Credibility Assessments and the REAL ID Act's Amendments to Immigration Law

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SUMMARY

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I. INTRODUCTION

> *Asylum cases pose thorny challenges in evaluating testimony. Applicants regularly tell horrific stories that, if true, show past persecution and a risk of worse to come. . . . Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials. Often they are coached by friends or organizations that disapprove of this nation's restrictions on immigration and do what they can to help others remain here. Occasionally the coaches (like smugglers who provide transportation and bogus credentials) do this for pay rather than out of friendship or commitment. How is an immigration judge to sift honest, persecuted aliens from those who are feigning?*

Chief Judge Frank H. Easterbrook, writing for the United States Court of Appeals, Seventh Circuit, in *Mitondo v. Mukasey*, 523 F.3d 784, 788 (2008).

Chief Judge Easterbrook's observations do not concern an issue recently emerging in present-day discourse on immigration matters. Rather, his observations reflect a challenge inexorably linked to the emergence of refugee protection in the aftermath of World War II.[1] Hundreds of thousands, if not millions, of foreign nationals have sought asylum protection in the United States,[2] and a prerequisite to a grant of asylum has always been the need to ensure that the events applicants allege in support of their claims actually happened.[3] "Credibility is arguably the

1. *See* Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

2. *See, e.g.*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFF. OF IMMIGR. REV., OFF. OF PLAN., ANALYSIS, & TECH., IMMIGRATION COURTS: FY 2007 STATISTICAL YEARBOOK (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf (providing a statistical compilation of the number of asylum applications filed over the past several years); U.N. HIGH COMM'R FOR REFUGEES, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES, 2007 (2008), *available at* http://www.unhcr.org/statistics/ STATISTICS/47daae862.pdf (citing the United States as the main destination for asylum seekers in recent years).

3. *See In re* Acosta, 19 I. & N. Dec. 211, 215–16 (BIA 1985).

most crucial aspect of any asylum case"[4] and "the single biggest substantive hurdle" facing asylum applicants.[5]

While the difficulty in assessing asylum applicants' credibility is not new, there are several distinctive features in the present-day evaluation of these claims. First, the impact of these claims on the federal appellate courts has grown exponentially. The Second and Ninth Circuit Courts of Appeals are the two appellate courts hearing the most immigration cases. Between thirty-five and forty percent of the two circuits' dockets have concerned immigration cases over the last several years.[6] The remainder of the federal appellate courts adjudicate a smaller, but still significant number of immigration cases.[7] A substantial percentage of these immigration cases concerns asylum, and credibility determinations are the most challenged aspect of asylum claims.[8] The recent exponential increase of cases has yielded a sizable body of case law attempting to synthesize the distinguishing features and unique circumstances of the thousands of asylum cases hinging on credibility adjudicated in recent years.

Second, the state of the law is at a turning point. In 2005, Congress enacted the REAL ID Act, which amended the Immigration and Nationality Act ("INA") in several respects, including changes to the manner by which credibility determinations are rendered in administrative proceedings and reviewed in the federal courts of appeals.[9] Although Congress enacted the REAL ID Act in 2005,

4. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006).

5. Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003).

6. *See* ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2007, at 99, 102 (2008), *available at* http://www.uscourts.gov/judbus2007/contents.html; *see also* Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547, 551–52 (2007) (discussing the dramatic increase of asylum cases in the Second Circuit between 2001 and 2006). *See generally* John R.B. Palmer, *The Second Circuit's "New Asylum Seekers:" Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 965–66 (2006) (discussing how the increase in immigration cases in the Second Circuit is largely attributable to asylum appeals); John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 43–54 (2005) (stating that petitions for review challenging the Board of Immigration Appeals now account for a substantial percentage of the caseload in the courts of appeals, especially in the Second and Ninth Circuits).

7. ADMIN. OFF. OF THE U.S. COURTS, *supra* note 6, at 98–103.

8. *See* Edward R. Grant, *Law of Intended Consequences: IIRAIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 959 (2006) (arguing that the current surge in immigration appeals is attributable to streamlining of the administrative appeals process).

9. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302. Further adding to the burden facing the federal appellate courts, the REAL ID Act stripped federal district courts of jurisdiction over removal orders, leaving the appellate courts as the only appropriate venue if an asylum applicant chooses to seek further review after disposition at the agency level. *See* 8 U.S.C. § 1252(a)(5) (2006) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal."). For a further discussion on the implications of Congress's elimination of habeas review of final orders of removal and whether the limited venue and time period for seeking judicial review implicates the Suspension Clause of the United States Constitution, see Ruiz-Martinez v. Mukasey, 516 F.3d 102 (2d Cir. 2008); Wang v. DHS, 484 F.3d 615 (2d Cir. 2007). In addition to the REAL ID Act's credibility amendments, the law also codified several changes to the standards governing the need for applicants to provide corroborating evidence, *see* 8 U.S.C. § 1158(b)(1)(B)(ii) (2006), and whether the alleged persecutor's actions directed at the asylum seeker was

the credibility amendments only apply to asylum applications filed on or after May 11, 2005.[10] Given this cutoff date, the impact of the REAL ID Act amendments to the INA is only beginning to be felt, as asylees' applications make their way from the U.S. Citizenship and Immigration Services asylum offices,[11] if applicable, to the immigration judges initially adjudicating the cases, to the Board of Immigration Appeals ("Board" or "BIA"),[12] and then to the United States Court of Appeals sitting within the applicable venue.[13]

A vast majority of the literature on this subject is highly critical of the REAL ID Act amendments to the INA.[14] It is not surprising that the asylum law amendments expanding the bases immigration judges may use to discount the veracity of an applicant's claim would be viewed with much caution and skepticism, given the need to ensure protection for those legitimately fleeing horrific persecution. This article does not purport to serve as a basis for quashing advocacy in favor of asylum applicants' rights, nor will it delve into the policy debate concerning perceived shortcomings in the current adjudicatory process at the agency level.[15] Nevertheless, it is important to challenge the conventional wisdom expressed

"on account of" a reason asylum law recognizes as worthy of protection, *see id.* § 1158(b)(1)(B)(i).

10. REAL ID Act § 101(a)(3), (h)(2); *see In re* S-B-, 24 I. & N. Dec. 42, 43 (BIA 2006) (holding that the effective date provision of the REAL ID Act impacting the majority of amendments to asylum law is the date when the asylum application is initially filed with an asylum office or the immigration judge).

11. United States Citizenship and Immigration Services is an agency within the United States Department of Homeland Security ("DHS") with jurisdiction over the services and benefits functions of the former Immigration and Naturalization Service ("INS") of the United States Department of Justice. Enforcement functions of the former INS now reside with Immigration and Customs Enforcement, also a component of DHS. The INS officially ceased to exist on March 1, 2003 pursuant to sections 441 and 471 of the Homeland Security Act of 2002. *See* Pub. L. No. 107–296, 116 Stat. 2135 (abolishing the INS and transferring some of its former authority to the Under Secretary for Border and Transportation Security).

12. The Executive Office of Immigration Review is a regulatory body within the United States Department of Justice responsible for overseeing the hundreds of immigration judges throughout the country and the Board, which should be comprised of fifteen members in the absence of vacancies. *See* 8 C.F.R. § 1003.1(a) (2009).

13. 8 U.S.C. § 1252(b)(2).

14. *E.g.*, Eric M. Fink, *Liars and Terrorists and Judges, Oh My*, 83 NOTRE DAME L. REV. 2019, 2036 (2008) (asserting that the purported small percentage of reversals of adverse credibility determinations in the Ninth Circuit negates the justification for the REAL ID Act's credibility amendments to the INA); Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 14 (2007) ("The 2005 REAL ID Act's sweeping evisceration of procedural safeguards is alarming."); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 118 (2007) (arguing that the REAL ID Act necessarily creates bias when evaluating an asylum seeker's credibility); Maria Suarez, *Categories of Migration*, 22 BERKELEY J. GENDER L. & JUST. 342, 352 (2007) (remarking that the REAL ID Act will be "very problematic for asylum claims"); Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers*, 26 PENN ST. INT'L L. REV. 383, 383–84, 397 (2007) (claiming the REAL ID Act allows minor inconsistencies to defeat a grant of asylum); Cianciarulo, *supra* note 4; Aubra Fletcher, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 118 (2006) (contending that the REAL ID Act will impose "increased hardships on asylum applicants"); Victor P. White, *U.S. Asylum Law Out of Sync With International Obligations: REAL ID Act*, 8 SAN DIEGO INT'L L.J. 209, 254–58 (2006) (stating the opinion that the REAL ID Act's credibility amendments are "likely to violate international law"); Bridgette A. Carr, *We Don't Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants*, 33 PEPP. L. REV. 535, 567 (2006); *see also* Human Rights Watch, Immigrants' Rights Under Attack in House Bill (H.R. 10) (criticizing the new credibility standards in the proposed law for failing to take into account the circumstances of asylum seekers), http://hrw.org/english/docs/2004/10/06/usdom9469_txt.htm (last visited Feb. 11, 2009).

15. *See* Iao v. Gonzales, 400 F.3d 530, 533–35 (7th Cir. 2005) (reviewing several deficiencies the court

by many that the REAL ID Act amendments represent an inexplicable departure from current uniform case law.[16] To the contrary, the amendments stem from a perceived disconnect in certain instances between the appropriate deference owed to agency decisions under pre-REAL ID Act law, and that employed by some reviewing courts.[17] After an overview of asylum law in Part II, Part III will show divergent pre-REAL ID Act interpretations in the courts of appeals concerning the types of falsehoods found to be demonstrative of incredibility to highlight the justification for seeking a more uniform standard.

Apart from pointing out these divergences are the methodologies that led to them. Part IV will review several exclusionary principles applied categorically in the courts of appeals prior to the REAL ID Act to reject consideration of inconsistencies that, in fact, bear potential relevance to an assessment of credibility. Immigration judges' authority to consider any falsehood under the REAL ID Act does not eliminate several important safeguards for applicants. Part V will review several aspects unchanged by the REAL ID Act that can negate the potential impact of a perceived inconsistency or other testimonial infirmity on the applicant's credibility.

How will the courts of appeals under the REAL ID Act evaluate the link between an inconsistency and veracity when none of the safeguards remaining in place negate its relevance to an assessment of untruthfulness? Part VI delves into this question with a discussion of when it is appropriate to infer untruthfulness. Part VI will also address the impact of the burden of proof and the standard of review on the courts of appeals' evaluation of inferences and fact-finding generally. Part VII

believes recur with regularity during immigration proceedings at the agency level); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 3–10 (2008) (discussing the lack of legal representation in a significant amount of immigration cases at the agency level); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication (Asylum Study)*, 60 STAN. L. REV. 295, 299 (2007) (advocating a more professionalized asylum adjudication system); Hill, *supra* note 14, at 85 (recounting the politically motivated hiring practices of immigration judges under Monica Goodling); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11–36 (2006) (discussing the failure of immigration courts "to apply the law"); Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 44 (2004) (discussing procedural changes to adjudication of immigration cases); Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html (last visited Feb. 23, 2009); U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 1–5 (2006), http://trac.syr.edu/tracatwork/detail/P104.pdf (last visited Feb. 11, 2009); John Lantigua, *In Asylum Cases, Immigration Judges Under a Lot of Pressure*, PALM BEACH POST, May 10, 2008 (detailing specific examples of pressures faced by immigration judges), *available at* http://www.palmbeachpost.com/state/content/state/epaper/2008/05/10/m1a_judges_0511.html; Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15 (detailing disparities in asylum decisions); Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave*, L.A. TIMES, Mar. 12, 2003, at A16 (detailing dismissal of Board members for allegedly ideological reasons).

16. *See, e.g.*, Walker, *supra* note 14, at 14–16 (contending that the REAL ID Act now creates "dizzying" choices for applicants in the wake of amendments with clear "xenophobic" undertones); Carr, *supra* note 14, at 567 (recounting the types of inconsistencies and other testimonial deficiencies an immigration judge may consider in assessing credibility that the author believes are only subject to review subsequent to the REAL ID Act).

17. *See* H.R. REP. NO. 109-72, at 167 (Conf. Rep.) (2005) (stating the need for a uniform standard of credibility to address conflict on the issue between the Ninth Circuit and other circuits and the BIA).

will provide some additional thoughts on the important role explanations play in an assessment of credibility in light of the REAL ID Act and the principles guiding appellate court review. Part VIII will review emerging cases in the appellate courts adjudicating asylum claims under the REAL ID Act credibility amendments and discuss the future direction of credibility law in light of the REAL ID Act in the critical years to follow. A short conclusion will highlight stakeholders' shared interest in a uniform application of the law consonant with a proper assessment of veracity.

II. ASYLUM LAW

Asylum is discretionary relief available to an individual who qualifies as a "refugee" and is not otherwise barred from such relief.[18] A refugee is an individual who is unable or unwilling to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[19] There are two ways to qualify as a refugee. An individual can demonstrate that he or she has suffered past persecution, which creates a presumption of a well-founded fear of future persecution.[20] Alternatively, an individual can prove a well-founded fear of future persecution, which requires credible testimony of a subjective fear that is also objectively reasonable.[21]

As the refugee definition makes clear, harm is not enough to qualify for asylum.[22] The individual seeking asylum must prove that the inflicted harm was "on account of" a protected ground, such as political opinion;[23] this is often referred to as the "nexus" requirement.[24] Moreover, an individual establishing the requisite nexus between a protected ground and instances of harm sufficiently severe to constitute persecution still does not qualify for asylum protection without demonstrating that the alleged harm is being perpetrated by the government or a group the government is unwilling or unable to control.[25] Essentially, this requirement ensures that an individual at least attempt to seek redress when feasible from his or her own government before seeking to inure the benefits of asylum protection in a foreign

18. *See* 8 U.S.C. § 1158(b)(1) (listing circumstances where asylum may not be granted); *Cardoza-Fonseca*, 480 U.S. at 428 n.5 (emphasizing the discretionary nature of asylum).

19. 8 U.S.C. § 1101(a)(42)(A) (2006).

20. 8 C.F.R. § 1208.13(b)(1) (2009); Capric v. Ashcroft, 355 F.3d 1075, 1084–85 (7th Cir. 2004); Melgar de Torres v. Reno, 191 F.3d 307, 311 (2d Cir. 1999).

21. 8 C.F.R. § 1208.13(b)(2); *see* Abankwah v. INS, 185 F.3d 18, 22 (2d Cir. 1999).

22. The requisite harm necessary to establish persecution need not be entirely physical. *See Capric*, 355 F.3d at 1084 (noting that sufficiently severe economic deprivation may provide a basis for establishing persecution); Li v. Att'y Gen., 400 F.3d 157, 159 (3d Cir. 2005) ("[D]eliberate imposition of severe economic disadvantage because of a protected ground may rise to the level of persecution.").

23. 8 U.S.C. § 1101(a)(42)(A).

24. Tobon-Marin v. Mukasey, 512 F.3d 28, 31 (1st Cir. 2008); Jiang v. Gonzales, 500 F.3d 137, 142 (2d Cir. 2007). To some observers, the nexus requirement is an overly rigid, outdated formula for determining whether an individual deserves asylum protection. *See, e.g.*, Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221, 223 (2000) (attributing the limitation of the nexus prong to the "causes most apparent in the aftermath of World War II").

25. 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1)(i); Da Silva v. Ashcroft, 394 F.3d 1, 7 (1st Cir. 2005); Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002).

country. If an individual meets all of these prerequisites, then asylum protection may be granted in the Attorney General's discretion.[26]

Asylum and related relief and protection share a common prerequisite: credibility.[27] The claim put forward by the applicant must be true. Immigration laws and regulations place the burden of proof upon the applicant to provide credible testimony.[28] Credibility plays a particularly important role in immigration proceedings because of the circumstances of the cases. Individuals fleeing persecution may lack sufficient time to gather probative evidence either in their possession or otherwise obtainable, or may fear traveling with any documentation adverse to repressive governments.[29] Many countries have questionable record-keeping practices or do not keep paper trails of their abusive activities, calling into question the accuracy of provided documentation.[30] Indeed, articles in newspapers of foreign countries have documented the seizure by customs officials of fake documents being smuggled to asylum applicants in the United States.[31] Further compounding the difficulties in assessing credibility, asylum seekers speak hundreds

26. 8 U.S.C. § 1158(b)(1)(A); *see also Cardoza-Fonseca*, 480 U.S. at 444; Groza v. INS, 30 F.3d 814, 821 (7th Cir. 1994). An individual applying for asylum is assumed also to have applied for withholding of removal, which has similar prerequisites to establishing asylum eligibility, but requires a higher burden of proof. *See* 8 U.S.C. § 1231(b)(3)(A) (2006) (stating that the Attorney General may not remove an applicant to a country if his life or freedom would be threatened due to certain delineated circumstances); 8 C.F.R. § 1208.16(b) (2009) (placing the burden of proof on the applicant to establish that his life or freedom would be threatened on account of a protected ground); *see also* INS v. Stevic, 467 U.S. 407, 429–30 (1984) (applying the "clear probability of persecution" standard to withholding of deportation claims); Zhang v. Slattery, 55 F.3d 732, 738 (2d Cir. 1999) (emphasizing that a "clear probability of persecution" is a higher standard of proof than the well-founded fear of persecution standard applicable to asylum). If an individual qualifies for withholding of removal, however, then protection is automatic. Asylum applications are often filed in tandem with requests for protection under the regulations implementing the Convention Against Torture ("CAT"). *See* 8 C.F.R. §§ 1208.16, 1208.18 (2009); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(b), 112 Stat. 2681 (directing the agency to issue regulations implementing CAT). CAT has the same higher burden of proof as withholding of removal and requires the applicant to establish a risk of torture by or at the acquiescence of the government, but there is no nexus requirement. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18 (defining "torture" and the level of government involvement or acquiescence necessary to qualify for CAT protection).

27. There are limited exceptions. For example, an applicant can produce evidence that his home country punishes those who seek asylum abroad, or that his home country punishes individuals leaving the country without conforming to the country's exit laws. *See, e.g.*, Ramsameachire v. Ashcroft, 357 F.3d 169, 184 (2d Cir. 2004) (holding that the "INS may not deny an alien's CAT claim solely on the basis of its determination that the applicant's testimony is not credible").

28. *See* 8 C.F.R. § 1208.13(a) (asylum); *id.* § 1208.16(b) (withholding of removal), (c)(2) (Convention Against Torture); *see also* 8 U.S.C. § 1158(b)(1)(B) (REAL ID Act codification of burden of proof for asylum).

29. *See* Dawoud v. Gonzales, 424 F.3d 608, 612–13 (7th Cir. 2005) ("Many asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives."); *see also* Cordon-Garcia v. INS, 204 F.3d 985, 992–93 (9th Cir. 2000) (minimizing the negative implications of an applicant providing hearsay testimony on account of the difficulties in obtaining direct evidence from her home country); *In re* S-M-J-, 21 I. & N. Dec. 722, 726 (BIA 1997) (requiring documentary evidence where "reasonably available").

30. *See* Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008) (describing potential shortcomings in documentary evidence).

31. *See, e.g.*, *Illegal Immigrants Applying for Permanent Residency in the U.S., Fuzhou Customs Intercepted 300 Fraudulent Documents*, SINGTAO DAILY, Aug. 18, 1998 (on file with author).

of different languages and come from backgrounds with different accepted modes of expression.[32]

The actual process for evaluating credibility is also unique in the immigration context.[33] An immigration judge presides over a hearing where the applicant and any other witnesses testify and are subject to questioning by their own attorney and government counsel, as well as by the immigration judge.[34] In addition to evaluating the internal consistency of the applicant's testimony and its consistency with any exhibits submitted by the applicant to corroborate his story, the immigration judge must also assess the consistency and plausibility of the applicant's story as it compares to previous statements made by the applicant and reports regarding conditions in his home country.[35]

The type and frequency of these previous statements is based on the circumstances of the applicant's arrival in the United States and subsequent mode of applying for asylum. For example, if the applicant arrived at an airport in the United States without a visa or other proper basis for entry, immigration officials would detain the individual at the airport and interview him to determine if he has a credible fear of persecution.[36] Additionally, an applicant and his attorney may meet with an asylum officer of DHS, who interviews the applicant and either grants asylum or refers the case to the immigration court for a hearing on the application.[37] Under any circumstance, the applicant sets forth his reasons for seeking asylum in the asylum application itself, which is submitted to the immigration court before the merits hearing.[38] The immigration judge then sifts through all the information and makes a credibility determination.[39]

32. *See* U.S. DEP'T OF JUSTICE, *supra* note 2, at 85–93 (listing the numerous countries from which applicants seek asylum).

33. *See In re* Velasquez, 19 I. & N. Dec. 377 (BIA 1986) (finding that the Federal Rules of Evidence are not applicable to proceedings before an immigration judge); *see also* Niam v. Ashcroft, 354 F.3d 652, 659 (9th Cir. 2004) ("[A]dministrative agencies are not bound by the hearsay rule or any other of the conventional rules of evidence, but only by the looser standard of due process of law."); Ezeagwuna v. Ashcroft, 325 F.3d 396, 405 (3d Cir. 2003) ("[The] Federal Rules of Evidence do not apply in asylum proceedings.").

34. *See* 8 U.S.C. § 1229a (2006) (reviewing the role of the immigration judge in the removal proceeding, the applicable procedures, and the applicant's rights). An applicant has a statutory and regulatory right to obtain counsel at no expense to the government. *Id.* § 1229a(b)(4)(A); 8 C.F.R. § 1240.10(a)(1) (2009).

35. 8 U.S.C. § 1229a(c)(4)(C).

36. For more information on the role of airport interviews in assessing credibility, see *Ramsameachire*, 357 F.3d at 179–82 (discussing factors the court will consider to assess the reliability of a statement purporting to accurately characterize an interaction between an immigration officer and prospective asylum applicant at an airport); Balasubramanrim v. INS, 143 F.3d 157, 162 (3d Cir. 1998) (same); Senathirajah v. INS, 157 F.3d 210 (3d Cir. 1998) (same).

37. *See* 8 C.F.R. § 1208.9(b) (2009) (noting that the interview between the applicant and the asylum officer is conducted in a "nonadversarial manner"); *id.* § 1208.14(b) (providing the asylum officer with authority to grant the application); *see also id.* § 1208.30(g) (reviewing the process of referring a stowaway to an immigration judge after a credible fear interview).

38. Even if an individual here illegally is placed in removal proceedings before an immigration judge and has failed to apply for asylum, an immigration judge has an obligation to advise the individual of the right to apply for asylum if it becomes apparent during the hearing that the individual may fear persecution if returned to his or her country of nationality and citizenship. 8 C.F.R. § 1240.11(c) (2009).

39. In addition to a formal removal proceeding before an immigration judge, there are several other potentially applicable removal procedures used to determine whether an individual has a right to remain in the United States—or to "enter" as the case may be. *See* 8 U.S.C. § 1225(b)(1), (c) (2006) (discussing removal without a hearing on security grounds); *id.* § 1228(b) (providing for expedited removal of aliens

If the immigration judge renders an adverse credibility determination, the applicant may appeal that decision to the Board.[40] The Board then assesses the record before it, along with the immigration judge's reasons for not crediting the applicant's story, and determines whether the immigration judge's factual findings are "clearly erroneous."[41] If not, the Board affirms the immigration judge's opinion. The applicant may then appeal the Board's decision to the federal court of appeals with jurisdiction to hear the case.[42]

The federal appellate court then reviews the adverse credibility determination to determine whether the agency's decision is supported by "substantial evidence."[43] The substantial evidence standard, as applied to immigration proceedings, means that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[44] Because the statute requires that the evidence "compel" a contrary conclusion, the federal appellate courts cannot reverse the agency's factual findings, which include credibility

who are not permanent residents based on an aggravated felony conviction). An individual who illegally reenters the United States after being deported is not entitled to any hearing. Rather, DHS may "reinstate" the previous deportation or removal order. *Id.* § 1231(a)(5); 8 C.F.R. § 241.8 (2009). However, even for individuals illegally reentering the United States, the government is still required to provide the individual with a hearing before an immigration judge if the individual claims to fear persecution. *See* 8 C.F.R. §§ 208.31, 241.8(e) (2009) (withholding only proceedings). For a further analysis on some of the numerous complications surrounding the seemingly straightforward reinstatement process, see Garcia-Villeda v. Mukasey, 531 F.3d 141 (2d. Cir 2008); Morales-Izquierdo v. Gonzales, 486 F.3d 484 (9th Cir. 2007) (en banc); Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004); Berrum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004); Perez-Gonzales v. Ashcroft, 379 F.3d 783 (9th Cir. 2004); Duran-Hernandez v. Ashcroft, 348 F.3d 1158 (10th Cir. 2003); *In re* Torres-Garcia, 23 I. & N. Dec. 866 (BIA 2006).

40. 8 C.F.R. §§ 1003.1(b), 1003.3 (2009).

41. *Id.* § 1003.1(d). Although the Board may not engage in fact-finding, it may take "administrative notice of commonly known facts such as current events or the contents of official documents." *Id.* § 1003.1(d)(3)(iv). For more on the potential due process concerns stemming from the Board's decision to take administrative notice of facts dispositive of the applicant's asylum claim, see Burger v. Gonzales, 498 F.3d 131 (2d Cir. 2007), but compare Abovian v. INS, 219 F.3d 972 (9th Cir. 2000) (finding the immigration judge violated the applicant's due process rights even though the issue was not briefed by the parties). For more on the definition of fact-finding and the Board's interpretation of the appropriate standard of review for ultimate judgments and the application of legal principles to undisputed facts, see *In re* V-K-, 24 I. & N. Dec. 500, 502 (BIA 2008) ("[I]t would appear essential to the performance of our appellate function as contemplated by the Attorney General that we possess the authority to review de novo findings deemed by an Immigration Judge to satisfy an ultimate statutory standard."); *In re* A-S-B-, 24 I. & N. Dec. 493, 497 (BIA 2008) (stating that "whether the facts demonstrate harm that rises to the level of persecution and whether the harm was inflicted 'on account of' a protected ground" are not the types of determinations that the Board will review under the "clearly erroneous" standard).

42. *See* 8 U.S.C. § 1252(a) (reviewing the types of claims and issues the courts of appeals may review); *id.* § 1252(b)(1) (requiring that applicants petition the court for review of the Board's decision within thirty days); *id.* § 1252(b)(2) (reviewing the appropriate venue to file a petition for review). The applicant may also file a motion to reopen with the Board within ninety days of its decision. 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2) (2009); *see also id.* § 1003.2(b)(1) (permitting an applicant to file a motion to reconsider). However, a motion to reopen does not toll the statutory time limitation for petitioning the appropriate court of appeals to review the Board's initial disposition of the applicant's case. Stone v. INS, 514 U.S. 386, 397–98 (1995). There are limited circumstances when an applicant does not need to file a motion to reopen within ninety days. 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii) (2006); *cf.* Chen v. Mukasey, 524 F.3d 1028 (9th Cir. 2008) (rejecting an applicant's attempt to file a successive asylum application).

43. *See, e.g.*, Sillah v. Mukasey, 519 F.3d 1042, 1044 (9th Cir. 2008); Miah v. Mukasey, 519 F.3d 784, 787 (8th Cir. 2008).

44. 8 U.S.C. § 1252(b)(4)(B).

determinations, even if the evidence "supports" a conclusion contrary to that reached by the agency.[45]

Before the REAL ID Act, the criteria used to evaluate an applicant's credibility were based on precedential agency decisions by the Board and the Attorney General, as well as a body of case law developed within each federal circuit and the Supreme Court over a number of years. The criteria essentially included everything that could possibly be demonstrative of an applicant's lack of credibility, from inconsistencies[46] and omissions[47] to implausibilities,[48] deficiencies in level of detail,[49] unresponsiveness,[50] and questionable demeanor.[51] The extent to which courts considered these factors varied by circuit. The REAL ID Act, however, codified for the first time what an immigration judge may consider in assessing credibility. Specifically, the REAL ID Act credibility amendments to the INA state:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.[52]

The consequence of this amendment is plain: all facets of an immigration proceeding bear potential relevance. If there were any dispute prior to the REAL

45. INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992); *see* Berri v. Gonzales, 468 F.3d 390, 395 (6th Cir. 2006); Sultani v. Gonzales, 455 F.3d 878, 881 (8th Cir. 2006); Zhang v. INS, 386 F.3d 66, 73–74 (2d Cir. 2004); Singh v. Ashcroft, 351 F.3d 435, 442 (9th Cir. 2003); Ouda v. INS, 324 F.3d 445, 451 (6th Cir. 2003); Melgar de Torres v. Reno, 191 F.3d 307, 313 (2d Cir. 1999).

46. *E.g.*, Sourmare v. Mukasey, 525 F.3d 547, 553 (7th Cir. 2008); Kaur v. Gonzales, 418 F.3d 1061, 1064 (9th Cir. 2005); Balogun v. Ashcroft, 374 F.3d 492, 504 (7th Cir. 2004); Xie v. Ashcroft, 359 F.3d 239, 243 (3d Cir. 2004).

47. *E.g.*, Tai v. Gonzales, 423 F.3d 1, 5–6 (1st Cir. 2005); Liti v. Gonzales, 411 F.3d 631, 637 (6th Cir. 2005); Dong v. Ashcroft, 406 F.3d 110, 111–12 (2d Cir. 2005) (considering an applicant's failure to mention on her asylum application an alleged forced sterilization); *Xie*, 359 F.3d at 243.

48. *E.g.*, Chen v. Bd. of Immigration Appeals, 435 F.3d 141, 144–45 (2d Cir. 2006); Dia v. Ashcroft, 353 F.3d 228, 250 (3d Cir. 2003) (en banc); Singh v. Ashcroft, 301 F.3d 1109, 1112 (9th Cir. 2002).

49. *E.g.*, Akinmade v. INS, 196 F.3d 951, 954 (9th Cir. 1999); Aguilera-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990) (chastising the immigration judge for expecting "answers provided in the applications to be as comprehensive or as thorough as they would be if set forth in a legal brief"); *see also* Rodriguez del Carmen v. Gonzales, 441 F.3d 41, 43–44 (1st Cir. 2004) (finding germane the applicant's inability "to recall important details of her putative married life").

50. *E.g.*, Lin v. Gonzales, 446 F.3d 395, 400–01 (2d Cir. 2006); *Singh*, 301 F.3d at 1114 (finding that an immigration judge must articulate the specific reasons for believing the applicant failed to respond to the questions posed during the immigration hearing).

51. *E.g.*, *Lin*, 446 F.3d at 400–01.

52. REAL ID Act § 101(a)(3) (codified at 8 U.S.C. § 1158(b)(1)(B)(iii) (2006)).

ID Act, the amendments make clear that now "[t]here is no presumption of credibility."[53]

III. MINOR INCONSISTENCIES, INCORRECT ASSUMPTIONS, AND CONTEXTUAL CONSIDERATIONS

Before the REAL ID Act, case law in almost every circuit addressed the reliance on minor inconsistencies by immigration judges in rendering adverse credibility determinations.[54] The REAL ID Act, in permitting immigration judges to consider any inconsistency "without regard to whether … [it] goes to the heart of an applicant's claim," expressly provides immigration judges authority to consider "minor" inconsistencies when determining an applicant's credibility.[55] This provision of the REAL ID Act has been the most highly criticized change to the asylum laws.[56] The criticisms stem from incorrect assumptions about adverse credibility case law prior to the REAL ID Act.

A. The Use of Inconsistencies Expressly Referred to as "Minor"

The first incorrect assumption is that prior to the REAL ID Act the courts of appeals did not permit immigration judges to consider minor inconsistencies.[57] The

53. *Id.* "[H]owever, if no adverse credibility determination is explicitly made" by the immigration judge, then "the applicant . . . shall have a rebuttable presumption of credibility on appeal." *Id.*

54. *See, e.g.*, Sarr v. Gonzales, 474 F.3d 783, 796 (10th Cir. 2007) (finding that a "minor discrepancy" making "no difference to the strength or plausibility of [an applicant's] story" will not support "an adverse credibility finding"); Stroni v. Gonzales, 454 F.3d 82, 88 (1st Cir. 2006) ("[M]inor or trivial inconsistencies in an applicant's testimony are insufficient to support an adverse credibility finding."); Singh v. Gonzales, 439 F.3d 1100, 1106 (9th Cir. 2006); Thamsir v. Att'y Gen., 167 F. App'x 788, 790 (11th Cir. 2006) (relaying the occasionally applied rule in the circuit that "'minor inconsistencies and minor admissions that reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding'" (quoting Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988))); Sylla v. Ashcroft, 388 F.3d 924, 926 (6th Cir. 2004) ("An adverse credibility finding must be based on issues that go to the heart of the applicant's claim."); Kondakova v. Ashcroft, 383 F.3d 792, 796 (8th Cir. 2004) ("[M]inor inconsistencies and omissions will not support an adverse credibility determination."); Korniejew v. Ashcroft, 371 F.3d 377, 387 (7th Cir. 2004) ("[A]dverse credibility determinations should not be grounded in trivial details or easily explained discrepancies."); *Xie*, 359 F.3d at 243 (stating that minor inconsistencies "do not provide an adequate basis for an adverse credibility finding"); Secaida-Rosales v. INS, 331 F.3d 297, 308 (2d Cir. 2003) ("Inconsistencies of less than substantial importance for which a plausible explanation is offered cannot form the sole basis for an adverse credibility finding." (quoting Campos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir. 1999))); *Mendoza Manimbao*, 329 F.3d at 660; *Akinmade*, 196 F.3d at 954; Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986).

55. 8 U.S.C. § 1158(b)(1)(B)(iii).

56. *See, e.g.*, Hill, *supra* note 14, at 118 (arguing that consideration of minor inconsistencies encourages "selective listening"); Carr, *supra* note 14, at 567 (criticizing the negative impact on children); Cianciarulo, *supra* note 4, at 134 (criticizing its departure from established case law); *see also* Fink, *supra* note 15, at 2037–41 (contending that the REAL ID Act's credibility amendments are a symbolic response to an imaginary problem because the Ninth Circuit does not overturn adverse credibility determinations with any greater frequency than other circuit courts). Fink's analysis is fatally flawed because, even assuming for the sake of argument his statistical analysis is correct, he assumes erroneously that the Ninth Circuit's case law has no impact on the adjudication and outcome of cases at the agency level that never reach an appellate court. *See* Fink, *supra* note 15.

57. *See, e.g.*, Fletcher, *supra* note 14, at 123–24 (citing reliance on inconsistencies); Hill, *supra* note 14,

assumption is often stated to emphasize the supposed severity of the shift in the adjudication of credibility determinations and to highlight the purported deficiencies of a concept previously rejected universally in the courts of appeals.[58] While a number of circuit courts did explicitly reject the consideration of minor inconsistencies as a basis for an adverse credibility determination, this ban was by no means absolute and was highly circuit-specific. For example, in *Lin v. Gonzales*, the Second Circuit explained that in evaluating adverse credibility determinations "on the record as a whole," it is possible that "the cumulative effect [of minor inconsistencies] may nevertheless be deemed consequential by the fact-finder."[59] *Lin* is but one example of a long line of cases in the Second Circuit sanctioning the use of seemingly minor inconsistencies as a factor for upholding an adverse credibility determination.[60] Similarly, in *Berri v. Gonzales*, the Sixth Circuit reviewed a number of inconsistencies that would not individually support an adverse credibility determination, but concluded it is "'their cumulative effect' that lends support to the [immigration judge's] adverse credibility finding."[61] Aside from case law in the Second and Sixth Circuits, other circuit courts, without providing an explicit rule, have cited minor inconsistencies they believed particularly relevant to the case at hand, or have asserted a level of neutrality on the relevance of minor inconsistencies.[62] In the Eleventh Circuit, the court has repeatedly stated that precedent in the circuit does not prohibit the use of minor inconsistencies in rendering adverse credibility determinations.[63] Other circuits have recognized the role seemingly less important inconsistencies play in an adverse credibility determination even when circuit precedent technically prohibited the use of minor inconsistencies.[64]

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at 115 (contending that the REAL ID Act credibility amendments require "a standard in direct contradiction to previous judicial insistence that adverse credibility determinations must be based on inconsistencies which 'go to the heart of the applicant's claim'").

58. *See, e.g.*, Fletcher, *supra* note 14, at 124 (contending that the REAL ID Act permits immigration judges to discount the "logic" employed by the circuit courts "and deny asylum to an otherwise credible applicant who presents inaccurate information immaterial to her well-founded fear of persecution").

59. *Lin*, 446 F.3d at 402; *see also* Diallo v. INS, 232 F.3d 279, 288 (2d Cir. 2000) (noting its apprehension in the face of multiple inconsistencies).

60. *See, e.g.*, Chen v. U.S. Dep't of Justice, 471 F.3d 315, 337 n.19 (2d Cir. 2006) ("[T]he IJ did not err in stressing the cumulative impact of such inconsistencies in making his adverse credibility determination."); Chen v. Att'y Gen., 454 F.3d 103, 106–07 (2d Cir. 2006) ("[A]n IJ need not consider the centrality *vel non* of each individual discrepancy or omission ….").

61. Berri v. Gonzales, 468 F.3d 390, 395 (6th Cir. 2006) (quoting Yu v. Ashcroft, 364 F.3d 700, 704 (6th Cir. 2004)).

62. *See, e.g.*, Dankam v. Gonzales, 495 F.3d 113, 122–23 (4th Cir. 2007) (finding inconsistencies that "at first glance" appear "tangential" do indeed "add to and create a cumulative effect" supporting an adverse credibility finding); Arias v. Att'y Gen., 155 F. App'x 444, 447 (11th Cir. 2005) (relying on the "cumulative effect of the minor and major inconsistencies" in the record).

63. *See* Li v. Att'y Gen., 194 F. App'x 886, 887 (11th Cir. 2006) ("While some circuits have required the adverse credibility finding to go to the heart of the asylum claim, we have never adopted that test." (Citations omitted.)); *see also* Solano v. Att'y Gen., 239 F. App'x 569, 574 (11th Cir. 2007) (maintaining that the court still has not adopted a test requiring that inconsistencies go to the heart of an applicant's claim).

64. *Compare Stroni*, 454 F.3d at 88 (finding minor inconsistencies "insufficient to support an adverse credibility finding"), *with* Pan v. Gonzales, 489 F.3d 80, 86 (1st Cir. 2007) ("Some of these inconsistencies, in isolation, may seem like small potatoes. What counts, however, is that their cumulative effect is great."), *and compare Kaur*, 418 F.3d at 1064 (noting that the Ninth Circuit's categorical exclusion of minor inconsistencies from an assessment of credibility is "well settled"), *with* Mejia-Paiz v. INS, 111 F.3d 720, 724 (9th Cir. 1997) (affirming the use of a minor inconsistency as a factor in an assessment of credibility).

B. A Lack of Uniformity in Determining When a Discrepancy Is "Minor"

The second incorrect assumption is that a "minor inconsistency" is a readily discernable term uniformly defined.[65] Given the unique circumstances presented in each case, it is difficult to gauge whether a particular set of facts would be uniformly evaluated in the courts of appeals. However, the case law provides several types of factual criteria consistently appearing in credibility determinations. The most prevalent one is an evaluation of the chronology of events espoused by the applicant, and whether inconsistencies in the dates described may be considered in evaluating credibility.

Numerous opinions, particularly in the Ninth Circuit, have found inconsistencies related to dates "minor" and therefore irrelevant in assessing credibility. For example, the courts have found irrelevant the *day* an applicant resumed his political activities because the applicant testified consistently about the *month* authorities arrested him for taking part in those activities,[66] as well as whether authorities arrested an applicant at the beginning or end of the month because the distinction revealed nothing about the applicant's "fear for his safety."[67]

Conversely, other decisions have held that an applicant's inability to recall dates consistently is material to his claim, and hence warrants consideration in evaluating credibility. For example, the Second Circuit in *Chen v. Board of Immigration Appeals* found particularly important the applicant's inability to recall consistently the date authorities arrested him because the applicant stated he would not forget the date when he underwent persecution.[68] In that case, the distinction concerned a difference of about two months.[69] Similarly, in *Li v. Gonzales*, the court found substantial the applicant's testimony that authorities arrested his mother one day later than his father because he previously stated that authorities arrested both parents on the same day, and the inconsistency showed the applicant's inability to

65. *See, e.g.*, Cianciarulo, *supra* note 4, at 133–35, 142.

66. Tandia v. Gonzales, 487 F.3d 1048, 1053 (7th Cir. 2007).

67. Singh v. Gonzales, 127 F. App'x 937, 938 (9th Cir. 2005); *accord* Hashemi-Hafezi v. Gonzales, 244 F. App'x 91, 94 (9th Cir. 2007) (finding that inconsistencies about the date authorities purportedly arrested the applicant were irrelevant to an assessment of his credibility); Wang v. Ashcroft, 341 F.3d 1015, 1021–22 (9th Cir. 2003) (holding inconsequential inconsistent dates concerning when an applicant was allegedly forced to undergo an abortion because the inconsistency revealed nothing about the applicant's "fear for her safety"). The origins of the "fear for safety" rule appear to derive from concerns related to possible translation issues. *Damaize-Job v. INS* was one of the first cases where an appellate court questioned whether an immigration judge may use inconsistencies in dates as explained by the applicant as a negative factor in evaluating the applicant's credibility. 787 F.2d 1332, 1337 (9th Cir. 1986). The Ninth Circuit concluded that "minor discrepancies in dates that are attributable to the applicant's language problems or typographical errors and cannot be viewed as attempts by the applicant to enhance his claims of persecution have no bearing on credibility." *Id.* Shortly thereafter, the Ninth Circuit in *Vilorio-Lopez v. INS* cited *Damaize-Job* for the proposition that "[m]inor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding." 852 F.2d 1137, 1142 (9th Cir. 1988). The Court's analysis in *Vilorio-Lopez* does not focus on translation errors, but rather focuses on whether admittedly inconsistent testimony can be used to gauge the truthfulness of the testimony based on the inconsistencies' relationship to the applicants' asylum claim as a whole. *Id.* In so doing, *Vilorio-Lopez* shows how the analysis began to focus on gauging an admitted inconsistency based on how important it appears to be in an applicant's asylum claim.

68. Chen v. BIA, 230 F. App'x 52, 54 (2d Cir. 2007).

69. *Id.*

recall the sequence of events regardless of the specific day the events took place.[70] An inconsistent date may also be particularly demonstrative of an applicant's truthfulness when the applicant asserts a date which literally cannot be accurate. In *Bah v. Gonzales*, the Tenth Circuit found the applicant's inability to recall consistently the dates authorities arrested him to be a material inconsistency because the applicant at one point put forward an arrest date subsequent to the time he departed his home country for the United States.[71]

The differences in the acceptance of date distinctions as a basis for rendering an adverse credibility determination show that a uniform standard for gauging when an inconsistency is "minor" cannot be assumed for purposes of passing judgment on this amendment to the INA. It also lends support to the proposition that the credibility amendments may be appropriate, considering the divergent opinions between circuits, and even within a circuit, between the types of inconsistencies an immigration judge may consider.[72]

IV. SHORTCOMINGS IN THE METHODOLOGY USED TO DETERMINE THE MATERIALITY OF INCONSISTENCIES

A. "Fear for Safety" and Analogous "Heart of the Claim" Rules of General Application

The variable acceptance of date distinctions as a basis for rendering an adverse credibility determination also highlights a distinction in the actual methodology used in these cases and why a case specific contextual analysis is favorable. The opinions that find that date distinctions may be substantial also discuss why the dates matter in those cases. In this respect, the inconsistency is considered in conjunction with what the applicant is trying to prove, how the inconsistency comes out during testimony, and whether the applicant provides any explanation for the inconsistency.[73] In *Chen*, for example, the importance of the applicant's inconsistent testimony as to the incident date arose from his claim that the date was particularly memorable, and his explanation that he made a "mistake" was unavailing because he created further ambiguity later in his testimony by providing a third inconsistent date.[74]

Conversely, many of the opinions that discount wholesale date distinctions rest on the alleged failure of the distinction to reveal anything about the applicant's "fear

70. Li v. Gonzales, 212 F. App'x 28, 29 (2d Cir. 2007).

71. Bah v. Gonzales, 158 F. App'x 959, 961–62 (10th Cir. 2005).

72. *See* Jibril v. Gonzales, 423 F.3d 1129, 1138 (9th Cir. 2005) ("Time and again, however, we have promulgated rules that tend to obscure that clear standard and to flummox immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents.").

73. *Compare* Zheng v. Gonzales, 464 F.3d 60, 64 (1st Cir. 2006) (refusing to find plausible the applicant's explanation for his inconsistent account of the time when authorities arrested him because the explanation required the court to believe that he planned on distributing fliers continuously for twenty-four hours), *with Jibril*, 423 F.3d at 1138 (finding plausible the applicant's explanation for a perceived deficiency in the date on which he alleged his prior employer fired him because the purported inconsistency was based on the immigration judge's misunderstanding of his testimony).

74. *Chen*, 230 F. App'x at 54.

for [his or her] safety."[75] This analysis is flawed for several reasons. First, it conflates the facts necessary to prove the elements of asylum with the prerequisite that the events conveyed to the immigration judge by the applicant actually happened. For example, while the petitioner discussed above in *Li* would not fear for his safety any more or less if his parents were arrested at the same time or on consecutive days, Li's inability to recall consistently when they were arrested reveals facts probative of the truthfulness of his claim, which in turn is relevant to assessing whether he has any basis at all to fear for his safety.[76]

The "fear for safety" rule has another shortcoming: it is malleable and easily morphed to reach a desired outcome.[77] Consider a persecution claim premised on several incidents where the applicant claims authorities improperly arrested him and he experienced harm for the duration of his detention. Would the date of arrest reveal anything about the applicant's fear for his or her safety? It would seem any inconsistencies related to the very incidents an applicant claims comprised the past persecution could reveal something about his fear of persecution.[78] However, as discussed above, several courts have found otherwise, concluding that an inconsistent account of when an arrest took place does not impact the applicant's

75. In addition to the cases discussed *supra* note 67 and accompanying text, see, for example, Chyzhyk v. Mukasey, 268 F. App'x 528, 529 (9th Cir. 2008) (finding that the applicant's inconsistent testimony regarding "whether the location was Yanka Kupala Park or Independence Square, who spoke at the rally, and the extent of her participation in the Young Social Democrats" failed to reveal anything about the applicant's fear for her safety and did not "constitute a valid ground upon which to base a finding that she was not credible"); Gabuniya v. Att'y Gen., 463 F.3d 316, 322 (3d Cir. 2006) (finding that any inconsistency surrounding the date the applicant's wife died would be irrelevant because it does not reveal anything about the applicant's "fear for his safety" (quoting Berishaj v. Ashcroft, 378 F.3d 314, 323 (3d Cir. 2004))); *Mendoza Manimbao*, 329 F.3d at 660 ("Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding."); *Gao*, 299 F.3d at 272 (citing *Vilorio-Lopez*, 852 F.2d at 1142, for the proposition that "[g]enerally, minor inconsistencies and minor admissions that 'reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding'"); *see also* Singh v. Gonzales, 234 F. App'x 794, 796 (9th Cir. 2007) ("[The applicant's] party membership number, position on India's nuclear policy and reason for wearing a turban are minor issues that do not relate [to his] alleged fear of persecution."); *Berishaj*, 378 F.3d at 323 (citing *Vilorio-Lopez*, 852 F.2d at 1142) (observing that minor inconsistencies that reveal nothing about an applicant's fear for his safety are not generally an adequate basis for an adverse credibility finding).

76. *See Li*, 212 F. App'x at 29.

77. *Compare* Don v. Gonzales, 476 F.3d 738, 741–43 (9th Cir. 2007) (finding that an applicant's inconsistent account of the year he hired his cook was relevant to his claim because his claim was premised on events that occurred as a direct result of authorities subsequently arresting his cook), *with id.* at 745–48 (Wardlaw, J., dissenting) (arguing that the applicant's inability to remember the year when he hired his cook has no bearing on his fear of safety because all the persecutory events he alleged began after authorities arrested the cook).

78. *See, e.g.*, *Dankam*, 495 F.3d at 122 ("Because the arrests are the key events underlying Dankam's claim for asylum, it follows that the details surrounding these arrests and the dates on which they occurred are more than minor or trivial details."); Arslan v. Att'y Gen., 190 F. App'x 114, 118 (3d Cir. 2006) ("While in other circumstances we might not place such reliance on such seemingly minor matters as an inconsistent date[,] . . . Arslan's detentions for taking part in political protests were central to his claims of intimidation and retaliation."); Durasevic v. Att'y Gen., 152 F. App'x 161, 165 (3d Cir. 2005) (finding the inconsistencies in the chronology of events "touched the 'heart'" of the applicant's claim); Singh v. Ashcroft, 367 F.3d 1139, 1143–44 (9th Cir. 2004) (finding significant the applicant's inability to recall consistently when authorities allegedly arrested him in 1990); *Xie*, 359 F.3d at 243–46 (holding that the inconsistencies concerning the applicant's testimony of forced sterilization went "to the heart of [his] claim").

fear because it does not concern what exactly happened once the applicant was arrested.[79]

What about the duration of the arrest? Even if the applicant was not sure exactly when authorities arrested him, surely an inconsistent account of the duration of his alleged confinement may have some bearing on an immigration judge's assessment of whether the incident took place at all.[80] However, some decisions have determined that inconsistencies related to the amount of time an applicant allegedly spends incarcerated reveal nothing about his fear for his safety.[81]

Finally, having stripped from review any inconsistencies concerning when and for how long an alleged persecutory event took place, what remains are the facts concerning the treatment received while detained. It would seem the recollection of these alleged persecutory events must bear some relevance to the applicant's

79. *See, e.g.*, *Hashemi-Hafezi*, 244 F. App'x at 94 (finding that a discrepancy between "several days" and 14 days was a minor inconsistency, and the applicant's testimony about his first arrest was ultimately consistent with his other statements once his correction was considered); *Singh*, 127 F. App'x at 938 (holding that a one-month discrepancy about the date of the applicant's third arrest was minor and revealed nothing about his fear for his safety); *Wang*, 341 F.3d at 1021–22 (reasoning that inconsistent statements about dates were not material to the applicant's claims because "[i]t cannot be implied that Wang did not fear for her safety because her husband does not remember the dates that the Chinese government forced her to have two abortions and an IUD insertion"); *see also* Bandari v. INS, 227 F.3d 1160, 1165–66 (9th Cir. 2000) (finding irrelevant whether the applicant was allegedly whipped upon his arrest or after a trial because he consistently testified that he was whipped).

80. *See, e.g.*, *Dankam*, 495 F.3d at 122 (finding that the applicants' inconsistent account of the duration of one of their incarcerations concerned "a significant issue"); Tarverdyan v. Gonzales, 232 F. App'x 632, 633–34 (9th Cir. 2007) (holding that "how long [the applicant] was held in detention" is "not [a] minor inconsistenc[y], but rather go[es] to the heart of [his] claim of persecution"); Zhu v. Gonzales, 201 F. App'x 104, 106 (2d Cir. 2006) ("Here, however, the duration of Zhu's beating, the only incident of persecution he alleged, was central to his claim."); *Zheng*, 464 F.3d at 63–64 (noting that the applicant had stated that he was detained for fifteen days but later testified that he was detained for four days, and finding that the duration of his detention was among the "conspicuous facts central to [the applicant's] religious persecution claim"); Diaw v. Ashcroft, 108 F. App'x 318, 321 (6th Cir. 2004) (finding the length of the petitioner's incarceration central to his claim of persecution); *Ramsameachire*, 357 F.3d at 182 (finding an inconsistency in the length of time of detention not to be one of the "more minor" inconsistencies).

81. *See, e.g.*, *Hashemi-Hafezi*, 244 F. App'x at 94 (relaying that "'[m]inor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety' do not provide an adequate basis for an adverse credibility determination," and concluding that "to the extent there is a discrepancy between 'several days' and 14 days, it is minor and cannot form the basis for the IJ's credibility finding" (citation omitted)); Anganu v. Ashcroft, 85 F. App'x 590, 591 (9th Cir. 2004) (finding the duration of the applicant's detention irrelevant because the court has "made clear" that the agency must establish a link between the inconsistency and the applicant's fear for his safety); *see also* Wang v. Mukasey, 262 F. App'x 798, 801 (9th Cir. 2008) (Thomas, J., dissenting) (stating that minor date discrepancies attributable to language problems, such as the two-day difference between the applicant's initial and subsequent testimony about his detention, have no bearing on credibility); Giday v. Gonzales, 434 F.3d 543, 552 (7th Cir. 2006) (finding a distinction in the amount of time authorities detained the applicant easily explainable, but noting that whether the applicant was detained for two or three weeks would be "irrelevant" because it would be "unlikely that the BIA would have granted a request for asylum based on a twenty-one day detention but denied it for a sixteen or seventeen day detention with identical facts"); Safarian v. Gonzales, 139 F. App'x 875, 876–77 (9th Cir. 2005) (discounting the immigration judge's consideration of divergent testimony about the duration of the applicant's detention, and bolstering this finding by noting that the explanation provided by the applicant was satisfactory anyway); Singh v. Ashcroft, 104 F. App'x 644, 647 (9th Cir. 2004) (Hawkins, J., dissenting) (reasoning that the applicant "corrected himself and explained his confusion" about specific dates, the immigration judge's failure to address these explanations should preclude an adverse credibility finding, and the discrepancies were minor and revealed nothing about the applicant's fear for his safety).

credibility.[82] Even for these details, however, relevance is not always assumed or even accepted.[83]

The "fear for safety" analysis employed by the courts can be used to negate almost any inconsistency. If the applicant cannot recall consistently whether prison guards shot him or stabbed him when he was detained, the inconsistency can be excluded by reasoning that the device used to harm him has no bearing on his consistent testimony that he was injured by the officers detaining him.[84] All the fallacy requires is the premise that a particular occurrence is undisputed at a general level to negate the importance of any one particular detail within the general narrative.[85]

82. *See, e.g.*, *Pan*, 489 F.3d at 86; *Tarverdyan*, 232 F. App'x at 633–34 (finding substantial an inconsistency concerning whether police beat the applicant when he was detained); Esaka v. Ashcroft, 397 F.3d 1105, 1109–10 (8th Cir. 2005) (finding an applicant's inability to recall consistently whether she was beaten while detained material to evaluating her credibility); *Ramsameachire*, 357 F.3d at 182 (finding important inconsistencies between an initial interview in which the applicant stated that he had been arrested then immediately released and his later testimony that included "specific accounts of arrests, extended confinement, beatings, threats, and bribery"); *see also* Noel v. Att'y Gen., 225 F. App'x 59, 61 (3d Cir. 2007) (finding that inconsistencies concerning "how many men attacked [the applicant], and how they were dressed" were material).

83. *See, e.g.*, *Gabuniya*, 463 F.3d at 323 (reviewing the applicant's inconsistent account of the injury he suffered when allegedly assaulted by police officers, and concluding that even if the inconsistency was not attributable to a translation error, "it does not support an adverse credibility finding given [the applicant's] otherwise detailed, consistent, and logical testimony"); Patatanyan v. Gonzales, 170 F. App'x 505, 506–07 (9th Cir. 2006) (finding that seven "minor" inconsistencies concerning the main persecutory event alleged by the applicant did not provide any basis for rendering an adverse credibility determination when there was consistent testimony on the main aspects of the incident in question); Garrovillas v. INS, 156 F.3d 1010, 1013–14 (9th Cir. 1998) (accepting the applicant's explanation of a "minor" discrepancy between his 1990 application, which stated he had been shot at, and his claim six years later while testifying that nobody had ever shot at him); *see also* Badalyan v. Gonzales, 182 F. App'x 705, 705 (9th Cir. 2006) (finding irrelevant inconsistent testimony regarding the location and frequency of political party meetings as well as whether the applicant's son spoke at these meetings because the applicant's claim "is premised on persecution unrelated to both the scope of his party participation and the actuality or location of his son's speeches"); Nwakanma v. Gonzales, 126 F. App'x 699, 702 (6th Cir. 2005) (holding that inconsistencies concerning whether two or three men were searching for the applicant to persecute him and whether Muslim extremists visited his family's home more than twice in search of him are "irrelevant and do not support an adverse credibility finding"); *cf.* Yeimane-Berhe v. Ashcroft, 393 F.3d 907, 911 n.5 (9th Cir. 2004) ("Because the medical certificate refers to Yeimane-Berhe's torture and rape, it can be characterized as going to the heart of her asylum claim . . . . On the other hand, it can be argued that the medical certificate does not go to the heart of Yeimane-Berhe's claim because it goes only to her suicide attempt and hospitalization, not her arrests and the mistreatment she suffered while imprisoned.").

84. *See Singh*, 301 F.3d at 1113. In *Singh*, the court disregarded the relevance of an inconsistency concerning the location of a rally the applicant attended because "[t]he salient point for Singh's claim of persecution is that he actually attended a political rally." *Id.* In this respect, the court justified its finding that the inconsistency was irrelevant by assuming the validity of the very conclusion at issue in the case. *See id.* *Compare Wang*, 341 F.3d at 1021 (determining that inconsistencies such as "how the couple celebrated after they found out Wang was pregnant a second time" and "inconsistent testimony as to whether Ming went to the hospital to meet Wang after the first abortion" had no bearing on the couple's credibility because neither directly proved or disproved whether Ming was actually forced to undergo an abortion), *with Xie*, 359 F.3d at 240–45 (reviewing that the petitioner sought asylum "because he fathered three children, which violated Chinese national policy of family planning," and finding that the applicant's inconsistent account of his employment history supported the finding that he was not credible).

85. *See* Ndrecaj v. Mukasey, 522 F.3d 667, 675 (6th Cir. 2008) (finding inconsistencies concerning the specific location where authorities allegedly arrested the applicant irrelevant because the applicant testified consistently about the general location where the arrest allegedly took place); Quan v. Gonzales, 428 F.3d 883, 887 (9th Cir. 2005) (finding that if the witness provided inconsistent testimony about the

A reasonable observer may look at the hypothetical above concerning an applicant arrested and harmed while detained and brainstorm numerous reasons why such an applicant's inability to recall a specific date should have no bearing on the truthfulness of the alleged persecutory events. First, a cautionary word is in order. Note the distinction between an applicant's failure to remember when an event occurred and an applicant proactively providing two different dates when an alleged persecutory event took place.[86] The former is not an inconsistency, and its relevance to an assessment of credibility is based on whether it is plausible that the applicant would forget the date of the event in question.[87]

Second, it is entirely possible to brainstorm innocent explanations for the inconsistency.[88] For this reason, the above analysis was careful to point out that the inconsistencies "could" or "may" be demonstrative of the applicant's veracity.[89] Context, however, is critical to that evaluation, and precluding immigration judges from even considering such inconsistencies is at the heart of the problem.[90]

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relative with whom he allegedly lived when he was in hiding, it would be irrelevant because he consistently testified that he was not at his own home). *See generally* Kumar v. Gonzales, 444 F.3d 1043, 1060–61 (9th Cir. 2006) (Kozinski, J., dissenting) (critiquing the approach espoused in the opinion of the majority, which assumed the court could overturn any adverse credibility determination of an immigration judge by simply labeling the applicant's inconsistencies as "minor" or "merely incidental" to the asylum claim).

86. Additionally, the applicant may only have provided testimony about one date, where the second, inconsistent date came from the testimony of a third party or documentary evidence submitted by the applicant to corroborate the asylum claim.

87. As noted above, plausibility is another basis for assessing credibility. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (specifically listing "inherent plausibility" as a factor an immigration judge can consider when assessing credibility). Although the analysis to this point has focused on inconsistencies, the rationale for the need to consider the context of an applicant's claim to assess its plausibility applies with equal force. *See Jibril*, 423 F.3d at 1135–36 (discussing the fine line between implausibility and "conjecture and speculation"). The reasoning also applies to the use of omissions as a basis for assessing credibility, although the probative force of information omitted in applicants' prior oral statements or written submissions, but later revealed during testimony at the merits hearing, raises a number of additional issues and concerns beyond the scope of this article. In addition to the reasonableness of the inferences drawn from the omission in question, *compare* Paramasamy v. Ashcroft, 295 F.3d 1047, 1053 (9th Cir. 2002) (acknowledging that the initial failure to disclose a sexual assault "cannot be considered an inconsistency," especially given a Tamil woman's "cultural reluctance to tell male interviewers that she had been violated"), *with* Alvarez-Santos v. INS, 332 F.3d 1245, 1254 (9th Cir. 2003) (finding it unbelievable that an asylum applicant would fail to remember and include in his application "a dramatic incident in which he was attacked, stabbed, and fled to the mountains—the very incident that precipitated his flight from Guatemala—only to be reminded of it at the conclusion of his testimony, after taking a break, and assertedly, because of an itch in his shoulder"), there is an entirely separate issue concerning the reliability of the prior statements, *see, e.g.*, *Ramsameachire*, 357 F.3d at 179–82 (reviewing the factors the court considers when assessing the reliability of an airport interview). The REAL ID Act specifically permits the immigration judge to consider any statement "whenever made and whether or not under oath," but the immigration judge must take into account "the circumstances under which the statements were made." REAL ID Act § 101(a)(3) (codified at 8 U.S.C. § 1158(b)(1)(B)(iii) (2006)).

88. *See infra* notes 119—122, 230—240 and accompanying text (discussing the role explanations play in assessing credibility).

89. *See* text accompanying *supra* notes 78, 80.

90. For purposes of illustration, the above discussion focused predominantly on courts' employment of a "fear for safety" test in discounting an inconsistency as "minor." However, the premise supporting the "fear for safety" test applies equally to similar condition precedents linking the probative nature of an inconsistency to its inclusion within a particular category. Many other such rules have been used as a basis for discounting the relevance of an inconsistency cited by an immigration judge. Discussing each in full would be needlessly redundant, particularly since many are often discussed in tandem with the "fear for safety" rule. *See, e.g.*, Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 660 (9th Cir. 2003) (finding that in addition to an applicant's fear of safety, minor inconsistencies do not support an adverse credibility

B. The "Enhancement" Rule

In allowing immigration judges to consider minor inconsistencies and "any other relevant factor," the REAL ID Act also appears to overrule circuit court precedent that prohibits an immigration judge from considering inconsistencies that did not "enhance" the asylum applicant's claim.[91] It is helpful to review the so-called "enhancement rule" because its rationale shares many of the same characteristics as those used by courts drawing a distinction between material and seemingly less important inconsistencies. The enhancement rule essentially requires that immigration judges only base an adverse credibility determination on inconsistencies that would enhance an applicant's ability to establish one of the elements necessary to prove asylum, such as showing an increase in the severity of harm suffered by the applicant, or depicting an interaction more closely tied to the applicant's political opinion or another protected ground.[92]

The requirement that an inconsistency must enhance an applicant's claim in order to be relevant to the veracity of his story has only been employed in a handful of circuits, predominantly in the Sixth and Ninth Circuits.[93] For example, in *Chen v. Gonzales*, the petitioners, husband and wife, claimed they were persecuted in China on account of China's coercive population control policies.[94] The couple alleged that government officials tried to force Chen's wife to undergo an abortion, but they were able to escape until Chen's wife gave birth to their second child, after which time Chen's wife was allegedly caught and forced to undergo sterilization.[95] While testifying, the couple apparently described different modes of transportation they allegedly used during their escape when authorities tried to force Chen's wife to undergo an abortion.[96] The appellate court reviewing the immigration judge's decision found that the details surrounding the couple's escape from Chinese authorities, such as "whether the couple escaped on a three-wheeled, man-powered vehicle or a three-wheeled, motorbike," did not support an adverse credibility

determination when they "do not relate to the basis of an applicant's fear of persecution" or "go to the heart of an asylum claim"); *see also* Shah v. INS, 220 F.3d 1062, 1068 (9th Cir. 2000) (stating that, in the absence of an explicit explanation from the agency about the significance of an inconsistency, an inconsistency does not support an adverse credibility determination unless the applicant was evasive when asked about the inconsistency).

91. *See* 8 U.S.C. § 1158(b)(1)(B)(iii).

92. *See Safarian*, 139 F. App'x at 876–77 ("[B]ecause Safarian testified that *fewer* arrests occurred than indicated in her asylum application, 'any discrepancy cannot be viewed as an attempt by the applicant to enhance [her] claims of persecution, and thus has no bearing on credibility.'" (quoting Singh v. Ashcroft, 362 F.3d 1164, 1171 (9th Cir. 2004))).

93. *E.g.*, Ceraj v. Mukasey, 511 F.3d 583, 591 (6th Cir. 2007); Chen v. Gonzales, 447 F.3d 468, 472 (6th Cir. 2006); Marcos v. Gonzales, 410 F.3d 1112, 1117 (9th Cir. 2005); Daneshvar v. Ashcroft, 355 F.3d 615, 623 (6th Cir. 2004); Chen v. INS, 266 F.3d 1094, 1100 (9th Cir. 2001), *overruled on other grounds by* 537 U.S. 1016 (2002), *on remand to* 326 F.3d 1316 (9th Cir. 2003) (stating that if inconsistencies "cannot be viewed as attempts by the applicant to enhance his claims of persecution, [they] have no bearing on credibility"); *see also* Diallo v. Mukasey, 508 F.3d 451, 455 n.3 (8th Cir. 2007) (recognizing the "enhancement" rule in other circuits, but declining to adopt or reject it); Stoyanov v. INS, 172 F.3d 731, 736 (9th Cir. 1999) (noting that if an applicant revises his account of persecution so as to "lessen the degree of persecution he experienced rather than to increase it," the discrepancy generally does not support an adverse credibility finding (citation omitted)).

94. *Chen*, 447 F.3d at 469–70.

95. *Id.* at 470.

96. *Id.* at 476.

determination because they "do not . . . enhance or detract from the [petitioners'] claims of persecution."[97]

The *Chen* court's conclusion highlights the important distinction between the nature of an inconsistency itself and the role an inconsistency plays in an asylum applicant's persecution claim. One may look at the distinction between the testimony of Chen and his wife about the mode of transportation used in the escape and conclude that there really is no inconsistency; perhaps a "motorbike" would qualify as a "vehicle."[98] In that case, the appropriate review by the appellate court of the immigration judge's decision would be whether the petitioners testified inconsistently in this respect at all.[99]

Such an analysis, however, is entirely distinct when there is no dispute that an inconsistency indeed exists. Driving a greater wedge between the petitioners' respective testimonies illustrates this point. Suppose Chen testified that he escaped using a car while his wife testified that they escaped on a horse. While the mode of transportation would not technically be probative of the elements necessary to prove their asylum claim,[100] the inconsistency is certainly probative of whether the events they described happened at all.[101] It is suspicious that two individuals would have such a different recollection of the circumstances surrounding the event, and that suspicion is what lends support to a finding that the entire narrative was embellished or concocted. Indeed, details of the narrative are often where an untruthful asylum applicant falters.[102]

Inevitably, when the enhancement rule is applied to enough fact-specific adverse credibility determinations, its shortcomings become apparent in ways seemingly unrecognized at the time of the rule's inception. One of the best examples illustrating the problems of the enhancement rule came from the Ninth

97. *Id.*; *see also* Singh v. Gonzales, 139 F. App'x 891, 893 (9th Cir. 2005) (finding that notwithstanding the applicant's acceptable explanation for an inconsistency surrounding the amount of time he was detained, the inconsistency was irrelevant because that applicant's later testimony, which shortened the length of time of his detention, did not enhance his claim). Interestingly, the Sixth Circuit in *Chen* seemingly states that an inconsistency only goes to the heart of an applicant's claim if it enhances it. 447 F.3d at 472; *cf.* Singh v. Keisler, 251 F. App'x 467, 469 (9th Cir. 2007) ("Once a discrepancy can be viewed as enhancing a claim of persecution, the discrepancy must then be found to go to the heart of the asylum claim in order to support a negative credibility finding."). If this is the case, then the REAL ID Act's inclusion of the use of minor discrepancies would seem to automatically preclude the Sixth Circuit from finding that its pre-REAL ID Act "enhancement" jurisprudence continues to apply.

98. At this point, a more detailed analysis of the particular inconsistency is not possible because the Sixth Circuit's decision does not discuss the mode of transportation allegedly used by the couple to escape. *Chen*, 447 F.3d at 469–70.

99. *See infra* Part V.A.

100. *See* 8 U.S.C. § 1101(a)(42)(B) (stating explicitly that an applicant forced to undergo sterilization or an abortion satisfies the definition of a refugee). For a discussion on whether an individual is entitled to assert a coercive population control policy claim on the basis of persecution suffered by his or her spouse, see Lin v. U.S. Dep't of Justice, 494 F.3d 296 (2d Cir. 2007) (en banc); *In re* J-S-, 24 I. & N. Dec. 520 (A.G. 2008).

101. *Cf.* Chahal v. Gonzales, 204 F. App'x 679, 680 (9th Cir. 2006) (upholding an adverse credibility determination because the applicant falsely testified about events taking place in the United States that called into question the veracity of his other testimony).

102. *See* Weng v. Gonzales, 186 F. App'x 145, 147 (2d Cir. 2007); Zheng v. Gonzales, 163 F. App'x 53, 55 (2d Cir. 2006); Hamzehi v. INS, 64 F.3d 1240, 1243 (8th Cir. 1995). *But cf.* Vucaj v. Gonzales, 150 F. App'x 444, 449–50 (6th Cir. 2005) (refusing to agree with the government's contention that "the devil is in the details").

Circuit's decision in *Kaur v. Gonzales*.[103] In *Kaur*, the applicant originally stated that sixty-five officers raided her home and arrested her father and brother, and she was also arrested at a later point and raped twice by a local police officer.[104] In a subsequent statement, Kaur alleged that only eight to twelve officers were at her home when they arrested her grandfather and brother, and she was interrogated but not raped by police officers upon her arrest.[105] The immigration judge denied Kaur's asylum claim on credibility grounds, and Kaur eventually appealed the decision to the Ninth Circuit, arguing that the immigration judge improperly relied on inconsistencies that weakened her claim in finding her asylum claim incredible.[106] The court rejected Kaur's argument, holding that immigration judges need not rigidly follow "rules of general application" that would require them to "abandon . . . common sense" and "ignore [an asylum applicant's] repeated and blatant inconsistencies."[107]

As with minor inconsistencies, the purpose of discussing the enhancement rule is not to argue that all inconsistencies struck down on the basis of the enhancement rule are necessarily indicative of veracity or relevant to the applicant's asylum claim. But an asylum applicant's inability to recall consistently the specific date when an event allegedly occurred,[108] the specific circumstances surrounding an alleged persecutory event,[109] and even the date when his or her children were born[110] may indeed have varying importance depending on the context of the case at hand. Discounting its use in an adverse credibility determination at the outset is wholly contrary to a proper assessment of truthfulness.[111]

103. Kaur v. Gonzales, 418 F.3d 1061 (9th Cir. 2005); *see also Don*, 476 F.3d at 742 (citing *Kaur* with approval).

104. *Kaur*, 418 F.3d at 1062–63.

105. *Id.* Several additional inconsistencies between Kaur's asylum applications and testimony emerged, such as the route she took from India before arriving in the United States. *Id.*

106. *Id.* at 1065.

107. *Id.* at 1066–67. The Court went to great lengths to distinguish prior cases seemingly requiring that an inconsistency enhance a claim of persecution, noting that inconsistencies weakening a claim have been found to "generally" not support an adverse credibility finding, and reviewing that the basis for the rule was largely dependent on not allowing trivial details to lead to an adverse credibility determination. *Id.* at 1065–67.

108. *See, e.g.*, *Quan*, 428 F.3d at 887; Wang v. INS, 352 F.3d 1250, 1254 (9th Cir. 2003); *Shah*, 220 F.3d at 1068; Liu v. Mukasey, No. 02-74199, 2008 WL 748948, at *2 (9th Cir. Mar. 19, 2008); Liu v. Ashcroft, 88 F. App'x 170, 171–72 (9th Cir. 2004); *see also Wang*, 262 F. App'x at 801 (Thomas, J., dissenting).

109. *See, e.g.*, *Singh*, 301 F.3d at 1113; *Patatanyan*, 170 F. App'x at 506–07; *Nwakanma*, 126 F. App'x at 702.

110. *See* Xu v. Ashcroft, 108 F. App'x 482, 484–85 (9th Cir. 2004). In *Xu*, the court held: "Two of Xu's children had birthdays within a week of the asylum hearing, and Xu mentioned the Chinese practices of counting ages from one year at birth and of adding a year at the time of the New Year's celebration, rather than on a child's birth date. In this context, Xu's slight inaccuracies 'cannot be viewed as attempts . . . to enhance her claims of persecution.'" *Id.* While her children's specific date of birth did not "enhance" her persecution claim, her inability to remember when they were born called into question whether she actually had children. Since the applicant's claim was based on China's coercive population control policies, *see id.* at 484, her ability to prove she had children is an essential element to her claim, *see* 8 U.S.C. § 1101(a)(42)(B) (defining persecution based on political opinion to include resistance to coercive population control policies). The authenticity of documentation applicants submit allegedly originating from China is among the most common and surprisingly unanswered questions facing immigration adjudicators.

111. An additional problem with the enhancement rule is that it presupposes applicants are aware of asylum law to the extent that they would know whether a particular aspect of their claim enhances it.

V. ASPECTS UNCHANGED FROM THE REAL ID ACT

The REAL ID Act in codifying the fact-finder's consideration of "minor" inconsistencies, and implicitly negating distinctions previously drawn by the enhancement rule, permits immigration judges to consider factors relevant to an assessment of truthfulness that may not have been permissible to consider, or upheld on appeal, under pre-REAL ID Act jurisprudence within certain circuits. By amending the REAL ID Act to permit consideration of minor inconsistencies and inconsistencies that do not appear to enhance an asylum claim, Congress has taken away from the courts of appeals the threshold question of whether an immigration judge may consider an inconsistency. That immigration judges have the power to consider any inconsistency, however, is quite distinct from the issue of whether the inconsistencies cited support an adverse credibility determination. In this respect, there are still several important aspects of an adverse credibility determination unaffected by the REAL ID Act.

A. Three Unaffected Considerations

First, as under pre-REAL ID Act case law, there has to be a real inconsistency. Many decisions in the courts of appeals have found a purported inconsistency's materiality to a claim irrelevant because no actual inconsistency exists in the record.[112] An appellate court, however, should not circumvent its new inability to discredit an inconsistency on the basis of a purported lack of materiality by examining each cited inconsistency under a microscope, searching for a way to reconcile for itself the applicant's testimony.[113] Indeed, plenty of ambiguity exists in assessing purported inconsistencies anyway, even when a reviewing court does defer to an immigration judge's determination that an inconsistency is present in the record if such a conclusion is reasonable. There is a noticeable grey area between

112. *See* Kaita v. Att'y Gen., 522 F.3d 288, 298 (3d Cir. 2008) (finding that the immigration judge's "conclusion is not supported by substantial evidence because it relied upon a non-accurate characterization of the record evidence"); *Tandia*, 487 F.3d at 1053 (finding the date an applicant began organizing opposition unrelated to the date when authorities arrested him for such activity); Castañeda-Castillo v. Gonzales, 464 F.3d 112, 124 (1st Cir. 2006) ("We therefore see no inconsistency in Castañeda's testimony that, while he had radio contact with his base commander during the Operation, he did not have radio contact with the other patrols on the day in question."); *Giday*, 434 F.3d at 550 (finding no inconsistency "[e]ven with our thumbs on the deference side of the scale"); *Korniejew*, 371 F.3d at 385 (finding "illusory" a perceived discrepancy concerning the timing when the applicant was threatened); *Gao*, 299 F.3d at 273 (finding that both the petitioner's asylum application and testimony "present[ed] a consistent statement that Gao was a messenger for Falun Gong"); *Nwakanma*, 126 F. App'x at 701 (faulting the immigration judge for identifying inconsistencies that "simply are not actually inconsistent").

113. *See Bandari*, 227 F.3d at 1167. In *Bandari*, the court found no inconsistency between the applicant's testimony that his grandfather paid a sum of money to secure his release from prison and his previous statement that "his family spent a lot of money and through an influential Muslim man was able to secure his release" because the applicant's father is part of his family, and he could have "paid a government official, an influential and possibly Muslim man, to secure his release." *Id.* The fault in the court's analysis is clear by its use of the word "possibly" because it shows that the court was only able to conclude that no inconsistency existed by speculating about a series of circumstances that would render the two statements consistent. *Cf. Singh*, 439 F.3d at 1106 (citing *Bandari* for the proposition that an inconsistency concerning the particular family member paying the bribe does not support an adverse credibility determination because the inconsistency "does not go to the heart of [the applicant's] claim," even though *Bandari* purported to negate the alleged inconsistency by finding that none existed).

those perceived inconsistencies that plainly constitute an inconsistency and those failing to yield a true discrepancy.[114]

Second, immigration judges' explicit authority to consider minor inconsistencies does not mean that an inconsistency resulting from a translation or interpretation error should negatively affect the applicant's credibility.[115] Discerning when a translation or interpretation problem exists is not always a straightforward process,[116] but it remains incumbent upon the applicant to bring to the attention of the adjudicatory body any deficiency in this regard.[117] The fact that translation and interpretation problems exist generally does not provide a basis for overturning an adverse credibility determination when the applicant has not raised the issue and attempted to explain how and why it pertains to his case.[118]

114. *See* Kazi v. Gonzales, 135 F. App'x 66, 67 (9th Cir. 2005) (reviewing the distinction between the persecutors visiting the applicant's home "several times" as opposed to "many times"); *see also* Georgis v. Ashcroft, 328 F.3d 962, 968–70 (7th Cir. 2003) (concluding that all six of the immigration judge's inconsistencies could be explained or required further investigation); *cf.* 4 WEINSTEIN'S EVIDENCE 801-76–801-76.1 (1976) (reviewing, in relation to Rule 801(d)(1)(A) of the Federal Rules of Evidence, the "better view, urged by Wigmore, McCormick, and others," that prior statements of a witness are permitted "whenever a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs"); *infra* Part VI (discussing inferences and the standard of review for factual findings).

115. *See* Tun v. Gonzales, 485 F.3d 1014, 1030 (8th Cir. 2007) (failing to account for interpretation error contributed to overall prejudice); He v. Ashcroft, 328 F.3d 593, 598 (9th Cir. 2003) (identifying poor translation as a source of error undermining credibility determinations). While translation and interpretation issues might be considered a subcategory of the need to ensure an actual inconsistency exists in the record, the mode of analysis when evaluating specific language problems is distinctive enough to support treating it as a separate category.

116. *See, e.g.*, Neal P. Pfeiffer, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 TEX. INT'L L.J. 139, 147–48 (1988) (discussing potential deficiencies in verbatim interpretations). Indeed, an applicant is not entitled to be represented by an attorney who could look into such potential problems for them, and there are general communicative issues that may otherwise inhibit the ability to assess the adequacy of interpretations and translations. *See generally* Katzmann, *supra* note 15 (describing ramifications of the lack of legal representation). As previously mentioned, however, this article does not purport to serve as a basis for evaluating the divergent policy considerations inherent in deciding whether individuals seeking asylum deserve greater safeguards or processes. *Cf.* Afanwi v. Mukasey, 526 F.3d 788 (4th Cir. 2008) (presenting an analysis of ineffective assistance of counsel claims); *In re* Compean, 24 I. & N. Dec. 710 (A.G. 2009) (providing a new framework for the assertion of a "deficient performance of counsel" claim).

117. *See Singh*, 367 F.3d at 1143–44 (noting the importance of proper translations before stating that the applicant has the burden of raising any translation issues, and that the applicant must specifically identify the aspect of the record perceived to be inaccurate); *see also Xie*, 359 F.3d at 245 (reviewing the immigration judge's refusal to accept the applicant's claim that the inconsistencies in the record were attributable to mistakes in his application made by the "travel agent" who filled it out for him, and noting that the particular discrepancies in the record were "too specific and too dissimilar to be attributed to the incompetency of the preparer").

118. *Compare Shah*, 220 F.3d at 1068 ("Since the discrepancy is *capable* of being attributed to a typographical or clerical error, it *cannot* form the basis of an adverse credibility finding." (Emphasis added.)), *and* Nikoghosyan v. Gonzales, 133 F. App'x 450, 452–53 (9th Cir. 2005) (speculating that a "likely explanation" for an inconsistency is "poor translation"), *with Diaw*, 108 F. App'x at 321 (finding the applicant's claim that translation errors were the cause of incorrect information in the asylum application unpersuasive because the applicant was represented by counsel and the immigration judge had asked the applicant before beginning the proceedings to look over the application and make sure nothing was incorrect). Alleged translation and interpretation deficiencies also serve as a common basis for applicants asserting a due process challenge. *See, e.g.*, Zacarias-Velasquez v. Mukasey, 509 F.3d 429, 434–35 (8th Cir. 2007); Gishta v. Gonzales, 404 F.3d 972, 978–80 (6th Cir. 2005); Kuqo v. Ashcroft, 391 F.3d 856 (7th Cir. 2004).

Third, an applicant can attempt to reconcile his testimony and resolve an apparent inconsistency during the proceedings. If the immigration judge does not believe the attempted explanation reconciles the perceived inconsistency, then the applicant can appeal to the Board and argue why the explanation negates the importance of the inconsistency in assessing the applicant's credibility.[119] An explanation provided by the applicant during an immigration hearing may show that no inconsistency exists, or an applicant's denial that he previously testified inconsistently may lead the immigration judge to play back the tape recording of the proceedings to make sure there was an inconsistency or to determine if the previous inconsistency was attributable to a mistake by the interpreter.[120] Moreover, an applicant may acknowledge the existence of an inconsistency or falsehood, but put forward a set of circumstances that explains why the inconsistency should not negatively affect the believability of the claim.[121] An example would be any of the myriad of cases where applicants admit they attempted to enter the United States using fraudulent documents, but explain that the false documentation was necessary in order to flee persecution.[122]

B. Apprehension in the Face of Deportation

Despite all of these avenues left undisturbed by the REAL ID Act, there is a notable hesitance expressed by many in the courts and literature in drawing negative inferences from seemingly inconsistent testimony or other falsehoods.[123] This hesitance is not surprising. The characteristics of immigration proceedings are quite exceptional, considering the consequences of potentially subjecting another human being to persecution through a mistaken credibility assessment, along with the numerous linguistic and cultural derivations[124] that make a credibility assessment in this context particularly distinctive.[125] However, when an applicant presents truly

119. *See generally* Elboukili v. INS, 125 F.3d 861 (10th Cir. 1997) (unpublished table decision) (finding that the applicant's failure to bring a potential explanation for an inconsistency to the attention of the Board precluded the court from considering it).

120. Of course, if the applicant attributes the inconsistency to an interpretation issue, and listening to the tapes shows that the interpreter correctly conveyed the applicant's answer, then any other explanation the applicant gives for the inconsistency would be suspect.

121. *Compare* Rodriguez Galicia v. Ashcroft, 422 F.3d 529, 537 (7th Cir. 2005) (explanation accepted), *with* Camara v. Ashcroft, 378 F.3d 361, 369 (4th Cir. 2004) ("Although Camara gave a plausible explanation for failing to acknowledge her children on her initial asylum application, she did state an untruth, and the IJ was free to reject her explanation.").

122. *See, e.g.*, *Akinmade*, 196 F.3d at 955; *In re* O-D-, 21 I. & N. Dec. 1079, 1082 (BIA 1998).

123. Indeed, this is apparent in appellate cases overturning adverse credibility determinations that recite the facts put forward by the applicant as if they were "gospel." *See, e.g.*, *Kumar*, 444 F.3d at 1060 (Kozinski, J., dissenting) (expressing displeasure with the majority's lack of deference to the IJ's adverse credibility determination). *But cf.* Pulisir v. Mukasey, 524 F.3d 302, 306 (1st Cir. 2008) (giving substantial deference to the adverse credibility finding of the BIA and IJ).

124. *See* Cianciarulo, *supra* note 4, at 130–31 (stating that cultural differences affect credibility assessments); Kagan, *supra* note 5, at 393 (providing an overview of subjective factors, such as cultural norms, that impact credibility assessments); Ilene Durst, *Lost In Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 152–56 (2000) (describing specific differences in cultural norms that may affect narratives to, and interaction with, the court); *see also* Djouma v. Gonzales, 429 F.3d 685, 687–88 (7th Cir. 2005) (remarking on the immigration judge's lack of "cultural competence"); *Iao*, 400 F.3d at 534 (arguing that cultural distinctions impede the legitimacy of basing an adverse credibility determination on an applicant's demeanor).

125. Consider the court's opinion in *Hanaj v. Gonzales*, 446 F.3d 694, 698–700 (7th Cir. 2006), where

inconsistent testimony or documentary evidence that he is unable to reconcile or explain away,[126] there should be no reason in law or logic why the same principals used to assess truthfulness in other contexts should not apply with equal force.[127] Some may argue that the applicant always deserves the benefit of the doubt.[128] The immigration laws, however, do not provide applicants with the benefit of the doubt in credibility determinations or otherwise, and instead provide specifically that the applicant carries the burden of proof.[129] Any disagreement with this burden of proof

an objective observer reading the facts of the case as described by the court would feel compelled to permit this individual to remain in the United States in light of the atrocities he purportedly underwent in his home country. It would also be reasonable to feel disturbed by the immigration judge's decision in light of the undisputed scars the applicant presented over his body demonstrating some sort of physical injury. It is hard to detach the uncontroverted harm the applicant suffered from the validity of the story as a whole, even though the particulars of the story itself are what link the harm to a protected ground for asylum recognized by the law. *See* 8 U.S.C. § 1101(a)(42)(A) (setting out the nexus requirement); *see also Jiang*, 500 F.3d at 142 ("Even assuming that the privations Jiang suffered rose to the level of persecution as a matter of severity, the record evidence demonstrates no nexus to a protected ground in Jiang's individual case."). Further, when a psychiatrist who has spent a significant amount of time with the applicant testifies that *he* believes the story presented by the applicant is "very reliable," one would be inclined to want to believe that the harm matches up with the narrative presented by the applicant to the immigration judge. The record clearly "supports" a conclusion contrary to that reached by the immigration judge, but does it "compel" such a conclusion? Or is the fault in the immigration judge's decision simply the failure to adequately state for the record why the evidence supporting a contrary conclusion did not in this case? *See infra* notes 188—216, and accompanying text.

126. An applicant may argue, for instance, that he provided inconsistent testimony based on suffering from Post Traumatic Stress Disorder. *See, e.g.*, Chatta v. Mukasey, 523 F.3d 748, 751 (7th Cir. 2008) (entering into evidence doctor testimony diagnosing PTSD); Tadesse v. Gonzales, 492 F.3d 905, 911 (7th Cir. 2007) (disapproving of the immigration judge's cursory examination of PTSD evidence); *see also* Cianciarulo, *supra* note 4, at 130 ("Sufferers of PTSD and other trauma-related disorders may have one or more of the following symptoms: flat affect when relaying traumatic events, inability to remember dates or sequences of events correctly, dissociation, and avoidance."); Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235 (2007).

127. Systemic problems within the immigration system are another perceived shortcoming of the process unrelated to the actual standard of review. The Seventh Circuit has stated:

> Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.

Kadia, 501 F.3d at 821. *Contra* 8 U.S.C. § 1252(b)(4)(B) (obligating reviewing courts to defer to the immigration judge's factual findings); *Mitondo*, 523 F.3d at 788 (stating that beyond certain changes to the types of inconsistencies and other falsehoods an immigration judge may now consider in assessing credibility, immigration laws as amended by the REAL ID Act still "require[] courts to use in immigration proceedings the same deferential approach traditionally applied to credibility findings in labor cases and other administrative controversies" (citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)); Hoxhallari v. Gonzales, 468 F.3d 179, 186 (2d Cir. 2006) (reviewing the deference afforded to the NLRB and ICC, and noting that "[f]act-finders in immigration cases command no lesser deference").

128. *See, e.g.*, Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1 (1991–1992) (arguing that such a standard would be consistent with protective statute policy, aligned with the 1980 Refugee Act objectives, and reflective of the serious consequences of asylum proceedings); *see also* James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"?*, 26 MICH. J. INT'L L. 505, 533 (2005).

129. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the

or the courts of appeals' standard of review of immigration judges' decisions,[130] however meritorious, does not itself provide a vehicle for circumventing the appropriate interpretation of the law as it stands now regarding adverse credibility determinations.

VI. CREDIBILITY AND INFERENCES

Given appellate courts' inability to rely on categorical bases for finding inconsistencies irrelevant under the REAL ID Act, the question becomes how courts otherwise relying on such methodologies will evaluate the consequences of an inconsistency in an assessment of an applicant's truthfulness when none of the bases discussed in the previous section negate its relevance in such an assessment.[131] To answer this question, this section will review inferences and when it is appropriate to infer untruthfulness on the basis of an inconsistency or other potential negative factors.

After discussing inferences generally, the second part will review the special role of the burden of proof and appellate courts' standard of review of adverse credibility determinations in an assessment of the inference of untruthfulness. The REAL ID Act does not alter the burden of proof or the standard of review for adverse credibility determinations. Accordingly, the purpose of this analysis will be two-fold. The first purpose of this analysis is to show why the current standards in place should not become vehicles for overturning adverse credibility determinations on the basis of discrepancies an immigration judge is otherwise permitted to consider under the REAL ID Act. Second, the analysis will review how the standard of review could be misapplied to such an end.

A. When Is It Appropriate to Infer Untruthfulness?

There is an implicit assumption underlying the discountenance of seemingly immaterial inconsistencies that such inconsistencies do not support the inference that the applicant is being untruthful. The Third Circuit's decision in *Gabuniya v. Attorney General* illustrates this point.[132] In *Gabuniya*, the applicant based his persecution claim in part on his testimony that Georgian police officials killed his wife.[133] The immigration judge based the adverse credibility finding in part on the applicant's inconsistent account of when his wife allegedly died.[134] The court

applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."); 8 C.F.R. § 1208.13(a); *see also id.* § 1208.16(b), (c)(2).

130. *See* Kagan, *supra* note 5, at 371–72 (stating that such deference should only apply when credibility is established); Ruppel, *supra* note 128 (arguing for a change to the current standard, rather than a reinterpretation).

131. It is worth reiterating that while this article focuses predominantly on inconsistencies and other falsehoods, the premise is applicable to other testimonial and documentary infirmities, although many interesting distinctions beyond the scope of this article are present in some of them. *See, e.g.*, Siewe v. Gonzales, 480 F.3d 160, 169 n.3 (2d Cir. 2007) ("[P]ermissible inferences can, in appropriate circumstances, be drawn from a *lack* of record evidence, particularly against a party bearing the burden of proof on an issue where the evidence is available.").

132. 463 F.3d 316 (3d Cir. 2006).

133. *Id.* at 317, 319.

134. *Id.* at 322.

concluded that the inconsistency was irrelevant to the broader question of whether the applicant's wife actually died, and noted that the immigration judge never expressly stated that he did not believe the applicant's wife had died.[135] In a footnote on this issue, the court noted that "the [immigration judge] apparently did not believe that this inconsistency revealed any specific lie or exaggeration," stating only "that the inconsistency negatively affected [the applicant's] credibility in general."[136] The court concluded: "We have found no support for such a broad and vague mode of impeaching the credibility of an applicant for asylum."[137]

Rather than searching for support, the question should be why certain inconsistencies could not reasonably lead the immigration judge to question the applicant's credibility. Dissenting with seven colleagues from the Ninth Circuit's denial of rehearing en banc in *Abovian v. INS*, Chief Judge Kozinski noted that "the trier of fact doesn't deny relief because it believes the petitioner made up only the minor details."[138] "Rather," he observed, "inadvertent contradictions as to details can give rise to the suspicion that the petitioner made up the whole story, and the minor inconsistencies reflect the difficulty in telling a good lie."[139] The potential probative value of immaterial inconsistencies in assessing truthfulness is well-established. The Supreme Court, commenting on an administrative proceeding unrelated to immigration matters, stated:

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing.[140]

Irrespective of perceived materiality, when an immigration judge is tasked with assessing truthfulness, indicia of deception would seem central to gauging whether the story presented by the applicant is worthy of belief. In the immigration context, broad modalities of impeachment have indeed been explicitly utilized. The Board of Immigration Appeals, in In re *O-D-*, determined that "the presentation of a fraudulent document is a critical factor" in the assessment of an asylum claim, and that "[s]uch fraud tarnishes the [applicant's] veracity and diminishes the reliability of

135. *Id.*

136. *Id.* at 322 n.6.

137. *Id.*

138. Abovian v. INS, 257 F.3d 971, 977 (9th Cir. 2001) (Kozinski, J., dissenting from denial of rehearing en banc).

139. *Id.*; *see also Jibril*, 423 F.3d at 1134 ("Why a person who provides inconsistent testimony on any *one* matter should still be presumed credible as to *all* other matters is far from obvious.").

140. FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946); *see also* United States v. Arvizu, 534 U.S. 266, 274–75 (2002) (remarking on the reasonableness of inferences drawn from the cumulative impact of activities that individually appear innocent); Jenkins v. Anderson, 447 U.S. 231, 239 (1980) (illustrating that an omission of fact has historically been sufficient to impeach witness testimony); Jencks v. United States, 353 U.S. 657, 667 (1957) (noting the value of contradiction in witness impeachment).

his other evidence."[141] The fraudulent documents at issue in In re *O-D-* were the applicant's identity card and birth certificate.[142] The Board made clear that a fraudulent document does not necessarily demonstrate untruthfulness because an applicant may not have known the submitted document was false, and even if the applicant knew the document was fraudulent, such fraud would not tarnish the viability of the applicant's claim if he used the document as a means of escaping persecution in his home country.[143] In so holding, the Board highlighted the importance of evaluating, within each claim, the circumstances surrounding the document found to be fraudulent, but specifically drew "adverse inferences" from both the submission of fraudulent documentation and the applicant's failure to explain adequately the fraudulent submissions.[144]

The determination as to whether infirmities in the record may be properly used to generalize about the credibility of the applicant is based on the distinction between "bald" speculation and permissible inference.[145] As Chief Judge Jacobs, writing for the Second Circuit, explained, "[t]he speculation that inheres in inference is not 'bald' if the inference is made available to the factfinder by record facts, or even a single fact, viewed in the light of common sense and ordinary experience."[146] The rationale employed by the Second Circuit was in response to the appropriate inference to draw from a fraudulent document, but the rationale logically extends to inconsistent testimony and other infirmities resulting from immigration proceedings.[147] The key criteria are the grounding of the inference, whether the particular inference is supported by the record and the circumstances of the case, and whether explanations given for the inconsistency negate its significance.[148] In the abstract, there would seem to be nothing controversial about drawing inferences from evidence of record, by a finder of fact in immigration proceedings,[149] or otherwise.[150]

141. *In re* O-D-, 21 I. & N. Dec. at 1083.

142. *Id.* at 1082 (noting that the birth certificate was "probably counterfeit").

143. *Id.* at 1083.

144. *Id.* at 1082.

145. *See Siewe*, 480 F.3d at 168–69 (distinguishing between fair inference and bald speculation to address the question of authenticity). Greater divergence is inevitable when the analysis moves from a consideration of inconsistencies in the record to an evaluation of whether it is reasonable to draw an inference of untruthfulness from purportedly implausible testimony. See *Chen*, 435 F.3d at 145, for a summary by Judge Newman on the inevitability of divergent court opinions in an assessment of plausibility; *see also Dia*, 353 F.3d at 250 & n.21 (en banc) (noting the difficulty in formulating a consistent plausibility standard).

146. *Siewe*, 480 F.3d at 169–70; *see also Abovian*, 257 F.3d at 979 (Kozinski, J., dissenting from denial of rehearing en banc) ("When you meet a man on the Brooklyn Bridge, you are much more likely to believe that he owns the clothes on his back than the bridge on which you are standing.").

147. Indeed, the Board itself in In re *O-D-* drew support for its conclusions from circuit court precedent inferring untruthfulness on the basis of testimonial inconsistencies. *In re* O-D-, 21 I. & N. Dec. at 1082; *see also Siewe*, 480 F.3d at 167 (finding the rationale employed by the Supreme Court in *Lavender v. Kurn*, 327 U.S. 645 (1946), applicable when reviewing "administrative findings of fact").

148. *See* Qin v. Ashcroft, 360 F.3d 302, 308 (1st Cir. 2004) (attributing the link between false testimony and a lack of credibility to "common sense"); Jishiashvili v. Att'y Gen., 402 F.3d 386, 392 (3d Cir. 2005) (premising deference on record evidence supporting the immigration judge's inference); *cf.* Kevin C. Mcmunigal & Calvin William Sharpe, *Reforming Extrinsic Impeachment*, 33 CONN. L. REV. 363, 390 (2001) (critiquing the collateral contradiction rule, which excludes extrinsic evidence "collateral" to the proceeding, because "it is overinclusive by excluding extrinsic evidence in cases in which the testimonial inaccuracy clearly carries high probative value despite the fact that the subject matter of the inaccuracy does not relate to the substantive merits of the case nor to the witness' bias or capacity").

149. *See, e.g.*, Teng v. Mukasey, 516 F.3d 12, 14–15 (1st Cir. 2008) (finding that the court owed a

Nor should the reasonableness of inferring untruthfulness necessarily be based on any set number of testimonial infirmities or other falsehoods of record, but rather what such evidence denotes about the applicant and the story presented.[151] While several inconsistencies concerning details in an applicant's claim could support the inference that the entire story is not believable, a single deficiency may also reasonably lead to the inference of untruthfulness. The Second Circuit has frequently held that the "application of the maxim *falsus in uno*, *falsus in omnibus* [false in one thing, false in everything] may at times be appropriate" and that the falsity may "redound[] upon all evidence the probative force of which relies in any part on the credibility of the petitioner."[152] In *Zaman v. Mukasey*, the court upheld an adverse credibility determination because the evidence showed that the applicant submitted two forms of identification from different years with the same picture, even though he claimed the pictures were separately taken when each document was issued to him.[153]

In contrast, in *Kadia v. Gonzales*, Judge Posner asserted that *falsus in uno*, *falsus in omnibus* is a "discredited doctrine" based on "primitive psychology."[154] This assertion was not made in relation to fraudulent documentation or a "material" inconsistency; rather, it was based on what the court characterizes as "innocent mistakes, trivial inconsistencies, and harmless exaggerations" by the applicant during

deferential standard of review to both "the agency's findings of fact and inferences from them"); Ye v. U.S. Dep't of Justice, 489 F.3d 517, 524 n.4 (2d Cir. 2007); Adefemi v. Ashcroft, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc) ("[W]e view the record in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision."); *Balasubramanrim*, 143 F.3d at 162.

150. *See Arvizu*, 534 U.S. at 274–75 (giving deference to inferences drawn by a police officer during a criminal investigation); Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 114–15 (1963) (giving deference to inferences drawn by the jury in a negligence action); *Lavender*, 327 U.S. at 652–53 (same).

151. *See* Yongo v. INS, 355 F.3d 27, 33 (1st Cir. 2004) ("Obviously there are some lies that, because of their circumstances and limited relationship to the main issue, do relatively little to discredit other statements."). *Compare* Huang v. Mukasey, 525 F.3d 559, 564 (7th Cir. 2008) (finding reasonable the immigration judge's assessment that the large sum of money the applicants spent to travel to the United States undercut the applicants' claim that they could not pay the more modest fine authorities allegedly required them to pay), *with id.* at 566 (pointing out the defect in the immigration judge's discountenance of the possibility that authorities could perform an abortion within a certain amount of time).

152. *Siewe*, 480 F.3d at 170 (quoting Zhong v. U.S. Dep't of Justice, 461 F.3d 101, 123 (2d Cir. 2006)); *see* Zaman v. Mukasey, 514 F.3d 233, 238–39 (2d Cir. 2008) (finding it was proper for the agency to discredit the applicant's testimony as a whole due to "the invalidity of the PPP membership card"); Zheng v. Gonzales, 500 F.3d 143, 147 (2d Cir. 2007); Borovikova v. U.S. Dep't of Justice, 435 F.3d 151, 157–58 (2d Cir. 2006); *see also* Huang v. Gonzales, 453 F.3d 942, 945–46 (7th Cir. 2006); Selami v. Gonzales, 423 F.3d 621, 625–26 (6th Cir. 2005); *Yongo*, 355 F.3d at 32–34; Li v. Att'y Gen., 194 F. App'x 886, 890 (11th Cir. 2006) (finding that the applicant's certificate attesting to his date of birth undermined his credibility because the certificate was allegedly notarized in China on a date subsequent to the date when the applicant arrived in the United States); Chen v. Ashcroft, 112 F. App'x 633, 636 (9th Cir. 2004) (Bea, J., concurring). The *Siewe* court found that there were five categories of possible limitations to the invocation of *falsus in uno*, including independent corroboration of evidence, fraudulent documents created to escape persecution, and false evidence which is wholly ancillary to the claim. *Siewe*, 480 F.3d at 170–71. Of course, the third category invites further analysis about the type of documents reasonable construed as "ancillary to the claim" and whether the circumstances of the case render a seemingly ancillary document particularly probative of the applicant's truthfulness.

153. *Zaman*, 514 F.3d at 236, 238–39.

154. *Kadia*, 501 F.3d at 821; *cf.* Mcmunigal & Sharpe, *supra* note 148, at 388 ("The central thrust of the collateral contradiction rule is a categorical rejection of the transitive inaccuracy relevance theory as adequate to support the admission of extrinsic evidence.").

his testimony before an immigration judge.[155] In this respect, it is not clear the court's misgivings even concern *falsus in uno*, since falsehood "materiality"—whether or not justifiably so[156]—was historically a near-universal condition precedent to its application.[157] Nevertheless, accepting the court's characterization of the record as accurate, as well as the inference that these testimonial infirmities do not show the applicant to be a liar, then indeed there would be nothing in the record negatively impacting the applicant's credibility that could in turn reflect upon the truthfulness of the applicant's claim as a whole.[158] Conversely, if inconsistencies in the record were in fact material and not "innocent" or otherwise reconciled to the satisfaction of the fact-finder, then why could the circumstances of the case not properly lead an immigration judge to question the applicant's credibility, even if the inconsistencies did not concern the specifics of alleged harmful events?

Indeed, later in the *Kadia* opinion, the court concedes that inconsistencies of less than material importance can be relevant to the assessment of veracity. Specifically, the court stated that "the mistakes that witnesses make in all innocence must be distinguished from slips that, whether or not they go to the core of the witness's testimony, show that the witness is a liar."[159] Even so, once that distinction is made, the tendency of the applicant's testimony to make him out to be a "liar" should give the fact-finder pause with regard to the veracity of whatever other details the applicant's claim entails.[160] And what if such a distinction cannot be made? The difference, for example, between an exaggeration of a story and a complete fabrication of events is evident, yet the effect of this difference is perhaps negligible in a majority of cases on account of the evidentiary issues in immigration proceedings. The distinction presupposes the immigration judge would be capable

155. *Kadia*, 501 F.3d at 821.

156. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1014, at 991 (Little, Brown & Co. 1970) (remarking on the "inapt analogy" with criminal perjury charges causing courts to require materiality).

157. *See, e.g.*, Mason v. United States, 95 F.2d 612, 614 (5th Cir. 1938) (stating that if the jury concluded a witness had testified falsely to a material fact in the case, they might disregard the testimony altogether, but were not bound to do so if they considered part of his testimony true); People v. Ruffin, 94 N.E.2d 433 (Ill. 1950) (same); People v. Perry, 14 N.E.2d 793, 796 (N.Y. 1938) (same); Commonwealth. v. Alessio, 169 A. 764, 766 (Pa. 1934) (same); Larsen v. Webb, 58 S.W.2d 967 (Mo. 1932) (same); Blankavag v. Badger Box & Lumber Co., 117 N.W. 852, 854 (Wis. 1908) (same); People v. Sprague, 53 Cal. 491, 493–94 (1879) (same). Given the circumstances of the case in *Kadia*, the Seventh Circuit's initial concern would appear more directed at a specific circumstance when inferring untruthfulness would be inappropriate even though the court characterizes its *falsus in uno* comments in general terms. *See Kadia*, 501 F.3d at 821. However, given the divergent opinions expressed in various circuits regarding the specific application of the maxim under the REAL ID Act credibility amendments, *see infra* Part VIII; Castañeda-Castillo v. Gonzales, 488 F.3d 17, 23 n.6 (1st Cir. 2007), a discussion of the maxim in greater detail is warranted.

158. Of course, this would be based on what is meant by "trivial" or "harmless," and the surrounding context of the case at hand. Indeed, the immigration judge could be assured that an appellate court would overturn an adverse credibility determination where the immigration judge discredited the asylum claim because of a "misspelling in the asylum application," which implies the record establishes a technical error in the application. *See Kadia*, 501 F.3d at 822; *see also* Rodriguez Galicia v. Gonzales, 422 F.3d 529, 537 (7th Cir. 2005) (discussing whether several inconsistencies in the record supported the conclusion that the applicants had a propensity for lying).

159. *Kadia*, 501 F.3d at 822.

160. *See* Toure v. Ashcroft, 400 F.3d 44, 48 (1st Cir. 2005) (finding the applicant's prior false testimony relevant to an assessment of her credibility in her own asylum proceeding); *see also Abovian*, 257 F.3d at 977 (Kozinski, J., dissenting from denial of rehearing en banc) (discussing the role of the immigration judge in making the distinction).

of discerning embellished facts from those that are completely false. If not, all that is left is the similarity between them—they are both lies. Unlike inadvertent contradiction, conscious embellishment carries with it the probative value often central to ascertaining veracity, namely willful deception.[161]

The discountenance of the *falsus in uno* maxim by courts as referred to in *Kadia* also must be placed into context because the application of the maxim itself changed over time, and it concerned proceedings involving jury trials. Originally, courts required jurors to discount the whole of the witness's testimony if they believed the witness willfully lied about an issue material to the case.[162] The maxim's mandatory application persisted throughout American courts for a significant amount of time,[163] but as a mandatory maxim, has since been almost uniformly discounted.[164] Of particular importance is the context and basis for its rejection in mandatory form (or permissive, for that matter), which is premised largely on the belief that jury instructions invoking the maxim improperly impinge on the role of the jury in assessing a witness's credibility.[165] As stated by the Fourth Circuit:

> The rule has been watered down until it means no more now than that the jury may disbelieve a witness if they think he is lying; but they need no instruction as to that and giving it with respect to a particular witness accomplishes nothing except to convey to the jury the impression that the judge thinks that the witness has lied.[166]

Other problems include the wording of the jury instruction itself and the jury's interpretation of the instruction.[167]

Immigration proceedings have little in common with the types of trials at which the Fourth Circuit directed it comments. There is no jury, and thus no jury instructions.[168] Therefore, there is no concern that the trier of fact will be unduly influenced or struggle to discern the particular contours of an instruction otherwise permitting him to discount the whole of the applicant's testimony. What is left is simply the idea that the immigration judge should not be prevented from doing that

161. *See* WIGMORE, *supra* note 155, § 1013, at 988 (explaining conscious falsehood).

162. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 655 & n.368 (1997).

163. *See id.* at 655–56 (citing, among other cases, Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 339 (1822)).

164. *E.g.*, People v. Williams, 330 P.2d 79, 80 (Cal. Dist. Ct. App. 1958); City of Coral Gables v. Blount, 156 So. 244, 245 (Fla. 1934) (en banc).

165. *See* Fisher, *supra* note 162 at 655 & n.372; United States v. Weinstein, 452 F.2d 704, 713–14 (2d Cir. 1971) (finding that while "there were unusually strong grounds for not believing [the witness], . . . that decision was the jury's function, not the judge's," and quoting *Knowles v. People*, 15 Mich. 408, 412 (1867), for the proposition that "when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the Court to determine"); *see also* Mancuso v. Poole, 848 So. 2d 154, 161 (La. Ct. App. 2003) (discussing the application of the maxim in a bench trial).

166. Virginian Ry. Co. v. Armentrout, 166 F.2d 400, 405 (4th Cir. 1948); WIGMORE, *supra* note 156, § 1008.

167. *See, e.g.*, Metropolitan Life Ins. Co. v. Wright, 199 So. 289, 290 (Miss. 1940) (discussing the harmful effect of incorrectly worded jury instructions).

168. *See* 8 U.S.C. § 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.").

which is obvious—"disbelieve a witness if [he] think[s] he is lying"[169]—on the basis of record evidence lending support to that conclusion.

As with the discussion of context and materiality in Part IV above, there is a similar difficulty in evaluating whether an inconsistency or falsehood reasonably leads to the inference of untruthfulness on the basis of its perceived materiality to an asylum claim. The courts of appeals, regardless of whether they refer to the maxim of *falsus in uno*, have determined that its underlying principle can support an adverse credibility analysis. Prior to the REAL ID Act, many courts of appeals expressly noted that one inconsistency can be sufficient to support an adverse credibility determination.[170] However, many of these opinions have limited the types of inconsistencies that can be considered, and have phrased the limit in some derivation requiring significant centrality to the claim.

In *Singh v. Gonzales*, for example, the Ninth Circuit stated that "[a] single supported ground for an adverse credibility finding is sufficient if it relates to the basis for [the applicant's] alleged fear of persecution and goes to the heart of the claim."[171] The court explained that "[a]n inconsistency goes to the heart of a claim if it concerns events central to petitioner's version of why he was persecuted and fled."[172] Of course, the court is also implying that an inconsistency supported by record evidence can never reasonably lead to the inference of untruthfulness if it concerns any matter other than why the applicant suffered persecution and subsequently fled. As with the "fear for safety" precursor,[173] this is a flawed analysis because it makes a generalized statement about the validity of an inference without any background of the facts or context underlying the particular claim. The logic employed would be analogous to the Board in *In re O-D-* holding that fraudulent documentation automatically creates an inference of untruthfulness without looking at the particular circumstances surrounding the fraudulent document or the applicant's knowledge that it is fraudulent.[174] The Ninth Circuit in that circumstance quickly jumped on the shortcomings of such an automatic inference (and rightfully so).[175] The court's failure to reject the application of the converse automatic inference, where the falsity is not related to a persecutory event, is inconsistent.

169. *Virginian Ry. Co.*, 166 F.2d at 405.

170. *E.g.*, *Don*, 476 F.3d at 741–42; Katabarwa v. Gonzales, 193 F. App'x 519, 525 (6th Cir. 2006); Al Hriri v. Att'y Gen., 128 F. App'x 750, 752 (11th Cir. 2005) (citing Chebchoub v. INS, 257 F.3d 1038, 1043 (9th Cir. 2001)); *see also Dong*, 406 F.3d at 111–12 (finding the omission of one significant detail sufficient to uphold an adverse credibility determination).

171. *Singh*, 439 F.3d at 1108 (citing *Chebchoub*, 257 F.3d at 1043); *see also* Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1059 (9th Cir. 2005) ("Our law has long recognized that a person who is deemed unbelievable as to one material fact may be disbelieved in all other respects." (citing Hattem v. United States, 283 F.2d 339, 343 (9th Cir. 1960))).

172. *Singh*, 439 F.3d at 1108.

173. *See supra* Parts III.B & IV.A.

174. *In re* O-D-, 21 I. & N. Dec. 1079.

175. *See, e.g.*, Mamouzian v. Ashcroft, 390 F.3d 1129, 1138 (9th Cir. 2004) (finding that an applicant's willingness to use false documentation to "gain entry to a safe haven" may actually "support[] his claim of fear of persecution"); *Akinmade*, 196 F.3d at 955 (recognizing that "a genuine refugee escaping persecution may lie about his citizenship to immigration officials" if doing so secures his exit from the country persecuting him); *see also* Nreka v. Att'y Gen., 408 F.3d 1361, 1368 (11th Cir. 2005) ("[D]ocuments to facilitate travel or gain entry into the United States cannot in and of themselves be used as the basis to deny asylum."); *Yongo*, 355 F.3d at 33 (contrasting "[a] lie by a fleeing victim to a tyrant's border guard" with "a lie under oath in an INS proceeding about the circumstances of persecution").

Other decisions in the courts of appeals have held that inconsistencies and other actions by the applicant unrelated to claimed persecution can lead to an inference of untruthfulness on the basis of circumstances more directly tied to a willingness to deceive. In *Toure v. Ashcroft*, the First Circuit upheld the immigration judge's adverse credibility determination, which relied on inconsistent testimony the applicant provided in her husband's removal proceedings before a different immigration judge.[176] The court found that the applicant's "false testimony under oath in her husband's hearing fairly illustrated her propensity to dissemble under oath."[177] Similarly, in *Sidhu v. INS*, the court found that an immigration judge may reasonably infer untruthfulness when an applicant fails to produce a witness located within a short proximity of the courthouse, when that witness could purportedly verify the applicant's claim.[178] The intermediate inference sanctioned by the court was that an applicant declining to produce an easily available corroborating witness declines to do so because the witness's testimony is likely to contradict the applicant's testimony.[179]

Regardless of whether these particular examples standing alone could or should support an adverse credibility determination on the basis of the surrounding factual circumstances, these cases show how inconsistencies unrelated to a persecutory event can lend support to the inference of untruthfulness. Reasonable minds invariably differ on whether an inconsistency supports an adverse credibility determination, but whether the inconsistency can be indicative of untruthfulness should be the driving force in such an assessment.[180]

176. *Toure*, 400 F.3d at 47–48. The applicant's reaction when the immigration judge brought up that her prior testimony was found to be incredible did not help her cause: "If I understand, I am not here for you to ask me question about my husband, I am here for you to ask me question about my case. I do not know anything about what you talking about now. If you want, you can ask me questions about my case and I am going to answer, but, because I am not here to answer any question about my husband." *Id.* at 48.

177. *Id.* (citing Laurent v. Ashcroft, 359 F.3d 59, 64 (1st Cir. 2004)) (internal quotation omitted); *accord* Farah v. Ashcroft, 348 F.3d 1153, 1155–56 (9th Cir. 2003) (upholding an adverse credibility determination based on material deficiencies such as the applicant's failure to provide the court with the correct date when he entered the United States); *Esaka*, 397 F.3d at 1107–10 (upholding an adverse credibility determination where the immigration judge relied on the applicant's propensity to lie when "she considered it to be in her interest to do so"); *Balogun*, 374 F.3d at 503–04 (mentioning the applicant's inconsistent account of the circumstances of her arrival in the United States as one relevant factor in upholding an adverse credibility determination); *see also Pan*, 489 F.3d at 82–83, 86 (upholding an adverse credibility determination premised in large part on the applicant's inconsistent testimony about the circumstances of his arrival into the United States, and how he managed to get across the country subsequent to his arrival).

178. Sidhu v. INS, 220 F.3d 1085, 1091–92 (9th Cir. 2000).

179. *Id.* at 1091; *see also Kumar*, 444 F.3d at 1061 (Kozinski, J., dissenting) ("The IJ caught the Kumar brothers red-handed mocking the integrity of our immigration procedures. Once the IJ found that they had committed immigration fraud, he had every right to disbelieve the aspects of their story that *did* take place long ago and far away, as there is nothing to corroborate that story beyond the Kumar brothers' good word and some documents they produced.").

180. *Compare, e.g.*, Diallo v. Gonzales, 447 F.3d 1274, 1282–83 (10th Cir. 2006) (finding material the applicant's inability to recall consistently whether prison guards knocked out one or two teeth during his detention at a prison camp), *with* Smolniakova v. Gonzales, 422 F.3d 1037, 1045 (9th Cir. 2005) (determining that even if the applicant would not have been able to recall consistently whether her assailants walked or ran away subsequent to attacking her, giving weight to such an inconsistency would amount to "judicial hair-splitting [that] does not go to the heart of the asylum claim").

B. Burden of Proof, Standard of Review, and Inference

> *"The facts are straightforward (although reasonable minds can draw differing inferences from them)."*[181]

The supposition of the previous section is that certain circumstances may make it appropriate to infer untruthfulness on the basis of an evidentiary falsehood (or falsehoods). If we consider this inference in a vacuum, then all we have is an inference lending support to an adverse credibility determination. This inference would be enough to support an adverse credibility determination because the burden of proof rests on the applicant to establish a credible asylum claim,[182] which means that the applicant bears the "risk of non-persuasion."[183] Upon review, a court of appeals could not overturn the immigration judge's finding that a falsehood supports the conclusion that the applicant failed to establish his credibility, provided that the falsehood is actually present in the record.[184] The standard of review for factual determinations such as credibility, substantial evidence, is "even more deferential" than the "clearly erroneous" standard.[185] The evidence must "compel" a reasonable adjudicator to reach a contrary conclusion.[186]

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181. *Pulisir*, 524 F.3d at 305.

182. 8 C.F.R. § 1208.13(a); *see also In re* Acosta, 19 I. & N. Dec. at 214–16 (discussing an applicant's burden of proof), *overruled in part*, *In re* Mogharrabi, 19 I. & N. Dec. 439, 440 (BIA 1987).

183. Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 546 (9th Cir. 1949); *see also* Moore v. Kulicke & Soffa Indus., Inc., 318 F.3d 561, 566 (3d Cir. 2003) (stating that the risk of nonpersuasion never shifts, as opposed to the burden of production (citing Larry L. Teply & Ralph U. Whitten, CIVIL PROCEDURE 855 (2d ed. 2000))); Yang v. McElroy, 277 F.3d 158, 163 (2d Cir. 2002); *cf.* Woodby v. INS, 385 U.S. 276 (1966) (reviewing the requisite burden of proof on the government for establishing deportability).

184. *See Gallick*, 372 U.S. at 115 (finding that the "very essence" of the role of the fact-finder "is to select from among conflicting inferences and conclusions that which it considers most reasonable" and stating that the conclusion of the fact-finder, "whether it relates to negligence, causation or *any other factual matter*, cannot be ignored" simply because "judges feel that other results are more reasonable" (emphasis added)).

185. *See* Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 623 (1993) (listing the reasonableness standard as even more deferential than a "definite and firm conviction that a mistake has been committed"); Chen v. Mukasey, 510 F.3d 797, 801 (8th Cir. 2007); Reynoso-Lopez v. Ashcroft, 369 F.3d 275, 278 (3d Cir. 2004). *But cf. Siewe*, 480 F.3d at 168 n.1 (refuting the suggestion of another Second Circuit panel in dicta that the substantial evidence standard is more stringent). The additional level of deference in application is perhaps negligible, or, as the Supreme Court has described it, a "subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." Dickinson v. Zurko, 527 U.S. 150, 163 (1999); *see also* Yan v. Mukasey, 509 F.3d 63, 67 (2d Cir. 2007) (upholding an adverse credibility determination by finding "nothing else in the record from which a firm conviction of error could properly be derived"); *Ye*, 489 F.3d at 524 n.4. However, the subtlety described by the Supreme Court may concern a substantial evidence standard slightly less deferential from the one employed in review of immigration proceedings. *See infra* note 186.

186. 8 U.S.C. § 1252(b)(4)(B) (2006); *see Elias-Zacarias*, 502 U.S. at 481 & n.1 (citing NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), which compared evidence needed to overturn an agency's findings of fact with "a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury"); *cf.* Agosto v. INS, 436 U.S. 748, 770 (1978) (Powell, J., dissenting) (disagreeing with the opinion of the majority on the appropriate standard of review regarding when the reviewing appellate court is required to transfer an immigration case to district court for the purpose of a de novo adjudication of a claim of U.S. citizenship, and likening the appropriate standard of review of such a determination to those governing directed verdicts). For a discussion on whether the

An inference lending support to an adverse credibility determination, however, is not evaluated in a vacuum. There is an entire narrative, particular circumstances, and possible explanations that could negate the inference.[187] There are several intersecting principles applicable to administrative procedures generally, and immigration proceedings specifically, from which reviewing courts explicitly and implicitly draw support for the particular standards of reviewing credibility determinations. First, in consonance with the longstanding precept that the agency must "set forth with such clarity as to be understandable" the reasons for reaching its decision,[188] the courts of appeals require immigration judges to list "specific, cogent reasons" in support of the adverse credibility determination.[189] Second, to gauge the reasons specified by the immigration judge to assess whether substantial evidence supports the decision, the reviewing courts consider the record "as a whole."[190] Third, contrary to Article III judges, immigration judges play a more active role in developing the record.[191] The INA provides that an immigration judge shall "receive

Supreme Court's holding in *Elias-Zacarias* altered the substantial evidence standard as applied to immigration proceedings at the time, see Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under* Elias-Zacarias, 20 GEO. IMMIGR. L.J. 133 (2005); John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 628–29 (2004); Chen v. U.S. Dep't of Justice, 471 F.3d 315, 334 & n.13 (2d Cir. 2006) (finding that circuit precedent prevented the court from applying a standard of review that based on "the language of § 1252(b)(4)(B) indicates an even more deferential standard of review than was historically provided by the 'substantial evidence' standard").

187. *See Yongo*, 355 F.3d at 33–34 (analyzing instances where particular facts may negate a possible inference of incredibility).

188. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (recalling the rules established in *Chenery I*, 318 U.S. 80, where the Court also found that the reviewing appellate court "must judge the propriety of such action solely by the grounds invoked by the agency").

189. *See, e.g.*, *Secaida-Rosales*, 331 F.3d at 307; *Balasubramanrim*, 143 F.3d at 162; *see also In re* A-S-, 21 I. & N. Dec. 1106 (BIA 1998). For a review of the history on the emergence of the requirement that immigration judges provide "specific, cogent reasons," see Singh v. Gonzales, 495 F.3d 553, 556–57 (8th Cir. 2007) (remarking on the origination of the rule in Eighth Circuit case law several decades before). Notwithstanding the application of this principle, whether and to what extent an immigration judge has a duty to articulate the bases for his or her decision, in an adverse credibility determination or otherwise, is a more complicated issue beyond the scope of this article.

190. *See, e.g.*, Zoarab v. Mukasey, 524 F.3d 777, 780 (6th Cir. 2008) ("[W]e must uphold the administrative decision if it is 'supported by reasonable, substantial, and probative evidence on the record considered as a whole,' and may reverse only if the evidence compels a different result." (quoting Ramaj v. Gonzales, 466 F.3d 520, 527 (6th Cir. 2006))); Rivera v. Mukasey, 508 F.3d 1271, 1274 (9th Cir. 2007) ("'The substantial evidence test is essentially a case by case analysis requiring review of the whole record.'" (quoting Turcios v. INS, 821 F.2d 1396, 1398 (9th Cir. 1987))); Mejia v. Att'y Gen., 498 F.3d 1253, 1256 (11th Cir. 2007); Bocova v. Gonzales, 412 F.3d 257, 262 (1st Cir. 2005) (quoting *Elias-Zacarias*, 502 U.S. at 481); *see also Universal Camera Corp.*, 340 U.S. at 488 ("[T]he requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence."); 8 U.S.C. § 1105a(a)(4) (1994) (codification of the previous language used to explain the appropriate standard of review, which stated that the agency's findings must be "supported by reasonable, substantial, and probative evidence on the record considered as a whole"). The Eighth Circuit has synthesized the holdings of *Universal Camera* and *Chenery* to derive the principles behind the requirement of "specific, cogent reasons." *See* Chen v. Mukasey, 510 F.3d 797, 801 (8th Cir. 2007).

191. *See* Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) (stating that an immigration judge "is not merely a fact finder and adjudicator, but also has an obligation to establish and develop the record"); Kaur v. Ashcroft, 388 F.3d 734, 737 (9th Cir. 2004) (discussing the obligations of the immigration judge to develop the record fully); Al Khouri v. Ashcroft, 362 F.3d 461, 464–65 (8th Cir. 2004) (discussing the immigration judge's duty to fully develop the record when an asylum applicant appears pro se); *Manimbao*, 329 F.3d at 661–62 (reviewing the immigration judge's obligations in a proceeding to fully

evidence, and interrogate, examine, and cross-examine the alien and any witnesses," and the INA affords applicants the "reasonable opportunity" to present evidence.[192] The immigration judge is required to walk a fine line between the need to preclude the submission of irrelevant evidence and the need to directly elicit pertinent information from witnesses,[193] in addition to the special obligation to develop the record more directly when an applicant appears *pro se*.[194]

Each one of these principles runs the risk of negating the deference owed to agency credibility determinations. The first guiding principle, specificity, can be used to challenge whether the rationale employed by the immigration judge is specific and detailed enough to satisfy the concerns of the reviewing court.[195] This problem is particularly pronounced in the immigration context because immigration judges, relying on their own notes, render their judgments orally at the end of the hearing, and the transcript of this oratory synthesis of the proceedings may fail to match up to the stylistic (and perhaps substantive) standards of many opinions authored by Article III judges.[196]

The second principle, review of the record as a whole, is merely a way to provide a contextual backdrop from which to evaluate whether the evidence compels a contrary conclusion. An appellate court will invariably review whatever parts of the record it believes necessary to make an informed decision about the case.[197] In so doing, the court may properly negate the bases used by the immigration judge to find the applicant incredible because, for example, the record shows that the immigration judge's justification for finding testimony inconsistent was based on a misunderstanding of the applicant's statements to the court, or the immigration judge may have overlooked a document submitted to the immigration court that *per se* dispels the doubts expressed by the immigration judge.[198]

The potential obscuration of the deferential standard of review occurs when a reviewing court takes a more balancing-of-the-scales approach to evaluating credibility. In such circumstances, the analysis can shift from an evaluation of the

develop the record on which his decision is based); *Yang*, 277 F.3d at 162 (discussing an immigration judge's duty to establish the record); *see also* Richardson v. Perales, 402 U.S. 389, 410 (1971) (affirming the integrity of proceedings involving the Social Security Act and the Administrative Procedure Act because these proceedings require full and true disclosure of facts); Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983) (discussing an administrative law judge's duty in a Social Security case to fully and fairly develop the record).

192. 8 U.S.C. § 1229a(b)(1), (b)(4)(B) (2006).

193. Additionally, the immigration judge must be careful when eliciting testimony to maintain the tenor of a neutral adjudicator. *See Zacarias-Velasquez*, 509 F.3d at 434–35; Apouviepseakoda v. Gonzales, 475 F.3d 881, 885–89 (7th Cir. 2007); Catabay v. Ashcroft, 95 F. App'x 218, 220 (9th Cir. 2004) ("An IJ need not examine a witness with kid gloves; aggressive questioning does not rise to a due process violation." (citing Melkonian v. Ashcroft, 320 F.3d 1061, 1072 (9th Cir. 2003))).

194. *See Al Khouri*, 362 F.3d at 464–65.

195. *See* Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974). *Compare Apouviepseakoda*, 475 F.3d at 890–93, *with id.* at 893–98 (Posner, J., dissenting).

196. *See* Poghosyan v. Att'y Gen., 276 F. App'x 254, 256 n.1 (3d Cir. 2008) ("While particular statements in the IJ's decision (rendered orally) might have been more precise, her adverse credibility finding appears to be reasonably grounded in the record.").

197. *See generally Chen*, 435 F.3d at 145 ("Panels will have to do what judges always do in similar circumstances: apply their best judgment, guided by the statutory standard governing review and the holdings of our precedents, to the administrative decision and the record assembled to support it.").

198. *See, e.g.*, *Tandia*, 487 F.3d at 1053 (overturning immigration judge's adverse credibility finding because defendant's testimony was consistent; *Castañeda-Castillo*, 464 F.3d at 124; Shah v. Att'y Gen., 446 F.3d 429, 437 (3d Cir. 2006) (same).

merits of the immigration judge's bases for finding the applicant incredible to a focus on other evidence viewed as a testament to the consistency of the applicant and indicative of truthfulness. There are several potential problems when courts infer truthfulness based on such an approach. First, it can lead to improper or inappropriate reversals of adverse credibility determinations based on perceived procedural defects. In this respect, the analysis combines the requirement that the immigration judge provide "specific, cogent reasons" with the appellate court's evaluation of the record as a whole to fault the agency for seemingly failing to consider all record evidence.[199] Second, depending on how it is applied, a quasi-balancing test might not make sense in credibility assessments. For example, if a plaintiff in a personal injury suit is caught spending one percent of his time exercising at home, his claimed injury does not create an entitlement to remedy simply because he acted in a manner consistent with his purported injury ninety-nine percent of the time. Consistency itself does not necessarily detract from the reasonableness of inferences drawn from inconsistencies.

The third principle, the immigration judge's role in the development of the record, provides applicants with several safeguards enforced by reviewing courts, such as when an immigration judge pretermits an asylum hearing without cause before the applicant has a chance to present the majority of his case.[200] However, this principle can lead to an analysis of the applicant's credibility inconsistent with the standard of review in several ways. An applicant can blame a particular testimonial shortcoming or perceived gap in the record on the immigration judge in an attempt to circumvent his own responsibility for initially creating that shortcoming.[201] Similarly, a reviewing court may label the immigration judge's

199. *See infra* notes 204—229 and accompanying text (reviewing cases faulting the immigration judge for such perceived missteps). *Compare Hanaj*, 446 F.3d at 700 (faulting the immigration judge for failing to state for the record why evidence consistent with the applicant's story did not negate the bases used to discount the applicant's credibility), *and* Gomes v. Gonzales, 473 F.3d 746, 756–57 (7th Cir. 2007) (remarking that the immigration judge had an "obligation" to state on the record why he credited certain parts of a report over others), *with Pulisir*, 524 F.3d at 309 ("*Gomes* is not a fair congener. The record in this case, read objectively, does not support the claim of selectivity."), *and id.* ("Nor does it matter that the BIA and the IJ did not dissect every scrap of proof. The law is pellucid that 'each piece of evidence need not be discussed in a decision.'" (quoting Morales v. INS, 208 F.3d 323, 328 (1st Cir. 2000))), *and* 151 Cong. Rec. at H2870 (expressing Congress' intent in enacting the REAL ID Act that the immigration judge state his or her reasons for finding the applicant incredible, but noting that the immigration judge need not recite for the record the significance of all evidence presented at the immigration hearing). *See generally* Sok v. Mukasey, 526 F.3d 48, 58 (1st Cir. 2008) (remanding for reconsideration the agency's denial of asylum due to the immigration judge's failure to explain adequately the significance of all record evidence, because "the IJ's decision is not supported by substantial evidence in the record" although "the record does not compel us inexorably to the opposite conclusion").

200. *See, e.g.*, *Tun*, 485 F.3d at 1026–27 (remarking that the immigration judge's apparent "desire to help the translator make a six o'clock flight weighed substantially in the decision to exclude" the applicant's expert from testifying); Kerciku v. INS, 314 F.3d 913, 918 (7th Cir. 2003) (finding that the immigration judge had made up his mind early on and refused to hear any testimony on behalf of the applicant); Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) (finding that the immigration judge stated that he had already judged the claim before the hearing began); Podio v. INS, 153 F.3d 506, 507–08 (7th Cir. 1998) (finding that the immigration judge refused to hear testimony of corroborating witnesses, but then characterized the applicant's evidence as uncorroborated); *cf.* Aguilar-Solis v. INS, 168 F.3d 565, 568 (1st Cir. 1999) (finding that the immigration judge's attempt "to move things along" did not impose "unreasonable restrictions on the petitioner's presentation of either testimonial or documentary proof").

201. *See, e.g.*, Debab v. INS, 163 F.3d 21, 26 (1st Cir. 1998) (rejecting the applicant's argument that the immigration judge's failure to ask questions which would have supported the applicant's arguments was a

perceived failure to explore an issue as the basis for reversal when, under the proper substantial evidence standard of review, a contrary conclusion to that reached by the immigration judge would not be compelled.[202] This type of rationale is particularly noteworthy when the perceived shortcoming in the record involves one of the many implicit inferences in the causal chain of an ultimate or intermediary express factual finding.[203]

Several cases in the courts of appeals addressing an applicant's knowledge that he or she submitted fraudulent documentation to the immigration court highlight the seemingly subtle yet profound impact that the aforementioned factors can still have on credibility determinations after the REAL ID Act. *Kourski v. Ashcroft* concerned a Russian national asserting persecution on the basis of his alleged Jewish ethnicity; he submitted a birth certificate, sent to him by his mother, "listing his nationality as Jewish."[204] The immigration judge rendered an adverse credibility determination affirmed by the Board on the basis of its finding that the birth certificate submitted to the immigration court was fraudulent.[205] The Seventh Circuit overturned the adverse credibility determination, concluding that "[t]here is a gaping hole in the reasoning of the board and immigration judge" based on the "unsupportable ground that the forgery showed [the applicant] was not a credible witness."[206] The court believed the adverse credibility determination was

deficiency in the proceedings because the applicant could have made the argument himself but failed to do so).

202. The potential for such an application does not minimize the legitimate reasons for remanding a case on the basis of mistakes or improprieties during a stage of the agency proceedings. *See* Chen v. INS, 359 F.3d 121, 128 (2d Cir. 2004) ("Because the BIA did not consider Chen's testimony that he had been beaten, its decision is fatally flawed and we are unable adequately to consider whether substantial evidence supports the BIA's determination that Chen failed to establish either past persecution or a well-founded fear of future persecution."); *see also Islam*, 469 F.3d at 5 (attributing record deficiencies to the conduct of the immigration judge). Under certain circumstances, remand to the Board may be compelled. *See* Gonzales v. Thomas, 547 U.S. 183, 185–86 (2006) (per curiam) (holding that because the Ninth Circuit did not allow the administrative agency to resolve a particular issue in the first instance, the case must be summarily reversed); INS v. Ventura, 537 U.S. 12, 16–17 (2002) (per curiam) (stating that Congress has entrusted resolution of particular matters to an administrative agency, and the proper course of action is remand to that agency for resolution of the issue rather than allowing the appellate court to address the issue in the first instance).

203. *See generally* Louis L. Jaffe, *Judicial Review: "Substantial Evidence of the Whole Record*," 64 HARV. L. REV. 1233, 1242 (1951).

204. Kourski v. Ashcroft, 355 F.3d 1038, 1038 (7th Cir. 2004).

205. *Id.* at 1038–39.

206. *Id.* at 1039. In between the two sentences quoted above, the court reviews a tangential issue that at first appears to address the specific "gaping hole" concerning the court, but actually addresses generally the interrelationship between credibility, corroboration, and burden of proof as interpreted by the Board and several circuit courts, and the court's misgivings about its theoretical, and perhaps paradoxical, application in circumstances where the court does not believe it warranted. *Id. But cf. Hanaj*, 446 F.3d at 699; *Yeimane-Berhe*, 393 F.3d at 912. Despite the potential applications troubling the court, should the fact that an immigration judge simply has *authority* to deny an asylum claim because of the applicant's failure to present purportedly obtainable corroborating evidence both justify *and* excuse an applicant supplying the immigration court with fraudulent documentation? *See* Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070 (2008). For more on the interrelationship between credibility, corroboration, and burden of proof, see Dorosh v. Ashcroft, 398 F.3d 379, 382–83 (6th Cir. 2004); El-Sheikh v. Ashcroft, 388 F.3d 643, 647 (8th Cir. 2004); Abdulai v. Ashcroft, 239 F.3d 542, 551–53 (3d Cir. 2001); *Diallo*, 232 F.3d at 285–86; Ladha v. INS, 215 F.3d 889, 898 (9th Cir. 2000) (relying on precedent established by a different Ninth Circuit panel rather than the Board's interpretation of the statute and regulations it administers); *In re* M-D-, 21 I. & N. Dec. 1180, 1182–85 (BIA 1998); *see also* National Cable & Telecomms. Assoc. v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (raising doubts, by implication,

unsupported because the immigration judge did not explicitly find that the applicant knew the document was a forgery, no evidence presented showed that the applicant's mother knew the document was forged, and, consequently, "if they didn't know, the fact of forgery cannot be evidence against the credibility of his testimony that he is Jewish."[207] Conversely, the court stated that "if there were reason to believe that [the applicant] knew or suspected that the birth certificate had been forged," then an adverse credibility determination would have been supported.[208]

The court's holding conflates a permissible inference with the potential reasons for rebutting that inference. Professor Louis Jaffe, examining the meaning of "substantial evidence" in the wake of *Universal Camera*, observed that "[a]ll fact finding involves a continuous chain of inference so that the finding of basic facts itself is the drawing of an inference."[209] It is undesirable and inconsistent with judicial review of administrative findings of fact to expect that each intermediate inference along the continuous chain of inferences needed to reach an ultimate conclusion warrants explicit discussion, much less specific "evidence." Indeed, many inferences are so intuitive to a reviewing court as to escape notice or explicit discussion.[210] There is no basis for remanding a decision to an agency to require additional findings of fact before an assessment of the reasonableness of the inference in question.

In *Kourski*, there was certainly a reason to believe the applicant knew the document was a fake. First of all, he submitted it, and there is no judicial principle unique to immigration cases permitting a presumption of ignorance of the fraudulent nature of evidence the applicant relies upon in his case.[211] More specifically to this

about the continued validity of the Ninth Circuit's holding in *Ladha*). For an analysis of the Seventh Circuit's interpretation of the REAL ID Act's impact on the so-called corroboration rule, see Rapheal v. Mukasey, 533 F.3d 521, 527–528 (7th Cir. 2008).

207. *Kourski*, 355 F.3d at 1039.

208. *Id.* at 1040.

209. Jaffe, *supra* note 203, at 1242.

210. *See, e.g.*, *Ndrecaj*, 522 F.3d at 671. In *Ndrecaj*, the applicant could not recall the names of his purported neighbors who had allegedly written a letter to corroborate his asylum claim. *Id.* at 672. In support of its adverse credibility finding, the court stated: "[i]f these individuals were actually his friends or neighbors, it is reasonable to expect that Ndrecaj would be able to identify them correctly." *Id.* at 675. The court then concluded that "[b]ecause Ndrecaj could not correctly identify the names of his supposed friends and neighbors, this was a valid factor for the IJ to weigh in assessing Ndrecaj's credibility." *Id.* Accordingly, the court accepted without stating so, at least three implicit inferences: if a person submits a letter allegedly signed by individuals he should be able to recognize but cannot identify, then it is reasonable to infer that the letter is fraudulent; if the letter is fraudulent and submitted by the applicant, it is reasonable to infer that the applicant was aware that the letter was fraudulent; if the applicant knowingly submitted fraudulent documentation to the immigration court, then it is reasonable to use that basis to infer untruthfulness or be suspicious of other aspects of the applicant's claim.

211. *Cf.* United States v. Tampas, 493 F.3d 1291, 1304 (11th Cir. 2007) (finding that the district court did not err in applying the obstruction of justice enhancement, because while the defendant did not explicitly order documents altered or destroyed, the evidence supported the inference that his goal was to conceal his embezzlement scheme); United States v. Klopf, 423 F.3d 1228, 1236–37 (11th Cir. 2005) (reviewing the inferences a jury may draw in an assessment of the defendant's likely future actions based on the documentation found in his possession); United States v. Stephens, 421 F.3d 503, 515 (7th Cir. 2005) (reviewing inferences based on the racial composition of a selected jury); United States v. Brown, 374 F.3d 1326, 1329 (D.C. Cir. 2004) (describing the chain of reasoning leading to a reasonable inference of criminal activity).

case, the inference is that an individual who submits a fraudulent document that he alleges an official source gave to his mother knew the document was fraudulent. This does not mean the inference is true, but such an inference is both rational[212] and tethered to facts in the record.[213] Otherwise, a reasonable adjudicator would be *compelled* to conclude that a governmental official would create a fake document without any apparent motive, or that the mother knew the document to be fake, but never conveyed the information to her son for reasons unknown.

The court, however, does not evaluate whether this inference is supported by the record, or why a reasonable adjudicator would be compelled to find the inference unsupported.[214] Rather, the court inverts the burden of proof by stating that the agency's conclusion is unsupported because there is no evidence the applicant knew the document was fraudulent, and the immigration judge did not make an explicit finding of knowledge.[215] The immigration judge, however, is not responsible for providing evidence to show why the applicant is not believable. It is the applicant who must show why the immigration judge should consider the claim credible despite evidence in the record lending support to the inference of untruthfulness (*i.e.*, where the applicant submitted fraudulent documentation to the immigration court). Even when a forgery is excused because the applicant used the document to escape persecution, there is no dispute as to knowledge of the forgery.[216]

212. *See Yongo*, 355 F.3d at 34 (finding "[]rational" the immigration judge's ability to determine that a fraudulent document redounds on the truth of the applicant's testimony, so long as the immigration judge does not believe a finding of fraud requires him to infer overall untruthfulness).

213. *See Siewe*, 480 F.3d at 169 ("So long as an inferential leap is tethered to the evidentiary record, we will accord deference to the finding.").

214. *Cf.* Hailemichael v. Gonzales, 454 F.3d 878, 885 (8th Cir. 2004) (requiring the government to prove knowledge of fraud when DHS has the burden of proof).

215. *Kourski*, 355 F.3d at 1039; *see also Diallo*, 508 F.3d at 454 (stating that *Kourski* stands "for the proposition that a falsified document, standing alone, *cannot* support an IJ's adverse credibility finding where there is no reason to believe the alien knew the document was false" (emphasis added)). Other appellate courts upholding an immigration judge's consideration of fraudulent documentation have distinguished *Kourski* on the basis of, inter alia, other evidence of record lending support to an adverse credibility determination besides the fraudulent documents. *See, e.g.*, Sakho v. Att'y Gen., 276 F. App'x 243, 248 (3d Cir. 2008). However, other evidence of record which might independently be considered substantial evidence does not address the underlying question of why it is improper for an immigration judge to infer knowledge unless the applicant makes a compelling argument to the contrary. Perhaps the courts implicitly conclude that other inconsistencies in the record, which increase the applicant's tendency to provide false information to the court, also increases the likelihood that the applicant had knowledge the document was fraudulent, which in turn increases the reasonableness of inferring knowledge. Such an unspoken assumption is reasonable, but would, ironically, place the courts' analysis within the very "gaping hole" for which the Seventh Circuit faulted the immigration judge. *See Kourski*, 355 F.3d at 1039.

216. *See, e.g.*, *Akinmade*, 196 F.3d at 954. The court stated that the proceedings below focused on whether the document in question was an actual forgery. *Kourski*, 355 F.3d at 1039–40. A finding by an immigration judge that a document is fraudulent is entitled to deference regardless of whether the decision is based on evidence conclusively establishing its fraudulent nature or evidence making it likely that a document is fraudulent. And, if a reviewing court must defer to a finding of fraud, then do not all inferences reasonably drawn from that finding not deserve equal deference? Or, does the certainty expressed by the immigration judge in reaching the ultimate conclusion about the fraudulent nature of the document somehow diminish the reasonableness of the inferences drawn from the finding? *See* Niang v. Mukasey, 511 F.3d 138, 144 (2d Cir. 2007) (noting that aside from the documentation in the record found to be fraudulent, the immigration judge had "misgivings" about finding the applicant incredible because the applicant's remaining testimony did not sound "made up").

Shortly after the Seventh Circuit issued its opinion in *Kourski*, the Ninth Circuit addressed a "remarkably similar" case in *Yeimane-Berhe v. Ashcroft*, where the agency found a submitted medical document fraudulent and the applicant "provided no explanation for the document."[217] In this case, the applicant's sister had gone to the hospital in their home country, obtained the medical document, and given it to the applicant.[218] The court first asserted that "[a]lthough the use of a fraudulent document may, considering the totality of the record, lend support to an adverse credibility finding, [the applicant's] submission of an allegedly fraudulent document alone is not substantial evidence that she lacks credibility."[219] The court repeated the facts of *Kourski*, asserted that "[s]imilarly here, there is no evidence [the applicant] knew or should have known that the medical certificate was counterfeit," and faulted the agency for "assum[ing]" the applicant knew the document was fraudulent.[220] The court then concluded that, as in *Kourski*, the applicant's otherwise consistent testimony along with his submitted documentation supported a claim of asylum.[221]

The Ninth Circuit's decision uses the same rationale employed in *Kourski* by faulting the agency for "assum[ing]" the applicant had knowledge that the document was fraudulent, without evaluating why a reasonable adjudicator would be compelled to conclude that the applicant lacked knowledge that she submitted a fraudulent document to the immigration court.[222] The Board in this case explicitly stated that the applicant failed to provide an explanation,[223] which is the appropriate avenue available to an applicant to show why she lacked knowledge or why the inference of untruthfulness is incorrect.[224] The court apparently decided that the evidence compelled the conclusion that the immigration judge erred by "assuming" that the applicant knew a document was fraudulent, even though no explanation was provided to negate this assumption.[225]

The court took the analysis one step further, however, by requiring the agency to disregard any inference of untruthfulness from a submitted document if the "totality of the record" is otherwise consistent, detailed, and demonstrative of the elements necessary to prove eligibility for asylum.[226] Thus, according to the court, if evidence other than the fraudulent document in question is relatively consistent to the satisfaction of the court and demonstrates enough detail to establish the

217. *Yeimane-Berhe*, 393 F.3d at 910–11.

218. *Id.* at 909–10.

219. *Id.* at 911.

220. *Id.* at 912; *see also* Sy v. Gonzales, 199 F. App'x 444, 449 (6th Cir. 2006) (using the analysis employed by the court in *Kourski*).

221. *Yeimane-Berhe*, 393 F.3d at 912–13.

222. *Id.* at 912.

223. *Id.* at 910.

224. *See* Onsongo v. Gonzales, 457 F.3d 849, 854 (8th Cir. 2006) ("An IJ may base an adverse credibility determination upon submission of fraudulent documents if the petitioner fails to offer a legitimate explanation for the suspected fraud."); Kasa v. Gonzales, 128 F. App'x 435, 438 n.2 (6th Cir. 2005) (finding that the applicant's submission of a fraudulent document supports an adverse credibility finding where the applicant "offers no excuse as to why the document is fraudulent").

225. Interestingly, the court found that the applicant's sister's testimony further supported her asylum claim because the two siblings testified consistently. *Yeimane-Berhe*, 393 F.3d at 912. Of course, this conclusion begs the very question at issue in this case, because the testimony of her sister would not support her claim if her sister was part of the chain of custody of the fraudulent document submitted to the immigration court.

226. *Id.* at 911.

elements of asylum, the immigration judge is precluded from using a fraudulent document to reach a contrary conclusion.[227] At bottom, the court is reweighing the evidence in contravention of the appropriate standard of review.

From the court's analysis in *Yeimane-Berhe* derived several new, and incorrect, interpretations of the applicable standard of review and burden of proof, such as: "even where an applicant submits a potentially fraudulent document that goes to the heart of the claim, it *cannot* support an adverse credibility finding where the totality of the evidence *weighs in favor* of the applicant's credibility."[228] Thus, the question of whether an inference is grounded in record evidence bears little relevance. Instead, through a combination of potential applications of the principles guiding review discussed at the beginning of this section, according to the court, the immigration judge and Board now bear the burden of showing why evidence other than the fraudulent document going to the "heart of the claim" supports the otherwise ungrounded assumption that the applicant is not credible.[229]

VII. ADDITIONAL THOUGHTS ON DISCREPANCY RECONCILIATION AND ITS INCREASED IMPORTANCE IN LIGHT OF THE REAL ID ACT

The role an applicant's subsequent explanation plays in an adverse credibility determination is particularly important, and the approaches throughout the circuit courts have some notable distinctions. There is a general understanding that an applicant's attempt to reconcile inconsistent testimony may negate the importance of a perceived inconsistency in the record.[230] It is also generally recognized that a "plausible" explanation does not necessarily provide a basis for overturning an immigration judge's decision.[231] Less clear, however, is whether the immigration

227. Even in *Kourski*, the court appeared to concede that the fraudulent document would support an adverse credibility determination if the applicant had knowledge the document he submitted was fraudulent. *See Kourski*, 355 F.3d at 1040. The court does proceed to note that knowingly submitting a forged document does not "prove" the applicant is not Jewish because applicants with valid claims have been known to submit forged evidence. *Id.* Even if this were true, it has no bearing on whether record evidence would compel a reasonable adjudicator to reach a contrary conclusion.

228. *Singh*, 439 F.3d at 1109 (emphasis added); *accord* Singh v. Gonzales, 161 F. App'x 706, 708 (9th Cir. 2006); *see also* Liu v. Gonzales, 175 F. App'x 877, 877–78 (9th Cir. 2006) ("[S]ubmission of a fraudulent document . . . is not determinative of adverse credibility, especially where there is no other reason to question credibility."); *cf. Hanaj*, 446 F.3d at 698–700 (applying *Kourski*).

229. The so-called "knowledge" requirement placed on the immigration judge as an affirmative obligation has also been reviewed in the Second Circuit. *See* Corovic v. Mukasey, 519 F.3d 90 (2d Cir. 2008). In *Corovic*, the agency found the applicant incredible based on the submission of two fraudulent documents and the applicant's "failure to offer an adequate explanation for the fraud." 519 F.3d at 94. No finding was made regarding the applicant's "knowledge" of the fraud, and the court thus concluded that record evidence on an issue of central importance had not been developed adequately below. *Id.* at 98. Assuming for the sake of argument this lack of record evidence would be a proper basis for remand, it is unfortunate the court switched the burden to require that an immigration judge "must make an explicit finding that the applicant knew the document to be fraudulent before the IJ can use the fraudulent document as a basis for an adverse credibility determination." *Id.* at 97–98. Rather, it should have required the immigration judge to state why he found unpersuasive the applicant's attempt to explain why his submission of fraudulent documentation should not negatively redound on his credibility, be it for lack of knowledge that the documents were fraudulent or otherwise.

230. *See, e.g.*, Chen v. Ashcroft, 362 F.3d 611, 618 (9th Cir. 2004) (holding that where an applicant was denied a reasonable opportunity to explain an inconsistency, the immigration judge could not base an adverse credibility finding on that inconsistency).

231. *See, e.g.*, *Dankam*, 495 F.3d at 122 (holding that despite the applicant's plausible attempt to

judge has an affirmative duty to bring to the attention of an applicant any inconsistency that may be subsequently cited as a basis for an adverse credibility determination. Several circuits have found an immigration judge's obligation to inform the applicant of a pending ground for rendering an adverse credibility determination limited to instances where the inconsistency is not evident or obvious.[232] Others have more universally regarded the immigration judge's failure to consider an explanation sufficient to undermine the importance of the inconsistency.[233]

It remains to be seen how the REAL ID Act will impact case law precluding consideration of inconsistencies and falsehoods in the absence of the immigration judge's solicitation of an explanation from the applicant. Whatever the perceived problems with a rule placing an affirmative obligation on the immigration judge,[234] it is not clear that the logic leading to the creation of any such rule would change simply because the immigration judge may now consider any inconsistency deemed probative of untruthfulness (although several other factors may support a contrary conclusion, such as the burden of proof on the applicant now being imposed by statute).[235] Irrespective of the courts' opinions about whether the immigration judge has an affirmative obligation to bring a potential inconsistency to the applicant's attention, the role post hoc explanations will play in appellate review of adverse credibility determinations subsequent to the REAL ID Act is likely to become more important. As an inconsistency's perceived materiality begins to play a less critical role in the arsenal of potential agency missteps asserted by petitioners, attacks on the process used to reach an adverse credibility determination are likely to increase. In this respect, it will become even more important to differentiate between post-hearing "explanation" arguments attacking the process generally from those that actually put forward a basis for questioning the decision of the immigration judge. Petitioners routinely assert that the immigration judge failed to provide the

reconcile the inconsistency, "the immigration judge was entitled to reject this explanation"); Majidi v. Gonzales, 430 F.3d 77, 80–81 (2d Cir. 2005) (stating that the court might have accepted the applicant's plausible explanation, "[b]ut this is emphatically not our role"); Singh v. Ashcroft, 398 F.3d 396, 402 (6th Cir. 2005). *But see Shah*, 220 F.3d at 1068 (noting that the court "will not uphold an adverse credibility finding unless the IJ or BIA specifically explains the significance of the discrepancy"); *Garrovillas*, 156 F.3d at 1013–14 (requiring the BIA to discuss discrepancies on which it bases its decision and to address an applicant's explanations in a reasoned manner).

232. *See, e.g.*, Pang v. Bureau of Citizenship & Immigr. Servs., 448 F.3d 102, 109 (2d Cir. 2006) ("When putative inconsistencies or implausibilities are not dramatic and the need to clarify is not obvious, an IJ has an obligation to inform the petitioner that his testimony is being viewed as potentially flawed, and the IJ must give the petitioner a chance to explain."); *see also* Xue v. BIA, 439 F.3d 111, 125 (2d Cir. 2006) (stating that explanations are not needed for "self-evident" inconsistencies). *But cf. Majidi*, 430 F.3d at 81 ("Nor have we ever required that an IJ, when faced with inconsistent testimony of an asylum applicant, must always bring any apparent inconsistencies to the applicant's attention and actively solicit an explanation. We hold that an IJ may rely on an inconsistency in an asylum applicant's account to find that applicant not credible—provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding—without soliciting from the applicant an explanation for the inconsistency."). In *Xue*, the court characterized its reasoning in *Majidi* as dicta. *Xue*, 439 F.3d at 121.

233. *See, e.g.*, *Singh*, 439 F.3d at 1106 (discounting the relevance of testimony found indicative of untruthfulness "[b]ecause [a]n adverse credibility finding is improper when an IJ fails to address a petitioner's explanation for a discrepancy or inconsistency"); *Wang*, 341 F.3d at 1022 (declining to uphold the adverse credibility determination where "the BIA failed to consider '[a]ll plausible and reasonable explanations for any inconsistencies'" (quoting *Chen*, 266 F.3d at 1100)).

234. *See supra* Part VI.B.

235. 8 U.S.C. § 1158(b)(1)(B).

applicant an adequate opportunity to explain the inconsistency. However, such an argument begs the question: what explanation would have been provided? Without any further argument by the petitioner, there is no basis for asserting error.[236]

Equally important is whether the applicant asserted in the appeal to the Board that the immigration judge failed to provide the applicant an opportunity to explain an inconsistency he believed to be reconcilable.[237] If not, then any such argument to the court of appeals is unexhausted and should be considered unreviewable.[238] If such an argument is asserted before the Board, especially if it concerns an inconsistency the applicant asserts he was unaware of during his immigration proceedings, then it is incumbent upon the Board to address the issue adequately and not summarily affirm the immigration judge's decision or otherwise fail to provide the requisite analysis.[239] Although it should seem self-evident, it is entirely inconsistent with the appropriate burden of proof and standard of review for a court to negate the relevance of an inconsistency, or, in effect, give the applicant a "pass," on the basis of a hypothetical reason why the inconsistency *could* be irrelevant to an assessment of veracity.[240]

236. *Cf.* Graham v. Mukasey, 519 F.3d 546, 551 (6th Cir. 2008) (finding that an applicant's due process claim necessarily fails in the absence of prejudice); Alimi v. Gonzales, 489 F.3d 829, 837 (7th Cir. 2008) (same).

237. *See Kumar*, 444 F.3d at 1058 (Kozinski, J., dissenting) (noting that the applicant had ample opportunity to address discrepancies in his testimony but failed to do so); *see also* Doumbia v. Gonzales, 472 F.3d 957, 962 (7th Cir. 2007) (reviewing the Board's failure to address adequately an issue raised by the applicant on appeal).

238. 8 U.S.C. § 1252(d)(1); *see* Amaya-Artunduaga v. Att'y Gen., 463 F.3d 1247, 1250 (11th Cir. 2006) ("We lack jurisdiction to consider a claim raised in a petition for review unless the petitioner has exhausted his administrative remedies with respect thereto."); Foster v. INS, 376 F.3d 75, 78 (2d Cir. 2004); *cf.* Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 119–22 (2d Cir. 2007) (reviewing the court's distinction between jurisdictional and judicially-constructed exhaustion requirements).

239. *See* 8 C.F.R. § 1003.1(e) (providing the Board with the option to dispose of an appeal in various ways, from one-member decisions summarily affirming the immigration judge's opinion, to reasoned decisions issued by a three-member panel); *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

240. *See Zhang*, 386 F.3d at 74 ("[T]he court may not itself hypothesize excuses for the inconsistencies, nor may it justify the contradictions or explain away the improbabilities."). For this reason, the Ninth Circuit's opinion in *Wang v. INS* is particularly striking. *See* 352 F.3d 1250, 1254 (9th Cir. 2003). In *Wang*, the court, in response to a noted inconsistency between the applicant's testimony and submitted documentation concerning the dates of her marriage and birth certificates, stated:

> We have speculated in our prior decisions that such discrepancies could have been caused by the mistakes of typists, clerks, or translators. Given our assumptions that these minor discrepancies can be attributed to causes other than a deliberate attempt to enhance the petitioner's persecution claims, we do not allow the Board to afford these inconsistencies conclusive weight in assessing a petitioner's credibility.

Id. Thus, the court provided an explanation for the applicant and deemed that excuse justifiable. *Cf.* Abadi v. INS, 52 F. App'x 997, 999 (9th Cir. 2002) (reviewing an adverse credibility decision where purported translation problems were made an issue in the immigration proceedings before the immigration judge); Zahedi v. INS, 222 F.3d 1157, 1166–67 (9th Cir. 2000) (relaying that the interpreter at the immigration hearing specifically mentioned his difficulty interpreting dates).

VIII. CREDIBILITY DECISIONS UNDER THE REAL ID ACT

The appellate courts, predicting changes to the law in dicta, have expressed divergent opinions about the impact of the REAL ID Act. The Second Circuit noted in *Chen v. Attorney General* that the REAL ID Act credibility amendments "would seem to overrule" several of its past holdings.[241] The Ninth Circuit, in reviewing conflicting precedent, hailed the REAL ID Act as a "welcome corrective" where "only the most extraordinary circumstances will justify overturning an adverse credibility determination."[242] The particularly divergent case law in the Ninth Circuit, of course, was the catalyst for many of the REAL ID Act amendments to the INA.[243]

In *Castañeda-Castillo v. Gonzales*, the First Circuit asserted its belief that the REAL ID Act credibility amendments appear to revive the doctrine of *falsus in uno, falsus in omnibus*.[244] As previously discussed, the Seventh Circuit in *Kadia v. Gonzales* disagreed with the First Circuit's assumption, arguing instead that by requiring the immigration judge to consider the "totality of the circumstances," the REAL ID Act does not permit the trier of fact to discount "otherwise persuasive testimony."[245] Both courts incorrectly presuppose that the principles underlying the maxim were not applied by appellate courts prior to the REAL ID Act.[246] The First Circuit's analysis is faulty in its assertion that an immigration judge's ability to *consider* any inconsistency or falsehood as prescribed under the REAL ID Act would itself alter the reasonableness of inferences drawn from record evidence in an assessment of credibility. Likewise, the Seventh Circuit's analysis wrongly asserts that an immigration judge's need to consider the "totality of the circumstances"—which it has always been obligated to do[247]—itself impacts the immigration judge's authority to infer incredibility on the basis of limited inconsistencies, or perhaps a single inconsistency. However, the Seventh Circuit's opinion would be correct to the extent that it refers to an immigration judge's *mandatory* application of the maxim as stated historically in jury instructions.[248]

The most remarkable aspect of a majority of the adverse credibility cases decided under the REAL ID Act is the omission of any express reference to the REAL ID Act as a basis for an alteration in the outcome of the decision. The majority of these decisions have been unpublished and thus have no precedential value.[249] Several of these opinions have even stated expressly that the REAL ID Act

241. *Chen*, 454 F.3d at 107.

242. *Jibril*, 423 F.3d at 1138 n.1; *see also Kaur*, 418 F.3d at 1064 n.1 (stating that the court's review of adverse credibility determinations under the REAL ID Act will be "significantly restricted").

243. 151 Cong. Rec. at H2870.

244. *Castañeda-Castillo*, 488 F.3d at 23 n.6.

245. *Kadia*, 501 F.3d at 821–22.

246. *See supra* Part VI.A.

247. *See supra* Part VI.B (distinguishing between the need to evaluate all record evidence and the need to state for the record the significance of all record evidence).

248. *See* Fisher, *supra* note 162, at 655 & n.368.

249. *See, e.g.*, Salifou v. Mukasey, No. 07-3601, 2008 U.S. App. LEXIS 12598 (2d Cir. 2008); Mendez-Morales v. Mukasey, 256 F. App'x 971 (9th Cir. 2007); Cao v. Mukasey, 256 F. App'x 969 (9th Cir. 2007); Lin v. Mukasey, 256 F. App'x 423 (2d Cir. 2007); Yang v. Mukasey, 256 F. App'x 149 (9th Cir. 2007); Cala v. Att'y Gen., 250 F. App'x 296 (11th Cir. 2007); Paramanantham v. Mukasey, 256 F. App'x 143 (9th Cir. 2007); Fssahaye v. Att'y Gen., No. 07-12275, 2008 U.S. App. LEXIS 1594 (11th Cir. 2008); Bushi v. Att'y

made no difference in the court's disposition of the case.[250] The body of case law thus far tends to show that those who predicted that the REAL ID Act credibility amendments would drastically change the outcome of a vast majority of credibility assessments perhaps overestimated its impact based on an incorrect evaluation of pre-REAL ID Act case law. The changes thus far have been more implicit, significant not for any reference to the REAL ID Act, but due to the omission of any references to categorical criteria previously prominent in such assessments.

There also have been several published cases in which the court has reviewed the agency assessment of an applicant's credibility under the REAL ID Act.[251] The First Circuit in *Lin v. Mukasey* found irrelevant the applicant's attempt to claim that inconsistencies in the record were minor.[252] However, the applicant in *Lin* alternatively argued that no discrepancies existed and that he remained consistent throughout his testimony.[253] As discussed above, this is one of the bases for resolving perceived conflicting testimony unaffected by the REAL ID Act. In this manner, the *Lin* court proceeded to analyze the record and juxtapose the specific inconsistencies and context in which they arose to show that the applicant had, in fact, changed his story repeatedly.[254]

More telling than the holding itself in *Lin* is footnote 3 in the opinion.[255] After discussing language in the conference report leading up to the REAL ID Act stressing the need for credibility determinations to be "reasonable," and noting that this language did not make it into the REAL ID Act's express language, the court stated:

> [T]he requirement of reasonableness in the conference report could be read to contemplate a rationality requirement that is less stringent than the old heart of the claim rule, but stops short of allowing credibility decisions based on inconsistencies that no rational person could consider relevant to a witness's truthfulness. Resolution of that precise question should await a case in which it would make a difference to the outcome, which it does not in this case, since we cannot say it would be irrational to consider the inconsistencies in this case relevant to Qun Lin's truthfulness.[256]

Perhaps the court need not rely on the application of language in the conference report. Under the codified standard of review, a factual finding would compel a contrary conclusion if, as the First Circuit noted, "no rational person"—or no reasonable adjudicator—could consider it probative of truthfulness.[257] The question becomes how to assess whether "no rational person" could find a falsehood probative of truthfulness. If the sliding scale discussed by the First Circuit is to serve

Gen., No. 07-11632, 2008 U.S. App. LEXIS 6120 (11th Cir. 2008); Xie v. Att'y Gen., No. 07-14272, 2008 U.S. App. LEXIS 7236 (11th Cir. 2008).

250. *See, e.g.*, *Yang*, 256 F. App'x at 150; *Paramanantham*, 256 F. App'x at 144–45.

251. *E.g.*, Chen v. Att'y Gen., 463 F.3d 1228 (11th Cir. 2006).

252. Lin v. Mukasey, 521 F.3d 22, 26–27 (1st Cir. 2008).

253. *Id.*

254. *Id.* at 28.

255. *Id.* at 27 n.3.

256. *Id.*

257. 8 U.S.C. § 1252(b)(4)(B); *Lin*, 521 F.3d at 27 n.3.

as the basis for assessing rationality, the decisions will inevitably ebb closer to the pre-REAL ID Act analysis based on the "heart of the claim" rubric. With the elimination of the centrality requirement, as well as the use of rules of general application to eliminate a falsehood from consideration in credibility assessments, the analysis should focus more on the context of the falsehood and whether the record compels the conclusion that inferences drawn from the circumstances of the case are unreasonable.

Methodology aside, the First Circuit's premise touches at the heart of a matter that will need further resolution. It is beyond serious dispute that inconsistencies such as the hypothetical one identified by the court in *Kadia*—a "misspelling in the asylum application"[258]—would not by themselves justify an adverse credibility determination. However, on a sliding scale of inconsistencies between simple misspellings and inconsistencies reasonably indicative of untruthfulness are those that will require further resolution on the basis of their relation to the inference of untruthfulness as interpreted in accordance with the deferential standard of review and applicable burden of proof.

The Seventh Circuit in *Mitondo v. Mukasey*, its first published decision analyzing an agency credibility determination under the REAL ID Act amendments, reviewed the immigration judge's decision based on the circumstances of the case.[259] The court focused on the context in which the inconsistencies and implausibilities arose and analyzed the inferences reasonably flowing from them.[260] There was no need to consider whether the infirmities concerned the heart of the applicant's claim, simply whether they were probative of truthfulness, and how the details of the applicant's claim "did not hang together."[261]

In its assessment of the shortcomings in the applicant's story and the circumstances of the case, the Seventh Circuit discussed empirical studies that analyzed when perceived attributes reasonably lead to the inference of untruthfulness.[262] If the Seventh Circuit's methodology is indicative of the way appellate courts choose to review credibility determinations under the REAL ID Act's amendments to the INA, then courts' modality of review would reflect a proper shift from the categorical evaluation of untruthfulness based on perceived materiality to an assessment of the link between perceived infirmities and untruthfulness.[263] However, it will take years of circuit court case law in each of the

258. *Kadia*, 501 F.3d at 822.

259. *Mitondo*, 523 F.3d at 787.

260. *Id.* at 786–87.

261. *Id.* at 789.

262. *Id.* at 788 (citing, among others, RICHARD WISEMAN, QUIRKOLOGY: HOW WE DISCOVER THE BIG TRUTHS IN SMALL THINGS 50–81 (2007), and Stephen Porter & John C. Yuille, *The Language of Deceit: An Investigation of the Verbal Cues to Deception in the Interrogation Context*, 20 L. & HUM. BEHAV. 443 (1996)).

263. That is not to say empirical research is a holy grail in the immigration context or otherwise. *See, e.g.*, Morales v. Artuz, 281 F.3d 55, 60–62 & nn.2–6 (2d Cir. 2002) (discussing the value of jurors being able to see a witness's eyes in assessing credibility); *see also* Charles v. Cotter, 867 F. Supp. 648, 655–56 (N.D. Ill. 1994) (discussing the admissibility of prior felony convictions as evidence to impeach the witness's credibility); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776 (1993) (describing the indicators and guidelines, such as demeanor and consistency, that jurors use to determine the veracity of witness testimony). Indeed, categorical reliance on empirical studies as a benchmark for the assessment of untruthfulness is itself precarious, particularly in relation to

eleven appellate courts reviewing agency decisions adjudicated under the REAL ID Act credibility amendments to truly assess the future direction of adverse credibility determinations in immigration proceedings.[264]

IX. CONCLUSION

The credibility amendments of the REAL ID Act do not form an impenetrable wall precluding reviewing courts from overturning ungrounded adverse credibility decisions. Nor should they. There are many avenues providing reviewing courts opportunities to review adverse credibility decisions, from those grounded in the proper assessment of veracity and in consonance with the standard of review, to methods based on rules of general application and procedural technicalities. The methodology employed by appellate courts will greatly impact the future direction of asylum law. A perceived disconnection in certain instances between the law prior to the REAL ID Act and the appropriate deference reviewing courts should afford the agency was the stated catalyst for the REAL ID Act credibility amendments to the INA. Accordingly, all parties share an interest in ensuring an erroneous application of the law does not foster tighter restrictions in the future.[265] A policy debate on the state of the current system is certainly in order. That debate, however, should not impact the legal principles guiding review of adverse credibility assessments.

the standard of review for findings of fact in immigration proceedings.

264. Because there is no immigration court in the District of Columbia, and there is no habeas review of final orders of removal, the Court of Appeals for the District of Columbia Circuit does not review credibility determinations rendered by immigration judges in removal proceedings, *see* 8 U.S.C. § 1252, or "asylum only" proceedings, *see Mitondo*, 523 F.3d at 786; Shehu v. Att'y Gen., 482 F.3d 652, 656 (3d Cir. 2007); Kanacevic v. INS, 448 F.3d 129, 134–35 (2d Cir. 2006); *Nreka*, 408 F.3d at 1366–67.

265. While changes in the law are invariably linked to the policies an administration or a particular congress chooses to pursue in conjunction with the political climate on matters of immigration and related concerns impacting immigration, it is worth pointing out that when such a climate brings immigration to the fore, a perceived disconnection between the express meaning of a statute and its application may drive potential changes to the law. In this respect, overly pronounced deviations from the perceived standards, shifting the law in a desired direction in the short term, might actually produce the opposite effect in the long run. *See* H.R. REP. 109-72, at 167 (remarking on the belief that the credibility amendments seek to remedy inconsistent application in certain circuit courts); 151 CONG. REC. at H2870 (same); Jahed v. INS, 356 F.3d 991, 1002 (9th Cir. 2004) (Kozinski, J., dissenting) ("The government can't bother the Supremes every time we go over the top, so it's a fair bet that if we keep marching to our own drummer we'll mostly get away with it.").