

**“A SINCERELY HELD SEXUAL BELIEF”:
WHAT LGBT REFUGEE AND ASYLUM LAW CAN LEARN FROM FREE
EXERCISE CLAIMS AND POST-DOMA IMMIGRATION BENEFITS FOR
SAME-SEX COUPLES**

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ABSTRACT

It would be ridiculous to say that someone is gay enough to qualify for some immigration benefits but not others. Yet, a careful analysis of how courts and immigration officials analyze sexuality in different immigration contexts reveals that this absurdity may not be far from actual practice. Specifically, a comparison of how courts and immigration officials treat sexuality in petitions for spousal benefits and how they treat sexuality in applications for refugee or asylum status demonstrates that the very same individual may be able to obtain a green card for his or her spouse, but not protection from persecution. The result is both troublesome and problematic. Interestingly—at a time when religious freedom and lesbian, gay, bisexual, and transgender (LGBT) civil rights seem utterly at odds—the solution may rest in an important analogy between sexuality and religion.

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INTRODUCTION

“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”¹ For more than fifteen years, these thirty-eight words controlled over one thousand federal laws in which “marital or spousal status [was] addressed as a matter of federal law.”² The effect was real and unmistakable: married same-sex couples were excluded, denied the federal benefits and protections guaranteed their opposite-sex counterparts.³ Insofar as the superior authority to regulate immigration and naturalization rests in the federal government,⁴ the Defense of Marriage Act (DOMA) barred same-sex couples from using their marriages to confer immigration benefits.⁵

In June 2013, the Supreme Court invalidated section 3 of DOMA: “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriages laws, sought to protect in personhood and dignity.”⁶ Shortly thereafter, the Board of Immigration Appeals (BIA) expanded the definitions of “marriage” and “spouse,” as those terms appear in the Immigration and Nationality Act (INA),⁷ to include same-sex marriages and spouses.⁸ Around the same time, then Secretary of Homeland Security Janet Napolitano ordered U.S. Citizenship and Immigration Services (USCIS) “to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”⁹

Critics of this equal treatment policy questioned whether it would actually yield inequitable results.¹⁰ For example, insofar as a married couple must prove the

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1. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).
 2. *Windsor*, 133 S. Ct. at 2683.
 3. *Id.* at 2693 (“DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.”).
 4. See *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“exclusive [f]ederal power”).
 5. *Matter of Lovo*, 23 I. & N. Dec. 746, 749 (BIA 2005) (“Marriages between same-sex couples are clearly excluded.”).
 6. *Windsor*, 133 S. Ct. at 2696.
 7. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 *et seq.* (2012)).
 8. *Matter of Zeleniak*, 26 I. & N. Dec. 158, 159 (BIA 2013) (“This ruling is applicable to various provisions of the Act, including, but not limited to, sections 101(a)(15)(K) (fianc[é] and fianc[ée] visas), 203 and 204 (immigrant visa petitions), . . . and 245 (adjustment of status), 8 U.S.C. §§ 1101(a)(15)(K), 1153, 1154, . . . and 1255 (2012).”). Specifically, the BIA expanded the definitions of “marriage” and “spouse” to include a same-sex marriage “valid under the laws of the [s]tate where it was *celebrated*.” *Id.* (adopting a “place-of-celebration,” rather than a “place-of-domicile,” standard) (emphasis added).
 9. Janet Napolitano, U.S. Sec’y Dep’t of Homeland Sec., Statement on the Review Standard for Immigration Visa Petitions Filed on Behalf of Same-Sex Spouses (July 1, 2013) [hereinafter Statement of Janet Napolitano], *available at* <http://www.uscis.gov/family/same-sex-marriages>.
 10. See generally Am. Bar Ass’n, *DOMA’s Demise Brings New Challenges: Lawyers Face Aging, Immigration Issues for LGBT Clients*, 99 A.B.A. J. 25 (2013); Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100 (2013); John Medeiros, Note, *Immigration After DOMA: How Equal is Marriage Equality?*, HAMLIN J. PUB. L. & POL’Y 196 (2013); Joseph Best, *Immigration Issues for Binational LGBT Families*, LEGAL INTELLIGENCER, May 20, 2014, <http://www.thelegalintelligencer.com/id=1202655911428/Immigration-Issues-for-Binational-LGBT-Families?slreturn=20141002150803>.

bona fides of their marriage for it to confer immigration benefits, critics wondered how this equal treatment policy would account for cultural hostility toward lesbian, gay, bisexual, and transgender (LGBT) identities, as illustrated by the criminalization of homosexual acts in some countries.¹¹ Such hostility may preclude the same-sex couple from demonstrating widely used indicators of a bona fide marriage premised on the relationship’s visibility.¹²

This Note contends that USCIS and other adjudicatory bodies deal more appropriately with sexuality when evaluating petitions for marriage-based immigration benefits than when evaluating applications for refugee or asylum status. In doing so, this Note dispels concern over the insufficient process of review for same-sex couples by presenting empirical evidence of how USCIS has implemented its equal treatment policy. Moreover, this Note contends that USCIS’s post-DOMA sexuality inquiry for the immigration benefits of married same-sex couples should replace the sexuality inquiry for LGBT refugee and asylum law. To better illuminate the sexuality inquiries for both immigration contexts, this Note compares sexuality to religion and argues that the standard for marriage-based immigration benefits mimics the “sincerely-held-religious-belief” standard¹³ used to evaluate Free Exercise claims under the First Amendment of the U.S. Constitution.¹⁴

Part I of this Note provides a brief history of immigration by LGBT noncitizens to the United States between 1965 and 2014, as guided by the Immigration and Nationality Act of 1965,¹⁵ the Refugee Act of 1980,¹⁶ *Matter of Toboso-Alfonso*,¹⁷ the Immigration Act of 1990,¹⁸ and *United States v. Windsor*.¹⁹ Part I also discusses state court decisions to recognize same-sex marriage insofar as those decisions pertain to the validity of a marriage for immigration purposes. Finally, Part I looks at how the federal government, specifically the Department of Homeland Security (DHS), has implemented *Windsor*.

Part II examines the overall schema for ascertaining whether a marriage is qualified to confer benefits under the immigration laws. In Part II, I acknowledge inconsistencies among jurisdictions and adjudicative bodies, such as whether to employ a two- or three-prong test.²⁰ I also discuss the specific methodology that

11. See, e.g., Indian Penal Code, Act No. 45 of 1860, § 377 (“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished . . .”).

12. See *Matter of Phillis*, 15 I. & N. Dec. 385, 387 (BIA 1975) (specifying that testimony or other evidence regarding a couple’s wedding ceremony is relevant to determining whether the couple had a bona fide marriage); Best, *supra* note 10 (“Questions arise, though, about how lesbian, gay, bisexual and trans families will be treated when proving lives more accustomed to having been lived invisibly . . .”). Moreover, “[w]here the parties have never lived together, the amount of evidence required to establish that the marriage was not entered into for the fraudulent purpose of evading the immigration laws may be considerable.” *Matter of Phillis*, 15 I. & N. Dec. at 387.

13. See *United States v. Seeger*, 380 U.S. 163, 185 (1965) (establishing an inquiry into whether the belief is sincerely held and rejecting an inquiry into whether the belief is true).

14. U.S. CONST. amend. I.

15. Pub. L. No. 89-236, 79 Stat. 911.

16. Pub. L. No. 96-212, 94 Stat. 102.

17. 20 I. & N. Dec. 819 (BIA 1990).

18. Pub. L. No. 101-649, 104 Stat. 4978.

19. 133 S. Ct. 2675 (2013).

20. See, e.g., *Agyeman v. INS*, 296 F.3d 871, 879 n.2 (9th Cir. 2002) (using a three-prong test); *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982) (using a two-prong test); *Matter of Zeleniak*, 26 I. & N. Dec. 158, 158 (BIA 2013) (using a two-prong test).

courts and immigration officials use to analyze whether a marriage is bona fide. In particular, I address what types of evidence generally weigh favorably or unfavorably in the calculus and whether there are limits on how invasively courts and immigration officials may probe.

Part III presents the findings of empirical research on how USCIS has evaluated the bona fides of same-sex marriages when reviewing petitions for marriage-based immigrant visas and adjustments of status. I focus on circumstances that have the potential to raise suspicions of fraud, such as when a same-sex spouse has previously engaged in one or more heterosexual relationships. Specifically, I argue that USCIS recognizes the amorphous nature of sexuality by choosing not to scrutinize the applicant's potentially inconsistent behavior, but acknowledges that USCIS may be taking this approach in light of a bias toward well-documented cases. In that regard, Part III suggests that USCIS will use a different approach to handle weaker cases.

Part IV explores the various ways in which adjudicators evaluate asylum applications for LGBT individuals who seek legal protection as members of a particular social group. In Part IV, I distinguish between corroboration and credibility inquiries and point out areas in which adjudicators appear to base their decisions on stereotypical conceptions of sexuality. I also highlight recent changes to the law of asylum application review, both administrative and legislative, and argue that adjudicators appear well-positioned to abandon review standards based on sexual stereotypes. Nevertheless, I conclude that adjudicators in this context employ a relatively rigid conception of sexuality when determining whether an individual has proven his or her sexuality.

Part V introduces the sincerely-held-religious-belief inquiry for Free Exercise claims under the First Amendment and argues that USCIS has employed a variation of that analysis to examine sexuality in the context of identifying cases of marriage fraud for same-sex couples. Specifically, I argue that USCIS presently uses an abbreviated version of the sincerely-held-religious-belief analysis to evaluate well-documented petitions for partner-based immigration benefits, and I predict that USCIS will shift to a full-blown version of this analysis to handle poorly documented petitions. In doing so, I assert that USCIS has drawn an appropriate analogy between sexuality and religion.

Finally, Part VI argues that USCIS uses the same criteria to examine sexuality for marriage-based immigrant visa petitions and applications to adjust status as it does for applications to obtain asylum based on membership in a particular social group, but that USCIS applies its analysis in dissimilar fashion between the two categories of immigration. To reach this conclusion, Part VI employs a detailed hypothetical analysis to demonstrate how the same set of core facts results in different findings of sexuality in different immigration contexts.

I. A HISTORY OF LGBT IMMIGRATION TO THE UNITED STATES (1965-2014)

In 1965, Congress explicitly banned homosexuals and other “sexual devia[nts]” from immigrating to the United States.²¹ In so doing, Congress perpetuated a regime of hostility toward prospective LGBT immigrants previously labeled “mentally defective” or “psychopathic[ally] inferior[]”—treating

21. Immigration Act of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (amending Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952), to exclude “[a]liens afflicted with . . . sexual deviation.”).

homosexuality as a medical ground for exclusion.²² It was not until 1990 that Congress lifted this ban and permitted LGBT individuals to visit and immigrate to the United States.²³

In 1980, Congress defined “refugee” to include any person located outside of his or her country of nationality “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 . . . membership in a particular social group.*”²⁴ Although refugees and asylees seek the protections of the United States under different geographical circumstances,²⁵ applicants for asylum must establish that they are refugees within the meaning of 8 U.S.C. § 1101(a)(42)(A).²⁶ Since *Matter of Acosta*²⁷ in 1985, the BIA has defined “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”²⁸ Not just any “common, immutable characteristic” will suffice, however: “[W]hatever the common characteristic that defines the group, it 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.”²⁹

Before 1990, homosexuals did not constitute a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A).³⁰ Yet, in *Matter of Toboso-Alfonso*, the BIA held that homosexuality can be the basis for finding a particular social group.³¹ On June 19, 1994, then Attorney General Janet Reno ordered the Immigration and Naturalization Service (INS) to adopt *Matter of Toboso-Alfonso* as binding precedent.³²

22. See Immigration Act of 1917, Pub. L. No. 64-301, § 9, 39 Stat. 874, 880; see also *Boutilier v. INS*, 387 U.S. 118, 121 (1967) (upholding the removal of a gay Canadian on the basis of his sexual orientation by interpreting “psychopathic personality” to include homosexuals).

23. The Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067-75; Mara Schulzetenberg, *U.S. Immigration Benefits for Same Sex Couples: Green Cards for Gay Partners?*, 9 WM. & MARY J. WOMEN & L. 99 (2002) (“In 1991, Congress . . . pass[ed] the Immigration Act of 1990, which removed the express bar on gay foreign visitors and immigrants.”).

24. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102 (emphasis added), *codified at* 8 U.S.C. § 1101(a)(42)(A) (2012).

25. 8 U.S.C. § 1158(a)(1) (2012) (permitting “[a]ny alien who is physically present in the United States or who arrives in the United States” to apply for asylum).

26. 8 U.S.C. § 1158(b)(1)(B)(i) (2012) (“To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

27. 19 I. & N. Dec. 211 (BIA 1985).

28. *Id.* at 233.

29. *Id.*

30. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 822 (“The Immigration and Naturalization Service appeals . . . arguing that homosexuals [are] not a particular social group contemplated under the Act . . .”).

31. *Id.* at 822-23 (upholding an immigration judge’s finding that persecution resulted from “the applicant’s membership in a particular social group, namely homosexuals,” and that “homosexuality is an ‘immutable’ characteristic”).

32. Att’y Gen. Order No. 1895-94 (June 19, 1994) (“[A]n individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group.”).

Concerned that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with meaningful level of harm, were all that [an applicant needed to show],”³³ the BIA eventually revised its particular social group analysis. The BIA accomplished this goal in 2008 when it decided *Matter of S-E-G*³⁴ and *Matter of E-A-G*,³⁵ stating, “[I]n addition to the common immutable characteristic requirement set forth in *Acosta* . . . an applicant [who seeks to demonstrate membership in a particular social group must] establish [both] ‘particularity’ and ‘social visibility’”³⁶ To establish particularity, an applicant must show that the putative social group has “well-defined boundaries”; thus, “[t]he essence of the ‘particularity’ requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”³⁷ Whereas particularity focuses on group definition,³⁸ social visibility asks whether the group is recognizable, such that the group is “perceived as a group by society”;³⁹ thus, social visibility is “the extent to which members of a society perceive those with the characteristic in question as members of a social group.”⁴⁰

In 2014, *Matter of M-E-V-G*⁴¹ clarified that the “‘social visibility’ test was never intended to, and does not require, literal or ‘ocular’ visibility.”⁴² To dispel confusion over the meaning of social visibility, the BIA instated a new name for the requirement: “social distinction.”⁴³ An applicant who wishes to prove social distinction must show that “if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.”⁴⁴ Importantly, the BIA noted that “[s]ociety can consider persons to comprise a group without being able to identify the group’s members on sight.”⁴⁵ The BIA also noted that a group’s eligibility for

33. *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 231 (BIA 2014) (quoting *Matter of R-A-*, 22 I. & N. Dec. 906, 919 (BIA 1999; Att’y Gen. 2001)) (internal quotation marks omitted).

34. 24 I. & N. Dec. 579 (BIA 2008).

35. 24 I. & N. Dec. 591 (BIA 2008).

36. *Matter of M-E-V-G*, 26 I. & N. Dec. at 232–33.

37. *Matter of S-E-G*, 24 I. & N. Dec. at 582, 584; *Matter of M-E-V-G*, 24 I. & N. Dec. at 239 (“A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”); *id.* (“The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”).

38. *See id.* at 241.

39. *See Matter of S-E-G*, 24 I. & N. Dec. at 586 (internal quotation marks omitted).

40. *Matter of E-A-G*, 24 I. & N. Dec. at 594.

41. 26 I. & N. Dec. 227 (BIA 2014).

42. *Matter of M-E-V-G*, 24 I. & N. Dec. at 234. *See Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009), for an example of how courts struggled to apply the particularity and social visibility requirements: “Often it is unclear whether the Board is using the term ‘social visibility’ in the literal sense or in the ‘external criterion’ sense, or even whether it understands the difference.” *Id.* at 430 (Posner, J.).

43. *Matter of M-E-V-G*, 24 I. & N. Dec. at 236.

44. *Id.* at 238.

45. *Id.* at 240. The BIA pointed to *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990), and *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988), to illustrate this point. *Matter of M-E-V-G*, 24 I. & N. Dec. at 240 (“It may not be easy or possible to identify who is opposed to [female genital mutilation (FGM)], who is homosexual, or who is a former member of the national police . . . [but] a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of

asylum recognition turns on the perception of the society in question, not on the perception of a particular persecutor.⁴⁶ Finally, the BIA concluded by summarizing its particular-social-group jurisprudence in a succinct, three-prong test: “An applicant for asylum or withholding of removal seeking relief 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.”⁴⁷

Although U.S. immigration law provides that a U.S. citizen or lawful permanent resident may petition for his or her noncitizen spouse to immigrate to the United States as a lawful permanent resident,⁴⁸ section 3 of DOMA excluded married same-sex couples from this form of immigration.⁴⁹ It was not until 2013 that the Supreme Court invalidated section 3 of DOMA⁵⁰ and married same-sex couples could use their marriages to confer immigration benefits.⁵¹ Yet, the *Windsor* Court did not address the constitutionality of section 2, which reaffirms pre-existing state authority to reject the same-sex marriages of another state.⁵² That is, although the majority of federal agencies and departments now recognize those same-sex marriages deemed valid by the states in which they were celebrated, state governments are not required to do the same. For example, another state is not required to recognize the validity of a same-sex marriage celebrated in

reasons, such as sociopolitical or cultural conditions in the country.”). In their discussion of these cases, the BIA stressed that a group does not lose its protected status simply because its members seek to conceal their group membership. *See id.*

46. *Id.* at 242. The distinction is subtle, but important. Suppose that Frank persecutes John because John wears blue t-shirts. Frank views blue-t-shirt wearers as a socially distinct group. That is, Frank hates the color blue so much that he “meaningfully distinguishes” between blue-t-shirt wearers and everyone else. Society, however, makes no such distinction. Because the standard for social distinction turns not on the idiosyncratic and subjective beliefs of the individual persecutor, but on the more objective beliefs of society as a whole, blue-t-shirt wearers likely would not constitute a socially distinct class for asylum purposes. Thus, the society-persecutor distinction seems to make it more difficult for applicants to establish that they are members of a particular social group. Specifically, it is not enough to show that the persecutor views the victim as different.

47. *Id.* at 251–52.

48. 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (“For the purposes of this subsection, the term ‘immediate relatives’ means children, spouses, and parents of a citizen of the United States”); § 1151(a) (“[A]liens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to . . . family-sponsored immigrants described in section 1153(a) of this title”); § 1153(a) (describing “spouses” as family-sponsored immigrants).

49. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996).

50. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (“The federal statute is invalid”).

51. *See* Statement of Janet Napolitano, *supra* note 9.

52. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 2, 110 Stat. at 2419 (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”). Yet the Supreme Court recently heard oral arguments on whether “the Fourteenth Amendment require[s] a state to license marriage between two people of the same sex” and whether “the Fourteenth Amendment require[s] a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.” *Obergefell v. Hodges*, 135 S. Ct. 1039, 1040 (2015).

Massachusetts⁵³ notwithstanding that the Department of Homeland Security (DHS) recognizes the validity of such marriages for immigration purposes.

II. DETERMINING WHETHER A MARRIAGE IS ELIGIBLE TO CONFER IMMIGRATION BENEFITS

In *Agyeman v. INS*,⁵⁴ the Ninth Circuit stated that “[f]or a marriage to confer immigration benefits, it must satisfy three criteria.”⁵⁵ First, the marriage must be legally valid.⁵⁶ Second, “the couple must have married out of a bona fide desire to establish a life together, not to evade immigration laws.”⁵⁷ Third, the marriage must not contravene public policy.⁵⁸

More recently, however, the BIA relied on an older Ninth Circuit case to articulate a two-step analysis: “[T]o determine whether a marriage is valid for immigration purposes, the relevant analysis involves determining first whether the marriage is valid under State law and then whether the marriage qualifies under the Act.”⁵⁹ For the beneficiary to qualify as a spouse under the INA, the petitioner must show the existence of a bona fide marriage.⁶⁰ “The issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage.”⁶¹ Thus, a marriage is legally valid for immigration purposes only if it is first valid under the laws of the state in which the marriage was performed, in effect leaving vulnerability to state law (and the authority of that state law rooted in section 2 of DOMA) intact.⁶²

“[T]he critical issue when assessing the bona fides of a marriage between an alien and a United States citizen is the couple’s intent at the time of the marriage; the couple must not have entered into marriage ‘for the purpose of evading immigration laws.’”⁶³ Evidence of a bona fide marriage may include, but is not limited to, “proof that the beneficiary has been listed as the petitioner’s spouse on any insurance policies, property leases, income tax forms, or bank accounts; and

53. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (“We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”).

54. 296 F.3d 871 (9th Cir. 2002).

55. *Id.* at 879 n.2.

56. *Id.*

57. *Id.*

58. *Id.*

59. Matter of Lovo, 23 I. & N. Dec. 746, 748 (BIA 2005) (relying on *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982)); see also *Matter of Zeleniak* 26 I. & N. Dec. 158, 158 (BIA 2013) (“[T]o determine whether a marriage is valid for immigration purposes, the United States citizen petitioner must establish that a legally valid marriage exists and that the beneficiary qualifies as a spouse under the Act . . .”).

60. See *Matter of Zeleniak*, 26 I. & N. Dec. at 158.

61. *Matter of Lovo*, 23 I. & N. Dec. at 748; see also *Adams*, 673 F.2d at 1038–39.

62. See, e.g., *Matter of Lovo*, 23 I. & N. Dec. at 748.

63. Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241 (1986) (quoting 8 U.S.C. § 1154(c) (1982)); see also *Lutwak v. United States*, 344 U.S. 604, 611 (1953); *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975) (“Petitioner’s marriage was a sham if the bride and groom did not intend to establish a life together at the time they were married.”).

testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences.”⁶⁴

III. WHETHER A SAME-SEX MARRIAGE IS BONA FIDE FOR PARTNER-BASED IMMIGRATION

The Supreme Court’s decision in *Windsor* and Janet Napolitano’s subsequent announcement that USCIS would review immigration visa petitions filed on behalf of opposite-sex and same-sex spouses in the same manner led to considerable speculation over the fair treatment of married same-sex couples.⁶⁵ Questions arose as to how literally this equal treatment approach would be applied and whether its application would have unintended inequitable consequences. Insofar as sexuality plays into asylum and partner-based-benefits determinations, Bijal Shah describes the principal underlying concern:

Imagine an idealized spectrum. One end of this spectrum represents the “purest” form of LGBT identity in popular culture—status without any conduct at all. Here, one might find an individual with strong same-sex attraction who has perhaps “prayed the gay away” . . . or someone either who has no need to engage in or has otherwise found a way to subvert and ignore . . . any impulse towards physical and emotional intimacy with a person of the same sex. This person’s LGBT identity (whether or not they even claim it) is purely status-oriented, neither expressed as nor claimed on the basis of any actual conduct. On the other end of this spectrum, someone may identify as bisexual, pansexual, or even straight but perhaps have same-sex relationships with romantic undertones, or someone may consider herself “queer” based on political activity alone. This person may claim and even experience her LGBT identity solely on the basis of her conduct. It may safely be said that most people who identify as LGBT likely fall somewhere in the middle of this spectrum. Very likely, the formation of an individual’s LGBT identity is comprised of a complex interaction between the notion of an internal, intrinsic personal LGBT or queer self *and* outward expression of, and participation, in personal and community acts that mark one as LGBT or queer.⁶⁶

64. Matter of Phillis, I. & N. Dec. 385, 387 (BIA 1975); *see also* 8 C.F.R. § 1216.5(e)(2) (2012) (“[T]he director shall consider evidence relating to the amount of commitment by both parties to the marital relationship[, such as d]ocumentation relating to the degree to which the financial assets and liabilities of the parties were combined.”); Reynoso v. Holder, 711 F.3d 199, 206, 206 n.23 (1st Cir. 2013); Agyeman v. INS, 296 F.3d 871, 882–83 (9th Cir. 2002) (“Evidence of the marriage’s bona fides may include . . . jointly-filed tax returns; shared bank accounts or credit cards; insurance policies covering both spouses; property leases or mortgages in both names; documents reflecting joint ownership of a car or other property; medical records showing the other spouse as the person to contact; telephone bills showing frequent communication between the spouses; and testimony or other evidence regarding the couple’s courtship, wedding ceremony, honeymoon, correspondences, and shared experiences.”).

65. *See generally* Am. Bar Ass’n, *supra* note 10; Shah, *supra* note 10; Medeiros, *supra* note 10; Best, *supra* note 10.

66. Shah, *supra* note 10, at 140.

Therein lies the danger of using sexuality as a proxy for fraud: the individual applying for immigration benefits may not be neatly classified as either gay or straight. Not uncommonly, at least one party to a same-sex relationship was once married to or otherwise romantically involved with a person of the opposite sex.⁶⁷ Valid explanations for this brand of superficially inconsistent behavior abound: the individual is bisexual; the individual could not accept his or her sexuality; the individual entered into a heterosexual relationship before realizing or comprehending his or her sexuality; the individual married for religious reasons; the individual married for cultural reasons or to conform with societal norms; the marriage was arranged; the individual feared persecution as an LGB person and married to conceal his or her sexual identity.⁶⁸ Notwithstanding these explanations, and to the extent that a couple seeking partner-based immigration benefits must prove the existence of a bona fide marriage,⁶⁹ would such a relationship history raise a presumption of fraud?

As it turns out, attorneys have reported with startling consensus that USCIS has treated their married same-sex clients with fairness, compassion, and professionalism since the demise of DOMA section 3 in June 2013.⁷⁰ Over a two-week period in October and November 2014, I surveyed immigration attorneys across the country to investigate the post-*Windsor* treatment of married same-sex couples in applying for immigration benefits. Twenty-one attorneys participated in the study. Participants in the study have appeared before immigration officials in eighteen different states,⁷¹ the District of Columbia, and Puerto Rico. All participants have represented both opposite-sex and same-sex clients in their attempts to obtain partner-based immigration benefits for their spouses. Finally, the attorneys who participated in this study have varying levels of experience representing same-sex clients in these matters. Some attorneys who partook in the survey have handled only two or three same-sex immigration marriage cases, while others have handled upwards of two hundred.⁷²

Every attorney who participated in this study characterized his or her experience working with USCIS to obtain partner-based benefits for a same-sex

67. Medeiros, *supra* note 10, at 223.

68. *Id.*

69. *Agyeman v. INS*, 296 F.3d 871, 879 n.2 (9th Cir. 2002).

70. See, e.g., E-mail from Brian Aust, Partner, Aust Schmiechen, to author (Oct. 30, 2014) [hereinafter Aust E-mail] (on file with author) (“[B]oth USCIS and DOS have done an admirable job of being professional and courteous to all same-sex couples . . . and immigrant visa applicants.”).

71. Specifically, these eighteen states include Alaska, Arizona, California, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, and Wisconsin.

72. Interviewees, members of the American Immigration Lawyers Association (AILA), some of whom participate in the organization’s gay, lesbian, bisexual, and transgender interest group (GLIG), received promotional emails about the study on AILA’s listserv. Interviewees volunteered their participation and were not offered compensation. Interviewees received a questionnaire containing ten free-response questions. They were not asked multiple choice questions, nor were they asked to rate their experiences on a quantified scale. To elicit comprehensive answers, the questionnaire encouraged interviewees to provide detailed anecdotal responses within the bounds of client confidentiality. Interviewees represent the U.S. territory of Puerto Rico and numerous states of varied conservatism across the United States. The study would benefit from a larger sample and the inclusion of additional perspectives, such as those of applicants and USCIS interviewers.

couple as positive.⁷³ Participants commonly reported that they were “very satisfied”⁷⁴ or “very impressed”⁷⁵ with how USCIS has been reviewing same-sex immigration marriage petitions. One participant even corrected herself to explain how truly happy she was to see a smooth transition: “So far, I’m satisfied. Actually, I’m ecstatic to be able to handle these cases in such a normal manner.”⁷⁶ Multiple participants recalled emotional encounters with immigration officials: “These people had been together for decades, and now—after years of marriage—they were finally being treated like a married couple. Everyone in the room was crying.”⁷⁷

Eighty-one percent of the twenty-one attorneys who participated in the study reported that they have not noticed a difference between how USCIS examines opposite-sex and same-sex marriages for fraud. Fourteen percent reported that immigration officials have treated same-sex couples more leniently than they have routinely treated opposite-sex couples.⁷⁸ The remaining 5 percent described a more open-ended line of questioning and discussion for same-sex couples.⁷⁹ Participants who reported a greater leniency for same-sex couples explained this differentiation by theorizing a bias toward strong, well-documented applications.⁸⁰ In other words, adjudicators only appeared to be going easier on same-sex couples because the first wave of same-sex applicants comprised individuals who had been together for many years and who had amassed more evidence than was sufficient to prove a bona fide marriage.⁸¹

Seventy-six percent of the attorneys who participated in this study have handled partner-based immigration cases for married same-sex couples where one or both parties to the marriage were previously involved in a heterosexual relationship. All of the attorneys reported that their clients were able to obtain

73. Respondents who represented married same-sex clients in the immediate wake of *Windsor* distinguished their experiences then from their experiences later, when USCIS had worked out some kinks. Respondents who made such a distinction noted a rough start. See, e.g., E-mail from Maurice Goldman, Partner, Goldman & Goldman, PC, to author (Oct. 29, 2014) (on file with author) (describing a “disast[rous]” interview in which the adjudicator fixated on his client’s sexuality and previous heterosexual marriage); E-mail from Joseph Best, Managing Partner, Best Immigration Law Group, to author (Nov. 12, 2014) [hereinafter Best E-mail] (on file with author) (describing an interview in which the adjudicator was too uncomfortable with the same-sex couple to ask more than one question about their relationship).

74. Aust E-mail, *supra* note 70.

75. E-mail from Michael H. Sharon, Partner, Sharon & Kálnoki LLC, to author (Oct. 29, 2014) (on file with author) (“I warned my clients about possible bias against them from individual officers, but have been very impressed with the USCIS’s fairness [in] Cleveland . . .”).

76. E-mail from Laura Danielson, Shareholder, Fredrikson & Byron, P.A., to author (Nov. 2, 2014) [hereinafter Danielson E-mail] (on file with author).

77. Telephone Interview with Joy Alegría Haynes, Attorney, Haynes Novick Immigration (Oct. 31, 2014); see also E-mail from Alfredo Murga, Partner, Hua & Murga LLP, to author (Oct. 29, 2014) [hereinafter Murga E-mail] (on file with author) (“For the first wave of cases, the officers were extremely generous with their time and many officers cried at the interview when they learned that our clients [had] been together for decades . . .”).

78. See, e.g., E-mail from Christine Popp, Managing Partner, Popp Law Office, to author (Oct. 30, 2014) (on file with author); Best E-mail, *supra* note 73.

79. See E-mail from John R. Egan, Attorney, MigrationCounsel, to author (Oct. 29, 2014) [hereinafter Egan E-mail] (on file with author).

80. Danielson E-mail, *supra* note 76 (“One good thing about these early cases is that they often involve people who have been in very long-term relationships; they just haven’t been able to file until now.”).

81. *Id.*

immigration benefits notwithstanding their previous heterosexual relationships.⁸² In fact, these previous heterosexual relationships have mattered so little that some adjudicators did not even ask about them.⁸³ One attorney even reported that her married same-sex clients had easily obtained partner-based immigration benefits despite having children from their previous heterosexual marriages.⁸⁴ Another attorney recalled a sincere exchange between the adjudicator and his client:

The adjudicator asked about the earlier marriage, and asked in a pretty amicable way: “I’m afraid [that] I’m just not familiar with this type of situation yet; can you explain to me how you could be in a marriage with a man before but with a woman now?” The applicant said, also in an amicable way, “I don’t know how to explain that; I guess you really can’t control who you fall in love with.” That seemed to satisfy the adjudicator, who granted her adjustment at the interview.⁸⁵

By choosing not to scrutinize applicant behavior that might be construed as inconsistent—evidence that could damage an applicant’s credibility—USCIS implicitly recognizes the fluid and idiosyncratic nature of sexuality. When applicants can show with abundant documentation and evidence that they presently love and care about their same-sex spouses, prior relationships with persons of the opposite sex seem to have little effect on the outcomes of their petitions. Thus, in practice, USCIS appears to concede not only that individuals may express their sexualities differently in the face of different circumstances, but also that prior relationships become less relevant the more competent individuals are to demonstrate that they are presently devoted to their marriages. To that extent, USCIS likely will scrutinize applicants’ past behavior when it handles partner-based immigration cases for same-sex couples who are in poorly documented relationships.⁸⁶

82. *But see* E-mail from Margaret Stock, Counsel, Cascadia Cross-Border Law, to author (Oct. 29, 2014) (on file with author) (describing a case in which the immigration officer found fraud in the client’s previous heterosexual marriage, and thereby denied immigration benefits for the same-sex marriage).

83. *See, e.g.*, E-mail from Julie Cruz Santana, Owner, Law Office of Julie Cruz Santana, to author (Nov. 2, 2014) [hereinafter Santana E-mail] (on file with author).

84. *See* E-mail from Ilana Drummond, Managing Partner, Jackson & Hertogs LLP, to author (Oct. 29, 2014) [hereinafter Drummond E-mail] (on file with author).

85. Egan E-mail, *supra* note 79.

86. This prediction analogizes to the framework used by American courts to determine whether a restraint of trade is unreasonable under the antitrust laws:

To determine whether a restraint of trade is unreasonable, most antitrust claims are analyzed according to the “rule of reason.” This rule requires analysis of various factors including information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect. Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se* and no further inquiry is required. . . . The *per se* rule is used when courts are confronted with conduct that experience teaches is overwhelmingly likely to be anticompetitive. . . .

. . . .

IV. SEXUAL ORIENTATION AS AN ELEMENT OF ASYLUM

By contrast, proof of sexual orientation appears more important in determining whether an individual qualifies for asylum protection based on his or her sexual orientation.⁸⁷ The REAL ID Act of 2005 states:⁸⁸

An alien applying for relief or protection from removal has the burden of proof to establish that the alien . . . satisfies the applicable eligibility requirements In evaluating the testimony of the applicant . . . the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant’s burden of proof Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant . . . , the inherent plausibility of the applicant’s . . . account, the consistency between the applicant’s . . . written and oral statements . . . , [and] the internal consistency of such statements with other evidence of record⁸⁹

Thus, LGBT asylum applicants—commonly referred to as sexual minority applicants—have the burden of proving their sexual orientation or gender identity.⁹⁰ Historically, LGBT individuals have had a relatively difficult time proving their

“To avoid examining the relevant market, market power, and anticompetitive effect in all cases in which conduct does not clearly fit within a *per se* category, the Supreme Court has sanctioned an intermediate inquiry known as ‘quick look’” Such . . . an analysis . . . is appropriate where “the great likelihood of anticompetitive effects can easily be ascertained”

Clarett v. Nat’l Football League, 306 F. Supp. 2d 379, 404, 407 (S.D.N.Y. 2004). Similarly, adjudicators make deeper inquiries into an applicant’s sexual orientation, the weaker is an applicant’s *prima facie* case. To the extent that adjudicators come across well-documented cases, they take a “quick look.” To the extent that adjudicators come across poorly documented cases, they will likely need a full exposition of the facts.

87. See generally 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 (2009); Fadi Hanna, Case Comment, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913 (2005); Deborah Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY 135 (2006).

88. Pub. L. No. 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.).

89. *Id.* § 101(d)(2) (codified at 8 U.S.C. § 1229a(c)(4)(A)–(C) (2012)).

90. Conroy, *supra* note 87, at 10 (quoting Timothy Wei, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 500 (1998)). Conroy uses “sexual minority” to describe “gay, lesbian, bisexual, and transgender individuals, as well as any persons whose identities and expressions thereof do not conform to the dominant sexual norms within their cultures.” See *id.* at 2 n.3.

status as sexual minorities because “sexual and gender identities are not externally visible and verifiable in the same ways as race, ethnicity, religion, or national origin may be.”⁹¹ Moreover, the inherently private and personal nature of sexuality makes it difficult to prove with extrinsic evidence.⁹²

In *Kun Ko Lin v. Ashcroft*,⁹³ for example, the Ninth Circuit sought to verify an asylum applicant’s sexual orientation by considering factors such as the date of “his last homosexual activity” and the number of same-sex sexual partners he claimed to have had in his lifetime.⁹⁴ A sexual minority applicant who has concealed his or her sexual identity for fear of persecution will struggle to present corroborative, extrinsic evidence of these very personal matters.⁹⁵

Sexual minority asylum applicants also struggle to establish credibility.⁹⁶ Generally, credibility creates the greatest obstacle for applicants “who do not fit within normative male, heterosexual, American cultural expectations for testimonial behavior.”⁹⁷ Indeed, before the BIA clarified that social visibility does not require “literal or ‘ocular’ visibility” in *Matter of M-E-V-G*,⁹⁸ courts rejected asylum applications from individuals who did not appear “‘gay enough’ on the basis of stereotypical physically ‘feminine’ characteristics as indicators of homosexual identity.”⁹⁹ This stereotype-driven approach to reviewing asylum applications is problematic not only because atypical characteristics can cast doubt on whether an

91. See *id.* at 8.

92. *Id.* (“[S]exual minorities create a valid concern that private, intimate expressions of highly-personal identities are extremely difficult to corroborate with extrinsic evidence.”).

93. 99 F. App’x 810 (9th Cir. 2004).

94. *Id.* at 812. Other countries have relied on biology to verify sexual orientation. See Amelia Smith, *EU Court Bans Sexuality Tests for Gay Asylum Seekers*, NEWSWEEK, Dec. 2, 2014, <http://www.newsweek.com/eu-court-bans-sexuality-tests-gay-asylum-seekers-288643> (“Until 2011, Czech authorities used ‘phallometric tests’ to try to determine sexual orientation in asylum processes, a practice developed in the early years of Communist Czechoslovakia that involved using rubber tubes to measure the blood circulation in a man’s penis when shown pornographic material.”). The European Court of Justice (ECJ) banned the use of biological tests in 2014, holding that such tests constitute an “infringement of human dignity, and therefore cannot be used to determine asylum status on the grounds of homosexuality” in any EU member country. Cases C-148/13, C-149/13, C-150/13, A, B & C v. Sec’y of State for Sec. & Justice, 2014, ¶ 72, available at <http://www.curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=EN&mod=req&dir=&occ=first&part=1&cid=178746>; see also Katie Zavadski, *European Court Rules Out Boner Tests for Gay Asylum Seekers*, N.Y. MAG., Dec. 2, 2014, <http://www.nymag.com/daily/intelligencer/2014/12/europe-nixes-erection-test-for-gay-asylum-cases.html>. The court also ruled that immigration officials may not require applicants to submit photographs or videos of themselves engaging in sexual acts, nor may they “excessively question applicants about intimate activity.” See Zavadski, *supra*.

95. Conroy, *supra* note 87, at 11 (“This is the potential dilemma facing a sexual minority applicant who has spent his or her life attempting to remain closeted, only to be discovered and compelled to flee.”).

96. *Id.* at 13 (“Perhaps more than any other area of asylum law, fulfilling credibility requirements has been an incredible challenge for sexual minority applicants.”).

97. See *id.*; cf. Morgan, *supra* note 87, at 152, 153 (arguing that “[t]he government appears to have adopted the substitutive model of homosexual identity in its adjudication of sexual orientation asylum cases,” under which “a homosexual is someone who not only has homosexual sex, but who also has a visible homosexual identity that conforms to stereotypical white norms”).

98. 26 I. & N. Dec. 227, 228 (BIA 2014).

99. See Morgan, *supra* note 87, at 156 (“[J]udges in both Canada and the United States have rejected claims because gay men were not ‘visibly effeminate.’”).

applicant is actually gay,¹⁰⁰ but also because judges may conclude that LGB people who pass as heterosexual do not need legal protection.¹⁰¹ Furthermore, this approach facilitates fraud by encouraging reliance on an archetypical set of superficial characteristics, thereby making it easier to “play gay.”¹⁰²

Presently, however—given that the BIA has replaced social visibility with social distinction and stated that “a group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor”¹⁰³—adjudicators are well situated to abandon this unflattering, stereotype-driven approach and institute a fairer, more sensitive system. That is, whether an LGBT individual can obtain asylum protection now hinges on whether society recognizes the LGB and T populations as socially distinct groups within society as a whole, rather than whether the persecutor can identify a specific LGBT individual as LGBT based on that individual’s outward, visible expressions of gender and sexuality.

Insofar as courts analyze an applicant’s evidence for consistency, previous heterosexual relationships appear more likely to defeat an applicant’s credibility claim in the asylum context than they do in the spousal immigration context.¹⁰⁴ Indeed, many courts have recognized the inconsistency of a sexual minority applicant’s previous heterosexual marriage.¹⁰⁵ In *Eke v. Mukasey*,¹⁰⁶ for example, the Seventh Circuit upheld an immigration judge’s adverse credibility finding against an asylum applicant whose “testimony and affidavit contained several inconsistencies about his homosexuality and history of homosexual conduct,” such as his marriage to a Nigerian woman and his paternity to their children.¹⁰⁷ Similarly, in *Mockeviciene v. Attorney General*,¹⁰⁸ the Eleventh Circuit upheld a BIA

100. See, e.g., *id.* at 145 (“At Mohammad’s asylum interview, the immigration officer listened to Mohammad’s story and then asked him how she was supposed to believe he was gay when he was ‘not feminine in any way.’”).

101. See, e.g., Hanna, *supra* note 87, at 914 (“While accepting that Soto Vega was homosexual, the [immigration judge] reasoned that he was not stereotypically gay enough to objectively fear identification as such, remarking that [he] didn’t see anything in his appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays.” (quoting *Matter of Soto Vega*, No. A-95880786, at 3 (Immigration Ct. Jan. 21, 2003), *aff’d*, No. A-95880786 (BIA Jan. 27, 2004), *remanded sub nom. Vega v. Gonzales*, 183 F. App’x 627 (9th Cir. 2006))).

102. Morgan, *supra* note 87, at 156 (“Misguided reliance on physical stereotypes to determine if an applicant is gay . . . opens the system to manipulation by those willing to ‘play gay’ for immigration papers.”); *cf. Amanfi v. Ashcroft*, 328 F.3d 719, 721, 730 (3d Cir. 2003) (imputing “status as a homosexual” to an asylum applicant who neither claimed to be homosexual nor presented evidence of being homosexual because his alleged persecutors perceived him to be homosexual).

103. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (BIA 2014).

104. Compare Santana E-mail, *supra* note 83 (describing how seamless it was for her clients to obtain partner-based immigration benefits notwithstanding their previous, child-bearing heterosexual marriages), with *Safadi v. Gonzales*, 148 F. App’x 372, 377 (6th Cir. 2005) (“[T]he record reflects that the inconsistencies cited by the [immigration judge] raise questions as to whether [the applicant] is in fact gay and as to the nature of his relationship with [his putative partner.]”); see also Conroy, *supra* note 87, at 17 (“Safadi’s marriage to an American woman heavily influenced the opinion of the Board and Circuit[, and] led adjudicators to doubt both Safadi’s objective sexual identity and prospective social visibility.”).

105. Conroy, *supra* note 87, at 44 (“Unfortunately, many courts have [found] that heterosexual marriage is an externally inconsistent element of a sexual minority’s testimony.”).

106. 512 F.3d 372 (7th Cir. 2008).

107. *Id.* at 376, 382.

108. 237 F. App’x 569 (11th Cir. 2007).

determination that a female asylum applicant's "marriage to a man undercut the credibility of her claim to be a lesbian," stating that "evidence of [the applicant's] recent marriage . . . does not compel a finding that the [immigration judge's] credibility determination was in error."¹⁰⁹

V. THE ANALOGY BETWEEN SEXUALITY AND RELIGION

Local boards and courts may not reject an individual's religious beliefs "because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed . . . are sincerely held and whether they are, in his own scheme of things, religious."¹¹⁰ Whether a belief is "truly held" is a "threshold question of sincerity which must be resolved in every case."¹¹¹ The question of sincerity is a question of fact: "Assessing a claimant's sincerity of belief demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination."¹¹² Courts have described this sincerity analysis as "exceedingly amorphous"¹¹³ and have cautioned that courts should exercise "judicial shyness."¹¹⁴ As a result, the sincerity of an individual's religious belief is rarely challenged, and claims of sincerity may succeed on sparse evidence.¹¹⁵

109. *Id.* at 573, 574. Like sexual-orientation-based asylum claims in the United States, sexual-orientation-based asylum claims in the United Kingdom have been "denied because the person was not believed to be lesbian or gay, [or because of] serious misconceptions about how lesbians and gay men behave when forced to conceal their sexual identity." See UK LESBIAN & GAY IMMIGRATION GROUP (UKLGIG), FAILING THE GRADE: HOME OFFICE INITIAL DECISIONS ON LESBIAN AND GAY CLAIMS FOR ASYLUM 8 (2010), available at <http://www.uklgig.org.uk/wp-content/uploads/2014/04/Failing-the-Grade.pdf>. Moreover, like previous heterosexual relationships in U.S. asylum cases, previous heterosexual relationships in UK asylum cases damage the credibility of an individual who seeks to prove that he or she is gay. See *id.* ("In three of the sample cases, the person's previous marriage or heterosexual relationship was taken as proof that [he or she] was lying."). Paradoxically, UK case owners have also rejected asylum claims from putatively gay applicants for expressing their sexual orientation too overtly. *Id.* ("In [ten] cases, . . . the case owner disbelieved the person's account due to their engagement in perceived 'risky' sexual behavior, association with other lesbians or gay men, 'coming out' to a family member, or nonconforming dress or actions that could subject the person to risk of detection or harm."). Case owners in these instances "speculated that no rational person would take such a risk, so the applicant must be lying." *Id.* Thus, it seems that refugee applicants to the UK who seek to escape persecution on account of their sexual orientation have three "options": (1) take no action to conceal or draw attention to their sexual orientation and risk having no corroborative evidence to substantiate their claims; (2) conceal their sexual orientation, possibly by participating in heterosexual relationships, and risk damaging their credibility by over-concealing; or (3) express their sexual orientation, possibly by participating in homosexual relationships, and risk their credibility yet again by engaging in putatively implausible behavior. Perhaps, then, refugee applicants to the UK who seek to escape persecution on account of their sexual orientation have no real options at all.

110. *United States v. Seeger*, 380 U.S. 163, 184–85 (1965); see also *United States v. Ballard*, 332 U.S. 78, 86 (1944) ("Men . . . may not be put to the proof of their religious doctrines or beliefs; religious experiences which are as real as life to some may be incomprehensible to others.").

111. *Seeger*, 380 U.S. at 185; *Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986) ("A sincere religious belief is a prerequisite to any free exercise claim.").

112. *Seeger*, 380 U.S. at 185; *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

113. *Patrick*, 745 F.2d at 157.

114. *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (quoting *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 262 (5th Cir. 2010)).

115. *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 486 (5th Cir. 2014) ("Indeed, 'the sincerity of a plaintiff's engagement in a particular religious practice is rarely challenged,' and 'claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible

Because courts may not inquire into the truth or validity of a free-exercise plaintiff's religious beliefs,¹¹⁶ “[t]he inquiry into . . . sincerity . . . is almost exclusively a credibility assessment.”¹¹⁷ To the extent that sincerity is “purely a subjective question” and forays into the human mind are naturally speculative,¹¹⁸ a free-exercise plaintiff's in-person appearances may provide the probative evidence.¹¹⁹ Thus, to the extent that credibility functions as a proxy for sincerity, courts making sincerity determinations often consider the consistency with which free-exercise plaintiffs adhere to their purported beliefs,¹²⁰ as well as the duration of such adherence.¹²¹

Free-exercise plaintiffs may establish sincerity in spite of their putatively inconsistent behavior: “A finding of sincerity does not require perfect adherence to [an individual's] beliefs . . . , and even the most sincere practitioner may stray from time to time. [A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance”¹²² Moreover, courts may not premise their consistency determinations on a false generalization that all members of a particular religious group hold the same beliefs and practice those beliefs similarly.¹²³ That is, “[i]ndividuals may practice their religion in any way they see

assertions.” (quoting *Tagore*, 735 F.3d at 328)); *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012) (“Sincerity is generally presumed or easily established.”).

116. *Seeger*, 380 U.S. at 185 (“[W]e hasten to emphasize that . . . the ‘truth’ of a belief is not open to question.”).

117. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1352–53 (10th Cir. 1997); *see also Moussazadeh*, 703 F.3d at 792 (“To examine religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread.”); *Patrick*, 745 F.2d at 159, 185 (“In determining whether [plaintiff's] beliefs are to be accorded [F]irst [A]mendment protection, the factfinder must delve into the internal workings of [plaintiff's] mind and assess the credibility of his claims. . . . [T]hese factual issues cannot be resolved without the benefit of observing [plaintiff's] demeanor during direct and cross-examination to facilitate credibility evaluation.”); *United States v. Broyles*, 423 F.2d 1299, 1302 (4th Cir. 1970) (“[A plaintiff's] *prima facie* sincerity and good faith belief [can] be overcome by an adverse conclusion as to [the plaintiff's] credibility” (citing *Witmer v. United States*, 348 U.S. 375, 382 (1955))).

118. *Witmer*, 348 U.S. at 381.

119. *Campbell v. United States*, 221 F.2d 454, 457 (4th Cir. 1955) (“The best evidence on [the question of sincerity] may well be, not [an individual's] statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact-finding agency.”).

120. *See Broyles*, 423 F.2d at 1302 (stating that “inconsistent prior acts” may be used to defeat a plaintiff's *prima facie* showing of sincerity); *see, e.g., Moussazadeh*, 703 F.3d at 787 (noting that plaintiff “consistently ate the kosher meals”); *Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986) (upholding a finding that plaintiff's beliefs were not sincerely held because plaintiff attended worship services only five times in the course of a year and failed to designate a spiritual advisor); *Vaughn v. Garrison*, 534 F. Supp. 90, 92 (E.D.N.C. 1981) (upholding a prison's requirement that plaintiff-inmate “request . . . a pork free diet in order to be considered as a Muslim qualified to receive a prayer rug” because the requirement guards against “frivolous and insincere requests for prayer rugs”).

121. *See, e.g., Cole v. Fulcomer*, 588 F. Supp. 772, 774–75 (M.D. Pa. 1984) (noting that a free-exercise plaintiff may establish sincerity without “actively ‘practic[ing]’ his religion throughout his life”), *rev'd on other grounds sub nom. Cole v. Flick*, 758 F.2d 124 (3d Cir. 1985), *cert. denied*, 474 U.S. 921 (1985). “Many individuals who practice Christianity or Judaism have not held their religious belief through their lives. Likewise, many sincerely religious individuals engage in formal observance of religious practices infrequently.” *Id.*

122. *Moussazadeh*, 703 F.3d at 791–92 (quoting *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012)); *see also Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (“[T]he fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.”).

123. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981) (“[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect”).

fit.”¹²⁴ Because a belief that does not fit neatly within the teachings of an organized religion warrants no less First Amendment protection than one that does, “courts consistently focus on the *individual’s* belief system rather than the beliefs of a religious group with which the individual may (or may not) be associated.”¹²⁵

The analogy between sexuality and religion makes sense in this context because both are highly personal and idiosyncratic dimensions of human identity, separate and apart from how society chooses to label or generalize them.¹²⁶ Just as someone who considers herself Catholic may not celebrate every Catholic holiday or heed every decree of the Catholic Church, someone who considers himself gay may not fit every gay stereotype. Just as someone who considers herself Catholic may have become more religious at a certain point in her life, someone who considers himself gay may have become more comfortable outwardly expressing his sexuality at a certain point in his life. Just as someone who considers herself Catholic may doubt certain tenets of her religion or hold beliefs outside of her Catholicism, someone who considers himself gay may not associate exclusively with persons of the same gender when seeking romance or sexual intimacy. Insofar as sexuality and religion are highly subjective concepts, difficult to prove by way of objective evidence, it also makes sense that courts analyze similarly whether an individual’s sexual identity or religious beliefs are entitled to legal protection.

VI. SAME FACTS, DIFFERENT OUTCOMES: ONLY GAY ENOUGH FOR CERTAIN THINGS

That courts appear to scrutinize proof of sexuality more in the context of asylum applications than they do in the context of partner-based immigration benefits may be explained by cross-context differences in the applicants’ objectives. Perhaps in the context of partner-based immigration benefits, adjudicators are less concerned with labeling the petitioners and more concerned that the petitioners are not using their marriage to evade immigration laws. That is, they are more willing

Courts are not arbiters of scriptural interpretation.”). “Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences” *Id.* at 715.

124. *Moussazadeh*, 703 F.3d at 791 (noting that “[a]lthough certain adherents of Judaism may consume only certified kosher food, others will consumer food that is not *per se* nonkosher”); *see also* *Fraze* v. Ill. Dep’t of Emp’t Sec., 489 U.S. 829, 834 (1989) (explaining that a self-identifying Christian plaintiff’s refusal to labor on the Sabbath was no less entitled to First Amendment protection because “there are assorted Christian denominations that do not profess to be compelled by their religion to refuse [work on] Sunday”); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 261 (5th Cir. 2010) (“Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream”); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding that a Seventh Day Adventist’s vegetarian diet was entitled to First Amendment protection notwithstanding a lower court finding that the Seventh Day Adventist Church does not strictly require its members to eat vegetarian).

125. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1117 (10th Cir. 2013); *see also* *Fraze*, 489 U.S. at 834 (“[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.”).

126. *See Moussazadeh*, 703 F.3d at 791 (“Individuals may practice their religion in any way they see fit”); *id.* (noting that “[a]lthough certain adherents of Judaism may consume only certified kosher food, others will consumer food that is not *per se* nonkosher”); *Conroy*, *supra* note 87, at 8 (noting the “private,” “intimate,” and “highly-personal” nature of sexual identity). Several important distinctions belie this analogy, however. Expressions of sexuality generally do not serve a divine being or entity, for example. Moreover, unlike sexuality, religious beliefs may be understood as part of an organized and teachable system or scheme.

to recognize the fluidity and spectrum-like nature of sexuality as long as petitioners appear to care about each other genuinely. On the other hand, adjudicators in the asylum context seek to do just the opposite. They are less willing to accept nontraditional conceptions of sexuality because applicants are trying to fit within a particular social category—trying to label themselves as gay.

Perhaps the most precise comparison between these standards of review can be achieved by applying them. Suppose the hypothetical individual Susan Kraft, a forty-five-year-old lesbian who lives in Boston, Massachusetts with her wife, Danielle. Susan was born to a devout Christian family in rural Warren County, Iowa. She became aware of her sexual interest in women when she was in middle school, but nevertheless dated male classmates throughout high school. During this time, Susan struggled to reconcile these feelings with her religious beliefs. She feared how her parents would react and chose to repress any and all urges she had to be with another woman.

Susan attended college in Chicago, Illinois, where she lived on her own for the first time in her life. She became more comfortable with her attraction to women throughout her time in college, which she attributes to living apart from her parents and making her first openly gay friends. In her third and fourth years of college, Susan visited several underground bars that catered primarily to lesbians. To maintain anonymity, she visited these bars alone. Although she hoped to meet other lesbian women at these bars, Susan could not muster enough courage to tell others that she was a lesbian. She graduated from college having not once been physically intimate with another woman.

Susan found a job in Boston, Massachusetts and moved there shortly after graduation. There she met Chris Harmon, a coworker. Although Susan was not physically attracted to Chris, she enjoyed his company and loved how he made her laugh. It did not take long for Susan to realize that Chris felt for her romantically, at which point Susan made a difficult choice. Afraid to lose her parents and live life openly as a lesbian, Susan chose to pursue a life with Chris. The two dated for several years before getting married and buying a house together. The marriage brought great joy to Susan’s parents, who worried that Susan would end up a spinster. Ultimately, Chris and Susan had three children, who kept them both very busy and helped Susan to feel as though her marriage to Chris was more than just a charade. Chris and Susan maintained the reputation of husband and wife in their community by taking positions on the parent-teacher association and participating in community politics. After fifteen years of marriage, Susan finally confessed to how unhappy she was and admitted to being a lesbian. Chris and Susan divorced a few months later, but kept the reason for their divorce a secret so that their children would not be bullied at school.

Two years passed before Susan was ready to date again. She was tired of lying about her sexuality and finally allowed herself to see other women. Susan joined a dating website at age forty-four and met Danielle Oduya, a foreign national who came to the United States to earn a PhD in anthropology. Danielle hailed from Kenya, where it is illegal to engage in homosexual acts.¹²⁷ The two clicked

127. See Penal Code, (2009) Cap. 63 § 162(a) (Kenya) (“Any person who . . . has carnal knowledge of any person against the order of nature . . . is guilty of a felony and is liable to imprisonment for fourteen years”); *id.* § 162(c) (“Any person who . . . permits a male person to have carnal knowledge of him or her against the order of nature . . . is guilty of a felony and is liable to imprisonment for fourteen years”); *id.* § 163 (“Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.”); *id.* § 165 (“Any male person who, whether in

immediately and married rather quickly, only eighteen months after meeting. Danielle is the only female sexual partner that Susan has ever had.

Now assume that Susan applies for spousal immigration benefits so that Danielle can continue to live in the United States as a lawful permanent resident. Notwithstanding her previous marriage to Chris, Susan would likely face little resistance in proving that she has a bona fide marriage to Danielle.¹²⁸ In fact, an adjudicator may not even ask Susan about her previous marriage to Chris¹²⁹ even though the couple had three children together.¹³⁰ Although the adjudicator may be suspicious of Susan and Danielle's short engagement,¹³¹ the adjudicator likely would not challenge whether Susan is actually a lesbian.

Now assume instead that Susan claims a religious exception to some neutral, generally applicable law because of her sexual attraction to other women. The court indulges Susan's creative claim and for the sake of argument treats her lesbianism as religion. To claim a religious exception, Susan must demonstrate that her lesbian beliefs are sincerely held.¹³² To determine whether Susan sincerely held her lesbian beliefs, the court would likely engage in an assessment of Susan's credibility¹³³ by examining her past.¹³⁴

Although Susan would have to overcome numerous inconsistencies in her practice of lesbianism,¹³⁵ she would likely be able to demonstrate that her lesbian beliefs are sincerely held. Specifically, Susan likely can show that her lesbian beliefs are sincerely held notwithstanding that she had heterosexual relationships in high school, was married to a man for fifteen years, and had three children with her ex-husband because "a finding of sincerity does not require perfect adherence to [the] beliefs expressed by [an individual]."¹³⁶ Even though her first sexual experience with a woman was at age forty-four, Susan likely can show that her

public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, . . . whether in public or private, is guilty of a felony and is liable to imprisonment for five years."); *Kenya Gay Activist Criticizes Odinga Crackdown Threat*, BBC NEWS (Nov. 29, 2010, 2:43 PM), <http://www.bbc.co.uk/news/world-africa-11864702> ("[Prime Minister] Odinga warned that men or women found engaging in homosexual acts would be arrested.").

128. See *supra* text accompanying note 82 ("All of the attorneys reported that their clients were able to obtain immigration benefits notwithstanding their previous heterosexual relationships.").

129. See Santana E-mail, *supra* note 83.

130. See Drummond E-mail, *supra* note 84 (reporting that her married same-sex clients had no problem obtaining partner-based immigration benefits despite having children from their previous heterosexual marriages).

131. See Danielson E-mail, *supra* note 76 (hypothesizing that adjudicators appear to be treating married same-sex couples more leniently than their opposite-sex counterparts because the first wave of same-sex applicants has involved well-documented, long-term relationships).

132. See *United States v. Seeger*, 380 U.S. 163, 185 (1965) (stating that whether a belief is "truly held" is a "threshold question of sincerity that must be resolved in every case").

133. See *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1352-53 (10th Cir. 1997) ("The inquiry into . . . sincerity . . . is almost exclusively a credibility assessment . . .").

134. See *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("[A]ssessing a claimant's sincerity of belief demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination.").

135. See *United States v. Broyles*, 423 F.2d 1299, 1301 (4th Cir. 1970) (stating that "inconsistent prior acts" may be used to defeat a plaintiff's prima facie showing of sincerity).

136. See *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012).

lesbian beliefs are sincerely held because a free-exercise plaintiff may establish sincerity without “actively practic[ing her] religion throughout [her] life.”¹³⁷

Finally, Susan likely can show that her lesbian beliefs are sincerely held because courts may not premise their consistency determinations on a false generalization that all members of a particular religious group practice their beliefs similarly.¹³⁸ To the extent that being sexually attracted to other women constitutes lesbian beliefs and acting on those feelings constitutes the “practice of lesbianism,” Susan has held lesbian beliefs for most of her life and merely chose not to practice her lesbianism until age forty-four because she feared the reaction of her conservative parents. Alternatively, to the extent that lesbianism is a status defined by sexual attraction rather than sexual activity, Susan has considered herself a lesbian since middle school.¹³⁹

Now, assume instead that Susan, rather than Danielle, is a Kenyan national and that Susan’s life story through her divorce from Chris proceeds on an analogous set of facts in Kenya. Accordingly, Susan, rather than Danielle, has come to the United States on a student visa to pursue her PhD in anthropology. Susan and Danielle maintain a relatively private life and choose not to marry because Susan does not want an official record of her lesbian relationship. Susan completes her PhD and stays in the United States past the expiration of her student visa, at which point Susan applies for asylum. She is able to show that lesbians in Kenya constitute a particular social group under the Refugee Act of 1980.¹⁴⁰ She is also able to show that lesbians have a well-founded fear of persecution on account of their membership in a particular social group¹⁴¹ by relying on the criminalization of homosexuality in Kenya.¹⁴²

Although Susan can show that lesbians in Kenya constitute a particular social group, she likely will struggle to prove that she is a lesbian.¹⁴³ Proving that

137. See, e.g., *Cole v. Fulcomer*, 588 F. Supp. 772, 774–75 (M.D. Pa. 1984) (internal quotation marks omitted). Wrongly or rightly, this argument equates the “practice of lesbianism” with lesbian sexual activity.

138. See *Moussazadeh*, 703 F.3d at 791 (“Individuals may practice their religion in any way they see fit.”); see generally Bernard Lazerwitz & Michael Harrison, *American Jewish Denominations: A Religious and Social Profile*, 44 AM. SOC. REV. 656 (1979) (surveying various denominations of American Judaism and recognizing behavioral differences among persons of the Jewish faith).

139. See *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (explaining that a self-identifying Christian plaintiff’s refusal to labor on the Sabbath was no less entitled to First Amendment protection because “there are assorted Christian denominations that do not profess to be compelled by their religion to refuse [work on] Sunday”); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981) (“Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences . . .”).

140. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102; see also *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990) (holding that homosexuality can be the basis for finding a particular social group).

141. § 201(a), 94 Stat. at 102; see also *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (defining “persecution on account of membership in a particular social group” to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic”).

142. See Penal Code, (2009) Cap. 63 § 162(a) (Kenya) (“Any person who . . . has carnal knowledge of any person against the order of nature . . . is guilty of a felony and is liable to imprisonment for fourteen years . . .”).

143. See *Conroy*, *supra* note 87, at 810 (“The burden is on the sexual minority asylum applicant to . . . [p]rove the truth of his or her sexual . . . orientation.” (quoting Timothy Wei, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 500 (1998))).

she is a lesbian will be difficult because Susan has only had one female sexual partner in the course of her life and has only been sexually active with women for less than two years.¹⁴⁴ Furthermore, Susan will struggle to produce corroborative evidence of her lesbianism because she concealed her sexuality while living in Kenya and has led a relatively private life with Danielle.¹⁴⁵ Finally, Susan will struggle to establish credibility as a lesbian because she was married to Chris for fifteen years¹⁴⁶ and “many courts have . . . [found] that heterosexual marriage is an externally inconsistent element of a sexual minority’s testimony.”¹⁴⁷ That Susan and Chris had three children together will further weaken Susan’s credibility.¹⁴⁸

Thus, on roughly the same facts, Susan likely would be able to show that she has a bona fide lesbian marriage and that her lesbian beliefs are sincerely held, but not that she is a lesbian. Thus, on roughly the same facts, Susan would be able to use her sexuality to obtain partner-based immigration benefits or a religious exception from some neutral and generally applicable law, but not to obtain asylum protection to avoid persecution on account of her homosexuality.

This experiment reveals a problematic and unacceptable disparity in the way that administrative and judicial adjudicators understand sexuality. On the one hand, determinations of eligibility for partner-based immigration benefits and religious exceptions recognize the fluid nature of sexuality and acknowledge the many circumstances that influence an individual’s choice either to act on his or her sexual impulses or repress them. On the other hand, determinations of whether to grant asylum protection utilize rigid conceptions of sexuality and rely on crude proxies such as how many sexual partners of the same sex a person has had in his or her lifetime. The result is that individuals who are sexually active and individuals who are sexually inactive are treated differently; individuals who try to conceal their homosexuality by marrying persons of the opposite sex and individuals who only date persons of the same sex are treated differently; individuals who come from liberal, accepting communities and individuals who come from conservative, intolerant communities are treated differently. Ultimately, persons of the same sexuality are treated inequitably because they have chosen to live their lives differently.

CONCLUSION

Although LGBT individuals still face injustice in the immigration context, they have come a long way since being inadmissible to the United States in 1965.¹⁴⁹

144. See *Kun Ko Lyn v. Ashcroft*, 99 F. App’x 810, 812 (9th Cir. 2004) (verifying an asylum applicant’s sexuality by considering such factors as the date of “his last homosexual activity” and the number of sexual partners he claimed to have had in his lifetime).

145. See *Conroy*, *supra* note 87, at 11.

146. See *Mockeviciene v. Attorney General*, 237 F. App’x 569, 573 (11th Cir. 2007) (upholding a BIA determination that the female asylum applicant’s “marriage to a man undercut the credibility of her claim to be a lesbian”); *Safadi v. Gonzales*, 148 F. App’x 372, 376–77 (6th Cir. 2005) (questioning whether a male asylum applicant was actually gay because he had previously been married to a woman).

147. *Conroy*, *supra* note 87, at 44.

148. See *Eke v. Mukasey*, 512 F.3d 372, 376–82 (7th Cir. 2008) (upholding an immigration judge’s adverse credibility finding against a putatively gay male asylum applicant because of “inconsistencies [in] his homosexual activity and history of homosexual conduct,” such as his previous marriage to a Nigerian woman and his paternity to their children).

149. Immigration Act of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919.

LGB individuals have made particularly great strides in the context of marriage-based immigration, where they can now use their legally valid marriages to gain partner-based immigration benefits around the world¹⁵⁰ and have their applications for partner-based immigration benefits reviewed both fairly and generously.¹⁵¹ Moreover, LGB individuals can avoid persecution on account of their sexual orientation by applying for asylum or refugee status on the basis of their membership in a particular social group.¹⁵² Yet, claims for asylum and refugee status premised on homosexuality have proceeded on misguided and inaccurate conceptions of sexuality.¹⁵³

Discrepancies in the treatment of LGB people who seek partner-based immigration benefits on the one hand, and LGB people who seek protection from persecution on the other, create a simple, yet troubling problem: Individuals of the same sexual orientation will possess different rights if they choose to express their sexual orientations differently, despite being identical in all other respects. The problem is that two gay men will have different rights merely because one was previously married to a woman when he could not come to terms with his sexuality, or merely because one chose to abstain from sexual activity for most of his life. One easy solution to this problem is to take the framework already used by USCIS to review petitions for partner-based immigration benefits and use it in the asylum context. This approach recognizes a fluid and idiosyncratic concept of sexuality and accounts for the totality of circumstances affecting individual expression.

150. See, e.g., Civil Marriage Act, S.C. 2005, c. 33 (Can.); *Matter of Zeleniak*, 26 I. & N. Dec. 158, 159 (BIA 2013).

151. See Murga E-mail, *supra* note 77.

152. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102; Refugee Act 1996 (Act No. 17/1996) (Ir.).

153. See, e.g., *Eke v. Mukasey*, 512 F.3d 372, 376, 382 (7th Cir. 2008).