGC was pervasive. In addition to this alleged contradiction, the IJ noted that FGC could not be considered persecutory, because it was a cultural practice endemic to FK's tribal group. Although Immigration and Naturalization Services (INS) intervened on FK's behalf against the IJ's ruling, they agreed with the IJ that the cultural practice of FGC did not fit the definition of persecution as set forth in a ruling precedent, *INS v. Zacarias* (1992), which required proof of "malignant and punitive intent." The INS sought to waive this requirement in the case of FK, arguing that in most cases practitioners of FGC "believe they are simply performing an important cultural rite that binds the individual to society." In its stead, the INS proposed a new framework that would allow anyone to seek asylum if they suffered a harm that "is so extreme as to shock the conscience of the society from which asylum is sought," viz., a harm that is extreme, was resisted, and inflicted not as punishment for simply refusing, but in the course of actually suffering, the conscience-violating action. The BIA, by contrast, rejected the INS proposal to waive the intent (or nexus) requirement, partly because the INS construction would not provide a rationale for granting asylum to children, who often do not resist FGC³.

the ten listed countries (El Salvador, Nicaragua, Sudan, Haiti, Honduras, and Nepal). This decision has been challenged in the courts. Once TPS is terminated, beneficiaries from delisted countries (such as Liberia) can apply for Deferred Enforced Departure (DED). Sweden also provides subsidiary protection to those who do not qualify for refugee status, but beneficiaries of this program, unlike refugees, do not have their costs for family reunification and travel documentation covered.

³ The INS requirement that the harm in question not be inflicted as punishment is also problematic from the standpoint of the UNHCR 2002 guidelines (see below). The guidelines recognize two types of gender asylum claims: one in which the *form of persecution* is uniquely or

The BIA instead reasoned that social context, such as a cultural pattern of patriarchal domination, apart from the conscious motivation of the individual inflicting the harm, could suffice to establish persecutorial intent (Musalo 2010: 54).

Case 2: In the *Matter of R-A-* (1996), an IJ ruled that a Guatemalan woman fleeing from spousal beatings who had been denied protection by Guatemalan police authorities merited asylum. The IJ found that Rody Alvarado belonged to a persecuted social group possessing “immutable and fundamental characteristics” as required by ruling precedent (*Matter of Acosta* [1985]), namely, “Guatemalan women who have been involved with Guatemalan male companions, who believe that women are to live under male domination.” It further noted that Alvarado had resisted her husband’s acts of domination, thereby expressing a political opinion for which he persecuted her (Musalo 2010: 56). In 1999 the BIA reversed the IJ’s grant of asylum. In doing so, it appeared to reject its own reasoning in *Matter of Kasinga*. First, it denied that social context, combined with government toleration of violence against women, was sufficient to constitute an act of intentional government persecution. Second, in addition to the *Acosta* requirements for defining a social group possessing immutable and fundamental characteristics (in this instance, one defined by gender and married status), the BIA now required that a persecuted group also be “recognized and understood to be a societal faction” possessing “social visibility” and “particularity.” Because in 1999 Guatemalan women who resisted spousal violence did so privately, in the confines of their homes, and were diffusely spread throughout all regions, classes, and subgroups of Guatemalan society, the BIA reasoned that they could not count as a persecuted group under this new requirement (Musalo 2010: 57). Fortunately for Alvarado, her case was eventually taken up by the newly created Department of Homeland Security (DHS) and resolved favorably under the Obama administration. The DHS affirmed that the *Acosta* requirement for membership in a social group possessing immutable and fundamental characteristics was sufficient. Besides rejecting social visibility and particularity as requirements, it also affirmed that the applicant’s burden of proof regarding demonstration of persecutorial intent could be established by circumstantial evidence showing that

disproportionately inflicted on women (such as FGC, forced marriage, and rape), apart from being related to one of the 1951 Geneva Convention grounds; and one in which the *reason for persecution* is based on gender (or sexual orientation), apart from whether the persecution in question takes a gendered form. Thus, a woman can be denied equal rights to work outside the home, testify in courts of law, or attend school because of her gender. In many cases, both types of gender-claims are raised (as when women are raped because of their political activism on behalf of women’s equality). The INS requirement does not appear to recognize as persecution cases in which women are raped or killed as punishment for their activism on behalf of women’s equality.

such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect “a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society.” Thus, the abuser’s intention to persecute --- and the government’s collusion in furthering that aim---can be inferred from either his statements or actions, in combination with circumstantial evidence regarding social context and government inaction (Musalo 2010: 59).

These cases bring to the fore several distinct questions that are pertinent to the application of recognition theory, broadly understood. The first question addresses the philosophical (or conceptual) problems that attend any legal classification: Should women who suffer domestic violence and cultural oppression be legally recognized as refugees under U.S. law? The second, quite different, question addresses the ethical problems that attend any effort to conceptualize harms and injustices as instances of specific types of misrecognition: Should women, men, children, and transgender persons who suffer gender-based restrictions and identity-shaping socialization be recognized as wrongfully oppressed, or disrespected? If so, should this type of misrecognition be understood as a form of persecution, or violation of a basic human right; or should it be understood as a lesser harm, such as a denial of equal social esteem or equal social inclusion (as distinct from unequal social esteem and unequal social inclusion)? If it should be understood as a form of persecution, how is persecution as a distinctive type of human rights violation to be understood? Must persecution always be undertaken or at least officially supported by the state, or can it be undertaken by non-state members of society in a way that is permitted, or at least not prevented, by the state? Must persecution always target a religious, racial, national, political or otherwise publicly visible subgroup? Or can it target a more amorphous and less publicly visible sub-group, such as the sub-group of all who are deemed to have suffered a severe diminution of their human rights on account of being compelled to conform to socially imposed gender norms?

This latter question ---which arises within an ethics of recognition as it grapples with how restrictive identity-based socialization can constitute an ethically regrettable form of misrecognition that can rise to the level of a significant human rights injury---clearly has a bearing on how U.S law should classify asylum seekers fleeing persecution. However, U.S law has been remarkably inconsistent in how it has been applied, since the jurisprudential, recognitive ethics according to which persecution should be interpreted has not been consistently worked out. By 2009 the BIA had determined that victims of domestic and gender violence could qualify for asylum, but in the *Matter of C-A-* (2006), the BIA reaffirmed its requirement that persons qualifying for asylum must be members of a social group that is both socially visible and particular. Particularity is needed to recognize the discriminatory targeting of subgroups within a population, the entire membership of which may be seen to suffer from untargeted cultural, economic or political oppression.⁴ Social visibility, by contrast, seems unnecessary and overly

⁴ North Koreans fleeing into China are economically and politically oppressed by their government. To regard them as if they were also persecuted---and thus as meriting refugee status---would eviscerate the meaning of persecution and overburden the mechanisms of humanitarian

exclusive. Uncomplaining and otherwise publicly silent victims of FGC as well as of other forms of domestic violence, not to mention “closeted” homosexuals and non-binary persons, are not socially visible, even though they are socially (mis)recognized within the culture as undeserving of respect and protection. Furthermore, as Musalo remarks, the BIA appears to be mistaken in thinking that the UNHCR Social Group Guidelines support its insistence on visibility as a necessary feature of an oppressed group.

In its *amicus* brief in the *Valdiviezo- Galdamez* (2009) case, the UNHCR proposes two *disjunctive* tests for identifying an oppressed social group: the “protected characteristics” tests (based on immutable and fundamental characteristics) and the “social perception” test (based on societal recognition). The social perception test is not required by the UNHCR and the UNHCR does not understand it to mean that “the common attribute [of the social group] be visible to the naked eye in the literal sense of the term [or] that it be one that is easily recognizable by the public (*Amicus Brief*, p. 11). What counts is that the social group in question be recognized by the society in question as a group that is not only subject to discriminatory societal treatment but is also deserving of this treatment, and also that the victim and his or her abuser can be assumed to know this. Thus, in the absence of direct forms of state persecution or in the absence of abuser’s stated persecutorial intent, social recognition of social group discrimination suffices to establish the nexus between victim harm and persecution.

Gender Asylum Cases in Sweden: Disrespecting Testimony and Misunderstanding Social Context

relief available to them (China would be compelled to process thousands of ‘refugees’ while abrogating its treaty responsibilities to the North Korean government). That said, China’s current refusal to recognize North Koreans fleeing economic destitution as refugees (the South Korean government also recognizes them as its own citizens) has led to their repatriation and subsequent imprisonment, torture, and execution as ‘traitors.’ One remedy to this tragic situation would be a change in China’s policy ---highly unlikely given China’s reliance on North Korea as a buffer against US geopolitical power---allowing for North Korean escapees to enjoy temporary protected status while transiting to South Korea. I thank Thomas Arms, S.J. for bringing to my awareness the desperate plight of North Koreans escaping to China and the inadequacy of current refugee law to remedy their situation. See his MA Thesis: *Escape from China: A Legal and Philosophical Understanding of the North Korean Escapee’s Journey for Freedom* (unpublished ms).

Swedish gender-asylum cases raise similar questions about the role of social recognition in establishing the category of “persecuted group.” However, they also raise additional questions of social recognition pertaining to the processing of asylum cases. In particular they raise questions about the fairness of argumentation and deliberation within court proceedings, questions that DT is especially well equipped to answer, as well as questions about the epistemic sources that immigration boards and appellate courts use in determining the harshness of discriminatory treatment, questions that properly fall within the province of RT. In particular they raise questions about how much applicants’ first-hand testimony of their own persecution should be weighed in comparison to country-wide reports prepared by government “experts” in constituting knowledge of what counts as socially recognized persecution within a specific context. How should an applicant’s testimony regarding her privileged *experience* of the unique circumstances surrounding her trauma be properly recognized by immigration judges in order to fairly determine the extent to which her social group should be recognized as suffering societal persecution?

In order to assess the cognitive epistemic dilemmas encountered in these cases it is necessary to understand the UNHCR’s 2002 gender-related and social group guidelines for interpreting persecution within the framework of the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol. The new guidelines suggest that the UNHCR has undertaken the ethical labor of reinterpreting gender identity-based harms as a form of society-wide misrecognition rising to the level of a human rights injury. Article 1 A(2) of the Convention Relating to the Status of Refugees defines a refugee as anyone who “owing to a well-founded fear of being persecuted for reasons of race religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country . . . is unable or, owing to such fear, unwilling to return to it.” The barriers against defining gender-related harms as harms worthy of asylum protection under this article are apparent. This article makes no mention of gender in its listing of five grounds for persecution. Furthermore gender-related harms, as noted in the case of FK, typically reflect cultural norms, and so are not always inflicted with the kind of malicious intent commonly associated with persecution. Finally, the abusers are typically domestic partners and family members, not the state, and the harm they inflict typically occurs in private, not public, settings.

Beginning in 1985 the UNHCR permitted governments to regard “women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live” as a “particular social group” within Article 1 A(2). The 2002 guidelines draw upon a decade of case law, state practice, and academic writing in unequivocally affirming that the definition of refugee include gender-related claims. They expressly appeal to human rights norms as guidelines for defining persecution, so that rape, sexual violence, domestic violence, FGC, dowry-related violence, or trafficking can count as persecution, either when legally mandated or legally permitted or legally outlawed but officially unenforced. As noted above, the guidelines’ “bifurcated nexus” analysis establishes persecutorial intent regardless of the non-state actor’s reasons for inflicting harm, so long as the harm is related to one of the five grounds listed by the convention or the government’s “inability or unwillingness” to offer protection is so related.

The cases discussed above involving U.S. gender asylum processing illustrate the difficulty in applying the updated UNHCR guidelines, specifically as it touches upon recognizing women and non-cisgender conforming persons as legally and ethically harmed groups. How does one relate the relatively clear legal (and ethical) concept of publicly recognized targeted discrimination of visible groups to commonly accepted practices of gendered socialization and policing that potentially restrict the freedom of all members of society and whose effects might not be personally experienced as a form of disrespect by many of those affected or might not be felt directly by those who are “closeted”? As we shall shortly see, even countries, like Sweden, that expressly incorporate these guidelines into

their asylum law still have difficulty answering this question consistently. What kind of gender-based discrimination amounts to persecution, what kind of government inaction counts as a lack of protection, what kind of harms arise specifically because of gender, and what it means to belong to a gender- or sexual orientation based group that merits protection according to their “protected characteristic” or “social perception” are all questions that resurface in Swedish gender asylum processing. And they resurface in a way that illustrates how the epistemic sources available for interpreting them are divided and ranked, with those enjoying the imprimatur of legal authority being imposed with little respect for those proffered by asylum applicants.

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

The epistemic injustices Wikström documents might be described as ancillary to the injustices that theories of discourse and recognition highlight. Discursive procedures that exclude, marginalize, or otherwise diminish the experiential narratives of some participants in comparison to the statistical data advanced by authorities violate egalitarian norms of discursive deliberation and argumentation, partly by defining what counts as argumentation in a presumptive way that discounts personal experience as a reason that possesses the same persuasive force as quantifiable data. This discursive injustice is accompanied by a recognitive injustice. Discounting testimony disrespects the witness by impugning her credibility as a reliable knower. This misrecognition of persons as less than rationally accountable agents often reflects deeper prejudices against the witness owing to her gender, race, culture, age, educational attainment, or economic status. These forms of discursive and recognitive injustice are illustrated in Wikström’s study.

Case 3: Wikström’s study highlights the ease with which Sweden’s migration boards and courts routinely misinterpret the 2002 UNHCR guidelines along three axes of analyses: culture, gender, and protection in the country of origin. One case involves a Kurdish woman (Sara) who fled Iraq after both her brother and the police from whom she sought protection threatened violence against her for having sexual relations with a colleague at work, in violation of an impending marriage her family had arranged for her against her will.

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

It is odd and not very likely that she would initiate a sexual relation with another man when she knows she is going to marry her cousin That she would be so blinded by love and disregard the consequences is not a reasonable explanation, with the culture that is prevalent in Northern Iraq and with her family traditions in mind Furthermore, it must be considered striking that, at her age, an arranged marriage has not occurred earlier (Verdict 15: 3 ---cited in Wikström: 214).

In commenting on this case, Ezgi Sertler remarks that “when the board listens to Sara, they do so through a frame in which ‘non-white’ women seem intelligible insofar as they are without any agency, and their cultures seem intelligible insofar as they are all oppressive” (Sertler 2018: 10). The parallel with the IJ’s ruling in the American case involving FK is striking. Because ‘persecution’ is understood as an extraordinary deviation from cultural norms, the board, in characterizing all of Kurdish culture as monolithically oppressive for both men and women who face criminal punishment for violations of family honor, can find no basis for Sara’s claim to have suffered discriminatory persecution. Culture, rather than membership in a persecuted group, is the alleged source of harm. By blaming culture, as if it were the “agent” responsible for inflicting harm, the MB absolves everyone else of

responsibility, thereby denying agency to both perpetrators/facilitators of culturally mandated violence and victims who resist it.

Case 4: Another case discussed by Wikström highlights the ease with which the migration board misapplies the UNHCR's guidelines regarding gender-related persecution. A Kurdish woman (Nesrin) flees Iraq after her family kills her lover, a man who proposed marriage to her, because she was promised to a cousin of hers. Because her brother, uncle, and cousin are members of the police force, she seeks help from a women's organization to arrange her escape. The written verdict of the migration board (MB) notes that

"Nesrin alleges a well-founded fear of persecution due to her gender and that she should therefore receive protection as a refugee. However, it has not emerged that the threat she refers to has occurred due to her gender. She has herself stated that even the man she has had a relationship with has been subjected to violence and was eventually killed because of their relationship" (Verdict 12:9, cited by Wikström: 213).

Here, the MB argues that because a man is the principal victim of honor violence (HV), Nesrin cannot claim to be a refugee based on membership in a specific, gender-identified group which was targeted with gender-specific discrimination. This parallels the BIA's ruling in the American case involving Alvarado insofar as domestic violence, or gender-related violence, like HV, is not exclusively directed to women, but relates to all forms of non-biologically understood gender oppression, including (for instance) discriminatory treatment meted out to non-binary-identified persons and homosexuals. However, the Swedish Aliens Act (2006), which was intended to incorporate a broad spectrum of gender-related harms under the Swedish provision for refugee protection as stipulated in the UNHCR's 2002 guidelines, contradicts the MB's interpretation of gender-based refugee claims. The Aliens Act states that

"[i]n refugee law, the term gender [kön] should be used in its broadest sense and as such include not only the biological difference between men and women, but also the socially and culturally determined and stereotyping notions concerning how men and women should behave (Prop. 2005:21)

The Aliens Act adds that "[w]hen the forms of persecution take different shapes depending on whether the persecuted individual is a man or a woman, refugee law usually refers to gender specific persecution (Pop. 2005:22). But gender-*specific* persecution, which the MB had in mind when making its determination that Nesrin was not the one targeted with HV execution, is not required for determining gender-*related* persecution based on "socially and culturally determined and stereotyping notions concerning how men and women should behave."

Another aspect of the MB's ruling in Nesrin's case touches on the MB's assessment of the degree to which she herself (and not her boyfriend) could have found protection within her native community. According to the MB, "for abused women there is generally a possibility of good enough protection" and "Nesrin did not make contact with the police, other authorities or alternative mediation institutions in Iraq [for her protection] before seeking international protection" (Verdict 12: 4-5 ---cited by Wikström: 213). These statements flatly contradict Nesrin's own testimony, in which she claimed that the very police authorities that the MB says could have provided her with protection were members of her own family who had perpetrated the killing of her lover.

Case 5: Two other cases also reinforce the impression that the MB routinely disregards the credibility of women's first-hand experience of the risks they face within the unique social context of their native community in deferring to its own data-based reports about the risks women living in their country generally face in not being afforded adequate official protection. These cases illustrate the discretion taken by the MB in drawing from conflicting assessments of country-wide risk. Two Syrian women, Almas and Afya, apply for asylum at about the same time in their effort to escape from repeated acts of HV. In the case of Almas, who is awarded refugee status, the migration court relies on six national and international reports to argue that "HV and murders take place all over Syria" and that Syrian law recommends "impunity or punishment mitigation in honour-related violations" (Verdict 21: 7). In Afya's case, by contrast, the migration court relies on only the board's internal report, which asserts that "the number of honour killings has gone down in the country in recent years" because "it is said that people have

become more enlightened “ and men know that “they will be sentenced to harsh prison terms” (Verdict 24:4). Once again, the discretion of Swedish migration boards in issuing inconsistent rulings based on different sources of knowledge parallels the discretion of their American counterparts in choosing different cases and different constructions of common legal texts.

Not only does the same migration court use cultural and national stereotypes in rendering its verdicts, but it uses vastly different reports containing diametrically opposed assessments of the Syrian “culture of honor violence.” In this instance, migration courts presume (in Wikström’s word) a positivistic conception of knowledge in which numerical data provide the only reliable touchstone for determining facts on the ground. Here the presumption seems to be that the data determine a uniquely coherent description of the extent of HV and official protection country-wide, which is then presumed to describe the situation of all women and men, regardless of the uniqueness of their circumstances. There appears to be little awareness of the hermeneutical complications involved in synthesizing conflicting reports and deploying finer-grained methods in understanding the unique circumstances surrounding each applicant’s risks and opportunities for protection. Indeed, to undertake this kind of finer-grained analysis would require that the migration courts concede that the applicant’s own first-hand experience of her situation plays a necessary role in constituting the relevant “facts on the ground.” The willful hermeneutical ignorance of the migration board thus inflicts not only testimonial and hermeneutic injustices but also what Kristie Dotson calls “contributory injustice,” whereby marginalized persons are prevented from contributing to the production and revision of what is always socially constructed knowledge (Dotson, 2012: 32).

As we have seen, studies by Musalo and others show that the women pleading gender-based asylum in the United States and elsewhere experience similar kinds of testimonial, hermeneutic, and contributory injustice as those applying in Sweden. Whether it be reliance on expert data or legal terminology for interpreting persecution, socially recognized group-based oppression, or political resistance, courts routinely underappreciate women’s complex gendered and (multi-) cultured identity/agency. No doubt, some of this ignorance reflects straightforward kinds of misrecognition, based on cultural and gender stereotypes, that disrespect the individuality of the asylum seeker. But some of this ignorance reflects a generalized misrecognition of asylum seekers as less competent epistemic agents ---due to the trauma they have suffered and the less verifiable nature of their testimony--- in comparison to expert data gatherers. This leads Sertler to ponder whether the very institution of gender-based asylum contains *structural* obstacles preventing recognition of applicants as competent interpreters of their situations.⁵ Her own examination of the entrenched nature of social stratification and epistemic hierarchy

⁵ By presuming the innocence of the accused until proven guilty, criminal trials in Anglo-American jurisdictions already impose a greater burden of proof on the state. As I noted earlier, this burden of proof still inclines courts to give exceptional weight to the eyewitness testimony of living victims. However, the scale of credibility can shift in favor of the accused in some circumstances. For instance, the standard of reasonable fear invoked in determining whether a woman with a long history of suffering spousal abuse can justifiably claim to have injured or killed her assailant in self-defense or out of “irresistible impulse” (as in the case of so-called battered women syndrome) has at times been understood to require courts to adopt the standpoint of the accused, given her unique circumstances as a victim. I discuss the advantages and disadvantages

suggests an affirmative answer. Challenging the dominant epistemic resources poses a dilemma, for the only way this can happen would be if those in authority were to find intelligible the counter-knowledge that their own hermeneutical standpoint renders unintelligible (Pohlhaus 2012: 731).

There is an additional structural explanation for the migration board's willful ignorance that does not directly refer to structural misrecognition of asylum seekers as less credible sources of knowledge but rather reflects an antagonism directed against asylum seekers as opportunists or security threats. Asylum courts presume the legitimacy of the existing nation-state system which rests upon privileging national security. The default in the court's reasoning lies with the state's interest in protecting the freedom, prosperity, and cultural identity of its citizens (Rusen and Franke 2010). As Musalo notes, this default in the court's reasoning finds support in a kind of textual fundamentalism: refugee law was only originally intended to apply to public forms of discrimination, not private domestic abuse, so that extending its application allegedly threatens to unleash a tidal wave of asylum seekers, which can only lead to overwhelming the scarce economic, political, cultural, social, and legal resources of the state (Musalo 2010: 47-8).⁶

Grounding the Critical Theory of Gender Asylum Adjudication: A Preliminary Overview of RT and DT

Discourse theory (DT) and recognition theory (RT) overlap and complement each other when applied to a critical assessment of asylum claim processing. When properly supplemented by supporting evidence, both theories, I argue, require that judges reverse the institutional privilege accorded to officers of the state. In requiring that the state assume at least an equal (and perhaps higher) burden of proof in denying relief to asylum seekers, RT, in particular, requires judges to exercise not only *epistemic justice* by conceding credibility and authority to applicants' stories; it requires a humble effort at understanding the totality of coercive circumstances that have compelled the individual applicant to seek refuge in the first place. By contrast, DT focuses on institutional procedures for justifying and applying laws and subsidiary principles.

So construed, DT is better equipped to illuminate the court's reasoning than its understanding. As Habermas and Günther understand it (Habermas 1996: 172, 220-32; Günther 1993; Ingram 2010: 206-211), judicial decision-making reflects a process of discursive reasoning that enters deliberation retrospectively. Choosing the most appropriate statutes, principles, and precedents requisite for doing

of adopting such a psychopathological conception of reasonableness in Ingram (2006). As I noted earlier, the impact of trauma can distort victim's memory of their circumstances which, in turn, can cast doubt on the credibility of their testimony (Schweiger 2019).

⁶ As I remarked in discussing the case of North Korean economic 'refugees' (see note 4), this concern about over-extending the category of refugees cannot be dismissed, even if it is exaggerated when discussing women as a discrete class of persons who have suffered a distinctive type of persecution.

complete justice to the unique circumstances of the case alters the meaning of this body of law.⁷ Accurately describing the case depends on properly understanding, weighing, and combining different sources of evidence in a coherent narrative, with the first-person, eye-witness testimony of the asylum seeker normally weighing very heavily. In this way, proper recognition of the asylum seeker as a credible witness to her circumstances can become the catalyst for a potentially far-reaching reinterpretation of law, as can be evidenced by changes in refugee, asylum, and deportation policy over the last 20 years (Ingram 2009).

DT and RT are social ---not merely philosophical --- theories that take their bearings from actual practices that are far from what any ideal theory might condone. Among other things, they articulate norms and values that underwrite the popular acceptance of what are essentially imperfect legal institutions.

Beginning with this premise, DT defines a legitimate law as a law that all whom it significantly affects could freely (viz., rationally) consent, after they, as equally positioned interlocutors, have collectively discussed and, if necessary, transformed their different interests in light of the probable impact that accepting the norm will have on everyone's welfare.⁸ Human rights, associational duties, and the common good are here seen as having their ultimate justification in on-going consensus-oriented dialogue that aspires to be fully inclusive, egalitarian, and unconstrained by the effects of social power and internal bias.

⁷ For further discussion of this hermeneutical circle as it applies to judicial decision-making (application), see Hans-Georg Gadamer's *Truth and Method* (1960), Ronald Dworkin's *Law's Empire* (1986), and Ingram (2009, 2010).

⁸ DT reconstructs the general normative expectations of persons in performing social roles embedded in social practices that are essential to social reproduction, social cooperation, and socialization. It takes its bearings from social practices that aim to coordinate action based on voluntary mutual consent, what Habermas calls 'communicative action.' Communicative action involves the reciprocal raising of claims that arise whenever actors offer and accept invitations to cooperate with each other. Should any claim be challenged, cooperation must be restored by redeeming it with convincing justification or by re-establishing it based on an alternative claim that all parties find rationally compelling. The special kind of action associated with the argumentative disputation and redemption of claims ---what Habermas calls *discourse*---sets in motion mutual normative expectations regarding the freedom, equality, and impartiality of the participants to reach an unconstrained, viz., rationally motivated, agreement that would also include the perspective of all third parties who are also significantly impacted by the terms of the agreement. In sum, what distinguishes discourse theory from mainstream social contract theory is its emphasis on discourse as a collective medium for critical self-reflection and autonomous action (or rational self-determination).

RT takes its bearings from a broader set of institutionalized practices than those associated with the argumentative justification of action norms. It draws its normative orientation from the rights and duties implicit in all forms of human relationship---nurturing, working, deliberating---insofar as these are necessary for realizing two complementary aspects of human fulfillment: free agency, on one side, and psychological integrity (which depends on persons being accorded respect, care, and esteem for their humanity and individuality), on the other.⁹

Seen in this light, both DT and RT are frequently put forward by their respective proponents as though they each exclusively provided the metaethical foundation for all practical and theoretical ethics. However, it is immediately apparent that this presumption is mistaken. As my earlier discussion of Swedish gender asylum cases shows, DT and RT essentially complement each other. One cannot give an adequate account of rational deliberation and argumentation that focuses exclusively on the procedural justice of making and responding to assertions. One must also attend to the epistemic justice of lending credibility to assertions that are made and seeking, whenever possible, a common conceptual and experiential framework for understanding their significance. Conversely, one cannot give an adequate account of proper recognition that focuses exclusively on persons' experiencing or not experiencing feelings of disrespect. Given that disrespect may have occurred even when it is not experienced by the one disrespected, and that disrespect may not have occurred even when it is experienced, one must have recourse to a public exchange of arguments in establishing whether someone has in fact suffered justifiable misrecognition or lack of proper recognition.

In sum, Neither DT nor RT can guide critical assessments of institutional practices apart from each other, not to mention other ethical theories, spanning, as we have seen, human rights, but also theories of distributive, compensatory, value-maximizing, and epistemic justice.¹⁰ Nevertheless, DT and RT are particularly well suited to framing harms associated with the processing of asylum claims. These injustices involve not only placing a higher burden of proof on asylum seekers and denying them equal

⁹ RT takes its bearings from a broader range of social practices that go beyond those associated with communicative action to include non-communicative forms of social interaction, such as relationships of care and concern among intimates and relationships requiring mutual understanding *simpliciter*. It bears a closer resemblance to virtue ethics, emphasizing the intrinsic psychological and agential good that is realized upon performing institutionalized social roles, insofar as the practices in which these roles are embedded live up to their implicit normative expectations.

¹⁰ Resentment towards immigrants and minorities is closely linked to feeling disrespected by government policies that allegedly favor these groups. Showing that such feelings are misplaced requires a critical theory of structural distributive injustices encompassing a critique of capitalist (and racist) globalization (Fraser, 2003).

time to prepare and make arguments---a failure for which DT is preeminently designed to diagnose. They also involve a failure to understand these claims in the first place. By failing to properly respect the individuality of the migrants that appear before them; viz., by failing to properly attend to the stories they tell about themselves and the unique circumstances that mark their desperation, judges and administrators misrecognize and misunderstand those who plead before them. *This injustice may occur even when discourse ethical norms regarding fair procedures of argument are superficially respected; indeed, they occur prior to formal argument, insofar as they reflect deep-seated prejudices.*¹¹

DT: Reversing the Burden of Proof

DT and RT provide ample resources for framing social pathologies and social injustices, including those associated with the institutional imposition of an unfair burden of proof. Speaking more generally, their diagnosis of social injustices is relatively straightforward. For DT, forms of “voluntary” cooperation, whose presumed consensual basis in shareable reasons is contradicted by the irrational compulsions and hidden, background constraints of social domination, belie their own implicit embodiment of a norm of *egalitarian reciprocity* and so are, on the surface, unjust.¹² RT is less insistent that all

¹¹ Earlier in his career Habermas defended therapeutic discourse as a privileged means for addressing the pathologies of ‘systematically distorted communication’ including ideologically biased forms of understanding that prejudice (constrain) argument subconsciously, despite outwardly conforming to procedures of rational dialogue (Habermas 1971). This view, which Habermas has never abandoned, supports my contention that neither discourse theory nor recognition theory, here understood as specifying norms of undistorted understanding, can function independently of the other.

¹² For Kristie Dotson, “refusal, intentional or intentional, of an audience to communicatively reciprocate a linguistic exchange owing to pernicious ignorance” (Dotson 2011: 238) amounts to “epistemic violence” insofar as the speaker/listener who is harmed is silenced by another (“testimonial quieting”) or is forced to silence herself because of another (“testimonial smothering”) (Dotson 2011: 242). The presumption that linguistic reciprocation should be the guiding norm in communicative contexts is true as far as it goes, but when it becomes apparent to

recognitive relationships should involve linguistic reciprocity (a loving relationship between a parent and infant child involves expressive forms of communication that cannot be fully reciprocal, simply because the child has not developed full-fledged communicative competence and, along with it, an implicit expectation of linguistic reciprocity). Instead RT identifies as unjust forms of institutional recognition that misrecognize or fail to recognize persons' proper sense of self to the point of denying their agency and causing harm to their personal identity as a credible witness.¹³

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

one of the interlocutors that communication is "systematically distorted" by cognitive prejudices, defense mechanisms, or a shared background of knowledge and linguistic meaning that one-sidedly misrepresents the experience of that interlocutor or one of the other interlocutors, then, as Habermas observes, the exchange must no longer be regarded by that interlocutor as if it were a genuine communication but rather as a provocative, manipulative or (self-)deceitful action that masquerades as communication. Under these conditions, a person of color, say, is not obligated to listen or respond to the racist comments of a white person.

¹³ Using discourse or recognition theory to diagnose social pathology is a great deal more complicated. Without delving deeply into the ways in which different institutionalized systems of action, or different institutionalized action spheres and their accompanying recognition orders, can clash with each other,¹³ it suffices to note that forms of unjust cooperation and unjust recognition also often produce forms of distorted communication, false "knowledge," and distorted (self-) understanding, which can decrease a person's capability for exercising agency.

to an unlimited community, whose possible opinions about ideal justice only personal hypothetical speculation can entertain.

The importance of face-to-face dialog over personal speculation regarding the justice of borders, immigration policy, and practical application varies considerably. Moral reasoning about meta-political questions concerning appropriate boundaries of deliberation and decision-making and universal human rights principles will rely on personal speculations (ideal theory) that abstract from time and place and imagine possible worlds. Political reasoning about domestic immigration policy will rely on situational discussions taking place in parliament and public arena (non-ideal theory). Judicial reasoning in deportation and asylum proceedings will rely on private conversations between judge, defendant, and legal counsel. In some instances, all three types of reasoning may be elicited. Judges, for example, typically recur to policy rationales in applying the law to individual cases; in adjudicating cases that are recalcitrant to mechanical resolution they are often thrown back on their own moral intuitions.

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

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

discussing immigration quotas,¹⁴ Habermas insists that the needs of migrants count as much (or more) than the economic needs of the host country “in accordance with criteria that are acceptable from the perspective of all parties involved” (232).

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

Adjudication of an appeal may be routine but, but as my sampling of gender asylum cases attests, it often involves judicial discretion in choice, interpretation, and application of statutes, guidelines, and executive orders. Judges rely on open-textured constitutional principles in undertaking this endeavor. The principle mandating equal protection under the law and equal access to due process under the law that often crops up in immigration cases, for instance, is not a rule that narrowly dictates a single correct application but a regulative ideal that requires interpretation in light of the relevant case history and body of law. This principle can impact our understanding of who should carry the burden of proof. It can also impact our evolving understanding of what it means to suffer persecution and who can be persecuted. The hermeneutical circle wherein legal precedents, executive priorities, constitutional principles, statutes, and case law mutually interpolate each other can produce new holdings that reverberate throughout the legal system.

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

The requirement that a migrant be allowed to state his or her case freely brings into play normative considerations that, while pertinent to DT, also fall within the purview of RT. In keeping with Habermas’s characterization of judicial decision-making, judges are properly equipped to apply, not

¹⁴ The 1965 U.S. Immigration and Nationality Act ended quotas based on national origin, race, and ancestry that had reserved 70 percent of all slots to the UK, Germany, and Ireland and very few to Asia and Africa. Unfortunately, the good that came with eliminating a remnant of U.S. racism was counterbalanced by a new set of regional quotas that limited the emission of Mexican work visas to only 20,000, which eventually led to a massive wave of undocumented Mexican migration into the U.S.

legislate, the law; but applying the law requires choosing which parts of settled law and principled procedure best fit a comprehensive description of the case, which, in turn (and especially within the Anglo-American tradition of case-based law, which Habermas does not consider) can lead to the judicial re-interpretation of settled law and procedure. In this account, judges are institutionally privileged dialogue partners; it is their responsibility, as placeholders of public impartiality, to synthesize the testimony put forward by all litigants into a coherent and comprehensive description of the case. But of course, as Habermas himself observes, the “dialogue” in the court is constrained by an adversarial atmosphere which, in the case of asylum and deportation law, privileges the perspective of the government and places a burden of proof on migrants pleading their cases. Deference to standing law, with its technical distinctions between different grounds for pleading asylum, coupled with severe time constraints, compels judges to describe the case before them in a partial way that does not do justice to the complexities of the asylum-seeker’s own life circumstances. The Swedish cases recounted above especially attest to this injustice.

RT: Exposing Epistemic Bias in Asylum Courts

The institutional constraints imposed on immigration courts seems to render a discourse theoretic defense of modern legal systems less convincing than Habermas himself recognizes. DT can be used to criticize clear violations of courtroom procedure that deny clients a fair hearing of their claims,

but in its institutional (or legal) form---as distinct from its ethical application---it cannot be used to criticize many of the judge's institutional biases that invariably lead to misunderstanding testimony that has been freely given.¹⁵ In short, it cannot criticize the institutional misrecognition of the migrant as a less than credible witness of his or her own life circumstances. This misrecognition leads to hermeneutical injustice, in which the migrant's perspective is not allowed to adequately inform the description of his or her legal case. This injustice is magnified by the fact that, in most asylum cases, DT should require a reversal of the burden of the proof. Being an eyewitness to one's own injury as an asylum-seeker should normally be accorded the same degree of respect as that accorded to a victim of assault testifying in a criminal court. Leaving aside any distortion of memory wrought by the experience of her injury, DT normally attaches the greatest authority to an asylum seeker's eyewitness testimony whenever such testimony finds some independent support and is not contradicted by demonstrable facts. As I argue below, the court should also recognize the special authority of the asylum seeker if he or she happens to be fleeing from circumstances that the court knows have been created in part by the policies of its own government. Conversely, in cases involving children under the custody of adults, the

¹⁵ Judges, of course, are obligated to reflect on personal prejudices that prevent them from relating to witnesses as individual rather than stereotypes. That said, Habermas notes that judicial discourses of application are institutionally bound by precedent legal classifications and traditions of interpretations, so that the scope for any judicial interpretation that radically departs from tradition is severely constrained. By contrast, ethical discourse unbound by institutional constraints requires an unlimited scope for critical reflection on, and radical reinterpretation of, traditional categories and meanings. The distinction between discourse theory in its institutional (legal) and non-institutional (ethical) forms provides a catalyst for legal reform, as ethical reflection invariably enters into the evolution of law as a progressively inclusive system of rights. Nonetheless, disregarding the exceptional moments of revolutionary legal transformation (as happened, for instance, during the American Civil Rights Movement) the tension internal to law between these distinctive discursive regimes is typically resolved in favor of the institutional regime, so that subaltern experiences of disrespect and misrecognition cannot be sufficiently voiced or acknowledged by the legal system. The kind of injustice referenced here is similar to what Jean-Francois Lyotard designates as a *differend* (Lyotard 1988; Ingram 2018a).

court should help child applicants to asylum become epistemic agents by providing them with legal and social support. As I noted in the case of FK, children who are exposed to FGC, forced marriage, and the like may not have a clear understanding of their oppression. They may express an acceptance of restrictive and harmful gender practices with or without expressing reluctance to undergo them. Their preference for a pathological form of social esteem and social inclusion instead of one that is less harmful, less coercive, and less affirming of patriarchal domination, must therefore be questioned as purely adaptive and amenable to change upon assisted reflection.

The kinds of injustices that recognition theory is pre-eminently equipped to illuminate in the legal processing of asylum claims involve the judicial misrecognition of person's individuality and agency through the lens of gender and cultural stereotypes---injustices that were especially well documented in the Swedish asylum cases I discussed. I have also argued that, besides the personal racial and cultural prejudices of legal authorities, structural biases within the legal system compel judges and lower-level border police to discount the credibility of asylum seekers as authoritative witnesses to, and interpreters of, their situation. This latter disrespect---which deprives asylum seekers of the esteem due to them as competent witnesses and purveyors of knowledge---is epistemic in nature. It involves a failure to recognize migrants as credible witnesses to their own circumstances, which in turn excludes their knowledge from contributing to the court's knowledge of the case. The growing literature on epistemic injustice that followed in the wake of Miranda Fricker's eponymous book (Fricker 2007) thus provides a useful supplement to RT. Using Gaile Pohlhaus Jr's' taxonomies of epistemic injustice, I shall select just some of the most salient features of epistemic injustice that apply to asylum court proceedings. Taken together, they suggest that the testimony offered by asylum seekers, while not irrefutable, should be given the benefit of the doubt unless strongly contradicted by overwhelming evidence. In light of the distorting impact of trauma and, especially in the case of children who may have developed "adaptive preferences" for restrictive and harmful gender-based forms of treatment, these findings further suggest that courts have a duty to provide asylum seekers with legal and social support capable of promoting the epistemic agency of the clients they represent.

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

One of the dangers Pohlhaus mentions regarding (c) is defining the field of knowledge, and therewith the field of epistemic injustice too narrowly. DT can be accused of this injustice to the extent that it defines truth, knowledge, and reality in terms of a procedure of argumentative justification, which privileges competencies related to analytic reasoning, theoretical abstraction, and oral argumentation that find exemplary institutionalization in philosophy departments and courts of law but not in other areas of life. By focusing attention on asymmetries in knowers' opportunities to participate freely in oral argumentation, discourse ethics neglects a very important epistemic field, that of everyday narrative understanding, whose virtuous exercise requires developing listening competencies associated with humility, curiosity, and open-mindedness (Medina 2013: 42).

Pohlhaus mentions several other lenses through which epistemic injustices come into focus. The first concerns the temptation to blend ideal social theory with non-ideal social theory in a way that legitimizes extant institutions as if they aspired to realize a just, impartial social contract. Habermas's insistence that the ideal norms of discourse find institutional purchase in democratic institutions, including courts of law, is one example of this.¹⁶ By encouraging judges to believe that they are part of an impartial tribunal of higher legal knowledge, the discourse theory of law *unintentionally* encourages their epistemic arrogance, close-mindedness, and mechanical lack of creativity and imagination. What José Medina (Medina 2013), with reference to Charles Mills' indictment of the white racial contract underwriting *Herrenvolk* democracy (Mills 1997), describes as an institutional epistemic blindness to subaltern perspectives can just as easily be characterized as a kind of "willful hermeneutical ignorance," to use Pohlhaus's words (Pohlhaus 2017: 17).

A second lens that is useful for magnifying epistemic injustices concerns the interdependence of epistemic relationships, or the way in which knowledge is a social product built out of the contributions of both consenting and dissenting perspectives. Knowledge presupposes a relationship of social trust. As we saw in Case 3, Courts of law notoriously display mistrust towards witnesses they institutionally suspect of being untrustworthy and biased. This disrespect encourages witnesses to doubt their own testimony while also leading them to distrust institutional authority for its own breach of trust (Pohlhaus 2017: 19). The result is that applicants for asylum are excluded (and sometimes exclude themselves) from contributing to the production of expert knowledge that is relevant to describing their cases.¹⁷

A third lens through which the layers of epistemic injustice come into view accordingly pinpoints three levels at which knowers are excluded from participating in systems of knowledge. Their credibility can be diminished owing to biases that are not institutionally mandated, such as when the discourse theoretic norm of equitable participation is violated by failure to adhere to due process or when judges let their personal biases cloud their assessment of witnesses credibility; at a second level, the institutional resources for understanding---such as the technical definitions available to judges in their description of a case as a case of persecution of a certain kind, the expert country-specific data bases available to them, and the time constraints imposed on giving testimony---can, by excluding, invalidating, or ignoring the applicant's sources of understanding, suppress or distort understanding of the applicant's case, thereby resulting in what Fricker dubs a "hermeneutical injustice." Finally, at a third level, the entire epistemic institution might structurally impose testimonial and hermeneutical

¹⁶ Habermas himself repeatedly underscores the "counterfactual" status of institutionalized discursive norms, whose actual functioning is distorted by power relations.

¹⁷ Schweiger (Schweiger 2019, 56) notes that asylum seekers can exclude themselves for innocuous reasons owing to the distorting impact that their trauma has on their ability to remember the details of their situation accurately.

injustices. In a trivial sense, this appears to be the case with all legal institutions, especially those that rely on adversarial argumentation for filtering legal facts, but it is uniquely applicable to asylum courts, whose default for processing claims reflects a defensive nationalism aimed at upholding and legitimizing restrictive entry in the name of national security and practical expediency.¹⁸

A fourth lens for perceiving the systemic epistemic injustice inherent in judicial systems pertains to the unfair distribution of epistemic labor in the production of knowledge. What Pohlhaus calls *agential* injustice occurs when, given the default noted above, migrants pleading their cases are forced to assume a greater burden of proof than the state in arguing their cases. This systemic (or structural) injustice is magnified further by the burden of having to dispute the court's "controlling images" (Collins 2000 69-96) of asylum seekers as, for example, economic opportunists. As David Coady points out (Coady 2017), although it may seem that credibility and understanding are not scarce resources that can be justly distributed (Fricker 2017, 19-20), the fact of the matter is that credibility and understanding are relative terms. As Fricker concedes, the weight given to the testimony of a black man like Harper Lee's fictional character Tom Robinson in *To Kill A Mockingbird* stands in inverse proportion to the weight accorded the white woman who has accused him of rape (Fricker 2007: 25). In a parallel manner, the credibility of the asylum seeker as expert witness is diminished when confronted by the credibility of the state's expert data banks; the descriptions available to the migrant for understanding his or her experiences compete with the technical legal descriptions available to the court and its fact finders. In this respect the epistemic labor of the migrant is not only made unreasonably burdensome but often ends up being wasted as "invalid." Finally, the epistemic labor of asylum applicants can be exploited, through coerced testimony, to produce knowledge favorable to the state, as when trafficked women are forced to betray their traffickers in exchange for asylum. Coerced testimony that can be used against the testifier, in turn, leads the testifier to silence herself (what Dotson calls "smothering"), so that mistrust between asylum seekers and asylum boards invariably compels the former to exclude

¹⁸ Alison Wylie observes that persons occupying privileged positions (such as judges) are "invested in not knowing (or, indeed, are invested in systematically ignoring and denying" the testimony of those "who are economically dispossessed, politically oppressed [and] socially marginalized" (Wylie, 2003, 32). This compounds the systematic ignoring and denying that affects all persons, regardless of background, of testimony deemed by the judge to not respond appropriately (often in simple 'yes or no' answers) to questions put forth by officers of the court. Noteworthy in this regard is the fact that adults and persons of privileged backgrounds and educational attainment have a greater chance to represent themselves directly before the judge rather than be passively led (or kept silent) by attorneys who are chosen to speak for them.

themselves from the latter's construction of their case. Migrants also find themselves caught in a double bind: to the extent that their testimony is credible and understandable according to the court's criteria for rational argumentation, it may be less persuasive to judges (Pohlhaus 2017: 22). A child who testifies that she consented to be married into her husband's family at the age of ten because of parental pressure might appear credible and reasonable to a judge who operates with a contextual understanding of oppression; but she still might not persuade the judge that she suffered persecution based on her gender, especially if her husband was a child like herself who was equally vulnerable to parental pressure.

Concluding Remarks: Extending DT and RT Beyond Gender-based Asylum

I have argued that DT and RT uniquely contribute to illuminating the procedural and epistemic injustices suffered by migrants in pleading their cases before asylum courts. Even adversarial courtroom proceedings should abide by discourse theoretic conditions of procedural justice, guaranteeing asylum seekers adequate legal representation, equipped with translators, who have equal opportunities to raise claims and challenge arguments made by government officials. In principle, these proceedings should be conducted in a non-adversarial manner, as an impartial search for the truth regarding the asylum seekers' claims. Furthermore, once it is acknowledged that asylum seekers are victims who have fled coercive (and often violent) circumstances, they should be accorded the same respect as ordinary victims of violence. Although their claims are not impervious to challenge, they should normally be given considerable credence unless clearly undermined upon cross-examination. Once asylum seekers' claims are given the credence they merit, the burden of proof they shoulder should be proportionately lessened and transferred to the immigration boards that are predisposed to rule against them. A just procedure for weighing arguments should therefore permit an extended hearing of the applicant's story that is not perfunctorily truncated by draconian time constraints and interrupted by hostile forms of interrogation.

Because discourse theoretic requirements also mandate that the force of reason (evidence) alone should motivate courtroom deliberation, it is imperative that the applicant's experience, which ought to weigh heavily among the evidentiary sources brought forth as reasons, be properly understood. In this respect, the epistemic virtues that RT enjoins provide a necessary complement to the procedural expectations prescribed by DT. RT requires that judges listen to the applicant's story with empathy and open-mindedness, with full awareness of the law's incapacity to do justice to its complexity and ambiguity. It requires that judges regard the applicant's story as a potential hard case that cannot be easily subsumed under the law as it has hitherto been understood. So construed, the applicant's case represents both a challenge to the justice and integrity of the law and an opportunity for reinterpreting it in a more inclusive way.

The recognitive requirements noted above acquire greater moral urgency when we recall that the testimonial and hermeneutical injustices experienced by women who seek gender-based asylum are typical for all migrants. Personal and structural biases predispose migration judges to deny migrants a fair hearing. The structural biases have their basis in an international legal order that bestows prerogatives on governments and their agents to define who qualifies as a legal refugee. Using national security as a broad pretext for restricting asylum, they refuse admission to all but those who can prove

they are fleeing state-mandated political persecution.¹⁹ Persons fleeing forms of domestic violence, economic violence, or climate-related violence do not count as political refugees under this narrow definition, even if the violence they suffer is abetted and condoned by their governments and by the international order.

¹⁹ 20 In late March of 2020 the Trump administration used the Covid-19 pandemic as a national security pretext for suspending the processing of all asylum claims, thereby arguably violating international and domestic legal obligations to not repatriate persons who have a credible fear of suffering persecution. Earlier decisions by the Trump administration to deny asylum requests from persons attempting to enter the US through non-designated ports of entry and persons who have not first applied for asylum in another country while transiting to the US appear to be legally dubious as well. The Trump administration's Migrant Protection Protocols (MPPs), also known as the Remain in Mexico Program, overturned the legally recognized practice of allowing asylum seekers to enter and remain in the U.S. while their cases were being processed. Asylum seekers now had to live in squalid and dangerous camps in Mexico while waiting for their names to be placed on a list for eventual processing. Most disturbing from the perspective of DT and RT were the new rules ("Prompt Asylum Case Review" and "Humanitarian Asylum Review Process") implemented for screening asylum seekers by poorly trained officers, who are now instructed to interpret and apply the law governing refugees in the narrowest way possible to applicants that are given barely 24 hours to prepare for their interviews, with only a mere possibility of discussing their case over the phone with a lawyer. Together, these policies amount to much more than a gross violation of discursive and recognitive norms; they constitute a grave violation of legal due process.

Recognition theory shows how this conceptual narrowing of who counts as a refugee reflects a vicious hermeneutical circle. The migrant whose testimony is discounted cannot contribute personal knowledge that could revise the very expertise that invalidates her knowledge. To paraphrase Jean-François Lyotard, the migrant's testimony cannot be entered into litigation as a form of dissent that merits argumentative rebuttal because it cannot be recognized as a legitimate truth claim (Lyotard 1988; Ingram 2018a). There is no neutral rule for adjudicating the disagreement between the asylum board's statistical generalizations and classifications that, say, define gender-related violence as an acceptable cultural norm within the migrant's native country and the migrant's unverifiable experience of suffering and resisting her government's acquiescence in the violation of her human rights. Any rule that recognizes the authority of the board's claim ---with its structural deference to state sovereignty (both within and without the domestic border of the state it represents) ---disqualifies the authority of the migrant's claim to a human right that transcends state sovereignty. One voice must go unrecognized, or at least suffer diminished credibility in relation to the other. And the voice that is effectively silenced will be the less institutionally entrenched voice, which in the case before us is that of the migrant.²⁰

To be sure, the injustice committed in silencing the asylum seeker is not inevitable. Sovereignty and human rights need not be conceptualized in stark opposition to each other. Indeed, the Responsibility to Protect doctrine that was adopted by the UN in 2005 arguably redefines sovereignty in terms of respect for and protection of human rights. Once respect for and protection of human rights is understood to be the primary rule guiding the interpretation of the Geneva Convention Relating to the Status of Refugees, as the UNHCR recommends that it should be, the restrictive binary categories in terms of which persecution is legally defined must be deconstructed.

Pre-interpreted through the cipher of binary legal categories, the exclusionary logic of the dominant asylum paradigm is challenged by the personal experiences of those who must submit to it. The distinction between private and public domains of life, between domains of life that should be left to individuals to work out among themselves and domains that properly fall under public and political regulation, is questioned by a feminist standpoint that interprets domestic violence as a public harm visited upon women as a politically vulnerable group. The distinction between political persecution and economic oppression is questioned by a critical theory standpoint that interprets government negligence in securing everyone's human right to material security as an act of political discrimination

²⁰ The UNHCR must also recognize the competing demands of national sovereignty and humanitarian rescue. The protective confinement of displaced populations is politically preferable to their protective resettlement in a foreign country or their repatriation. As in the case of asylum courts, the UNHCR's decision to repatriate is often done without consulting those whose lives are at risk, and even when they are consulted, the testimony of government officials and experts often outweighs the testimony of eyewitnesses on the ground (Ingram 2018b: 141-44 ; Barnett 2010, .

endangering the basic freedoms of the poor.²¹ Finally, the distinction between asylum seekers fleeing natural disasters, such as climate change, and asylum seekers fleeing oppressive government is questioned by a globalizing standpoint that interprets climate change, poverty, and political oppression as the shared responsibility of the entire international community.²²

Thus, the Salvadoran woman seeking asylum in the United States flees from a situation which an inhospitable nature, an impoverished economy, an oppressive society, an unresponsive and hostile government, and an irresponsible global order have conspired together to create. Criminalizing her for bypassing legal ports of entry or punishing her with confinement shows the degree to which the legal system misrecognizes her. If she has voluntarily colluded with a trafficker she may be misrecognized as a simple accomplice, in total disregard for the coercive bargain and accompanying threats of retaliation leveraged by her trafficker, not to mention the violence compelling her to embark on such a desperate course of action in the first place. Or she may be misrecognized as a passive victim of non-consensual exploitation in total disregard for her agency. This misrecognition is compounded if she happens to be an unaccompanied minor, in which case she will be treated as an incompetent witness without adult standing or as a blameworthy delinquent meriting summary deportation back to her family.²³

²¹ Urging reconsideration of the usual way in which economic and political categories of government sanctioned endangerment are interpreted does not require abandoning their distinction. Immanent, durable, and severe risk of government persecution (imprisonment, torture, and assassination) targeting specific persons and groups requires urgent action in a way that untargeted and widespread economic suffering caused by government neglect does not. Persons fleeing economic oppression should be afforded temporary protected status but not refugee status (see note 4)

²² In fact, the Syrian refugee crisis implicates a climatological cause---drought--- as contributing to the economic and political causes of the Syrian civil war.

²³ See the dilemma of misrecognition posed by unaccompanied minors seeking asylum in the United States from Central American gang-related violence (Heidbrink 2013). In defending a prima facie case for prioritizing children for asylum because of their vulnerability (among other

If recognition theory provides a lens for magnifying the epistemic injustices visited upon asylum seekers in the immigration system, it also provides a framework for correcting them. The incorporation of gender-related persecution into refugee law shows that dominant epistemic frameworks informing law are not impervious to change, once alternative resources based on lived experience are given a fair hearing. Accordingly, since 2016 the UNHCR has expanded the definition of a refugee to include anyone living outside their country of residence who faces “serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order” and other “man-made disasters.”²⁴ Serious and indiscriminate threats to life, physical integrity or freedom that count as “man-made disasters” include willful neglect of domestic abuse, poverty, and environmental devastation wrought by anthropogenic climate change. Simply reclassifying gender-based asylum seekers as endangered persons who do not merit full protection under the legal definition of refugee, but who nonetheless merit “temporary” or “subsidiary” protection, violates the spirit of the UNHCR’s expansive recognition of refugees and misrecognizes the severity, duration, and specificity of their endangerment.

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reasons), Gottfried Schweiger notes that children are regarded as less reliable witnesses than adults to the circumstances bearing upon their case for asylum (Schweiger 2019: 56-57).

²⁴ This definition adopts the wording contained in the Organization of African Unity’s Convention Governing the Specific Aspects of Refugees in Africa (1974). The Cartagena Declaration on Refugees (1984), adopted a non-binding resolution by Mexico and other Latin American countries, builds upon this definition to include “persons who have fled their countries because their lives, safety, and freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other disturbances which have seriously disturbed public order.”

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