QUEER EVIDENCE: THE PECULIAR EVIDENTIARY BURDEN FACED BY ASYLUM APPLICANTS WITH CASES BASED ON SEXUAL ORIENTATION AND IDENTITY

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I. INTRODUCTION

The notions of religious, racial and social tolerance are central to the ideals of democracy. The United States, in holding itself out as a model of democracy to the world, reinforces these ideals each year by admitting an allocated number of refugees to live in the United States and by permitting an unrestricted number of individuals within the country to apply for asylum if they fear return to their countries of origin.[2] The refugee admission process is regulated primarily from overseas locations that are proximate to theatres of war or conflict, and will not be the focus of this paper.[3] The process of obtaining asylum status, on the other hand, is entirely regulated from within the United States,[4] and frequently requires an applicant's appearance before an

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[2] *See* Immigration and Nationality Act § 207(d)(1), 8 U.S.C.A. § 1157 (West 2005, Westlaw through P.L. 112-74 (excluding P.L. 112-40, 112-41, 112-58, and 112-66)). "Before the start of each fiscal year the President shall report to the Committee on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year." 8 U.S.C.A. § 1157(d)(1) (West 2005).

[3] Press Release, U.S. Dep't of Justice, Asylum Protection in the United States (Apr. 28, 2005) [hereinafter Asylum Protection] (explaining that "[individuals] seeking refugee status apply from outside the United States").

[4] 8 U.S.C.A. § 1158(a)(1) (West 2005) (explaining that "any alien . . . physically present in the United States . . . may apply for asylum."). Aliens outside of the U.S. cannot apply for asylum status, but may apply for refugee status. *See* Asylum Protection, *supra* note 3.

Immigration Judge ("IJ") in Federal Immigration Court.[5] If the IJ denies the applicant's request for a grant of asylum, the applicant can appeal to the Board of Immigration Appeals ("BIA") for review of the IJ's decision.[6] If, as is usually the case, the BIA affirms the IJ's decision – often without issuing an opinion – the applicant can appeal to the U.S. Court of Appeals, which has jurisdiction over the case.[7]

Within this complex administrative and judicial infrastructure, asylum applicants are faced with the daunting evidentiary burden of establishing credibility and proving their underlying claims for relief. There is one subgroup of asylum-seekers, perhaps more than any other, who faces an increased evidentiary burden in asylum claims due to a recent convergence of adverse factors. This paper will examine the cumbersome and, at times, seemingly impossible evidentiary burden faced by the subset of asylum applicant that is comprised of individuals who request asylum relief based on persecution due to sexual orientation or sexual identity.

The premise of this paper is that applicants whose claims are based on sexual orientation or sexual identity suffer this increased burden due to a combination of factors, including the promulgation of the REAL ID Act, the inherent difficulties of proving an asylum case based on "membership to a particular social group" ("MSPG"), and the jurisdictionally vacillating standard of what constitutes "persecution" under the Immigration and Nationality Act ("INA"). The combined effect of these factors on applicants who seek asylum status based on sexual orientation or sexual identity is an insurmountable evidentiary burden that is increasingly resulting in the denial of relief to individuals with very compelling cases.

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[5] *See* 8 C.F.R. § 208.2(b) (2008) ("Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien" who is in removal proceedings, has been issued a Notice to Appear, or has been referred for denial by an asylum officer in affirmative asylum proceedings.").

[6] Press Release, U.S. Dep't of Justice, Asylum Variations in Immigration Court (Nov. 5, 2007) (explaining that in a defensive asylum case, "[a]n Immigration Judge decides the case in the first instance. That decision may then be appealed to the EOIR's Board of Immigration Appeals (BIA)").

[7] Victoria Neilson, *Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV Positive Status*, Nat'l Immigration Justice Ctr. 15 (2006) *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf.

II. History and Background

To better understand the overwhelming evidentiary difficulties faced by asylum applicants claiming relief based on sexual orientation or identity, an overview of the requirements for obtaining asylum status is necessary. Asylum is a form of discretionary relief that the U.S. Attorney General may grant to any alien who meets the definition of a "refugee" under the INA.[8] The INA defines a refugee as any person unable or unwilling to return to her country of origin because of persecution or a well-founded fear of persecution on account of the five grounds of race, religion, nationality, membership in a particular social group, or political opinion.[9] This definition, and the exhaustive list of five protected classes that it enumerates, come directly from the United Nations Protocol Relating to the Status of Refugees.[10] An asylee therefore must meet the INA definition of "refugee" before being afforded asylum status. In this statutory sense, an asylee is a refugee, because under either definition she must prove past persecution or fear of future persecution based on one of the five protected grounds.

The practical significance of having two separate terms – refugee and asylee – is that a refugee is an individual who meets the INA definition and experiences overseas processing of his claim, whereas an asylee is someone present in the United States who applies to remain here.[11] For example, someone who flees from Liberia to the Ivory Coast, and later gains approval to come to the United States due to past persecution in Liberia, is a refugee. The same Liberian individual would be an asylee if, instead of fleeing to the Ivory Coast, she flew to the United States and made her request for relief here upon arrival.

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[8] 8 U.S.C.A § 1158(b)(1)(A) (West 2005) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).").

[9] 8 U.S.C.A. § 1101(a)(42)(A) (West 2005) (defining refugee as "any person who is unable or unwilling to return to [their 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] Protocol Related to the Status of Refugees, art. XXXIII, ¶ 1, Jan. 31, 1967, 19 U.S.T. 6223.

[11] Asylum Protection, *supra* note 3 (explaining that "[t]he major difference between asylum and refugee applicants is that those seeking refugee status apply from outside the United States. Asylum-seekers must be in the United States or applying for admission at a port of entry").

Accordingly, an alien present in the United States who can demonstrate that he meets the INA definition of a refugee is eligible to apply for the status of asylum.

One crucial procedural distinction between the two different statuses that relates significantly to the ultimate discussion of evidence is the forum in which the asylum applicant or refugee applicant must present her claim for relief. Because refugee claims are processed outside of the United States, their claims do not fall within the jurisdiction of the U.S. federal or immigration courts.[12] Whereas refugee cases are most often reviewed by on-the-ground officials who exclusively assess refugee claims, an asylum applicant will likely plead her case in front of a federal IJ, who hears all variety of immigration cases and typically does not have the benefit of personal knowledge of conditions in the applicant's country of origin.[13] Significantly, the asylum applicant who must argue her case in court will also have to face a federal prosecutor as adversary, whereas the refugee interviewee is assessed by an impartial adjudicator in a non-adversarial setting.[14]

This is the context in which the evidentiary burden of asylum applicants with claims based on sexual orientation and identity must be examined – in court, before a federal prosecutor. With these distinctions in mind, this paper will focus on the growing and increasingly insurmountable evidentiary burdens that asylum applicants are faced with when they must make their case to an IJ in court, and specifically, when their claim is based on sexual orientation or sexual identity.

III. Analysis

A. *Why MPSG as Grounds for Asylum is so Hard to Prove*

As a theory of this paper, I have asserted that there are inherent difficulties in proving an asylum case based on "membership to a particular social group" that do not exist to the same extent with the other four grounds of asylum. Of the five protected grounds - race, religion,

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[12] *See id.*, *supra* note 3.

[13] U.S. Citizenship and Immigration Services: Refugee, Asylum, and International Operations Directorate Asylum Division- Affirmative Asylum Procedures Manual 41 (2007) (explaining that not all asylum applicants must make their request for relief in court. An affirmative asylum process exists whereby the alien, if he meets certain statutory requirements can apply for relief affirmatively—before removal proceedings are commenced against him), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPM.pdf.

[14] Asylum Protection, *supra* note 3.

nationality, membership in a particular social group and political opinion - applicants claiming membership in a particular social group, perhaps more so than applicants claiming asylum on the other protected grounds, have a particularly difficult evidentiary burden in terms of providing "primary evidence" for their claims. The U.S. Court of Appeals for the Second Circuit has supported this position, stating, "[o]f the various categories, 'particular social group' is the least well-defined on its face, and the diplomatic and legislative histories shed no light on how it was understood by [the United Nations or] by Congress."[15]

In explaining its interpretation of the asylum ground of "membership to a particular social group," the court has stated that a particular social group refers to a group of persons "who[ ] share a common, immutable characteristic," such as a characteristic that they cannot change or "should not be required to change because it is fundamental to their individual identities or consciences."[16] The courts have recognized homosexuality to constitute membership to a particular social group since 1990, when the decision in *Matter of Toboso-Alfonso* designated it as such.[17] Subsequent to the holding in *Toboso-Alfonso*, the Attorney General even issued a general order designating the case to serve as "precedent in all proceedings involving the same or similar issues."[18]

In 2000, a decision by the U.S. Court of Appeals for the Ninth Circuit made clear that sexual identity, as distinct from sexual orientation, can also constitute membership to a particular social group.[19] In *Hernandez-Montiel v. INS*, the court designated gay Mexican men with female gender identities as belonging to a particular social group.[20] Significantly, the specification of this group served to open the protections of asylum to Mexican men who are singled out for persecution not on the basis of homosexuality alone, but based on their markedly

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[15] Gao v. Gonzales, 440 F.3d 62, 66-67 (2d Cir. 2006) (discussing whether victims of China's "one-child policy" can be "members of a particular social group"), *vacated*, Keisler v. Hong Yin Gao, 552 U.S. 801 (2007).

[16] *In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (considering whether Salvadoran taxi-drivers can be "members of a particular social group").

[17] *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (BIA 1990) (holding, in a precedential decision, that homosexuality constitutes "membership to a particular social group").

[18] Order of the Att'y Gen. 1895-94, (June 19, 1994), *available at* 1994 WL 16515318.

[19] Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that Mexican man was a member of the particular social group of homosexual men with female gender identities).

[20] *Id.* at 1091.

effeminate characteristics, which make them targets for acts of violence. Because an asylum applicant must prove not only inclusion under one of the protected grounds, but also past persecution or a well-founded fear of future persecution based on that ground, this distinction is very significant.[21] Whereas a gay Mexican man with a male sexual identity and a gay Mexican man with a female sexual identity would both be considered to be members of particular and distinct social groups, only the latter might be deemed to have a well-founded fear of future persecution if it is determined that male-identity gay men in Mexico are not targeted for acts of violence. As such, it is possible that the gay man with a female sexual identity would be granted asylum, whereas the gay man with the male sexual identity would not.

With this explanation of what the courts have historically considered to constitute membership to a particular social group, I return to the assertion that membership to a particular group is arguably more difficult to prove than are the other four grounds of asylum. This assertion relies on the idea that evidence of any alleged fact during asylum proceedings can be given in the form of documentation or testimony. I posit that in proving a claim of asylum based on MPSG, an applicant is often forced to rely heavily on testimony and secondary documentation, rather than on more favorable primary documentation, which is more accessible to claims based on the other grounds. This leads to a follow-up assertion, which is that testimonial evidence in immigration court, more so than documentary evidence, is likely to result in an adverse credibility determination by the Immigration Judge and thereby devastate the applicant's chances of reaching a successful outcome. An explanation of this string of assertions follows.

Although country conditions often make it difficult for asylum applicants to obtain it, civil documentation is likely to be available for individuals whose claims of persecution are based on national origin, race or religion. National identity cards, birth certificates, baptismal records and other civilly-issued documents exist to support claims based on those grounds.[22] Admittedly, many of these types of documents are unreliable or altogether fabricated, which requires Immigration Judges to screen heavily for document fraud. As such, it is not contended that primary documentation ensures success in cases where

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[21] *Id.*

[22] *See generally* Victoria Neilson et al., Heartland Alliance's Midwest Immigrant & Human Rights Ctr., Immigration Equal. Asylum Manual § 11.3 (2006), *available at* http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/.

it is available. However, from the perspective of the applicant, it is far better to have primary documentation available, even with the knowledge that it will be highly scrutinized, than it is to submit proof of the protected ground exclusively by way of testimonial evidence. Similarly, an asylum claim based on political opinion is likely to be accompanied by documentation of membership to a political party, or participation in recorded political events, proof of which exists in abundant media sources.

The protected ground of "membership to a particular social group," in many cases, generates no such paper trail. Young women who are likely to be subject to female genital mutilation have been deemed members of a particular social group for asylum purposes, yet these young women are rarely issued membership cards identifying them as such.[23] Similarly, while homosexuality has been acknowledged since 1990 to constitute a particular social group, gay and lesbian individuals are rarely issued homosexual ID cards from their countries of origin, instead proclaiming their homosexual orientations in a documented national registry.[24] In fact, many homosexual individuals from gay-intolerant countries will have spent the better part of their lives trying to hide any evidence of their unacceptable sexual orientation, resulting in an even more diminished evidentiary capacity. Rather than being proven through civil documentation, their status as group members most likely will be established through circumstantial evidence, such as country condition reports, and largely through individual testimony.[25]

Applicants who must provide proof of the claimed protected ground primarily through testimony are much more susceptible to credibility attacks than those who can furnish a stack of documents in evidence of their status. Because IJs will frequently make "adverse credibility" findings when the slightest inconsistency is present in an applicant's testimony, it is to an individual's distinct advantage to support

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[23] *Gonzales*, *supra* note 15, at 66-67 (quoting *In re* Fauziya Kasinga, 21 I. & N. Dec. 357, 358 (BIA 1996)) (announcing that "young women of the Tchamba Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice," are members of a particular social group).

[24] *Toboso-Alfonso*, *supra* note 17, at 822-23 (holding, in a precedential decision, that homosexuality constitutes "membership to a particular social group").

[25] Neilson, *supra* note 22, at § 11.3. "[M]ost LGBT applicants cannot prove their membership in a particular group as clearly as other asylum applicants can prove, for example, their affiliation with a political party or their ethnic group."

his claim through sources other than narrative, in-court testimony.[26] The mechanics of the adverse credibility determination will later be discussed in detail, but suffice it to say as a preliminary matter that in-court testimony, in many cases, turns out to be a death sentence of an applicant's credibility.

As such, while the other grounds for asylum can be proven in many cases through documentation, proof of membership to the particular social group of homosexuals or other gender-related social category is decidedly subjective and non-civilly documented in comparison. Yet, the fact remains that in order to obtain a grant of asylum from the Attorney General, an individual must meet the INA definition of a refugee;[27] that means that the individual applying for asylum based on membership to a particular social group must provide evidence of group membership.[28] For individuals basing their claim on race or natural origin, a birth certificate might meet this evidentiary burden. For individuals basing their claim on sexual orientation; however, this means that they must submit evidence that they are gay.

Although the Code of Federal Regulations unequivocally articulates that an asylum applicant may satisfy the burden of proof by testimony alone – i.e., credible testimony that an applicant is gay proves MPSG – I am unconvinced that testimony alone has *ever* resulted in a favorable adjudication for a sexual orientation or identity claim.[29] The following review of a selected case where an asylum applicant failed to prove her gayness should prove enlightening on the subject of what IJs consider to constitute objective evidence of homosexuality.

In *Mockeviciene v. Attorney General*, an unpublished opinion from the Eleventh Circuit Court of Appeals, a Lithuanian woman's denial of asylum relief by the IJ and BIA was affirmed based on the IJ's finding of lack of credibility because "he did not believe she was actually a

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[26] Austin T. Fragomen, Jr. et al., Immigration Legislation Handbook 244-45 (2012). Adverse credibility determinations remain one of the most frequently cited bases for denial of asylum claims.

[27] 8 U.S.C.A. § 1101(a)(42)(A) (West 2005) (defining refugee as "any person . . . who is unable or unwilling to return to [their 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").

[28] 8 U.S.C.A § 1158(b)(1)(B) (West 2005) (proscribing that the burden of proof is on the applicant for asylum to establish that he meets the definition of "refugee" under the INA, which requires the alien's membership in one of the five protected classes).

[29] 8 C.F.R. § 208.13(a) (2012). The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

lesbian."[30] Mockeviciene testified that in 1994, she revealed to her husband that she was a lesbian and was subsequently beaten and raped by him while his friends held her down.[31] Proof of her claimed past persecution was almost exclusively through testimony.[32] In his denial of Mockeviciene's request for relief, the IJ articulated his reasons for doubting her MPSG as a lesbian because, "although [Mockeviciene] had been in the United States for four years she had not yet had a lesbian partner, so that she was '[a]t best . . . a non-practicing lesbian.'"[33] He also reasoned that Mockeviciene had "no documents to establish that she [was] a lesbian," and that she had not joined any groups during her four years in the United States that engaged in "lesbian activities."[34] Based on his statements concerning Mockeviciene's lack of documentary proof of her status as a lesbian, it appears that the IJ might have deemed her to be a bona fide lesbian if she had only taken greater pains to register as such in the country of persecution. The IJ failed to address the fact that, as yet, there is no Registry of Lithuanian Lesbians, and did not give a list of examples of acceptable "lesbian activities" for consideration by the court. On appeal, the Eleventh Circuit expressed skepticism regarding the IJ's reasoning, but held that the evidence did not compel reversal of the IJ's decision.[35]

The stated premise of this section is that MPSG, as a ground of asylum, is inherently more difficult to prove than are the grounds of race, religion, national origin or political opinion. The decision in *Mockeviciene* illustrates how an IJ's clear preference for documentary proof of homosexuality over testimony conflicts with the stated principle in the regulations that an applicant's testimony alone may satisfy his burden of proof in an asylum claim.[36] In the next section we will explore the ways in which the REAL ID Act has impacted the decision in *Mockeviciene* and in other similar cases. As I will demonstrate, the disfavored status of testimony as proof of MPSG has devastating implications on appeal as well.

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[30] Mockeviciene v. U.S. Att'y Gen., 237 F.App'x 569, 572 (11th Cir. 2007).

[31] *Id.* at 570.

[32] *Id.* at 572.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 574.

[36] 8 C.F.R. § 208.13(a) (2012) (in a claim for asylum "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration").

B. *Enter Adverse Credibility and the REAL ID Act*

"*[A]n alien's credibility, by itself, may satisfy his burden, or doom his claim.*"[37]

The terrorist attacks of September 11, 2001 acted as a catalyst for the proliferation of federal legislation and bureaucratic restructuring of federal entities that resulted in, among other things, promulgation of the Patriot Act[38] and consolidation of a number of federal agencies into the Department of Homeland Security.[39] As yet, this wave of legislative energy shows no sign of subsiding. A significant ripple in the legislative tsunami was the enactment, in 2005, of the REAL ID Act, which was signed into law with the stated purpose of "improv[ing] the integrity and security of state-issued driver's licenses and identification cards, which in turn will help fight terrorism and reduce fraud."[40] While the White House promoted the law as crucial in the ongoing fight against terrorism, opponents of the Act described it as containing "sweeping language relating to border security, asylum, drivers' licenses, and judicial review of immigration decisions, [that] capitalize[s] on anti-immigrant sentiment and fear."[41]

Public focus on the REAL ID Act has primarily centered on its imposition of federal requirements on the states in issuing state identification cards, which is widely unpopular and claimed by some to be unconstitutional as a violation of the Tenth Amendment.[42] Immigrant advocates, however, have identified a spectrum of adverse consequences of the REAL ID Act that impact refugees, asylum seekers, and other immigrants. I will examine three areas of asylum law that have been modified by provisions of the REAL ID Act to the absolute detri-

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[37] Grijalva v. Gonzales, 212 F.App'x 541 (6th Cir. 2007) (quoting Dia v. Ashcroft, 353 F.3d 228, 247 (3d Cir. 2003)).

[38] H.R. Res. 3162, 107th Cong. (2001) (enacted).

[39] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[40] Press Release, Dep't of Homeland Sec., DHS Issues Proposal for States to Enhance Drivers' Licenses, (March 1, 2007) (explaining the reasons for enacting REAL ID), *available at* http://lawprofessors.typepad.com/law_librarian_blog/2007/03/dhs_issues_prop.html and http://epic.org/privacy/id_cards/.

[41] *Anti-Immigrant "REAL ID" Act Becomes Law,* 15 Civil Rights Monitor 1 (2005) (explaining the potential impact of REAL ID on asylum seekers in the United States).

[42] Anthony D. Romero, *Repeal Real ID*, USA Today (Mar. 5, 2007, 10:17 PM), http://usatoday30.usatoday.com/news/opinion/2007-03-05-opposing-view_N.htm. "That democratic scrutiny would have shown that REAL ID is an unfunded mandate that violates the Constitution's Tenth Amendment on state powers, destroys states' dual sovereignty, and consolidates every American's private information, leaving us all far more vulnerable to identity thieves."

ment of asylum applicants. Further, I will contend that these changes have had even more devastating effects on sexual orientation - and sexual identity-based asylum claims, than on asylum claims based on other protected grounds. Although the Act has impacted numerous aspects of asylum law, I will focus on the specific changes that it has effectuated with respect to the judicial finding of adverse credibility.

For all asylum applicants, the probability of success on appeal will largely hinge on a particular finding of fact by the IJ – the applicant's credibility.[43] Accordingly, in cases where the IJ makes a finding of "adverse credibility," the applicant's chances of success on appeal will be significantly diminished.[44] The finder of fact in any court proceeding must assess the credibility of witnesses who testify in court in order to determine the probative value of their testimony.[45] Because the fact finder in Immigration Court is always the Immigration Judge,[46] he or she will be the originator of the determination of credibility or non-credibility – adverse credibility – for asylum applicants in defensive asylum proceedings. This determination is of crucial importance: once an IJ has made a finding of adverse credibility, the asylum applicant's burden on appeal becomes cumbersome to the point of near impossibility.[47]

Adverse credibility has always been dangerous territory for asylum seekers appearing in Immigration Court. For applicants whose claims are based on sexual orientation as MPSG, adverse credibility serves as a baited trap, waiting for even the slightest faltering of the applicant to trigger her demise. Because IJ adverse credibility determinations are so frequently made based on inconsistencies in testimony, it logically follows that the more testimony that is offered by the applicant, the more likely he is to contradict himself – either through inconsistencies in a timeline, the minute narrative details given in evidence of persecution

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[43] FRAGOMEN, JR. ET AL., *supra* note 26, § 3:6, at 244-45 (explaining that adverse credibility determinations remain one of the most frequently cited bases for denial of asylum claims).

[44] 8 U.S.C.A § 1252(b)(4)(B) (West 2005). "[T]he administrative findings of fact are conclusive, unless any reasonable adjudicator would be compelled to conclude to the contrary."

[45] 8 U.S.C.A. § 1158(b)(1)(B)(ii)-(iii) (West 2005).

[46] FRAGOMEN, JR. ET AL., *supra* note 26, § 3:6, at 244-45.

[47] 8 U.S.C.A § 1252(b)(4)(B) (West 2005) (stating on appeal the applicant must prove that the evidence compels reversal of the IJ's adverse credibility determination, which is a substantial evidence standard).

or otherwise.[48] The REAL ID Act amended the INA to make it possible to find adverse credibility based on such minor inconsistencies.[49]

Prior to the enactment of the REAL ID Act in May 2005, it was in the discretion of the IJ to make a finding of adverse credibility where "inconsistent statements, contradictory evidence, or inherently improbable testimony in view of the background evidence on country conditions"[50] went "to the heart of the alien's claims."[51] Additionally, the finding of adverse credibility had to be supported by "specific, cogent reasons" that "bear a legitimate nexus to the finding."[52] Prior to the enactment of REAL ID, "[a]dverse credibility findings based on 'speculation or conjecture rather than evidence in the record [were] reversible.'"[53] In practice this meant that as long as an applicant's inconsistent testimony was peripheral to the central, core elements of his claim, such inconsistency would not result in a finding that the applicant was not credible.

When the REAL ID Act was enacted, however, a number of significant changes were made to the judicial process of finding adverse credibility. Significantly, a new standard was promulgated governing credibility determinations.[54] Subsequent to May 11, 2005, an Immigration Judge can make an adverse credibility determination "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of an applicant's claims."[55] While one might conclude that it is reasonable to expect asylum applicants to be consistent even in the minute details of their claim, practitioners know that even the most credible, bona fide accounts of persecution can contain inconsistencies that do not undermine an applicant's credibility.[56] Numerous asy-

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[48] BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 243 (2004) (explaining negative credibility findings are often based "upon minor inconsistencies and perceived discrepancies," especially where an asylum applicant has given an account of persecution in his application that is later expounded upon in court, in greater detail).

[49] 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2005) (explaining that *any* inaccuracy, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim" is sufficient grounds for an adjudicator to make a finding of adverse credibility).

[50] Duarte v. Att'y Gen., 209 F.App'x 153, 158 (3d Cir. 2006) (quoting Dia v. Ashcroft, 353 F.3d 228, 249 (3d Cir. 2003)).

[51] *Id.* (quoting Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002)).

[52] Gao v. Ashcroft, 299 F.3d 266, 276 (3d Cir. 2002).

[53] *Duarte*, 209 F.App'x at 158 (quoting *Ashcroft*, 229 F.3d at 272).

[54] *Id.* at 8 n.6; 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2005).

[55] 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2005).

[56] HING, *supra* note 48, at 242-44.

lum applicants suffer from psychological conditions such as post-traumatic stress disorder, which can significantly impair an applicant's recollection of a precise timeline. Similarly, in the case of an asylum applicant who is illiterate, written dates may have no significance to that individual in terms of the chronology of his or her account.

One case that illustrates this new standard in practice is *Grijalva v. Gonzales*, an unpublished case from the Sixth Circuit.[57] Grijalva's claim for asylum was based on his membership to the particular social group of obviously effeminate gay men in Guatemala.[58] He testified that the multiple and brutal instances of persecution that he endured prior to coming to the United States were on account of his notably effeminate appearance, which made him a target for violence by the police.[59] Among the incidents that Grijalva described were routine beatings by the police, which occurred on an almost weekly basis for over two years, and a three-day detention and gang-rape by thirty or more Guatemalan soldiers.[60] The IJ found that Grijalva lacked credibility primarily due to fact that he inconsistently testified that the gang-rape occurred in 1994, whereas his written asylum application indicated that the rape happened in 1990.[61] The psychiatrist who diagnosed Grijalva with post-traumatic stress disorder also testified that Grijalva had listed 1990 as the date of the rape, and presented evidence that it is a cultural norm in Guatemala to use life events rather than calendar dates to explain when an event has occurred.[62] Despite the fact that "the IJ was convinced that Grijalva [was] an effeminate homosexual and observed that homosexuality had been recognized as a 'particular social group' . . . he found that Grijalva lacked credibility."[63] The IJ's adverse credibility determination was based primarily on a single discrepancy in the timeline of the applicant's narrative, even though he acknowledged Grijalva's MPSG status.[64] Under the old standard for adverse credibility, the IJ would have had to support this finding with an explanation of how the single, temporal discrepancy went "to the heart of the [Grijalva]'s claims."[65] Subsequent to enactment of REAL ID, the

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[57] *Grijalva*, *supra* note 37.
[58] *Id.* at 543.
[59] *Id.*
[60] *Id.* at 544-45.
[61] *Id.* at 545.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 546.
[65] *Duarte*, *supra* note 50, at 158.

mere existence of a discrepancy appears to be enough to facilitate judicial findings of adverse credibility.

Due to the new and slackened standard for finding adverse credibility, an adjudicator need not consider the literacy, psychological impairment, or culture of an applicant in order to find that she lacks credibility. According to the new language of REAL ID, the finding may be based on a single inconsistency, often insignificant to the overall cohesiveness of an applicant's account.[66] As such, REAL ID has made it easier for IJs to conclude that an asylum applicant is not credible, resulting in failure of that applicant's claim.

Furthermore, REAL ID provides that in removal proceedings, "a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness . . . ."[67] The specific vocabulary of this section, namely "demeanor," has provided a creative outlet for IJ bias in asylum claims based on sexual orientation or identity that is nothing short of remarkable. The following cases, all decided subsequent to implementation of the REAL ID Act in 2005, illustrate how an applicant's "demeanor," especially in the case of a claim based on sexual orientation or identity, may be his downfall under the new law.

In the *Mockeviciene* case, discussed previously, the IJ made a finding of adverse credibility because "he did not believe [Mockeviciene] was actually a lesbian."[68] Additionally, no explanation is given by the IJ as to why the applicant's demeanor compromised her credibility, or even what was meant by *demeanor*. The BIA, however, neither questioned this finding nor based his adverse credibility determination on

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[66] 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2005). "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."

[67] *Id.*

[68] *Mockeviciene*, *supra* note 30, at 572.

Mockeviciene's demeanor during testimony.[69] Neither did the Eleventh Circuit on appeal.[70] One can infer, based on the IJ's criticism of Mockeviciene's four years of celibacy as contradicting her claim that she was a lesbian, that the IJ simply did not believe that Mockeviciene looked like a lesbian. Whether this is actually the case is impossible to tell because the buzzword, "demeanor," seems to be all that is necessary to invoke the new and slackened adverse credibility standard permissible under the REAL ID Act.

The case of *Shahinaj v. Gonzales* is a sobering example of how the REAL ID's incorporation of the word "demeanor" into the credibility assessment can lead to clearly biased adverse credibility findings.[71] Shahinaj's claim for asylum stated that he had suffered past persecution in Albania due to his homosexual orientation, and that he feared future persecution if he was forced to return to Albania.[72] The IJ made a finding of adverse credibility because "neither [Shahinaj's] dress, nor his mannerisms, nor his style of speech [gave] any indication that he [was] a homosexual."[73] While it would seem that this claimed justification by the IJ for his finding of adverse credibility would be clearly deemed as illustrative of prejudicial bias on appeal, the BIA adopted the IJ's opinion and affirmed his ruling.[74] The Eighth Circuit ultimately remanded the case, on the grounds that the IJ's adverse credibility determination was tainted by bias.[75] Even in consideration of the Eighth Circuit's recognition of the erroneous finding, however, it is clear that the specific vocabulary implemented by the REAL ID Act – demeanor, candor, and responsiveness – opens the door to IJ subjectivity in the crucial finding of credibility.

Since the holding in *Shahinaj* in 2007, "demeanor" as a basis for determining applicant credibility has returned to haunt gay asylum seekers on numerous occasions. In all of the examples that follow, the adverse credibility determinations of IJs underlying what I will term "demeanor-based denials" have been exposed as bias once they reached the federal appellate level. Despite the eventual redress afforded these erroneous IJ decisions, the mere fact that IJs continue to deny cases on this basis indicates that "demeanor" as a term in the

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[69] *Id.* at 572, 574.
[70] *See id.*
[71] Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007).
[72] *Id.* at 1027-28.
[73] *Id.* at 1028.
[74] *Id.*
[75] *Id.* at 1029.

governing federal statute lends itself too easily to the emergence of bias in these cases.

A Tenth Circuit decision from 2009 serves as an apt example of this tendency. In *Razkane v. Holder*, the applicant was a closeted gay man from Morocco who had gone to great lengths to conceal his sexual orientation from family and friends out of concern for his physical safety, should his homosexuality be discovered.[76] Razkane's testimony revealed that despite his closeted status, he had been assaulted and threatened with death by a neighbor who was suspicious that he was gay.[77] After considering the evidence before him, the IJ deemed the applicant to lack credibility, finding that "[Razkane's] appearance does not have anything about it that would designate [him] as being gay. [He] does not dress in an effeminate manner or affect any effeminate mannerisms."[78] In the cultural context of a majority-Muslim country that criminalizes homosexuality, the IJ's finding leaves one to wonder what type of "gay appearance" a closeted Moroccan homosexual should have conveyed in order to have been found credible. The Tenth Circuit reversed the BIA's decision and remanded;[79] however, the phenomenon of "demeanor-based denials," persists.

In an even more recent decision from 2010, the Eleventh Circuit reviewed the BIA's denial of the claim for relief of a gay Serbian asylum applicant named Mladen Todorovic.[80] The IJ made a finding of adverse credibility and the BIA affirmed based on the IJ's "demeanor" determination that the asylum applicant "did not appear to be overtly gay."[81] On appeal, the Eleventh Circuit held that the IJ's adverse credibility finding based was not truly based on demeanor, pursuant to section 1158(b)(1)(B)(iii) of the United States Code, but rather it was based on "wholly speculative assumptions" untethered from the evidence of record and instead "driven by stereotypes about how a homosexual is supposed to look."[82] Even though the appellate review ultimately resulted in reversal and remand, the persistent recurrence of IJ adverse credibility findings based on "non-gay appearance" evidences the problematic inclusion of the term "demeanor" in the controlling federal statute.

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[76] Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009).
[77] *Id.* at 1285.
[78] *Id.* at 1286.
[79] *Id.* at 1289.
[80] Todorovic v. U.S. Att'y Gen., 621 F.3d 1318 (11th Cir. 2010).
[81] *Id.* at 1326.
[82] *Id.*

The *Grijalva, Shahinaj, Mockviciene, Razkane* and *Todorovic* cases are indicative of the outcome-determinative impact that the REAL ID amendments to the INA have had in regards to the trial court finding of credibility or adverse credibility, which we have seen is crucial to the success of an asylum applicant's claim. While it is clear that the amended standard puts all asylum applicants at greater risk of being deemed not credible, the risk to applicants with sexual orientation and identity claims is arguably even greater. By considering the adverse implications of REAL ID in conjunction with the previously examined evidentiary preference for documentation over testimony, the chances of success for asylum applicants with sexual orientation and identity claims begin to look dire.

Perhaps more so than any other subgroup of asylum-seekers, MPSG claims of asylum based on sexual orientation or identity suffer from groundless IJ findings of adverse credibility that reek with prejudicial bias. I submit that for asylum applicants whose claim is based on sexual orientation or sexual identity, the likeliness of receiving an initial determination of "adverse credibility" by the IJ is even higher than with other groups, due to the IJ's ability – courtesy of REAL ID – to justify the finding with subjective criteria, such as the applicant's "demeanor" and "candor," which are criteria that easily lend themselves to the expression of bias.[83]

C. *The Problem With Persecution*

The final assertion in support of my theory of evidentiary impossibility is that, with respect to proof of past persecution or fear of future persecution, asylum applicants with sexual identity and orientation claims face an impossibly vague standard of what actually constitutes persecution. An examination of this subject will reveal the unsettling approach used by some IJs to draw distinctions between homosexuality and homosexual acts, as well as the widely-varying perceptions among IJs of what types of treatment are deemed inherently persecutory.

In order to address this issue, I must return again to the definition of "refugee" under the INA. That definition requires that, in addition to establishing one of the five grounds of eligibility – MPSG, race, religion, national origin or political opinion – the applicant must prove

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[83] 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2005) (stating that in removal proceedings, "a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness").

that he or she is unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution."[84] Significantly however, the Act does not define "persecution."[85]

The noted absence of this crucial term has given rise to some interesting judicial interpretations. A number of case-derived definitions of persecution are frequently cited by the courts.[86] One such definition, adopted by the Ninth Circuit, is that persecution is "the infliction of suffering or harm upon those who differ in a way regarded as offensive," and that this is necessarily an objective determination.[87] The Eighth Circuit has held that, "[g]enerally speaking, '[p]ersecution is the infliction or threat of death, torture, or injury to one's person or freedom, on account of a protected characteristic.'"[88] The Third Circuit has adopted the use of the definition of persecution as "extreme conduct," such as "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom."[89]

These definitions revolve around a central theme with what seems at least to be apparent elasticity. One would imagine that if persecution can be proven on the basis of economic restriction, as stated in the Third Circuit definition, that persecution, generally, espouses a fairly flexible range of conduct towards the victim. This is not the case in many sexual orientation-based claims, however. This lack of a statutory or otherwise unilaterally adopted definition of persecution presents one significant problem to asylum applicants persecuted on the basis of sexual orientation or identity.

A second problem that plagues these applicants concerns the persecution requirement. The INA definition of a refugee requires that the persecution take place by the government of the alien's country of

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[84] 8 U.S.C.A. § 1101(a)(42)(A) (West 2005).

[85] Faddoul v. I.N.S., 37 F.3d 185, 188 (5th Cir. 1994) (explaining that "[w]hile the INA does not provide a precise definition of persecution, we have construed the term as requiring 'a showing by the alien that "harm or suffering will be inflicted upon [her] in order to punish [her] for possessing a belief or characteristic a persecutor sought to overcome"'").

[86] *See, e.g.*, Kimumwe v. Gonzales, 431 F.3d 319, 321 (8th Cir. 2005); Pitcherskaia v. INS, 118 F.3d 641, 647 (9th Cir. 1997); Fatin v. INS, 12 F.3d 1233, 1240 (3rd Cir. 1993).

[87] *Pitcherskaia*, *supra* note 86, at 647 (citing Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997)) (defining persecution as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive").

[88] *Kimumwe*, *supra* note 86, at 321 (quoting Salkeld v. Gonzales, 420 F.3d 804, 808-09 (8th Cir 2005)).

[89] *Fatin*, *supra* note 86, at 1240.

origin, or by a group that the government is unable or unwilling to control.[90] In the case of sexual orientation or identity-based asylum cases, this requirement has become a looming specter of doom, even in compelling and credible cases. The reason for this is that, in society, the courts have found an easy culprit. Persecution, if attributed to society generally, or deemed to be "private mistreatment" at the hands of family members or other citizens, is usually insufficient grounds to grant asylum relief.[91] To warrant a grant of asylum, the persecution must be perpetrated by the government, or by a group that the government is "unable or unwilling to control."[92]

Two important considerations with respect to the element of persecution therefore are: (1) what constitutes persecution; and, (2) who are the persecutors? Both of these aspects of the persecution requirement are particularly treacherous to individuals with sexual orientation or identity-based claims. When added to the already numerous evidentiary obstacles explored thus far, these considerations further complicate an already oppressive burden on the applicant.

To get an idea of what the court has historically deemed to constitute persecution – or, perhaps more accurately, what the court has deemed *not* to be persecution – I return to the *Mockeviciene* case previously discussed in the context of proving MPSG and of the adverse effects of the REAL ID Act. In that case, the IJ, in addition to finding that Mockeviciene was not credibly a lesbian, found that even if she did prove MPSG, she failed to establish past persecution or fear of future persecution.[93] Mockeviciene's persecution claim was based on multiple events including: the publicly-assisted rape and beating by her husband upon disclosing that she was a lesbian, an unlawful search by the police of her home for "homosexual literature" after she reported the abuse by her husband, sexual molestation and threats of severe injury by lo-

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[90] Suprun v. Gonzales, 442 F.3d 1078, 1080 (8th Cir. 2006) (explaining that persecution may be "a harm to be inflicted either by the government of [a country] or by persons or an organization that the government was unable or unwilling to control").

[91] *Neilson*, *supra* note 7, at § 3.3. "Generally, beatings by other citizens will not constitute persecution if there is no showing that there was government involvement or that the government refused to assist in prosecuting the abusers or protecting the victim." "Violence or sexual assault at the hands of family members generally will not be sufficient unless the applicant had approached police regarding the problem and the police refused to assist the applicant or the applicant can clearly demonstrate through compelling documentary evidence that seeking government protection would have been futile or dangerous."

[92] In re *Acosta*, *supra* note 16, at 222.

[93] *Mockeviciene*, *supra* note 30, at 572.

cal police three years later, termination of employment after the police told her employer that she was a lesbian, unlawful eviction by the police on account of homosexuality followed by a two-day unlawful detention, and additional beatings and threats by the police subsequent to a police set-up that occurred when she responded to a police-fabricated flyer asking her to join a non-existent gay community.[94] The IJ found that these events "did not constitute a threat to her life or freedom," and that "the incidents perpetrated by one police officer were insufficient to establish that . . . the persecution was caused by the government."[95] The claimed persecution was therefore discounted because it was perpetrated by only a single police officer. It is difficult to understand the IJ's rationalization that a single police officer does not, for statutory purposes, satisfy the requirement that the persecution be carried out by the government or a group that the government is unable to control. Despite the fact that there is no statutory requirement that persecution be carried out by a particular number of government actors – or uncontrolled non-government actors – judges in immigration courts have often relied upon the same conclusion drawn by the IJ in *Mockeviciene*.[96] The IJ ultimately held that the events described by Mockeviciene amounted to, "at best . . . discrimination."[97] This distinction between persecution and mere discrimination is one frequently drawn by immigration courts in denying asylum relief.[98]

Another case where the IJ found, and the BIA affirmed, that an asylum applicant's claim didn't rise to the level of persecution is *Nabuwala v. Gonzales*.[99] Olivia Nabuwala realized that she was a lesbian while in high school.[100] Upon sharing this with her family in 1994, she was beaten and urged to marry a man.[101] She later attended university and joined a gay rights group.[102] During a meeting of that group, a mob that outnumbered the group members attacked her and others,

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[94] *Id.*

[95] *Id.*

[96] *See* Nabuwala v. Gonzales, 481 F.3d 115, 117 (8th Cir. 2007).

[97] *Mockeviciene, supra* note 30, at 572.

[98] *See, e.g.*, Ahmed v. Ashcroft, 341 F.3d 214, 217 (3rd Cir. 2003) (holding that discrimination alone does not generally rise to the level of persecution).

[99] Nabuwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (ruling that family arranged rape of lesbian daughter to make her "become" heterosexual doesn't evidence past persecution, but indicates "private family mistreatment").

[100] *Id.* at 1116.

[101] *Id.*

[102] *Id.*

resulting in Olivia's hospitalization.[103] Then, in 2001, her family arranged for her to be forcibly raped by a stranger in the hopes of making her heterosexual, and finally disowned her and expelled her from the family's clan.[104] The IJ found that the events described did not rise to the level of persecution, reasoning instead that the family-arranged rape and the public beating were isolated incidents, and that the rape, in any event constituted "private family mistreatment."[105] The Eighth Circuit ultimately remanded this case because the BIA erroneously engaged in fact-finding on the issue of government sponsorship of Nabuwala's abuses, but left undisturbed the IJ's findings and BIA's affirmance that the abuse didn't constitute persecution.[106] In sum, rape, family-sponsored physical abuse, and mob-assisted public beating and hospitalization, do not rise to the level of persecution.

One final example of the frequently invoked "persecution versus discrimination" distinction is evident in the case of *Paredes v. U.S. Attorney General*.[107] In this case, Edgar Paredes was denied asylum relief by the IJ and subsequently the BIA, based on his contention that his membership in the particular social group of gay Venezuelan men with HIV gave him a well-founded fear of persecution if he were to return to Venezuela.[108] Evidence was presented that Venezuelan police habitually conduct arbitrary arrests of gay men, and that there is a "culture of discrimination towards homosexuals" in Venezuela.[109] Additionally, Paredes alleged that HIV-infected gay men were specifically denied medical care in Venezuela, and were also denied the possibility of employment by the frequently implemented although unlawful practice of private employers requiring blood tests prior to hiring job applicants.[110] On appeal, the Eleventh Circuit remarked that, "[a]lthough such discrimination is reprehensible, it does not rise to the level of persecution that would compel reversal of the IJ's decision."[111] The court further explained that, "while this system of healthcare is regrettable and evidences discrimination towards homosexual men, it does not rise to the level of persecution necessary for a grant of asylum,"

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[103] *Id.* at 1116-17.
[104] *Id.* at 1117.
[105] *Id.* at 1117-18.
[106] *Id.* at 1119.
[107] *Paredes v. U.S. Att'y Gen.*, 219 F.App'x 879 (11th Cir. 2007) (per curiam).
[108] *Id.* at 880.
[109] *Id.* at 887.
[110] *Id.* at 882-83, 887-88.
[111] *Id.* at 887.

and that "Venezuelan employers' practice of requiring blood testing prior to employment is discriminatory, but not persecution."[112] By looking at these acknowledged instances of discrimination in the aggregate, it is fairly evident that upon return to Venezuela, Paredes would encounter a culture of discrimination, the eventuality of arbitrary arrest and detention by police, no access to medical treatment for his terminal disease, and no opportunity for employment. Yet the court upheld the IJ's finding that this amounted to mere discrimination.[113]

These three cases: *Mockeviciene*, *Nabuwala* and *Paredes*, aptly illustrate both of the previously mentioned dilemmas associated with persecution in sexual orientation and identity asylum claims. First, IJs consistently deem that violent attacks and acts towards an applicant are discriminatory rather than persecutory. Second, they attribute these discriminatory or persecutory acts to private instances of mistreatment rather than being the result of action by the government or a group the government is unable or unwilling to control.

In the unlikely event that an asylum applicant is able to prove both MPSG and past persecution, his claim can still fail if the IJ determines that the persecution was not "on account" of the applicant's membership to a particular social group.[114] This terrifying logic has appeared in a number of cases;[115] *Kimumwe v. Gonzales* is one such example.[116] In this case, a Zimbabwean man's request for asylum was based on past persecution as a result of his homosexual orientation.[117] Kimumwe's account of persecution included his expulsion from school at twelve years of age for engaging in sexual conduct with another boy, as well as a two-month detention by police without charge for having

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[112] *Id.* at 887-88.

[113] *Id.* at 887.

[114] 8 U.S.C.A. § 1101(a)(42)(A) (West 2005) (requiring the applicant to prove MPSG or one of the other protected grounds in order to be considered a "refugee" under the INA's definition).

[115] *See, e.g.*, Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008); *Kimumwe*, *supra* note 86; Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005). *See also* Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009) (holding that petitioner's past persecutions were motivated by money and personal animosity, rather than petitioner's religious affiliation); Shaikh v. Holder, 588 F.3d 861, 864 (5th Cir. 2009) (holding that petitioner was not persecuted on account of a protected ground, religion, but rather persecution was based on economic interests).

[116] *Kimumwe*, *supra* note 86.

[117] *Id.* at 320.

sex with another man.[118] He also described being chased and verbally harassed by local authorities, and being beaten, shocked, pummeled with stones, and spat upon by other villagers.[119] The IJ denied his claim, reasoning that "the actions of the Zimbabwean authorities in these instances were not based on Kimumwe's sexual orientation, but rather on Kimumwe's involvement in prohibited sexual conduct."[120] The IJ explained that the expulsion from school was attributable to the fact that Kimumwe had violated school policy by engaging in sexual conduct, rather than to the fact that he was homosexual.[121]

This assessment implies that homosexuality and homosexual conduct are so separate and distinct that persecution on account of homosexual conduct is inherently different from persecution on account of homosexuality. This type of reasoning excuses persecution at the hands of a government as long as the persecutory country has antisodomy laws on the books. The notion that criminalization of homosexual acts does not violate a homosexual person's rights is eerily reminiscent of pre-*Lawrence* decisions in the United States and is difficult to reconcile with the present state of the law in this country. On appeal, the BIA affirmed the IJ's holding and the Eighth Circuit subsequently denied Kimumwe's petition for review.[122]

This case impeccably ties in most of the other evidentiary hardships discussed thus far that affect asylum applicants with claims based on sexual orientation or identity. Notably, the IJ stated, "Kimumwe had presented no objective evidence to confirm his homosexuality."[123] This assertion indicates that the IJ gave very little weight to Kimumwe's sworn testimony regarding his sexual orientation, or to the sworn affidavit provided by the director of the orphanage where Kimumwe grew up, confirming his homosexuality. The IJ also claimed that the beatings and other abuses sustained by local authorities "[do] not rise to the level of persecution," and that the abuses by villagers are "[a]ctions by private parties" not amounting to persecution.[124]

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[118] *Id.* at 320-21.
[119] *Id.* at 322.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 322-23.
[123] *Id.* at 321.
[124] *Id.* at 322-23.

Judge Heaney of the Eighth Circuit authored a dissent that provides a starkly humanitarian contrast to the majority decision.[125] In it, Judge Heaney noted that the president of Zimbabwe was notoriously homophobic and had publicly declared that homosexuals are "worse than dogs and pigs," and that Zimbabwe would do "everything in its power" to combat homosexuality.[126]

Other than the presence of a well-authored dissent, this case aptly illustrates the full panoply of evidentiary hurdles that asylum seekers face when their claims for relief are based on sexual orientation or identity. The IJ showed a clear preference for documentary evidence over testimonial evidence; he dismissed abuses sustained by the petitioner as mere discrimination; and he attributed actual persecution as being on account of the applicant's illegal homosexual conduct rather than on his status as a homosexual. From this one decision, the looming evidentiary burden facing all similarly situated asylum applicants is clear. The consistently confounding articulations of Immigration Judges as to what constitutes "persecution," remains a major obstacle to fair adjudication in asylum cases based on sexual orientation and identity.

IX. Conclusion

It seems a great irony that for many asylum applicants who likely spent the better parts of their lives trying to conceal unfavorable sexual orientation or identity from persecutory forces, they are ultimately denied refuge in the United States because they are not sufficiently able to convince the powers that be that they are that which they have been trying to hide at all cost. Sexual orientation and identity are fundamental to personal identity. They are central to the most intimate aspects of human existence. That any individual should have to bare these core elements of private identity in a courtroom, to be scrutinized and adjudicated, is at least uncomfortable and, at worst, violative of their personal privacy. The irony is compounded by the fact that the often painful testimonial evidence extracted in the courtroom is consistently deemed by immigration judges to be of little probative value. For asylum applicants with claims based on sexual orientation or identity, the enactment of the REAL ID act in 2005 served to further complicate this already oppressive evidentiary burden.

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[125] *See id.* at 323 (Heaney, J., dissenting).

[126] *Id.* at 324.

It is not clear whether asylum law has evolved with such apparent disfavor towards this vulnerable sub-set of asylum seekers through cold calculation or through passive inattentiveness. It is quite clear, however, that affirmative steps must be taken to lessen the evidentiary burden on these applicants – at the very least to bring the burden within the realm of feasibility. Rather than habitually discounting testimonial evidence as marginally probative, Immigration Judges should acknowledge federal regulations, which proscribe that in an asylum claim "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[127] In the absence of an explicit finding of adverse credibility, IJs should give full weight to credible applicant testimony without requesting corroborative evidence of sexual orientation. Finally, the provisions of the REAL ID Act that relate to judicial determinations of adverse credibility should be reviewed and redrafted to require that this crucial finding be based on specific, articulable, and objective reasons by the IJ, rather than on applicant "demeanor" or peripheral inconsistencies in applicant testimony.[128] To continue to evaluate asylum claims based on sexual orientation and identity under the present judicial framework would be to acquiesce to the unjust denial of relief in numerous compelling cases. Such acquiescence is unacceptable and inconsistent with the democratic ideals of this country and with the American notion of justice.

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[127] 8 C.F.R. § 208.13(a) (2012) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.").

[128] 8 U.S.C.A. § 1158(b)(1)(B)(iii) (West 2005) (stating that in removal proceedings, "a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness . . . .").