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## The “Particular Social Group” Requirement: How the Asylum Process Is Consistently Failing LGB Applicants and How an Evidentiary Standard of “Self-Attestation” Can Remedy These Failures

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**THE “PARTICULAR SOCIAL GROUP” REQUIREMENT: HOW THE  
ASYLUM PROCESS IS CONSISTENTLY FAILING LGB APPLICANTS AND  
HOW AN EVIDENTIARY STANDARD OF “SELF-ATTESTATION” CAN  
REMEDY THESE FAILURES**

Reagan Greenberg\*

INTRODUCTION

Every year, tens of thousands of individuals flee their home nation for the United States to seek asylum.<sup>1</sup> In 2015 alone, 26,124 individuals were granted asylum to the United States.<sup>2</sup> Asylum is requested and, for the lucky, granted for a variety of reasons.<sup>3</sup> People seek asylum in the United States on the basis of their race, religion, nationality, relationship to certain social groups, political opinion, and more.<sup>4</sup> This Comment focuses on those individuals who seek asylum because they have faced, or will face, persecution in their home country because of their sexual orientation.<sup>5</sup>

Lesbian, gay, and bisexual (LGB) asylum seekers face unique challenges throughout the process of seeking asylum.<sup>6</sup> These

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\* J.D. Candidate, 2018, University of Maryland Francis King Carey School of Law. I would like to thank the editors and staff of the *University of Maryland Law Journal of Race, Religion, Gender, and Class* for their insights. I would also like to thank my mother, Marilyn Lavan, and father, Bennett Greenberg, for their continued support and enduring love. Finally, I would like to dedicate this Comment to those individuals suffering and struggling for the opportunity to establish a home and create a life in this country – I see you, I hear you, I stand with you.

<sup>1</sup> Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL’Y INST. (Oct. 28, 2015),

<http://www.migrationpolicy.org/article/refugees-and-asylees-united-states>.

<sup>2</sup> *Table 16. Individuals Granted Asylum Affirmatively or Defensively: Fiscal Years 1990 to 2015*, U.S. DEP’T OF HOMELAND SECURITY (Dec. 15, 2016),

<https://www.dhs.gov/immigration-statistics/yearbook/2015/table16>.

<sup>3</sup> Zong & Batalova, *supra* note 1.

<sup>4</sup> *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS.,

<https://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last updated Aug. 6, 2015).

<sup>5</sup> Sexuality is fluid and encompasses an array of different identities. For the purposes of this Comment, I will be addressing the challenges faced by lesbian, gay, and bisexual individuals. This Comment does not aim to conflate sexual orientation with gender identity. The transgender community faces a number of challenges when seeking asylum that are distinct from sexual orientation and for that reason, I do not address the particular barriers faced by transgender asylum seekers.

<sup>6</sup> *See infra* Part II.

challenges are pervasive within the field of immigration.<sup>7</sup> Sexual orientation is not a characteristic that is readily observable, and because of the pervasive stigma experienced by LGB individuals in many countries, these asylum applicants do not have access to the evidence required to adequately prove their claims.<sup>8</sup> This Comment argues that, in the absence of reasonably available evidence, an evidentiary standard of “self-attestation” for sexual orientation is sufficient for proving that an LGB asylum seeker is a member of a protected social group.<sup>9</sup>

Part I gives the reader an overview of the asylum process in place today and what requirements an asylum seeker must meet in order to be granted asylum.<sup>10</sup> Part II discusses a recent Seventh Circuit decision that illustrates the prevalence of the difficulties faced by LGB asylum seekers when having to prove the legitimacy of their sexual orientation.<sup>11</sup> Part III begins with an overview of how LGB individuals have been treated in asylum cases throughout American history.<sup>12</sup> It then discusses the administrative and social barriers an LGB asylum seeker faces when having to outwardly “prove” their sexuality, an internal characteristic.<sup>13</sup> Finally, Part IV sets forth the standard of self-attestation and how it would apply to the asylum process.<sup>14</sup> Part IV concludes with acknowledging and addressing the potential concerns of an evidentiary standard of self-attestation.<sup>15</sup>

## I. OVERVIEW OF THE ASYLUM PROCESS

The asylum process incorporates a number of prerequisites that must be completed before an asylum seeker can be granted asylum in the United States.<sup>16</sup> Among this process includes a set of procedural

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part III.B.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part III.A.

<sup>13</sup> See *infra* Part III.B.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See *infra* Part IV.C.

<sup>16</sup> Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL’Y INST. (Oct. 28, 2015), <http://www.migrationpolicy.org/article/refugees-and-asylees-united-states#Admissions Process>.

steps and substantive requirements.<sup>17</sup> Among these substantive requirements include the need for the asylum seeker to prove that they are a member of a particular social group or protected class,<sup>18</sup> and that the individual has a legitimate fear of persecution because of their membership to that group.<sup>19</sup>

### A. Substantive Requirements

During the asylum process, an applicant must prove that they are eligible for, and should be granted asylum, based on a number of substantive requirements.<sup>20</sup> The requirements relevant to this analysis involve a two-step process, which asks: (1) the applicant's life or freedom would be threatened "on account of race, religion, nationality, membership in a particular social group, or political opinion,"<sup>21</sup> and (2) the applicant has a "credible fear of persecution"<sup>22</sup> because of their<sup>23</sup> membership in one of the aforementioned categories.

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<sup>17</sup> See *infra* Part I.A.

<sup>18</sup> See *infra* Part I.A.1.

<sup>19</sup> See *infra* Part I.A.2.

<sup>20</sup> See *infra* notes 21–22 and accompanying text. While there are a number procedural requirements in the asylum process, none of them are relevant to this Comment. The requirements involve such steps as: filing paperwork, scheduling an interview, and submitting fingerprint and background checks. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> (last updated Jan. 17, 2017). While these procedural steps can act as barriers for many asylum seekers, this Comment deals with the particular barriers faced by LGB asylum seekers when *proving* they are eligible for asylum rather than the procedural steps they must go through.

<sup>21</sup> 8 U.S.C. § 1158(a)(2)(A) (2012).

<sup>22</sup> *Id.* § 1225(a)(2) (2010).

<sup>23</sup> Throughout this Comment, I will use "they/their" instead of "he or she/him or her." "They/their" are acceptable gender-neutral replacements. In 2015, "they" was named Word of the Year by the American Dialect Society. *2015 Word of the Year is Singular "They"*, AM. DIALECT SOC'Y (Jan. 8, 2016), <http://www.americandialect.org/2015-word-of-the-year-is-singular-they>. During the 2015 Word of the Year proceedings, the American Dialect Society noted that not only is "they" a well-established pronoun for someone who identifies as non-binary (identifying neither as a man nor a woman), but that scholars have increasingly accepted the word "they" as a gender-neutral replacement for "he or she." *Id.*

## 1. “Member of a Protected Class”

According to the United States Code, an applicant will be judged by the trier of fact, generally an immigration officer or judge, based on their testimony and evidence presented during the application process.<sup>24</sup> At first blush, the burden does not appear high – indeed, the applicant carries the burden of proving that they belong within one of the five aforementioned categories (race, religion, nationality, membership in a particular social group, or political opinion).<sup>25</sup> The statute provides that “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.”<sup>26</sup>

However, the trier of fact’s determination that the asylum seeker’s assertions are credible is of particular importance.<sup>27</sup> The trier of fact can rely on testimony, as well as “other evidence of record” when making this credibility determination.<sup>28</sup> The trier of fact may require more evidence as to the applicant’s membership if they deem the applicant to be lacking credibility.<sup>29</sup>

When an applicant claims that they are a member of a “particular social group,” further inquiry must be made into the claim, requiring the Board of Immigration Appeals (BIA) to identify the characteristics that form the “particular social group.”<sup>30</sup> In order to be a particular social group, the “group must not be too amorphous[] to

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<sup>24</sup> *Id.* § 1158(b)(1)(B)(iii).

<sup>25</sup> *Id.* § 1158(b)(1)(B)(i).

<sup>26</sup> *Id.* § 1158(b)(1)(B)(ii).

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 1158(b)(1)(B)(iii). Additional evidence could include third party testimony as to the applicant’s membership, any documentation that the applicant belongs to an organization linked to their claimed membership group (non-profit organization member, church/synagogue/mosque member, medical information, etc. *See Preparing the Application: Corroborating Client-Specific Documents*, IMMIGR. EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/preparing-the-application-corroborating-client-specific-documents> (last visited Apr. 17, 2017) [hereinafter *Preparing the Application*].

<sup>30</sup> NAT’L IMMIGR. JUST. CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF M-E-V-G- AND MATTER OF W-G-R 2 (2016), <https://www.immigrantjustice.org/sites/default/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf>.

create a benchmark for determining group membership.”<sup>31</sup> Second, the BIA considers whether society considered the group to be recognizable or distinct because of that trait.<sup>32</sup> This second prong requires that a group and its members have an aspect of social distinction of visibility because of their shared characteristic recognized by others in the community.<sup>33</sup> The BIA has, over time, elaborated on this “visibility” requirement, focusing on the group in question being socially distinct from the rest of the population.<sup>34</sup> The BIA explained that an applicant who is seeking asylum based on membership in a particular social group must establish that the group is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”<sup>35</sup>

As noted above, all of these determinations are based on evidence and testimony proved by the asylum applicant.<sup>36</sup> Not only must an applicant fulfill their burden of proof, but the trier of fact must also *believe* the evidence and testimony submitted.<sup>37</sup> If an applicant is unable to fulfill these requirements and overcome these burdens, they will be denied asylum to the United States.<sup>38</sup>

## 2. “Well-Founded Fear of Persecution”

Once an applicant establishes that they are a part of a particular social group, they must then credibly prove that they have been persecuted in the past or have a fear of future persecution, on the basis of their membership to that particular social group.<sup>39</sup> Again, much of

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> Matter of M-E-V-G-, 26 I&N Dec. 227, 227 (BIA 2014) (questioning whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor); *see also* Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014).

<sup>36</sup> 8 U.S.C. § 1158(b)(1)(B)(iii).

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

<sup>38</sup> *Id.* § 1225(b)(1)(B).

<sup>39</sup> *Id.* § 1158(b)(1)(B).

this element is determined by the evidence and testimony put forth by the asylum applicant.<sup>40</sup>

A well-founded fear of persecution does not require an applicant to “prove that it is more likely than not” that they will be persecuted in their home country.<sup>41</sup> The applicant is only required to prove that (1) their fear is genuine, and (2) that there are objective facts that support a fear of persecution.<sup>42</sup> This means that an applicant’s fear of persecution must be “subjectively genuine”—that the applicant personally could be/will be subject to harm if returned to their home country—and objectively reasonable—that the harm is likely to happen based on the discriminatory climate of the home country.<sup>43</sup> Again, the applicant’s credibility is crucially important. The absence of either of these dual requirements would lead the trier of fact to conclude that the applicant does not have a “well-founded fear of persecution” and therefore a denial of asylum.<sup>44</sup>

Under the subjective part of the analysis, the asylum officer must consider the personality and demeanor of the applicant as a whole to determine if their actions qualify as reasonable when considering their psychological state.<sup>45</sup> Even if fear is exaggerated, it may still be considered well-founded in light of the general disposition of the applicant and the circumstances of their case.<sup>46</sup> The objective part of the analysis requires the asylum officer to consider the conditions within the applicant’s country of origin and whether those conditions, in addition to the claimed status of the applicant, gives rise to a well-founded fear.<sup>47</sup> This fear can be based on personal

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

<sup>41</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (rejecting the Government’s argument that the “more likely than not” standard applied to applications for asylum).

<sup>42</sup> See generally *Demirovski v. INS*, 39 F.3d 177 (7th Cir. 1994) (holding that the petitioner had not established an objectively reasonable fear of persecution).

<sup>43</sup> U.N.H.C.R., HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 11, U.N. Doc. HCR/IP/4/ENG/REV. 3 (Dec. 2011), <http://www.unhcr.org/3d58e13b4.pdf> [hereinafter UNHCR HANDBOOK].

<sup>44</sup> 8 U.S.C. § 1158(b)(1)(B).

<sup>45</sup> UNHCR HANDBOOK, *supra* note 43, at 12.

<sup>46</sup> *Id.* at 11.

<sup>47</sup> *Id.* at 12.

experiences, as well as experiences by individuals belonging to the same protected group as the applicant.<sup>48</sup> The asylum office must consider both the personal experiences of the applicant and the shared experiences of members of the protected group the asylum seeker with which identifies.<sup>49</sup>

## II. *Fuller v. Lynch*: THE ASYLUM PROCESS, AND ITS INADEQUACIES, IN ACTION

While the asylum process has been heavily litigated and refined through judicial review and agency guidance, there are still questions of law and ethics that arise throughout the process.<sup>50</sup> The system's inadequacies were put on full display in *Fuller v. Lynch*,<sup>51</sup> a recent case out of the Seventh Circuit. A Jamaican man, Fuller, filed for asylum on the basis that he was, and will be, persecuted in Jamaica because of his sexual orientation.<sup>52</sup> During the administrative process, Fuller gave testimony that he identifies as bisexual and was attacked, stoned, harassed, and "robbed at gunpoint" because of his sexual orientation.<sup>53</sup> After an incident where he was shot multiple times by an "anti-gay mob," he was kicked out of his home and disowned by his family.<sup>54</sup>

The Immigration Judge (IJ) denied Fuller's asylum application on the basis that his testimony and evidence were not credible – in other words, the IJ did not believe that Fuller was bisexual.<sup>55</sup> The IJ likely determined that Fuller's self-identity as bisexual was not credible because of his past relationships—indeed, he had been married to a woman once and had children with two other women.<sup>56</sup> The Board of Immigration Appeals (BIA) affirmed the IJ's determination.<sup>57</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See *infra* notes 51–54 and accompanying text.

<sup>51</sup> 833 F.3d 866 (7th Cir. 2016).

<sup>52</sup> *Id.* at 867.

<sup>53</sup> *Id.* at 868.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 869.

<sup>56</sup> *Id.*

<sup>57</sup> *Fuller*, 833 F.3d at 870.



The Seventh Circuit denied Fuller's appeal because 8 U.S.C. § 1252(b)(4)(B) requires an Article III court to yield in its review of an IJ's decision unless "any reasonable adjudicator would be compelled to conclude...that the IJ (or the [BIA]) erred."<sup>58</sup> Given this broad grant of discretion to the IJ and BIA, the Seventh Circuit upheld the IJ's determination that Fuller was not bisexual.<sup>59</sup>

The repercussions of such a decision are clear, and articulated in a powerful dissent by Judge Posner.<sup>60</sup> Posner criticizes the IJ's determination that the proof offered by Fuller was not sufficient to prove his sexuality:

The weakest part of the immigration judge's opinion is its conclusion that Fuller is not bisexual, a conclusion premised on the fact that he's had sexual relations with women (including a marriage). Apparently the immigration judge does not know the meaning of *bisexual*. The fact that she refused even to believe there is hostility to bisexuals in Jamaica suggests a closed mind and gravely undermines her critical finding that Fuller is not bisexual.<sup>61</sup>

While the Seventh Circuit's holding was dependent upon the level of deference owed to an IJ and the BIA, *Fuller v. Lynch* illustrates the dire need for change within the immigration and asylum process. The IJ did not accept Fuller's evidence of his bisexuality, and, as a result, he did not qualify as a member of a "particular social group" – the first substantive requirement in the asylum process.<sup>62</sup> He was not able to overcome the evidentiary burden of proving his sexuality.<sup>63</sup> And because this determination falls under the broad grant of discretion to the IJ, Article III courts are restricted from reviewing the decisions.<sup>64</sup> Because of this deference owed to an IJ, there is little check on their authority to grant or deny applications of asylum, even when their reasoning rests on inappropriate grounds (i.e., a judge's

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<sup>58</sup> *Id.* (quoting 8 U.S.C. § 1252(b)(4)(B)).

<sup>59</sup> *Id.* at 871.

<sup>60</sup> *Id.* at 872 (Posner, J., dissenting).

<sup>61</sup> *Id.* at 874 (Posner, J., dissenting).

<sup>62</sup> *Id.* at 869.

<sup>63</sup> *Fuller*, 833 F.3d at 869.

<sup>64</sup> *Id.* at 870.

refusal to believe that an applicant is bisexual solely because they are married to someone of the opposite sex).<sup>65</sup>

LGB asylum seekers who are unable to offer satisfactory proof of their sexuality fall into this glaring hole in the asylum process that grants IJs broad discretion to set an evidentiary standard and then offers little means of review for the applicant who is denied.<sup>66</sup> These applicants are denied the safety and protection that they are so desperately seeking just because the evidentiary standard for proving their sexual orientation is too high a hurdle overcome.<sup>67</sup>

### III. LGB ASYLUM SEEKERS

When a refugee comes to the United States seeking asylum, they have to overcome all of the barriers articulated above.<sup>68</sup> However, there are more than just these legally and administratively imposed hoops that certain asylum seekers have to clear.<sup>69</sup> The LGB community faces a number of unseen barriers when seeking asylum.<sup>70</sup> Most individuals who identify as lesbian, gay, or bisexual carry the heavy burden of stigma and fear associated with their identity.<sup>71</sup> In its history, the United States has not been understanding and welcoming to the LGB community, and this history of refusing to acknowledge the specific needs and protections of the LGB community continues to be pervasive throughout the modern immigration and asylum process.<sup>72</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *See* 8 U.S.C. § 1158(b)(1)(B).

<sup>67</sup> *See Fuller*, 833 F.3d at 870.

<sup>68</sup> *See supra* Part I.

<sup>69</sup> *See infra* Part II.A.–B.

<sup>70</sup> *See infra* Part II.A.–B.

<sup>71</sup> Sunnive Brydum, *LGBT Americans Face Unfair Laws and Stigma*, ADVOCATE (Sept. 12, 2012), <http://www.advocate.com/politics/2012/09/12/lgbt-americans-face-unfair-laws-and-stigma>. This article cites to a report conducted by the Human Rights Campaign, along with several other organizations, that describes the general and historic trend of discrimination faced by LGB individuals. *Id.*

<sup>72</sup> *See infra* Part IV.A.

A. *The Historical Treatment of LGB Individuals Created a Number of Barriers for LGB Asylum Seekers*

Seeking asylum based on one's sexuality has been, and remains, an extremely difficult process. As early as 1917, there has been federal legislation that has prevented any individual who was found to be "mentally defective" or "inferior" from being granted asylum in the United States.<sup>73</sup> While the 1917 legislation did not explicitly deem homosexuals as being mentally defective or inferior to their heterosexual counterparts, homosexuality was a well-established mental disorder until removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973.<sup>74</sup> This categorization of homosexuality as a mental disability, and Congress's desire to prohibit the admission of "mentally defective" individuals from being granted asylum, indicates the intent to exclude homosexuals as well.

This intent was made explicit when Congress passed a 1965 Amendment to the Immigration & Naturalization Act which added "sexual deviation" as a ground to deny prospective immigrants from applying for asylum.<sup>75</sup> It was not until Congress passed the Immigration Act of 1990 that one's sexuality was no longer a legislative bar to being granted asylum to the United States.<sup>76</sup>

The Board of Immigration Appeals has followed a similar trajectory in its prohibition of granting LGB individuals asylum.<sup>77</sup> In the seminal case of *Matter of Toboso-Alfonso*, the BIA affirmed the findings of the Immigration Judge, holding that "homosexuals" qualified as being a part of a "particular social group" as required by 8 U.S.C. § 1158(b)(1)(B).<sup>78</sup> In 1994, then United States Attorney

<sup>73</sup> Immigration Act of 1917, ch. 29, § 3, 39 Stat. 875 (1917),

<http://library.uwb.edu/Static/USimmigration/39%20stat%20874.pdf>.

<sup>74</sup> *The History of Psychiatry and Homosexuality*, LGBT MENTAL HEALTH SYLLABUS, [http://www.aglp.org/gap/1\\_history](http://www.aglp.org/gap/1_history) (last visited Apr. 17, 2017).

<sup>75</sup> Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 919 (1965).

<sup>76</sup> Tracy J. Davis, Comment, *Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States*, 6 HUM. RTS. BRIEF 19 (1999).

<sup>77</sup> See *infra* notes 78–80 and accompanying text. The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws. BOARD OF IMMIGRATION APPEALS, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Mar. 24, 2016).

<sup>78</sup> *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (BIA 1990).

General Janet Reno deemed *Matter of Toboso-Alfonso* to be agency precedent, stating that “an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under refugee laws under the basis of persecution as a *member of a particular social group*...”<sup>79</sup>

This provided an obvious hook for LGB asylum seekers to hang their metaphorical hats on. *Matter of Toboso-Alfonso* and Janet Reno created the clear and binding precedent that members of the LGB community were, for purposes of the asylum process, members of a “particular social group.”<sup>80</sup>

*B. Immutability and Social Visibility: Continuing Complications Faced by LGB Asylum Seekers*

One would imagine that this development closes the door to uncertainty regarding the applicability of the “particular social group” standard to the LGB community. This, however, could not be further from the truth. In 1985, the BIA defined membership to a particular social group as the “persecution [which is] directed toward an individual who is a member of a group of persons all of whom share a *common, immutable characteristic*.”<sup>81</sup> This understanding implies that one’s sexuality “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>82</sup> However, many individuals and academics do not see sexuality as an immutable characteristic.<sup>83</sup> The other side of the coin would argue that even with this interpretation of what qualifies as a “particular social group,” sexuality still would not qualify as such because it is not “immutable.”<sup>84</sup> Rather than being immutable, many

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<sup>79</sup> Memorandum from Attorney General Janet Reno to Mary Maguire Dunne, Acting Chair, BIA (June 16, 1994),

<http://www.qrd.org/qrd/www/world/immigration/reno.html> (emphasis added).

<sup>80</sup> *Id.*

<sup>81</sup> *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (emphasis added).

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, J. SEX RESEARCH 1 (2016).

<sup>84</sup> *See generally id.* (arguing that arguments about sexuality as immutable are unnecessary in light of the Supreme Court’s decisions and unjust in that they are not inclusive of those who consider themselves sexually fluid).

consider sexuality to be caused by a number of factors including cultural and social influences, epigenetics, and neuroendocrine contributions.<sup>85</sup>

Under the standard set forth in *Acosta*, the trier of fact does not take into account external perceptions when considering whether an individual is part of a particular social group.<sup>86</sup> Even assuming that sexuality is immutable, later rulings by the BIA further complicate the requirement of qualifying as a member of a particular social group.<sup>87</sup> In 2006, the BIA added an additional (or maybe an alternative) view of this requirement.<sup>88</sup> In *In re C-A-*, the BIA continued the implementation of the *Acosta* standard for determining membership of a particular social group, but continued on to articulate a “social visibility” aspect of the assessment.<sup>89</sup> Under the “social visibility” prong, an individual must show that the members of the allegedly particular social group are visible to the public.<sup>90</sup>

In clarifying what “social visibility” entails, the BIA noted that it does not mean literal visibility, but “social distinction.”<sup>91</sup> The BIA explained that an applicant who is seeking asylum based on membership to a particular social group must establish that the group is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”<sup>92</sup>

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<sup>85</sup> See generally *id.* (arguing that arguing that sexuality is immutable is “unscientific”).

<sup>86</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 (2008).

<sup>87</sup> See *infra* notes 88–90 and accompanying text.

<sup>88</sup> *In re C-A-*, 23 I&N Dec. 951, 951 (BIA 2006).

<sup>89</sup> *Id.* at 959.

<sup>90</sup> *Id.*

<sup>91</sup> Matter of M-E-V-G-, 26 I&N Dec. 227, 236 (BIA 2014) (stating whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor); see also Matter of W-G-R-, 26 I&N Dec. 208, 208 (BIA 2014).

<sup>92</sup> Matter of M-E-V-G-, 26 I&N Dec. at 227.

### 1. The Invisibility of Sexual Orientation

While immutability looks introspectively at the individual to determine if the characteristic at issue is something that is shared by a group, social visibility looks externally at society to determine if the members of the group are considered to be identifiable by that characteristic.<sup>93</sup> Not only does this “social visibility” requirement break from precedent,<sup>94</sup> but its implementation has disastrous consequences for LGB asylum seekers.

The innate invisibility of one’s sexuality, and the lack of physical characteristics associated with such a trait, further compounds the difficulty of providing evidence of “social visibility.”<sup>95</sup> “Unlike some characteristics or traits, sexual orientation is not externally visible, and sexual minorities often feel compelled to hide their orientation for various reasons.”<sup>96</sup> Therefore, the requirement that an asylum applicant, and the alleged particular social group, must be “socially visible” essentially forces the applicant to be publicly “out” about their membership to that group.<sup>97</sup>

The social visibility requirement is subjective not only to the “out-ness” of the asylum seeker, but also to the social interactions and emotional experiences had by individuals within a society, and society in general, the “perceiver.”<sup>98</sup> The perceiver may use their preconceived notions about someone’s gender, ethnicity, age, occupation, etc. to come to a certain conclusion about them.<sup>99</sup> The implications that arise from these assumptions creates layers of subjectivity, not only within individuals but within society as a whole. Because of this “an individual may be perceived as belonging to a particular social group in one situation but not in another.”<sup>100</sup>

These requirements do not just create difficulties for LGB asylum seekers because of their subjectivity, but also because of the

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<sup>93</sup> Marouf, *supra* note 86, at 67–68.

<sup>94</sup> *Id.* at 68.

<sup>95</sup> *Id.* at 79.

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

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 72.

<sup>99</sup> Marouf, *supra* note 86, at 72.

<sup>100</sup> *Id.* at 73.

difficulty in producing credible evidence of such visibility. The BIA can and has relied on evidence such as public opinion polls regarding attitudes towards a certain group of people.<sup>101</sup> These public opinion polls are unreliable because their outcome often depends on what questions are being asked and how the inquiries are being framed.<sup>102</sup> The constantly changing and subjective nature of societal feelings and trends towards a certain group of people with shared characteristics creates inconsistent and unreliable outcomes regarding what is “socially visible.”<sup>103</sup>

## 2. The Resulting Repercussions to LGB Applicants

Individuals who are seeking asylum on the basis of their sexuality are doing so because they have a “fear of persecution” in their home country because of their sexual orientation.<sup>104</sup> Because of this fear, people who are members of the LGB community are likely not “out” or vocal about their sexuality.<sup>105</sup> This lack of external representation can lead to that specific part of society (the country from which the asylum seeker is fleeing) to not accept or identify LGB individuals as being part of a particular social group.<sup>106</sup> The argument proceeds as follows: an applicant must be socially visible in order for them to meet the asylum requirements, but being “out” subjects these individuals to possible harm because of their sexuality—in other

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<sup>101</sup> See *In re A-M-E- & J-G-U-*, 24 I&N Dec. 69, 75 (BIA 2007) (citing BUREAU OF DEMOCRACY, HUM. RTS. & LABOR, U.S. DEP’T OF STATE, GUATEMALA-PROFILE OF ASYLUM CLAIMS & COUNTRY CONDITIONS 4 (June 1997)); see also Marouf, *supra* note 86, at 76.

<sup>102</sup> Marouf, *supra* note 86, at 76 (quoting *In re A-M-E-*, 24 I&N Dec. at 74 (emphasis added)) (“This is exactly what happened in *A-M-E-*, where the BIA limited its analysis to whether ‘wealthy Guatemalans would be recognized as a group that is at greater risk of crime on general or of extortion or robbery in particular.’ Instead of simply asking whether ‘wealthy Guatemalans would be recognized as a group,’ the BIA folded the feared persecution into the social group inquiry.”).

<sup>103</sup> See *id.*

<sup>104</sup> HOME OFFICE, ASYLUM POLICY INSTRUCTION: SEXUAL ORIENTATION IN ASYLUM CLAIMS 5 (Aug. 3, 2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf).

<sup>105</sup> Marouf, *supra* note 86, at 79 (quoting Bill Fairbairn, *Gay Rights Are Human Rights: Gay Asylum Seekers in Canada*, in *PASSING LINES* 237, 243–44 (Brad Epps et al. eds., 2005)).

<sup>106</sup> *Id.* at 71–72.

words, if they are visible, they subject themselves to danger, if they are not visible, society does not recognize as them as being part of a particular social group. It defies logic to enforce such a requirement that is so inconsistent with reality.

The application of these standards results in, what Angela DeVold terms, “refugee roulette.”<sup>107</sup> “This analogy plays upon the idea that an asylum applicant may never know just how the public morals of society and the decision-maker will affect the outcome of the decision, and ultimately, his or her life.”<sup>108</sup> The voices and lives of LGB asylum seekers are stunted by a game that should be objective, but which is constantly influenced by the subjective notions held by the majority population.<sup>109</sup>

Under these conditions, the chance for an LGB asylum seeker to prevail on their asylum claim is dismal at best. LGB individuals must often hide their sexuality in order to remain safe in their country.<sup>110</sup> Any sort of external indication of one’s sexuality would be the result of societal stereotypes—gay men being seen as more feminine and lesbians being seen as more masculine.<sup>111</sup> Not only does this leave out the obvious group of gay men and women who do not conform to these stereotypes, but it also completely disregards the existence of bisexual asylum seekers.<sup>112</sup> “Not all sexual minorities conform to cognizable stereotypes; therefore, not all sexual minorities are socially visible.”<sup>113</sup>

This begs the question: under the current system, how can an applicant prove they are a member of a particular social group after, more likely than not, hiding their identity for their own safety?

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<sup>107</sup> Angela DeVold, Note, *Refugee Roulette: Wagering on Morality, Sexuality, and Normalcy in U.S. Asylum Law*, 92 NEB. L. REV. 627, 628–29 (2014).

<sup>108</sup> *Id.* at 629 n. 9.

<sup>109</sup> *Id.* at 629.

<sup>110</sup> *Id.* at 642.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> DeVold, *supra* note 107, at 642.



## IV. A STANDARD OF SELF-ATTESTATION

Self-attestation is the process in which an individual affirms, as genuine and correct, something that they are saying or claiming.<sup>114</sup> When an LGB asylum seeker self-attests to their sexuality, they merely make the claim that they are a member of that community and that testimony would be deemed sufficient for satisfying the “particular social group” requirement. The applicant’s testimony would still be subject to a valid credibility determination. However, that determination may not rest on a lack of evidence.

A. *Why Is Self-Attestation Necessary?*

The concept of self-attestation finds explicit reference in statutory text. The United States Code states that “[t]he testimony of an applicant may be sufficient to sustain the applicant’s burden without corroboration.”<sup>115</sup> The inadequacies arise in the application of this statute and a decision maker’s ability to properly, and without bias, apply it.<sup>116</sup>

## 1. Continuous Failure to Believe an Asylum Applicant’s Claims

While *Fuller v. Lynch* was the most recent portrayal of the evidence offered by an asylum seeker being deemed inadequate, it is not the only one.<sup>117</sup> These situations arise not only among LGB asylum seekers, but also among individuals seeking asylum because of their religion<sup>118</sup>, political beliefs<sup>119</sup>, affluence or socioeconomic status<sup>120</sup>, and other group affiliations. The occurrence of an

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<sup>114</sup> *Attestation*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/attestation> (last visited Apr. 17, 2017).

<sup>115</sup> 8 U.S.C. § 1158(b)(1)(B)(ii) (“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.”).

<sup>116</sup> See *infra* Part III.A.2.

<sup>117</sup> 833 F.3d at 869. See *supra* notes 118–123 and accompanying text.

<sup>118</sup> *Supangat v. Holder*, 735 F.3d 792, 796 (8th Cir. 2013).

<sup>119</sup> *In re R-A-*, 22 I&N Dec. 906, 927 (BIA 1999, A.G. 2001) (vacated and remanded by the Attorney General for reconsideration), remanded by the Attorney General to the Board, 23 I&N Dec. 694 (A.G. 2005) (The victim of domestic violence failed to adequately demonstrate that the harm she experienced from her husband was on account of her political beliefs and opinions.).

<sup>120</sup> *In re A-M-E-*, 24 I&N at 73–74.

Immigration Judge or the Board of Immigration Appeals not believing an applicant's claim may occur at different times throughout the asylum process. However, the case law depicting this pattern of disbelief is extensive. An IJ or BIA may determine that an applicant's claim to be part of a protected social group is not true<sup>121</sup>, or they may determine that the experiences of persecution faced by the applicant are not true<sup>122</sup>, or they may determine that the membership to the claimed social group is not the reason for the persecution.<sup>123</sup>

In *Hernandez-Montiel v. INS*, an Immigration Judge and the Board of Immigration Appeals denied an applicant's claim for asylum on the basis that he did not prove that he was a member of a particular social group.<sup>124</sup> Notably, even though the IJ found that the applicant's testimony was credible, they failed to accept his claim to be part of a particular social group, homosexual males who outwardly present feminine characteristics.<sup>125</sup> Similarly, in *Pitcherskaia v. INS*, a Russian applicant sought asylum on the grounds that she was being persecuted for her anti-Communist political beliefs as well as her identity as a "Russian lesbian."<sup>126</sup> The IJ denied Pitcherskaia's asylum application on the grounds that she "had not established that she was eligible for asylum".<sup>127</sup> Even though the IJ did not make a credibility determination, despite having reviewed all of the evidence on the record, the IJ maintained that Pitcherskaia had not met the burden of proving her membership in a particular social group and fear of persecution because of that membership.<sup>128</sup>

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<sup>121</sup> *Fuller*, 833 F.3d at 869.

<sup>122</sup> *Escamilla v. Holder*, 459 Fed. Appx. 776, 788–89 (10th Cir. 2012) (refusing to acknowledge that the past persecution applicant had faced was associated with his HIV status or his being related to a high-ranking and well-known gang member).

<sup>123</sup> *Gonzalez-Posadas v. Att'y Gen. U.S.*, 781 F.3d 677, 686–87 (3rd Cir. 2015) (noting that the evidence of persecution by a gang could have been related to applicant's possession of money and possibility of being a recruit rather than his alleged homosexuality).

<sup>124</sup> 225 F.3d 1084, 1089–90 (9th Cir. 2000). While the Ninth Circuit eventually reversed the holding of the BIA, this case illustrates the continuing practice of IJs and BIAs denying asylum to LGB applicants because of a failure to provide adequate evidence of their membership to the LGB community. *See id.*

<sup>125</sup> *Id.* at 1089.

<sup>126</sup> 118 F.3d 641, 643 (9th Cir. 1997).

<sup>127</sup> *Id.* at 645.

<sup>128</sup> *Id.* at 645.

## 2. Sociological Evidence of Implicit Bias by Decision Makers

One explanation for the extensive collection of case law indicating a trend of disbelief towards the claims of asylum applicants is the inherent bias that many judges and decision makers implicitly employ in their determinations.<sup>129</sup> Implicit biases are “attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it.”<sup>130</sup> While the role of a decision-maker and fact-finder is to maintain a level of neutrality when conducting an investigation or determination, it is difficult to separate the individual from their inherent biases,<sup>131</sup> because they are not readily observable. Professor Fatma Marouf identifies this bias as “aversive prejudice,” characterizing it as applying to “those who are politically liberal and openly endorse non-prejudiced views, but whose unconscious negative feelings and beliefs get expressed in subtle, indirect, and often rationalizable ways.”<sup>132</sup>

These implicit biases create an additional barrier to those who fall victim to their effects.<sup>133</sup> For asylum seekers, not only do they have to battle with the metaphorical red-tape of the immigration process, but they must also overcome any such bias that an immigration official may hold against them.<sup>134</sup> Explicit and implicit bias are readily apparent within the asylum process.<sup>135</sup> Implicit bias

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<sup>129</sup> Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012). While this article focuses on the impact of implicit bias within the courtroom, a parallel can be drawn to the implicit bias of jury and the implicit bias of an immigration officer or IJ. *See id.* Both play an important role in fact-finding and, in the immigration context, “immigration officials act as judge and jury.” RESTORE FAIRNESS AND DUE PROCESS TO OUR IMMIGRATION SYSTEM, AMERICAN IMMIGRATION LAWYERS ASSOCIATION POSITION PAPER, <http://www.aila.org/File/DownloadEmbeddedFile/40555> (last visited Apr. 17, 2017).

<sup>130</sup> *Id.* at 1126.

<sup>131</sup> *Id.* at 1144.

<sup>132</sup> Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 421–22 (2011) (quoting Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 317 (2009)).

<sup>133</sup> *See generally id.* (discussing how the impact of implicit bias drives decision-making by Immigration Judges).

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

<sup>135</sup> *Id.* at 420–21 (quoting a number of recent judicial decisions in which Immigration Judges are chastised for their blatant prejudicial opinions regarding Chinese and Indonesian asylum seekers).

against LGB asylum seekers can be seen in the practice of excluding all homosexuals from being granted asylum on “health-related grounds, until 1990” and the ban on allowing any HIV-positive asylum seekers and immigrants into the United States until 2006 as a similarly “ostensibl[e] public health measure.”<sup>136</sup> As these examples indicate, implicit bias by those officials involved in the asylum process create unique barriers for LGB and other asylum seekers who claim asylum as a member of an at-risk, minority group member.

### 3. Lack of Access to Corroborating Evidence of One’s Sexual Orientation

The implicit bias held by immigration officials is only further compounded by the fact that many LGB asylum applicants lack evidence that corroborates their sexual orientation claim. First and foremost, sexual orientation encompasses someone’s sexual and romantic attraction to another and cannot be readily observed through physical characteristics.<sup>137</sup> While some people may claim that one’s sexuality can be determined by how a person talks, acts, dresses, etc., these types of categorizations are over-simplified stereotypes.<sup>138</sup>

Because sexual orientation is not a readily observable physical characteristic, an applicant must make sure that their asylum application “contains as much corroborating evidence as possible that the applicant is really homosexual.”<sup>139</sup> Applicants may provide corroborating evidence in a number of ways.<sup>140</sup> They can—and when able, should—supply: letters from current/ex-partners, family members, and friends attesting to the applicant’s sexual orientation, photographs of the applicant with their partner, any documents that indicate that the applicant belonged to or volunteered with an LGBT organization, and letters from therapists or medical professionals who

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<sup>136</sup> *Id.* at 422.

<sup>137</sup> *Sexual Orientation*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/sexual-orientation> (last visited Apr. 17, 2017).

<sup>138</sup> *Id.*

<sup>139</sup> *Immigration Basics: Challenging Asylum Cases*, IMMIGR. EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-challenging-asylum-cases> (last visited Apr. 17, 2017).

<sup>140</sup> *Preparing the Application*, *supra* note 31.

can attest to the applicant's sexual orientation.<sup>141</sup> Applicants will most likely to be denied when their application is not accompanied by any of these forms of corroborating evidence.<sup>142</sup> And, that is one of the critical shortcomings of the system because it overlooks the circumstances for the application in the first place.<sup>143</sup>

The central idea surrounding a claim for asylum is that the applicant has a "well-founded fear of persecution."<sup>144</sup> Because of this fear, asylum seekers often flee their home countries in a hurried fashion, failing to bring much more than their clothes and some personal belongings, let alone any documentation that could support the validity of the persecution from which they are fleeing.<sup>145</sup> The expectation that asylum seekers should have a substantial amount of evidence that corroborates their fears of persecution cannot withstand the reality of the circumstances under which many people are forced to flee their home country.<sup>146</sup> "The United Nations High Commission on Refugees has also stressed the difficulties applicants have in obtaining evidence, and the need to give them the benefit of the doubt."<sup>147</sup>

In addition to fleeing from persecution, LGB individuals are often thrown out of their own homes and disowned by their families because of their sexual orientation.<sup>148</sup> Aside from the mistreatment and danger that these individuals are subject to, being disowned by their family and thrown out of their home has significant repercussions on

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

<sup>142</sup> *See id.*

<sup>143</sup> 8 U.S.C. § 1252 (2010).

<sup>144</sup> *Id.*

<sup>145</sup> Sheilah C. O'Grady, *Dangerous Side Effects May Occur: The REAL ID Act's Prescription for Changing Standards of Credibility and Corroboration in Asylum Law 6* (unpublished manuscript), <https://www.kentlaw.iit.edu/Documents/Academic%20Programs/Honors%20Scholars/2006/Sheilah-OGrady-paper.pdf> (last visited Apr. 17, 2017) (quoting Robert Gammon, *Opening Old Wounds*, EAST BAY EXPRESS (June 15, 2005), <http://www.eastbayexpress.com/oakland/opening-old-wounds/Content?oid=1078141>).

<sup>146</sup> *See id.*

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

<sup>148</sup> Chatterjee Subhrajit, *Problems Faced by the LGBT People in Mainstream Society: Some Recommendations*, 1 INT'L J. INTERDISC. & MULTIDISCIPLINARY STUD. 317, 318 (2014).

their claim for asylum.<sup>149</sup> Without access to their belongings, asylum seekers struggle with producing adequate documents and evidence that can attest to their sexual orientation and membership to a particular social group.<sup>150</sup> “It often takes considerable time and effort for an applicant to obtain corroborating documents, especially since such documents generally come from his home country, and he may not be in touch with family members or friends there any more.”<sup>151</sup>

Finally, LGB asylum seekers often may not even have evidence of their sexual orientation, regardless of how stable or turbulent their relationship with family and friends may be. Many LGB asylum seekers spend their life in their home country hiding their identity for fear that they will face persecution because of it.<sup>152</sup> However, the fact that these individuals are forced into hiding their sexuality for their own safety means that they are likely to not have the requisite amount of evidence needed to prove their sexual orientation.<sup>153</sup> The catch-22 here is obvious: an LGB person has to hide their identity to remain safe, but by hiding their identity, they are disadvantaged when they seek asylum for their own safety – put another way, the best way for an LGB asylum seeker to prove their sexual orientation is to willingly “out” themselves and be placed in potentially dangerous situations.

#### *B. Statutory and Administrative Precedent for Self-Attestation*

An evidentiary standard of self-attestation when proving one’s sexual orientation for the purposes of seeking asylum is not unheard of. In fact, the very statute from which the asylum process is derived from explicitly allows for an immigration judge to rely solely on the applicant’s testimony when corroborating evidence is unavailable and the applicant’s testimony that is provided is deemed credible.<sup>154</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Preparing the Application*, *supra* note 31.

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

<sup>152</sup> DeVold, *supra* note 107, at 642.

<sup>153</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, 10–11 (2009) (“This is the potential dilemma facing the sexual minority applicant who has spent his or her life attempting to remain closeted, only to be discovered and compelled to flee.” *Id.* at 11.).

<sup>154</sup> 8 U.S.C. § 1158(b)(1)(B)(ii).

A number of immigration cases have interpreted the language of the statute to mean “that an alien’s own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the alien’s alleged fear.”<sup>155</sup> While the burden of proof rests on the asylum applicant to prove both prongs of the asylum process<sup>156</sup> (membership to a particular social group and well-founded fear of persecution), that burden can in fact be satisfied by merely giving credible testimony as to one’s experiences that qualify them for asylum. That is precisely what the BIA did in *In Re B-*.<sup>157</sup> The Immigration Judge found that the applicant’s testimony *could* warrant a grant of asylum if it were accepted as true.<sup>158</sup> However, the IJ refused to accept the applicant’s testimony as true, partially because the applicant failed to provide any such evidence that could corroborate his testimony.<sup>159</sup> The BIA declined to accept the IJ’s findings, determining that the applicant’s testimony satisfied credibility requirements and sufficed to prove his eligibility for asylum, even without corroborating evidence.<sup>160</sup>

While 8 U.S.C. § 1158 and the administrative decisions cited above allow for the application of a self-attestation standard to a certain extent, “it is still at the adjudicator’s discretion whether the

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*The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant’s burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. Id. (emphasis added).*

<sup>155</sup> *In re S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997) (citing *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989)); *see also In Re B-*, 21 I&N Dec. 66, 69 (BIA 1995).

<sup>156</sup> *In Re S-M-J-*, 21 I&N Dec. at 66.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 68.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 70–72.

testimony of [an asylum applicant] alone is sufficient.”<sup>161</sup> It is not entirely clear what will satisfy an immigration judge’s own personal theory of what passes as being substantial evidence and even when that evidence needs to be provided, to qualify an applicant for asylum. Immigration Equality, a non-profit immigration organization, proffers that an “attorney should put themselves in the position of the IJ and ask: “What type of evidence would I want to consider to make a fair determination of this claim?””<sup>162</sup> While this may offer some level of guidance to asylum seekers and immigration attorneys, the level of subjection with this standard is obvious.

Even though statutory and immigration case law indicates a precedent allowing for the standard of self-attestation, the lack of a clearly set standard, and the number of IJ and BIA opinions attempting to clarify the standard, is only muddying this already unclear area of law.

*C. Concern for Fraud and Abuse under New Standard and How to Counter That*

The weightiest concern, and most well-founded argument against a standard of self-attestation, is that it invites individuals who would otherwise be ineligible for asylum to lie on their application.<sup>163</sup> This is a legitimate concern for many people – within government and among the general population alike – although some may be more concerned than others.<sup>164</sup>

Governments and media start with a broad public consensus that...these people lie to get themselves accepted.... For two decades, the media and the political elites of all parties have focused attention on the notion of “genuineness.” This culture of disbelief penetrates the whole system. So “bogus” refugees and

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<sup>161</sup> *Immigration Basics: Real ID Act*, IMMIGR. EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-basics-real-id-act> (last visited Apr. 17, 2017).

<sup>162</sup> *Id.*

<sup>163</sup> *C.f.* Michael Welch & Liza Schuster, *Detention of Asylum Seekers in the UK and USA: Deciphering Noisy and Quiet Constructions*, 7 PUNISHMENT & SOC’Y 397, 400 (2005) (quoting STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF MODS AND ROCKERS*, at xix (2002)).

<sup>164</sup> *See id.*



asylum seekers have not really been driven from their home countries because of persecution...<sup>165</sup>

Paired with this fear that a more “lenient” evidentiary standard would invite asylum seekers to lie on their application is the concern that it would “open the floodgates” to a massive influx of immigrants.<sup>166</sup> A majority of the United States public is concerned that an increase in the number of immigrants accepted into the country will have detrimental effects across the board.<sup>167</sup> Some of these concerns include: the deterioration of working conditions in certain industries, a decrease in U.S. wages, an increase in the poverty rate, a depletion of economic resources on low-income immigrants, and an increase in organized crime.<sup>168</sup>

What these concerns overlook are the safeguards already in place that prevent false testimony from allowing an ineligible applicant from being granted asylum. While self-attestation would be the applicable standard that is read into 8 U.S.C. § 1158, the statute still qualifies that standard when the asylum applicant has access to documentation that supports their claim for asylum.<sup>169</sup> This means that if, and when, an applicant can produce evidence, be it third party testimony, medical records, or some other form of documentation, the applicant can reasonably be required to do so.<sup>170</sup> The standard of self-attestation is applicable when an asylum seeker has no way of proving their claims, beyond personal testimony. These situations arise, specifically for LGB asylum applicants, when they are forced into hiding their sexual orientation for their own safety so they do not have any evidence, or when they have been disowned by friends and family and they do not have *access* to such evidence, even if it does technically exist.<sup>171</sup> What self-attestation does is equalize the asylum application process for LGB asylum seekers, and similarly situated asylum seekers, who are legitimately unable to produce corroborating evidence to support their application claims.

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<sup>165</sup> *Id.*

<sup>166</sup> See *infra* notes 167–168 and accompanying text.

<sup>167</sup> Roy Beck, *The Case Against Immigration*, WASH. POST (1996),

<http://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/againsti.htm>.

<sup>168</sup> *Id.*

<sup>169</sup> 8 U.S.C. § 1158(b)(1)(B).

<sup>170</sup> *Id.*

<sup>171</sup> See *supra* Part V.A.3.

Additionally, self-attestation does not remove the requirement that the applicant's testimony, when that is all that is available, must be credible.<sup>172</sup> An asylum applicant's "own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account" of the claims.<sup>173</sup> The Board of Immigration Appeals goes on to note that "the assessment of the application for asylum should be a *qualitative*, not a quantitative, one."<sup>174</sup> Therefore, even when an immigration judge relies solely on the testimony of the applicant as sufficient evidence to prove their asylum claim, the immigration judge must still make the determination that the applicant's testimony is credible for the asylee to be granted asylum.<sup>175</sup> While there is still a possibility of the IJ not finding the asylee to be credible due to some implicit or explicit bias,<sup>176</sup> self-attestation removes are large opportunity for such bias to be applied. That is, an IJ does not have the opportunity to reject evidence based on bias because self-attestation would be sufficient in proving one's membership to a particular social group.

#### CONCLUSION

LGB asylum seekers face particular difficulties when applying for asylum in the United States.<sup>177</sup> LGB individuals often lack evidence of their sexuality or lack access to evidence that could prove their sexual orientation.<sup>178</sup> These unique circumstances, fleeing their home country in a hurried manner, being disowned by their family, being thrown out of their home, etc., extremely disadvantage LGB asylum seekers when applying for asylum to the United States.<sup>179</sup> To remedy this disadvantage, immigration officers should apply a self-attestation standard when evaluating LGB applicants' claims for asylum.

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<sup>172</sup> 8 U.S.C. § 1158(b)(1)(B).

<sup>173</sup> *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

<sup>174</sup> *Id.* at 446 (emphasis added).

<sup>175</sup> *See id.*

<sup>176</sup> *See supra* Part IV.A.2.

<sup>177</sup> *See supra* Part III.

<sup>178</sup> *See supra* Part III.B.1.

<sup>179</sup> *See supra* Part IV.A.3.

An evidentiary standard of self-attestation allows asylum claims to be evaluated on their merit – on the quality of the claims, rather than on the amount of evidence an individual is able to, or required to, offer.<sup>180</sup> Self-attestation does not only benefit vulnerable asylum seekers, LGB and otherwise, who flee from their home country out of genuine fear for their safety, but also contributes to the ease with which asylum grants or denials may occur.<sup>181</sup> By explicitly employing a standard of self-attestation, asylum law is less likely to be subject to the varying and conflicting opinions regarding what qualifies an applicant for asylum, and gives qualifying asylum applicants the opportunity to have their claims heard and approved.<sup>182</sup>

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<sup>180</sup> *See supra* Part IV.

<sup>181</sup> *See supra* Part IV.B.

<sup>182</sup> *See supra* Part IV.B.