

**Objectivity, Authority, and Truth: Confirming a Homosexual Identity
in Lesbian and Gay Fights for Asylum**

Ryan Carlino '10

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Article 2 of the Universal Declaration of Human Rights (UDHR) states that the freedoms and livelihoods of people throughout the world cannot be compromised or denied based on “colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The list of characteristics enumerated in the UDHR seems to protect members of all possible social categories; however, Article 2 fails to explicitly mention sexual orientation as a personal trait protected from discrimination and violence. By not specifically citing sexual minorities in the Declaration, the U.N. relegates to individual states the power to decide how they will treat their lesbian and gay citizens. Governments around the world permit and legitimize atrocious acts of violence against their homosexual citizens to occur because homosexual people are not protected by the UDHR. Violence becomes an everyday reality for lesbians and gays when their governments fail to grant them the same rights and protections as every other citizen. When lesbians or gays decide to flee a country rather than be subject to hatred and violence, myriad issues arise while they apply for asylum in a foreign country.

In this paper, I investigate the arduous process lesbians and gays must navigate to obtain refugee status based on sexual orientation, and subsequently, to constitute themselves as citizens with universally recognized rights. I begin with an exploration of what criteria lesbians and gays must meet in order to gain refugee status, and what arguments homosexual people employ in the battle for asylum. Next, I examine how courts construct homosexual identities and behaviors when hearing cases for refugee status. I then unpack the courts’ privileging of expert witness and authoritative knowledge as the sole forms of admissible, truthful evidence to prove a homosexual identity. Ultimately, I contend that the refugee courts’ adherence to a narrow conception of homosexuality combined with a homophobic legal system that depends on authoritative “truth” to justify lesbian and gay plaintiffs’ claims strips lesbian and gay

individuals of their subjectivities and renders them essentially powerless in the determination of refugee status. Denying lesbians and gays refugee status represents yet another manifestation of the hidden mechanisms of inequality structured in the courts' conceptions of objective truth.

First of all, the criteria that qualify claimants as eligible for refugee status does not include a category for individuals applying for protection from harassment due to sexual orientation, and must therefore rely on a liberal interpretation of the law to be granted asylum. Article 1(A) (2) from the Refugee Convention of 1951 classifies a refugee as someone harboring “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion” (Mullins 2003:147). Lesbians and gays applying for refugee status argue that their non-normative sexuality constitutes them as members of a particular social group, and thus they should receive asylum from violence and discrimination. The ambiguity of the term “social group,” however, confounds claimants' attempts to be recognized as refugees. Courts struggle to interpret what refugee law means by “social group.”

In an effort to elucidate the definition of “social group,” the Board of Immigration Appeals (BIA or The Board) asserted that to be a member of a particular social group connotes that all members of the group share a common, immutable, unchangeable characteristic that constitutes a fundamental aspect of their identities or consciences (Park 1995:4; Mullins 2003:149). Unquestionably, this definition applies to lesbian and gay applicants; similar to people of a specific race, members of different religious sects, or people with differing political affinities, homosexual citizens' sexual orientation forms a major part of their personal identities, and to strip lesbians and gays of their sexuality would be to fundamentally change their entire perception of self. Yet, courts continue to question whether homosexual claimants can

legitimately be considered members of a particular refugee group even though the definition of “social group” fully applies to the situation of lesbian and gay individuals.

A historicity of xenophobia and homophobia explains why courts cannot conceptualize gays and lesbians as members of a unique social group. The issue of non-normative sexualities adds yet another opportunity for courts to discriminate against marginalized communities. Indeed, the BIA’s treatment of homosexuality stems from a history of discrimination against lesbians and gays in the refugee courts. From 1917 when the first Immigration Act was passed in the U.S. until 1965, lesbians and gays were denied refugee status because the U.S. refused to accept the “mentally defective”¹ into the country; and then “sexual deviants” (i.e. lesbians and gays) were barred from asylum until the U.S. finally removed this category in the Immigration Act of 1990 (Park 1995:2). Lesbians and gays endured re-categorization through re-categorization in the refugee courts: from invisible citizens to mental defectives to sexual deviants to people who practice same-sex behavior but do not constitute a distinct social group.

Therefore, an uninformed misunderstanding concerning homosexual identities, behaviors, and issues based on narrow, stereotypical conceptions of homosexuality complicate the process of applying for asylum, because in many instances, lesbians’ and gays’ constructions of their identities and sexualities do not match the preconceived notions court actors carry about homosexuality. In the eyes of the BIA and refugee courts, a homosexual is either a man who engages in sexual activities with another man, or a woman who partners with another woman. This limited definition of homosexuality fails to consider the fluidity of sexuality, the actual lived experiences of claimants in their home countries, and the ways in which homosexual identity and behavior may differ in other countries than the U.S. due to strong (and often violent) state sanctions enacted against lesbians and gays. Hence, the BIA’s “emphasis on reference in

¹ Until 1973, the psychiatric and medical communities considered homosexuality to be a mental disorder.

survivor testimony elides other political and social aspects of narrative production . . . as well as erases the complicated contexts for the ongoing production of meaning” (French 2009:96) because the courts consider victims’ testimonies only at referential face value. Once a claimant identifies as lesbian or gay, the courts expect the claimant’s subsequent testimony and evidence to agree with the courts’ conceptions of homosexuality, otherwise the legitimacy of the testimony is questioned.

An example of this can be seen in the case of Ioan Vraciu, a Romanian self-identified homosexual who applied for asylum in the United Kingdom in 1992 (McGhee 2000). Vraciu applied for asylum twice; the first time he claimed he could not return to Romania because he was involved in political activity that would endanger his life if he was forced back home. The Immigration Appeal Tribunal (IAT) refused to grant him asylum, and Vraciu appealed, this time stating he was gay, and if sent home, he would be persecuted (McGhee 2000:31). The courts suspected Vraciu’s alleged homosexuality served as a last-ditch effort to gain asylum after the court reject his initial application for political asylum.

Regardless, the courts were at a loss at how to prove without a doubt that Vraciu was indeed homosexual. Vraciu’s self-identification as homosexual did not convince the Tribunal; officials demanded concrete evidence and witness testimony to confirm Vraciu’s gay identity. The tribunal requested that Vraciu contact his previous male lover in Romania to testify, which did not happen because the lover had been arrested, presumably for being a gay man. The Tribunal exploited this to negate Vraciu’s supposed homosexuality, claiming that for Vraciu to abandon his lover was “‘inconceivable’ in homosexuals, who were ‘gentle and sensitive people’” (Special Adjudicator, in *Vraciu v. SSHD* 1995:21, cited in McGhee 2000:32). This saliently

demonstrates courts' stereotypical conceptualizations of gay men as feminine and sensitive, and illustrates how they can negatively affect a claimant's chances at obtaining asylum.

The Tribunal then discovered a picture of Vraciu's bedroom in Romania in which he plastered pictures of naked women on the walls. A "real homosexual" would not hang pictures of naked women, only photographs of nude men members of the court argued (McGhee 2000:32). Self-identifying as homosexual carried no legal weight for Mr. Vracui, and because his subjective knowledge of his sexuality did not match the IAT's objective knowledge gleaned from official, legally recognized evidence coupled with prejudices based on stereotypes, the Tribunal failed to accept Vracui's personal statements as legitimate evidence.

In an effort to indisputably identify Vracui as a gay man, one member of the tribunal suggested Vracui undergo a series of medical examinations to prove his homosexuality (McGhee 2000:39), which effectively reduced homosexual identity from a fundamental characteristic of a person's sense of self, to a simple, sexual behavior. International gay and lesbian human rights activist and legal scholar Nicole LaViolette cautions, "There is no uniform way in which lesbians and gay men recognize and act on their sexual orientation" (1996b:15). Thus, courts and refugee tribunals cannot judge the legitimacy of claimants' testimonies and evidence according to narrow, Western-centered, and stereotypical perceptions of homosexual expression, behavior, and identity. Subjecting gay male claimants to medical examinations, which literally probe men for evidence in order to confirm a homosexual identity, constitutes a deplorable violation of basic human rights.

In both instances, the legal system depends on antiquated and barbaric imposition of state, medical, and authoritative power and knowledge over the bodies of gay individuals (McGhee 2000:39; Long 2004:116), and equates homosexuality with a specific behavior, namely

sodomy. The medical exams cannot unquestionably prove that a man engaged in sodomy (Long 2004:116), and moreover, what if the claimant has never participated in penetrative sex, what if he penetrated another man, or what if he has never had any type of same-sex physical encounter? Obviously, a claimant can identify as a homosexual without having been involved in any type of physical sexual activity (LaViolette 1996b:17), but if the courts insist on defining a gay identity as strictly sexual behavior, gay men applying for asylum will continue to be unable to completely substantiate their identities as homosexual men. In addition, by reducing gay and lesbian identities to nothing more than a sexual behavior, refugee tribunals destabilize claimants' testimonies of violence and persecution because the courts can argue that an *activity* is being policed or persecuted, not actual human beings.

Even if the courts legitimate and recognize lesbian and gay plaintiffs' homosexual identities as valid personal characteristics that expose these individuals to a higher risk of state-sponsored violence, the courts require lesbians and gays to corroborate their claims of persecution with legally admissible evidence. Mullins explicates that according to the refugee tribunals, "persecution 'means harm or suffering that is inflicted upon an individual in order to punish him [or her] for possessing a belief or characteristic a persecutor seeks to overcome'" (2003:153). Jin S. Park claims that the courts recognize only three different categories of persecutions as legitimate forms of violence worthy of asylum: 1. Government complicity-the governing body is either unwilling or unable to protect sexual minorities from violence; 2. Official persecutions-the people enacting the violence are agents of the government; and 3. Arbitrary or excessive criminal sanctions without due process-persecutors carry out extreme amounts of violence against lesbians and gays without juridical processes (1995:9-11). If claimants fail to produce evidence that complies with the courts' criteria to classify violence as

persecution, lesbians' and gays' testimonies are destabilized; and the courts deem violence against homosexual people as merely discrimination, which does not grant refugee status to oppressed lesbians and gays. The predicament thus arises: what types of legally permissible evidence can be used to undoubtedly authenticate accusations of homophobia-based persecution?

Because the courts employ a rigid Foucauldian legal epistemology that privileges objective medical, scientific, and legal knowledge over subjective plaintiff testimony, the refugee tribunals deprive plaintiffs of their subjectivity and render them powerless to challenge oppressive systems of power that continually seek to deny lesbian and gay refugees equal rights. Lesbian and gay testimonies are valueless in the refugee court system without authentication from legally-sanctioned authoritative systems of knowledge, such as science and medicine. Although lesbians and gays attempt to narrate their understandings of their sexuality and experiences, refugee articulations must be translated into the official legal code and legitimized by objective agents of knowledge (i.e. doctors, psychiatrists, and scientists) (LaViolette 1996a:5). The courts' proclivity for documents and expert testimony from professionals demonstrates the legal system's privileging of objective rather than subjective discourse. Derek McGhee claims, "(T)he 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" (2000:34). Hence, lesbian and gay testimonies become pieces of discourse that can either be legitimized by authorities of knowledge and power, or be rejected as worthless utterings that certainly will not grant asylum to lesbians and gays.

Returning to the case of Mr. Vraciu, his testimony that he was a homosexual failed to convince the courts that he belonged to a specific social group that is victimized and persecuted around the world. Instead, the courts suggested Vraciu be subjected to medical examinations

because “Mr. Vraciu’s homosexuality could not be authenticated from scrutinizing his appearance or ‘outward activity’, nor could it be authenticated from *the appellant’s unauthorized self-knowledge*,” therefore the medical examinations would rely on “the corporeal site where *medical practices of truth* could bring to light *the signs of an authentic or inauthentic homosexual identity*” (Mullins 2000:39, emphasis added) to legitimize Vracui’s alleged homosexuality. Eventually, Vracui consulted with a psychiatrist who authenticated Vracui’s homosexual identity. The details of Vraciu’s narrative of his sexuality did not change between the courtroom and the psychiatrist’s office; what did change was the person authorized to speak and provide authentic testimony (Mullins 2000:42). The only manners by which courts can validate homosexuality are through the supposed authoritative knowledge of science and medicine, two institutions that historically have treated homosexual people as anomalies.

Perhaps refugee courts valorize medical and scientific knowledge regarding homosexuality because of the institutions’ historicities of homophobia and discrimination. Laura Jeffrey highlights the subjugating nature of the court system, especially for minorities, “(L)egal processes disempower ‘outsiders’ by rejecting their stories that are based on backgrounds, worldview, and experiences not understood by judges and jurors” (Jeffrey 2006:240). The fact that sexual identities and expressions of homosexuality differ cross-culturally confounds the process of acquiring knowledge and granting asylum. Western conceptions of homosexuality and same-sex behaviors largely shape how courts conceive of homosexuality which delimits the space in which claimants’ constructions of their sexual orientations can occur. This situates lesbians and gays from outside the United States in a position where they must either model their experience to meet the courts’ expectations or rely on authoritative “professionals” to interpret and translate claimants’ discourses. When plaintiffs inevitably fail to mobilize the legally-

sanctioned language and evidence, the courts solicit the “expert” knowledge of the scientific and medical communities which reinforce the antiquated conceptions of homosexuality espoused by the courts. And, although courts and agents of professional knowledge can be sympathetic to the horrible descriptions of violence provided by claimants, ultimately “judges most frequently reaffirm their commitment to the state and to the superior authorities of higher courts rather than challenging the status quo” (Jeffrey 2006:245). As a result, the refugee tribunals propagate anti-gay sentiment and homophobic stereotypes, support systems of power and dominance that breed inequality, and castigate lesbian and gay claimants for their non-normative sexualities and for their lack of knowledge of the legal system.

Linguistic anthropologist Briggittine M. French states that “individuals’ testimonies give voice to collective experiences of suffering and death that were sanctioned by a repressive state” (French 2009:95). Lesbians and gays live silent existences in homophobic, oppressive countries that persecute openly homosexual individuals. The refugee courts theoretically restore lesbians’ and gays’ voices when they file apply for asylum; however, because the courts valorize objective constitutions of homosexual identities over subjective self-constructions, the fates of lesbians and gays are again placed under the control of hegemonic institutions of power and discrimination. Western conceptualizations of homosexuality combined with a privileging of authoritative, objective “truth” over subjective narrations of knowledge plague lesbians’ and gays’ quests for asylum. This not only causes refugee courts to sanction and legitimize the persecution of gays and lesbians in foreign countries, but reveals the invisible structures of inequality and state violence that leave lesbians and gays powerless in an inherently prejudiced, homophobic institution.

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