

Kaldor Centre for International Refugee Law, UNSW Sydney

2019 Annual Conference

'Good decisions: Achieving fairness in refugee law, policy and practice'

Transcript of keynote address

Toward 'fair, transparent and protection-sensitive' credibility judgments, Dr Hilary Evans Cameron

Podcast available at: <https://www.kaldorcentre.unsw.edu.au/node/2039/>

In a context characterised by profound uncertainty, how do decision-makers make sound judgments about the credibility of refugee claims? This was the central question of the keynote address at the 2019 Kaldor Centre Conference, 'Good Decisions: Achieving fairness in refugee law, policy and practice'. The keynote speaker was Dr Hilary Evans Cameron, introduced here by Andrew Kaldor.

Andrew Kaldor AM:

Hilary Evans Cameron is a former litigator who represented refugee claimants for a decade. She holds a doctorate in refugee law from the University of Toronto, where she is a lecturer in the Ethics, Society and Law program, in addition to being an adjunct professor at Osgoode Hall Law School. Dr Evans Cameron's highly acclaimed recent book is *Refugee Law's Fact-finding Crisis: Truth, Risk and the Wrong Mistake*.

Hilary Evans Cameron:

Thank you, Guy. Thank you, Mr Kaldor, and a massive heartfelt thank you to the Kaldors and to all of the wonderful people at the Kaldor Centre for having me here today. It is such an honour, and in such company. It is also just so exciting to be part of a refugee law event dedicated to the question of fairness. My contribution will be looking at credibility judgments, beginning with a little thought experiment.

Imagine you meet a stranger at some social event. You don't know anything about them, and they tell you something about themselves, some little personal detail that you think is unlikely. Let's say you think it's real unlikely. Let's somewhat artificially put a number on this – let's say you think that there is less than one-third-of-1 per cent chance that what they're saying is accurate. Show of hands, who here thinks that they would nonetheless, without a moment's hesitation, believe this person's claim?

Oh, we've got a couple. Fantastic. Well, I mean, for the rest of you, fair enough. What are the chances that my birthday is the fifth of September? I mean, roughly all else being equal, about one in 365. So, less than one-third of one per cent.

Put another way, if you were randomly to send me a happy birthday email on the fifth of September, there's a greater than 99-and-two-thirds per cent chance that I would think that's strange, because: a) I don't know you and b) it's not my birthday. But, now, say we meet and I say, 'Hi, my name is Hilary. My birthday is the fifth of September' – because that's how I start all my conversations – I bet

that almost all of you, without a moment's hesitation, would accept that this claim is true. Because I don't have any reason to lie to you.

Refugee claimants have a reason to lie. So, they're starting behind the eight-ball in any analysis in which trustworthiness is key. And the first point that I want to make today is, judgments about trustworthiness underlie almost all decisions about whether to accept or reject a statement as unlikely.

I spent the last few years analysing hundreds of Canadian refugee status decisions in which our adjudicators have rejected the claimant's claims. And as a side note, I expect this will come as a galloping shock to nobody, but in a large majority of these decisions (about 85 per cent) the adjudicator made a negative credibility judgment, and in a large majority of those (about 75 per cent) this negative credibility judgment was the only live issue in the claim. Come to think of it, I don't think I read a single decision in which the adjudicator debated a question of legal interpretation. That may not actually be true, but it sort of feels true when I say it.

Whenever adjudicators explain why they don't believe the claimant story, they often suggest that their negative credibility findings flowed from the fact that what the claimant was describing was unlikely. 'It's really unlikely that the woman behind the desk in the passport office would have agreed to help you – what are the chances?'

Suggesting that improbability alone is responsible for the negative credibility findings in these cases is missing something really important. We can and do accept, all the time, even highly improbable statements from people we trust, but we don't trust claimants. And to make matters worse, the stories that they're telling will often be highly improbable, by definition, because these are survivor narratives. Adjudicators are only ever going to see the one claimant in however many who happened to meet the right woman at the passport office. In my book I quote a man who lived through the Holocaust who said, 'All survivors can tell you a string of coincidences that border on the weird.'

So how are truthful claimants to win our trust? Well, not with supporting evidence. Very often we know this is very hard to come by. What about with their testimony? There's a large body of literature about the kinds of problems that truthful claimants face in trying to be read and understood as credible – problems caused by cross-cultural miscommunication, poor interpretation, the after-effects of trauma, to name a few.

To these, I'd like to add another. To many adjudicators, many claimants will simply look like liars. And to understand why, we need to understand a little about what lies behind all of those Facebook posts about 'How to spot a liar', 'Top 10 ways to tell if someone's lying or not'. None of the clues that these posts put forward could ever plausibly claim to be signs that a person is lying. At best, what they're getting at is that these clues might suggest that something else is going on, which in turn might suggest that the person is lying. What's that something else? One of two things. One major theory in the lie detection literature is that when we lie, we're more nervous or afraid or anxious than when we tell the truth, and that our bodies betray these emotions. So, based on this theory, these posts suggest we should look for signs that a person is feeling these kinds of emotions strongly. They might fidget, you know, avert their eyes or take defensive postures. The second major theory in the lie detection literature is that it takes more mental energy to lie than to tell the truth. Based on this theory, we should look for signs that the person is working very hard to tell their story, their cognitive load is heavy, they might hesitate or trip over their words or speak slowly.

The first thing to know about these kinds of lie detection methods is that they don't work. Whatever the merits of the two grounding theories, when we try to use cues like these, in real time, to decide if a stranger is telling the truth, we are only slightly more accurate than if we decided by tossing a coin. This has been observed in hundreds of studies. It's as true of so-called experts, like veteran police detectives, as it is of college students or lay people.

But what's more, in a refugee interview, these kinds of clues aren't only ineffective, they're deadly. Because in a refugee interview, of course, a truth teller may well be more nervous or frightened than a liar; they have more at stake. And testifying about one's own traumatic experiences may take much more mental energy than repeating a made-up story. But decision-makers may not be able to avoid interpreting signs of nervousness or cognitive load as indications that the claimants are lying.

The upshot is, claimants have no reliable way to win our trust. So we just have to give it to them. In law, this means, at a minimum, that rather than making them prove that they're telling the truth, we have to presume that they're telling the truth. Adjudicators should go in, look around, ask questions, and, at the end of the day, unless they're convinced that the claimant is lying, accept their evidence. If they're unsure about whether the claimant is lying, accept their evidence.

And if this seems, bizarrely, naively generous, it's worth pondering that we extend this courtesy daily to murderers, and rapists and thieves. Sure, the police and the prosecutor and a handful of witnesses think that Bob shot somebody, but Bob says he didn't. So we're going to give him the benefit of the jury's doubts. Why? Why does the criminal law work this way? Why don't we expect Bob to prove that he's telling the truth? Well, the criminal law says because if we did, we would convict too many innocent people, and that would be a bad thing. Okay, but wait. On the other hand, we would also convict many more guilty people. Wouldn't that be a good thing? I hear you, says the criminal law. But the accused is facing the most serious kinds of consequences in these proceedings. Their very liberty is at stake. And plus, they're a particularly vulnerable kind of litigant in a battle against the all-powerful state.

We could convict many more guilty people if we were willing to convict a few more innocent ones. But our criminal law decided a long time ago throughout the Commonwealth, that for all kinds of crimes, it is a much worse mistake to convict the innocent than to exonerate the guilty. You've likely all heard of Blackstone's Maxim. It's one of the most famous ideas and the common law: It is better that 10 guilty persons go free than one innocent one be convicted. As a result, the law tips the scales in favour of the accused. And here's the thing: the law's scales must always tip.

I think we've all been misled by that famous image of Lady Justice with her nicely balanced scales. We think that legal decision-makers are supposed to be neutral. A legal decision maker can never be neutral. And the law doesn't expect them to be. Quite the contrary, in a courtroom and an interview room, or in real life, in fact, in any kind of case in which a decision-maker has to decide whether to accept or reject an allegation, two questions will come up in every case that force them to pick a side, because they force them to choose who should pay the price and who should benefit from their uncertainty. The first question is, how certain do they need to be before they accept that an allegation is true? The second is, what should they do if they're on the fence, if they can't decide whether they're certain enough?

And then in some cases, the third question will come up, which is, what should they do if they think they know ahead of time that certain kinds of allegations are very likely to be true or not true? Should they take these prior probabilities into account? The answer to these questions will make it easier or harder for an allegation to prove itself. And so the decision-maker will answer them

differently depending on how they feel about the two potential kinds of mistake that hang in the balance. Should they make it easier for an allegation to prove itself and err on the side of accepting more false allegations? Or should they make it harder and err on the side of rejecting more true allegations? Which kind of mistake is worse? Which is the wrong mistake?

If every decision-maker could decide for themselves in any case, for any reason, how they would prefer to resolve their doubts, this will be a recipe for inconsistent, arbitrary judgments. Making clear to decision-makers which kind of mistake they should prefer is the single express purpose of the law of fact-finding. Those three questions that determine how decision-makers resolve their doubts, the law answers them with its three fact-finding structures: Standards of proof – how certain do I have to be? Burdens of proof – the law's tie-breakers. Presumptions – what can I go in assuming, for the sake of argument?

Burdens of proof, standards of proof, and presumptions together design the obstacle course, that an allegation has to run on its way to the finish line of being accepted as fact. And the law will make that obstacle course more or less challenging, depending on whether and to what extent it wants that allegation to pay the price for the decision-makers doubts. Because our criminal law strongly prefers to err in favour of the accused, throughout the common law, the criminal law's fact-finding obstacle course makes the accused's job easier. The state has the burden of proof. The standard of proof is very high: beyond a reasonable doubt. And many presumptions favour the accused; very few favour the state.

Which is the wrong kind of mistake in refugee status decision-making? Is it worse to deny a claim that should have been granted, or to grant a claim that should have been denied? The drafters of the [Refugee] Convention frankly passed the buck when it came to the law of fact-finding. Maybe they were just worn out after haggling over the protection doctrine. But when it came to how signatories should establish the facts, the drafters basically said, 'You know, you do you – sort it out.'

Nonetheless, in my book, I argue that resolving doubt in the claimant's favour is a foundational normative principle of refugee law internationally, in the same way that a preference for the accused is in the criminal law. And for the same reasons, because claimants are facing the most serious kinds of consequences if their claims are wrongly denied. And because they're an exceptionally vulnerable class of litigant.

I think there are a number of ways that we can get to the conclusion that a mistaken rejection is the wrong kind of error. And others have made a version of this argument drawing on, for example, the purposes and principles of the Convention, or out of respect for the drafters' intentions. In my book, I make a different kind of structural legal argument. I argue that two of refugee law's fundamental elements combine to create an apparent problem in the law, and that this problem can only be solved, and can quite neatly be solved, by recognising that States have a duty to design their fact-finding structures to resolve doubt in the claimant's favour.

On the one hand, the *non-refoulement* provision is the heart and the soul of the Convention. It's its normative core. At the same time, refugee status is declaratory. So, as you know, a person becomes a refugee the minute they meet the Convention definition, even if their status is never recognised – even if, for example, their host state makes a mistake and wrongly denies their claim. The intersection of these two principles put states in a uniquely difficult position. Elsewhere in the law, legal decisions create legal realities. So criminal courts convict innocent people, of course, but they don't convict *legally* innocent people. The very fact that a person is convicted means that they are legally guilty unless and until that conviction is overturned, but not so in refugee law. The finding

that a person is not a refugee allows States, as a practical matter, to send that person home. But if that finding is a mistake, then, as a matter of law, they have sent a refugee home and they are in breach of their obligations under the Convention.

What I suggest in the book is that, since refugee law is declaratory, and since mistakes happen, the *non-refoulement* principle cannot be read literally. It can't mean that States are never allowed to make a mistake; that would be meaningless. Instead, it should be read pragmatically, as a direction to States about how to structure their decision-making. In the predetermination context, the *non-refoulement* principle says, since you have to tip the error balance in one direction or the other when you're designing your fact-finding obstacle course, tip it in the claimant's favour.

You can't meaningfully promise never to send a refugee home. Because you can't promise never to make a mistake. But you can recognise, on a principled basis, that sending a refugee home is the wrong mistake. So, in short, for fair decisions, refugee law badly needs its own Blackstone's Maxim. And since Blackstone's 10-to-one ratio has been the subject of much distracting debate – there was one great article I read that traced the history of various ratios that been proposed over time, so, five-to-one, 10-to-one, 100-to-one – I think we should just go simply with, it is *much better* to accept a claim that should have been rejected than to reject a claim that should have been accepted.

And there's something else that we as an international legal community must do if we want fair credibility judgments. We need to get up-to-speed on some bold, innovative ideas in the social sciences. We need to catch up to the 1950s. Adjudicators the world over are deciding whether claimants are telling the truth or not, based on what their common sense tells them about how people think and act. And common sense is fine, when it's the best that we can do. But more than a half century ago, researchers started to look empirically at how people think and act, how we process information, how we make decisions, how our memories work, how we respond to danger. These researchers took issue with the idea that we can simply assume that we know how human minds work. They believed instead that we should treat the mind as an object of scientific study.

And I think there's a real irony in the fact that this game-changing idea, the so called cognitive revolution in the social sciences, came onto the scene just as another game-changing idea was coming to fruition, the idea that the nations of the world should get together and promise not to send people home to persecution. It's ironic because 70 years later, almost, we're sending claimants home to persecution because of what we simply assume that we know about how people respond to danger. For example, 'The guerrilla threatened you, but you didn't flee - I don't believe it, I don't think that a person at risk would wait three weeks before leaving, that doesn't make any sense.'

In my recent study, out of the hundreds of rejections that I looked at, just under two-thirds of the negative credibility judgments included some finding about the claimant's implausible risk response. They didn't leave soon enough, they didn't claim soon enough, or they returned home, or they took some other kind of risk – all based on these common-sense ideas of how a person at risk acts. But researchers have for decades looked at a host of factors that affect how we respond to dangerous situations that help to explain why claimants' stories may not match up with what your wonderful Australian scholar Anthea Vogl calls those 'stock narratives' about how frightened people behave. Researchers have tried to understand, for example, why people refuse to evacuate their homes after earthquake warnings or flood warnings or fire warnings? On a more basic level, why we smoke cigarettes, why we're afraid of flying but we don't think twice about hopping in the car. Why some people take more risks than others.

One observation, for example, that was made in some of the very early studies of risk perception, and that's been borne out consistently since, is that the more familiar a risk is, the easier it is to push it to the back of your mind. We get very upset about novel risks. But when it comes to everyday risks, we can't maintain the same level of concern, or it would be paralysing. Car-accident risk is the classic familiarised risk. We see it on the news, we probably all know somebody who's been affected by it. And we get it, intellectually, that cars are dangerous. But when it comes to getting in a car, it's very easy to push that thought to the back of your mind, through mechanisms that researchers call 'thought suppression' and 'cognitive escape' and [what] the rest of us call 'just getting on with it'.

The last time I remember reading in the news about a kidnapping for ransom in Canada was a number of years ago now, a young man was captured, held for a week and then rescued by the police. And I remember that during that week, that story ran on the front page of every national newspaper when he was missing and we didn't know where he was. In Canada, thankfully, a kidnapping for ransom is national news. Around the same time, during the height of Colombia's drug war troubles, as many people were kidnapped for ransom in one year in Colombia as died in car crashes in Canada. If you were living in Colombia, at that time, you knew someone who'd been kidnapped or you knew someone who knew someone. It was a familiarised risk; it was just an everyday fact of life. But you can maybe imagine what would happen when my Colombian clients would try to explain to our decision makers how they reacted when they learned, for example, that they were being targeted: Did you quit your job? Did you pack up? Did you flee? What did you do? [My client might reply,] I tried not to think about it. Our decision-makers' common sense would routinely suggest to them that these people must be lying, when the evidence might have suggested otherwise.

Similarly, we are sending claimants home because of what we assume that we know about how memory works. Many of us tend to assume that memory works like a video recorder, that we can just play back the recording to remind us of what we've experienced. Actually, I read a really fascinating book a little while back called *Metaphors of Memory* that was making the argument that throughout history, when we try to understand how our memories work, we've always used as metaphors the tools that we use to preserve our memories, and that those metaphors then inform how we think about our own cognition.

Back in Plato's day, for example, people wrote by making impressions on a wax tablet. So Plato talks about memory as this wax tablet in the mind on which your experiences make an impression. And that metaphor carries within it certain ideas about how memory works that were part of the understanding at the time. Since a piece of wax can be grainy or smooth, it might take better or worse impressions, so, different people have intrinsic predispositions to making different qualities of memory. Also, wax can melt, or it can break, so you can lose a memory, it can become distorted.

Skip ahead a couple of millennia, and now we record our experiences on video. And if you think about it, a video recording has two essential qualities: it's complete (the camera will capture everything in its ambit) and it's stable (over time, the quality of the image might degrade but you won't go from seeing this to seeing that). There's another real irony here, because there is so much that we don't know about how memory works. Pretty much all we know for sure is that it's not complete and it's not stable. It's not complete because there are whole categories of information that we typically don't remember well, if at all, and it's not stable because memories change over time, sometimes significantly.

I'll give you one example of each. Memory for dates was a recurring problem for my clients. They couldn't remember would misremember the dates of when they were arrested or assaulted, and so

the members would conclude that they were lying. But the evidence is overwhelming about how bad we are, as a rule, when it comes to dating specific events. Even personal events of great impact.

You know how we know for sure that people don't reliably remember the dates of their assaults? Because people have spent their grant money researching this question. If you want to study unreported crime, for example, you want to know if unreported crime has gone up or down during a six-month window. You need to be confident that your subjects are remembering correctly the dates of the events that they're describing. Thirty years ago, some researchers were concerned about this, so they decided to look at reported crime. They followed up with people who had reported an assault to the police within the previous six months, and asked them to date those assaults. More than a quarter of those subjects got the date wrong. In another study, researchers interviewed 13 witnesses to a murder – these people had watched a man get shot on the street in front of them; four to five months after that shooting, 10 of the 13 witnesses couldn't get the *month* right.

And yet my clients were being disbelieved because, well, in your first interview, you said that you were arrested at the beginning of June three years ago, and now you say it might have been the end of June. Were you lying then, or are you lying now?

It's one thing for claimants to have memory gaps. But what if their story keeps changing? When researchers interview witnesses who've previously given a statement to the police, for example, typically around 20 per cent of the information that the witnesses give in the second interview to the researcher directly contradicts what they said to the police. One team of researchers, for example, interviewed witnesses several months after a shooting and asked them to describe the perpetrator's car, which had been in plain view during the event. A witness who had told the police that the car was red told the researchers that it might have been blue. Another correctly had told the police that it was a Falcon. He told the researchers it was a gold Chevrolet.

People's stories change because their memories change. On the morning of the September 11th terrorist attacks, one Canadian university surveyed about 1400 of its students within hours of the attacks. And then again at the end of the term, eight months later. They asked them where they had been, who they've been with, and what they've been doing. At the eight-month mark, more than one in 10 students had clear, vivid memories of where they've been who they've been with – what they've been doing on perhaps the most memorable morning in recent history – that were wrong on all accounts.

Some of the most dramatic examples of changing memories come from soldiers. One study surveyed US Army veterans shortly after returning home from a war zone and again about two years later. And the researchers here, they asked these veterans 19 quite unambiguous yes/no questions about their experiences in the war. Did you see others killed or wounded? More than one-quarter changed their answer. Did you see disfigured bodies? More than one-third changed their answer. 88% changed at least one answer; 8% changed a full third of their answers. And the changes, interestingly, ran in both directions – so, many were claiming to have experienced something now that before they had denied; many were now denying having experienced something that they had previously claimed.

Other studies have shown similar results in other populations of soldiers and peacekeepers, as well as victims of school shootings. Some of these studies have found a link with post-traumatic stress, but others found no significant correlation – which suggests at the very least, that other kinds of psychological factors may be at play. And the researchers suggest a number of explanations for why

this might be happening – everything from misinformation effects from media exposure, to the idea that the subjects may be subconsciously editing their memories to fit a changing self-image.

What none of these researchers is suggesting is that these people must all be lying. Rather, it's been clear for many years now that even highly emotional memories are not stable. We cannot make fair credibility judgments without considering this kind of evidence. Refugee law needs its own cognitive revolution.

When I give these kinds of talks, and I try to sell this pitch about the benefit of the doubt and evidence-based decision-making, I often meet with two opposite responses: that what I'm suggesting will make either too little, or too much, of a difference.

On the one hand is the idea that it's really very naive to think that any of this law stuff matters when it comes to credibility judgments, especially in the refugee context; decision-makers will be moved by biases at the micro and macro level, by individual psychological biases, by systemic social, political ones, and at the end of the day, whatever legal structures we put in place will not change their conclusions, it will just change how they write their decisions. Well, yeah, I mean, it's true, there is good evidence that our credibility judgments are often quick, intuitive snap decisions, that we ourselves may not, in fact even be aware of the factors that have led us to our conclusions. So the process of justifying these conclusions, I think, will unavoidably involve at least some reverse engineering.

It's also true that there is a hard limit to what the law can achieve. And we can see that limit clearly when the law bumps into David. David was for many years one of our decision-makers. Over a three-year period, he maintained a zero-percent acceptance rate. He denied, I believe it was, 172 claims in a row. Using the law's strongest structures, we cannot build a David-proof system.

For fair decisions, clearly, we need good decision-makers who are open to being persuaded on the evidence. But I think that we have them. I think we have many of them [in Canada]. I'm sure you do [in Australia], too. And while there's only so much that they can do to recognise and correct for their biases, let's give them all the help we can. Let's give them a clear and coherent legal framework and the best available evidence and see what happens. It can't hurt right?

Unless you take the position that this might in fact ruin everything. In the words of a comment that I received online after a talk recently, 'Why is it always, always women who are hell-bent on destroying Western civilization?', which I think is a question worth pondering, and I'm sorry, we don't have more time to spend on it today. Read charitably, I think the thrust of this second kind of objection is that my analysis is failing to account properly for the many harms caused by accepting bogus claimants. That what I'm proposing would force decision-makers to accept everybody, which would encourage even more widespread fraud, which would become unsustainable.

I have two answers to this kind of concern. First, is that Blackstone's Maxim has been at the heart of the criminal law for centuries, and yet our courts don't acquit everybody. Refugee status decision-makers who are told to give claimants the real benefit of the doubt will still reject many claims for the same reason that judges and juries convict – because at the end of the day, they're confident enough. We all think that we can spot a liar, even when we can't. The same studies that show that accuracy doesn't increase with experience show that our confidence does. Resolving doubt in the claimant's favour will not open the borders any more than Blackstone's Maxim has emptied the jails.

And second, to my online friend, I would say this: Imagine that you have been falsely accused of a crime. The judge says, you know, I'm not actually convinced that you did it. In fact, I have plenty of

doubt. But I think that convicting you will send the right message to would be criminals, will help to bring down the crime rate. And acquitting you might send the opposite message and have the opposite effect. So I find you guilty. That would be unfair, because the judge had one job, and it wasn't to lower the crime rate, it was to decide your claim on its own merits. Figuring out what to do about the crime rate is someone else's job. That's the government's job – the same people who now, in countries across the globe, are trying to answer one of the major policy questions of our time, which is how to handle migration flows.

I won't take up more of your time with my thoughts on this question, because, frankly, policymaking isn't my department, either. Many of you have a much fuller understanding of the nuances and complexities at play. And besides, you probably want to take my thoughts with a grain of salt since I'm hell-bent on destroying Western civilization.

But I will end on this note. It seems like many of us globally keep coming up with more and more horrible ways to avoid our responsibilities to refugees. In a world in which we inter them in prison camps and jail them and refuse them medical care and, for God's sake, take their children away, the fact that we also call them liars to their face for indefensible reasons may pale in comparison. But it's still really unfair.

Thank you.