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# The Role of Trust in LGBTQ+ Refugee Status Determination (RSD) System

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## 1 | Introduction

The refugee status determination (RSD) system struggles to treat LGBTQ+/queer<sup>1</sup> asylum seekers fairly. The many humiliations to which they are subject over the course of the determination process are well-documented (O’Leary 2008; Jensen and Spijkerboer 2011; Lewis 2014; Danisi et al. 2021). The dangers they face before they seek status and after they are granted this status are widely recognized (Grungras, Levitan, and Slotek 2009; UNHCR 2021, 2022a; 2022b; Human Rights Watch 2020; Rainbow Railroad 2022; NGLHRC [National Gay and Lesbian Human Rights Commission] and Amnesty International 2023). Many LGBTQ+ claimants are being denied status because their way of expressing their sexuality or gender identity does not conform to the existing stereotypes of being queer (Morgan 2006; Tschalaer 2020; Wolff and Cochrane 2023). During grueling and often humiliating interviews, their stories are discredited by homo- or transphobic interviewers, and their discomfort with being open about their sexuality or gender identity along with their occasional refusal to disclose highly private, intimate details about their behavior, is often judged in ways that are detrimental to their case (Murray 2014; Akin 2017; Dhoest 2019; Dustin and Ferreira 2021; Ferreira 2023).

In this article, we look at one specific, underlying feature of the RSD system—that of mistrust—and the ways in which the unique experiences of LGBTQ+ persons and the social attitudes directed at them challenge the appropriate functioning of trust within the system. We bring together several strands of

philosophical analysis—specifically insights from queer theory, democratic theory, and political theory of refugees—to demonstrate the difficulties that LGBTQ+ persons face in gaining access to protection, and to shape several recommendations for undermining these difficulties.

We start from the assumption that certain relations of trust and institutional mistrust ought to operate at the center of a fair RSD system, one that aims to identify those (and only those) individuals who are eligible for international protection. The appropriate relations of trust and mistrust within the system—and between individual RSD officers and asylum claimants—are, however, distorted in many ways. One major distortion, which is endemic to the system and which applies to all asylum seekers, stems from the structural disadvantages that asylum seekers face vis-à-vis the asylum system in general. That is to say, asylum seekers are always at the mercy of the officers that determine their fates. We will consider the way that these structures shape trust, mistrust, and distrust below, among all asylum seekers, but our main analysis is focused on two additional factors that undermine trust in LGBTQ+ cases specifically: (1) The often unique experiences of queer people that lead to what we call the *logic of concealment*, that is, the near-universal experience of LGBTQ+ people recognizing that sometimes it may be better, and safer, for them to conceal their being queer than to risk the consequences of not doing so. (2) The ways in which the prevailing social attitudes, including homo- and transphobia, bleed into the RSD processes, thus undermining trust and the appropriate use of discretion within the system. We call this the *problem of institutional bleeding*.

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We proceed as follows. In Part 2, we give a brief outline of the RSD system and elaborate the kinds of trust, mistrust, and discretion that are necessary for the system to do the work it is supposed to do. In Part 3, we turn specifically to the case of LGBTQ+ individuals and show how the logic of concealment feeds into an already existing system of distrust between the RSD officers and LGBTQ+ claimants. In Part 4, we consider the problem of institutional bleeding as one of the RSD system's internal challenges in creating conditions of trust in LGBTQ+ cases. In Part 5, we outline three complementary measures for reducing the risks of institutional bleeding.

## 2 | Trust, Mistrust, and Discretion in the RSD System

Trust is typically an attitude that one has towards another person, or a group of others, that demonstrates a willingness to put oneself in a position of vulnerability towards another, who can (but we expect or hope not) betray or disappoint our trust. Extending trust therefore carries some risk to it. Trust can be extended to individuals in intimate relations, and more general social relations, and it can also be directed towards those in positions of authority. In other words, trust can be extended and reciprocated where individuals engage as equals, and *also* where one individual is in some relevant way more powerful than another. Although there are power differentials that influence these relations, people do (or do not) trust police officers, judges, political leaders, journalists, religious figures, and so forth. Additionally, there is nothing confusing about saying something like “I don't trust the police in general, but I do trust Detective Williams, who is one of the good ones.” In other words, people can *at the same time* distrust an institution while trusting specific individuals who work within them. That trust can be extended (and reciprocated) to specific individuals even if the institution itself is viewed skeptically is relevant to the analysis that follows.

Where someone extends trust, sometimes it is extended on the basis of concrete information—for example, on the basis of the testimony of others or on the knowledge that someone has proven to be trustworthy in the past—in which case, it looks more like a rational calculation of whether trust will be well- or poorly placed (e.g., Hardin 2002). In other cases, and perhaps even in most cases, the extension is based on something more like intuition or gut-feeling—another person does or does not just “seem” like they can be trusted. And in yet others, people extend trust unthinkingly—or more specifically on the basis of all kinds of information that is not really considered deliberately or consciously—just because it is part of normal human relations.

In extending trust to others one is, in effect, giving them the *discretion* to act, with a reasonable hope and expectation that the trusted will use their discretion well.<sup>2</sup> Sometimes, what the truster is hoping or expecting is amorphous and therefore the discretion needed to reward the trust is greater. If parents trust a babysitter to care for their children during the day, then that babysitter has considerable discretion with respect to how best to do so. Crucially, though, the discretion is limited to caregiving—a babysitter who, during the day, sat down at the

parents' computer to ensure that their financial assets were well-organized (even if she was an expert financial advisor as well as a babysitter) would have violated the trust placed in her (Mullin 2005). In other words, people can be trusted with specific tasks or roles that limit the discretion they are extended, and traveling beyond those roles or tasks amounts to betrayed or disappointed trust.<sup>3</sup> As Annette Baier explains, “The relativization of trust to particular things cared about by the truster goes along with the discretion the trusted usually has in judging just what should be done to “look after” the particular good entrusted to her care. This discretionary power will of course be limited by the limits of what is entrusted and usually by some other constraints” (Baier 1986, 237). From the perspective of the truster, the successful use of discretion typically makes the trust relation stronger over time.

Trust can be distinguished both from mistrust and distrust, both of which are sometimes described as its opposite (Lenard 2008). Mistrust describes a cautionary or skeptical attitude towards others that one does not quite trust, but where one is at least in principle open to reasons or information suggesting that trusting behaviors may be warranted. Distrust describes an attitude where one does *not* trust others, and where one is largely closed to information or reasons suggesting that trusting behaviors might be warranted. Where mistrust is present, extending trust is possible, if the right conditions or constraints are identified. Where distrust is present, more extensive work will need to be done to enable or at least encourage the extending of trust (Govier 1992). It is important to avoid moralizing the extension or not of trust: some scholars, who track the decline of trust across democracies over time, imply that the presence of distrust is always a bad thing. Recent scholarship suggests however that there are conditions where *distrust* is rational, and even more importantly, where distrusting attitudes are key to prompting political change (see e.g., Krishnamurthy 2015).

What happens when this theorizing is applied to the RSD system? In general, an individual who is seeking status across borders as a refugee must have their claim assessed, via a RSD procedure, run either by individual governments or the United Nations High Commission on Refugees (UNHCR). The UNHCR has developed guidelines that governments are asked to follow when adjudicating individual claims for asylum, which codify accepted best practices with respect to conducting assessment (UNHCR 2020). Recognizing that states have the right to determine for themselves whether an individual claimant is entitled to protection as a refugee, the UNHCR guidelines detail the fair and appropriate treatment of claimants, through the sometimes lengthy status determination procedures. At the heart of the determination system is a desire to identify successfully who is, and correspondingly who is not, entitled to refugee status and the safety that this status delivers. The UNHCR guidelines convey the importance of treating all claimants with respect, as well as what respectful treatment means in terms of practice, for example, with respect what kinds of questions can or should be asked in RSD interviews, and what kind of treatment claimants can expect while they wait for their claims to be assessed. These guidelines are intended to guide the practice of asylum adjudication in the context of the intense vulnerability that asylum seekers

inevitably face in relation to the system in general and the officers assigned to their case in particular. These vulnerabilities cannot be entirely erased—they are part of a system that is charged with assessing, deciding, and allocating asylum spots to those who are in intense need—but they can be mitigated by respectful treatment of the kind that the UNHCR advises.<sup>4</sup>

When claimants present their case for refugee status, they typically present it in writing and to an officer who is charged with adjudicating the claim. In an interview, the officer asks questions to determine whether a particular claimant is entitled to refugee status. In the ideal, that officer is trusted, by the claimant,<sup>5</sup> *in her role* as UNHCR (or other) officer, to carry out the rules and regulations associated with fair RSD. This *role-based* trust is directed at officers in virtue of their status as an officer, and the extent to which they can be trusted to carry it out fairly. Role-based trust is key to the functioning of many institutions—people trust doctors, dentists, teachers, pharmacists, and so forth, in virtue of their *role*. Much of the trust that is extended to such individuals is connected to an understanding of the way in which they have come to occupy these roles, through education and certification and so forth. In part, the role-based trust is extended based on the perception that the institution they are a part of, does its job well and that the certification and educational requirements that this institution grants and requires are meaningful. In the case that we are focused on here, then, the officers charged with carrying out UNHCR protocols are trusted (or not) in that role, partially based on the general view that the UNHCR or governments can themselves be *trusted* to produce legitimate outcomes with respect to who gains refugee status and who does not. From the perspective of the claimant, their trust in UNHCR or equivalent state-based agency will be at least somewhat contingent on whether the population as a whole (that will then host the refugees) has predetermined attitudes towards refugees and whether they ought to be welcomed. But, where the determination procedures are believed to be fair, it is more likely that the institutional mechanisms are trusted, even under conditions that a hosting state is more hostile than welcoming of refugees in general.

A critic might respond here that it is nearly impossible to imagine asylum seekers being able to extend trust, given their intense vulnerability—and given, moreover, that asylum seekers have no choice but to hope that they will be treated fairly. We believe this view is mistaken however. As we outlined earlier, even those in situations of vulnerability can and do extend trust, and even those who believe an institution is fundamentally corrupt can extend trust to specific individuals operating with it. On the other hand, as we noted earlier, individuals can also give discretion, and thus act in a trust-like manner, without having a reasonable hope or expectation that this discretion will be used well. This may be the case, for example, when the refugee claimant realizes that the only, even if distant shot that they have for gaining refugee status is by providing the RSD officer as much information as they can, even if they have little hope or expectation that this information will be treated appropriately. Such instances, we believe, are better described as instances of desperation, rather than trust, and should not thus be viewed as parts of a refugee system that treats all refugee claimants with respect.<sup>6</sup>

The question of trust from the individual claimants towards the RSD officers or the system as a whole are not, however, the only relations of (mis)trust that affect the functioning of the RSD system. Even if the institution is trusted as a whole by the many parties involved, including asylum claimants themselves, it remains the case that at the core of RSD procedures is an intent to identify *real* refugees, at least according to international legal guidelines. The result is that refugee claimants are met, via the assessment procedure, with a certain level of mistrust: a sort of skepticism that is not directed at them personally, as individuals, but rather is a systematic, institutional mistrust that derives from the purpose of the status determination system, and which is directed at any individual who makes a claim. This mistrust is directed at claimants by national- or UNHCR-RSD authorities whose job it is to read the submitted documentation, and interview claimants, to assess whether an individual is or is not entitled to refugee status. A properly placed mistrust is thus an inherent element of the RSD system.

While the RSD officers must thus direct a level of mistrust to those whose cases they consider, they are also recipients of trust, mistrust, or distrust by those whom they interview. In the ideal, they are offered the kind of role-specific trust, depending in part on whether the institution they represent (UNHCR or a national RSD system) is viewed as trustworthy, and whether the determination procedures are viewed as fair. Further, the claimant's trust (or not) directed at the officer will depend on the sensitivity that the officer demonstrates over the course of the interviews they conduct. The situation they are in is tricky from a trust-perspective: the officer's job is to engage skeptically with claimants, but in a sensitive and respectful way that encourages the claimant to be open about their situation, to feel comfortable to provide the information that may help make their case for protection, and to ultimately trust the procedure to produce a fair outcome of their case.

To return to the connection between trust and discretion, RSD officers are, in virtue of their role, granted the *discretion* to pursue asylum claims as they see fit, within the boundaries of the guidelines for doing so. In this case, as in general, discretion can be used well or arbitrarily. Whether the RSD officers earn the trust of those whom they are assessing depends in large part on whether they use their discretion well. Recall that the very nature of discretion is to give people flexibility, and to know if it is used well or arbitrarily, general principles must apply. Lenard (2018) identifies three criteria for assessing whether discretion is used well or arbitrarily. Properly used discretion must (1) be deployed within the boundaries of the relevant guidelines, in this case with respect to RSD procedures; (2) the discretionary choices, in this case with respect to the pursuit of specific lines of questioning, must be justifiable, in the sense that there must be a reasonable expectation that the line of questioning can deliver information that is relevant to whether an individual is (or is not) entitled to refugee status; and (3) discretion must be deployed in “ways that are consistent with the values and norms that govern a community”, which in this case refers to the UNHCR and the guidelines that are set to govern both UNHCR and state-based RSD processes. As we argue in Section 4, these criteria are not always met in the RSD processes, and the claimants may thus be right in distrusting the officers handling their case. But before we argue this further, let us turn more directly to the case of

LGBTQ+ refugees in order to see whether, from the perspective of trust and mistrust, there may be something special about their case, and the kinds of challenges that LGBTQ+ claimants face within the RSD system.

### 3 | LGBTQ+ Refugees and the Logic of Concealment

While all claimants in the RSD system are met with a certain level of mistrust necessary for the officers to carry out their job, some groups of claimants may face additional challenges insofar as (mis)trust is concerned. Danisi et al. (2021, ch. 7) identify a *persistent culture of disbelief* that operates throughout the LGBTQ+ asylum processes, thus making the RSD processes especially challenging for LGBTQ+ claimants. LGBTQ+ claimants are faced with various forms of epistemic injustice (cf. Fricker 2007). Their stories are discredited and their roles as reliable sources of knowledge are being questioned (testimonial injustice). Oftentimes, the claimants also lack vocabulary via which to tell their stories to the officers, as these stories may not align with the dominant western stereotypes of being queer (hermeneutical injustice). Consequently, the relations between LGBTQ+ claimants and officers handling their case can be characterized as relations, not only of mistrust, but arguably also of distrust that often go both ways: the RSD officers' distrust of Sexual Orientation and Gender Identity (SOGI)-based asylum claimants, and the LGBTQ+ claimants' distrust of the officers handling their case. In this section, we illustrate some of the specific features of this *culture of disbelief* by looking at, first, the typical grounds upon which SOGI-based claims are being rejected, and second, the special circumstances and experiences of LGBTQ+ persons that, properly understood, contribute to the already existing environment of distrust in the RSD processes for LGBTQ+ claimants.

Typically, LGBTQ+ claims are rejected due to one or both of these factors: the claimants are not believed to have a “well-founded fear of persecution owing to them being queer,” or, they are not believed to be queer in the first place, and thus, are not subject to SOGI-based persecution.<sup>7</sup> While there is no necessary link between these two factors, they are often interconnected. The claimant may not be believed to be queer because of ‘lack of evidence’ of their being so. This disbelief may stem from, for example, lack of personal photos or other documentation of queer intimate relationships (and, occasionally, an abundance of documentation of non-queer relationships), or an inability to tell a convincing story of their queerness, sometimes because (at least according to the interviewing officer), the claimant does not fit queer stereotypes, or does not “present” in expected ways.<sup>8</sup> The claimant's authenticity as LGBTQ+ may also be questioned because they did not immediately disclose their queerness to the RSD officers. This *late disclosure* is then interpreted as a sign of disingenuous or opportunistic usage of SOGI-based claims, by allegedly straight individuals pretending to be LGBTQ+, in the hope of acquiring protection to which they are not entitled (see, e.g., Battjes 2013; Middelkoop 2013).

The persistent culture of disbelief around whether a claimant really is LGBTQ+ also has implications for the assessment of the first factor—that is, whether they are believed to have a

“well-founded fear of persecution” and whether the claimant is thus eligible for international protection. Not being viewed as queer (enough), or having concealed their identity for example by living in a standard hetero- and *cis*-normative relationship, have often resulted in assessments where the claimant is interpreted as not having been subject to persecution, as they have (so far at least) been able to keep their identity as LGBTQ+ hidden. While the *discretion argument*—that is, the idea that LGBTQ+ persons can, or even should, ‘be discreet’ (or, in effect, *conceal*) their identities to avoid persecution—has largely been deemed unjust and contrary to the basic human rights of LGBTQ+ people, the reasoning behind the discretion/concealment argument nevertheless continues to operate in the background of many RSD processes for LGBTQ+ claimants (Millbank 2013; Wefels 2013, 2021; Danisi et al. 2021). Queer claimants who appear to *pass* as straight, or who struggle to be open about their sexuality or gender identity during the RSD interviews, are far less likely to succeed in their claims, due to their not being believed to be subject to persecution, or due to their not being believed to be queer in the first place.<sup>9</sup>

While we acknowledge in general that there is an inherent, and necessary, element of institutional mistrust in the RSD process, what we see in the case of RSD processes for LGBTQ+ claimants seems to go beyond this mistrust, translating into distrust of LGBTQ+ claimants and, especially, of those who fail to fit into queer stereotypes or who are not open about their sexuality or gender identity. Part of this distrust may, of course, be structural, ingrained in a system that was never designed for the protection of LGBTQ+ individuals, and that, to this day, struggles to recognize many of the harms and forms of violence experienced by queer people as persecution.<sup>10</sup> It is beyond the scope of this article to give a full story of the various ways in which the RSD system fails to protect LGBTQ+ claimants. In the following, we nevertheless aim to provide a partial explanation of why, within the existing culture of disbelief, LGBTQ+ claimants find it especially difficult to make their cases heard. These difficulties, we argue, are directly related to the lived realities of LGBTQ+ persons in the refugee regime: (1) the specific vulnerabilities and risks that LGBTQ+ persons in the refugee regime face, and (2) the perfectly rational responses to these risks: that is, the motivation to conceal one's identity in the hope of minimizing these risks.

First, LGBTQ+ persons continue to be among some of the most vulnerable groups of refugees in all stages of their refugee journeys (UNCHR 2022a; 2022b; Shaw and Verghese 2022). Having escaped persecution in their country of origin, LGBTQ+ persons are typically faced with substantively heightened risks of physical, sexual, and psychological violence throughout their journeys as refugees: starting from their country of origin, to the refugee routes, camps, reception centers, as well as (should the person be lucky enough to get that far) in the eventual countries of resettlement. Importantly, there are two special features of these heightened risks. First, they continue to be largely of the same nature as the persecution that LGBTQ+ persons are fleeing,<sup>11</sup> that is, persecution, violence, discrimination, prejudice, and disadvantage *qua being LGBTQ+*. Second, they often come, at least partially, from the same sources that threaten LGBTQ+ persons to begin with. LGBTQ+ persons who flee the threat of persecution *qua being LGBTQ+* are often subjected to

heightened risks of violence *qua being LGBTQ+*, and, to a substantial extent at least, these risks are coming from the same groups of people that made the person flee in the first place. The heightened risks *qua being LGBTQ+* by no means disappear once the person has managed to leave their country of origin, but often travel with LGBTQ+ persons throughout their journeys as refugees.

Second, given the persistence of both the nature and source of the risks in question, it is not surprising that many LGBTQ+ persons aim to conceal their identities to minimize the risks that they are subjected to *qua LGBTQ+*. This response, a set of protective behaviors, is perfectly rational given the situation that LGBTQ+ persons find themselves in within the refugee regime. It is also a manifestation of a far more general experience of LGBTQ+ people that we call the *logic of concealment*: a near-universal experience of queer people acknowledging that there are, indeed, situations where it may be better, and safer, to conceal their being queer than to risk the consequences of not doing so—that being open about their sexuality or gender identity will subject them to risks and vulnerabilities, sometimes severe, that they reasonably may act to avoid.

One way to understand this logic of concealment is via a queer theoretical understanding of the *epistemology of the closet* (Sedgwick 1990), and the double-bind of either concealing or being open about one's sexual orientation or gender identity. On the one hand, concealing one's identity ("staying in the closet") always incorporates the risk of being found out, and the psychological effects of not being able to live as one's authentic self. On the other hand, being open about one's sexuality or gender identity ("coming out of the closet") poses risks of being targeted *qua being LGBTQ+*, whether by one's immediate relations, the surrounding society, or, as the case still often is, by criminalizing/discriminatory legal codes. In the case of refugees who are LGBTQ+, the risks of disclosing one's sexual orientation or gender identity are, of course, very real, as both the nature and some of the sources of these risks tend to travel with LGBTQ+ persons throughout the refugee system. Distrusting one's compatriots, other refugees, relations and family, and concealing one's identity is thus a perfectly rational response for refugees who are LGBTQ+, although—as we indicated above—it is also something that often has a negative effect on the assessment of SOGI-based claims.

Notably, this logic of concealment and the double-bind of either concealing or revealing one's identity is inherently related to situations with notable power imbalances and, in the case of LGBTQ+ asylum claimants, where the stakes are exceptionally high. Kenji Yoshino's (2002, 2006) work on *covering* provides further insights into these dynamics by showing how the external expectations of, not only of hiding or coming out, but also of how one presents oneself as queer, constrain queer people's lives in various ways. In order to be socially accepted, and to protect themselves from various forms of disadvantage and discrimination, queer people are often expected to cover—to tone down—their sexuality or gender identity, with a failure to do so having detrimental effects on their prospects in life. Yoshino's examples range from employment and family law to more everyday occurrences of social exclusion. Any acts of flagging or flaunting one's sexuality (or gender identity) are viewed as failures to conform,

with immediate social (and, in some cases, legal) sanctions to follow.

In the context of asylum, the external expectations of covering on the one hand, and flaunting on the other, however, pull in two different directions. On the one hand, concealing or covering one's identity may be one of the only ways for queer claimants to protect themselves from homo- and transphobia around them. On the other hand, in order to provide a credible case in the RSD process—to be believed to be LGBTQ+—claimants are often expected to reverse cover: to flaunt and signal their sexuality or gender identity in accordance with the dominant western stereotypes of being queer. This situation, to repeat, is a double-bind: On the one hand, by concealing or toning down their identity, LGBTQ+ claimants reduce some of the risks they face *qua being LGBTQ+*, but may also be less likely to be believed during RSD processes. On the other hand, being open about their sexual orientation or gender identity, and adhering to western stereotypes of being queer, may have positive effects on their asylum claims, but subject them to heightened risks of physical, sexual, and psychological violence by those around them.<sup>12</sup> Some of these risks, as we now turn to argue, may also be present within the RSD processes, and be enabled by the internal functioning and the role of discretion on which these processes depend.

#### 4 | The Problem of Institutional Bleeding

In the previous section, we identified the *logic of concealment*—a perfectly rational response of LGBTQ+ people to conceal their identities to minimize risks—as one of the factors that further feeds into the already existing culture of disbelief and distrust within RSD processes for LGBTQ+ claimants. Some of the risks that encourage concealment include threats of physical, psychological, and sexual violence, and there is no doubt that much could be done to reduce these risks and to protect LGBTQ+ people against them. In this section, however, we focus on one specific challenge that we view as internal to the present functioning of the RSD system and that, from within this system, feeds into the felt need of LGBTQ+ claimants to conceal, rather than be open about, their sexual orientation or gender identity throughout RSD processes. We term this the *problem of institutional bleeding*, and it occurs when the personal, potentially homo- and transphobic, attitudes of an RSD officer *bleed* into the interviewing room, thus creating an unwelcoming, even hostile, environment for an LGBTQ+ claimant to make their case. Notably, we view the problem of institutional bleeding as analytically distinct from the deeper, systemic difficulties of cis- and heteronormativity within the RSD system, although, as we recognize in Section 5, some of the solutions for reducing the risks of institutional bleeding may also attend to some of the systemic problems within the system.

As we explained earlier, RSD officers occupy an important role as authorities speaking on behalf of and representing the UNHCR or a state-based refugee agency committed to following the general UNHCR guidelines. As representatives of the UNHCR or state-based agency, they have a crucial role to play in sustaining enough trust in the system that processes claimants and offers safety to refugees. RSD officers have roles with guidelines that determine and shape how they are meant to engage

with asylum claimants. These guidelines, however, leave considerable room for discretion. Inside of the guidelines, that is, officers have discretion to pursue what they believe are relevant and appropriate lines of inquiry in order to determine the eligibility of a particular claimant for refugee-status. The exercise of this discretion is key to a successful RSD procedure, and yet it is also the source of some of its weaknesses, especially in relation to SOGI-based claims.

In principle, LGBTQ+ claimants ought to be able to extend their trust to RSD officers in their capacity as RSD officers. More specifically, the trust that is or ought to be directed at them is purely in the question of whether they do their roles well. Given the level of discretion that RSD officers have, the claimant's trust (or distrust) towards them depends much on how this discretion is used. As we discussed in Section 2, discretion is used well if and only if it meets certain criteria. For our present case, the discretionary decisions of the RSD officer must be within the boundaries of the relevant (SOGI-based) guidelines and in line with the more general values and norms of the UNHCR, including in particular the importance of treating all claimants with respect.

Treating all claimants, including LGBTQ+ claimants with respect entails *not* subjecting them to degrading or dehumanizing treatment during their interview, or asking questions that are clearly in violation of claimant's privacy. Yet, what we know about the RSD processes for LGBTQ+ claimants is that LGBTQ+ claimants are regularly subjected to questioning that breaches these norms. These may include questions about very intimate details of claimant's sexual history, for example, ejaculation or swallowing of cum, or requests to provide photographic evidence of their being queer.<sup>13</sup> There are also multiple reports of claimants being subjected to humiliating physical examinations, such as the (now discontinued) practice of phallometric testing for the measuring of sexual arousal while being shown homoerotic imagery (Mrazova 2019).

Our intention here is not to provide a comprehensive account of how or why many RSD processes for LGBTQ+ claimants still fail to treat queer people with respect: some of these may well have to do with the deeper, systemic difficulties of a broadly cis- and heteronormative system that was never designed for the protection of LGBTQ+ individuals to start with. Apart from the broader systemic problems, we wish to focus on one particular problem that stems from the internal functioning of the system, from the role of trust and discretion that individual RSD officers are granted: the problem of institutional bleeding, where the broader social and/or personal attitudes of the RSD officer *bleed* into the system thus leading to bad or arbitrary use of discretion as demonstrated, for example, by the highly inappropriate and privacy invading questions described above.

To demonstrate this difficulty, let us look at where, and by whom, RSD processes for LGBTQ+ claimants are typically conducted. As the vast majority of refugees are hosted by the global south—typically the neighboring countries from where refugees are fleeing (UNHCR 2023)—the vast majority of LGBTQ+ RSD processes also happen in these countries. As a matter of practice, RSD officers and others employed in the process (e.g., translators), in countries of refuge, are so-called locals, that is, citizens and residents of that country, and in many instances,

the homo- and transphobia that forces LGBTQ+ individuals to flee is also present in the country of refuge. Having their cases assessed in a predominantly queerphobic environment, by officers who are likely to share the prevailing cultural norms and attitudes towards LGBTQ+ individuals, may already reduce the likelihood of the claimant's felt-ability to make their case in a convincing way. Furthermore, where the personal attitudes of an RSD officer affect their discretion, for example, by directing their line of questioning to issues that are not only irrelevant, but which also degrade and humiliate, LGBTQ+ claimants are right to distrust their interviewing officers.

The problem of institutional bleeding is not, of course, restricted only to cases where RSD officers are likely to share the predominantly homo- and transphobic attitudes of the surrounding society (such as in many of the refugee hosting states in the global south), but can also create difficulties for LGBTQ+ claimants in so-called LGBTQ+ friendly states (typically, western liberal democracies with relatively robust LGBTQ+ protections). While RSD officers in these countries might well be less likely to occupy the same kinds of queerphobia simply by virtue of coming from a relatively less queerphobic society,<sup>14</sup> they may nevertheless hold biases that, when entering the interviewing room, have detrimental effects on the building of trust within the system. For example, the officer's discretion may be clouded by the dominant western preconceptions and stereotypes of being queer, with insufficient sensitivity to the cultural variations and specific experiences of LGBTQ+ people from different backgrounds.

Given prevailing homo- and transphobia, prejudice, and cultural biases in most environments where asylum interviews take place; however, LGBTQ+ claimants are likely to be mistrustful of RSD officers, based on an expectation that they may well share the queerphobic attitudes that they are attempting to flee. Note, however, that this mistrust—an attitude of skepticism that may, in the light of evidence provided, turn either to trust or distrust—will largely be molded by the experiences of LGBTQ+ claimants throughout and within the interviewing processes. Should the RSD officer relate to the claimant with respect, direct their questioning to issues that are relevant to the claimants' case, and do so in a sensitive and respectful manner, the discretion of the officer is used well and in a trust-building way. Should the officer's personal attitudes—homo- and transphobia, bias, and prejudice—affect their views of the claimant, or direct their questioning in ways that show disrespect or hostility towards the claimant, their discretion is used poorly, and in a way that further feeds into suspicion and distrust within the system.

## 5 | Remedies for Stopping the Bleeding

Having identified institutional bleeding as one of the challenges for building trustful relations within the RSD processes for LGBTQ+ claimants, we conclude this article by proposing three measures via which to reduce the risks of such bleeding. All these measures aim at limiting the dangers of poor or arbitrary use of discretion by RSD officers, by clarifying and enforcing their institutional role within the system, by improving their training in identifying and supporting LGBTQ+ asylum claimants, and by empowering refugees to

escape cases where they believe that officers are treating them with anti-queer bias. By doing so, the three measures aim at strengthening the grounds for the LGBTQ+ claimants to trust the officers in their institutional capacity, and for thus reducing their often felt need to conceal their identities in a process that, to a large extent at least, expects them to do the opposite, that is, disclose it.

As the first measure for reducing the likelihood of institutional bleeding, we advocate for wide adoption and enforcement of SOGI guidelines that limit the scope of discretion available to RSD officers in their institutional capacity. Much work for developing such guidelines has already been done by the UNHCR (2008, 2010, 2012, 2021), and by the individual refugee agencies in countries that currently admit LGBTQ+ refugees (e.g., RAIO/USCIS 2015; IRBC 2021; Home Office 2011, 2016). The application of such guidelines, however, varies tremendously, not only between different refugee receiving countries, but also within refugee agencies and individual RSD officers that adjudicate LGBTQ+ asylum claims (Danisi et al. 2021). By providing clear procedural frameworks for RSD processes for LGBTQ+ claimants, the guidelines constrain the scope of discretion available for RSD officers by providing clear limits within which their discretion can be used. This constraint on officer discretion increases the predictability of the system and reduces the likelihood, as well as the extent to which the RSD officers' personal attitudes, including possible homo- and transphobia, can affect their assessment and decision processes. For example, SOGI guidelines can provide limits to the lines of questioning that officers are allowed to pursue (by e.g., disallowing questions about the intimate details of the claimant's sex life<sup>15</sup>) and sets the focus back on the claimant's own testimonies, and on the objective evidence available, including reliable country of origin information. Having a standardized procedure and clear and comprehensive guidelines of assessment may not only produce better results (in the sense of identifying the correct persons eligible for international protection), but also enhance claimants' trust in the system. The knowledge that the discretion of RSD officers is heavily constrained by their roles as institutional actors can increase the likelihood that claimants will view the officers first and foremost as representatives of the UNHCR or other RSD agency (rather than e.g., as fellow compatriots), and in so doing creating a safer space within which claimants can make their case.

Recall, however, the connection between trust and discretion that we observed earlier. Trust is in effect the *giving* of discretion to another, and where that discretion is deployed well, it can build trust relations. It may therefore seem counter-intuitive to propose to constrain discretion, to build trust within the RSD system for LGBTQ+ claimants. However, the mere giving of discretion is not sufficient for building trust: discretion can only build trust if it is *well-used*, that is, if it is used in a trustworthy way (O'Neill 2018). The history of LGBTQ+ asylum claims provides considerable evidence that it is frequently used poorly, to humiliate or direct intense suspicion at LGBTQ+ asylum seekers, as we have documented earlier. The result of problematic deployment of discretion is the undermining rather than building of trust. The goal of the constraints that we have proposed, largely in defense of

a further development, adoption, and enforcement of SOGI guidelines, is to reduce the poor use of discretion in examining LGBTQ+ claimants.

Where discretion looks more like acting on a whim, in ways that are not consistent with principles of equality, for which no generalized justification can be offered, and where no collective goods are achieved, then discretion is arbitrary and therefore likely to be trust-undermining (Lenard 2018). On the other hand, discretion is well-used when it is deployed in ways that are consistent with generally agreed rules, in this case, consistently with SOGI guidelines; for which principled justification can be offered; where all individuals are treated equally and consistently with equal respect, unless the conditions demand otherwise; and aimed at furthering collective goods, in this case the granting of asylum to those in need of safety from persecution (Lenard 2018). Thus, although it may *appear* constraining that RSD officers are asked to follow SOGI guidelines, and although it may appear therefore that their discretion is being constrained, in fact, this sets the boundaries for the appropriate use of discretion in SOGI cases, and in so doing can create the conditions under which trust can be built and sustained.

While the adopting and enforcing of SOGI guidelines may increase both the predictability of the system, and the claimants' trust in it, it may not, however, do much about the root causes of the problem: the prevailing homo- and transphobia that RSD officers, translators and others working within the system may nevertheless have. Nor does it attend to the possible difficulties that these guidelines may have, including the still prevailing western stereotypes of queerness, or the ways in which the guidelines nevertheless operate within a cis- and heteronormative system that was never intended to identify or provide safety from SOGI-based persecution. Constraining discretion and providing guidelines that, to a considerable extent at least, dictate the permissible avenues of interrogation can reduce the likelihood of institutional bleeding, but does not entirely eliminate it.

Thus, as a complementary measure, we propose a system of *LGBTQ+ cultural competency training* that aims at increasing the general knowledge on LGBTQ+ issues among those working within the refugee system, including, but not restricted to, those working specifically on SOGI-based claims. This measure is different from that of developing and enforcing SOGI guidelines in RSD processes for LGBTQ+ claimants as it aims, not only to reduce the risks of institutional bleeding by constraining the scope of discretion available for RSD officers, but also to reduce general biases and misconceptions about LGBTQ+ people in the refugee system as a whole. This objective is important, since not all LGBTQ+ people seek status as a refugee on SOGI-based grounds, and many who do may not be initially comfortable in doing so because of the hostile attitudes that they witness and experience over the course of their refugee journey.

Following Nicole LaViolette (2013), *LGBTQ+ cultural competency training* draws from the broader notions of cross-cultural or intercultural competence that is often viewed as essential for understanding the different, and often specific, experiences of people from different cultural backgrounds. In the case of LGBTQ+ asylum seekers, "LGBT[Q+] cultural

competency training is the recognition that sexual minorities have societal characteristics and histories of social stigma and discrimination that require specific competences to address their unique concerns.” (ibid., 199) Furthermore, the specific characteristics and experiences of LGBTQ+ people, and their responses to social stigma, discrimination, and ultimately persecution, have specific cultural manifestations that may be very different from the standard western imaginaries of being queer. As we have highlighted throughout this article, one of the common difficulties in RSD processes for LGBTQ+ claimants relates to the ways in which the western stereotypes of being queer often dominate the imaginaries in these processes, with predictably detrimental effects to the claims of LGBTQ+ people who do not fit these stereotypes. To counter these stereotypes, proper LGBTQ+ cultural sensitivity training is needed that highlights both the unique experiences of being queer (contra non-queer refugees), and the myriad ways in which this queerness may be manifested especially within the specific cultural context from which the claimant is coming.

In LaViolette’s model, LGBTQ+ cultural competency training includes three components that attend to (1) the awareness and attitudes (of possible cis- and heteronormativity) of those being trained, (2) the knowledge of the situation and experiences of LGBTQ+ claimants, and (3) the skills of being able to convey the required respect and sensitivity towards claimants (ibid., 200–203). From our perspective, that focuses on the role of the RSD officers and the catering of the conditions of trust within the RSD processes for LGBTQ+ claimants, such training serves two important functions. First, it helps alleviate, even if not entirely eliminate, the potential negative attitudes and hostility towards LGBTQ+ claimants simply by increasing the officers’ knowledge of LGBTQ+ people, the kinds of persecution and disadvantages to which they may have been subject, as well as of the general, human rights-based grounds for why such persecution and disadvantage is objectionable (in the case of persecution: grounds for international refugee protection). Second, it operates as a corrective to the possible flaws and blind spots in the existing guidelines, including the overrepresentation of western stereotypes of queerness and the necessarily incomplete accounts of situational variations in LGBTQ+ people’s experiences and responses to persecution, and their lived realities of being queer. The general training, ideally done in cooperation with those with an insight into the relevant cultural context (e.g., local LGBTQ+ organizations, LGBTQ+ refugee organizations, and organizations providing specific support for LGBTQ+ refugees) thus helps *direct* the remaining discretion of RSD officials to be exercised in ways that are more accommodating of the varied experiences of LGBTQ+ claimants, including their different cultural, religious, and societal backgrounds.

The two above measures—adoption and enforcement of SOGI guidelines, and LGBTQ+ cultural sensitivity training—aim at constraining the discretion of RSD officers in their institutional capacity, and at directing their use of the remaining discretion in ways that are sensitive and respectful to the varied experiences of LGBTQ+ asylum seekers. Such sensitivity and respectful treatment of LGBTQ+ claimants is essential for the building of trustful relations within the system, and for reducing the felt

need of LGBTQ+ people to conceal or be secretive about their sexual orientation or gender identity in these processes. In reality, no guidelines or training can fully eliminate the human factor in the system, or the chance that the officers’ personal attitudes and prejudices come to affect their use of discretion in ways that diminish the claimant’s trust in the system and encourages concealment. However, the two above measures will help to create safe and respectful conditions in which LGBTQ+ individuals can make their case as persuasively as possible that they ought to be granted asylum.

These two measures focus on what officers can and should be asked to do, in order to generate the conditions under which they will be understood as trustworthy by claimants. A third set of measures aim elsewhere, at giving claimants some control over an environment in which they are exceedingly vulnerable to the decisions of others. In recent years, there has been an upsurge of literature highlighting the importance of respecting refugees’ own agency, for creating the conditions under which they can exercise this agency, and for listening to the voices of refugees themselves over the course of their migration journey including, for example, with respect to resettlement decisions (Gibney 2015; Owen 2018; Fine 2019; Vitikainen 2023a, 2023b).

How can claimants be given agency over the course of RSD processes? We propose three measures. One measure is simply information provision, with respect to what officers are told about how to proceed respectfully during interviews. In order words, LGBTQ+ asylum claimants should be informed in advance of the questions that are permissible to be asked (and which are not) and statements that are permissible to be made, by the officers adjudicating their case. This information enables claimants to understand *if* they are being treated respectfully in accordance with the existing SOGI-based guidelines. A second and connected measure is to give asylum claimants some control over who will adjudicate their case. In some asylum contexts, such as in Germany, SOGI claimants already have a right to request a specialized officer to handle their case, although this option is not always provided nor does the involvement of the specialized officer guarantee the quality of the interview. Moreover, in most cases, SOGI claimants are also not aware of this option (Danisi et al. 2021, 205). Yet, the presence of this option in Germany signals that there is awareness of the difficulties that SOGI-claimants can face, and (suitably modified to be effectively available) offers a model for going forward. Third, LGBTQ+ asylum claimants (and others) can be offered access to an appeals mechanism already during the RSD process (and not only after the asylum decision), if they believe they are not being treated fairly. Doing so would provide them a channel via which to express concerns if they believe they are being unfairly assessed. This kind of channel aims to increase the claimants’ own agency by offering them the ability to respond to possible mistreatment, including with respect to the detrimental effects of institutional bleeding within the RSD system. Together, these measures give asylum claimants avenues to address the possible queerphobic attitudes they are facing. These measures are thus distinctively different from the first two, since they do not—at least not directly—affect the scope or likely use of discretion by the RSD officers. They do nevertheless operate as corrective measures for addressing those situations where the



discretion of the officer is arbitrarily used by giving the claimant some agency to respond to homo- or transphobia during the assessment process. All three together may well serve to make the extension of trust more likely during RSD processes for LGBTQ+ individuals.

## 6 | Conclusion

RSD procedures, whether they are run by states or by the UNHCR, are inevitably environments in which claimants, whether LGBTQ+ or not, are highly vulnerable to those who run them. Claimants have, in a sense, no choice but to hope that they will be fairly treated and get access to the safety they seek. But, we have argued, in spite of their disadvantaged position, conditions under which in particular LGBTQ+ asylum seekers (our focus) can extend their trust to RSD officers, can and should be put into place. The structural vulnerability to which they are subject cannot be erased entirely, but the measures we have proposed above can create conditions under which they can make their claim for asylum in the most persuasive way possible—without feeling that they need to conceal their LGBTQ+ identity.

We identified *institutional bleeding* as one of the main additional challenges that contribute to the felt need for LGBTQ+ people to conceal their identities in the RSD processes: that is, a phenomenon where the social and cultural norms, including homo- and transphobia, *bleed* into the interviewing room and thus compromise the building of trustful relations between the RSD officer and LGBTQ+ claimants. In order to reduce the risk of institutional bleeding and the consequent effects of poor or arbitrary use of discretion, we suggested three measures for strengthening the institutional role of RSD officers: (1) the development and enforcing of clear and comprehensive SOGI guidelines that set the limits within which the discretion of RSD officers can be used; (2) the providing of LGBTQ+ cultural sensitivity training that gives reliable, context sensitive information about the multiplicity of ways of being queer, thus reducing the likelihood of the RSD officers to base their assessments on false beliefs or stereotypes; and (3) the strengthening of the claimant's own agency by (a) sufficient provision of information about the permitted lines of questioning during the RSD interview; (b) allowing of a degree of choice with respect to the officers handling their case, and (c) creating avenues via which the claimant can express their concerns over homo- or transphobic treatment within the process. Together, we believe, these measures will not only cater for the better functioning of the RSD system, with respect to better identifying those in need of international protection, but also for creating conditions that cater to the building of institutional trust in the system and among those affected by it, that is often undermined by the unique experiences of LGBTQ+ people, and the stereotypes and prejudices that continue to be attached to them.

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## Conflicts of Interest

The authors declare no conflicts of interest.

## Endnotes

- <sup>1</sup> We adopt the abbreviation LGBTQ+. To avoid repetition, and to highlight many of the commonalities rather than differences in the lived experiences of SOGI-based persecution, we refer to this group of people as either LGBTQ+ or “queer.”
- <sup>2</sup> This element of reasonable hope and expectation is important, as the mere giving of discretion without such hope or expectation does not, in our view, constitute trust, but can better be described, for example, as an act of gambling—extreme risk taking—with little (yet some) hope that the discretion will be used well.
- <sup>3</sup> For a general theory of role-based trust (see Seligman 1997).
- <sup>4</sup> There are many factors that shape whether the UNHCR (and other RSD procedures) is trusted, including that its influence is limited by the willingness of states to accept its determinations and to collaborate cooperatively with it to ensure that those in need of safety can access it efficiently. These factors influence *all* asylum seekers, and our objective is to identify the factors that further complicate matters for LGBTQ+ asylum seekers.
- <sup>5</sup> There are, of course, many others who may (or may not) trust the officer, including others working within the RSD system (fellow adjudicators, translators, support workers, superiors) as well as the general population as a whole. While the trust relations between an individual officer and any of the parties involved need not be identical, these relations are, first and foremost, instances of role-based trust.
- <sup>6</sup> This general critique was raised by a reviewer and we thank them for pressing us to take it seriously here.
- <sup>7</sup> Being subjected to persecution qua one's membership in LGBTQ+ is not restricted to those who actually are LGBTQ+, and may also include those who are *perceived* to be a member of this group (as well as, sometimes, allies of LGBTQ+ groups, see also Dustin and Ferreira 2021).
- <sup>8</sup> There is an abundance of literature focusing on the ways in which the RSD processes often rely on predominantly western (white, male) stereotypes of queerness (see for example, Morgan 2006; Murray 2014; Akin 2017; Dhoest 2019; Tschalaer 2020; Boncompagni 2021; Wolff and Cochrane 2023).
- <sup>9</sup> There is an immense variation in the success rates of SOGI based asylum claims both between potential refugee receiving countries and the subcategories falling under the umbrella of LGBTQ+. General attitudes, as well as western stereotypes of queerness, often affect the assessment processes making, for example, openly gay men more likely to be granted asylum than, for example, black lesbian women (see e.g., Tschalaer 2021). Very few states that currently accept SOGI-based claims, however, provide relevant statistics of their decisions and there is thus a continued need for further data collection on the topic (Shaw and Verghese 2022).
- <sup>10</sup> The incorporation of SOGI-based persecution within the international system of refugee is a relatively new phenomenon, with Netherlands setting the course in 1981. The UN General Assembly 1951 refugee convention does not include a mention of SOGI-based persecution, although LGBTQ+ people are seen to fall under the rubric of “particular social group” (PSG) within this convention. In many cases, the persecution experienced by LGBTQ+ individuals is also different from the traditional views of persecution enacted by

state agents, with the refugee system continuing to struggle to recognize SOGI-based violence, for example, within the private sphere, as persecution (see e.g. Tschalaer 2021; Dustin 2022).

<sup>11</sup> Notably, this is not always the case, as some LGBTQ+ persons do not flee because of persecution on the basis of their sexual orientation or gender identity, but rather for other reasons, for example, religious or ethnic persecution.

<sup>12</sup> This risk is especially acute where LGBTQ+ claimants worry that their claims will be denied: if they are open about their sexuality or gender identity, and their claims are denied, they run the risk that they will be returned to a community in which their previously kept “secret” is out—subjecting them to persecution, the threat of which ought to have grounded a successful asylum claim.

<sup>13</sup> Buxton and Ritholtz (2024) dedicate a whole chapter to exposing the often-humiliating nature of LGBTQ+ asylum interviews by simply listing some of the actual, documented questions of LGBTQ+ interviews.

<sup>14</sup> Our intention here is not to claim that the officers in predominantly queerphobic societies would automatically hold such attitudes, or that officers in relatively LGBTQ+ friendly societies would not, but simply to highlight the fact that, like everyone else, RSD officers’ personal attitudes are not produced in a vacuum and are likely to be reflective of the more general attitudes of the surrounding society.

<sup>15</sup> As it stands, different SOGI guidelines take a slightly different view on the kinds of questions available for the RSD officers, as well as on the kinds of information that can be deemed relevant for the case at hand. In a recent article, Ghosh (2024) provides a forceful criticism against current US LGBTQ+ asylum policy that precludes, not only questions about the claimant’s sexual behavior, but also the claimant’s own testimonies, if they include sexually sensitive material.

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