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**RUNNING HEADS**

**VERSO: BERNARD KEENAN & ALAIN POTTAGE**

**RECTO: ETHICS IN REHEARSAL**

## **Ethics in rehearsal**

BERNARD KEENAN & ALAIN POTTAGE

*London School of Economics and Political Science*

In this essay we explore a rather spare kind of meeting: a conversation between three people with minimal facilitating equipment. The stakes are high because these are meetings in which the barrister in an asylum or immigration case first meets with a client who is at risk of deportation. We focus on two dimensions of these encounters. First, we identify the aesthetic that configures and animates most asylum cases: the aesthetic of inconsistency. The meetings we observed were all about inconsistency; about working out how to respond to actual and anticipated challenges to the coherence of a refugee or migrant's personal narrative. The logic of inconsistency is so persistent and so corrosive that the exercise of anticipation - 'rehearsal' - is essentially open-ended. This leads to the second dimension of our meetings. Barristers who work in this area of law develop a particular style or ethos, which allows them to accompany vulnerable clients through the rehearsal and also to make sense of their own involvement in the machinery of deportation. In these two aspects we find the basic choreographic principles of our meetings: the articulations which shape their material and affective ecology, and which inform the barrister's interpretation and performance of his or her professional role.

According to a practitioner who had recently left the fold, lawyers who dedicate their professional lives to representing refugees risk becoming 'either martyrs or ironists'. How does one engage with a system in which a popular discourse of

radical suspicion functions as bureaucratic infrastructure? And how is a lawyer to deal with the routine documentary products of this machinery: letters of refusal in which selected parts of a refugee's story are arbitrarily recomposed so as to suggest logical contradiction, inconsistency, and lack of credibility? We know that these letters have little to do with the lived experiences of refugees; for the lawyer, the problem is how to bring law to bear on texts that are often just pastiches of legal logic. It seems that for the bureaucrats who compile these letters the ritual formula of refusal - 'it is not accepted that' - is all the argument that is needed. And to some extent that is so, because in the UK, the refusal of an asylum application by a Home Office caseworker leaves the refugee with recourse to an appeal mechanism whose effectiveness has been compromised by reforms which were expressly designed to expedite deportation, and by cuts to the legal aid budget which have further reduced the involvement of lawyers.<sup>1</sup> In terms of the broad structure of the asylum process, the role of lawyers was already more marginal than one might have supposed, but the effect of these changes is further to reinforce a structural effect of alienation.

[p1[Many lawyers were drawn to working with refugees because they wanted 'to make a difference'. The barrister who convened the meeting around which this essay is framed expressed this vocation very eloquently:

]ex/[I had no doubt in my mind about it being the right thing to do, in every case. Even if people were crazy rapists or whatever, I didn't think it was better to send them to Congo, for example, where women live without proper police or probation services or whatever a rapist needs [to not reoffend]. So even in the worst immigration cases, I still always felt that what I was doing was right.]/ex[

]p[How does one work out a professional style that reconciles this kind of normative commitment with the indifference of bureaucratic machinery? This is a classically ethical question, which we explore by way of a study of a particular kind of meeting: the case conference in which the barrister retained to represent a refugee at a forthcoming hearing meets the client and the solicitor.

]p1[The lawyer's mode of engagement, his or her ethical style, will depend in the first instance on which branch of the profession he or she inhabits. In the English legal system, the solicitor will accompany the refugee from a relatively early stage in

the case through to the final disposition, and may become much more familiar with the refugee, with their circumstances, and perhaps their broader community. The barrister will usually meet the refugee for the first time in the case conference, which, now that access to legal aid is so severely restricted, is likely to be held in the moments before the hearing itself. There is some latitude in the way that lawyers use the term 'conference', but most of the practitioners we observed insisted on using it only for the classic encounter between solicitor, client, and barrister. This is a simple form of meeting, which rarely involves more than four people (the client, two lawyers, and an interpreter), and which is contextualized by the most minimal equipment. But our hunch is that some interesting insights into law and lawyering emerge from the observation of these encounters.

Case conferences might be unfolded as sociotechnical assemblages. They involve the repertoire of frames, infrastructures, and techniques that has been anatomized in recent ethnographies of legal form (see notably Riles 2010), and analysis might be scaled up or down, from the procedural regime of asylum law to the now-classic form of the file. In the course of our observations, two forms emerged as particularly intriguing principles of articulation. First, taking our cue from Thomas Scheffer's discussion of 'styles' of lawyering, we started out with the notion that ethics played an interestingly complex role in the articulation of the conference. In his study of how case files function as infrastructure for very distinct professional styles,<sup>2</sup> Scheffer notices how ethics (in the sense of an affective or normative disposition) is wired into contexts: '[H]abitus turns into a disposition that is supported by a local infrastructure of corresponding artefacts' (2007: 71). Style is 'infrastructured' by, and in turn acts as infrastructure for, the elements that are 'convened'<sup>3</sup> in a case conference.<sup>4</sup> Ethics in this particular sense remains the 'medium' of our study. At the same time, however, we noticed the persistence of a particular legal aesthetic - inconsistency - which seemed to be articulated into almost all the observable elements of the conference, from the materiality of the documentation to the ethos of the practitioners. This aesthetic is interesting because it suggests a mode of technicality which is distinguishable from sociotechnical inflection. So although we retain 'ethics' as the rubric of our study, we take lawyering style as a medium in which the agency of this technical armature becomes manifest.

## **]ha[Inconsistency**

]p[The only evidence that many asylum seekers can offer in support of their application is a story held in their head – a recollected narrative of persecution and flight.<sup>5</sup> There is no witness evidence to enrich or corroborate their version of events, and no contextualizing evidence other than official compilations of information about the political situation in the ‘country of origin’.<sup>6</sup> For refugees seeking asylum in the United Kingdom, the procedural chain that leads to the appeal tribunal (and hence the kind of case conference that we observed) begins with a screening interview, either with an Immigration Officer at a port of entry or with a Home Office official at the centre in Croydon. The training given to immigration officers emphasizes the forensic significance of contradictions or inconsistencies: ‘Point out the discrepancies, that is your job, find out the discrepancies in what they say and decide’ (cited in Jubany 2011: 80). The screening interview, which is supposed to be about gathering information rather than making decisions, is followed by an interview with a Home Office caseworker, who will make a decision on the application. In the letters of refusal which follow most of these interviews, grounds for refusal of an application are typically elicited from the tissue of the story itself, and formulated in terms of ‘inconsistency’ between different parts or iterations of the narrative. Indeed, the rhetoric of inconsistency has become so automatic that Home Office caseworkers often characterize propositions as inconsistent when they quite plainly are not. Of course, legal cases usually turn on judgements as to the consistency, plausibility, or credibility of a factual narrative, but in asylum procedure ‘inconsistency’ becomes a particularly persistent and pernicious device.

]p1[Inconsistency is carried forward throughout the case as a device that functions at once synchronically and diachronically; it articulates the elements within each phase (interview, consultation, conference, hearing) and relays each phase to the next. So, for example, the object of the conference is to formulate, within the temporal frame of the meeting, a witness statement which retrospectively engages the arguments made in the Home Office letter of refusal, and which does so in terms which also anticipate the rejoinders that are likely to be made in the tribunal by the Home Office advocate and the inquiries that the judge might pursue. In that sense, inconsistency is always ‘in rehearsal’. Inconsistency, and the hermeneutical style that

actualizes it, is apt to disclose gaps and contradictions anywhere and everywhere. Indeed, in asylum cases the bottom line is a tragic irony: an account of persecution that presents no obvious inconsistencies will itself be said to be inconsistent with the traumatized state of the 'real' refugee. So no narrative can ever be intrinsically complete. When it happens, the 'resolution' of inconsistency is often the effect of a singular event which eclipses the narrative as 'a whole': on one side the 'gotcha' moment in which the applicant is betrayed by a flagrant contradiction; on the other, the moment in which a single detail emerges from the narrative so as to 'absolve' inconsistency (here we fuse the familiar meaning with the archaic sense of absolution as resolution).<sup>8</sup>

How is ethics implicated in this machinery? To begin with, there is a rather obvious sense in which the subjectivity (or ethos) of the refugee is implicated in the discourse of gaps and contradictions. The barrister who convened the conference that serves as the narrative frame for this essay told us that she saw her role as being to detach the refugee from the logic of the letter of refusal:

[A] surprising number, given the culture of disbelief, most people are telling the truth in their cases, you know? And the problem is that they're battered down by this system. And often the more important thing is about not getting people to respond to the ridiculous logic of refusal letters. The problem is people take it on, they take on the wild crazy reasons for why they're not ... then they try to explain them, and trying to explain them, that's what makes them sound not credible.]

The barrister insulates the client from the Home Office narrative by characterizing the allegation of non-credibility as a technical problem to be addressed and resolved through the presentation of the evidence. The case, which centres on inconsistency, is a matter of legal technicality and therefore the business of the advocate as champion. And, if the basic strategy is to anticipate and defuse potential allegations of inconsistency, then the 'case' is crafted by drawing the potentialities of the refugee's narrative, the self-presentational competences (or limitations) of the refugee, and the form of the witness statement into the aesthetic of inconsistency. But this ethical style works only if the client gives the barrister something to work with. In some situations the client is 'inconsistent' even in the case conference, and it becomes

almost impossible for the barrister to develop a strategy that connects the witness statement to the self-presentation of the client. In extreme cases, where the refugee's case is publicly funded, the barrister may have to form a professional judgement as to whether the case justifies further funding.

Inconsistency also articulates the professional relationship between the barrister and the solicitor. Many barristers assumed a posture of detachment or relative objectivity, and hence claimed a particular insight into the documented case – or, more precisely, into the way that the contents of the file might play out in the agonistic frame of inconsistency. From this perspective, one question as the conference unfolds is whether a particular solicitor can be relied upon to have drafted a decent witness statement. As one barrister observed to us:

[If you've got a solicitor you trust, you think, 'You've done all this. I know these are all the grounds and I don't need to poke or prod to find some more'. There are some solicitors where you think, 'I don't think these are all the grounds'. So actually in the conference you spend time poking and come out with two or three grounds that weren't there before.]

The encounter between barrister and solicitor, which may be just one phase of an ongoing relationship, is inflected by the barrister's sense of how the solicitor's competences 'measure up' to the logic of inconsistency.

### **Ecology**

Most case conferences take place in barristers' chambers, in rooms dedicated to the purpose. In less fancy chambers the conference room often doubles as a library or filing room; and, for clients at least, the experience of being enfolded in an archive has its own aesthetic effects. The conventional ecological formula for the conference is simple: three people sitting around a table. In one rather extreme situation, this prototypical infrastructure is expressed as hard architecture. The room set aside for lawyer-client meetings in the High Security Unit of HMP Belmarsh (the maximum-security prison used to hold a number of those facing deportation or extradition for reasons related to national security) imposes a particular frame for interaction. The

'table' is a solid cuboid structure that runs the entire length of the room, effectively dividing it in two. The lawyer, having been driven from the secure visiting area of the prison to the maximum-security unit in a van with darkened windows, enters the meeting room from one 'side', the client from the other. The solid table ensures that nothing can be passed between lawyer and client without being visible through the windows that run the length of each side, and who knows whether what is transacted verbally is not also open to scrutiny.<sup>9</sup> In yet other situations, the conventionalized form of the conference has to be actualized in a context in which few or none of the usual props are available. One barrister with experience of working in both refugee law and criminal law told us of some of the peculiarities of criminal cases:

]ex/[It's slightly different, yeah, and a huge percentage of those conferences take place when you're interviewing somebody in a room not much bigger than a disabled toilet, with no obvious furniture and a terrible smell. The first thing I was told, or one of the first things I was told when doing conferences in crime, is that when you open the wicket [the hatch on cell door], to speak to your client, make sure your face isn't in front of the wicket because who knows what's going to come out of that thing first. It might well be a fist, even if they know it's you.]/ex[

]p1[So what is involved in sitting three people around a table? The 'arrangement of people' (Sommer 1967: 145) is an obvious infrastructure of interaction, so obvious that it is easily overlooked. It is also, as it turns out, a resource for ethical performance. Even the most minimal equipment – again, a table and a few chairs – allows for degrees of proximity, opacity, or engagement, whether material or discursive, to be mobilized strategically. The case conference that we take as a narrative frame for this essay offers a particularly interesting example. The case in question was not a matter of refugee law because there was no question of persecution, but it mobilized the forms and strategies that we observed in other conferences. The client was facing deportation from the United Kingdom on the ground that he was a foreign national who had been convicted of a criminal offence. He had a British partner with whom he had two children, so deportation would have resulted in the separation of the family. The question, then, was whether deportation



would amount to 'disproportionate' interference with his rights and the rights of his family within the terms of the European Convention on Human Rights. One of the children had learning difficulties, so the family had been supported by social services for some time. This kind of case no longer falls within the scope of legal aid provision, so the client was paying for representation himself, on the basis of a fixed fee arranged with the solicitor.

]p1[About ten minutes after the client, his partner, and the solicitor arrive at the chambers, the barrister comes to the waiting area next to reception. She introduces herself very warmly; she smiles and addresses both the clients directly, shaking their hands. She and the solicitor know each other well, and they acknowledge each other very briefly. The barrister leads the solicitor and clients a short distance to the conference room, in which a large table is surrounded by a number of chairs. Water, biscuits, glasses, cups, and saucers are assembled on the table, and the barrister relays requests for tea and coffee to someone outside the room. The barrister is carrying the papers with her and she sets these up in front of her as she sits down. She asks the client to sit next to her - 'Why don't you sit here?' He does so, and his partner takes a seat adjacent to him. This is perhaps the most interesting moment in the meeting. In most conferences the barrister automatically sits opposite the client and solicitor. This may be a vestige of tradition; some of our barristers referred to the solicitor and client as, respectively, the 'professional client' and the 'lay client'. The usual seating arrangement is not inconsistent with expressions of empathy. One barrister suggested to us that she always sat opposite the client and the solicitor because 'it would be a bit intimidating to have both lawyers on the other side of the table from you. It looks a bit like we're opposed to them really'. But the ethical ecology of this particular conference is significantly different.

]p1[After the meeting, the barrister told us why she preferred to sit next to her clients:

]ex/[I don't want to be an aloof barrister. I feel like, without fail, the clients I mainly have, you want to be as unintimidating and as much like a 'real person' as possible. So I think you want to be next to them. And it will be like this in the hearing, it will be me, and you, and that's what you want to make them feel. You have to be like, I am going to be there, I am going to say this, you

want them to feel like, oh my God, thank goodness she's going to be the one, the wall, like the kind of solid ... I don't know, you've really got to try and make sure your clients feel confident in you. And you've got to know their case well before you meet them. Because if you don't know ... I think it really reassures a client when you come to your conference and you're able to say it's obvious that you know their whole case already. That makes them feel like, OK, she understands it ... ]/ex[

]p1[Although her professional profile was similar to that of other asylum law barristers - young but relatively experienced, trained in the public service-orientated repertoire of public law, immigration law and criminal law - this barrister had (somewhat unusually) started out as a junior caseworker in a solicitor's firm. As much as possible, she tried to model her professional style on this formative experience:

]ex/[I think when I started in some ways I would have been better [at conferences] because as a caseworker I was very used to having client contact, and sometimes now I have to remind myself to slow down and explain, it can't be me talking to another lawyer, and that's so much of your time as a barrister is just talking to another lawyer, or a judge, and writing things.]/ex[

]p[This contrasts quite sharply with the style of the lawyer for whom the work of accompanying refugees, or of gaining their trust, was not part of her role, and who might well take a case without ever meeting the refugee him- or herself:

]ex/[If credibility's not an issue, I don't ever want a conference. If [the Home Office] accept everything that's been said, then it's legal stuff, and unless [the client] can contribute to that, which is quite rare, there might be two or three questions they can help with but I'd always ask the solicitor for those, just phone them.]/ex[

]p[Of course, there is more to an ethical style than the axis of proximity. In dealing with the client, one is also relating to the solicitor and documentation, and to each of

these elements through the other. And a sustainable ethical style is one that holds together all these dimensions of the conference.

]p1[In some of the conferences that we observed, the basic felicity condition for the barrister's participation was opacity rather than proximity. Some practitioners preferred to sit opposite the client and the solicitor so that in the course of the conference they could discreetly check their email, or perhaps work on a more urgent case. One of our barristers deployed the material form of documents to strategic effect. Using a trick learned from his mentor, he would forest the papers with randomly placed Post-it notes to suggest close reading of the file, and he would seek to compound that impression by evoking one or two of the more obscure details of the case. He explained to us that 'a real part of conferences is giving the impression of knowing the case better than the client. And clients are always in my experience impressed if they can see how well you've prepared for the meeting'. From the client's point of view, the difference between opacity and proximity may not be decisive. After all, the barrister who made defensive use of Post-it notes also came up with the one of the more spectacular 'resolutions' of inconsistency in the course of a conference: noticing that a refugee had scars on his head which substantiated his story of having been beaten by police officers, and which explained why he was unable to recall his experiences in any consistent way.

### **]ha[Agenda**

]p[To return to the conference that frames our discussion, the barrister begins by describing the spatial layout of the courtroom to the client: the judge will sit at the front behind a bench, the Home Office will have a table on one side of the room and they will have a table on the other side. She explains the order in which each party will speak, summarizes the roles of the Home Office Presenting Officer and the Immigration Judge, and her own role in the hearing. She emphasizes to the client that she is there to deal with all procedural issues and that if he has any questions or concerns during the case he can confer with her at any time. She then goes on to identify the central issue in the case: 'credibility'. She tells the client that although the issue has been explored quite extensively by the solicitor, it remains problematic: 'Basically, it means whether or not the judge accepts the facts as you put them, your version of events. In this particular case, your big credibility issue is going to be

about the offence, so we'll focus on that today, because it will be difficult at the hearing'. Having flagged the question, the barrister then turns to a part of the file that contains a report by the social services on the children's needs. She goes through the facts in the report with the client and checks that they are correctly recorded. The client's partner adds some more details to the issues discussed in the report and the barrister makes further notes.

]p1[This phase of the conference is quite conventional. It is usual for the barrister to set the agenda by identifying the central issue, and to spend the first few minutes checking certain details in the paperwork. In most of the conferences that we observed, the questions or issues to be covered in the conference were written on the last page of a (new and freshly opened) notepad, and from time to time the barrister would suspend the flow of note-taking and turn to this page to check the agenda. The (invariably blue) notepad mediates between the bundle of documents (which might be marked with Post-it notes to identify the most crucial parts) and the course of the conversation as it unfolds in the conference. The central document is a work in progress – the witness statement in which the contents of the refugee's narrative are tuned and retuned in the light of a strategic judgement of how the narrative (and the narrator) might stand up to the forensic questioning of a Home Office Presenting Officer. At least for one barrister, the witness statement was the essential actor in the conference:

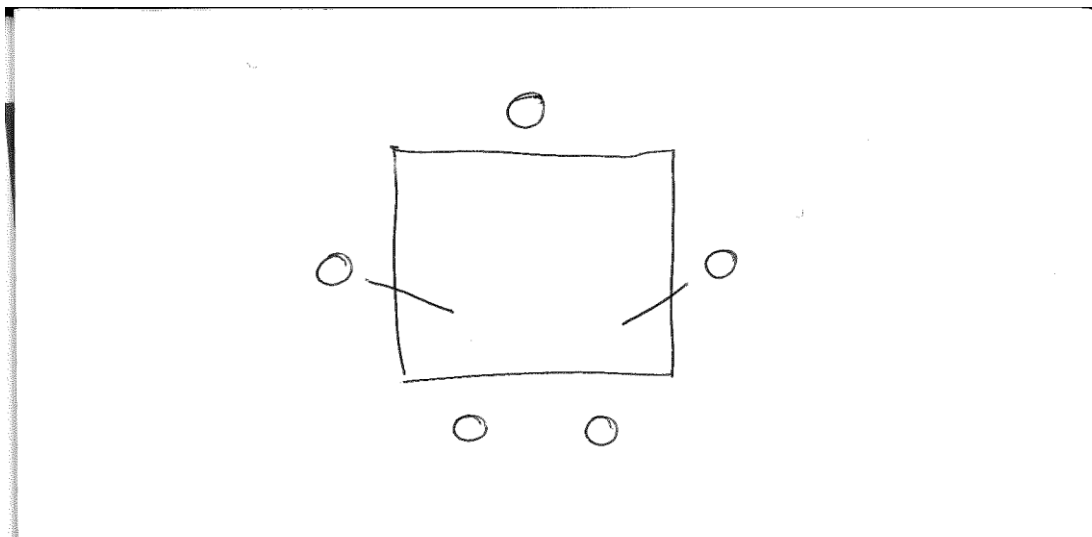
]ex/[I don't like conferences unless there's already a witness statement. I know some solicitors like to take the client along in order to get a witness statement ... I prefer to have a statement in front of me so I can cross-examine, effectively, the witness statement, check for gaps, errors, issues.]/ex[

]p[In cases where the participation of the refugee might give greater latitude to the Home Office, the barrister might seek to let the statement stand in for the client.

]p1[The rather spare image in **Figure 1**, which is a photograph of the back page of one of these blue jotters, depicts a somewhat idiosyncratic conference plan. Instead of writing out an agenda, or a list of questions, on the last page of her notepad, this barrister draws a map of the courtroom. She then reproduces the image for the client in the course of the conference, step by step. As she draws each figure, and positions them in relation to the place that will be occupied by the client, she

explains the role of each actor in the hearing, what they might be likely to do or say, and sounds out the client's likely reactions or responses. This procedure works as a kind of mnemonic device for the barrister: from her perspective, each figure stands for a part of the case that is likely to be put to the client, so that the re-animation of the map within the frame of the conference recalls the points that she has identified in her reading of the draft witness statement. But the map is also an exemplary piece of ethical machinery. It is a device for rehearsing the experience of the trial with the client, for 'walking them through' the forthcoming hearing. The process of drawing out these minimalist figures, of situating, contextualizing, and explaining, brings the time of the hearing into the process of the conference. Rehearsal through topography casts the lawyer as empathetic champion, assures the client of her competence and mastery of the case, and realizes an affect of proximity that is, if anything, more intense than what is achieved by sitting alongside the client.

**]INSERT FIGURE 1 NEAR HERE[**



]p1[To return to our conference, the barrister concludes the first phase of the meeting with a brief review of a further set of reports from social services about the likely effects of deportation on the welfare of the children. And here she addresses the solicitor directly:

]ex/[These reports are good but we could use more. How many reviews were done in total? We should try to get the whole file - normally it is possible.

Call up and request it from legal department, say you urgently need the file. There might be helpful notes. The problem is that the current report doesn't show the timing.]/ex[

]p[The solicitor, who has been keeping notes on her laptop, makes a further note and agrees to look into the matter. The barrister goes on to remind her of the implications of a recent decision in which it was held that children might eventually adapt to life without a deported parent, and observes that it would be important to use psychological assessments of the family to meet that argument. In this collegial exchange, the solicitor figures as a productive collaborator, but it is clear that the barrister has the better insight into the case as it goes forward to the hearing.

]p1[The barrister then turns to the crucial part of the case: the client's account of the criminal offence. She automatically turns to the relevant pages of her file, but she proceeds to ask a series of focused questions without ever consulting the papers. Her tone remains friendly, but the tempo of the conference changes. In response to a question about a specific aspect of the conviction which had led to these deportation proceedings, the client offers a non-committal answer: 'Not really'. At this point the barrister responds with a firm but non-confrontational challenge:

]ex/[What do you mean by 'not really'? Look, the problem is that you are minimizing your role ... In your statement, it sounds like you didn't even do anything. In the sentencing remarks from the trial, the judge says that you describe yourself as having let yourself be brought into a situation, but that you are not naïve ... So it was clearly not accepted that your basis of plea was just that you had no idea. So if you say it now, they won't trust you. You obviously admitted something different before the court. It's better to take full responsibility - and leave it at that. You did the sentence, you're not going to reoffend, it was clearly a mistake. At the moment, your statement says something different.]/ex[

]p[This is the point at which the aesthetic of inconsistency emerges most clearly in the course of the conference. The Home Office Presenting Officer or the judge will pick up on this contradiction between what the client admitted at his trial and what he says in the witness statement. The barrister begins the process of reformulating

the statement by going back to the beginning, the better to satisfy herself of the possible grounds of inconsistency: ‘What happened with the offence? Start at beginning. How did you get into it?’ The documents drop away, and the conference turns into a rehearsal of cross-examination.

### **]ha[Ethics**

]p[All of the barristers we talked to emphasized that they were bound by rules of professional conduct which prohibited the ‘coaching’ of witnesses – essentially, telling witnesses what they should say in court. The barrister who convened our sample conference offered us the clearest explanation of the rule:

]ex/[You can always tell someone what to leave in and what to leave out of a statement, and what evidence will help their case and what won’t. What you can’t do is tell them to change their evidence. If they say, I said the car was black, and it would be better if it was blue, you can’t tell them to say it’s blue. You have to say, tell me the truth and I’ll tell you whether the truth is helpful or not helpful. And when the client asks, well what should I say, that’s when you have to be like, no I can’t help. I don’t think it’s that difficult. I don’t. I think that line is not that difficult to navigate.]/ex[

]p[When pressed on the question of where this rule was inscribed, or what its contents were, she responded somewhat vaguely: ‘Yeah, I think it is in ... I don’t know where’. This is intriguing: the rule is recognized to be essential and binding, it is consistently practised, and yet none of the practitioners we worked with felt impelled to verify its provenance, content, or scope.

]p1[The rule that proscribes rehearsal is indeed found in the Bar Council’s Code of Conduct: ‘You must not rehearse, practise with or coach a witness in respect of their evidence’. The handbook in which the Code of Conduct is contained runs to 277 pages, of which only six are devoted to the rubric ‘Behaving ethically’; and whereas other rules in this rubric are glossed with commentaries and illustrations, this particular rule stands unadorned (Bar Standards Board 2014: 27-30). So even if practitioners were to look for a formal specification, they would not find very much.

Here, we should recall what sociologies of the so-called 'self-regulating' professions have long suggested: that ethical rules function as a corporate parure, a documentary get-up by which the professional body impresses itself and others (see here Strathern 2006). We are interested in the sense in which 'ethics' as a corpus of deontological principles is articulated by 'ethos' in the sense of professional style. We know that rules are learned through being lived, but these ethical rules of conduct are not lived (or mastered) in the same way as the technical rules of law or procedure that barristers mobilize in textual or oral argument.

]p1[Our hypothesis is that the rule takes on a different depth or texture depending on the articulation of the logic of inconsistency with the perceived competences of the client and the ethical style of the lawyer. A number of barristers drew a distinction between the experts who are sometimes consulted in asylum cases and the regular refugee. Whereas experts were able to infer from a barrister's line of questioning how they should deal with a Home Office Presenting Officer, many refugees lacked the competences to do this. So, as one put it, 'You do try and fix that stuff as much as you can'. What are the limits to 'fixing stuff'?

]p1[At the point in our conference when the barrister's questioning turns into a mode of cross-examination, the client's answers become increasingly terse. When asked whether he was paid for his role in the offence of which he was convicted, he replies, 'Not really'. At this point, the barrister offers further advice:

]ex/[Just answer the question; stop trying to minimize. Let someone else judge it. Imagine how it comes across. You can be embarrassed, you can say you were embarrassed, but there is no point minimizing or misleading. You got a five-year sentence because it was a serious offence. You admitted you knew what you were doing. You can't make it sound better now. It sounds best to say you accept it ... The judge's mind-set is constantly tuned to lying or not lying. And if you suggest in any way that you're not being 100 per cent honest, they won't like you; it's insulting to them, and they won't be sympathetic to your stressful situation and that you were motivated by your family.]/ex[

]p[After this, the client relaxes a bit. He admits that some cash was seized, and that it was forfeited. Once this has been discussed, the barrister also seems happier. She has convinced the client to be more forthcoming; the statement can be redrafted and



hopefully the client will offer more expansive and forthright answers if or when he is called to give evidence at the hearing. What has been negotiated here is the line between familiarization and inadmissible 'rehearsal' or 'coaching'.

]p1[How does one 'fix' inconsistency while remaining on the right side of the rule? One fairly consistent theme emerged from our conversations with barristers: 'There's a difference between familiarizing someone with the likely procedure and the likely way that the evidence is going to be presented by the other side, and saying, "Look, you're going to say *x*, *y*, and *z*'. Perhaps this can be construed as a difference between two modes of rehearsal: between putting the client in the picture about how things will unfold in court and instructing them on how to perform once they get there. For one of our barristers, telling a client how to dress for their appearance would count as coaching. Many of our informants invoked a criterion of truth: so, for instance, it would be permissible to say to a client, 'Tell me the truth and I'll tell you whether the truth is helpful or not'. Rehearsal would be anything that prompted the client to change a 'true' story. But the nature of inconsistency is such that what is in play is not truth as such but the 'truth' that emerges from the agonistic exchange of hypotheses and allegations. Again, inconsistency is 'resolved' not by 'completing' a narrative but by finding a strategy that anticipates and defuses the aspersion as to credibility that is implied by an allegation. In our conference, the barrister feels that she has properly judged that line.

]p1[Concluding the conference, the barrister addresses the solicitor with a list of points that need further work. First, she recapitulates the elements of the case and identifies additions or amendments that should be made to the witness statement. Then she asks the solicitor to procure a full set of records from the social worker, to obtain a letter of support from a prospective employer, and to get hold of the children's medical files and letters from their teachers. The conference concludes on a less than optimistic note: the barrister advises that although some Presenting Officers are fair, others are not, and although some Immigration Judges are sympathetic, the family should also 'prepare for the worst'. When the clients have left, the solicitor and barrister fix a time for their next conversation about the case.

]ha[Passing

]p[In his account of law-making in the Conseil d'État, Bruno Latour observes that law is not truly a sociotechnical enterprise. The media of lawyering – speech and text – have remained essentially the same for two millennia, and these media lack the capacity to ‘inflect’ action in the manner of even the most basic technological artefacts (Latour 2006: chap. 5). One might suggest in response that communicative media – in law as elsewhere – have precisely the capacities of inflection that Latour reserves for technological devices. An example can be found in his ethnography of the Conseil. In the course of rendering judgement, the *conseillers* felt obliged to respect a time-honoured convention of hesitation: ‘for [justice] to speak justly, she must have hesitated’ (Latour 2006: 152). In debate, the judges sought to convince themselves that they had hesitated for long enough to sound out the full scope for decision that was afforded by precedent and policy, or to ensure that the decision was properly reasoned. It would be interesting to pursue Latour’s analysis somewhat further, and to explore the variability of the convention. How does the duration of hesitation vary, how does its inflection of the decision change, according to the character of the tribunal or the case? What of those cases in which judges do not hesitate, the better to affirm the rightness of the decision or the more peremptorily to reject the pretensions of one of the parties? But the essential point is that the time of hesitation, its measure or texture, is not chronometric: ‘long enough’ is not a matter of minutes or seconds.

]p1[The forensic sense of time emerges from the way that the judges, as agents of the convention, ‘perform’ duration so as to engage the expectations of the public, and these expectations are ethopoietic artefacts – effects of the way that the judges see themselves being seen by this (virtual) public. In the process of hesitating, the judges mobilize or inflect time in such a way as to turn it into something other than itself. The ‘time’ that functions as a variable or emergent felicity condition for the formulation and enunciation of judgement is generated by the process of communication, by the reflexive performance of hesitation for an addressee (the virtual ‘body’ of the court, or a public). This is inflection within the ancient medium of ‘talk’. It is interesting to dwell on the formula that Latour uses to characterize the moment of decision, or the moment in which an ethical moment is capitalized to the benefit of a mode of enunciation: ‘law passes’.

]p1[In asylum and immigration cases, the machinery through which law ‘passes’ is configured by the aesthetic of inconsistency; documents, ecologies, ethical

dispositions, professional strategies, and conceptual forms are actualized and connected along lines of force or tension that are generated by 'inconsistency'. The ethos or style of the barrister, which is manifested in such things as the disposition of chairs, the handling of files, or the ethical care with which clients are engaged, evolves as a resource for making this machinery more 'liveable' for both the lawyer and the client. But, as in Latour's example, the lawyer's ethical style is itself implicated in the articulation of the protocol through which law passes. To begin with, inconsistency is the aesthetic that discloses the elements of the case to the barrister, and which conditions how she positions herself (spatially, ethically, cognitively) in relation to her client. It is the frame that prompts and shapes the evolution of a lawyerly style: 'Lawyers adjust to the procedural regimes that they regularly attend to. The regime serves as the frame that tells apart good from bad practice, successful from failing strategies, available from unavailable communications, and useless from useful information' (Scheffer 2007: 71). And, within the frame of a particular case or a particular conference, this lawyerly ethos conditions how, in the real time of rehearsal, the barrister senses the emergence of actual or potential 'gaps' in the evidence, these 'gaps' being a function of the barrister's perception of how the material and 'human' resources that make up the evidence will play out in court. Ultimately, an ethical style is capitalized in the 'passing' of asylum procedure. This is not surprising: ethical 'equipment' (Rabinow 2003) is necessarily bound up in the world from which it seeks to take its distance. And, to return to our opening sentence, it may be that 'martyrdom' or 'irony' is just the most resilient device for acknowledging that implication.

#### ]hx[NOTES

The authors wish to thank the participants, both lawyers and clients, for the time, confidence, and insights that made this research possible.

]nt[ <sup>1</sup> In the United Kingdom, about 60 per cent of applications for asylum are denied by the Home Office. Of those who are receive a refusal letter, most will appeal to a tribunal, where about 25 per cent are successful (House of Commons, 'Asylum statistics'; figures are for 2013).

<sup>2</sup> Scheffer is interested in 'the regularities and routines 'of styles: 'Why, one may wonder, do lawyers sustain their respective styles across a broad range of cases, clients, and legal matters?' (2007: 70).

<sup>3</sup> According to an archaic sense, people are not the only agents that can be 'convened'; the *Oxford English Dictionary* (s.v. convene) offers an illustrative quotation from Robert Boyle's *The origin of forms and qualities* (1666): 'The wise Author of Things did, by guiding the first

motions of the small parts of Matter, bring them to convene after the manner requisite to compose the World’.

<sup>4</sup> Scheffer’s association of habitus with infrastructure suggests an interesting inflection of the old theme of ethos/habitus. Ethos or habitus is not a form of interiorized capitalized experience, which is actualized in engagements in a ‘field’; it is an effect of the co-articulation of material, semantic, and psychic forms. This is not the sense of habitus that one finds in work of Pierre Bourdieu. That particular sense, which has a long history, involves a particular set of tropes: in habitus, experience is capitalized as equipment for agency in the present; habitus somehow articulates potentiality into actuality, or convention into invention; habitus is observable only in its actualization, so that (sociologically or ethnographically) the ‘field’ functions as the medium in which virtual capacities are both actualized and disclosed to observation (see the classic analysis in Heran 1987). So in the tradition that Bourdieu draws upon, ethos/habitus becomes observable when a virtual, interior, competence is actualized in or as a set of observable transactions.

<sup>5</sup> The Refugee Convention provides that asylum should be granted where the applicant has a ‘well-founded fear of being persecuted’ (Convention Relating to the Status of Refugees [adopted 28 July 1951, entered into force 22 April 1954] 189 UNTS 137 [Refugee Convention], art. 1A). The (rarely observed) principle is that the authorities have to assist the refugee in making their case.

<sup>6</sup> In their analysis of how this information is actually used, Gibb and Good observe that for the Home Office the primary aim is ‘to anticipate and pre-empt rival arguments rather than assess the overall country situation’, so that country of origin information ‘risks being treated as a set of discrete snippets, with little attempt to link one factoid to another, still less to construct a structured, multi-dimensional picture of the country situation’ (2013: 303-4).

<sup>7</sup> For an example, see Luker (2013).

<sup>8</sup> In his study of appeal hearings in France, Dequen reports the observations of a judge who, having formed the impression that an applicant was too ‘detached’ in telling the story of how her young son had been crushed to death by a tank, was then convinced when the applicant recalled seeing next to the body a chocolate bar that the child’s father had bought for him earlier that day: ‘One can’t invent this; these are the details that make a story credible or not’ (cited in Dequen 2013: 461).

<sup>9</sup> In the course of the hearing in the case of *Belhadj & Others v. The Security Service, SIS, GCHQ, Home Office and FCO* (2015) IPT/13/132-9/H, it was revealed that legally privileged communications between lawyers and clients in national security cases have indeed been intercepted.

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**[INSERT SPACE FOR FRENCH ABSTRACT]**