NOTES

CONSTRUCTING SEXUALITY AND GENDER IDENTITY FOR ASYLUM THROUGH A WESTERN GAZE: THE OVERSIMPLIFICATION OF GLOBAL SEXUAL AND GENDER VARIATION AND ITS PRACTICAL EFFECT ON LGBT ASYLUM DETERMINATIONS

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INTRODUCTION

There is not much legal authority or legal scholarship that explicitly discusses credibility determinations for LGBTQ+ asylum-seekers in the United States immigration system. Most scholarship about credibility and the LGBTQ+ asylum experience exists in social science fields like anthropology and sociology and addresses the LGBTQ+ asylum experience in other jurisdictions. There is thus a need for scholarship that addresses the essential question of what boundaries the legal system has drawn between credible LGBTQ+ identities and experiences and incredible LGBTQ+ identities and experiences for the legal purposes of asylum.[1] There are some clear determinations in case law and in Article I courtrooms that determine whether or not LGBT asylum-seekers will be found to be "credibly" LGBTQ+.[2] However, it is unclear which LGBTQ+ asylum-seekers have identities and lived experiences that are credible or incredible for the purposes of seeking asylum. This matters because what constitutes acceptable proof that an individual identifies as gay, lesbian, bisexual, transgender, gender nonconforming, or queer is more than just an intellectual evidentiary discourse; it reflects how a given society identifies and defines queer people, queer identities, queer narratives, and queer lived experiences.

In *Legally Queer: The Construction of Sexuality in LGBTQ Asylum Claims*, Stefan Vogler argues that the way in which U.S. queer asylum law "has been elaborated, adapted, and interpreted, particularly in approximately the past decade, offers possibilities for making unique identity claims that are not recognized in existing scholarship."[3] In his article Vogler argues that the indeterminacy of the law surrounding LGBT asylum "allow[s] advocates and asylum seekers to challenge existing categories and stake out new claims based on their sexualities."[4] After interviewing legal actors and reading case law,[5] Vogler argues that "queer asylum claims, in particular, often seem to push the boundaries of established conceptions of sexuality in order to

1. *See* KAREN MOULDING ET AL., SEXUAL ORIENTATION AND THE LAW § 9:13 (2020).
2. "Credibly" or "incredibly" a member of the LGBTQ+ community for the purposes of claiming a fear of persecution on the basis of membership in a particular social group.
3. Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBTQ Asylum Claims*, 50(4) L. & SOC'Y REV. 856, 856 (2016).
4. *Id.*
5. *Id.*

engender changes in legal definitions of sexuality and to expand the categories worthy of protection as a 'particular social group' under asylum law."[6] As Vogler found, what constitutes membership in a particular social group ("PSG")[7] has expanded since *Toboso-Alfonso*, the first case that recognized asylum based on sexual orientation, and increasing Article I judicial discretion in asylum cases based on membership in a PSG can lead to more progressive outcomes.[8] Vogler's article was written in 2016—two years after the Board of Immigration Appeals ("BIA") issued *Matter of A-R-C-G-*,[9] and two years before the Attorney General overruled *Matter of A-R-C-G-* in *Matter of A-B-*.[10] *Matter of A-B-* is of consequence to PSG-based asylum claims, because then Attorney General Jeff Sessions ruled that to constitute a cognizable PSG, a PSG must exist independently of the harm asserted in an asylum application.[11]

While theoretically sound, Vogler's article may not practically capture the current exigencies and practical experiences that LGBTQ+ asylum-seekers face in front of an Article I judge since 2016. First, it relies on an understanding of a standard for asylum based on membership in a PSG that may be subject to change pending the outcome of cases currently on appeal. Second, it does not take into account the macro-social and macro-legal structures and concepts that circumscribe the asylum process, like: (1) contemporary U.S. politics; (2) the impact of BIA-issued and Attorney General-issued opinions on the asylum process; (3) the nature of the asylum process; and (4) the standard for appellate review in asylum cases, among other structures and concepts governing and intrinsic to the asylum process. Additionally, his article overemphasizes the value of favorable precedent in the asylum context without fully realizing the differences between the Article I and Article III courtroom context.

These critiques are important in the post-Trump era because they have serious implications for LGBTQ+ credibility determinations in the LGBT asylum process. In general, judicial deference in the asylum process in the post-Trump era is not just an omnipotent thumb on the scale of the asylum adjudication process, but is increasingly used as a tool to limit the number of asylum-seekers and immigrants admitted to the United States and to achieve broader administrative immigration policy goals put in place by the Trump administration.[12] LGBTQ+ advocates and activists are torn between wanting

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6. *Id.*
7. *Id.*
8. *See* Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).
9. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).
10. Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).
11. *Id.* The viability of LGBT asylum claims has since been questioned, because legal advocates feared courts would see a claim for LGBT asylum as a claim that does not exist independent of the harm. *See generally* Laura H. Dietz, Annotation, *Asylum Claims Based upon Sexual Orientation and Transgender Status*, 47 A.L.R. FED. 3d Art. 2 (2019).
12. Following *Matter of A-B-*, the number of asylum denials jumped nationally in FY 2018. *See Asylum Decisions and Denials Jump in 2018*, TRAC (Nov. 29, 2018) ("Fiscal year 2018 broke records for

to see queer justice and sociolegal recognition of an array of queer lived experiences and seeking justice for the queer people they represent before Article I tribunals who are fleeing persecution based on sexual or gender identity.[13] Rather than leading to LGBTQ+ advocates asking the Attorney General to recognize a new sexual identity, this tension in the post-Trump era is, understandably, more likely to manifest in legal actors trying to fit asylees' experiences into culturally accepted Western, (homo/trans)normative self-proving narratives that are more widely understood in American culture and in American courtrooms.[14] This is important to consider because usually LGBTQ+ people do not have the burden of proof to prove their sexual or gender identity.[15] How the law understands sexual or gender identity reflects how society understands and legitimates sexual identity and queer and transgender lived experiences.

This Note attempts to begin a discourse about what constitutes credible and incredible LGBTQ+ experiences and identities for the purposes of establishing one's membership in the LGBTQ+ community to successfully seek LGBT asylum.[16] This Note will first discuss the state of asylum in the United States during and after the Trump era and explain the current process for applicants seeking asylum due to a fear of persecution on the grounds of their membership in the LGBTQ+ community or a perception that they are a member of the LGBTQ+ community. This Note will then identify case law that has delineated permissible and impermissible characteristics that the court system can use to determine whether an LGBT asylum applicant is credible enough to have a plausible asylum claim. This Note will then critique the flexibility Article I judges have in adjudicating LGBT asylum cases and argue that this flexibility amounts to unfettered judicial discretion in the LGBT asylum process. The Note then explains how this unfettered judicial discretion can and does have the effect of minimizing LGBTQ+ lived experiences in the asylum process by creating a vacuum for what constitutes credible and incredible LGBTQ+ asylum identities and experiences. It forces legal actors involved in the asylum process to advise queer asylum-seekers in the United States to: (1) perform Western archetypes of queerness; and (2) tell their stories to conform to Western tropes of "foreign" queer

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the number of decisions [42,224] by immigration judges granting or denying asylum. Denials grew faster than grants, pushing denial rates up as well. The 42,224 decisions represented a 40 percent jump from decisions during FY 2017, and an 89 percent increase over the number of asylum decisions of two years ago."), https://trac.syr.edu/immigration/reports/539/.

13. Siobhan McGuirk, *(In)credible Subjects: NGOs, Attorneys, and Permissible LGBT Asylum Seeker Identities,* 41 POL. & LEGAL ANTHROPOLOGY REV., 1 (2018).

14. *See, e.g., id.*; THOMAS SPIJKERBOER, FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM, SEXUAL IDENTITY, NORMATIVITY & ASYLUM 223–26, (Routledge, 2013).

15. In instances where the opposing party does not object to classification as a protected class, for example, LGBTQ+ people can prove that their protected class by stipulation.

16. This Note will define "LGBT asylum" as asylum based on an asylee's fear of persecution or harm based on their identity as a member of a particular social group, the LGBTQ+ community, or fear or harm of persecution based on the perception in their home country that they are a member of the LGBTQ+ community.

persecution. This creates a dichotomy between "credible" and "incredible" LGBT asylum determinations, which, in turn, create (1) permissible queer performativities and (2) permissible queer narratives that determine whether LGBT asylum-seekers may be found credible.

I. OVERVIEW OF U.S. LGBT ASYLUM

After the United States bound itself to the 1951 Convention Relating to the Status of Refugees (the "1951 Geneva Convention") and became a signatory to the 1967 Protocol Relating to the Status of Refugees (the "1967 Protocol"), it was obligated to accept asylum-seekers under international law.[17] The United States' commitment to refugees[18] was codified in the Refugee Act of 1980 ("Refugee Act"), an amendment to the Immigration and Nationality Act ("INA").[19] The Refugee Act modified the INA such that the INA:

> authorizes the Attorney General to grant asylum if an alien is unable or unwilling to return to her country of origin because she has suffered past persecution or has a well-founded fear of future persecution on

17. The United States was not a party to the 1951 Geneva Convention, but was a party to the 1967 Protocol. "[B]y ratifying the Protocol, the United States bound itself to respect Articles 2 through 34 of the 1951 Convention relating to the Status of Refugees," and even expanded what is required of signatories to the 1951 Geneva Convention. *See* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law,* 15 BERKELEY J. INT'L. L. 1, 1 n.1 (1997); *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

18. This Note will use the terms "asylum-seeker" and "refugee" interchangeably to describe those asylum applicants, because asylum-seekers have to meet the definition of refugee defined by the Immigration and Nationality Act ("INA") in order to be eligible for asylum in the United States. The definition of refugee as defined by the INA is as follows:

> (42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

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

19. 94 Stat. 102.

> account of "race, religion, nationality, membership in a particular social group, or political opinion."[20]

Congress intended the Refugee Act to establish a more uniform basis for the provision of assistance to refugees, setting out the elements by which asylum-seekers and refugees today have the burden of proof to establish that they fall under the definition of a refugee in order to be granted asylum in the United States.[21]

Asylum-seekers who identify as sexual[22] or gender[23] minorities may seek asylum on any protected ground.[24] For example, if an asylum-seeker identifies as gay, it does not mean that they are necessarily seeking asylum on the basis that they fear persecution in their home country because of their sexual identity or gender identity. However, asylum-seekers who are fleeing or fear harm, persecution, or mistreatment in their home country because they identify as gay, lesbian, bisexual, transgender, gender-nonconforming, or queer[25] or who are perceived as being gay, lesbian, bisexual, transgender, or queer, may seek asylum in the United States through their membership in a PSG—the LGBTQ+ community.[26] Sexual and gender minorities who seek asylum on the basis that they fear persecution in their home country because of their sexual and gender identities, or heterosexual and cisgender people who fear harm in their home country based on the perception that they are members of the LGBTQ+ community, are commonly referred to as LGBT asylum-seekers or refugees. The process by which LGBT asylum-seekers or refugees seek asylum based on their membership in a PSG is commonly referred to as LGBT asylum.[27]

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20. Matter of A-B-, 27 I. & N. Dec. at 317–18 (citing 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(a), (b)(i)).

21. 94 Stat 102.

22. Including lesbian, gay, bisexual, pansexual, queer, or another marginalized sexual identities.

23. Including transgender, gender-nonconforming or third gender (two-spirit, Fa'afafine, hijra, Khanith, or other third genders recognized across cultures across the world).

24. 94 Stat 102.

25. Usually, LGBTQ asylum decisions only use the words "gay," "lesbian," "bisexual," and "transgender." It should be noted that sexual identities and gender identities vary across cultures and within cultures. These terms even limit the types of domestic identities that members of the American LGBTQ+ community identify as, including but not limited to those who identify as nonbinary—somewhere along the gender binary but not as male or female—or those who identify with other gender and sexual identities.

26. It is possible, for example, that an attorney may strategically argue that a *e.g.* transgender asylum-seeker is seeking asylum on a protected ground not only because they fear persecution because of their gender identity in their home country, but also because they fear harm based on their "political opinion" in their home country because they engaged in LGBTQ+ rights activism there. This Note is limited to analyzing LGBTQ asylum on the basis of an LGBTQ person's fear of persecution, harm or mistreatment in their home country based on their sexual or gender identity, and not based on any other protected ground codified in the Refugee Act of 1980. *See generally*, 94. Stat 102.

27. While not members of the LGBTQ+ community, heterosexual and cisgender people who are perceived as members of the LGBT community can claim asylum on the ground that they fear persecution because of their perceived membership in the LGBT community in their home country. The term "LGBT asylum-seekers" in this Note will include those who are perceived as LGBT but may not identify with a marginalized sexual identity or a marginalized gender identity.

Asylum applicants already face a high burden in establishing an LGBT asylum claim. To have a credible asylum claim on the basis that an asylum-seeker is a member of a PSG, asylum applicants must establish a prima facie case that they have: (1) a well-founded fear of persecution (2) based on past persecution or risk of persecution in the future if returned to the country of origin (3) because of the applicant's membership in a PSG wherein (4) the persecutor is a government actor and/or a non-governmental actor that the government is unwilling or unable to control.[28] The asylum-seeker bears the burden of establishing that the PSG to which they belong is (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.[29] Since 1994, the United States has recognized that asylum-seekers who have been able to establish their sexual orientation have been able to prove their membership in a PSG for the purposes of asylum.[30] Since 2000, courts have also recognized that transgender and other gender-nonconforming people can establish their membership in a PSG through sexual orientation and gender identity.[31]

In addition to establishing the standard of proof required of all asylum-seekers who seek asylum on the basis of their membership in a PSG, LGBTQ+ asylum-seekers must also uniquely prove that they identify with the sexual identity or the gender identity alleged, or that they are perceived in their home country as identifying with that sexual or gender identity.[32] A court's findings with respect to these requirements are commonly called credibility determinations because they assess whether an asylum-seeker is credibly a member of a marginalized sexual orientation or cisgender-nonconforming gender identity.[33] LGBTQ+ asylum-seekers can generally establish proof of their sexual or gender identity or perceived sexual or gender identity through credible testimony and corroborating documentary evidence.[34] However, federal asylum procedures explicitly state that the "testimony of [an] applicant [for asylum], if credible, may be sufficient to sustain the

28. *Immigration Equality Asylum Manual: 3. Elements of Asylum Law*, IMMIGRATIONEQUALITY.ORG, https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-elements-of-asylum-law/#return-note-2044-1.

29. Matter of M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

30. Sexual orientation was established as a PSG in *Matter of Toboso-Alfonso*. The case was decided in 1990 but established as precedent in 1994. *See Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819. (B.I.A. 1990)

31. *See* Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1087 (9th Cir. 2000) (holding that "gay men with female sexual identities" constituted a particular social group).

32. *See generally* Dietz, *supra* note 11; Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

33. Not to be confused with testimonial credibility determinations.

34. *But see* Heather Scavone, *Queer Evidence: The Peculiar Evidentiary Burden Faced by Asylum Applicants with Cases Based on Sexual Orientation and Identity*, 5 ELON L. REV. 389, 394 (2013) (arguing that testimony and secondary documentation can be more favorable to asylum applicants arguing that they have a claim for asylum based on their membership in a particular social group than primary documentary evidence); *see also* Amanfi v. Ashcroft, 328 F.3d at 723–24.

burden of proof without corroboration," meaning that corroborating documentary evidence is not *per se* necessary.[35]

However, as is the case with other asylum claims—especially those based on membership in a PSG—the ultimate standard of proof for an LGBTQ+ asylum-seeker's credibility determination can sometimes be discretionary. One serious challenge in the U.S. asylum system is that asylum adjudicators are afforded vast, often virtually unchecked, judicial discretion.[36] This is in part because asylum is a discretionary, and not mandatory, form of relief.[37] This means that an asylum-seeker who otherwise proves that they are statutorily eligible to seek asylum in the United States may nonetheless be denied asylum due to a variety of discretionary factors.[38] Further, the INA states that the Attorney General's (or an immigration judge acting on behalf of the Attorney General) discretionary judgment whether to grant asylum relief is "conclusive unless manifestly contrary to the law and an abuse of discretion."[39] Practically speaking, this means that asylum decisions have little meaningful appellate review and little binding precedent.[40] For these reasons, Article I immigration judges ("IJs") inherently have more judicial discretion in the asylum and other immigration contexts than Article III federal judges do in most contexts. Consequently, IJs have more latitude in making many decisions in their courtrooms, including in assessing the sufficiency of evidence for establishing an asylum claimant's sexual orientation or gender identity.

II. PSG-BASED ASYLUM IN THE TRUMP AND POST-TRUMP ERA AND ITS IMPACT ON JUDICIAL DISCRETION IN CREDIBILITY DETERMINATIONS FOR LGBTQ+ ASYLUM-SEEKERS

Like in the rest of the Western world, immigration has become a hot topic in the United States and was a major campaign issue in the 2016 and 2020 presidential elections.[41] The Trump administration took several measures to reform the immigration process through the executive branch[42] and the

35. 8 C.F.R. § 208.13(a) (2012). *But see* Scavone, *supra* note 34 (noting that immigration judges in LGBT asylum proceedings "habitually discount testimonial evidence as marginally probative").

36. Courts grant vast deference to fact findings of Article I judges adjudicating asylum claims due in part to *Chevron* deference. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

37. *See generally* Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595 (2012).

38. *Id.* at 597.

39. INA §242(b)(4)(D), 8 U.S.C. §1252(b)(4)(D).

40. Nora Snyder, *Matter of A-B-, LGBTQ Asylum Claims, and the Rule of Law in the U.S. Asylum System*, 114 NW. U. L. REV. 809, 814 (2019).

41. 52% of registered voters in the 2020 presidential election and 70% of registered voters in the 2016 presidential election in the United States said that immigration was a "very important" issue. *See Important Issues in the 2020 Election*, PEW RSCH. CTR. (Aug. 13, 2020), https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/; *see also Top Voting Issues in 2016 Election*, PEW RSCH. CTR. (July 7, 2016), https://www.pewresearch.org/politics/2016/07/07/4-top-voting-issues-in-2016-election/.

42. *See, e.g.*, Exec. Order No. 13767, 82 FR 8793 (2017) (providing funding for the border wall); U.S. Dep't of Homeland Sec., Policy Guidance for Implementation of the Migrant Protection Protocols

judicial branch[43] of the U.S. Federal Government. The executive branch and the judicial branch have seen attempts by the Trump administration to limit the ability of asylum-seekers to seek asylum on the basis of their membership in a PSG—most notably in *Matter of A-B-* in 2018.[44] While theoretically these cases should not impact credibility determinations made in LGBT asylum proceedings in the way that immigration and LGBTQ+ activists feared when the decisions were issued, practically speaking, scholars have noted that immigration legal actors, like IJs and immigration advocates, are skeptical of the viability of PSG-based asylum claims after *Matter of A-B-*.[45] However, immigration legal actors and asylum-seekers may be reading too much into these cases by inferring that IJs are afforded more discretion in determining which members of a PSG should be granted the discretionary relief of asylum than the cases permit.[46]

In 2018, then Attorney General Jeff Sessions issued *Matter of A-B-*, thereby overruling *Matter of A-R-C-G-*, a precedential BIA decision which held that "married women in Guatemala who are unable to leave their relationship" is a PSG for the purposes of seeking asylum because the group is socially distinct, "defined with particularity," and "based on the immutable characteristic of sex."[47] *Matter of A-B-* overruled *Matter of A-R-C-G-* on procedural grounds and "cast doubt on the continued viability of asylum claims predicated on non-state actor violence … which alarmed LGBTQ+ advocates, whose asylum claims often involve non-state actor persecutors."[48] *Matter of A-B-* was overruled in January 2019 by *Grace v. Whitaker*, which found that the holding in *Matter of A-B-* was arbitrary and capricious.[49] The Attorney General then issued *Matter of L-E-A-* which, like *Matter of A-B-*, again narrowed the criteria for establishing membership in a PSG for the purposes of asylum.[50] Many of the decisions in this complicated series of cases are currently on appeal and may substantially alter what constitutes a PSG for the purposes of seeking asylum.[51]

In LGBT asylum cases, credibility determinations assess whether LGBTQ+ asylum applicants have proven before an immigration court that they are a member, or would be perceived as a member, of the PSG—the LGBTQ+ community—in their home country.[52] Theoretically, *Matter of*

(Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf (enforcing the migrant protection protocols).

43. *See, e.g.*, the Attorney General's decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

44. Matter of A-B-, 27 I. & N. Dec. 316; Matter of L-E-A-, 27 I. & N. Dec. 581 (A.G. 2019).

45. Michael Kareff & Jorge Roman-Romero, *Post-Matter of A-B-, the Ninth Circuit Joins the First and Sixth Circuit in Finding Domestic Violence Based Asylum Claims Are Still Viable*, 35 GEO. IMMIGR. L.J. 349, 349 (2020).

46. Snyder, *supra* note 40, at 856.

47. Matter of A-B-, 27 I. & N. Dec. 316; Matter of A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).

48. Snyder, *supra* note 40, at 809.

49. Grace v. Whitaker, 344 F. Supp. 3d 96, 125 (D.D.C. 2019).

50. Matter of L-E-A-, 27 I. & N. Dec. at 582.

51. *See* Kareff, *supra* note 45.

52. *See, e.g.*, Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

A-B- should not impact LGBT asylum-seekers in meeting their burden of proving that they fear persecution in their country of origin because they are a member of a PSG, particularly with regard to the credibility determinations.[53] The holding itself in *Matter of A-B-* does not substantively alter LGBT asylum precedent, but rather simply narrows the scope of a court's PSG analysis.[54] Further, recent decisions by the Trump administration address whether certain PSGs constitute protected PSGs for the purposes of asylum.[55]

Nonetheless, one likely effect of cases like *Matter of A-B-* and the Trump administration's rhetoric regarding immigration codified in law is a heightened reliance on discretionary factors to deny otherwise plausible asylum claims. Nora Snyder explains in *Matter of A-B-, LGBTQ Asylum Claims, and the Rule of Law in the US Asylum System* how, anecdotally, since the Attorney General issued *Matter of A-B-*, IJs have applied an incorrect reading of *Matter of A-B-*'s holding in their asylum cases—namely one that "embolden[s] asylum adjudicators who are already biased against LGBTQ+ asylum seekers to reject more of their claims."[56] Snyder further explains how this may be extremely problematic for LGBTQ+ asylum-seekers because

> IJs might have "strong personal opinions" about issues involving sexual orientation and gender identity [which] could cause them to use their discretion to reject LGBTQ claims, not because of lack of merit, but because of reliance on stereotypes or personal prejudice … [because] only the most extreme [cases] will make it past the deferential standard of review [of asylum cases].[57]

She finds that, despite case law across federal circuits suggesting IJs may not permissibly rely on "egregious and blatant examples of reliance on stereotypes," IJs may nonetheless be emboldened to reject more LGBT asylum claims than before.[58]

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53. *But see* Snyder, *supra* note 40, at 809 (stating that "statistical and anecdotal evidence indicates that *Matter of A-B-* contributed to record high denial rates in 2018, and some asylum seekers denied as a result identified as LGBTQ."). However, this might not directly be linked to the actual narrow holding of *Matter of A-B-*. It could be related to an incorrect reading of *Matter of A-B-*, it could be related to a general animus toward asylum applicants in the executive branch, or it could be related to something else.

54. *See* Kareff, *supra* note 45.

55. *Id.*

56. Snyder, *supra* note 40, at 852.

57. *Id.* at 851–52.

58. *Id.* at 852. Snyder cites the following as precedential cases where federal circuits overruled impermissible IJ reliance on LGBT stereotypes: "*Todorovic v. U.S. Att'y Gen.*, 621 F.3d 1318, 1321, 1323-24 (11th Cir. 2010) (remanded because IJ's decision that applicant did not appear 'overtly gay' or feminine was 'so colored by impermissible stereotyping'); *Razkane v. Holder*, 562 F.3d 1283, 1286, 1288 (10th Cir. 2009) (remanding because IJ used personal opinions and stereotypes to determine applicant would not be identified as gay); *Ali v. Mukasey*, 529 F.3d 478, 479 (2d Cir. 2008) (remanding because IJ relied on gay stereotypes); *Bosede v. Mukasey*, 512 F.3d 946, 952 (7th Cir. 2008) (remanding in part because IJ was flippant about the danger an HIV positive applicant faced); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (remanding because IJ's finding that applicant's mannerisms did not show that he was gay tainted the decision)." *Id.* at 857 n.264.

III. DIVERSE EXPERIENCES, LIMITED IMAGINARIES: QUEER GLOBAL EXPERIENCES AND WESTERN (HOMO/TRANS)NORMATIVITY

In his article, Vogler accurately depicts a tension in U.S. and Western asylum law, noting that many times asylum-seekers "must adopt Western [homo/transnormative] identity categories and conform to Western stereotypes of gay [or transgender] identity to make successful claims."[59] As queerness is more than conduct—like partaking in same-sex sexual activity or dressing in clothes assigned to the opposite sex—queerness is also a social status defined by the society in which it operates.[60] The meaning of queerness is thus necessarily dependent upon the culture in which it is constructed, and it might not necessarily fit into another culture's conception of it, in the same way that one culture cannot seamlessly merge with another.

One problem for LGBTQ+ asylum legal actors is the imposition of Western queer identities and experiences onto non-Western queer identities and experiences. Much like how the very terms other societies may use for queer identities change across cultures, so too changes the conduct that may define a queer person in a given culture.[61] This has tangible legal consequences on the viability of an LGBT asylum claim. If a person cannot satisfy the burden of proof that they are a member of the LGBTQ+ community, then they cannot meet every element of their asylum claim.[62] If a person reads as queer in the cultural context of their country of origin and reasonably fears persecution based on their queer identity, then Article I courts should recognize the viability of an asylum-seeker's LGBTQ+ asylum claim. However, if an asylum applicant's story does not fit certain Western cultural markers of queerness—for example, not having a story that sounds like a Western LGBTQ+ story of persecution, or not appearing to look "gay enough" or "transgender enough" to be considered queer in the Western context—then a queer asylum-seeker may arbitrarily be denied a form of relief they should otherwise be entitled to, for not physically appearing or sounding LGBTQ+ enough, or rather, for failing to conform to Western ideas of what LGBTQ+ people look or sound like.

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59. Vogler, *supra* note 3, at 870.

60. *See id.*

61. For example, many cultures have historically recognized a third gender, like Native Americans (two-spirit), Samoans (Fa'afafine), various South Asian cultures (hijra), and Arabs (Khanith). These individuals necessarily aren't *trans*-gender, because they are not expressing a gender identity on the opposite end of the gender binary of the culture in which they exist. Rather, the culture recognizes a *third* gender, which means they simply identify as another gender identity compared.

62. 94 Stat. 102.

IV. IMPACT OF CONTEMPORARY IMMIGRATION POLITICS, VAST JUDICIAL DEFERENCE, AND ASYLUM CASE LAW ON CREDIBILITY DETERMINATIONS IN THE LGBT ASYLUM PROCESS

Record-high asylum denial rates, unfettered judicial discretion, and a presidential administration's interest in curbing immigration are all factors that a legal actor must consider when bringing a claim before an Article I asylum adjudicator in the Trump era and post-Trump era. The following sections describe what this could mean for an LGBTQ+ asylum applicant for the purposes of a credibility determination.

A. *Case Law and (Im)Permissible Factors in Credibility Determinations for the Purposes of LGBT Asylum Claims*

'While the standard of review for asylum decisions is highly deferential to the determinations of the IJ,[63] many asylum decisions have nonetheless been reviewed by appellate courts, and IJs have been found to have used impermissible factors in determining the viability of an asylum claim.[64] LGBT asylum decisions have similarly been reviewed to determine whether a judge relied on impermissible factors in assessing whether an asylum applicant met their burden of showing that they are a refugee within the meaning of the INA.[65] There is also some limited case law providing guidance on how to determine whether IJs used impermissible factors in deciding whether asylum applicants had established that they identify with the sexual or gender identity they allege for the purposes of showing a fear of persecution in their home country.[66]

The most notable example of guidance from appellate courts concerning impermissible factors is that IJs may not use gay, lesbian, bisexual, transgender, gender nonconforming, or queer stereotypes in their credibility determinations.[67] One of the most cited decisions concerning the proper use of stereotypes for the purposes of an LGBT asylum claim is *Razkane v. Holder*.[68] In *Razkane*, an IJ found that it was not "more likely than not that [Razkane] would be persecuted or tortured upon return to Morocco" because his "appearance [did] not have anything about it that would designate [him] as being gay . . . [because he did] not dress in an effeminate manner or affect any effeminate mannerisms."[69] The Tenth Circuit found that "the IJ's homosexual stereotyping likewise precludes meaningful review in this case

63. *See* Scavone, *supra* note 34; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).
64. *See e.g.* Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009).
65. *Id.*
66. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).
67. *See, e.g.*, Razkane v. Holder, 562 F.3d 1283; Todorovic v. U.S. Att'y Gen., 621 F.3d 1318 (11th Cir. 2010); Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007); Ali v. Mukasey, 529 F.3d 478 (2d Cir. 2008). *But see* Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000).
68. *See Razkane*, 562 F.3d at 1283.
69. *Id.* at 1286.

[because] the IJ's reliance on his own views of the appearance, dress, and affect of a homosexual led to his conclusion that Razkane would not be identified as a homosexual" in Morocco.[70] The Tenth Circuit reversed and remanded Razkane's case.[71] *Razkane* has been cited in decisions across federal circuits that have similarly reversed and remanded IJ determinations that impermissibly relied on the use of stereotypes in an asylum decision.[72]

However, some decisions by appellate courts have upheld the use of stereotypes regarding what an LGBTQ+ person's demeanor should look like in an IJ determination of whether an asylum applicant is credibly lesbian, gay, bisexual, transgender, gender nonconforming, or queer for the purposes of establishing their sexual or gender identity for asylum. In *Mockeviciene v. United States*, the Eleventh Circuit upheld an asylum adjudicator's finding that an asylum-seeker was not by definition a lesbian because she had been previously married to a man and that her demeanor did not comport to that of a lesbian.[73] The Second Circuit, in *Chambers v. Sessions,* found that a bisexual asylum petitioner failed to establish his bisexuality, despite testimony about sexual and romantic relationships with men and women, because he did not provide enough documentary evidence nor witness testimony, neither of which are required by the INA to establish asylum.[74]

Another possible impermissible factor to consider is marriage, depending on the facts and context.[75] While "there are no precedential asylum claims recognizing bisexual people as a particular social group," like transgender claimants before transgender and gender nonconforming claimants were recognized by courts as their own PSG, bisexual asylum-seekers may nonetheless seek asylum based on their attenuated membership to the recognized PSG, sexual orientation.[76] Nonetheless, for bisexual asylum applicants, "marriage to an opposite-sex partner is perfectly consonant with their sexual orientation," and thus would not be a permissible factor to consider in determining whether a bisexual asylum-seeker actually identifies as bisexual.[77] Still, in some cases married bisexual asylum-seekers have received negative asylum decisions for failing to establish that they were bisexual, despite testimonial evidence attesting to such.[78]

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70. *Id.* at 1288.

71. *See* Scavone, *supra* note 34, at 404 (stating "in the cultural context of a majority-Muslim country that criminalizes homosexuality, the IJ's finding leaves one to wonder what type of 'gay appearance' a closeted Moroccan homosexual should have conveyed in order to have been found credible.").

72. *See, e.g., Todorovic*, 621 F.3d 1318.

73. Mockeviciene v. U.S. Att'y Gen., 237 F. App'x 569, 572, 574 (11th Cir. 2007).

74. Chambers v. Sessions, 740 F. App'x 191, 193–95 (2d Cir. 2018).

75. *See, e.g., Asylum Manual, 11. Immigration Basics: Challenging Asylum Cases*, IMMIGR. EQUAL., https://immigrationequality.org/asylum/asylum-manual/immigration-basics-challenging-asylum-cases/.

76. *Id.*; *see also* Matter of Taboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).

77. IMMIGR. EQUAL., *supra* note 75.

78. *See, e.g.*, Sempagala v. Holder, 318 F. App'x 418, 422 (6th Cir. 2009) (finding, in part, that an asylum-seeker who was married to a woman and has not engaged in a same sex relationship since leaving his country of origin could not adequality demonstrate that his sexuality could be discovered in his country of origin).

B. *Practical Effects of Contemporary Immigration Politics, Judicial Discretion, and Case Law on Credibility Determinations in LGBT Asylum Cases*

There are various practical consequences of the vacuum created by LGBT asylum law as to what does and what does not constitute a credible LGBTQ+ identity or experience. Theoretically, Vogler argues, the way in which U.S. queer asylum law "has been elaborated, adapted, and interpreted, particularly in approximately the past decade, offers possibilities for making unique identity claims that are not recognized in existing scholarship."[79] However, this Note argues that, practically speaking, unfettered judicial discretion over LGBT asylum cases in the post-Trump era forces legal actors involved in the asylum process to advise queer asylum-seekers in the United States to: (1) perform and conform to Western archetypes of queerness; and (2) tell their stories to conform to Western tropes of "foreign" queer persecution.

In *(In)credible Subjects: NGOs, Attorneys, and Permissible LGBT Asylum Seeker Identities*, Siobhan McGuirk argues that "statist logics concerning acceptable lesbian, gay, bisexual, and/or transgender (LGBT) immigrants permeate civic spheres, creating new forms of exclusion for asylum seekers in the United States."[80] McGuirk explains:

> [E]xisting research on U.S. asylum policy and procedures as they pertain to LGBT claimants suggests that a "gay enough" litmus test typifies U.S. Citizenship and Immigration Services (USCIS) adjudications, such that officers expect claimants to engage in conspicuous consumption of stereotypical commodities and culture and to appear visibly "LGBT," either through gender non-conformity or by being "out."[81]

McGuirk finds that the "homonormative, Western-informed ideas about LGBT subjectivity—particularly that sexuality is immutable, and that coming out is both necessary and inevitable—function simultaneously to regulate individuals seeking asylum to reaffirm the expectations of USCIS officers adjudicating asylum claims, and to reassert homonationalist imaginaries within, and of, the United States."[82]

In an era of increasing judicial discretion over, and denial of, asylum claims in general[83] after a presidential administration that sought to limit the

79. Vogler, *supra* note 3, at 856.
80. McGuirk, *supra* note 13, at 4.
81. *Id.*
82. *Id.* at 16–17.
83. *See, e.g.*, *Asylum Denial Rates Continue to Climb*, TRAC (Oct. 28, 2020), https://trac.syr.edu/immigration/reports/630/#:~:text=One%20contributing%20factor%20to%20the,20.0%20percent%20in%20FY%202020.

amount of LGBTQ+ asylum-seekers by law,[84] McGuirk illuminates an important point: vast judicial deference over asylum "processes extend, rather than challenge, existing barriers to asylum," and nowhere is this clearer than in the credibility context.[85] LGBTQ+ asylum-seekers have to prove, before any other element of their claim, that they are in fact lesbian, gay, bisexual, transgender, gender nonconforming, or queer. To do so, legal actors and asylum-seekers have an incentive to convey an asylum-seeker's fear of persecution based on sexual or gender identity using Western terms in a Western script, or risk having their asylum claim rejected by an unfavorable analysis of their fear of persecution based on *Matter of A-B-*.[86] In a system where the stakes could not be higher—as many asylum-seekers fear death, persecution, or harm in their home countries—a risk of being misunderstood in the courtroom is a risk of irreparable bodily harm.[87] In a system that affords vast judicial deference to asylum adjudicators to allow for flexibility, a vacuum for "credible" LGBTQ+ identities and narratives creates a dichotomy between permissible and impermissible LGBTQ+ subjectivities and experiences and limits what constitutes winnable testimony or favorable facts in an asylum case.

CONCLUSION

There are few instances where LGBTQ+ people have to prove their sexual or gender identity before an adjudicator. Some of the most vulnerable LGBTQ+ people—LGBTQ+ asylum-seekers—bear the burden of proof before a court to establish that they identify as gay, lesbian, bisexual, transgender, gender nonconforming, or queer to be considered for asylum. However, what constitutes acceptable proof that an individual identifies as gay, lesbian, bisexual, transgender, gender nonconforming, or queer is more than just an intellectual evidentiary discourse; it reflects how a given society identifies and defines queer people, queer identities, queer narratives, and queer lived experiences.[88]

This Note finds that, despite vast judicial discretion that has the potential to recognize a variety of queer lived experiences, narratives, and identities as legitimate, the asylum process unfortunately limits queer imaginaries and forces LGBTQ+ asylum-seekers to conform to Western queer identities and tell their stories using Western (homo/trans)normative scripts to legitimate

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84. *See, e.g.*, *President Trump Wants to Dramatically Limit People Seeking Asylum in the U.S.* TIME (June 12, 2019), https://time.com/5604991/donald-trump-migrants-asylum/.

85. McGuirk, *supra* note 13, at 4.

86. *See, e.g., Sempagala v. Holder*, 318 F. App'x 418, 422 (6th Cir. 2009).

87. Asylum-seekers fleeing violence in their country of origin do not want to risk being misunderstood in the courtroom to avoid behind sent back to a place where they would face an imminent threat of danger to their lives. *See, e.g.*, "EVERY DAY I LIVE IN FEAR": VIOLENCE AND DISCRIMINATION AGAINST LGBT PEOPLE IN EL SALVADOR, GUATEMALA, AND HONDURAS, AND OBSTACLES TO ASYLUM IN THE UNITED STATES, HUM. RTS. WATCH (2020).

88. SPIJKERBOER, *supra* note 14.

their reasonable fear of persecution in their home countries. Unfortunately, legal actors and asylees have an incentive before a court to delegitimize and downplay certain queer experiences in favor of those that have been recognized by law as more deserving of asylum. Understanding what, for the purposes of asylum, constitutes sufficient evidence of one's sexual or gender identity illuminates not only what cognizable harm the American legal system thinks deserves asylum protection, but also illuminates what American society at large thinks of the legitimacy of certain queer experiences and narratives. These insights have serious implications for the discourse about what legally constitutes evidence of sexual or gender identity, as well as the proper scope of judicial discretion in the asylum adjudication process.