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The American University in Cairo

School of Public Affairs

**MISTAKES IN IDENTITY: SEXUAL ORIENTATION AND CREDIBILITY IN THE ASYLUM
PROCESS**

A Thesis Submitted to

The Center for Migration and Refugee Studies

in partial fulfillment of the requirements for

the degree of Master of Arts

by Michael Carl Budd

BA, Bradley University, 2008

Under the supervision of Dr Ray Jureidini

December 2009

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In partial fulfillment of the requirements for

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has been approved by

Dr Ray Jureidini

Thesis Committee Chair _____

Affiliation _____

Michael Kagan, JD

Thesis Committee Reader _____

Affiliation _____

Dr Martina Rieker

Thesis Committee Reader _____

Affiliation _____

Department Chair Date Dean Date

Michael Carl Budd 1/8/10 9:59 AM
Comment: This page is to be replaced by the update form printed and signed after the defense.

ACKNOWLEDGMENTS

I would like to thank the many people without whose input and support this thesis would not have been possible. For his direction, suggestions, and encouragement, I am grateful to my advisor, Dr. Ray Jureidini. I thank the other two members of my committee, Dr. Martina Rieker and Michael Kagan, for agreeing to share their valuable time and energy.

I am also grateful to Christopher Nugent, Lisa L. Weinberg, Joanne Ahola, Michel Duponcelle, and Rachel Levitan both for the insights they provided in interviews and for their encouragement.

The support of family and friends also made this project possible. In particular, I am grateful to my mother and father for instilling in me an appreciation for the value of education and encouraging me in my academic endeavors. I thank my colleague, Marise Habib, for her feedback and time spent proofreading.

Finally, I would like to acknowledge the financial and moral support I received from the Rotary Foundation, Rotary District 6460, and the Rotary Club of Peoria that made my pursuit of a graduate education possible.

ABSTRACT

MISTAKES IN IDENTITY: SEXUAL ORIENTATION AND THE ASYLUM PROCESS

by

Michael Carl Budd

The American University in Cairo
under the supervision of Dr. Ray Jureidini

This thesis examines the prejudice that exists on the part of decision-makers responsible for determining refugee status and adjudicating asylum claims in jurisdictions that accept claims based on sexual orientation. An analysis of case law from both common law and civil law jurisdictions uncovers the negative impact of judicial stereotypes about sexuality on refugees and asylum-seekers. It follows the increasing importance placed on proving the genuineness of the claimants' professed sexual identity that has coincided with an increased emphasis on credibility, a trend that has heightened the impact of decision-makers' biases regarding sexuality.

In addition to analyzing case law, the opinions of lawyers and other experts are included to add nuance and further illuminate decisions. The unique challenges that distinguish lesbian, gay, bisexual and transgender (LGBT) claimants from other refugees as well as the behavior of decision-makers are subsequently interpreted through the lens of sociologist Erving Goffman's theories on stigma and self-presentation.

The thesis then suggests that Western stereotypes about sexuality (and non-normative sexuality in particular) that revolve around appearance, demeanor, past relationships, sexual activity, cultural values, and other experiences and elements of identity are particularly problematic for LGBT refugees, most of whom come from a non-Western context. The thesis further asserts that to be understood properly, the refugee narrative must be examined with regards to the intersection of multiple identities—gender, ethnic, religious, and others. The conclusion ultimately drawn is that LGBT refugees who are multiply marginalized as a result of these identities must be seen as having been excluded from participation in the political and religious discourses that regulate and restrict their lives who attempt to rectify this injustice through their transgressions of social norms. In light of this, recommendations are made to consider LGBT claims based on political opinion and religious grounds rather than relying on membership in a particular social group which does not recognize the political and religious dimensions of sexual identity. Recognizing the considerable difficulty of such a shift, further suggestions are made with regard to combating stereotypes within the current particular social group approach.

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LIST OF ACRONYMS

BIA	Board of Immigration Appeals (US)
CAT	Convention Against Torture
CNDA	<i>Coordination nationale des recours des réfugiés</i> (France)
ECHR	European Convention on Human Rights
FMC(A)	Federal Magistrates Court (of Australia)
IJ	Immigration Judge (US)
INS	Immigration and Naturalization Service (US)
IRB	Immigration and Refugee Board (Canada)
LGBT	Lesbian, gay, bisexual, and transgender
PTSD	Posttraumatic Stress Disorder
RPD	Refugee Protection Division (Canada)
RRT(A)	Refugee Review Tribunal (of Australia)
RSD	Refugee status determination
OHCHR	Office of the High Commissioner for Human Rights (UN)
UNHCR	United Nations High Commissioner for Refugees

I. Introduction

A. Problem and Significance

At least as long as groups of people have been labeled and singled out based on their sexual activity as well as their sexual and gender identities, sexual minorities have been victims of discrimination and violence around the globe. Beginning in the 1960s, with the advent of the gay rights movement, relatively safe environments began to emerge in some societies where lesbians, gay men, bisexuals, and transgender (LGBT) people could live freer and more open lives.

Meanwhile, originating with the 1951 UN Convention Relating to the Status of Refugees and expanded by the Convention's 1967 protocol, international refugee law formalized the standards governing the protections and rights of people fleeing persecution. The Convention defined a refugee as:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹

The interpretation of the five grounds of persecution outlined in the definition has since been the motor force in propelling the development of this area of law.

These concurrent advances yielded the foundation for sexual-orientation based refugee claims. By the 1980s, such claims began to meet with limited success with

¹ UN General Assembly, *Convention Relating to the Status of Refugees*, (28 July 1951), Article 2A.

judges placing applicants primarily in the category of those suffering persecution by reason of their membership in a particular social group. The particular social group in question was, from the earliest cases, that of “homosexuals”. That this term, one with roots in a pathologizing medical discourse and not a term of self-description, was and remains the most frequent descriptor of LGBT refugees hints at the fact that the sexual identity in question is largely imposed on the refugee. In each sexual orientation-based claim, all of the actors involved participate in defining and redefining same-sex sexuality both generally and as it applies to the claim. A lack of objective indicators often compels decision-makers to rely on the testimony of the claimant alone. In determining the credibility of such a testimony, the decision-maker is constantly faced with the risk of comparing the experiences of an individual refugee with a flawed construction of sexual identity that is informed by stereotypes and unfounded assumptions. Focusing primarily on those responsible for adjudication refugee claims, this thesis will explore the ways in which bias disadvantages LGBT refugee and asylum claimants.

B. Review of the Literature

Several authors provide a broad picture of the developments in the definition of a particular social group that led to its use as a context for sexual orientation-based asylum claims. These include Kristen L. Walker who surveys and compares relevant jurisprudence from major common law countries² and T. Alexander Aleinikoff who additionally includes civil law jurisdictions like France, Germany, and the Netherlands.³

² “Sexuality and Refugee Status in Australia,” 12 *International Journal of Refugee Law* 2 (July 2000), 176.

³ “Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’” in *Refugee Protection in International Law: UNHCR’s Global Consultations on*

Walker suggests that because of increasing “transjudicial communication” the lessons learned from case law in one jurisdiction are valuable in understanding decisions in others.⁴ She provides as an example *Re: GJ*, a New Zealand case that canvassed jurisprudence from the US, the UK, Canada, the Netherlands, Denmark, Germany, and Australia to illuminate the question of whether or not homosexuals could be considered a cognizable social group. The court ruled in the affirmative.

Other authors address the issues that have arisen limiting the success of asylum claims since it became commonplace to accept that LGBTs could constitute a particular social group. Among the first of these to emerge was the question of whether or not an LGBT refugee should be obliged to live “discreetly” to avoid persecution. Walker frames this issue as a reflection of “an unwillingness to recognise a right to express one’s sexuality publicly [...] a right to express one’s identity as gay, lesbian, transgender or bisexual, to live openly in a sexual relationship with one’s partner of choice, and to express intimacy in ways that are socially acceptable for heterosexual members of society”.⁵ Jenni Millbank, writing nearly a decade later, maps the progress in addressing the problems of the discretion requirement. She identifies the expectation that refugees should have to cooperate in their own protection by “exercising ‘self restraint’ such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places;

International Protection, ed. Erika Feller, Volker Türk, and Frances Nicholson (Cambridge: Cambridge University Press, 2003), 263-304.

⁴ Walker (2000), 181.

⁵ *Ibid.*, 205.

pretending that their partner is a 'flatmate'; or indeed remaining celibate"⁶ as faulty logic that subverts the Refugee Convention's aim to provide surrogate protection by making the refugee responsible for protecting himself. She further asserts that this discretion requirement is applied discriminatorily to LGBT refugees, pointing out that the right to be "'openly' religious" is accepted as being protected under the Convention. Millbank also describes attempts by decision-makers to circumvent decisions that delegitimize the discretion requirement by claiming that certain applicants were "naturally discreet".⁷ The reason behind this, she writes, is a "profound and continuing failure to comprehend the hegemonic and naturalised expression of heterosexuality in all cultures".⁸ Millbank further explores the approach to the discretion question in the context of the UK, the last common law jurisdiction to do away with the requirement. She ties the prolongation of the issue there to a "discernible national response" exemplified by the Wolfenden Report's recommended solution of privacy for the "'problem' of homosexuality".⁹ This solution consisted in rendering gays, determined to be offensive to public sensibilities but not criminals, invisible in a legal sense by decriminalizing consensual same-sex sexual acts between adults. In turn, gay men were supposed to cooperate with this progress by behaving discreetly and covering their non-normative sexuality.

⁶ Jenni Millbank, "From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom," 13 *The International Journal of Human Rights* 2-3 (2009a), 391-414.

⁷ See 396-398.

⁸ *Ibid*, 397.

⁹ Jenni Millbank, "A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003", 14 *Social Legal Studies* (2005).

The issue of privacy is taken up by several authors as another source of challenges for LGBT asylum claims. The general interpretation challenge in refugee status determination and asylum law relating to whether the agent of persecution must be the state for a claimant to be granted status or asylum is connected to the LGBT divide between the public and private spheres by Millbank who points out that either the expression of LGBT identity or the act of persecution based thereupon or both take place in the public sphere in the experiences of gay men while lesbians are rendered invisible because both identity expression and persecution happen in the private realm (at the hands of family members and the community). She does this primarily through an analysis of Australian and Canadian caselaw.¹⁰ Victoria Neilson provides a similar analysis using American caselaw.¹¹

Nearly all the authors in the field touch on the fundamental subject of credibility. Christopher N. Kendall rejects the notions of “liberal discourses of law as objective” and of “law as impartial fact finder” asserting that “self-reflexive analyses call into question legal decision-makers’ subjectivity”¹². This opens the door for an examination of the prejudice and stereotypes that affect decision-making. Millbank, drawing conclusions from 1000 publicly-available cases from the UK, Canada, Australia, and New Zealand, highlights the pitfalls of credibility assessment by decision-makers in lower level tribunals. She examines problematic reasoning in decisions made based on claimants’

¹⁰ Jenni Millbank, “Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation”, 18 *Georgetown Immigration Law Journal* (2003).

¹¹ Victoria Neilson, “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims”, 16 *Stanford Law and Policy Review* (2005).

¹² Christopher Kendall, “Lesbian and Gay Refugees in Australia: Now that ‘Acting Discreetly’ is no Longer an Option, will Equality be Forthcoming?”, 15 *International Journal of Refugee Law* 4 (2003), 716.

demeanors as well as the consistency and plausibility of their narratives, observing that this reasoning is related to a lack of education and training as well as, most importantly, the lack of “a critical space of reflection”—a context in which adjudicators decide cases with one or more colleagues, benefit from peer reviews, and acknowledge that objectively-verifiable truth may not fit into the process of refugee adjudication.¹³ Along with Laurie Berg, she also ties the difficulties in credibility assessment with the challenges of LGBT refugee narrative construction. They identify psychosocial issues faced by refugees that may hinder the presentation of the narrative as well as preconceptions on the part of decision-makers that may negatively impact the reception of the narrative.¹⁴ Such preconceptions, especially those that rely on a medicalized view of homosexuality, are illuminated by Derek McGhee through the UK case of *Vraciu*.¹⁵ Barry O’Leary also focuses on decision-makers’ preconceptions in a UK context, calling into question assumptions of decision-makers there about the relationship between sexual activity and sexual identity as well as the inadequacy of country information relied upon.¹⁶ Another barrier to fair credibility assessment, the availability of accurate independent country information against which adjudicators analyze refugees’

¹³ Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations,” 21 *International Journal of Refugee Law* (2009b), 29.

¹⁴ Laurie Berg and Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants,” 22 *Journal of Refugee Studies* (2009).

¹⁵ Derek McGhee, “Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status - The Case of Ioan Vraciu”, 6 *Body and Society* (2000).

¹⁶ Barry O’Leary, “‘We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals’: The Particular Problems facing Those Who Seek Asylum on the Basis of Their Sexual Identity”, 16 *Feminist Legal Studies* (2008).

narratives, is explored by Nicole LaViolette in the Canadian context.¹⁷ She finds that in many cases, the necessary evidence is either unavailable or lacking in sufficient focus and detail.

While all of the above-discussed authors judge the deployment of stereotypes to be hurdles in the path of progress, at least one published author views the acceptance of LGBT refugee claims as detrimental to traditional societal norms and therefore understand decisions to limit such claims to be desirable. Michael A. Scaperlanda sees “innovative statutory interpretation and administrative discretion “ in “the area of asylum and refugee law” as “provid[ing] the greatest long-term potential [...] to further undermine traditional notions of marriage, family, and sexuality.”¹⁸ One of the ways he sees this happening is by the “blur[ring of] the distinction between orientation and behavior, *being* and *doing*” in “cases and most [...] academic commentary”.¹⁹ Such academic commentary might include that of O’Leary who understands sexual activity to be part of sexual identity.²⁰ Scaperlanda and O’Leary would both agree that focusing on conduct alone greatly reduces the chances for a successful asylum claim, but while O’Leary sees this as a mistake²¹, Scaperlanda employs it as a method of analysis. He interprets the US Ninth Circuit case *Hernandez-Montiel* to be in error because it protects

¹⁷ Nicole LaViolette, “Independent human rights documentation and sexual minorities: an ongoing challenge for the Canadian refugee determination process”, 13 *The International Journal of Human Rights* 2-3 (June 2009) 437-476.

¹⁸ Michael A. Scaperlanda, “Kulturkampf in the Backwaters: Homosexuality and Immigration Law”, 11 *Widener Journal for Public Law* 3 (2002), 483-484.

¹⁹ *Ibid.*, 506.

²⁰ O’Leary, 90.

²¹ *Ibid.*, 91.

an asylum-seeker on the grounds of his conduct rather than for his identity.²² In so doing, he disconnects activity from identity, arguing that even if a person cannot change his sexual orientation, he can change its outward manifestations and thus asserts that because conduct is not immutable, it is not part of a protected characteristic on that ground.²³ He responds subsequently to the question that logically follows: whether, if the expression of sexual identity is not immutable, it is so fundamental to human dignity that it should not have to be changed. In so doing, Scaperlanda argues in the negative, using a slippery slope argument in which he compares LGBTs to pedophiles.²⁴ While he recognizes the immutability of sexual orientation (if only for the sake of argument), he does not believe that the expression thereof it is fundamental to human dignity.²⁵ In comparison, he holds the *Toboso-Alfonso* decision (as he interprets it to focus on identity alone) to be a preferable approach because it doesn't "declare that a 'millennia [sic] of moral teaching' is morally repugnant or irrelevant in post-modern America"²⁶. In his interpretation, the decision protects LGBTs for "being" LGBTs but not acting like LGBTs.

Though the literature on the subject of LGBT asylum claims is comparatively rich, especially in articles detailing single-country case studies or studies comparing two countries, there is a need for a system-wide analysis of judicial prejudice. Furthermore, illuminating the trends described in earlier articles with recent jurisprudence will give a more complete picture of the current state of affairs. Adding examples from the UNHCR

²² Scaperlanda, 507.

²³ *Ibid.*, 509.

²⁴ *Ibid.*, 509-510.

²⁵ *Ibid.*, 510.

²⁶ *Ibid.*, 505-506.

refugee status determination (RSD) process and from non-Anglophone sources will further contribute to this provide a broader perspective.

C. Methodology

i. Approach to the Problem

The primary means upon which I relied to uncover the beliefs of immigration officials about sexuality and same-sex sexuality in particular was through their written decisions and transcriptions of their remarks appearing in court documents. Because the decisions also report whether the adjudicator decided in favor of an applicant's claim or against it, this method of analysis allowed for an understanding of which lines of reasoning were privileged, showing the force of certain beliefs. For further explanation of judicial prejudice and the particularities of sexual orientation-based claims, I turned to experts in the fields of refugee law, psychiatry, and refugee advocacy. These interviews helped me identify trends and make connections between conclusions I had drawn from case law.

After locating what were considered to be instances of judicial prejudice, I aimed to explain them using the sociological perspectives of Erving Goffman, an expert on social stigma and self-presentation. Since the articulation of his theories on stigma in the 1960s, many authors have used his work specifically to elucidate the experiences of LGBTs.²⁷ Rather than constructing purely legal arguments, I interpreted court decisions

²⁷ See, for example, Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (2006). Yoshino develops Goffman's concept of "covering", or minimizing the manifestation of a stigma while admitting to possessing it, in an LGBT context.

in a “law as culture” context that sees law and the legal system structurally as part and parcel of society. When viewed this way, adjudicators’ preconceptions are easily fit into broader discourses of sexuality, gender, and morality.

Relying on the significance of transjudicial communication discussed by Walker²⁸ and the hegemonic nature of heterosexism articulated by Millbank²⁹, I have attempted to synthesize the lessons from the various cases and sources presented in this thesis to reveal a picture of system-wide judicial stereotyping and the ways in which it disadvantages LGBT refugees. It is my hope that such a picture will provide a foundation for further research. Such research could seek to further understand the rationale behind decisions through in depth oral interviews with officials. It may also be desirable to interview both successful and unsuccessful claimants directly to understand their experiences firsthand as well as how they contributed to the construction of sexual identity in general and in particular in the court context. Finally, given the trend both in this thesis and in the field more broadly to focus primarily on gay men, it would be invaluable to further pursue the unique features of claims made by lesbian and bisexual female asylum-seekers that I touch on in Chapter V.

ii. Terminology

As with any analysis relating to sexual orientation, choosing appropriate terminology is inevitably problematic. I rely on the terms “LGBT” and “sexual minority” to describe the communities and identities of people whose sexuality is not exclusively

²⁸ *Supra* note 3.

²⁹ *Supra* note 7.

oriented toward people of the opposite biological sex. The term LGBT incorporates lesbians, gay men, bisexuals, and transgender individuals and is often used by international organizations and agencies such as UNHCR. While this term is generally criticized for not including other minority sexualities (non-normative heterosexualities, for example), the specific cases examined in this thesis all deal with applicants covered under the LGBT rubric. Because the cases here revolve around sexual orientation-based claims, I have not used (nor encountered) any that involve exclusively heterosexual transgender cases.

I recognize that if it is to be taken from the research of Alfred Kinsey and others that the majority of people fall somewhere along a spectrum of sexualities stretching from exclusively homosexual to exclusively heterosexual, the term “sexual minority” may be erroneous. I believe, however that in the heteronormative context of societies of origin, receiving countries, and the refugee adjudication system itself, those who recognize and/or accept their non-normative sexualities (be it privately or publicly) do constitute a minority.

Because it is not a preferred term of self-description and has medical connotations,³⁰ I will avoid the term “homosexual” outside of the context of its use by decision-makers and authors. Instead, to refer to a “person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with,

³⁰ Walker (2000), 176.

individuals of [...] the same gender”³¹ or aspects of that sexuality included in “bisexuality”, I will use the term “same-sex sexuality”.

I. From Pariahs to a Particular Social Group

With homosexuality formally a grounds for exclusion from admission to the territory of the US for most of the 20th Century (until 1990), LGBT individuals systematically denied equal immigration rights with regard to family reunification in a majority of countries, and laws restricting same-sex consensual sexual activity between adults effectively restricting the freedom of movement of sexual minorities, the discrimination against and isolation of the LGBT community has long informed immigration policy. Court decisions and intervention by intergovernmental organizations over the past three decades, however, have largely transformed LGBT individuals fleeing persecution from pariahs to members of a particular social group protected under international law. The number of countries that grant asylum to LGBT refugees has grown to at least 20 since the first successful claims in Europe and North America in the 1980s.³² This jurisprudential progress has occurred in phases, beginning in common law jurisdictions with the definition of the “particular social group” ground

³¹ International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007), preamble.

³² These countries are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Latvia, the Netherlands, New Zealand, Norway, South Africa, Spain, Thailand, the United Kingdom, and the United States. See Amnesty International, *Sexual Minorities and the Law: A World Survey* (July 2006); Spanish Supreme Court, *Appeal 1447/2004* (25 July 2007); and Swetha Sridharan, “The Difficulties of US Asylum Claims Based on Sexual Orientation,” Migration Information Policy Institute (2008) <http://www.migrationinformation.org/Feature/display.cfm?id=700>. A single successful sexual orientation-based asylum case in Israel was also reported in Michael Kagan and Anat Ben-Dor, “Nowhere to Run: Palestinian Asylum-Seekers in Israel”, (Tel-Aviv: Tel Aviv University’s Public Interest Law Program, April 2008), 30.

written into the 1951 Refugee Convention, then turning to the matter of whether or not asylum-seekers should be required to cooperate in their own protection by living out their sexuality “discreetly”, and finally to questions of credibility that require applicants to prove their claims of sexual identity.

Decisions like *Matter of Acosta* in the US and *Canada (AG) v. Ward* set a standard that would move the discussion from whether sexual minorities had any Convention grounds on which to claim refugee status to whether or not they could be considered to constitute particular social groups. This question was answered definitively in the affirmative by cases such as *Applicant A* in Australia, *Shah and Islam* in the UK, and *Toboso-Alfonso* in the US. In civil law jurisdictions, the first two phases have taken a similar course, though a focus on the existence of a threat of persecution has been privileged over the specific Convention ground under which the refugee may be classified. Over the course of these determinations, under both common and civil law, decision-makers struggled with whether to grant LGBTs fleeing persecution protection under the Convention or other, lesser forms such as leave to remain on humanitarian grounds. This issue has largely been resolved as well. The third phase has consisted in a shift from the categorical to the individual with an emphasis on the claimants’ ability to, in the context of demonstrating that they belong to a particular social group, prove the validity of their sexual identity.

Matter of Acosta, a 1985 US Board of Immigration Appeals (BIA) judgment, aimed to answer questions about how to interpret the particular social group criterion established by the 1951 Refugee Convention. Applying the principle of *ejusdem generis*,

the judgment determined that because the other Convention grounds of persecution (race, religion, nationality, and political opinion) hinge on “persecution aimed at an immutable characteristic: a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed,” then persecution based on membership in a particular social group should be taken to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share common, immutable characteristics.”³³ The echoes of this case were strongest in other common law jurisdictions, such as Canada where a similar decision was reached by the Supreme Court in 1993. *Canada (AG) v. Ward* defined a particular social group as encompassing any of three categories:

- (1) groups defined by an innate, unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
- and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.³⁴

Acosta and *Ward* have become the two leading cases in the interpretation of the particular social group ground.

Parallel conclusions were drawn in Australia and New Zealand. A year prior to *Ward*, the Australian case of *Morato v. Minister for Immigration, Local Government and Ethnic Affairs* determined that to be a member of a particular social group, it is required of an individual that she or he “belongs to or is identified with a recognisable or

³³ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals (1 March 1985).

³⁴ Aleinikoff, 269.

cognisable group within society that shares some experience in common”.³⁵ Social cognizability was again emphasized in *Applicant A v. Minister for Immigration and Ethnic Affairs* wherein McHugh J states that “the existence of a ‘particular social group’ depends in most, perhaps all, cases on external perceptions of the group because the notion of persecution for reasons of membership of particular social group implies that the group must be identifiable as a social group”.³⁶ In New Zealand, *Re: GJ* (1995) reaffirmed that protected characteristics were vital in discerning what constituted a particular social group reiterating that “making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group”.³⁷ The Refugee Status Appeals Authority thus aimed to avoid the “objective observer” approach which it saw as enlarging the social group category to the point of meaninglessness.

The enduring criteria for determining whether an individual belongs to a particular social group have most often revolved around a common immutable or fundamental characteristic and social cognizability. However, other interpretations have diverged significantly from the *Acosta/Ward* standards. In the 1986 case of *Sanchez-Trujillo v. INS*, the US Ninth Circuit Court of Appeals stated that “the phrase ‘particular social group’ implies a collection of people closely affiliated with each other” and that a “voluntary associational relationship among the purported members” must

³⁵ (1992) 111 ALR 417 in Kristen L. Walker (2000), 180.

³⁶ *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331.

³⁷ *Refugee Appeal No. 1312/93, Re GJ*, No 1312/93, New Zealand: Refugee Status Appeals Authority (30 August 1995).

exist.³⁸ This kind of reasoning, though rejected in *Applicant A* as well as UK cases *Shah* and *Islam*,³⁹ persists in some circuits of the federal appellate courts in the US.⁴⁰

In 1999, the United Kingdom became the last major common law jurisdiction to adopt the protected characteristics standard through the joint decision issued on *Shah* and *Islam*. The Immigration Appeal Tribunal drew on this decision and on *Acosta* and *Ward* to determine that a particular social group must be based on a characteristic that is “immutable or, put summarily, is beyond the power of the individual to change except at the cost of renunciation of fundamental human rights”.⁴¹

In *Shah* and *Islam*, while dealing primarily with heterosexual claimants and gender issues, the House of Lords also took up the issue of sexual orientation in asylum following several years of inconsistencies in the application of particular social group criteria to lesbians and gay men. Many of the initial cases that would open the door for sexual orientation-based asylum claims did not involve lesbian or gay claimants but sought secondarily to clarify how sexual minorities fit in. *Ward*, for example, was a Canadian case in which the claimant sought asylum on the basis of his membership in the Irish National Liberation Army that led the Canadian Supreme Court to delineate the boundaries of particular social groups. In doing so, the Court explicitly included homosexuality in response to the gross inconsistencies in LGBT cases from 1991 until that time. There were in fact cases in Canada that defined homosexuals as constituting a particular social group, but there were also several that denied homosexuals that

³⁸ *Sanchez-Trujillo, et al., v. Immigration and Naturalization Service*, 801 F.2d 1571, United States Court of Appeals for the Ninth Circuit (15 October 1986).

³⁹ Aleinikoff, 277.

⁴⁰ Berg and Millbank, 195.

⁴¹ *Montoya*, Appeal No. CC/15806/2000 (27 April 2001) in Aleinikoff, 273.

status on, among other grounds, the fact that sexual orientation did not appear in the *Universal Declaration on Human Rights*.⁴² Like *Shah and Islam* and *Ward*, the Australian case *Applicant A*, mentioned earlier, followed the same pattern—the case involved applicants afraid of persecution for their rejection of China’s “One Child Policy” but the judges made sure to include the issue of sexual orientation. The process in the US happened in two steps: *Acosta* defined a particular social group and then *Toboso-Alfonso* explicitly included homosexuals. *Matter of Toboso-Alfonso* became, in 1990, the first of the principal decisions of this kind. The BIA overturned a decision by the Immigration and Naturalization Service (INS) in which it was found that “socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act”.⁴³ The BIA’s reversal of the INS decision came the same year as immigration legislation was passed in the US Congress effectively removing homosexuality from a list of grounds for exclusion from immigration. Four years later, the US Attorney General declared *Toboso-Alfonso* a binding precedent “in all proceedings involving the same issue or issues”.⁴⁴

While nearly fifteen years of cases in common law jurisdictions pinpointed the meaning of a particular social group and clarified that sexual minorities fit into this category, civil law systems generally privilege the determination of the existence of a threat of persecution over social group membership.⁴⁵ The civil law jurisprudence thus

⁴² Nicole LaViolette, “The Immutable Refugees: Sexual Orientation in *Canada (AG) v. Ward*”, 55 *University of Toronto Faculty of Law Review* 1, (1997).

⁴³ *Matter of Toboso-Alfonso*, 20 I & N Dec 819, 822 (1990).

⁴⁴ Attorney General Order No. 1895-94 (June 19, 1994).

⁴⁵ See Aleinikoff, *Re: GJ*, and Françoise Stichelbaut, “Les obstacles à la reconnaissance du statut de réfugiée des demandeuses d’asile lesbiennes,” 7 *Work in progress : Etudes Genre* (March 2008).

lacks the depth of analysis of the particular social group categories. Nevertheless, countries like the Netherlands, Germany, and France have accepted sexual orientation-based claims, yielding similar results to the progress in the common law systems. According to Thomas Spijkerboer in his discussion of Dutch refugee law, quoted in Feller, “just which of the five persecution grounds is related to the (feared) persecution is virtually considered immaterial”.⁴⁶ In a similar way, Germany, which has approved sexual orientation-based claims since the early 1980s, long fit refugee claims into a political persecution paradigm rather than determining which of the five grounds is specifically involved.⁴⁷ Gay men have successfully been considered at risk of political persecution for their status as homosexuals. France, like the US, had two phases of progress. In the mid-1980s, social group claims unrelated to sexuality were approved and then in *Ourbih* in 1997, a precedent was set that sexual minorities could be recognized in refugees.

In both common and civil law systems, it often happened that refugees were not granted asylum under the provisions of the 1951 Convention, but were allowed on humanitarian grounds to remain in the countries to which they fled. Lesbians and gay men seeking asylum in the UK prior to *Shah and Islam* were sometimes granted “exceptional leave to remain” (later replaced by the status of “humanitarian protection”). These lesser forms of protections do not carry the same settlement, travel, and family reunification rights as asylum. Later, during a brief interval, UK asylum-seekers found themselves protected under the European Convention on Human

⁴⁶ 284.

⁴⁷ See Case Abstract *IJRL/004*, 1 *International Journal of Refugee Law*, (1989) 110-111.

Rights (ECHR) *non-refoulement* guidelines. The application of these in the UK has since become much more restrictive.⁴⁸ In Scandinavia, in the early 1990s, lesbian and gay refugees were given residence permits or permission to remain in the country on humanitarian grounds but not granted refugee status. Denmark, for example, did not initially interpret sexual orientation as grounds for asylum in the particular social group context.

Given the inconsistencies in the application of international refugee law by the mid-1990s, the importance of facilitating sexual orientation-based asylum claims began to be recognized system-wide and at regional levels (specifically in Europe). In 1996, UNHCR stated that

Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group. It is the policy of UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees.⁴⁹

In 2000, the practice of granting leave to remain rather than full Convention refugee status was addressed by the Council of Europe in *Recommendation 1470* as follows:

The Assembly is of the opinion that homosexuals who have a well-founded fear of persecution resulting from their sexual preference are refugees under Article 1.A.2. of the 1951 Convention Relating to the Status of Refugees as members of a particular social group, and consequently should be granted refugee status. The present practice in some Council of Europe member states to grant them leave to stay on humanitarian grounds may be detrimental to their human rights, and cannot of itself be considered as a satisfactory solution.⁵⁰

⁴⁸ See Millbank (2005).

⁴⁹ UNHCR, *Protecting Refugees: Questions and Answers*, UNHCR/PI/Q&A-UK1.PM5/Feb.1996 (1996).

⁵⁰ Council of Europe, *Recommendation 1470 (2000) on Situation of Gays and Lesbians and their Partners in Respect of Asylum and Immigration in the Members of the Council of Europe* (30 June 2000), 1470.

While the cohesiveness requirement exemplified by *Sanchez-Trujillo* and the undesirable substitution of leave to remain for full protection were explicitly addressed by the end of the 1990s, other hurdles to the protection of LGBT refugees remain. These hurdles have more to do with the construction of the sexual identity of the applicant than with technicalities of international law or the selection of which legal approaches are most appropriate for sexual orientation-based claims.

II. Activity and Identity

The divides in notions of sexual identity that exist in adjudication belong to broader social discourses. Among the most problematic is the debate over the relationship between sexual activity and sexual identity. In an asylum context,

[t]here is a considerable measure of agreement that a particular social group connotes a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of membership of such group. In this context, the emphasis is on what a person is, i.e. a *member* of a social group, not on what the person has done i.e. the acts or omissions of that person.⁵¹

The extent to which those “acts and omissions” inform or bespeak that identity is very often unclear. When sexual activity and sexual identity are decoupled, an approach that allows Western states to grant minimal protections to sexual minorities while retaining the authority to regulate morality,⁵² asylum-seekers are put in a precarious position. This is an approach that Scaperlanda advocates. He sees activity as a non-essential expression of an immutable identity rather than as an integral part of it. Because of the premium attached to identity, the difference between a person who engages in same-sex sexual contact and a homosexual (or a gay man, a lesbian, a bisexual, a transgender person, etc.) can be the difference between someone who does not merit refugee protection by virtue of the membership in a particular social group and someone who does. At the same time, when sexual activity and sexual identity are conflated, LGBTs

⁵¹ *Re GJ*

⁵² Hollis V. Pfitsch “Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity”, 15 *Law & Sexuality* (2006), 73. Pfitsch further suggests that a conflation of identity and conduct can also be used toward the same ends.

are also put at risk. Because of the Western-introduced identity discourse in the post-colonial, practitioners of same-sex contact who do not apply a sexual identity to themselves might now be labeled and their activity politicized in a way it was not before.

Joseph A. Massad, who has written at length on Orientalism and sexuality in the Arab world (a major LGBT refugee-generating region), argues that the internationalization of the Western gay rights movement in recent decades has transformed “practitioners of same-sex contact into subjects who identify themselves as homosexual and gay”.⁵³ He claims that a cohesive international gay rights régime “produces homosexuals, as well as gays and lesbians, where they do not exist, and represses same-sex desires and practices that refuse to be assimilated into its sexual epistemology”.⁵⁴ According to this logic, in transforming those who engage in same-sex sexual contact into LGBTs, rights advocates create cognizable social groups that did not exist before. By extension, then, the Western human rights régime creates groups of people who may be vulnerable to persecution because of the foreignness of their new identities and simultaneously provides a possibility of relief from that persecution. Massad emphasizes that it is this foreign identity that leads to the persecution of LGBTs in the Arab world rather than their sexual activities.

Katherine M. Franke of Columbia Law School sets forth a similar argument about the novelty of sexual minority identities in the context of sub-Saharan Africa. She says

⁵³ Joseph A. Massad, “Re-Orienting Desire: The Gay International and the Arab World,” 14 *Public Culture* 2 (2002), 362.

⁵⁴ *Ibid.*, 363.

that though there is “ample evidence” of pre-colonial same-sex sexual activity, “[s]exual identity of object choice framed in terms of desire was never the organizing force behind pre-colonial sexuality”.⁵⁵ The idea of homosexual and heterosexual identities is a colonial artifact, according to Franke. Because a majority of LGBT refugees come from countries once subject to colonization, this is an important argument. Not only is “gay” or “homosexual” identity foreign according to Massad and Franke’s arguments, but so too is the very notion of sexual identity itself, let alone sexual identity politics. Gay rights and the concomitant gender and sexual identity politics are, in reality, a modern Western solution to the injustices stemming from the modern Western concept of sexual identity. Michel Foucault, the notable theorist of power and sexuality, describes a unique shift in the 19th Century West from an understanding of same-sex sexuality in terms of acts to an understanding of same-sex sexuality in terms of identity.⁵⁶ Whereas before, people were prosecuted for sexual acts they had committed, after the shift a class of people known as “homosexuals” were pathologized, psychoanalyzed, and discriminated against on the basis of their identity. It is thus identity-based persecution that Western asylum systems expect.

Though the colonial use of categories of heterosexual and homosexual was not transposed into colonized societies on a social or cultural level, they were borrowed as biopolitical tools by post-colonial governments. Because, as Franke, drawing on

⁵⁵ Katherine M. Franke, “Sexual Tensions of Post-Empire,” 33 *Studies in Law, Politics and Society* (2004), 67-68.

⁵⁶ Michel Foucault, *Histoire de la sexualité*, vol. 1 : *La volonté de savoir* (Paris: Gallimard, 1976), 59.

Foucault, points out, “sex is an especially dense transfer point for power”,⁵⁷ there was special attention given to the regulation of sexuality as a means of controlling colonized populations. Strangely, the sexual norms established by colonizing powers (specifically the opposition to homosexuality and the view that it is a medical disorder) have been recast as authentically indigenous. This allows post-colonial leaders to retain the colonial tool of the regulation of sexuality as a means to solidify a hold on power.⁵⁸ Attempts to alter the dynamics of sexuality and gender roles within a country are thus perceived as challenges to power, inevitably met with deep suspicion and hostility. Those who accept Western solutions like gay rights are therefore seen as traitors and saboteurs.

Because of the political implications of sexual identity, its relationship with sexual activity has politicized the latter. There is frequently no longer room in post-colonial societies for those who “just” practice same-sex sexual contact. As a result, sexual minorities are vulnerable to being seen as a fifth column regardless of whether or not they self-identify as homosexual or LGBT. This is made evident by the remarks of Robert Mugabe, the president of Zimbabwe. He identified both non-normative sexual activity and homosexual identity as Western when he told Americans to keep their “sodomy [... and their] stupid and foolish ways to themselves.” Said the president, “Let the gays be gays in the United States and Europe, but they shall be sad people here”.⁵⁹

⁵⁷ Franke, 61.

⁵⁸ Ibid.

⁵⁹ James Roberts, “Mugabe’s ill-fitting suit of moral outrage,” *The Independent* (27 August 1995).

His party secretary for women's affairs referred to "foreign behaviour"⁶⁰ rather than foreign identity.

Mahmoud Ahmadinejad famously declared in a speech at Columbia University that Iran has no homosexuals. While this may have been true in the past in the sense that the category did not exist and therefore could not be applied to people with a "capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of [...] the same gender",⁶¹ the Iranian president and his government are entrenching sexual identity politics in Iran by tying same-sex sexual activity to a foreign identity. If there were no homosexuals before, Ahmadinejad is directly involved in creating them now.

Given the detrimental effect of the separation of conduct from identity that Scaperlanda advocates and the persecution committed and tolerated by states like Zimbabwe and Iran because of the conflation of the two, it is easy to understand the fragility of the situation in which LGBTs find themselves everywhere in the world whether they flee their countries of origin or not. The concept of sexual identity was first abused in its deployment in the construction of categories used as tools to regulate sexuality. Now, the use of these categories by leaders of post-colonial states denies people there the possibility to use a "foreign" tool to construct a genuine indigenous sexual identity. This kind of synthesis is especially unviable when pre-colonial labels are used to describe politicized sexual identities to which they did not previously correspond. While this cuts people with same-sex desires off from a socially acceptable

⁶⁰ Ibid.

⁶¹ International Commission of Jurists

sexual identity in the post-colonial world, Scaperlanda seeks to contain LGBTs, whom he considers “morally corrupt”, within the boundaries of an identity cut off from identity expression (specifically sexual activity) to prevent them from undermining “traditional” mores.⁶²

Norms in international law recognize that both identity and activity (as an expression of identity) should be protected. As it relates to refugees and international human rights law, this has been affirmed most recently in UNHCR’s 2008 *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* which states explicitly that like “race, religion, nationality, [...] and political opinion”, “[s]exual orientation is a fundamental part of human identity”;⁶³ and by the Yogyakarta Principles which declare that “[s]exual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination or abuse” and call upon states to “[r]epeal any law that prohibits or criminalises the *expression* of gender identity” (emphasis added).⁶⁴

In asylum courts, these international norms are meant to inform decisions, yet both the conflation and the separation of activity and identity nevertheless jeopardize claims. At one end of the spectrum, the conflation of activity with identity leaves the sexual identity claims of refugees who have not been involved in a same-sex sexual relationship or other same-sex sexual contact vulnerable to disbelief. Françoise Stichelbaut gives an example in the form of the case of an Iranian lesbian asylum-seeker

⁶² Scaperlanda, 504.

⁶³ 6.

⁶⁴ International Commission of Jurists. The Yogyakarta Principles were developed by the International Commission of Jurists together with the International Service for Human Rights and were adopted during in Yogyakarta, Indonesia in 2006.

in the UK. Despite the fact that same-sex contact between women in Iran carries penalties of whipping and death, the adjudicator disbelieved the applicant's sexual identity claim because she offered no proof of having been in a same-sex sexual relationship.⁶⁵ This lack of involvement may well have been the result of a suppression of her identity because of a fear of persecution. This means that there must be other indicators of sexual identity than sexual activity.

At the other end of the spectrum, the protection that applies to identity may not be extended to expressions of that identity. This parallels the old precept that enjoins people to "love the sinner, hate the sin". The idea is that LGBTs whose "disorder" may in fact be innate or unchangeable should be pitied and protected from harm, but certainly not encouraged to "indulge" in their desires. It is much easier to portray same-sex sexual contact as a deviant habit or a medical condition when it is characterized as something someone indulges in rather than a manifestation of fundamental identity.⁶⁶ Scaperlanda argues that if sexuality is assumed only to be what one does and not an immutable characteristic or a characteristic fundamental to human dignity, then sexual orientation falls short of being a protected characteristic under the Convention. According to this view, the refugee can only be protected on the basis of her identity and only her identity and not its expression can be protected.⁶⁷

The supposed aberrations of homosexuality are meant to be restricted to ensure the safeguard of heterosexual norms not only in the view Scaperlanda, but in the views

⁶⁵ Stichelbaut, 25.

⁶⁶ See Millbank (2005), 123-125 for a discussion of the use of loaded terminology in UK jurisprudence.

⁶⁷ Scaperlanda, 507-509.

of some immigration officials as well. The heterosexual couple and the family they found are taken to be fundamental to civilization and worthy of protection both in terms of heterosexual identity and heterosexual activity. This is the same goal that drives politicians like Mugabe and Ahmadinejad. There then exists a double standard where heterosexual sexuality and its expression are so fundamental that their protection can lead to the persecution of sexual minorities, but the expression of same-sex sexuality is considered incidental. The idea that non-normative sexuality should be repressed to preserve the heteronormative paradigm is espoused not only by post-colonial leaders, but also within the refugee adjudication system itself. Sean Rehaag, who has written extensively on sexual minority refugee claims, offers the example of a Canadian case in the early 1990s in which an Immigration and Refugee Board (IRB) member stated her belief that:

From man's earliest recorded history we find that all human expression ... was directed by, ... laws based on religion. ...

All [such religious laws] ... admonish their adherents to refrain from certain sexual expressions ...

[T]hey all speak about the fundamental value of the family as a unit in the pyramid of society. No ... nation could function without this basic unit⁶⁸

The member went on in the decision to agree to deny refugee status to the applicant, asserting that because "international law recognizes the right of states to establish laws regulating sexual behaviour", "those who suffer mistreatment because they 'flaunt' their objection to these laws (i.e., uncloseted homosexuals) do not fall within the

⁶⁸ Leistra in Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada," 53 *McGill Law Journal* (2008), 66.

refugee-law definition of a particular social group".⁶⁹ What amounts to sympathy with the goals of state and state-tolerated persecutors in this early LGBT asylum case has since been modulated into subtler forms of discrimination against LGBT refugees as it has become accepted that sexual minorities can and do constitute particular social groups.

⁶⁹ Rehaag, 66.

III. Discretion

Taking the approach of separating identity expression from identity into account, it follows that one of the most enduring mistakes adjudicators make is in applying the “discretion requirement”. Even in cases where the court accepts both that the applicant belongs to a sexual minority and that individuals in his or her country of origin who express an LGBT identity face a genuine risk of persecution, it has been declared reasonable to expect the applicant to live discreetly to avoid persecution.⁷⁰ This problem, unlike the cohesiveness standard or the leave to remain approach, has been virtually system-wide.⁷¹ In 2006, the Netherlands and Sweden took steps toward deporting Iranian LGBT asylum-seekers only a year after both countries had placed moratoriums on such deportations. When discussing her intention to lift the moratorium in the Netherlands, Immigration Minister Rita Verdonk stated:

It appears that there are no cases of an execution on the basis of the sole fact that someone is homosexual. ... For homosexual men and women it is not totally impossible to function in society, although they should be wary of coming out of the closet too openly.⁷²

⁷⁰ See Walker (2000), 203-207.

⁷¹ According to Brian F. Henes, “The Origin and Consequences of Recognizing Homosexuals as a ‘Particular Social Group’ For Refugee Purposes”, 8 *Temple International and Comparative Law Journal* (1994), 5, “The court stated that because homosexuality is not a mere preference, restricting a homosexual asylum seeker to a hidden and inconspicuous life is similar to requiring a person to hide and deny his/her religious beliefs or change his/her skin color.” This would suggest early precedent in the German asylum system rejecting the discretion requirement.

⁷² Human Rights Watch, *Netherlands: Asylum Rights Granted to Lesbian and Gay Iranians* (19 October 2006).

While public outcry later led to the extension of the moratorium in the Netherlands, Sweden almost immediately ordered the deportation of a gay Iranian asylum-seeker.⁷³ It took nearly two years for the Swedish Migration Board to reconsider its position,⁷⁴ one that was originally based on the idea that applicants had to show that they were under legal investigation for homosexuality in their countries of origin.⁷⁵ Kristen Walker enumerates a series of Australian cases that incorporate a discretion requirement. She cites a passage from a 1995 case which reads, "It is not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality and ... this restriction on his activities would not constitute Convention persecution."⁷⁶ The word "activities" here disregards the possibility that this expression of same-sex sexuality forms an integral part of the claimant's identity that should not have to be suppressed and therefore amounts to persecution. Even as decision-makers accept applicants' assertions that they belong to a sexual minority, they deny the immutability or fundamentality of sexual orientation and, in effect, reject it as a characteristic that requires protection. Françoise Stichelbaut points to a 2003 case in the UK where a judge decided that, despite the persecution of sexual minorities, it was reasonable to return an Ethiopian lesbian who had previously lived her sexuality in absolute secrecy, guarding it from her family and friends. The judge, suggests Stichelbaut, seems to have been convinced that the applicant's ability to live discreetly meant that her status as a

⁷³ James Savage, "Gay Iranian to be deported," *The Local* (29 September 2006).

⁷⁴ "Sweden Allows Gay Iranian Asylum Seekers," *Advocate* (2 July 2008).

⁷⁵ See IGLHRC, *Sweden: Restrictive Immigration Policy Threatens Gay And Lesbian Iranians With Deportation, Death* (1 November 1998).

⁷⁶ 203.

lesbian was not fundamental.⁷⁷ This harkens back to *Binbasi*, the first UK case of this kind, wherein the court ruled that was not obligated to decide whether homosexuals constitute a particular social group because, in Cyprus, the applicant faced no as long as he remained “inactive”.⁷⁸ In the same year the Ethiopian lesbian woman was denied asylum in the UK, it was recognized by the High Court in Australia in *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs* that requiring LGBT people to conceal their sexuality could be tantamount to forcing them to participate in their own persecution.⁷⁹ An initial decision in 1999 had accepted that Bangladeshi applicants were homosexuals and that, indeed, homosexuals were at risk of persecution in Bangladesh. The delegate for the Minister of Immigration and Citizenship found, however, that they should be expected to remain discreet and in so doing could avoid persecution. Commenting separately on each applicant’s situation, he came to the same essential conclusion: “In his circumstances, if he believes that his homosexuality, and his relationship, would not be acceptable to the community in which he is living, it is only reasonable to believe that he should be discreet about such matters.”⁸⁰ The applicants appealed to the RRT. The Tribunal rejected the appeal in 2001, agreeing with the validity of the “discretion test”. An appeal of the RRT’s decision was dismissed by a Federal Court in 2002,⁸¹ but the appellants were then allowed to appeal to the High Court where the discretion test was rejected and the case remitted to a differently constituted RRT. In its ruling, the High Court held that the RRT erred in

⁷⁷ Stichelbaut, 25.

⁷⁸ Henes, 6.

⁷⁹ See Millbank(2009), 391-414.

⁸⁰ *NAOX v. Minister for Immigration and Citizenship* [2009] FCA 1056 (18 September 2009).

⁸¹ *Kabir v. Minister for Immigration & Multicultural Affairs* [2002] FCA 129 (22 February 2002).

determining that the applicants “were naturally ‘discreet’” rather than having “acted discreetly only because it was not possible to live openly as a homosexual in Bangladesh”; they had created a “false dichotomy” between “discreet and non-discreet homosexual males”.⁸² This decision, Millbank notes, had a discernibly positive effect, but she contends that adjudicators, especially at lower levels, have been slow in accepting that sexual minorities are secretive about their sexuality not because it is a choice, but because of the threat posed by social pressures. On the one hand, *0906110*, a recent Australian RRT decision clearly reflects the progress made in *S395 and S396*:

...the Tribunal understands the applicant's case to be that he would, if returned to Lebanon, be forced to either live discreetly or incite violence by living an openly homosexual lifestyle. The Tribunal accepts that being forced to live discreetly is a form of persecution where the “discreet” behaviour is motivated by a fear of harm and shame that might result in living an openly homosexual lifestyle.⁸³

And yet on the other hand, a decision by another Refugee Review Tribunal found in 2009 that an “applicant was homosexual, but [...] that he had never practised openly, and had always been discreet, and there was no reason why he could not continue this practice”.⁸⁴ A 2005 Federal review of another RRT decision not to overturn a lower decision to grant asylum to a gay Lebanese man agreed that because the applicant was “not promiscuous nor [...] blatantly gay” but rather “naturally a discreet and private person”⁸⁵ he did not merit refugee protection. They did not attempt to illuminate what “blatant gayness” might consist of.

⁸² *S395/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71; 216 CLR 473; 203 ALR 112; 78 ALJR 180 (9 December 2003)

⁸³ *0906110* [2009] RRTA 808 (18 September 2009).

⁸⁴ *0902150* RRTA 530 (5 June 2009)

⁸⁵ *SZBSA v Minister for Immigration & Anor* [2005] FMCA 1248 (31 August 2005).

Recent cases in Canada have used similar reasoning, despite the fact that the discretion requirement “was rejected as an inherently discriminatory approach very early on in Canadian jurisprudence”.⁸⁶ A 2009 decision issued by the Refugee Protection Division reasoned that a gay Nigerian applicant had an internal flight alternative because:

There was no evidence to suggest that he would have to remain in hiding [in Lagos], should he live there, although, as with respect to certain elements of his life in Canada, he would possibly have to practice discretion with respect to his sexual orientation in Nigeria.⁸⁷

Citing *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, the Federal Court called this kind of logic “perverse as they require an individual to repress an immutable characteristic” and overturned the ruling.⁸⁸

⁸⁶ Catherine Dauvergne and Jenni Millbank, “Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh”, 25 *Sydney Law Review* (2003), 97.

⁸⁷ *Okoli v. Canada* (Citizenship and Immigration), 2009 FC 332 (2009).

⁸⁸ *Ibid.*

IV. Proving Sexual Identity

Following *S395 and S396* in Australia and analogous decisions elsewhere, Millbank suggests “that there was a shift [...] from ‘discretion’ to ‘identity disbelief’”.⁸⁹ Whereas before, the eye of the adjudicator was on the reasonableness of the demand to ask a self-identified LGBT refugee to live his sexual identity in secret to avoid persecution, now turned to “a searching examination of applicant’s identity claims”.⁹⁰ This transition drew LGBT claims further into the problems surrounding credibility assessment inherent in refugee claims generally. According to Goffman, for

members of an audience[,] it is natural [...] to feel that the impression the performer seeks to give may be true or false, genuine or spurious, valid or “phony”. So common is this doubt that [...] we often given special attention to features of the performance that cannot be readily manipulated, thus enabling ourselves to judge the reliability of the more misrepresentable cues in the performance.⁹¹

Because refugees are often unable to provide independent evidence to corroborate their claims, there is little that is not manipulable. This is especially true of LGBT claims where the subjective experience of refugeehood meets the subjective experience of sexuality.

Proving to an adjudicator that a person is a refugee—that elements of her identity expose her to a risk of persecution and therefore entitle her to special protection under international law—can be a harrowing process, one that is further complicated when the claim is based on sexual identity. Sexuality is inextricable from

⁸⁹ Millbank (2009a), 399.

⁹⁰ Ibid.

⁹¹ Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, NY: Doubleday Anchor Books, Inc., 1959), 58.

gender, politics, and religion, all of which add yet more complex dimensions to the task of authenticating claims. Constructing an identity at the intersection of these areas is a lifelong task for anyone, and yet refugees are asked to provide a succinct, coherent, and consistent presentation of self that convinces a decision-maker that they are genuine and deserving of protection. Refugee sexual identity in a courtroom is often constructed using unfamiliar tools since preconceptions about sexual identity vary enormously from one set of cultural norms to the next. Faced with the challenge of how to interpret refugees' claims, decision-makers too often lean on stereotypes based on appearance, relationships, social habits, and sexual practices. This practice has, predictably, led to flawed judgments. As Victoria Neilson, legal director at New York-based Immigration Equality said in an interview with Hollis V. Pfitsch,

“it really depends on the asylum officer and the immigration judge. You can tell from the moment you sit down. Sometimes the officers or judges are just not accepting of gay claims. On the other hand, I've had cases where the officer gives the [asylum seeker] a hug at the end of the interview.”⁹²

Pfitsch asserts that US trial attorneys and immigration judges are not neutral decision-makers, but rather in many cases, vehicles of entrenched heterosexism and homophobia.⁹³ Neither of these is unique to the US. Rather, heteronormativity looms large in the decisions in all asylum systems that consider LGBT claims.

Remarks from RRT case *0906110* address the uniqueness of the challenges in sexual identity claims and the problem of stereotypes:

Claims of a fear of persecution by virtue of homosexuality present decision-makers with a particularly challenging task. Whereas decision-makers are able to

⁹² 73.

⁹³ Ibid.

test the evidence of claims of persecution by virtue of religious beliefs or political opinion by questioning the applicant about those beliefs or opinion it is particularly difficult to assess whether the applicant's claim to be homosexual is genuine or merely contrived for migration purposes. It would be wrong to assess the applicant against a benchmark of stereotypical attributes and, as with other refugee claims, unreasonable to expect an applicant to produce witnesses to their homosexuality.⁹⁴

While this measured approach marks a major departure from earlier decisions that betray severe bias on the part of decision-makers, it has not been definitive. Even contemporary cases continue to show mistakes based on assumptions about minority sexual identities.

A. Stereotypes Based on Appearance and Demeanor

In *Herrera v. Canada*, the shift is clear. The IRB denied asylum to a Mexican man based on a disbelief of his claim to be gay by virtue of a lack of an “*allure efféminée*”, an effeminate demeanor. The Federal Court that overturned the decision declared that the IRB had “breached [...] a principle of natural justice”. The judge, explaining the decision, stated that

There is really no reason for the Board to even mention the Applicant's 'effeminacy' or lack thereof in its decision unless it is assuming that someone who is homosexual must be effeminate in appearance or behaviour [...] This is a thoroughly discredited stereotype which should not have any bearing on the Board's judgment of the Applicant's credibility. [...] Homosexuals are subject to extensive prejudice, of which effeminate stereotypes form a part. The Applicant's lack of 'effeminacy' is not a proper basis on which to impugn the credibility of his claim to be a homosexual.⁹⁵

Explicitly inculpatng the Board itself for prejudice, the judge continues, saying that the decision “reveals a level of ignorance and prejudice which is not only unusual in general,

⁹⁴ 0906110

⁹⁵ *Herrera v. Canada* (Minister of Citizenship and Immigration), 2005 FC 1233 (2005).

but is particularly astonishing on the part of a decisionmaker who is in a position to adjudicate sensitive claims that could be expected to involve homosexuality.”⁹⁶ This example of an appellate jurisdiction rebuking a lower decision-making body suggests that the kind of ignorance and prejudice present in this case lingers at the initial levels of adjudication.

The same is true of recent US cases from the 2nd and 10th Circuit Courts of Appeals. The first case handled the appeal of a gay Guyanese man with a series of criminal charges against him who was trying to remain in the US on the grounds that his deportation would violate his rights under the Convention Against Torture (CAT). He claimed that he would be vulnerable to persecution both as a criminal deportee and a gay man. The immigration judge (IJ) who made the initial decision not to grant the applicant relief held that “violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people” and that therefore the applicant “was less likely to be viewed in Guyana as a member of either disfavored group”.⁹⁷ The 2nd Circuit Court judge ruled that the IJ had made “gratuitous comments on the petitioner’s sexuality, as well as unfounded speculations about homosexuals in general” and that other of his comments betrayed “an impermissible reliance on preconceived assumptions about homosexuality and homosexuals” and that therefore, he had “clearly abrogated his ‘responsibility to function as a neutral, impartial

⁹⁶ Ibid.

⁹⁷ *Ali v. Mukasey*, 2008 Westlaw 2437646 (June 18, 2008) in Arthur Leonard, “2nd Circuit Blasts Biased Immigration Judge on Gay CAT Claim”, *Leonard Link* <http://newyorklawschool.typepad.com/leonardlink>

arbiter”.⁹⁸ The IJ whose decision was vacated by the 10th Circuit Court of Appeals made comments that echoed those of the initial decision-maker quoted in *Herrera*, saying that a Moroccan applicant’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”, and determined as a result that he would not be at risk if returned to Morocco.⁹⁹ The Circuit Court judge lambasted the decision finding that

The IJ’s homosexual stereotyping [...] precludes meaningful review in this case. The IJ’s reliance on his own views of the appearance, dress, and affect of a homosexual led to his conclusion that Razkane would not be identified as a homosexual. From that conclusion, the IJ determined Razkane had not made a showing it was more likely than not that he would face persecution in Morocco. This analysis elevated stereotypical assumptions to evidence upon which factual inferences were drawn and legal conclusions made. To condone this style of judging, unhinged from the prerequisite of substantial evidence, would inevitably lead to unpredictable, inconsistent, and unreviewable results. [...] Such stereotyping would not be tolerated in other contexts, such as race or religion.¹⁰⁰

It is also important to note that while many such cases involve gay men (who originate a preponderance of refugee claims), lesbians are subjected to appearance-based prejudice as well. Rehaag provides as an example a Canadian case wherein a Colombian woman’s claim to be a lesbian is not believed because the IRB found that she “presents as an articulate, professional, well-groomed, and attractive young woman. Based on all of these considerations ... the panel cannot conclude that the claimant’s sexual orientation would be physically obvious to intolerant and bigoted segments of Colombian society”.¹⁰¹ Despite more than a half decade of rulings by appellate courts

⁹⁸ Ibid.

⁹⁹ *Razkane v. Holder, Attorney General*, No. 08-9519 (21 April 2009), 6.

¹⁰⁰ Ibid., 10-11.

¹⁰¹ Rehaag, 71.

opposing these kinds of stereotypes, such mistakes based on assumptions about the appearances and demeanors of sexual minorities persist.

B. Stereotypes Based on Relationships

Such blatant stereotyping is not limited to appearances, however. Stereotypes about how sexual minorities interact relationally, sexually, and socially with one another and with heterosexuals are readily apparent in many judgments. On the same day that the RRT decision finding in favor of the Lebanese applicant was published, a Federal Court decision declared that another RRT ruling concerning gay refugees was “not made in good faith” and was “unreasonable”, “contrived”, and “perverse”.¹⁰² The appellants in this case were the same two Bangladeshi men who were appellants in *S395 and S396*. Throughout the first several cases in which the appellants were involved, the fact that they were homosexuals was never in doubt; the question at hand was of the validity of the requirement for LGBT refugees to live “discreetly” so as to avoid persecution. And yet, after the case was remitted, a second Tribunal skirted the issue by alleging that the appellants were not, in fact, homosexuals. Allegations that the couple were actually cousins who had been married to women were used to justify this central finding, the problems with which I will analyze later. An appeal of this finding was dismissed by a Federal Magistrates Court, but ultimately resulted in a third RRT review again unfavorable to the appellants. This review was then followed by a return of the case to the High Court.

¹⁰² NAOX.

i. Same-Sex Sexual Activity

The RRT's unfavorable decision vis-à-vis the appellants during the third review hinged on an adverse credibility finding based on the refusal of one of the appellants to answer a question about the couple's sex life. This after the couple had offered in a letter to the tribunal to definitively settle the question of their homosexuality:

Should you require it (although such a step would cause us significant embarrassment) we are prepared to have an adult witness view us engaged in an act of homosexual intercourse and then attest before you to that fact. It would be illogical were you to refuse such an offer and then go on to find, as did Member Hardy, that we are not homosexual.¹⁰³

The Tribunal declined the offer and then, according to the transcript as cited in the document published by the High Court, the line of questioning proceeded as follows:

[THE TRIBUNAL]: Do you have sex in the morning?
THE INTERPRETER: This is a personal question.
[THE TRIBUNAL]: You don't want to answer?
THE INTERPRETER: No. ...
[THE TRIBUNAL]: Do you have sex with him though?
THE INTERPRETER: Yes.
...
[THE TRIBUNAL]: *Now you may not want to answer this question* but when you do have sex do you use a lubricant?
[NAOX]: I don't want to.
[THE TRIBUNAL]: Don't want to answer ...
(Emphasis added)¹⁰⁴

The Tribunal, in analyzing this exchange, explained that it had

difficulty understanding how viewing an act of homosexual intercourse, where a lubricant may or may not be used, is less offensive to the applicants than answering a question as to whether a lubricant is used. Because of the refusal to answer the Tribunal's question, and the lack of a cogent response, the Tribunal finds that the first applicant is not a truthful or credible witness.¹⁰⁵

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

The exasperation and incredulity of the High Court were apparent when they found that “the decision [of the third Tribunal] was perverse to such an extent as to exhibit a serious failure in the decision making process” and remitted the matter to the RRT for a fourth review.

The significance attached to the specifics of sexual activity (and especially the roles chosen by gay men in anal sex as well as stereotypes about how these roles relate to gender identity and risk of persecution) are the focus of the reasoning in a 2001 Canadian decision in the case of a gay Iranian man. The IRB concluded that though the claimant was gay he was not entitled to refugee protection because during anal sex he “play[ed] the male role” and therefore would “likely not be given the same punishment as the partner who plays the submissive role”.¹⁰⁶ The “male” role was assumed by the adjudicator to be the insertive one. The IRB based its conclusions on a videotape of a sex act submitted by the claimant and country information about homosexuality in Iran provided by a French sociologist. The sociologist asserts that in Iran

A man who plays the active, penetrator role in a homosexual act behaves like a man, and is therefore not considered “homosexual.” Passive homosexual behaviour, however, implies being penetrated like a woman, and is considered to be extremely scandalous and humiliating for a man, because it is feminine behavior.¹⁰⁷

Despite the IRB’s acceptance of this dynamic as being the norm and despite using the video evidence to decide the claimant played the “male” role, the videotape was determined to have been filmed “purposely to be used as evidence” and was a

¹⁰⁶ VA0-02318 [2001] CanLII 26999 (21 February 2001).

¹⁰⁷ Ibid.

“concoction to support his allegation that he was persecuted as a homosexual”.¹⁰⁸ Strangely, the IRB found it suspect that in the acts, the claimant was taking the “virile”, “male” role and found lacking “smile and [...] conversation”, “tenderness, passion [and] affection”.¹⁰⁹ The IRB concludes that “[t]he sex acts appear so mechanical it looks more like an encounter between a ‘John’ and a male prostitute, rather than two men very much in love with each other”.¹¹⁰ The IRB relies on its own understanding of what sexual activity between Iranian gay men should look like when it comes to discounting evidence, but relies on independent evidence that portrays a very different dynamic between sexual partners in Iran when it comes to deciding the claimant does not merit refugee protection.

This fixation on sex roles is not limited to national asylum systems. UNHCR legal officers too have asked overly invasive questions about sexual activity when conducting refugee status determination (RSD) interviews.¹¹¹

The third Tribunal’s probing questions rely problematically on the questioner’s knowledge of same-sex sexual activity and assumptions about how that activity relates to sexual identity. While the Tribunal admits that an act of homosexual intercourse may or may not involve lubricant, the fact that the question was asked at all recalls earlier

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Neil Grungras, Rachel Levitan and Amy Slotek, “Unsafe Haven: Security Challenges Facing LGBT Asylum Seekers and Refugees in Turkey”, 24 *Praxis: The Fletcher Journal of Human Security* (2009), 48. It should be noted that also according to this report, since the 2008 sexual orientation guidance note was issued, practices have improved at the refugee agency. See pp. 47-48.

asylum cases where, as in criminal cases¹¹², adjudicators deemed anal examinations a definitive indicator of homosexuality. “This form of medical examination”, Walker points out, “is based on the incorrect notion that all gay men engage in receptive anal sex and that no heterosexual men do so”.¹¹³ This notion, as it affects refugees, has been most written about in the context of *Vraciu v. SSHD*, a British case from the mid-1990s involving a Romanian man unwilling to expose the identity of his Romanian lover or provide other evidence to the court corroborating his claim to be homosexual. The lawyer representing the Home Office called for a physical examination, apparently believing, along with the tribunal, that homosexual identity could be reduced to and identified by the evidence of anal or rectal scarring.¹¹⁴ The applicant’s legal representative proposed a psychiatric examination instead and no physical examination was performed. Though physical examinations are increasingly discredited,¹¹⁵ as recently as 2004, a Canadian adjudicator apparently relied on an anal examination as the sole piece of convincing evidence that authenticated a Ugandan applicant’s claim to be homosexual.¹¹⁶ In 2006, an immigration judge in the UK asked a solicitor “what medical evidence” existed to prove that his Iranian client was gay. The question centered on the role the applicant claimed to take in sexual intercourse.¹¹⁷

¹¹² See, for example, Amnesty International, *Annual Report: Human Rights in Egypt* (2009) for a description of the forcible subjection to anal examinations of men accused of “habitual debauchery” in Egypt.

¹¹³ Walker (2000), 185.

¹¹⁴ See McGhee, 29-50.

¹¹⁵ For example, the RRT in *0805807* [2008] RRTA 420 (21 November 2008) relied on evidence referring to the practice of anal examination as “Invasive, abusive, and a form of torture in itself, the practice is predicated on outdated pseudoscience, on myths—of the “marks” left by anal intercourse—which date back nearly a century and a half.”

¹¹⁶ *TA2-19317* [2004] CanLII 56794 (1 August 2004).

¹¹⁷ O’Leary, 89.

This lingering preoccupation with medical submissions is directly tied to decision-makers' discomfort with the minimal possibility for independent evidence. Physical and psychiatric examinations fit in alongside "scientific police work and projective testing" which Goffman cites as "extreme examples" of the tendency to focus on features of a narrative that "cannot be readily manipulated" to relieve doubts about the discernibleness of false claims.¹¹⁸

Psychiatric evaluations, which bind homosexuality to the realm of the medical, are also problematic and have been rejected as a means of determining the authenticity of sexual identity in some court cases. Walker offers the example of Australian case *N97/16114* in which the Tribunal observes that the psychiatrist's submission is essentially a retelling of the applicant's story.¹¹⁹ In other cases, the court has been more likely to accept the evidence of psychiatrists and psychologists as legal evidence than a refugee's direct statements of "self-knowledge". McGhee attributes this to a "hierarchy of discursive value" in the courtroom that requires the claimant's narrative to be processed and represented by an expert to carry weight, even if the representation by the expert matches the narrative.¹²⁰ In UK case *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department*, the court made clear that it accepted the submissions of a psychologist because they were "not formed solely on the basis of the account given by a patient".¹²¹ The psychologist "also based [her conclusions] on the responses given to many questions posed during examination, to

¹¹⁸ Goffman (1959), 58.

¹¹⁹ [1998] RRTA 4882 (2 November 1998) in Walker, 185.

¹²⁰ McGhee, 42. See 42-47 for a discussion of this dynamic.

¹²¹ [2005] UKAIT 00120 (4 August 2005), para. 63.

elicit further details of experiences, and the associated symptoms and emotional responses.”¹²²

ii. Opposite-Sex Relationships and Sexual Activity

While the mistakes of the third Tribunal are glaring, it is important to return to the findings of the second Tribunal where assumptions about gay identity lead the adjudicator to fail to protect the appellants. Two primary assumptions are taken to undermine the claims of the appellants to be gay and in a relationship with one another: first, that they were close relatives and second, that they were married to women. These two claims were later found to be spurious, but understanding the logic behind them is important. The allegation that they were first cousins or first cousins once-removed had nothing to do with their identities as gay men, but rather was taken to suggest that they had not met by chance as they asserted in their initial asylum claim. As for the allegation that the men were married to women, the Principal Member of the second Tribunal stated: “The fact that they are married knocks out their claims about their aversion to heterosexual marriage”.¹²³ To the mind of the second Tribunal, then, gay men cannot be both party to a heterosexual marriage and have an aversion to it. This simplistic view is untenable when it is taken into consideration that marriage is often entered into because of social pressures and societal expectations. Many heterosexuals, especially women, who are unsure about or even resistant to marriage

¹²² Ibid. Also, according to personal interviews with attorney Lisa L. Weinberg, telephone interview with Michael Carl Budd (14 August 2009) and psychiatrist Joanne Ahola, MD, interview with Michael Carl Budd, New York, NY (25 August 2009), psychiatric evaluations that do not identify “symptoms” of homosexuality but rather symptoms of psychological disorders that LGBT victims of persecution are likely to exhibit (PTSD, major depression, complicated bereavement, hyperactive startle reflex, substance abuse) have contributed to the success of claims in US immigration cases.

¹²³ *NAOX & Anor v. Minister for Immigration & Anor* [2006] FMCA 434 (13 April 2006).

are forced to marry regardless. Why should this be any different for sexual minorities?

This is an especially salient question given that heterosexual marriage is seen as a remedy for homosexuality across cultures. The 2008 *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* takes up the issue in paragraph 13:

LGBT persons may [...] be forced into arranged marriages or experience extreme pressure to marry. They might fear that a failure to marry will ultimately mark them out as LGBT in the public eye. Social, cultural and other restrictions which require them to marry persons of the opposite sex can have the effect of violating the right to marry with full and free consent, and the right to respect for private life. Such community pressure could escalate beyond general societal expectations and reach the threshold of persecution.¹²⁴

The *Guidance Note* goes on to describe forced marriage as a “persecutory act”.¹²⁵

Therefore, not only was the second Tribunal remiss in their finding that the appellants were not gay by virtue of being married despite an aversion to it, but it failed to appreciate entirely the very fact that people forced into marriage could, by virtue of such circumstances, be entitled to refugee protection. Juxtaposing the finding in this case with another Australian decision reveals a contradictory expectation that would seem to leave sexual minorities damned if they marry and damned if they don’t: the Tribunal in this second decision “asked whether [the applicant] had considered living a secret gay life and [...] marrying, as many had and did.”¹²⁶ This remark by the Tribunal was decried as discriminatory by a Federal Court. Five years later, prior to the ruling of the second Tribunal in the case of the Bangladeshi couple, an Australian Federal

¹²⁴ UNHCR.

¹²⁵ *Ibid.*, para. 27.

¹²⁶ *Bhattachan v. Minister for Immigration and Multicultural Affairs* [1999] FCA 547 (27 April 1999).

Magistrate Court decided that pressure to marry could amount to persecution based on Convention standards.¹²⁷ The intent of the second Tribunal therefore appeared to be to fault the appellants for being victims of persecution.

In addition to heterosexual marriage, opposite-sex sexual activity can cast aspersions on the verisimilitude of a refugee's claimed sexual identity in the eyes of an adjudicator even where it is not central to that identity. In RRT case *V97/06483*, the Tribunal member declared on the basis of a single "unsatisfactory" sexual relationship between an applicant and his female neighbor that she could not "rule out the possibility that he is able to function heterosexually also".¹²⁸ Walker points out that the Tribunal member failed to appreciate that "it is rare to find gay men and lesbians who have not had some sexual contact with members of the opposite sex, sometimes 'satisfactorily', sometimes not, and often because of social pressure to do so" and that "This does not mean that they are not 'really' gay or lesbian".¹²⁹ Contrast this with another case involving a Pakistani man where the Tribunal found that

the Applicant might have enjoyed sexual play with other males when he was a teenager, noting from country information that this kind of behaviour is common in Islamic cultures [...] However, the Tribunal is not prepared to accept on the evidence before it that this was anything but a transient, youthful phase.¹³⁰

"Sexual play" during adolescence because of social pressure is accepted as not being fundamental when it is homosexual in nature while opposite-sex encounters, even

¹²⁷ See: *SZANS v Minister for Immigration* [2004] FMCA 445 (13 August 2004).

¹²⁸ *V97/06483* [1998] RRTA 27 (5 January 1998).

¹²⁹ Walker (2000), 186.

¹³⁰ *N05/50659* [2005] RRTA 207 (17 May 2005).

isolated and “unsatisfactory” ones are considered to clearly disprove homosexuality.

Walker offers another example of this double standard, citing *N98/23086*:

I accept that the Applicant engaged in sexual activities with a group of his male school friends. However, I note that the activities he described were activities which are relatively common amongst young people involved in sexual experimentation. Further, the Applicant has had no contact whatsoever with young women his own age. His only sexual experience with a woman involved sexual intercourse with a prostitute. [...] In the circumstances, I have some difficulty accepting that the Applicant has a settled homosexual orientation.¹³¹

The suggestion here appears to be that the applicant has not had enough heterosexual, that is to say “normal”, sexual experiences to know for certain that he has a deviant (homosexual) sexuality.

Just as is the case with same-sex activity, opposite-sex activity may also be involuntary and violent, a fact that is usually taken to show past persecution. However, in the context of heterosexual marriages, marital rape has been used to discredit the claims of lesbian asylum-seekers. O’Leary describes an example of a woman from Sierra Leone who, after being outed as a lesbian, was forced into marriage with a man who subsequently raped and impregnated her. The immigration official deciding her case disbelieved her claim to be a lesbian simply because she had a child.¹³²

iii. Social and Sexual Relationships in the Host Country

The difficulty of verifying claims about a refugee’s past relationships in his country of origin sometimes leads adjudicators to focus on participation in the host country’s LGBT community and romantic relationships entered into after arrival. This is particularly problematic when adjudicators expect refugees in their “free” host

¹³¹ Walker (2000), 186.

¹³² O’Leary, 89.

countries to be capable and desirous of entering into a same-sex relationship. In a British case, a lesbian applicant was notified in a refusal letter that her claim to sexual identity was disbelieved “because during the [...] interview you were asked if you had been in a relationship with another woman in this country (U.K.) and you stated that you had not. It is believed that if you were attracted to other women then with all the freedom to choose a sexual partner of your choice in this country you would have a relationship with another woman”.¹³³ Such a decision fails to take into account economic factors,¹³⁴ cultural differences, psychological conditions, and the possibility that the applicant is already in a committed relationship. Furthermore, applicants are often expected to forge relationships in the context that they perceive the local LGBT community operating in (i.e. gay clubs, the Internet).

An Albanian man seeking asylum in Canada was determined not to be a refugee in part because “He has never had any sexual relations with any man (either in Albania or in Canada), he is too shy”.¹³⁵ This finding came despite the fact the applicant was “raped and brutalized” by four men when he had sought out a same-sex sexual encounter in the past. Though the court doubted his homosexuality, they modulated an understandably deeply fearful response in the wake of sexual assault to shyness.¹³⁶ An adverse claim based on this reasoning is perverse and fails to consider the affect PTSD and other psychological conditions that can negatively impact an individual’s ability to

¹³³ Secretary of State for the Home Department in O’Leary, 90.

¹³⁴ Ibid, 90.

¹³⁵ *Menaj v. Canada* (Citizenship and Immigration), 2008 FC 611 CanLII (2008).

¹³⁶ Ibid.

form relationships. A lesbian claimant explained her not having entered into a relationship this way:

I have interpersonal problems after what I suffered. It is hard for me to communicate what is on my mind. I feel that if I speak up, I will be rejected. Why am I still unable to have a girlfriend in this country? It is my fear of rejection. The strong fears are still there.¹³⁷

This comes despite attempts to become involved with the gay community.

The second component of these kinds of expectations, that a genuine LGBT refugee will straightaway be involved in the “gay ‘scene’”, is manifested in “repeated and often detailed questioning about the names and street addresses of gay nightclubs” and betrays a belief that “same-sex attracted individuals from elsewhere in the world should know about and visit gay bars and clubs as a matter of course upon their relocation”.¹³⁸ This logic is based upon a problematic two-pronged line of thinking, according to Millbank: first, because this is what Western LGBTs supposedly do, taking part authenticates a refugee’s same-sex sexual identity claims; and second, refugees escaping oppression and an obligation to live their sexuality covertly will inevitably be enthusiastic in participating in “cultural manifestations of gayness, because that is how ‘freedom’ is expressed”.¹³⁹ These stereotypes and untested assumptions on the part of adjudicators not only essentialize the local gay community, but they ignore important pieces of LGBT refugee identity and its accompanying challenges. Refugees who have, like the Albanian man in the above case, suffered sexual assault and other traumas and may, as a result, experience depression or PTSD may not have the energy, wherewithal,

¹³⁷ Ahola.

¹³⁸ Millbank (2009b), 18.

¹³⁹ Ibid., 19.

or desire to go out to a gay venue. The cultural and language barriers may also be intimidating just as they are for any refugee, regardless of sexual orientation. And some may simply not enjoy socializing in a club context or find it inconsistent with their morality.

In an Australian case, a Nigerian man's claim was rejected in the first instance because of his lack of romantic relationships and the fact that he did not "visit places where he could meet homosexual people".¹⁴⁰ This decision was overturned by a Tribunal that sympathized with the fact that that applicant had "no need to do so because he has someone overseas with whom he has had a continued relationship. He owes him fidelity and plans to be re-united with him someday".¹⁴¹ Furthermore, it was put simply that "He is also not a club person and does not drink or smoke" nor does he "enjoy nightclub culture".¹⁴² This image of a monogamous homebody who happens also to be gay is an image that would no doubt be unfamiliar in a refugee system where promiscuity and "blatant gayness" are what is taken to set at-risk gay male refugees apart¹⁴³. And yet, paradoxically, the idea of a "respectable" gay man (the Tribunal was moved by the appellant's sadness at his having to leave seminary and abandon his dreams of becoming a priest) seems to have impacted the reversal of the decision in the first instance.¹⁴⁴ This disconnect in stereotypes reflects the broader social discourse that attempts to determine whether authentic male same-sex sexuality is "naturally"

¹⁴⁰ 0902348 [2009] RRTA 572 (1 July 2009).

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ SZBSA.

¹⁴⁴ 0902348, para. 118.

promiscuous or monogamous and whether gay men can be “civilized” with idealized heterosexual norms.¹⁴⁵

C. Explanations of Prejudice

It has been demonstrated that an adjudicator’s personal beliefs about gay identity can directly impact the fate of LGBT asylum-seekers, but it is also important to try to understand why this happens. According to Berg and Millbank, “In the refugee context, it is always the decision-maker and not the applicant who has the power to name, the authority to decide who the applicant ‘really’ is and what sexuality ‘really’ means”.¹⁴⁶ Similarly, McGhee reveals that “the person who is alleging to be a homosexual cannot be the author of his own subjectivity before the law; he remains an object whose legal subjectivity must be made for him by an authorized knower and speaker of it”.¹⁴⁷ Thus, because the decision rests with the adjudicator, it is ultimately her preconceptions that are paramount and will color whatever submissions the applicant provides about his identity. Often, decision-makers are only satisfied with a self-presentation that fits within specific familiar parameters. Cultural dimensions inform expectations, making the problem more than just an imperfect understanding of non-normative sexuality. This is evident in cases decided by Luke Hardy, the principal member of the second Tribunal in the case of the Bangladeshi couple and the principal member in the case of the Pakistani man. Hardy, himself gay,¹⁴⁸ was found by a federal magistrate’s review of a different appeal to hold “preliminary views incapable of

¹⁴⁵ See, for example, Christian Klesse, *The spectre of promiscuity: gay male and bisexual non-monogamies and polyamories* (Burlington, VT: Ashgate Publishing Company, 2007).

¹⁴⁶ 208.

¹⁴⁷ McGhee, 34.

¹⁴⁸ Paul Toohey, “Under the gaydar,” *The Bulletin* (21 May 2007).

alteration regarding male homosexuals".¹⁴⁹ In this case, *WAAG v. Minister for Immigration*, the federal magistrate further stated that the questions Hardy posed to the applicant (aimed at discovering the authenticity of his claim to be a homosexual) revealed "a pre-formed template into which the Tribunal considered all homosexual males would fit and that if an applicant who claimed to be a homosexual did not respond appropriately to these questions he must ipso facto not be a homosexual."¹⁵⁰ In the appeal under review, Hardy betrayed a thoroughly Western and indeed stereotypical conception of same-sex sexual identity in casting doubt upon the appellant's claims essentially because the appellant did not identify with gay icons:

There can be no tried and true inquisitorial test for establishing beyond doubt whether a person is or is not homosexual, especially given subjective states and conditions of homosexuality. Nevertheless, the Tribunal attempted to gain insights into the Applicant's outlook as a homosexual and the experiences and other phenomena that contributed to it. The Tribunal asked the Applicant which, if any, art, literature, song lyrics or popular culture icons spoke to him in his isolation from the rest of the society. The Applicant provided not one example. He said he did not understand the question. The Tribunal asked him if his ears pricked, say, when he heard of any famous, perhaps foreign artist, performer or author being banned in Iran for reasons of immorality. In reply, he said he did not understand the question. The Tribunal was not demanding that the Applicant be a leading Gide scholar or even a Marilyn Monroe fan, but it did seem odd that the sexuality he was forced to suppress in Iran did not find expression in any phenomena at all, whether in high culture or low.¹⁵¹

If Massad and others greatly limit the possibility for an authentic same-sex sexuality in the non-Western world by assigning gay and lesbian identities a foreign origin, Hardy limits the possibility for authentic non-Western same-sex sexualities by expecting them to correspond to Western ones. Despite his apparent attention to the "subjective states

¹⁴⁹ *WAAG v. Minister for Immigration* [2002] FMCA 191 (2002).

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

and conditions of homosexuality”, Hardy did not recognize the appellant’s subjective experience of homosexuality as valid. Indeed, contradicting himself, Hardy seemed to lay out exactly what the attentions of gay men should be focused on:

The Tribunal thus well understands that it should not expect all or any homosexual men in Iran to take an interest, for example, in Oscar Wilde, or in Alexander the Great, or in Naguib Mahfooz, or in Greco-Roman wrestling, or in the songs of Egypt’s tragic muse Oum Khalsoum, let alone, say, in the alleged mystique of Bette Midler or Madonna. ... However, the Tribunal was surprised to observe a comprehensive inability on the Applicant’s part to identify any kind of emotion-stirring or dignity-arousing phenomena in the world around him.¹⁵²

The suggestion that for a man to have a capacity for emotional, romantic, and sexual attraction to other men, he must also show a serious interest in divas or gay (or purportedly gay) literary and historical figures exposes a troublingly narrow conception of what it means to be gay. Hardy further encumbered gay identity with expectations that a gay man in a country where pervasive attitudes and homophobia do not allow him to live openly in regard to his sexual orientation should have a gay circle of friends and/or contact with the “‘gay’ underground”.¹⁵³ He fails to consider the isolating context of being a sexual minority in a place where it is unacceptable, but he also assumes that the person in this situation would have a well enough developed sense of self, confidence, and the courage to reach out to others he may perceive correctly or incorrectly as being like him. This is a terrible risk to expect a person to take to meet the minimum standards of same-sex sexual identity or gender discordant identities.

¹⁵² Ibid.

¹⁵³ Ibid. Hardy is certainly not alone in making this kind of mistake—according to Thibault Raisse, “Réfugiés homosexuels : la grande loterie”, *Le Monde* (20 June 2008), in France, a Pakistani asylum-seeker appealing his case to the CNDA was asked to name the colors of the gay flag as part of a line of questioning meant to determine the authenticity of his claim to be gay.

Though he explicitly said that the he “should *not* expect” (emphasis added) that a refugee conform to the rubric for gay identity, in effect, Hardy’s line of questioning discredits his commitment to this idea. Hardy says to the appellant:

Well I put it to you that this isn't something that you can switch on and off, it's something that, particularly if it isolates you, it can take over your whole life. It can be the lens through which you see the whole world, if you're lonely enough as a result of, or feel isolated enough as a result of being different from other people ... um here, sorry here's an example. Here's an example. If, if say, a famous Egyptian novelist wins the Nobel Prize, but he's also a homosexual who writes about, ah, you know, the love between two men. It mightn't be a big part of his story but it might be an element in the novel, right. Just say he gets banned in Iran, okay. Might not your ears prick up when you hear that that author has been banned in Iran, and you go, oh, yeah, that's another, that's just another case, just another problem.¹⁵⁴

While the latter part of the above quote presses the matter of the appellant’s identification with supposedly gay figures, the first sentence is telling and brings up another problematic assumption. The Tribunal’s Principal Member would seem to be equating disruptions in the consistency of the expression gay identity with inauthenticity. This view relies too heavily on “Western conceptions of the linear formation and ultimate fixity of sexual identity” to which Berg and Millbank refer in their discussion of the flawed approaches of Western adjudicators.¹⁵⁵

That Hardy’s mistake in this case is based on a failure to appreciate the diversity in minority sexual identities is made even clearer when taking into account his decision in *N96/10584* (2006). This case was a review of a decision by a primary adjudicator to deny refugee status to a gay Chinese man who, it was ruled, could avoid persecution by acting discreetly. Hardy relied largely on the testimony of a witness brought forward by

¹⁵⁴ Ibid.

¹⁵⁵ Berg and Millbank, p. 197.

the applicant for his favorable determination. The witness, who corroborated the claim of the applicant to be a homosexual, discussed the discrimination and harassment that Chinese men faced after meeting socially in a Shanghai restaurant known to be a gay meeting place. It is not clear from the published decision whether or not the applicant himself visited this restaurant, but Hardy seemed to attribute this kind of overt expression to the applicant. Hardy went on to talk about public bathrooms and parks in Shanghai and the practice of meeting in such spaces for anonymous sex. It is again unclear whether or not the applicant frequented parks in Shanghai. Though Hardy was using these examples to prove a general point about discrimination in China against homosexuals,¹⁵⁶ it appears that the parallels (attributed or real) between familiar aspects of Western gay identity and the expression of gay identity in China were sufficient to accept that the applicant was homosexual. A corroborating witness and the frequenting of gay spaces (the restaurant mentioned, public bathrooms and parks) in the country of origin were elements impossible for the Iranian man in *WAAG* or the Bangladeshi couple in *NAOX* to employ to authenticate their sexual identity claims.

To understand Hardy's decisions, it is useful to look at them through the lens of Goffman's theories on social stigma. In his 1963 book *Stigma*, Goffman observes that the stigmatized individual absorbs the social identity standards of the unstigmatized (or "normals") regardless of the fact that she herself fails to conform to them. The resulting ambivalence toward her own identity may lead her to attempt to "normify" herself. Goffman defines normification as "the effort on the part of the stigmatized individual to

¹⁵⁶ See the published decision in case *N96/10584* [1996] RRTA 1131 (15 May 1996) for further detail on Hardy's arguments.

present himself as an ordinary person, although not necessary making a secret of his failing".¹⁵⁷ This process is also called "covering" wherein "persons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large".¹⁵⁸ Identity ambivalence can also cause a stigmatized person to draw a distinction between herself and others like her (within the group of those sharing her stigma) on the one hand and those more demonstratively or stereotypically stigmatized than she. In some cases, the less overtly stigmatized will engage not only in normification of themselves, but also the stigmatized group as a whole. Goffman calls this "in-group purification".¹⁵⁹ Those who do not or cannot cover are othered as a result, stigmatized within an already-stigmatized group, as it were. Those who refuse to normify themselves may be accused of engaging in "minstrelization" whereby they act out stereotypes and external expectations of the characteristics imputed to their stigma "consolidating a life situation into a clownish role".¹⁶⁰ They are seen as damaging to the dignity of the group.¹⁶¹

And yet, excluding the less or un-normified is only one form of in-group purification. Goffman states that the stigmatized individual is also warned *against* normification or "deminstrelization" and is

¹⁵⁷ Erving Goffman, *Stigma: Notes on the management of spoiled identity* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1963), 31.

¹⁵⁸ *Ibid.*, 102. For further analysis of covering in the LGBT context, see: Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (2006).

¹⁵⁹ *Ibid.*, 108.

¹⁶⁰ *Ibid.*, 110.

¹⁶¹ See Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (2000) for a discussion of in-group purification in the LGBT community.

encouraged to have distaste for those of his fellows who, without actually making a secret of their stigma, engage in careful covering, being very careful to show that in spite of appearances they are [...] gentlemen deviants, nice persons like ourselves in spite of the reputation of their kind¹⁶²

On this basis, the would-be out group who are more demonstratively or stereotypically associable with the stigma they possess reject the more normified as inauthentic. This is the context into which I suggest placing Hardy's approach in *NOAX* and *WAAG*. Rather than understanding that minority sexualities may manifest themselves differently in different concepts, Hardy chooses to use the rubric of Western gay identity. Therefore, not being connected with politicized gay movements, not frequenting gay spaces, not identifying with Western gay cultural figures, and being in a heterosexual marriage are all pieces of the applicants' identities (imputed or real) that push them further out of the "in-group" whose authenticity Hardy is tasked with maintaining both as a gay man and as an adjudicator. This is especially ironic given a statement he made in a case in which he denied asylum to a gay Malaysian appellant wherein he decried the "labelling of a person as a homosexual merely over his or her [...] stated philosophy, taste in music or marital status."¹⁶³

While Hardy's rulings are particular, their analysis is indispensable. Hardy, in addition to his position as a member of the Refugee Review Tribunals of Australia was a UNHCR officer and executive director of the Refugee Council of Australia. He was thrice part of the Australian delegation to UNHCR's Executive Committee in Geneva. These positions, in addition to work on TV documentaries and publications on refugee

¹⁶² Goffman (1963), 110.

¹⁶³ *N97/14443* [1998] RRTA 387 (27 January 1998).

issues,¹⁶⁴ indicate a high level of influence. This is particularly salient given Goffman's assertion that "verbal and vocal members" of a stigmatized group "present in a well-rounded version" the character of the stigma and the stigmatized to the rest of society.¹⁶⁵ Goffman further describes this role, saying that "once a person with a particular stigma attains high occupational, political, or financial position [...] a new career is likely to be thrust upon him, that of representing his category".¹⁶⁶ Hardy and those in similar positions help to define for the rest of society (and, importantly, for others in the refugee adjudication community) what constitutes an authentic gay identity. Outsiders endeavoring in good faith to move past stereotypes accept that he and others like him are insiders and that he therefore has special knowledge of the group. When these outsiders are other adjudicators, this presumed insight is used to determine an authentic gay identity for legal purposes in "an idiosyncratic practice that seeks systematically to appropriate, privilege and secure a specific and limited set of meanings, accents, and connotations by means of displacing and rejecting alternative and competing meanings..."¹⁶⁷

In a courtroom, where objective standards and precedents are indispensable, the breadth of minority sexual identity becomes a formidable challenge. The problem with the influence of Hardy and others in the LGBT community who have the ears and eyes of refugee adjudicators is that these are primarily from Western "spokesmen". Sexual minorities in the West are often freer to be more verbal and vocal and tend to dominate

¹⁶⁴ Migration Review Tribunal and Refugee Review Tribunal, "Appendix 1: Members of the Tribunals," *Annual Report 2005-2006* (2006).

¹⁶⁵ Goffman (1963), 112.

¹⁶⁶ *Ibid.*, 26.

¹⁶⁷ Leslie J. Moran in McGhee, 34.

the identity discourse. While Massad errs in negating the importance of non-Western sexual identities (suggesting there are only “desires and practices”¹⁶⁸ rather than identities), there is validity in his general point that Western minority sexual identity, even as it conceives of itself as universal, fails to incorporate the realities of non-Western sexual minorities.

¹⁶⁸ Massad, 363.

V. Multiple Identities, Multiple Marginalities

A refugee who is a member of a sexual minority suffers on account of her individual multiple identities and at their intersection. In no country in the world do lesbians, gay men, bisexuals, and transgender individuals enjoy full equality with exclusively heterosexual people. In the best cases, sexual minorities in states that provide them legal rights such as marriage, the ability to adopt children, and protection against discrimination in the workplace and in healthcare still face the stigma of having rejected the heteronormative standards of the majority. In the worst cases, they are executed by the state, tortured, subjected to sexual violence, disowned by their families, and deprived of their fundamental human dignity.

Driven to the margins on account of a characteristic either innate and immutable, or so fundamental to their human dignity they should not be forced to change it, refugees of any sexual orientation have by definition faced persecution or live in fear of it. Once in a host state, they are often regarded with suspicion or as an additional burden. Language, culture, values, and beliefs that distinguish them from their host society mark them as different, even undesirable. Along the way, they can be pigeonholed as vulnerable by those whose goal it is to help them and unintentionally dispossessed of their agency.

At the intersection of these identities are a host of unique problems, combining the worst of both experiences. When a refugee who shares and respects the values of his coreligionists or those belonging to his ethnic group (these two categories often

coincide), he enjoys the possibility of reconstructing his life in a host country with the support of the refugee community there. He will find a network of people who have something in common with him who can help him navigate the challenges of refugee life. Not so in many cases for the LGBT refugee who is shunned by his own community for his sexual orientation. Left with fewer resources and limited connections because of his status as a sexual minority, he is often also unable to seek the assistance of the “native” LGBT community in the host society because of his status as a foreigner. Cut off from assistance, the LGBT refugee often lacks vital information, exacerbating problems such as those revolving around filing claims within a fixed amount of time after arrival.¹⁶⁹ In some cases, organizations that bring together LGBT members of a particular ethnic group or religious background do exist and can provide something like a surrogate family for refugees. Only in rare cases do LGBT refugee organizations that bring together refugees from diverse ethnic groups and backgrounds exist.

In addition to the double-marginality that results from the double LGBT/refugee identity, I have explained that blind spots exist for adjudicators who rely on a familiarity with Western same-sex sexuality to understand same-sex sexuality in refugees’ countries of origin. However, this dual identity also intersects with other identities, causing further particular problems for the member of a sexual minority who flees persecution. Each of these refugees, in fact, has multiple identities.

¹⁶⁹ O’Leary, 93.

A. Gender

At the intersection of LGBT refugee identity and gender, the dichotomy of male and female is paralleled by a dichotomy between the public and private spheres. The locations of two elements are at play in this division: the expression of identity (which may be an activity) and persecution. According to Victoria Neilson, for gay men, the occurrence of one or both of these elements in the public sphere is far more likely, whereas for lesbians, both frequently occur in the private sphere.¹⁷⁰

Because, according to the UN's Special Rapporteur on violence against women, there is a "traditional division between the public and private spheres and the emphasis in human rights discourse on public sphere violations",¹⁷¹ the often private nature of lesbian identity expression and persecution creates unique challenges. According to the special report, human rights guarantees no longer apply only to the public realm, a development that obliges the state "to act with due diligence to prevent, investigate and punish violations" within the private realm, including in the family.¹⁷² In practice, however, violence and other forms of persecution of women (like forced marriage) that takes place within the context of the family is still hidden behind the veil of persistent ideas about the inviolability of the private sphere. These ideas have proven a formidable challenge for lesbians and other female asylum-seekers.

Across cultures and national boundaries, women are inordinately more likely than men to be the victims of domestic violence. This violence is very often a form of

¹⁷⁰ Neilson, 427.

¹⁷¹ OHCHR, *Violence Against Women in the Family* E/CN.4/1999/68 (1999), para. 6.

¹⁷² *Ibid.*

persecution intended to maintain a male-dominated power dynamic within the family and, by extension, in the community and in society as a whole. Taking into account the extremely high proportion of sexual assault visited upon women together with the fact that sexual minorities are more often victims of sexual assault than heterosexuals, it is not unsurprising that lesbians are uniquely vulnerable.¹⁷³ Given the extremely high significance of sexuality as a transfer point for power,¹⁷⁴ transgressive female sexuality may be regarded as among the most flagrant violations of patriarchal norms. The state is often tolerant of or even complicit in the maintenance of such dynamics. According to the Rapporteur, “State-tolerated violence [is] intended to control women in their so-called private lives”.¹⁷⁵

An American case, *In re R-A-*, was the first Board of Immigration Appeals (BIA) review to examine whether or not domestic violence could be considered tantamount to persecution. While the case is still awaiting the final decision of an Immigration Judge, the direction of the Department of Homeland Security and the Obama administration has been to find in favor of the claimant. This precedent, important for female asylum-seekers in general as well as lesbians, would presumably clarify that violence in the private sphere rises to the level of persecution and thus can form part of the basis of an asylum claim.

¹⁷³ See Millbank (2003), 75 for an explanation of the distinctness of anti-lesbian violence.

¹⁷⁴ Supra 29.

¹⁷⁵ OHCHR, *Report of the Special Rapporteur on violence against women, its causes and consequences* E/CN.4/1996/53 (1996), para. 26.

There is only one specific precedential decision relating to lesbian refugees in the US,¹⁷⁶ unsurprising given the degree of lesbian invisibility: *Pitcherskaia v. INS*, while important for a number of reasons (particularly in relation to the question of the relevance of intent in persecution), does not address the problems originating in the private realm. According to Millbank, when the question has been addressed in Australia, the RRT has generally been “unable to see the sexuality component in that violence in that it was directed specifically at lesbians *as lesbians*”, failing to understand that sexual minorities are often targeted with sexual violence as a punishment or cure.¹⁷⁷ Even more problematic for lesbian claims in Australia (but also for women’s claims there in general), the RRT has been slow to recognize the extension of human rights guarantees into the home. Millbank provides as an example an unpublished 1999 case involving a Bolivian lesbian who was the victim of violence and sexual assault by men in her neighborhood after being outed by a relative who believed that insults and physical attacks would convinced her to “change”. The Tribunal found that it was

[A] purely private matter and [...] not for reasons of the Applicant's membership of a particular social group of homosexuals. There is no evidence to suggest that [...] other homosexuals were threatened or harmed by [the male relative or his associates ...] The tribunal accepts that although Bolivian society, and many other societies or communities generally disapprove of homosexuality, the Applicant's relative's motivation to 'cure' her of her homosexuality is directed solely at the Applicant, a family relation.¹⁷⁸

Writing in 2003, Millbank provided examples of several other cases in Australia that used similar reasoning, while noting that, in distinction, Canadian adjudicators were

¹⁷⁶ Neilson, 427.

¹⁷⁷ Millbank (2003), 77.

¹⁷⁸ *N98/23425* (Apr. 28, 1999) in Millbank (2003), 78.

“generally very sensitive to the interplay of gender and sexuality”.¹⁷⁹ However, more recent cases have reflected an understanding that violence and other forms of persecution in the private realm can be sufficient to qualify lesbians for protection under the Convention. In a 2008 ruling in favor of a Vietnamese applicant, the RRT stated:

This harm, carried out by individual members of society, but reflecting a general antithesis towards lesbians, is premeditated, intended and targeted towards lesbians, and in this case, the applicant, because of her membership of the particular social group, lesbians in Vietnam. While it is clear that the acts of serious harm are carried out by private actors, their actions are officially tolerated and sometimes condoned by the forces of law and order.¹⁸⁰

In France and Germany where persecution by non-state actors was long considered insufficient for a refugee claim, the problem of public versus private realms complicated claims involving domestic violence and family- or community-based persecution.¹⁸¹

If the gender norms in many refugee-generating countries lead to women expressing their sexuality and being persecuted in the private realm, they often push men in the other direction.¹⁸² Public (often anonymous) sexual encounters are often seen as the only recourse for men looking for same-sex encounters. A 1996 case review by the RRT found that in some countries “reconnoitring in public places where the risk of danger is heightened” was “virtually the only way” gay men could “give expression to

¹⁷⁹ Millbank (2003), 75.

¹⁸⁰ 071862642 [2008] RRTA 40 (19 February 2008).

¹⁸¹ See: Karen Musalo, “Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence”, 52 *DePaul Law Review* (2003) 777-808.

¹⁸² See Millbank (2003), 91 for a discussion of the differences in public sex along gender lines and possible reasons behind them.

their sexuality”.¹⁸³ Despite this recognition, stereotypes that exist in the West about the promiscuity of gay men are all too often used by adjudicators to explain the expression of gay sexuality in public and semi-public places. As Kendall explains, gay refugees whose “narratives reveal ‘promiscuity’ [...] may well be rejected for performing gender in a way that is unacceptable to [decision-makers’] heterosexist mores”.¹⁸⁴

A Canadian example of this can be found in the case mentioned earlier in which the adjudicator relied on a medical examination that concluded the applicant had engaged in anal intercourse while disbelieving most of the evidence and claims provided in the claimant’s personal narrative. In this case, the decision-maker is surprised by the “indiscreetness” of alleged sexual activities the applicant describes in his narrative. According to the published court decision, these consisted in the applicant having sex with another student in a classroom at 11 o’clock at night after he had believed other students had left and, on another occasion, having sex with his partner in a bedroom (of a private home) in which the curtains were open.¹⁸⁵ The decision-maker disbelieved the applicant’s claim because, in her estimation, “Given the stigma of homosexuality in Uganda, it is surprising the claimant would have engaged in such risky behaviour”.¹⁸⁶ The implication is that there was another, more “discreet” way for the applicant, were he reasonable, to express his sexual identity through same-sex contact. This is but one

¹⁸³ V95/03527 [1996] RRTA 246 (9 February 1996). This phenomenon is described in Laud Humphreys’ *Tearoom trade : a study of homosexual encounters in public places* (London: Duckworth 1970). While the specific context is Western, the general reasons for anonymous encounters between gay men in the public sphere (i.e., the insulation of non-normative expressions of sexuality identity from both the private norm-conforming roles in the family and the public norm-conforming roles in public) exist outside the West.

¹⁸⁴ Kendall, 748.

¹⁸⁵ TA2-19317.

¹⁸⁶ Ibid.

case that betrays a misunderstanding of the circumstances that constrain gay men in refugee-generating countries.

Because of their incorrect transposition of Western expectations of the availability of the private sphere for male-male sexual intimacy¹⁸⁷, decision-makers qualify their recognition that public places may be virtually the only place gays “may be able to give expression to their own sexuality” with an understanding that the public or semi-public venue is appropriate only for a mutual acknowledgment of sexual orientation that is supposed to lead to a private expression of sexuality.¹⁸⁸ This is little more progressive than an early Canadian decision in which an IRB member declared “It would be foolhardy to flaunt ones sexual preference in the face of one’s country[’s] legally established laws which prohibit expression of open sexual activities ... judged ... to be objectionable ...”.¹⁸⁹ This statement relies either upon the same assumption that gay men have alternative ways of expressing their sexual identity or, more likely given the IRB member’s other statements, a discriminatory expectation that anyone whose sexual identity does not fall within the heteronormative expectations of his society does not deserve to have any private context for the expression of such an identity. The effect of denying sexual minorities’ access to both the private and public realms is one that creates refugees in the first place.

¹⁸⁷ In the US, for example, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) both reaffirmed the taboo of “public” sexual activity and reinforced its perceived immorality by explicitly stating that the case did not “involve public conduct or prostitution”.

¹⁸⁸ V95/03527

¹⁸⁹ *Leistra in Rehaag*, 66.

Gay men are thus seen to be acting promiscuously, provocatively, and immorally when forced (or choosing¹⁹⁰) to pursue sex in the public sphere. These stereotypes cause some adjudicators to stray into an inappropriate “respectability discourse” akin to the one that has informed decisions to protect wives but not prostitutes from rape.¹⁹¹ Whereas other adjudicators fault applicants for not participating in the “gay scene”, these adjudicators come to regard what Goffman describes as “gentlemen deviants”¹⁹² who “appear to mimic idealised heterosexual paradigms of monogamy”¹⁹³ as more worthy of protection. Three Australian examples are found in cases analyzed by Walker where the successful applicants were involved in long-term monogamous relationships and an unsuccessful applicant was not.¹⁹⁴ In one of these, we find the ideal representation of the “gentleman deviant”: a Chinese homosexual who had been in a relationship “to which he had strong commitment”, “whose expression of his homosexuality was not through numerous fleeting sexual encounters”, and who had converted to Christianity and joined an LGBT-friendly Anglican parish. He did “not visit gay bars and discos in Sydney but is content to mix with homosexual Christians”.¹⁹⁵

If the expectations described earlier of gay men (and to a lesser extent, lesbians) to be involved in the “gay scene” (i.e. by frequenting gay bars, sex venues, etc.) and through sexual relationships in the host country parallel the minstrelization demand

¹⁹⁰ See: Jenni Millbank, “Imagining Otherness: Refugee Claims On The Basis Of Sexuality In Canada And Australia”, 26 *Melbourne University Law Review* (2002) for a discussion of the possibility of articulating an expression of public sexuality in a human rights framework if it involves choice.

¹⁹¹ Kendall, 748.

¹⁹² Goffman (1963), 110.

¹⁹³ Kendall, 748.

¹⁹⁴ Walker (1996).

¹⁹⁵ N93/00846 [1994] RRTA 347 (8 March 1994).

described by Goffman, then the favor shown the “gentlemen deviants” corresponds to the demand for normification or covering.

B. Ethnicity & Nationality

When LGBT refugees are part of an ethnic population displaced by conflict or persecution, their ethnic or national identity can obscure their sexual identity in relation to decision-makers. They can be left vulnerable and their need for protection, unmet when adjudicators focus on ethnic or national background to the exclusion of sexual identity. Lauren Fouda provides as an example of this mistake, the situation of LGBT members of the Sudanese refugee population in Cairo.¹⁹⁶ While under the OAU refugee guidelines, many Sudanese fleeing conflict would likely qualify as refugees, a temporary protection arrangement has been set up to deal with the large influx. UNHCR, responsible for refugee status determination in Egypt, devised this scheme (which gives limited protection *prima facie*) after the Comprehensive Peace Agreement was signed between opposing factions in the Sudanese Civil War. It was decided in 2004 that the expected peace made individual refugee status determinations unnecessary, not only for those who had fled the conflict between the North and the South but all Sudanese asylum-seekers, including those who had escaped the conflict in Darfur and those persecuted for unrelated reasons. Some two percent of registered asylum-seekers from Sudan gave persecution based on sexual orientation as their primary reason for flight¹⁹⁷. If, by extrapolation, this percentage is applied to the total number of Sudanese asylum-

¹⁹⁶ Lauren Fouda, “Compulsory Voluntary Repatriation: Why Temporary Protection For Sudanese Asylum-Seekers In Cairo Amounts To Refoulement”, 14 *Georgetown Journal on Poverty Law & Policy* (2007), 511-537.

¹⁹⁷ Fouda, 529.

seekers in Egypt, LGBT refugees in that population could number in the thousands. These people who, given the climate of hostility toward LGBTs in Egypt (itself an LGBT refugee-generating country), are especially in need of resettlement but are left to face the risks of attempting to integrate locally or those of “voluntary” repatriation.

Sudanese fleeing to Israel have been denied proper protection because of their nationality, despite the fact that they are persecuted by groups tolerated by or agents of the Sudanese government that is technically at war with Israel. While according to the Geneva Conventions, people who are not protected by any government are not meant to be considered “enemy aliens” by virtue of their nationality *de jure* of an “enemy state”,¹⁹⁸ hundreds of Sudanese have were put in prison in Israel between 2005 and 2007 under the 1954 Prevention of Infiltration law.¹⁹⁹ This, of course, is not the only case where a focus on nationality occludes the need for protection against persecution. According to Michael Kagan and Anat Ben-Dor, LGBT Palestinians are at particular risk because of Israel’s rigid restrictions against “enemy nationals”, restrictions that violate the Convention on Refugees.²⁰⁰ Palestinian LGBTs cannot, as a result of their ethnic and national identity, seek protection in the nearest and most logical state to do so. While not the result of prejudice on the part of specific adjudicators, this gap in protection represents a systemic identity-related failure in the Israeli asylum system.

¹⁹⁸ Kagan and Ben-Dor, 25.

¹⁹⁹ Human Rights Watch, *Sinai Perils: Risks to Migrants, Refugees and Asylum Seekers in Egypt and Israel*, (12 November 2008) 1-56432-398-6.

²⁰⁰ *Ibid.*, 44.

C. Religion

Just as adjudicators' views of same-sex sexuality may reflect a narrow understanding specific to their cultural context, their views about religion and the authenticity of religious claims may fail to incorporate diversity within religion. For LGBT refugees who are also religious, this has proven an obstacle to asylum.

In 2004, a Federal Magistrates Court overturned an RRT ruling that a gay Ukrainian should not be granted asylum in Australia. The RRT stated:

at the hearing when asked how as a practicing Roman Catholic he reconciled his homosexuality with the Catholic faith his response was that he had never considered the matter. This response, together with his confusion with respect to his homosexuality is sufficient to satisfy me that the Applicant's claims of being homosexual are not genuine. Having regard to the current teachings of the Catholic Church, I am firmly of the view that a person of single sex orientation must have at least considered their position in the Church and whether they wished to continue practise (sic) Catholicism. ... As I am not satisfied that the claims of the Applicant that he is a homosexual are genuine, it follows that I do not accept that there is a real chance of him suffering Convention based persecution upon his return to Ukraine for the reason of his being a member of a particular social group - homosexuals in Ukraine²⁰¹

The FMC in its ruling found that the RRT's decision was "based on a personal assessment by the presiding member of what could have been expected of a practising Roman Catholic" and that

no indication that the presiding member made any enquiry through an assessment of independent information. It was simply a subjective assessment [...]The rationality [behind which] is dubious. It assumes that a practising Catholic [...] would necessarily give consideration to doctrinal issues concerning homosexuality.²⁰²

²⁰¹ *SZAKD v. Minister for Immigration* [2004] FMCA 78 (19 March 2004).

²⁰² *Ibid.*

Similarly, in *Trembliuk v. Canada*, a Canadian appellate court overturned a ruling against another gay Catholic man from Ukraine. The initial decision by the RPD found that the claimant was not gay in part because, in its opinion, a genuine homosexual would dissociate himself from the Catholic Church and Catholic schools.²⁰³ Furthermore, the claimant's narrative included that he had lived with a Catholic priest in an arrangement set up by his godmother so he could be closer to the Catholic school he attended. The RPD found this implausible "given the current climate in North America [...] with respect to the sexual abuse of minors and young adults by Roman Catholic clergy".²⁰⁴ The appellate court stated that such "inferences were based on stereotypical profiles that simply cannot be assumed to be appropriate to all persons of homosexual orientation and to all Roman Catholic priests".²⁰⁵

While these two cases represent a failure to recognize the possibility that a refugee may be both LGBT and religious (and indeed these sorts of cases are not particularly common), the larger mistake in the asylum system is one of not appreciating the significance on religious grounds of the intersection of sexual and religious identities. Religious LGBTs for whom international law consultant Jeffrey A. Redding coins the term "homo-sectuals",²⁰⁶ in addition to seeking freedom from persecution on the basis of their sexual orientation are often also seeking to be able to practice their religion freely. The interpretations of their religion that many LGBTs have will often be at odds with the interpretations of those around them given that the suppression of

²⁰³ *Trembliuk v. Canada* (Minister of Citizenship and Immigration), 2003 FC 1264 (CanLII).

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Jeffrey A. Redding, "Human Rights and Homo-sectuals: The International Politics of Sexuality, Religion, and Law", 4 *Northwestern University Journal of International Human Rights* 3 (May 2006).

non-normative sexualities is often driven by religious beliefs or framed using religious arguments. In failed asylum claim in Australia, a gay transgender Muslim man had claimed that he was unable to freely practice his religion. Because of his sexuality and gender identity, he was made to sit in the back of the mosque and forbidden from reading the Qur'an allowed. Taking a leadership role in any sort of Muslim religious group was forbidden to him. Furthermore, he claimed that people at the mosque would laugh and deride him and even grope him and touch his genitalia. The court found that this treatment did not amount to serious harm "as the applicant was still able to attend the Mosque and practice his religion".²⁰⁷ This conclusion was reached despite the fact that the court accepted that the applicant was likely to be barred from Qur'anic readings and leadership roles in mosques elsewhere in Thailand. Whether or not this amounts to persecution, glossing over this kind of discrimination is not consistent with a fair and thorough risk assessment.

A further and perhaps even more compelling argument may be made that persecution on both religious and social grounds is in play when religious LGBTs are barred from having a say in how their religion is constructed and functions if they either suffer "serious harm" in the process of trying to exercise their freedom of religion (attempting to participate in the discourse that shapes their religion) or are so afraid of this possibility that they remain silent and suffer discrimination as a result. This latter scenario finds its parallel in the increasing findings that a refugee's living discreetly out

²⁰⁷ N03/46498 [2003] RRTA 879 (22 September 2003).

of fear cannot be held against him and cannot be taken to mean that he should continue to live discreetly to avoid persecution.

VI. The “Lying Refugee”²⁰⁸

The shift from adjudication focused on determining whether LGBT refugees could return to their countries of origin and, by behaving discreetly, avoid persecution to adjudication concerned with the genuineness of their claims to be lesbians, gay men, bisexuals or transgender people brought sexual orientation-based into the thick of one of the biggest challenges for all refugees—credibility determination. From a sense of guilt and obligation that led to the initial formulation of international refugee law and, later, an opportunistic view of the intellectual and ideological capital Soviet refugees provided to First World receiving states, attitudes toward refugees shifted sharply with the end of the Cold War and the increasing number of refugees from developing countries. Suddenly, the concern that waves of cheats, freeloaders, and infiltrators were threatening receiving states gained primacy, modifying the image of a vulnerable, helpless refugee to a deceitful, undeserving one. Because of the notion that the “claim of being homosexual is in many ways an easy one to make, and a difficult one to dispute”,²⁰⁹ credibility is an especially heavy burden for LGBT refugees.

All of the stereotypes discussed earlier are brought into play in response to a performance by the claimant. She gives the decision-maker the raw materials to construct an identity, either that of a genuine refugee or that of a fraudster. The decision-maker examines the performance for consistency, relying on the assumption

²⁰⁸ The term “lying refugee” is borrowed from Cécile Rousseau and Patricia Foxen, “Le mythe du réfugié menteur : un mensonge indispensable ?”, *L'évolution psychiatrique* 71 (2006), 505-520 in which the authors discuss the utility for immigration officials of painting asylum-seekers as fraudsters.

²⁰⁹ N97/16114 [1998] RRTA 4882 (2 November 1998); See also Millbank (2009a), notes 90-91.

that the “honest performer” is able to avoid discrepancies and contradictions by simple virtue of the genuineness of her claim.²¹⁰ Goffman explains that this “common-sense view has limited analytical utility”²¹¹ because “there is often no reason for claiming that the facts discrepant with the fostered impression are any more the real reality than is the fostered reality they embarrass.”²¹² Discrepancies do not necessarily represent an act of dissimulation. In fact, there are a number of issues that can account for inconsistency in the self-presentation of an LGBT claimant that have nothing whatsoever to do with a lack of genuineness.

Among these issues is the assumption that a hesitancy to speak frankly about sexual experiences must necessarily be equated with dishonesty. This is exemplified by the review by the third Tribunal in the case of the Bangladeshi couple. It is a trying demand to ask anyone to bring forward for intense scrutiny deeply personal experiences, especially when previous responses may have been persecutory and for LGBT claimants, who “often have feelings of shame and self-hatred or internalized homophobia” and thus “may find answering questions about their sexuality very difficult,” the demand is all the more anxiety-producing.²¹³ As Berg and Millbank explain, there is a dominant view in the West that sexuality is fixed. Situated in this context is an understanding of the LGBT experience as a linear one marked by a moment of coming out followed by the consistent expression of a stabilized sexual identity. When adjudicators espouse this view, this makes refugees who are unsure or conflicted

²¹⁰ Goffman (1959), 59.

²¹¹ *Ibid.*

²¹² *Ibid.*, 65.

²¹³ Millbank (2009b), 8.

about their sexuality vulnerable to being seen as inauthentic.²¹⁴ Many refugees will speak of their sexuality as a “sexual problem” or an “addiction”.²¹⁵ Rather than understanding this as internalized homophobia, adjudicators take this to be, at worst, the mark of a faker who is not adept enough to play the part by using the proper labels; or at best, someone whose ambivalence suggests he is merely flirting with the idea of homosexuality. The genuineness of the process of wrestling with one’s sexual identity is expressed by an Indian lesbian claimant:

It is still there deep down, there is something in there; I am not normal. Something is wrong with me that I am gay, that is why people don’t like me, don’t accept me. I’m trying to come to terms with that nothing is wrong with me, that I am normal.²¹⁶

There is some evidence, however, that at least in appellate courts, adjudicators are beginning to admit that an unsettled sexual identity need not be equated with dishonesty. In a 2008 RRT, case for example, the Tribunal overturned a first instance decision not to grant a gay Pakistani claimant asylum. Though the Tribunal put to the appellant that he was being “evasive” and that he showed no “introspection about his homosexuality and the choices he [...] made in relation to it [nor any] explanation or awareness about his own experience as a homosexual or how he was able to reconcile that to his strict adherence to Islam”,²¹⁷ it nonetheless found in his favor. When the appellant was questioned about his evasiveness, “he was confused, ashamed and

²¹⁴ In the Australian case *SZAKD v Minister for Immigration*, the FMC overturned an RRT decision not to grant asylum in which the Tribunal stated: “At hearing the applicant admitted to still being confused about his sexual identity. Although the applicant sought to explain this statement it causes me to have serious doubts that the applicant is a homosexual.”

²¹⁵ Berg and Millbank, 199.

²¹⁶ Joanne Ahola, correspondence with author (30 August 2009).

²¹⁷ 0803755 [2008] RRTA 331 (1 September 2008), para. 77.

unsettled”²¹⁸ and he also mentioned that he felt his children should not be exposed to the “reality of their father being homosexual”.²¹⁹ This uncertainty, despite his enduring involvement in a same-sex relationship, was not held against him by the RRT which recognized that “[b]y their very nature, [sexual orientation-based cases] involve private issues of self-identity and sexual conduct and sometimes personal issues for individuals that may be sensitive, stressful or unresolved. Social, cultural and religious attitudes to homosexuality in an applicant’s society may exacerbate such problems.”²²⁰

Compounding the difficulty of presenting a coherent image of one’s sexuality are cases where sexual violence is involved. This is an important consideration given that the research of Berg and Millbank has uncovered “high levels” of “sexual assault in refugee claims based upon sexual orientation”.²²¹ Guidelines, such as those in Canada that recognize that “decision-makers should be aware of the specific impact of sexual assault on the ability to seek help, as well as the possibility that sexual violence at the hands of state actors will increase the difficulty of substantiating a claim”,²²² go unheeded in many cases. Refugees with claims on any ground may be subject to sexual violence but when the weight of this kind of violence falls especially hard on refugees with gender and sexual orientation-based claims. Unlike other refugees, they are forced to confront and present before the court the very aspect of their identity most affected by the psychological violence of the sexual assault. It is entirely natural that this would affect not only the applicant’s ability to talk about the experience of the assault, but

²¹⁸ Ibid.

²¹⁹ Ibid., para. 79.

²²⁰ Ibid., para. 75.

²²¹ Berg and Millbank, 201.

²²² Immigration and Refugee Board in Berg and Millbank, 203.

about her sexuality in general as the two are tragically tied together. There seems to be an expectation that, upon arrival and quite possibly with no previous psychological treatment, a claimant should be able to coherently and spontaneously give full accounts of sexual assault. When this is not the case, and instances of sexual violence are introduced later in the process, decision-makers hold the inconsistency against the claimant. In Australia, a Ugandan lesbian who had been initially denied asylum after an adverse credibility finding (a decision upheld by the RRT) told a Federal magistrate, “There is no way, there is no way I could tell anybody about that [her experience of sexual assault] when I had first come, delegate. I am human just like you are and I can’t meet a stranger and just tell them about my life. I mentioned it but it doesn’t come out clearly.”²²³ This is something that would seem common sense—that someone who had been sexually assaulted, an experience that can leave deep psychological problems in its wake would not be willing or even capable to discuss it at length and with coherency—and yet it is routinely held against claimants.²²⁴ Additionally, while some may refrain from talking about a traumatic sexual assault experience either to avoid reliving the pain or because there is not significant trust in the questioner (or both), others may reframe their experiences to lessen the psychological impact of the event. According to Christopher Nugent, an immigration lawyer who has represented LGBT claimants,

²²³ *MZXFJ v Minister for Immigration & Anor* [2006] FMCA 1465 (10 October 2006).

²²⁴ Berg and Millbank on 202-203 give the example of *Mahmood*, a Canadian case wherein a tribunal member disbelieved the applicant because he was reticent to discuss his first sexual experience which involved being raped by older boys at the age of 15. The tribunal member was surprised that the claimant, 25 at the time of the hearing, “who has now had multiple gay sex partners” did not recount “details of his sexual experience [...] in a more straightforward manner than what occurred”. According to the tribunal member, the claimant had omitted “core evidence” that would have consisted in spontaneously reporting pain or bleeding.

refugees also do not want to conceive of themselves as victims, but rather as survivors. In representing themselves this way (both internally and externally), they may minimize the harm they have suffered.²²⁵ For example, in the landmark case *Toboso-Alfonso*, it was stated that the immigration judge in the first instance decision “perceive[d] that [Toboso] was restrained in his testimony as to the difficulty of his life during the years that he lived in Cuba”²²⁶

Another issue that, despite an authentic claim, may lead to discrepancies in self-presentation is that of the interpreter. Goffman says that if perception (in this case on the part of the decision-maker) “is seen as a form of contact [...] then control over what is perceived is control over contact that is made, and the limitation and regulation of what is shown is a limitation and regulation of contact”.²²⁷ It is easy to forget when looking at translated transcriptions or picturing a lone claimant standing before a decision-maker or a panel of decision-makers that in many cases there is an intermediary. The refugee rarely makes direct “contact” with the judge because the judge’s perception of the refugee is defined by interpreters and interviewers. The refugee’s identity and story are handled, sometimes roughly, by these participants in the identity-construction process.²²⁸

Beyond the general difficulties of recounting traumatic stories of persecution or difficult details of one’s struggles to come to terms with his sexual identity, the identity

²²⁵ Telephone interview, 8 April 2009.

²²⁶ *Matter of Toboso-Alfonso*, 823.

²²⁷ Goffman (1959), 67.

²²⁸ For a discussion of the many layers of the LGBT claimant’s narrative that are lost or warped in translation, see Juana María Rodríguez, “The Subject on Trial: Reading *In re Tenorio* as Transnational Narrative” in *Queer latinidad : identity practices, discursive spaces* (New York: New York University Press, 2003), 84-113.

of the interpreter can also be an impediment to obtaining a thorough, forthright narrative from a claimant. Talking to an interpreter of a different gender, for example, can render a claimant too uncomfortable to speak about his sexuality.²²⁹ This is increasingly being taken into consideration by decision-making bodies like the UNHCR²³⁰, the Swedish Migration Board²³¹, and the RRT²³², but such efforts are limited by scarce resources and personnel shortages. In addition to gender, the ethnic background of the interpreter can be an obstacle to the claimant's ability to be open about her sexuality. An interpreter from the same ethnic community may be identified with those from whom she is feeling and/or as someone who may be untrustworthy and reveal her sexual identity to the community. In the previously-described case of the Pakistani appellant who lacked "introspection" regarding his sexuality, his interpreter was "of the same background" from whom he felt "compelled him to hide the truth" and through whom he "he felt humiliated having to answer such questions and provide such detail as the Tribunal sought".²³³ While the perceptions of interpreters may impact refugees' ability to be forthcoming, interpreters have also actively and negatively interfered in refugee status determination and asylum cases. This sometimes occurs when untrained (if not outright homophobic) interpreters use pejorative terms rather

²²⁹ Millbank (2009a) provides the examples of case N01/37891 [2001] RRTA 889 (16 October 2001) in which an Iranian man was denied asylum—the initial interviewer and the interpreter were both women, something the claimant said made him unable to discuss his sexuality; and case N01/37352, where another Iranian man who was denied asylum said that he was unable to disclose his sexuality to a female Afghan interpreter.

²³⁰ Grungras, Levitan and Slotek, 22-23.

²³¹ Swedish Migration Board, *Guidelines for Investigation and Evaluation of Asylum Cases in Which Persecution Based on Given Sexual Orientations is Cited as a Ground* (28 January 2002).

²³² Millbank (2009b), note 41.

²³³ 0803755, para. 77.

than neutral alternatives to describe LGBTs. According to Grungras et al., a Farsi interpreter in the employ of UNHCR referred to gay men as *hamjensbaz* (همجنسباز), a Persian word implying prostitution, rather than the more neutral *hamjensgara* (همجنسگارا).²³⁴ Incidentally, *hamjensbaz* is the word Ahmadinejad used to describe gays in his speech at Columbia. While the implications for the applicants for refugee status in the cases where this Farsi interpreter was used are unclear, there are failed asylum cases that have hinged on interpreters' mistranslations. In 2006, for example, an Albanian man applying for asylum in Canada was denied by a first instance decision-maker because he was found not to be credible. This adverse finding relied in part on the apparent fact that the applicant "did not know what a gay bar was".²³⁵ This testimony was conveyed by an interpreter who was later found by the IRB "to have had difficulty translating", something to which the Board gave great weight in deciding that the finding was in error. According to the IRB, the

finding was based upon references in Mr. Lekaj's testimony to some bars as being "normal" bars, and that women were "not allowed" into some bars in Toronto. The Board found that it "is common knowledge that public facilities such as restaurants or bars are not allowed to discriminate based on sex or sexual orientation in Canada".

[9] Mr. Lekaj's use of the phrase "normal" ought to have been considered in the context that he was testifying in Albanian through an interpreter. Thus, the Board was required to consider whether in the Albanian language there is a word for gay or homosexual which is not pejorative, and to consider what alternatives a native Albanian speaker would have when referring to heterosexuals. In the absence of such consideration the Board erred by applying North American logic to Mr. Lekaj's use of the word "normal" [...] The Board did not pursue this with Mr. Lekaj, but simply seized upon his observation that in

²³⁴ Note 55.

²³⁵ *Lekaj v. Canada* (Minister of Citizenship and Immigration), CanLII 2006 FC 909 (2006), para. 3.

Toronto some bars (including the one he named) are only for men, and women are not allowed to enter.²³⁶

In many languages widely spoken in LGBT refugee-generating countries, there are no commonly used neutral terms for sexual minorities. In Arabic, for example, the use of the recent coinage *methliyya jensiyya* (مَثَلِيَّةٌ جِنْسِيَّةٌ), a calque of the word homosexuality, remains limited while more popular terms like *al-shudhudh al-jensi* (الشذوذ الجنسي), meaning “sexual deviance”, remain the common “polite” term.²³⁷ Terms that might be equivalent to “queer” or “gay” have not been reclaimed, leaving even those applicants who do not feel conflicted about their sexuality to use negative labels to describe themselves. How these nuances or difference in terminology are relayed relies on the acumen and objectivity of the interpreter.

In addition, there can be problems of terminology that relate more to decision-makers’ knowledge of country conditions. Variations in dialect and differences between popular terms and language that is used in an activist or an academic context can introduce suspicion where it need not exist. In an RRT case involving a gay Bangladeshi man, the Tribunal told the applicant that, in “read[ing] about men who had sex with men in Bangladesh”, it “came across the Bengali word ‘koti’”.²³⁸ When the applicant, in response to a description of what the Tribunal took the word to mean, expressed confusion over the exact meaning, but offered a synonym familiar to the court as well as a similar term in Chittagonian (a language related to but distinct from Bengali), the Tribunal remained skeptical saying “that it seemed unusual that he would not have

²³⁶ Ibid., paras. 8-9.

²³⁷ Joseph A. Massad, *Desiring Arabs* (Chicago: The University of Chicago Press 2007), 172.

²³⁸ *N04/49626* [2005] RRTA 6 (23 March 2005).

come across that word before if he had been having sex with men for some years".²³⁹

The court, divorced from the context in which the applicant was immersed presumed to dictate which terms a gay man from southeastern Bangladesh should be familiar with.

²³⁹ Ibid.

Conclusions

The most general mistake in refugee status determination and asylum claim adjudication is an ill-founded cynicism toward the claimant. That an important number of people who do not fit the 1951 Convention definition of a refugee have misrepresented themselves to adjudicators for any number of reasons is not in question. Limiting abuse of refugee status and asylum is certainly a legitimate concern, one that in its purest form has the wellbeing of genuine refugees in mind. In sorting between the genuine claims and the fake, however, decision-makers are often forced to rely on the testimony of claimants alone. A discomfort with a lack of objective evidence in such cases leads many decision-makers into error. Some put too much weight on consistency, failing to appreciate that, as Goffman puts it, “the performance offered by impostors and liars [... and] ordinary performances [...] are similar in the care their performers must exert in order to maintain the impression that is fostered”.²⁴⁰ Both the genuine refugee and the fraudster risk raising suspicion through an over-polished narrative or, contrariwise, through a disorganized and implausible presentation of their experiences. The impressions fostered by any narrative are subject to disruption and such disruptions are colored by the expectations of the audience.²⁴¹ Other decision-makers have erred by trying through medical examinations to restore objective fact-finding to reconcile the subjective milieu of the refugee narrative. In an LGBT context, this relies on the problematic view that sexual identity can be accurately determined by

²⁴⁰ (1959), 66.

²⁴¹ Ibid., 65.

forensic medicine, a view that in turn rests on stereotypes about the nature of sexual activity between gay men and the relationships that LGBTs in general have (or do not have). It is in grappling with the challenge of a lack of independent evidence (in turn made extraordinarily important by the focus on credibility brought about by a heightened skepticism about the genuineness of refugee claims) that decision-makers most often fail LGBT asylum-seekers. Exhausting the possibilities for documentary evidence, they often turn to their own stereotypes as tools of measurement that can lead, not unsurprisingly, to inconsistent judgments.

In parsing the solutions of UNHCR's 2008 *Guidance Note* it is possible to gauge what issues have been widely accepted as problematic. The *Note* refers to specific cases in Western asylum systems and also articulates trends and areas of growing consensus. It recognizes and deals with the problem of the "disruptions" Goffman describes in several ways, effectively agreeing with the idea that judging a claimant's genuineness according to inconsistencies is not useful as an analytical tool. After acknowledging the inevitability that, in some cases, they will have to "rely on [the applicant's] testimony alone", the *Note* enjoins decision-makers not to let a cynicism about refugees' intentions predispose them against the refugee. This reiterates the text that appears in the UNHCR Handbook on RSD²⁴²: "if the applicant's account appears credible, he [or she] should unless there are good reasons to the contrary, be given the benefit of the doubt".²⁴³ It goes on to list several possibilities for perceived inconsistencies that should

²⁴² Formally the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*

²⁴³ UNHCR (2008), para 3.

not be held against the applicant, including a lack of relationships in either the country of origin or the country of asylum²⁴⁴ and a reluctance to talk openly about “intimate matters” relating to sexual orientation,²⁴⁵ as discussed earlier. Importantly, the *Note* then declares, “Even where the initial submission for asylum contains false statements, [...] the applicant can still be able to establish a credible claim.”²⁴⁶ For states to accept and implement this directive, there must be an understanding that initial ignorance of the ability to make a claim on the basis of one’s sexual orientation²⁴⁷ as well as the possibility of the presentation of inaccurate or false information early in the process may lead to adverse credibility findings in first instance decisions. Appellate jurisdictions must be allowed to review fully the credibility findings of lower courts.

The *Note* does explicitly address the problems inherent in the use of medical examinations. It does mention however, that the presence of threat of “serious harm” should be “assessed in light of the opinions, feelings and psychological make-up of the applicant”.²⁴⁸ While physical examinations should be rejected outright as a means of determining the credibility of an applicant’s sexual identity claim, psychological evaluations may have some utility. Because some adjudicators see a mental health professional as being able to, in effect, transform the raw testimony (together perhaps

²⁴⁴ According to *ibid.*, para 38, “The fact that an applicant has not had any significant relationship(s) in the country of origin or in the country of asylum does not necessarily mean that he or she is not LGBT. It may, rather, be an indication that he or she has been seeking to avoid harm as explained above in paragraphs 23-26 [i.e. living “discreetly” to avoid persecution]”.

²⁴⁵ Again in *ibid.*, the applicant may be hesitant to discuss “such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case”.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*: “The applicant will not always know that sexual orientation can constitute a basis for refugee status”.

²⁴⁸ *Ibid.*, para. 10.

with behavioral indicators) of an applicant into objective evidence, the involvement of such experts may be a way to assuage the discomfort with the lack of an ability to determine objective truth. Given the harm done to LGBTs and LGBT refugees in particular by the medicalization of the discourse surrounding same-sex sexuality, it is imperative that psychological submissions do not pathologize the applicant's sexuality. Mental health professionals analyzing LGBT refugees should not be asked to diagnose homosexuality anymore than they should be asked to diagnose political opinion or religion. Rather, mental health affects associated with persecutory acts like physical, emotional, and sexual abuse, torture, and other traumas should be identified to confirm or disconfirm claims of past persecution. Furthermore, a mental health professional may be able to make the refugee's experience more understandable to an adjudicator. There are several ways in which a refugee's narrative may not simply be retold, but "translated".²⁴⁹ Given the societal role of psychologists and psychiatrists as care-givers, the forensic role they play in an asylum case should be clearly defined and should indeed be one in which the mental health professional clarifies or interprets.²⁵⁰ An adversarial role would be inappropriate. For example, because it is now widely agreed that sexual orientation is so fundamental to human dignity that it is a characteristic a

²⁴⁹ In my interview with Joanne Ahola, MD (25 August 2009), she explained that she has found administering the Klein Sexual Orientation Grid allows her to succinctly describe an applicant's sexual orientation based on his behavior, desires, self-identification, and experiences. The use of this grid, developed to show sexual orientation along a spectrum from exclusively heterosexual to exclusively homosexual, may seem to fall into the category of a retelling of the applicant's narrative, but to the extent that it provides the decision-maker an interpretation of the applicant's sexual identity that she may not arrive at herself, it can be a useful tool.

²⁵⁰ In a review of an Australian case in which a gay Pakistani refugee failed to gain asylum, the RRT noted that "The psychologist's report made no mention of counselling and in fact stated that the interview goal was to ascertain the applicant's sexual orientation" despite the fact that his lawyers "were seeking to have counselling arranged for [him...and] requested that a hearing be deferred until he had received counselling", V97/06971 [1999] RRTA 260 (1 February 1999).

person should not be required to change, decision-makers must not task experts with discovering whether or not an applicant's sexual orientation is reversible.²⁵¹

Psychiatric reports and other solutions that aim to compensate for the lack of objective evidence cannot be relied upon exclusively. It is therefore imperative that decision-makers responsible for protecting refugees from harm are sufficiently aware of the experiences of LGBT refugees and the legal questions that accompany their cases.²⁵²

To increase awareness and to enable decision-makers to avoid relying on stereotypes, the *Note* recommends

short targeted training sessions, mainstreaming of issues relating to sexual orientation and gender identity into the induction of new staff and training of existing staff, ensuring awareness of websites with expertise on LGBT issues, as well as the development of guidance relating to appropriate enquiries and interview techniques to use during the different stages of the asylum procedure.²⁵³

As part of this training, decision-makers should also be sensitized to the breadth of the problem of persecution based on sexual identity. The *Guidelines on Gender-Related Persecution* which the 2008 *Guidance Note* is meant to supplement (and with which it is meant to be read in conjunction) states that an asylum-seeker "is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted".²⁵⁴ This means that it is incumbent upon the decision-maker to be open to the possibility that a sexual orientation-based claim may need to be understood in a

²⁵¹ Aiming to medically discover whether the "discretion requirement" could be viable in the cases of certain applicants, German courts have required psychological examinations to prove the irreversibility of their sexual orientation. Lambda Legal Defense and Education Fund in Walker (2000), 185.

²⁵² UNHCR (2008), para. 1.

²⁵³ *Ibid.*, para. 37.

²⁵⁴ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002), para. 23.

political or religious context in addition to, or outside of, a particular social group context.²⁵⁵

That sexual orientation-based claims (as well as gender-based claims) are usually considered on grounds of membership in a particular social group suggests that there is a failure to give due consideration to the political and religious dimensions of sexual identity.²⁵⁶ The *Note* addresses this issue in regard to the first dimension by clarifying that “‘political opinion’ should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged”.²⁵⁷ While the *Note* does not expound the “machinery of [...] society”, I suggest that it must include constituent parts like the family and the local community. In every society, the state, the family, and the community are engaged in defining and upholding gender roles and regulating the exercise of power among those who play these roles. In this context, the expression of non-normative gender and sexuality identities—of refusing to accept normative definitions and regulations—may be understood as a political act.²⁵⁸ This is

²⁵⁵ Para. 29 of UNHCR (2008) reads, “Convention grounds contained in the refugee definition are not mutually exclusive and may overlap. As such, the transgression of social or religious norms, including by expressing one’s sexual orientation or identity, may be analyzed in terms of political opinion, religion or membership of a particular social group. This opinion, belief or membership may also be imputed or attributed to the applicant by the State or the non-State agent of persecution”.

²⁵⁶ See Alice Edwards, “Age and gender dimensions in international refugee law” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, ed. Erika Feller, Volker Türk, and Frances Nicholson (Cambridge: Cambridge University Press, 2003), 68-69 for a discussion of how political and religious grounds are neglected in cases involving gender-based claims.

²⁵⁷ *Ibid.*, para. 30.

²⁵⁸ In Human Rights Watch, In a Time of Torture, *The Assault on Justice In Egypt’s Crackdown on Homosexual Conduct* (29 February 2004), an Egyptian man entrapped by State Security via the Internet reported being “‘asked who knew [he] was gay’”. When he refused to give names, his interrogator reiterated, “‘We’re looking for members of this political organization’” and told him that if he signed the arrest report he could “prove” that he did not belong to it.

true regardless of the intention of the individual expressing the identity, given that persecution on the basis of imputed political opinion is grounds for asylum.

In many LGBT refugee-generating countries, politics and religion are interwoven. Because of the important role religion plays in power relations at all levels of these societies, gender and sexual identity expression that does not conform to religious norms and expectations has both political and religious implications. Paragraph 31 of the *Guidance Note* explains that:

[r]eligion may be a relevant 1951 Convention ground where the attitude of religious authorities towards LGBT people is hostile or discriminatory or where being LGBT is seen as an affront to religious beliefs in a given society. Where someone has a well-founded fear of persecution because he or she is seen as not conforming to the interpretation given to a particular religious belief, a link to that ground may be established.²⁵⁹

This clarification is important but speaks only incompletely to the complexities that exist at the intersection of gender, sexuality, and religion. Redding's "homo-sexuals", religious LGBTs who remain committed to their religion, are not clearly accounted for. When LGBTs reject religion altogether because of proscriptions of non-normative sexuality or because of its restrictions on gender roles in states where the lines between religion and politics are blurred, they are indeed acting politically. They are, intentionally or not, questioning the place of religion in politics as well as in their own lives. Homo-sexuals, however, do not reject religion but rather seek "to escape hegemonic articulations and enforcements of religious morality with which they disagree".²⁶⁰ Proposed solutions should therefore not frame the problem as one of

²⁵⁹ UNHCR (2008).

²⁶⁰ Redding, para. 142.

homosexuality versus religion, but rather the deprivation of marginalized groups from having a say in shaping the religion to which they belong.

The relegation of LGBTs and women as categories into the membership in a particular social group category and the underuse of political and religious grounds to explain their persecution mirrors their exclusion from the dominant channels of participation in social, religious, and political life. The hegemonic heteronormative and patriarchal status quo was constructed largely without the consent or participation of these groups. LGBTs and women have not been allowed access to the religious institutions that shape doctrine and practice nor to political institutions that regulate society. Transgressing the norms that are imposed upon them without their consent is therefore virtually their only way to “participate” in the shaping and reshaping of norms, social values, and power relationships. To properly adjudicate refugee claims based on sexual orientation, decision-makers must reframe their understanding of LGBTs with this in mind. LGBT refugees, like refugees conventionally considered by virtue of having suffering persecution because of their political opinions or religious beliefs, belong to marginalized groups that have been deprived of power and have been excluded from the discourses that shape the “machinery of State and society”. The question that adjudicators should be asking about LGBTs fleeing persecution, then, is not “is this refugee a homosexual?” but instead “does persecution result from the assertion of a sexual or gender identity that is in conflict with dominant norms?”²⁶¹ This would negate

²⁶¹ No doubt Scaperlanda and others who fear a “slippery slope” that begins with protecting LGBTs and ends with sanctioning of pedophilia would take issue with this shift. I am not proposing that non-normative sexual identities whose expression does not conform to international human right law be

the reflex to rely on a set of stereotypes about specific labels such as “homosexual”, “lesbian”, or “gay”, something that is especially important given that LGBT refugees, as mostly non-white non-Westerners, have also been largely excluded from participating in the construction of those categories. Furthermore, viewing LGBT claims through a political lens would obviate the preoccupation with the immutability, innateness, or fundamentality of same-sex sexuality. Choosing to live out a non-normative sexual orientation could be considered a political act.²⁶² Affecting this change would likely involve integrating these principles into the kind of training recommended by the UNHCR and others for decision-makers as well as interviewers and interpreters.

While this shift is an ideal, it may be that it can only feasibly be achieved piecemeal. Because sexual orientation-based asylum claims are for the present tied to the particular social group membership ground and because the categories and labels attached to same-sex sexuality continue to be invoked, it is important for decision-makers to be sensitized to a number of issues related to sexuality. This will require them stepping back from their own preconceived notions and “common sense” assumptions that are in reality influenced by social constructions and hegemonic norms. Even decision-makers with non-normative sexual orientations are not exempt from many of these kinds of preconceptions, as has been shown in this thesis.

It must be understood that not only is sexuality a fundamental part of identity and so fundamental to human dignity that no one must be asked to change it, but that

protected. The Convention on the Rights of the Child protects children from sexual abuse and exploitation and thus proscribes pedophilia.

²⁶² Edwards, 69.

the expression of this identity is also to be protected. Requiring “discretion” in this expression can be tantamount to asking a refugee to participate in her own persecution. Adjudicators must also accept that their notions of masculine and feminine behavior and appearance are not necessarily accurate indicators of sexual orientation and that likewise stereotypes about involvement in a “gay scene”, particular kinds of sexual activity, and both same-sex and opposite-sex relationships cannot be relied upon to discern the veracity of a sexual orientation claim. The persistent paradigm of a heterosexual/homosexual binary and the idea of sexual identity development as a linear process that culminates in a fixed sexuality, though both entrenched in the Western understanding of sexuality, must be understood by decision-makers to be specific to a particular cultural context and a particular era. These ideas may not only inaccurately describe Western experiences, but may be wholly alien to non-Western asylum-seekers. In sum, it must be understood that conceptualizations of homosexuality, bisexuality, and indeed heterosexuality are socially constructed as are categories like lesbian and gay. They are imbued by the individual employing these categories with particular meanings and particular boundaries such that they are susceptible to failing to correspond with the reality of human experiences. For these reasons, the decision-maker must actively recognize and restrain internal stereotypes of sexuality while grappling with the nuances of individual narratives. This approach would be rendered all the more difficult where a general cynicism about the intentions of refugees colors how decision-makers handle inconsistencies and information that does not conform to their existing notions of sexuality. In balancing their role as agents of humanitarian

protection with their responsibility to protect the integrity of the asylum system, they must expect that the refugee's testimony may be their only window into a different understanding of sexuality. It is in this context, and not the context of Western same-sex sexuality that the events leading to the claimant's flight occurred. Especially where specific country information is lacking, it is often through the claimant alone that a picture of the particular societal mores and beliefs about sexuality (and thus those of the persecutor or potential persecutor) that have led her to seek protection. It is only with these factors taken into an account that a decision-maker can effectively and justly undertake the difficult task of judging the credibility of a claimant.

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