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Asylum, Credible Fear Tests, and Colonial Violence (Guest Post)

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Guest Post

by

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Let's start with what asylum is: an international protection mechanism that individuals seeking "refuge" from violence can use to obtain official refugee status in another country. The term we use to refer to forcibly displaced people in general – *refugee* –

is different than the legal refugee status granted to an asylum seeker. In order to obtain refugee status, an asylum seeker has to show they have been (or fear they will be) persecuted on the basis of race, religion, political opinion, nationality, or membership of a particular social group. They also have to show that their home country cannot offer them protection and that due to a well-founded fear of persecution they are unable or unwilling to return home.

The Refugee Convention (1951 & 1967, see UNHCR) states that countries are responsible for determining whether an asylum seeker is a refugee or not. Asylum seekers, in turn, bear most of this responsibility; they are the ones who have to prove that they fit the above-mentioned description. Proving a 'well-founded fear' can be a difficult task, especially when the standards for proof shift constantly to reflect the ideological agendas of national administrations. Whether liberal or conservative, domestic policy often moves the credibility goalpost in an attempt to control the outcome of the asylum process at the structural level. It is here that the design of distribution of populations can be orchestrated. Consider the Act made by the Sixty-First congress to amend the Immigration Act of 1907, which forbade entrance to a wide range of "classes of aliens," including "epileptics," anyone a surgeon deemed to have "a mental or physical defect" impacting labor potential, anyone with any kind of history of mental illness, unaccompanied minors under sixteen, contract laborers or anyone who did not pay their own passage, unless, of course, they were "persons employed strictly as personal or domestic servants" (Sixty-First Congress 1910).

Like immigration policy, a lot of work has gone into crafting definitions of Refugee Law that would preempt many individuals fleeing violence from being

recognized *as* legitimate asylum seekers. We call this *structural pre-screening*. The 1951 Refugee Convention, in fact, had a “territorial application clause” where countries were not required to extend the Convention to everyone; rather, only to the people they saw fit, so that they could comfortably avoid refugees from former colonies while accepting European applicants (Mayblin 2017). Structural pre-screening allows governments to avoid letting people enter without explicitly saying “we do not want these people from these places” (though it’s debatable whether the US has this difficulty now). It allows democratic rule of law to operate right alongside anti-democratic processes, and by design.

Over time, administrations have had to get more sophisticated in their approaches to structural pre-screening. Whereas Roosevelt could incarcerate “undesirable aliens” in concentration camps with little more than a wartime security narrative in 1936, Reagan and Nixon knew enough about crafting public policy in a post-civil rights era to conceal their private sentiments towards people of color in certain venues. After a lengthy court battle, earlier this year the National Archives finally released a phone call between the two ex-presidents where they can be heard joking and bromancing over mutually-shared racist antipathies towards Africans, calling them cannibals, monkeys, and uncivilized people who only recently learned to wear shoes (Naftali 2019). Neither one believed they were racist—Reagan especially. Yet Nixon’s war on drugs and Reagan’s housing policy were proof of their many commitments to bring structured harm to communities of color the same way Jim Crow had functioned after reconstruction. Strategy can be seen in structural intent, not just private belief (or self-reflection on one’s belief).

For Reagan, the rise of multicultural politics meant that he had to employ structural pre-screening strategies more consistently in his immigration policy. His public comments on borders and immigration were often liberal and best explained through his broader economic liberalization agenda for North America. He couldn't afford to piss off Mexico as a trade partner, nor give up its cheap labor force in the U.S. In 1986, he granted amnesty to millions of (predominantly Mexican) undocumented migrants. When asked to defend his policy, he answered that "no regulation or law should be allowed if it results in crops rotting in the fields for lack of harvesters." He had a clear answer to: "What can Brown do for you?"

U.S. refugee policy prior to the Refugee Act of 1980 was part of broader foreign policy aims at dismantling communism. Passed in the last days of the Carter Administration, the 1980 Act amended 1962 and 1965 legislation that were not in line with international standards by giving statutory right to asylum seekers. Anyone now could, in theory, apply based on their "human right" to asylum. When large numbers of Haitian and Central American refugees began applying, the Reagan administration quickly reclassified them as "economic migrants," knowing there is no international standard for the human right to economic betterment.

Like the dog-whistle politics of Lee Atwater's southern strategy, these legally coded nuances made it easy for folks benefiting from the exclusionary politics of settler colonial nativism to deny the functional purpose of asylum policy in U.S. immigration politics, which is to keep America white. While it's much harder to justify and pass white supremacist domestic policy without structural pre-screening (because courts have to step in procedurally—see *Trump v. Hawaii*, 585 U.S. ___ 2018), it

is not essential once the foundations have been well laid. Thus, President Trump can openly remark: “Why do we want these people from all these [Haiti, El Salvador, African Nations] shithole countries? ... We should have more people from places like Norway” without historical contradiction in U.S. Asylum policy.

Recently, Lucy Mayblin’s (2017) work makes clear that Refugee Law since its inception has been structurally exclusionary. Mayblin traces the history of structured exclusions from the very social categories associated with legitimate asylum seekers that led up to the formation of the 1951 Convention. The law said one thing but did another without producing a legal contradiction. The struggle that governments seem to be having today teeters on the ups of looking like a “good” international actor on the multinational human rights stage—which comes with important benefits and protections—and the downs of having to constantly find new policies, methods, and strategies that prevent certain people from certain places from using their “human right” to asylum.

These legal ideals of who may rightfully belong in what lands, for how long, and under what “status” come from very old cultural traditions of understanding territorial belonging, displacement, and power that predate modern international refugee protection efforts. They have always been closely connected to settler imaginaries and violences that support them, like racism, sexism, and ableism. Back in the fifth century BCE when democracy was just rising, the term asylum (from the Greek *asulon*, as in “a place of refuge”) arose to refer to the physical state of being *protected from* a political body’s right of seizure. We find evidence of this definition in Aeschylus’ story of the Libyan king’s fifty daughters who fled to Greece to escape forced marriage to their cousins in Egypt and

sought asylum in the city of Argos (*Suppliant Women* 607-620). Granted asylum by the people of Argos, the women 'suppliants' rejoiced "that we strangers should have *the right to settle here freely*, safe from arrest or attack from mortals, that no one domestic or foreign should drive us away". Asylum meant one couldn't just take or violate what was designated as inviolable, untakable, and that there were new punishments for doing so. It is rooted in patriarchal assumptions of the ideal victim, women's purity, men's rights, cultural essentialism and paternalism, but also an important imaginary of rights to resettlement on foreign lands.

Since the beginning, asylum has been constructed as a tool of social power. It was something that had to be granted through power, not something one had the power to make happen through an inherent human right. It had a distinct structure of giver-with-power and asker-without-power who was under conditions of duress the giver may have helped shape or uphold. This context of supplication only intensified under the Imperial power machine of the Roman empire, which lasted well into the fifteenth century before restructuring in European colonial policy. In Justinian's *Institutes*, for instance, the law regulating asylum pertained to the managing of fugitive slaves and providing corrective measures that maintained the Roman practice of enslavement. Doing good for good's sake was never on the table.

So, there is nothing really new about asylum as a tool of social power. Its conceptual parameters have been crafted for over two millennia to serve the interests of particular cultural traditions. The legal principle of non-refoulement that prevents those with a credible fear of returning home due to threat of harm can be found as far back as 431 BC in Euripides' *Medea* (727-728). The reason this history is useful is to show

invariance across social transformations. While Refugee and Asylum policy falls strictly into the governance structures of modern nation states and the related legal infrastructures of multinational organizations (such as the U.N. and I.C.J.), the supporting conventions that allow policy to function violently against some populations but not others are quite old. It's not a political story about just and unjust restrictions against non-citizens or the rational limits and obligations of powers of state in modern nations. It's about who has the power to speak, be heard, and listen—who has always had it—and who is in the perpetual position to be the one doing the asking.

On the long view of history, the institution of asylum provides a master class in gaslighting: it is always other than what one knows it to be. Today, it is a racial reorganization of the prison industrial system through privatized, for-profit detention centers of migrants. On the surface, it pretends to be about credibility and facts. It seems to be all about proving, as a matter of objective fact, whether an asylum seeker has suffered or fears the said persecution. At every level, from the first encounters with an Asylum Pre-Screening Officer (APSO) to immigration judges at a full asylum hearing, to Board of Immigration Appeals (BIA), what's been publicly emphasized is how different people have to *believe* that your story makes sense and that your testimony is credible. The U.S. has aptly named the initial interview in the modern asylum process the “credible fear test.”

A credible fear test is an in-depth interview process given to undocumented people of *any age* arriving at a U.S. port of entry to determine qualification for asylum-seeking. The test suggests that all that is determined is the credibility of your fear and poses as neutral tool for determining which asylum

seekers legitimately deserve to have their full cases heard by a judge. It was first developed in 1991 by the Immigration and Naturalization Services (I.N.S.) as a legal standard “to screen for possible refugees among the large number of Haitian migrants who were interdicted at sea during the mass exodus following a coup d’état in Haiti.” (RAIO and Asylum Division Officer Training). They were instituted as an actual interview procedure in 2002 to mitigate risk of removing asylum seekers under new *expedited removal* rules. In other words, because expedited removal meant you could now be flagged for removal without a hearing or trial, it was important to try and save those the US saw as deserving of asylum from slipping through the net.

In USCIS’s (U.S. Citizenship and Immigration Services) words, credible fear tests are there to determine whether “there is a *significant possibility* that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution or harm” (See USCIS Credible Fear FAQ, our emphasis). “Significant possibility” is supposed to be a low threshold to allow the next step to kick in for legitimate asylum applicants. The opposite is in fact the case; these tests are instruments of structural pre-screening, pre-determining in advance who can and cannot claim their (human) right to asylum. One way to see this is through the contradictions in aims brought by Reasonable Fear screenings. Individuals who are already subject to administrative removals can only make defensive claims for asylum (instead of affirmative cases, where you’re asking to be let in or allowed to stay but haven’t been subject to removal orders or proceedings). In defensive claims, the standard for belief of an applicant’s fear is “reasonable,” not “credible” fear. The bar for

reasonable fear of persecution or torture is higher than credible fear, in that you have to show there's good reason to think a judge would grant a withholding of removal orders.

It is not surprising to us that something that is designed to separate legitimate" asylum seekers from "illegitimate" ones is a perfect place to serve interests and projects other than the ones stated. Following President Trump's executive order (EO – January 25, 2017) "Border Security and Immigration Enforcement Improvements," USCIS updated its lesson plan (Feb 13, 2017 effective on Feb 27, 2017) for asylum officers, which sets the standards for conducting interviews. The new lesson plan tried to clarify the threshold of "significant possibility." It highlighted that "significant possibility" standard was *higher* than the "not manifestly unfounded" standard favored by the Office of the United Nations High Commissioner for Refugees (UNHCR) (RAIO and Asylum Division Officer Training). The new plan stated that an applicant's testimony has to be not only credible *but also persuasive* and has to refer to specific facts, noting that a credible testimony by itself will not be enough. The goalpost got moved quickly and much further back:

[It] encouraged officers to pay attention to all “relevant evidence” and “make a credibility finding based on a ‘totality of circumstances.’” “Thus, the officer can take into account inconsistencies and discrepancies that are not relevant to the asylum claim.” In fact, the lesson plan removes language that requires that credibility findings be relevant to the claim. ... the lesson plan instructs officers to probe applicants during their interviews as to inconsistencies between their initial statements with Immigration and Customs Enforcement or Customs and Border Protection [CBP] and the testimony before the asylum office. Such inconsistencies on their own could result in the asylum claim being deemed not credible (<https://cliniclegal.org/resources/uscis-revises-protection-screening-lesson-plans> (<https://cliniclegal.org/resources/uscis-revises-protection-screening-lesson-plans>)).

Consider the case of ten-year-old David, his brother Marco, and their Mother (pseudonymized here for safety). David and his mother were given a credible fear interview when reaching the US through Mexico, while Marco had been earlier apprehended and returned to El Salvador. David’s mother testified that both children had been targeted for violence by well-known criminal organizations and that they were marked for retribution for refusing recruitment as children. The mother’s fear was founded, among other evidence, on the fact that her children had been physically beaten. The APSO, who took sketchy notes, only said the ten-year-old gave one-word answers and did not appropriately respond as they expected someone to respond when answering questions about torture. Their test had a negative finding. Shortly after, word came: Marco had been killed back in El Salvador.

With this evidence, a Request for Reconsideration was issued. “The Asylum Office summarily denied it within the hour” (Jain and Lee 2018).

The discretionary space allowed to asylum officers has dramatically increased under the Trump administration, allowing officers to decline claims based on considerations beyond ‘credibility’. In our previous work, we have called this phenomenon “institutional comfort,” referring to how decision-makers are systemically afforded the ability to arbitrarily and ambiguously misinterpret asylum applicants’ experiences, cultures, and countries. The term called attention to the discretionary space systemically afforded to state actors within their institutional roles and how easily this discretionary space can be used to produce inconsistent, ambiguous, and arbitrary assessments of applicants’ experiences (Sertler 2018). Where institutional comfort exists, the term “evidence” becomes functionalized to serve the interests of ideology, not objective finding through logical analysis. Consider now Lourdes’s story:

In May [2018], Lourdes walked across the bridge from Mexico to El Paso, Texas, and requested asylum. The first step is an interview with an asylum officer.

“I told him that I have the evidence on me,” Lourdes said, through an interpreter. She told the asylum officer about the scar on her arm, and the four missing fingers on her left hand—all evidence, she says, of a brutal attack by a gang in her native Honduras.

But the asylum officer rejected her claim.

“I don’t know what happened,” Lourdes said. “I don’t know how I failed.”

(<https://www.npr.org/2018/07/20/630877498/denie>

d-asylum-but-terrified-to-return-home
(<https://www.npr.org/2018/07/20/630877498/denied-asylum-but-terrified-to-return-home>)

The question of evidence, then, does not mean much without the question of *what counts as evidence* in an administrative system built to structurally pre-screen individuals on the basis of white supremacist logics.

Lourdes's case also takes us to Sessions's 2018 decision in *Matter of A-B-*. In it, Sessions overrules a prior BIA case, *Matter of A-R-C-G-*, which qualified domestic violence survivors for asylum based on their particular social group, e.g. "married women in Guatemala who are unable to leave their relationship." Sessions attempted to change the parameters of the membership in a particular social group category, which is the asylum ground mostly used in gender-based violence cases. The structural intent is clear: prevent domestic violence survivors and other survivors of persecution by non-state actors from being eligible for asylum.^[1] Sessions tried to exclude the persecution perpetrated by non-government agents from the kinds of persecution the U.S. is responsible to offer international protection from as a signatory to the Refugee Convention: "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum" (*Matter of A-B-*, Respondent 2018). USCIS followed suit with a policy memorandum (USCIS PM 602-0162 2018). The territorial application clause never really left. It just reorganized structurally.

Sessions goes on to state: "The mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim" (*Matter of A-B-*, Respondent 2018). Seeing

cultures as persecutors or as “naturally” inclined to produce crime allows the receiving states and cultures to substantiate their moral and political superiority (Bhabha 2002, Noll 2006), and to exonerate themselves, and thus it serves the settler colonial logic persistently. It was not a coincidence that although Sessions’s decision did not specify a country, it affected asylum applicants from Guatemala, El Salvador and Honduras disproportionately (Human Rights First 2019). This is something Mayblin also calls attention to in her effort to trace colonial legacies of asylum seeking: the seemingly neutral policy language that specifically targets *some* people from *certain* places.

We also have to consider Sessions’s decision in the bigger context of U.S.’s on-going approach to gender-based violence in Refugee Law (e.g. Nayak 2015, McKinnon 2016, Millbank & Dauvergne 2010). The U.S.’s approach to “social group” asylum ground, commonly used by gender-based applicants, has been criticized for being far too limiting. Jenni Millbank and Catherine Dauvergne have said: “...on the issue of particular social groups the United States was and remains the most stagnant, least coherent and most out of step with international developments” (2010, 938). In this context, then, leaning on evidence, consistency, and credibility in testimony as indicators of qualified asylum seeking is an old epistemological game, where some people cannot win. To emphasize “consistency” when people are talking about traumatic events in a new setting, in front of a uniformed enforcement officer, in a language very likely not their own, in front of people who, they know, might not consider gender-based violence as legitimate persecution is nothing but violent (Baillot et al. 2014, Kelson 1997, Neacsu 2003). Terms like “significant possibility,” “evidence,” “consistency,” “credibility,” can never be neutral in the context of colonial administrative violence. These

issues are what we hope to highlight in a book we are currently working on with Nora Berenstain, entitled *Knowledge Refugees: Gender-Based Asylum and Epistemic Violence in the U.S.-México Border*.

We know legal criticism of many of these claims comes in the form of ameliorative relief provided in specific cases, as well as legal challenges to anti-immigrant policy items. It is good to know the Ninth circuit court of appeals is on deck most days (until Trump's twelve GOP appointees are confirmed and radically reshape the balance of the court), recently ruling that negative findings of credible fear tests can be appealed. But appellate reconsideration mechanisms do not change the structure of informancy built into the process, how easy it is to use credible fear interviews to pre-screen who can be considered for asylum—think about the recent attempt to give the right to administer credible fear test to CBP officers as opposed to trained asylum officers (Veroff 2019)—or the months and years that the process can take. It does not address the new and often irreparable harms brought on by U.S. policy in the form of forced family separations, sexual violence by patrol officers and gross neglect resulting in death. In “Lynch Law in America” (1900) Ida B. Wells reminds us that “while the United States cannot protect, she can pay. This she has done, and it is certain will have to do again in the case of the recent lynching of Italians in Louisiana. The United States already has paid in indemnities for lynching nearly a half million dollars.” Compounding for interest, it is smart policy to start thinking of the cost of *not* reuniting children with their parents and abolishing the for-profit carceral detention of migrants. Given America's history of structured misdeeds, the list is only getting longer.

We think that credible fear tests are structured to be *instruments of violence* that turn on a colonial logic of power, not objective measurement tools that help determine the validity of applicants' claims in the absence of clear and present indicators of harm. By "colonial logic" we are referring to a way of understanding the world—an epistemological system—that "upholds" and "preserves" a hierarchy of social organization that justifies the ongoing, non-accidental, and systemic *dispossession* of Indigenous people's lands and resources and legitimizes structured harm to some people but not to others (Dotson 2014, Mayblin 2017, Ruíz (forthcoming)). This logic is functionalized through institutionalized practices. And it surfaces in many ways: when asylum seekers' experiences, cultures, and countries are only intelligible through the dominant cultural norms of settler colonial culture (Ruíz 2010).

There is no doubt structural pre-screening will continue because settler colonial heteropatriarchal white supremacist structures continue. Who do we think CBP will tend to consider a legitimate asylum seeker? Where will they be from? What will they look like? The ebbs and flows may bring different statistical data but on the broader timeline, a pattern emerges. Credible fear tests are structurally violent. They are used to obtain positive results as well, sure, but that's not the point. They are built to be used as instruments of violence when wanted and/or needed, and this little ready-to-hand tool is replicated across a multitude of institutions and structures that impact our lives. The capacity to use them as instruments of violence is built into them, ready to use when any administration wants to stop certain people from certain places from entering without regard to their own occupation of Indigenous lands. One tool is both sword and shield, protective and harm. As a double-edged instrument,

asylum policy in the U.S. is and is not about human rights. It is about who has been deciding who is human enough to use that right. We think this is functionally indifferent from other practices in its history.

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[1]"A federal court has already ruled that the government cannot rely on *Matter of A-B-* to issue blanket denials of asylum claims based on domestic and gang-related violence during credible fear screenings."

<https://www.humanrightsfirst.org/resource/central-americans-were-increasingly-winning-asylum-president-trump-took-office>
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*This post builds upon “Structural Violence and the Settler Logic of Credible Fear Tests,” the presentation that Elena Ruíz and Ezgi Sertler gave in a session at the 2019 Pacific APA entitled Decolonization and Settler Colonial Theory.

[Description of photo below: Elena, an Indomeztix woman wearing sunglasses, a shirt, and jeans, smiles widely while sitting outside in Los Angeles. A building can be seen on the far right of the shot, with shrubs and flowers in the surrounding area.]

Elena Ruíz is an assistant professor of philosophy at Michigan State University, a Woodrow Wilson Fellow, and Visiting Scholar in Sociology at Harvard University.

[Description of photo below: a photo of Ezgi (and her curls) near a beach in Los Angeles. A smiling Ezgi, who is wearing a dark shirt and sunglasses and carries a backpack, stands next to some plants and flowers, as well as a palm tree. There are a few volleyball nets and people on the beach.]

Ezgi Sertler is an assistant professor of philosophy at Butler University.

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