

# THE RING OF TRUTH: DEMEANOR AND DUE PROCESS IN U.S. ASYLUM LAW

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## INTRODUCTION

Whether to believe an asylum applicant is one of the most critical issues in asylum law. Many competing interests are in direct conflict: the need to protect people from persecution, the government's desire to control entry into the country as an exercise of sovereignty, the extreme difficulty of gathering documentary proof of one's persecution, and the government's concerns about allowing security threats into the country. It is essential to strike the right balance between these conflicting priorities. The conflict between national welfare and public safety against individual liberty and personal security is not, however, a matter of mere policy preferences. The Constitution demands that whenever government action threatens to deprive an individual of their liberty, that individual must be provided due process.<sup>1</sup> Unfortunately, policymakers have adopted the rhetoric of "security" and cultivated a climate of fear to justify increasing the burdens on refugees to prove their eligibility for asylum.<sup>2</sup> In 2005, the REAL ID Act, claiming to be an effort to maintain security and identify asylum fraud,<sup>3</sup> dictated the factors immigration judges must consider in determining whether an asylum applicant's testimony is credible and therefore able to support their claim for asylum.<sup>4</sup> Among these factors is the applicant's "demeanor."<sup>5</sup>

This Note argues that the consideration of demeanor is a violation of asylum applicants' due process rights. Though demeanor evidence is pervasive throughout the American legal system, its validity has been called into question by modern psychological studies, and its use has been sharply criticized by legal scholars.<sup>6</sup> Furthermore,

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1. U.S. CONST. amend. V.

2. Katherine Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 649–51 (2007).

3. *Id.* at 651–52 (explaining the circumstances of the Act's introduction in the House of Representatives).

4. Immigration and Nationality Act § 208(b)(1)(B)(iii) (AILA 2018), 8 U.S.C. § 1158(b)(1)(B)(iii) (West 2018) [hereinafter INA].

5. *Id.* (stating that among other factors, "a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness.").

6. See, e.g., Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know about Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1332 (2015) ("[C]ognitive psychological studies have consistently established that the typical cultural cues jurors rely on, including averting eye contact, a furrowed brow, a

unique aspects of asylum adjudication make the use of demeanor especially damaging. Because corroborating evidence is frequently unavailable to asylum applicants, their claims typically turn on their own testimony. To have that testimony found not credible will almost certainly mean denial of the asylum claim.<sup>7</sup> The extraordinary breadth of ways in which demeanor can be assessed, combined with the lack of meaningful judicial review of demeanor determinations, gives immigration judges overwhelming discretion to deny claims for asylum.

Inherent problems in judging demeanor lead to the unfair exercise of that discretion, defeating the possibility of fundamental fairness demanded by constitutional due process requirements. The consideration of demeanor gives the implicit biases held by immigration judges the opportunity to rationalize and manifest themselves into inaccurate negative credibility determinations. These determinations may be based on the immigration judges' personal, even unconscious feelings towards and assumptions about the applicant.<sup>8</sup> Furthermore, because demeanor relies on culturally instructed ideas about body language, its consideration in the cross-cultural asylum context allows the asylum adjudication system's institutional bias to prejudice the outcome.<sup>9</sup> Even without personal and institutional bias, however, demeanor is simply an inaccurate method of assessing credibility, and the majority of people are unable to identify truth from lies based on demeanor.<sup>10</sup> Additionally, the lack of judicial review of demeanor assessments precludes the jurisprudential development of clear standards, resulting in confusion, inconsistency, and the total inability to constrain immigration judges' discretion.<sup>11</sup>

United States asylum law must be revised to correct the due process deficiencies posed by demeanor assessments. One simple

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trembling hand, and stammering speech, for example, have little or nothing to do with a witness's truthfulness.").

7. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 474 (2016).

8. See *infra* Part II.B.1.

9. See *infra* Part I.B.2.

10. See *infra* Part I.B.3; see also Michael Kagan, *Is Truth in the Eye of the Beholder? Objectivity Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 379 (2003) [hereinafter Kagan, *Eye of the Beholder*] (explaining that most people are unable to use verbal cues to discern truth from lies accurately).

11. See *infra* Part I.B.4.

solution would be to exclude demeanor from the credibility analysis. However, this risks increasing the unfair burdens on asylum seekers. It would place additional weight on other credibility factors that have also been criticized as being unfair to asylum applicants in their own right, especially because of the REAL ID Act's provision that inconsistencies, inaccuracies, and falsehoods need not go to the heart of the applicant's claim to support a negative credibility determination.<sup>12</sup> An alternative solution is to establish a presumption of credibility for asylum applicants, so that a negative credibility determination cannot be made in the absence of clear, affirmative evidence establishing a reason to doubt the applicant's testimony. While this does not fully redress the problems of demeanor, it could mitigate the harms posed in a way that would improve the overall balance of credibility determinations consistently with the underlying purposes of asylum.

Part I of this Note will lay out the legal background for two aspects of asylum adjudication: how demeanor is factored into credibility determinations and what due process requires for fair asylum adjudications. Part II will apply the *Mathews v. Eldridge* due process framework to establish how the consideration of demeanor violates due process.<sup>13</sup> Part II.A will discuss the private interest at stake. Part II.B will explore the various ways in which the use of demeanor in credibility determinations risks the erroneous deprivation of that interest—focusing on personal bias, institutional bias, inaccuracy, and the lack of appellate review—and Part II.C will examine the government's interests in employing demeanor assessments and how these interests are neither truly served by demeanor, nor sufficiently weighty to justify the risk posed to the private interest at stake. Part III will examine two potential solutions to the due process problem: striking demeanor from the credibility determination altogether and establishing a presumption of credibility for asylum applicants.

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12. See INA § 208(b)(1)(B)(iii) (AILA 2018) (providing that immigration judges may consider inconsistencies, inaccuracies, and falsehoods in the applicants' statements "without regard to whether any inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim").

13. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that due process claims are assessed by balancing 1) the private interest at stake, 2) the risk of erroneous deprivation of that interest, and 3) the government's interest).

## I. Demeanor and Credibility Under the REAL ID Act and the Due Process Standard

This section will examine two legal regimes to understand how they affect a refugee's ability to obtain asylum. First, it examines how demeanor is considered in determining an asylum applicant's credibility. Second, it traces the contours of Fifth Amendment procedural due process in asylum proceedings.

### A. Denial of Asylum Based on the Applicant's Demeanor

Under the Immigration and Nationality Act (INA), applicants bear the burden of proving their eligibility for asylum.<sup>14</sup> Recognizing that the very nature of an asylum claim makes it difficult, if not impossible, to collect corroborating evidence, the INA allows an asylum applicant to meet this burden with their testimony alone, provided that their testimony is found credible.<sup>15</sup> These credibility determinations are critical to every asylum applicant's case, but an adverse credibility determination will likely result in the denial of an asylum seeker's claim when the applicant cannot present corroborating evidence—a difficulty asylum seekers frequently face.<sup>16</sup> Whether or not the Immigration Judge (IJ) thinks the asylum applicant is telling the truth thus becomes the critical determination in whether asylum will be granted.

The REAL ID Act of 2005 amended the INA in order to clarify and codify how an IJ should determine credibility in asylum proceedings, creating a “uniform standard for credibility” which enshrined factors that had developed in the case law:<sup>17</sup>

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14. INA § 208(b)(1)(B)(i) (AILA 2018) (placing the burden of proof on the applicant to establish that they are a refugee); *see also id.* § 208(b)(1)(B)(iii) (AILA 2018) (providing that there is no presumption of credibility for asylum applicants).

15. *Id.* § 208(b)(1)(B)(ii) (allowing for the testimony of the applicant to sustain their burden without corroboration, but only if that testimony is “credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee”).

16. Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum*, 29 J. CONTEMP. HEALTH L. AND POL'Y 283, 286–87 (2013); *see also* Paskey, *supra* note 7, at 474 (“Given this limited evidence, the applicant's credibility is the linchpin of the judge's analysis—asylum is all but certain to be denied to an applicant who is deemed not credible.”).

17. *In re J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007) (quoting H.R. Rep. 109-72, at 166–67 (2005) (Conf. Rep.)); *see also* Aubra Fletcher, Note, *The REAL ID Act: Furthering Gender Bias in Asylum Law*, 21 BERKELEY J. GENDER L. & JUST.

Credibility determination.—Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the inconsistency between the applicant's or witness's written and oral statements . . . , the internal consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements, without regard to whether any inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.<sup>18</sup>

The REAL ID Act thus allows IJs to base adverse credibility determinations on an asylum applicant's demeanor, so long as the IJ considers the “totality of the circumstances.”<sup>19</sup> Judge Learned Hand articulated demeanor as making “the carriage, behavior, bearing, manner and appearance of a witness” into evidence.<sup>20</sup> In line with this vision of demeanor as evidence, consideration of “demeanor” as evidence under the REAL ID Act is extremely broad. It includes a wide range of observations, such as “the expression of [the witness's] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication.”<sup>21</sup>

While demeanor is only one among several factors, the statute's language provides that “any inconsistency, inaccuracy, or falsehood” can support a negative credibility finding even if it does not “go[] to the heart of the applicant's claim.” This language gives IJs broad authority and little guidance as to when these factors should result in an adverse credibility determination, granting an IJ's opinions about an applicant's demeanor inordinate weight in the ultimate decision.

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111, 121 (2011) (noting that while factors such as demeanor, candor, and responsiveness played a role in credibility determinations prior to the REAL ID Act, the Act heightened their importance).

18. INA § 208(b)(1)(B)(iii) (AILA 2018).

19. Melanie A. Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 27 (2009).

20. *Dyer v. MacDougall*, 201 F.2d 265, 268–69 (2d Cir. 1952) (L. Hand, J.).

21. *Pardes-Urrestarazu v. INS*, 36 F.3d 801, 818 (9th Cir. 1994) (quoting *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078–79 (9th Cir. 1977)).

Despite this broad authority, however, IJs cannot base an adverse credibility determination on vague references to the applicant's demeanor as seeming generally untruthful.<sup>22</sup> The IJ must provide specific and cogent reasons to support an adverse credibility determination, discussing which factors form its basis and referring to specific instances in the record that support the IJ's conclusion.<sup>23</sup> When the IJ is basing their adverse credibility determination on the applicant's demeanor, the IJ's assessment must refer to *specific aspects* of the applicant's demeanor,<sup>24</sup> and their conclusion must be supported by *substantial evidence*, meaning such relevant evidence as a reasonable person would accept as adequate to support a conclusion.<sup>25</sup> At a minimum, the IJ must state on the record exactly what aspect(s) of the applicant's demeanor convinced the IJ that the applicant was not telling the truth. Critically however, the IJ does not have to say *why* they believed that demeanor attribute indicated untruthfulness.<sup>26</sup>

For example, an observation of the applicant's rapid speech or agitation can be held against their credibility,<sup>27</sup> as can an applicant's "halting and hesitating manner of testifying."<sup>28</sup> An applicant's apparent lack of emotion while testifying about traumatic events may also support an adverse credibility finding.<sup>29</sup> Courts have also upheld adverse credibility determinations based on "perceived anxiousness, delays in responses to questions, and verbal and nonverbal cues of deception."<sup>30</sup>

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22. Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010).

23. *Id.* at 1044.

24. *Id.* at 1042.

25. Todorovic v. U.S. Att'y Gen., 621 F.3d 1318, 1323–24 (11th Cir. 2010).

26. Scott Rempell, *Gauging Credibility in Immigration Proceedings*, 25 GEO. IMMIGR. L.J. 377, 397–98 (2011).

27. *In re J-Y-C-*, 24 I&N Dec. 260, 264 (BIA 2007) (holding that applicant's explanation for discrepancies between their testimony and the corroborating evidence was validly dismissed because the applicant's "rapid manner" of testimony suggested that the explanation was fabricated).

28. *In re A-S-*, 21 I&N Dec. 1106, 1111 (BIA 1998). However, the BIA suggested that it may be inappropriate to base an adverse credibility finding on "halting and hesitating testimony" alone if that testimony was nonetheless detailed and consistent. *Id.* at 1112.

29. *See* Wang v. Holder, 569 F.3d 531, 535, 537–38 (5th Cir. 2009) (upholding IJ adverse credibility determination based in part on finding that the applicant's testimony about her incarcerations and beatings lacked emotion and "seemed to the IJ more consistent with one who has rehearsed a story, rather than who lived the events").

30. Rempell, *supra* note 26, at 396 (internal quotation marks omitted).

However, because the IJ must look at the totality of the circumstances, rather than “cherry pick[ing]” the facts favoring an adverse credibility determination while ignoring those undermining it,<sup>31</sup> behavior such as looking at the table or wall instead of the IJ may not be enough to support an adverse credibility determination when the record as a whole suggests that the behavior was not truly indicative of deceptiveness.<sup>32</sup> Crucially, the substantial evidence requirement means that demeanor cannot be used as an excuse to rely on conjecture and speculation, and in particular, the IJ may not rely on “stereotypes about how persons belonging to a particular group would act, sound, or appear.”<sup>33</sup>

Nevertheless, IJs’ credibility determinations, particularly their findings of demeanor, receive an extraordinary amount of deference on review.<sup>34</sup> The REAL ID Act requires a substantial level of deference to IJ credibility determinations, as IJs are considered to be “in the best position to assess demeanor and other credibility cues” not readily accessible to reviewing courts.<sup>35</sup> The IJ’s ability to witness live testimony supposedly puts them in a better position to assess demeanor than a reviewing court, as an appellate body cannot easily review demeanor from the record alone.<sup>36</sup> The ability to observe the asylum applicant and to assess their tone and appearance is thus believed to make the IJ “uniquely qualified to decide whether the alien’s testimony has about it the ring of truth.”<sup>37</sup> This “ring of truth”

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31. *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010).

32. *See Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995) (noting that looking at the table and wall may have simply indicated the applicant’s concentration on what he was being asked, particularly since the record suggested the applicant was listening and responding carefully, repeatedly asking for clarification of questions before answering).

33. *Todorovic v. U.S. Attorney Gen.*, 621 F.3d 1318, 1325–26 (11th Cir. 2010) (holding that the IJ’s adverse credibility determination, based on the fact that the witness claiming persecution for his sexuality did not appear “overtly gay,” impermissibly relied on stereotypes as a substitute for substantial evidence).

34. *Li Hua Lin v. U.S. Dep’t of Justice*, 453 F.3d 99, 109 (2d Cir. 2006); *see also Abdulrahman v. Ashcroft*, 330 F.3d 587, 598 (3d Cir. 2003) (noting that the overriding consideration in reviewing an adverse credibility determination is the “extraordinarily deferential” standard of review).

35. *Shrestha*, 590 F.3d at 1041.

36. *In re A-S-*, 21 I&N Dec. 1106, 1111 (BIA 1998).

37. *Todorovic*, 621 F.3d at 1324–25 (quoting *Abdulrahman*, 330 F.3d at 597).

notion was noted by the REAL ID Act's drafters to support the use of demeanor in gauging credibility.<sup>38</sup>

This deference leads to a strict application of the "substantial evidence" standard of review: the standard is defined as "such relevant evidence as a reasonable person would accept as adequate to support a conclusion," and the IJ's findings will only be reversed if the evidence would *compel* any reasonable factfinder to reach a different conclusion.<sup>39</sup> The reviewing court will thus defer to the IJ's credibility finding whenever it is "supported by a specific, cogent reason for disbelief."<sup>40</sup> As a result, the IJ's credibility determination will be upheld even when the IJ clearly relied on impermissible speculation and assumptions not supported by the record, so long as some evidentiary basis for the determination can be found.<sup>41</sup> The REAL ID Act may have raised this level of deference even higher, as its rejection of the previous "heart of the claim" standard has been read to indicate an intent to give the IJ increased discretion when making credibility determinations.<sup>42</sup>

The preceding discussion demonstrates three aspects of demeanor that lend it the potential to have devastating impacts on refugees' claims for asylum: (1) an asylum claim can be denied on the basis of the IJ's demeanor findings, (2) the IJ has extremely broad discretion in making such demeanor findings, and (3) the reviewing

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38. Rempell, *supra* note 26, at 395 (quoting H.R. Rep. No. 109-72, at 167 (2005)).

39. *Todorovic*, 621 F.3d at 1323–24; *see also* *Shahinaj v. Gonzales*, 481 F.3d 1027, 1028 (8th Cir. 2007) (quoting *Menendez-Donis v. Ashcroft*, 360 F.3d 915, 918 (8th Cir. 2004)) (stating that the BIA's determination will only be reversed if "it would not be possible for any reasonable fact-finder to come to the conclusion reached by the administrator."); *Abdulrahman*, 330 F.3d at 597 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992)) (describing the standard of review as a "high hurdle").

40. *Shahinaj*, 481 F.3d at 1028–29 (quoting *Mohamed v. Ashcroft*, 396 F.3d 999, 1003 (8th Cir. 2005)).

41. *See Abdulrahman*, 330 F.3d at 598 (upholding the IJ's adverse credibility determination despite the fact that it was "not confined to the evidence in the record and smacked of improper conjecture" because it could not be concluded from the evidence as a whole that any reasonable factfinder would be compelled to find the applicant's testimony credible).

42. *Wang v. Holder*, 569 F.3d 531, 537–38 (5th Cir. 2009); *see also* Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 94 (2007) (describing the REAL ID Act's passage as Congress restricting judicial review by "statutorily endorsing" IJs' adverse credibility determinations even when based on minor inconsistencies not going to the heart of the claim).

courts give the IJ's demeanor findings an extraordinary level of deference. In its current form, the use of demeanor gives IJs enormous discretion with only minimal constraints when adjudicating asylum claims.

## B. The Scope of Procedural Due Process in Asylum Proceedings

The Supreme Court has held that the federal government has plenary power over the admission and expulsion of non-citizens as a matter of sovereignty.<sup>43</sup> However, the Fifth Amendment entitles non-citizens to due process of law in deportation proceedings.<sup>44</sup> As such, non-citizens facing deportation are entitled to a full and fair hearing of their claims, including the reasonable opportunity to present evidence on their own behalf.<sup>45</sup>

There are various ways to bring an asylum claim, and the procedure an applicant chooses can have drastic effects on their ability to invoke due process protections. One method is the affirmative asylum process, in which an applicant who is already physically present in the United States submits an application for asylum to U.S. Citizenship and Immigration Services (USCIS), which reviews the claim and conducts a non-adversarial interview with the applicant.<sup>46</sup>

The other way of applying for asylum is by raising a defensive asylum claim. An individual placed in removal proceedings in immigration court with the Executive Office for Immigration Review (EOIR) may raise asylum as a defensive claim for relief from removal.<sup>47</sup> This process includes those whose affirmative asylum claims were denied by USCIS—as USCIS “refers” all denials to removal proceedings before EOIR—as well as those apprehended while trying to enter the United States without proper documentation.<sup>48</sup>

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43. Hill, *supra* note 42, at 94–96.

44. U.S. CONST. amend. V; *Reno v. Flores*, 507 U.S. 292, 306 (1993) (recognizing the right of aliens to due process in deportation proceedings as well established); *see also* *Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903) (reasoning that deportation involves a liberty interest, of which no person shall be deprived without opportunity to be heard, including for non-citizens alleged to be in the country illegally).

45. *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

46. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/humanitarian/reguees-asylum/asylum/obtaining-asylum-united-states> [perma.cc/8A5G-WH7W].

47. *Id.*

48. *Id.*

Defensive asylum is also available to those within the United States whom the Department of Homeland Security is attempting to deport.<sup>49</sup>

Courts have restricted due process protections for non-citizens who have not effected entry into the United States.<sup>50</sup> An effected entry requirement is a drastic limit on due process, as those asylum seekers who apply at the border or airport and are either paroled or detained pending the resolution of their claims are not considered “admitted” and are supposedly not entitled to any process beyond that established by Congress.<sup>51</sup> However, those who have effected entry into the United States are protected by the Due Process Clause regardless of their status: the Fifth Amendment protects “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>52</sup>

At the same time, the *scope* of that protection may vary according to the individual’s status and circumstances.<sup>53</sup> For example, the Justice Department has argued that the protections of due process are lower for those seeking only relief from removal than for those contesting removability itself.<sup>54</sup> That distinction has been challenged as meaningless, because the private interests at stake are no less severe in the former than the latter.<sup>55</sup>

Regardless, due process requires that, at a minimum, asylum applicants have the opportunity to be heard at a meaningful time and in a meaningful manner, so they must be given a full and fair hearing

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49. DREE K. COLLOPY, *AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURES* 650 (7th ed. 2015).

50. See *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (holding that a non-citizen held at Ellis Island had not sufficiently effected entry into the United States so as to be afforded due process protection).

51. Victor P. White, Note, *U.S. Asylum Law Out of Sync with International Obligations: REAL ID Act*, 8 *SAN DIEGO INT’L L.J.* 209, 240 (2006).

52. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

53. *Id.* at 693–94.

54. Asylum claims in deportation proceedings are essentially affirmative defenses to deportation; they follow the determination that the applicant is “removable,” and they therefore fall into the category of “relief from removal” rather than “contesting removability.” See U.S. Dep’t of Justice, *Asylum and Withholding of Removal Relief, Convention Against Torture Protections* 4 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATP protections.pdf> [perma.cc/MXD6-V8L2].

55. Evelyn H. Cruz, *Double the Injustice, Twice the Harm*, 16 *STAN. L. & POL’Y REV.* 481, 488 (2005).

on their claims.<sup>56</sup> The full examination of an asylum applicant is essential as a matter of fairness to the parties and of the integrity of the asylum process itself.<sup>57</sup>

*Mathews v. Eldridge* established the general framework used for assessing due process claims: the court weighs the private interest at stake; the risk of erroneous deprivation of that interest posed by the existing procedures, as well as the probable value, if any, of additional safeguards; and the government's interest, including the function involved and the burdens entailed by substitute or additional safeguards.<sup>58</sup>

There are a few essential aspects of due process in removal and asylum proceedings, primarily involving the right to be heard and the right to notice. Regarding the right to be heard, due process protects asylum applicants' right to testify fully on the merits of their application.<sup>59</sup> Due process prohibits the IJ from prematurely stopping the applicant before they've completed their testimony.<sup>60</sup> Whether this right to be heard has been violated depends on whether the IJ has merely limited the extent of some testimony or frequently interrupted the applicant's presentation, or if the IJ has instead barred complete chunks of testimony that would have supported the applicant's claim.<sup>61</sup> The former situations are not due process violations, because in those scenarios, the IJ is merely streamlining and focusing the proceedings. In the latter case, however—where the IJ bars complete portions of testimony—the IJ violates the applicant's due process right to be meaningfully heard.<sup>62</sup>

56. *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002); *see also* *Burger v. Gonzales* 498 F.3d 131, 134 (2d Cir. 2007) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (recognizing that due process, at a minimum, entitles aliens to the opportunity to be heard at a meaningful time and in a meaningful manner).

57. *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (B.I.A. 1989).

58. *Mathews*, 424 U.S. at 335. Though the *Mathews* test was developed in the context of disability benefits, it applies to deportation and asylum proceedings as well. *See also* *Martinez-de Bojorquez v. Ashcroft*, 365 F.3d 800, 804–05 (9th Cir. 2004) (applying the *Mathews* analysis to conclude that the failure to notify an applicant that if she left the country she would forfeit her appeal was a due process violation); *see also Rusu*, 296 F.3d at 321 (stating that the *Mathews* principles apply when assessing whether a deportation or asylum hearing has comported with due process).

59. *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003) (per curiam).

60. *Oshodi v. Holder*, 729 F.3d 883, 885 (9th Cir. 2013).

61. *Kerciku*, 314 F.3d at 917–18.

62. *Id.*

Notice is another essential aspect of due process.<sup>63</sup> Applicants must have adequate notice of the procedures and standards to be applied to their claims for relief.<sup>64</sup> Similarly, courts have also found due process violations when applicants were not notified of the requirements for appeal to the Board of Immigration Appeals (BIA).<sup>65</sup> A finding of due process violation based on inadequate notice does not require the existence of a total omission of relevant information, but instead can be established through a “concatenation” of factors, such as the confusing nature of the BIA’s forms or failure by the BIA to give advance warning about the possibility of summarily dismissing an appeal.<sup>66</sup> This is because due process requires not only that administrative agencies inform applicants that proceedings have been instituted against them, but also that agencies provide applicants with sufficient information to allow them to prepare and present objections to the agency’s preliminary action or decision.<sup>67</sup>

The two preceding paragraphs show that the essential elements of procedural due process in asylum cases are the same as they are in any proceeding: notice and the opportunity to be heard.<sup>68</sup> For example, if the IJ or the BIA intend to take administrative notice of potentially dispositive facts, they must give the asylum applicant notice and an effective chance to respond to those administratively noticed facts.<sup>69</sup>

The absence of a neutral, unbiased arbiter also violates due process.<sup>70</sup> A due process challenge based on the lack of a neutral and

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63. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (reasoning that notice and an opportunity to be heard are essential to both criminal and civil proceedings).

64. *Huysev v. Mukasey*, 528 F.3d 1172, 1182 (9th Cir. 2008).

65. *Martinez-de Bojorquez v. Ashcroft*, 365 F.3d 800, 804 (9th Cir. 2004).

66. *Padilla-Augustin v. INS*, 21 F.3d 970, 977 (9th Cir. 1994) (holding that the “concatenation” of factors can combine to amount to a denial of due process).

67. *Id.* at 974.

68. See *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)) (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’”).

69. *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (quoting *Chhetry v. U.S. Dep’t of Justice*, 490 F.3d 196, 200 (2d Cir. 2007)).

70. *Cham v. Att’y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006) (holding that no one can be deprived of their interests without being given the opportunity to present their case with the assurance that the arbiter is not predisposed to find against them); see also *Wang v. Holder*, 569 F.3d 531, 540 (5th Cir. 2009) (noting that a due

impartial arbiter does not require establishing that the IJ was actually biased, but only that they failed to reflect the *appearance* of impartiality.<sup>71</sup> However, it is difficult to succeed on a claim of bias, as such a claim requires showing that the IJ's opinion has been formed on something other than the basis of facts introduced or events occurring in the course of proceedings; displays of temper are not enough.<sup>72</sup> An IJ who frequently interrupts and questions an applicant during their testimony does not violate their due process rights, even though it may appear that the judge is taking an aggressive stance against the applicant, so long as the IJ does not prevent the applicant from fully presenting their evidence.<sup>73</sup> The allowance for this interrogatory role is based on the fact that IJs, unlike Article III judges, have an obligation to establish the record as well as to serve as fact-finder and adjudicator; thus, even impatient and inappropriate behavior by the IJ will be tolerated unless it becomes so aggressive as to “amount[] to wholesale nitpicking or overly-active questioning which distorts rather than develops the record.”<sup>74</sup>

A due process challenge generally requires a showing of prejudice.<sup>75</sup> Thus, to bring a successful due process challenge, the asylum applicant must both (1) show that the proceeding was so fundamentally unfair that they were prevented from reasonably presenting their case and (2) demonstrate prejudice, meaning that the alleged violation may have affected the outcome of the proceeding.<sup>76</sup> For example, an applicant whose due process rights were violated

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process violation can be premised on the absence of a neutral arbiter). This has sometimes been considered a component of the due process right to be heard, but at other times the lack of impartiality has been distinguished as a separate issue. Hill, *supra* note 42, at 102.

71. Hill, *supra* note 42, at 102.

72. Wang, 569 F.3d at 540 (citing *Liteky v. United States*, 510 U.S. 540 (1994)).

73. *Id.* at 541 (observing that, far from being a due process violation, judges asking questions of a witness during a bench trial is a commonplace occurrence). Note how this tracks the distinction between limiting and wholly barring testimony in whether the due process right to be meaningfully heard has been violated, suggesting that the presence of a neutral arbiter is in fact an aspect of the right to be heard. See *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003) (*per curiam*); *supra* texts accompanying notes 59 and 61.

74. Hill, *supra* note 42, at 101 (internal quotation marks and citations omitted).

75. *Martinez-de Bojorquez v. Ashcroft*, 365 F.3d 800, 806 (9th Cir. 2004).

76. *Tampubolon v. Holder*, 610 F.3d 1056, 1063 (9th Cir. 2010) (quoting *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006)).

when the BIA failed to inform her that leaving the country would forfeit her right to appeal was able to demonstrate prejudice in that, had she been warned about the consequences of leaving the country, she likely would have remained, and so she almost certainly would have received relief from removal.<sup>77</sup> However, the prejudice requirement does not necessitate a clear showing that the adverse credibility determination resulted from the lack of due process, just (at least in most jurisdictions) that the violation had the *potential* to affect the outcome of the proceedings.<sup>78</sup>

Asylum applicants have a right to a fair hearing and, if prejudiced by an absence of fairness, they can challenge the validity of that hearing. From the case law, it appears that the courts, in protecting this fairness, have been primarily concerned with notice of and ability to respond to the Government's case and the legal requirements of the asylum adjudication process, the applicant's ability to fully present evidence in support of their case, and the impartiality of the adjudicator.

## II. THE *MATHEWS* TEST: HOW Demeanor DENIES ASYLUM APPLICANTS DUE PROCESS

The use of demeanor in credibility determinations poses a substantial and unjustifiable risk of erroneous deprivation of asylum applicants' liberty interests. Under *Mathews v. Eldridge*, due process claims are assessed by weighing the private interests at stake, the risk of erroneous deprivation through current procedures and probable value of additional or substitute procedural safeguards, and the Government's interest.<sup>79</sup> This section will apply the *Mathews* test in the context of asylum adjudications, weighing these factors to show why a refugee's demeanor cannot constitutionally be considered in assessing their credibility.

### A. The Private Interests at Stake

The private interests at stake in deportation proceedings in general, and asylum proceedings in particular, are dire. The liberty interests at stake in any removal proceeding are "weighty one[s]"—posing the risk of loss of "the right to stay and live and work

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77. *Martinez-de Bojorquez*, 365 F.3d at 806.

78. Hill, *supra* note 42, at 103.

79. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

in this land of freedom,” as well as, for many, the “right to rejoin . . . family, a right that ranks high among the interests of individuals.”<sup>80</sup> Furthermore, the consequences of the erroneous denial of this liberty interest are especially severe for an asylum seeker, where “the private interest could hardly be greater. If the court errs, the consequences for the applicant could be severe persecution, torture, or even death.”<sup>81</sup>

## B. The Risk of Erroneous Deprivation

The use of demeanor in asylum credibility determinations creates a drastic risk of erroneous deprivation of an applicant’s liberty interests. Demeanor, as currently employed within asylum adjudication, creates this risk because it (1) invites personal bias into IJs’ decision-making, (2) fosters and exacerbates institutional bias, (3) is an inaccurate, widely discredited method of ascertaining truthfulness, and (4) is unreviewable. These issues amount to a deprivation of the core due process guarantees of notice and the right to be heard before an impartial adjudicator.

### 1. Demeanor invites personal bias into immigration judges’ decision-making

As discussed in Part I, *supra*, demeanor is an extremely broad element, and IJs are almost completely unrestrained in how they factor demeanor into their decision-making. While an IJ may not use demeanor as an excuse to explicitly invoke stereotypes as evidence to determine credibility in their reasoning,<sup>82</sup> if the IJ can point to a cogent basis for their conclusion supported by specific instances in the record, the determination will be upheld.<sup>83</sup> The IJ is not even required to explain *how* a particular aspect of the applicant’s demeanor indicates

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80. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (internal quotation marks and citation omitted).

81. *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013).

82. *See Todorovic v. U.S. Att’y Gen.*, 621 F.3d 1318, 1325–26 (11th Cir. 2010) (rejecting a demeanor determination based on an IJ’s speculative assumptions and stereotypes).

83. *See Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010) (concluding that, under the REAL ID Act, IJs must identify factors that “form the basis of an adverse credibility determination,” while still asserting that courts should give “ample deference” to responsible agencies).

untruthfulness.<sup>84</sup> The statutory mandate that IJs consider an applicant's demeanor in assessing credibility, combined with this broad, unrestrained discretion in determining what counts as a credible demeanor, invites implicit personal biases into the thinking of IJs, tainting their decision-making so as to risk erroneous negative credibility determinations.

Implicit bias has a recognized impact on the decision-making of judges, either as feelings harbored towards or stereotypes attributed to particular groups.<sup>85</sup> Immigration judges in particular have a documented history of exhibiting bias—conscious and implicit—to a troubling degree, and federal circuit courts have overturned IJ decisions exhibiting egregious levels of explicit bias.<sup>86</sup> However, this section will show that because implicit bias can be rationalized by demeanor, appellate review cannot safeguard against the risk of bias posed by demeanor.

First, implicit bias functions automatically, so an IJ's decision-making will be impacted by their perception of the applicant before the IJ can consciously deliberate; even individuals who believe they don't discriminate frequently show bias in their decision-making.<sup>87</sup> Judges in general typically show the same kinds of implicit bias as the general population, and while it is possible for highly motivated judges to compensate for their biases to prevent them from affecting their decision-making, the conditions in which immigration judges work make this compensation unlikely.<sup>88</sup> IJs have limited independence,

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84. Rempell, *supra* note 26, at 397–98 (explaining that while an IJ must state on the record, for example, that they found an applicant not credible because of long pauses before answering questions, the IJ “could leave undisclosed the reason why he or she assumed that a long pause by a testifying witness demonstrated that the witness was not telling the truth.”).

85. Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 27–28 (2016) (explaining that judges can harbor biases, and have their decision making be influenced by them, just like other people).

86. *Id.* at 37–39 (discussing cases in which IJs have been overturned for exhibiting clear bias against applicants on the basis of race, education, class, single motherhood, religion, sexuality, and gender).

87. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 (2006) (explaining how implicit bias automatically affects the thinking even of many who “say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias”).

88. See Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428 (2011).

which, especially when combined with their inquisitorial role, makes it easier for implicit bias to affect their decision-making.<sup>89</sup> Additionally, their high caseload and pressure to resolve cases quickly limit their opportunity to engage in the deliberate thinking necessary to counteract the influence of implicit attitudes towards particular groups; the low motivation caused by stress and burnout prevents the effort needed to control automatic biases; the complexity of the cases presented increases reliance on heuristics, cognitive shortcuts which invite the influence of implicit assumptions; and the limited review by the BIA and federal appeals courts withholds a necessary check on implicit bias.<sup>90</sup>

This inability to control implicit bias is especially dangerous in assessing an asylum applicant's demeanor, particularly because implicit bias can operate through *aversive prejudice*, where the unconscious negative feelings and beliefs of one who may consider themselves liberal and outwardly endorse non-prejudiced views manifest themselves in subtle, indirect, and rationalizable ways.<sup>91</sup> The broad, undefined scope of demeanor, in which IJs merely have to point to a specific trait to find an applicant untrustworthy but need not explain how that trait demonstrates untrustworthiness,<sup>92</sup> invites this kind of rationalization by which an IJ's unexpressed feelings towards and assumptions about a particular group, possibly even unknown to the IJ themselves, can taint their decision-making and result in the denial of asylum. This is especially so because:

non-conscious feelings and beliefs . . . will produce  
discrimination in situations in which normative

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89. Though it could be argued that greater independence *increases* the risk of bias, IJs' role as Department of Justice attorneys results in weaker "structural and professional norms to remain impartial and independent" than those of Article III judges, and when combined with their inquisitorial role, this "can contribute to the appearance of a one-party system and make it even easier for IJs to abuse their authority." *Id.* at 429–30. While "highly motivated" Article III judges may "compensate for their implicit biases in their decision making," recognizing that the freedom of independence carries with it the responsibility to be impartial, IJs, in perceiving themselves as simply DOJ employees doing their job, may experience less motivation to make the active effort to counteract bias and remain impartial. *See id.* at 417.

90. *Id.* at 428–43.

91. *Id.* at 421–22 (quoting Adam R. Pearson, et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 317 (2009)).

92. Rempell, *supra* note 26, at 397–98.

structure is weak, when the guidelines for appropriate behavior are unclear, when the basis for social judgment is vague, or when one's actions can be justified or rationalized based on some factor other than race.<sup>93</sup>

In addition to the fact that these factors are prevalent throughout immigration courts,<sup>94</sup> they are especially pertinent to the consideration of demeanor because IJs' discretion in how to assess demeanor is mostly uncontrolled, due to the lack of standards for how to weigh demeanor<sup>95</sup> and the extreme deference given to IJs' findings.<sup>96</sup> Because there are no guidelines, IJs are free to rationalize their biases into seemingly neutral assessments of demeanor, with which reviewing courts will not interfere.

Because evaluations of demeanor often occur implicitly,<sup>97</sup> the operation of implicit bias, rationalized in aversive prejudice, can result in biased results from an IJ who is prejudiced against a particular group. These results come from the IJ attributing a negative credibility determination to an aspect of a member of that group's demeanor without even realizing that what they are really doing is manifesting their distrust of members of the applicant's group. For example, in cases of racial implicit biases, studies have shown that "implicit attitudes lead individuals to read unfriendliness or hostility into the facial expressions of blacks but not whites" as well as "to more negative evaluations of ambiguous actions by racial and ethnic minorities."<sup>98</sup>

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93. Marouf, *supra* note 88, at 424 (quoting Adam R. Pearson, et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 318 (2009)).

94. *Id.*

95. *See id.* at 442 (discussing how "[t]he paucity of BIA precedents" leads to an increased use of cognitive shortcuts by IJs); *see also* Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER & LAW. 1, 33 (2017) (discussing how the dearth of BIA precedent decisions deprives both applicants and IJs of clear standards to apply to asylum claims); Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem*, 43 VAND. J. TRANS'L L. 1179, 1184 (2010) [hereinafter Kagan, *Religious Imposter*] (explaining how demeanor's treatment as an unreviewable fact question prevents the jurisprudential evolution of clear standards).

96. *See* Ling Huang v. Holder, 744 F.3d 1149, 1153–54 (9th Cir. 2014) (explaining that demeanor assessments are based on the observation non-verbal cues and so must be given deference).

97. Marouf, *supra* note 88, at 438.

98. *Id.* at 438–39.

Though appellate courts have held it improper, the undefined breadth of “demeanor” allows bias to infect IJ decision-making in another way: the absence of any legal definition of the term has tempted IJs to use “demeanor” to rely on stereotypes about how they expect a member of a particular group, such as sexual minorities or trauma survivors, to act, sound, or appear, instead of on actual evidence of an applicant’s credibility.<sup>99</sup> Demeanor assessments thereby “foster[] abuse of judicial discretion by permitting off-the-record influences to creep into decisions under the guise of credibility.”<sup>100</sup> For sexual minority applicants, IJs may even be tempted to use demeanor to try to judge whether the applicant is actually a sexual minority.<sup>101</sup>

Furthermore, IJs are ill-equipped to assess the demeanor of trauma survivors, as doing so “ultimately privilege[s] [immigration judges’] individual ideas of how refugees should respond to persecution.”<sup>102</sup> The effects of trauma and surviving persecution at the hands of government authorities may lead the asylum applicant to exhibit behaviors typically thought indicative of untruthfulness, such as appearing distrustful and nervous or sweating excessively.<sup>103</sup> Beyond this, reactions to experiences of rape, domestic violence, torture, or other traumatic harms attending persecution can vary widely from person to person, often on the basis of gender, culture, age, class, or other factors.<sup>104</sup> As asylum applicants often come from traumatic experiences and present cases involving “unique combinations of cultural elements and post-traumatic symptoms,”<sup>105</sup> previous Immigration and Naturalization Service (INS) guidelines sensibly instructed asylum officers, the USCIS officials who decide affirmative asylum claims, to exercise cross-cultural sensitivity in

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99. Jeanette L. Schroeder, Note, *The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms*, 97 B.U. L. REV. 315, 328 (2017).

100. Conroy, *supra* note 19, at 34 (quoting Fletcher, *supra* note 17, at 121); see also Bowmani, *supra* note 95, at 32 (quoting same).

101. Bowmani, *supra* note 95, at 35; see also *Todorovic v. U.S. Att’y Gen.*, 621 F.3d 1318, 1325–26 (11th Cir. 2010) (holding that the IJ’s negative credibility determination impermissibly relied on stereotypes as a substitute for substantial evidence). Though an IJ’s demeanor assessment is given great deference and credibility determinations are “largely unreviewable,” these determinations must “rest on substantial evidence, rather than on conjecture or speculation.” *Id.* at 1325.

102. Bowmani, *supra* note 95, at 34.

103. *Id.* at 34 (discussing *Rezhdo v. Att’y Gen.*, 187 F. App’x 193 (3d Cir. 2006)).

104. Fletcher, *supra* note 17, at 121.

105. *Id.*

assessing credibility.<sup>106</sup> The INS Guidelines recognized the varied effects of trauma on demeanor:

The demeanor of traumatized applicants can vary. They may appear numb or show emotional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment[.] Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling.<sup>107</sup>

Nevertheless, the REAL ID Act's unqualified inclusion of demeanor among the credibility factors to be considered allows IJs to grant or deny asylum claims based on their personal beliefs as to how a trauma survivor ought to act.<sup>108</sup> This is especially problematic for women asylum applicants who are survivors of trauma. While IJs typically expect to see applicants convey emotion and feeling in giving a credible asylum testimony,<sup>109</sup> trauma survivors often suffer from Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD), both of which are characterized by "a numbing of responsiveness to, or reduced involvement with, the external world."<sup>110</sup> Those suffering these disorders frequently exhibit a "flat affect," appearing "withdrawn, uninterested, and detached."<sup>111</sup> An IJ assuming that someone who actually experienced the traumatic events recounted by the asylum applicant would express visible emotion in doing so will thus be led to believe an applicant with PTSD- or MDD-induced flat

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106. Memorandum from the Office of International Affairs, Immigration and Naturalization Service to All INS Asylum Officers (May 26, 1995) [hereinafter INS Guidelines].

107. *Id.*

108. See Kagan, *Religious Imposter*, *supra* note 95, at 1191–92 (describing a study that found British asylum adjudicators made subjective assumptions, both implicit and explicit, regarding "how they believed that people and families who experience danger and trauma would act, how genuine refugees would behave . . . , and what a truthful refugee account should look like").

109. See *Wang*, 569 F.3d at 535 (explaining that the IJ found the applicant's testimony incredible because of her "lack of emotion").

110. Melloy, *supra* note 2, at 653.

111. *Id.* at 653–54 (explaining that, for example, a woman suffering from these disorders as a result of her traumatic experiences "may not cry or otherwise show emotion when discussing her child's abduction by government officials").

affect is being dishonest.<sup>112</sup> Though both men and women may display a flat affect, it undercuts women’s credibility more severely. American culture presumes that women communicate through their emotions and men communicate through their ideas, such that an IJ is more likely to find that a woman’s lack of emotion undermines her credibility.<sup>113</sup>

The U.N. High Commissioner for Refugees has recognized this conflict and issued guidelines dictating that “[t]he type and level of emotion displayed during the recounting of her experiences should not affect a woman’s credibility.”<sup>114</sup> Even so, IJs will use demeanor to make negative credibility determinations based on their own inexperienced ideas of how women should respond to and retell their persecutions, and may make adverse credibility determinations for survivors who do not exhibit “the occasional pauses one would expect while [stopping] to remember the details of terrible experiences[,] . . . visible change in . . . countenance[,] or signs of emotional upheaval.”<sup>115</sup>

The judiciary is not above such bias: the ABA has noted bias in the judiciary along gender lines—such as in rape cases where a woman’s credibility is presumed to be tied to her sexuality—and courts have been criticized for harboring implicit racial biases, as exhibited by sentencing disparities for criminal convictions.<sup>116</sup> Adjudicators’ decisions are impacted by their own background, experiences, race, gender, and culture.<sup>117</sup> For example, a study found that IJs who previously worked in positions that were adverse to immigrants, such as the Trial Attorneys for the Department of Homeland Security responsible for bringing and trying removal cases against immigrants,

112. *Id.* at 654.

113. *Id.*

114. Fletcher, *supra* note 17, at 121 (quoting U.N. High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 10, HCR/GIP/02/01 (May 7, 2002)).

115. Fletcher, *supra* note 17, at 121–22 (citing and quoting *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048–49 (9th Cir. 2002)). *See also* *Wang v. Holder*, 569 F.3d 531, 535, (5th Cir. 2009) (upholding adverse credibility determination where the IJ found applicant’s “testimony about her incarcerations and beatings incredible due to [applicant’s] lack of emotion that seemed to the IJ more consistent with one who has rehearsed a story, rather than who lived the events.”).

116. Gupta, *supra* note 85, at 29–30 (further explaining that bias has also been noted on the basis of class, wealth, and region).

117. *Id.* at 30–31.

were significantly less likely to grant asylum than IJs who had not.<sup>118</sup> Furthermore, asylum grant rates have been found to be 44% higher for female than for male IJs, demonstrating the degree to which IJs' personal characteristics may impact their decision-making.<sup>119</sup>

An IJ's individual bias has many opportunities to manifest itself in the assessment of demeanor: demeanor gives aversive prejudice the opportunity to rationalize itself, allows for an IJ's assumptions about or feelings towards a particular group to implicitly affect their conclusion, and invites the IJ to rely on faulty assumptions about how survivors of persecution behave. The pressures and constraints of the immigration court system make it extraordinarily difficult for IJs to consciously counteract their biases, so that in resolving difficult questions, such as determining whether an asylum applicant is telling the truth based on nothing but their own testimony, the IJ is more likely to instead rely on cognitive shortcuts that make it easier for bias to affect an adjudicator's conclusions.<sup>120</sup> This is especially so given the emotionally difficult nature of asylum and the ambiguity surrounding the meaning and import of "demeanor."<sup>121</sup>

## 2. Demeanor fosters institutional bias

Even if IJs attempted to counteract their personal biases, demeanor as a credibility factor favors certain cultural norms, allowing *institutional* bias—bias inherent in the system of asylum adjudication itself rather than the bias of individual IJs—to negatively impact a

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118. Marouf, *supra* note 88, at 429 (noting that the majority of IJs previously worked in these adversarial positions); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 345–46 (2007).

119. Gupta, *supra* note 85, at 41; *see also* Ramji-Nogales, *supra* note 118, at 377.

120. *See* Gupta, *supra* note 85, at 35–36, 43 (explaining that the rushed deliberation of immigration courts may lead IJs to engage in "unhealthy satisficing," in which a decision-maker prematurely stops analyzing data and comes to a conclusion that relies on heuristics to fill the gaps); *see also* Melloy, *supra* note 2, at 641 (noting that rather than being known for the thoughtfulness and skill necessary to assess credibility from a culturally sensitive standpoint, IJs have been repeatedly criticized for "sloppy and insensitive adjudication").

121. *See* Gupta, *supra* note 85, at 35 (quoting Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 27 (2006)) ("Most judges experience unhealthy satisficing as a result of (1) emotional reactions to aspects of cases that resemble their significant experiences or the experiences of loved ones, and (2) ambiguity relating to facts, the definition of words, or legal theories.").

refugee's credibility determination. The inclusion of demeanor among the credibility factors allows this to happen by "fail[ing] to take into account how people from different countries interact with authority figures in particular, how they talk about traumatic personal experiences"<sup>122</sup> and by privileging western, Anglo-American assumptions of what credible demeanor looks like.<sup>123</sup>

Institutional bias within the asylum adjudication system often results from a cultural expectation of what a "credible demeanor" looks like. The concept of "credible demeanor" is inherently subjective and relies on culturally received notions about what it means to appear trustworthy. For example, factfinders tend to perceive verbal communication traits associated with female speakers—such as intensifiers ('so' and 'such'), fillers ('um,' 'er'), and hedging phrases ('sort of')—as less credible than communication traits associated with male speakers.<sup>124</sup> These baseline presumptions about what behaviors seem credible are not derived from "universal bodily expressions of emotion," but instead result from "a strong cultural overlay influenc[ing] both the physical expressions themselves and the ability to read them, particularly in individuals from other cultures."<sup>125</sup>

In fact, the traditional Western norms of credible speaking which lawyers are taught to practice—and hence judges are taught to respect—can be traced back to power struggles in Athenian and Roman culture, where "[t]he dominant elite tradition successfully imposed aristocratic, upper class demeanor, including the physical habits of wealthy foot soldiers, as natural and linked to rationality and truth."<sup>126</sup>

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122. Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 *FORDHAM INT'L L.J.* 1361, 1393 (2004).

123. See *Dia v. Ashcroft*, 353 F.3d 228, 274 (3d Cir. 2003) (en banc) (McKee, J., concurring) ("Fact finders who are unfamiliar with the mannerisms and subtleties of a witness's cultural tradition have no advantage in assessing credibility based upon demeanor. Moreover, to the extent that the customs of a witness's native land differ from the fact finder's, the fact finder may be at a substantial disadvantage because he/she may misinterpret subliminal clues that mean one thing in the fact finder's culture, but something entirely different in the witness's.").

124. Melloy, *supra* note 2, at 658. *Cf. id.* at 654 (discussing how the American cultural presumption that women express themselves through emotions and men through ideas results in women's credibility being more significantly undermined by the effects of trauma on demeanor than men's).

125. Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor, Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 *PACE L. REV.* 379, 386 (2017).

126. *Id.* at 387.

To learn to appear credible, law students and lawyers practice this “elite delivery” style—in which one takes a supposedly “neutral” stance with their feet squared shoulder-width apart, their hands at their sides, taking an authoritative posture, and speaking in a low, calm, and measured voice.<sup>127</sup> The classical Greek culture from which this style derives associated credibility with strength, and weakness with deception.<sup>128</sup> Deviations from the elite style of delivery were disparaged as pandering, deceptive, and irrational, such that any demeanor other than the elite style was perceived as not credible.<sup>129</sup>

Not only are the American legal institution’s perceptions of credibility thus rooted in its cultural influences, but it also unfairly disadvantages asylum applicants for reasons that have nothing to do with the merits of their claims. For example, the association in American culture between a higher pitched voice and a lack of authority or with an excess of emotion can predispose an IJ to find a female asylum applicant’s testimony not credible.<sup>130</sup>

This failure to account for cultural, psychological, and practical issues and how they affect an asylum applicant’s testimony<sup>131</sup> charges the seemingly neutral concept of demeanor with such institutional bias that asylum applicants are deprived of their due process right to impartial adjudication.

It comes as no surprise, then, that because the significance of many behavioral attributes of demeanor is culturally specific and varied such that in asylum adjudication, where the applicants come from a myriad of cultures, the assumptions held as to the meaning of one’s behavior are frequently mistaken.<sup>132</sup> In other words, “[t]he

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127. *Id.* at 388–89.

128. *Id.* at 390, 392–94, 399.

129. *Id.* at 414–15, 432.

130. *See id.* at 403 (quoting a legal writing handbook’s advice that those with high-pitched voices should try to lower their pitch due to American culture’s association of higher pitch with a lack of authority and excess emotion, and noting the problems this poses for female speakers).

131. Paskey, *supra* note 7, at 464.

132. Rempell, *supra* note 26, at 403 (“[P]articipants in immigration proceedings have distinctive cultural, ethnic, and linguistic backgrounds that may make generalizations about the significance of demeanor attributes from an American vantage point much harder to extend to those coming from other countries.”); *see also* Arianna Garcia, Note, *The Real ID Act and the Negative Impact on Latino Immigrants*, 9 SCHOLAR 275, 292–293 (2007) (describing demeanor as a highly cultural factor for which the REAL ID Act does not fully

nonverbal cues that people tend to rely on to decide if another person is telling the truth vary widely from culture to culture.”<sup>133</sup> Previous INS Guidelines pointed to variations in the meaning of body language as one reason why cultural differences must be considered in assessing an asylum applicant’s demeanor for credibility:

In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect,. [sic] *This is a product of culture, not necessarily credibility.*<sup>134</sup>

The cultural differences around the import of eye contact can have manifestations along fault lines of gender, trauma, and nationality; for instance, in authoritarian regimes it is “considered impolite for a woman to look a superior in the eye, a practice that may have been literally beaten into the asylum applicant.”<sup>135</sup> Though a prominent non-verbal cue, eye contact is just one way for cultural differences to impact demeanor assessments.

In addition to cultural differences, the direct effects that persecution can have on one’s demeanor should not be ignored—the fear and distrust a person who was persecuted by their government might reasonably have of government officials may make a refugee exhibit supposedly suspicious behavior at their asylum hearing, such as shifting eyes, nervous and rapid speech, or excessive sweating.<sup>136</sup>

Trauma can have drastic impacts on a refugee’s perceived credibility, and the failure to account for these impacts seriously threatens the refugee’s procedural due process rights.<sup>137</sup> An asylum

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account—specifically, members of Hispanic cultures may avoid eye contact with an authority figure as “a gesture of deference”).

133. Kagan, *Eye of the Beholder*, *supra* note 10, at 379 (citation omitted).

134. INS GUIDELINES, *supra* note 106 (emphasis added); *see also* Rempell, *supra* note 26, at 403 (“An immigration judge might consider an applicant’s failure to make eye contact a sign of deception even though the applicant may simply be adhering to a cultural background that views direct eye contact as abrasive or disrespectful in certain instances.”).

135. Melloy, *supra* note 2, at 657 (citation omitted).

136. *Id.* at 657–58.

137. Cummins, *supra* note 16, at 287–89.

adjudication system's legitimacy must depend on its ability to accurately assess the claims of trauma survivors, as trauma is widespread among refugees, who are "ten times more likely to suffer PTSD than the general population in the countries where they've resettled."<sup>138</sup> Unfortunately, the current system incorrectly assumes "that a judge with no training in the effects of trauma can reliably assess the credibility of a survivor."<sup>139</sup>

In addition to the impacts of flat affect discussed in Part II.B.1, *supra*, trauma can affect an asylum applicant through a range of symptoms, which can be grouped into three broad categories: hyperarousal, intrusion, and constriction/numbing.<sup>140</sup> Hyperarousal is a state in which the nervous system is permanently on alert, causing survivors to startle easily and react irritably to small provocations.<sup>141</sup> Intrusion is a state commonly referred to as "flashbacks," in which survivors "relive" traumatic events as if they are happening in the present moment.<sup>142</sup> Constriction or numbing is a state of perception-change, causing survivors' present experience to lose qualities of

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138. Paskey, *supra* note 7, at 485 (noting that both pre-displacement factors—"prolonged detention, severe violence, torture, or the death of family [or] friends"—and post-displacement factors—"arduous migration, the shock of resettlement in an unfamiliar culture, and stresses related to employment, finance, and uncertain immigration status"—place refugees at an increased risk of suffering trauma symptoms) (citation omitted).

139. *Id.* at 462 (explaining that this is part of the broader assumption that "judges and juries can reliably assess the credibility of any and all witnesses without the benefit of training or expert guidance"). See also *Immigration Courts: Still a Troubled Institution*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/210/#M4> [perma.cc/UPK9-3E8X] (New IJs go through five weeks of training "composed of intensive one week classroom training on law and procedure, two weeks of field court mentoring, two weeks of home court mentoring.") (quotations omitted); Sarah Sherman-Stokes, *Immigration Judges Were Always Overworked. Now They'll Be Untrained, Too*, WASH. POST (July 11, 2017), [https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644\\_story.html](https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644_story.html) [perma.cc/KQ5U-AFYT]; Paul Schmidt, *It's True!—DOJ Eliminates U.S. Immigration Judges' Only Annual Training!*, IMMIGRATION COURTSIDE (Apr. 13, 2017) <http://immigrationcourtside.com/2017/04/13/its-true-doj-eliminates-u-s-immigration-judges-only-annual-training-quality-professionalism-de-prioritized-in-trump-era-billions-for-enforcement-incarceration-crumbs-for-du/> [perma.cc/NA3W-LTNL].

140. Paskey, *supra* note 7, at 486; see also Cummins, *supra* note 16, at 289–90 (articulating these groupings as: intrusive memories, avoidance and numbing, and increased anxiety/heightened emotions (hyperarousal)).

141. Paskey, *supra* note 7, at 486.

142. Paskey, *supra* note 7, at 486.

ordinary reality and to seem as though it is happening to someone else. This state can be attended by feelings of indifference, detachment, and passivity.<sup>143</sup> If these symptoms occur while giving testimony, an applicant's credibility could be undermined, such as if their hyperarousal causes them to react irritably to the provocations of the IJ's or DHS attorney's questioning.<sup>144</sup> Alternatively, an applicant who experiences a flashback while testifying could suffer extreme anxiety and even a sense of terror,<sup>145</sup> which could cause the appearance of nervousness from which IJs frequently infer a lack of credibility.

Beyond these psychological symptoms, any fair assessment of demeanor must acknowledge the emotional impact of trauma and torture on one's ability and willingness to speak in an institutional setting, particularly in the context of an individual's cultural background:

For instance, trauma survivors often feel shame, guilt, or self-loathing about their experiences, and survivor's [sic] ability to discuss her experiences in the presence of lawyers and judges may be diminished by cultural factors, gender roles, a fear of authority figures, or the social repercussions of talking about a rape with strangers. Moreover, because the goal of torturers is often to make their victims talk, a torture survivor may associate talking in a legal setting with the experience of forced talking under torture.<sup>146</sup>

At least one Fourth Circuit decision has recognized the "inherent tension [that] exists in evaluating an IJ's demeanor-based conclusions in asylum proceedings" between the broad deference given to IJs' assessments of demeanor and the fact that "linguistic and cultural differences, combined with the effects of trauma, caution

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143. Paskey, *supra* note 7, at 486.

144. See *In re J-Y-C-*, 24 I&N Dec. 260, 260 (BIA 2007) (affirming a negative credibility determination where the IJ considered the "agitated" demeanor displayed by the applicant when attempting to explain inconsistencies in his testimony to make said explanation incredible). See also Immigration Equality, *Immigration Court Proceedings*, in IMMIGRATION EQUALITY ASYLUM MANUAL (3rd ed. 2006) <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-court-proceedings/> [perma.cc/N994-7Y2C] (describing the process of bringing an asylum case in immigration court).

145. Cummins, *supra* note 16, at 306.

146. Paskey, *supra* note 7, at 464 n.20 (citations and internal quotation marks omitted).

against normative determinations.”<sup>147</sup> The court held that the BIA’s refusal to accept a torture victim’s “uncomfortable” appearance as normal given their experience reflected “a basic misunderstanding of the human condition,” arguing that “the ability to testify in a cool and collected manner about an experience of torture would arguably raise greater credibility concerns.”<sup>148</sup> While it is encouraging to see the court take note of trauma’s effects on demeanor, the latter part of its argument is still problematic in that it nevertheless imposes a judicial view of how trauma survivors are expected to act when discussing their trauma—an applicant experiencing constriction/numbing or otherwise exhibiting the “flat affect” described in Section II.B.1,<sup>149</sup> would presumably be damned by her lack of emotion before the Fourth Circuit.

Even without the effects of trauma, the very nature of the circumstances in which asylum applicants must bring their claims—in which an individual forced to abruptly flee their home and culture finds themselves at the mercy of the institutions of a wholly different culture—can interfere with their ability to establish credibility. Factors of interference include, among others, culture shock, subculture, and obstacles posed by using an interpreter.<sup>150</sup> Rather than recognizing how cultural factors, particularly combined with trauma, impact one’s demeanor, guidance issued to asylum officers by the current administration appears to disregard the influence of these factors, saying that cultural factors such as being detained in a foreign land, language barriers, or trauma should not be “significant factors” in credibility determinations.<sup>151</sup>

Culture shock can affect an asylum seeker’s demeanor by causing them to “speak in a confused, nervous, fragmented and unconvincing manner,” which may be interpreted by the IJ as indicating that the applicant is not telling the truth, but in reality, it is merely the manifestation of “anxiety and insecurity caused by

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147. *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015).

148. *Id.* at 212–13.

149. See *supra* notes 113–115 and accompanying text.

150. Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT’L MIGRATION REV. 230, 232–33 (1986).

151. Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the US*, CNN (Mar. 8, 2017), <https://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html> [perma.cc/WPE2-8L4K] (commenting that this change “essentially allow[s] asylum officers to consider signs of stress as a reason to doubt someone’s credibility”).

the difficulties of life in an entirely new social and cultural environment.”<sup>152</sup> This risks leading the IJ to interpret the applicant’s confused manner of speaking as an indication that the applicant is a security threat or otherwise not a refugee.<sup>153</sup> Beyond this, the difficulties of functioning in a new society are not purely an operation of the refugee’s own anxieties, but they can reflect institutional choices made by the American legal system that depart from other societies, such as limiting participants to speaking only on “relevant matters” in their testimony, preventing them from speaking freely.<sup>154</sup>

Subculture can affect a refugee’s demeanor in that members of political parties and groups which were illegal in their home countries develop and internalize a sense of secrecy and suspicion towards outsiders, which will make the refugee feel unable to express themselves freely and “credibly” in a courtroom—particularly if they perceive that the one interrogating them doesn’t share their ideology or political views.<sup>155</sup>

Further, the frequent necessity of interpreters in asylum adjudication poses a barrier to communication that can prejudice the applicant’s ability to be perceived as having a credible demeanor: interpreters often lack the skill to fully bridge the gap between cultures, and the need to go through an interpreter may create an extra burden on the applicant’s ability to feel that they can testify freely and safely.<sup>156</sup>

As the preceding discussion illustrates, institutional biases or culturally influenced assumptions about what “truthful” demeanor looks like can have devastating impacts, resulting in the denial of legitimate claims for asylum. In applying for asylum, an applicant without corroborating evidence will be judged on their ability to tell their story—the story they tell about their persecution may be all they have to save them from being sent back into the grasp of their persecutors; in this situation, “the applicant’s credibility becomes a proxy for the truth, even though a story that does not conform to our

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152. Kalin, *supra* note 150, at 232.

153. Melloy, *supra* note 2, at 660–61.

154. Kalin, *supra* note 150, at 232.

155. *Id.*

156. *Id.*; see also *Cham v. Att’y Gen.*, 445 F.3d 683, 687 (3d Cir. 2006) (recounting the Wolof-speaking applicant’s difficulty in answering the judge’s questions as to his date of birth through an interpreter, explaining “I cannot count it in Wolof”).

norms for a credible story may, in fact, be true.”<sup>157</sup> Because cultural norms around credibility are not objective or universal, they should not be relied on to deny asylum to a refugee who has told a true story of persecution, even if their telling of that story fails to adhere to our expectations of what truthfulness looks like. Norms of credible demeanor go only to verisimilitude, not veracity—there is no direct, intrinsic connection between a story teller who *appears truthful* and a story that *is true*.<sup>158</sup>

### 3. Demeanor is inaccurate

The disconnect between appearing truthful and being truthful flags an essential problem with demeanor as a factor in credibility determinations. Questions of personal and institutional bias aside, using demeanor to gauge an asylum applicant’s truthfulness simply does not work. Because demeanor is an unreliable, subjective way to gauge truthfulness, its consideration impedes an adjudicator’s ability to make an accurate credibility determination.<sup>159</sup>

Demeanor evidence establishes witness truthfulness “about as accurately as a coin flip.”<sup>160</sup> Psychological studies have found that the majority of people are unable to distinguish “truth from lies . . . based on non-verbal cues.”<sup>161</sup> Some studies have found that even “police perform[] little better than chance and no better than untrained subjects at detecting lies”; police officers who participated in the studies were only more *confident* in their ability to do so.<sup>162</sup> These studies demonstrate that reliance on demeanor as evidence of truthfulness is misplaced—“most observers believe they are far better at determining witness deception than they actually are.”<sup>163</sup>

Despite the courts’ insistence that demeanor is essential in evaluating a witness’s testimony,<sup>164</sup> legal academics have discredited

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157. Paskey, *supra* note 7, at 460, 478.

158. *Id.* at 494–95 (observing that many REAL ID credibility factors, including demeanor, are elements of discourse (the manner in which a story is told) and not story (the actual events told), and therefore have no real bearing on whether the story is true).

159. See Kagan, *Eye of the Beholder*, *supra* note 10, at 378.

160. Bennett, *supra* note 6, at 1332.

161. Kagan, *Eye of the Beholder*, *supra* note 10, at 379.

162. *Id.*

163. Bennett, *supra* note 6, at 1367.

164. See *id.* at 1332, 1347 (explaining that the notion of demeanor as essential to determining witness credibility is deeply embedded in American

this type of evidence.<sup>165</sup> For example, cognitive psychological studies have demonstrated that the “cues” jurors look to when assessing witness credibility are wrong; the traditional signals believed to indicate lying—a trembling hand, shifty eye contact, stammering speech, a furrowed brow, grimacing, nervous blinking, furtive glances, or shifty bodies—are merely “cultural myths.”<sup>166</sup> In reality, witnesses do not give off these “cherished cultural stereotypes,” and the stereotypes about liars simply cannot be supported by empirical data.<sup>167</sup> Furthermore, many fact finders incorrectly confuse a witness’s confidence with accuracy, and in reality there is no established correlation between confidence and accuracy in witness testimony.<sup>168</sup>

Demeanor’s inaccuracy is likely also a function of the subjective nature of demeanor assessments, being “highly personal to the decision-maker, dependent on personal judgment, perceptions, and disposition, and often lacking an articulated logic. They are very difficult to review and are likely [to] be inconsistent from one decision-maker to another.”<sup>169</sup> While not solely attributable to demeanor, the results of subjectivity, inconsistency, and a lack of strong appellate review can be seen in the wide disparities in asylum grant rates between IJs.<sup>170</sup>

Further explaining this inaccuracy, an applicant’s demeanor can be a reaction to the interviewer more than a reflection of what is in the applicant’s own mind, as the INS Guidelines noted: “Poor interview techniques/cross-cultural skills may cause faulty negative

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jurisprudence and underlies the need for “live testimony, the rule against hearsay, and the right of confrontation under the Sixth Amendment”).

165. O’Regan, *supra* note 125, at 379 n.3 (“The legal academy no longer credits demeanor evidence, yet the courts, with a few exceptions, ignore this widespread consensus.”). See also Chad M. Oldfather, *Appellate Courts, Historical Fact, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 440 (2004) (arguing that because “people . . . perform poorly at using demeanor” to determine whether a person is telling the truth, reliance on a transcript may place appellate courts in a superior position to assess witness credibility than those who actually observed the testimony).

166. Bennett, *supra* note 6, at 1366–67.

167. *Id.* at 1367 (citing Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 7 (2000)).

168. *Id.* at 1369 (noting that one study found witness accuracy declined significantly over the period of a week, but their subjective confidence did not).

169. Kagan, *Eye of the Beholder*, *supra* note 10, at 374.

170. *Id.* at 376–77; see generally Ramji-Nogales, *supra* note 118 (analyzing disparities in asylum grant rates in four levels of the asylum adjudication process).

credibility findings.”<sup>171</sup> In 2006, the Third Circuit rebuked IJ Ferlise, who had bullied an applicant to the point that the applicant became extremely nervous and started stuttering; IJ Ferlise then cited this “demeanor” as the basis for an adverse credibility finding.<sup>172</sup> Even without going to such cruel extremes, assessing an individual’s credibility by trying to glean it from their demeanor can never claim the sober, removed deliberation normally ascribed to the work of judges, because such assessments are a product not just of what the speaker says, “but also the questions, the way the questions are asked, and the environment in which they are asked.”<sup>173</sup> Indeed, a speaker’s behavior is not just a product of their truthfulness; it can be affected—potentially negatively in the eyes of an asylum adjudicator—by “cultural barriers, language and interpretation problems, mental health issues, and the general limitations of human memory and communication.”<sup>174</sup>

The problems of demeanor are exacerbated in asylum. Because demeanor is highly dependent on the personal and cultural dispositions of both adjudicator and applicant, as well as on the difficult situation experienced by the applicant, and because non-verbal cues relied on to determine truthfulness vary widely between cultures,<sup>175</sup> demeanor’s usefulness in asylum adjudication is drastically reduced. This is the case even against the above-described baseline of inaccuracy, as such adjudications necessarily involve communication between people from different cultural and experiential positions.

The idea that there is some sort of “universal human body language that includes inevitable ‘leakage’ of involuntary nonverbal cues of deception,” though deeply rooted in Western culture,<sup>176</sup> is thus unsustainable and particularly untenable in asylum adjudication. Fortunately, the traditional wisdom around the effectiveness of

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171. INS Guidelines, *supra* note 106, at 4.

172. *Cham v. Attorney Gen. of U.S.*, 445 F.3d 683, 686–88, 691, 691 n.7 (3d Cir. 2006) (“Judge Ferlise continually abused an increasingly distraught petitioner, rendering him unable to coherently respond to Judge Ferlise’s questions. This, of course, enabled Judge Ferlise to then conclude that Cham’s testimony was ‘totally incredible’ because of inconsistencies and because his demeanor was that of ‘an individual not telling the truth.’”).

173. Kagan, *Religious Imposter*, *supra* note 95, at 1185.

174. *Id.*

175. Kagan, *Eye of the Beholder*, *supra* note 10, at 379.

176. O’Regan, *supra* note 125, at 432–33 (explaining that the assumption of “leakage” was used by ancient Greeks to justify judging the credibility of outsiders as a matter of nature, rather than personal or systemic ignorance).

demeanor may be breaking down. One Seventh Circuit judge, recognizing that scientific studies have greatly discredited the efficacy of demeanor evidence, noted that “if you want to find a liar you should close your eyes and pay attention to what is said, not how it is said or what the witness looks like while saying it.”<sup>177</sup> Additionally, a survey of administrative law judges<sup>178</sup> found that ALJs view demeanor evidence as having relatively low value.<sup>179</sup> However, refugees continue to face the risk of being erroneously denied asylum because of faulty assumptions about demeanor and credibility.<sup>180</sup>

#### 4. Demeanor is unreviewable

The limited scope of judicial review for assessments of demeanor and credibility exacerbate these due process problems. Credibility findings are reversible by the BIA only when clearly erroneous, and on appeal to federal circuit courts, they are reviewed under the highly deferential substantial evidence standard.<sup>181</sup> Beyond this, however, the REAL ID Act precludes federal courts from reviewing discretionary decisions in asylum adjudication. As a result, asylum applicants are unable to challenge any but the most egregious

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177. *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008) (Easterbrook, J.) (noting that social science has refuted the popular idea, largely received from television and movies, that careful attention to witnesses’ demeanor can reveal truthfulness, and pointing to one study in which a television audience performed more poorly at distinguishing truth from fiction than both newspaper readers and radio listeners).

178. Immigration Judges, though working within an administrative agency, are different from “administrative law judges.” See *Judicial Oversight v. Judicial Independence*, TRAC IMMIGRATION, [http://trac.syr.edu/immigration/reports/194/include/side\\_4.html](http://trac.syr.edu/immigration/reports/194/include/side_4.html) [perma.cc/S2F9-JKKD] (explaining that immigration judges, appointed by the Attorney General to act as the Attorney General’s delegates, have less independence than administrative law judges, who “derive their power through Congressional legislation[,] . . . are not evaluated by the agency in which they conduct hearings[,] and may only be fired for good cause after an independent hearing process”).

179. See generally Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 J. NAT’L ASS’N ADMIN. L. JUDGES 1 (2000).

180. See Guglielmo Veditore, *Human Rights and Refugees: The Case of Kenya*, 12 J. REFUGEE STUD. 54, 59 (1999) (noting that one UNHCR officer claimed to be able to “understand if someone is lying or not in the first minute of the interview”).

181. Paskey, *supra* note 7, at 475 (citing 8 C.F.R. § 1003.1(d)(3)(i) and *Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 334 n.13 (2d Cir. 2006)).

displays of bias by an IJ.<sup>182</sup> Credibility determinations are almost never overturned by federal appeals courts: an empirical review of over four hundred 2010 appellate court decisions reviewing IJs' negative credibility determinations found that 96% of cases resulted in affirmations of the IJ's negative credibility finding and decision to deny asylum.<sup>183</sup> This extreme level of deference is inappropriate for reviewing demeanor assessments, as they are especially vulnerable to being tainted by the implicit bias infused by an IJ's culture and background.<sup>184</sup>

In addition to failing to provide a much-needed check on IJ bias, the lack of appellate review also results in a lack of clear judicial standards to be applied to credibility determinations. Demeanor assessments are treated as deference-entitled questions of fact by the BIA and unreviewable exercises of IJ discretion by federal appeals courts. This means that those standards never get the chance to "evolve gradually through jurisprudence."<sup>185</sup> The problem is exacerbated by the BIA's rare use of its powers to make legal rules, instead only publishing a handful of decisions each year. It is therefore "nearly impossible for an IJ or an applicant to discern clear standards necessary to establish a successful claim."<sup>186</sup>

What governs then is a problematic standard of deference. The high degree of deference given to IJs' credibility determinations is based on the assumption that the initial decision makers, who witnessed the testimony in person, are in the best position to review that testimony, an assumption which emphasizes the role of demeanor.<sup>187</sup> Given demeanor's vulnerability to bias,<sup>188</sup> dependence on inaccurate assumptions about the body language of liars,<sup>189</sup> and

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182. Bowmani, *supra* note 95, at 32–33.

183. Paskey, *supra* note 7, at 476. The empirical study also found that judges cited to the applicant's demeanor in 18% of all cases. *Id.* at 477.

184. Gupta, *supra* note 85, at 41–42.

185. Kagan, *Religious Imposter*, *supra* note 95, at 1184 (discussing how the same problem is posed by the lack of rigorous appellate review of credibility in refugee status determinations, where credibility is similarly treated as a question of fact rather than law).

186. Bowmani, *supra* note 95, at 33.

187. Kagan, *Eye of the Beholder*, *supra* note 10, at 408.

188. *See supra* Part II.B.1.

189. *See supra* Part II.B.3.

problems in interpreting non-verbal communication across cultures, this deference is highly questionable.<sup>190</sup>

##### 5. Demeanor undermines notice and the right to be heard before an impartial adjudicator

The above analysis shows that the use of demeanor in credibility determinations risks depriving asylum applicants of the two essential features of due process: notice and the right to be heard before an impartial adjudicator. Asylum applicants are deprived of notice because the ambiguity of demeanor, and the fact that demeanor can be interpreted in different ways by different IJs, makes it impossible for asylum applicants to know the standards by which their claims will be judged. The emphasis on demeanor has led some applicants to believe they need to “perform” aspects of their persecution.<sup>191</sup> This places them in a double bind in which applicants may be held to have an untruthful demeanor by one IJ for giving the impression of being imperfectly committed to memory, but be denied credibility by another IJ for appearing overly rehearsed.<sup>192</sup> This problem is exacerbated by the fact that the BIA rarely publishes full opinions setting and defining applicable legal standards, creating a system in which neither

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190. Kagan, *Eye of the Beholder*, *supra* note 10, at 408 (noting that both the INS and the BIA have expressed that “demeanor should not be the sole basis for a negative credibility finding in asylum cases”); *see also supra* Part II.B.2 (discussing how demeanor consideration presents a risk of erroneous deprivation of due process).

191. Conroy, *supra* note 19, at 35 (discussing how a heightened importance placed by adjudicators on applicants’ testimonial behavior encourages “premeditated performance” by the applicants); *see also* Bowmani, *supra* note 95, at 32 (“By placing a heightened importance on the testimonial behavior of applicants, the REAL ID Act also creates the expectation that refugees should perform their identities in such a way as to seem credible to the judging official, usually based on stereotypes.”) (citations omitted); *Eke v. Mukasey*, 512 F.3d 372, 382–83 (7th Cir. 2008) (in which asylum applicant argued on appeal that had he been able to testify in person, rather than in tele-video format, the IJ would have recognized that he was actually homosexual).

192. *Compare* *Li Hua Lin v. U.S. Dep’t of Justice*, 453 F.3d 99, 109 (2d Cir. 2006) (considering the IJ’s observation that the applicant’s testimony had the “impression” of being an attempt to relate back information “not reduced to memorization very successfully,” rather than a recounting of actual experience, to be a legitimate ground for skepticism), *with* *Wang v. Holder*, 569 F.3d 531, 535 (5th Cir. 2009) (upholding adverse credibility determination where the IJ thought the applicant’s demeanor indicated she had “rehearsed a story . . . rather than . . . lived the events.”).

IJ nor applicant can discern clear credibility standards.<sup>193</sup> Such a state is inexcusable as a matter of due process, as applicants are constitutionally entitled to know the standards by which their claims will be judged.<sup>194</sup> Where, as here, the standards do not exist, or are so vague as to be applied in wildly disparate and even directly contradictory manners by various IJs, an asylum applicant cannot possibly be said to have notice of those standards.

Demeanor also deprives asylum applicants of an impartial adjudicator by allowing for claims to be rejected not on the basis of their validity but as a matter of bias, faulty assumptions as to what indicates truthfulness, and a lack of constraint on IJ discretion. An applicant's bias motion can be supported when an IJ's remarks "reveal an opinion that derives from an extrajudicial source."<sup>195</sup> As the preceding discussion demonstrates, a credibility determination based on demeanor necessarily derives from extrajudicial sources. Demeanor has no direct connection to truth,<sup>196</sup> and its evaluation is really nothing but a reflection of personal and institutional bias,<sup>197</sup> unsupported cultural myths about the body language of liars,<sup>198</sup> and a complete lack of judicial standards.<sup>199</sup>

Demeanor thus makes credibility determinations a matter of subjective personal impressions and gut feelings, rather than objective judicial application of law to fact.<sup>200</sup>

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193. Bowmani, *supra* note 95, at 33; *see also* Kagan, *Religious Imposter*, *supra* note 95, at 1184 (noting that credibility determinations are treated as questions of fact rather than law and are therefore not subject to rigorous appellate review, meaning that the standards of credibility assessment do not evolve gradually through jurisprudence).

194. *See* Huysev v Mukasey, 528 F.3d 1172, 1182 (9th Cir. 2008) (holding that due process is violated where the applicant is not given adequate notice of the procedures and standards to be applied to their claims for relief).

195. *Liteky v. United States*, 510 U.S. 540, 555 (1994).

196. *Paskey*, *supra* note 7, at 494–95.

197. *See* Marouf, *supra* note 88, at 438 (explaining how implicit attitudes are especially likely to influence credibility assessments in asylum cases, because evaluations of non-verbal cues such as demeanor tend to occur implicitly); *see also* Kagan, *Eye of the Beholder*, *supra* note 10, at 379 (arguing that demeanor is highly dependent on personal and cultural dispositions).

198. *Bennett*, *supra* note 6, at 1366–67.

199. *See* Bowmani, *supra* note 95, at 33 (arguing that a lack of BIA precedent means that IJs as well as applicants are left without clear standards to apply in adjudicating asylum claims).

200. *See* Kagan, *Eye of the Beholder*, *supra* note 10, at 374–76 (arguing that credibility assessments should be objective and not based on an adjudicator's

### C. The Government's Interest

Proponents of the REAL ID Act's credibility provisions point to the need to distinguish between legitimate and illegitimate claims for asylum, in part for reasons of national security.<sup>201</sup> As demonstrated below, these justifications fail to outweigh the asylum applicant's due process interests threatened by the use of demeanor in credibility determinations.

The REAL ID Act, in attempting to establish a uniform credibility standard,<sup>202</sup> has had the opposite effect by giving IJs the "ability to make subjective, capricious determinations about the credibility of asylum applicants."<sup>203</sup> The lack of judicially developed standards guiding the assessment of demeanor, discussed in Part III.B.4, results in credibility assessments operating as a matter of subjective "gut feelings" rather than as a uniform, objective analysis.<sup>204</sup>

The legislative history of the REAL ID Act shows that it was presented couched in the language of security and the need to identify asylum fraud. The bill was "tout[ed] . . . as a necessary tool to combat post-September 11 terrorism," and defended on the grounds that "by 'ferreting out asylum fraud,' the new provisions would protect bona fide asylum seekers."<sup>205</sup>

The security and fraud concerns fail for two reasons. First, asylum law prohibited anyone who posed a security threat or was suspected of being a terrorist from obtaining asylum prior to the passage of the REAL ID Act, and extensive security checks were already required under the INA.<sup>206</sup> The design of the REAL ID Act and

emotional impressions of a person, as illustrated by refugee status determinations performed by the UNHCR); *see also id.* at 377 ("As much as possible, refugee status determination should be about assessing whether a person is in danger of human rights violations, not about personal impressions applicants make on adjudicators.").

201. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 101-02 (2006).

202. *In re J-Y-C-*, 24 I&N Dec. 260, 262 (B.I.A. 2007) (quoting H.R. Rep. 109-72, at 166-67 (2005) (Conf. Rep.)).

203. *See* Melloy, *supra* note 2, at 652 (predicting this outcome not long after the Act's passage).

204. *See* Kagan, *Eye of the Beholder*, *supra* note 10, at 375 (discussing the risk that subjectivity in credibility assessments can have on the perceived legitimacy of the asylum system).

205. Melloy, *supra* note 2, at 651.

206. Garcia, *supra* note 132, at 306; *see also* HUMAN RIGHTS FIRST, BARS & SECURITY SCREENING IN THE ASYLUM & REFUGEE PROCESS (2013), <http://www>

the particular ways in which it burdens asylum seekers do not fit with the purported goal of screening terrorists. As Marisa Silenzi Cianciarulo points out:

[T]he Real ID Act . . . illogically focuses on shoring up an asylum system that already was a difficult and unattractive means of gaining legal status in the United States. . . . Moreover, application of the Real ID Act's asylum provisions is not limited to asylum seekers who may match the profile of a terrorist. It instead affects all asylum seekers, including those fleeing female genital mutilation, domestic violence, religious persecution, politically based persecution, genocide, and ethnic cleansing.<sup>207</sup>

Second, because demeanor is an inaccurate method of assessing whether the asylum applicant is telling the truth,<sup>208</sup> the use of demeanor evidence in asylum proceedings fails to serve these interests. The government's interest in identifying and stopping asylum fraud cannot be accomplished if the system's primary check on fraud is ineffective.<sup>209</sup> The same can be said for the government's interest in keeping out security threats.

In light of demeanor's ineffectiveness in serving any of the offered government interests, these interests cannot be said to outweigh an applicant's need to avoid persecution and obtain liberty. While the erroneous denial of asylum to a legitimate refugee can place the refugee's life and safety directly in danger, there is little to be lost by the faulty grant of asylum to someone who is not a refugee.<sup>210</sup>

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.humanrightsfirst.org/wp-content/uploads/HRF-Security-Safeguards.pdf [perma.cc/CPQ9-JXFB] (detailing the various security related bars to obtaining asylum and the security and background check procedures which all asylum seekers must undergo).

207. Cianciarulo, *supra* note 201, at 103.

208. *See supra* Part II.B.3.

209. *See* Paskey, *supra* note 7, at 521 (arguing that asylum adjudication's system of adversarial cross-examination, without evidence to contradict the applicant's testimony, is an inaccurate and ineffective way to stop asylum fraud); *see also* Kagan, *Eye of the Beholder*, *supra* note 10, at 414 ("Refugee status determination should not overestimate human beings' ability to tell when one another are being dishonest. Just as refugee claimants rarely have enough evidence to conclusively 'prove' their claims, adjudicators and governments rarely have enough evidence to conclusively prove that claimants are committing fraud.").

210. Paskey, *supra* note 7, at 522.

One may argue that demeanor is too essential to the functioning of the American legal system to be treated differently in asylum adjudications—that the departure from tradition would be too great a burden, and the mere fact that the concept is intricately woven into our system shows that it is both an appropriate and necessary part of evaluating witness testimony. However, this overlooks the critical ways in which asylum adjudications differ from other legal proceedings.

As described by Michael Kagan, asylum adjudications are marked by several characteristics which, while no one may be wholly unique to asylum, together make the process distinct: (1) asylum adjudications are largely concerned with future risks, rather than solely with past facts, (2) refugees rarely have access to much documentary or witness evidence to support their claims, so judges must often make decisions based on incomplete information, (3) the process invariably involves applicants from different cultures and language backgrounds,<sup>211</sup> (4) the purpose of the process is to protect an individual, rather than to assign blame or divide rights and responsibilities between adverse parties, and (5) errant decisions can have particularly grave consequences.<sup>212</sup> Asylum adjudication is a unique species of legal proceeding, and the fact that courts have traditionally used certain mechanisms in other types of legal proceedings does not justify putting refugees' due process rights in such grave danger.

Asylum adjudication is unique in another way. The only other context in which comparable life and liberty interests are put at risk is in criminal law, where the burden of proof lies with the government rather than with the defendant.<sup>213</sup> In asylum proceedings, however, the burden is on the applicant to prove their claim.<sup>214</sup> In criminal law, if the only evidence in a case were the defendant's own declaration of

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211. *Dia v. Ashcroft*, 353 F.3d 228, 273–74 (3d Cir. 2003) (en banc) (McKee, J., concurring) (recognizing the law's longstanding recognition of a relationship between demeanor and credibility but countering that “this principle has evolved in the context of proceedings where the fact finder and witnesses share a common culture.”).

212. See Kagan, *Eye of the Beholder*, *supra* note 10, at 406–07 (referencing these five characteristics as reasons why the typical justifications for deferential review are misplaced in the context of refugee status determinations).

213. See, e.g., *United States v. Nerey*, 877 F.3d 956, 970 (11th Cir. 2017) (“[T]he government in a criminal proceeding has the burden of proving every element of the charged offense beyond a reasonable doubt.”).

214. INA § 208(b)(1)(B)(i) (AILA 2018).

their innocence, there would be an insufficient basis upon which a court could sustain a conviction, regardless of how that testimony were weighed.<sup>215</sup> In fact, a prosecutor would be unlikely to bring a case with such a dearth of evidence to trial in the first place.<sup>216</sup> A criminal defendant cannot be convicted purely because of their own inability to prove their innocence—the government must provide positive evidence as to their guilt.<sup>217</sup> In asylum adjudications, however, the burden of proof is on the applicant, so that when the only evidence is their own testimony, if that testimony is found not to be credible they will be denied asylum, and thus deprived of their liberty and potentially their life.<sup>218</sup> The fact that demeanor evidence is a regular, if not critical, aspect of criminal adjudication thus cannot be used to support the use of demeanor evidence in asylum adjudication, because the consequences of a single demeanor finding vary so wildly between the two adjudication systems.

### III. PROTECTING DUE PROCESS: DISREGARDING Demeanor OR ESTABLISHING A PRESUMPTION OF CREDIBILITY

The historic roots of demeanor in the American legal system, often connected with the desire to *protect* due process, make it difficult to approach the problem that due process is in fact *threatened* by demeanor. Some have suggested that IJs be trained to counteract bias and be made to demonstrate a degree of cultural competency,<sup>219</sup> but this is unlikely to successfully address the problem for multiple reasons. Due to the heavy time pressure and cognitive load placed on immigration judges, they may simply not have the capacity to make the kind of cautious adjustments which this training would

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215. See *Nerey*, 877 F.3d at 970.

216. See *id.*

217. See *id.* (stating that prosecutors may not improperly shift the burden of proof to the defendant).

218. INA § 208(b)(1)(B)(i) (AILA 2018) (placing the burden of proof on the applicant to establish that they are a refugee); see also INA § 208(b)(1)(B)(iii) (AILA 2018) (providing that there is no presumption of credibility for asylum applicants).

219. See *Marouf*, *supra* note 88, at 447–48 (suggesting that IJs be trained in identifying how implicit bias can alter their assessments of demeanor); see also *Gupta*, *supra* note 85, at 51 (arguing that this kind of training “on the impact of bias on their decision making . . . could encourage immigration judges to consciously acknowledge and reject those biases.”).

instruct them to do;<sup>220</sup> the body of immigration judges has repeatedly experienced problems with careless and insensitive adjudication,<sup>221</sup> and such training would not be able to address the fact that demeanor is an inherently inaccurate way to determine truthfulness.<sup>222</sup> The link between demeanor and credibility is inherently fraught, regardless of what is in the mind of the adjudicator. Therefore, solutions to the due process problems caused by demeanor must be focused on the factor itself. This Note proposes two possible solutions: one is to strike demeanor altogether from the credibility factors, removing it from the consideration entirely, and the other is to establish a presumption of credibility for asylum applicants, mitigating the damage caused by demeanor's inherent flaws.

#### A. Rejecting Demeanor

Potentially the more obvious solution to the problem is to eliminate demeanor as a credibility factor altogether. Without even reaching the due process issues, it has been argued that demeanor's unreliability and subjectivity alone warrant disregarding it in credibility assessments, that its subjectivity undermines confidence in the asylum system by making it appear arbitrary, and that due to its unreliability, credibility standards overall "would be improved by prohibiting any consideration of non-verbal credibility assessments."<sup>223</sup> By considering these functional flaws in light of the *Mathews* factors discussed above, we see that striking demeanor is not just practical but constitutionally necessary.

One may protest that our system needs to allow IJs the discretion to differentiate between legitimate and illegitimate asylum claims, and because the process allows asylum applicants to prove their claims by credible testimony alone, IJs need every tool available to assist in determining whether an applicant's testimony is in fact credible. However, because assessing demeanor is not an effective method of determining whether or not a speaker is telling the truth, its consideration does not serve this credibility purpose.

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220. See Marouf, *supra* note 88, at 434 ("Implicit attitudes surface when individuals are under time pressure and a heavy cognitive load—conditions that clearly apply to IJs.")

221. See Melloy, *supra* note 2, at 663 (discussing "how thoughtless adjudication exacerbates the potential for erroneous credibility determinations under the REAL ID Act").

222. See *supra* Part II.B.3.

223. Kagan, *Eye of the Beholder*, *supra* note 10, at 375, 378–79.

Moreover, the REAL ID Act allows for a broad range of credibility factors to be used in assessing an applicant's testimony without resorting to demeanor. An IJ may consider the testimony's inherent plausibility, its consistency with the applicant's written statements, the internal consistency of the statements with other evidence of record, and any inaccuracies or falsehoods in those statements as indicators of credibility, regardless of whether an inconsistency, inaccuracy, or falsehood goes to the applicant's claim.<sup>224</sup> All of these are arguably more effective in determining an applicant's credibility, because they go to consideration of the content of the testimony in an attempt to determine whether that content can plausibly be perceived as truthful, or if there are objective reasons to call the applicant's statements into doubt.

The problem with removing demeanor as a factor altogether, and thus relying more heavily on the other REAL ID credibility factors, is that these factors pose their own problems, particularly for survivors of persecution and trauma. "Inherent plausibility" appears to ask the IJ to make decisions based on their own assumptions about what a persecutor or persecuted person would do in a given situation, much as demeanor asks the IJ to make decisions based on their own assumptions about how a persecuted person would act when retelling their experience. The conditions causing refugees to flee and seek asylum are inherently extreme conditions which may, by their extremity alone, seem implausible to those who have spent their entire lives in the relative comfort and stability of American society. IJs are therefore arguably not qualified to assess whether a refugee's claim is "plausible."<sup>225</sup>

The consistency requirements also prejudice trauma survivors. Consistency requires the details of an applicant's story to remain unchanged from the moment they entered the United States through the end of their hearings with the IJ. However, trauma is known to directly affect the survivor's memory, so that their healing process

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224. INA § 208(b)(1)(B)(iii) (AILA 2018). The statute also contains a catch-all clause, allowing IJs to consider "any other relevant factor." *Id.*

225. *See Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 110–11 (2d Cir. 2006) (holding that the IJ improperly speculated as to the implausibility of applicant's account of being subjected to forced sterilization; the IJ thought the procedure described by the applicant could not be performed on someone writhing in pain but failed to provide any evidence supporting the conclusion that one experiencing the pain described would necessarily writhe or that the procedure could not be performed under the conditions to which the applicant testified).

is itself a process of developing a memory and narrative of what happened to them—a narrative which may change as the survivor heals, even with regards to core details that individuals who have not personally experienced trauma would assume that anyone would remember clearly.<sup>226</sup>

Furthermore, because inconsistencies and inaccuracies need not go to the heart of the claim to defeat the applicant's credibility, striking demeanor from the consideration may result in IJs putting even more weight on immaterial inconsistencies or inaccuracies. It is therefore necessary to be cautious in considering whether to strike demeanor from credibility determinations. Nevertheless, the current use of demeanor operates to taint the asylum credibility process, and the fact that the process is tainted in other ways is not a reason to ignore this deficiency. If anything, it suggests the need for more radical reforms to the asylum system as a whole than those considered in this Note.

## B. Presuming Credibility

A less targeted, but potentially more beneficial, solution would be to establish a presumption of credibility, rather than amend the factors considered in establishing credibility. Currently, the INA explicitly denies the presumption of credibility to asylum applicants.<sup>227</sup> Reversing this to instead establish a rule by which asylum applicants are presumed credible unless there is an affirmative reason to find otherwise would not magically transform demeanor into a sensible and fair factor in the consideration but would mitigate its harmful effects on refugees in a way that is consistent with the purposes of asylum.

It has been argued that REAL ID's statement denying applicants the presumption of credibility was in fact an abrogation of precedent case law providing claimants "the benefit of the doubt."<sup>228</sup> However, "the benefit of the doubt" and a "presumption of credibility" are not exactly synonymous.<sup>229</sup> The UNHCR 1979 Handbook on

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226. Paskey, *supra* note 7, at 487–88.

227. INA § 208(b)(1)(B)(iii) (AILA 2018).

228. Fletcher, *supra* note 17, at 124–25 (citing *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 (9th Cir. 1984)).

229. See *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 (9th Cir. 1984) (citing to the UNHCR's prescription in its Handbook on Procedures and Criteria for Determining Refugee Status—which recommends that *credible* accounts should be given the benefit of the doubt due to the difficulties non-citizens have in collecting

Procedures and Criteria for Determining Refugee Status articulated a benefit of the doubt rule, which provided that uncorroborated testimony by refugee claimants can be enough to prove they meet the definition of “refugee,” provided that their account is credible.<sup>230</sup> This does appear to track with at least the letter of the REAL ID Act’s general approach to the treatment of uncorroborated applicant testimony,<sup>231</sup> though the act does give IJs’ the discretion to decide that corroboration may be required.<sup>232</sup> Nevertheless, some have argued that the benefit of the doubt rule is a guiding principle which should shape credibility in two ways: (1) negative credibility findings should not be based on unsubstantiated suspicions that applicants’ testimonies are self-serving, and (2) applicants should be presumed to be telling the truth.<sup>233</sup>

Establishing the presumption of credibility makes sense because the purpose of asylum is to protect people at risk of persecution. The risk of erroneously denying asylum for refugees is far greater, in the ordinary case, than the risk of erroneously granting asylum. The only potential exception would be in the case of security threats, but those who are granted asylum must pass rigorous background checks. These background checks are designed to identify security threats and are presumably more effective than, for example, an observation that the applicant started to sweat while testifying. A

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proof—to support the court’s directive to the BIA to bear in mind these difficulties in considering the record as a whole on remand).

230. Kagan, *Eye of the Beholder*, *supra* note 10, at 372; *see also* UNHCR, Handbook on Procedures for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, ¶¶ 203–04, HCR/IP/4/Rev.1 (1979) (stating that, while recognizing that it is not possible for refugees to “prove” every part of their cases, the benefit of the doubt should “only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility.”). It thus appears that the “benefit of the doubt” principle is a matter of corroboration that only comes into play once credibility has been established.

231. *See* INA § 208(b)(1)(B)(ii) (AILA 2018) (“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”).

232. *See id.* (“Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”).

233. Kagan, *Eye of the Beholder*, *supra* note 10, at 372–73.

person's inability to affirmatively demonstrate that their testimony is credible does nothing to reveal that they are a security threat, so in the absence of an actual affirmative reason to doubt their credibility, their claim should not be denied on the basis of security.

A potentially more nuanced approach would be to clarify and expand the meaning of "credible." In 1998 the UNHCR issued the standard "capable of being believed" for refugee status determinations, in which credibility is not a matter of whether the adjudicator personally believes the applicant, but instead a more objective inquiry as to whether a reasonable person could believe the applicant's testimony.<sup>234</sup> The BIA once endorsed a similar "believable" standard in *In re Mogharrabi*.<sup>235</sup> While the language of *In re Mogharrabi* has been cited in subsequent BIA and circuit court decisions, these courts appear to have treated the standard as a means of determining when corroboration of an applicant's testimony is required,<sup>236</sup> rather than creating the objective standard of credibility called for by the UNHCR. Applying the believability standards to credibility determinations also appears to be inconsistent with the extremely deferential standard of review currently granted to these courts, in which a negative credibility determination is not disturbed unless any reasonable fact finder would be *compelled* to believe the applicant.<sup>237</sup>

That being said, making credibility a matter of "*believable* rather than being *believed* makes clear that an adjudicator should in some cases accept the credibility of applicants he or she may personally mistrust, since another reasonable person may find the applicant

234. *Id.* at 381.

235. *Id.* at 381; *see also* Mogharrabi, 19 I. & N. Dec. 439, 445 (1987) (interim decision) (holding that an alien's testimony can suffice to meet the burden of proof if it is "*believable*, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear") (emphasis added).

236. *See* Diallo v. INS, 232 F.3d 279, 285 (2d Cir. 2000) (referring to *Mogharrabi*'s "believable, consistent, and sufficiently detailed" language as the "standard concerning the need for corroboration in asylum and withholding of deportation cases"). Additionally, there may be some question as to whether the *Mogharrabi* standard remains in place even as to corroboration requirements after the passage of the REAL ID Act. *See* Min Xiu Chen v. Lynch, 661 F. App'x 64, 67 (2d Cir. 2016) (pointing out that *Mogharrabi* is a pre-REAL ID Act decision, and that the REAL ID Act allows the trier of fact to determine that the applicant should provide evidence for otherwise credible testimony).

237. *See* Wang v. Holder, 569 F.3d 531, 538–39 (5th Cir. 2009) (reasoning that while, if believed, the applicant's story would support granting her asylum, "nothing in this record *compels* belief in her story") (emphasis in original).

believable.”<sup>238</sup> This would have the benefit of mitigating the effect of IJs’ personal biases, as IJs would be forced to look past their personal distrust of the applicant to ask if any reasonable person could potentially believe the testimony. This would also mitigate the effects of certain incorrect assumptions about demeanor and truthfulness, both in the expectations of how survivors of persecution would act and in stereotypes about the body language of liars. The question, “Is the applicant’s account capable of rationally being believed?” would mean that it is not enough to say, “The applicant does not appear to me to be telling the truth.” Because stereotypical assumptions about demeanor are matters of personal, subjective perception rather than rational objectivity, the inquiry would then require them to be disregarded. This would have a similar result to establishing a presumption of credibility, in that it would prevent the IJ from making a negative credibility finding without some sort of affirmative, objective reason to do so, rather than a mere hunch that the applicant appears to be lying.

#### CONCLUSION

Demeanor as it is currently employed in asylum credibility assessments creates an unjustifiable risk of erroneously denying the life and liberty interests of refugees who have fled persecution. It invites immigration judges to rely on personal bias, culturally-specific assumptions, and outdated stereotypes in adjudicating what may literally be matters of life or death. It evades clear judicial standards and results in unpredictable, inconsistent adjudications. It places applicants at the mercy of the whims of their individual adjudicator, rather than the measured rule of law. Demeanor results in a system that is inconsistent with constitutional due process guarantees, so the system must be changed.

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238. Kagan, *Eye of the Beholder*, *supra* note 10, at 381.