

## Disparities in Queer Asylum Recognition Rates on the Basis of Gender: A Case Study of Australia and New Zealand

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*Using an approach based on intersectionality theory, this Note tests whether a difference in asylum recognition rates exists in Australia and New Zealand at the first-appeals level. Through compiling an original dataset of judicial decisions and performing logistic regression analysis, this Note finds no difference in asylum recognition rates between queer men and queer women in Australia. In New Zealand, however, queer men were significantly more likely to win their cases than were queer women.*

*This Note then qualitatively analyzes why recognition rates between queer men and women were similar in Australia but different in New Zealand. Examining a subset of judicial opinions, this Note argues that one explanation for the quantitative results can be found in the role of credibility. In Australia, judges set questionably high thresholds for establishing that male applicants were credibly gay and female applicants were credibly lesbian. In New Zealand, judges set similarly high thresholds for establishing that female applicants were lesbian, but lower thresholds for establishing whether men were gay. In both countries, the judicial opinions demonstrated a lack of understanding of challenges specific to queer women, as intersectionality theory suggests.*

*This Note is important for several reasons. First, there is minimal research on the experiences of queer female asylum seekers, and almost no research on asylum adjudication in New Zealand. Second, from a practical standpoint, this Note empirically demonstrates that queer women are potentially being forced back into persecution because judges do not have a proper understanding of queer female sexuality.*

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INTRODUCTION.....	499
I. BACKGROUND INFORMATION AND THEORY .....	502
<i>A. LGB Asylum Legal History</i> .....	502
<i>B. Issues in the Adjudication of LGB Asylum Cases</i> .....	504
1. <i>Discretion</i> .....	504
2. <i>Stereotyping</i> .....	505
3. <i>Gender Disparities</i> .....	506
<i>C. Theory</i> .....	508
<i>D. Gaps in the Literature</i> .....	511
II. QUANTITATIVE ANALYSIS OF AUSTRALIAN AND NEW ZEALAND	
LGB ASYLUM APPEALS .....	513
<i>A. Australia and New Zealand Asylum Procedure</i> .....	514
1. <i>Australia</i> .....	514
2. <i>New Zealand</i> .....	515
<i>B. Methods, Data, and Hypotheses</i> .....	516
1. <i>Dataset Collection Methods</i> .....	516
2. <i>Descriptive Data</i> .....	516
3. <i>Hypotheses and Analytic Methods</i> .....	518
<i>C. Logistic Regression Results</i> .....	518
<i>D. Limitations and Future Directions</i> .....	519
<i>E. Discussion</i> .....	520
III. QUALITATIVE ANALYSIS OF AUSTRALIAN AND NEW ZEALAND	
LGB ASYLUM APPEALS .....	521
<i>A. Dataset Collection Methods</i> .....	521
<i>B. Credibility Analysis</i> .....	523
1. <i>New Zealand Applicants</i> .....	523
2. <i>Australian Applicants</i> .....	528
3. <i>Conclusions</i> .....	531
<i>C. Credibility Pattern of Entire Dataset</i> .....	531
<i>D. Limitations and Future Directions</i> .....	532
CONCLUSION .....	533

## INTRODUCTION

In 2006, a Mongolian man spent the night in a hotel room with his male partner.<sup>1</sup> During that night, the two men received an anonymous death threat over the phone, and the next morning they were “badly beaten” by a group of people yelling “homos should die.”<sup>2</sup> The Mongolian police did not intervene and instead told the men that “homosexuals . . . deserve it.”<sup>3</sup> The man’s partner eventually died as a result of his injuries.<sup>4</sup> Subsequently, the deceased partner’s family threatened him, harassed him at his workplace, and ultimately had him fired.<sup>5</sup> He faced continued job insecurity, verbal threats and physical assault.<sup>6</sup> In 2009, kidnappers forced him into a car, threatened to kill him, and dumped him on the side of the road.<sup>7</sup>

Fearing for his life, he fled to Australia and lodged an asylum application.<sup>8</sup> A delegate of the Minister for Immigration and Citizenship initially denied his case in 2011, but he appealed to the Refugee Review Tribunal.<sup>9</sup> The Tribunal overturned the decision and granted him asylum on account of persecution he suffered in relation to his sexual orientation.<sup>10</sup>

Not long before the Mongolian man’s case, a Mongolian woman was caught by her husband having an affair with another woman.<sup>11</sup> For the next several years, the husband tortured her “on a regular basis,” sometimes leaving her unconscious.<sup>12</sup> He told the police she was a lesbian, so they would not intervene in the domestic abuse.<sup>13</sup> After her husband passed, his family continued to abuse her by beating her and “hammered [her] fingers by blunt stones” so that she “would not be able to satisfy” herself anymore.<sup>14</sup> She called the police, but they “did not bother to question” the family and closed the case.<sup>15</sup>

Fearing for her life, she fled to Australia and applied for asylum on account of her lesbian sexual orientation.<sup>16</sup> Like in the Mongolian man’s case, a delegate of the Minister for Immigration and Citizenship denied her

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1. Refugee Review Tribunal Case No. 1103086 [2012] RRTA 11, at ¶ 27 (16 January 2012) (Austl.), <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/RRTA/2012/11.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at ¶¶ 28–29.

6. *Id.* at ¶ 45.

7. *Id.* at ¶ 31.

8. *Id.* at ¶ 2.

9. *Id.* at ¶¶ 2–4.

10. *Id.* at ¶¶ 42, 59.

11. Refugee Review Tribunal Case No. 0905373 [2009] RRTA 973, at ¶¶ 6–8 (15 October 2009) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/RRTA/2009/973.html>.

12. *Id.* at ¶ 9.

13. *Id.* at ¶ 10.

14. *Id.* at ¶ 14.

15. *Id.* at ¶ 79.

16. *Id.* at ¶¶ 2, 17.

case.<sup>17</sup> Unlike in the gay Mongolian man's case, she lost her appeal to the Refugee Review Tribunal, which found she lacked credibility and "[was] not a lesbian."<sup>18</sup>

Why did the man win his case but not the woman? These two different outcomes from otherwise similar cases might point to the presence of gender discrimination in cases involving queer or Lesbian, Gay, Bisexual, and Transgender (LGBT) asylum seekers. Whether these two Mongolian cases are exceptional or typical of gender patterns in queer asylum outcomes is unclear because queer asylum claims are relatively new and there is very little scholarship on the role of gender in these cases.<sup>19</sup> In 1951, the United Nations formalized the international legal mechanism through which individuals could flee persecution and secure refugee status in a surrogate state.<sup>20</sup> Beginning in the mid-1980s, LGBT individuals began to win their asylum cases on grounds that they were persecuted for their queer orientation.<sup>21</sup> Careful adjudication of LGBT asylum claims is crucial, as a negative decision can literally mean life or death.<sup>22</sup> Therefore, it is essential to ascertain whether LGBT petitioners are treated fairly in asylum proceedings.

While there has been a growing amount of scholarship on queer asylum, there has been minimal attention given to the intersection of gender and sexuality in these cases. Specifically, there has been a lack of research on the experiences of lesbian asylum seekers.<sup>23</sup> However, the research that does exist suggests that queer cisgender women are at a disadvantage in their adjudication processes compared to queer cisgender men. This Note draws on this body of research, in conjunction with Kimberlé Crenshaw's intersectionality theory,<sup>24</sup> to explore the ways in which queer cisgender women are at a disadvantage in the asylum process. In the context of first-level refugee appeals cases in Australia and in New Zealand, this Note asks the following question: are recognition rates higher for cisgender gay men than cisgender gay women, and if so, what accounts for this difference?

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17. *Id.* at ¶¶ 2–4.

18. *Id.* at ¶ 115.

19. *See infra* Part I.

20. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

21. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 442–45 (2d ed. 2014) (providing an overview of countries accepting refugees based on their LGBT status and highlighting that, for example, Germany first entertained the possibility in 1986).

22. *See, e.g.*, Gwen Aviles, *Trans Woman Killed in El Salvador After U.S. Deportation, Rights Group Says*, NBC NEWS (Feb. 21, 2019, 12:27 PM), <https://www.nbcnews.com/feature/nbc-out/trans-woman-killed-el-salvador-after-u-s-deportation-rights-n973771>.

23. *See infra* Part I.B.

24. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter, Crenshaw, *Demarginalizing the Intersection of Race and Sex*].

Through quantitative analysis, this Note finds that recognition rates are significantly higher for cisgender queer men than they are for cisgender queer women in New Zealand, but in Australia, recognition rates between the two groups are not significantly different. Through qualitative analysis, this Note argues that one explanation for the results can be found in the role of credibility. In New Zealand, judges set dubiously high thresholds for establishing that female applicants were credibly lesbian, but lower thresholds for establishing whether men were credibly gay. In Australia, judges set similarly high thresholds for women, but also set high thresholds for men. Thus, in both countries, the judicial opinions demonstrated a lack of understanding of challenges specific to queer women, as intersectionality theory suggests, but the countries differed in their treatment of men, where New Zealand judges were much more lenient.

Part I of this Note provides a literature review on queer asylum. It focuses on the challenges faced by lesbian applicants and introduces the intersectional theoretical framework for understanding those challenges. Part II quantitatively tests whether asylum outcomes vary between queer men and women at the Australian and New Zealand first appeals level. Part III qualitatively analyzes what might account for the quantitative results, focusing on the role of credibility. Finally, this Note concludes with a summary of key findings and future directions for research.

It is important to clarify terminology before proceeding. Scholars, civil society organizations, and judges all use different terminology to denote individuals who have sexual or romantic desires towards people of the same gender.<sup>25</sup> Asylum applicants also self-identity in a myriad of ways.<sup>26</sup> This Note employs the terms “queer” and “LGBT” interchangeably to denote such individuals. While the larger field includes research on transgender asylum seekers,<sup>27</sup> this Note does not draw on this research, nor does it include transgender cases in Parts II and III. This is not to erase the experiences of transgender asylum seekers. Instead, transgender asylum seekers and their adjudication experiences must be understood on their own terms as they face additional hardships and prejudices not faced by cisgender individuals.<sup>28</sup> Thus, this Note employs the acronym LGB going forward.

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25. Elif Sari, *Lesbian Refugees in Transit: The Making of Authenticity and Legitimacy in Turkey*, 24 J. LESBIAN STUD. 140, 143–44 (2020).

26. *Id.* at 144 (describing refugees in Turkey identifying as, for example, “LGBT,” “lesbian,” or “queer.”).

27. See, e.g., Nielan Barnes, *Within the Asylum-Avocacy Nexus: An Analysis of Mexican Transgender Asylum Seekers in the United States*, 2 SEXUALITY, GENDER & POLY 5 (2019); Ellen Jenkins, *Taking The Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 GOLDEN GATE U. L. REV. 67 (2009); Debanuj DasGupta, *The Politics of Transgender Asylum and Detention*, 12 HUM. GEOGRAPHY 1 (2019).

28. See Mariza Avgeri, *Assessing Transgender and Gender Nonconforming Asylum Claims: Towards a Transgender Studies Framework for Particular Social Group and Persecution*, 3 FRONTIERS HUM. DYNAMICS 1,

While this Note does not include transgender cases, it does include cases involving bisexual applicants. When discussing overarching research on LGB applicants or discussing the dataset of cases, this Note refers to applicant groups as “gay,” “lesbian,” or “queer,” but when it discusses particular applicants, it refers to them as “bisexual” or “queer” if that is how they identify in their judicial proceedings.

## I. BACKGROUND INFORMATION AND THEORY

This Part provides background information on asylum law and introduces the theoretical framework for studying the role of gender in LGB asylum cases. Section I.A begins by discussing the legal history that has culminated in the recognition of LGB asylum seekers as a distinct and protected group under international and domestic refugee law. Section I.B gives an overview of scholarship on LGB asylum adjudications, highlighting some of the most contentious issues, and it narrows the discussion to one of those issues—gender disparities. Section I.C draws on intersectionality theory to propose a useful theoretical framework for analyzing gender disparities in LGB asylum petitions. Section I.D concludes with gaps in the literature.

### A. LGB Asylum Legal History

The foundation of refugee law that would eventually provide an inclusive framework for LGB claimants can be found in the *Convention Relating to the Status of Refugees* (Refugee Convention). According to Article 1A(2) of this United Nations treaty, a refugee is someone who:

as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>29</sup>

The *Protocol Relating to the Status of Refugees* supplemented the 1951 Convention by removing the geographical and temporal limits.<sup>30</sup>

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5 (2021) (describing the “the legal complications of the protection of transgender . . . people who are [in] need of international protection).

29. Refugee Convention, *supra* note 20, at art. 1A(2).

30. Protocol Relating to the Status of Refugees art. 1, ¶¶ 2–3, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (“For the purpose of the present Protocol, the term ‘refugee’ shall . . . mean any person within the definition of article I of the [Refugee] Convention as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ and the words ‘. . . as a result of such events’, in article 1 A

To understand the LGB asylum process, it is necessary to focus on the legal development of one part of this refugee definition—“particular social group.” “Particular social group” was a last-minute addition to the Refugee Convention by the Swedish delegation.<sup>31</sup> There was little explanation for its inclusion and no discussion before it went to vote.<sup>32</sup> Because it came without further explanation, definitions for particular social group have mostly developed through domestic jurisprudence.<sup>33</sup> The United States took the first prominent approach in *Matter of Acosta*, when the Board of Immigration Appeals (BIA) ruled that an individual is part of a particular social group when the members of the group all “share a common, immutable characteristic.”<sup>34</sup> The BIA further held 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.”<sup>35</sup> Elaborating on “immutable,” the BIA described these characteristics as ones that are “beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.”<sup>36</sup> This approach was adopted by courts around the world, including those in South Africa, the United Kingdom, and Canada.<sup>37</sup> The United Nations High Commissioner for Refugees (UNHCR) offered that a particular social group is a “group of persons who share a common characteristic” or a collection of people “who are perceived as a group by society.”<sup>38</sup>

Though the qualifications for particular social group continue to evolve, there is broad legal agreement that members of the LGB community constitute such a group. Beginning as early as 1986, courts have welcomed the possibility of an LGB particular social group.<sup>39</sup> In 1990, the BIA recognized that homosexuals from Cuba constituted a particular social group, and this decision was adopted by the U.S. Attorney General as legal

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(2) were omitted...The present Protocol shall be applied by the States Parties hereto without any geographic limitation.”).

31. HATHAWAY & FOSTER, *supra* note 21, at 423–24.

32. *Id.*

33. *Id.* According to international law, however, there are limits on the manner in which states can interpret international treaties such as the Refugee Convention. International treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

34. HATHAWAY & FOSTER, *supra* note 21, at 426 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)).

35. *Id.*

36. *Matter of Acosta*, 19 I. & N. Dec. at 234.

37. HATHAWAY & FOSTER, *supra* note 21, at 426 n.419.

38. UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, 3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

39. HATHAWAY & FOSTER, *supra* note 21, at 442 n.535 (noting that Germany “recognized the viability of considering sexual orientation as the basis for a claim to refugee status” in a 1986 case).

precedent.<sup>40</sup> Since these initial decisions, courts around the world have come to similar findings,<sup>41</sup> including in Australia<sup>42</sup> and New Zealand.<sup>43</sup> In the latter case, the New Zealand Refugee Status Appeals Authority clarified that “sexual orientation is either an innate or unchangeable characteristic so fundamental to identity or human dignity that it ought not be required to be changed.”<sup>44</sup> Evidently, caselaw has solidified the legal soundness of an LGB particular social group across many different countries.

## *B. Issues in the Adjudication of LGB Asylum Cases*

### *1. Discretion*

One main issue that arose in LGB asylum cases concerned whether applicants could qualify for refugee status if they were able to avoid persecution in their home countries by remaining discreet. In other words, some courts in early LGB asylum cases denied asylum claims on the grounds that the applicant would not endure persecution if they kept their sexual orientation hidden. This discretion-based reasoning “appeared very widely in the refugee case law” as a means to deny LGB asylum claims.<sup>45</sup> In one case in Hungary, for example, the court ruled that the asylum seeker could practice his sexual orientation “in a hidden, discreet way, in order to prevent possible attacks.”<sup>46</sup> However, courts have come under much scrutiny for denying cases on discretion bases.<sup>47</sup> New Zealand eliminated discretion-

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40. *Id.* at 443 n.40 (citing *Matter of Toboso Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990)).

41. *Id.* at 442–44 (citing cases from Canada, the United Kingdom, Belgium, Sweden, South Africa, Spain, and Ireland).

42. Refugee Review Tribunal Reference No. N93/00846 [1994] RRTA 347 (8 March 1994) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/RRTA/1994/347.html> (“The Tribunal finds that the Applicant’s fear, as expressed, is well-founded and he has suffered persecution through regular harassment, involving beating and incarceration, as a consequence of his membership of a particular social group, namely homosexual.”).

43. *Re GJ* Refugee Appeal No. 1312/93, at 57, 30 Aug. 1995 (N.Z. Refugee Status Appeals Authority), [https://www.refworld.org/cases,NZL\\_RSAA,3ae6b6938.html](https://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html) (“Sexual orientation can, therefore, in an appropriate fact situation, be accepted as a basis for finding a social group for the purposes of the Refugee Convention.”). In addition to Australia and New Zealand, countries such as Canada, the United Kingdom, and Belgium have determined that LGB claimants can constitute a particular social group through caselaw. HATHAWAY & FOSTER, *supra* note 21, at 443 nn.540–41.

44. *Re GJ* Refugee Appeal No. 1312/93, at 58, 30 Aug. 1995 (N.Z. Refugee Status Appeals Authority), [https://www.refworld.org/cases,NZL\\_RSAA,3ae6b6938.html](https://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html).

45. 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, 391 (2009) [hereinafter, Millbank, *From Discretion to Disbelief*].

46. SABINE JANSEN & THOMAS SPJIKERBOAR, FLEEING HOMOPHOBIA, ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 33 (VU UNIV. AMSTERDAM 2011).

47. *See* Millbank, *From Discretion to Disbelief*, *supra* note 45, at 393–94 (describing “[t]he discretion problem” and arguing that “[d]iscretion reasoning also led to and compounded errors in a range of areas of analysis in the refugee determination process”); Heather Kolinsky, *The Shibboleth of Discretion: The Discretion, Identity, and Persecution Paradigm in American and Australian LGBT Asylum Claims*, 31

based reasoning in 1995<sup>48</sup> and Australia followed suit in 2003.<sup>49</sup> UNHCR reaffirmed these decisions, stating that an applicant “should not be required to give up or conceal” their sexual orientation.<sup>50</sup> Thus, being able to live discreetly is no longer a sound legal basis for rejecting an LGB asylum claim.

## 2. *Stereotyping*

A second issue that has pervaded LGB asylum cases is stereotyping. Scholars have found that “in an alarming number of cases” judges relied on “highly stereotyped and Westernised notions of ‘gayness’ as a template that, when applicants did not fit, led to their claim of sexual identity being rejected.”<sup>51</sup> With the Supreme Court of the United Kingdom declaring that gay men should be able to “enjoy themselves going to Kylie [Minogue] concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates,”<sup>52</sup> it becomes clear that LGB petitioners are often judged against what Western adjudicators think LGB people should look and act like. Decision-makers in many contexts dismiss the credibility of LGB asylum seekers because these applicants often do not fit into stereotypical conceptions of a queer person, and as a result the adjudicators do not believe they are in fact LGB.<sup>53</sup> If women are not “butch” or if men are not effeminate and hypersexual, judges cast skepticism on their case.<sup>54</sup>

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BERKELEY J. GENDER L. & JUST. 206, 217 (arguing that “[d]iscretion improperly focuses the question of safety upon return on the applicant’s behavior instead of the applicant’s identity”).

48. *Re GJ* Refugee Appeal No. 1312/93, at 58, 30 Aug. 1995 (N.Z. Refugee Status Appeals Authority), [https://www.refworld.org/cases,NZL\\_RSAA,3ae6b6938.html](https://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html) (holding, in the context of a gay asylum seeker from Iran, “we are of the conclusion that to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable”); *see also* Millbank, *From Discretion to Disbelief*, *supra* note 45, at 391 (noting that discretion-based reasoning has been “consistently rejected by lower-level courts and tribunals in [] countries such as . . . New Zealand in earlier years”).

49. *Appellant S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (Austl.).

50. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 5, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) [hereinafter UNHCR LGBT Guidelines].

51. Millbank, *From Discretion to Disbelief*, *supra* note 45, at 392 (discussing United Kingdom and Australian cases).

52. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ) and HTI* [2010] UKSC 31, ¶ 78 (UK) (Lord Hope).

53. Volker Türk, *Ensuring Protection for LGBTI Persons of Concern*, 42 FORCED MIGRATION REV. 5, 7 (2013) (“Decision-makers have [] been preoccupied with obtaining evidence to prove whether an applicant is in fact LGBTI. Lacking guidance and knowledge, they have relied on their own personal assumptions or stereotypes to draw conclusions.”).

54. *See* Claire Bennet & Felicity Thomas, *Seeking Asylum in the UK: Lesbian Perspectives*, 42 FORCED MIGRATION REV. 25, 28 (2013) (“Under pressure to conform to Western stereotypes, some women felt under pressure to change their look and dress in a way described as ‘more butch.’”); Charlotte Mathysse, *Barriers to Justice in the UK*, 42 FORCED MIGRATION REV. 29, 29 (2013) (“Asylum seekers have been denied protection because they have appeared too typically straight and often applicants are expected to act, dress and speak in certain ways which conform to rigid Western notions of sexuality.”).

This skepticism arises despite UNHCR guidelines that state self-identification as LGB is sufficient for establishing credible sexual orientation.<sup>55</sup>

### 3. *Gender Disparities*

Discretion and stereotyping are topics that apply to both male and female LGB applicants, but a growing number of studies have begun to uncover the ways in which the asylum process presents specific challenges to queer women. This subsection highlights the ways in which queer women are disadvantaged in the asylum process as compared to queer men.

The nature of the violence queer women face might present challenges for their asylum applications. To corroborate a claim of persecution, it is useful to have public records outlining what transpired. However, “the nature of persecution by non-state actors, specifically, that it often occurs at home and outside of public view, makes it difficult for lesbians to provide corroborating evidence.”<sup>56</sup> These private forms of violence “do not conform to the public narratives assumed by asylum adjudicators”<sup>57</sup> and are less likely to lead to tangible pieces of evidence as compared to gay men who can draw on police records.<sup>58</sup>

Because of the private nature of persecution that queer women endure, there is a lack of scholarship on their experiences that might be beneficial to their claims. Given the limits placed on women by patriarchal forces, it is not surprising that “most women” who face persecution cannot “get out of their countries.”<sup>59</sup> For queer women, these difficulties are compounded because they might keep the reason why they want to leave a secret, or if they do not, they might live in a society in which no one is willing to help them escape. As a result, the vast majority of queer asylum applications are

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Lesbians have been rejected for not seeming butch enough, and gay men have been asked if they frequented parks for sex.”)

55. UNHCR LGBT Guidelines, *supra* note 50, at 16 (“Self-identification as a LGBTI person should be taken as an indication of the applicant’s sexual orientation and/or gender identity.”).

56. NAT’L CTR. FOR LESBIAN RTS., THE CHALLENGES TO SUCCESSFUL LESBIAN ASYLUM CLAIMS 7 (2013).

57. Cheryl Llewellyn, Deciding What Counts as Persecution: An Analysis of Gender and Sexual Orientation Asylum Cases in the United States 85 (2015) (Ph.D. dissertation, Stony Brook University), [https://ir.stonybrook.edu/xmlui/bitstream/handle/11401/76825/Llewellyn\\_grad.sunysb\\_0771E\\_12525.pdf?sequence=1](https://ir.stonybrook.edu/xmlui/bitstream/handle/11401/76825/Llewellyn_grad.sunysb_0771E_12525.pdf?sequence=1).

58. Jenni Millbank, *Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia*, 26 MELBOURNE U.L. REV. 144, 158 (2002) [hereinafter Millbank, *Imagining Otherness*].

59. Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 221 (1995).

put forth by gay men.<sup>60</sup> Because there are so few lesbian asylum seekers, there is a dearth of literature on their experiences.<sup>61</sup>

In part because the evidence is private and the scholarship is minimal, courts have made decisions on lesbian asylum cases by referring to country conditions based on gay male experiences. Australian refugee tribunal judges, for example, drew on “travel guide[s] aimed at gay men” for adjudicating cases about queer women.<sup>62</sup> These guides were created for gay male tourists travelling abroad, but courts relied on them to assess country conditions for queer women, despite the fact that there was no mention of queer women in those guides.<sup>63</sup> Courts have also relied on laws that target gay male sexual relations in order to make claims about persecution against lesbians. However, these acts might have little bearing on the extent to which lesbian relationships are policed.<sup>64</sup> By placing gay men at the center of all queer asylum cases, judges run the risk of “erasing the distinct experiences of lesbians.”<sup>65</sup> In turn, lesbians’ cases are adjudicated in dubious ways.<sup>66</sup>

Finally, because gay men are at the center of queer asylum cases, credibility is shaped by gay male experiences. Judges may find adverse credibility when lesbians cannot offer documentation of harm. The judges have high expectations for document-availability given the more public-facing persecution gay men often face.<sup>67</sup> However, even when judges rely

60. Catherine Dauvergne & Jenni Millbank, *Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers*, 31 FED. L. REV. 299 (2003) (finding that 80% of queer Australian applicants were gay men); NAT’L CTR. FOR LESBIAN RTS., *supra* note 56, at 1 (noting that “lesbians account for only a small fraction of all applications for asylum based on sexual orientation”); Llewellyn, *supra* note 57, at 87 (finding in the U.S. context that “of the 196 cases, 21 cases were made by women, 174 cases were made by men.”).

61. Sarah Keenan, *Safe Spaces for Dykes in Danger? Refugee Law’s Production of the Vulnerable Lesbian Subject*, in REGULATING THE INTERNATIONAL MOVEMENT OF WOMEN: FROM PROTECTION TO CONTROL 29, 35 (Sharon FitzGerald ed., 2011) (“[T]here has as yet been little academic attention paid to the particular issues arising when women make refugee claims on the basis of sexuality.”); Mengia Tschalaer, *Victimhood and Femininities in Black Lesbian Asylum Cases in Germany*, J. ETHNIC & MIGRATION STUD. 1, 1 (2020) (“[W]e know very little about how gender and sexuality structure the access of lesbian asylum seekers to refugee protection.”). In fact, lesbian asylum seekers’ stories are so systematically undermined that a recent collection of essays on the topic was titled *Lives That Resist the Telling*. Eithne Luibhéid, *Migrant and Refugee Lesbians: Lives That Resist the Telling*, 24 J. LESBIAN STUD. 57, 57 (2020).

62. Dauvergne & Millbank, *supra* note 60, at 318.

63. *Id.*

64. NAT’L CTR. FOR LESBIAN RTS., *supra* note 56, at 6 (“Where there are strict taboos around women’s sexuality in general, lesbian sexuality may be less likely to be named explicitly in laws, regulations, or public documents”); Douglas McDonald-Norman, *No One to Bear Witness: Country Information and LGBTQ Asylum Seeker*, 33 REFUGEE 88, 92 (2017).

65. McDonald-Norman, *supra* note 64, at 92.

66. Dauvergne & Millbank, *supra* note 60, at 321–22.

67. Rachel Lewis, *The Cultural Politics of Lesbian Asylum: Angelina Maccorone’s Unveiled (2005) and the Case of the Lesbian Asylum-Seeker*, 12 INT’L FEMINIST J. POL. 424, 425 (2010) [hereinafter, Lewis, *The Cultural Politics*] (“Unlike gay male asylum applicants, many of whom experience traditional human rights violations in the public sphere, the limited information we possess about lesbians internationally suggests that they are particularly vulnerable to abuse in the private sphere at the hands of non-state

on personal testimony, problems arise, including stereotyping.<sup>68</sup> Scholars have also demonstrated that judges cast suspicion when women do not portray a linear, clear-cut narrative of sexuality that judges often find, or at least expect to find, in queer men's cases.<sup>69</sup> Women who have husbands or children were deemed to not be credible because the stereotypical image of a gay man who is childless and unambiguously homosexual serves as a benchmark.<sup>70</sup> The gay male experience serves as this benchmark despite the fact that there are societal factors in queer women's home countries that might have required them to enter marriages to hide their sexuality.<sup>71</sup> Similarly, a woman could have discovered her sexual preferences after her marriage, especially if the society was repressive towards teaching girls and young women about sexuality.<sup>72</sup>

### C. Theory

This Section offers Crenshaw's intersectionality theory as a useful framework for understanding the many observations on gender disparities.<sup>73</sup> Many scholars have hinted at the need for such an approach.<sup>74</sup> In fact, the title of a collection of essays on lesbian asylum seekers, *Lives That Resist Telling*, takes its name directly from Crenshaw.<sup>75</sup>

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agents. . . . As with gender-based asylum applications, persecution by non-state actors can make it more difficult for lesbians to provide the kind of documentation that would strengthen their claims."); Rachel Lewis, "Gay? Prove it": *The Politics of Queer Anti-deportation Activism*, 17 *SEXUALITIES* 958, 962 (2014) [hereinafter, Lewis, "Gay? Prove it"] ("[L]esbian . . . asylum applicants are thus expected to conform to western stereotypes of male homosexual behavior based on visibility, consumption, and an identity in the public sphere in order to be considered worthy candidates for asylum.").

68. See *supra* notes 51–55 and accompanying text.

69. NAT'L CTR. FOR LESBIAN RTS., *supra* note 56, at 4–5 (describing how lesbian asylum seekers often are not "out," may have never had sexual relationships with women, and may be married to or have sex with men).

70. Llewellyn, *supra* note 57, at 93 (discussing judges' skepticism over lesbian applicants with children); Sari, *supra* note 25, at 147 (noting that lesbian "asylum applicants who had been married in their home countries and/or have children are often denied asylum . . . based on the failure to conform to common Euro-American perception of lesbians as 'young, unmarried, childless, and independent of their families.'").

71. NAT'L CTR. FOR LESBIAN RTS., *supra* note 56, at 5 ("In countries where the societal, familial, or economic controls on women and women's sexuality are greater, even more lesbians may marry and have children. A lesbian may even hope that her status as a wife and mother will help her conceal her sexual orientation and so avoid persecution.").

72. *Id.* at 5 ("If an applicant has been isolated from other lesbians or feared outing herself, she may not have been able or willing to act on her same-sex orientation . . . . Many women have consensual sex with men before coming out as lesbian.").

73. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24.

74. Amy Shuman & Wendy Hesford, *Getting Out: Political Asylum, Sexual Minorities, and Privileged Visibility*, 17 *SEXUALITIES* 1016, 1023 (2014); Tschalaer, *supra* note 61, at 1; Lewis, "Gay? Prove it," *supra* note 67, at 959; Luibhéid, *supra* note 61, at 69.

75. Luibhéid, *supra* note 61, at 59 (citing Kimberlé Crenshaw, *Whose Story is it Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in *RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (Toni Morrison ed., 1992)); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence*

Crenshaw's theory posits that individuals who live at the intersection of marginalized identities—in her case, Black women—are disadvantaged in many spheres of society, even in situations where marginalized groups are supposed to be lifted.<sup>76</sup> This disadvantage arises because “dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis.”<sup>77</sup> In other words, societal efforts that try to undo discrimination have the tendency to look at that discrimination from a one-dimensional, rather than multifaceted, lens. In Crenshaw's context, this means trying to ameliorate racial discrimination without taking into account the notion that race and gender combine to privilege certain individuals over others.<sup>78</sup> As a result, “this single-axis framework erases Black women.”<sup>79</sup>

Crenshaw argues that we can see the negative consequences of this one-dimensional framework through American anti-discrimination law.<sup>80</sup> In the 1976 case *DeGraffenreid v. General Motors*, Crenshaw points to such a single-axis framework.<sup>81</sup> The case involved five Black women who sued General Motors, alleging that their “employer's seniority system perpetuated the effects of past discrimination against Black women.”<sup>82</sup> General Motors had recently laid off many of their employees, disproportionately effecting recent hires. Because General Motors only started hiring Black women in 1964, these women represented a large proportion of the layoffs.<sup>83</sup> The court ruled that this was not unlawful discrimination because “plaintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination.”<sup>84</sup> Instead, the court would have needed to see “race discrimination, sex discrimination, or alternatively either, but not a combination of both.”<sup>85</sup> However, white women and Black men had been hired for many years before Black women, and thus were not as affected by the seniority-based layoffs, so there was no pure sex-based discrimination or pure race-based discrimination to be found.<sup>86</sup>

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*Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (“Although racism and sexism readily intersect the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as woman or person of an either/or proposition, they relegate the identity of women of color to a location that resists telling.”).

76. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24, at 140.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 141–152.

81. *Id.* at 141 (citing *DeGraffenreid v. General Motors*, 413 F. Supp. 142 (E.D. Mo. 1976)).

82. *Id.*

83. *Id.*

84. *Id.* (citing *DeGraffenreid*, 413 F. Supp. at 143).

85. *Id.*

86. *Id.*

Because the court was unwilling to recognize that Black women face discrimination *because* they are Black women, Crenshaw concluded that “the boundaries of sex and race discrimination doctrine are defined respectively by white women’s and Black men’s experiences.”<sup>87</sup> In other words, Black women are viewed through the prism of more privileged members of their marginalized groups. Because white women or Black men—groups marginalized along one axis—serve as the benchmark against which Black women are understood, Black women’s experiences are erased or distorted. Therefore, anti-discrimination law ironically serves to further discrimination when relying on one-dimensional frameworks.

Crenshaw applies intersectionality to other situations,<sup>88</sup> but this example is sufficient to demonstrate just how clearly her theory applies to queer female asylum cases. In this context, the two axes of marginalization are sexual orientation and gender, rather than race and gender. Intersectionality theory would suggest that queer women face unique challenges by virtue of their identities as queer women. However, the theory would also suggest that asylum laws and procedures would further discriminate against queer women by conceptualizing the most privileged members of the queer community as a benchmark. In this scenario, this benchmark is gay men who are marginalized because of their sexual orientation but not because of their gender.

What intersectionality suggests would happen in the queer asylum scenario is exactly what scholars have begun to observe. As discussed, several studies have demonstrated that queer women face discrimination in the asylum process because judges determine persecution and credibility in accordance with gay male experiences.<sup>89</sup> Additionally, Crenshaw posits that another way in which doubly marginalized groups are erased is through the “small statistical sample” of people putting claims forward who live at that intersection.<sup>90</sup> As we have seen, queer women represent a small proportion of LGB asylum claims and the academic literature is sparse.<sup>91</sup> Thus, as Crenshaw’s theory suggests, it is difficult to empirically demonstrate the disadvantage, or “disparate impact” that queer women face.<sup>92</sup>

In the LGB asylum context, the scholar who has most clearly introduced an intersectional-minded theory is Sara L. McKinnon.<sup>93</sup> Referring to the

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87. *Id.* at 143.

88. *Id.* at 143–48.

89. *See supra* Section I.B.3.

90. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24, at 146; *see also* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 756–67 (2011) (discussing the difficulties of proving discrimination with small sample sizes).

91. *See supra* text accompanying notes 59–61.

92. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24, at 146.

93. SARA L. MCKINNON, *GENDERED ASYLUM: RACE AND VIOLENCE IN U.S. LAW AND POLITICS* (2016).

“Ampersand Problem,” McKinnon posits that “[g]ay women are sometimes recognized as women, and sometimes as gay, but rarely both at the same time”<sup>94</sup> and “struggle to win asylum claims because . . . ‘sexual orientation-based jurisprudence has been built on a male model.’”<sup>95</sup> Thus, McKinnon directly applies Crenshaw’s intersectionality framework to queer asylum. The question is, how can the theoretical work of Crenshaw and McKinnon help fill gaps in the LGB asylum literature?

#### *D. Gaps in the Literature*

There is a dearth of literature on problems that lesbian asylum seekers face. While some research has focused on these problems, most of these studies have approached them with a small-scale lens.<sup>96</sup> The literature reviewed thus far has largely consisted of close analyses of a small set of queer asylum cases.<sup>97</sup> What is missing, therefore, is a wider, more systematic analysis of LGB asylum cases.

Crenshaw and McKinnon provide useful theories for determining what type of larger analysis would be most logical to undertake. Intersectionality and the Ampersand Problem suggest that queer women might be at a systemic disadvantage in asylum hearings as compared to gay men.<sup>98</sup> Thus, this Note draws on these theories to empirically test whether there is a difference in asylum recognition rates between gay men and gay women.

While these two scholars write in the American context, their theories need not be confined to U.S. asylum cases. This is because of the obvious fact that patriarchal systems exist across the world.<sup>99</sup> In fact, McKinnon relies on empirical observations in the Australian and Canadian contexts to generate her U.S.-based theory.<sup>100</sup> It is essential to consider what current studies exist—in and outside of the U.S.—that compare recognition rates in order to understand where fruitful new research lies.

A select few studies have compared asylum recognition rates between queer men and women. One study, drawing on U.S. Circuit Court asylum

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94. *Id.* at 108.

95. *Id.* (quoting Victoria Neilson, *Homosexual or Female? Applying Gender-Based Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POLY REV. 417, 442 (2005)).

96. See, e.g., Lewis, “Gay? Prove it,” *supra* note 67; Shuman & Hesford, *supra* note 74; McDonald-Norman, *supra* note 64; Luibhéid, *supra* note 61; Sari, *supra* note 25.

97. *Id.*

98. This does not necessarily mean, however, that gay men do not also face systemic disadvantages in asylum hearings as compared to, for example, straight men, but such an analysis is beyond the scope of this Note.

99. See, e.g., *Gender Equality by Country 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/gender-equality-by-country> (last visited Apr. 12, 2023) (ranking countries on gender equality and finding no country with complete equality between men and women).

100. MCKINNON, *supra* note 93, at 108.

cases from 1985-2013, finds that queer men won their cases 23.5% of the time, whereas lesbians won less than 10% of the time.<sup>101</sup> However, statistical analysis did not reveal this difference to be significant.<sup>102</sup> In southern Germany, “NGO estimates suggest that about 95 percent of” lesbian asylum cases “get rejected after the first asylum interview” whereas this number is only 50% for gay men.<sup>103</sup> Drawing on over two hundred Australian Refugee Review Tribunal decisions from 1994-2000, another study found that 26% percent of claims put forth by gay men were successful, but only 7% were for lesbians.<sup>104</sup> However, the study found that during the same timeframe, but in the Canadian context, lesbians won 69% of their cases, but men only won in 52%.<sup>105</sup>

These studies are limited in a number of ways. First, the fact that the results are inconsistent across countries suggests that it would be enriching to continue to explore comparisons of recognition rates. Second, some of these studies would benefit from an update. The Australian study covered cases primarily from the previous millennium,<sup>106</sup> but much has changed since then in Australian LGB asylum law, notably the removal of discretion-based reasoning in 2003.<sup>107</sup> Finally, there are so many countries in which we simply have no understanding of whether and to what extent lesbians are discriminated against in the asylum process, despite theory suggesting that queer women are disadvantaged.

This Note reconciles these limitations by comparing recognition rates for queer male versus queer female asylum seekers in Australia and in New Zealand. This Note selects these two countries both for what they share and what they do not. Both Oceanic countries have accessible databases of asylum cases where searches can be done to parse out claims based on LGB-related persecution.<sup>108</sup> In both countries, the cases that are available are at the stage of the first appeal, where tribunal members consider cases on the facts and the law.<sup>109</sup> Finally, the two countries have similar general asylum

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101. Llewellyn, *supra* note 57, at 87.

102. *Id.* (noting that this finding was likely due to small sample size). Such a finding is consistent with Crenshaw’s point about sample sizes in discrimination cases.

103. Tschalaer, *supra* note 61, at 1.

104. Dauvergne & Millbank, *supra* note 60, at 302.

105. *Id.*

106. *Id.* (explaining that the study examines Australian cases from 1994–2000).

107. *Appellant S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (Austl.).

108. See *Refugee Review Tribunal of Australia*, AUSTRALASIAN LEGAL INFO. INST., <http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/RRTA/> (last visited Jan. 4, 2023); *Administrative Appeals Tribunal of Australia*, AUSTRALASIAN LEGAL INFO. INST., <http://www6.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AATA/> (last visited Jan. 4, 2023); *New Zealand Refugee Status Appeals Authority*, NEW ZEALAND LEGAL INFO. INST., <http://www.nzlii.org/nz/cases/NZRSAA/> (last visited Jan. 4, 2023); *New Zealand Immigration and Protection Tribunal*, NEW ZEALAND LEGAL INFO. INST., <http://www.nzlii.org/nz/cases/NZIPT/> (last visited Jan. 4, 2023).

109. See *infra* Section II.A.

laws and specifically LGB asylum laws.<sup>110</sup> Both countries base their refugee definitions on the Refugee Convention, both explicitly grant asylum on the basis of LGB-related persecution, and both have outlawed discretion-based reasoning for LGB cases.<sup>111</sup> In terms of differences, while there has been some research on LGB asylum in Australia<sup>112</sup> there has been almost none in New Zealand.<sup>113</sup> Thus, this Note directly builds on Australian studies of the past, but it also begins this conversation in New Zealand.

This research is important in a number of respects beyond testing intersectionality theory. While there is much we do not know about LGB asylum seekers because of data limitations, it is estimated that thousands of queer people flee homophobia and seek protection around the world every year.<sup>114</sup> It is important to conduct studies such as this one to discover whether these asylum seekers are treated fairly in their adjudication processes, and the fact that there is essentially no scholarship on queer asylum in New Zealand means that we have not even begun to work towards this end.

## II. QUANTITATIVE ANALYSIS OF AUSTRALIAN AND NEW ZEALAND LGB ASYLUM APPEALS

Part II quantitatively analyzes Australian and New Zealand asylum appeal decisions to uncover whether disparities exist in recognition rates between gay and lesbian asylum seekers. Section II.A provides background information on the Australian and New Zealand asylum systems. Section II.B then introduces the methods for assembling a dataset of cases suitable for quantitative analysis and presents the dataset. Through logistic regression analysis, Section II.C finds that queer men are significantly more likely than queer women to win their cases in New Zealand, but in Australia there is no significant difference in recognition rates between genders. Section II.D introduces limitations and future directions, and Section II.E concludes with a discussion of the results.

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110. *See infra* Section II.A.

111. *See infra* Section II.A.

112. Millbank, *From Discretion to Disbelief*, *supra* note 45; Millbank, *Imagining Otherness*, *supra* note 58; Dauvergne & Millbank, *supra* note 59.

113. Alia Bloom & Martine Udahemuka, 'Going Through the Doors of Pain': *Asylum Seeker and Convention Refugee Experiences in Aotearoa New Zealand*, 9 *KŌTUITUI: N. Z. J. SOC. SCIS. ONLINE* 70, 72 (2014) ("[T]here is a dearth of research about asylum seekers and Convention refugees in Aotearoa New Zealand.").

114. Maria Cristina Nisco, *You Cry Gay, You're In': The Case of Asylum Seekers in the UK*, in *QUEERING MASCULINITIES IN LANGUAGE AND CULTURE* 225, 228 (Giuseppe Balirano & Paul Baker eds., 2018) (noting that thousands of LGBT people apply for asylum in the European Union each year).

*A. Australia and New Zealand Asylum Procedure**1. Australia*

In Australia, the *Migration Act* governs immigration and asylum procedures.<sup>115</sup> Section 5H of this *Act* incorporates language from Article 1A(2) of the Refugee Convention's refugee definition into Australian domestic law.<sup>116</sup> According to Section 36(2)(a) of the *Act*, Australia is obligated to provide a protection visa to individuals who have demonstrated that they are refugees.<sup>117</sup> To apply for this type of protection visa, an asylum seeker must submit a written application to the Australian Department of Immigration and Border Protection, where an officer will make a decision on the case after assessing the application.<sup>118</sup> Before July 2015, if the officer did not grant the applicant a protection visa, the asylum seeker could appeal their decision to the Refugee Review Tribunal (RRT), which conducted a new hearing and reviewed the case on the merits.<sup>119</sup> In July 2015, the RRT was incorporated into the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT), which performs the same function.<sup>120</sup> Tribunal judges can either overturn or affirm the lower officer's decision.<sup>121</sup> If the judge affirms a negative decision, the asylum seeker can appeal their case to the Federal Circuit Court of Australia, which has limited jurisdiction over what it can rule on and does not conduct a full merits review.<sup>122</sup> An applicant can appeal one final time to the Federal Court of Australia or the High Court of Australia, but they are similarly limited in what they can review.<sup>123</sup> This Note analyzes cases at the RRT/AAT level because they involve a full merits review and because the decisions are published online, whereas the initial decisions are not.

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115. *Migration Act 1958* (Cth) (Austl.).

116. *Migration Act 1958* (Cth) s 5H (Austl.) (“For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person: (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country”).

117. *Migration Act 1958* (Cth) s 36(2)(a) (Austl.).

118. *Seeking Asylum in Australia—Policy in Practice: Determining Refugee Status*, ASYLUM INSIGHT, <https://www.asyluminsight.com/determining-refugee-status> (last visited Mar. 30, 2023).

119. Laura Smith-Khan, *Telling stories: Credibility and the Representation of Social Actors in Australian Asylum Appeals*, 28 DISCOURSE & SOC. 513, 514 (2017).

120. *Id.*; *Refugee Status Determination in Australia*, ANDREW & RENADA KALDOR CTR. FOR INT'L REFUGEE L. (Nov. 2, 2020), <https://www.kaldorcentre.unsw.edu.au/publication/refugee-status-determination-australia>.

121. ASYLUM INSIGHT, *supra* note 118.

122. *Id.*; *Refugee Status Determination in Australia*, ANDREW & RENADA KALDOR CTR. FOR INT'L REFUGEE L. (Nov. 2, 2020), <https://www.kaldorcentre.unsw.edu.au/publication/refugee-status-determination-australia>.

123. *Refugee Status Determination in Australia*, ANDREW & RENADA KALDOR CTR. FOR INT'L REFUGEE L. (Nov. 2, 2020), <https://www.kaldorcentre.unsw.edu.au/publication/refugee-status-determination-australia>.

## 2. *New Zealand*

In New Zealand, international and domestic law govern immigration and asylum procedures. New Zealand defines refugees as “people who meet the definition of a refugee provided in the [Refugee] Convention.”<sup>124</sup> While New Zealand initially relied on international law to fulfill its obligations to refugees, the country incorporated the definition into domestic law through the 2009 *Immigration Act*.<sup>125</sup> Section 129 of the *Act* states that a person must receive refugee status protection if “he or she is a refugee within the meaning of the Refugee Convention.”<sup>126</sup> Thus, like Australia, the refugee definition continues to be based on the Refugee Convention.

After an applicant submits an application to the Refugee Status Branch,<sup>127</sup> a Refugee Protection Officer (RPO) will review the claim, interview the applicant, and make a decision.<sup>128</sup> This first stage is similar to that in Australia. Before the 2009 *Immigration Act*, if the initial officer denied the claim, the asylum seeker could appeal the decision to the New Zealand Refugee Status Appeals Authority (RSAA).<sup>129</sup> Through Section 217 of the *Immigration Act*, the RSAA was incorporated into the Immigration and Protection Tribunal (IPT), just as the Australian RRT was incorporated into the AAT.<sup>130</sup> Like in the Australian tribunals, the IPT utilizes the same Convention-based refugee definition as did the RSAA.<sup>131</sup> And also like in the Australian tribunals, the New Zealand tribunals hear refugee cases on the merits.<sup>132</sup> An applicant can appeal their case to the High Court of New Zealand, but the Court can only review the case on limited grounds related to procedural or legal errors.<sup>133</sup> This Note analyzes cases at the RSAA/IPT level. Just as in Australia, these cases are at the first appeals level, involve full merits reviews and include written decisions that are published online.

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124. NEW ZEALAND IMMIGR., CLAIMING REFUGEE AND PROTECTION STATUS IN NEW ZEALAND 4 (2015), <https://www.immigration.govt.nz/documents/refugees/claimingrefugeeandprotectionstatusinnewzealand.pdf>.

125. *Id.* at 3 (citing *Immigration Act 2009* (N.Z.)).

126. *Immigration Act 2009*, s 129 (N.Z.).

127. NEW ZEALAND IMMIGR., *supra* note 124, at 3.

128. *How to Claim Refugee Status: The Process*, CMTY. L. MANUAL ONLINE (last visited Jan. 4, 2023), <https://communitylaw.org.nz/community-law-manual/chapter-30-refugees/how-to-claim-refugee-status-the-process/>.

129. *Immigration Amendment Act 1999*, s 129N (N.Z.).

130. *Immigration Act 2009*, s 217 (N.Z.); *Immigration and Protection Tribunal*, NEW ZEALAND GOV'T: (last visited Mar. 30, 2023), <https://www.govt.nz/organisations/immigration-and-protection-tribunal/> (stating that the Immigration and Protection Tribunal replaced the Refugee Status Appeals Authority).

131. *Immigration Act 2009*, s 129 (N.Z.); *Immigration Amendment Act 1999*, s 129D (N.Z.).

132. *Appeals: What You Can Do if You're Refused Refugee Status*, CMTY. L. MANUAL ONLINE (last visited Jan. 4, 2023), <https://communitylaw.org.nz/community-law-manual/chapter-30-refugees/appeals-what-you-can-do-if-youre-refused-refugee-status/>.

133. *Id.*

## B. Methods, Data, and Hypotheses

### 1. Dataset Collection Methods

This Note assembled a dataset of Australian and New Zealand cases from the Australasian Legal Information Institute (AustLII)<sup>134</sup> and the New Zealand Legal Information Institute (NZLII),<sup>135</sup> respectively.<sup>136</sup> This Note is only concerned with Australian cases after 2003 and New Zealand cases after 1995 because these cases were decided after discretion-based reasoning was eliminated.<sup>137</sup> As discussed in Section I.B.1, before these dates, a large proportion of queer asylum claims were often immediately denied on the grounds that applicants could avoid persecution by remaining discreet about their sexual orientation.<sup>138</sup> Because LGB asylum cases were consistently denied on these grounds, there was a lack of consideration of other issues such as gender.<sup>139</sup> After filtering out discretion-based cases, this search yielded 496 Australian and 69 New Zealand cases suitable for quantitative analysis.<sup>140</sup>

### 2. Descriptive Data

Table 1 shows the descriptive data for the 496 Australian cases. The vast majority of applicants were gay men (81.9%), whereas lesbians represented a small proportion of claims (18.1%). Gay men received favorable results in 39.9% of their cases, and gay women received favorable results in 36.7% of their cases.

Table 2 shows the descriptive data for the 69 New Zealand cases. Similar to Australia, the asylum seekers were overwhelmingly gay men (82.6%), with gay women representing a small proportion (17.4%). Recognition rates suggest a different story from Australia. Whereas in the Australian case the recognition rates were similar between gay men and lesbians, in New Zealand, men received favorable results in 54.4% of cases, whereas women received favorable results in 25% of cases.

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134. AUSTRALASIAN LEGAL INFO. INST., <http://www.austlii.edu.au/> (last visited Jan. 4, 2023).

135. NEW ZEALAND LEGAL INFO. INST., <http://www.nzlii.org/> (last visited Jan. 4, 2023).

136. In all databases, this Note employed the search term “Gay or Lesbian or Bisexual or Homosexual or Queer.”

137. *Re GJ Refugee Appeal No. 1312/93*, at 56–57, 30 Aug. 1995 (N.Z. Refugee Status Appeals Authority), [https://www.refworld.org/cases,NZL\\_RSAA,3ae6b6938.html](https://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html); *Appellant S395/2002 & S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71 at 3 (Austl.).

138. *See supra* Section I.B.1.

139. *See supra* Section I.B.1.

140. This Note included cases where applicants put forth claims on multiple grounds if one of those grounds was LGB-related and the judge factored in this aspect in making their decision. However, as discussed in the introduction, this Note did not include cases where the asylum seekers identified as transgender. This Note also did not include cases where applicants were not themselves queer but feared persecution because others in their hometowns thought they were queer.

**Table 1: Descriptive Data of Asylum Seekers Claiming Persecution Based on LGB Status in the Australian Refugee Review Tribunal or Administrative Appeal Tribunal, 2004-2020**

Category	n	% of Total	Recognition Rate
Gender			
Cisgender Female	90	18.1	36.7
Cisgender Male	406	81.9	39.9
Most Common Countries			
Lebanon	75	15.1	45.3
India	68	13.7	33.8
Malaysia	53	10.7	52.8
Mongolia	35	7.1	25.7
Bangladesh	29	5.9	62.1
Other Countries	236	47.6	35.2
Overall	496	100*	39.9

*Notes: \* indicates that subcomponents do not add up to 100% because of rounding. Data collected from Australasian Legal Information Institute. Dataset on file with author.*

**Table 2: Descriptive Data of Asylum Seekers Claiming Persecution Based on LGB Status in the New Zealand Refugee Status Appeals Authority or Immigration and Protection Tribunal, 1996-2020**

Category	n	% of Total	Recognition Rate
Gender			
Cisgender Female	12	17.4	25
Cisgender Male	57	82.6	54.4
Most Common Countries			
Iran	14	20.3	71.4
India	7	10.1	42.9
Egypt	5	7.2	80
South Africa	5	7.2	20
Bangladesh	4	5.8	25
Other Countries	34	47.3	44.1
Overall	69	100*	49.3

*Notes: \* indicates that subcomponents do not add up to 100% because of rounding. Data collected from New Zealand Legal Information Institute. Dataset on file with author.*

### 3. *Hypotheses and Analytic Methods*

Part I introduced initial observations that scholars have made when analyzing LGB-related asylum cases. A growing number of these scholars have pointed out the ways in which queer women appear to be at a disadvantage in the courtroom as compared to gay men.<sup>141</sup> Intersectional theories by Crenshaw and McKinnon give conceptual backing to these initial observations<sup>142</sup> and help to frame a hypothesis for asylum recognition rates. Based on these theories, this Note predicted that gay men would be significantly more likely to receive favorable outcomes than lesbians in both Australia and New Zealand. As demonstrated in Tables 1 and 2, recognition rates are higher for gay men in both states, though by different margins.

To test these two hypotheses, this Note estimated two logistic regressions using case outcome (deny or grant asylum) as the dependent variable and gender (male or female) of the asylum seeker as the independent variable. This Note conducted a logistic, rather than linear, regression because the dependent variable is binary. To conduct this regression, this Note coded all negative decisions as 0s and all positive decisions as 1s. For the independent variable, this Note coded all cases with a female asylum seeker as 0 and all cases with a male asylum seeker as 1. To ensure robustness, this Note assesses p-values using two-tailed, rather than one-tailed, tests.

#### *C. Logistic Regression Results*

The data presented in Table 3 does not support the hypothesis that gay male asylum seekers would be significantly more likely to receive favorable outcomes than lesbian asylum seekers in Australia. Gay male asylum seekers were 1.15 times as likely to receive a favorable outcome as were lesbian asylum seekers in Australia, but this difference was not significant ( $p = .57$ ). The New Zealand logistic regression, however, does support the hypothesis that gay men would be significantly more likely to receive favorable outcomes than lesbians. Gay male asylum seekers were 3.58 times as likely to receive a favorable outcome as were lesbian asylum seekers in New Zealand, and we can reject the null hypothesis that there is no difference in recognition rates between gay men and women at the 0.10 level ( $p = .076$ ).

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141. *See supra* Section I.B.3.

142. *See supra* Section I.C.

**Table 3: Estimated Odds Ratios from Logistic Regressions**

Australia	Odds Ratio	$p > \alpha$	New Zealand	Odds Ratio	$p > \alpha$
Intercept			Intercept		
Gender (Female)			Gender (Female)		
Male	.15	.57	Male	3.58	.076*

Notes:  $n$  for Australia = 496,  $n$  for New Zealand = 69. \* $p < 0.10$ . Data from LGB-related asylum cases assembled from Australasian Legal Information Institute and New Zealand Legal Information Institute. Dataset on file with author.

#### D. Limitations and Future Directions

One limitation of this analysis is related to the population sample. First, the sample size could be a concern. While there were a sizeable number of Australian cases (496), there were far fewer in New Zealand (69). Even though the proportion of cases that were brought by women was similar between Australia and New Zealand, at just under 20% each, the fact that there were only twelve cases put forth by women in New Zealand suggests that future scholars might consider waiting until there are a larger number of cases in New Zealand before further quantitative analysis.

A second type of limitation concerns the regression itself. This Note estimated a univariate regression, but the results would be stronger had it accounted for other factors. For example, this paper could have introduced country conditions into the regression and coded countries of origin in accordance with the degree to which they provide rights to LGB people. It may be possible that lesbian applicants in New Zealand come from countries that are less repressive to queer people than do gay male applicants. As a result, they might win their cases less often. However, trying to code for country conditions proved difficult, as laws—and how they are enforced<sup>143</sup>—continually change. Aside from country conditions, there could be many other factors that one could try to put into the regression. There is ample evidence, for example, that certain asylum judges are more lenient than others,<sup>144</sup> so this Note could have tried to factor this in. Adding factors such as these would help to clarify the extent to which gender is associated with case outcome.

143. UNHCR LGBT Guidelines, *supra* note 50, at 8 (noting that laws criminalizing same-sex behavior are not always enforced); HATHAWAY & FOSTER, *supra* note 21, at 129 (noting that courts have given “weight to evidence of the partial non-enforcement of persecutory laws in order to avoid a finding of well-founded fear” of persecution).

144. Andrew I. Schoenholtz, Jaya Ramji-Nogales, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 325–49 (2007) (finding wide disparities in asylum outcome rates between immigration judges).

*E. Discussion*

Despite these limitations, the conclusions drawn from this chapter are important. This analysis offers a novel academic contribution in that it empirically tests a hypothesis suggested by a growing body of literature and tests an application of Crenshaw's and McKinnon's intersectional theories. It is one of the few papers to compare queer male and female asylum recognition rates and one of the only to statistically test these differences.<sup>145</sup>

The New Zealand results suggest that gay men are more likely than women to receive asylum at the first-appeals level. Not only does this suggest queer women might be facing unfair discrimination, but also highlights that we must not continue to ignore New Zealand in subsequent queer asylum scholarship. The results of this analysis challenge New Zealand's reputation as an "outstandingly humanitarian" and "ideal society" in relation to immigration policy.<sup>146</sup> Thus, future scholars should look towards New Zealand with a more critical eye.

The Australian results demonstrated that there was no significant difference in recognition rates between queer men and women, but this does not necessarily serve to challenge intersectionality or previous literature that informed the hypotheses. Rather, it could indicate that judges have learned from the Australian scholarship of the early 2000s,<sup>147</sup> or it may indicate that queer women face discrimination in unique ways but that men do as well in a way that balances out the recognition rates. From this quantitative analysis alone, we can only speculate why the hypothesis did not bear out.

Taken together, the results leave important questions to explore. If in one country there is no difference in recognition rates between queer men and women, but in another there is, then that suggests there are important differences in either the applicants or in how the applicants are assessed. As Crenshaw points out, it is difficult to demonstrate disparate impact with small sample sizes,<sup>148</sup> so quantitative analysis is insufficient for understanding the extent to which queer women are discriminated against in the asylum process, especially in the New Zealand case. Thus, Part III qualitatively analyzes a subset of cases in Australia and New Zealand to parse out what might account for the different results.

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145. The other being Llewellyn, *supra* note 57, at 87.

146. KLAUS NEUMANN & GWENDA TAVAN, DOES HISTORY MATTER?: MAKING AND DEBATING CITIZENSHIP, IMMIGRATION AND REFUGEE POLICY IN AUSTRALIA AND NEW ZEALAND 105 (ANU Press 2009).

147. Millbank, *From Discretion to Disbelief*, *supra* note 45; Millbank, *Imagining Otherness*, *supra* note 58; Dauvergne & Millbank, *supra* note 60. This would be surprising, however, given the continued criticism Australia receives for its asylum policies. *See, e.g.*, John Minns, Kieran Bradley & Fabricio H. Chagas-Bastos, *Australia's Refugee Policy: Not a Model for the World*, 55 INT'L STUDS. 1, 2–3 (2018) (criticizing Australia for adopting increasingly strict asylum policies and labeling the asylum system "defunct").

148. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24, at 146.

### III. QUALITATIVE ANALYSIS OF AUSTRALIAN AND NEW ZEALAND LGB ASYLUM APPEALS

At first glance, the quantitative results might suggest that the Australian system is more sensitive to the unique challenges of queer women. However, by focusing on the role of credibility in the subset of cases, this Note arrives at a different conclusion. In New Zealand, judges frequently doubted that female applicants were queer—as intersectionality theories would predict—but males’ queerness went largely unchallenged. In Australia, judges frequently cast suspicion on whether both male and female applicants were queer. These findings suggest that there is no difference in recognition rates between genders in Australia, not because the country is more sensitive to queer women, but rather in part because Australia is similarly harsh towards both genders, whereas in New Zealand judges appeared harsher to lesbians than gay men.

#### *A. Dataset Collection Methods*

This Note qualitatively analyzed a subset of cases drawn from the dataset discussed in Part II. To control for as many factors as possible, this Note included ten cases from Australia and ten cases from New Zealand, evenly divided between male and female applicants. This Note also chose a subset of cases from similar time periods: the most recent cases from the dataset in Part II. The most recent cases also have the added benefit of being most reflective of contemporary adjudication practices. Tables 4 and 5 present an overview of the twenty cases.

**Table 4: Subset of New Zealand Queer Asylum Cases**

<i>Gay Male</i>			
Case	Date Decided	State of Origin	Outcome
<i>AP (Jordan) [2019] NZIPT 801341</i>	April 9 2019	Jordan	Allow
<i>HR (India) [2019] NZIPT 801474</i>	August 19 2019	India	Allow
<i>IR (India) [2019] NZIPT 801640</i>	December 19 2019	India	Deny
<i>AV (Egypt) [2020] NZIPT 801705</i>	December 10 2020	Egypt	Allow
<i>AL (Ukraine) [2020] NZIPT 801695</i>	October 14 2020	Ukraine	Allow

*Gay Female*

Case	Date Decided	State of Origin	Outcome
<i>BL (South Africa) [2016]</i> NZIPT 800968	November 30 2016	South Africa	Allow
<i>BN (South Africa) [2017]</i> NZIPT800973	January 25 2017	South Africa	Deny
<i>BX (South Africa) [2017]</i> NZIPT 801194	November 20 2017	South Africa	Deny
<i>AQ (Cameroon) [2019]</i> NZIPT 801410	March 28 2019	Cameroon	Deny
<i>FY (Sri Lanka) [2020]</i> NZIPT 801610	February 26 2020	Sri Lanka	Deny

*Notes: Subset of cases collected from New Zealand Legal Information Institute.*

**Table 5: Subset of Australian Queer Asylum Cases**

*Gay Male*

Case	Date Decided	State of Origin	Outcome
<i>1708847 (Refugee) [2020] AATA 2626</i>	June 16 2020	Malaysia	Deny
<i>1704758 (Refugee) [2020] AATA 2915</i>	June 19 2020	South Korea	Deny
<i>1619377 (Refugee) [2020] AATA 4202</i>	August 7 2020	Indonesia	Deny
<i>2010249 (Refugee) [2020] AATA 3638</i>	August 31 2020	Palestine	Allow
<i>1709883 (Refugee) [2020] AATA 5364</i>	October 28 2020	Lebanon	Allow

*Gay Female*

Case	Date Decided	State of Origin	Outcome
<i>1704734 (Refugee) [2020] AATA 1214</i>	January 14 2020	Malaysia	Allow
<i>1709743 (Refugee) [2020] AATA 970</i>	April 7 2020	Malaysia	Allow
<i>1711974 (Refugee) [2020] AATA 2056</i>	May 5 2020	Vietnam	Deny
<i>1710404 (Refugee) [2020] AATA 2916</i>	June 11 2020	Malaysia	Deny
<i>1713106 (Refugee) [2020] AATA 3829</i>	July 21 2020	Fiji	Deny

*Notes: Subset of cases collected from Australasian Legal Information Institute.*

### B. *Credibility Analysis*

This Section explores the twenty cases with a focus on the role of credibility. As discussed in Part I, scholars have uncovered that immigration judges across countries frequently cast suspicion on whether women are queer. This is because queer women may have had husbands or children as a result of societal expectations or because they do not have documentation of their sexual experiences in the way that judges expect men to possess.<sup>149</sup> Thus, judges may not appreciate the unique challenges of queer women, as intersectionality theories suggest, and as a result queer women struggle in their asylum adjudications. This Section explores to what extent credibility issues play a role in New Zealand and Australian asylum cases.<sup>150</sup>

#### 1. *New Zealand Applicants*

New Zealand judges often doubted whether female applicants were queer. The ways in which they came to their conclusions are indicative of problems suggested by Crenshaw and McKinnon, who—as discussed in Part I—argue that individuals marginalized along two axes are often discriminated against because they are not understood on their own terms and instead are compared to groups marginalized along one axis.<sup>151</sup>

In one case from the subset, a woman claimed she could not return to her native Cameroon on account of her bisexuality.<sup>152</sup> She testified that she had been in two same-sex relationships while growing up in Cameroon through which she discovered she was bisexual but “thought something was wrong with her.”<sup>153</sup> Later, she began a relationship with a man, but he found her with another women.<sup>154</sup> Nonetheless, she went on to marry him because the marriage could conceal her bisexuality and keep her safe.<sup>155</sup> However, she continued to have relationships with other women, including when she moved to New Zealand in 2015.<sup>156</sup> As a result, communication with her husband, who remained in Cameroon, became “more distant.”<sup>157</sup> In 2017,

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149. *See supra* Section I.B.3.

150. To discover credibility as a worthwhile avenue of explanation, this Note followed the “coding” method, whereby it read through the twenty cases, “organiz[ed] the data by bracketing chunks” of text segments, labeled those chunks with “a word representing a category,” and looked for patterns within the categories. JOHN W. CRESSWELL & J. DAVID CRESSWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* 193 (5th ed., SAGE Publ’g 2018). Relevant to this Note, one of those labeling categories was “credibility.”

151. *See supra* Section I.C.

152. *AQ (Cameroon)* 801410, at ¶ 4, 28 Mar. 2019 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2019/801410.html>.

153. *Id.* at ¶¶ 52–53, 58.

154. *Id.* at ¶ 67.

155. *Id.* at ¶ 68.

156. *Id.* at ¶ 76–89.

157. *Id.* at ¶ 82.

the applicant's husband divorced her. She felt that if she had to return to Cameroon she would not be able to put on a "façade" of heterosexuality and would suffer government persecution.<sup>158</sup>

The Tribunal deemed she was not credibly bisexual in ways demonstrative of a lack of understanding of queer women, in accordance with past research and intersectionality theory. One reason why the Tribunal deemed her non-credible was because she did not divulge her bisexuality to medical professionals. The court stated:

[t]he appellant was aware and conscious of her bisexuality from her late teens. Although she reported feeling at times confused and unsure about her bisexuality, she was in a supportive and confidential process with mental health professionals whose role it was to assist her to overcome her mental health challenges . . . The Tribunal does not accept that the appellant failed to raise the issue of her bisexuality with the psychologists because she was either feeling ashamed or was trying to protect her husband. Rather, the Tribunal concludes, the matter did not arise because the appellant never had the need to discuss this with her therapists because she is not bisexual<sup>159</sup>

This is a clear example of a lack of appreciation for issues specific to queer women. There is a difference between being aware of a feeling and being comfortable sharing that feeling with an authority figure, but judges expect lesbian women to conform to westernized conceptions of out-and-proud gay men.<sup>160</sup> In reality, this is far from the lived experience of many lesbian asylum seekers. Lesbian applicants might be reluctant to share this private information because of their feelings of shame and because they do not know if they can trust authority figures.<sup>161</sup> Additionally, queer women might be especially reluctant to share this information because of "taboos" around females expressing sexual desires and because of a belief that their experiences "will not be taken seriously" due to patriarchal forces that constrain female agency.<sup>162</sup> It is clear the applicant felt shame given her belief that something was "wrong with her" when she realized she was bisexual, and it is clear she had a complicated relationship with authority

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158. *Id.* at ¶ 4–6.

159. *Id.* at ¶ 140–41.

160. NAT'L CTR. FOR LESBIAN RTS., *supra* note 56, at 4; Lewis, "Gay? Prove it," *supra* note 67, at 962.

161. Lewis, *The Cultural Politics*, *supra* note 67, at 429 (noting that it can be a "traumatic process for many lesbian asylum-seekers [to come out], especially if their lives have depended upon remaining silent about their attraction to women," and offering an example of an applicant stating "It was very difficult to talk about my sexuality because I was very sensitive and didn't know who to trust").

162. NAT'L CTR. FOR LESBIAN RTS., *supra* note 56, at 6–8.

figures given that she feared government persecution.<sup>163</sup> Thus, the Tribunal was unable to appreciate why, as a queer woman, she might have been reluctant to share this information with medical professionals.

The Tribunal also cast suspicion on her sexuality because of the evidence she provided. Despite the fact that she brought in photographs with past lovers, the Tribunal ruled that this evidence did not sufficiently verify her same-sex relationships. The court determined:

[these photos] show the appellant with a woman, said to be [a past lover] at a bar, and in one photograph, the woman appears to be kissing the appellant on the cheek. The other photographs show the appellant with friends, including her two friends from [an LGBT organization] and [another past lover] in social situations at bars . . . . However, the identities of the individuals in those photographs cannot be independently verified, and all the photographs objectively show is that the appellant has close friends.<sup>164</sup>

This finding also demonstrates a lack of appreciation for issues specific to queer women. First, it is questionable, though unsurprising, that the Tribunal dismissed the photos as evidence. Judges expect lesbians to “publicly perform their sexuality like gay men,” but the photographs the Cameroonian applicant presented were not sexually explicit.<sup>165</sup> To expect queer women—or any applicants—to present sexually explicit photos of themselves is a dubious practice, yet this case demonstrates that the New Zealand Tribunal was looking for such a form of evidence because queer asylum claims have been built around the idea of public sexuality. Second, to reduce the applicant’s relationships to that of “close friends” is troublesome because the Tribunal invokes the long-standing trope of hesitating to “define same-sex relationships between women as sexual.”<sup>166</sup> As a result, queer women—as a doubly marginalized and thus misunderstood group<sup>167</sup>—are erased in the eyes of the law. Judges expect them to have proof more in-line with the experience of a group marginalized along one axis (gay men), and when they cannot provide this proof, judges lump them in with a different single-axis group (heterosexual women). Taken together, this case demonstrates how difficult it would be for queer women to prove that they are queer.

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163. *AQ (Cameroon)* 801410, at ¶ 58, 28 Mar. 2019 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2019/801410.html>.

164. *Id.* at ¶ 158.

165. Keenan, *supra* note 61, at 37.

166. Victoria Brownworth, *Why Lesbian Erasure Should be a Focus of Women’s History Month*, OUTVOICES (Oct. 19, 2018), <https://outvoices.us/lesbian-erasure>.

167. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24.

Similar dubious practices arose in another New Zealand case involving a Sri Lankan woman who feared persecution because of her bisexuality.<sup>168</sup> She started dating her future husband in 2008 and began a relationship with a woman in 2012.<sup>169</sup> Like the Cameroonian applicant, she felt “guilty about” her same-sex attraction.<sup>170</sup> In 2013, people threw stones at her house and drew “two naked women” on the front wall after they saw her holding hands with that woman.<sup>171</sup> She eventually confided in her sister who “threatened to disown the appellant if she did not leave their village.”<sup>172</sup> She then told the man she began dating in 2008, and he was more sympathetic.<sup>173</sup> In 2017, they travelled from Sri Lanka to New Zealand together, where he was a national, and eventually she applied for refugee status.<sup>174</sup>

The Tribunal was suspicious that her relationship with the Sri Lankan woman was more detailed in her Tribunal hearing than it was in her initial hearing with the Refugee Status Branch (RSB).<sup>175</sup> The applicant replied that she felt ashamed of her sexuality and was nervous about the information finding its way back to Sri Lanka.<sup>176</sup> The Tribunal did not accept this explanation:

the appellant is sufficiently sophisticated to understand that the RSB interview process is confidential . . . Her employment history in Sri Lanka indicates that she has worked as an office clerk and for a non-government organisation where she was required to interview people, write reports, and liaise with case officers for the purpose of improving the lives of those she had interviewed. The appellant is a capable woman and she has not lived a sheltered life.<sup>177</sup>

Thus, the Tribunal determined that her testimony was false and that she and the other Sri Lankan woman were just “close friends.”<sup>178</sup> Just as in the Cameroonian case, the court was unable to appreciate that queer women might be especially hesitant to divulge details of same-sex experiences given taboos around female sexuality and a distrust in authority figures. Instead, like in the Cameroonian case, the court lumped the applicant in with straight women and invoked the “close friends” trope.

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168. *FY (Sri Lanka)* 801610, at ¶ 2, 26 Feb. 2020 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2020/801610.html>.

169. *Id.* at ¶ 8–15.

170. *Id.* at ¶ 11.

171. *Id.* at ¶ 17–20.

172. *Id.* at ¶ 22.

173. *Id.* at ¶ 23.

174. *Id.* at ¶ 23–27.

175. *Id.* at ¶ 37–39.

176. *Id.* at ¶ 41–42.

177. *Id.* at ¶ 43–44.

178. *Id.* at ¶ 45.

What would it take for a female applicant in New Zealand to prove she is queer? The subset includes two cases where courts found the applicants to be queer, but each involved lesbian couples who had been together for decades and were jointly applying for refugee status.<sup>179</sup> In a third case, the applicant was a “butch” and “masculine” lesbian.<sup>180</sup> If the applicant is not able to show she has been in a long-term queer relationship, or does not conform to the image of a “stereotypical” lesbian,<sup>181</sup> it is unclear whether the Tribunal will deem her to be queer. Thus, because the Tribunal is insensitive to the unique challenges of queer women, it runs the risk of erasing their identities in the eyes of the law and dismissing their cases.

In male New Zealand cases, however, the courts were much more lenient in determining whether applicants are gay and found each applicant to be credibly queer. In one case, a man fled Egypt because he feared persecution on account of his bisexuality.<sup>182</sup> The Tribunal dedicated just three sentences to the issue of credibility, finding that he was gay because his evidence was “consistent” with his testimony to the RSB and because two of his friends wrote letters on his behalf.<sup>183</sup> This leniency is in stark contrast to how the New Zealand Tribunal treated the aforementioned female Cameroonian applicant. In that case, a friend did not just write a letter, but even testified in court on her behalf.<sup>184</sup> However, the Tribunal dismissed this testimony because it could not provide additional “evidence, independently of what the appellant ha[d] reported.”<sup>185</sup> Why is it that in the male’s case, the judge viewed corroborative testimony as one of the key factors for establishing credibility, whereas in the female case, corroborative testimony was dismissed because it was *only* corroborative and not additive?

In other cases, judges were even more lenient towards men. In one case, the Tribunal merely stated that a Ukrainian man’s “credibility is accepted” without further explanation.<sup>186</sup> Even when the man possessed attributes that would ordinarily cast suspicion in female cases—being bisexual and having

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179. *BN (South Africa)* 800973, at ¶ 2, 25 Jan. 2017 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2017/800973.html> (lesbian couple with six-year-old daughter); *BX (South Africa)* 801194, at ¶ 10, 20 Nov. 2017 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2017/801194.html> (lesbian couple who had been together since 1985).

180. *BL (South Africa)* 800968, at ¶ 11–12, 30 Nov. 2016 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2016/800968.html>.

181. *See supra* Section I.B.2.

182. *AV (Egypt)* 801705, at ¶ 2, 10 Dec. 2020 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2020/801705.html>.

183. *Id.* at ¶ 26.

184. *AQ (Cameroon)* 801410, at ¶ 151, 28 Mar. 2019 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2019/801410.html>.

185. *Id.* at ¶ 156.

186. *AL (Ukraine)* 801695, at ¶ 65, 14 Oct. 2020 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2020/801695.html>.

an opposite-sex spouse<sup>187</sup>—the judge did not question the male applicant’s queerness. Similarly, after reviewing the testimony of a gay Indian applicant, the Tribunal in one case simply stated that it “accept[ed] the appellant’s account” and then moved on to consider whether the applicant faced persecution.<sup>188</sup> Thus, New Zealand judges appear less likely to deny male cases on queer credibility grounds than female cases.

## 2. *Australian Applicants*

Australian tribunals are similarly harsh as New Zealand tribunals in their credibility assessments of female applicants. In one case, an applicant sought asylum because her husband abused her in their native Fiji.<sup>189</sup> She sought out other Fijians to confide in about the abuse. She met another woman, and it was through this relationship that the applicant “realised she had a sexual preference for women” and had “lost interest” in men.<sup>190</sup> In 2015, she moved to Australia, much to her husband’s displeasure.<sup>191</sup> In Australia, she began a relationship with another woman and applied for asylum, claiming that she would “suffer humiliating and degrading treatment from her husband and others” on account of her sexual orientation in Fiji.<sup>192</sup>

The Tribunal determined she was not queer by relying on similar questionable practices employed by the New Zealand tribunals. Her partner in Australia submitted a letter describing “the love we have been shamed for,” but the court did not see how this “love” was evidence of “bona fide, sexual, long-term” partnership.<sup>193</sup> This comment suggests, just as in the New Zealand context, that women must show sexually explicit information or evidence of long-term partnership to establish themselves as queer. Because the applicant could not provide this type of proof, the court ruled that the applicant was not queer. The court reasoned:

[t]he Tribunal has considered the applicant’s evidence about each of the relationships separately and together, and is not satisfied either was, or remains, same-sex in nature, rather it considers that the applicant finds the company of close female friends comforting. The Tribunal concludes that each of the relationships was based on companionship and solace, rather than innate sexual attraction. In the hearing, the applicant emphasised the acceptance she felt with

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187. *Id.* at ¶ 2.

188. *IR (India)* 801640, at ¶ 37, 19 Dec. 2019 (N.Z. Immigration and Protection Tribunal), <http://www.nzlii.org/nz/cases/NZIPT/2019/801640.html>.

189. Administrative Appeals Tribunal Case No. 1713106 [2020] AATA 3829, at ¶ 3 (21 July 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/3829.html>.

190. *Id.* at ¶¶ 39–41.

191. *Id.* at ¶ 44.

192. *Id.* at ¶¶ 3, 44.

193. *Id.* at ¶ 75.

the two women, and the comfort of female understanding, and the Tribunal notes this aspect was expressed more convincingly than any sexual aspect.<sup>194</sup>

Beyond just employing the “close friends” trope, the Tribunal did not even doubt the applicant’s testimony, but rather substituted its own understanding of the applicant’s relationship in place of how she and her partner described their relationship. Surely the court would not have reduced male-male relationships centered on “companionship,” “solace” and “comfort” to those of friendship, and in none of the cases in the subset did the courts come to such findings. This exemplifies the Tribunal’s lack of understanding and erasure of queer female sexuality. As Crenshaw and McKinnon would predict, the courts expect the type of evidence that gay men are more likely to possess, and when lesbians do not possess this evidence, the judges lump them in with straight women<sup>195</sup>.

The Australian cases in which women were deemed to be queer demonstrates how high the Tribunals place the credibility threshold. In one case, the applicant self-described as a “tomboy,”<sup>196</sup> and in two others, the applicants were each in long-term same-sex partnerships.<sup>197</sup> Thus, just as in the New Zealand context, it is unclear whether women who are not partnered and not “stereotypically” queer-looking are able to successfully prove to the court that they are queer.

In contrast to New Zealand, gay men applying for asylum in Australia face harsh credibility thresholds in their first-level appeals cases. In one case, a Malaysian man sought asylum to escape persecution.<sup>198</sup> He testified that he had numerous same-sex relationships in his youth which he kept secret.<sup>199</sup> Once his family found out, they evicted him and “his friends and neighbours . . . shunned” him.<sup>200</sup> Eventually, he fled to Australia and sought asylum.<sup>201</sup>

Similar to the lesbian cases, the Tribunal determined the applicant was not credibly queer in dubious ways. For example, the court found him not

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194. *Id.*

195. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 24; MCKINNON, *supra* note 93.

196. Administrative Appeals Tribunal Case No. 1710404 [2020] AATA 2916, at ¶ 22 (11 June 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/2916.html>.

197. Administrative Appeals Tribunal Case No. 1709743 [2020] AATA 970, at ¶¶ 29, 32 (7 Apr. 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/970.html> (applicant self-describing as “not very feminine,” and recounting a four-year relationship with a woman); Administrative Appeals Tribunal Case No. 1704734 [2020] AATA 1214, at ¶ 17 (14 Jan. 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/1214.html> (court discussing applicant’s female partner).

198. Administrative Appeals Tribunal Case No. 1708847 [2020] AATA 2626, at ¶ 18 (16 June 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/2626.html>.

199. *Id.* at ¶¶ 30–31.

200. *Id.* at ¶¶ 18, 29.

201. *Id.* at ¶¶ 18, 37.

credible because he did not describe what he and a fellow student “did together with other gay male students for a social life.”<sup>202</sup> In this case, the court assumed that a gay person should associate with other gay people. Evidently, this need not be the case, and especially should not be expected for someone who was not out of the closet and would likely be at pains to not associate himself with any activities that might out him.<sup>203</sup> Interestingly, in this case the judge expected the applicant to associate with other gay men, but in the Fijian case, when the applicant testified that she did associate with gay women, the judge ruled that the relationships were not queer ones.<sup>204</sup> Thus, the courts employed troublesome practices in both cases, though for different reasons.

The court also dismissed the Malaysian applicant’s explanation for how he realized he was gay. The applicant explained that he first tried to have relationships with females but realized he “had a strong personal preference for males.”<sup>205</sup> The court rebutted that this was not a “sufficient” explanation, but did not elaborate on what would suffice.<sup>206</sup> UNHCR, however, stresses that “self-realization” can take on many forms.<sup>207</sup> Thus, for the Tribunal to simply deem the applicant’s explanation as a poor one is demonstrative of the harsh nature of the Court’s credibility-finding threshold.

Just as in the female Australian examples, male Australian cases in the subset where courts did establish queerness offer a glimpse into how high the courts place this credibility threshold. In one case, the Tribunal deemed an applicant queer who self-described as “way too obvious[ly]” gay-looking to avoid discretion.<sup>208</sup> In another case, the applicant had been in a same-sex relationship for five years,<sup>209</sup> and in a third the applicant contracted syphilis through unprotected gay sex.<sup>210</sup> Thus, in the Australian context, it remains unclear whether an applicant who is not “stereotypically” gay-looking or who does not have permanent evidence of being gay (through a long-term same-sex partner or gay-associated illness), is able to pass the harsh credibility threshold.

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202. *Id.* at ¶ 56.

203. UNHCR LGBT Guidelines, *supra* note 50, at 16 (noting that applicants may purposefully not enter queer relationships in order to avoid harm).

204. Administrative Appeals Tribunal Case No. 1713106 [2020] AATA 3829, at ¶ 75 (21 July 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/3829.html>.

205. Administrative Appeals Tribunal Case No. 1708847 [2020] AATA 2626, at ¶ 56 (16 June 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/2626.html>.

206. *Id.*

207. UNHCR LGBT Guidelines, *supra* note 50, at 16.

208. Administrative Appeals Tribunal Case No. 1704758 [2020] AATA 2915, at ¶ 35 (19 June 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/2915.html>.

209. Administrative Appeals Tribunal Case No. 1619377 [2020] AATA 4202, at ¶ 31 (7 Aug. 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/4202.html>.

210. Administrative Appeals Tribunal Case No. 2010249 [2020] AATA 3638, at ¶ 26 (31 Aug. 2020) (Austl.), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2020/3638.html>.

### 3. *Conclusions*

This qualitative analysis of a subset of cases has pointed to a possible explanation for the quantitative findings in Part II. It has highlighted how queer women—but not queer men—were held to dubiously high standards for establishing that they are queer in New Zealand. These courts seemed to assume that male applicants who identified as queer were indeed queer, in accordance with UNHCR guidelines.<sup>211</sup> In Australia, judges were harsh towards both genders. In both countries, judges continually demonstrated that they were not sensitive to issues specific to queer women, as Crenshaw and McKinnon would predict. Instead of addressing queer women on their own terms, the judges frequently compared them to and lumped them in with groups marginalized along one axis—gay men and straight women. Thus, this Note has argued that one reason why Australian courts saw no difference in recognition rates between gay men and women—whereas New Zealand did—is not because of an Australian sensitivity to queer issues. Rather, in the context of credibility, Australia is similarly harsh to queer men and women, whereas New Zealand is harsher in its adjudication of queer female claims than it is in queer male ones.

#### *C. Credibility Pattern of Entire Dataset*

From an analysis of the subset of cases alone, this Note cannot generalize the findings regarding credibility differences to the whole dataset. However, while it was beyond the scope of this Note to qualitatively analyze all of the cases, a brief examination of overall credibility patterns from the entire dataset from Part II supports the qualitative findings. In both Australia and New Zealand, when considering the entire dataset, judges determined women were not queer in about one in every three cases. This supports the above argument that judges treat queer women harshly in both Australia and New Zealand. However, there are clear differences in the treatment of men when looking at the entire dataset. In Australia, judges determined that men were not queer in just over 40% of cases. In New Zealand, this number was only just over 20%. In fact, in New Zealand cases from just the past decade, this number fell to around 10%. Thus, as argued in the qualitative analysis, it appears that New Zealand judges are much more lenient in their credibility determinations for queer men. This pattern helps to explain why men fare much better than women in queer New Zealand asylum cases.

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211. UNHCR LGBT Guidelines, *supra* note 50, at 16.

*D. Limitations and Future Directions*

There are limits to this analysis and areas in which further research is needed. One limit relates to the generalizability of the results. This Note has tried to support the qualitative findings with a brief analysis of the overall pattern, but future research would benefit from qualitatively analyzing credibility in all cases.

A second limitation relates to the narrowness of this Part's analysis. There surely are many factors that contribute to differences in recognition rates, but this Note focuses only on credibility. Future scholars should consider other explanations. For example, country of origin would be a ripe arena for exploration. Tables 1 and 2 highlight that the most common country for Australian applicants was Lebanon, and for New Zealand it was Iran. Interestingly, not a single woman came from either of these countries. In conjunction with Tables 4 and 5, this might imply that men, in higher proportions than women, come from Middle Eastern countries where laws are on average more repressive towards queer people.<sup>212</sup> It might be the case, then, that these men bring "stronger" claims than do queer women.

A final limitation relates to the sources used for qualitative analysis. This Note relied solely on judicial decisions for its analysis, which only reveal so much. Judges surely do not write down everything they think when penning their opinions and review more evidence than they describe in those opinions.<sup>213</sup> Thus, to conduct a more robust analysis, scholars would benefit from interviewing asylum applicants, refugee lawyers, and especially judges.

Despite these limitations, the findings are important. Examining the role of credibility, this Part has argued that lesbian cases are adjudicated in harsh ways in New Zealand, whereas gay male cases are adjudicated in much more lenient ways. In Australia, both genders are adjudicated harshly. In both countries, queer women—as a doubly marginalized group—are not understood on their own terms and instead are inappropriately compared to singularly-marginalized gay men and straight women, in accordance with intersectionality theories. Taken together, the findings from this and the previous Part offer an important contribution to the literature on LGB asylum in that they paint a coherent picture regarding the ways in which lesbians face challenges in their asylum adjudication processes.

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212. *Sexual Orientation Laws in the World*, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N (Dec. 2020).

213. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133, 1135 (1990) (discussing the limitations of legal scholarship that focuses solely on judicial opinions).

## CONCLUSION

Based on LGB asylum literature, this Note identified that queer women might be at a disadvantage in the asylum adjudication process compared to queer men. Grounding this literature in intersectionality theory, it empirically tested whether a difference in recognition rates exists in Australia and New Zealand at the first-appeals level. Using logistic regression estimates, it found that there was no difference in asylum recognition rates between queer men and queer women in Australia. In New Zealand, however, queer men were significantly more likely to win their cases than were queer women.

This Note then qualitatively analyzed why recognition rates were similar in Australia between queer men and women, but different in New Zealand. Analyzing a subset of judicial opinions from both countries, it argued that one explanation for the quantitative results can be found in the role of credibility. In Australia, judges set questionably high thresholds for establishing that male applicants were gay and female applicants were lesbian. In New Zealand, judges set similarly high thresholds for establishing that female applicants were lesbian, but lower thresholds for establishing whether men were gay. In both countries, judicial opinions demonstrated a lack of understanding of challenges specific to queer women, as intersectionality theory suggests.

This Note also raises larger questions about the global refugee regime and its impact on queer women. This paper adds to the growing body of research demonstrating that queer asylum claims are numerically dominated by cisgender gay men. However, there has been a lack of scholarship that draws on this finding. Surely it is not the case that 80–90% of the world’s cisgender queer people are gay men.<sup>214</sup> Rather, this large disparity suggests that—in addition to problems queer women face in their asylum hearings—there are forces that prevent queer women from seeking asylum in the first place. It is evident that one main mechanism of this prevention can be found in patriarchal forces that restrict the agency of queer women from fleeing their home countries.<sup>215</sup> However, might it also be the case that the global refugee regime and the refugee definition itself prevent queer women from seeking asylum?

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214. In the United States, for example, the Williams Institute at the University of California of Los Angeles School of Law found that 4,007,834 individuals in the United States identified as cisgender gay or bisexual women and 4,030,946 identified as cisgender gay or bisexual men. Therefore, men comprised only 50.14% percent of the queer cisgender population. GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 6 (Williams Inst. Apr. 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-People-LGBT-Apr-2011.pdf>.

215. NAT’L CTR. FOR LESBIAN RTS., *supra* note 56, at 1–2 (discussing barriers lesbian asylum seekers face in fleeing their home countries).

The Refugee Convention states that a refugee must be “outside the country of his nationality.”<sup>216</sup> Aside from the male-centric articulation of this phrase, the qualification says nothing about how persecuted individuals are to get outside of their home country. In his defense of this “alienage” component of the Convention definition, Hathaway argues that comparing persecuted people inside their home countries to those outside is a “dog” to “cat” comparison.<sup>217</sup> He posits that there are sufficient “opportunities for the international community to intervene in states to stop the harms.”<sup>218</sup> This argument, however, seems to fall short in the queer asylum context. Queer women are not escaping their home countries to the degree that queer men are escaping. As a result, it is surely the case that many queer women are enduring persecution with no remedy in site, and perhaps this is in part because the international community has no legal obligation to help queer women flee their home countries. If anything, this Note should encourage future refugee scholars to center<sup>219</sup> queer women in their research in order to better conceptualize how and if the refugee regime can offer queer women a fair chance at a life free from persecution.

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216. Refugee Convention, *supra* note 20, at art. 1A(2).

217. James C. Hathaway, *Is Refugee Status Really Elitist? An Answer to the Ethical Challenge, in EUROPE AND REFUGEES: A CHALLENGE?* 79, 87 (Jean-Yves Carlier & Dirk Vanheule eds., 1997).

218. *Id.*

219. See Kimberlé W. Crenshaw & Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*, AFR. AM. POL'Y F. 30 (2015) (advocating centering marginalized group to better understand structural oppression).