"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

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ABSTRACT: Many LGB persons from around the world come to the United States in search of a safe haven from violence and persecution. Some of those persons end up in deportation proceedings where they need to prove their sexual orientation before they can be granted asylum. Many immigration judges are understanding and receptive to the plights of these persons. However, while adjudicating claims, some judges stereotype and bully these persons with inappropriate questions about their sexual and other histories to adjudicate their claims. Since appellate courts have recently thrown out such bizarre and harmful questions and assumptions in religious asylum cases in favor of gauging a claimant's sincerity, this Note argues that courts should apply the same deference and standard to LGB claims. This would provide immigration judges a framework to obtain the information necessary for a proper decision, while also maintaining the proper level of respect for LGB asylum seekers.

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I. INTRODUCTION & BACKGROUND

It is an unfortunate reality that many members of the lesbian, gay, and bisexual ("LGB")[1] community all around the world still face discrimination, and even violent persecution, for their sexual orientation. While circumstances are not perfect for the LGB community in the United States, many LGB persons are able to find a safe haven in the United States where they are less likely, at least ideally, to be subjected to violence than in their

1. Because this Note deals only with issues of sexual orientation, and not issues of gender identity, it only advocates for members of the LGB community. In this Note, the acronym "LGB" refers to all persons who identify in a way other than heterosexual. The acronym "LGB" is not meant to disparage other such identities, such as pansexual, etc., but is merely a colloquialism meant to reach the widest audience.

home countries. Consistent with its international obligation, the United States welcomes many of these refugees each year.

Often once they arrive, however, their battle continues. Some refugees who claim asylum because of their sexual orientation find themselves at risk for being deported. These refugees must plead their case in front of an immigration judge ("IJ"). Many IJs are understanding and empathetic of the struggles of LGB refugees. They try to do everything they can to ascertain the truth of the refugees' claims and grant relief where possible. Other IJs can be critical, disbelieving, and uninformed about LGB issues. These IJs act as barriers, instead of mediators, between refugees and the relief that they seek. Many IJs, no matter which camp they fall into, nor whether they fall somewhere in between, can find themselves asking questions that are inappropriate, intrusive, and reliant on Western stereotypes in order to determine whether the refugee seated in front of them is actually gay. Such questions are demeaning to refugees and can cause them extensive mental distress. Luckily, these questions are unnecessary for a fair deportation hearing.

In the past, IJs used similar, but much less demeaning, questions to quiz religious refugees about their claimed beliefs. Recently, the circuit courts of appeals have chastised IJs for relying on such methods. They have instead encouraged IJs to rely on a refugee's sincerity in testifying when deciding whether to grant or deny a claim for asylum.[2] Such a transition has not posed problems for IJs who adjudicate religious asylum claims, which provides an excellent framework for how to adjudicate other asylum claims, like those based on a refugee's sexual orientation. This Note will argue that IJs should give a respondent who is claiming asylum based on his or her sexual orientation the same deference that they would give a claim based on religion; IJs should ask questions to probe the respondent's sincerity and credibility as opposed to asking questions that rely on stereotypes.

Part I provides an overview of the United States immigration system and asylum process and the major participants. Part II describes the questions and assumptions that have plagued LGB respondents, why they are particularly problematic, and how the courts have eliminated such questions and assumptions for religious respondents. Part III outlines the proposed prioritizing credibility determinations over stereotyping for LGB individuals seeking asylum as modeled by the current procedures for religious asylum seekers.

A. THE ASYLUM PROCESS

It is a devastating reality that millions of people each year are persecuted in their home countries and are forced to flee to save their own lives and

2. *See infra* Part II.D.

liberty.[3] Some of those people escape such persecution by relocating within their own county.[4] For those who are not so "lucky," Article 14(1) of the Universal Declaration of Human Rights states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[5] This article, later codified in the 1967 United Nations Protocol Relating to the Status of Refugees, provides the basis for an international obligation to welcome such persons.[6] As a signatory to the Protocol, the United States bears this obligation and should accept refugees into the country each year.[7] The United States is also considered a haven for those who wish to flee their home country because they face persecution for their sexual orientation, and so the number of LGB refugees that come to the United States rises each year.[8]

Asylum law in the United States is a portion of federal immigration law. Like many other types of law, immigration law consists of both statutes[9] and case law. Immigration cases begin in Immigration Court[10] and are appealed to the Board of Immigration Appeals ("BIA").[11] The BIA is "the highest administrative body for interpreting and applying immigration laws," and it has national jurisdiction.[12] After the BIA, if a case is appealed, it is sent to the circuit court of appeals in the same circuit in which the local immigration

3. The United Nations High Commissioner for Refugees ("UNHCR") placed this number at 65.3 million people in 2015. *Figures at a Glance*, UNHCR, http://www.unhcr.org/uk/figures-at-a-glance.html (last visited Apr. 27, 2017).

4. Those who can flee persecution or other harm by relocating within their own country are called Internally Displaced Persons ("IDPs"). *Internally Displaced People*, UNHCR, http://www.unhcr.org/pages/49c3646c146.html (last visited Apr. 27, 2017). IDPs constitute the majority of displaced people (UNHCR placed their number at approximately 38 million people in 2014). *Id.* However, this Note only focuses on those who: (1) flee to another country; (2) apply for asylum; and (3) are able to prove that they cannot relocate within their home country. 8 C.F.R. § 1208.13(b)(1)(i)(B) (2016); *id.* § 1208.13(b)(1)(iii) (stating that the asylum-seeker must prove that internal relocation is impossible "in the absence of [the asylum-seeker's] well-founded fear of persecution" before winning asylum in the United States (emphasis omitted)); M-Z-M-R-, 26 I. & N. Dec. 28, 33–34 (B.I.A. 2012) (explaining that, before denying asylum to an asylum-seeker who has demonstrated past persecution, the Department of Homeland Security must establish that internal relocation is possible); *see also* 8 C.F.R. § 1208.13(b)(1)(ii).

5. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

6. *Id.*; *see generally* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (describing the United States' international obligation).

7. *Id.* For the fiscal year 2015, the United States planned to accept up to 70,000 refugees. Memorandum on Presidential Determination on Refugee Admissions for Fiscal Year 2015, 2014 DAILY COMP. PRES. DOC. 731 (Sept. 30, 2014).

8. *Gay Russians Are Seeking Asylum in the Unites States Because of Anti-Gay Hostility and Attacks in Their Homeland*, DAILY MAIL (Nov. 30, 2014, 2:19 PM), http://www.dailymail.co.uk/news/article-2854394/Gay-Russians-seeking-asylum-Unites-States-worsening-hostility-homeland.html.

9. *See generally* 8 C.F.R. §§ 207–08; Immigration and Nationality Act (INA) § 212, 8 U.S.C. § 1182 (2012).

10. *See infra* Part I.B.

11. 8 C.F.R. §§ 1003.1(b), 1003.38(a) (2016).

12. *Board of Immigration Appeals*, U.S. DEP'T OF JUST., http://www.justice.gov/eoir/board-of-immigration-appeals (last updated Mar. 24, 2016).

court decided the case.[13] If appealed again, it is sent to the United States Supreme Court. The precedential decisions released by the United States Supreme Court control all the circuits, the BIA, and the Immigration Courts. The circuit courts' decisions control the immigration courts within its jurisdiction and the BIA, when it is deciding cases within the locality of that particular circuit.[14] Consequently, an individual immigration court need only heed a BIA decision when the decision does not conflict with its controlling circuit court law.[15] As a result, the precedential decisions with the clearest consequences are usually from the individual circuit courts. For that reason, and the fact that many BIA decisions are unpublished,[16] the majority of cited case law in this Note comes from the circuit courts of appeals, despite the many circuit splits that exist on many different issues.[17]

The statutory law on asylum outlines eligibility for asylum, while the case law outlines the subtleties and developments within the field. While the statutes are instructive, it is truly what has occurred in immigration proceedings that develop the asylum law. But before there is any discussion of the court proceedings, it is instructive to understand what makes an alien eligible for asylum and what can place him or her in removal proceedings.[18]

1. Eligibility for Asylum

To be eligible for asylum in the United States, an asylum-seeker must meet the technical definition of a refugee. He or she[19] must: (1) have been persecuted or have "a well-founded fear of persecution" in his or her home country;[20] (2) fall within one of five protected grounds; and (3) such a protected ground must be "one central reason" for the persecution.[21] Such protected grounds are "race, religion, nationality, membership in a particular

13. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

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

15. *Id.*

16. *Id.*

17. Where necessary, this Note illustrates such circuit splits. But, the problem at issue in this Note, the lack of deference for the claimed sexual orientation of asylum-seekers, is relevant in each circuit. This is true despite each circuit's particular interpretations of the minutia of immigration law issues.

18. Though the United States carries its international obligation to welcome refugees, not all who would claim the status fit within its particular definition, and it is at that point that the United States has drawn the line.

19. Because I will only be discussing the issues confronting non-heterosexual asylum-seekers in this Note, I will be using the pronouns "he" and "she" together as opposed to only he, only her, they, etc. This is meant as a matter of simplicity and to limit the scope of this Note to members of the lesbian, gay, and bisexual communities.

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

21. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i); *see also* Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009).

social group ["PSG"], [and] political opinion";[22] the LGB community is generally considered to be a PSG.[23] An asylum-seeker must first prove that he or she meets each requirement.

i. Persecution

To prevail on a claim for asylum, an asylum-seeker must either have been persecuted in the past or have "a well-founded fear of future persecution."[24] While persecution is considered an elusive concept, it is generally defined as conduct "ris[ing] above the level of mere harassment."[25] It can be a recurring harm or an isolated instance of harm "if it is severe enough."[26] LGB persons in countries other than the United States experience an alarming frequency of conduct rising above the level of mere harassment. One example of such persecution occurred in Russia, where "vigilantes lured gay men by pretending to be an online romantic interest and offering to meet in person."[27] The men were then videotaped while their persecutors shaved "the center of their scalp . . . and [then] painted [their scalps] in rainbow colors. Some were forced to sit in a bathtub while an attacker poured urine on [their] head[s]."[28]

When an asylum-seeker has suffered past persecution, his or her claim automatically carries a presumption of a well-founded fear of future persecution. The government must rebut this presumption to block an otherwise meritorious claim.[29] For those who have not suffered persecution in the past, a fear of future persecution is often more difficult to prove.

To prove a well-founded fear, an asylum-seeker must "subjectively fear[] persecution and establish that his [or her] fear is objectively reasonable."[30] An asylum-seeker can establish subjective fear through credible and persuasive

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

23. Toboso-Alfonso, 20 I. & N. Dec. 819, 820–23 (B.I.A. 1990)*; see also* SHARITA GRUBERG & RACHEL WEST, CTR. FOR AM. PROGRESS, HUMANITARIAN DIPLOMACY 34 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/06/LGBTAsylum-final.pdf; IMMIGRATION EQUALITY, *supra* note 14, at 10.

24. IMMIGRATION EQUALITY, *supra* note 14, at 21.

25. Dandan v. Ashcroft, 339 F.3d 567, 573 (7th Cir. 2003) (quoting Ambati v. Reno, 233 F.3d 1054, 1060 (7th Cir. 2000)).

26. Zhu v. Gonzales, 465 F.3d 316, 319 (7th Cir. 2006) (citing *Dandan*, 339 F.3d at 573).

27. 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.

28. *Id.*

29. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2012); 8 C.F.R. § 208.13(b)(1)(ii) (2016).

30. Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004).

testimony[31] or less-than-credible testimony with adequate corroboration.[32] Objective fear, however, requires a bit more proof. The asylum-seeker must prove either that there is a "pattern or practice of persecution of similarly situated persons . . . in his [or her] home country" or that he or she "would be singled out individually for persecution."[33] An asylum-seeker cannot successfully claim that there is a pattern and practice of persecution without some form of corroboration. However, such corroborating evidence does not have to be individual to the person.[34] After finding such generic corroboration, the real trouble for many LGB asylum-seekers is placing themselves within a group of similarly situated persons (to show that they would be victims of the pattern and practice) or showing how they would be "singled out."

ii. An LGB Person's Membership in a Particular Social Group

People are able to "win" asylum every day on each of the five protected grounds. However, this Note concentrates only on the protected status of membership in a PSG because it is the most common and applicable ground on which an LGB person relies to obtain asylum on account of his or her sexual orientation.[35] The first successful relief-from-removal claim for persecution on account of sexual orientation was the *Matter of Toboso-Alfonso* in 1990.[36] In that case, the IJ determined that homosexuals in Cuba

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31. A respondent's testimony may be sufficient to prove he or she has a well-founded fear of persecution if it "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the [respondent] is a refugee." INA § 208(b)(1)(B)(ii); 8 U.S.C. § 1158(b)(1)(B)(ii).

32. *See id.*; Ren v. Holder, 648 F.3d 1079, 1093 (9th Cir. 2011) (holding that adequate corroboration can save a claim for asylum where a respondent's testimony is less than credible).

33. Hamzah v. Lynch, 624 F. App'x 29, 31 (2d Cir. 2015) (citing Mufied v. Mukasey, 508 F.3d 88, 91 (2d Cir. 2007)).

34. *See, e.g.*, Carcamo-Flores v. INS, 805 F.2d 60, 64 (2d Cir. 1986) (finding newspaper articles and examples of draconian laws can suffice as such corroboration). An immigration lawyer may even have such materials on-hand if they frequently represent similarly situated clients.

35. *See* IMMIGRATION EQUALITY, *supra* note 14, at 10. It should be noted, however, that as of November 7, 2015, "[t]here are no precedential asylum claims recognizing bisexual people as a particular social group." *11. Immigration Basics: Challenging Asylum Cases*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-challenging-asylum-cases (last visited Apr. 28, 2017).

36. *See generally* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (finding that the asylum-seeker's "freedom was threatened" based on his sexual orientation). The IJ in *Toboso-Alfonso* did not grant the respondent asylum, but instead granted him another type of relief: withholding of removal, because the IJ in his case, within his proper exercise of discretion, denied him asylum because of his criminal record. *Id.* at 820; *see* INA § 208(b)(1), 8 U.S.C. § 1158 (2012); INS v. Cardoza-Fonseca, 480 U.S. 421, 443 (1987) ("[A]n alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it."); *Immigration Judge Benchbook: Asylum, Withholding of Removal, CAT*, U.S. DEP'T JUST., http://www.justice.gov/eoir/immigration-judge-benchbook-section-241b (last updated Feb. 4, 2015) (discussing the Attorney General's discretion in granting asylum to eligible asylum-seekers).

comprised their own "particular social group."[37] He found 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.[38] This decision was especially profound, since only 73 years earlier, homosexuals "were prohibited from entering the country altogether under the Immigration and Nationality Act of 1917, which excluded the 'mentally or physically defective.'"[39] Congress did not remove the ban until 1990.[40]

The BIA, in its decision in *Matter of Acosta*, defined a particular social group as "a group of persons all of whom share a common, immutable characteristic."[41] In the world of immigration law, an "immutable characteristic" is one that a person "cannot change" or "should not be required to change."[42] After the BIA decided the *Matter of Toboso-Alfonso* in 1990, "Attorney General Janet Reno designated the decision . . . as a

37. *Toboso-Alfonso*, 20 I. & N. Dec. at 822.

38. *See id.* (finding only that "persecution resulted from the applicant's membership in a particular social group"). While such a distinction may seem unnecessary, it is actually quite meaningful in the field of immigration law. At the time of the *Toboso-Alfonso* decision, homosexuality was illegal in Cuba. *Id.* at 821. By itself, the fact that something is legal in the United States but illegal in another country does not trigger a grant of asylum. Punishment for breaking the law in another country, no matter the law, does not trigger a grant of asylum either, unless the punishment amounts to "invidious prosecution or disproportionate punishment." *3. Asylum Basics: Elements of Asylum Law*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-elements-of-asylum-law (last visited Apr. 28, 2017). An IJ must find that the asylum-seeker has suffered or will suffer additional harm rising to the level of persecution to grant asylum. *Toboso-Alfonso*, 20 I. & N. Dec. at 820. *But see* Maldonado v. Attorney Gen. of the U.S., 188 F. App'x 101, 104 (3d Cir. 2006) (holding that a homosexual identity vs. homosexual conduct "is a distinction without a difference"); Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005) ("Accordingly, we see no appreciable difference between an individual, such as Karouni, being persecuted for being a homosexual and being persecuted for engaging in homosexual acts."). The Ninth Circuit does not subscribe to the view that this dichotomy is necessary. *Id.*; Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 205 (2007–08).

39. 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.

40. *Id.*

41. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *see also* GRUBERG & WEST, *supra* note 23, at 5 (defining "[p]articular social group" as a "[g]roup of people who share a common, immutable characteristic that the members of the group cannot or should not be required to change").

42. 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 (2016), https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf [hereinafter PARTICULAR SOCIAL GROUP PRACTICE ADVISORY] (citing *Acosta*, 19 I. & N. Dec. at 233).

precedential decision," and thus established sexual orientation as an immutable characteristic for immigration purposes.[43]

But, since deciding *Matter of Acosta*, the BIA created hurdles for PSG-based asylum-seekers. Now, a PSG should be "socially visible" and "particularly defined" or "sufficiently distinct."[44] According to the BIA, "[t]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[45] An asylum-seeker must show that his or her PSG has a solid definition.[46] Social visibility does not mean ocular visibility;[47] it simply requires that an asylum-seeker be visible "in terms of perception by a society" [48] and that the group is recognized "as a distinct entity."[49] An LGB asylum-seeker must "be prepared to prove that [he or] she would be recognized as a homosexual person in [his or] her [home] country and would face persecution as a result."[50] This standard can encourage IJs to ask problematic questions, especially if they have certain preconceptions about what an LBG person should "look like," either ocularly or not. While such a definition has been instructive for the circuit courts of appeals, the "strictness" of the PSG's bounds is a contentious ground between them and the BIA.[51]

iii. "On Account of"

Lastly, asylum-seekers must show that their persecution was or will be "on account of" their protected ground.[52] Often, to prove such a fact, an asylum-seeker would be wise to examine and prove, to the best of his or her ability,

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43. O'Dwyer, *supra* note 38, at 196; *see also generally* PARTICULAR SOCIAL GROUP PRACTICE ADVISORY, *supra* note 42 (instructing practitioners how to bring their claim).

44. PARTICULAR SOCIAL GROUP PRACTICE ADVISORY, *supra* note 42, at 1–2, 4 (citing E-A-G-, 24 I. & N. Dec. 591, 594 (B.I.A. 2008); S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008)).

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

46. *Id.*

47. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013).

48. *Id.*

49. PARTICULAR SOCIAL GROUP PRACTICE ADVISORY, *supra* note 42, at 4 (citing M-E-V-G-, 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014)).

50. *11. Immigration Basics: Challenging Asylum Cases*, *supra* note 35.

51. PARTICULAR SOCIAL GROUP PRACTICE ADVISORY, *supra* note 42, at 2–3; *see also* Cece v. Holder, 733 F.3d 662, 676 (7th Cir. 2013) (en banc) (holding that gender plus at least one "narrowing characteristic[]" can form the basis for a PSG within the Seventh Circuit). In *Cece*, the Seventh Circuit also noted that other circuits may find that gender alone is enough to constitute a PSG. *See id.* (citing Perdomo v. Holder, 611 F.3d 662, 667 (9th Cir. 2010) ("Thus, we clearly acknowledged that women in a particular country, regardless of ethnicity or clan membership, could form a particular social group.")). *But see generally* Gaitan v. Holder, 671 F.3d 678 (8th Cir. 2012) (holding that gender plus four narrowing characteristics were still not enough to establish membership within a PSG).

52. 8 C.F.R. § 1208.13(b)(1) (2016).

the "motives" of his or her persecutor.[53] While at least one of the motives of the persecutor must be directed at the asylum-seeker's sexual orientation, it does not need be his only reason for harming the asylum-seeker;[54] it need only be "one central reason."[55] Often, the persecutor's motive is to "overcome" the protected characteristic of the asylum-seeker.[56] For example, if a gay man is able to show that he has been or would be persecuted in his home country, and that such persecution is directed at him because he is gay, he meets the definition of an asylum-seeker. His next step is to determine if he is eligible to apply and win asylum in the United States.

2. Filing for Asylum: Affirmative vs. Defensive Filing

So long as an asylum-seeker meets these criteria, is physically present in the United States, and files within one year of his or her arrival to the United States, he or she may apply for asylum "affirmatively" with United States Citizenship and Immigration Services ("USCIS").[57] The asylum-seeker's local asylum office adjudicates affirmative applications. Many applicants are able to win asylum on the basis of their submitted application, gaining lawful status in the United States without ever seeing the inside of a courtroom.[58]

Many asylum-seekers, however, do not proactively file for affirmative asylum and find themselves in the United States without legal status

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53. INS v. Elias-Zacarias, 502 U.S. 478, 483–84 (1992).

54. Gjerazi v. Gonzales, 435 F.3d 800, 812–13 (7th Cir. 2006).

55. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

56. Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). This is a particularly salient worry for LGB women around the world who may be subjected to "corrective rape," one of the most egregious ways in which a persecutor may attempt to "overcome" a person's sexual orientation. David Smith, *Teenage Lesbian is Latest Victim of 'Corrective Rape' in South Africa*, GUARDIAN (May 9, 2011, 2:07 PM), http://www.theguardian.com/world/2011/may/09/lesbian-corrective-rape-south-africa; *see also* Claire Bennett & Felicity Thomas, *Seeking Asylum in the UK: Lesbian Perspectives*, FORCED MIGRATION REV., Apr. 2013, at 25, 25–26, 28 n.3 (discussing corrective rape); *Applying for Asylum*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum (last visited Apr. 28, 2017) ("A military officer 'helps' a lesbian with a flat tire by picking her up in his jeep, bringing her to a deserted field, and raping her 'to show her what a real man feels like.'").

57. IMMIGRATION EQUALITY, *supra* note 14, at 10–11, 118; *see also* 8 C.F.R. § 1208.4(a)(2)(A) (2016); 8 C.F.R. § 207.1(a) (2016); GRUBERG & WEST, *supra* note 23, at 5.

58. *See* IMMIGRATION EQUALITY, *supra* note 14, at 118–19. In the 2012 fiscal year, 17,506 people won asylum on affirmative applications. AM. IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 3 (2014), http://docs.house.gov/meetings/JU/JU01/20150211/102941/HHRG-114-JU01-20150211-SD003.pdf. However, some unsuccessful affirmative applicants are referred to an Immigration Court because their application was denied and they "are in the United States illegally." *Types of Asylum Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions (last updated June 16, 2015). An IJ will reevaluate those applicants referred to an Immigration Court, in much the same way that defensive applications for asylum are evaluated. *See id.* The IJ reviews applications *de novo*. *26. Immigration Court Proceedings*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-court-proceedings (last visited Apr. 28, 2017).

("status").[59] While some without status are able to live in the United States undetected by authorities, many are served with a Notice to Appear ("NTA"). The NTA is an indictment-type document, which initiates removal proceedings against the alien.[60] Removal proceedings, more commonly referred to by lay persons as "deportation" proceedings, involve a hearing in front of an IJ to determine two things: (1) whether the alien is unlawfully present in the United States, and therefore eligible for removal; and (2) whether the alien qualifies for any forms of relief, which would allow him or her to stay in the United States with lawful status.[61] Asylum is a form of relief. An asylum application submitted during immigration proceedings is a defensive application for asylum. In contrast, an affirmative application is one an applicant would submit prior to receiving an NTA.[62]

For those asylum-seekers called into Immigration Court, "[a]n order of [removal] can effectively amount to a death sentence when an individual will be subject to persecution upon return to his or her country."[63] It is for these individuals that the United States and other countries around the world offer a safe haven through asylum. But having such a safe haven is useless if it is not open to those who truly need it. For that to be done, immigration proceedings need competent participants overseeing the process.

B. THE ROLE OF THE PARTICIPANTS IN A REMOVAL PROCEEDING

There are a number of different players in a removal proceeding. The most important players are the IJ,[64] the trial attorney ("TA") for the government arguing for removal,[65] and the respondent, who is the subject of

59. A colloquialism for an alien who is without legal status in the United States.

60. 8 C.F.R. § 1003.13.

61. *Id.* § 208.2(b); *see also* INA § 240 (a)(1), (c)(4)(A), 8 U.S.C. § 1229a(a)(1), (c)(4)(A) (2012).

62. Affirmative and defensive asylum applications do not differ in terms of consequence. The different names refer to how the application was filed and how it should be adjudicated. There are no consequences for an alien who is granted asylum on a defensive application as opposed to an affirmative application. Unfortunately, though, data shows that applicants are more likely to win asylum on an affirmative application than on a defensive application. GRUBERG & WEST, *supra* note 23, at 4; U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 77 (2008). The distinction between affirmative and defensive applications for asylum is helpful for purposes of this Note since IJs adjudicate defensive applications for asylum. While asylum officers conduct during asylum interviews is far from perfect, their conduct is not at issue in this Note. *See* 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 ("The officer said: 'You're not a transsexual. You don't look gay. How are you at risk?'").

63. Denise Noonan Slavin & Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785, 1785 (2011).

64. 8 C.F.R. § 1001.1(l) (2016).

65. *Id.* § 1001.1(s); *see also id.* § 1003.16(a).

the removal proceeding, arguing against his or her own removal.[66] The IJs are quite different than those who oversee most other court proceedings. IJs are not Article III judges; they are administrative judges who "act as the Attorney General's delegates in the cases that come before them."[67] They "are members of the Department of Justice's Executive Office [for] Immigration Review ("EOIR"), an agency within the" Department of Justice ("DOJ").[68] Consequently, IJs do not need to go through the same nomination and vetting process as Article III judges do: "Immigration judges traditionally are . . . chosen through a competitive civil service process. Those applying for the positions are vetted by EOIR, and EOIR's recommendations are forwarded to the Office of the Deputy Attorney General, where they are usually approved."[69]

IJs also carry significant burdens that most other judges do not. They are expected to make fair and expeditious decisions in each case, despite their enormous caseloads and the complexity of the laws.[70] Further, respondents have no right to counsel in immigration proceedings (at least not at the government's expense)[71] and often cannot afford a private attorney nor find a pro bono advocate.[72] Even if they can find and afford an attorney, "all too often the representation is mediocre."[73] Therefore, IJs must balance a dual role: an impartial decision-maker and a guardian in the David-and-Goliath-esque battle.[74] IJ Noel Brennan of the New York City Immigration Court explains, "[h]owever time-consuming, it is our duty to explain the law to [unrepresented] immigrants and to develop the record . . . . Given the dearth

66. *Id.* § 1001.1(r). Respondents may have an attorney to represent them, adding another major player in the courtroom. Unfortunately, not all respondents have attorneys for their immigration proceedings. *See infra* notes 72–74 and accompanying text.

67. 8 C.F.R. § 1003.10(a).

68. Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 471 (2008).

69. *Id.* at 473 (footnotes omitted).

70. Slavin & Marks, *supra* note 63, at 1785. In 2009, IJ Noel Brennan of the Immigration Court in New York City had approximately 1,000 cases on his docket, as did his 24 colleagues on each of their own dockets. Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 624 (2009).

71. INA § 292, 8 U.S.C. § 1229a(b)(4)(A) (2012), 8 C.F.R. § 1003.16(b) (2016).

72. *But see* 8 C.F.R. § 1003.61(b) (obligating the Immigration Court to maintain and provide to respondents a list of "organizations, pro bono referral services, and attorneys qualified . . . to provide pro bono legal services").

73. Brennan, *supra* note 70, at 626. He continues, "I've grown concerned that many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it." *Id.*

74. 8 C.F.R. § 1003.10(b) ("[I]mmigration judges shall exercise their independent judgment and discretion . . . ."); Slavin & Marks, *supra* note 63, at 1785 ("[T]hese are life-altering proceedings where people's fates lie in the hands of IJs."); *see also* IMMIGRATION EQUALITY, *supra* note 14, at 143 ("[T]he Judge . . . typically believes that she has a duty to actively question the respondent . . . .").

of representation . . . without the IJ's assistance, many immigrants would be for all practical purposes foreclosed from making a case against removal."[75]

While they often have the best of intentions, IJs want to be absolutely sure that the respondents fit within the protected ground before granting asylum. Similarly, IJs want to be absolutely sure that the respondent before them does not fit within the protected ground of asylum before denying an application for that reason.[76] "[IJs] are often fearful that a[] [respondent] has completely fabricated his claim simply to remain in the United States" and will often go to extraordinary lengths to find the truth and to follow the law.[77]

For that reason, Immigration Equality[78] warns its practitioners: "[N]ever to take for granted that the [IJ] accepts that your client actually is LGBT."[79] In theory, it would seem easy to determine if a person falls within a protected class.[80] In reality, respondents often do not outwardly show traits or knowledge that comport with an IJ's perception of the protected class. These clients can face difficult and sometimes inappropriate questions from an IJ. Asking questions during the immigration proceeding is a convenient and efficient way of getting answers, and it is within the IJ's authority to ask such questions.[81] Unfortunately, however, many IJs use questions to "quiz" respondents. These IJs will deny respondents' claims if they answer any of the questions "incorrectly" according to the IJs' standards. "Some [IJs] are very controlling and will take over much of the questioning themselves, others are very passive, and still others may be 'yellers' or abusive to litigants."[82] These "yellers" "can present serious problems, since very often the questions are

75. Brennan, *supra* note 70, at 626.

76. As discussed in Part I *supra*, a claim of asylum consists of three elements. Falling into one of the protected grounds is just one of those elements. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). An IJ has the authority to reject a claim of asylum if a respondent fails to meet any of the elements, any other requirements under INA sections 101(a)(42)(B), 208(a)(2), 208(b)(2), or if the IJ believes that the case is not worthy of a positive exercise of discretion. *Immigration Judge Benchbook: Asylum, Withholding of Removal, CAT*, *supra* note 36; *see also* Brennan, *supra* note 70, at 626.

77. *11. Immigration Basics: Challenging Asylum Cases*, *supra* note 35. *But see* Joel Millman, *The Battle for Gay Asylum: Why Sexual Minorities Have an Inside Track to a U.S. Green Card*, WALL STREET J. (June 13, 2014, 12:59 PM), http://www.wsj.com/articles/why-sexual-minorities-have-an-inside-track-to-a-u-s-green-card-1402676258 ("Immigration officials and advocates said they weren't aware of any cases involving an applicant faking being gay to gain asylum.").

78. Immigration Equality is a non-profit organization that provides legal aid to LGBT and HIV-positive immigrants through its own staff attorneys and its pro bono partner law firms. *About Us*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/about-us (last visited Apr. 28, 2017). It "is the nation's leading LGBTQ immigrant rights organization" and its impact can be felt around the United States. *Id.*; *see also Press*, IMMIGRATION EQUALITY, http://www.immigrationequality.org/press (last visited Apr. 28, 2017).

79. IMMIGRATION EQUALITY, *supra* note 14, at 142.

80. For example, if an applicant was persecuted due to skin color or appearing to be a member of a race.

81. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 15.

82. IMMIGRATION EQUALITY, *supra* note 14, at 137.

such that, if they were asked by an attorney in any other court proceeding, they would be subject to strong objections."[83]

It is important that IJs have a way to determine whether a respondent does fall into one of the five protected grounds. If a respondent cannot answer a basic question the way someone within that protected ground would, it can reduce his or her credibility. This is rightfully so, "given the incentive of aliens who can remain in the United States only if they are granted asylum to claim membership in a persecuted group and swear falsely in support of the claim."[84] But sometimes IJs go too far. This is particularly true with regards to a respondent's religious beliefs and sexual orientation.

II. THE INAPPROPRIATE QUESTIONING OF AND ASSUMPTIONS ABOUT RESPONDENTS IN REMOVAL PROCEEDINGS

While TAs have an obligation to cross-examine respondents about their claims, IJs have an obligation to elicit all the relevant facts to make an informed decision. But neither should have the obligation or privilege to ask inappropriate and overly-personal questions of respondents. Unfortunately, IJs and TAs ask inappropriate questions all too often. IJs will then use the responses as the basis for denying a claim if they are not answered in the way that the IJ expects. While there are some safeguards to protect the rights of respondents—at least on appeal—not enough has been done to assure fair and impartial hearings.

A. THE CREDIBILITY OF THE RESPONDENT

In any court proceeding, no witness is automatically assumed credible. A witness must prove his or her credibility through testimony. Similarly, respondents in immigration proceedings, who almost always testify, must prove their credibility.[85]

A respondent being found credible in an immigration proceeding, though, is arguably as important, or more important, than a defendant being found credible in his or her criminal trial. According to the Immigration and Nationality Act, supplemented by the REAL ID Act in 2005, so long as a respondent delivers testimony that "is credible, is persuasive, and refers to specific facts," such testimony alone may be adequate to sustain his or her burden of proof that he or she is a refugee, and thus eligible for a grant of asylum.[86] What this means for LGB respondents is that they must testify

83. *Id.* at 143.

84. Muhur v. Ashcroft, 355 F.3d 958, 960 (7th Cir. 2004).

85. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2012); *see also 11. Immigration Basics: Challenging Asylum Cases*, *supra* note 35 ("[IJs] are often fearful that an [asylum-seeker] has completely fabricated his claim simply to remain in the United States . . . .").

86. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii); *see also* Tang v. U.S. Attorney Gen., 578 F.3d 1270, 1276 (11th Cir. 2009) ("If an alien's testimony is credible, it may be sufficient, without corroboration, to satisfy [his] burden of proof in establishing [his] eligibility for relief from removal.");

credibly and persuasively, and refer to specific facts. He or she does not necessarily need to provide any additional evidence for the claim to succeed; his or her own experiences can suffice.[87]

While such a policy appears to make it easier for anyone seeking asylum to prevail on his or her claim, proving credibility is no easy task. The IJ alone makes credibility determinations,[88] though the BIA and courts of appeals often scrutinize them, and it is generally the job of the TA to tear down any semblance of credibility.[89] An IJ 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.[90]

While it may seem that IJs are looking for honesty and candor from respondents, certain IJ tactics can cause some respondents to be dishonest. Some immigration attorneys and respondents make their clients/themselves appear "stereotypically" LGB according to Western standards so that they

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9. Immigration Basics: Real ID Act, IMMIGRATION EQUALITY, http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-real-id-act (last visited Apr. 28, 2017) (summarizing how an applicant can "corroborate her . . . asylum claims"). The credibility requirement is only half of what this portion of the INA addresses. While credible testimony is enough to sustain the respondent's burden, respondents should provide evidence to corroborate their claim, if possible. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii). Just as an IJ *may* grant asylum where a credible respondent has provided no corroboration, IJs *may* require such corroboration before issuing a grant. Jaramillo-Mesa v. U.S. Attorney Gen., 405 F. App'x 449, 451–52 (11th Cir. 2010); *Tang*, 578 F.3d. at 1276–77; *9. Immigration Basics: Real ID Act, supra*. While the issues surrounding corroborating evidence are important, complex, and fascinating, they are not at issue in this Note; what *is* at issue in this Note is IJs' preconceived notions about religion and sexual orientation, the relevance of which decreases upon the introduction of corroborating evidence—regardless of how relevant such corroborating evidence may actually be. While corroborating evidence would likely save the claims of the respondents advocated for in this Note, this Note argues that their corroboration should not be necessary, so long as respondents are sincere and credible.

87. That is, until the IJ requests such corroboration. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii). But this Note does not address such a requirement to provide corroboration when an IJ requests it.

88. *See* INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (the IJ is the "trier of fact" in an immigration proceeding).

89. I do not intend to disparage any TAs with this statement. I merely wish to highlight the adversarial nature that underlies immigration court proceedings, no matter how "simple" they may sometimes seem on paper.

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

comport with the worst-case-scenario IJ's idea of a member of the LGB community.[91] When respondents refuse or are unable to "play up" such a stereotype, they can face either IJs 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 IJs, trying to give the respondent a chance to prove or disprove their personal views. While IJs likely deserve the benefit of the doubt that they are only using such tactics to strengthen the respondent's case, such tactics should not be allowed in immigration proceedings. And largely, the speculation and conjecture is not allowed: Courts of appeals have repeatedly chastised IJs for relying on "speculation and conjecture" in making their determinations.[92] Still, respondents are left facing inappropriate and irrelevant questions from a "helpful" IJ, just trying to ascertain the "truth."

B. THE INAPPROPRIATE QUESTIONS AND ASSUMPTIONS ABOUT LGB GROUP MEMBERSHIP

Those who claim asylum on account of their sexual orientation are often faced with inappropriate and intrusive questions[93]—questions that could lead to their removal if they do not answer them "correctly."[94] As one lesbian asylum-seeker put it, "[IJs] 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."[95]

One woman, Claire Bennett, a former Research Fellow at the ESRC Centre for Population Change, University of Southampton,[96] took it upon herself to interview "a dozen gay women from socially conservative countries

91. *See* Bilefsky, *supra* note 62 ("After years of trying to conceal his sexual orientation back home in Brazil . . . Mr. Castro had been advised by his immigration lawyer that flaunting it was now his best weapon against deportation.").

92. *See, e.g.*, Tavera Lara v. U.S. Attorney Gen., 188 F. App'x 848, 857 (11th Cir. 2006) ("An IJ's finding must be based on evidence in the record and not on speculation or conjecture." (citing Sukwanputra v. Gonzales, 434 F.3d 627, 636 (3d Cir. 2006))); Karouni v. Gonzales, 399 F.3d 1163, 1177 (9th Cir. 2005) ("Again, it is well-settled in this circuit that an IJ's speculation and conjecture cannot substitute for substantial evidence."); Paramasamy v. Ashcroft, 295 F.3d 1047, 1052 (9th Cir. 2002) ("An immigration judge's personal conjecture 'cannot be substituted for objective and substantial evidence.'" (quoting Bandari v. INS, 227 F.3d 1160, 1167 (9th Cir. 2000))).

93. *See* IMMIGRATION EQUALITY, *supra* note 14, at 143; Sridharan, *supra* note 39; Colin Yeo, *Questions to a Bisexual Asylum Seeker in Detention*, FREEMOVEMENT (Jan. 24, 2014), https://www.freemovement.org.uk/questions-to-a-bisexual-asylum-seeker-in-detention.

94. Tom Batchelor, *"Guilty Until Proven Innocent": The Trial of LGBT Asylum Seekers Detained in the UK*, NEWSTATESMAN (Mar. 10, 2015), http://www.newstatesman.com/world/2015/03/guilty-until-proven-innocent-trial-lgbt-asylum-seekers-detained-uk.

95. 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, 11:26 PM), http://www.independent.co.uk/nws/uk/home-news/gay-prove-it-then-have-you-read-any-oscar-wilde-judges-accused-of-asking-lesbian-asylum-seekers-8558599.html.

96. Bennett & Thomas, *supra* note 56, at 28.

such as Pakistan, Saudi Arabia, Uganda and Jamaica to assess what their experience of applying for asylum [in the UK] has been like."[97] Her modest study confirmed the worst: She found that the women were routinely subjected to "inappropriate and insensitive" questioning from judges attempting to ascertain whether the women were actually gay.[98] Most notably,

> [o]ne woman from Jamaica was told by an immigration judge that he did not believe she was homosexual because "you don't look like a lesbian". . . . [Another woman's] credibility as a lesbian was also questioned because she had not attended a Pride march and the immigration judge [told] her that "all lesbians go to Pride."[99]

"Many of the women [in Bennett's study] complained that much of the questioning seemed to presume they led the same kind of gay lifestyles as someone might in the West . . . . The questioning also made stereotypical assumptions of what constitutes a typical gay lifestyle."[100] Another lesbian who applied for asylum in the United Kingdom was quizzed about her taste in music.[101] In Canada, one attorney heard so many of these types of questions that he began calling the process "Gay 101."[102]

While such examples come from all around the world, it would be willfully ignorant to assume that asylum seekers in the United States do not face similar questions. Unfortunately, such issues are difficult to quantify in the United States because "[a]sylum hearings are confidential and the hearings are generally closed to the public."[103] Further, "[g]ranting asylum is a secretive process involving many court documents that are not subject to U.S. public records laws."[104] The decisions of IJs are oral decisions, which, while often recorded, are not often published, nor are the transcripts of the hearings.[105] Generally, the most that is released to the public are the small snippets that come in circuit court decisions; the American public is lucky to get what it can about these important proceedings.

From what the Second Circuit Court of Appeals released in its opinion, *Ali v. Mukasey*, circuit courts are likely horrified by the conduct of the IJ when it comes to these issues. They are unlikely to be proud of releasing evidence

97. Taylor, *supra* note 95.

98. *Id.*

99. *Id.*

100. *Id.*

101. S.N., *When and Where Is Being Gay Grounds for Asylum?*, ECONOMIST: ECONOMIST EXPLAINS (Nov. 19, 2013), http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-13.

102. Marina Jimenez, *Gay Refugee Claimants Seeking Haven in Canada*, GLOBE & MAIL (Apr. 25, 2004, 11:20 PM), http://www.theglobeandmail.com/news/national/gay-refugee-claimants-seeking-haven-in-canada/article1136511.

103. IMMIGRATION EQUALITY, *supra* note 14, at 138.

104. Gliha, *supra* note 27.

105. Benedetto, *supra* note 68, at 472.

of such lapses in judgment: "We believe [the IJ] 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."[106] Some IJs can stay eerily quiet on this issue during a hearing and base a denial of asylum on the respondent not appearing overly gay.[107] While such a method might temporarily spare a respondent's feelings, the denial that follows cannot be considered a respectable alternative: Inappropriate questions and assumptions alike should all be eliminated from IJ rhetoric.

C. WHY IT IS A PROBLEM

IJs who use stereotypes as a basis for their decisions and subject respondents to demeaning and irrelevant questioning about their sexuality do more than just risk excluding those who truly are refugees—the negative psychological effects on respondents in these situations have been well-documented. First and foremost, "being questioned in open courts about their sexual desires and their relationships [can be] difficult, and for some [respondents] this experience affect[s] their mental health and well-being."[108] Often, asylum-seekers suffer from PTSD or similar ailments even before the application process begins.[109] The process of applying for asylum is taxing, and it has been known to cause "major depression" among those who are "especially vulnerable" because they "are being repeatedly rejected and have continued to press claims for protection."[110] In Australia, this has led to the discovery of a new mental illness: Asylum Seeker Syndrome.[111] The process of applying for asylum in the U.S. is also particularly taxing because those asylum-seekers who are lucky enough to avoid detention are unable to work or receive public assistance for at least 180 days after the filing of their

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

107. *See* Todorovic v. U.S. Attorney Gen., 621 F.3d 1318, 1323 (11th Cir. 2010) ("The Court studied the demeanor of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay. . . . [H]e bears no effeminate traits or any other trait that would mark him as a homosexual."); Stephanie Mencimer, *Immigration Judge to Asylum Seeker: You Don't Look Gay*, MOTHER JONES (Oct. 7, 2010, 6:42 AM), http://www.motherjones.com/mojo/2010/10/bush-immigration-judge-gay-asylum-seeker.

108. Bennett & Thomas, *supra* note 56, at 26.

109. IMMIGRATION EQUALITY, *supra* note 14, at 58.

110. Linda Hunt, *Psychiatrists Identify 'Asylum Seeker Syndrome,'* ABC NEWS (May 21, 2012, 10:21 PM), http://www.abc.net.au/news/2012-05-22/rsearch-reveals-mental-health-toll-on-asylum-seekers/4025480.

111. *Id.*

application.[112] Respondents are already vulnerable enough—they do not need the added toll that these difficult and intrusive questions can take.

The use of stereotypes about the LGB community in court proceedings also shows a deep disrespect for the community's members.[113] As the Tenth Circuit noted in *Razkane*, "Such stereotyping [of LGB persons] would not be tolerated in other contexts, such as race or religion."[114] This essentially ranks refugees, with LGB respondents at the bottom. Such a "ranking" of protected grounds is not compatible with the text of the INA, which places all protected grounds on equal footing.[115] While currently those applying for asylum based on their membership in a PSG have more hurdles than those applying based on their race or religion, those additional hurdles have nothing to do with meeting an IJ's personal biases based on social stereotypes.[116]

Further, such inappropriate questions and assumptions are not likely to lead IJs to the truth of a respondent's claim. Many respondents have hidden their sexuality to escape persecution in their home countries. "A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, *you will take pains to avoid being socially visible . . . .*"[117] Courts cannot and should not force a person who fled from persecution to first make a target of him or herself before he or she can find relief. Lori Adams, an attorney at Human Rights First, was candid with the *New York Times*: "The rationale is that if you don't look obviously gay, you can go home and hide your sexuality and don't need to be worried about being persecuted."[118]

Arguably the most famous of these respondents, Jorge Soto Vega, was originally denied asylum because the IJ found that "Soto Vega didn't 'appear gay' and could keep his sexual orientation hidden if he chose to."[119] Eventually, after appealing his case to the BIA and to the Ninth Circuit Court of Appeals where his denial was reversed and remanded, an IJ awarded him

112. "*At Least Let Them Work:" The Denial of Work Authorization and Assistance for Asylum Seekers in the United States*, HUM. RTS. WATCH (Nov. 12, 2013), https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united.

113. Ali v. Mukasey, 529 F.3d 478, 492 (2d Cir. 2008).

114. Razkane v. Holder, 562 F.3d 1283, 1288 (10th Cir. 2009).

115. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2012) ("To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.").

116. *See* NAT'L IMMIGRANT JUSTICE CTR., *supra* note 42, at 2 ("The BIA held that in order to establish a viable PSG, the group must be based on an immutable characteristic, be socially visible, and particularly defined.").

117. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) (emphasis added).

118. Bilefsky, *supra* note 62.

119. *Soto Vega v. Gonzales*, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/soto-vega-v-gonzales (last visited Apr. 29, 2017).

asylum, stating "that no one should have to hide their [sic] sexual orientation to be safe."[120]

But IJs' use of stereotypes has also signaled to asylum-seekers that they are better off coming into court being disingenuous, as it might be the only way to prevail on their claims. One of these asylum-seekers, Romulo Castro, was "advised by his immigration lawyer that flaunting [his sexual orientation] was now his best weapon against deportation."[121] This should not be an acceptable consequence of our immigration system; IJs should do whatever they can to encourage truthfulness in testimony.

Lastly, such questioning also reveals some IJs' deficiency in understanding LGB issues. For example, one IJ was noted to have asked why a respondent "*chose* to be gay," a question understood to be antiquated and insulting, as society has largely come to understand sexual orientation as beyond the realm of choice.[122] IJs and attorneys alike have either refused to believe respondents can be gay because they have children or have had heterosexual relationships in the past, or they use such a fact to inappropriately pick away at credibility.[123] Such a deficiency highlights the need for additional training on LGB issues for all those involved in the immigration system,[124] in addition to the change in inquiry methods during immigration proceedings that this Note advocates for.

D. INAPPROPRIATE QUESTIONING ABOUT RELIGIOUS BELIEFS: A WORKING METHOD

LGB respondents have not been the only respondents in asylum proceedings who have been subjected to inappropriate questioning from IJs about their claims. Such inappropriate questions have also plagued respondents claiming asylum based on their religious beliefs. An asylum claim

120. *Id.*

121. Bilefsky, *supra* note 62.

122. Bennett & Thomas, *supra* note 56, at 26 (emphasis added).

123. *Id.*; *see also* Claire Bennett, *U.K. Authorities Routinely Humiliate LGBT Asylum Seekers*, SLATE: OUTWARD (Mar. 5, 2015, 12:13 PM), http://www.slate.com/blogs/outward/2015/03/05/lgbt_asylum_seekers_in_the_u_k_are_routinely_humiliated.html ("He put it this way at the court hearing [to the LGB respondent]: 'You can't be heterosexual one day and a lesbian the next day, just as you can't change your race.'").

124. It is a widely accepted fact that IJs need more training. *See, e.g.*, COMM'N ON IMMIGRATION, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 1, http://www.americanbar.org/content/dam/aba/migrated/Immigration_Courts_1.authcheckdam.pdf ("[T]he American Bar Association supports the following measures regarding immigration courts: . . . Provide additional opportunities for training of immigration judges, including training in . . . cultural sensitivity and awareness . . . ."); Jason Dzubow, *Interview with an Immigration Judge: John F. Gossart, Jr.*, ASYLUMIST (Nov. 3, 2015), http://www.asylumist.com/2015/11/03/interview-with-an-immigration-judge-john-f-gossart-jr ("Judges also need more training—one live conference in five years is not adequate."); *Holder: DOJ Needs Congress' Support to Reduce Immigration Backlog*, PBS NEWSHOUR (July 31, 2014, 6:10 PM), http://www.pbs.org/newshour/bb/holder-doj-needs-congress-support-reduce-immigration-backlog ("We need . . . to train more judges.").

based on religious beliefs is relatively similar to a claim based on sexual orientation, but does not require as many distinct components; those asserting a religious claim need only show that they have been or will be persecuted on account of their religious beliefs and do not need to show that their group is socially distinct and socially visible as an LGB respondent would need to show.[125]

Much like LGB respondents, respondents whose claims are based on their religion must actually show the court that their claim is truthful, and they are similarly unable to do so by their appearance alone. For that reason, they are also asked intrusive and inappropriate questions that do little to help the IJ ascertain whether they actually believe in their professed religion—in cases for asylum based on religious beliefs, IJs often ask questions that reinforce stereotypes or that have little to do with the religion at all.

1. The Inappropriate Questions Posed to Respondents Claiming Asylum Based on Their Religious Beliefs

In one particularly egregious case of a respondent claiming asylum based on his religious beliefs, an IJ who was ill-informed about Sikhism took to Wikipedia to learn more about the religion.[126] He "asked [the respondent] about the symbolism behind certain objects revered in Sikhism, the reasons for particular traditions, and [the respondent's] compliance with rules that Sikhs must follow."[127] The respondent replied, "explain[ing] what *he understood* these religious beliefs to mean . . . . [The] IJ . . . however, seemed only interested in answers that parroted back the exact language of the Wikipedia entry."[128] Instead of "listen[ing] to [the respondent's] personal explanation of religious beliefs. . . . [and] thoughtfully consider[ing the respondent's] tone, words, and demeanor, as well as other indicia of reliability," the IJ doubted that the respondent was actually a Sikh.[129] Unfortunately, this is not the only example of an IJ relying on internet articles, and not the respondent's sincerity, to make credibility determinations.[130]

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125. *Compare* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012) (defining refugee as one experiencing, inter alia, religious-based persecution), *with* Part I.A.i, *supra* (explaining requirements for asylum for LGB members). The additional hurdles that those claiming asylum because of their membership in a PSG face come not from the statutes, but from case law, and thus do not apply to religious claims. *See supra* Part I.A.i.2.

126. Singh v. Holder, 720 F.3d 635, 643 (7th Cir. 2013). It is worth mentioning that the asylum claim of the respondent in this case was actually denied. *Id.* at 644. That did not stop the Seventh Circuit from berating the IJ for his conduct and setting a standard for religious belief that would govern IJ's behavior moving forward. *Id.*

127. *Id.* at 643.

128. *Id.* at 643–44 (emphasis added).

129. *Id.* at 644.

130. *See* Cosa v. Mukasey, 543 F.3d 1066, 1069 (9th Cir. 2008) (reversing where the IJ found adverse credibility after comparing the respondent's answers to some that she found on the internet).

In another case, an IJ denied a respondent's claim where the respondent "fail[ed] to answer adequately what [the IJ] considered [to be] basic questions about Christianity."[131] Specifically, the respondent said that Thanksgiving is a Christian holiday—a fact that the IJ found so egregious that she cited it as one of her reasons for rejecting his claim, yet a fact that is so unclear that the Ninth Circuit Court of Appeals, on appeal, cited two United States Presidents who considered the holiday to be one related to the Christian faith.[132] The respondent also was not able to recite enough information about the Old and New Testament to please this IJ.[133] The court of appeals reversed and remanded his claim.[134]

Such questions are inappropriate inquiries into the respondents' religious beliefs because they do not accurately ascertain whether the respondent is or is not a believer—the only hurdle related to their religion that the respondent must clear. Just like almost any church, synagogue, or mosque would welcome a sincere believer who is uneducated about doctrine, nowhere, in any of the United States' immigration laws, are there any requirements for knowing religious doctrine to win asylum based on religious beliefs. For that reason, the circuit courts of appeals have instructed IJs on how to properly question respondents who claim asylum based on their religious beliefs.

2. Sincerity over Stereotype in Religion Claims

In another asylum case, a respondent was unable to convince his IJ that he truly was a Christian because he was "[unable] to demonstrate basic knowledge of Christianity," according to her standards.[135] In reversing the IJ's decision, the Second Circuit Court of Appeals noted:

> Both history and common sense make amply clear that people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion's doctrinal tenets, and that those same people can be persecuted for their religious affiliation. Such individuals are just as eligible for asylum on religious persecution grounds as are those with more detailed doctrinal knowledge.[136]

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131. Li v. Holder, 629 F.3d 1154, 1156 (9th Cir. 2011); *see also* Kevin Eckstrom, *Religious Test in Asylum Case Ruled Improper*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2011/01/21/religious-knowledge-test-_n_812370.html.

132. *Li*, 629 F.3d at 1157–58. Apparently, those Presidents, George Washington and Abraham Lincoln, would be so incredible that they would be unable to succeed if they claimed asylum in front of this IJ. *Id.* So much for our dear "Honest Abe."

133. *Id.* at 1158.

134. *Id.* at 1160.

135. Rizal v. Gonzales, 442 F.3d 84, 88 (2d Cir. 2006) (emphasis omitted). Her questioning included asking where Jesus was crucified, which of the apostles authored the New Testament, and who denied knowing who Jesus was after he was crucified and rose from the dead. *Id.* at 87.

136. *Id.* at 90.

As these circuit courts have professed, "[o]rthodoxy is no substitute for sincerity;"[137] a respondent may very well be "a true believer" even if he or she is not able to recite "details of [his or her claimed] religious doctrine."[138] Courts of appeals have chastised IJs who ask respondents doctrinal questions and expect certain responses. The Seventh Circuit Court of Appeals, in *Jiang v. Gonzales*, equated an IJ quizzing the respondent on certain doctrinal issues with "concluding that someone is not a baseball devotee because he can't explain the intricacies of the balk rule."[139] The court noted that Christians in China have "a lack of access to religious training and literature," no doubt impacted by their need to keep their practice secret.[140] Requiring a respondent to have the same knowledge about a religion as a believer who lives in a place with freedom of religion is ludicrous.

Multiple circuits have plainly rejected the idea that doctrinal quizzes are adequate methods of determining the validity of a claimed religious belief.[141] Such a prevailing of sincerity over doctrinal knowledge is prevalent not only in the immigration field, but also the law pertaining to the free exercise of religion under the First Amendment.[142] It follows naturally, then, that in a

137. Singh v. Holder, 720 F.3d 635, 644 (7th Cir. 2013); *see also* Jiang v. Gonzales, 485 F.3d 992, 995 (7th Cir. 2007) ("In the Profile of Asylum Claims, the Department of State informs adjudicators that 'because of a lack of access to religious training and literature, some committed Chinese Christians may have difficulty responding to' simple doctrinal questions."); Ahmadshah v. Ashcroft, 396 F.3d 917, 920 n.2 (8th Cir. 2005) ("We are . . . not convinced that a detailed knowledge of Christian doctrine is relevant to the sincerity of [a respondent's] belief; a recent convert may well lack detailed knowledge of religious custom. Even if [the respondent] did not have a clear understanding of Christian doctrine, this is not relevant to his fear of persecution.").

138. *Jiang*, 485 F.3d at 995 (quoting Muhur v. Ashcroft, 355 F.3d 958, 961 (7th Cir. 2004)).

139. *Id.*

140. *Id.*; *see China*, OPEN DOORS, https://www.opendoorsusa.org/christian-persecution/world-watch-list/china (last visited Apr. 29, 2017) (presenting persecution level of Christians in China).

141. *See, e.g.*, Li v. Holder, 629 F.3d 1154, 1158 (9th Cir. 2011) ("But more importantly, an IJ's perception of a petitioner's ignorance of religious doctrine is not a proper basis for an adverse credibility finding."); Cosa v. Mukasey, 543 F.3d 1066, 1070 (9th Cir. 2008) ("Of course, it is not unfair to test the scope of a petitioner's understanding of her religion or even to challenge a preposterous claim, but to do so, as here, without a benchmark other than the IJ's views is unacceptable."); *Jiang*, 485 F.3d at 995 ("Instead of accounting for this limited doctrinal knowledge, the IJ here erroneously discredited Jiang's testimony based on an exaggerated notion of how much people in China actually should know about Christianity."); Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006) ("To the extent that the IJ's conclusion stemmed from the rationale that a certain level of doctrinal knowledge is necessary in order to be eligible for asylum on grounds of religious persecution, we expressly reject this approach.").

142. *See* Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007) ("While the Free Exercise Clause may be aimed primarily at protecting 'central' religious practices, it is beyond the competence of the courts to determine the centrality of a particular religious belief or practice. The test is sincerity, not centrality."); *see also, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection."); Witmer v. United States, 348 U.S. 375, 381 (1955) ("[T]he ultimate question in conscientious objector cases is the sincerity of the registrant in

court system where credible testimony with no additional evidence or corroboration can survive the respondent's burden of proof, [143] sincerity should prevail over doctrinal knowledge. Unfortunately, LGB respondents are not afforded the same protection for their sexual orientation: IJs ask inappropriate questions, akin to the doctrinal questions once asked of religious respondents, and turn respondents away when they are unable to "adequately" answer them. If only such sincerity were rewarded in LGB cases as it is rewarded in religious cases.

III. SINCERITY OVER STEREOTYPE FOR SEXUAL ORIENTATION CLAIMS

Just as IJs have substituted sincerity for stereotype in asylum cases based on religious beliefs, IJs should also make such a substitution for claims based on sexual orientation. This Part describes what tools IJs can use to make such a transition in an effective and positive way.

A. THE CREDIBILITY DETERMINATION—MEASURING SINCERITY IN VERBAL AND NON-VERBAL COMMUNICATION

It is possible that IJs, in an effort to be sure that they are doing their job to the best of their ability, might forget the awesome tool they wield that is unavailable in other types of legal cases: the credibility determination. IJs have the power to sustain an asylum claim on a respondent's testimony alone, without any additional evidence, so long as the IJ finds the respondent to be credible.[144]

To evaluate a respondent's credibility, an IJ looks at the respondent's "demeanor, candor, or responsiveness" in testifying. [145] The IJ should compare the respondent's testimony to any other statements that the respondent has made, regardless of whether they were made under oath, and ensure that they are all consistent with one another.[146] Lastly, an IJ should look at the respondent's testimony as a whole and decide whether or not it is plausible.[147] Such a credibility determination inherently requires the subjective evaluation of the IJ, which rightfully includes the IJ's own skillset, knowledge, and experience. However, no IJ should determine credibility based on whether a respondent does or does not comport to an IJ's stereotypical understanding of the LGB community.

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objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question."); Benning v. Georgia, 391 F.3d 1299, 1313 (11th Cir. 2004) ("[T]he First Amendment . . . requires Georgia to determine whether the asserted belief of an inmate making a Free Exercise claim is religious and sincerely held.").

143. *See supra* note 86 and accompanying text.

144. *See supra* notes 78–79 and accompanying text.

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

146. *Id.*

147. *Id.*

Does this mean that IJs should avoid asking additional questions of the respondent after the respondent testifies? Absolutely not. It is still incredibly important for the IJ to be sure that all the facts have come to light before making a decision. This Note only aims to remind IJs that they have all the tools they need at their fingertips—and a decision can easily be made without resorting to stereotypes and inquiries about a respondent's sexual history.

B. POSSIBLE IJ QUESTIONS: WHAT WORKS

Of course, even after a respondent has testified, an IJ still may not be satisfied that the respondent is actually a member of the LGB community—and that is perfectly acceptable. It is the job of the IJ to be skeptical of claims and to be sure that they are ascertaining all the important facts before coming to a decision. For that reason, IJs must have a set of questions that they can ask respondents to help them verify that they are LGB—but these need to be questions that are appropriate and not based on stereotypes. They also need to be questions that help to flesh out the markers of credible or not-credible testimony.

Sometimes, respondents can get nervous speaking to the judge, and they may not testify to all that they had planned—and all that is needed for them to win their cases.[148] It is in these situations that IJs should be sure to collect all relevant information. When adjudicating claims of respondents without attorneys, this may mean that IJs need to ask more questions or adjust their tone to make the respondent feel more comfortable. Where the respondent does have counsel present, the IJ should allow the attorney to elicit additional information through a redirect, so long as it is relevant and not a waste of the court's time.[149]

First and foremost, before IJs begin their questioning to determine whether a respondent is or is not LGB, they should preface their questions with an explanation of what they are looking for. For example, an IJ could say, "I'm just going to ask you a few questions about how you first came to understand that you were LGB and how that has affected you and your relationships. It is important that I have such information in order to adjudicate your claim." Such a preface can help respondents feel comfortable speaking to the IJ and may help to increase their candor.

When asking questions, IJs can do their part to make the respondent comfortable, but asking more like the respondent's own attorney—a proper and expected role of the IJ. The LGBT Bar Association would thus recommend that IJs use "[o]pen-[e]nded, [n]on-[j]udgmental [q]uestions [a]nd [d]emonstrat[e] [p]atience, [a]ctive [l]istening [a]nd [s]ensitivity"

148. *See 26. Immigration Court Proceedings*, *supra* note 58.

149. *Id.*

towards the respondent.[150] Also, IJs should allow such respondents a few extra moments to answer such questions, in case they should feel nervous or self-conscious. They should do whatever possible to make the respondent feel open and ready to assist in his or her own defense.

1. Questions About Sexual or Other History are Irrelevant

There are no circumstances under which a respondent should have to testify to a lengthy sexual history to win asylum in the United States. Just as a person may be Christian without ever setting foot in a church, a person can be LGB without ever having acted on his or her homosexual attractions—and the United States Immigration Laws do not require such actions for a grant of relief.[151] Similarly, nothing in the United States Immigration Laws require that LGB respondents comport with an IJ's stereotypical view of LGB persons—i.e., whether or not a person has attended a Pride celebration should have no bearing on an IJ's decision. Instead of focusing on what a respondent has or has not done, an IJ should focus on what a respondent has or has not *felt*.

IJs *should* ask about when the respondent first knew that they were LGB and how they knew. IJs should feel free to ask about a respondent's past romantic history and feelings, but they should just stop short of any questions that are too intrusive into topics that may make a respondent uncomfortable and are irrelevant to the claim. If respondents have been romantically involved with people of the same sex, IJs should ask how they felt when they were with their partners. IJs can ask if respondents have ever felt heartbreak before and ask them to describe the heartbreak and how they dealt with it. All the while, IJs should use the criteria for credibility determinations.[152] So long as IJs do what they can to make sure that respondents feel comfortable in the courtroom, truthful respondents are likely to respond with more candor and with more vivid descriptions of their time in their home country. IJs are incredibly intelligent and talented—by utilizing their unique skillset as opposed to their unique understanding of LGB stereotype, IJs can create a much better environment, both for LGB respondents and for themselves.

But, IJs should not feel the need to stray away from discussing a respondent's sexual history *if the respondent brings it up himself or herself*. If a discussion of the respondent's sexual history will help the IJ make a decision

150. *See* HEATHER MCCLURE ET AL., PREPARING SEXUAL ORIENTATION-BASED ASYLUM CLAIMS: A HANDBOOK FOR ADVOCATES AND ASYLUM SEEKERS 22 (2d ed. 2000), http://lgbtbar.org/annual/wp-content/uploads/sites/3/2014/07/Preparing-Sexual-Orientation-Based-Asylum-Claims.pdf (providing guidelines for how to proceed for attorneys trying asylum cases).

151. *See* Toboso-Alfonso, 20 I. & N. Dec. 819, 821 (B.I.A. 1990) ("The government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual.").

152. *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2012) (listing the factors for credibility determinations).

on the claim, it should be welcomed. IJs should be careful, though, to keep their body language neutral even if they are uncomfortable with the idea of homosexual intercourse—exhibition of this type of body language may frighten the respondent and make the respondent less candid and less likely to reveal other, helpful information.

2. Proving Social Visibility Without Resorting to Stereotype

While, ideally, the social visibility requirement for PSGs would be removed,[153] for now LGB respondents must not only prove that they are lesbian, gay, or bisexual, but they must also prove that they would be recognized as lesbian, gay, or bisexual in their home country to prevail in their claim for asylum.[154] This is where IJs often insert their own "experiences" with the LGB community and may be willing to deny a claim simply because a lesbian does not wear her hair cropped short.

Social visibility is not limited to ocular visibility—it can come in the way a respondent speaks or carries him or herself. It stems from how the respondent's home society would view him or her, not how his or her persecutor would view the respondent.[155] Thus, an IJ should feel free to ask if people in the respondent's home country knew that the respondent was LGB and if they knew, how they found out. If a lesbian respondent were unable to show that she would be recognized as, or at least suspected to be, a lesbian in her home country, her claim would not succeed.[156] An IJ can also feel free to ask what, in the eye of the respondent, would outwardly show that someone is gay in his or her home country.[157] While such a response is likely of little value as evidence, an IJ can evaluate the truthfulness of the respondent's testimony and assertion based on the candor and plausibility of this particular answer.[158]

153. *Compare* Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) ("[The BIA] has found groups to be 'particular social groups' without reference to social visibility . . . ." (quoting Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996))), *with* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013) (stating that social visibility and social distinction requirements will be upheld as long as they "d[o] not directly conflict with prior agency precedent"). Do the social visibility and social distinction requirements really comport with "prior agency precedent" as the Ninth Circuit claims? *Id.* The Seventh Circuit would disagree. But this is an argument for another day.

154. E-A-G-, 24 I. & N. Dec. 591, 593–95 (B.I.A. 2008).

155. M-E-V-G-, 26 I. & N. Dec. 227, 242 (B.I.A. 2014).

156. *Id.*

157. *See* Tami Abdollah, *Citing Persecution, Judge Grants Gay Mexican Immigrant Asylum in U.S.*, L.A. TIMES (Jan. 31, 2007), http://www.latimes.com/local/la-me-persecution31jan31-story.html ("He's a 38-year-old man who is not married and has never been married. In Mexico, that means you're gay . . . .").

158. *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2012). Additionally, IJs have the power to perform their own research and utilize outside knowledge to bolster or tear down a respondent's claim. *See generally* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, *Administrative Notice*, *in* IMMIGRATION JUDGE BENCHBOOK (2015), http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/administrative-notice.pdf.

Such an inquiry is of particular importance, especially for LGB respondents who are not from Western countries, because what may be seen as "gay culture" in the West, may be the furthest from gay culture in the East.

Additionally, IJs can ask if their respondents made any effort to hide their LGB identity and how they did so.[159] Such a question is likely to show a respondent that the claim will not be dismissed in the United States simply because the respondent hid her identity at home. Credible testimony about hiding behaviors may also be the key to a respondent's relief: If a respondent did not do anything to hide her LGB identity before coming to the United States, an IJ is right to question how likely it is that such a respondent would actually be subject to persecution in her home country on account of her sexual orientation at all.[160]

IV. CONCLUSION

LGB persons who are subjected to persecution come to the United States in search of relief and safety. As international obligations require, the United States takes many of them in and allows them to stay, but not before placing some in deportation proceedings, which forces them to face an IJ. While some IJs have been understanding and supportive of the LGB community, all IJs should do their part to rely on sincerity and credibility in assessing respondents' claims. They should engage in a comfortable question-and-answer session and putting stereotypes aside, as they have for religion claims. Only then will the United States be treating LGB asylum seekers with the respect, dignity, and safety they deserve.

159. *Cf.* Part II.C.

160. *See supra* notes 117–21 and accompanying text.