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## Frozen Identity: How Rigid Conceptions of Sexuality Endanger Lesbian Asylum Claims

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# Frozen Identity: How Rigid Conceptions of Sexuality Endanger Lesbian Asylum Claims

MariaJose De la Hoz\*

## ABSTRACT

*Bias, stereotypes, and antiquated conceptions of sexual orientation erect systemic barriers for lesbian women seeking asylum in the United States. Decision-makers with a limited understanding of LGBTQI+ identities impose expectations that reinforce stereotypes while discrediting applicants' lived experiences. This results in adverse credibility determinations that distort evidentiary burdens and deny relief to applicants with legitimate claims. This Note examines how fixed conceptions of identity endanger the asylum process for lesbian women fleeing persecution based on their sexual orientation. Proposed solutions include statutory reforms, updated training for asylum officers, and a shift toward evaluating claims through the applicant's lived experiences rather than preconceived notions. While judicial bias in asylum adjudication has been widely documented, this Note centers on the underexamined experiences of lesbian women within the asylum system.*

**Keywords:** sexuality and the law, immigration law, gender identity, refugees, race, ethnicity and the law, human rights law, legal practice and procedure, social group issues.

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INTRODUCTION

Meet Fatima, a woman from the Democratic Republic of Congo, a nation that does not prohibit homosexual activity by law, but has no anti-discrimination laws to protect LGBTQ+ rights. When Fatima was just 11 years old, her parents sold her to her uncle in exchange for a bride price. While married to her uncle, Fatima endured years of sexual and physical abuse. After years of abuse, Fatima finally escaped the Congo when her husband sent her to undergo female genital mutilation. Fatima entered the United States on a tourist visa, but stayed after it expired. After a lifetime of exploitation, the United States offered safety and a chance for Fatima to begin to rebuild her life. Shortly after arriving, she married a man in an effort to assimilate. However, after two years, Fatima separated from him and met her female partner. Fatima began to identify as a lesbian and express herself through masculine clothing.

Unfamiliar with the formal process to seek asylum, Fatima did not apply for asylum within the one-year statutory requirement. The Department of Homeland Security (DHS) later served Fatima with a Notice to Appear, alleging that they placed Fatima in removal proceedings and ultimately could remove Fatima for overstaying her visa. Fatima responded to the notice by requesting withholding of removal and protection under the Convention Against Torture. She explained that she wanted to stay in the United States, as she feared persecution in the Congo because of her sexual orientation. As noted, while the Congo does not prohibit consensual same-sex activity, the country lacks anti-discrimination legal protections for LGBTQI+ individuals.

As part of the proceedings, Fatima later met with a United States immigration asylum officer to discuss her fear of persecution in her country of origin. The officer concluded that Fatima had suffered past persecution and, because of her sexual orientation, demonstrated a well-founded fear of torture should she return to the Congo. Unfortunately, after the immigration officer referred her case to a United States immigration judge for adjudication, the judge denied Fatima’s application seeking refugee status. The immigration judge discredited Fatima’s testimony as a Congolese national, ruling that she failed to corroborate her allegation of past persecution with a medical evaluation of her scars, did not establish the identity of her uncle, and did not substantiate the horrific abuse by her family. Finally, the judge found that Fatima would not suffer persecution on account of her sexual orientation in the Congo because she showed no evidence of state-perpetrated violence against lesbian women.

The failure of Fatima’s claim highlights how the United States asylum system imposes structural barriers that prevent lesbian women from establishing a credible fear of persecution.<sup>1</sup> The process of seeking asylum is often filled with legal and personal

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<sup>1</sup> Roxana Akbari & Stefan Vogler, *Intersectional Invisibility: Race, Gender, Sexuality, and the Erasure of Sexual Minority Women in Us Asylum Law*, 46 LAW & SOC. INQUIRY 1062, 1076 (2021) (finding that

challenges. The intersection of sexual orientation, gender, and race creates a unique dynamic that the current asylum framework fails to account for in many instances, but particularly for lesbian women of color. This Note argues that the system heightens evidentiary standards for lesbian women of color seeking asylum by enforcing fixed notions of identity, deeply ingrained stereotypes, and compounded credibility barriers that obscure the legitimacy of their claims.<sup>2</sup>

This Note proceeds in four parts. Part I provides an overview of the requirements for applying for asylum within the United States, highlighting the statutory and case law foundations for establishing a well-founded fear of persecution and background for how lesbian women seeking asylum must frame their identity to prove membership in a “particular social group.” Part II examines the evidentiary standards imposed on these claimants, particularly how legal expectations of immutability and visible queerness distort burdens of proof. Part III explores how gender, sexuality, and racial biases shape the way judges assess credibility, analyzing case law and judicial reasoning that reflect these patterns. Part IV argues for reform to ensure that the asylum process accurately reflects the lived experiences and vulnerabilities of this marginalized group and considers how practitioners can embrace nuance in pursuit of zealous advocacy.

## I. THE ASYLUM PROCESS FOR LESBIAN WOMEN

As a party to the 1967 Protocol Relating to the Status of Refugees, the United States is obligated not to return any individual to their country of origin if that person is outside their country of nationality because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion.”<sup>3</sup> Congress has the ultimate power over immigration matters and has delegated authority to the United States Citizenship and Immigration Services (USCIS), a branch within the DHS, and the Immigration Courts, established under the Department of Justice (DOJ), to adjudicate asylum claims.<sup>4</sup>

Because most asylum decisions are unpublished and non-precedential, and many records are only accessible through Freedom of Information Act (FOIA) requests, comprehensive data on lesbian women asylum claims remain limited.<sup>5</sup> As a result, much

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judgments of no persecution or no torture were the most common reasons for a sexual orientation-based claim failing and that sexual minority men won their claims at nearly three times the rate of sexual minority women).

<sup>2</sup> This Note primarily discusses cis-gender women who seek asylum based on their identity as lesbian women to fill a gap in “lesbian invisibility in the asylum context.” Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 *LAW & SEXUALITY* 135, 143–44 (2006). As such, discussions about transgender, non-binary, and male homosexual applicants are beyond the scope of this paper.

<sup>3</sup> Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152–54.

<sup>4</sup> Keith Southam, *Who Am I and Who Do You Want Me to Be? Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 *CHI.-KENT L. REV.* 1363, 1364–65 (2011).

<sup>5</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, 60 *STAN. L. REV.* 295, 404 (2007); U.S. CITIZENSHIP & IMMIGR. SERVS., *READING AND USING CASE LAW (RAIO DIRECTORATE – OFFICER TRAINING)* 6 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Reading\\_and\\_Using\\_Case\\_Law\\_RAIO\\_Lesson\\_Plan.pdf](https://www.uscis.gov/sites/default/files/document/foia/Reading_and_Using_Case_Law_RAIO_Lesson_Plan.pdf) [<https://perma.cc/6ZT5-THAE>]; Emily Creighton, *In a Win for Transparency, Court Orders Board of*

of the analysis in this paper draws from select published decisions, practitioner interviews, and secondary sources.<sup>6</sup> The following section first outlines the asylum application process, including procedural requirements and timing constraints; second, it defines persecution and membership in a particular social group; and third, it traces how immigration courts have treated lesbian identity within the particular social group category.

### A. *Application Process for Seeking Asylum*

Under 8 U.S.C. § 1101(a)(42), a “refugee” is a person who is unable or unwilling to return to their country of origin due to persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Applicants for asylum must file their claim within one year after the date of their arrival in the United States.<sup>7</sup> An applicant may seek asylum affirmatively, meaning they apply proactively within the one-year period, or defensively, after denial of a claim or while they are in removal proceedings.<sup>8</sup> While it is possible to apply after the one-year deadline if a qualified extenuating circumstance exists, this exception is not broad enough to encompass all refugees and fails to account for mental health challenges, language barriers, and difficulties in obtaining documentation.<sup>9</sup> Applicants who are unable to prove they entered the United States less than one year before their application, or demonstrate the existence of a qualifying excuse, are “rejected” and referred to an immigration court hearing.<sup>10</sup>

After an individual applies for asylum, an asylum officer will review the application and issue a decision, which undergoes secondary review by supervisory asylum officers within a regional office.<sup>11</sup> Although asylum officers may grant asylum if the applicant is eligible and “in status”, asylum officers are barred from granting asylum to applicants who are removable or “out of status” (like those who overstay visas) and are required to refer those cases to immigration judges for adjudication.<sup>12</sup> If an asylum officer refers a case to immigration court, the asylum office serves the asylum applicant with a Notice to Appear in that court, the equivalent of a summons in a civil case.<sup>13</sup> Immigration court hearings are adversarial proceedings where a DHS attorney is assigned to argue before the immigration judge that asylum is not warranted.<sup>14</sup> Asylum seekers must either represent themselves or find representation at their own expense.<sup>15</sup>

The REAL ID Act of 2005 instructs triers of fact to consider the totality of the circumstances to make credibility determinations, including the “demeanor, candor, or responsiveness” of an applicant, the “inherent plausibility” of their account, and whether

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*Immigration Appeals to Make Immigration Court Decisions Public*, AM. IMMIGR. COUNCIL (Feb. 18, 2021), <https://immigrationimpact.com/2021/02/18/immigration-court-decisions-public/> [https://perma.cc/3XCG-AY6K].

<sup>6</sup> See Interview with Connor Leighton-Cory, Staff Attorney, Immigration Equality (Feb. 27, 2025).

<sup>7</sup> 8 U.S.C. § 1158(a)(2)(B).

<sup>8</sup> Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 308.

<sup>9</sup> Michele R. Pistone, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 30–31 (2001).

<sup>10</sup> Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 308.

<sup>11</sup> *Id.*

<sup>12</sup> 8 C.F.R. § 1208.14(c)(1).

<sup>13</sup> Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 308.

<sup>14</sup> *Id.* at 309.

<sup>15</sup> *Id.* at 309.

statements made are considered consistent.<sup>16</sup> An immigration judge or asylum officer can reject claims for asylum, withholding of removal, or Convention Against Torture if they deem an applicant's testimony is not credible based on inconsistencies, even if those inconsistencies do not go to the heart of the claim.<sup>17</sup> Asylum seekers do not benefit from a presumption of credibility, and adverse credibility findings can be fatal to their claim.<sup>18</sup> In fact, the Supreme Court's decision in *Urias-Orellana v. Bondi* clarified the scope of review over agency credibility findings and reinforced the decisive weight such determinations play in adjudicating asylum claims.<sup>19</sup>

Immigration judges order nearly all unsuccessful applicants to be deported to the exact countries they sought to escape.<sup>20</sup> If DHS or an asylum seeker appeals the immigration judge's decision, the case goes to the Board of Immigration Appeals (BIA).<sup>21</sup> The BIA does not engage in de novo review of the immigration judge's factual findings and cannot engage in fact-finding.<sup>22</sup> The BIA can either affirm the decision of the immigration judge without opinion, adopt and modify the decision, issue its own decision, deny relief, or remand the case back to the immigration judge for further proceedings.<sup>23</sup>

An asylum applicant can appeal an adverse decision from the BIA to a federal court of appeals; however, the circuit courts give great deference to the BIA and cannot grant asylum, only remand a decision to the BIA.<sup>24</sup> With the exception of "constitutional questions and questions of law," the REAL ID Act of 2005 bars courts of appeals from reviewing final orders of removal against aliens who were removed by reason of having committed a criminal offense, even if they are applying for asylum.<sup>25</sup> This restriction is especially harmful to lesbian women and the LGBTQI+ community as a whole because the United States has a long history of criminalizing Queer identity through laws targeting same-sex intimacy, gender nonconformity, and HIV status.<sup>26</sup> This pattern continues to shape how the legal system perceives and treats Queer asylum seekers.

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<sup>16</sup> See 8 U.S.C. § 1158(b)(1)(B)(iii).

<sup>17</sup> *Kalulu v. Bondi*, 128 F.4th 1009, 1014 (9th Cir. 2024).

<sup>18</sup> See 8 U.S.C. § 1158(b)(1)(B)(iii); *Ibarra-Rodalleas v. Bondi*, No. 24-3328, 2025 U.S. App. LEXIS 5353, at 23 (6th Cir. Mar. 5, 2025) (holding that an adverse credibility finding supported by substantial evidence precludes reliance on the petitioner's testimony to establish eligibility for asylum, withholding of removal, or CAT protection).

<sup>19</sup> See *Urias-Orellana v. Bondi*, 146 S. Ct. 845 (2026).

<sup>20</sup> 8 U.S.C. § 1231(b)(2)(A); *Kalulu*, 128 F.4th at 1013.

<sup>21</sup> *Kalulu*, 128 F.4th at 1014.

<sup>22</sup> *Halmenschlager v. Holder*, 331 F. App'x 612, 618 (10th Cir. 2009).

<sup>23</sup> Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 193 (2008).

<sup>24</sup> *Ramji-Nogales, Schoenholtz & Schrag*, *supra* note 5, at 310.

<sup>25</sup> *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282, 1289 (11th Cir. 2014); 8 U.S.C. § 1252(a)(2)(C).

<sup>26</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986) (upholding Georgia's sodomy statute criminalizing consensual same-sex intimacy). See generally *City of Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (banning cross-dressing laws that were being used to target trans and gender non-conforming individuals); *People v. Hall*, 2007 WL 2121912 (Cal. Ct. App. 2007) (convicting a woman of a felony for failing to disclose her HIV status before unprotected sex).

*B. Establishing Persecution and Membership in a “Particular Social Group”*

In making a viable claim for asylum, an applicant must show (i) a well-founded fear, (ii) of persecution, (iii) on account of, (iv) a protected group (race, religion, nationality, political opinion, or particular social group).<sup>27</sup>

The “well-founded fear” standard is both subjective (the applicant’s fear) and objective (whether a reasonable person in the same situation would have that fear).<sup>28</sup> Persecution is defined as an “extreme concept, requiring ‘more than a few isolated incidents of verbal harassment or intimidation . . . .’”<sup>29</sup> An applicant may establish eligibility based on a past persecution or a well-founded fear of future persecution.<sup>30</sup> An applicant for asylum is not required to prove that persecution is more likely than not.<sup>31</sup> Even a 10 percent showing is enough to establish a well-founded fear of persecution.<sup>32</sup> By comparison, eligibility for withholding of removal, where removal proceedings are already in place, requires applicants to demonstrate a “clear probability” of persecution upon return, meaning that it is more likely than not that their life or freedom would be threatened.<sup>33</sup>

To demonstrate persecution in an asylum claim, applicants must also establish that the government is their persecutor or that the government would be unwilling to protect them from persecution in their country of origin.<sup>34</sup> For example, an applicant may support these claims with evidence of a law criminalizing homosexuality or documented, systemic attacks on a protected group.<sup>35</sup> In one instance, an immigration judge denied the asylum application and withholding of removal of a Ugandan lesbian woman who left her native country after her family arranged for her to be sexually abused and after she was attacked for being a member of a lesbian organization advocating for gay rights.<sup>36</sup> The immigration judge held that the fear of persecution was not well-founded because the “family-arranged rape” was “private family mistreatment,” and the previous persecution was “not in any way government sponsored or authorized abuse.”<sup>37</sup> The immigration judge concluded that the harm did not rise to the level of persecution because it was not government-sponsored; the Eighth Circuit reversed and remanded, reasoning that persecution may also consist of harm the government is unable or unwilling to control.<sup>38</sup>

Courts examine whether applicants can sufficiently show a “nexus” between their well-founded fear of persecution and the protected group.<sup>39</sup> Specifically, applicants must

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<sup>27</sup> O’Dwyer, *supra* note 23, at 191.

<sup>28</sup> Michael A. Rosenhouse, *Sufficiency of Evidence to Establish Alien’s Well-Founded Fear of Persecution Entitling Alien to Status of Refugee Under § 101(a)(42)(A) of Immigration and Nationality Act of 1952 (8 U.S.C. § 1101(a)(42)(A))—Alleged Persecution in North and South American Nations*, 180 A.L.R. Fed. 369, 213 (2002).

<sup>29</sup> Sepulveda v. U.S. Att’y Gen., 401 F.3d 1226, 1231 (11th Cir. 2005).

<sup>30</sup> Al-Harbi v. I.N.S., 242 F.3d 882, 888 (9th Cir. 2001).

<sup>31</sup> *Id.* (explaining that there must be an objective showing based on credible, direct, and specific evidence that there is a reasonable possibility that persecution will occur).

<sup>32</sup> *Id.*

<sup>33</sup> Santos-Zacaria v. Garland, No. 19-60355, 2025 WL 79828, at \*2 (5th Cir. Jan. 13, 2025).

<sup>34</sup> 8 C.F.R. § 208.1(e) (2021).

<sup>35</sup> Lopez v. U.S. Att’y Gen., 504 F.3d 1341, 1345 (11th Cir. 2007).

<sup>36</sup> Nabulwala v. Gonzales, 481 F.3d 1115, 1117 (8th Cir. 2007).

<sup>37</sup> *Id.* at 1118.

<sup>38</sup> *Id.*

<sup>39</sup> Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 580 (2019).

be able to show that the persecution was because of their membership in the protected group.<sup>40</sup> In other words, membership in the protected group was a central reason for the persecution.<sup>41</sup> In the case of a trans woman from Honduras, the immigration judge denied asylum for lack of substantial evidence that she experienced persecution because of her gender identity.<sup>42</sup> The judge found that her uncle was physically abusive to her *and her sister*, and therefore, she was not targeted specifically because of her identity as a transgender woman.<sup>43</sup> The BIA upheld the immigration judge's conclusion that there was no pattern or practice of persecution.<sup>44</sup> Although the Tenth Circuit remanded the case for reconsideration, this case illustrates how difficult it remains for asylum seekers to establish a specific nexus between their identity and the harm they have suffered.<sup>45</sup>

Subsequently, whether an asserted group can be classified as a “particular social group” is a question of law.<sup>46</sup> Immigration courts define a “particular social group” as one whose members share a common, immutable characteristic that they cannot or should not be required to change, can be defined with particularity and clear boundaries, and exhibit social distinction or visibility, meaning they are recognized as a group by the society in question.<sup>47</sup> Courts have also recognized that membership in a particular social group can include those who are *perceived* to be members; for example, “women in Guatemala who are perceived to be lesbian.”<sup>48</sup> These requirements are convoluted and subjective, endangering asylum seekers who must prove persecution while trying to fit into a legal framework that remains unsettled and inconsistently applied.<sup>49</sup>

To support an asylum claim, applicants may submit a wide range of evidence to establish both a well-founded fear of persecution and membership in a particular social group. Applicants can include personal declarations, sworn affidavits from family or community members, expert testimony, medical or psychological evaluations, and reports on country conditions.<sup>50</sup> Reports on country conditions can be helpful to show the circumstances an applicant would face if the applicant returned home, but they can lead to higher evidentiary standards for applicants from countries with laws seemingly favorable to LGBTQI+ individuals.<sup>51</sup> Even so, applicants can present a strong case if they are able to show reasonable fear of persecution based on previous events that happened to them or a loved one.<sup>52</sup> When persecutors are members of the applicant's own family, evidence that the applicant filed a police report and that the government failed to provide protection can

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<sup>40</sup> *Id.*

<sup>41</sup> *See* Perez-Zenteno v. U.S. Att’y Gen., 913 F.3d 1301, 1307 (11th Cir. 2019) (citing INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i)).

<sup>42</sup> Aguilar v. Garland, 29 F.4th 1208, 1211 (10th Cir. 2022).

<sup>43</sup> *Id.* at 1212.

<sup>44</sup> *Id.* at 1213.

<sup>45</sup> *Id.* at 1219.

<sup>46</sup> Gonzalez v. U.S. Att’y Gen., 820 F.3d 399, 403 (11th Cir. 2016).

<sup>47</sup> Cory, *supra* note 39, at 583–84.

<sup>48</sup> Antonio v. Garland, 58 F.4th 1067, 1076–77 (9th Cir. 2023) (remanding for agency to consider the question of whether Guatemalan women perceived to be lesbian constitute a particular social group).

<sup>49</sup> Cory, *supra* note 39, at 583–84; O’Dwyer, *supra* note 23, at 191.

<sup>50</sup> *See* 8 C.F.R. § 208.12(b) (2024); U.S. DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 8 (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> [<https://perma.cc/398Y-LZQ5>].

<sup>51</sup> Interview with Connor Leighton-Cory, *supra* note 6.

<sup>52</sup> *Id.*

support their claim.<sup>53</sup> In the event that a lesbian woman does not have a current or previous partner, lacks photo evidence of participation in any LGBTQI+ interactions, and is unable to find anyone to corroborate her story, she may provide notes from a psychological evaluation or other forms of evidence to show internalized homophobia and its effects on her.<sup>54</sup>

Although applicants are not always required to produce documentary evidence, failing to provide corroborative evidence leaves applicants with little margin of error.<sup>55</sup> An applicant may sustain their burden of proof through testimony alone, without corroborating evidence, but only if the adjudicator finds that testimony credible.<sup>56</sup> While this may seem flexible, asylum officers and immigration judges have broad discretion to make credibility determinations, which can leave asylum seekers vulnerable to prejudiced decision-making.<sup>57</sup>

For example, in two separate cases in the Ninth Circuit, the court found that the BIA failed to properly analyze probative and corroborative evidence and remanded those cases for further proceedings despite clear instruction that “where there is any indication that the [agency] did not consider all of the evidence before it . . . the decision cannot stand.”<sup>58</sup> In *Antonio v. Garland*, the court found that the immigration judge did not note evidence that “despite police awareness, the death threats continued” and therefore, may not have considered the evidence in their decision.<sup>59</sup> Similarly, in *Kalulu v. Bondi*, the BIA disregarded medical records provided to show abuse, and three corroborative eyewitness statements because they were not signed or sworn, and instead “manufactured inconsistencies, applied arbitrary authentication requirements, and overlooked or mischaracterized key portions of the documents to discredit [the applicant].”<sup>60</sup> Although the court recognized that “two-thirds of the factors cited by the agency for its adverse credibility determination were based on dubious stereotyping, mischaracterizations of the testimony, or purported inconsistencies not found in the record,” the remedy was to remand the case to be decided by the same agency in which the prejudicial decision-making originated.<sup>61</sup> Such remands, while procedurally correct, risk perpetuating harm: when remanded, asylum seekers are subjected to prolonged proceedings, the same institutional frameworks that have already demonstrated bias, renewed credibility scrutiny, and continued exposure to prejudicial decision-making.

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<sup>53</sup> *Id.*

<sup>54</sup> Interview with Connor Leighton-Cory, *supra* note 6.

<sup>55</sup> *See* 8 U.S.C. § 1158(b)(1)(B)(ii).

<sup>56</sup> *See* 8 U.S.C. § 1158(b)(1)(B)(ii).

<sup>57</sup> Cory, *supra* note 39, at 582.

<sup>58</sup> *Cole v. Holder*, 659 F.3d 762, 771–72 (9th Cir. 2011) (“[s]uch indications include . . . failing to mention highly probative or potentially dispositive evidence.”).

<sup>59</sup> *Antonio v. Garland*, 58 F.4th 1067, 1078 (9th Cir. 2023).

<sup>60</sup> *Kalulu v. Bondi*, 128 F.4th 1009, 1025 (9th Cir. 2025) (Sanchez, J., concurring in part and dissenting in part) (“two-thirds of the factors cited by the agency for its adverse credibility determination were based on dubious stereotyping, mischaracterizations of the testimony, or purported inconsistencies not found in the record.”).

<sup>61</sup> *Id.*

*C. Lesbian Identity as a Social Group: Recognition and Resistance*

For LGBTQI+ individuals, sexual orientation and gender identity have been recognized as valid grounds for asylum under the “particular social group” category.<sup>62</sup> The BIA recognizes the existence of “homosexuals” as a valid “particular social group.”<sup>63</sup> In 1997, the Ninth Circuit ruled for the first time in favor of a lesbian woman seeking asylum after she was subjected to abuse intended to “cure” her sexuality.<sup>64</sup> The BIA originally denied her asylum claims, concluding that she had not been persecuted because the “treatments” she endured were not intended to punish her.<sup>65</sup> Despite this recognition, lesbian women seeking asylum are often required to corroborate their sexuality, potentially in unreasonable circumstances.<sup>66</sup> Further, lesbian women applicants must do more than simply prove they are members of the “particular social group.” An asylum applicant must establish that they experienced or will experience persecution “on account of” their membership in the particular social group.<sup>67</sup>

Lesbian women are marginalized on account of both their gender and their sexual orientation, which can lead to significant obstacles not only in arriving in the United States to seek refuge, but also in making successful claims for asylum.<sup>68</sup> While sexual orientation has been recognized as a “particular social group,” gender identity alone does not constitute a distinct category under which women can seek asylum.<sup>69</sup> Regardless, international authorities recognize that gender-based violence disproportionately affects women, even more so when they are displaced.<sup>70</sup> This contradiction reflects how the United States asylum process prioritizes the “typical male persecution experience” at the expense of women’s claims.<sup>71</sup>

It was not until the 1990s that the United States began to recognize gender-based persecution in asylum claims; however, the BIA has not established a consistent, binding precedent that establishes victims of gender-based persecution as a particular social group.<sup>72</sup> For example, in *Matter of A-R-C-G*, the applicant fled Guatemala after years of abuse and domestic violence.<sup>73</sup> Although the court recognized “married women in

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<sup>62</sup> Cory, *supra* note 47, at 585–86.

<sup>63</sup> See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

<sup>64</sup> See *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 648 (9th Cir. 1997).

<sup>65</sup> *Id.* at 645 (“The BIA majority concluded that Pitcherskaia had not been persecuted because, although she had been subjected to involuntary psychiatric treatments, the militia and psychiatric institutions intended to ‘cure’ her, not to punish her, and thus their actions did not constitute ‘persecution’ within the meaning of the Act.”).

<sup>66</sup> Melanie A. Conroy, *Real Bias: How Real Id’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 Berkeley J. Gender L. & Just. 1, 29–31 (2009)

<sup>67</sup> 8 C.F.R. § 208.13(b)(2)(i)(A) (2025).

<sup>68</sup> Akbari & Vogler, *supra* note 1, at 1063.

<sup>69</sup> Federica Dell’Orto, *Legal Challenges for Women Seeking Asylum*, L.A. Law., December 2023, at 14, 15.

<sup>70</sup> U.N. High Comm’r for Refugees, *Gender-Based Violence*, UNHCR, <https://www.unhcr.org/what-we-do/protect-human-rights/protection/gender-based-violence>.

<sup>71</sup> Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 Geo. J. Gender & L. 541, 544 (2019); Stephanie Robins, *Backing It Up: Real Id’s Impact on the Corroboration Standard in Women’s Private Asylum Claims*, 35 Women’s Rts. L. Rep. 435, 442 (2014).

<sup>72</sup> Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 Geo. J. Gender & L. 554-557, 557 (2019).

<sup>73</sup> *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (BIA 2014).

Guatemala who are unable to leave their relationship” as a cognizable social group, her case was remanded for further proceedings so she could demonstrate that the government was unwilling or unable to control her husband. Despite the outcome, *Matter of S-S-F-M* overruled *Matter of A-R-C-G* (for a second time), finding that case-by-case adjudication is necessary for defining social groups because previous interpretations were “overly broad.”<sup>74</sup> The BIA’s indecision on how to treat victims of domestic violence underscores the barriers to protection for individuals fleeing gender-based violence.

Although gender is an immutable characteristic, adjudicators often require narrower depictions of particular social groups that satisfy particularity and social distinction requirements.<sup>75</sup> Lesbian women have endured well-documented violence that supports their designation as a “particular social group.” In the United States, 44% of lesbian women reported experiencing rape, physical violence, or stalking by an intimate partner in their lifetime.<sup>76</sup> Around the world, lesbian women, bisexual women, and Queer individuals face horrific abuse, including sexual assault at the hands of community members and their own family, especially in regions like sub-Saharan Africa.<sup>77</sup> Legally, consensual same-sex relationships between women remain criminalized in 40 countries, exposing women to potential imprisonment in addition to state-sanctioned discrimination.<sup>78</sup> While these factors affirm lesbian women as particularly vulnerable to persecution, their claims are often evaluated through gendered and heteronormative assumptions, under which trauma responses and gendered expectations may be misinterpreted as indicators of dishonesty.<sup>79</sup>

Returning to Fatima’s case, Fatima could submit an appeal to have her case reviewed by the BIA, but the Board would not review any additional facts and could only review questions of law.<sup>80</sup> Fatima could likely prove membership in a particular social group as a lesbian woman, based on the well-established recognition by the BIA.<sup>81</sup> However, without additional evidence or *de novo* review, Fatima may struggle to establish the nexus between her identity and her well-founded fear of persecution.<sup>82</sup>

If given the opportunity to present additional evidence, Fatima could provide testimony of her lived experiences. Since officers can deem her “noncredible” based on the slightest inconsistency, consistent, corroborated testimony is likely essential to Fatima’s case as well.<sup>83</sup> Additionally, medical records that describe the trauma she endured from the

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<sup>74</sup> *Matter of S-S-F-M*, 29 I. & N. Dec. 207 (2025).

<sup>75</sup> *Id.*

<sup>76</sup> See Mikel L. Walters, Jieru Chen & Matthew J. Breiding, *The National Intimate Partner and Sexual Violence Survey: 2010 Findings on Victimization by Sexual Orientation*, CTR. FOR DISEASE CONTROL & PREVENTION (2013), <https://stacks.cdc.gov/view/cdc/12362> [<https://perma.cc/WZ6B-ZMTY>].

<sup>77</sup> See *This Is Why We Became Activists: Violence Against Lesbian, Bisexual, and Queer Women and Non-Binary People*, HUM. RTS. WATCH (Feb. 14, 2023), <https://www.hrw.org/report/2023/02/14/why-we-became-activists/violence-against-lesbian-bisexual-and-queer-women-and-non-binary-people> [<https://perma.cc/B5E3-GBDC>].

<sup>78</sup> See HUM. DIGNITY TR., *INJUSTICE EXPOSED: THE CRIMINALISATION OF LESBIANS AND BISEXUAL WOMEN AND ITS IMPACTS 5* (2023), <https://www.humandignitytrust.org/wp-content/uploads/2024/10/Breaking-The-Silence-2024.pdf> [<https://perma.cc/QQ3G-MRJA>].

<sup>79</sup> Katherine E. Melloy, *Telling Truths: How the Real Id Act’s Credibility Provisions Affect Women Asylum Seekers*, 92 Iowa L. Rev. 637, 653–54 (2007)

<sup>80</sup> Ramji-Nogales, Schoenholtz, & Schrag, *supra* note 5, at 310.

<sup>81</sup> Cory, *supra* note 39, at 585–86.

<sup>82</sup> See *Aguilar v. Garland*, 29 F.4th 1208, 1211 (10th Cir. 2022).

<sup>83</sup> Cory, *supra* note 39, at 582.

physical and sexual abuse from her husband could support Fatima’s claim.<sup>84</sup> Fatima could also provide sworn or signed testimony from her friends or family in the Congo who speak to her arranged marriage or the conditions of her life, but evidence of domestic violence may not be enough. To draw the nexus between her identity and her well-founded fear of future persecution, she could produce expert reports that discuss the Congo’s response to LGBTQI+ individuals and probable repercussions if the United States forced her to return.

## II. EVIDENTIARY BURDENS AND THE PROBLEM OF PROOF

In adjudicating asylum cases, a court must consider *all* evidence introduced by the applicant because failure to do so would frustrate judicial review.<sup>85</sup> In theory, to seek asylum, lesbian women must prove they fear persecution based on their membership of a particular social group.<sup>86</sup> In practice, lesbian women must perform their identities in ways that satisfy legal expectations rooted in immutability and visibility while not “disrupt[ing] the predominately white, Western, cis-heterosexual norms of good behavior that prevail in the U.S.”<sup>87</sup> LGBTQI+ asylum seekers, therefore, face the dual burden of proving not only that their sexual orientation is immutable, but also that it is socially recognized as a basis for persecution.<sup>88</sup> This section explores how the immutability standard enforces a “freeze frame” conception of sexuality that forces applicants to present their identities as fixed.

### A. Immutability and the “Freeze Frame”

Immigration courts define the characteristic of immutability as “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>89</sup> Similarly, a “freeze frame” policy, first recognized in the case of a transgender woman seeking gender affirming care, is a rule or practice that locks a person’s status, identity, or circumstances at a specific point in time, ignoring any subsequent changes or developments that may be assessed through an objective case-by-case analysis.<sup>90</sup> “Freeze frame” policies are common manifestations of discriminatory structures that shape the lived experiences of LGBTQI+ people under state control, including asylum seekers. Both “freeze frame” policies and immutability mirror “born this way” rhetoric to invalidate LGBTQI+ identities and create a legal framework that leaves little room for the fluid and highly personal ways women and Queer individuals experience and express their identity.<sup>91</sup>

The United States has applied the concept of immutability in other contexts beyond immigration, signaling broader judicial reluctance to authentically recognize queerness,

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<sup>84</sup> See 8 C.F.R. § 208.12(b) (2025).

<sup>85</sup> James Feroli, *Evidentiary Issues in Asylum Proceedings*, 10–11 IMMIGR. BRIEFINGS 1 (Nov. 2010).

<sup>86</sup> 8 C.F.R. §§ 208.13(b)(2)(i)(A), 208.12(a) (2025).

<sup>87</sup> See Cory, *supra* note 39, at 590.

<sup>88</sup> *Id.*

<sup>89</sup> Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

<sup>90</sup> Hicklin v. Precynthe, No. 4:16-CV-01357-NCC, 2018 WL 806764, at \*1 (E.D. Mo. Feb. 9, 2018); see Aranda Stathers, *Freeze-Frames and Blanket Bans: The Unconstitutionality of Prisons’ Denial of Gender Confirmation Surgery to Transgender Inmates*, 127 DICK. L. REV. 243, 271 (2022).

<sup>91</sup> Cory, *supra* note 39, at 591.

not only as a fluid identity, but as a protected category.<sup>92</sup> In *U.S. v. Skrmetti*, the Sixth Circuit addressed access to gender-affirming care and whether identity can be treated as something malleable.<sup>93</sup> The Sixth Circuit found that transgender individuals do not fit the description of an immutable group because transgender identity cannot be “definitely ascertainable at the moment of birth” and can describe a wide variety of gender identities and expressions.<sup>94</sup> If this logic is applied to asylum seekers, they would have to have identified as members of their particular social group at birth, reducing the viability of most, if not all, asylum claims.

Similarly, examples of how “freeze frame” policies operate in carceral settings can also inform our understanding of how these policies harm lesbian women in immigration proceedings. In *Hicklin v. Precythe*, the Eighth Circuit addressed the legality of a prison’s “freeze frame” policy, which restricted transgender inmates from receiving hormone therapy or other gender-affirming medical treatment unless they had already begun such treatment before incarceration.<sup>95</sup> The court reasoned that this policy violated the Eighth Amendment’s prohibition against cruel and unusual punishment by denying necessary medical care to transgender inmates by deliberate indifference.<sup>96</sup> “Freeze frame” approaches like the prison policy in *Hicklin* reflect a broader legal and social tendency to treat gender and sexual orientation as static, despite growing recognition that both are fluid and can evolve over time. In the context of asylum law, similar “freeze frame” policies manifest when judges assess an applicant’s sexual orientation or gender identity based solely on past conduct or relationships, rather than acknowledging the fluid and evolving nature of identity.

### B. The “Freeze Frame” in Asylum Cases

In asylum cases, the “freeze frame” approach is evident when adjudicators apply heteronormative assumptions to assess the legitimacy of asylum seekers’ sexual orientation. In *Mockeviciene v. U.S. Atty. Gen.*, the court upheld the denial of asylum to a Lithuanian woman who claimed she was persecuted because of her sexual orientation, citing a lack of specific evidence to substantiate her fear of future persecution.<sup>97</sup> Mockeviciene testified that after coming out as a lesbian, she faced severe harassment, including physical violence, loss of employment, and eviction.<sup>98</sup> She also reported being targeted by both her neighbors and the police.<sup>99</sup> Nevertheless, the immigration judge ultimately denied her asylum claim,

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<sup>92</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 658, 670–71 (2015) (stating that the immutable nature of same sex couples dictates that they be afforded equal dignity); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660–661 (2020) (holding that discrimination based on sexual orientation or gender identity is a form of sex discrimination under Title VII’s “because of sex” language, but not recognizing sexual orientation or gender identity as separate protected classes).

<sup>93</sup> *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023); see also *U.S. v. Skrmetti*, 605 U.S. \_\_\_ (2025) (The Supreme Court upheld the Tennessee law prohibiting certain medical treatments for transgender minors, ultimately determining it was not subject to heightened scrutiny under the Equal Protection Clause.).

<sup>94</sup> *Id.*

<sup>95</sup> *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at \*1 (E.D. Mo. Feb. 9, 2018).

<sup>96</sup> *Id.* at 13.

<sup>97</sup> *Mockeviciene v. Att’y Gen.*, 237 F. App’x 569, 574 (11th Cir. 2007).

<sup>98</sup> *Id.* at 571.

<sup>99</sup> *Id.*

concluding that, in addition to not filing within the year deadline, her testimony lacked credibility and that she failed to provide sufficient evidence to establish a well-founded fear of persecution.<sup>100</sup> To support the immigration judge’s decision, the immigration judge cited Mockeviciene’s previous marriage to a man as a factor undermining her credibility regarding her sexual orientation.<sup>101</sup> On appeal, the Eleventh Circuit affirmed the BIA and the immigration judge’s decision because the evidence was not sufficient to compel reversal of the BIA’s credibility determination.<sup>102</sup> This case illustrates how previous heterosexual relationships become questions of consistency in testimony for lesbian women, creating a heightened burden of proof for lesbian asylum seekers.

Despite recognizing lesbian women as a particular social group, the asylum framework often fails to accommodate the fluid and evolving nature of sexual orientation and gender identity. Instead, the framework relies on a “freeze frame” model that requires applicants to provide evidence of a fixed and consistent sexual orientation wherein previous relationships with men “shatter” their credibility before the court.<sup>103</sup> Similarly, negative credibility determinations can effectively freeze an applicant’s case by limiting the evidence a court will consider.<sup>104</sup> *Urias-Orellana v. Bondi* further entrenches this dynamic by emphasizing deference to the trier of fact on appeal, leaving applicants with little meaningful recourse once credibility is denied.<sup>105</sup>

Scholars and legal advocates argue that the need to present a “linear coming out narrative” is based on white, Western standards that fail to acknowledge that women may be forced to be closeted for their own protection and resort to opposite-sex marriages to survive the patriarchal society in their countries of origin.<sup>106</sup> This rigid approach disregards the reality that many individuals, especially those socialized in heteronormative environments, may only come to terms with their sexual orientation or gender identity after leaving their countries of origin.<sup>107</sup>

Thus, the asylum framework penalizes applicants like Fatima, whose sexual identity evolved after fleeing persecution. In adjudicating her case, a judge may discredit her identity as a lesbian woman simply because she was previously married to a man, despite her experience being forced into marriage.<sup>108</sup> Immutability and “freeze frame” policies are antiquated approaches and contain harmful rhetoric that allow uninformed adjudicators and bias to dictate credibility, and ultimately, relief.

### III. COMPOUNDED BARRIERS FOR WOMEN OF COLOR

Queer women of color face distinct and compounded biases in asylum proceedings, where racial and gendered stereotypes intersect to create heightened evidentiary burdens and more difficult paths to protection. The expectation that lesbian women will present in a particular way—either through masculine clothing or involvement in LGBTQI+

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 572.

<sup>102</sup> *Id.* at 574.

<sup>103</sup> Akbari & Vogler, *supra* note 1, at 1083.

<sup>104</sup> See 8 U.S.C. § 1158(b)(1)(B)(iii).

<sup>105</sup> See *Urias-Orellana v. Bondi*, 146 S. Ct. 845 (2026).

<sup>106</sup> *Id.* at 1070.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

culture—reflects a fundamentally white, Western construction of lesbian identity.<sup>109</sup> For lesbian women of color, this creates a double bind: they are either penalized for not conforming to Western expectations of Queer identity or accused of lacking authenticity when they do not meet racialized stereotypes.

This section explores exactly how implicit and structural biases distort the adjudication of asylum claims for lesbian women of color. Even when applicants meet legal requirements and provide evidence, adjudicators often evaluate claims through a lens shaped by cultural assumptions about sexuality, gender, and credibility. This section will first examine judicial bias in judging queerness, then analyze how immutability and visibility leave applicants vulnerable to prejudice, and finally, explain the barriers faced by lesbian women of color, whose intersecting identities frequently result in heightened scrutiny, disbelief, and exclusion.

### A. *Judging Queerness: Judicial Bias*

Judicial bias shapes the adjudication process for lesbian women of color.<sup>110</sup> Disparities in asylum adjudication are well documented.<sup>111</sup> The fate of an applicant, who is often facing a life or death situation, begins when a judicial clerk assigns an applicant to a particular asylum officer or immigration judge.<sup>112</sup> Judicial attitudes and apathy toward race, gender, and sexuality influence asylum decisions.<sup>113</sup> Some immigration judges, for example, hold conservative views on gender and sexuality, resulting in more restrictive interpretations of asylum law for LGBTQI+ claimants.<sup>114</sup> This judicial bias disproportionately affects Queer women of color, whose identities are already marginalized within the legal system.<sup>115</sup> Intersectional invisibility in U.S. asylum law demonstrates how racialized expectations of femininity and sexual expression result in heightened scrutiny for lesbian women of color.<sup>116</sup> For example, in one case, a Jamaican woman's credibility was questioned by an immigration judge who said, "you don't look like a lesbian."<sup>117</sup> Similarly, an immigration judge dismissed another woman's authenticity as a lesbian because she had not attended a Pride march, with the judge asserting that "all lesbians go to Pride."<sup>118</sup> This line of reasoning reveals a deeply entrenched bias, with judges basing their decisions on the outward appearance or the claimant's behavior rather than on the substance of the claimant's experiences.<sup>119</sup> Such reasoning exemplifies the broader problem of adjudicators relying on stereotypical or culturally biased assumptions when evaluating LGBTQI+ asylum claims.

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<sup>109</sup> Morgan, *supra* note 2, at 154.

<sup>110</sup> See generally O'Dwyer, *supra* note 23.

<sup>111</sup> See Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 316 (reviewing 126,504 cases with 527 different asylum officers to find deviation rates from 2% to 51%). See generally O'Dwyer, *supra* note 23.

<sup>112</sup> See Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 296.

<sup>113</sup> *Id.* at 364.

<sup>114</sup> *Id.* at 363; O'Dwyer, *supra* note 23, at 210.

<sup>115</sup> Akbari & Vogler, *supra* note 1, at 1065.

<sup>116</sup> *Id.* at 1069.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 169–170.

<sup>119</sup> Similarly, in the Eighth Circuit case, *Shahinaj v. Gonzales*, 481 F.3d 1027, 1028 (8th Cir. 2007), an immigration judge dismissed the asylum seeker's claim based on his dress, mannerisms, and speech, suggesting that these traits did not conform to the judge's stereotypical idea of a homosexual individual.

### B. Stereotype-Based Identity Markers

In addition to immutability, courts and immigration judges also frequently assess the social visibility of a particular social group through outdated and stereotypical markers of homosexuality, such as clothing, behavior, or participation in LGBTQI+ culture.<sup>120</sup> Sexual identity is not externally visible.<sup>121</sup> For lesbian women, particularly those from conservative or patriarchal societies, public visibility can be dangerous or impossible.<sup>122</sup> Immigration judges often expect LGBTQI+ applicants to provide evidence of public expression of their sexual orientation, such as attending Pride events or engaging with LGBTQI+ organizations.<sup>123</sup> In fact, one article reported the anecdotal experience of a practitioner who found that courts focused “more on knowledge of gay trivia than on actual experiences and culturally relevant identity markers.”<sup>124</sup>

For some immigration judges and asylum officers, conforming to Western expectations of outness and visibility equates to credibility.<sup>125</sup> Asylum seekers are expected to perform as “practicing lesbians.”<sup>126</sup> This pattern extends to gender presentation as well. Queer women who present as feminine often struggle to be seen as “authentically” gay, while those who present as masculine are penalized for failing to meet traditional standards of femininity.<sup>127</sup> This binary approach imposes a single narrative of identity that does not reflect the nuanced and diverse journey of many lesbian women. This also demonstrates how adjudication of asylum cases forces a linear narrative of coming out that is based on a specific timeline, presentation, and identity.<sup>128</sup> Such a trajectory reflects white, Western norms and overlooks the reasons individuals may have to go through their own unique process.<sup>129</sup> As such, the asylum process’s demand for credibility becomes a mechanism for exclusion based on stereotypes and standards for compliance.

Lesbian women of color face compounded erasure in a system that prioritizes Western, white, and masculine-coded narratives of queerness.<sup>130</sup> Their claims are often undervalued or dismissed, not because the law expressly excludes them, but because adjudicators fail to recognize how intersecting forms of oppression shape their identity presentation and persecution.<sup>131</sup> These claimants are less likely to have the types of evidence the system deems persuasive, more likely to be misunderstood by adjudicators, and more likely to have their trauma filtered through lenses that neither reflect their realities nor respect their complexity.<sup>132</sup>

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<sup>120</sup> Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 48–49, 79 (2008).

<sup>121</sup> *Id.*

<sup>122</sup> Morgan, *supra* note 2, at 144.

<sup>123</sup> *Id.* at 147.

<sup>124</sup> *Id.* at 154–155.

<sup>125</sup> *Id.* at 144, 150.

<sup>126</sup> *Mockeviciene v. U.S. Atty. Gen.*, 237 F. App’x 569, 572 (11th Cir. 2007).

<sup>127</sup> *Id.* at 573–74; *see also Halmenschlager v. Holder*, 331 F. App’x 612, 617 (10th Cir. 2009) (finding that immigration judge believed the applicant’s identity as homosexual because he was “very feminine”).

<sup>128</sup> Akbari & Vogler, *supra* note 1, at 1070.

<sup>129</sup> *Id.*

<sup>130</sup> Cory, *supra* note 39, at 590.

<sup>131</sup> Akbari & Vogler, *supra* note 1, at 1070.

<sup>132</sup> *Id.*

Within the asylum framework, identity is viewed as fixed and immutable rather than fluid and socially constructed. The “freeze frame” model of asylum law exacerbates these challenges for Queer women of color, especially those who come from patriarchal societies, where male dominance can lead to extreme forms of violence, including corrective rape, forced marriage, and social ostracization. This dynamic played out in the case of Malu, a real Congolese lesbian woman who was married to a man upon entering the United States but later came out as a lesbian.<sup>133</sup> Despite providing evidence of persecution and intimate partner violence, her claim was rejected.<sup>134</sup> Until the asylum system acknowledges intersectional queerness as both legitimate and legally cognizable, lesbian women of color, like Fatima and Malu, will continue to face heightened scrutiny and systemic exclusion, even when the law purports to protect them.

#### IV. MELTING THE FREEZE FRAME: MOVING TOWARDS FLUIDITY TO CENTER PROTECTION

Reforming the asylum system to protect lesbian women, particularly lesbian women of color, requires confronting the rigidity of current evidentiary frameworks and replacing them with structures that reflect the lived realities of queerness, trauma, and cultural difference. This Part argues that meaningfully reforming the asylum process to reduce disparities starts by ensuring that adjudicators are properly trained and held accountable when they rely on harmful stereotypes, and encouraging practitioners to embrace nuance in how they understand and present their clients’ narratives. Together, these reforms would begin to melt the “freeze frame” imposed by current law and allow space for fluid identities and personal truths to be heard and believed.

##### A. Practical Reforms to the Asylum Process

To build a more equitable asylum system, legal reforms must directly address the structural barriers that lesbian women applicants face. By centering the most vulnerable populations, like lesbian women of color, the immigration system can address harmful systemic barriers that create unnecessary hurdles for all applicants. Addressing the disparities in the asylum process will benefit applicants, professionalize the adjudication system, and make the process more effective.<sup>135</sup>

First and foremost, Congress should move to explicitly include sexual orientation and gender identity as a protected group within the statutory definition of “refugee,” as opposed to the ambiguous reliance on “membership in a particular social group.” This would reinforce the legitimacy of LGBTQI+ claims. With a more specific statutory definition, courts can begin establishing frameworks for asylum cases specific to the LGBTQI+ community, providing applicants, practitioners, and adjudicators with clarity.

Second, the one-year filing deadline should be repealed in its entirety or extended to a more reasonable timeframe that allows applicants to adjust to the United States, gather necessary documents, and account for any other factors that might delay their application without having to provide a “qualified excuse.”<sup>136</sup> Meeting the deadline is also complicated by the reality that many asylum seekers arrive with limited financial resources, English

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<sup>133</sup> Malu v. U.S. Att’y Gen., 764 F.3d 1282, 1285 (11th Cir. 2014).

<sup>134</sup> *Id.* at 1284.

<sup>135</sup> Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 296, 382.

<sup>136</sup> Pistone, *supra* note 9, at 30–31.

language skills, and little or no knowledge of the American legal system.<sup>137</sup> Two categories of exceptions exist for applicants who apply after the one year period: (i) changed circumstances, which include but are not limited to, changes in the applicant’s country of nationality, and changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum; and (ii) extraordinary exceptions, including illness or disability, unaccompanied minors, ineffective assistance of counsel, maintaining lawful non-immigrant status, death or serious illness of a legal representative or family member, or other circumstances.<sup>138</sup> Even if an applicant can demonstrate they present an acceptable exception, they must also demonstrate that they are filing within a “reasonable period given those circumstances.”<sup>139</sup>

The asylum application process can be traumatizing for anyone, as it requires applicants to document some of the worst experiences of their lives.<sup>140</sup> For LGBTQI+ individuals, it can also mean addressing “shame, deeply rooted social taboos, or fear for their physical safety” in addition to the reality that the asylum seeker may not be “out” to their family members or people in their country of origin, who could compile corroborating evidence.<sup>141</sup> Coming out is a process that often takes time because it is not a specific moment or changed circumstance; it is the development of one’s identity.<sup>142</sup> Achieving the unjustified filing deadline imposes barriers for everyone escaping persecution, and the United States should repeal the requirement in its entirety or provide specific language within the Officer Training Manual that addresses LGBTQI+ cases.<sup>143</sup>

Third, credibility assessments under the REAL ID Act must be revised to prohibit discretionary disbelief based on subjective impressions, requiring adjudicators to articulate clear, culturally competent reasons when discrediting a claimant’s testimony. The current use of the law allows for unchecked discretion based on arbitrary factors such as demeanor and candor.<sup>144</sup> Without clear restrictions, minor, immaterial discrepancies can result in adjudicators making adverse credibility determinations underwritten by prejudice and bias.

### *B. Rebuilding the Adjudicatory System: Training and Accountability*

More immediate reforms that do not require legislative action can be implemented through adjudicator training and practitioner competency skills. Inconsistent asylum outcomes frequently stem from a lack of adequate training and oversight.<sup>145</sup> Immigration judges receive far less ongoing training than asylum officers, contributing to significant disparities in decision making.<sup>146</sup> Training that emphasizes trauma-informed interviewing, cross-cultural competence, and an understanding of intersectionality helps dismantle the implicit biases that currently undermine fairness. Without adequate training, judges

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<sup>137</sup> Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y.C.L. Rev. 233, 262 (2005).

<sup>138</sup> 8 C.F.R. § 208.4 (2026).

<sup>139</sup> *Id.*

<sup>140</sup> Neilson & Morris, *supra* note 137, at 264–65.

<sup>141</sup> *Id.* at 264.

<sup>142</sup> Interview with Connor Leighton-Cory, *supra* note 6; *see also* Akbari & Vogler, *supra* note 1, at 1070.

<sup>143</sup> Neilson & Morris, *supra* note 137, at 257, 269 nn. 212, 280, 282.

<sup>144</sup> Cory, *supra* note 39, at 597.

<sup>145</sup> Ramji-Nogales, Schoenholtz & Schrag, *supra* note 5, at 325.

<sup>146</sup> *Id.* at 311, 381–82.

presiding over LGBTQI+ cases are often learning in real time about the Queer identity and how the law has criminalized their existence.<sup>147</sup> This knowledge and understanding is essential to ensuring the compassion and dignity that the asylum process deserves.

Current adjudication frequently reduces Queer identity to a checklist of externally visible behaviors.<sup>148</sup> Adjudicators often disbelieve lesbian asylum seekers because they do not conform to Western, masculinized stereotypes of queerness.<sup>149</sup> If immigration judges and asylum officers are not hired with the requirement that they demonstrate cultural competency, then adequate training must be provided to ensure that all parties are treated with dignity and cases can be determined in a consistent manner. Adjudicators must be trained to recognize the diversity of lesbian identity and reject reliance on fixed visual cues or performative expectations. Specifically, adjudicators should strive for Queer competency, meaning “respecting Queer identities and possessing a basic knowledge of terms and other culturally significant references to enable meaningful interaction with Queer people.”<sup>150</sup> Instead of rewarding stereotype conformity, the system must shift toward understanding the socio-cultural contexts that inform how queerness is experienced and expressed. Doing so would prevent the erasure of those whose identities are less visible but no less valid.

### *C. Embracing Nuance: The Practitioner’s Role in Centering Queer Identity*

Meaningful reform must also begin with the legal advocates themselves. Representing an LGBTQI+ asylum seeker is not simply about legal analysis—it demands an intentional, relational, and deeply empathetic approach.<sup>151</sup> Asylum representation intensifies the typical attorney-client dynamic; it requires disclosure of deeply personal, often painful experiences, and the stakes are as grave as life or death.<sup>152</sup> In Queer asylum cases, practitioners must go beyond legal checklists and work to understand their clients’ identities on their clients’ own terms, which often requires asking for clarification or repetition.<sup>153</sup> Just as adjudicators need to strive for Queer competency, practitioners should strive for Queer excellence as advocates.<sup>154</sup>

A client-centered approach involves building trust, setting clear expectations, and embracing fluidity in how identity is disclosed and understood. Attorneys must listen actively, remain open to non-linear narratives, and resist the urge to “package” a claim into a culturally legible but reductive story.<sup>155</sup> The goal is not to translate queerness into terms palatable to adjudicators, but rather to present the truth in all its complexity and advocate fiercely for its recognition.<sup>156</sup>

Together, these reforms offer a path forward for a system that too often fails those whose identities are not easily categorized. Centering lived experience, structural

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<sup>147</sup> See Transcript of Oral Argument at 90–91, *United States v. Skrametti*, 605 U.S. 495 (2025) (No. 23-268).

<sup>148</sup> Marouf, *supra* note 120, at 79.

<sup>149</sup> Akbari & Vogler, *supra* note 1, at 1070.

<sup>150</sup> Cory, *supra* note 39, at 597.

<sup>151</sup> *Id.* at 595.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 596.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 600.

<sup>156</sup> *Id.*

competency, and practitioner humility can help transform asylum law from a gatekeeping institution into one that genuinely protects people seeking refuge.

#### CONCLUSION

Sexuality is fluid. The current asylum system relies far too heavily on rigid stereotypes and fixed ideas about identity, creating significant barriers for lesbian women of color seeking asylum due to their intersectional identity. Reform can begin to address these inequities by eliminating the freeze-frame mentality, encouraging a more nuanced and dynamic understanding of sexual and gender identities, and prioritizing an applicant's lived experiences rather than stereotypical markers. This shift would allow for a more inclusive, fair, and comprehensive approach to asylum claims, one that recognizes the evolving nature of identity and considers the intersectional realities of applicants. By doing so, asylum law can move towards a more just and empathetic system that truly reflects the diverse experiences of those seeking refuge.