Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants

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[†] J.D., Harvard Law School, 2008; A.B. Bowdoin College, 2005. Many thanks to the editors and staff of the Berkeley Journal of Gender, Law & Justice for their time and effort in improving the quality of this article. Any errors herein are mine alone. With special gratitude to my clients, who have been my most important teachers in how the law of asylum can better serve its noblest purposes.

I. INTRODUCTION

The REAL ID Act of 2005[1] ("Real ID") drastically expanded the codified standards by which immigration adjudicators evaluate the veracity of an asylum applicant's claim.[2] Real ID contains detailed requirements regarding credibility and corroboration determinations, wherein the adjudicator decides whether the applicant has met his or her burden of proof. For sexual minorities,[3] Real ID presents a new and significant challenge in establishing a successful claim. Problems with demonstrating credibility and presenting corroborating evidence are nothing new for sexual minority asylum applicants. By codifying the worst trends in preexisting case law, Real ID ensures that the potential obstacles that applicants previously faced are now a certainty.

The difficulties sexual minority asylum applicants face under current U.S. law stem from problematic assumptions underlying international law dating back to the 1950s. The United Nations ("UN") drafted the 1951 UN Convention

1. Pub. L. No. 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.).
2. 8 U.S.C. §1158(b)(1)(B)(ii-iii) (2006) (amending 8 U.S.C. §1158(b)(1)(B)(ii-iii) (2002).
3. In this article, "sexual minority" refers to gay, lesbian, bisexual, and transgender individuals, as well as any persons whose identities and expressions thereof do not conform to the dominant sexual norms within their cultures. When referring to asylum applicants, this article employs either the phrase "sexual minority" or an applicant's term of self-identification. This article does include the word "homosexual" within the context of quotations in order to accurately reflect the language used by courts and other authors. It is the author's sincere wish that the use of "homosexual," and other words that signify identity with cultural connotations, does not offend readers.

Relating to the Status of Refugees ("Convention")[4] based on the assumption that a refugee is a male, heterosexual, European political dissident.[5] The 1967 UN Protocol Relating to the Status of Refugees ("Protocol"), to which the United States ("U.S.") is a party, incorporates the Convention.[6] The U.S. Congress drafted the Refugee Act of 1980,[7] which amended the Immigration and Nationality Act[8] to bring the United States into compliance with the Protocol. These treaty documents and the subsequent implementing legislation, at their time of drafting, did not anticipate an asylum applicant fleeing persecution on account of his or her sexual minority status. Therefore, sexual minority applicants have always faced natural, structural obstacles to successful claims because of the type of applicant originally contemplated by treaty parties and Congress. The Real ID Act is a perpetuation of this legislative blind spot, creating significant impediments by inviting bias, improper inferences, illogical valuations of evidence, and unrealistic expectations for corroboration. Real ID places new hurdles and exacerbates old ones that stand in the way of sexual minority applicants proving the credibility of their testimony and the veracity of their claims through corroborating evidence.

II. SEXUAL MINORITIES AND THE LAW OF ASYLUM

The current version of the Immigration and Nationality Act authorizes the Attorney General to grant asylum to any individual who is a "refugee" within the meaning of U.S. law.[9] A "refugee" is a person "who is unable or unwilling to return to" his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[10] In general, sexual minorities apply for asylum on the ground of their membership in a particular social group,

4. Convention Relating to the Status of Refugees, July 8, 1951, 189 U.N.T.S. 150.
5. Karen Musalo, *Beyond Belonging: Challenging the Boundaries of Nationality: Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 780 (2003) ("[C]ommentators are legion who observe that the Convention has been interpreted within a male paradigm, which has resulted in the historic exclusion from protection of women."). The same may be said for sexual minorities, who did not fit into this *heterosexual* male paradigm. *See also* Lynn Hodgens, *Domestic Silence: How the U.S.-Canada-Safe-Third-Country Agreement Brings New Urgency to the Need for Gender-Based-Asylum Regulations*, 30 VT. L. REV. 1045, 1055 (2006) ("[T]he relevant [asylum] law was written under a male paradigm during the political climate of the Cold War."). For an example of an analysis of asylum law within a male, political, European, heterosexual paradigm, see generally S. PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW (1971).
6. Protocol Relating to the Status of Refugees, art. I, ¶ 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
7. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).
8. 82 Cong. Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.), *amended by* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).
9. 8 U.S.C. § 1158(b)(1)(A) (2006).
10. 8 U.S.C. § 1101(a)(42)(A) (2006).

which is a separate and complex element of their claim that they must prove.

Prior to 1990, sexual minorities were ineligible for asylum relief due to both a lack of precedent and long-standing exclusionary bars to their admission as immigrants to the United States. The Immigration Act of 1990 removed "sexual deviation" as a basis for exclusion from immigration.[11] Congress's clear intent was to end the use of mental health exclusions to prevent the immigration of sexual minorities.[12]

In *In re Toboso-Alfonso*,[13] the Board of Immigration Appeals ("Board") decided its first sexual minority-based claim wherein a Cuban man applied for asylum. The Board recognized Cuban "homosexuals" as members of a particular social group, noting that "homosexuality is an 'immutable characteristic'" that is resistant to change.[14] The INS argued that "homosexual" Cuban men could not be a social group because they engaged in "socially deviated behavior . . . in violation of the laws" of their country.[15] The Board refused to entertain this argument, stating that it is the applicant's "status of being a homosexual," not his "specific activity," that establishes his membership in a social group.[16] This landmark case demonstrated to other courts that sexual orientation could constitute a particular social group within the context of asylum law.

On June 19, 1994, Attorney General Janet Reno issued an order stating: "I hereby designate the decision of the Board of Immigration Appeals in *In re Fidel Toboso-Alfonso* as precedent in all proceedings involving the same issue or issues."[17] This was the final step in ending any remaining disputes about whether a sexual minority could receive asylum as a member of a protected social group.

The sexual minority asylum cases that followed demonstrated both the expansiveness of the particular social group category and the restrictive nature of credibility and corroboration that were fashioned for the 1950s political asylee. Ironically, although asylum was not originally intended to serve as relief for persecuted sexual minorities, it proved to have unique potential for protecting these individuals. In the past fourteen years, the challenge has been to reconcile the immense possibilities of sexual minority asylum claims with the structural and practical hurdles presented by the law and the system implementing it.

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11. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067-77 (1990) (codified as amended at 8 U.S.C. § 1182(a) (2006)).
12. *See* Alan G. Bennett, *The "Cure" that Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U.L. REV. 279, 282 (1999). This change in the law reflected an understanding that it is inappropriate to characterize sexual minorities as "sexual deviants," formerly a category of mental illness. At the time the bar on the admission of sexual minority aliens was lifted, Congress also liberalized immigration law's treatment of immigrants with mental illnesses. Today, aliens may be inadmissible only where a "mental disorder" is deemed dangerous. *See* 8 U.S.C. § 1182 (a)(1)(A)(iii)(I) (2006).
13. 20 I. & N. Dec. 819 (B.I.A 1990).
14. *Id.* at 822.
15. *Id.*
16. *Id.*
17. U.S. Att'y Gen. Order No. 1895-94 (June 19, 1994), 1994 WL 16515318.

III. PRE-REAL ID CREDIBILITY AND CORROBORATION LAW AND PROBLEMS

Real ID did not create the ways in which credibility and corroboration standards work against sexual minority applicants. Although credibility and corroboration are not mentioned in the Convention or Protocol, they are critical components of any claim and have proven especially concerning for sexual minority applicants.[18] Before analyzing the impact of Real ID, one must examine the law of credibility and corroboration as it existed before 2005, as well as the special problems the law posed for sexual minority asylum applicants.

A. Pre-Real ID Corroboration Law

Leading up to the passage of Real ID, the law regarding corroboration of asylum claims trended toward a greater expectation that applicants should supplement their oral testimony with evidence. The Board, as the highest administrative authority interpreting asylum law, led the development of corroboration standards. *In re Mogharrabi* set out the Board's basic framework for the requirement of corroborating evidence.[19] The Board stated,

> In determining whether the alien has met his burden of proof, we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. Although every effort should be made to obtain such evidence, the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.[20]

This standard was incorporated into the Code of Federal Regulations and "[s]everal Courts of Appeals adopted its reasoning."[21] The *Mogharrabi* standard does not direct that an applicant's claim should fail if she does not present corroborating evidence, even when determined reasonably available. Instead, *Mogharrabi* places its emphasis on the subjective availability of evidence—that the applicant made "every effort . . . to obtain such evidence."[22] Quoting the UN High Commissioner for Refugees ("UNHCR") 1979 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ("Handbook"),[23] the Board

18. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003).
19. 19 I. & N. Dec. 439 (B.I.A 1987).
20. *Id.* at 445.
21. Marisa Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 123 (2006) (citing 8 C.F.R. §§ 208.13(a), 208.16(b), 1208.13(a), 1208.16(b) (1990)).
22. 19 I. & N. Dec. at 445.
23. UN HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR

explained that "the allowance for lack of corroborative evidence does not mean that 'unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.'"[24] Despite what the members of Congress who staunchly supported Real ID claimed, *Mogharrabi* and the cases that followed it did not create a loophole permitting asylum grants based on fabricated oral testimony.[25]

Following *Mogharrabi*, the Board decided *In re Dass*, which clarified the standards for corroboration.[26] *Dass* should have set skeptics' minds at ease by explaining that broad, uncorroborated claims in oral testimony will not result in a grant of asylum. "These cases," the Board explained, "do not stand for the proposition that the introduction of supporting evidence is purely an option with an asylum applicant in the ordinary case. Rather, the general rule is that such evidence should be presented where available."[27] This rule is general, not absolute, and does not require the rejection of all claims that do not present available corroborating evidence. Guided by the Handbook again, the Board noted,

> Particularly when the basis of an asylum claim becomes less focused on specific events involving the respondent personally and instead is more directed to broad allegations regarding general conditions in the respondent's country of origin, corroborative background evidence that establishes a plausible context for the persecution claim (or an explanation for the absence of such evidence) may well be essential.[28]

The Board directed that the nature of the applicant's claim should dictate whether corroborating evidence is necessary for a grant of asylum. *In re S-M-J-* clarified and elaborated on *Dass*, explaining, "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided."[29] An applicant's failure to provide "such corroborating evidence *can* lead to a finding that an applicant has failed to meet her burden of proof."[30] The Board did not create a mandatory requirement for corroborating evidence whenever reasonably available, as reflected by the use of permissive language "should" and "can."[31]

Importantly, *In re S-M-J-* also placed a requirement on asylum officers "to introduce into evidence current country reports, advisory opinions, or other

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DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967, PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 197, HCR/IP/Eng/Rev.1 (1992) [hereinafter HANDBOOK], *available at* http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf.

24. 19 I. & N. Dec. at 446.
25. *See infra* Part IV. A.
26. 20 I. & N. Dec. 120, 124 (B.I.A. 1989).
27. *Id.*
28. *Id.* at 125.
29. 21 I. & N. Dec. 722, 725 (B.I.A. 1997).
30. *Id.* at 725-26 (emphasis added).
31. Cianciarulo, *supra* note 21, at 124.

information readily available."[32] Further, an immigration judge must "seek evidence in cases where [she] receives an application for asylum that has not been referred by an asylum officer"[33] including any background information relied upon in deciding an asylum claim in the record.[34] The Board pointed out that the Handbook and the Basic Law Manual of the Asylum Division and Office of the General Counsel of the Service both describe asylum adjudicators as partners in the search for country information and corroborative evidence. This participatory understanding of the trier of fact's role in relation to corroboration would be absent from Real ID, creating a critical flaw, especially in the many cases where an applicant has no legal representation.[35]

B. Pre-Real ID Corroboration Problems

Problems with corroboration, which have always been acute for sexual minorities, did not originate with Real ID. As the UNHCR Handbook counsels implementing governments,

> Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.[36]

Although "[a]sylum seekers almost by definition will arrive without corroboration,"[37] nearly all courts, with the exceptions of the Seventh and Ninth Circuits,[38] demanded that applicants produce all reasonably-expected

32. 21 I. & N. Dec. at 727.
33. *Id.* at 728.
34. *Id.* at 727.
35. The majority of applicants are unrepresented in asylum office interviews, and nearly one-third of applicants in immigration court hearings lack representation. *See* Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 765 (2002).
36. HANDBOOK, *supra* note 23, at ¶ 196.
37. Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, 01-10 IMMIGR. BRIEFINGS 1, 3 (2001).
38. *See, e.g.*, Gontcharova v. Ashcroft, 384 F.3d 873, 877 (7th Cir. 2004) (superceded by statute in Raphael v. Mukasey, 533 F.3d 531, 527 (7th Cir. 2008) (which "amended the law regarding credibility and corroboration for asylum and withholding of removal cases.")); Uwase v. Ashcroft, 349 F.3d 1039, 1045 (7th Cir. 2003); Ladha v. INS, 215 F.3d 889, 900-01 (9th Cir. 2000). These cases demonstrate a more flexible approach to corroboration where applicant testimony is credible. Note that they better approximate the "benefit of the doubt" principle in paragraph 196 of the Handbook than other cases. *See* HANDBOOK, *supra* note 23, ¶ 196.

corroborating evidence.

Corroboration problems have historically been difficult for sexual minorities because of the legal category by which they are extended asylum relief: membership in a particular social group. Unlike other Convention groups, sexual and gender identities are not externally visible and verifiable in the same ways as race, ethnicity, religion or national origin may be. Although these other Convention groups are very much socially-constructed categories that can be subject to fraud, sexual minorities create a valid concern that private, intimate expressions of highly-personal identities are extremely difficult to corroborate with extrinsic evidence. In general, adjudicators properly require applicants to show that: 1) a particular social group exists in their country of origin, 2) of which they are a member, 3) which is the nexus to their anticipated or past persecution. These elements are progressively more difficult to corroborate. In many cases, it is likely that an applicant's credible testimony will be all that is available. In sexual minority-based claims, closetedness can be necessary for survival, both for the social group and the applicant. At the same time, an applicant must explain how they are sufficiently socially visible so as to be a targeted member of the group in question. In this manner, sexual minority cases involve competing and contrary dynamics that are difficult to demonstrate with extrinsic evidence beyond broad country conditions evidence regarding similarly-situated individuals.

i. Corroborating the Persecution of Similarly-Situated Individuals

Two pre-Real ID cases illustrate the dilemma facing sexual minority asylum applicants who lack the objective evidence to which courts have given such high importance. In *Abdul-Karim v. Ashcroft*, the applicant was a male, Lebanese sexual minority who feared future persecution at the hands of the government.[39] Abdul-Karim presented evidence in the form of "unsigned, unsworn translations of newspaper clippings" to show a pattern of persecution of members of his particular social group in Lebanon.[40] However, the court gave greater weight to the 1998 State Department advisory opinion that "prohibitions on homosexual behavior went unenforced" in Lebanon because it was more current than Abdul-Karim's evidence.[41] Further, because Abdul-Karim's testimonial evidence regarding similarly-situated individuals was essentially hearsay, the immigration judge did not credit it or find that it rebutted the State Department's evidence.[42] What the immigration judge failed to consider is that State Department documents are not continuously updated but rather published annually. Therefore, under some circumstances, State Department publications that are chronologically more current may not reflect changes in country

39. 102 F. App'x 613, 614 (9th Cir. 2004).
40. *Id.* at 615.
41. *Id.* at 614.
42. *Id.* at 615.

conditions with the same immediacy as slightly older newspaper sources.

Although the immigration judge entered no adverse credibility finding against Abdul-Karim, his asylum claim was denied on the basis of the insufficiency of his corroborating evidence. Despite the more generous standards of the Ninth Circuit, the immigration judge expected more than the evidence Abdul-Karim prsented. Under a standard that accepts only the most current, authenticated corroborating documents, it is difficult to imagine how most pro se applicants would ever be able to successfully present a sexual minority-based asylum claim.

A case decided shortly after *Abdul-Karim* demonstrates both the great weight that courts have placed on corroborating evidence, as well as the difficulty sexual minority applicants have in presenting extrinsic evidence to prove all of the elements of their claims. The same circuit court that decided *Abdul-Karim* less than a year earlier presided over *Karouni v. Gonzales*, again involving a male, Lebanese sexual minority.[43] Like Abdul-Karim, the Board had found Karouni's evidence insufficient to show past persecution or a well-founded fear of future persecution on account of his membership in a particular social group. However, unlike Abdul-Karim, Karouni had developed a rich administrative record with documentary evidence regarding country conditions in Lebanon and the treatment of similarly-situated individuals.[44]

In *Karouni*, the Ninth Circuit restated its standard that, "[o]nce an applicant's testimony is deemed credible—as Karouni's testimony was deemed here—no further corroboration is required to establish the facts to which the applicant testified."[45] However, Karouni *had* provided corroborating evidence, including documentary and testimonial evidence about Hizballah's control over his region in Lebanon, the group's application of Islamic law, the punishment of homosexuality, and the persecution of similarly situated individuals. In fact, Karouni presented evidence to the Board of an immigration case that closely resembled the brutal persecution of his cousin, who was also a male, Lebanese sexual minority, on account of his sexual identity.[46] Although the court did not accept similar testimonial evidence from Abdul-Karim, it found that Karouni's account proved the merits of his case. *Karouni* demonstrates the critical importance of the presentation of corroborative evidence in both form and substance. Further, the outcome of *Abdul-Karim* shows that even before Real ID, the courts placed a heavy burden of proof on the applicant and did not necessarily act as an independent fact-finder beyond merely referencing (in his case, tragically but only slightly dated) State Department documents.[47]

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43. 399 F.3d 1163 (9th Cir. 2005).
44. *See id.* at 1174.
45. *Id.*
46. *Id.* at 1173-75.
47. *See also* Densmaa v. Att'y Gen., 283 F. App'x 889, 892 (3rd Cir. 2008) (upholding an Immigration Judge's finding that the applicant failed to prove a pattern or practice of persecution against sexual minorities in Mongolia by merely providing a newspaper article

As the above cases demonstrate, insistence on documentary, third-party evidence even in the case of credible applicant testimony is especially troubling for sexual minority cases. This is in part because sexual minorities can be invisible to external human rights groups and the press. In *Abdul-Karim* and *Karouni*, the Board expected newspaper clippings to verify events reported by the applicants, without regard to the fact that hate crimes against sexual minorities are often unreported. The expectation that such harms will be reported—that its victims will come forward and name their violations as well as their perpetrators—ignores the fact that within societies tolerant of such persecution, reporting can be an invitation to more violence. Further, the type of harm often visited upon sexual minorities is private and incredibly traumatic, involving extreme sexual violence.[48] Although such harm can be countrywide and social group-targeted, it does not mean that this harm would be well-known or widely documented for retrieval by an applicant overseas. Therefore, in these cases, the Ninth Circuit rule that credible testimony should not have to be corroborated is appropriate.

ii. Corroborating One's Sexual Minority Membership

Although the problems of corroborating one's membership in the particular social group of a sexual minority are quite often challenges to credibility, corroboration is a distinct challenge for applicants. The burden is on the sexual minority asylum applicant to "not only come out to a feared bureaucratic agent, but to prove the truth of his or her sexual [or gender] orientation" as well.[49] Proving "this very private aspect of his or her life" is a serious challenge, especially when proof must be in the form of extrinsic evidence.[50] The invasiveness and difficulty of this process was demonstrated by *Kun Ko Lin v. Ashcroft*.[51] Although that case turned on the applicant's credibility, the Ninth Circuit revealed the factors it considered in authenticating the applicant's sexual minority identity, including the applicant's number of sexual partners, last date of sexual activity, and last meeting with the applicant's reported sexual partner.[52] These factors, assumed by the court to be probative of the applicant's

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reflecting societal discrimination and "unauthenticated letters from relatives and a friend."). *Densmaa* further demonstrates the difficulty that applicants face in corroborating the persecution they fear, which in part may be caused by a lack of visibility and public awareness about the persecution of sexual minorities. *Id.* Without a doubt, applicants such as Densmaa, who have claims that are particularly difficult to corroborate, would benefit from the assistance of the immigration judge as a neutral fact finder with access to government, inter-governmental and NGO publications.

48. This is not to suggest that these harms do not rise to the level of persecution. On the contrary, private harms can include the most heinous forms of violence while at the same time receiving the least amount of state protection.

49. Timothy Wei, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 500 (1998).

50. *Id.*

51. 99 F. App'x 810 (9th Cir. 2004).

52. *Id.* at 812.

membership in a particular social group, are highly personal and therefore extremely difficult to verify with corroborating evidence. This can be the dilemma for a sexual minority applicant who has spent his or her life attempting to remain closeted, only to be discovered and compelled to flee.

C. Pre-Real ID Credibility Law

The law regarding the assessment of asylum applicants' credibility has been a complex reflection of the give-and-take between the avoidance of fraud and the recognition that applicants are human. The applicant's testimony is often the most critical component of her claim because, in essence, the applicant is an "expert witness" on the history of her life. However, the applicant is also obviously a biased witness, and thus the power of her oral testimony evokes concerns about abuse and fraud. To address these issues, the courts have developed standards for accessing an applicant's credibility.

In re Mogharrabi addressed credibility indirectly after its initial inquiry about corroboration.[53] The Board hinted at the benchmarks of credible testimony, which should be "plausible, detailed, and coherent."[54] Further, the Board indicated that testimony is credible where "there is nothing in the record to otherwise suggest that the respondent lacks credibility."[55] *In re Dass* enumerated another component of the credibility assessment—consistency with external sources.[56] The Board stated, "knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility."[57]

The 1998 case *In re A-S-* extensively discussed standards of review for credibility based upon omissions, inconsistencies, and demeanor.[58] In that case, the Board found it reasonable to base an adverse credibility finding on the omission of "seemingly important events on his asylum application and while testifying."[59] Although "the failure to provide precise dates may not be an indication of deception," the Board found that these omissions, coupled with inconsistencies in testimony, were fatal to the applicant's credibility.[60] The dates provided by the applicant during his testimony varied from his asylum application by more than two years, and in some circumstances the applicant blended separate events into the same time period.[61] Finally, the applicant did not provide a "convincing explanation for the inconsistencies or omissions

53. 19 I. & N. Dec. 439 (B.I.A 1987).
54. *Id.* at 448.
55. *Id.*
56. 20 I. & N. Dec. 120 (B.I.A. 1989).
57. *Id.* at 125.
58. 21 I. & N. Dec. 1106 (B.I.A. 1998).
59. *Id.* at 1110.
60. *Id.*
61. *Id.*

addressed in the immigration judge's decision."[62]

In *In re A-S-*, the observation of the immigration judge as to the applicant's demeanor carried great weight. The Board stated, "we emphasize that the immigration judge is in the unique position of witnessing the live testimony of the alien at the hearing," citing a long line of cases stressing the probative value of these observations.[63] As will be discussed below, the evaluation of demeanor is a *highly* subjective process which asks whether the applicant's testimony has "the ring of truth."[64] In *A-S-*, this "ring of truth" was absent from the applicant's "very halting and hesitant manner."[65] *In re A-S-* demonstrated the difficulty in establishing credibility long before Real ID would go into effect. However, an important quality of pre-Real ID law was that it did afford an opportunity for a fair assessment when adjudicators were capable of providing it.

In *In re S-M-J-*, the Board gave a reasoned explanation of the proper bases for credibility determinations.[66] The Board explained,

> Adverse credibility determinations are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony; and where these circumstances exist in view of the background evidence on country conditions, it is appropriate for an immigration judge to make an adverse credibility determination on such a basis.[67]

Interestingly, *In re S-M-J-* does not discuss demeanor, but instead focuses on relatively objective markers of credibility that focus on the substantive aspects of an applicant's testimony. The *S-M-J-* determinants,[68] along with the *In re A-S-* requirements that the immigration judge provide specific and cogent reasons for her finding and an opportunity for the applicant to explain discrepancies,[69] created a reasonable but rigorous basis for judging applicant credibility. Unfortunately, Real ID foreclosed on the possibility that adjudicators could apply the more appropriate and less subjective standards outlined in *In re S-M-J-* and *In re A-S-*, which focus on the content rather than the delivery of testimony.

62. *Id.*
63. *Id.* at 1111.
64. Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985); *see also* Jenni Millbank, *'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT'L J. REFUGEE L. 1 (2009) (a recent examination of the unreliability of subjective markers of credibility, including demeanor, that analyzes asylum decisions in the U.K., Canada, Australia, and New Zealand from 1994 to 2007).
65. 21 I. & N. Dec. at 1111.
66. 21 I. & N. Dec. 722 (1997).
67. *Id.* at 729.
68. *Id.*
69. 21 I. & N. Dec. at 1109, 1118.

D. Pre-Real ID Credibility Problems

Perhaps more than any other area of asylum law, fulfilling credibility requirements has been an incredible challenge for sexual minority applicants. This is in part because the difficulty an applicant experiences in establishing credibility correlates with cultural difference.[70] Therefore, credibility most penalizes those who do not fit within normative male, heterosexual, American cultural expectations for testimonial behavior.[71] Overly subjective components of the credibility determination invite bias, a phenomenon bolstered by Real ID. Credibility tests include a number of components, including internal consistency, external consistency, plausibility, and demeanor. Some of these indicia are more reliable than others.

i. Airport Statements

Airport statements are a concerning area of credibility law.[72] Some courts have correctly recognized that airport statements, which are not made under oath or recorded beyond interviewer notes, are not sufficiently reliable to serve as the sole basis of a negative credibility finding.[73] The consideration of airport statements that later prove to be inconsistent with other testimony is extremely problematic for sexual minority asylum applicants.

Since many applicants have limited knowledge of asylum law, it is absurd to expect all sexual minorities, for whom "coming out" can risk alienation and shame, to volunteer their sexual minority status before they have been advised of their legal rights. In fact, before consulting an attorney, "[m]any LGBT and HIV-positive foreign nationals have no idea that they can seek asylum based on their fear of persecution because of sexual orientation, gender identity, or HIV status."[74]

Fear of authority is another hurdle that prevents sexual minorities from fully disclosing their reasons for seeking asylum upon their initial entry. For these reasons, it is entirely understandable—indeed reasonable—that targeted sexual minorities will harbor serious reluctance to disclose their sexual and

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70. Human nature is such that "[t]he tendency is to find incredible that which is not understood." Amanda Weston, *A Witness of Truth'—Credibility Findings in Asylum Appeals*, in 12 IMMIGR. & NAT'LITY L. & PRAC.. 87, 89 (1998).

71. *See* Claudia Muller-Hoff, *Representations of Refugee Women—Legal Discourse in Europe*, L. SOC. JUST. & GLOBAL DEV. J., 2001, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/muller1/#enb66 ("[T]he person whose credibility is assessed [is] vulnerable to prejudicial bias. The more so, the more different her background is, in terms of, for example, ethnic origin, 'race', class, gender, ideological or political position.").

72. "Airport statements" is a phrase that refers to interviews administered by immigration officials at points of entry to U.S. territory.

73. *See* Singh v. INS, 292 F.3d 1017, 1021-22 (9th Cir. 2002).

74. Victoria Neilsen & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 262 (2005).

gender identities. Especially at the initial point of entry to the United States, where officials are uniformed and bear the imprimaturs of authority and power, fear on the part of sexual minorities is rational and expected.[75]

These issues are compounded by the experiences of being a sexual minority within the applicant's culture, as

> [m]any LGBT and HIV-positive asylum seekers are not 'out' to their families in their own countries due to shame, deeply rooted social taboos, or fear for their physical safety. Therefore, they often continue to live a life of secrecy once they reach the United States. The fear and danger they experienced at home is transferred to their new lives in the United States within their insular communities, especially during their first year here.[76]

It is reasonable to expect that a sexual minority refugee, unfamiliar with her legal rights in the United States, would fear continuing persecution if her sexual identity was discovered by her new community.

In *Balasubramanrim v. INS*, the Board upheld an immigration judge's negative credibility finding based on "inconsistencies between Balasubramanrim's testimony at the hearing and his airport statement."[77] The Third Circuit found that the Board and immigration judge inappropriately relied on the airport statements, due to the incompleteness of the record, the brevity of the questions asked, the likely fear and uncertainty experienced by arriving aliens, and the absence of a translator.[78]

Unfortunately, not all cases were as well-reasoned as *Balasubramanrim*. In *Zheng v. Ashcroft*, the Sixth Circuit determined that the presence of an interpreter and consideration of other factors supported the immigration judge and Board's use of inconsistent airport statements to reach a negative credibility finding.[79] The Third Circuit, in *Lumaj v. Ashcroft*, upheld a negative credibility finding based on translator-aided airport statements.[80] Even *omissions* during airport statements have yielded negative credibility findings.[81] Without understanding the asylum benefits of complete and initial disclosure, expecting

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75. As Judge Pregerson stated in a recent dissent, "It is not hard to imagine . . . that a gay man who has suffered persecution on account of his sexual orientation would hide that fact from government authorities." Martinez v. Mukasey, No. 04-72975, 2008 U.S. App. LEXIS 21003, at *19-20 (9th Cir. Oct. 6, 2008), *withdrawn*, Martinez v. Mukasey, 2008 U.S. App. LEXIS 23402 (9th Cir. Nov. 7, 2008) (opinion forthcoming).
76. Neilsen & Morris, *supra* note 74, at 264.
77. 143 F.3d 157, 161 (3d Cir. 1998).
78. *Id.* at 162-63.
79. 2004 FED App. 0180N, at 2, (6th Cir.) 117 F App'x 440, 443
80. 115 F. App'x 595 (3d Cir. 2004).
81. *See* Hu v. INS, 95 F. App'x 372, 374 (2d Cir. 2004) ("[A]lthough Hu testified on cross-examination that he was threatened with sterilization by Chinese family planning officials, he failed to assert this critical fact in his asylum application."); *see also* Ramsameachire v. Ashcroft, 357 F.3d 169 (2d Cir. 2004) (upholding an immigration judge's denial of asylum "based entirely on his finding that Ramsameachire's hearing testimony was not credible because of its inconsistency with his airport interview.")

sexual minorities to declare their identities upon entry is impractical and paradoxical. Why would a genuine sexual minority refugee volunteer the very information that has made her so at risk that she would flee family, friends, and home?

ii. The Social Visibility Requirement: Demeanor, Plausibility, and Consistency

Social visibility, a substantive area of asylum law that has been problematic for sexual minorities, is closely related to credibility. Originating with *Gomez v. INS*, social visibility requires that individuals in a particular social group show that they "possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."[82] This standard has persisted in the Second Circuit, necessitating the Court to inquire into the state of mind of the persecutor in order to establish membership in a particular social group.[83] The inherent difficulty with this requirement is the manner in which it invites speculation based on evidence not in the record. In theory, social visibility is not so troubling—the fact alone that persecutors targeted the individual based on their particular social group membership evidences that the applicant is socially visible, a clear case of *res ipsa loquitor*. On paper, a social visibility test adds nothing new; it only requires a confirmation of nexus and social group membership. In practice, social visibility is an invitation to bias in adjudicatory inferences.

In the context of sexual minority claims, social visibility has been damaging because it focuses on whether the applicant would be readily apparent as a sexual minority in her country of origin. For example, an immigration judge might focus on an individual's prior success at hiding her sexual minority status. This analysis obscures the fact that a well-founded fear is based on not just the chance of discovery but also the severity of persecution. Further, social visibility ignores that would-be persecutors are not just mere passers-by but perhaps close acquaintances, from whom a lifetime of concealment would be nearly impossible. In many cases, the persecutor can be a parent or close relative, individuals from whom complete concealment is extremely difficult. Finally, the social visibility test, when analyzing whether the applicant is obviously a sexual minority within a society, forgets that by forcing closeting, society has already denied an applicant the essential right to possess an innate characteristic.[84]

In terms of credibility determinations, the incorporation of the social visibility test's "eye of the persecutor" analysis into the definition of a particular social group is problematic because it requires the adjudicator to ask whether the

82. 947 F.2d 660, 664 (2d Cir. 1991).

83. Abzun-Ladino v. Gonzales, 223 F. App'x 29 (2d Cir. 2007).

84. This line of reasoning appears in *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000), which based its logic on *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

applicant "looks" like a member.[85] Coloring the adjudicator's consideration of the applicant's demeanor and her narrative's inherent plausibility, this task promotes bias. Inquiries of this kind question whether the applicant "seems" to be a member of a sexual minority group such that it would be plausible that a persecutor would target them. This requires the adjudicator both to consult stereotypes and impose a culturally specific analysis. This is exactly what has happened, and sexual minority applicants have been rejected because they did not appear "gay enough" according to "stereotypical physically 'feminine' characteristics [employed] as indicators of homosexual identity" in American culture.[86] Shockingly, immigration judges "have rejected claims because gay men were not 'visibly effeminate.'"[87] It is unacceptable that in claims of sexual minorities who argue they are members of a particular social group, adjudicator-held stereotypes may be dispositive.

Long before Real ID, social visibility standards introduced a requirement that applicants show, through their demeanor and narrative, sufficient markers of sexual minority status. In this way, the impermissible inferences that form conclusions about social visibility inevitably also affect determinations of credibility. One troubling example of this is the pre-Real ID case of *Safadi v. Gonzales*.[88] In *Safadi*, the Board and Sixth Circuit upheld the immigration judge's finding that the applicant's testimony lacked credibility because he failed in "proving that he is gay."[89] Although Safadi, a citizen of Jordan, testified that he was gay, was involved in a sexual relationship with a man in the United States, and "would be forced to either hide his sexual orientation or risk imprisonment or execution," his claim was denied based on inconsistencies in his statements.[90] These inconsistencies were minor, but went to the heart of whether Safadi's sexuality would be sufficiently socially visible to persecutors according to the preconceptions of adjudicators.

First, Safadi was inconsistent on whether he had moved in with his partner five days or two weeks after meeting him in 1989. It is important to note that Safadi's application was submitted in 1997, eight years after the cohabitation allegedly started. Safadi's second fatal mistake was in recounting the visit by his parents in 1992, where it was unclear whether he admitted to his parents that his

85. An additional problem about inquiry into the persecutor's perspective is that it invites judicial conjecture about specific motives and attitudes about sexuality that presume to be true across cultural context. For example, see *Tourchin v. Attorney General*, where an immigration judge found the applicant's self-identification as a sexual minority credible as well as his story that KGB agents, after learning of the applicant's sexuality, threatened to kill his family and subject him to rape in order to extort money from him. 277 F. App'x 248, 249-50 (3d Cir. 2008). However, the immigration judge found that the agents were motivated by his success as a businessman, not by his sexual identity. *Id.*

86. Deborah Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY 135, 156 (2006).

87. *Id.*

88. 2005 FED App. 0682N (6th Cir.),148 F. App'x 372.

89. *Id.* at 2, 374.

90. *Id.* at 3, 375.

marriage to an American woman was a "sham" and whether his partner was presented as a roommate or absent for the duration of the visit. Safadi characterized these inconsistencies as minor, whereas the Sixth Circuit, Board, and immigration judge found them to be central to Safadi's claim because they "raise questions as to whether Safadi is in fact gay."[91]

The two inconsistencies do not, in fact, go to the heart of Safadi's sexuality. Without further evidence, the immigration judge must have based this decision not on the record, but on inference.[92] *Safadi* demonstrates the problem, pre-Real ID, that minor inconsistencies in an applicant's testimony, if improperly labeled central, can defeat a claim.[93] Adjudicators may be more inclined to label testimony "inconsistent" if it fails to conform with their expectations of "social visibility." In *Safadi*, it is likely this factor was at play. First, Safadi's marriage to an American woman heavily influenced the opinion of the Board and Circuit. Safadi's marriage led adjudicators to doubt both Safadi's objective sexual identity and prospective social visibility.[94] This is supported by the fact that the Board was ready to reach only two conclusions: that Safadi's marriage either proved his heterosexuality or his intent to defraud all immigration officials. Further, the circuit court opinion references the immigration judge's significant and consistent doubt that Safadi was gay. These factors inappropriately influenced the weight given to Safadi's minor inconsistencies because of the improper inquiries that a social visibility analysis promotes.

A more persistent and pernicious aspect of social visibility findings is the way that inappropriate inferences can lead adjudicators to punish applicants for not exhibiting characteristics that play into their stereotypes. In *Hernandez-Montiel v. INS*, the Ninth Circuit reprimanded the Board for finding that the applicant was persecuted for dressing like a "male prostitute" rather than for being a sexual minority.[95] The Ninth Circuit observed,

> This statement is not supported by substantial evidence; in fact, it is wholly unsupported by any evidence in the record. There is no evidence that Geovanni

91. *Id.* at 5, 377.

92. It is reasonable that a person would not remember the exact date when they moved in with their partner eight years before. Further, for a person who has had to live his life concealing his sexuality with cover-up stories, it is not unreasonable that he would be unsure about which story was told to whom and on what occasion. What is clear is that the immigration judge had difficulty sympathizing with the applicant's day-to-day difficulties in having to conceal his sexuality. These inconsistencies do not go to the heart of the applicant's sexual identity, and only further evidence could show their true significance.

93. These minor inconsistencies were likely interpreted as major inconsistencies, because of an unsophisticated understanding of sexuality itself. Without a clear understanding of what constitutes a sexual identity and what are its actual characteristics, a determination of which facts go to the heart of proving sexual identity will likely be muddled.

94. For a discussion of perceptions of sexual identity and heterosexual marriage, see *infra* Parts III.D.iii and V.B.iii.b.

95. 225 F.3d 1084, 1095 (9th Cir. 2000).

> was a male prostitute, and we do not venture to guess the non-record basis of the BIA's assumption of how a male prostitute dresses.[96]

Unfortunately, the social visibility requirement and its credibility consequences have persisted, and not all off-record inferences are filtered through the court of appeals's sometimes careful review.[97]

iii. Social Constructions of Gender and Sexuality: External Consistency

Before Real ID, there were serious obstacles in the area of credibility for sexual minorities attempting to show the external consistency of their testimony. In large part, this is because the adjudicator's framework for analyzing the applicant's claim is a product of social constructions of gender and sexuality.[98] In determining whether the applicant has demonstrated the veracity of her testimony based on external consistency and the provision of sufficient detail, the decision-maker must decide what external information is relevant to the applicant's claim. In this way, adjudicators categorize applicants and select to which external indicators an applicant must conform.

Before Real ID, commentators observed the way in which analysis of a sexual minority applicant's particular social group membership often operated like a blunt instrument. With little theoretical footing in gender and sexuality, adjudicators frequently conceptualized social groups in essentialized, culturally insensitive ways that did not accommodate genuine sexual minorities.[99] In every sexual minority case, there has always been a significant danger that the applicant's sexual and gender identity is analyzed according to its external consistency with American conceptions of sexuality.

In some cases, proof of a sexual relationship was unduly weighted as probative, an error that the substitutive model of sexual identity generates by conflating sexual acts and identity.[100] This model "obscures the growing complexities of sexuality, modernity, and socialization" in different cultural

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96. *Id.*

97. *See In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007); *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

98. "External consistency" references the consistency between the applicant's evidence, testimonial and otherwise, and information that the adjudicator receives from uninterested parties.

99. *See* Fadi Hanna, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913 (2005).

100. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 115 (2002); *see also* Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 252 (2005) (discussing a "performative" model of sexual and gender identity that recognizes "the way those statuses are acted out, or performed [or] gender practices that not only describe, but actually create, our sex"). Landau argues that performative acts that both reflect and constitute sexual and gender identity should receive asylum protection equal to the identity itself.

contexts.[101] Because it ignores "marked differences in the social meaning of same-sex sexual conduct across cultures, a substitutive model of identity and conduct" fails non-Euro-American applicants because it universalizes "Western notions of desire, self, and identity-based rights."[102] The model "assumes that homosexual characteristics carry fixed and clear meanings" that are consistent across cultures and "requires public expression of private sexual behavior."[103] These expectations, however, often exclude sexual minorities who do not conform to American "upper-class white male norms of [sexual] behavior."[104]

The substitutive model is fatal to many claims because it assumes that to be a sexual minority means that an applicant is sexually active, does not have heterosexual relationships, and openly identifies him or herself as gay, lesbian, bisexual, transgender, or another culturally-significant term. Problematically, the model assumes that individuals who engage in sexual acts that are consistent with certain Western understandings of sexual or gender identities will always self-identify as a member of one of those corresponding, culturally-defined categories.[105] But this is frequently not the case, which can negatively affect the adjudicator's judgment of whether the applicant's testimony is internally and externally consistent. In short, this model treats external consistency as an applicant's conformity to cultural expectations about who sexual minorities are and how they act. A more correct model would permit applicants to self-identify in a manner that explains the significance of their sexual and gender identities, and expressions thereof, from within their native culture.[106]

One significant issue with the universalization of the U.S. substitutive model of sexuality is that it fails to interpret an applicant's participation in a heterosexual marriage as it relates to his or her sexual minority status.[107] In some cultures, "same-sex sexual intimacy is tolerated . . . [until there is a] risk that it will interfere with a heterosexual marriage and prevent the bearing and raising of children."[108] Tragically, when adjudicators encountered cases where an applicant was married to a member of the opposite sex or previously engaged in same-

101. Katyal, *supra* note 100, at 115.

102. *Id.* at 122-23.

103. Morgan, *supra* note 86, at 151-52.

104. *Id.* at 152. For an in-depth discussion of gender and sexual identities and the attribution of socially-constructed categories, see Mary Coombs, *A Collaborative Work With Berkeley Women's Law Journal: Review Essay: Interrogating Identity*, 2 AFR.-AM. L. & POL'Y REP. 222, 244-47 (1995).

105. Katyal, *supra* note 100, at 129.

106. Note that some self-identification, whether imputed from behavior or genuinely self-ascribed, is necessary in order to show one's membership in a "particular social group." Not all applicants will self-identify by using a term, but rather may indicate that an identity has been ascribed to them based on expressions perceived by others in their country of origin. Further nonconformity itself may consitute an imputed identity. However, an individual who feels that she has no gender or sexual identity, external or internal, of any social significance will not qualify under the refugee definition.

107. For a discussion of heterosexual marriage, see *infra* Part V.B.iii.b.

108. Katyal, *supra* note 100, at 131.

gender sexual relations without persecution, their claim most often failed.[109]

Misunderstandings about gender and sexuality are part of an overall failure of adjudicators to "look for the 'cultural meaning' of [an] act."[110] In this way, *Hernandez-Montiel* set a positive judicial example when it considered "cultural differences that distinguish transgendered [sic] from both self-identified gay and heterosexual individuals who engage in same-sex sexual conduct."[111] *Hernandez-Montiel*, with *Reyes-Reyes v. Ashcroft*,[112] established an important practice of considering both the sexual and gender identities of the applicant in his or her country of origin's context. Unfortunately, few adjudicators adopted the Ninth Circuit's nuanced approach, and persisted in discriminating against applicants who did not appear "'gay enough' on the basis of stereotypical physically 'feminine' characteristics as indicators of homosexual identity."[113] This bias has especially hurt pro se applicants, who do not have the means to produce expert testimony or in-depth country conditions evidence to reveal the complex cultural meaning of their sexual behavior and identity.[114]

IV. REAL ID: ITS HISTORY, CONTENT, AND CONSEQUENCES

A. Real ID's Legislative History

It is impossible to parse the effects of Real ID on the credibility and corroboration determinations in sexual minority claims without first looking at the history of its text. Legislatively, Real ID began as the failed bill H.R. 418 [109th]: Real ID Act of 2005 ("H.R. 418"), which passed in the House of Representatives on February 10, 2005.[115] At the time H.R. 418 passed in the House, it was uncertain how it would fare in the Senate, in part due to strong media opposition.[116] Even in the House, H.R. 418 faced vocal opposition based

109. *See, e.g.*, Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d Cir. 2006) (although the marriage was admittedly fraudulent, it necessarily influenced the decision); Duarte v. Attorney General, 209 F. App'x 153 (3d Cir. 2006) (applicant's fraudulent marriage influenced the decision); Safadi v. Gonzales, 2005 FED App. 0682N, at 4-5 (6th Cir.),148 F. App'x 372, 376-77 (6th Cir. 2005) (holding that "the record reflects that the inconsistencies cited by the [immigration judge, coupled with the applicant's fraudulent marriage,] raise questions as to whether Safadi is in fact gay"); Molwatha v. Ashcroft, 390 F.3d 551 (8th Cir. 2004) (upholding the immigration judge's determination that applicant did not successfully demonstrate that he would be subject to future persecution upon returning to his native country because he had previously lived with a male lover there and had not suffered any severe adverse consequences as a result).

110. Morgan, *supra* note 86, at 147.

111. Katyal, *supra* note 100, at 147.

112. 384 F.3d 782 (9th Cir. 2004).

113. Morgan, *supra* note 86, at 156. *See generally* Hanna, *supra* note 99, at 913.

114. Morgan, *supra* note 86, at 156. This is one area in which expert testimony and academic publications are especially helpful to an applicant's claim. *Id.*

115. REAL ID Act of 2005, H.R. 418, 109th Cong. (2005), 2005 CONG US HR 418 (Westlaw).

116. *See, e.g.*, Press Release, Human Rights First, House Passed 'REAL ID Act' Places REAL Lives in Danger (Feb. 11, 2005), http://www.humanrightsfirst.org/media/2005_alerts/asy_0211_realid.htm

upon its potential to exclude bona fide refugees from receiving asylum relief.[117] Therefore, after its House passage, H.R. 418 remained dormant.

Real ID is but one part of the larger milieu that is the securitization of U.S. immigration law. Over the past two decades, asylum applicants have shouldered much of the burden that results from immigration "reforms" passed to assuage fears of terrorism and security threats. Congress has consistently decided that, on balance, the *refoulement* of asylees is an acceptable cost for tightening purported security weaknesses in immigration law.[118] Prior to Real ID, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996 responded to concerns that immigration law, and in particular asylum, created gaps through which terrorists could enter and remain in the United States.[119] Evidence that Ramzi Youself perpetrated the first World Trade Center bombing in 1993 while awaiting his asylum hearing supported these fears.[120] After September 11, 2001, concerns that the U.S. immigration system was ripe for abuse by would-be terrorists resurfaced. Legislators interpreted the 9/11 Commission Report to reinforce these suspicions, arguing that asylum was a potential loophole for terrorists.[121]

The influence of the securitization of asylum law was evident from the inception of Real ID's asylum provisions. The title of Section 101 of Real ID, which contains the credibility and corroboration provisions, reveals its rationale: "Preventing Terrorists from Obtaining Asylum."[122] From the start, Real ID's purpose was not the improvement of immigration law but rather the protection of U.S. borders. House Judiciary Committee Chairman James Sensenbrenner (R-WI), the man behind the asylum language in Real ID, stated that Real ID was "aimed at preventing another 9/11-type attack by disrupting terrorist travel and bolstering our border security."[123] In further justification of the need for Real ID, the Committee claimed that the country's immigration adjudicators needed uniform evidentiary standards.[124]

Although nearly 600 immigration advocacy organizations opposed Real ID's restrictive asylum provisions, the bill nonetheless prevailed.[125]

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117. *See, e.g.*, 151 CONG. REC. H453 (daily ed. Feb. 9, 2005)(statement of Rep. Jackson-Lee), 2005 WL 309592.
118. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (modifying criminal bars and procedures for detention and removal).
119. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Katherine Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 649 (2007).
120. *Id.*
121. H.R. REP. NO. 109-72, at 160 (2005).
122. REAL ID Act of 2005, H.R. 418, 109th Cong. (2005), 2005 CONG US HR 418 (Westlaw).
123. Press Release, Office of Congressman F. James Sensenbrenner, Jr., House Passes REAL ID (May 5, 2005), http://sensenbrenner.house.gov/News/DocumentSingle.aspx?DocumentID=55591.
124. H.R. REP. NO. 109-72 at 161, 165.
125. Gregory H. Siskind, *REAL ID Act Becomes Law*, 10-12A BENDER'S IMMIGR. BULL. 1 (2005).

Representative Sensenbrenner successfully attached Real ID as a rider to the H.R. 1268 [109th]: Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, ("H.R. 1268"). The attachment of H.R. 418 to H.R. 1268 was keen gamesmanship on the part of Representative Sensenbrenner, because from the start this larger legislation was considered "must-pass" in light of the pressing need to provide "funds for tsunami relief, the wars in Afghanistan and Iraq, and increased death benefits for soldiers and foreign-service workers killed in service."[126] Noting the unlikely passage of H.R. 418 in the Senate, House leadership astutely incorporated Real ID into H.R. 1268, "seeking to press the Senate to accept anti-refugee provisions without sufficient consideration or debate."[127]

Floor debate on Real ID was indeed scanty. From the speeches between Real ID's attachment and H.R. 1268's passage, one can garner that many Representatives and Senators were reluctant to accept the terms of Real ID but unable to oppose the bill in total. Favorable floor speeches emphasized the security rationale behind Real ID, showing that its provisions were envisioned not from the perspective of asylum seekers attempting to set forth their claims but rather that of gatekeepers attempting to protect the country from terrorists. On March 15, 2005, Representative Smith (R-TX) expressed support for Real ID on the basis that it would "tighten our asylum system" to combat "judges [who] have made asylum laws vulnerable to fraud and abuse."[128] Importantly, Representative Smith felt that "judge-imposed presumptions" benefited "suspected terrorists . . . providing them a safe haven."[129] Without offering any evidence or further analysis, Representative Smith concluded that Real ID would "reduce the opportunity for immigration fraud so that we can protect honest asylum seekers and stop rewarding the terrorists and criminals who falsely claim persecution."[130]

The Congressman's assumptions—that applicants successfully pursued fraudulent claims with ease and that the presumptions disproportionately favored applicants—were unfounded. No doubt the presumption of which he spoke was the direction in the Immigration and Naturalization Service ("INS")[131] Basic Law Manual that an "applicant who swears to certain allegations will be presumed to be telling the truth unless there is a reason to doubt the truthfulness

126. Melloy, *supra* note 119, at 651.

127. Press Release, Human Rights First, House Attaches REAL ID Act to Emergency Spending Bill, Threatens U.S. Commitment to Refugees (Mar. 16, 2005), www.humanrightsfirst.org/media/2005_alerts/asy_0316_realid.htm.

128. 151 CONG. REC. H1427, H1431 (2005).

129. *Id.*

130. *Id.*

131. Pursuant to the Homeland Security Act of 2002, the INS was reorganized along with several other federal agencies. *See* Notice of Name Change From the Bureau of Citizenship and Immigration Services to U.S.

Citizenship and Immigration Services, 69 Fed. Reg. 60938 (Oct. 13, 2004). The U.S. Citizenship and Immigration Service, an office of the Department of Homeland Security, now performs the functions of the former INS. *Id.*

of those allegations."[132] Real ID radically departed from this favorable presumption espoused by the INS and the "benefit of the doubt rule" embraced in the Handbook.[133]

On the floor of the House, Real ID was not without its critics, who pointed out the asylum provisions' supporters had not proved their claims that the asylum system compromised national security or that the changes would not *refoule* bona fide refugees. Representative Udall (D-CO) argued, "REAL ID Act does not strengthen national security, but it does create undue difficulties for asylum seekers."[134] Representative Sanchez's (D-CA) position was more vehement, stating that Real ID would "slam the doors on refugees seeking asylum from persecution. The REAL, bad, ID Act has nothing to do with supporting our troops, let alone national security."[135]

Several Representatives questioned the necessity and efficacy of the Real ID asylum provisions. Representative Langevin (D-RI) pointed to the way in which Real ID "would significantly alter our nation's asylum and immigration laws in the name of homeland security, though its provisions went far beyond the recommendations of the 9/11 Commission."[136] On May 5, 2005, Representative Jackson-Lee (D-TX) noted,

> The USA PATRIOT Act . . . already barred terrorists from receiving asylum protection in the United States. None of the people associated with recent attacks, or plans for terrorist attacks in the U.S., were here under grants of asylum. Instead, these changes will make it harder for people legitimately fleeing persecution to prove their asylum claims and gain protection here. Bona fide refugees who cannot meet the higher standards will be returned to countries where they were persecuted, possibly to face terror, torture and death.[137]

Despite these objections, H.R. 1268 passed in the House on Mar 16, 2005 by 388 to 43 and proceeded to the Senate.[138]

Members of the Senate expressed a similar range of reactions to Real ID as the House. On May 10, 2005, Senator Feingold (D-WI) stated that, despite the

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132. Kagan, *supra* note 18, at 373 n.25 (quoting U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, THE BASIC LAW MANUAL 102 (1994)).

133. *Id.* at 371 n.15 (quoting HANDBOOK, *supra* note 23, at ¶¶ 196, 203, 204); *see also* Henrik Zahle, *Competing Patterns for Evidentiary Assessments*, *in* PROOF, EVIDENTIARY ASSESSMENT AND CREDIBILITY IN ASYLUM PROCEDURES 17-19 (Gregor Noll ed., 2005) [hereinafter PROOF] ("It may best be handled in the light of some 'benefit of the doubt' in the sense that the court should be open to trust not only tragic but even surprising statements that are not without discrepancies.").

134. 151 CONG. REC. H1514, H1519 (2005).

135. *Id.* at H1520.

136. *Id.* at H1522.

137. 151 CONG. REC. H2997, H3014 (2005).

138. Gov Track. US, H.R. 1268 [109th]: Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and …, http://www.govtrack.us/congress/bill.xpd?bill=h109-1268 (last visited Mar. 23, 2009).

revisions to the language of the House-passed Real ID in conference, "the provisions in this bill will result, I am sure, in the rejection of legitimate asylum applications without making U.S. any safer."[139] On that same day, Senator Reed (D-RI) pointed out that Real ID did not represent comprehensive immigration reform but rather exacted a higher burden of proof from asylum applicants, despite the fact that "those suspected of engaging in terrorist activities are already prohibited from being granted asylum under our current system."[140] Although many Senators criticized Real ID's obvious defects, H.R. 1268 passed 99-0 in the Senate on Apr 21, 2005.[141] After a quick reconciliation of differences between the House and Senate versions of the bill, President George W. Bush signed the bill into law on May 11, 2005.[142]

B. Real ID: The Text and its Immediate Consequences

Real ID's credibility and corroboration requirements are encoded in 8 U.S.C. § 1158(b)(1)(B), "Burden of proof."[143] The standards for "Burden of proof" are divided into "Sustaining burden,"[144] which deals with corroboration requirements, and "Credibility determination."[145]

i. Corroboration

The section titled "Sustaining burden" sets out Real ID's corroboration requirements:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[146]

The first clause of the section is clear that, under some circumstances, credible testimony without corroborating evidence will be sufficient to

139. 151 CONG. REC. S4816, S4824 (2005).
140. *Id.* at S4830.
141. GovTrack.us, *supra* note 138.
142. *Id*.
143. Although Real ID contained many provisions relating to immigration and asylum law, the focus of this paper is only its credibility and corroboration requirements.
144. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).
145. *Id.* § 1158(b)(1)(B)(iii).
146. *Id.* § 1158(b)(1)(B)(ii).

successfully present a claim.[147] Real ID requires, at minimum in order to prevail, an applicant to provide credible, persuasive testimony with facts sufficient to prove her claim and to present all corroborating evidence that the trier of fact determines is reasonably available. Although it seems plausible, this floor is often insurmountably high, as a later exploration of recent cases will demonstrate.

On its face, Real ID appears to uphold the "benefit of the doubt rule." However, this impression is largely an illusion. The Conference report stated that the initial clause of the "sustaining burden" section accommodated the difficulties in obtaining evidence facing refugees: "[t]his clause recognizes that a lack of extrinsic or corroborating evidence will not *necessarily* defeat an asylum claim where such evidence is not reasonably available to the applicant."[148] Therefore, the "benefit of the doubt rule" is drastically restricted. Claims supported only by credible, persuasive, and factual testimony will no longer succeed if they fail to produce corroborating evidence deemed reasonably available by the adjudicator.

In this way, the statement that Real ID merely codified *In re S-M-J-* is misleading.[149] *In re S-M-J-* used permissive language, allowing the denial of a claim on the basis that an applicant failed to meet her burden of proof by failing to provide corroborating evidence when it was reasonably expected.[150] Real ID, on the other hand, uses mandatory language, stating that an applicant "must" provide evidence deemed reasonably available by the adjudicator.[151] If an applicant fails to produce this evidence, she can prevail *only if* she can then show that this evidence is not available to her and that she cannot reasonably obtain it. In this way, Real ID takes a leap from *In re Dass*[152] and *In re S-M-J-*,[153] which urged adjudicators to consider as just one factor whether all available evidence has been presented. Real ID, on the other hand, imposes this as a necessary element. Real ID gives heightened and inappropriate emphasis to corroboration, especially given that it was never an initial requirement of the original 1980 Refugee Act.[154]

Real ID also shifts the role of the officer and immigration judge in weighing asylum applications. *In re S-M-J-* emphasized the duty of adjudicators "to introduce into evidence current country reports, advisory opinions, or other

147. *Id.*

148. 151 CONG. REC. H2813, H2870 (2005).

149. The Conference Report stated, "Congress anticipates that the standards in *In re S-M-J-*, including the Board's conclusions on situations where corroborating evidence is or is not required, will guide" interpretation of the act. *Id.*

150. 21 I. & N. Dec. 722, 725-26 (B.I.A. 1997); *see* Cianciarulo, *supra* note 21, at 124.

151. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

152. 20 I. & N. Dec. 120 (B.I.A. 1989).

153. 21 I. & N. Dec. at 725-26.

154. *See* Refugee Act of 1980, Pub. L. No. 96-212, 201(a), 94 Stat. 102, § 101 (a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988).

information readily available."[155] Real ID shifts the adjudicator away from acting as an investigator, who would aid the pro se applicant in producing corroborating evidence, and moves the burden squarely (and solely) onto the applicant's shoulders.

Additionally, Real ID increases the depth of analysis an adjudicator must conduct into corroboration, requiring greater factual inferences regarding the reasonable availability of evidence from all corners of the globe. Real ID's corroboration requirements add two *necessary* factual determinations for the adjudicator: whether corroborating evidence exists and whether corroborating evidence is reasonably available.[156] This inquiry deepens the expertise an adjudicator must exercise regarding the on-the-ground conditions of countries of origin, but does not expand training, time for decision-making, or research and financial resources.

ii. Credibility

The Real ID section titled "Credibility determination" sets out the statute's credibility requirements for asylum applicants as follows:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the *demeanor, candor, or responsiveness* of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (*whenever made and whether or not under oath, and considering the circumstances under which the statements were made*), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim*, or any other relevant factor. *There is no presumption of credibility*, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.[157]

Therefore, in making a credibility determination, the trier of fact must consider the "totality of the circumstances"[158] and supply in her opinion the basis of her decision.[159] Further, Real ID blatantly points out that any presumption of credibility, or "benefit of the doubt," no longer exists at the initial asylum

155. 21 I. & N. Dec. at 727.
156. § 1158(b)(1)(B)(ii-iii).
157. § 1158(b)(1)(B)(iii) (emphasis added).
158. *See* Kadia v. Gonzales, 501 F.3d 817 (7th Cir. 2007); Sarr v. Gonzales, 474 F.3d 783 (10th Cir. 2007); Uanreroro v. Gonzales, 443 F.3d 1197 (10th Cir. 2006).
159. *See In re* J-B-N-, 24 I. & N. Dec. 260 (B.I.A. 2007); *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (B.I.A. 1998).

hearing.

Facially, the credibility provisions modify existing law in three ways. First, Real ID gives great significance to applicant "demeanor, candor or responsiveness."[160] This is a departure from *In re S-M-J-* which does not once mention any of these three factors. Demeanor has been recognized as an inappropriate and subjective basis for credibility assessments because it is highly dependent on culture, language, and adjudicator personality.[161] Real ID enshrines these poor indicators, stating that an adjudicator may base her entire credibility determination on demeanor so long as she considers the totality of the circumstances.

Secondly, Real ID's credibility section codifies prior problems with consistency analysis, directing that statements may be compared "whenever made and whether or not under oath."[162] Although this section does counsel "considering the circumstances under which the statements were made," it basically preserves some of the worst aspects of pre-2005 case law, especially regarding airport statements.[163] Based on this section, Real ID permits adjudicators to make a negative credibility assessment when hearing testimony is inconsistent with unrecorded airport statements that were not under oath, without advice of counsel, and resulted from limited questioning.

Finally, Real ID permits negative credibility determinations based on minor inconsistencies and inaccuracies, regardless of whether the mistake "goes to the heart of the applicant's claim."[164] This development completely disregards the Handbook and well-reasoned precedent. The UNHCR and U.S. courts have repeatedly emphasized that valid claims will almost always contain minor inconsistencies.[165] *Gao v. Ashcroft* observed "minor inconsistencies and minor

160. § 1158(b)(1)(B)(iii).

161. Kagan, *supra* note 18, at 378-79 (arguing that demeanor should no longer be recognized as a part of credibility assessments as it is unreliable and subjective).

162. § 1158(b)(1)(B)(iii).

163. *Id*.

164. *Id*.

165. The Handbook indirectly supports this proposition, assuming that upon initial inspection, most claims will have minor inconsistencies that a more thorough analysis will resolve. *See* HANDBOOK, *supra* note 23, at ¶ 199. Further, the UNHCR has later *directly* supported this proposition in many of its publications. *See* UN HIGH COMM'R FOR REFUGEES, ENSURING GENDER SENSITIVITY IN THE CONTEXT OF REFUGEE STATUS DETERMINATION AND RESETTLEMENT. MODULE 1: ENSURING GENDER SENSITIVITY IN REFUGEE STATUS DETERMINATION 67 (2005), http://www.unhcr.org/refworld/docid/43e73af14.html (citing the UN Committee against Torture Communication: "The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims."); UN HIGH COMM'R FOR REFUGEES, ENSURING GENDER SENSITIVITY IN THE CONTEXT OF REFUGEE STATUS DETERMINATION AND RESETTLEMENT. MODULE 2: ENSURING GENDER SENSITIVITY IN REFUGEE STATUS DETERMINATION—PROCEDURAL ISSUES 9, 99 *(*2005), http://www.unhcr.org/refworld/docid/43e73b644.html ("Omissions, inconsistencies or inaccuracies on the part of the applicant do not necessarily mean dishonesty." Inconsistencies are "invalid reasons for questioning [the applicant's] credibility."); UN HIGH COMM'R FOR

admissions that 'reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding.'"[166] The credibility standard set out in Real ID abandons this wisdom. Real ID's disregard for the low probative value of minor inconsistencies infuses asylum adjudication with an inappropriate focus on perceived merit rather than whether an individual is a bona fide refugee. In short, the provisions of Real ID move away from the objective indicators that are genuine markers of credibility and toward a more arbitrary and subjective standard.

V. HOW REAL ID HAS AFFECTED SEXUAL MINORITY ASYLUM CLAIMS

Although Real ID did not dramatically depart from the pre-existing law of credibility and corroboration for asylum claims, it codified the worst elements of prior case law and eliminated much of the flexibility in the law that permitted adjudicators to accommodate sexual minority claims that differed from traditional political asylum cases. Real ID reinforced a judicial climate that placed a disproportionate emphasis on the credibility and corroboration of the applicant, rather than the results of government fact-finding or other criteria. While credibility and corroboration have great "practical importance," they are not legal elements of the refugee definition in U.S. or international law.[167] Imprudently, Real ID threatens to let practical considerations "swallow the actual refugee definition."[168]

The conspicuous number of sexual minority claims denied on the basis of credibility and corroboration after Real ID signal the enlargement of this particular obstacle standing between sexual minorities and asylum. In one Court of Appeals survey of fifty-six sexual minority asylum claims over eight years, more than half were denied on the basis credibility or corroboration.[169] The cases discussed below reveal the ways in which Real ID has further alienated sexual minority refugees from the laws that should protect them.

REFUGEES, SELF-STUDY MODULE 5: HUMAN RIGHTS AND REFUGEE PROTECTION, VOL. II, at 62 (2006), http://www.unhcr.org/refworld/docid/4669434c2.html ("Contradictions or inconsistencies in the presentation of facts adduced by the person that do not raise doubts to the material elements of the claim will not undermine the application.").

166. 299 F.3d 266, 272 (3d Cir. 2002) (citations omitted); *see also* Ceballos-Castillo v. INS, 904 F.2d 519, 520 (9th Cir. 1990); Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988) ("Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding."); Damaize-Job v. INS, 787 F.2d 1332, 1337-1338 (9th Cir. 1986) ("[M]inor discrepancies in dates that are attributable to the applicant's language problems or typographical errors and cannot be viewed as attempts by the applicant to enhance his claims of persecution have no bearing on credibility.").

167. *See* Att'y Gen. Order No. 1895-94, *supra* note 17.

168. Kagan, *supra* note 18, at 369.

169. Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Minority Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 206-08 (2007-2008).

A. Sexual Minority Asylum Seekers and Real ID Corroboration

Although the cases and analyses bearing on Real ID's consequences for sexual minority applicants are recent and few, there is a visible negative trend from the start. Corroboration requirements affect sexual minorities in a unique way, requiring them to present extrinsic evidence to prove their sexuality. However, sexual minorities generally have spent their entire lives in hostile cultures attempting to conceal this fact, leaving little evidence. The limited federal standard of review set out for Real ID corroboration judgments has meant that sexual minorities who find themselves before unreasonable adjudicators are unlikely to find recourse through appeal.[170]

i. The Reasonableness of Having to Corroborate Sexuality

No other area has demonstrated the abandonment of the "benefit of the doubt" principle more starkly than the requirement that applicants corroborate their sexuality. One would hope that an applicant would succeed if she established a well-founded fear on account of her status as lesbian, provided country conditions evidence, and testified with clarity, consistency, and sufficient detail. However, Real ID has seemingly dictated that claims supported by otherwise credible testimony and reliable country conditions evidence should fail when applicants cannot corroborate their sexual minority status.[171]

This result, in many ways, is unreasonable on its face. How should an individual who has feared being identified as a sexual minority, to such a degree that he fled his country of origin, provide extrinsic evidence of this secret? The applicant will already have provided the reason why he has become a target—a relationship, appearance, social behavior, or political activity that belied his sexuality. Yet Real ID permits adjudicators to go further and demand corroboration of the applicant's sexuality as a fact. The failure of Real ID to provide adjudicators with a specific "standard of reasonableness when determining whether corroboration is necessary or whether the corroboration provided is sufficient" exacerbates this problem.[172] While Real ID's drafters may have expected those implementing it to find guidance in precedent, especially *In re Mogharrabi*, *In re Dass*, and *In re S-M-J-*, this assumption falls short of real guidance and invites abuse of discretion.[173]

In addition to providing inadequate guidance on when corroboration should

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170. As O'Dwyer's article, *id.*, above explains, applicants face a serious danger that the disposition of their claims will be the result not of a consistent application of the law but rather their assignment to the judge before whom they appear. Therefore, applicants whose fate is resigned to finding themselves before an unreasonable adjudicator have little chance of vindicating the wide disparity among immigration judges on appeal.

171. For a general discussion of evidence, proof, and sexual orientation, see Peter Nicolas, *"They Say He's Gay": The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793 (2003).

172. Cianciarulo, *supra* note 21, at 127.

173. *Id.* at 123-24.

be reasonably expected, Real ID limits the federal review standard, which dictates: "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."[174]

In *Eke v. Mukasey*, the Seventh Circuit applied this weak standard of review and upheld the immigration judge and Board's denial in part because the applicant failed to corroborate his sexual minority status.[175] Eke claimed that both the immigration judge and Board erred by requiring him to corroborate his sexual identity in order to establish his membership in the particular social group of Nigerian, "homosexual men."[176] The judge and Board denied Eke's claim, in part, because of he failed to produce corroborating evidence. This was the case despite the fact that Eke testified he "tried to keep his sexual orientation a secret" for all of his life, until the day his wife discovered him with his lover.[177] Nonetheless, the Board found that expecting Eke to corroborate his sexuality was reasonable. The Board specified types of evidence that Eke could have provided, including "supporting witnesses," "some kind of documentation indicating his sexual preferences," and information about "the gentleman with whom he was allegedly involved in a homosexual relationship."[178]

These expectations, that are unimpeachable under Real ID's standard of review, hardly take into account the unique circumstances of the applicant. It is uncertain, and the Board does not explain, how a man fleeing for his life on account of his sexuality would be able to obtain supporting witnesses of his affair or documentary evidence of his sexuality, especially when avoiding corroboration of these facts was key to his survival. By failing to address the way in which its expectations diverged so radically from the applicant's circumstances, the Board set out a clear example of how unreasonable demands for corroboration will survive judicial review.

Although not controlled by Real ID, a 2007 case demonstrates the danger of a judicial climate with heightened expectations for corroboration in the absence of specific guidelines addressing the special circumstances of sexual minorities.[179] In *Doe v. Attorney General*, like *Eke*, the immigration judge found that the applicant "had not corroborated his homosexuality."[180] The Board found that while there was "enough evidence in the record to establish this fact," Doe

174. Aubra Fletcher, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 125 (2006) (citing 8 U.S.C. §1252(b)(4) (2006)).

175. 512 F.3d 372 (7th Cir. 2008).

176. *Id.* at 381.

177. *Id.* at 375-76.

178. *Id.* at 381.

179. *See also* Shahinaj v. Gonzales, 481 F.3d 1027, 1028 (8th Cir. 2007) (where an immigration judge cited the applicant's "failure to present any evidence corroborating Shahinaj's claim that he was a homosexual").

180. 259 F. App'x 425, 427 (3rd Cir. 2007).

had not proved the likelihood of his persecution should he return to Egypt.[181] Although in Doe's case the Board overturned a highly stringent requirement for corroborating sexual minority status, *Doe* serves as an indicator of the climate facing sexual minority applicants appearing before immigration judges.[182]

Another 2007 case, *Mockeviciene v. Attorney General*, demonstrates how a judicial atmosphere that expects the corroboration of sexuality is problematic. In that case, the applicant was denied asylum in part because she could not produce "documents to establish that she [was] a lesbian."[183] The "letters or notes she did submit were not originals and did not 'mention with any degree of specificity the lesbian relationships of Mockeviciene, only addressing the conclusion that Mockeviciene is indeed a lesbian.'"[184] The immigration judge found it fatal to her case that she could not "produce any witnesses to 'attest to the fact that she [was] indeed a lesbian.'"[185] Despite her attempt to produce extrinsic evidence to corroborate her sexuality, the applicant was denied asylum on the basis that she did not satisfy the evidentiary expectations of the immigration judge.

By permitting the Board and immigration judges to demand corroboration of sexual identity, even when the circumstances of these applicants point to the unreasonableness of the requirement, Real ID creates the conditions for systemic unfairness. Without guidelines or a more vibrant standard of review, it is possible that bona fide sexual minority refugees will be returned to their persecutors—even when they provide credible, detailed testimony and consistent country conditions information. Although cases are limited and only time will fully reveal the true nature of Real ID's effects on the corroboration requirements imposed on sexual minorities, the few cases available point to a disastrous probability. For the law, probable abuse of discretion and judicial bias should be enough to warrant reconsideration.

ii. Special Problems for the Pro Se Sexual Minority Applicant

For a skilled attorney, it should not be an insurmountable challenge to show that corroborating evidence is unavailable and unreasonable to expect. Yet the majority of applicants are unrepresented in asylum office interviews, and nearly one-third of applicants in immigration court hearings lack representation.[186] Further, not all immigration attorneys are able to provide applicants with representation of a sufficient quality to overcome corroboration

181. *Id.*

182. For another example of a climate that unreasonably demands corroboration of sexual identity, see Ni v. Attorney General, 157 F. App'x 455, 456 (2d Cir. 2005) (failing to consider the applicant's circumstances by upholding the immigration judge's requirement that Ni provide "available corroboration" of his sexual orientation from his brother and father).

183. 237 F. App'x 569, 572 (11th Cir. 2007) (citations omitted).

184. *Id.* (citations omitted).

185. *Id.* (citations omitted).

186. Schoenholtz & Jacobs, *supra* note 35, at 765.

issues.[187] Even if an applicant who was unrepresented during immigration court proceedings manages to find an attorney for her appeal, she must, in most circumstances, work with the administrative record her attorney inherits.[188]

The corroborating evidence that the Board lists in *Eke* would be difficult for any attorney, let alone a pro se asylum applicant, to locate and produce.[189] Among various social groups, sexual minority pro se applicants are especially unlikely to be able to obtain the type of corroborating evidence demanded by Real ID. Sexual minority applicants often fear alienation in their communities and may have already been rejected by friends and family in their country of origin. Under these circumstances, sexual minority applicants may not be able to locate witnesses or find assistance in the collection of evidence in support of their claims.

The heightened importance that Real ID explicitly gives to State Department reports is a mistake because these documents "are not always accurate, complete, or up to date."[190] For sexual minority applicants, there is a special danger of silence and inaccuracy in State Department reports.[191] Sexual minorities can be victims of gender-based violence, and these harms "often receive less public attention than other types of harms, especially where a society deems harms such as domestic violence to be private matters."[192] When Real ID elevates the status of State Department reports but diminishes the adjudicator's role as investigator, there is a significant potential for arbitrary results based on the tyranny of State Department documents.

Two cases, *Maldonado v. Attorney General*[193] and *Paredes v. Attorney General*,[194] demonstrate this risk. These cases, although not governed by Real ID, were decided after Real ID became law.[195] Like *Karouni* and *Abdul-Karim*,

187. Research suggests that many private attorneys are under-qualified to handle their often large immigration caseloads. *See id.* at 757.

188. It is difficult for applicants to introduce new evidence on appeal or in order to reopen immigration proceedings. In an appeal of a final order of removal, review is limited to the administrative record, and "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *See* 8 U.S.C. § 1252(b)(4)(A)–(B) (2006). On a motion to reopen, the applicant must show that the evidence offered was previously unavailable and is material to their claim. *See* 8 U.S.C. § 1229a(c)(7)(B) (2006); 8 C.F.R. § 1003.2(c) (2009) (in effect in all jurisdictions except the 4th Circuit). Therefore, applicants must usually work with the evidence assembled and elicited by their prior counsel when seeking to appeal or reopen.

189. 512 F.3d 372, 381 (7th Cir. 2008).

190. Fletcher, *supra* note 174, at 126.

191. This danger persists, in part, because of the inconsistent depth of analysis that adjudicators give to evidence of country conditions, sometimes ranging from a perfunctory consultation of State Department reports to a detailed examination. *See* Arwen Swink, *Queer Refuge: A Review of the Role of Country Conditions Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 HASTINGS INT'L & COMP. L. REV. 251, 263-66 (2006).

192. Fletcher, *supra* note 174, at 126.

193. 188 F. App'x 101 (3d Cir. 2006).

194. 219 F. App'x 879 (11th Cir. 2007).

195. This article submits that Real ID cemented a pattern and practice of excessive reliance, affecting applicants whose cases are not subject to Real ID.

they highlight the danger of over-emphasis of these documents without an accompanying investigative duty. In *Maldonado*, the existence of corroborating State Department Country Reports was influential in the outcome of the case, and fortunately these documents supported the plaintiff's claims.[196] In *Paredes*, the immigration judge relied on the *2003 State Department Country Report on Human Rights Practices in Venezuela* and concluded that its silence about violence toward sexual minorities and people with HIV/AIDS, coupled with the ability of "several hundred" people to openly protest against the mistreatment of sexual minorities without punishment, evidenced tolerance and defeated Paredes' claim of a well-founded fear.[197] The State Department report does not completely account for the outcome in each case, but the official U.S. position on country conditions was a significant factor in each determination.[198]

In *Duarte v. Attorney General*, an immigration judge applying Real ID dismissed the applicant's evidence because it contradicted State Department reports.[199] The Third Circuit cautioned against basing an entire asylum determination on State Department reports, but nonetheless upheld the credibility determination on other grounds.[200]*Duarte* demonstrated that Real ID had done nothing to prevent the error of the Board in *Ezeagwuna v. Ashcroft*[201]—undue reliance on government documents—and actually perpetuated it.

There is a logical disconnect between the reality that many asylum applicants have no representation and the weight given to State Department reports, which are typically silent on matters of violence toward sexual minorities.[202] As in the case of *Paredes*, it is uncertain whether even a highly skilled attorney would be able to surmount this difficulty—even when armed with experts and independent research. To expect a pro se sexual minority applicant to adequately present corroborating evidence to rebut the silence of State Department reports is unrealistic and unreasonable. Even more

196. 188 F. App'x at 104.

197. 219 F. App'x at 883.

198. *See also* Morett v. Gonzales, 190 F. App'x 47, 49 (2d Cir. 2006) (where the State Department's corroboration of a sexual minority's asylum claim carried significant weight).

199. 209 F. App'x 153, 159 (3d Cir. 2006).

200. *Id.*

201. 325 F.3d 396, 405-07 (3d Cir. 2003) (citing Galina v. INS, 213 F.3d 955, 958-59 (7th Cir. 2000)).

202. The under-reporting of violence toward sexual minorities is due in part to the frequently sexual nature of these attacks, as well as the history of the State Department. Although the State Department has been issuing Human Rights Reports since 1975, human rights abuses of sexual minorities were only included as of 1993. The State Department should issue enhanced guidance to U.S. embassies in order to compensate for the lack of experience and expertise that results from this twenty-eight year delay. *See* Diana Bögner et al., *Impact of Sexual Violence on Disclosure During Home Office Interviews*, 191 BRIT. J. PSYCHIATRY 75 (2007) (victims of sexual violence were less likely to disclose their past trauma in a study on refugees and asylum seekers); *see also* MARK BROMLEY, CONGRESSIONAL BRIEFING ON INTERNATIONAL AND HUMAN RIGHTS ISSUES (2008), http://lgbt.tammybaldwin.house.gov/pdf/MarkBromley62308.pdf (providing suggestions for ways the State Department can improve reporting and promote LGBT human rights around the world).

unreasonable is the lack of any guaranteed mechanism in place to assist pro se applicants in seeking corroborating evidence and explaining its unavailability. There is no information available to show how many of these pro se sexual minority applicants' claims fail due to an inability to gather and properly present evidence, but if the frequent failure of represented applicants is any indication,[203] this number is likely, and tragically, quite high.

B. Sexual Minority Asylum Seekers and Real ID Credibility

Real ID did not invent the strong inherent bias in the credibility standards of U.S. asylum law, but it did codify some of the worst logic embedded in prior case law. Through an emphasis on demeanor, non-differentiation between central and minor inconsistencies, and similar treatment of statements made under oath or without, Real ID invites and fails to prevent prejudice. Real ID fosters abuse of judicial discretion by permitting off-the-record inferences to creep into decisions through the guises of credibility.

i. Demeanor, Candor, and Responsiveness: Inappropriate Criteria

Real ID directly recommends three subjective, unreliable markers as appropriate indicators of credibility: "demeanor, candor and responsiveness." When applied to sexual minorities, these indicators pass through a rigid cultural filter that can improperly influence an adjudicator. Credibility assessments based on demeanor "ultimately privilege [immigration judges'] individual ideas of how refugees should psychologically respond to persecution."[204] Applicants may appear distrustful, nervous, and may sweat excessively due to trauma and internalized suspicion of government authorities.[205] But these psychological influences on non-verbal communication can be fatal to an applicant's credibility determination, as in *Rezhdo v. Attorney General*.[206] In that case the circuit court upheld an immigration judge's Real ID-guided credibility determination that "Rezhdo's demeanor demonstrated he was lying" because "he was sweating profusely and appeared extremely nervous."[207]

In *Soto Vega v. Ashcroft*, an immigration judge exemplified the danger of basing credibility determinations on demeanor.[208] The immigration judge "did not think Mr. Soto Vega's 'appearance, dress, mannerisms or voice' conformed

203. Many sexual minority applicants claims failed simply due to an inability to present sufficient evidence to support their asylum applications. *See* Zhong Xing Zhan v. Gonzales, 217 F. App'x 86 (2d Cir. 2007); Maquiling v. Gonzales, 221 F. App'x 668 (9th Cir. 2007); Santoso v. Gonzales, 231 F. App'x 611 (9th Cir. 2007); Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d Cir. 2006); Sewidjaja v. Att'y Gen., 198 F. App'x 265 (3d Cir. 2006).

204. Fletcher, *supra* note 174, at 121.

205. Melloy, *supra* note 119, at 657-58.

206. 187 F. App'x 193 (3d Cir. 2006).

207. *Id.* at 196.

208. 183 F. App'x 627 (9th Cir. 2006).

to the 'stereotypical things that society assesses to gays.'"[209] This case highlights a special danger that attaches to sexual minority applicants when demeanor is considered an appropriate indicator of credibility: adjudicators will be tempted to also judge whether the applicant is truly a sexual minority. In the case of Soto Vega, the focus turned to the way that his demeanor conveyed his "gayness" and hence his credibility. These "stereotypical" assessments of demeanor are likely to be based on markers of sexual and gender identity that comport with expectations based on race, class, and culture. Therefore, basing an evaluation of credibility on demeanor is all the more inappropriate because asylum adjudication deals almost exclusively with cross-cultural communication.[210]

The criteria of candor and responsiveness are also ill-suited for judging the credibility of sexual minority applicants. For sexual minorities and refugees subjected to gender-based persecution, "[b]asic traumas are hidden under a blanket of shame, which may be, but is not always, culturally determined."[211] This analysis of gender-based asylum seekers is applicable to sexual minority applicants in many ways, especially in understanding the way that shame and culture influence candor and responsiveness. Some sexual minority applicants must recount incidents of extreme sexual violence, and remembering constitutes new trauma. For these individuals, a "strong sense of cultural or religious shame may affect the applicant's [testimony]."[212]

The criteria of demeanor, candor and responsiveness create an additional problem that Real ID's authors should have anticipated. When adjudicators place a heightened importance on the testimonial behavior of applicants, they encourage premeditated performance. When conformity to race- and class-based gender and sexual stereotypes can be outcome determinative, U.S. law creates a perverse incentive to conduct oneself accordingly. One applicant argued on appeal that he should have been able to testify in person because "if the [immigration judge] had seen him in person, the [immigration judge] would have recognized that [he] is in fact homosexual."[213] Another applicant stated on appeal that "he did not understand that he needed to present evidence of his involvement in a romantic relationship to prove that he was homosexual."[214]

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209. Brief of Petitioner at 48, Soto Vega v. Ashcroft, No. 04-70868 (9th Cir. Oct. 25, 2004), *available at* http://www.lambdalegal.org/our-work/in-court/briefs/soto-vega-v-ashcroft-brief.html.

210. Morgan, *supra* note 86, at 150.

211. Melloy, *supra* note 119, at 659 (citing Sepp Graessner et al., *Everything Forgotten! Memory Disorders Among Refugees Who Have Been Tortured*, *in* AT THE SIDE OF TORTURE SURVIVORS 184, 193 (Sepp Graessner et al. eds., 2001)).

212. *Id.*

213. Eke v. Mukasey, 512 F.3d 372, 382-83 (7th Cir. 2008). The Seventh Circuit displayed appropriate cynicism, stating "As for Eke, even if we thought (stereotypically) that something about his physical presence could prove his homosexuality, he has not explained how the televideo format prevented the [immigration judge] from considering the evidence." *Id.* at 383. Note, however, the Circuit's failure to dispel the assumption that judges will determine sexual identity based upon demeanor.

214. Kibuuka v. Gonzales, 178 F. App'x 24, 25 (1st Cir. 2006).

Tragically, the applicants were denied asylum because they did not realize that they were supposed to comport with the cultural expectations that they must be sexually active or perceptibly effeminate. The lesson that *Eke* and *Kibuuka* send to future applicants is clear: one must present facts and a demeanor that play into U.S. stereotypes in order to gain a greater probability of success.

These cases also produce ethical dilemmas for attorneys about whether "to strategically deploy racist, sexist or homophobic narratives that will advance their clients' interests."[215] In the lawyer's ethical duty to society and refugees at large, the answer seems easy—not to pander to heterosexist cultural stereotypes and assume responsibility for "shaping this judge's judgment."[216] But this answer is more difficult when encouraging a client to "act gay" could save the client's life. These are the impossible, irrational choices that Real ID's credibility guidelines create for those attempting to work within its regime.

ii. Internal Consistency

a. Minor Discrepancies During the Natural Evolution of a Claim

Real ID's consideration of "*any* inaccuracies or falsehoods" is a troubling standard, because it does not matter whether they go "to the heart of the applicant's claim."[217] In this way, Real ID ignores a body of scientific knowledge of human memory and trauma, which has confirmed the poor probative value of minor inconsistencies to determining the veracity of the overall claim.[218] The prevailing knowledge about memory confirms that traumatic narratives

> [A]re fragments, usually sensory impressions; they may be images, sensations, smells or emotional states. Importantly, probably because of the nature of the memory store in which they are held, they do not seem to carry a 'time-stamp' so they are often experienced as if they were not memories of the past at all, but current experiences. These types of memories are usually not evoked at will, as a normal memory can be searched for and produced, but they are provoked by triggers, or remainders of the event.[219]

Before Real ID, the Ninth Circuit "recognized that a refugee claimant's credibility should not be dismissed based on minor inconsistencies or

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215. Muneer Ahmad, *The Ethics of Narrative*, 11 AM. U.J. GENDER SOC. POL'Y & L. 117, 117 (2003).
216. *Id.* at 127.
217. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (emphasis added).
218. *See* Kagan, *supra* note 18, at 388 ("[E]mpirical studies of human memory suggest that inconsistency does not always indicate fabrication.").
219. Jane Herlihy, *Evidentiary Assessment and Psychological Difficulties*, *in* PROOF, *supra* note 133, at 126.

misrepresentations."[220] By erasing the requirement that an inconsistency go to the heart of the applicant's claim, Real ID "overturns precedential case law."[221]

In *Duarte v. Attorney General*, a minor error led to an applicant's denial of asylum.[222] Although the court took note of Real ID, the law did not govern the case because the applicant applied for relief in 2003.[223] Duarte's error was the date his boyfriend was murdered, which he misreported six years later by about a year and a half.[224] Although there were other elements of the applicant's case that cautioned skepticism, this inconsistency alone should not have carried the weight to warrant a denial because Duarte's boyfriend's death fit the very definition of a highly traumatic event. For a variety of reasons, the recall of exact dates of traumatic events is not a suitable marker for the truthfulness of statements.

Satkauskas v. Attorney General, like *Duarte*, was not governed by Real ID but the judicial climate resulting from the Act likely influenced the decision. In *Satkauskas*, the applicant was found not credible because there was a discrepancy in his statements about the number of days he was hospitalized.[225] The Board affirmed, ignoring the question of credibility but finding Satkauskas ineligible for relief. Satkauskas appealed to the Third Circuit, arguing that he was denied due process because the immigration judge's decision was based on her personal view that she "did not believe that he is gay."[226] The Circuit noted that "the [Board]'s findings thus must be upheld 'unless the evidence not only supports a contrary conclusion, but compels it.'"[227] For Satkauskas, the Circuit did not find that the record compelled reversal.

Tavera Lara v. Attorney General is a case similar to *Duarte* where the applicant provided inconsistent testimony surrounding a highly traumatic event.[228] Tavera Lara failed to provide a consistent date for when she was attacked on account of her sexual identity. The immigration judge, Board, and Circuit demonstrated serious misperceptions about the function of memory and trauma in the oral testimony of asylum applicants. The Eleventh Circuit, in upholding the negative credibility determination, stated, "[W]e find that this is a significant event to her case for asylum and that her failure to include the attack in her application, particularly in light of her widely varying accounts as to the

220. Aguilera-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990)); Kagan, *supra* note 18, at 387 (citing Kaur v. INS, 207 F. App'x 19 (9th Cir. 2006); Bandari v. INS, 227 F.3d 1160, 1165 (9th Cir. 2000); *see also* Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002) (finding that minor inconsistencies reveal nothing about the merits of a claim)).

221. Fletcher, *supra* note 174, at 123; *see* Singh v. Ashcroft, 362 F.3d 1164 (9th Cir. 2004); Akinmade v. INS, 196 F.3d 951, 954-56 (9th Cir. 1999); Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988).

222. 209 F. App'x 153 (3d Cir. 2006).

223. *Id.* at 155.

224. *Id.* at 159.

225. 176 F. App'x 271, 272 (3d Cir. 2006).

226. *Id.* at 273.

227. *Id.* (citing Abdille v. Ashcroft, 242 F.2d 477, 483-84 (3d Cir. 2001)).

228. 188 F. App'x 848 (11th Cir. 2006).

date of the attack, was properly considered by the [immigration judge] in determining her credibility."[229] The *Tavera Lara* decision is based not on science but on Real ID's undue emphasis of credibility, which diminishes the quality of consideration given to applicant testimony. Instead of providing comprehensive, culturally- and psychologically-sensitive guidance on evaluating and eliciting applicant testimony, Real ID merely prepares adjudicators to try and "catch" applicants when they fail to provide clear and consistent testimony.

b. Inconsistencies Whether Under Oath

Another area of concern is Real ID's direction to base credibility determinations on the "consistency between the applicant's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made)."[230] For terrified and traumatized sexual minorities, "initial or other unsworn statements [that] are unreliable indicators of the validity of [their] claim[s]" can be an accepted basis of denial.[231] This provision of Real ID harms the most vulnerable and least visible of applicants, those for whom disclosing their worst experiences to authoritative government officers is extremely difficult.

On the issue of initial or unsworn statements and credibility, there is a trilogy of recent cases implementing Real ID that reveal its failures. In *Grijalva v. Ashcroft*, the immigration judge entered an adverse credibility finding based on inconsistencies between Grijalva's 1995 and 1997 asylum applications.[232] The Sixth Circuit found that "Grijalva's argument, that the 1995 application has no probative value because it was prepared by a notario and signed by Grijalva, who cannot read, lacks merit."[233] Because Grijalva had been read his application out loud in 1995 and had signed it, the Circuit ignored the applicant's circumstances. Applicants like Grijalva, who have their documents prepared by community members, are often reluctant to disclose their sexual identities and past experiences of sexual violence.[234] As it was prepared by a notario, the application should have been considered unreliable on its face for proving Grijalva's credibility. Further, it is completely credible that Grijalva would have been highly reluctant to reveal his sexuality and brutal gang rape to a member of his new community. Guided by Real ID, the immigration judge, Board and Circuit ignored the unique circumstances and psychological pressures on the

229. *Id.* at 857-58.
230. 8 U.S.C. §1158(b)(1)(B)(iii) (2006).
231. Fletcher, *supra* note 174, at 123.
232. 2007 FED App. 0017N, 35, (6th Cir.), 212 F. App'x 541, 548-49.
233. *Id.* at 7, 548.
234. *See* Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 272 (2005) ("[S]ome clients may be afraid to reveal their sexual orientation, gender identity, or HIV status to an attorney . . . from the foreign national's ethnic community because the applicant may fear that her status will become known within that community.").

applicant and instead focused on insignificant inconsistencies.

Chen v. Mukasey took note of Real ID's credibility guidelines, but applied earlier law due to Chen's date of application.[235] In *Chen*, the immigration judge based her adverse credibility finding on implausibility (which, as discussed above, is problematic) as well as inconsistencies between Chen's testimony and his earlier affidavit.[236] Chen's fatal mistake was that in his affidavit he omitted the fact that the police had beaten his mother.[237] For this, the Board and the Circuit determined that Chen was fabricating his claim.[238] Especially for omissions, oral testimony should carry more significance in credibility analyses than written testimony. This is in part because oral testimony involves questions designed to elicit all relevant testimony, the relevance of which the applicant may not realize when making written testimony. It is precisely this type of circumstantial factor that an adjudicator should consider when determining whether an omission indicates incredibility. Instead, the immigration judge dismissed Chen's explanation that "what happened to his mother was minor" and that he did not think to include it.[239]

The third case, *Moab v. Gonzales*, offers some hope for the Circuit level, but demonstrates how Real ID's credibility factors, without giving regard to the circumstances of testimony, have led to improper determinations at lower court levels.[240] In his credible fear interview at O'Hare International Airport, Moab stated that he feared returning to Liberia because of the civil war and a familial land dispute.[241] These statements were neither under oath nor were they recorded. Later, on his application for asylum, Moab disclosed that he feared returning because of the beatings he had received on account of his sexual identity. In his hearing before the immigration judge, Moab explained the omission, stating, "everywhere I go, people discover that I'm homosexual. It's different, so sometimes I want to keep it, but I can't keep it."[242] The Board affirmed the immigration judge's denial as a proper implementation of Real ID, since "as the respondent's claim progressed, his alleged account of harm became markedly more egregious."[243] The Seventh Circuit properly instructed that "airport interviews . . . are not always reliable indicators of credibility," given their incomplete record.[244] The court concluded that the claim did not become more egregious but rather provided an additional ground for asylum.[245]

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235. 510 F.3d 797, 801 (8th Cir. 2007).
236. *Id.* at 798.
237. *Id.* at 799 ("The affidavit mentions his mother in this scene only to say that she 'wept and shouted and yet no one came to the rescue.'").
238. *Id.* at 803.
239. *Id.*
240. 500 F.3d 656 (7th Cir. 2007).
241. *Id.* at 657.
242. *Id.* at 658.
243. *Id.*
244. *Id.* at 660.
245. *Id.* at 661.

Although the Seventh Circuit's conclusion was proper and recognized that the inconsistency between Moab's airport statement and application should not produce a negative credibility finding, the court's reasoning was flawed. It is probable that the harms described by a sexual minority will become more "egregious" between initial interviews and fully developed testimonial evidence. Legally, there should be no negative inference from this phenomenon. These individuals are often subject to the most traumatic, invasive, and humiliating types of violence. It is understandable why a sexual minority would state that he was "beaten" during an airport interview but later disclose that he was actually repeatedly gang raped. Real ID's guidance is faulty; it points adjudicators away from the fact that testimony will organically develop to become richer and more complete over time. Sadly, for the applicants who have been most brutalized, this means that over time, the full extent of the cruelty to which they have been subjected will become known. In this way, the circuit failed sexual minority applicants by suggesting an endorsement of the view that claims should fail when they become increasingly "egregious" over time. Here, as elsewhere, Real ID misguides by failing to provide adjudicators with a comprehensive mapping of asylum testimony, instead replacing it with simple and misleading logic.

iii. External Consistency

External consistency is the least problematic, most objective component of a credibility assessment but for two sub-categories: plausibility and, for sexual minorities, the special problem of marriage. Essentially, external consistency considers whether the facts presented by the applicant contradict *known* facts about the applicant's country of origin. The danger is that adjudicators can assess consistency with *assumed* facts, such as whether a persecuting government *would* let a targeted individual exit the country.[246] In evaluating external consistency, it is critical that an adjudicator focus first on whether facts are *known*, and then whether the applicant's testimony is contradictory.[247]

a. Determining Whether the Applicant is "Plausibly" a Sexual Minority

Real ID instructs adjudicators to examine "the inherent plausibility of the applicant's or witness's account" in addition to its faithfulness to the "other evidence of record."[248] Under these guidelines, adjudicators must look to whether the applicant's testimony creates a factual basis for concluding that he or she is a sexual minority. This line of analysis, with its emphasis on "inherent plausibility," welcomes speculation and can be particularly damaging to sexual

246. *See, e.g.*, *Chen v. Mukasey*, 510 F.3d 797 (8th Cir. 2007).

247. In essence, this is the difference between inconsistent and unexpected testimony. *See infra* note 272 for an example of testimony that is unexpected but may not be inconsistent.

248. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

minority applicants who cannot successfully communicate across cultural expectations. Often, adjudicators will make these plausibility judgments by concluding that the applicant's behavior did not correspond to that of a typical, reasonable person in the same circumstances.[249] Unfortunately, these expectations are heavily imbued with cultural values and norms, which can distort the adjudicator's findings. Further, many adjudicators make the easy mistake of confusing the implausible with the unexpected.[250]

The classic example of "inherent plausibility" is when an immigration judge questions why an applicant would remain in or return to her country of origin if she were in real danger. Rather than conduct a genuine inquiry into the circumstances of the applicant that would make such decisions difficult or unique, judges use a simple equation—no immediate, permanent flight means not a refugee.[251] For sexual minorities, and in particular, for victims of gender violence, fleeing a country of origin for a safe destination can be impossible.[252] One example is where an immigration judge and the Board found it implausible that a sexual minority gang-raped by soldiers would "remain in Guatemala for four years if he lived in constant fear of similar abuse."[253] Such plausibility judgments, where a judge substitutes his reasoning for that of a traumatized, terrified, and desperate sexual minority, are ludicrous and should not have been enshrined in Real ID's credibility factors.

A recent case applying Real ID reveals how damaging a judge's speculative conclusions about plausibility can be. The Eighth Circuit stated,

> We have in the past refused to disturb [immigration judges'] findings based on assessments of plausibility, even though such assessments must ultimately depend on the fact-finder's notions of common sense and life experience. While in certain cases, we have disagreed with the [immigration judge]'s assessments of plausibility, we have done so only where the [immigration

249. A frequent judgment of "inherent plausibility" occurs when judges determine that the applicant would not have returned to his or her country if he or she was a true refugee. *See, e.g.*, Duarte v. Attorney General, 209 F. App'x 153, 160 (3d Cir. 2006) (where the immigration judge "found Duarte's claim of persecution implausible in light of 'the fact that the respondent returned to his country where he had been persecuted.'").

250. *See, e.g.*, Katyal, *supra* note 100, at 367.

251. *See, e.g.*, *supra* note 249 (discussing *Duarte* and the presumption of permanent flight); *see also, e.g.*, Xue v. B.I.A., 439 F.3d 111, 117 n.9 (2d Cir. 2006) (referencing the immigration judge's erroneous conclusion that an applicant was not credible because it was not plausible that he would wait until thirteen years after his initial persecution to flee his country of origin).

252. The expectation alone that an individual can flee his or her country of origin upon first brush with persecution reveals a significant amount of bias, especially in its highly male-gender-based assumptions about the freedom and resources to travel. *See* INFORMATION CENTER ABOUT ASYLUM AND REFUGEES IN THE UK, WOMEN REFUGEES AND ASYLUM SEEKERS IN THE UK (May 2006), http://www.icar.org.uk/?lid=6341#3 ("For women, the barriers to being able to flee to industrialised countries are huge.").

253. Grijalva v. Ashcroft, 2007 FED App. 0017N, 36, (6th Cir.), 212 F. App'x 541, 549.

judge]'s finding was irrational or based on improper bias.[254]

For sexual minorities then, there is a serious risk that speculation based on prejudice will remain unchanged on appeal because it is not sufficiently apparent as bias. When prejudice is cloaked in the language of logical plausibility, sexual minorities face a real danger that the culturally constructed expectations of gender and sexuality will defeat their claims.

In *Mockeviciene v. Attorney General*, the Eleventh Circuit expressed skepticism about the immigration judge's basis for an adverse credibility finding, but nonetheless found they were not compelled to find that the determination was in error.[255] Sadly, this case is replete with farcical reasoning from which the judge concluded that "he did not believe [Mockeviciene] was actually a lesbian."[256] The factors that rendered Mockeviciene's sexual identity implausible included: she did not think being a lesbian required her to have a sexual relationship, she did not have a sexual partner in the United States, and she had not joined groups in the United States "that involved lesbian activities."[257] In short, the immigration judge concluded, Mockeviciene was "at best . . . a non-practicing lesbian."[258]

It is disturbing that an analysis so rooted in cultural and sexual bias could pass without more than skepticism from a circuit court, but the immigration judge nonetheless succeeded in preventing Mockeviciene from receiving asylum. The judge's expectations that a bona fide lesbian would be engaged in sexual activity, have a current sexual partner, and be a member of groups "that involved lesbian activities" reveals an overriding adherence to a substitutive model of sexuality that is highly culturally contextual.[259] Rather than permitting the applicant to elaborate on her identity, the immigration judge cared only to examine those acts which, in his cultural context, demarcate a particular sexual orientation.[260] *Mockeviciene* stands for the way in which the substitutive model of sexuality fails in asylum jurisprudence, and the invitation to bias and abuse that Real ID has created by permitting a judge to substitute his premonitions for facts in an "inherent plausibility" analysis.

Shahinaj v. Gonzales is an appropriate companion case to *Mockeviciene* because it reveals the flexibility Real ID eliminated.[261] *Shahinaj* was not governed by Real ID, and the circuit properly identified the errors of the

254. Chen v. Mukasey, 510 F.3d 797 (8th Cir. 2007) (citations omitted).
255. 237 F. App'x 569 (11th Cir. 2007).
256. *Id.* at 572.
257. *Id.*
258. *Id.* (citations omitted).
259. *See* Katyal, *supra* note 100, at 114-15.
260. *See also* Hassani v. Mukasey, No. 04-73139, (9th Cir. Nov. 13, 2008)(mem), *available at* http://archive.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/111308/$File/04-73139.PDF. In that case, the immigration judge reached a negative credibility finding based upon "the [immigration judge's] speculation as to how a gay man would behave in Iran, as well as assumptions about how *sharia*, Islamic customary law, treats homosexuality." *Id.* at 4.
261. 481 F.3d 1027 (8th Cir. 2007).

immigration judge's reasoning. Now that Real ID has codified "inherent plausibility" as a factor for determining credibility, it is uncertain whether the circuit's correct result would be possible today. The immigration judge based the negative credibility determination on Shahinaj's "dress," "mannerisms," and "style of speech," none of which the judge found gave "any indication that he is a homosexual."[262] Further, Shahinaj did not report police abuse "to any homosexual organization."[263] This, the judge found was "simply implausible" were Shahinaj truly an Albanian sexual minority.[264] The circuit properly identified the judge's bias and granted Shahinaj's petition for review. Unfortunately, the circuit never explained exactly why a "personal and improper opinion [that] Shahinaj did not dress or speak like or exhibit the mannerisms of a homosexual" or "lack of membership in any Albanian homosexual organizations" is an inappropriate basis for a credibility determination.[265]

One very recent case, *Ali v. Mukasey*, demonstrates the extent to which bias shapes determinations of inherent plausibility.[266] In *Ali*, the immigration judge expressed skepticism about the applicant's sexuality, finding that the introduction of "his homosexuality may have been just another attempt to delay the proceedings."[267] Immigration Judge Vomacka concluded that the applicant's claim he was a sexual minority and fear of torture because he was a criminal deportee were "incompatible."[268] The immigration judge speculated that because "violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people," Ali was likely to evade detection.[269] Unsupported judicial conjecture continued with the conclusion that Ali was unlikely to face torture because he had no "partner or cooperating person" from which he would be discovered as a sexual minority.[270] The Second Circuit properly rejected the practice of the immigration judge, finding "an impermissible reliance on preconceived assumptions about homosexuality and homosexuals, as well as a disrespect for the petitioner."[271] *Ali* demonstrates the way in which an immigration judge's prejudice and confusion about an applicant's sexuality can lead to biased judgments regarding the inherent plausibility of persecution and torture.

In the broader sense, individual circuit cases cannot prevent bias from

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262. *Id.* at 1028. Note how closely this case resembles *Soto Vega v. Ashcroft*. *See* Brief of Petitioner, Soto Vega v. Ashcroft, No. 04-70868 (9th Cir. Oct. 25, 2004), *available at* http://www.lambdalegal.org/our-work/in-court/briefs/soto-vega-v-ashcroft-brief.html.

263. *Shahinaj*, 481 F.3d. at 1028.

264. *Id.*

265. *Id.* at 1029.

266. 529 F.3d 478 (2d Cir. 2008). Although this case involves Convention Against Torture relief, the applicant had earlier applied for asylum and Immigration Judge Vomacka's evaluation of Ali's claim demonstrates the danger of this criterion of Real ID.

267. *Id.* at 485.

268. *Id.* at 487.

269. *Id.*

270. *Id.*

271. *Id.* at 492.

creeping into other credibility determinations or protect applicants at the immigration court level. Instead, Real ID now cloaks these biases in the permissible factor of "inherent plausibility," where a judge's expectations can replace facts. The frequency of these cases at the circuit level in recent years cannot be the full extent of the problem. Yet, the circuits have not stamped out the possibilities for sexuality and gender bias that Real ID preserved, even when faced with the opportunity.

b. The Problem of Marriage

Heterosexual marriage is a particularly problematic area in credibility assessments based on external consistency because, to most adjudicators, they are highly unexpected. As explained above, unexpected testimony is that which contradicts assumed facts regarding an applicant's country of origin. However, absent evidence that it is impossible for sexual minorities to enter into heterosexual marriages in the applicant's country of origin, these unions should not be sufficient grounds for denial. Unfortunately, many courts have not reached this conclusion, finding that heterosexual marriage is an externally inconsistent element of a sexual minority's testimony.

The applicant *Eke v. Mukasey* had been married to a woman before, although at the time he did not desire the union because he knew that he was sexually attracted to men.[272] Initially, Eke denied his paternity of his wife's two children, but later admitted that they were his. He explained the discrepancy was because he did not want to have the children, and found it "incredible" he had been able to father them.[273] Once in the United States, Eke divorced his wife and married an American woman for material support. The immigration judge and the circuit found it fatal to Eke's claim that he had "fraudulently entered into a marriage in order to obtain a benefit under the immigration laws" and misrepresented the paternity of his children.[274] Eke's testimony on these matters was not extrinsically contradictory in a liberal sense—his first and second marriages do not render his claimed sexual identity impossible, and his marriages and fatherhood represent an ongoing effort to conceal his sexual identity in order to gain communal acceptance. Unfortunately, the interpretation least generous to the applicant prevailed.[275]

In *Duarte v. Attorney General*, which did not apply Real ID but took note of it, the immigration judge found that Duarte's marriage to obtain a green card

272. 512 F.3d 372, 376 (7th Cir. 2008).

273. *Id.*

274. *Id.* at 377.

275. However, a more liberal approach is especially proper in light of the fact that Eke's first marriage resulted from family pressure, that his second marriage resulted from sister's rejection of him upon learning of his sexual orientation, and that he never considered his first marriage "consummated." It is entirely understandable why a person married to a spouse of the gender to which they are not attracted would never consider the marriage "consummated."

was evidence of his "flagrant and improper attempt to get around the immigration laws of asylum," which "fatally" affected his credibility.[276] To the immigration judge, Duarte's heterosexual marriage proved either the falseness of Duarte's claimed sexual identity or a pattern of fraudulent behavior. Because of Duarte's sexual identity, his heterosexual marriage complicated the analysis, even though it did not contradict any known facts. Further, it was not probative of the actual veracity of Duarte's claim.

This is not to say that heterosexual marriage is not relevant to a sexual minority asylum claim. Indeed, it is unexpected behavior that an individual claiming they were persecuted based upon a sexual identity inconsistent with normative values would enter into a heterosexual marriage. But this situation calls for greater inquiry, not summary rejection. Unfortunately, this is precisely what happened in *Mockeviciene v. Attorney General*, where the Board "found that Mockeviciene's subsequent marriage to a man undercut the credibility of her claim to be a lesbian."[277] Mockeviciene's marriage led the Circuit to conclude that the record did not compel finding that the credibility determination of the immigration judge was in error. Although this case did not apply Real ID, it laid disturbing ground for following cases implementing its credibility standards; in essence, it invites judges to determine that heterosexual marriage should defeat a sexual minority asylum claim. This external consistency analysis is erroneous, because, again, it treats unexpected facts as impossible. It is entirely possible that a lesbian woman would marry a man for a variety of non-sexual reasons. Instead of rejecting her claim, the adjudicator should ask the applicant to provide these reasons, rather than making a rash credibility determination.

Ugochukwu v. Gonzales[278] and *Safadi v. Gonzales*,[279] two post-Real ID cases applying pre-Real ID law, found the applicants' attempts to enter into fraudulent heterosexual marriages to United States citizens demanded adverse credibility findings. In both cases, a heterosexual marriage led the adjudicators to find the applicants' sexual identity and ability to make accurate representations incredible. These cases demonstrate a systemic misunderstanding, based on hetero-normative expectations about marriage, of the reasons why a sexual minority would marry an individual of a gender to which they are not sexually attracted. Conflating desperation with a propensity to defraud, these adjudicators end the inquiry where it should begin. Real ID perpetuates the blurring of unexpected responses with extrinsically inconsistent testimony by failing to distinguish the two in its analytical framework.

VI. CONCLUSION

Real ID did not invent the systemic problems with credibility and

276. 209 F. App'x 153, 157 (3d Cir. 2006).
277. 237 F. App'x 569, 573 (11th Cir. 2007).
278. 191 F. App'x 484 (7th Cir. 2006).
279. 2005 FED App. 0682N (6th Cir.), 148 F. App'x 372.

corroboration requirements for sexual minorities. The theoretical pitfalls and invitations to bias contained in Real ID's standards have long been a feature of the asylum system that was created for heterosexual male political dissidents. Like all refugees, it is likely to be difficult for sexual minority applicants to obtain evidence to corroborate the persecution of similarly-situated individuals and their membership in a particular social group. However, sexual minority applicants face unique obstacles because of their frequent insularity and attempted concealment of their sexual identities. For the most vulnerable of refugees, a resulting evidentiary invisibility is all the more likely. Before Real ID, immigration judges's determinations for credibility based upon airport statements, demeanor, plausibility, and consistency presented challenges for sexual minorities. Often, bias and inference replaced careful consideration. However, on rare occasions, courts took advantage of the flexibility in pre-2005 law to conduct careful, thorough analyses of sexual minority claims.

Given Real ID's legislative background, it is unsurprising that many of these significant changes were not tailored to avoid potentially harmful consequences. Congress, focused on issues of security, passed Real ID without meaningful debate or revision. The initial cases to implement Real ID bear witness to its deficiencies. Textually, Real ID shifts corroboration standards by eliminating the benefit of the doubt principle, heightening corroboration expectations by erasing permissive language, and expanding the scope of the adjudicator's factual inquiry. The statute diminishes the role of the adjudicator as a collaborative factfinder, disadvantaging pro se applicants. Real ID also modifies credibility standards by: comparing all statements, whether or not under oath; emphasizing demeanor, candor, and responsiveness; and giving weight to any inconsistency, whether minor or central.

Case law demonstrates the effects of these changes for sexual minorities, showing the way in which adjudicators can unreasonably demand corroboration of sexuality. Further, Real ID raises the barriers for successful claims by pro se applicants. Real ID's enshrinement of demeanor, candor, and responsiveness emphasize factors with little probative value, but great risk of bias and cultural misinterpretation. Standards for internal consistency ignore the natural evolution of asylum claims, punishing sexual minority applicants who are unlikely to initially disclose their sexual identity to government authorities. Although Real ID recommends considering the circumstances under which statements were made, case law shows that adjudicators pay little attention to the unique situation of each applicant in the name of locating any and all discrepancies. Finally, plausibility and the consideration of marriage are problematic features of external consistency determinations, proving unnecessarily fatal to many sexual minority claims.

Going forward, there are only three proper responses to Real ID: repeal, modification, or the promulgation of remedial regulations.[280] Repeal, in the

280. It is important that these regulations be mandatory for all adjudicators, at all levels of the

current legislative climate, seems unlikely, although not impossible. Modification and promulgation could yield the same result, alleviating aspects of credibility and corroboration factors that are especially ripe for prejudice and conceptual confusion. Clarification could provide guidance for adjudicators examining all claims, not just those of sexual minority applicants.[281] By looking to eliminate the ways in which Real ID disserves the most vulnerable applicants, administrative authorities could move toward better identifying and protecting all genuine refugees.

Although case law implementing Real ID is limited, it reveals the statute's weaknesses that permit adjudicators to employ unjust and flawed analyses. An area of law founded on international norms of human rights cannot fulfill its purpose of *nonrefoulement* if it continues to contain substantive standards that disparately disadvantage particular segments of the refugee population. Therefore, there is serious and important work to be done in preventing and eliminating the bias that permeates credibility and corroboration law. This work should be of key concern to those who care about the integrity of the administrative and judicial process and the stakeholders who work on all sides of the asylum system.

system. Although the United States, like many countries, already has Gender Guidelines, this document has only persuasive authority. Other countries are beginning to develop and implement guidelines for the adjudication of sexual minority asylum claims, and these documents could provide a useful starting point for the U.S. Although a guideline document, like the Gender Guidelines, would be a positive step, it is not enough. Many of the problems described herein are specific to the U.S. system and necessitate regulations that are comprehensive *and* binding. For an example of guidelines for sexual minority asylum claims see SWEDISH MIGRATION BOARD, GUIDELINES FOR INVESTIGATION AND EVALUATION OF ASYLUM CASES IN WHICH PERSECUTION BASED ON GIVEN SEXUAL ORIENTATIONS IS CITED AS A GROUND (2002), http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f8c1af44.

281. For an excellent starting point from which the U.S. government could begin in formulating Guidelines similar to the newly-released Guidance Note published by UNHCR, see U.N. HIGH COMM'R ON REFUGEES, UNHCR GUIDANCE NOTE ON CLAIMS FOR REFUGEE STATUS UNDER THE 1951 CONVENTION RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY (2008), http://www.unhcr.org/refworld/docid/48abd5660.html.