

(IL)LEGAL VIOLENCE AT THE BORDER:
A COMPARATIVE ANALYSIS OF LGBTQ+ ASYLUM CLAIMS
IN THE UNITED STATES AND EUROPE

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ABSTRACT

An estimated 175 million LGBTQ+ individuals worldwide live under persecutory environments. As highly controversial conversations regarding issues of sexuality are taking place in the context of current unprecedented global population movements, masses of LGBTQ+ individuals are fleeing their home countries in hopes of international protection in safer environments. Researchers estimate, however, that fewer than 2,500 LGBTQ+ refugees a year are accorded protection globally. This Note engages in a comparative analysis of LGBTQ+ asylum claims in the United States and Europe. The author's analysis highlights the shortcomings of the asylum systems with regard to proving the credibility of LGBTQ+ asylum claims, being "gay enough," and the applicability of LGBTQ+ asylum frameworks to all 'letters' of the acronym. To remedy these shortcomings, the author proposes a series of policy-based suggestions that advocate for the protection and furtherance of LGBTQ+ refugee and asylee rights both nationally and internationally.

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INTRODUCTION

Jean, a successful West African businessman, had been living under a guise of heterosexuality when it was discovered in 2005 that he was gay. Upon this discovery, Jean was imprisoned on multiple occasions and was severely beaten and tortured. The police and guards broke his spine and left deep wounds on Jean's feet and body, making it difficult for him to walk long distances. The local government also ordered that his business be burned down. Jean was able to escape to America, but when he arrived, he found that all of his money had been taken by the Cameroonian government. "I am poor, homeless, my children are not safe, there is no money for their education and I am an immigrant in a country; I have absolutely no power" With the help of a non-profit, Jean filed for asylum. At the time of this Note's writing, Jean had not heard the result of his asylum application and "lives in constant worry and despair."¹

Unfortunately, Jean's story is in many ways not unique. It is impossible to calculate accurate estimates of the number of LGBTQ+² refugees and asylum seekers worldwide because "[d]ata on the grounds on which asylum claims are based are generally not collected. Gathering statistics on claims based on sexual orientation or gender identity can raise data protection issues or violate the confidentiality of information collected during asylum interviews."³ Researchers estimate, however, that of the millions living in dangerous conditions, fewer than 2,500 LGBTQ+ refugees a year are

1. *Jean's Story*, LGBT ASYLUM TASK FORCE (2017), <https://web.archive.org/web/20190301130440/http://www.lgbtasyllum.org/stories.html>.

2. LGBTQ+ is an acronym for lesbian, gay, bisexual, transgender, queer or questioning, and more. These terms are used to describe a person's sexual orientation or gender identity. For this paper, I use LGBTQ+, and to a lesser extent "queer," as umbrella terms encompassing the whole spectrum of identities. When concepts pertain to only portions of the LGBTQ+ spectrum, the name of the specific identity will be used.

3. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, CURRENT MIGRATION SITUATION IN THE EU: LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASYLUM SEEKERS 3 (Mar. 2017) (detailing the lack of statistical data on claims based on sexual orientation and/or gender identity); see also Johannes Lukas Gartner, *(In)credibly Queer: Sexuality-based Asylum in the European Union*, HUMANITY IN ACTION DEUTSCHLAND (Feb. 2015), https://www.humanityinaction.org/knowledge_detail/incredibly-queer-sexuality-based-asylum-in-the-european-union/ [https://perma.cc/ELX4-ADGX]. Neither the United Nations High Commissioner for Refugees (UNHCR) nor the majority of the 176 territories that share asylum statistics with the UNHCR maintain statistics or hold any other form of data concerning LGBTQ+ asylum applications. Belgium and Norway are two of the very few countries that collect data on this field. *Id.*

accorded protection globally.⁴ Available research and statistics indicate that LGBTQ+ identities have started to penetrate refugee systems at exponentially increasing rates.⁵ Highly controversial conversations regarding issues of sexuality are taking place in the context of current unprecedented global population movements.⁶ It logically follows that masses of LGBTQ+ individuals are fleeing their home countries in hopes of international protection in less homophobic or transphobic environments.⁷

An estimated 175 million LGBTQ+ individuals worldwide live under persecutory environments.⁸ In seventy-one jurisdictions, private, consensual, same-sex activity is criminalized.⁹ In eleven of these jurisdictions, engaging in same-sex interactions is punished or punishable by death.¹⁰ Beyond such provisions codified in national statutes, “individuals who do not perform in accordance with their environments’ socio-cultural master narratives frequently face systematic violence including assault, rape, torture and murder, and the denial of their basic civil

4. Neil Grungras, *Rising Numbers of LGBTI Refugees Facing Fight for Survival*, HUFFINGTON POST (June 20, 2014), https://www.huffpost.com/entry/lgbti-refugees-facing-fight_b_5514737 [<https://perma.cc/TL3F-9AHH>].

5. Gartner, *supra* note 3.

6. For more on the trends of irregular migration, see UNITED NATIONS HIGH COMM’R ON REFUGEES, *GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018 (2019)*. The report is published annually to give an overview of the previous year’s refugee movements. The 2018 Report shows that nearly 70.8 million people were displaced at the end of the year and that “[e]very minute in 2018, 25 people were forced to flee.” The report makes no mention of LGBTQ+ refugees. *Id.*

7. See UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/12/09, at paras. 8–11 (Oct. 23, 2012) [hereinafter *Guidelines on International Protection No. 9*].

8. ORG. FOR REFUGEE, ASYLUM & MIGRATION, *OPENING DOORS: A GLOBAL SURVEY OF NGO ATTITUDES TOWARDS LGBTI REFUGEES & ASYLUM SEEKERS 7* (June 2012).

9. *Map of Countries that Criminalise LGBT People*, HUMAN DIGNITY TRUST, <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> [<https://perma.cc/PU9R-92DU>] (last visited July 21, 2021). The majority of these jurisdictions explicitly criminalize sex between men via ‘sodomy,’ ‘buggery,’ and ‘unnatural offences’ laws. Forty-three jurisdictions criminalize private, consensual sexual activity between women using laws against ‘lesbianism,’ ‘sexual relations with a person of the same sex,’ and ‘gross indecency.’ Additionally, fifteen jurisdictions criminalize the gender identity and/or expression of transgender people, using so-called ‘cross-dressing,’ ‘impersonation,’ and ‘disguise’ laws. In many more countries, transgender people are targeted by a range of laws that criminalize same-sex activity and vagrancy, hooliganism, and public order offences. *Id.*

10. *Id.* In six of these jurisdictions—Iran, Northern Nigeria, Saudi Arabia, Somalia, Sudan, and Yemen—the death penalty is implemented. The death penalty is a legal possibility in Afghanistan, Mauritania, Pakistan, Qatar, and U.A.E. Executions have also been reported in recent years in ISIS-held territory in Iraq and Syria. *Id.*

rights.”¹¹ In the ‘better’ cases, the hardships faced by LGBTQ+ individuals are limited to discrimination in employment, health and education.¹² Honor killings, blackmail, and “corrective rape” are only some of the methods used around the world to eradicate deviant sexualities and identities.¹³ In homophobic environments, government officials often act as willful or reckless accomplices to such violence.¹⁴ As a result, violence against LGBTQ+ individuals often goes unreported, and impunity for perpetrators is the norm, not the exception.¹⁵ This Note engages in a comparative analysis of LGBTQ+ asylum claims in the United States and Europe.¹⁶ Part I of this Note first examines the European Union asylum framework generally and as applied to LGBTQ+ individuals. Part I then examines the United States asylum framework generally and as applied to LGBTQ+ individuals. Part II discusses the shortcomings of the asylum systems in the European Union and the United States for LGBTQ+ individuals, with specific regard to proving the credibility of LGBTQ+ asylum claims, being ‘gay enough,’ and the applicability of LGBTQ+ asylum jurisprudence to all “letters” of the acronym. The conclusion of this Note discusses policy-based suggestions for the protection and furtherance of LGBTQ+ refugee and asylee rights both nationally and internationally.

I. HISTORY

The current global refugee system arose out of the horrors of World War II. More specifically, the Third Reich’s slaughter of millions of civilians and

11. Gartner, *supra* note 3.

12. U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) [hereinafter OHCHR].

13 See, e.g., INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, NOWHERE TO TURN: BLACKMAIL AND EXTORTION OF LGBT PEOPLE IN SUB-SAHARAN AFRICA (Ryan Thoreson & Sam Cook eds., 2011); HUMAN RIGHTS WATCH, “THEY WANT US EXTERMINATED”: MURDER, TORTURE, SEXUAL ORIENTATION AND GENDER IN IRAQ (2009).

14. OHCHR, *supra* note **Error! Bookmark not defined.****Error! Bookmark not defined.**, at paras. 23, 30.

15. OHCHR, *supra* note **Error! Bookmark not defined.****Error! Bookmark not defined.**, at paras. 23, 30, 42.

16. I chose a comparative structure for this Note because comparative analyses are particularly useful when trying to identify best practices.

the nearly insurmountable obstacles to fleeing these dangerous conditions¹⁷ caused the international community to spell out “protections for people fleeing their home countries in crisis and establish[] norms of responsibility sharing during large-scale population movements.”¹⁸ In its 1951 Convention, the United Nations created a universal definition of the term “refugee,”¹⁹ set forth the legal protections a refugee is entitled to receive, and established standards for responding to refugee crises.²⁰ The “core principle” of the 1951 Convention is non-refoulement, which asserts that “a refugee should not be returned to a country where they face serious threats to their life or freedom.”²¹ To apply the 1951 Convention to nations outside of Europe and crises occurring after 1951, the United Nations enacted the 1967 U.N. Protocol Relating to the Status of Refugees.²² One hundred forty-six countries are parties to the 1967 Protocol.²³ Its signatories commit to the Protocol’s international refugee protection regime and “agree to apply the core content of the 1951 Convention . . . to all persons covered by the Protocol’s Refugee definition, without limitations of time or place.”²⁴

17. Carole Fink, Opinion, *Carole Fink: Rights of Refugees Grew Out of WWII*, STARNEWS (Aug. 13, 2019, 10:07 AM), <https://www.starnewsonline.com/opinion/20190813/opinion-carole-fink-rights-of-refugees-grew-out-of-wwii> [<https://perma.cc/8S7C-RJG3>].

18. Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 579 (2019).

19. **Error! Bookmark not defined.** *Guidelines on International Protection No. 9, supra* note **Error! Bookmark not defined.**

20. U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

21. *The 1951 Refugee Convention*, UNHCR, <https://www.unhcr.org/en-us/1951-refugee-convention.html> [<https://perma.cc/U87F-95DT>] (last visited July 21, 2021). The principle of non-refoulement is now considered a rule of customary international law. *Id.*

22. U.N. Protocol Relating to the Status of Refugees, *supra* note **Error! Bookmark not defined.**; see also *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, UNCHR, <https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html> [<https://perma.cc/W2V7-WXPV>] (“The 1967 Protocol broadens the applicability of the 1951 Convention. The 1967 Protocol removes the geographical and time limits that were part of the 1951 Convention. These limits initially restricted the Convention to persons who became refugees due to events occurring in Europe before 1 January 1951.”).

23. *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR, 1, <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> [<https://perma.cc/JHS5-HDTA>] [hereinafter *States Parties to the 1951 Convention*]. One hundred forty-five States are party to the 1951 Convention. One hundred forty-two States are party to both the Convention and the Protocol. One hundred forty-eight States are party to one or both of these instruments. Three states are party to the 1967 Protocol only: Cabo Verde, the United States of America, and (the Bolivarian Republic of) Venezuela. *Id.*

24. Frances Nicholson & Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems*, INTER-PARLIAMENTARY UNION & UNCHR at 16 (2017), <https://www.unhcr.org/3d4aba564.pdf> [<https://perma.cc/TMQ8-WRJC>]; see also TOMASZ SZEWCZYK,

The primary and universal definition of a refugee is set forth in Article 1(A)(2) of the 1951 Convention, as amended by its 1967 Protocol, defining a refugee as someone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.²⁵

The U.N. determined that to be granted asylum on the basis of LGBTQ+ status, an individual must “prove to immigration authorities and judiciaries that they are queer, that they fear persecution on the grounds of their sexuality, and that such fear is well-founded.”²⁶

The issue of asylum and refugee protection involves both human and state security. Refugee protection and national security are often perceived to be competing interests.²⁷ On the one hand, “[r]efugees and other forcibly displaced persons have fled violence, persecution and other untenable situations. The overwhelming majority seeks a level of protection and

THE RIGHTS OF REFUGEES AND ASYLUM-SEEKERS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (UNIVERSITY OF ICE. MANNRÉTTINDASTOFNUN HUMAN RIGHTS 2016), http://mhi.hi.is/sites/mhi.hi.is/files/the_rights_of_refugees_and_asylum-seekers_under_the_european_convention_on_human_rights_-_corrected_0.pdf [<https://perma.cc/9P2T-RHWQ>].

Some obligations for the contracting states regarding asylum-seekers and refugees derive from other international agreements, *inter alia* the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3 prohibits expulsion of an individual to a country where he or she would be in danger of being subject to torture), the Convention on the Rights of the Child (Articles 6 and 371 establish the prohibition of sending a child to a country where he or she might be subject to actions causing an irreparable harm), the International Covenant on Civil and Political Rights (discusses the prohibition of expulsion of aliens in certain situations), and the International Convention on the Elimination of All Forms of Racial Discrimination).

Id.

25. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

26. Gartner, *supra* note 3.

27. See generally Donald Kerwin, *How Robust Refugee Protection Policies Can Strengthen Human and National Security*, 4 J. ON MIGRATION & HUM. SECURITY 83, 84 (2016).

security to which they are legally entitled.”²⁸ On the other hand, states have a compelling interest in preserving their national security and preventing terrorist attacks in order “to protect the lives and rights of their residents.”²⁹ However, this Note adopts the position that human and state security should be conceived of as complementary, not competing, imperatives.³⁰

A. Asylum in the European Union

1. Statutory Asylum Framework

Today, the European Union is striving “to develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to all third-country nationals who need international protection, and to ensure that the principle of non-refoulement is observed.”³¹ The legal basis for this common European asylum system stems from Articles 67(2), 70, and 80 of the Treaty on the Functioning of the European Union, which set the common policies on immigration, border control, and asylum matters,³² and Article 18 of the EU Charter of Fundamental Rights, which provides for the right to asylum.³³ This policy

28. *Id.* at 83–84.

29. *Id.* at 84.

30. For a more robust discussion of the intersection of human and state security and why they should be perceived as complementary imperatives, see Kerwin, *supra* note 27.

31. Marion Schmid-Drüner, *Asylum Policy*, EUROPARL (May 2019), <http://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy> [https://perma.cc/VAA8-3FBF].

32. Consolidated Version of the Treaty on the Functioning of the European Union, art. 67(2), 70, 80, Dec. 13, 2007, O.J. 2008/C 115/01, <https://www.refworld.org/docid/4b17a07e2.html> [https://perma.cc/A78P-2XB8].

33. Charter of Fundamental Rights of the European Union, art. 18, Oct. 26, 2012, O.J. 2012/C 326/02, <https://www.refworld.org/docid/3ae6b3b70.html> [https://perma.cc/MWY7-4A6Y]. More specific obligations for the EU member states concerning asylum-seekers and their rights derive from, *inter alia*, the Convention implementing the 1985 Schengen Agreement (European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (“Schengen Implementation Agreement”)* (June 19, 1990), <https://www.refworld.org/docid/3ae6b38a20.html> [https://perma.cc/84BF-GUTZ]); the Asylum Procedure Directive (Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 180/60 - 180/95; 29.6.2013, 2013/32/EU 2013 O.J., <https://www.refworld.org/docid/51d29b224.html> [https://perma.cc/K52N-HU28]); and the Return Directive (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals, 348/98-348/107; 16.12.2008,

must be consistent with the 1951 Convention³⁴ and the 1967 Protocol thereto.³⁵ Before a person can be granted asylum in the European Union, they must first “qualify for refugee status or subsidiary protection status.”³⁶ The Qualification Directive of 2011, passed by the European Parliament and the Council of the European Union, sets out new criteria for applicants to qualify for refugee status and defines the rights afforded to individuals who obtain such status.³⁷ In order to qualify for asylum, an applicant must prove their well-founded fear of persecution by providing documentation regarding their “age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.”³⁸ Applications for asylum are carried out on a case-by-case basis and take into account various factors including conditions in the country of origin, documentation provided by the applicant, the personal circumstances of the applicant, whether the applicant would be exposed to persecution or serious harm if returned to their home country, and whether the applicant can reasonably be expected to avail themselves of the protection of another country.³⁹

“Member States shall . . . have regard to the general circumstances prevailing in th[e] part of the country and to the personal circumstances of the applicant” when examining whether the applicant has a well-founded

2008/115/EC2008 O.J., <https://www.refworld.org/docid/496c641098.html> [https://perma.cc/9NSS-XLT4]).

34. *Guidelines on International Protection No. 9*, *supra* note 7.

35. *Id.*

36. *Who Qualifies for International Protection*, EUROPEAN COMMISSION, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/refugee-status_en [https://perma.cc/M27M-YGGZ].

37. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 337/9-337/26; 20.12.2011, 2011/95/EU 2011 O.J., <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF> [https://perma.cc/R3NJ-D5B3] [hereinafter Council Directive 2011/95]. This directive amends Council Directive 2004/83/EC of 29 April 2004, which set out the minimum standards for qualifying as a refugee. The Qualification Directive includes provisions on protections from refoulement, residence permits, travel documents, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration facilities, and specific provisions pertaining to children.

38. *Id.* at Ch. II, Art. 4, para. 2.

39. *Id.* at Ch. II, Art. 4, para. 3.

fear of persecution or is at real risk of suffering serious harm.⁴⁰ A “serious indication” of the applicant’s well-founded fear arises when the “applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, . . . unless there are good reasons to consider that such persecution or serious harm will not be repeated.”⁴¹ To constitute an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).⁴²

Acts of persecution can, *inter alia*, take the form of physical, sexual, or mental violence; discriminatory legal, administrative, police, and/or judicial measures; disproportionate or discriminatory prosecution or punishment; denial of judicial redress; and acts of a gender-specific or child-specific nature.⁴³ Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including

40. *Id.* at Ch. II, Art. 8, para. 2.

41. *Id.* at Ch. II, Art. 4, para. 4. A well-founded fear of persecution or real risk of suffering serious harm may also be based on events that have taken place since the applicant left their country of origin or on activities which the applicant has engaged in since they left. It may not, however, be based on “circumstances which the applicant has created by his or her own decision since leaving the country of origin.” *Id.* at Ch. II, Art. 5, paras. 1–3.

42. *Id.* at Ch. III, Art. 9, para. 1.

43. *Id.* at Ch. III, Art. 9, para. 2.

international organisations, are unable or unwilling to provide protection against persecution or serious harm . . .⁴⁴

In accordance with Article 1(A) of the Geneva Convention, an applicant must demonstrate “a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts” in order to qualify for protection.⁴⁵ It is important to note that when determining the existence of the applicant’s well-founded fear of persecution, “it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.”⁴⁶ To qualify as a “particular social group,” members of the group must “share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.”⁴⁷ The group must also have a “distinct identity” in the applicant’s country of origin “because it is perceived as being different by the surrounding society.”⁴⁸ Protection “shall” be afforded to an applicant “who qualifies as a refugee in accordance with Chapters II and III” of the Qualification Directive.⁴⁹

2. Required Adherence to EU Member State Asylum Laws

Although the 1951 Convention as amended by its 1967 Protocol has a broad reach and sweeping implications for refugees, the rights of refugees and asylum-seekers in receiving countries are regulated by both international and domestic laws.⁵⁰ The 1951 Convention does not define a

44. *Id.* at Ch. II, Art. 6. Contrarily, protection against persecution or serious harm can *only* be provided by the state or parties or organizations, including international organizations controlling the state, provided that they are willing and able to offer protection. Such protection against persecution or serious harm must be effective and of a non-temporary nature. *Id.* at Ch. II, Art. 7, paras. 1–2. However, when the State or its agents “are the actors of the persecution or serious harm, there should be a presumption that effective protection is not available to the applicant.” *Id.* at para. 27.

45. *Id.* at para. 29.

46. *Id.* at Ch. III, Art. 10, para. 2.

47. *Id.* at Ch. III, Art. 10, para. 1.

48. *Id.*

49. *Id.* at Ch. IV, Art. 13.

50. SZEWCZYK, *supra* note **Error! Bookmark not defined.**, at 5.

process for determining whether an individual meets the definition of a refugee.⁵¹ Instead, the establishment of asylum proceedings and refugee status determinations are left to each contracting State to develop.⁵² Parties to the 1951 Convention have crafted their legal asylum framework based on their resources, national security concerns, and histories with forced migration movements.⁵³ This has resulted in disparities among the statutory asylum frameworks among different States.⁵⁴ Thus, while the standards set forth in the 1951 Convention and the 1967 Protocol provide for some degree of uniformity in refugee and asylum law globally, these derivations of authority from both international and domestic legal frameworks give rise to stark country-by-country differences procedurally as well as substantively in the levels of protections afforded to refugees and asylum applicants. For example, in Germany, asylum is granted to everyone who flees political persecution, but in general only persecution perpetrated by the State is relevant.⁵⁵ Political persecution is persecution that causes specific violations of individual rights and, due to its intensity, excludes the individual from the “general peace framework of the state unit.”⁵⁶ However, not every disadvantage or material hardship supports a right to asylum.⁵⁷

51. **Error! Bookmark not defined.***Guidelines on International Protection No. 9*, *supra* note **Error! Bookmark not defined.**, at 2 (defining “refugee” but providing no elaboration into the process for determining who qualifies as a refugee under the definition).

52. *Id.*; *see also* *Asylum & The Rights of Refugees*, INTERNATIONAL JUSTICE RESOURCE CENTER, <https://ijrcenter.org/refugee-law/> [<https://perma.cc/QDY6-WFZT>].

53. *Asylum & The Rights of Refugees*, *supra* note **Error! Bookmark not defined.**52. *See also* Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, 2011 O.J. (L 337) 9, ch. I, art. 3 (“Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.”).

54. *Asylum & The Rights of Refugees*, *supra* note **Error! Bookmark not defined.**52.

55. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 1989, 80 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 315, 334 (Ger.). The right to asylum is codified in article 16a of the German Basic Law. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBl] [Federal Law Gazette] ch. I, art. 16a, http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf [<http://perma.cc/RW2X-HD46>] (Ger.). The constitutional right to asylum protects human dignity and reflects the view that no state has the right to persecute an individual for his or her political or religious beliefs or other personal characteristics that mark him or her as different. 80 BVERFGE 315, 333.

56. 80 BVERFGE 315, 334 *et seq.*

57. *Id.* at 335.

In the United Kingdom, individuals escaping persecution have a right to seek asylum but will only be given refuge upon a showing that they (1) are outside their own country; (2) have a well-founded fear of persecution; (3) that the persecution is because of their race, religion, nationality, or membership in a particular social group (“PSG”) or political opinion; and (4) that they cannot rely on their home country’s government for protection from the persecution.⁵⁸ If these criteria are met, the United Kingdom’s adherence to the principle of non-refoulement prohibits “the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons.”⁵⁹

3. Asylum for LGBTQ+ Individuals

Under the 1951 Convention, sexuality is not explicitly enumerated as a persecution ground deemed worthy of protection.⁶⁰ Such an interpretation of the 1951 Convention was first deemed unsustainable by the Dutch in 1981.⁶¹ It was not until 2004, however, that sexual orientation was formally incorporated into supra-nationally binding EU law as a relevant persecution ground.⁶² In 2013, the Court of Justice of the European Union formalized this previously existing consensus in the European Union and definitively held that LGBTQ+ individuals qualify as members of a PSG for the purposes

58. *The truth about asylum*, REFUGEE COUNCIL, <https://www.refugeecouncil.org.uk/information/refugee-asylum-facts/the-truth-about-asylum/> [<https://perma.cc/YTU5-JXC8>].

59. *Principle of Non-Refoulement in English Law*, IN BRIEF, <https://www.inbrief.co.uk/immigration-law/non-refoulement-english-law/> [<https://perma.cc/7MYF-R7VH>].

60. **Error! Bookmark not defined.** *States Parties to the 1951 Convention*, *supra* note 23, at 2. Such exclusion of LGBTQ+ people is in line with other international human rights legislation from the time the Convention was drafted. Even given this historical context, some scholars find it difficult to justify the exclusion of queer individuals from international protection given the systematic persecution of queer persons during the Holocaust. *See, e.g.*, Günter Grau & Claudia Shoppmann (eds), *The Hidden Holocaust?: Gay and Lesbian Persecution in Germany 1933-45* (3d ed., London: Routledge, 1995).

61. Afdeling Rechtspraak van de Raad van State [ARRvS] 13 augustus 1981 No. A-2.1113, RV 1981, 5 (Neth.), <https://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=246> [<https://perma.cc/6JH7-MD3W>].

62. This was achieved by the incorporation of the Qualification Directive of 2004 into the 1951 Convention. Council Directive 83/EC, 2004 O.J. (L 304) 312 and Council Directive 95/EU, 2011 O.J. (L 337) 339.

of the member states' asylum procedures.⁶³ Gender identity⁶⁴ was added as a qualifying protected ground in 2011.⁶⁵ Despite this recognition of their eligibility for refugee status, LGBTQ+ asylum seekers remain among the European asylum systems' most invisible constituents.⁶⁶ To be granted asylum, a queer refugee must "prove her sexuality, a well-founded fear of persecution on the basis of the aforementioned, and that the country of her nationality or residence is unwilling or unable to offer protection."⁶⁷ Applicants are burdened by evidentiary hurdles in order to make each of these showings because proving their eligibility is often based on circumstantial or non-existent evidence.⁶⁸

i. Particular Social Group

Under the Qualification Directive, "a particular social group might include a group based on a common characteristic of sexual orientation."⁶⁹ Most LGBTQ+ asylum applicants are recognized under this category.⁷⁰

63. Joined Cases C-199 to C-201/12, *Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12)*, Judgment of the Court (Nov. 7, 2013). Now, in most Western countries, it is "widely accepted that queer refugees can *prima facie* constitute members of a 'particular social group', thereby falling within the ambit of the Convention." Gartner, *supra* note 3 (citing *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, [1997] 190 CLR 225 (Can.); *(Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.); and *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another*, [1999] 2 WLR 1015 (Can.) as the most influential cases that led up to this acceptance).

64. The term "gender identity" refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth." This term encompasses "the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms." *The Protection of Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, UNHCR, at 17 (Sept. 22, 2010).

65. Gartner, *supra* note **Error! Bookmark not defined.**3.

66. *Id.*

67. *Id.*

68. *Id.*

69. Council Directive 2011/95, *supra* note 37, at ch. III, art. 10, para. 1. Gender related aspects, including gender identity, must also be considered in determining membership of a particular social group.

70. Gartner, *supra* note **Error! Bookmark not defined.**3. Although membership in a particular group is the most common legal basis for accommodating LGBTQ+ asylum claims, religion and political opinion have also served as legal bases for affording protection. *See, e.g., Guidelines on International Protection No. 9*, *supra* note 7, at para. 40ff; Erik Ramanathan, *Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence*, 11 GEO. IMMIGR. L.J. 1, 5–7 (1996); and Kristen L. Walker, *Sexuality and Refugee Status in Australia*, 12 INT'L J. OF REFUGEE L. 175, 178–79 (2000).

When defining a PSG, gender issues “including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.”⁷¹

Different analyses have been employed to fit LGBTQ+ asylum applicants into the PSG category, two of which have gained significant importance in international refugee law.⁷² One interpretation characterizes sexual orientation as “an innate and immutable characteristic.”⁷³ A second analysis “adopts a test of social perceptions” and dictates that in order to qualify for protection as a member of a PSG, the group must be united by a “common characteristic that is perceived as differentiating them from (and in) their society at large.”⁷⁴ Both of these approaches have their strengths and weaknesses,⁷⁵ “rely on limited assumptions regarding sexuality,” and often converge because in many cases, “groups that are persecuted on the basis of an immutable characteristic are also perceived as a distinct social group.”⁷⁶

71. **Error! Bookmark not defined.**Council Directive 2011/95, *supra* note 37, at para. 30.

72. Gartner, *supra* note **Error! Bookmark not defined.****Error! Bookmark not defined.**

73. *Id.* (citing UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02, at para. 6 (May 7, 2002) [hereinafter *Guidelines on International Protection No. 2*]).

74. *Guidelines on International Protection No. 2, supra* note 73,**Error! Bookmark not defined.** at para. 7.

75. A weakness of the immutable characteristics approach is that it functions on the presumption that “sexual orientation [is] fixed, consistently taking the same form and following the same narrative of persecution across society and across cultures.” Such an approach ignores the fluidity of sexuality as well as the impact of cultural differences. Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation based Asylum Claims*, 19 COLUM. J. OF GENDER & L. 367, 386 (2010). This impact is particularly relevant in the context of immigration authorities in refugee-receiving nations adjudicating claims based on their personal understanding of foreign identities and sexualities. Gartner, *supra* note 3, at n.**Error! Bookmark not defined.**. In contrast to the social perception approach, however, “conceptualising [sic] sexuality as immutable places less emphasis on external perceptions and behavioural [sic] patterns that are deemed associable with such identities.” *Id.* Emphasizing the external over the internal, as the social perception approach does, leads to several problems. First, it can indirectly demand a higher level of proof since observations usually require corroboration while immutable identity characteristics cannot be proven in the first place. Additionally, it may punish non-normative queer behavior and “it may give rise to adjudicators focusing on the social visibility of the individual claimant rather than of the group the claimant purports to be a member of.” *Id.*

76. *Guidelines on International Protection No. 2, supra* note 73, **Error! Bookmark not defined.**at para. 9.

The wording of the Qualification Directive, however, contradicts the position taken by the United Nations High Commission for Refugees, indicating that these two approaches “are to be treated as cumulative requirements (rather than as alternative bases).”⁷⁷ Despite ruling that sexual minority members do share an innate protected characteristic for which they “must be regarded as forming a particular social group,”⁷⁸ the Court of Justice of the European Union has upheld the cumulative reading of these requirements.⁷⁹ Therefore, EU member states continue to be afforded a prerogative to examine whether an LGBTQ+ petitioner meets the “social perception” threshold in the context of the individual case.⁸⁰ Because of this, “jurisprudence on the matter has been and continues to be extremely inconsistent in its definitions and analyses.”⁸¹

ii. Discretionary Denial of LGBTQ+ Asylum Claims

Until 2013, discretionary denial⁸² of LGBTQ+ asylum claims was allowed and widely applied by judiciaries across Europe.⁸³ Judicial bodies reasoned that queer asylum seekers could “behave discretely” and hide their non-conforming sexuality in order to avoid persecution.⁸⁴ European courts sent applicants back to the persecutory environments from which they fled and “effectively required refugees to play hide and seek with their persecutors.”⁸⁵ In 2013, the Court of Justice of the European Union (“CJEU”) held that discretion is no longer a valid basis for denying

77. Gartner, *supra* note 3; Maarten den Heijer, *Persecution for reason of sexual orientation: X, Y and Z*, 51 COMMON MARKET L. REV. 1217–34 (2014).

78. **Error! Bookmark not defined.** Joined Cases C-199 to C-201/12, *Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12)*, paras. 48–49 (Nov. 7, 2013).

79. Gartner, *supra* note **Error! Bookmark not defined.****Error! Bookmark not defined.**

80. *Id.*

81. *Id.*

82. Discretionary denial is a term used throughout the immigration community to refer to denials of asylum or other immigration protection by judges based on the presumption that asylum seekers could behave discretely to avoid persecution or that they otherwise do not qualify for protection. *See* Gartner, *supra* note **Error! Bookmark not defined.**

83. *Id.*

84. *See, e.g.,* MK v. Sec’y of State for the Home Dept. [2009] UKAIT 0036 [408] (“We take the view that the appellant would conduct herself discreetly as a lesbian in Albania and that it would be entirely reasonable in the circumstances to expect her to do so.”).

85. Gartner, *supra* note **Error! Bookmark not defined.** **Error! Bookmark not defined.**

protection to queer asylum seekers anywhere in the EU.⁸⁶ Since this abolition, the difference in the interpretation of LGBTQ+ asylum claims by member states has been minimal.⁸⁷ Discretionary denial has—in one form or another—still been used in judgments by courts in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Malta, the Netherlands, Poland, Romania, Spain, Norway, and Switzerland.⁸⁸ “[D]iscretion reasoning is extraordinarily widespread, resistant to challenge and strongly associated with high rejection rates for lesbian, gay and bisexual refugee claims.”⁸⁹ As a result, the Court’s abolition of discretion reasoning has been largely undermined.⁹⁰

B. Asylum in the United States

1. Statutory Asylum Framework

There are two basic pathways to obtaining asylum in the United States: affirmative and defensive asylum.⁹¹ Affirmative asylum-seekers must be physically present in the United States, file an application within one year of their arrival to the country, and must not have been placed in deportation proceedings by U.S. Immigration officials.⁹² Affirmative asylum applicants present their case in a non-courtroom setting such as an immigration office.⁹³ Defensive asylum-seekers present their case before an immigration judge at the Executive Office for Immigration Review, as they have already

86. **Error! Bookmark not defined.**Joined Cases C-199 to C-201/12, *Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12)*, (Nov. 7, 2013).

87. Thomas Spijkerboer, *Gender, Sexuality, Asylum and European Human Rights*, 29 L. CRITIQUE 221, 231 (Dec. 2017).

88. See SABINE JANSEN & THOMAS SPIJKERBOER, *FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY* 33–39 (2011).

89. Janna Wessels, “Discretion”, *persecution, and the act/identity dichotomy: Reducing the Scope of Refugee Protection*, VU Migration Law Series No 12, VRIJE UNIVERSITEIT AMSTERDAM at 4 (2013).

90. Spijkerboer, *supra* note **Error! Bookmark not defined.**87, at 231.

91. 8 C.F.R. §§ 208.2, 208.13; Beeraj Patel, *The Difference Between “Affirmative” and “Defensive” Asylum*, PRIDE IMMIGRATION (Apr. 22, 2015), <https://www.prideimmigration.com/the-difference-between-affirmative-and-defensive-asylum/> [https://perma.cc/XF69-892D].

92. *Id.*; *Affirmative Asylum Applications vs. Defensive Asylum Applications: What’s the Difference?*, FINDLAW, <https://immigration.findlaw.com/asylum-refugee/affirmative-asylum-applications-vs-defensive-asylum-applications.html> [https://perma.cc/TV7J-EBCU].

93. Patel, *supra* note 91**Error! Bookmark not defined.**

been placed in removal proceedings and are defending themselves against removal.⁹⁴ A denial of an affirmative application for asylum immediately initiates the defensive asylum process and an applicant is given a second opportunity to present their case.⁹⁵

By signing the 1967 Protocol, the United States acceded to the international legal refugee and asylum regime.⁹⁶ As such, the statutory asylum framework in the United States is, at least in theory, guided by the international framework discussed above.⁹⁷ Regardless of whether their application is affirmative or defensive, all applicants for asylum must prove the same thing in order to be eligible for protection: that they have suffered past persecution or fear persecution in the future on account of a protected ground.⁹⁸ The Immigration and Nationality Act (“INA”) enumerates five protected grounds: race, religion, nationality, political opinion, and “particular social groups.”⁹⁹ Individuals applying for asylum in the United States must also demonstrate that “the persecution they suffered or fear is at least in part due to their protected characteristic.”¹⁰⁰ This ‘nexus requirement’ in U.S. asylum jurisprudence differs from the causation standard required in the European Union.¹⁰¹ Specifically, the American standard, as it is written, does not require that the protected characteristic be the only cause of the persecution. In addition to meeting these substantive eligibility requirements, an applicant must also affirmatively prove that they are not barred from receiving asylum under the INA.¹⁰² Just as in the European Union, even if an asylum applicant successfully clears all of these hurdles, their application can still be denied on discretionary grounds.¹⁰³ The

94. *Id.*

95. *Id.*

96. Robert F. Barsky, *What does the 1967 Protocol have to say about the Legal Obligations that the United States Owes to Asylum Seekers?*, YALE J. ON REG. (Mar. 20, 2019), <https://www.yalejreg.com/nc/what-does-the-1967-protocol-have-to-say-about-the-legal-obligations-that-the-united-states-owes-to-asylum-seekers-by-robert-f-barsky/> [<https://perma.cc/D2JU-TT7A>].

97. *Id.*

98. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

99. *Id.*

100. Cory, *supra* note **Error! Bookmark not defined.**18, at 580. This element in asylum law is known as the “nexus requirement.” *Id.*

101. *See supra* text accompanying note 45.

102. Cory, *supra* note 18, at 580. An applicant could be barred from receiving protection for failure to meet the one-year filing deadline requirement or for having committed any of several enumerated immigration violations or criminal acts in the past, for example. *Id.* at 580–81.

103. *Id.* at 581.

burden is on the applicant to demonstrate that a favorable exercise of discretion is warranted.¹⁰⁴

2. Asylum for LGBTQ+ Individuals

Asylum claims based on an individual's status as LGBTQ+ are adjudicated under the PSG category.¹⁰⁵ *In re Acosta* clarified this undefined statutory term and provided some basic elements for defining PSGs. According to the Board of Immigration Appeals ("BIA"), a PSG refers to a group that "share[s] a common immutable characteristic," which the members of the group "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."¹⁰⁶ Since *In re Acosta*, the BIA has added additional requirements that a PSG must be defined with "particularity" and must be "sufficiently distinct."¹⁰⁷ To satisfy the particularity requirement, the proposed group must be able to be accurately described such that "the group would be recognized, in the society in question, as a discrete class of persons."¹⁰⁸ The social visibility requirement mandates that an asylum-seeker be visible "in terms of perception by a society" and that the group is recognized "as a distinct entity."¹⁰⁹

Determining the bounds of the PSG category is difficult. Like adjudication of asylum claims more generally, it largely turns on discretion from the tribunals involved because the requirements for making out a PSG are "convoluted" and "subject to interpretation."¹¹⁰ Decided in 1990 and designated as precedent in 1994, *Matter of Toboso Alfonso* is the watershed

104. See *Dankam v. Gonzales*, 495 F.3d 113, 119 n.2 (4th Cir. 2007); *Matter of Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987).

105. See generally *Cory*, *supra* note 18 **Error! Bookmark not defined.**, at 578.

106. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); see also *In re Kasinga*, 21 I. & N. Dec. 357, 366-67 (B.I.A. 1996).

107. *Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014); *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008); *In re M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); see also *In re W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014); NAT'L IMMIGRANT JUSTICE CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF M-E-V-G* AND *MATTER OF W-G-R* 1, 1-2, 4 (2016), <https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf> [<https://perma.cc/22PJ-THSW>] (citing *Acosta*, 19 I. & N. Dec. at 233).

108. *S-E-G-*, 24 I. & N. Dec. at 584.

109. *Id.* at 586.

110. *Cory*, *supra* note **Error! Bookmark not defined.**18, at 584.

case for LGBTQ+ asylum claims in the United States.¹¹¹ In that case, the court recognized “homosexuals” from Cuba as a valid PSG, and noted that “the harm the respondent suffered, and was likely to suffer in the future, was based on his membership in that group and not because he committed any specific homosexual acts.”¹¹² This was a monumental decision because only seventy-three years earlier homosexuals were outright prohibited from entering the country on account of being considered “mentally or physically defective” under the INA.¹¹³ Various cases since *Toboso Alfonso* continued to elaborate on how different sexual orientations and gender identities can constitute valid PSGs and reasoned that sexual orientation and gender identity are immutable characteristics so fundamental to one’s identity that a person should not be required to change them.¹¹⁴ In *Reyes-Reyes v. Ashcroft*, the Ninth Circuit reaffirmed its previous decision in *Hernandez-Montiel*, a case involving a transgender asylum-seeker.¹¹⁵ This decision along with its predecessor are “widely accepted as the landmark transgender asylum cases, and they are often relied upon as highly persuasive authority outside of the Ninth Circuit.”¹¹⁶ Accordingly, *Toboso Alfonso* and its progeny have made it such that LGBTQ+ individuals constitute a prima facie PSG.¹¹⁷ “The fact that sexual orientation and gender identity (‘SOGI’) related claims constitute a protected ground meriting asylum is practically taken for granted in many jurisdictions” within the United States.¹¹⁸ Because of these developments, American legal advocates have been able to secure

111. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

112. Kimberly D. Topel, “So, What Should I Ask Him to Prove that He’s Gay?”: *How Sincerity, and Not Stereotype, Should Dictate the Outcome of an LGB Asylum Claim in the United States*, 102 IOWA L. REV. 2357, 2364 (2017). **Error! Bookmark not defined.**

113. Swetha Sridharan, *The Difficulties of U.S. Asylum Claims Based on Sexual Orientation*, MIGRATION POL’Y INST. (Oct. 29, 2008), <http://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation> [<https://perma.cc/CL4F-NXMU>].

114. See *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1095 (9th Cir. 2000). See also *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that “all alien homosexuals are members of a ‘particular social group’” (emphasis in original)).

115. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 n.1 (9th Cir. 2004).

116. Cory, *supra* note **Error! Bookmark not defined.**18, at 586.

117. See generally **Error! Bookmark not defined.***id.* at 578.

118. **Error! Bookmark not defined.***Id.* It is important to note that outcomes of LGBTQ+ asylum claims can vary greatly by jurisdiction. Although there is strong legal authority backing the grant of LGBTQ+ claims, some judges have astonishingly low grant rates with LGBTQ+ cases or with particular social group cases as a whole.

asylum protection for a growing number of LGBTQ+ individuals fleeing persecution from around the world.¹¹⁹

II. SHORTCOMINGS OF THE ASYLUM SYSTEMS IN THE EUROPEAN UNION AND THE UNITED STATES FOR LGBTQ+ APPLICANTS

A. *Proving the Credibility of LGBTQ+ Asylum Claims*

Unfortunately, for many LGBTQ+ asylum applicants fleeing violence and persecution on the basis of their sexuality in their home countries, “the arrival in Europe does not represent the end of [the] violence.”¹²⁰ Upon arrival, many such individuals are “locked up in a detention centre” and face “constant risk of being assaulted.”¹²¹ As a result, LGBTQ+ asylum applicants “find themselves with no choice but to go back into the closet” and “hid[e] their sexual orientation.”¹²² Coupled with the belief on the part of immigration officials “that people will try to abuse the system,” this creates a credibility issue that often results in automatic disbelief on the part of the immigration officials that the applicant is being truthful about their sexuality.¹²³

In court proceedings, witnesses are not automatically presumed credible and must prove their credibility through testimony.¹²⁴ Similarly, respondents

119. *Id.*

120. Antonio Zappulla, *Forgotten Twice: the untold story of LGBT refugees*, WORLD ECONOMIC FORUM (Jan. 19, 2018), <https://www.weforum.org/agenda/2018/01/forgotten-twice-lgbt-refugees/> [<https://perma.cc/F8DJ-XBAW>].

121. *Id.* “According to UKLGIG and Stonewall, LGBT asylum seekers held in immigration centres across the UK have experienced abuse both from other asylum seekers and from staff members who ‘fail to protect them from abuse, often lack basic understanding of LGBT issues, and even display discriminatory attitudes’ towards LGBT asylum seekers.” *Id.* Transgender asylum seekers are particularly at risk upon their arrival because they are often allocated to immigration centers based on their gender at birth and are denied access to the drugs necessary to continue their transition. *Id.*

122. *Id.*

123. **Error! Bookmark not defined.** Nathanael Miles, *No Going Back: Lesbian and Gay People and the Asylum System*, STONEWALL, https://www.stonewall.org.uk/system/files/No_Going_Back_2010_.pdf [<https://perma.cc/3NU2-A456>].

124. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2012); *see also* 11. *Immigration Basics: Challenging Asylum Cases*, IMMIGRATION EQUALITY, <https://web.archive.org/web/20171027045110/http://www.immigrationequality.org:80/get-legal-help/our-legal-resources/>

in immigration proceedings, who almost always testify, must prove their credibility. While the growing consensus that queer identities constitute a PSG is undoubtedly a step in the right direction, this recognition “has only created the condition for protecting LGBTQI applicants.”¹²⁵ Not only must they meet all of the additional procedural requirements detailed above in order to be afforded protection, they also must prove that their claims are credible,¹²⁶ a burden that weighs particularly heavily on LGBTQ+ asylum applicants.¹²⁷

As recently as 2010, immigration officials in the Czech Republic used penile plethysmography and vaginal photoplethysmography to test whether purportedly queer asylum seekers were actually queer.¹²⁸ These processes involved immigration officials hooking up “gay and lesbian petitioners to machines that determined levels of sexual arousal by measuring the asylum seekers’ physical reactions as they were exposed to homo- and heterosexual porn.”¹²⁹ Upon discovering the use of such methods, the EU Agency for Fundamental Rights, the EU Commission, and the UNHCR condemned their use as “invasive, degrading and irreconcilable with European human rights

immigration-equality-asylum-manual/immigration-basics-challenging-asylum-cases [https://perma.cc/SYC6-4BQV] (“Asylum adjudicators are often fearful that an applicant has completely fabricated their claim simply to remain in the United States.”).

125. Sabine Jansen, *Fleeing homophobia, asylum claims related to sexual orientation and gender identity in Europe*, Introduction to FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM 1 (Thomas Spijkerboer ed., 2013).

126. Gartner, *supra* note 3**Error! Bookmark not defined.** “[T]he issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails.” Robert Thomas, *Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined*, 8 EUR. J. OF MIGRATION AND L. 8, 79 (2006) (quoting *SW v. Secretary of State for the Home Department (Adjudicator’s questions) Somalia* [2005] UKIAT00037, para. 20).

127. Gartner, *supra* note **Error! Bookmark not defined.** “On its most obvious level, being queer neither comes with a membership card, nor have the queer genes been discovered yet. Thus, needing to prove queerness to (hetero-centric) state authorities is prone to lead to rather nasty situations.” *Id.*

128. *Czech gay asylum ‘phallometric test’ criticised by EU*, BBC NEWS (Dec. 8, 2010), <https://www.bbc.com/news/world-europe-11954499> [https://perma.cc/NRB4-K89Q]; INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION, REPORT ON IMPLEMENTATION BY THE CZECH REPUBLIC OF THE RECOMMENDATION CM/REC(2010)5 OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON MEASURES TO COMBAT DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY (Apr. 4, 2012). While Czech immigration authorities claim the numbers of cases where such tests were employed was limited to less than a dozen, this remains unproven. The UNHCR claims that these tests were first used by the Czech authorities in 2004 to test the sexualities of Armenian and Sri Lankan applicants. *Id.*

129. Gartner, *supra* note 3**Error! Bookmark not defined.**

standards.”¹³⁰ However, many EU countries still employ psychologists, psychiatrists, and sexologists to determine the credibility of applicants’ claims regarding their sexuality.¹³¹

Equally questionable, though less physically intrusive, a leaked confidential report from the United Kingdom revealed details of immigration officials’ interrogations—as opposed to interviews—of LGBTQ+ asylum applicants.¹³² The report includes, for example, details of the interrogation of a bisexual man who was subjected to five hours of questioning without a lawyer present.¹³³ Questions asked to male applicants by immigration officials included: “did you put your penis into X’s backside?,” “[w]hen X was penetrating you, did you have an erection,” “did X ejaculate inside you?,” and “[w]hy did you use a condom?”¹³⁴ “[T]he authorities’ use of questions that reduce queer identities to anal and oral penetration are equally common in other EU countries including Belgium, the Netherlands, Ireland, Austria and Cyprus.”¹³⁵ Asylum seekers are also indirectly forced to take extreme steps to establish the credibility of their claims and ‘proving’ their sexuality by submitting photographic and video evidence showing them engaging in intimate contact with persons of the same sex.¹³⁶ Obtaining such

130. *Id.* (citing UNHCR’s Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation, UNHCR Bureau for Europe, Apr. 2014).

131. Sabine Jansen, *Credibility, or how to assess the sexual orientation of an asylum seeker?* (EDAL Conference 2014: Reflections on the Current Application of the EU Asylum Acquis Workshop Sexual Orientation, Gender Identity and Human Dignity 2014); see also Derek McGhee, *Assessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu*, 6 BODY AND SOCIETY 29 (2000) (critique of a case in which the UK Home office required a homosexual applicant to undergo a medical anal examination to prove his sexual orientation). “Notably, even judges have not shied away from asking legal representatives which medical evidence existed for their claimants to be queer.” Gartner, *supra* note 3.

132. Aaron Day, *Leaked report: UK Home Office ‘interrogates’ LGBT Asylum Seekers With Degrading Questions*, PINK NEWS (Feb. 9, 2014), <https://www.pinknews.co.uk/2014/02/09/leaked-report-shows-uk-home-office-humiliates-lgbt-asylum-seekers-abusive-questioning/> [<https://perma.cc/JQ5G-5CVF>].

133. *Id.*

134. Gartner, *supra* note 3 (citing Diane Taylor & Mark Townsend, *Gay asylum seekers face ‘humiliation’*, THE OBSERVER (Feb. 8, 2014), <https://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office> [<https://perma.cc/NQP8-5MVZ>]).

135. *Id.* (citing JANSEN & SPIJKERBOER, *supra* note 88, **Error! Bookmark not defined.** at 55; Jansen, *supra* note 131 **Error! Bookmark not defined.**).

136. Scott Roberts, *Home Affairs Select Committee slams government on LGBT asylum policy*, PINK NEWS (Oct. 11, 2013), <https://www.pinknews.co.uk/2013/10/11/home-affairs-select-committee-slams-government-on-lgbt-asylum-policy/> [<https://perma.cc/39JP-276A>].

evidence is not only extremely difficult for applicants, but also “might endanger family members, previous partners, and the asylum seekers themselves.”¹³⁷ Such practices are especially concerning given the vulnerability of LGBTQ+ asylum applicants discussed above, which often leads applicants to agree to anything that is asked of them, allowing authorities, in turn, to get away with demanding such evidence.¹³⁸

Demeaning practices like these occur with some frequency in the United States as well. In the United States, an Immigration Judge may base a credibility determination

on the demeanor, candor, or responsiveness of the [respondent], the inherent plausibility of the [respondent’s] account, the consistency between the [respondent’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 [respondent]’s claim, or any other relevant factor.¹³⁹

While at first blush it may seem that immigration judges are looking for honesty and candor from the respondents applying for asylum, many of the tactics these judges employ are cause for concern.¹⁴⁰ For example, when respondents refuse or are unable to conform to stereotypical Western LGBTQ+ norms and appearances, they are at risk of being subjected to “immigration judges who either who rely on their own ‘speculation or conjecture’ about what a member of the LGB community should look or act like, or they can face inappropriate and demeaning questions from

137. Zappulla, *supra* note 120.

138. See *Interview with Klaus-Dieter Sohn* in: Sabrina Papst, *Sohn: ‘Ein Asylwerber würde alles tun’*, DEUTSCHE WELLE (July 21, 2014).

139. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

140. See Topel, *supra* note 112, at 2357.

[immigration judges], trying to give the respondent a chance to prove or disprove their personal views.”¹⁴¹

Unfortunately, these issues are difficult to study and quantify in the United States because “[a]sylum hearings are confidential and the hearings are generally closed to the public.”¹⁴² The asylum process in the United States is “secretive” and involves “many court documents that are not subject to U.S. public records laws.”¹⁴³ Immigration Decisions are “oral decisions, which, while often recorded, are not often published, nor are the transcripts of the hearings.”¹⁴⁴

It is clear from the relatively scant information that is available that demeaning and inappropriate stereotyping and questioning of applicants is occurring in America’s courtrooms. In an opinion from the Second Circuit Court of Appeals, it came to light that the Immigration Judge “clearly abrogated his ‘responsibility to function as a neutral, impartial arbiter,’ . . . when, without reference to any support in the record, he voiced stereotypes about homosexual orientation and the way in which homosexuals are perceived, both in the United States and Guyana.”¹⁴⁵ From the perspective of another applicant, one lesbian asylum-seeker stated, asylum adjudicators “have in their mind this stereotypical lesbian woman with short hair and no make-up, they just expect you to conform to what they believe a lesbian woman should be like and how they behave.”¹⁴⁶ Immigration Judges who base their decisions on stereotypes and subject respondents to humiliating and irrelevant questioning about their sexuality not only risk excluding those who truly are refugees, but also cause severe negative psychological effects on applicants, including but not limited to PTSD, major depression,

141. *Id.*

142. IMMIGRATION EQUALITY, IMMIGRATION EQUALITY ASYLUM MANUAL 13, 138 (2014), http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf.

143. Lori Jane Gliha, *Fearful of Attacks, More LGBT Russians Seeking US Asylum*, AL JAZEERA AM. (Jan. 30, 2015, 5:30 PM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/1/30/more-lgbt-russians-seeking-asylum-in-united-states.html> [https://perma.cc/58AZ-XHD3].

144. Topel, *supra* note 112, **Error! Bookmark not defined.**, at 2373.

145. *Ali v. Mukasey*, 529 F.3d 478, 491 (2d Cir. 2008) (quoting *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006)).

146. Jerome Taylor, ‘Gay? Prove It Then—Have You Read Any Oscar Wilde?’: Judges Accused of Asking Lesbian Asylum Seekers Inappropriate Questions, INDEPENDENT (Apr. 3, 2013), <http://www.independent.co.uk/news/uk/home-news/gay-prove-it-then-have-you-read-any-oscar-wilde-judges-accused-of-asking-lesbian-asylum-seekers-8558599.html> [https://perma.cc/GNL5-Y787].

and “Asylum Seeker Syndrome.”¹⁴⁷ Such practices are demeaning and cannot be allowed to infiltrate judicial systems.

Determining the credibility of asylum applications is undoubtedly an important State interest and derives from the member state’s “right to control the entry, residence and expulsion of non-nationals.”¹⁴⁸ However, there is a delicate balance between allowing States to exercise that right and protecting the rights of the applicants by preventing arbitrary and invasive intrusions into their personal and sex lives. Going forward, the invasive ‘proof-finding’ techniques must be eliminated, and adjudicators should instead focus on fact-specific inquiries with particular regard and sensitivity for the privacy of the applicant. That is not to say that adjudicators ought to be wholesale prohibited from ascertaining the credibility of applicants or that they should approve LGBTQ+ asylum applications on their face—this would severely infringe upon the State’s legitimate interest in vetting asylum applicants. However, adjudicators should be specifically trained and instructed regarding the unique aspects of LGBTQ+ asylum applications. The methods by which adjudicators obtain proof of credibility should be equitable and reasonably limited to the extent practicable to ensure that the rights of the applicant are fulfilled.

B. Being “Gay Enough”

The success of an asylum claim, and the decision as to whether the claim is credible, rests solely in the hands of the adjudicator.¹⁴⁹ Because immigration authorities “usually and naturally exhibit a limited understanding of both queer and foreign identities, . . . decision-makers are continuously at risk to reach decisions that are disproportionately informed by their own subjective preconceptions of the (foreign, and often non-Caucasian, queer) subject that they adjudicate on.”¹⁵⁰ As a result, “petitioners

147. Topel, *supra* note 112 **Error! Bookmark not defined.**, at 2374. Asylum Seeker Syndrome, also referred to as resignation syndrome, is a “psychiatric condition that presents as a progressive social withdrawal and reluctance to engage in usual activities” that affects refugees. Louise Newman, *Explainer: what is resignation syndrome and why is it affecting refugee children?*, THE CONVERSATION (Aug. 21, 2018, 10:30 PM), <https://theconversation.com/explainer-what-is-resignation-syndrome-and-why-is-it-affecting-refugee-children-101670> [<https://perma.cc/G5WB-Y2G2>].

148. *Asylum & The Rights of Refugees*, *supra* note 52 **Error! Bookmark not defined.**, at 2.

149. See Gartner, *supra* note **Error! Bookmark not defined.**3.

150. *Id.*

who correspond to essentialist, Western and hetero-normative stereotypes of queer individuals (or bodies)” are often deemed to be more worthy of protection.¹⁵¹ LGBTQ+ asylum seekers are thereby required to portray their identities “in a way that shows they are ‘in place’ among the receiving state’s good gay and lesbian citizenry.”¹⁵² “Being in place often equates to embodying the expectations that immigration officials have of their own local and culturally specific queer communities.”¹⁵³ To establish that they are actually LGBTQ+, asylum applicants are often asked about “their experiences in, and details about, local gay and lesbian establishments.”¹⁵⁴

European asylum jurisprudence is fraught with cases where adjudicators deemed “queer men to not be ‘camp’ enough, or queer women to not be ‘butch’ enough.”¹⁵⁵ See the following table, compiled by the authors of *Fleeing Homophobia*,¹⁵⁶ for examples of such denials:

TOPIC	MEMBER STATE	EXAMPLE
Military service	Cyprus	A gay applicant was questioned regarding his service in the army. The fact that he did not try to avoid the army, which is mandatory in his country, was found to be contradictory with stereotypical gay conduct.
Cultural taste	France	Questions may concern a person’s dressing habits, leisure time, cultural tastes (music, film, television), knowledge of and/or participation in culture considered gay.
Language	Hungary	In the case of a Nigerian woman the asylum authorities deemed it improbable that the applicant would use “Latin terminology” (such as

151. *Id.*

152. Sarah Keenan, *Safe Spaces for Dykes In Danger? Refugee Law’s Production of the Vulnerable Lesbian Subject*, in REGULATING THE INTERNATIONAL MOVEMENT OF WOMEN: FROM PROTECTION TO CONTROL 29–47 (Sharon FitzGerald ed., 2011). “Being in place often equates to embodying the expectations that immigration officials have of their own local and culturally specific queer communities.” Gartner, *supra* note 3. To establish that they are actually LGBTQ+, asylum applicants are often asked about “their experiences in, and details about, local gay and lesbian establishments.” *Id.*

153. Gartner, *supra* note 3.

154. *Id.*

155. *Id.*

156. JANSEN & SPIJKERBOER, *supra* note 88Error! Bookmark not defined., at 61.

		“homosexual”) given her educational background. The authority supposed that the applicant heard or invented the story of her homosexuality to attain a refugee status. The medical examination resulted in the assessment of “strong feminine sexuality”. It has to be noted that other elements also questioned the credibility of the applicant.
Language	Spain	A Mauritanian gay man who called himself “maricon”. The Court was of the opinion that this word is rarely used by a gay person. ¹⁵⁷
Demeanour	Ireland	Some decision-makers reached negative decisions based on their own judgments of an applicant’s demeanour (i.e. whether, in the view of the decision-maker, the applicant presented as a homosexual person). For example, in refusing a refugee appeal by an Algerian gay man, a Tribunal Member stated “from his demeanour (at the appeal) I have no doubt that the applicant advanced the claim that he is a homosexual to enhance his application to be declared to be a refugee” ¹⁵⁸
Demeanour	Bulgaria	A common opinion is that a gay man should necessarily “look feminine” and “display” his sexual orientation, the same applies to homosexual women.
Sex work	Belgium	Homosexual sex workers have been rejected, because of “engagement in illegal homosexual acts motivated by economic and opportunistic reasons.” ¹⁵⁹
Sex work	Spain	A trans woman from Costa Rica suffered all kind of discrimination; the Court held that her problems and discrimination occurred because she worked in prostitution, not because of her gender identity. ¹⁶⁰
Cultural	UK	Stereotypes and ignorance, including expecting a

157. Audiencia Nacional (National Court) 19 December 2008, rec. no 1399/2007.

158. Refugee Appeals Tribunal, 2010 (Eur).

159. Raad voor de Vreemdelingenbetwistingen (Council for Aliens Cases) 21 Oct. 2008, Nr. 17.431 (Neth.); Raad voor de Vreemdelingenbetwistingen (Council for Aliens Cases) 22 Oct. 2008, Nr. 17.471; 19.383; 19.842; 19.837; 21.996 (Neth.).

160. S.A.N., Jul. 21, 2008 (R.G.D., No. 679/2006) (Spain).

tastes		gay man to know about the works of Oscar Wilde. ¹⁶¹
No other choice	UK	A woman's sexual conduct in prison was considered a continuation of teenage sexual experimentation; in prison, she had "no choice, bar celibacy" and therefore it was not found credible that she was a lesbian. The finding was reversed by the Court of Appeal. ¹⁶²
Genetics	Netherlands	A Jamaican's bisexuality was not found credible, because he stated that his homosexual orientation was "not in his genes." ¹⁶³
Monogamy	Netherlands	An Iraqi applicant stated that, although he had a sexual relationship with a man for five years, he was not sure whether he was in fact homosexual, because he never had feelings towards other men. The IND believed the relationship, but was of the opinion that the policy for homosexuals from Iraq did not apply to him, because he was not a homosexual. "In Arabic countries young men often turn to men for sexual satisfaction, because they cannot satisfy their sexual needs with a woman", according to the IND. The Regional Court of Groningen saw no reason why this speculation was applicable here. Appeal followed. ¹⁶⁴

The assumptions ascribed to LGBTQ+ asylum seekers regarding their own identities and experiences "logically rest on 'Western' hetero-normative and essentialist characterizations of sexual and gender minorities" and are pervasive not only among immigration officials at the border, but also in the judicial systems.¹⁶⁵ For example, Lord Rodger of the UK Supreme Court proclaimed that "just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their

161. Miles, *supra* note **Error! Bookmark not defined.**123, at 16.

162. NR (Jamacia) v. Sec'y of State for the Home Dep't [2009] EWCA (Civ) 856 [22]-[27] (appeal taken from Asylum and Immig. Tribunal) (Eng. and Wales).

163. Rechtbank (Regional Court) Haarlem, 18 December 2007, nr. 07/26891, Council of State, 18 Apr. 2008, 200800353/1.

164. Rechtbank (Regional Court) Groningen, 3 Sept. 2010, nr. 10/6506 (Eur.).

165. Gartner, *supra* note 3**Error! Bookmark not defined.**.

straight female mates.”¹⁶⁶ Such clichéd descriptions of LGBTQ+ individuals are problematic on their face, but are especially problematic “when they are imposed by heterosexual adjudicators on foreign identities in legal processes that function to secure the claimants’ physical and psychological integrity, namely by providing transnational protection to their ‘different’ identity.”¹⁶⁷

American asylum jurisprudence is also fraught with examples of applicants being denied protection on the basis of not being “gay enough.” One of the most well-known instances of such an occurrence was the case of Jorge Soto Vega. Soto Vega was originally denied asylum because adjudicators determined that “he didn’t ‘appear gay’ and could keep his sexual orientation hidden if he chose to.”¹⁶⁸ When immigration officials subscribe to such stereotypes and adjudicate claims on that basis, it creates perverse incentives among applicants to alter their personal image and behavior to fit the mold because doing so may be the only way to prevail on their claim.¹⁶⁹ For example, Romulo Castro was “advised by his immigration lawyer that flaunting [his sexual orientation] was now his best weapon against deportation.”¹⁷⁰

However, when an applicant *does* meet the stereotype-based expectations of the adjudicator, it can be to the applicant’s advantage.¹⁷¹ For example, in a decision out of Hungary granting a Tunisian man asylum, the Court “mentioned that he dressed in a feminine way and wore make-up.”¹⁷² Additionally, a gay man from Yemen was granted refugee status in the United Kingdom based partially on the fact that he wore tight T-shirts and tight jeans, had long hair, and refused to modify his dress or cut his hair to adhere to the styles of straight Muslim men.¹⁷³

166. HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT) [2010] UKSC 31 [78] (appeal taken from [2009] EWCA (Civ) 172) (UK).

167. Gartner, *supra* note 3 **Error! Bookmark not defined.**

168. *Soto Vega v. Gonzales*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/soto-vega-v-gonzales> [<https://perma.cc/JCD8-R7JK>]. This case was appealed to the BIA and to the Ninth Circuit Court of Appeals where the denial was reversed and remanded. He was afforded asylum and the presiding immigration judge stated, “that no one should have to hide their sexual orientation to be safe.” *Id.*

169. Topel, *supra* note **Error! Bookmark not defined.** 112, at 2376.

170. Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/2011/01/29/nyregion/29asylum.html> [<https://perma.cc/8T9Q-EV46>] (“The officer said: ‘You’re not a transsexual. You don’t look gay. How are you at risk?’”).

171. JANSEN & SPIJKERBOER, *supra* note **Error! Bookmark not defined.** 88, at 61.

172. *Id.*

173. *Id.*

In either case, “immigration authorities implicitly invite queer petitioners to present themselves in accordance with euro-centric and hetero-normative ideals of queer persons.”¹⁷⁴ In effect, asylum systems in both the United States and the European Union operate on a system that equates to “flee, but make sure you wear pink.”¹⁷⁵ Allowing the system to continue functioning in this manner “aid[s] a morally and culturally questionable construction and promotion of a pseudo-universal queer subject that operates on limited Western-centric notions of sexuality.”¹⁷⁶

C. “LG” Probably “B” and Maybe “T” Asylum

Another problem faced by asylum adjudicators and applicants alike is determining the extent to which asylum protections apply to each of the categories encompassed by the LGBTQ+ acronym. The majority of asylum jurisprudence and discussion involves lesbian and gay applicants. This makes it more difficult to adjudicate the claims of bisexual individuals, transgender individuals, and other sexual minorities, and also gives rise to specific concerns for members of each of those categories.

Bisexual asylum applicants are often scrutinized harshly regarding the credibility of their claim and their bisexual identity. For example, “when a bisexual person approaches an asylum officer to begin a claim, their sexual orientation may be viewed more skeptically than if the claimant was gay or lesbian.”¹⁷⁷ Bisexuals may also face a higher risk of having their claim denied based on the adjudicator’s belief that they are actually heterosexual or that bisexuals can simply choose to engage romantically with only members of the opposite sex in order to avoid persecution in their home country.¹⁷⁸ Such denials exemplify the problematic discretion-based reasoning discussed earlier in this Note.¹⁷⁹

Similarly, transgender asylum applicants face unique challenges to prove the credibility of their claims, particularly with regard to the

174. Gartner, *supra* note 3 **Error! Bookmark not defined.**

175. *Id.*

176. *See id.*; *see also* Edward Ou Jin Lee & Shari Brotman, *Identity, Refugeeess, Belonging: Experiences of Sexual Minority Refugees in Canada*, 48 CANADIAN REV. OF SOCIO. 241 (2011).

177. MOVEMENT ADVANCEMENT PROJECT, INVISIBLE MAJORITY: THE DISPARITIES FACING BISEXUAL PEOPLE AND HOW TO REMEDY THEM i (2016).

178. *Id.* at 12.

179. *See supra* notes 82–90 and accompanying text.

‘immutability’ of their status and demonstrating evidence of their transition.¹⁸⁰ Interviewers are often instructed to “explore what the applicant is claiming to be their current gender identity” when assessing asylum applications by transgender individuals.¹⁸¹ The “current gender identity” language poses problems because “the guidance belies the lived experiences of many trans people, who state they have always felt themselves to be transgender, regardless of how they are outwardly perceived.”¹⁸² Demonstrating evidence of their transition can also prove challenging for transgender asylum applicants because while adjudicators are instructed to look for evidence of transition such as legal and medical adjustments, dress, and hormone therapy, “outward transitioning is often not socially, medically and/or legally possible in the applicant’s country of origin.”¹⁸³ These hurdles may lead to the denial of a transgender asylum application based on either the applicant’s failure to prove their eligibility or the adjudicator’s discretion.¹⁸⁴

Similar problems arise for transgender asylum applicants within asylum detention centers. Research indicates that transgender asylum seekers are “particularly vulnerable to physical, sexual and emotional abuse within asylum detention centers” and are “at a high risk of self-harm or suicide” during the asylum process.¹⁸⁵ Transgender asylum applicants often also have difficulty obtaining adequate healthcare during asylum proceedings.¹⁸⁶

Despite these challenges faced by bisexual, transgender, and other sexual minorities included within the ambit of the LGBTQ+ acronym, the Court of Justice of the European Union has held that a person’s “sexual orientation is a characteristic so fundamental to his identity that he should

180. Jhana Bach, *Assessing Transgender Asylum Claims*, 42 FORCED MIGRATION REVIEW 34, 35 (2013).

181. *Id.*

182. *Id.*

183. *Id.*

184. *See generally id.*

185. TIM COWEN ET AL., SANCTUARY, SAFETY AND SOLIDARITY: LESBIAN, GAY, BISEXUAL, TRANSGENDER ASYLUM SEEKERS IN SCOTLAND 13 (2011), <http://www.equality-network.org/wp-content/uploads/2013/05/Sanctuary-Safety-and-Solidarity.pdf> [<https://perma.cc/22PG-GNMN>].

186. *Trans Healthcare in Asylum Reception Conditions*, TGEU: TRANSGENDER EUROPE (Aug. 21, 2018), <https://tgeu.org/trans-healthcare-in-asylum-reception-conditions/> [<https://perma.cc/268A-Q9TZ>]. Transgender specific healthcare needs include psycho-social support, hormone replacement treatment, or post-surgical care.

not be forced to renounce it,”¹⁸⁷ and sexual orientation has been formally incorporated into supra-nationally binding EU law.¹⁸⁸ Additionally, the Council of the European Union indicates that “a group based on a common characteristic of sexual orientation” constitutes a PSG.¹⁸⁹ The same sentiments have been accepted in the United States since 1994.¹⁹⁰ As such, by the letter of the law, the protections accorded to bisexuals, transgender individuals, and other sexual minorities are not and must not be limited because of the limited judicial and cultural understanding of their identities.

CONCLUSION

Although both the European Union and the United States have doubtlessly taken several commendable steps in the right direction toward the protection of LGBTQ+ asylum applicants, their systems, in many ways, are still in dire need of improvement. LGBTQ+ refugees and asylum applicants “face unique risks and require unique protections. Yet they are being failed by the very same system that is supposed to protect them.”¹⁹¹

The practice of forcing LGBTQ+ asylum applicants to play hide-and-seek with their persecutors should be put to an end, so that LGBTQ+ applicants are not required or presumed to be able to hide their sexual orientation or gender identity upon forcible removal to their home country in order to avoid persecution. As a general principle, the sexual orientation or gender identity of an applicant should be established through the self-identification of the applicant; subjecting LGBTQ+ individuals to inhumane medical procedures, psychological interrogations, and forcing them to provide degrading ‘evidence’ of their sexuality should no longer be considered reconcilable with international human rights standards. To this end, adjudicators should be professionally trained in and capable of taking into account the unique aspects of LGBTQ+ asylum applications.

187. Joined Cases C-199 to C-201/12, *Minister voor Immigratie en Asiel v. X (C-199/12) and Y (C-200/12) and Z v. Minister voor Immigratie en Asiel (C-201/12)*, para. 46 (Nov. 7, 2013).

188. See *supra* note **Error! Bookmark not defined.**62 and accompanying text for a discussion on how sexual orientation was incorporated into binding EU law.

189. Council Directive 2011/95, *supra* note **Error! Bookmark not defined.**37, at ch. III, art. 10, para. 1(d).

190. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

191. *Zappulla*, *supra* note 120.

Instead of the humiliating procedures currently used to determine the credibility of LGBTQ+ asylum applications, under Article 12 of the Procedures Directive, applicants should be able to describe how their sexual orientation or gender identity has developed and relate their experiences of violence and persecution in their home country in a narrative fashion. In so doing, the adjudicators' interest in determining the credibility of asylum claims will be served and the applicants' interest in personal integrity will be preserved. Such a practice would still allow adjudicators to determine the credibility of claims because applications based on vague or ambiguous narratives could be investigated further, while claims in which the credibility of the applicant is readily apparent could move through the system more swiftly, without intrusion into the personal corners of the applicant's life. Lastly, applications for asylum should not be denied on the basis of the imputed 'queerness' of an applicant or based on their physical presentation, mannerisms, life experiences, language use, familiarity with LGBTQ+ culture and local establishments, or any other factor. There is no single way to be LGBTQ+. Asylum procedures must be amended to reflect this and to adequately afford protection to those who desperately need it.

As they operate today, asylum systems effectively transform "safety from a necessity into a privilege."¹⁹² Moving forward, we must ensure that equity and humanity are the principal concerns during the consideration of LGBTQ+ asylum applications in order to ensure that "safety continues to remain a fundamental right."¹⁹³ LGBTQ+ individuals arrive at the borders of their destination countries fleeing persecution and often fearing for their lives. Regardless of how an individual identifies within the LGBTQ+ spectrum and regardless of how outwardly 'gay' they are, asylum adjudicators across Europe, the United States, and globally must be properly trained to identify such individuals and to treat them with the respect they deserve. Failing to rectify the issues identified in this Note will allow these individuals' hardships to persist even after they escape their home countries and seek refuge in the European Union or the United States. This cannot be how their stories end.

192. *Id.*

193. *Id.*