

CREDIBILITY AND PERFORMANCE IN GAY ASYLUM CLAIMS

by Reed Cantrell

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## I: Introduction

The United States immigration apparatus can be understood as a performance. It is a performance of control, of delineation between citizens and non-citizens, and of superiority via the filtering of undesirable persons. A distinct component of executing these performances is that of credibility checks. The U.S. immigration apparatus permeates the country from the Southern border to airport security checkpoints to immigration courts, and credibility checks play a role in each of them. To enter the country legally, you must present credible evidence of your pre-approval, such as a passport or visa. At airports, you may be assessed as a potential threat based on your race or religious attire, and be required to submit to a credibility check in the form of additional security screening.<sup>1</sup> U.S. immigration courts, specifically asylum courts, rely explicitly on credibility assessments to decide cases. In fact, the asylum seeker as a person—not just their testimony of persecution in their country of origin—must be deemed credible as a prerequisite to being granted asylum.<sup>2</sup>

Similar to how the entrances of the country are sites of performance, so is gender. Gender presentation can communicate relative masculinity and femininity, degree of cultural conformity, and sexuality. When asylum applicants come under the purview of the U.S. immigration apparatus, their performance of gender becomes an object of scrutiny to assess credibility. When applicants fail to perform their gender in a manner that immigration judges expect, they can be issued an adverse credibility determination and denied asylum. As Judith Butler wrote, “as a strategy of survival within compulsory systems, gender is a performance with clearly punitive consequences.”<sup>3</sup> Gay male asylum seekers have frequently been forced to struggle against

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<sup>1</sup> U.S. Domestic Human Rights Program. “Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States.” (*Amnesty International USA*, 2004).

<sup>2</sup>H.R. 418, REAL ID Act, 2005, United States Congress.

<sup>3</sup>Judith Butler. *Gender Trouble*. (Routledge Classics, 2006). 139.

American cultural stereotypes that view homosexuality as mutually exclusive with masculinity. Because immigration judges are primed to expect gay men to have a feminine gender presentation, they can and do deny asylum to masculine-presenting men on the basis that their sexuality is not credible.

All asylum seekers are subject to the intense and at times degrading skepticism of immigration courts; it is a core function of the asylum process. Human rights advocates point to a “culture of disbelief” to describe the United Kingdom’s adversarial approach to assessing the credibility of asylum seekers’ claims.<sup>4</sup> Immigration courts in the United States have a similar modus operandi: since the system was formally established in 1980, U.S. asylum courts have worked from the assumption that applicants fabricate parts of their claim in order to qualify for asylum.<sup>5</sup> As a consequence of this disbelief, immigration courts prioritize determining the credibility of asylum seekers over evaluating their claims of persecution when determining an applicant’s eligibility for asylum. Immigration courts cast doubt on every aspect of an asylum seekers’ claim, and for gay men’s cases that doubt can manifest as a disbelief in the applicants’ self-identification of their sexuality. To be deemed credible, gay asylum seekers are often coerced into performing a recognizable presentation of their sexuality—or punished for not doing so.

Asylum seekers make strategic decisions at every stage of the asylum process: first, the credible fear interview, second, the hearing in front of an immigration judge (IJ), and third, how they choose to appeal their case to the Board of Immigration Appeals (BIA) and the Circuit Court. Most appealed cases end at the BIA level, as taking your case to the Circuit Court

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<sup>4</sup>Jessica Anderson et al. “The Culture of Disbelief.” (*Refugee Studies Centre*, 2014),102.

<sup>5</sup>Refugee act of 1980. Bill, Congress.gov § (1980).

involves filing a more complicated petition and requesting a stay of removal, which is not automatically granted for cases appealed to the Circuit Court, unlike those appealed to the BIA. Therefore, asylum seekers with access to legal counsel—which only 37% of applicants have—are often the only ones whose cases reach the Circuit Court.<sup>6</sup> Even though cases at this level are not representative of the majority of asylum seekers, they are uniquely impactful. By determining whether the decision making process that took place at the previous two levels was correct, Circuit Courts are able to establish precedent that has far-reaching impacts for asylum seekers.

I posit that the U.S. borders are not sites of verification or proof; they are sites of performance and subjectivity. In order to prove this, I will first examine the utility of skepticism within immigration courts in regards to its efficiency in promoting an American identity that centers whiteness and heteronormativity through the process of exclusion. Then, by reviewing asylum case law pertaining to sexuality-based claims of persecution, I will show that credibility, when used as a tool of assessment, institutionalizes prejudice within immigration courts. I am choosing to examine asylum claims by gay men to prove this because homophobic prejudice is easily identifiable, and gay men comprise over 75% of LGBT-related asylum claims.<sup>7</sup>

## **II. Enemies in the Margins: Intersections of Deviance**

Nuno Ferreira wrote that within any process that produces knowledge or truth, there is epistemic injustice because there is an unfair distribution of who has the privilege to define what is true and what is false, as those in the margins—which certainly includes refugees and asylum

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<sup>6</sup> Ingrid Eagly and Steven Shafer. “Access to Counsel in Immigration Court.” (American Immigration Council, 2016).

<sup>7</sup>Ari Shaw. *LGBT asylum claims in the United States*, (Williams Institute, 2021), 1.

seekers—are not heard during this process.<sup>8</sup> Indeed, immigration judges have sole discretion in issuing credibility determinations. Ferreira also specified that determinations of what is true or not are made out of convenience rather than in actual pursuit of objectivity, consequently “order[ing] events around conformity and deviance.” It is convenient for immigration courts to see asylum seekers who do not conform to the idealized white, middle class, cisheterosexual image of the American as uncredible or deviant. Gay men from foreign, often relatively impoverished countries who are mostly Black or Brown are convenient targets for distrust. The U.S. asylum process is rife with epistemic injustice as immigration courts attempt to interpret asylum seekers’ narratives through American cultural lenses and prejudices.

Immigration policy sends explicit messages about who is and who is not welcome in the United States—essentially, it is an act of boundary-making that defines what an American citizen is. This boundary-making is performative; it pretends that the delineations it enforces are natural and necessary. Immigration policy has historically built these boundaries on the axis of race and deviance. Deviance is a loose term encompassing efforts to regulate against the admission of: persons convicted of a crime, the mentally ill, the physically or intellectually disabled, and the non-heterosexual.<sup>9</sup> Historian William Eskridge, Jr. wrote, “[t]he homosexual as moral pollutant became increasingly threatening [in the 19th century] as sexual deviants supposedly weakened the nation’s moral fiber and sapped societal resources.”<sup>10</sup> Through prohibiting the entrance of “sexual deviants,” the U.S. immigration apparatus performed to possess a level of control over the nation’s identity and sexuality that the government did not

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<sup>8</sup>Nuno Ferreira. “Utterly Unbelievable: The Discourse of ‘Fake’ SOGI Asylum Claims as a Form of Epistemic Injustice.” *Academic.Oup.Com*, 2023).

<sup>9</sup> Charles Wheeler. “The Evolution of the United States Immigration Laws,” (New York: Scalabrini International Migration Network Inc., 2014), 79.

<sup>10</sup>William Eskridge. *Law & the Construction of the Closet: American Regulation of Same-Sex Intimacy*, 1997. (discussing the story of Nicholas P., who was deported in 1909 as a “public charge” after admitting to “unnatural intercourse with men”).

have in reality. It was an attempt to establish a boundary between gayness and the American identity.

In the 21st century, immigration policy is still being used to filter “deviants” at the border. In order to appear impartial and depoliticized, this filtering is allowed to occur on what initially appears to be an individual basis, but actually represents a culture that has permeated immigration courts to such a degree that it is inseparable from the institution on both a logistical level and an ideological one. The American culture of disbelief is central to how the U.S. asylum system functions. Most succinctly, “culture of disbelief” can be summarized as the assumption among immigration court officials that many if not most asylum claims are fabricated in order to be successful, which leads to skepticism of every asylum seeker and refugee. This suspicion is rooted in the belief that one’s country is so desirable as to singularly compel immigration, which is why Laurn Berlant characterizes immigration discourse as “a central technology for the reproduction of patriotic nationalism.”<sup>11</sup> The culture of disbelief, then, is a tool used by the U.S. immigration apparatus to maintain the performance of an idealized nation in need of protection.

This performance of protecting an idealized nation, though present throughout U.S. history, is widely visible today. In January 2025, the Trump administration issued an executive order suspending the refugee admissions program on the same day as two other anti-immigration orders entitled “Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats” and “Protecting the American People Against Invasion.” The Trump administration’s use of language frames the United States as being in a war against immigrants, particularly those entering at the Southern border.<sup>12</sup> By evoking the language of war, the Trump

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<sup>11</sup>Laurn Berlant. “The Queen of America Goes to Washington City: Essays on Sex and Citizenship” (Durham, N.C.: Duke University Press, 1997), 195.

<sup>12</sup>Donald Trump. “Declaring a National Emergency at the Southern Border of the United States.” (The White House, 2025).

administration inherently positions the U.S. immigration apparatus as the nation's protector. It is performing protection of the American people against "Foreign Terrorists," "National Security Threats," "Public Safety Threats," and "Invasion." More than half of asylum claims are "defensive," or filed in order to prevent one's deportation.<sup>13</sup> When immigration officials are evaluating these asylum claims, they are to some degree influenced by their part in the immigration regime that has been positioned to perform the role of protector against the racialized threat that immigrants supposedly present to the country. While the degree of influence that being tasked with this performance has on their decision making will depend on the individual, the inherently subjective system of credibility checking that the immigration apparatus relies on permits immigration officials to depend on their biases when making assessments.

The American imagination creates a homosexuality that is white, highly sexualized, inextricable from gender roles, and validated by stereotypes. At the same time, its refugee construction is embedded in nationalism, the product of conflict, and able to be evaluated through objective measurement. In the American mind, the concepts of "gay" and "refugee" are contradictory. To further understand this contradiction and the consequences it has on the asylum process, it is critical to examine how Americans conceptualize homosexuality and refugeehood as separate social categories.

Homosexuality in the Western understanding has coalesced into a concrete set of behaviors, preferences, and aesthetics. In his analysis of how the global gay male identity became "Americanized," Sutton identifies several key aspects of this "Americanized" identity:

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<sup>13</sup> Noah Schofield and Amanda Yap. "Refugees and Asylees Annual Flow Reports." (Office of Homeland Security Statistics, 2023), 5.



“predisposition for fashion and beauty, an avaricious sex life, and an innate femininity.”<sup>14</sup> It is critical to acknowledge that the public images of homosexuality are formed on the axis of race as well as sexuality and gender. In their study, Carmen Logie and Marie-Jolie Rwigema found that “whiteness is normative and central” in portrayals and discussions of all queer identities, which leads to the exclusion and fetishization of non-white queer people even within queer spaces.<sup>15</sup> Outside of queer spaces, whiteness being central to the concept of queerness makes it harder for non-white queer people to have their queerness acknowledged—a difficulty that arises in many asylum claims as well.

Similar to the gay male identity, “refugee” as a social category contains its own set of stereotypes that can conflict with immigration courts’ “Americanized” understanding of how homosexuality presents in a person. Nando Sigona points to discourses prevalent in media and within academic and humanitarian circles in Western countries to show that they focus on a feminized and infantilized refugee figure that represents a “‘pure’ victimhood and vulnerability.”<sup>16</sup> This is an important rhetorical strategy for Western countries because it invites the rejection of any who do not meet the arbitrary standard of a pure victim—particularly people who embody deviance in the form of a criminal history. In “Ambivalent Hospitality: Governing the Unwanted,” Didier Fassin argues that governments shifted to recognizing the right to “bare life” or the physical condition of life over the social and political lives of refugees.<sup>17</sup> This political shift tied the “refugee” label to extremity and neglected other forms of persecution that occur in the social and political sphere, which are common forms of persecution against

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<sup>14</sup>Tyler Sutton. “The emergence of a male global gay identity: A contentious and contemporary movement.” 2007, 55.

<sup>15</sup>Carmen Logie. and Marie-Jolie Rwigema. “The Normative Idea of Queer is a White Person.” (*Journal of Lesbian Studies*, 2014), 175.

<sup>16</sup>Nando Sigona. “The Politics of Refugee Voices: Representations, Narratives, and Memories,” (*The Oxford Handbook of Refugee and Forced Migration Studies*, 2014), 2.

<sup>17</sup>Didier Fassin. “Ambivalent Hospitality: Governing the Unwanted,” (*Humanitarian Reason: A Moral History of the Present*, 2012), 145.

homosexuals. Sigona discusses the medicalization of asylum claims, how medical certificates confirming the individual's claim of torture or sexual violence are often the only way a person can be approved for asylum.<sup>18</sup> This is a symptom of the widespread epistemic injustice within an asylum assessment process that demands objective, legal truths from the often unprovable stories of refugees. For many gay men, their experiences of persecution do not leave a paper trail that bureaucratic institutions can file away as proof.

### III. The Theater of Asylum Claims

Upon consideration, it is ordered that your visa petition ... for classification of Anthony Corbett Sullivan as [your spouse] is ... denied for the following reasons:

You have failed to establish that a bona fide marital relationship can exist between two faggots.<sup>19</sup>

In American asylum tribunals, claims are largely litigated on the basis of whether or not the applicant is perceived to be “credible”—an inherently subjective determination that can be charged with prejudice. While the above example is a visa rejection—not an asylum claim—the same mechanism is used: credibility. The Immigration and Naturalization Service (INS) agent is able to code their homophobia in quasi-legal terms: they say the applicant “failed to establish,” indicating a lack of evidence, that his marriage to another man was “bona fide,” meaning authentic. The homophobic basis for the rejection is explicit in this his case: the INS agent did not believe in gay marriage, and even included a homophobic slur in their rejection. Decades

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<sup>18</sup>Sigona. “The Politics of Refugee Voices: Representations, Narratives, and Memories,” 7.

<sup>19</sup>Atticus Lee. “Sexual Deviants Need Not Apply: LGBTQ Oppression in the 1965 Immigration Amendments.” (*The Immigration and Nationality Act of 1965: Legislating a New America*, 2015) (quoting Letter from INS to Anthony Sullivan, Nov. 24, 1975).

later, the issue of credibility is still being used to institutionalize prejudice within the immigration court system—but in a much more subtle manner.

Asylum seekers must tailor their claims into internally consistent, plausible narratives that can satisfy immigration judges who are predisposed to disbelieve them due to the culture of disbelief and the xenophobic biases it contains. Credibility determinations are only made by immigration judges. They can be made based on the demeanor of the applicant in court, the consistency and plausibility of their narrative, and the perceived strength of any corroborating documentation that the applicant submits.<sup>20</sup> Additionally, as per policy set out in the REAL ID Act, “[t]here is no presumption of credibility,” meaning that asylum seekers must navigate an explicitly hostile system.<sup>21</sup> Credibility determinations are a prerequisite to a successful asylum claim, though applicants who are deemed credible are still vulnerable to deportation if other aspects of their case are deemed insufficient. When an applicant is applying for asylum on the basis that they have or will be persecuted in their country of origin due to their sexual orientation, credibility determinations are made on the additional basis of whether or not the court believes the applicant is gay. Applicants making asylum claims based on their sexuality must present a credible representation of themselves as a gay person to a court that often has a culturally specific, or “Americanized,” understanding of homosexuality.

How gay male applicants choose to represent themselves in immigration court, whether pro se or with the aid of an attorney, is of key interest in this section. I will be reviewing precedential case law concerning asylum claims from 2000 to 2020 that reached the Circuit Court of Appeals, which is the third level of asylum proceedings past the Board of Immigration Appeals (BIA) and the initial hearing with an immigration judge (IJ). Cases that are reviewed by

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<sup>20</sup>H.R. 418, REAL ID Act, 2005, United States Congress.

<sup>21</sup> Ibid.

the Circuit Court are better representative of the intended practice of immigration courts due to the multiple levels of review that they undergo. Additionally, these cases are able to establish precedent that lower courts must follow, which makes them relevant in discussions of the large-scale issues at play in immigration proceedings. Of particular note is the issue of epistemic injustice within the asylum system that is a direct consequence of the use of credibility checks. Due to their inherently subjective nature, credibility determinations institutionalize prejudice and result in wrongful denials of asylum.

### **Looking Gay: the Role of Demeanor in Assessing Sexuality**

The United Nations' 1951 Refugee Convention prohibits the refoulement—or deportation—of refugees who have a reasonable fear of being persecuted by their country of origin's government due to their “membership of a particular social group,” which the United States has interpreted to apply to gay men since 1996.<sup>22</sup> Preventing oneself from being deported, then, relies on performing a credible representation of both your fear of persecution and your sexuality. “Demeanor” is a tool used by immigration judges to assess the latter.<sup>23</sup> Demeanor is the physical appearance and behavior of an asylum seeker during their court hearing. Because the immigration judge is the only actor in the decision making process to visibly assess asylum seekers and question them, IJs have sole discretion over determinations based on demeanor—neither the BIA nor the Circuit Court can challenge an IJ's assessment of demeanor unless it violates procedures outlined by the Department of Homeland Security. Immigration judges are the only “fact finders” in the immigration process; each appeal stage is merely there to determine if the immigration judge's interpretation of facts was appropriate in the context of the court system's procedure and precedent.

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<sup>22</sup>*Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005).

<sup>23</sup> H.R. 418, REAL ID Act, 2005, United States Congress.

When demeanor is used to determine how credible an applicant's claim to be gay is, cultural stereotypes about gay men inevitably color the IJ's assessment. In *Ali v. Mukasey* (2008), Peter Ali was deported to Guyana after losing lawful permanent residence status in the U.S. when he was convicted of two crimes involving "moral turpitude" along with nine previous arrests for theft. Peter Ali faced persecution in Guyana, including being raped by a police officer while in custody, which led him to return to the United States and submit an asylum claim under the Convention Against Torture (CAT). However, his CAT claim was denied on the basis that the immigration judge did not believe Ali was gay due to his criminal history and masculine demeanor. Judge Vomacka stated that "violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people" and that people in Guyana would not perceive Ali as homosexual unless he had a partner, which the judge said Ali was unlikely to have due to "problems with [Ali's] personality," ostensibly referring to his diagnosis of PTSD and depression.<sup>24</sup> The IJ used his assessment of Ali's masculine demeanor to make an adverse credibility finding against his claim to be gay and deny him asylum. Not only was the judge prejudiced against Ali because of his criminal history, but the judge's "Americanized" understanding of gay men as inherently feminine also led him to disbelieve Ali's sexuality. The case was appealed to the BIA, which was "troubled by several of [IJ Vomacka's] gratuitous remarks" but determined that the hearing was fair.<sup>25</sup> The Circuit Court of Appeals remanded the case, deeming it too grounded in bias to review. By remanding the case, the Circuit Court forces the lower courts to utilize a different decision making process when evaluating the case. Because the Circuit Court is not a fact-finding body like the IJ is, they cannot reverse the IJ's adverse credibility finding to issue a new decision in Ali's case. The fact that the BIA initially approved

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<sup>24</sup> *Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008), 487.

<sup>25</sup> *Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008), 488.

of the IJ's reasoning despite acknowledging its homophobic bias shows how unduly reliant the immigration court system is on credibility assessments made at the IJ level. Had Peter Ali not been one of the only 37% of asylum seekers who had access to legal counsel and therefore the ability to appeal to the Circuit Court, his case would have ended there.

Another case that relied on stereotypes to assess demeanor is *Todorovic v. U.S. Atty. Gen.* (2010). Mladen Todorovic was seeking asylum under CAT due to repeated and heavily documented persecution he faced due to his homosexuality in Serbia. This persecution included sexual assault and torture at the hands of both Serbian soldiers and police officers on different occasions, some of which was medically documented when he had to receive emergency treatment.<sup>26</sup> The judge denied him asylum due to immaterial inconsistencies in his testimony—which is valid reasoning under the REAL ID Act—and due to the judge's disbelief of his homosexuality. The primary inconsistency in Todorovic's testimony that the IJ identified was the presence of anti-aircraft guns on the military base where Todorovic was stationed because the judge found it improbable that a secluded military base in Serbia would have them.<sup>27</sup> None of the supposed inconsistencies related to Todorovic's CAT claim. In his oral opinion, the immigration judge said:

The Court studied the demeanor of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay. The Court does not know whether he is or not, his testimony is that he is overtly gay and has been since he was 17 years old. Be that as it may, it is not readily apparent to a person who would see this gentleman for the first time that, that is the case, since he bears no effeminate traits or any other trait that would mark him as a homosexual.

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<sup>26</sup>*Todorovic v. U.S. Atty. Gen.*, 621 F.3d 1318 (11th Cir. 2010), 3–6.

<sup>27</sup>*Todorovic v. U.S. Atty. Gen.*, 621 F.3d 1318 (11th Cir. 2010), 7.

Again, the immigration judge utilized stereotypes about gay men being “effeminate” to make a demeanor-based adverse credibility determination. No facts of the case contradicted Todorovic’s claim to be gay—the IJ “not know[ing] whether he is or not” is indicative of the culture of disbelief and the REAL ID Act’s guidance to judges that “[t]here is no presumption of credibility.” The BIA reaffirmed the IJ’s decision that Todorovic was not credible, but the Circuit Court vacated the decision and remanded the case.

In *Shahinaj v. Gonzales* (2007), the immigration judge was even more explicit in his reliance on stereotypes: “Neither [Shahinaj]’s dress, nor his mannerisms, nor his style of speech give any indication that he is a homosexual.” Here, the IJ is indicating that there is a certain expected performance of gayness that Daniel Shahinaj, in this instance, is not embodying. Within asylum tribunals, the immigration judge is both the audience to a performance of gayness and an actor within it; IJs demand a performance that is culturally comfortable to them, and intervene to punish asylum seekers that fail to provide an easily digestible representation of a gay man. In the early 2000s, immigration judges often utilized their sole jurisdiction over “demeanor” to issue adverse credibility decisions rooted in homophobic stereotypes.

In *Fuller v. Whitaker* (2019), an immigration judge issued an adverse credibility finding on the basis that she disbelieved Fuller’s bisexuality. She cited Fuller’s marriage to a woman and history of heterosexual relationships, as well as inconsistencies in his testimony. The judge’s misunderstanding of bisexuality—leading her to cite Fuller’s previous heterosexual relationships as proof he was not bisexual—is so steeped in heteronormative bias that her decision reads as a homophobic obstinance to granting him asylum. Similar to Ali’s 2008 case, Fuller’s criminal history may have biased the judge against his unrelated CAT claim.

While stereotypes mostly work against asylum seekers, gay applicants are also able to use immigration judge's stereotyped understandings of homosexuality to support their claims. In *Castro-Martinez v. Holder* (2011) and *Vitug v. Holder* (2013), both applicants went out of their way to describe effeminate qualities of themselves to validate their sexuality. Vitug submitted this to the court, which the Circuit Court summarized:

From the age of three, Vitug knew he was “different.” He was effeminate and played with Barbie dolls and other toys meant for girls, which his family resented. Throughout his childhood, Vitug was teased and bullied by his classmates for “being a sissy.”<sup>28</sup>

Dennis Vitug chooses to describe himself as a “sissy” and paints a picture of himself as overwhelmingly and obviously “different” from heterosexual boys in the Philippines—perhaps anticipating objections like those from Peter Ali’s judge, who proposed that no one in Guyana would be able to tell Ali was gay. Castro-Martinez also leaned into stereotypes, stating that he “was victimized because of his homosexuality and feminine characteristics.”<sup>29</sup> The choice to forefront one’s stereotype-consistent traits in an asylum claim is a strategic move, if not necessarily effective—Castro-Martinez was deported despite being found credible.

As a tool to assess credibility, “demeanor” is especially vulnerable to being used by immigration officials to reify homophobic stereotypes. Judges have a culturally specific—i.e. American—understanding of what a gay man looks and acts like, which clashes with how gay asylum seekers often present. By rejecting these men’s asylum claims on the basis that their sexuality is not believable, immigration courts send a message that only people who already conform to American standards through their bodily performance can be accepted into the country.

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<sup>28</sup> *Vitug v. Holder* (2013)

<sup>29</sup> *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), 10.



## **Proving Persecution**

In asylum courts, physical evidence of persecution—or lack thereof—is subject to the same culture of disbelief and credibility checks as gay asylum seekers’ sexualities. The REAL ID Act of 2005 states that even applicants who are deemed credible may be required by the “trier of fact,” or the immigration judge, to submit additional evidence to corroborate their narrative of persecution. In most cases, as Nando Sigona identified, the best–recieved evidence will be medical or police reports that document the physical torture someone has endured in their country of origin as a result of their sexuality. These can be almost impossible for asylum seekers to obtain. Police are sometimes complicit if not actively involved in the torture of gay asylum seekers, and many times asylum seekers will not have documentation of the medical treatment they may have sought. In the rare cases when asylum seekers are able to present documents of this type to the court, immigration judges often find issues with their authenticity. The court is also able to consider country reports presented by the attorney general. Country reports are documents created by the Department of State that detail general conditions of persecution in a country; these are often used to contradict an asylum seeker’s lived experience of persecution. Gay male asylum seekers are often fleeing persecution in the form of systemic sexual assault. Of the twelve cases that I used to generate this analysis, all but two had elements of sexual assault as part of the asylum seeker’s claim of past persecution. The skepticism immigration courts show toward gay asylum seekers’ experiences of sexual assault are emblematic of larger trends of systematic dismissal of sexual assault against gay men. Dr. Aliraza Javaid, a researcher focusing on male sexual assault, noted that sexual assault against gay men tends to be seen as solely a “homosexual issue” by authority figures and dismissed via homophobic stereotypes, such as that gay men enjoy being assaulted or that engaging in casual sex means gay men “asked” to be

assaulted.<sup>30</sup> Widespread dismissal of gay male experiences with sexual assault is amplified by the hostile culture of disbelief that thrives within asylum courts; this creates an even larger burden on gay asylum seekers to prove their experiences of persecution.

In *Omondi v. Holder* (2012), Antony Omandi, a gay man from Kenya, was applying for asylum in the United States after he had been falsely detained, sexually assaulted, and tortured by Kenyan police. The IJ found Omondi himself to be credible, but denied his claim because the letter of corroboration from his former partner, Geoffrey Kamau, omitted the sexual assault and physical beating that they had both endured while falsely detained together. Kamau's affidavit in no way contradicted Omondi's testimony, but did omit material details. It is not hard to imagine why Kamau may not have wanted to write and submit an account of a traumatic and likely humiliating experience that would become part of the public record. Indeed, according to research by Dr. Javaid, gay men often feel pressure to stay silent about their experiences of sexual assault because being assaulted by another man "runs counter to men's masculinity," which is particularly challenging for gay men because their masculinity is already in question due to stereotypes about their sexuality.<sup>31</sup> The court, however, is under no obligation to take non-qualitative matters such as this into account because "[t]here is no presumption of credibility."<sup>32</sup> When confronted with the omission in Kamau's account, Omondi stated that he had not reviewed Kamau's affidavit prior to when it was submitted in 2002—seven years before the hearing in question. In rejecting Omondi's appeal, the BIA said: "where it is reasonable to expect corroborating evidence...such evidence should be provided." Given the years between the event itself, the submission of Kamau's letter, and the hearing—it strains credulity to find the

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<sup>30</sup> Ibid.

<sup>31</sup> Aliraza Javaid. "In The Shadows: Making Sense of Gay Male Rape Victims' Silence, Suffering, and Invisibility." (*International Journal of Sexual Health*, 2017), 281.

<sup>32</sup> H.R. 418, REAL ID Act, 2005, United States Congress.

BIA's expectation of corroborating evidence reasonable. Even though Omondi was deemed credible by the IJ and submitted several letters affirming he and Kamau were arrested, an omission in Kamau's affidavit was enough for the court to decide that he had not "sufficiently corroborate[d] the most essential feature of his claim—his account of detention."<sup>33</sup>

The validity of the IJ and BIA's expectation of evidence was considered in both *Castro-Martinez v. Holder* (2011) and *Bringas-Rodriguez v. Sessions* (2017). Both cases were handled by the Ninth Circuit. Rafael Castro-Martinez, a gay man from Mexico, applied for asylum on the basis that he was persecuted due to his sexuality and likely would be again if he returned to Mexico. He cited the repeated sexual abuse he suffered from the ages of six to ten at the hands of two teenagers, who targeted him due to early signs of his sexuality and "feminine characteristics," as proof of past persecution.<sup>34</sup> All three levels of the court denied his asylum claim and he was deported. The denial was decided on the basis that he had not proved the Mexican government was complicit in his persecution because he did not report the sexual abuse he suffered as a child to the authorities. When rejecting his appeal, the Circuit Court wrote:

Likewise, evidence supported the conclusion that Castro failed to demonstrate that the government was unable or unwilling to control his attackers. Castro testified that he never reported the abuse to the authorities. In determining whether the government was unable or unwilling to control violence committed by private parties, the BIA may consider whether the victim reported the attacks to the police.<sup>35</sup>

Though the court acknowledged that asylum seekers are not required to report a crime in order to demonstrate that the police would be unwilling to aid them, the court found that Castro-Martinez had not demonstrated that the authorities would be complicit in his persecution. The court felt

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<sup>33</sup> *Omondi v. Holder*, 674 F.3d 793, 797 (8th Cir. 2012), 3.

<sup>34</sup> *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), 10.

<sup>35</sup> *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), 13.

that the police would intervene in a case of child sexual assault regardless of the child's sexuality. They also cited a Country Report that said that Mexico was making efforts to prevent violence against homosexuals, which was their entire basis for negating his claim that he would experience future persecution if deported to Mexico. *Castro-Martinez v. Holder* was seen by the Ninth Circuit as having the potential to set a dangerous precedent of a "reporting requirement" for persecution to be deemed credible so, while the Ninth Circuit affirmed the IJ and BIA's decision to deny Castro-Martinez's application, they later chose to edit their opinion in order to soften the case's language and prevent the case from being used as precedent for a "reporting requirement."<sup>36</sup> However, the excerpt cited above remained unedited.

Bringas-Rodriguez was in a very similar position to Castro-Martinez; he was sexually abused in Mexico as a child and was applying for asylum on the basis of his sexuality. He also did not report the abuse he faced, and the IJ and BIA and the Ninth Circuit denied his petition. The Circuit Court explained the reasoning behind the denial: "relying primarily on our decision in *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011), which interpreted the 'unable or unwilling to control' standard as requiring proof that the police are unable or unwilling to control the sexual abuse of children generally."<sup>37</sup> Bringas-Rodriguez had proven to the court that his gay peers had reported their sexual assaults to Mexican police and had been laughed away, but the Ninth Circuit's argument was that they would not dismiss child sexual assault, and therefore Bringas-Rodriguez had not experienced persecution on account of his sexuality. The Ninth Circuit reheard the case two years later and remanded it to the BIA, stating that their intent was to overrule the precedent of a "reporting requirement" set in *Castro-Martinez v. Holder*.

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<sup>36</sup> *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011), 4.

<sup>37</sup> *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017), 6.

These cases go to show that not only is the evidentiary requirement high for asylum seekers, it is also unclear due to the degree of interpretive power judges have over the already loose laws that govern immigration proceedings. When individual agents are responsible for determining whether or not asylum seekers are credible, their decisions are often going to be deeply flawed.

### **Lying within the Culture of Disbelief**

The culture of disbelief predisposes immigration officials to assume asylum seekers are fabricating narratives of persecution in order to obtain asylum. To navigate this assumption, asylum seekers sometimes make a strategic decision to lie. These are uncommon cases that show how the culture of disbelief coerces certain performances from asylum seekers, generating epistemic injustice in its pursuit of objectivity.

Saul Martinez, a gay man from Guatemala, applied for asylum in 1992 on the basis that his life would be in danger due to his political activism if he stayed in Guatemala.<sup>38</sup> His asylum claim was denied, and Martinez subsequently filed a new claim with new reasoning: he actually feared persecution due to his sexuality, not political activism. It is likely that Martinez chose to lie initially because sexuality was not yet acknowledged by the United States as a potential grounds on which someone could be persecuted and therefore qualify for asylum. Additionally, only two years before Martinez submitted his original asylum claim the U.S. had lifted its prohibition against gay immigrants of any kind entering the country.<sup>39</sup> The immigration apparatus itself was prohibitive to Martinez submitting a truthful claim. After being forced to defend this lie for years, Martinez was finally able to submit a truthful asylum claim based on his sexuality making him vulnerable to persecution. However, the initial lie biased the Circuit Court against

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<sup>38</sup> *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009), 2446.

<sup>39</sup> S.358, Immigration Act of 1990, 1990, United States Congress.

Martinez. In their denial of his appeal, the court used words like “swindle,” “ruse,” “foil,” “phony,” and “hoax” to describe Martinez’s initial claim of political persecution.<sup>40</sup> The court’s opinion states:

The Respondent’s prior experience does not entitle him to come to the United States and lie to a governmental official to secure benefits under the laws of this country. Based upon this conduct I find that Respondent’s present claim of mistreatment due to his homosexuality lacks credibility...<sup>41</sup>

Here, the judges display a willingness to perform the protector role that the immigration apparatus has been given in the “reproduction of patriotic nationalism.”<sup>42</sup> In this case, the court views itself as protecting against the entrance of someone who is both untrustworthy and a potential burden because of the “benefits” they could find “under the laws of this country.” In the only instance of this that I have come across in my review of case law, there was a dissenting opinion published alongside the denial decision. Judge Pergerson, dissenting, wrote that “If Martinez had filed his asylum application in 1992 alleging persecution on account of his sexual orientation, he would likely have been deported,” and that his false initial claim actually supported that he had a credible fear of being persecuted if he were deported to Guatemala.<sup>43</sup> This, apparently, was insufficient evidence to redeem Saul Martinez in the eyes of the court, likely because he now personified the boogey-man that preoccupies the culture of disbelief. That is, an immigrant who will lie about anything in order to be granted access to the United States

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<sup>40</sup> *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009), 2446–2454.

<sup>41</sup> *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009), 2452.

<sup>42</sup> Laurn Berlant. “The Queen of America Goes to Washington City: Essays on Sex and Citizenship” (Durham, N.C.: Duke University Press, 1997), 195.

<sup>43</sup> *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009), 2456.

and receive its “benefits.” While I found other instances of gay asylum applicants admitting to lying, *Martinez v. Holder* encapsulates the dynamics present in those cases.<sup>44</sup>

#### **IV: Conclusion**

Credibility is an intentionally messy tool of assessment. It allows for immigration judges to use their biases as a resource for decision making, therefore institutionalizing prejudice within asylum courts. By hinging asylum decisions on such a subjective measurement, the U.S. immigration apparatus positions its officials to act as reinforcers of the boundaries of American identity—perhaps unbeknownst to themselves. While not every individual within the immigration apparatus is biased in the same way or to a similar degree, the prominence of credibility assessments in decision making allows for widespread cultural biases, including xenophobia, to create consistent patterns of prejudice within asylum decisions. U.S. asylum courts are inundated with legal terminology and procedure that affect a veneer of objectivity over their proceedings. This is merely a performance of fact-finding. In reality, the decision making process that occurs within asylum courts is inherently subjective and rife with epistemic injustice due to the power imbalance that favors American minds in determining what is true or false. Eliminating credibility assessments from asylum courts would not eliminate subjectivity or patterns of prejudice, but I believe that the asylum process would be marginally less susceptible to blatant instances of discrimination if American immigration officials were not charged with issuing credibility determinations. More critical is the impetus to recognize other, more subtle instances of credibility checks that occur in our society. Whether they be at the borders, within academic institutions, or barring the path to employment, credibility checks serve as a means to conceal prejudiced decision making.

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<sup>44</sup> *Barragan-Ojeda v. Sessions*, 853 F.3d 374 (7th Cir. 2017) and *Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008) are both cases where applicants were caught lying by the court.

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