2016

The Shibboleth of Discretion: The Discretion, Identity, and Persecution Paradigm in American and Australian LGBT Asylum Claims

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I. INTRODUCTION

> Romulo Castro considered attending his asylum interview in Rosedale, Queens, [New York] dressed as Fidela Castro, a towering drag queen in six-inch stilettos, a bright green poodle skirt and a mane of strawberry blonde hair. In the end, Mr. Castro, 34, opted for what he described as understatement: pink eye shadow, a bright pink V-neck shirt and intermittent outbursts of tears. After years of trying to conceal his sexual orientation back home in Brazil (where Fidela never made an appearance), Mr. Castro had been advised by his immigration lawyer that flaunting it was now his best weapon against deportation.[1]

Mr. Castro sought asylum as a refugee from Brazil because his home country's attitudes toward, and treatment of, the LGBT community convinced him he could not live safely without concealing integral parts of his identity.[2]

When the international community first defined a refugee in 1951 and established criteria for those who could seek asylum in a receiving country, rights for the LGBT community were probably not even considered at the time.[3] Convened at a Conference of Plenipotentiaries in Geneva, the United Nations agreed to a treaty concerning refugees: the Convention Relating to the Status of Refugees.[4] A refugee is defined as one who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a PSG 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.[5]

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1. 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 [hereinafter *Gays Seeking Asylum*].
2. *Id.*
3. After all, the first time that countries on the international stage even discussed discrimination based on sexual orientation was in 2008. *See* REUTERS (Dec. 19, 2008), http://www.reuters.com/article/us-un-homosexuality-idUSTRE4BH7EW20081219.
4. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; G.A. Res. 429 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 48 (Dec. 14, 1950) [hereinafter 1951 Convention]. This covered only those persons who had become refugees as a result of events occurring before January 1, 1951. *Id.* In 1967, a Protocol was signed that expanded the definition to applicants who became a refugee after 1951. Article 1A(2) *Protocol Relating to the Status of Refugees*, 19 U.S.T. 6223 (1968) [hereinafter 1967 Protocol].
5. Article 1A(2), 1967 Protocol, *supra* note 4. While the United States was not a signatory to

Asylum applicants who qualify as refugees are protected from "refoulement," which is the return of a person to a country where her life or freedom would be threatened.[6] Sovereign states that are signatories to the 1951 Refugee Convention,[7] or the 1967 Protocol,[8] withhold removal for those refugees in order to comport with the principle of non-refoulement and satisfy the nation's obligations under those documents.[9] This means that an applicant like Romulo Castro, who can demonstrate a well-founded fear of persecution in his own country, should be able to apply for asylum based on sexual orientation and identity. Unfortunately, receiving countries' attitudes and actions make such an application that much more daunting for LGBT applicants.

Although there is not one monolithic, linear development of a person's sexual identity, the reality is that preconceived notions of what it is to "be gay" permeate the asylum process.[10] The international LGBT[11] community has

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the initial Convention, it is a signatory to the Protocol which incorporates the original Convention. *Id*. Membership in a PSG or particular social group refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic that is beyond the power of the members of the group to change, or is so fundamental to their identities or consciences that it ought not to be required to be changed. Matter of Acosta, 19 I & N 211 (B.I.A. 1985).

6. 1951 Convention, *supra* note 4.
7. *Id.*
8. The 1967 Protocol extended coverage to all refugees regardless of when they had become refugees. 1967 Protocol, *supra* note 4.
9. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.
10. *See, e.g.*, STONEWALL—THE LESBIAN, GAY AND BISEXUAL CHARITY, IMMIGRATION & ASYLUM, http://www.stonewall.org.uk/what_we_do/research_and_policy/2874.asp. For more detailed information, see NATHANAEL MILES, NO GOING BACK: LESBIAN AND GAY PEOPLE AND THE ASYLUM SYSTEM (2010).
11. Lesbian, Gay, Bisexual, and Trans. Generally, these terms can be defined as follows:

> Lesbian is a term for a female whose primary sexual orientation is to other women. Gay is a term for a male whose primary sexual orientation is to other men. This term is sometimes used by lesbians (i.e., gay women). Bisexual is a term for a person whose sexual orientation is directed towards individuals of more than one sex or gender, though not necessarily at the same time. Trans is an umbrella term referring to people who do not embrace traditional binary gender norms of masculine and feminine and/or whose gender identity or expression does not fit with the one they were assigned at birth; it can refer to transgender, transitioned, transsexual, and genderqueer people, as well as some two-spirit people. Transgender is a term used by individuals who fall[] outside of traditional gender categories or norms. It literally means "across gender," and conveys the idea of transcending the boundaries of the gender binary system. It however is not necessarily a desire to be of the "opposite" sex.

S. Marvel et al., *Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Materials, Services and Facilities* 1 n.2 (2015) (on file with author). This Article will refer to LGBT and is not intended to exclude any group within LGBT from its analysis. However, the reality is that most of the reported cases, particularly in the United States, involve lesbian and gay asylum applicants. Additionally, there is an added nuance related to some identities that deviates from some of the broader themes in this analysis. For example, transgender individuals are treated differently in Iran that LGB individuals, in that a fatwa has been issued to protect them and to accept transgender individuals. However, that country's protection of transgender individuals has a darker side in that this protection is being used to resolve the problem of being gay in Iran and has caused many to flee that country and seek asylum based on the threat of sexual reassignment surgery. *See* Ali

identified the concept of discretion as an area of particular concern, at least for the United States and Australia.[12] Discretion, understood broadly, is an assumption that if an LGBT applicant chooses to live discretely, or even completely closeted, he or she would not be subject to future persecution, even if the applicant's home country has a pervasive homophobic culture or existing laws criminalizing homosexual behavior.[13] A more pressing concern is how this behavioral discretion defines and shapes LGBT identity in a particular social group (PSG) in the asylum process. Both of these issues, behavioral discretion and identity, ultimately impact whether or not an individual's claim of persecution will be deemed valid because behavioral discretion often supplants identity in an asylum determination.

As the approach to LGBT asylum claims has evolved, receiving countries have grappled with the tension between discretion and identity, which is endemic within the asylum process.[14] Recently, the United States Citizenship and Immigration Services (CIS) has promulgated new guidelines for asylum officers processing LGBT asylum claims.[15] These guidelines apply at the initial adjudicatory step of the asylum process, where the interviewers shape the contours of the applicant's identity by the types of questions asked, the testimony received, and the facts found.[16] The guidelines address many of the concerns voiced by the international LGBT community, and shared by many receiving countries, with respect to properly processing LGBT asylum claims and removing some of the Westernized stereotypes that act as improper barriers

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Hamedani, *The Gay People Pushed to Change Their Gender*, BBC MAGAZINE (Nov. 5, 2014), www.bbc.com/news/magazine-29832690; Lorah Moftah, *Iran Transgender Law: Islamic Republic Advances Bill to Protect Transsexuals Amid Crackdown on Gay Rights*, INT'L BUSINESS TIMES (May 27, 2015), http://www.ibtimes.com/iran-transgender-law-islamic-republic-advances-bill-protect-transsexuals-amid-1940978.

12. *See generally* Sabine Jansen, *Introduction: Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, *in* FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY & ASYLUM 1–22 (Thomas Spijkerboer ed., 2013); Jenni Millbank, *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, 13 INT'L J. HUM. RTS. 391 (2009) [hereinafter *Discretion to Disbelief*].
13. *See generally* Janna Weβels, *Discretion in Sexuality-Based Asylum Cases: An Adaptive Phenomenon*, *in* FLEEING HOMOPHOBIA, *supra* note 12, at 55–77; *see also Discretion to Disbelief*, *supra* note 12. This concept of discretion is distinguished from the judicial discretion that is exercised by asylum adjudicators in the United States. When referencing discretion and identity in these applications, this Article focuses on the applicant's behavior, or the court's imposition of certain constructs upon the applicant's identity based on behavior, not on the discretion that would be exercised in deciding whether to grant an application. *See generally* Matter of Pula, 19 I. & N. Dec. 467 (B.I.A. 1987); 8 C.F.R. § 208.13 (2013).
14. *See* Weβels, *supra* note 13, at 55–56.
15. U.S. CITIZENSHIP & IMMIGRATION SERVS., GUIDELINES FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS (2011), http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf [hereinafter U.S. CIS Guidelines].
16. *Id.*

to asylum.[17] At the same time, recent Board of Immigration Appeals (BIA)[18] opinions have rearticulated the PSG requirement—replacing the term "social visibility" with "social distinction" in the hope of dispelling the notion that a group must be actually visible to be persecuted, which may also have a positive impact on LGBT claims.[19]

While the guidelines represent a ground up[20] approach that is laudable, particularly in the United States where identity is still subject to stereotypical Westernized notions of what it is to be gay, they are not binding at any level of the asylum process.[21] The question remains whether the guidelines could be adjusted to more sufficiently address discretion and identity at every level of the asylum process so that there is consistent guidance that is both meaningful and effective.

In Australia, asylum applicants have faced a different struggle with respect to discretion. Instead of being a barrier to an establishment of identity, the struggle has been in terms of finding a well-founded fear of persecution.[22] Looking at the ongoing difficulties Australia has faced in combating the lingering power of behavioral discretion in the adjudicatory process is instructive in considering what may come next for the United States. While the High Court in Australia has made it clear that discretion is not to be considered when determining if an applicant may avoid persecution upon returning home, there are concerns that discretion persists in the decision-making process with respect to discrediting identity claims.[23] In addition, the Supreme Court of the United

17. *Id*. For a discussion of Westernized notions of gay identity, see *infra* Part III.
18. The Board of Immigration Appeals (BIA) is the highest ranking administrative body in the United States CIS. *See* U.S. Dep't of Justice, *Board of Immigration Appeals*, http://www.justice.gov/eoir/biainfo.htm. The BIA acts as an appellate body, as it conducts only paper review of decisions, and its decisions are controlling on Department of Homeland Security officials and Immigration Judges unless those decisions are overruled by the Attorney General or the federal courts. *Id.*
19. *See* Matter of M-E-V-G, 26 I. & N. Dec. 227 (B.I.A. 2014) (renaming the "social visibility" component of the PSG requirement of "social distinction" such that a PSG designation requires that the group be socially distinct within the society in question as perceived by that society, not the persecutor).
20. *See* Jenni Millbank, *Sexual Orientation and Refugee Status Determination Over the Past 20 Years: Unsteady Progress Through Standard Sequences?*, *in* FLEEING HOMOPHOBIA, *supra* note 12, at 35–36. Millbank discusses the problems caused by the lack of public access to written reasons for lower level, threshold decisions, and the biases that continue to recur through backsliding. *Id.*
21. *See* U.S. CIS GUIDELINES, *supra* note 15.
22. *See* Appellant S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 C.L.R. 473 (Austl.).
23. *See Discretion to Disbelief*, *supra* note 12; Jenni Millbank, *The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy*, 44 N.Y.U. J. INT'L L. & POL. 497, 504 (2012) [hereinafter *Reply to Hathaway and Pobjoy*] (noting the invidious nature of discretion and its tendency to adopt the view of the persecutor rather than the persecuted); James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 315, 332 (2012) [hereinafter *Queer Cases*]; *see generally* Christopher N. Kendall, *Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' Is No Longer an Option, Will Equality Be Forthcoming?*, 15 INT'L J. REFUGEE L. 715 (2003).

Kingdom handed down a retooled formulation of discretion, which once again created subcategories of applicants and suggested discretion is an appropriate consideration so long as it is not exercised out of a fear of persecution.[24] This discussion will focus on a comparison of the evolution of LGBT asylum claims in Australia and the United States. In addition, at least one recent decision from the Supreme Court of the United Kingdom will be included as a high-level judgment from a similarly-situated common law receiving country, which is crucial for a deeper understanding of the nuances of discretion, particularly as applied in Australia.[25]

Part II of this paper will examine and compare how the LGBT asylum process has evolved—specifically vis-à-vis identity and discretion—in the United States and Australia, which can help highlight some of the issues driven by improper application of Western essentialist LGBT definitions on asylum claims. Part II will also analyze the concepts of refugee and asylum law internationally, as well as the concerns of the gay international community with respect to asylum law globally. Parts III and IV will review the asylum process for LGBT asylum applicants in the United States and Australia, respectively—with a focus on identity, discretion, and persecution. Part V discusses the intersection of discretion and identity and what can be done to more appropriately address asylum claims based on sexual identity or orientation against a backdrop of prevalent anti-immigration sentiments in both countries. Finally, Parts V and VI will make suggestions for moving forward in making the asylum process in both countries more equitable for LGBT asylum applicants.

II. REFUGEE LAW AND THE GAY INTERNATIONAL

A. Human Rights and Refugee Rights for LGBT Individuals

Refugee rights have not developed in a vacuum. Instead they have evolved based on universally defined human rights.[26] One of the most basic precepts of

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24. *See* HJ (Iran) v. Sec'y of State for the Home Dep't *(HJ and HT)*, (2010) UKSC 31, (2011) 1 A.C. 596, http://www.refworld.org/docid/4c3456752.html; *see also* Jansen, *supra* note 12; *Queer Cases*, *supra* note 23, at 335. HJ also has a different problem in that it may extend protection to activities that should not be subject to protection such as going to concerts, drinking cocktails and "boy talk" with female friends, because these are relatively trivial activities from a human rights perspective. *Queer* Cases, supra note 23, at 335. Thus, *HJ* is both under- and over- inclusive. *Id*. While Hathaway and Pobjoy make an interesting point, it feels more like an artificial one. *See generally Reply to Hathaway and Pobjoy*, *supra* note 23. What the court was trying to say was that the right to live openly in a society should be protected and to the extent an applicant chooses not to live openly out of fear of being persecuted, such an applicant may be entitled to protection under the 1951 Convention. *See id.* at 510–11. However, they correctly observe that the court missed the tension between protections of activities associated with sexual orientation versus protection of identity itself. *See id.* This is one of the inherent problems with the construction of protection for sexual orientation and identity in the first place. *See id.*

25. *See generally Reply to Hathaway and Pobjoy*, *supra* note 23.

26. *See, e.g.*, U.N. G.A. Res. 3/217A(III), *The Universal Declaration of Human Rights* (Dec. 10, 1948), http://www.un.org/en/universal-declaration-human-rights/index.html [hereinafter

human rights is that human beings should enjoy fundamental rights and freedoms without discrimination.[27] Article 2 of the Universal Declaration of Human Rights provides that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[28]

Sexual orientation as a protected status finds support in the specific non-discrimination provisions on account of "sex" or "other status" in the International Covenant on Civil and Political Rights[29] (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights[30] (ICESC), "as well as in Article 2 of the Convention on the Rights of the Child[[31]] . . . as affirmed by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child."[32] However, even though LGBT persons are entitled to human rights, just as any other global citizen, freedom of sexual orientation is not explicitly recognized as a human right.[33] Building on these rights for the LGBT community, the Yogyakarta

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UDHR].

27. *See* 1951 Convention, *supra* note 4.
28. *UDHR*, *supra* note 26.
29. UN G.A., *International Covenant on Civil and Political Rights* (Dec. 16, 1966), http://www.unhcr.org/refworld/docid/3ae6b3aa0.html.
30. UN G.A., *International Covenant on Economic, Social and Cultural Rights* (Dec. 16, 1966), http://www.unhcr.org/refworld/docid/3ae6b36c0.html.
31. UN G.A., *Convention on the Rights of the Child* (Sept. 2, 1990), http://www.unhcr.org/refworld/docid/3ae6b38f0.html.
32. *See* UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY, UNHCR, 6 n.12 (Nov. 21, 2008), http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf [hereinafter UNHCR GUIDELINES 2008] ("Sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion. Claims relating to sexual orientation and gender identity are primarily recognized under the 1951 Convention ground of membership of a particular social group, but may also be linked to other grounds, notably political opinion and religion, depending on the circumstances."); *see also* Toonen v. Australia, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994) (finding that the International Covenant on Civil and Political Rights prohibits discrimination on the grounds of sexual orientation). The UNHCR Guidelines 2008 note that this has subsequently been affirmed by several other UN human rights treaty bodies, including recognition that gender identity is among the prohibited grounds of discrimination. UNHCR Guidelines 2008, *supra* note 32, at 6 (citing UN Human Rights Council, REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON DISCRIMINATORY LAWS AND PRACTICES AND ACTS OF VIOLENCE AGAINST INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY (Nov. 17, 2011), http://www.unhcr.org/refworld/docid/4ef092022.html).
33. UNHCR Guidelines 2008, *supra* note 32, at 6. To some extent, this statement may be misleading. If LGBT individuals are entitled to human rights, then how can their sexual orientation, part of their identity, not be protected as a human right already? As with many other human rights issues, anything that deviates from a very narrowly drawn narrative of what it means to be human and to have rights needs to be identified and specifically protected. The Yogyakarta Principles and the Resolutions passed by the United Nations are seemingly substantive steps in recognizing freedom of sexual orientation as a human right, even though intuitively we should understand it that way already. *See* THE INT'L COMM'N OF

Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity[34] were drafted in 2006 to confirm States' obligation to recognize that sexual orientation and gender identity are entitled to human rights protection.[35] Then, in 2011, the United Nations passed a Resolution on Human Rights, Sexual Orientation, and Gender Identity that affirmed the "recognition that LGBT persons are endowed with the same inalienable rights—and entitled to the same protections—as all human beings."[36]

B. Problems Inherent in the Asylum Process for LGBT Applicants

LGBT applicants in asylum are both visible and vulnerable in a way that is somewhat unique.[37] While LGBT applicants may have patent physical or visible qualities related to race or ethnicity, they also possess latent qualities, like religious belief and political opinion, which exist with respect to how their identity is embodied rather than expressed.[38] This intersection of seen and unseen means that LGBT applicants are particularly susceptible to asylum processes that require them to somehow prove they are sufficiently LGBT to be entitled to protection despite the fact that much of their status is based on self-identification and may be significantly affected by the persecution in their home

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JURISTS & THE INT'L SERV. FOR HUMAN RIGHTS, YOGYAKARTA PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), http://www.yogyakartaprinciples.org/principles_en.pdf [hereinafter YOGYAKARTA PRINCIPLES]. The intersection of politics, culture, and policy all play a role in how this discussion of LGBT human rights has evolved, and there is always the struggle of whether focusing on a perceived difference to obtain greater legal protection is the best course of action as opposed to simply asserting LGBT rights as part of human rights writ large.

34. YOGYAKARTA PRINCIPLES, *supra* note 33. The Principles were unanimously adopted in Yogyakarta, Indonesia, on November 6–9, 2006. *Id.*

35. *See id.*; *see also* M. O'Flaherty & J. Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207 (2008).

36. The White House, Office of the Press Secretary, *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity* (June 17, 2011).

37. As the Constitutional Court in South Africa observed in a landmark case:

> In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, and that impinges on the dignity and self-worth of a group.

Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC) (S. Afr.), at ¶127; *see also* Refugee Appeal No. 74665, New Zealand: Refugee Status Appeals Authority (July 7, 2004), http://www.refworld.org/docid/42234ca54.html.

38. *See* Nat'l Coalition for Gay and Lesbian Equality, 1 SA at ¶128 ("[T]heir identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference; and they are seen as especially contagious or prone to corrupting others. None of these factors applies to other groups traditionally subject to discrimination, such as people of colour or women, each of whom, of course, have had to suffer their own specific forms of oppression.").

country from which they have fled.

Sexual orientation and gender identity are not explicitly identified categories within the definition of refugee for purposes of international law, which means that LGBT asylum applicants are required to demonstrate a well-founded fear of persecution based on membership in a PSG.[39] While receiving countries have had less difficulty recognizing that LGBT refugees may exist in PSGs, the more intractable problem has been determining whether they are situated within those PSGs as part of the identity requirement.[40] Further exacerbating this problem is that even when identity and PSG are satisfied, it is often difficult for an applicant to establish a well-founded fear of persecution when a discretion requirement is improperly imposed upon the applicant or imputed to the objective part of that test.[41] What follows is a short discussion of some, but not all, of the concerns that have been raised with respect to the processing of LGBT asylum claims.

1. Identity

Establishing an asylum applicant's identity as a person with a protected status or as a member of a PSG is the first critical component in determining whether the applicant can satisfy the definition of refugee.[42] While this is the same for any asylum applicant, in that he or she must always establish membership in a protected category or in a PSG, it can be difficult to establish in LGBT claims.[43] The problem stems as much from the societal orientation of the initial asylum adjudicator in the receiving country as it does from the way identity is structured both in the receiving country and in the applicant's home country.[44] The "power dynamics of refugee determination procedures dictate that the construction of the applicant's life story cannot challenge foundational tenets of the decision-maker's understanding of the world."[45] Thus, the adjudicator's understanding of what it means to be gay in his community can eclipse the

39. *See* 1951 Convention, *supra* note 4; UNHCR Guidelines 2008, *supra* note 32; *see also* Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (cited as precedent for all cases related to LGBT asylum applications and via membership in a PSG for the United States); European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, Art. 10(1)(d) (May 19, 2004), http://www.unhcr.org/refworld/docid/4157e75e4.html.
40. *See, e.g.*, Hernandez-Montiel v. INS, 225 F.3d 1084, 1092–93 (9th Cir. 2000).
41. *See, e.g.*, HJ and HT, [2010] UKSC, at 16–18 (Lord Hope lays out what he deems to be the proper test, bifurcating the discretion analysis, and referencing the later opinions of Lord Walker and Lord Rodger as stated in paragraphs 98 and 82 of their opinions, respectively).
42. *See* Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUD. 195, 196 (2009) [hereinafter *Personal Narratives of LGBT*].
43. *Id.* at 196.
44. *Id.*
45. *Id.* at 197.

applicant's own experience in a profound way.

An asylum interview can easily become a humiliating and tortuous process whereby the applicant must prove she is "gay" enough or the "right kind" of LGBT applicant because the applicant "is mo[re] likely to be seen when she . . . looks like what is being looked for."[46] This can be difficult if the applicant does not track the appropriate gay narrative when answering interview questions that are xenophobic or homophobic, including probing questions about sexual practices.[47] Even more disheartening, until fairly recently, phallometry[48] was practiced in some receiving countries, and although it appears to have abated, the lingering stigma within an environment that encouraged such a practice remains.[49]

The Western gay narrative is one of initial discovery, recognition of self, and "coming out" to friends and family.[50] The story then goes that the newly declared gay person who has publicly claimed a sexual preference behaves in a way that tracks with what society perceives as gay behavior—dressing a certain way, speaking a certain way, displaying certain mannerisms, and preferring certain hobbies and behaviors.[51] The use of a Westernized definition of what it

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46. *Personal Narratives of LGBT*, *supra* note 40 at 197; *see also Gays Seeking Asylum*, *supra* note 1.
47. *See, e.g.*, *Gay Asylum Seekers Face "Humiliation,"* THE GUARDIAN (Feb. 8, 2014), http://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office; Sally Hayden, *The UK Wants to Deport a Ugandan Woman Who Fled Her Country After an Exorcism*, VICE NEWS (Dec. 6, 2014), *https*://news.vice.com/article/the-uk-wants-to-deport-a-ugandan-woman-who-fled-her-country-after-an-exorcism.
48. The procedure involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses. Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders,* 14 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2004). A similar technique is also apparently available for women. *Id.*
49. *See* Jansen, *supra* note 12.
50. Marni A. Brown, Coming Out Narratives: Realities of Intersectionality (Dec. 16, 2011) (unpublished Ph.D. dissertation, Georgia State University), http://scholarworks.gsu.edu/sociology_diss/63; Susanna Walters, *The Problem with "Coming Out,"* NORTHEASTERN UNIV. NEWS (July 13, 2014), http://www.northeastern.edu/cssh/news/the-problem-with-coming-out-the-flawed-cultural-expectations-of-gay-life-in-america ("While it is true that there are eight million (and counting) stories in the naked city, the coming-out story has long been offered as the master narrative of gay life. Indeed, the phrase "coming out" has so permeated cultural understanding that it has even moved from being a story gay people tell about themselves to others to a story multiplied through relationships (for example, when someone "comes out" as having a lesbian daughter or being the child of a gay man).") (citing SUSANNA WALTERS, THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY).
51. This narrative is generally reflected in societal attitudes and in the media itself. *See, e.g.,* Maya Dusenbery, *What About the Guys Who Do Fit the "Gay Stereotype"?*, THE ATLANTIC (May 31, 2013), *http://www.theatlantic.com/sexes/archive/2013/05/what-about-the-guys-who-do-fit-the-gay-stereotype/276407/.* For example, consider Romulo Castro's story. *See Gays Seeking Asylum*, *supra* note 1. In order to convey his identity, he need to tie it to a narrative that resonated with his Western audience, even if it did not reflect his day-to-day existence. *See id.* It was a necessary evil to receive protection from actual persecution. *Id*.

means to be LGBT can be dangerous when dealing with asylum applicants.[52] It allows for a stereotypical picture to emerge that may harm an LGBT applicant who has been forced to act with discretion in order to survive in a non-Western country. For example, "LGBT persons may be . . . forced into arranged marriages or experience extreme pressure to marry. They might fear that a failure to marry will ultimately mark them out as LGBT in the public eye."[53] Thus, an LGBT person may marry to avoid harm in their home country, and then that coercive act may be used to discount the LGBT applicant's claim of identity because, according to the typical Western narrative, gay people do not marry straight people.[54] More subtle, of course, is the Western notion of coming out and an applicant's failure to do so to friends and family in their home country may be considered a sign that the applicant is not really gay.[55]

Other than the obviously intrusive nature of asking detailed questions about one's sex life, the underlying reasons for one's attraction to a particular sex, or a failure to properly assert one's LGBT identity, the problem is that how an individual defines himself becomes less important than how that person's identity fits within the receiving country's perception of what it means to be LGBT.[56] Another problem is that LGBT asylum applicants face not only the psychological problems attendant to any applicant's claim, but also additional impediments like depression, shame, and violence.[57] Berg and Millbank identify significant psychological features in an LGBT claim as: "a reluctance to reveal group membership as the basis of a claim, the experience of passing or concealment strategies, the impact of shame and depression on memory, common experience of sexual assault, and sexualization of the identity narrative in the legal process."[58] Just as with other types of abuse and psychological trauma, these more distinct psychological features can prevent proper consideration of an asylum application because the applicant is unable to fully

52. It can, for that matter, be problematic for any LGBT individual. *See* Preston Mitchum, *On National Coming Out Day, Don't Disparage the Closet*, THE ATLANTIC (Oct. 11, 2013), http://www.theatlantic.com/national/archive/2013/10/on-national-coming-out-day-dont-disparage-the-closet/280469/.
53. UNHCR Guidelines 2008, *supra* note 32, at 8. Note that these behaviors were not so unusual in the United States even one generation ago—we simply have a short memory as a society. *See, e.g.,* Cheri Lawson, *A Place for Straight Spouses After Their Mate Comes Out of the Closet*, NPR (Oct. 20, 2015), http://www.npr.org/2015/09/16/440909117/a-place-for-straight-spouses-after-their-mate-comes-out-of-the-closet.
54. Of course, another problem may be that bisexual people may marry straight people, making them even more vulnerable to the Western gay narrative.
55. *See, e.g.*, Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009); Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007); *Gays Seeking Asylum*, *supra* note 1.
56. *See Gays Seeking Asylum*, *supra* note 1.
57. *Personal Narratives of LGBT, supra* note 42, at 198.
58. *Id.* This is not to suggest that there is one universal LGBT experience; in fact, quite the opposite. While there may be similar experiences, features and contours, every experience will be shaped significantly by the context (time, place, and manner) within which the experience occurs. However, the unifying experiences, particularly those that relate to asylum applications premised on persecution, are more closely aligned.

convey the lived experience within the native country; to the extent that these traumas are further minimized due to a pervasive narrative about what it means to be LGBT, they can compound and exacerbate what can already feel like an insurmountable obstacle for an LGBT applicant.

2. Discretion

"Discretion" —or the notion that an applicant can live covertly and escape persecution—impacts the applicant's ability to demonstrate a well-founded fear of persecution.[59] "'Discreet' suggests that the individual will be expected to be 'considerate,' 'judicious,' 'prudent,' 'circumspect,' 'well-behaved,' 'civil' and 'polite' and not 'indiscreet,' meaning 'injudicious,' 'imprudent,' 'inconsiderate,' 'unadvised,' and 'unwary.'"[60] However, what discretion really expects is that an individual will conceal their identity and deny who they are to avoid a persecutive environment.[61] "LGBT persons who live in fear of being publicly identified will often conceal their sexual orientation as a result in order to avoid the severe consequences of such exposure, including the risk of incurring harsh criminal penalties, arbitrary house raids, dismissal from employment and societal disapproval."[62] Individuals may choose to live this way or not, but an LGBT individual's choice to live with discretion, for whatever reason, does not mean that it is appropriate to consider that individual's ability to be discrete in determining whether an applicant has a well-founded fear of persecution.

Discretion improperly focuses the question of safety upon return on the applicant's behavior instead of the applicant's identity. It either does so directly, by imposing a responsibility on the applicant to act discretely to avoid persecution, or indirectly, by finding that the way the applicant acts will not encourage persecution if he returns and continues acting in that way.[63] Relying on discretion as a reason to find there is no well-founded fear of persecution neglects two important truths: 1) if an applicant needs to live discretely to avoid persecution, it would appear to reflect the notion that a persecutive environment exists; and 2) even if an applicant does live discretely for personal reasons, it does not mean other actors will honor this choice, and they can expose the applicant to persecution.[64]

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59. *See* Jansen, *supra* note 12; *Discretion to Disbelief*, *supra* note 12, at 393 ("At its baldest, discretion reasoning entail[s] a reasonable expectation that persons should, to the extent that it is possible, cooperate in their own protection, by exercising self-restraint such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a flatmate; or indeed remaining celibate.") (internal quotations omitted).
60. Weβels, *supra* note 13, at 64–65 (quoting the Equality and Human Rights Commission's brief before the United Kingdom's Supreme Court in HJ and HT at 29).
61. *See id.*
62. UNHCR Guidelines 2008, *supra* note 32, at 8.
63. *See, e.g.*, S395/2002, [2003] HCA 71, 216 CLR 473; Todorovic v. U.S. Atty. Gen., 621 F.3d 1318 (11th Cir. 2010).
64. *See Queer Cases*, *supra* note 23, at 346; Todorovic, 621 F.3d at 1326–27.

Discretion even asserts itself within the initial determination of an applicant's claim of identity within a PSG. If the applicant has been living discretely, or even completely hiding his or her orientation in the applicant's home country, it will make establishing identity in a PSG that much more difficult.[65] Given the inherent biases that may already be present in an initial interview with respect to matching the anticipated stereotype of an LGBT asylum seeker or looking like what the interviewer is looking for, it can make an asylum claim nearly impossible to prove.[66]

3. Particular Social Group

Generally, most receiving nations, including the member states of the European Union and the Commonwealth, acknowledge sexual orientation as a PSG.[67] The problem with PSG is not that it fails to receive recognition as such, but rather that receiving countries like the United Kingdom have created sub-classes of LGBT applicants based upon whether the applicant lives openly as an LGBT person, or whether the applicant has lived discretely or has otherwise completely hidden that person's identity in their home country.[68] Whereas an LGBT person who by their very nature simply chooses not to wear their sexual identity on their sleeve or to otherwise live openly may be denied protection, an applicant who satisfies the proper notion of living openly gay may receive protection even though each person is subject to, and at risk of, persecution. And, in some sense, as discretion has become less of a marker of persecution, it has evolved from being a distinction between open versus closeted to a more pervasive assessment of gender-conforming versus queer.

C. No Single Essential LGBT Experience

Part of the problem inherent in determining LGBT asylum claims is the tendency in receiving countries to reference a distinctly Westernized, essentialist narrative of what it means to be LGBT. This is due in large part to so-called

65. *See Gays Seeking Asylum*, *supra* note 1.
66. *See, e.g.*, Todorovic, 621 F.3d at 1318.
67. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), SUMMARY REPORT, INFORMAL MEETING OF EXPERTS ON REFUGEE CLAIMS RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY (Sept. 10, 2011), http://www.refworld.org/docid/4fa910f92.html; Millbank, *supra* note 12, at 36 n.6 (citing Council of Europe Commissioner for Human Rights (2011)); HJ and HT, (2010) UKSC, at 5 (Lord Hope) ("There is no doubt that gay men and women may be considered to be a PSG . . . regulation 6(1)(e) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) recognises as clearly as can be that a group based on a common characteristic of sexual orientation may be included in a PSG that is in need of international protection."); Refugee Appeal No. 1312/93 Re GJ (Aug. 30, 1995); (1998) INLR 387, a decision cited with approval by Lord Steyn in R v. Immigration Appeal Tribunal; Ex parte Shah (1999) 2 AC 629 at 643D & 644G (HL) ("New Zealand"); Matter of Toboso-Alfonso, 20 I. & N. Dec. at 819.
68. HJ and HT, 2010 UKSC at 16–18 (Lord Hope); *see also* Appellant S395, 216 CLR at 473 (rejecting the sub-division of homosexual men in a PSG into discrete and non-discrete).

political geography. Hathaway and Pobjoy explain that "[w]hile not so long ago institutionalized homophobia was common in developed countries, most of the North has now moved to embrace gay rights."[69] But the authors caution:

> The same evolution has not taken place in the political South, [thus it is not surprising] that members of sexual minorities in flight from both police and other state agents, as well as from vigilante and other private actors taking their cue from legislated homophobia, have increasingly sought the protection of Northern states that take a more sympathetic view of gay rights.[70]

Because the majority of receiving countries are members of the political North, their distinctly Western narrative of LBGT identity will likely dominate the asylum discourse to the exclusion of other narratives. The Western narrative of what it means to be gay, and the acceptance of gay rights within that narrative, will further contribute to what is already an essentialist view of LGBT asylum seekers from the political South.[71]

For example, in the United States, a person is more likely to be identified as gay if they have the appropriate coming out story, have some sort of physical manifestation of their queerness, have had same-sex partners, or have otherwise engaged in the quintessential gay experience such as pride parades and gay marriage.[72] There is also an expectation that the coming out process is progressive and linear in nature, rather than a fluid and evolving identity of self and sexuality.[73] Of course, as Catherine Dauvergne and Jenni Millbank have suggested, "the question of being 'out' is never answered once and for all, it is a decision made over and over, each day and in each new social situation. . . . The state of 'closeted-ness' is always a potentially permeable one."[74] And, it is always one that will be driven by the culture in which it is experienced, which is inherently more difficult where the culture does not recognize anything other

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69. *Queer Cases*, *supra* note 23, at 316–17.
70. *Id.*
71. *See id.*; Sarah Hinger, *Finding the Fundamental: Shaping Identity and Gender and Sexual Orientation Based on Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 389–90 (2010) ("Sexual orientation, like gender identity, is created by and through culture, as opposed to having an essential core . . . [and r]elying on an unstated presumption of what it means to be gay effectively denies cultural differences."); Zsolt Bobis, *You Are Not What You Ought to Be: Credibility Assessment in Sexuality-Based Asylum Cases* 2–3 (Feb. 29, 2012), http://www.etd.ceu.hu/2012/bobis_zsolt.pdf.
72. *See, e.g.*, Todorovic, 621 F.3d at 1326–27; Razkane, 526 F.3d at 1286. The concept of "coming out" is so entrenched that it even has its own Wikipedia page. *See Coming Out*, WIKIPEDIA, http://en.wikipedia.org/wiki/Coming_out (last visited July 9, 2016).
73. *See* Martin Manalansan, *In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma*, 2 GLQ: A J. LESBIAN AND GAY STUDIES 425, 434–35 (1995); Tim Teeman, *Tim Cook: Why "I'm Gay" Isn't Enough*, THE DAILY BEAST (Oct. 30, 2014), http://www.thedailybeast.com/articles/2014/10/30/tim-cook-why-i-m-gay-isn-t-enough.html.
74. *Queer Cases*, *supra* note 23, at 326 (quoting Catherine Dauvergne & Jenni Millbank, *Before the High Court: Applicants S396/2002 and S395/2002, a Gay Refugee Couple from Bangladesh*, 25 SYDNEY L. REV. 97, 122 (2003)).

than a heteronormative identity.[75]

The UNCHR Guidelines warn against the use of stereotypical images of LGBT persons, but it still happens.[76] Certain lines of questioning are still used to test an applicant's "queerness" such as the location of gay venues in both the home and receiving countries, LGBT organizations in the home country, or Westernized cultural icons in the LGBT community such as Madonna or Oscar Wilde.[77] When these concerns are superimposed on the asylum process of a receiving country, the damage they can wreak becomes all the more apparent.

III. LGBT ASYLUM CLAIMS IN THE UNITED STATES

A. The Asylum Process

In order to receive asylum under the Refugee Act of 1980,[78] an applicant must demonstrate that:

> (1) [he or she has] a "fear" of "persecution"; (2) the fear must be "well-founded"; (3) the persecution feared must be "on account of race, religion, nationality, membership in a PSG, or political opinion"; and (4) [he or she] must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.[79]

In order to qualify for asylum, an applicant must have been targeted on a protected basis.[80] General country conditions such as natural and economic disasters, civil strife, or war are not cognizable bases for asylum claims.[81]

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75. Hinger, *supra* note 71; Bobis, *supra* note 71, at 28. As Bobis explains, "when the notion of homosexuality is not recognized in a society, an individual cannot identify as LGBT in that society. Therefore, when the Iranian President . . . asserts that in his country they 'don't have homosexuals' what he claims is that 'LGBT identity does not exist in Iran.'" Bobis, *supra* note 71, at 28.
76. UNHCR Guidelines 2008, *supra* note 32, at 16; *Gay Asylum Seekers Face "Humiliation,"* THE GUARDIAN (Feb. 8, 2014), http://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office; Sally Hayden, *The UK Wants to Deport a Ugandan Woman Who Fled Her Country After an Exorcism*, VICE NEWS (Dec. 6, 2014), *https*://news.vice.com/article/the-uk-wants-to-deport-a-ugandan-woman-who-fled-her-country-after-an-exorcism.
77. *See* Bobis, *supra* note 71.
78. 8 U.S.C. § 1101 *et seq.*
79. Matter of Acosta, 19 I. & N. Dec. 211, 219 (B.I.A. 1985). Any person who is physically present in the United States may apply for asylum as set forth in 8 U.S.C. §1158 (2014).
80. Matter of M-E-V-G, 26 I. & N. Dec. at 235.
81. *Id.* (citing Al Fara v. Gonzales, 404 F.3d 733, 740 (3d Cir. 2005)) ("Generally, harsh conditions shared by many other persons do not amount to persecution. . . . [H]arm resulting from country-wide civil strife is not persecution 'on account of' an enumerated statutory factor."); Matter of N-M-A-, 22 I. & N. Dec. 312, 323, 326 (B.I.A. 1998) (finding that an applicant who faced "a variety of dangers arising from the internal strife in Afghanistan" did not qualify for asylum). Instead, with respect to natural disasters, civil strife, or war, temporary protected status is the appropriate vehicle to seek relocation. *See* U.S. Citizen &

An asylum applicant in the United States must either file a claim affirmatively within a year of arrival, or the applicant may file a claim defensively in response to a deportation or removal action.[82] If the application is an affirmative one, then it is first heard by an asylum officer with the U.S. Citizens and Immigration Services (U.S. CIS). If the application is a defensive one, then the claim is first heard by an immigration judge (IJ).[83] Regardless of which adjudicator first hears an asylum application, that party is tasked with the responsibility of determining the applicant's credibility.[84] To that extent, those who have first contact with LGBT asylum seekers within the system wield a significant amount of power in determining whether an applicant's sexual orientation satisfies the asylum requirements.[85]

Depending on the applicant's status, an asylum application heard by an interviewer and denied may go to an immigration judge (IJ), or if the initial decision is made by an IJ, to the Board of Immigration Appeals (BIA).[86] An applicant may then appeal to the Circuit Court of Appeal in the appropriate jurisdiction if necessary.[87] Only decisions by the BIA and the Circuit Courts of Appeal are publicly reported.[88]

B. PSGs, Identity, and Discretion

1. Recognizing PSG Status

The United States first recognized that a person could be a refugee based on his status as a homosexual in *Matter of Toboso-Alfonso*[89] in 1990. The

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Immigration Services, *Temporary Protected Status*, http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status; Matter of Sosa Ventura, 25 I. & N. Dec. 391, 394 (B.I.A. 2010).

82. 8 U.S.C. § 1158(a)(2); 8 C.F.R. § 208.4(a)(2)(ii) (2005). A defensive claim also has a one year limit. 8 U.S.C. § 1158(a)(2); 8 C.F.R. § 208.4(a)(2)(ii) (2005).
83. 8 C.F.R. § 208.2 (2011). Although there are exceptions, as in the case of unaccompanied minors.
84. The IJ alone is positioned to make determinations about demeanor—by observing the applicant and assessing his or her tone and appearance—and in that sense is "uniquely qualified to decide whether an alien's testimony has about it the ring of truth." Todorovic, 621 F.3d at 1324–25 (quoting Abdulrahman v. Ashcroft, 330 F.3d 587, 597 (3d Cir. 2003)).
85. Although an appeal to the IJ from a decision of an asylum officer is entitled to *de novo* review, it is my understanding that parties have significant power in terms of assessing credibility and developing a factual basis for the claim. *See* Nat'l Immigrant Justice Ctr., *Flow Chart: Steps in the Asylum Process*, https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Asylum%20Flow%20Chart.pdf.
86. *See id.*
87. *See id.*
88. *See id.*
89. 20 I. & N. Dec. 819 (B.I.A. 1990). In that case, the applicant came to the United States as part of the Mariel Boat Lift after enduring years as a "registered" homosexual in Cuba and persistent detention by the police as well as a threat to leave the country or serve four years in prison. *Id.*

applicant, who was officially identified as a homosexual by the Cuban government, established his membership in a PSG in Cuba based on that status.[90] In 1994, the Attorney General declared the decision in *Toboso-Alfonso* to be "precedent in all proceedings involving the same issue or issues," thus finding sexual orientation to be an acceptable basis for a PSG.[91] Since that time, it has been clearly established that LGBT applicants are a PSG and homosexuality is a protected identity.[92]

The United States, while progressive in terms of recognizing LGBT entitlement to PSG status, has had a more troubling experience in defining membership within a PSG. What has come to the fore is that, in many cases, identity has been improperly considered in a way that permits discretion to function as a barrier to inclusion in a PSG and has permitted essentialist and stereotypical Western views of what it means to be gay to become part of the process.

2. Identities and Discretion

In *Toboso-Alfonso*, the applicant claimed to be homosexual, he was publicly identified within Cuba as a homosexual, and he was persecuted specifically because of that identified status.[93] In that sense, his self-identification matched with the PSG within which he was situated, and was "verified" by the government's identification of Toboso-Alfonso as a homosexual.

However, in *Razkane v. Holder*[94] in 2009, the applicant testified that he avoided dating, did not disclose his sexual orientation to his family or friends, and maintained minimal contacts with gay men to protect himself.[95] Morocco, his country of origin, criminalized homosexual conduct; Islam, which he claimed was intolerant of homosexuality, was the dominant religion; and there was evidence that the police harassed and harmed homosexuals.[96] Based on the evidence, the IJ found that Razkane could not be a member of the homosexual men in Morocco PSG because he did not appear gay nor did he have relationships that would identify him as gay.[97] The IJ specifically found that Razkane's "appearance d[id] not have anything about it that would designate [him] as being gay. [He did] not dress in an effeminate manner or affect any

90. *Id.*
91. *See* ATTY. GEN. JANET RENO, MEMORANDUM FOR MARY MAGUIRE DUNNE, ACTING CHAIR, BD. OF IMMIGRATION APPEALS (June 16, 1994).
92. *See, e.g.*, Vitug v. Holder, 723 F.3d 1056, 1064 (9th Cir. 2013); Doe v. Holder, 736 F.3d 871 (9th Cir. 2013). Arguably, this would include trans and queer individuals as well, although again, the Westernized notion of gender and sexual identity may create problems in cases such as these.
93. 20 I. & N. at 820–21.
94. 562 F.3d 1283 (10th Cir. 2009).
95. *Id.* at 1284.
96. *Id.* at 1285–86.
97. *Id.* at 1286.

effeminate mannerisms."[98] Razkane also failed to have "any boyfriends or other gay encounters in Morocco" and although he had engaged in homosexual conduct in the United States, "he [] had no boyfriends" and did not "appear to be committed to any particular homosexual relationship."[99] Finally the IJ stated Razkane "testified that he would probably be 'involved' in homosexual activity if he returned to Morocco."[100] Thus, Razkane's lack of a Westernized stereotypical homosexual demeanor, coupled with his decision to live discretely in a persecutive environment because he was gay, prevented him from being found to be gay.

Additionally, the IJ found that Razkane had not "shown that it [was] more likely than not that he would be engaged in homosexuality in Morocco or, even if he was, that it would be the type of overt homosexuality that would bring him to the attention of the authorities or of the society in general."[101] The IJ effectively relied not only on Razkane's discretion, but also on Razkane's failure to live up to the Western narrative of "being gay," to determine he was not gay. Then, seemingly to add insult to injury, the IJ took this conception of gay and turned it around to the extent that he determined Razkane would not be subject to persecution if he returned to Morocco because no one would be able to tell he was gay as he would not engage in homosexual activity or, if he did, presumably no one would notice. Thus, to be a gender conforming gay man was not to be gay at all. The IJ's decision was driven by the ability of the IJ to bend discretion in a manner that acted as both shield and sword: the decision used Razkane's discretion to deny him *his* identity and to find that discretion protected his identity without ever acknowledging that identity.

The Eighth Circuit wanted no part of this exercise. The circuit court found that the IJ's factual determination about whether Razkane appeared sufficiently gay precluded meaningful review and that remand was required to get beyond the stereotypical assumptions used as evidence in this case.[102] Unfortunately, the court did not engage in a broader discussion beyond the stereotyping that the IJ utilized. What was left unaddressed was whether or not the discretion exercised prior to Razkane's application was an appropriate consideration at all and whether it was ever appropriate to hold discretion against an applicant coming from an ostensibly persecutive country.

Similarly, the applicant in *Shahinaj v. Gonzales*[103] was initially denied asylum because the IJ felt that "[the applicant] did not dress or speak like or

98. *Id*.
99. *Id.*
100. *Id*. It bears considering whether this idea that you must pursue relationships or monogamy to be properly LGBT will go away anytime soon, particularly where the dominant dialogue in the United States has been about same sex marriage.
101. *Id*.
102. *Id*. at 1288–89.
103. 481 F.3d 1027 (8th Cir. 2007).

exhibit the mannerisms of a homosexual."[104] Thus, the adjudicator found that even if Shahinaj were returned, he would not face persecution because he did not "look" gay.[105] Again, discretion was used as both sword and shield, challenging Shahinaj's identity and then using that identity against him in determining the level of persecution he would face. It was, and is, indicative of the Catch-22 faced by asylum applicants.

In *Todorovic v. U.S. Attorney General*, the IJ decided that although the applicant claimed to be singled out for persecution "'because he [wa]s gay in his home country[,] . . . [t]he 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.'"[106] The IJ instead found that it was not "readily apparent" that the applicant was gay "since he [bore] no effeminate traits or any other trait that would mark him as a homosexual."[107]

Based on this finding that Todorovic was not visibly gay, the IJ determined that he was not credible, that he was not a member of a PSG, and that he would not be subject to persecution if returned to Serbia because no one would be able to tell he was gay.[108] Once again, establishing membership in a protected PSG was subject to the IJ's Westernized notion of what it means to be gay. Indeed, that idea was so closely held that it caused the IJ to find that Todorovic was not credible despite the fact that "Todorovic never testified that he was 'overtly gay' or that this was the reason for his persecution; rather, the abuses to which he testified were the result of hostility by people who appeared to know he was gay for reasons other than his appearance or behavior."[109]

Again, Todorovic's failure to identify as a gender conforming gay man led to the conclusion that not only was he "not gay," but also that he was not credible simply because his identity did not deviate from the acceptable gender norm perceived by the adjudicator involved. While the circuit court remanded for a new determination based on actual evidence and expressed how troubling the IJ's approach was, the court failed to clarify how such determinations *should* be made and how identity and conduct were to be properly considered in this context.

In *Hernandez-Montiel*,[110] a case where a male applicant identified as female but did not always present as female, the IJ found that the applicant's female identity was not immutable or fundamental because he did not cross-dress all the time.[111] The Ninth Circuit clarified that the case was "about sexual identity, not fashion. Geovanni is not simply a transvestite . . . . Rather,

104. *Id.* at 1029.
105. *Id.*
106. Todorovic v. U.S. Attorney General, 621 F.3d 1318, 1326–27 (11th Cir. 2010).
107. *Id.*
108. *Id.*
109. *Id.*
110. 225 F.3d 1084 (9th Cir. 2000).
111. *Id.* at 1089.

Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women."[112] Thus, the court was able to disentangle the IJ's failure to distinguish between conduct and identity as it related to the applicant's inclusion within that group. It dug deeper into the distinction between embodied and expressed identity and finding that he belonged to a recognizable PSG.

While the United States has had difficulty separating Westernized notions of LGBT identity from asylum claims of applicants from the geopolitical South, the federal appellate courts have made it clear that an applicant cannot be required to exercise discretion upon return to his home country in order to avoid persecution. Debra Ankner and Sabi Ardalan have explained that the "U.S. jurisprudence recognizing forced renunciation and concealment of beliefs as persecutory harm is particularly robust."[113] This may be because the United States is more likely to recognize endogenous harms, those that are emotional or psychological, when considering what can constitute persecution, at least in the context of religious and political persecution.[114] However, the practical implications of this robust protection as applied to renunciation and concealment for LGBT asylum claims may be negligible. This is because an LGBT applicant is less likely to be found to be part of the PSG based on discretion—as in *Todorovic* and *Hernandez-Monteil*—and the lack of visibility permits a finding that there is no well-founded fear of persecution upon his return. In other words, LGBT asylum applicants may be denied access to this robust protection where the asylum process relies so heavily on the same behaviors to exclude those applicants from the PSG in the first instance.

C. Recent Changes in Process and What They Mean

1. The Guidelines

In 2012, the U.S. CIS issued Guidelines, and provided related training for initial asylum adjudicators, regarding the adjudication of LGBTI Refugee and Asylum Claims.[115] Both the training module and Guidelines were the result of a

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112. *Id.* at 1096.

113. Deborah Anker & Sabi Ardalan, *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 529, 536–38 (2012); *see also* U.S. CIS Guidelines, *supra* note 15, at 21 ("Being compelled to abandon or conceal one's sexual orientation or gender identity, where this is instigated or condoned by the state, may amount to persecution.") (citing Fatin v. I.N.S., 12 F.3d 1233, 1242 (3d Cir. 1993)).

114. U.S. CIS Guidelines, *supra* note 15, at 21 (citing Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1354 (11th Cir. 2009) ("[H]aving to practice religion underground to avoid punishment is itself a form of persecution.")); *see also* Woldemichael v. Ashcroft, 448 F.3d 1000, 1003 (8th Cir. 2006); Krotova v. Gonzales, 416 F.3d 1080, 1086 (9th Cir. 2005) ("In addition to the economic pressure and physical violence against Petitioner, her inability to practice her religion is significant."); Muhur v. Ashcroft, 355 F.3d 958, 960–61 (7th Cir. 2004); Zhang v. Ashcroft, 388 F.3d 713, 719–20 (9th Cir. 2004).

115. U.S. CIS Guidelines, *supra* note 15.

collaborative effort between the U.S. CIS and non-governmental organizations.[116] The purpose, as articulated by the U.S. CIS Guidelines, was to "1) increase awareness about issues sexual minorities face; 2) foster discussion about LGBTI issues; and, 3) provide consistent legal and interview guidance regarding these issues."[117]

The Guidelines are beneficial in that they distinguish between sexual identity, which is defined as internal and not necessarily visible, and gender expression, defined as "how a person expresse[s] one's gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics."[118] The Guidelines also clarify that social visibility does not require that an applicant "look gay or act gay."[119] They further highlight LGBT asylum applicants' vulnerability to sexual violence.[120] Finally, the guidance generally reflects the need to be sensitive to the applicant's experience within their own culture and country, which is of critical importance when making these decisions because it focuses attention back on the persecutor instead of the persecuted.[121]

Perhaps the best component of the Guidelines is solid guidance regarding conducting interviews with special attention paid to the delicate nature of LGBT asylum applications and the discomfort that both the adjudicator and the applicant may experience.[122] This guidance includes a discussion of some of the more harmful Westernized notions of what it means to be LGBT and how they impact applicants who are not Westernized or may hold different conceptions of what it means to be LGBT. For example, the guidelines discuss the applicant's general lack of familiarity with LGBT terminology, the applicant's marital status or whether the applicant has children, and whether the applicant "looks" or "acts" gay.[123]

The downside to the Guidelines is two-fold. First, they are not binding and can only go so far in addressing identity issues at initial adjudication. Second, it is somewhat disconcerting that discretion is not discussed more specifically. Instead, discretion concerns are part of the background in the sections that address the Westernized notions of LGBT, *but* the document itself still has a

116. *Id.* at 12.
117. *Id.*
118. *Id.* at 13. It also clarifies that transgender is a gender identity, not a sexual orientation, allowing that like anyone else, a transgender person may have a heterosexual, bisexual or homosexual orientation. *Id.*
119. *Id.* at 16. The Guidelines explain that, for purposes of "social visibility," the determination should be whether the society in question "distinguishes sexual minorities from other individuals in a meaningful way." *Id.* at 17.
120. *Id.* at 21–22.
121. *Id.* at 23 (discussing the very real impact of being disowned by family, being unmarried, or even being forced to marry).
122. *Id.* at 27–28. For example, the Guidelines suggest that an adjudicator ask a transgender applicant at the beginning of the interview what gender pronoun the applicant feels more comfortable with and if there is a name preference. *Id.* at 28. I would suggest that this would be an appropriate question for *any* LGBTI applicant. They also suggest being mindful of terminology or language used because our language may not reflect theirs. *Id.* at 31.
123. *Id.* at 39–40.

distinct Western perspective (frequently mentioning the "coming out" process) and does not address the issue of discretion in identity determinations separately.[124] Still, it is a laudable attempt to address the issues that have arisen in initial adjudications of LGBT asylum claims by reaching out to educate those that make the critical first decision and control matters such as credibility determinations.

2. Refining Particular Social Group

In addition to changing guidelines, the definition of PSG has shifted as well—a shift important in the larger context of LGBT asylum claims. The question involves whether the change in PSG will have a positive impact on future LGBT asylum claims, will work with the guideline changes, or will work against these guideline changes in a way that has yet to become apparent.

While sexual orientation has been recognized as a PSG in the United States since 1994, this recognition has in some sense complicated the relationship between status, visibility, and acts with respect to inclusion in a PSG that is based predominantly on sexual orientation. Even though the term PSG has been subject to clarification and legal discourse, it is still considered ambiguous.[125] In *Matter of Acosta*, the BIA first set forth a definition of PSG.[126] The BIA interpreted "persecution on account of membership in a particular social group" to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."[127] The BIA further explained that:

> The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it

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124. *Id.* The following passage is the only direct comment on discretion, and it is contained in the section related to the well-founded fear analysis:

> An applicant who was forced to conceal his or her sexual orientation or gender identity in the home country in order to avoid harm and did not suffer harm that rose to the level of persecution may still qualify for refugee or asylum status if he or she has a well-founded fear of persecution. In some cases, the experience of having to conceal sexual orientation or gender identity may itself result in suffering severe enough to constitute persecution. Some LGBTI applicants come to the United States for work or study and subsequently "come out" to themselves and to others.

Id. at 47–48.

125. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013).
126. Matter of Acosta, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985).
127. Hernandez-Montiel, 225 F.3d at 1091 (citing Matter of Acosta, 19 I. & N. Dec. at 233).

is fundamental to their individual identities or consciences.[128]

The term was further refined in 2006, through a series of BIA cases that added the concepts of "particularity" and "social visibility" to the definition.[129] Particularity requires that the PSG be "sufficiently distinct" and that it constitute a "discrete class of persons."[130] Social visibility requires that the "the shared characteristic of the [particular social] group should generally be recognizable by others in the community."[131] Thus, in order to constitute a PSG the group itself must "have particular and well-defined boundaries" and "possess a recognized level of social visibility."[132]

One problem that has caused confusion and disagreement amongst the federal courts with respect to the definition of PSG has been the meaning of the phrase "social visibility."[133] "In some cases, U.S. adjudicators have required that an applicant be literally visibly identifiable, an especially problematic requirement in cases involving sexual orientation where a finding of 'visibility' would force adjudicators to reach improper conclusions based on their own stereotypes."[134] As cases like *Razkane*, *Todorovic*, and *Shahinaj* highlight, a literal interpretation of social visibility not only allows adjudicators to look for the expressive "right kind" of LGBT identity but also renders emotional and psychological harms invisible in a way that is not in keeping with the United States definition of persecution.

The question then is whether the BIA's recently announced refinement of the definition of PSG with respect to social visibility, in response to concerns raised by the federal courts, will have a positive impact on LGBT asylum adjudications.[135] The BIA undertook the clarification of PSG because, "[c]ontrary to our intent, the term 'social visibility' has led some to believe that literal, that is, 'ocular' or 'on-sight,' visibility is always required for a particular social group to be cognizable under the Act."[136] To remedy this problem, the

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128. *Id.* at 1091–92.
129. *See* Matter of C-A-, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006), *aff'd sub nom*. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006), *cert. denied* 549 U.S. 1115 (2007); Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73–76 (B.I.A. 2007), *aff'd sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Matter of E-A-G-, 24 I. & N. Dec. 591, 595–96 (B.I.A. 2008); Matter of S-E-G-, 24 I. & N. Dec. 579, 582–88 (B.I.A. 2008).
130. *Matter of S-E-G-*, 24 I. & N. Dec. at 584.
131. *Id.* at 586.
132. *Id.* at 582.
133. *See* Umana-Ramos v. Holder, 724 F.3d 667, 672–73 (6th Cir. 2013); Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087 (9th Cir. 2013).
134. *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, *supra* note 113, at 551–52.
135. Matter of W-G-R-, 26 I. & N. Dec. 207 (B.I.A. 2014) (considering whether former Mara 18 gang members in El Salvador who have renounced their gang membership constitute a PSG); *Matter of M-E-V-G-*, 26 I. & N. Dec. at 227 (considering whether applicant who was a target of gangs for membership in Guatemala was part of a PSG). These cases were remanded by the Third Circuit Court of Appeals for precisely this purpose of clarifying the definition of PSG.
136. Matter of W-G-R-, 26 I. & N. Dec. at 211 (citing Valdiviezo-Galdamez v. Att'y Gen. of

BIA renamed "social visibility" as "social distinction" while reaffirming that such a requirement still comports with United States and international definitions of refugee.[137] As such, in order to be socially distinct a PSG need not be "seen" by society, but it must instead be "perceived as a group" by society.[138] Thus, "social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group."[139] In fact, in explaining that this had been the norm within BIA asylum decisions, the BIA specifically identified "homosexuals" in *Toboso-Alfonso* as an example of a PSG that was distinct, but not necessarily visible, and clearly considered a distinct social group in the applicant's country of origin.[140]

While this may serve to further clarify the formulation of a PSG generally, the fact is that PSG is already fairly well-defined for LGBT asylum applicants. The real issue is whether in the membership determination the PSG requirement can now be used to protect individuals seeking membership within a group that has been subjected to an inappropriate "visibility" requirement. While there is a benefit in removing the word "visibility" from the definition of refugee, problems persist. The problem is that even the term "social distinction" carries with it identity markers that are imputed to individuals in a way that will continue to allow individual adjudicators too much latitude in determining whether an applicant should be given membership in a PSG. The initial adjudicator will still be looking for manifestations of distinction in the individual's appearance and behavior instead of leaving the distinction determination at the macro level of determining the appropriate PSG. Thus, it seems that applicants will still be subject to Western essentialist notions of what it means to be gay or transgender, and subject to improper consideration of discretion.

For example, in *Hernandez-Montiel* both the IJ and the BIA found that the PSG consisted of gay Mexican men that dressed as women and then excluded

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U.S., 663 F.3d 582, 606 (3d Cir. 2011)).

137. *Id.* at 212, 216 ("Our definition of 'social visibility' clarified the importance of 'perception' or 'recognition' in the concept of the particular social group. The term was never meant to be read literally, but our use of the word 'visibility' unintentionally promoted confusion. We now rename that requirement 'social distinction' to clarify that social visibility does not mean 'ocular' visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be 'ocularly' visible to others in society.").

138. *Id.* at 216 ("Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question.").

139. *Id.* at 217.

140. *Id.* ("[W]e held that homosexuals in Cuba constituted a cognizable social group in *Matter of Toboso-Alfonso*. The group had sufficient particularity because it was discrete and readily definable. The evidence in that case also established social distinction. The Cuban Government classified homosexuals as a group and criminalized homosexuality. It also maintained files on them and required them to register and periodically appear for a hearing and physical exam. The Union of Communist Youth held a protest against homosexuals. For these reasons, it was apparent that Cuban society perceived homosexuals as a distinct group.").

the applicant because he did not always dress as a woman and was targeted in his home country because he dressed as a male prostitute, with the result that his identity did not match the PSG.[141] The circuit court found the PSG was improperly drawn because it was not the act of dressing as a woman that was immutable, but that the members of the group had a female sexual identity that was clearly persecuted in Mexico.[142] The distinction both the IJ and the BIA failed to recognize was that what made the applicant distinct was not his behavior, but how he identified himself. When that self-identification did not neatly fit within the IJ's understanding of how a female-identified homosexual man might behave, the IJ declined to include the applicant in the PSG.

While the new definition of PSG may have helped with the proper recognition of the PSG itself, the reality is that the IJ in that case still would not have placed Hernandez-Montiel in that PSG because as a homosexual man he failed to consistently cross-dress or display appropriate effeminate behaviors that would have satisfied the IJ's vision of how a Mexican homosexual who had a female sexual identity should behave. Placement within a PSG should not require a certain behavior to be constant as long as the identifying characteristics are present. That is no better than finding that he could escape persecution by choosing not to cross-dress. It also highlights once again how discretion can be inappropriately inserted into the inquiry where the applicant's behavior in a persecutive environment is used against him.

IV. PROCESSING LGBT ASYLUM CLAIMS IN AUSTRALIA

Australia has recently experienced new issues with discretion that had failed to exist previously. While Australia had a problem with discretion where it impacted the finding of persecution, it now has a problem with discretion impacting identity determinations. Australia's attempt to address discretion in one area of the adjudicative process appears to have created a new problem in a formerly less problematic step in the process. Reviewing how Australia got there, and how these new issues with discretion have arisen in the identity determination, is instructive in understanding the larger problems presented by the use of discretion in LGBT asylum determinations.

A. Features of the Australian System

A person claiming refugee status may seek a protection visa in Australia pursuant to section 36 of the Migration Act of 1958.[143] Initial interviews are conducted by trained officers in Australia's Department of Immigration and

141. Hernandez-Montiel v. INS, 225 F.3d 1084, 1089 (9th Cir. 2000).
142. *Id.* at 1095–96.
143. Migration Act of 1958 § 36(1)–(2).

Border Protection,[144] in a manner that mirrors the process in the United States. If the application is denied, applicants have a right of review before a Refugee Review Tribunal, or the Administrative Appeals Tribunal.[145] An unfavorable decision can be appealed on the basis of legal error to the Federal Magistrates Court.[146]

B. Discretion, Persecution, and Identity in Australia

Prior to 2002, Australian courts and tribunals had held that an applicant could be expected to act with discretion and actively participate in his or her own protection, if doing so would prevent persecution.[147] Thus, discretion entered the decision-making calculus after an applicant had been identified as LGBT, had been acknowledged as a member of a PSG, and the country of origin had been found to have a persecutive environment. This all changed when the High Court of Australia handed down its decision in *Appellant S395/2002 and S396/2002*.[148] As framed by Justices McHugh and Kirby, the issues in *Appellant S395/2002* were whether it was appropriate to divide homosexual men into two PSGs (discrete and non-discrete), whether the need to act discretely to avoid serious harm constituted persecution, and whether the applicants might suffer harm if members of the Bangladeshi community discovered their homosexuality.[149]

The Australian High Court rejected the idea that an applicant could be required to live discretely or with a level of discretion that can "reasonably be tolerated" in order to avoid persecution upon his return to his home country.[150] The Court cautioned about the danger in employing discretion in this manner and, much like the concern raised by some U.S. decisions, explained why permitting discretion to be part of the calculation is problematic:

> In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant

144. Australian Human Rights Comm'n, *Face the Facts: Some Questions and Answers About Indigenous People, Migrants and Refugees and Asylum Seekers* (2012), http://www.humanrights.gov.au/our-work/race-discrimination/publications/2012-face-facts.

145. Immigration Direct, *A Guide to the Process of Seeking Asylum in Australia*, http://immigrationdirect.com.au/asylum-australia.jsp.

146. *Id.*

147. *See, e.g.*, WABR v. Minister for Immigration and Multicultural Affairs (2002) 121 FCR 196, 205 [27]; Applicant LSLS v. Minister for Immigration and Multicultural Affairs (2000) FCA 211 at [24]. "'Discretion' reasoning had appeared very widely in the refugee case law of both Australia and the United Kingdom" prior to the decisions in *Appellant S395* although similar reasoning had been rejected in Canada and New Zealand. *Discretion to Disbelief*, *supra* note 12, at 391. *See also* Catherine Dauvergne & Jenni Millbank, *Before the High Court: Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh*, 25 SYDNEY L. REV. 97, 98-99 (2003); Jenni Millbank, *The Role of Rights in Asylum Claims on the Basis of Sexual Orientation*, 4 HUM. RTS L. REV. 193, 200 (2004).

148. Appellant S395 (2003) 216 C.L.R. 473, 493, 503 (McHugh and Kirby, JJ and Gummow and Hayne, JJ, respectively), http://www.refworld.org/docid/3fd9eca84.html.

149. *Id.* at 518.

150. *Id.*

> has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many—perhaps the majority of—cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct.[151]

The Court made it clear that a tribunal could not impose any expectation of discretion on an applicant and that "if applicants were to feel obliged to remain discreet for fear of being persecuted then the threat of serious harm would constitute persecutory conduct in itself."[152] What the Australian High Court seemed to leave open, and what at least one British court picked up on, was the possibility that if an asylum applicant chose to live discretely for reasons other than a fear of persecution, then an asylum adjudicator could find that the applicant did not have a well-founded fear of persecution because his secretive behavior was not tied to a fear of persecution such that asylum protection was necessary.

The decision in *HJ and HT* in the United Kingdom, which was based on the Australian High Court's decision in *Appellant S395*, demonstrates the pernicious nature of discretion and its ability to reemerge in asylum discourse in yet another guise. As a Commonwealth decision, and yet another decision from a Western receiving nation, it reinforces the idea that discretion is not a uniquely American problem and illustrates how an Australian court's decision can impact asylum process in other countries with respect to discretion. In *HJ and HT* the Supreme Court, after reviewing *Appellant S395* in depth, articulated a new test for well-founded fear of persecution in LGBT asylum cases in the United Kingdom that dispensed with the reasonably tolerable test but imposed a new test that hinged a claim of a well-founded fear of persecution on an applicant's behavior and *subjective* fear of persecution.[153]

The court found that if the applicant would act discretely for reasons other than a well-founded fear of persecution, then it was okay to send them home, even where they might be subject to the death penalty for homosexual activity, because the applicant did not fear persecution because of the applicant's sexual orientation.[154] In essence, the court split entitlement to asylum between those

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151. *Id.* at 490.
152. RRT Case No. 1207970, (2012) RRTA 757, Austl.: Refugee Review Tribunal (Sept. 3, 2012) (citing Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 C.L.R. 473), http://www.refworld.org/docid/507d49ae2.html.
153. HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT), (2010) UKSC 31, 8–29 (Lord Hope), 38 (Lord Rodger), (2011) 1 A.C. 596, http://www.refworld.org/docid/4c3456752.html.
154. *Id.*

who would live openly as homosexuals or would choose not to due to the threat of persecution, and those who would choose to act discretely simply because it was in their nature, or for cultural or religious reasons. Lord Hope explained the test thusly:

> [I]f it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, [then the next step] is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.[155]

This seems to beg an obvious question: by filing an asylum application in the first place, hasn't an applicant fulfilled the subjective component of the test? If I ask to stay in a receiving country because I fear persecution in my country of origin, regardless of why I behave the way I do, shouldn't that be enough?

In the years following *Appellant S395/2002*, the initial determination of identity and membership in a PSG has been more frequently challenged in Australia, which seems to track the experience in the United States.[156] Thus, there has been a clear shift from using discretion in the determination of an applicant's well-founded fear of persecution to using not only discretion but also a Westernized view of LGBT identity, to find that applicants are not LGBT and are not entitled to membership in a PSG in the first place.[157]

V. DISCRETION, IDENTITY, AND SOCIAL ACCEPTANCE

LGBT asylum applicants face an uphill battle in seeking protection because their sexual orientation is invisible and their "otherness"—both individually and politically—makes them vulnerable. Fundamentally, sexual orientation is seemingly perceived as a behavior, or even a belief, and not as an identity. Equally as damaging, the conception of what constitutes LGBT sexual orientation is tainted by a Western essentialist vision of what it means to be LGBT or to have a sexual orientation that is not heteronormative. These issues persist within the first-level decision making process in both the United States and Australia for two reasons: first, those persons who initially adjudicate claims are most likely to hold these essentialist beliefs about sexual orientation and identity; second, those beliefs are more likely to manifest in fact-finding proceedings such as the type conducted by initial adjudicators.[158] Another

155. *Id.* at 17 (¶ 35(d)).
156. *Discretion to Disbelief*, *supra* note 12, at 392–93.
157. *Id.*
158. *See* Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual*

reason, slightly more amorphous, is the political nature of the asylum process and its link to the broader immigration concerns and the evolving nature of the LGBT community in receiving countries such as the United States and Australia.[159]

Both the United States and Australia seem to be under constant political pressure with respect to immigration because their geographic locations make them accessible and desirable for migrants from the geopolitical South. In the United States, there is no more obvious an example than the migration of undocumented minors from Central America who are fleeing gangs and violence in their native countries.[160] Additionally, the invisible population of undocumented persons residing in the United States is a constant target of political aggression by and between political ideologues and the general population, who tend to scapegoat undocumented immigrant and asylum seekers for every conceivable harm suffered in society.[161] The result is a society that has

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Stereotypes in Sexual Orientation Asylum Cases, 15 LAW & SEXUALITY 135, 137 (2006) (arguing that "the facially neutral asylum process conceals the fact that immigration officials and judges make decisions based on racialized sexual stereotypes and culturally specific notions of homosexuality"); *Discretion to Disbelief*, *supra* note 12, at 392–93; *see also Gay Asylum Seekers Face 'Humiliation'*, THE GUARDIAN (Feb. 8, 2014), http://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office (noting the invasive and lurid questions Home Office officials asked of gay asylum seekers); Sally Hayden, *The UK Wants to Deport a Ugandan Woman Who Fled Her Country After an Exorcism*, VICE NEWS (Dec. 6, 2014), https://news.vice.com/article/the-uk-wants-to-deport-a-ugandan-woman-who-fled-her-country-after-an-exorcism (noting Home Office officials' doubts about an asylum-seeker's sexuality).

159. In Australia and in the United States, immigration seems to be a persistent salient issue. In the United States, Central Americans are coming across the border to avoid crime and gang violence, and Haitians and Cubans are coming to seek economic relief. In Australia, the same is true of Pacific Rim countries. *See* Editorial, *Australia's Refugee Problem*, N.Y. TIMES (July 4, 2014), http://www.nytimes.com/2014/07/05/opinion/australias-refugee-problem.html; Glenda Kwek, *Processing Asylum Seekers: How It Works*, SYDNEY MORNING HERALD (Sept. 1, 2011), http://www.smh.com.au/national/processing-asylum-seekers-how-it-works-2011001-1jnj6.html. Also, Australia caps the number of refugee and asylum applicants it will accept under its Humanitarian Program. *Asylum Seekers and Refugees Guide*, AUSTRALIAN HUMAN RIGHTS COMM'N (Aug. 14, 2015), https://www.humanrights.gov.au/asylum-seekers-and-refugees-guide. For 2013–14 that number was 13,750. *Id.* The Australian government also has a third country processing system in place for refugees who arrive in Australia by boat or without a valid visa, and an enhanced screening process for people who arrive by boat from Sri Lanka. *Id.* More recently, Europe and most of the political north have begun to feel similar pressures as receiving countries as the Syrian refugee crisis hit a new level in 2015, helping to create a perfect storm of refugee migration crises. *See generally* Patrick Boehler & Sergio Pecaha, *The Global Refugee Crisis, Region by Region*, N.Y. TIMES (Aug. 26, 2015), http://www.nytimes.com/interactive/2015/06/09/world/migrants-global-refugee-crisis-mediterranean-ukraine-syria-rohingya-malaysia-iraq.html.

160. *See* Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html; Julia Preston, *Hoping for Asylum, Migrants Strain U.S. Border*, N.Y. TIMES (Apr. 10, 2014), http://www.nytimes.com/2014/04/11/us/poverty-and-violence-push-new-wave-of-migrants-toward-us.html?_r=0.

161. *See, e.g.*, Jamie Longazel & Benjamin Fleury-Steiner, *Exploiting Borders: The Political*

significant anti-immigration sentiment.[162] In Australia, a similar pattern has emerged: there has been more prominent anti-immigration sentiment against those fleeing economic and political strife in Southeast Asia.[163]

The emerging cultural acceptance of LGBT lives in the United States highlights a slightly different pressure point. Culturally, the United States has been consumed, to some extent, with the push to recognize gay marriage in this country. Recent decisions by the United States Supreme Court and other federal courts continue to recognize and expand the rights of LGBT persons in this country.[164] However, in making LGBT relationships more normative, the courts seem to have crafted an LGBT identity that is static and unchanging. Where a problem in the past may have been an unfamiliarity with LGBT lifestyle, the concern looking forward is whether this known version of the LGBT experience will become the normative narrative for initial adjudicators.

A. Linking Discretion and Identity: A Symbiotic Relationship of Visibility and Vulnerability

The evolution of case law in the United States, Australia, and the United Kingdom demonstrates the inextricable link between identity and discretion. This link exists in part because sexual orientation is perceived to exist as a set of behaviors rather than as an identity that is both embodied and expressed. The reason we fail to express our identity openly can be based on a complex mix of personal, familial, social, cultural, and religious reasons.[165] In most instances, those choices are based on how we believe we will be perceived by society at large. In the context of an asylum applicant, while some of the individual's choices of expression may not be based on a "well-founded fear of persecution," as contemplated by the 1951 Convention, they may be driven by the context within which those decisions are made, rather than by the applicant's identity.

For example, a gay man in the United States may choose not to discuss his sexual identity at work or with his family for his own personal reasons. In that context, the issue is not whether such choices may be based on fear of persecution in the broader sense, because they likely are. Rather, the question is either whether the threat of persecution rises to a level that cannot be reasonably

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Economy of Local Backlash Against Undocumented Immigrants, 30 CHICANA/O-LATINA/O L. REV. 43 (2011) (considering the political and economic implications of immigrant labor juxtaposed against the anti-immigrant sentiment that is so prevalent along the U.S./Mexican border); Janet L. Dolgin & Katherine R. Dieterich, *When Others Get Too Close: Immigrants, Class, and the Health Care Debate*, 19 CORNELL J.L. & PUB. POL'Y 283 (2010) (discussing anti-immigration issues and healthcare reform).

162. *Id.*

163. *See* sources and accompanying text, *supra* note 159.

164. *See, e.g.*, Obergefell v. Hodges, 576 U.S. ___ (2015); U.S. v. Windsor, 570 U.S. ___ (2013); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).

165. *See generally Finding the Fundamental*, *supra* note 71; Swetha Sridharan, *The Difficulties of U.S. Asylum Claims Based on Sexual Orientation*, MIGRATION POLICY INST. (Oct. 29, 2008), http://www.migrationpolicy.org/article/difficulties-us-asylum-claims-based-sexual-orientation.

tolerated or whether there is a threat of harm against which the State fails to protect. In the United States, LGBT citizens still face violence, threats of harm, and discrimination.[166] Unlike many countries, the United States has laws against discrimination in housing, services, and employment, which should protect against manifestations of homophobia and transphobia.[167] These laws are arguably enforced although the public conservative backlash has reached new heights in the wake of *Obergefell*.[168] But when set in an environment that is socially homophobic and religiously conservative—or, even worse, where there is state-sponsored homophobia—any behavior that may be deemed voluntary discretion should be viewed instead as driven by persecution rather than attempting to dissect the underlying subjective forces driving such behavior.[169] For me, the maddening part of any type of metric to measure discretion is that while there are more open societies and more closed societies in terms of acceptance of LGBT citizens, the variations within even open societies render

166. *See* NAT'L CTR. FOR TRANSGENDER EQUALITY, *Non-Discrimination Laws*, http://www.transequality.org/issues/non-discrimination-laws; NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, Media Alert, http://www.avp.org/storage/documents/2016.2.23_ncavp_ma_mayayoung.pdf; NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, Media Alert, http://www.avp.org/storage/documents/Reports/MEDIARELEASE_2014_NCAVP_HVREPORT.pdf; CTR. FOR AM. PROGRESS, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment,* https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/; THE WILLIAMS INSTITUTE, *Employment Discrimination Against LGBT Workers*, http://williamsinstitute.law.ucla.edu/headlines/research-on-lgbt-workplace-protections/.

167. *See, e.g.*, Civil Rights Act of 1964, Pub. L. 88-352; Fair Housing Act of 1968, 42 U.S.C. § 3601.

168. This does not suggest the United States is without problems, but rather that those problems experienced by LGBT citizens likely do not rise to the level of persecution contemplated by the 1951 Convention, with the exception of transgender persons. *See National Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities Released Today* (May 29, 2014), http://equalitymi.org/media-center/media-releases/national-report-hate-violence-against-lesbian-gay-bisexual-transgender-0; James Nichols, *Transgender Murders 50 Percent Higher Than Gays, Lesbians in July*, THE HUFFINGTON POST (AUG. 27, 2013), http://www.huffingtonpost.com/2013/08/27/trans-murder-rates_n_3824273.html.

169. *See Queer Cases*, *supra* note 23, at 351–52. Hathaway and Pobjoy note that the way to move beyond the cast of reasonable tolerability and allow endogenous harm to be properly recognized as follows:

> [D]rawing on the established view of the risk of being persecuted as comprised of the sustained or systemic failure of state protection in relation to one of the core entitlements that has been recognized by the international community . . . there are at least two ways in which application of this accepted framework could have yielded the substantive result embraced by the courts[.] . . . The first approach is to define the harm as the modification of behavior itself, amounting to the denial of the right to a private life. The second approach is to define the harm as the psychological harm occasioned by the modification of behavior. In both cases, the requirement that there be a failure of state protection will be readily established by the failure to the state to provide a meaningful response to the precipitating cause of the serious harm.

See id.

any objective measure of context difficult. However, by failing to provide any sort of metric to measure the context within which discretion is potentially exercised, the invisibility of LGBT asylum applicants acts as a barrier to protecting their vulnerability.[170]

The failure to fully realize the complexity of discretion has manifested itself in an interesting way. In the United States, lower-level adjudicatory decisions have found that an applicant is not LGBT, and thus not a member of a PSG, because the applicant does not *behave* or *look* a certain way.[171] If an applicant is discrete or gender-conforming in behavior, manner, or appearance, then the application may fail despite the fact that applicant identifies as LGBT.[172] Thus, even though discretion as such is not properly considered in terms of establishing a well-founded fear of persecution, it has found its way into the asylum process in terms of identifying an applicant as a member of an LGBT PSG.

In Australia, this far more subtle application of discretion has surfaced in the determination of identity after discretion related to the well-founded fear of persecution component of the test was struck down by the High Court in *Appellant S395/2002*.[173] When discretion was removed from one component, it simply reemerged as a challenge to identity similar to decisions in the United States.[174] In fact, this is particularly striking because even the Bangladeshi couple seeking asylum in *Appellant S395/2002* was denied asylum by the Tribunal on remand because it was found that they were not gay after all.[175]

B. What's the Next Step in Protecting LGBT Applicants from the Improper Use of Discretion?

As discretion has migrated from a persecution discourse to an identity discourse, it has gained power from an unlikely ally, a Western narrative of what it means to be LGBT.[176] This is a problem because, as the UNHCR has reported,

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170. *See generally* Refugee Appeal No. 74665/03 (2005) INLR 68 at [113-14] (N.Z.) (finding that the defensive act of "self-denial" to avoid death or bodily harm satisfied the requirement of well-found fear of persecution).

171. *See Summary Report, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity,* UN High Commissioner for Refugees (UNHCR), at 10 (Sept. 10, 2011), http://www.refworld.org/docid/4fa910f92.html ("Participants recalled the shift from 'discretion' to disbelief in refusal decisions and that first instance decisions more and more question whether a person is LGBTI as claimed.").

172. *See, e.g.,* Todorovic, 621 F.3d at 1326–27. In contrast to the lower level adjudicatory decisions in these cases, Mr. Castro was fortunate enough to receive a positive decision in his asylum claim. 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. So perhaps his attorney's advice to engage in overstated understatement within the traditional Western gay narrative was, in fact, the best course of action.

173. *See Discretion to Disbelief*, *supra* note 12, at 392.

174. *Id.*

175. *Id.* at 392–93.

176. *Id.* (finding an alarming number of cases where applicants were cross-examined using highly stereotypical and Westernized notions of gayness as a template and denying claims when the

"[c]redibility assessments are influenced by stereotypical assumptions of the way in which LGBTI applicants should look or behave. Also, adjudicators often do not have the necessary training."[177] Eradicating discretion as a determiner of identity needs to be introduced into initial proceedings so that Westernized LGBT narratives are neutralized and a space is opened for LGBT experiences from both the political North and South. Allowing the federal courts in both Australia and the United States to act as gatekeepers in this regard will not work since, by the time cases arrive on appeal, the damage is done and review of fact-finding and credibility determinations is often limited.

The United States' CIS guidelines are a critical step in addressing both conscious and unconscious biases in the adjudicatory process. However, changing attitudes about LGBT identity is complicated, and the fact-finding nature of initial determinations may make correcting continuing bias difficult. Unfortunately, underlying political pressures—such as a desire to weed out false claims—in the asylum process will virtually always impact an identity determination that is best left to the applicant alone, so as to not exclude valid claims in an attempt to block false claims.[178] Even social progress can be problematic, creating a narrative for the masses that cannot adapt beyond a

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applicant failed to meet the stereotype).

177. *Summary Report*, *supra* note 171, at 10–11. The UNHCR has discussed using the "Difference-Stigma-Shame-Harm" model as an "identity checklist" to assist asylum adjudicators in making decisions that respect the applicant's individual experience within a broader normative framework. *Id.* As defined in the UNHCR's Summary Report:

> Difference refers to self-recognition or identification by others of when one is not living a heterosexual narrative, i.e. not conforming to how straight people are expected to live their lives, e.g. a man "trapped in a woman's body" or a woman without a male partner. Stigma relates to a recognition that close family members, friends or the "majority" disapprove of the applicant's conduct and/or identity. It also involves a recognition of state/cultural/religious mores/laws which are directed towards LGBTI persons. Shame is another aspect, associated with stigma and isolation through the impact of being the "other" rather than the "same." Harm relates to the specific forms of persecution that may be perpetrated upon LGBTI persons, including laws criminalizing same-sex conduct and the impact of these laws on the applicant as well as harm perpetrated by non-state actors such as mob violence and violence/killings in the name of "honor."

Id.

178. The United States has always had concerns about immigration fraud, particularly fraudulent asylum claims. *See* Sam Dolnick, *Immigrants May Be Fed False Stories to Bolster Asylum Claims*, N.Y TIMES (July 11, 2011), http://www.nytimes.com/2011/07/12/nyregion/immigrants-may-be-fed-false-stories-to-bolster-asylum-pleas.html?pagewanted=all&_r=0; Kirk Semple et al., *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES (Feb. 22, 2014), http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html; *Asylum Fraud: Abusing America's Compassion: Hearing Before the Subcomm. on Immigration and Border Security*, 113th Cong. 2 (2014) (House Judiciary Committee Takes Testimony on Asylum System Abuses); Stephen Dinan, *Audit Finds Asylum System Rife with Fraud: Approval Laws Broken with Surge of Immigrants*, WASH. TIMES (Feb. 2, 2014), http://www.washingtontimes.com/news/2014/feb/5/audit-finds-asylum-system-rife-with-fraud/?pagesall.

Western view of what it means to be LGBT.[179]

As Australia's experience has demonstrated, discretion is a pernicious weed that will find a place to grow wherever there is a perceived weakness in the process. In order to move beyond the limitations that education may have in terms of resolving the improper use of discretion, it may be necessary to flip the script on discretion instead. Receiving countries could create a presumption that engaging in discretionary or covert behavior of any kind is positive evidence of LGBT persecution when the discretionary behavior is situated in a state with persecutive conditions. For example, in a socially, religiously conservative society that engages in state-sponsored homophobia via laws against homosexuality, a person who identifies as LGBT or is perceived to be LGBT may be physically harmed or killed.[180] Thus, if an applicant has not conducted himself or herself openly, or even not at all, that "discretion" should reflect that the person has a well-founded fear of persecution and has behaved appropriately for an LGBT person in that country regardless of whether they satisfy a specific LGBT narrative. The strength of presumption of LGBT identity and persecution could increase in relation to the intensity of the persecutive environment.[181] In other words, context is everything and the lens should be turned back on the persecutor in making these decisions.

VI. CONCLUSION

Crafting a process that captures the different ways in which one can

179. For example, as same sex couples continue to move forward in securing marriage rights, their assimilation into the traditional Western family narrative may hurt the stories of those who are neither Western nor seeking marital rights, but rather seeking protection from persecution. So while cases like *Windsor* and *Baskin* have been a boon to LGBT rights in the United States, they may actually act as a hindrance to those seeking asylum here to the extent they further solidify the Western LGBT experience.

180. Interestingly, even within a country that a Western receiving country might perceive as persecutive, there is still further nuance. For example, in Iran, while it may be difficult to be LGB, transgender citizens may not suffer in the same way because sex change operations and shifting gender is more acceptable. Lorah Moftah, *Iran Transgender Law: Islamic Republic Advances Bill to Protect Transsexuals Amid Crackdown on Gay Rights*, INT'L BUS. TIMES (May 27, 2015), http://www.ibtimes.com/iran-transgender-law-islamic-republic-advances-bill-protect-transsexuals-amid-1940978. And, in the United States, while being LGB may be better (i.e., it may be easier for most LGB folks to live openly than trans folks), and not subject to state-sponsored homophobia, the transgender population is subject to significant violence and suffers from high levels of depression and suicide. *See generally* NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2013 (2014), http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf; Harvard School of Public Health, *Transgender Youth at Risk for Depression, Suicide*, http://www.hsph.harvard.edu/news/hsph-in-the-news/transgender-youth-at-risk-for-depression-suicide/.

181. This, of course, would require much better Country of Origin reports and reliance on reports from non-governmental organizations. But, it might be the next step beyond simply offering guidance on what questions to ask and may work against the bias that is unfortunately inherent in these types of claims.

embody their sexual orientation, while existing in a presumably persecutive environment, is critical to meaningful determination of LGBT asylum claims. Lord Walker observed in *HJ and HT* that: "neither the most courageous nor the most timorous forfeit protection as asylum seekers if, in their different ways, they satisfy the test of a well-founded fear of persecution because of their sexuality."[182] As Jenni Millbank explains, a new process requires

> [a] deep-seated, nuanced and context-sensitive equality analysis . . . to transform judicial understandings of minority sexual identities that go beyond (very) private gay sex from being understood as "flaunting," "provoking," "parading" or "publically proclaiming" . . . into what is really being claimed: the right to live an ordinary everyday normal . . . life *openly* as an LGBT person.[183]

At the end of the day, the entire process can be broken down into a deceivingly simple inquiry: if you live in a country where you cannot affirmatively answer the seemingly simple question, "Are you gay?"[184] without facing persecution, the threat of significant harm, or marginalization, and if there is also a lack of meaningful state protection because of your answer, then you should be able to maintain an asylum claim.[185] The mere fact that you could lie in response to the question should be completely irrelevant.[186] Similarly, the mere fact that you choose not to answer the question because you are a private person should be completely irrelevant as well. Instead, if affirmance of your identity as lesbian, gay, bisexual, transgender or queer would result in harm, then your inability to affirm your status is, in fact, just as harmful.

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182. HJ (Iran) v. Sec'y of State for the Home Dep't *(HJ and HT)*, (2010) UKSC 31, (2011) 1 A.C. 596, at 45, http://www.refworld.org/docid/4c3456752.html.
183. Millbank, *supra* note 12, at 33.
184. Or: "Are you bisexual?"; "Are you lesbian?"; "Are you queer?"; "Are you transgendered?"; "Are you gender fluid?"
185. Persecution, or the threat of persecution, as defined by the 1951 Convention. *See* 1951 Convention, *supra* note 4. I am not talking about not being able to see a Kylie Minogue concert. This question does not presume that this would be a safe question to answer in some parts of the United States, Australia, or the United Kingdom, rather it seeks to make a point about the social environment within which an LGBT applicant is situated generally. If the response is that I would answer this question in an urban area, and not a rural one within the same country, then that should be taken into account, but it highlights once again the complexity of applying any rules that implicate an applicant's behavior.
186. Australia and the United States seem to agree on this point.