Notes

Neither Here nor There: The Bisexual Struggle for American Asylum

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Recently, it has become increasingly difficult for foreign nationals to successfully gain refuge in the United States from persecution in their home countries. The year 1990 marked the first time that the United States granted asylum to a homosexual claimant on the grounds of membership in a "particular social group." Since then, several LGBTI asylum seekers have been granted the right to build new lives in the United States. Most recently, the country has increasingly included the transgender community in this group of fortunate individuals. Bisexuals, however, despite comprising over fifty percent of the LGBTI population, continue to be a significant subset of the community that consistently faces the most difficulty in attaining asylum in the United States. Asylum seekers who are discriminated against based on visible traits face far fewer roadblocks than those attempting to prove persecution for not being heterosexual.

There are fundamental societal misunderstandings about bisexuality and its presence in everyday life, and the judiciary suffers from a lack of targeted training that could help overcome this deficiency. Accordingly, the judiciary must take steps to prevent these deficiencies from resulting in stereotypes and inaccurate credibility determinations that may ultimately act as a bar to asylum. This Note proposes that all judges making asylum determinations be subject to a training program comparable to that of the LGBTI-specific module required by United States Citizenship and Immigration Services for Refugee, Asylum and International Operations officials. With this training, the personal biases of decisionmakers that lead to skepticism of a claimant's credibility can be reduced, thus avoiding miscategorizations of individuals who stray from perceived gender or sexual binaries.

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INTRODUCTION

In the early 1900s, "non-heterosexuals" were denied entry into the United States because they were seen as "constitutional psychopathic inferiors."[1] In 1979, the United States Surgeon General directed the Public Health Service to cease its practice of excluding homosexual immigrants, but the Assistant Attorney General upheld the ban.[2] At that point, asylum seekers who admitted to having sexual relations with both genders were put in the same category as homosexuals and denied protections.[3] It was not until 1990 that the United States granted asylum to sexual minorities on account of sexual orientation being an immutable trait that made them eligible for protection as "members of a particular social group."[4] From there, the challenge facing bisexual individuals went from an outdated view of being "too gay" to enter the country, to needing to prove they are "gay enough" to be granted asylum.[5] As discussed later, there are a multitude of asylum cases demonstrating the personal biases or a fundamental misunderstanding of sexual orientation present in judges' rulings.

1. Ray Sin, *Does Sexual Fluidity Challenge Sexual Binaries? The Case of Bisexual Immigrants from 1967–2012*, 18 SEXUALITIES 413, 416 (2015).
2. *Id.* at 418.
3. *Id.* at 426.
4. *See* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990); Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985).
5. Sin, *supra* note 1, at 429.

Today, the American LGBTI[6] community has witnessed a progression in its legal protections.[7] However, these anti-discrimination laws apply to those who are already legally in the United States, while LGBTI asylum seekers must satisfy a heavy burden of proof to be granted relief. While it will always be necessary for Asylum Officers and Immigration Judges to vet one's credibility in sexual minority asylum cases, considerable work still remains insofar as bisexual claimants are concerned. Some bisexual asylum seekers feel the need to identify as gay or lesbian during the asylum process, for fear that their application will be denied if they continue to identify as bisexual.[8] Should they subsequently want to get married to a United States citizen of the opposite sex, however, they could potentially face removal for committing fraud on their application.[9] This, too, demonstrates the idea that someone can be told they are not "gay enough" to be granted asylum by the United States.[10]

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6. Sexual minorities are perceived through several lenses and the pertinent vocabulary in these discussions can manifest itself in many different forms. Each use has its own meaning and relevance depending on the larger scope of the discussion. The most common acronym is LGBT (Lesbian, Gay, Bisexual, Transgender), but it has recently been expanded to include individuals who are "questioning" or "queer" (LGBTQ) and "intersex" (LGBTI), among others. For the purposes of this Note, the community is addressed as LGBTI, the acronym now being employed by both the United Nations High Commissioner for Refugees as well as the United States Citizenship and Immigration Services training directorate for Refugee, Asylum and International Operations officers. *See* Maks Levin, *UNHCR Leads in LGBTI Refugee, Asylum Seeker Protection*, UNHCR (Dec. 24, 2015), http://www.unhcr.org/afr/news/latest/2015/12/567bb2869/unhcr-leads-in-lgbti-refugee-asylum-seeker-protection.html; U.S. CITIZENSHIP & IMMIGRATION SERVS., RAIO DIRECTORATE, GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS (2011).

As sexual orientation and gender identity become more understood as fluid rather than binary, it can be difficult for some to keep up with the ever-changing terminology. One of the most inclusive definitions for sexual orientations that would historically be labeled simply as "bisexual" states that "the term b+ [is] an umbrella term for people who have the potential for sexual, emotional, and/or romantic attraction to more than one gender. This includes people who may identify as bisexual, pansexual, fluid, queer, and questioning as well as people who do not but whose emotions, desires and/or actions have the capacity to occur across more than one point along the gender spectrum." Heron Greenesmith, *Happy #BiWeek!*, LGBTQ COMMUNITY LIAISON, CITY OF SOMERVILLE (Sept. 21, 2015, 12:01 AM), http://somervillelgbtq.blogspot.com. However, this Note uses "bisexual" when referring to b+ individuals in order to remain consistent with the term used most throughout the articles and cases referenced herein, as well as to suggest an expansion of the original term's application.

Additionally, when not discussing a specific person whose gender identity is known, this Note refers to individuals with variations of the pronoun "them," rather than as "he" or "she," out of respect for persons of nonbinary, unspecified, and unknown social gender.

7. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Lawrence v. Texas, 539 U.S. 558 (2003).

8. Interview with Okan Sengun, LGBT Coordinator and San Francisco Asylum Office Liaison of Am. Immigration Lawyers Ass'n, N. Cal. Chapter, in San Francisco, Cal. (Sept. 9, 2016).

9. *Id.*

10. Sin, *supra* note 1, at 429.

Current asylum laws cover persecuted bisexual persons in the same manner as they cover other persecuted groups. Unfortunately, the interpretation and administration of these laws can be skewed by the immigration officials' perceptions of claimants. Part I of this Note explains the basics of the United States asylum process and the history of recent immigration reform. Part II introduces the difficulties that sexual minorities face when adjudicating asylum claims and then further delineates issues specific to bisexual asylum seekers. Part III explores how the legal and social views of immutability have changed, and continue to change. Finally, Part IV offers recommendations on how to reconcile existing precedent with changing perspectives. Specifically, this Part suggests both introducing legislation mandating continued training for immigration judges and setting a precedent that updates the legal meaning of "immutability."

I. THE ASYLUM PROCESS

A. OVERVIEW

Pursuant to United States statute and the United Nations High Commissioner for Refugees ("UNHCR") Convention and Protocol Relating to the Status of Refugees, a "refugee" is defined as:

> "[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[11]

The burden of proof falls on the claimant, requiring them to prove that they meet the definition of refugee by way of persecution for one of the aforementioned reasons.[12] The asylum seeker does not enjoy a presumption of credibility for their testimony or evidence.[13] Only if the judge does not make an explicitly adverse finding will the individual have a rebuttable presumption of credibility on appeal.[14]

The United States immigration system provides two routes to refugee status: affirmative applications and defensive applications.[15] The affirmative process begins with an asylum seeker who is physically in the United States submitting the appropriate forms to the United States

11. 8 U.S.C. § 1101(a)(42) (2012); *see also* United Nations High Comm'r for Refugees, United Nations Convention and Protocol Relating to the Status of Refugees 14 (Oct. 4, 1967).

12. 8 U.S.C. § 1158(b)(1)(B) (2012).

13. *Id.*

14. *Id.*

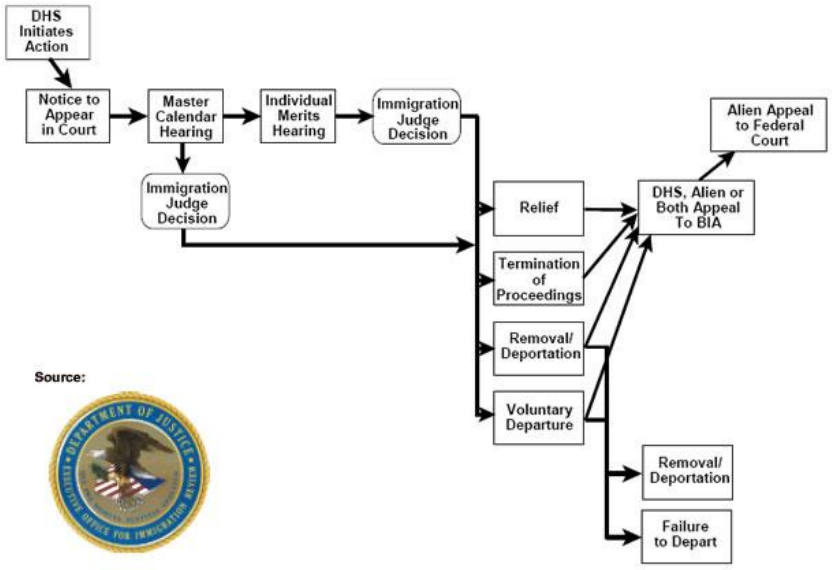
15. *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last visited Mar. 3, 2018).

Citizenship and Immigration Services ("USCIS"), complying with other formalities such as fingerprinting and background checks, and being interviewed by an Asylum Officer.[16] If the Asylum Officer denies an affirmative application, the Department of Homeland Security ("DHS") issues a Notice to Appear, removal proceedings are triggered, and the person's case is referred for a *de novo* review to an Immigration Judge at the Executive Office for Immigration Review ("EOIR").[17] The alternate scenario is the defensive process, which occurs when DHS begins removal proceedings after apprehending an individual who is already present in or attempting to enter the United States without proper legal documentation.[18] An individual who is apprehended in such a manner can petition for asylum as a defense against removal from the United States.[19] At this point, the two processes converge as the asylum seeker attempts to convince the Immigration Judge to grant them permission to remain in the United States.[20]

If the Immigration Judge does not grant asylum, or if the government chooses to contest a favorable decision, the case can be appealed to the Board of Immigration Appeals ("BIA").[21] The BIA typically does a "paper review" of the case, as opposed to hearing courtroom testimony, and makes a determination based on the information transferred from the Immigration Court.[22] From there, BIA decisions may be eligible for review in a federal Court of Appeals.[23] Except in rare cases where the Supreme Court grants certiorari, Courts of Appeals are the final review available, and their decisions determine whether the asylum seeker is permanently removed or if the case will be remanded back down to the BIA.[24]

The following graph illustrates the process for both affirmative and defensive applicants once DHS initiates the removal proceedings process:

16. *See id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *See* U.S. DEP'T. OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, *Board of Immigration Appeals*, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Mar.3, 2018).
22. *Id.*
23. *Id.*
24. *Flow Chart: Steps in the Asylum Process*, NAT'L IMMIGRANT JUST. CTR., http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Asylum%20Flow%20Chart.pdf (last visited Mar. 3, 2018).



B. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Membership in a particular social group can be the means of granting asylum to individuals who do not fit one of the other four grounds available.[25] The UNHCR directs decisionmakers in cases pertaining to social group claims to consider whether the group as asserted "is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it."[26] The same guidelines make clear that courts have previously concluded that women, homosexuals, and families are examples of accepted social groups for the purposes of granting asylum.[27]

In 1985, the BIA's decision in *Matter of Acosta* defined a "particular social group" as individuals who share a "common characteristic . . . that defines the group, [and] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[28] With this decision, the court held that persecution of social groups was comparable

25. 8 U.S.C. § 1101(a)(42) (2012).

26. U.N. High Comm'r for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1(A)(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02, at 3 (May 7, 2002).

27. *Id.* Note that the use of the word "homosexual" in these Guidelines predates the UNCHR and the U.S. government's updates that now provide immigration adjudicators with more inclusive terminology.

28. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

to the other four grounds for asylum under the Immigration and Nationality Act.[29] The court's subsequent ruling in *Matter of Toboso-Alfonso* expanded membership in a particular social group to include homosexual claimants.[30] In *Toboso-Alfonso*, a Cuban national testified that the "[g]overnment register[ed] and maintain[ed] files on all homosexuals" and that he was brought in every few months for hearings that involved a physical examination and questions about his sexual relationships.[31] He was often detained without being charged, sent to a forced labor camp for two months, and harassed by his neighbors.[32] The United States Immigration and Naturalization Service ("INS"), one of the DHS's predecessor agencies, argued that Toboso-Alfonso was not a member of a particular social group, but did not challenge the Immigration Judge's finding that homosexuality is an immutable trait.[33] Without any evidence to the contrary, the BIA ruled against the INS's assertion that Toboso-Alfonso did not satisfy the criteria for membership in a particular social group and instead, granted his petition for asylum.[34]

Ten years after the *Toboso-Alfonso* decision, the Ninth Circuit heard *Hernandez-Montiel v. INS*, which involved a gay Mexican man with a female sexual identity.[35] The court considered whether, for asylum purposes, variations of sexual minorities could also be considered a particular social group.[36] Ultimately, the court determined that he did satisfy the social group requirement, and that he had a well-founded fear of persecution if he were to be sent back to Mexico.[37]

Citing *Toboso-Alfonso*, the Ninth Circuit's subsequent decision in *Karouni v. Gonzales* cemented the idea that "all alien homosexuals are members of a 'particular social group.'"[38] Karouni was a Lebanese man seeking asylum because he feared that, if removed back to Lebanon, he would face persecution for being homosexual, suffering from AIDS, and being Shi'ite.[39] United States Attorney General Alberto Gonzales, in deciding against asylum for the petitioner, argued that the Lebanese government did not arrest someone for merely being "homosexual," but rather because they had engaged in "homosexual conduct."[40] The court disagreed and said that if Karouni had already engaged in such acts, or if the government believed him to have done so, he could be persecuted for

29. *Id.*
30. Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).
31. *Id.* at 820–21.
32. *Id.* at 821.
33. *Id.* at 822.
34. *Id.*
35. Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000).
36. *See id.* at 1087, 1093.
37. *Id.* at 1099.
38. Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005).
39. *Id.* at 1166.
40. *Id.* at 1172.

it regardless of his future actions.[41] The Ninth Circuit also reiterated an earlier ruling stating that "even a ten percent chance that the applicant will be persecuted in the future is enough to establish eligibility for asylum."[42] The court characterized the Attorney General's argument as akin to telling Karouni that he would have to change a fundamental trait and "forsake the intimate contact and enduring personal bond" protected by the Due Process Clause of the Fourteenth Amendment.[43] This decision indicated that Karouni was entitled to the same fundamental right to intimate contact as seen in non-asylum related LGBTI legal victories.[44] Further, the court refused to adopt a distinction between homosexual identity and homosexual conduct when it came to indicators of an immutable trait for the purpose of establishing membership in a particular social group.[45]

In 2002, the UNHCR released guidelines on social group claims in an attempt to reconcile a "protected characteristics"—or "immutability"—approach with a "social perception approach."[46] The guidelines characterized a "particular social group" as a "group of persons who share a common characteristic that is often innate or otherwise fundamental, *or* who are perceived as a group by society."[47] The disjunctive nature of the word "or" indicates a desire to show that both social perception and immutability are relevant factors; either is sufficient to satisfy the characterization. This conclusion is further supported by the statement that "[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[48] The guidelines also provide that, while persecution alone cannot determine a "particular social group," it can be evidence of an inference that the individuals are visible to society as a recognizable social group.[49]

C. IMMIGRATION APPEALS REFORM

In 2002, United States Attorney General John Ashcroft implemented a plan to streamline the immigration appeals process.[50]

41. *Id.*
42. *Id.* (quoting El Himri v. Ashcroft, 378 F.3d 932, 936 (9th Cir. 2004)).
43. *Karouni*, 399 F.3d at 1173.
44. *See* Lawrence v. Texas, 539 U.S. 558, 577; United States v. Marcum, 60 M.J. 198, 208 (2004).
45. KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 668 (4th ed. 2011).
46. U.N. High Comm'r for Refugees, *supra* note 26, at 3.
47. U.N. High Comm'r for Refugees, *supra* note 26, at 3 (emphasis added).
48. U.N. High Comm'r for Refugees, *supra* note 26, at 4.
49. U.N. High Comm'r for Refugees, *supra* note 26, at 4.
50. Press Release, Exec. Office for Immigration Review, U.S. Dep't of Justice, Attorney General

Among the changes made, the BIA was reduced from twenty-three members down to eleven, new time constraints for appeals were imposed, and the standard of review changed from *de novo* to "clearly erroneous."[51] A study conducted after the restructuring revealed that the judges with the highest percentage of rulings in favor of non-citizens were the ones removed from the Board.[52] In turn, critics called the result of Ashcroft's actions a "purge of dedicated civil servants based on a perception of their policy views."[53]

While Ashcroft's plan may have reduced backlog at the BIA level, it led to drastic increases in anti-immigrant decisions and, consequently, an exponential increase in the number of federal circuit court appeals.[54] In 2001, before the restructuring, immigration cases accounted for 3% of all federal appeals cases, with 59% of rulings going against immigrants.[55] In 2002, the number of rulings against immigrants drastically increased to 86%.[56] By 2005, immigration cases accounted for 17% of all federal appeals cases.[57] A study examining 76,000 rulings by the BIA between 1998 and 2005 found that asylum applicants who were represented by an attorney were awarded favorable appeals in 43% of cases in 2001, but by 2005 were only winning 13% of appeals.[58] Presently, the number of BIA members is up to twenty members, four of whom are listed as temporary members.[59]

Shortly after Ashcroft's reform, complaints arose about the treatment of litigants by the judges, namely biases being vocalized in

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Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), https://www.justice.gov/sites/default/files/eoir/legacy/2002/08/26/BIARestruct.pdf.

51. *Id.*

52. Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1163 (2004).

53. Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a Purge*, L.A. TIMES (Mar. 12, 2003), http://articles.latimes.com/2003/mar/12/nation/na-immig12.

54. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1669 (2010); Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, LOS ANGELES TIMES (Jan. 5, 2003), http://articles.latimes.com/2003/jan/05/nation/na-immig5 (the backlog in BIA cases dropped from 56,000 to 32,000 by 2004 while Courts of Appeal simultaneously saw a drastic increase in appeals of BIA decisions).

55. Getter & Peterson, *supra* note 54; Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases: Pattern of Bias Alleged*, N.Y. TIMES, Dec. 26, 2005, at A1.

56. Getter & Peterson, *supra* note 54.

57. Getter & Peterson, *supra* note 54; Liptak, *supra* note 55.

58. Julia Preston, *Big Disparities in Judging of Asylum Cases*, N.Y. TIMES (May. 31, 2007), http://www.nytimes.com/2007/05/31/washington/31asylum.html.

59. *Board of Immigration* Appeals, U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, www.justice.gov/eoir/board-of-immigration-appeals-bios (last visited Mar. 3, 2018). However, as recently as 2015, the Department of Justice ("DOJ") was still attempting to deal with a backlog of immigration cases, which it claims is due to a shortage of Immigration Judges. *Oversight of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration. and Border Security of the H. Comm. on the Judiciary*, 114th Cong. 2 (2015) (statement of Juan P. Osuna, Dir., Exec. Office. for Immigration Review, U.S. Dep't of Justice).

court.[60] Vocal biases are especially troubling in cases where the immigrant is of a background or culture not fully understood by the person deciding their asylum status. These prejudicial predispositions in rulings can adversely affect individuals' pleas for asylum. Further, the federal appeals judges noticed that the quality of review coming from the Immigration Judges was suffering as they attempted to cut through more cases with fewer judges.[61] Judge Posner wrote that the federal courts were receiving "either no opinion or . . . very short, unhelpful boilerplate opinion[s]" from Immigration Judges, making it difficult for federal appeals judges to give an informed review of the facts.[62]

Today, this lack of information still hinders the government's ability to determine which BIA judges fully comprehend the types of issues presented by the individuals seeking asylum from persecution faced in their native countries. Without an understanding of how or why the judges come to the conclusions that they do, it is difficult to determine whether they are biased or just underinformed.

II. DIFFICULTIES IN SEXUAL MINORITY ASYLUM CLAIMS

A. ROLES OF ASYLUM OFFICERS AND IMMIGRATION JUDGES

Given the relatively new recognition of sexual minorities as legitimate members of a "particular social group," it is not surprising that these individuals still face Asylum Officers and judges at every level who do not know how to properly evaluate their claims. Individuals who are discriminated against for more visible traits, such as race, must prove they have a "well-founded fear of persecution" upon returning to their country of origin to be granted asylum.[63] Meanwhile, sexual minorities have the added burden of also proving that they are, in fact, even part of the asserted social group. Personal biases on the part of decisionmakers can lead to skepticism of a claimant's credibility, and lack of knowledge can lead to a miscategorization of a person who strays from perceived gender or sexual binaries.

All United States Asylum Officers are required to complete the five-and-a-half-week Asylum Officer Basic Training Course.[64] It focuses solely on educating officers on how to proceed during asylum adjudications.[65] In addition, the Asylum Division requires that weekly training sessions be conducted in each of the field offices on various

60. Liptak, *supra* note 55.

61. Liptak, *supra* note 55.

62. Liptak, *supra* note 55.

63. 8 U.S.C. § 1101(a)(42) (2012).

64. *See Asylum Division Training Programs*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs (last visited Mar. 3, 2018).

65. *Id.*

topics that are determined by supervisors to best address the needs of each particular site.[66] A 2012 update to the Refugee, Asylum and International Operations ("RAIO") training directorate offers an LGBTI-specific module that includes definitions of central terms and relevant case law.[67] Additionally, the training offers guidance on asking sensitive questions that garner necessary testimony, and distinguishes between factors judges should or should not allow to sway their final determinations.[68]

Immigration Judges are appointed by the Attorney General to sit as an administrative judge within the EOIR.[69] The attorneys then undergo a total of six weeks of training within the first year after their appointment, the initial five weeks being consecutive and the final week occurring after they have heard cases for six to twelve months.[70] This training includes classroom education and shadowing established Immigration Judges with a focus on the laws and procedures central to adjudicating immigration cases.[71] No LGBTI related terminology appears in any of the EOIR's Immigration Court or BIA Practice Manuals, and the term "social group" is only included in the Immigration Court manual once as part of the definition for "reasonable fear standard."[72] As judges in the Immigration Court or on the BIA, these individuals are responsible for exercising independent judgment on all immigration cases, not just in reference to asylum.[73] Accordingly, these Practice Manuals deal entirely with the rules of the judicial process overall, rather than addressing how to approach any specific substantive immigration issues.[74]

Logically speaking, the more targeted training that Asylum Officers receive, the better equipped they would be to question asylum seekers and make determinations about the legitimacy and necessity of each claim. Unfortunately, as of 2017, there is not much data on whether the 2012 updates have affected the number of LGBTI asylum cases being appealed. One explanation for this is that many asylum cases are

66. *Id.*

67. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

68. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

69. 8 U.S.C. § 1101(b)(4) (2011).

70. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REVIEW, FACT SHEET: IMMIGRATION JUDGE TRAINING (2016).

71. *Id.*

72. *See generally* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, THE IMMIGRATION COURT PRACTICE MANUAL (2009), https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf; BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, EXEC. OFFICE OF IMMIGRATION REVIEW, https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf (last visited Mar. 3, 2018).

73. U.S. DEP'T OF JUSTICE, *supra* note 72; BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, *supra* note 72.

74. *See* U.S. DEP'T OF JUSTICE, *supra* note 72.

ultimately sealed. Another may be a combination of the length of time immigration appeals take and the fact that this directorate was introduced just five years ago. Immigration Court and BIA judges may have a fair amount of immigration law experience before being appointed, but they are not offered training akin to that received by Asylum Officers. Federal appeals judges have extensive experience on the bench, but they run the risk of being even further removed from the issues facing potential refugees. Without specified training, judges' familiarity with asylum issues likely lies in the types of cases they have already presided over. This may mean they are underinformed when it comes to making decisions on whether to reverse or uphold decisions by immigration officials.

B. JUDICIAL BIAS AND MISUNDERSTANDING

Once a case has entered the referral or removal process, and depending on how far up the chain it gets appealed, those persons making status determinations will have varying degrees of separation from the Asylum Officers who originally heard the case. This leaves each case open for a judge's inherent biases or fundamental misunderstanding of sexual orientation to potentially have a detrimental effect. As mentioned previously, it is difficult to find records of United States asylum cases, but some of the published opinions do offer insight into why judges could benefit from more in-depth training on the nature of LGBTI claims.

Some decisions indicate that judgments were made by comparing asylum seekers to stereotypes of the LGBTI community. In 2007, Albanian native Daniel Shahinaj entered the United States illegally and applied affirmatively for asylum.[75] Following the BIA's ruling to uphold the Immigration Judge's denial, the Eighth Circuit overturned the agency's decision and granted Shahinaj's petition for review. The court's reasoning was based in part on "the IJ's personal and improper opinion [that] Shahinaj did not dress or speak like or exhibit the mannerisms of a homosexual."[76] Other circuit court judges have overturned decisions in which Immigration Judges denied asylum seekers' claims because the men were not effeminate or did not otherwise indicate their sexual orientation via appearance or behavior.[77] The Eleventh Circuit, for example, has remanded a case "for a new factual hearing, free of any impermissible stereotyping or ungrounded assumptions about how gay men are supposed to look or act."[78] This indicates that biases and

75. Shahinaj v. Gonzales, 481 F.3d 1027, 1027 (8th Cir. 2007).

76. *Id.* at 1029.

77. *See* Razkane v. Holder, 562 F.3d 1283, 1286 (10th Cir. 2009); Todorovic v. U.S. Att'y Gen., 621 F.3d 1318, 1323 (11th Cir. 2010).

78. *Todorovic*, 621 F.3d at 1327.

fundamental misunderstandings of the LGBTI community are not confined to any one jurisdiction.

C. BI-SPECIFIC ISSUES

The struggles presented in cases involving sexual minorities can be exacerbated when the asylum seeker is bisexual because the answers to specific questions regarding sexual history or personal identification may seem somewhat ambiguous. The questions asked during interviews and trials seek to determine the degree of persecution the individual experienced while in their native country.[79] In addition to testimony, the decisionmakers require proof of these claims, but may misinterpret situations in which claimants show having relationships or sexual contact with persons of more than one gender.[80] If the decisionmaker misunderstands an asylum seeker's experiences, it could lead to a judgment based on the belief that the individual is actually heterosexual.[81]

At times, judges' decisions can also falter in terms of a fundamental, but subconscious confusion about human sexual orientation, especially as far as bisexual claimants are concerned. For instance, the Sixth Circuit's 2009 decision in *Sempagala v. Holder* denied a bisexual man asylum because it determined he could not prove his bisexuality or that he feared persecution in Uganda.[82] The Immigration Judge found that although Sempagala claimed to be bisexual, he was "able to conceal" his relationship with a man, was "currently married to a woman and [had] not engaged in a same-sex relationship since [leaving] Uganda."[83] To state that someone must be heterosexual because they have been in a monogamous opposite-sex marriage demonstrates a fundamental misunderstanding of bisexuality. Further, the idea of being able to hide his same-sex relationship goes against the idea of granting asylum on the grounds of a trait that one should not be required to change.

If *Sempagala* was decided today, the well-founded fear of persecution prong would be satisfied. However, whether the presiding judge would find credibility in Sempagala's sexual orientation claim is uncertain. The fear of persecution prong not being satisfied at the time of the decision made the credibility of his bisexual claim less important to address on appeal. Nonetheless, this demonstrates why continued training can be crucial to impartiality. Since the *Sempagala* ruling, there have been more petitions granted for Ugandan citizens due to increases

79. MOVEMENT ADVANCEMENT PROJECT, INVISIBLE MAJORITY: THE DISPARITIES FACING BISEXUAL PEOPLE AND HOW TO REMEDY THEM 1, 12 (2016).

80. *Id.*

81. *Id.*

82. Sempagala v. Holder, 318 F.App'x 418, 420 (6th Cir. 2009).

83. *Id.*

in widespread political persecution and in legislative goals, including a death penalty for homosexual behavior.[84]

Judicial rulings to date indicate that decisionmakers still have trouble separating a judgment of the asylum seeker's credibility from their asserted sexual orientation. Ray Fuller, a former native of Jamaica, testified that he was married to a woman but had sexual relationships with several individuals, both male and female, from his pre-teen years until the hearing.[85] Fuller presented reports of the criminalization and torture by police officers of LGBTI persons as evidence of the persecution faced in Jamaica.[86] He also testified to being taunted for being gay and sliced with a knife, being robbed at gunpoint while being called a homophobic slur, being shot in the back while at a party with his boyfriend, and being disowned by his mother and sisters for his sexual orientation.[87] Despite the evidence introduced, the Immigration Judge found issues with Fuller's credibility due to inconsistencies between his documentation and testimony, as well as an inability to get any of his stated former lovers to testify in person.[88] Chief Judge Lisa Wood of the Seventh Circuit denied Fuller's appeal, but stated that if he were able to collect solid evidence to prove that the Immigration Judge erred in his determination of Fuller's sexual orientation, he could make a motion to reopen his case.[89]

In the dissent, Judge Richard Posner said it came as no surprise that Fuller was unable to provide further documentation or testimony to corroborate his sexual orientation because it is unlikely that LGBTI persons in Jamaica would risk making that information about themselves public.[90] It can be hard for any asylum seeker to get former lovers to testify or even write letters when they are from a country that is known to persecute LGBTI persons because they fear outing and exposing themselves to the consequences.[91] Judge Posner added that the Immigration Judge's issues with Fuller's credibility are either misconstrued or irrelevant to whether he is truly bisexual.[92] Further, while it is more common for asylum seekers to call expert witnesses to establish their sexual identity, it would be acceptable for the Immigration Judge to call a psychologist to testify about the reliability of Fuller's

84. SHARITA GRUBERG & RACHEL WEST, HUMANITARIAN DIPLOMACY: THE U.S. ASYLUM SYSTEM'S ROLE IN PROTECTING GLOBAL LGBT RIGHTS, CTR. FOR AM. PROGRESS 7 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/06/LGBTAsylum-final.pdf.

85. Fuller v. Lynch, 833 F.3d 866, 868 (7th Cir. 2016).

86. *Id.*

87. *Id.*

88. *Id.* at 869–70.

89. *Id.* at 872.

90. *Id.* (Posner, J., dissenting).

91. Interview with Okan Sengun, *supra* note 8.

92. *Fuller*, 833 F.3d at 873.

claim. Had such an expert witness been called, then perhaps Chief Judge Wood could have avoided Judge Posner's scrutiny regarding her ability to discern whether the Immigration Judge properly ruled on Fuller's sexual orientation. Judge Posner ended by stating that "the weakest part of the Immigration Judge's decision is that Fuller is not bisexual, a conclusion premised on the fact that he's had sexual relations with women . . . Apparently the Immigration Judge does not know the meaning of *bisexual*."[93]

These two cases ended in denial of the claims for reasons that were stated to be separate from their characterization of sexual minorities.[94] However, the appellate decisions for both suggest that the judges at the Immigration Court level had a fundamental misunderstanding of bisexuality and the different ways in which it may manifest. This showcases ways in which continued training focused on LGBTI individuals may be necessary to ensure fairness in future cases. Up to this point, by upholding asylum denials on grounds other than sexual orientation, some courts have avoided the topic altogether.[95] It is easier to say the outcome would have been different when one finds reasons not to address the core questions. By bringing judicial understanding in line with current social understandings, courts may better recognize certain characteristics of a bisexual identity and be prepared to review such cases appropriately.

The national advocacy organization Immigration Equality compiled all the LGBTI and HIV asylum cases that reached United States Courts of Appeals between 1996 and 2012.[96] Of over 150 LBGTI cases, only three were asylum seekers who asserted a bisexual orientation.[97] Included in the heavier burden faced just to prove the legitimacy of their sexual orientation is a host of unique issues facing the bisexual subgroup.

Bisexual asylum seekers' petitions are granted at much lower rates than other sexual minorities,[98] which could leave many feeling uneasy about their chances from the onset. However, if an asylum seeker were to apply only as gay or lesbian to improve their chances of being granted asylum, it could cause problems down the road. Should someone claim to be gay or lesbian to gain asylum and then fall in love with a person of the opposite gender, the asylee's green card paperwork could be flagged

93. *Id.* at 871.

94. *See* Sempagala v. Holder, 318 F.App'x 418, 421–23 (6th Cir. 2009); *Fuller*, 833 F.3d at 870–72.

95. *Holder*, 318 F.App'x at 421–23; *Fuller*, 833 F.3d at 870–72.

96. *See* IMMIGRATION EQUALITY, U.S. COURT OF APPEALS GLBT AND HIV ASYLUM CASES—1996–PRESENT (current through Oct. 28, 2012), http://www.immigrationequality.org/wp-content/uploads/2012/12/Final-Circuit-Chart-12-12.pdf.

97. *Id.*

98. Sean Rehaag, *Bisexuals Need Not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia*, 13 INT'L J. OF HUMAN RIGHTS 415, 422 (2009).

for potential removal on account of a dishonest asylum testimony.[99] If this happens, the asylee would likely be given a chance to explain the inconsistency,[100] but may face trouble proving to a judge that they are bisexual at all. There is also the potential for a perjury claim, which would further frustrate an individual's asylum efforts. This scenario begs the question of why anyone who is lying about their sexual orientation for asylum purposes would claim to be bisexual, the subgroup with historically the lowest success rate, rather than homosexual. An argument could be made that a single heterosexual person seeking asylum would want to protect their right to marry later. However, the risk of being denied asylum outright is likely much higher than the benefits of that option.

The argument that LGBTI individuals who do not fit a given stereotype *could* live as heterosexual to avoid persecution has been frowned upon in the RAIO directorate.[101] This is akin to telling a biracial individual who can "pass" for a race that is not persecuted in their country that they should simply live as a member of that group in order to avoid persecution. However, non-monosexual sexual orientation is not as widely understood as someone's ethnicity, and therefore judges in these cases may have the mindset that it is acceptable to believe that bisexual persons should consider the option of living a heterosexual lifestyle at home rather than becoming an asylee. This all infringes on the "should not be required to change" aspect of the immutability approach. However, the immigration and appellate courts are constructed to answer binary questions, and thus attempt to look at every claim as a "yes or no" question.[102] This poses problems for bisexual individuals because a successful claim requires that judges step outside from a black and white approach to sexual orientation or gender identity to understand why those persons satisfy the particular social group requirement. These cases may depend on proving that past persecution can in part establish an asylum seeker's fear of future persecution, because an existing reputation for being non-heterosexual in their country of origin makes the ability to *appear* heterosexual a moot point.[103]

Another aspect of the asylum process that disproportionately affects LGBTI applicants is the one-year filing deadline.[104] LGBTI persons in general may be suffering from traumatic effects of sanctioned persecution in their country of origin and may be afraid to come out to

99. Interview with Okan Sengun, *supra* note 8.

100. E-mail from Aaron Morris, Exec. Dir., Immigration Equality, to Author (Nov. 13, 2016, 07:08 PST) (on file with Author).

101. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6, at 41.

102. Sin, *supra* note 1, at 431.

103. Sin, *supra* note 1, at 431.

104. GRUBERG & WEST, *supra* note 84, at 23.

people in any government position.[105] One who must disclose to another person what makes them eligible for asylum (because it may not be readily apparent) may understandably be apprehensive or distrustful due to a past riddled with persecution stemming from a third party's knowledge of that very attribute. Additionally, an individual who is fleeing a country for fear of losing their life might not have had the time or forethought to gather enough evidence to meet the criteria for a well-founded fear of future persecution (or, in the case of withholding of removal, a fifty-one percent likelihood of future persecution).[106] Finally, someone from a country that criminalizes or persecutes LGBTI people may not know that LGBTI status creates a potentially viable claim for asylum. In short, it may take longer than a year to declare their sexual orientation or find ways to prove it when they are coming from countries known to persecute people for nonheterosexuality.[107] While this task could prove difficult for any LGBTI applicant, the heavier, more complex burden of proof facing bisexuals attempting to convince decisionmakers who do not understand their sexual identity puts that subgroup at a disadvantage.

III. CHANGING VIEWS OF IMMUTABILITY

By adapting an equal protection approach,[108] the immutability argument is historically one element of how LGBTI activists have confronted and overcome oppressive legal barriers.[109] Arguing that a person's sexual orientation is genetic and unchangeable allows LGBTI activists to make a persuasive case that the person should not face discrimination based on that characteristic.[110] One legal issue with immutability claims, however, is that they define sexual orientation by how someone self-identifies according to attractions, rather than by same-sex behaviors.[111] This can be problematic for fighting laws that target homosexual conduct, because "the law [does] not target 'orientation' . . . only its behavioral manifestations."[112] If a bisexual individual engages in same-sex relationships, any persecution based on their orientation is likely much easier to present than that of one who is not. However, if the claimant has not acted (or acted publicly) on their self-identified orientation and persecutors are made aware of the

105. GRUBERG & WEST, *supra* note 84, at 26; s*ee also* MOVEMENT ADVANCEMENT PROJECT, *supra* note 79, at 1, 12.

106. MOVEMENT ADVANCEMENT PROJECT, *supra* note 79, at 23.

107. MOVEMENT ADVANCEMENT PROJECT, *supra* note 79, at 26.

108. *See* U.S. CONST. amend. XIV, § 1.

109. Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research of Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53:4-5 J. OF SEX RES. 364, 365 (2016).

110. *Id.*

111. *Id.* at 375.

112. *Id.* at 365.

person's sexual orientation in some other way, it may be harder for the claimant to prove a well-founded fear.

A major issue when dealing with bisexual asylum seekers is the concern that claimants are being dishonest about their sexuality to gain refugee status.[113] While there is the potential for people to abuse the system in this way, a refusal to acknowledge these claims as legitimate would mean reevaluating how one assesses *any* non-physical grounds for asylum. One could easily employ the same deceit with claims based on religious or political grounds because there often is no natural physical trait that ties an individual to that particular social group. It would also be just as hard to prove that someone is lying about their sexuality as it would be to prove that they are not. This is because many arguments made to prove one or the other would likely be a viable argument to the contrary. Not to mention, there is still the fact that bisexual claimants have the lowest percentage of success of any LGBTI subgroup in asylum cases and thus would be a risky deceit in the first place.

The idea that gender identity and sexual orientation are immutable has grounded several landmark legal victories because it is the most easily explained rationale for granting equal rights.[114] This, however, can present a problem for bisexuals, whose sexual orientation may appear to be more fluid than someone who is attracted only to people of the same or different genders. Bisexuality is often referred to as "invisible" in the legal arena because its complex nature disrupts the binary approach to sexuality that adjudicators are used to.[115] It is easier for courts to make determinations according to monosexual viewpoints, and thus stereotyping or inflexibility of interpretations can occur and result in the denial of asylum petitions.[116] While bisexuality might be seen as disruptive to an immutability argument, bisexuality, as any sexual orientation, is immutable.[117] Thus, the issue seems to lie in how people define "immutable."

Bisexual people make up more than fifty-one percent of the LGBTI population.[118] Regarding sexual fluidity, studies have not yielded any evidence to indicate that persons who see themselves as having an element of choice in their sexual orientation are less "biologically gay."[119] Although the relationships of some bisexual people may take the form of

113. *See* Interview with Okan Sengun, *supra* note 8.

114. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

115. Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years After Bisexual Erasure*, 17 CARDOZO J. OF L. & GENDER 65, 66 (2010); *see also* GRUBERG AND WEST, *supra* note 84; Rehaag *supra* note 98; Diamond and Rosky *supra* note 109.

116. Sin, *supra* note 1, at 431.

117. Greenesmith, *supra* note 115, at 73.

118. MOVEMENT ADVANCEMENT PROJECT, *supra* note 79.

119. Diamond & Rosky, *supra* note 109, at 372.

both same-sex and opposite-sex partnerships over time, the bisexual nature of their attractions itself can still be perceived as immutable.[120] A person may have a choice in who their relationships are with, and they may choose partners of different genders at certain times, but the capability of being attracted to more than one gender is beyond their conscious control.[121]

As early as 1985, the traditional view of immutability was not perceived as necessary in order for sexual minorities to prevail on an equal protection claim.[122] Rather, the basis for heightened scrutiny could be grounded in political disenfranchisement and exposure to hostility.[123] Judge William Norris of the Ninth Circuit stated that the Supreme Court's use of the word "immutable" is not meant to refer to traits that must be physically impossible to change or conceal.[124] Rather, the Court will consider traits to be immutable if they are "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[125] Just as religion, gender, skin color, citizenship, and other such traits can be perceived incorrectly, so too can sexual orientation.[126]

The Supreme Court's approach to immutability was further broadened in *United States v. Windsor,* when the Justices upheld the Second Circuit's insistence that the test be "whether the characteristic of the class calls down discrimination when it's manifest."[127] The Second Circuit aligned sexual orientation with other classifications that are evaluated using heightened scrutiny despite them being characteristics that "do not declare themselves, and often may be disclosed or suppressed as a matter of preference."[128] While Judge Norris made it clear that what we consider to be immutable is not necessarily unchangeable, the court in *Windsor* went a step further. This ruling demonstrates a shift away from the perspective that a person must see the trait as fundamental to their personality and a step toward the question of whether, upon manifestation, that trait triggers oppression.

The *Windsor* approach shows progress in both legal and social understanding of sexuality in such a way that is important for other LGBTI legal protections as well. The way in which immutability has been

120. Diamond & Rosky, *supra* note 109, at 370.

121. Diamond & Rosky, *supra* note 109, at 368.

122. Diamond & Rosky, *supra* note 109, at 368.

123. Diamond & Rosky, *supra* note 109, at 374.

124. *See* Greenesmith, *supra* note 115, at 76; Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (referring to interpretations of the Supreme Court's use of "immutable").

125. *Watkins*, 875 F.2d at 726.

126. *Id.*

127. United States v. Windsor, 699 F.3d 169, 183 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

128. *Id.* (referencing the Court's decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985), in which alienage, illegitimacy, and national origin are among the classifications subject to heightened scrutiny).

addressed in the context of defending rights under the Equal Protection Clause can be applied to immigration law insofar as it presents a judicial framework for evaluating cases involving LGBTI litigants. There is a concern that abandoning a determination of whether a trait can be changed for one that looks at whether a person should be made to change it will present difficulties for litigants "who do not consider their sexual orientation to be a fundamental component of their personal identity."[129] However, reframing the question and examining whether the trait plays a central role in the claimant's life need not be mutually exclusive.

Perhaps it would help close the gap for decisionmakers who view bisexuality as having a choice if the scenario was juxtaposed with that of persecution for religious beliefs. Rather than being viewed solely a choice of faith, religion may equally be seen as an inherent trait that forms one's culture. Similarly, one's choice of relationship is merely one aspect of a person's broader sexual identity. While it is possible to change one's religion, it seems unlikely that those who are persecuted for practicing a certain faith would be denied asylum on the grounds that they could simply choose to convert to a religion that is more accepted in their country of origin.

The legal argument that benefits from how the question is phrased must go together with redefining "immutability" as well. As the definition moves away from meaning something that *cannot* change, perhaps the argument of its being *fundamental* to one's identity can also be seen as incorrectly framed. Instead, moving forward, same-sex attraction should be seen as a trait that can and may manifest in a person, regardless of whether that person considers it a central aspect of their identity. It may simply be a characteristic that exists within them without being something they acknowledge or fight for each day, but should not render them undeserving of protection when its manifestation leads to persecution.

Whether the individual gave much weight to their sexual identity prior to any same-sex experiences or persecution is less important than is the existence of a trait at the time a conflict occurred. It might be central to one's being in the sense that the potential for same-sex attraction is a constant, even if it lays dormant at a given time. However, it does not need to be viewed as something the individual deems fundamental in the ways we tend to interpret that phrase. Anyone could potentially manifest a same-sex attraction, and thus fluidity should not invalidate immutability claims. Put simply, anytime someone manifests a same-sex attraction or a bisexual identity that elicits discrimination, that individual should qualify for equal protection.

129. Diamond & Rosky, *supra* note 109, at 376.

IV. WHERE DO WE GO FROM HERE?

As discussed, two of the major issues facing bisexual asylum seekers are: (1) decisionmakers making determinations based on inherent biases or fundamental misunderstandings of what bisexuality is, and (2) a definition of "immutable" that does not encompass all sexual identities equally. Ideally, these two issues should be remedied. It is necessary for judges at both the immigration and appellate levels to make impartial, educated decisions about the claims of bisexual individuals.

One means of addressing this issue is by introducing legislation that mandates that Immigration Judges be given LGBTI-centered training akin to the RAIO requirements discussed above. This would ensure that the courts are better prepared to review the initial decisions made by Asylum Officers. While judges spend years in the legal field before being appointed to the bench,[130] there is no way to ensure that their understanding and experience are uniformly appropriate. The resulting risk is that even when Asylum Officers make an informed determination, judges not working with the same basic knowledge might send people back to the country in which they feared for their lives. The 2012 RAIO LGBTI update is more bi-inclusive and attempts to guide the officers through better procedures for evaluating less common sexual minority claims.[131] Federal judges are required to preside over a plethora of practice areas, making it more difficult to thoroughly train them on every potential type of case they may encounter. However, Immigration Judges are responsible for creating the judicial records later reviewed by the federal judges when making appellate rulings. Therefore, judges who work exclusively on immigration matters should be just as well informed on LGBTI issues as the officers whose decisions they are reviewing. Not only would this provide more effective review, but detailed and knowledgeable written opinions may also help cut back the number of appeals if the reasons for each decision are better articulated. It is prudent that the Immigration Judges and BIA members who are reviewing Asylum Officer's findings ought to be trained with similar substantive standards in addition to merely learning judicial procedure.

Additionally, immigration courts could benefit from the Supreme Court setting a precedent that unquestionably determines the legal outlook on immutability. Of course, there is the danger of the Court defining immutability in such a way that adds to the difficulties for LGBTI asylum seekers rather than relieving them. As with many social justice movements, this possibility can be mitigated by advocates who remain patient and only bring cases which have the highest likelihood of

130. 8 U.S.C. § 1101(b)(4) (2011) (stating that immigration judges are former attorneys appointed to the bench by the Attorney General).

131. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

a favorable ruling. It should be explicitly confirmed through the Court that the UNHCR intended immutability to be one factor to consider, but it should be neither the sole basis for determining membership in a particular social group nor dispositive of credibility. Unfortunately, an outdated view of immutability seems to guide many immigration officials' judgments as they believe bisexual individuals could simply choose to live a heterosexual lifestyle to avoid persecution. Yet, removing immutability from the equation altogether could be problematic in the face of how many civil rights victories have already been won using arguments with that label. Thus, it would be most beneficial to reframe the analysis which has excluded certain subgroups and instead employ the approach that the UNHCR envisioned.

In addition to reducing the impact of the immutability factor, the Supreme Court is in the position to use previous rulings to redefine what "immutable" means. To do so consciously and effectively, they must have accurate factual findings from the lower courts. If Immigration Judges were required to undergo ongoing training similar to that of the Asylum Officers, the system as a whole would benefit. Not only would decisionmakers view asylum seekers through modern eyes that are more sensitive to a wide array of human situations, but the records they create for potential appellate use will be written with a deeper understanding of exactly what merits and shortcomings each asylum seeker offers. Traits that were once deemed unchangeable may not be so in the present day, because as society advances, certain characteristics have become more fluid. By offering judges a broader, more current understanding of how to define "immutable," earlier sexual minority legal victories can be reconciled with more recent rulings that do not see fluid traits as necessarily being mutable.

Over time, the characteristics that society thinks of as being immutable have shifted, and the courts' jurisprudence should reflect this fact. Gender was at one time considered fundamentally unchangeable, but that is no longer the case. One's status as an alien or as an illegitimate child have both long been legally changeable. In matters of religion, traits that are technically mutable are seen as being so essential to one's identity that they should not be forced to change them. Although the notion of non-binary identities is still a relatively new concept to governmental matters, earlier cases laid the groundwork for judicial determinations to support their legitimacy. The fact that a person's sexual orientation or their partners' gender identity changes over time is not proof that the asylum claims lack credibility. Similar to the discussion in *Windsor*, the focus should be on whether or not their sexuality triggers persecution when it is manifest. Continuing to build a judicial record of rulings that supports this idea provides documentation crucial to influencing how bisexual individuals are perceived. This may affect the

ways in which they feel comfortable presenting themselves, which then has the potential to come full circle and inform how judges understand and evaluate bisexual asylum seekers.

CONCLUSION

Individuals seeking asylum in the United States are clearly held to a much stricter standard than are LGBTI Americans in terms of what is required for them to gain the protections offered here. At times, the government must make tough decisions about who to allow in, with the well-being of the entire country in mind. This, however, can perpetuate a subconscious presumption that citizens are telling the truth about their sexual orientation while the same courtesy is not offered to non-citizen asylum seekers. To be truly impartial in these determinations, judges must be knowledgeable about current psychological and social worldviews of sexual minorities. An individual's focus on their sexuality may be solely out of caution for how they present themselves in their country of origin. The person may not necessarily see sexuality as a core element of their overall identity, but is forced to be aware of it more than any other inherent physical or behavioral trait so as not to be persecuted for it. Accordingly, asylum should not depend on a showing that one's sexual orientation is otherwise remarkable.

If the United States legal system cannot adapt its understandings of people from other cultures, especially in terms of the way LGBTI asylum cases are handled, then our country's approach to human rights may be subject to harsh scrutiny. It shows inconsistencies in our political system if equal protection claims for sexual minorities are approached differently than asylum cases because it sends conflicting messages about which groups the United States deems worthy of legal protections. Under the "particular social group" umbrella, United States asylum laws are already written with the intent to protect LGBTI individuals, including bisexuals. However, the interpretation of these laws regarding bisexual individuals is often skewed by the existing viewpoints of immigration officials. The fact that Immigration Judges and the BIA have full discretion when presiding in asylum cases means the government has an interest in educating them to avoid inherent biases and negative stereotyping as much as possible. By intertwining continued LGBTI sensitivity training and creating a judicial record of how to accurately define and apply immutability, the views of immigration officials can be brought in line with current social perspectives. Once immigration officials understand that neither bisexuality nor sexual fluidity invalidate an analysis of immutability, advocates for the bisexual community can begin to shape how our judicial and legislative systems function regarding bisexual and other non-monosexual asylum seekers.

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