Utterly unbelievable: the discourse of ‘fake’ SOGI asylum claims as a form of epistemic injustice

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Utterly Unbelievable: The Discourse of ‘Fake’ SOGI Asylum Claims as a Form of Epistemic Injustice
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ABSTRACT
Media and political debates on refugees and migration are dominated by a discourse of ‘fake’ and ‘bogus’ asylum claims. This article explores how this discourse affects in acute ways those people claiming asylum on grounds of sexual orientation or gender identity (SOGI). In particular, the article shows how such a discourse of ‘fakeness’ goes far beyond the well-documented and often inadequate credibility assessments carried out by asylum authorities. By framing the analysis within the context of the scholarship on epistemic injustice, and by drawing on a large body of primary and secondary data, this article reveals how the discourse of ‘fake’ SOGI claims permeates the conduct not only of asylum adjudicators, but also of all other actors in the asylum system, including non-governmental organizations, support groups, legal representatives, and even asylum claimants and refugees themselves. Following from this theoretically informed exploration of primary data, the article concludes with the impossibility of determining the ‘truth’ in SOGI asylum cases, while also offering some guidance on means that can be employed to alleviate the epistemic injustice produced by the asylum system against SOGI asylum claimants and refugees.

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1. INTRODUCTION

According to the United Nations High Commissioner for Refugees (UNHCR), at the end of 2021, there were 31.7 million refugees and people seeking asylum in the world. These individuals face numerous social and legal obstacles to obtaining international protection, including having to demonstrate the credibility of their asylum claim during the adjudication process. It is the nature of refugee status determination procedures that claimants must establish their entitlement to international protection, and that authorities must scrutinize the evidence available. The credibility of asylum claims may be called into question either because different elements of the testimony are not consistent with each other (internal credibility), or the testimony is not consistent with information gathered by the asylum authorities (external credibility). While the need for such credibility assessment is not in itself problematic, even before the legal adjudication process starts, claimants are often already labelled as ‘bogus’, their claims are presumed to be ‘fake’, and asylum authorities and the broader public alike adopt a sceptical – even a cynical – mindset. People are perceived as ‘potential fraudsters’ as soon as they file their asylum claims and, by assuming that their claims are ‘false’, States maintain control over their borders (for example, to reduce levels of immigration and feed into xenophobic and populist political discourses) without having to question the system of international protection or a State’s democratic credentials within the international community. Some researchers argue that decision makers in countries such as Spain, the United States of America (USA), and the United Kingdom (UK) seem to be trained to disbelieve and carry out their functions according to an ‘unwritten (meta) message of mistrust’. Existing scholarship has thus identified strong elements of willingness and consciousness in discrediting asylum claims independently of their merits.

Discussions about ‘fake’ asylum claims are fuelled by, and contribute towards, broader anti-refugee and anti-migration rhetoric in the media and political debates.

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5 Carol Bohmer and Amy Shuman, ‘Producing Epistemologies of Ignorance in the Political Asylum Application Process’ (2007) 14 Identities 603, 615.
7 Rousseau and Foxen (n 4) 510.
It is also clear that the ‘genuine refugee is discursively constructed in a particular legal, political, and cultural context’. This affects in critical ways those asylum claims based on sexual orientation or gender identity (SOGI). SOGI claims require a discrete analysis in this context on account of the particular issues they raise in relation to different aspects of asylum adjudication, especially the need for claimants to prove their SOGI identity, the role of private actors in persecution, the intense social prejudice against SOGI claimants, the role of legislation – namely criminalization – in the country of origin in sanctioning that prejudice, and the particular psychosocial challenges that these claimants face in terms of personal identity and community integration in the host State.

SOGI claimants are often accused of ‘fabricating’ their stories, including in media pieces that build on the assumption that pretending a certain sexual orientation or gender identity is easy for the claimant and a sure-fire way of obtaining international protection. This is especially the case where there is evidence of persecution against sexual and gender minorities in particular countries of origin. However, there is no guarantee of ‘automatic protection’ under such circumstances. Claimants must still go through the refugee status determination procedure, and authorities often place particular emphasis on the credibility assessment of SOGI claims. Such an assessment may depend mostly on the claimant’s own testimony – checked against the available country of origin information (COI) – owing to the limited documentary or witness evidence generally available in such cases. Furthermore, the ‘genuineness of a LGBT refugee is prone to constant negotiation and renegotiation dependent on ongoing developments occurring within the wider cultural politics of immigration and global sexual politics’.

As already explored by several authors, this cynical mindset in relation to SOGI claimants creates a damaging ‘culture of disbelief’ in asylum authorities in several contexts.
countries. In 2001, when deciding a SOGI asylum claim, a UK judge raised the possibility of ‘encouraging a flood of fraudulent Zimbabwean (and no doubt other) asylum-seekers posing as sodomites’. Although we have come a long way since then, an ingrained concern persists that SOGI asylum claimants may be lying about their stories. Although SOGI claims may not be statistically more prone to being used in a deceptive way, and while acknowledging that they may indeed be used in a deceptive way, SOGI claimants are deeply affected by the scepticism that accompanies their asylum claims.

Despite this culture of disbelief being well known to scholars, policymakers, and refugees, there is limited research on what makes SOGI claims – or claimants – so unbelievable as to render them ‘fake’ in the eyes of decision makers, especially in light of the thorough, objective, individualized, and sensitive process that is required to assess their claims. It is crucial to explore in an in-depth manner the mechanisms behind such presumptions of ‘fakeness’. This article does so through a novel, theoretically and empirically informed analysis that examines all actors in the asylum system. The analysis reveals that the discourse of ‘fake’ SOGI claims not only strongly influences asylum authorities (often under political pressure to refuse claims, or hardened by listening to so many terrible stories) and the wider public (influenced by populist, racist, and homo/transphobic social trends), but also affects the most unlikely stakeholders: on the one hand, non-governmental organizations (NGOs), support groups, and legal representatives take it upon themselves to filter out ‘fake’ claims from the asylum system, and, on the other hand, other SOGI claimants and refugees consider it necessary to themselves identify ‘fake’ claimants in order to contribute to the groups that support them and to protect the chances of future ‘genuine’ SOGI asylum claimants obtaining international protection.

This article offers a theoretically informed analysis of these dynamics by engaging with this subject matter from the perspective of the body of literature on epistemic injustice. The analysis is also empirically informed, drawing extensively on primary data collected through fieldwork carried out in several locations in Europe between 2017


This fieldwork – carried out in the context of the ‘Sexual Orientation and Gender Identity Claims of Asylum’ (SOGICA Project) – concentrated on Council of Europe and European Union (EU) institutions, and the countries of Germany, Italy, and the UK. It included: 143 semi-structured interviews with SOGI asylum claimants and refugees, NGOs, policymakers, decision makers, members of the judiciary, legal representatives, and other professionals; 16 focus groups with SOGI asylum claimants and refugees; 24 non-participant contextual observations of court hearings; two online surveys of SOGI asylum claimants and refugees and professionals working with them; and freedom of information requests relating to case studies lodged in all three countries. In order to ensure anonymity, respect participants’ agency, and distinguish between the sources, the article uses sources in the following ways: individuals are referred to either by their first name or by a pseudonym (according to their stated preference); references note the capacity in which participants were interviewed and the country in which they were based (if no capacity is specified, then the participant was an asylum claimant or a legally recognized refugee); focus groups are identified by their number and location; court hearings are identified by the level of the court, its broad geographical location, and the year in which the hearing took place; and survey respondents are referred to by a letter (S for ‘supporter’ and C for ‘claimant’) and a numerical identifier.

The article begins with a discussion of the theoretical framework on which the subsequent analysis relies, with an emphasis on the relevance of the scholarship on epistemic injustice for asylum law and policy (part 2). In part 3, the analysis of the primary data begins by exploring how epistemic injustice operates during the asylum adjudication process, and how epistemic injustice is produced by asylum decision makers. In part 4, the focus shifts to the roles of NGOs, support groups, and legal representatives, as well as asylum claimants and refugees themselves, who are often ignored in such debates but are undoubtedly also key actors in the discourse of ‘fake’ claims, as evidenced by the primary data. Part 5 explores key means to address the epistemic injustice produced by the actors discussed in parts 3 and 4, even though achieving the ‘truth’ is ultimately impossible. Finally, part 6 reiterates the need to accept the impossibility of determining the ‘truth’ in SOGI asylum claims and to alleviate the epistemic injustice of the asylum system for SOGI claimants.

‘Fake’ and ‘truth’ are used with quotation marks throughout the article to highlight the impossibility of determining the veracity of claims. Even when a claimant may acknowledge not having a genuine SOGI claim, their sexual orientation or gender identity may, in fact, be relevant to their need for international protection, although the claimant may choose to deny this, owing to emotional, social, or cultural factors.

18 Ethics approval was obtained from the University of Sussex (certificate of approval for Ethical Review ER/NH285/1). Written and informed consent was obtained from all the participants. The project – including the collection of empirical data – was carried out by all the team members: Carmelo Danisi, Moira Dustin, Nuno Ferreira, and Nina Held.

19 For full details of the methodology, see Danisi and others (n 14) ch 2; SOGICA, ‘Fieldwork’ <https://www.sogica.org/en/fieldwork/> accessed 12 September 2022.
2. CREATING EPISTEMIC INJUSTICE IN THE QUEST FOR ‘TRUTH’

As Foucault’s work so thoroughly explores, the quest for producing ‘truth’ has been central to the production of knowledge in the West – including in relation to sexuality – and is deeply embedded in subjective relationships of power. More specifically:

Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.

Similarly, Bourdieu suggests that constructing a discourse as ‘true’ or ‘false’ essentially depends on the power dynamics that underpin social and institutional relationships. As explained by Spivak, there are a range of historical and ideological factors that prevent those inhabiting the ‘periphery’ – surely including asylum claimants and refugees – from being heard. All these scholarly contributions point to the fact that interpersonal and institutional ‘power’ is a factor that shapes how we produce ‘truths’ and ‘lies’. Moreover, ‘truths’ and ‘lies’ are not produced according to what is ‘true’ or ‘false’ (if it were ever possible to determine this), but according to what is convenient, to order events around conformity and deviance. Consequently, epistemic injustice – understood here as injustice in the context of the production of knowledge – is rife in any system of ‘truth production’. In other words, no matter how a society produces knowledge, there is bound to be unfairness as to who decides what is true or not, and how this is done. In the context of asylum law and policy, this includes two main forms of injustice: testimonial injustice and contributory injustice.

On the one hand, testimonial injustice occurs when ‘prejudice causes a hearer to give a deflated level of credibility to a speaker’s word’ with such prejudice operating in relation to all different spheres of life that may affect a person’s social identity in the mind of the hearer. This entails a symbolic degradation, namely the listener undermines the other’s humanity, and oppresses the other by diminishing their self-confidence and thwarting their development. On the other hand, building on Pohlhaus’s work on

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24 Michel de Certeau, Histoire et Psychanalyse Entre Science et Fiction (Gallimard 1987).
26 ibid 44.
27 ibid 58.
‘willful hermeneutical ignorance’,

Dotson sees contributory injustice ‘as the circumstance where an epistemic agent’s willful hermeneutical ignorance in maintaining and utilizing structurally prejudiced hermeneutical resources thwarts a knower’s ability to contribute to shared epistemic resources within a given epistemic community by compromising her epistemic agency.’

Nonetheless, epistemic injustice (also) derives from the fact that ‘institutions structure interactions according to cultural norms that impede parity of participation.’ As Doan explains, this prevents ‘people from testifying and being heard, asking relevant questions, contesting claims and standards of evidence, and otherwise participating in everyday epistemic practices as peers’ – something that is directly relevant to the asylum system. Consequently, Doan submits that ‘epistemic injustice ought to be understood as rooted in the oppressive and dysfunctional epistemic norms undergirding actual communities and institutions’. As such, struggles for epistemic recognition require changes not only at the individual level but also at the social and institutional levels. The responsibility and the initiative for undoing epistemic injustice rest not only with single individuals but with all actors in the system, without ‘occluding the agency and resistance of victims’.

This is of direct relevance for present purposes, since all actors in the asylum system contribute to epistemic injustice which, in turn, affects SOGI asylum claimants and refugees. In fact, a transformative strategy that is able to ‘correct unjust outcomes precisely by restructuring the underlying generative framework’ may be required.

Asylum systems are textbook examples of how the State can devise and operationalize repressive and flawed epistemic norms. States deploy political technologies to govern the movement and conduct of refugees, namely by determining which ones are ‘bogus refugees’ and which ones are ‘persons in real need of protection’.

Looking at asylum systems through a Foucauldian and Fanonian lens, Lorenzini and Tazzioli adopt poststructural and decolonial prisms to highlight how:

the question of (the production of) truth is at the core of the mechanisms of subjection and subjectivation which are at stake in the processing of asylum claims. Asylum seekers are usually seen as suspect subjects who have to demonstrate that

32 ibid 15.
33 ibid 8 (emphasis in original).
34 Fraser (n 30) 74.
they really are in need of protection; yet, at the same time, they are considered as subjects incapable of telling the truth.\textsuperscript{36}

In this process, more than ‘truth’, we are in the presence of the ‘production of ignorance’,\textsuperscript{37} showing that both ‘truth’ and ‘fakeness’ are discursively constructed.

During the production of knowledge in the asylum system, there is a clear ‘struggle over truth’.\textsuperscript{38} By default, asylum systems privilege the epistemic resources of decision makers over claimants, thus legitimizing the former’s prerogative to ‘arbitrarily and ambiguously misinterpret asylum applicants’ experiences, cultures, and countries’ – the so-called ‘institutional comfort’ enjoyed by decision makers.\textsuperscript{39} In the asylum context, this institutional comfort translates into testimonial injustice in the form of denying applicants’ experiences, ignoring available information, and deciding which information or criteria to use. Simultaneously, the asylum system is characterized by contributory injustice in the form of knowingly and voluntarily employing prejudiced hermeneutical resources to undermine the epistemic agency of the claimants.\textsuperscript{40} Testimonial and contributory injustice combined produce a powerful version of epistemic injustice in asylum systems.

In the midst of such an epistemologically unfair system, asylum claimants may find themselves both dehumanized and ignored. Doubting the truth of the claimant is a violence perpetrated against them, which produces and increases their (narrative) vulnerability, and constitutes a form of epistemological and symbolic violence.\textsuperscript{41} At the same time, decision makers may see their personal experiences as universal and therefore suitable to be used as the basis for judging the veracity of claimants’ testimonies.\textsuperscript{42} As Jubany concluded from her research in Spain and the UK, based on decision makers’ ‘professional knowledge’, Chinese claimants are held to be untrustworthy, African claimants are perceived as liars, those from the Indian subcontinent are accused of being incoherent and using artificial stories, and those from Turkey are judged as cunning and exaggerated.\textsuperscript{43} ‘Intuition’, having a ‘feeling’, ‘just knowing’, or a certain ‘look’ are seen as legitimate means to determine the truthfulness of a claimant’s story and are used as justification for denying international protection.\textsuperscript{44} Even worse, the use of accelerated procedures (often coupled with the contested notion of ‘safe country’)\textsuperscript{45}

\textsuperscript{36} ibid 72 (citations omitted).
\textsuperscript{37} Bohmer and Shuman (n 5).
\textsuperscript{38} Lorenzini and Tazzoli (n 35) 82.
\textsuperscript{40} ibid 2, 16.
\textsuperscript{42} Rousseau and Foxen (n 4) 511.
\textsuperscript{43} Jubany (n 6) 83–84.
\textsuperscript{44} ibid 86–87; Rousseau and Foxen (n 4) 516.
\textsuperscript{45} Danisi and others (n 14) ch 6.7.
has rendered claimants’ speech ‘increasingly irrelevant’, depriving them of the opportunity to fully articulate their experiences and fears of persecution. Reaching an ‘objective truth’ is not achievable, just as proving that a claim is ‘fake’ is not possible. In other words, ‘the pretense of judgment based on evidence obscures the real problem of the unavailability of necessary information’. Barsky notes that ‘we cannot employ the tools of discourse analysis, no matter how sophisticated, to distinguish between truthful and untruthful statements in refugee hearings, except at a very superficial level’. ‘Fake’ claims are thus discursively produced: it is the discourse created by all the actors involved that labels claims as ‘fake’ and forms the subject position of the ‘fake’ claimant. This is true for SOGI claims as well: it is not possible to reach an ‘objective truth’ about them but, in the face of the ‘practical decisionism’ that asylum authorities face, ‘the various organizations and persons that claim that it is impossible to evaluate legitimately the truths of LGBT-ness are unsuccessful’. Historically, members of SOGI minorities had to hide their true identity and desires – and so society was full of ‘fake heterosexuals’ – but now, in a sort of inversion of the ‘politics of truth’, the fear is one of ‘fake homosexuals’. In this tangled web of the ‘politics of truth’, decision makers and other actors may overlook the fact that both sexual orientation and gender identity are socially constructed, culturally heterogeneous, fluid, complex, performed, and negotiated categories. A greater awareness of the nature of sexual orientation and gender identity would facilitate asylum decisions that more sensitively and accurately engage with SOGI claims, in ways that are also more socially and culturally appropriate.

In a Foucauldian sense, the ‘fake’ SOGI claim and ‘fake’ SOGI claimant’s subject position are (also) discursively produced, thus constituting a sub-category of ‘fake’ claims. As a consequence, ‘only those whose sexual and gender practices are intelligible according to hegemonic gender and sexuality norms can become eligible for permitted border-crossing’, thus further entrenching the fixed, homonormative sexual ontologies

46 Lorenzini and Tazzioli (n 35) 82.
47 An infamous version of this phenomenon can be seen in the UK’s Detained Fast Track system for detained individuals, whereby people were deported without being given the opportunity to appeal against negative Home Office decisions. The system was declared unlawful by the High Court in Detention Action v First-tier Tribunal (Immigration and Asylum Chamber) [2015] EWHC 1689 (Admin). The negative practical consequences of such systems are illustrated in the case of PN, a Ugandan lesbian claimant: see PN (Uganda) v Secretary of State for the Home Department [2020] EWCA Civ 1213.
48 Rousseau and Foxen (n 4) 518.
49 Bohmer and Shuman (n 5) 622.
53 ibid 1121–24.
that underlie the asylum system.\textsuperscript{54} The asylum system adopts a ‘privileged configuration of sexual orientation [that] reflects a particular historical configuration of gendered, raced and classed interests and experiences’.\textsuperscript{55} Moreover, while not every denial of international protection to a SOGI claimant is an instance of epistemic injustice, the asylum adjudication process becomes a ‘test of sexual veracity by means of a truthful performance’, on the basis of the ‘facticity of sexuality’, thereby legitimizing and sanctioning certain gender and sexuality performances but not others.\textsuperscript{56} The following parts of the article explore how all actors in the asylum system play a role in the ‘politics of truth’ of SOGI claims.

3. THE ‘UNTRUTH’ OF THE ASYLUM ADJUDICATION PROCEDURE

The evidence examined for this article revealed that at both an administrative and judicial level, there is significant institutional comfort relating to SOGI-based asylum claims (see part 2). Decision makers may not only be sceptical about such claims, but may deny that there is any ‘truth’ to them. Through their disbelief, decision makers exercise their power to produce testimonial injustice and reduce the humanity of claimants. As Victor – a SOGI asylum claimant participant in the UK – put it, decision makers:

\begin{quote}
wouldn’t want to listen to you. … If you try to explain something [to] the person, it is like you are offending them for you being there to, you know, to understand for them, you are already offending them [and] everything you are saying is not true.\textsuperscript{57}
\end{quote}

Decision makers’ role in the production of epistemic injustice is also apparent in their inclination to believe that a SOGI claim is ‘fake’ when there is simply an increase in the number of such claims.\textsuperscript{58} For example, Titti, a decision maker in Italy, spoke of ‘huge peaks’ in SOGI claims, of having heard about 15 such claims in one month in an Italian region, which prompted her to examine them more carefully. Bilal, a UK Home Office presenting officer, also expressed scepticism after an increase in SOGI claims: ‘I think I have had some cynicism … the gay Pakistani cases, because there seemed suddenly to be a huge raft and they all had very similar narratives’. Similarly, in Germany, an NGO participant reported that even gay decision makers were ‘extremely suspicious’ about a rise in SOGI asylum claims, thus leading to an increase in the number of rejections\textsuperscript{59} and demonstrating decision makers’ power to deny the ‘truth’ of claimants’ testimonies.

\begin{notes}
\item[56] Hertoghs and Schinkel (n 51) 691, 693.
\item[57] Focus Group No 2, Glasgow, UK.
\item[58] Celeste, social worker, Italy. Several participants described them as ‘fashionable stories’.
\item[59] Thomas, NGO volunteer, Germany.
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Another recurrent theme in the discourse of ‘fake’ claims is the degree of similarity between different claimants’ testimonies. Maria Grazia, a decision maker in Italy, became aware of this soon after assuming her role:

I realised how much the SOGI element is exploited. It is not a perception induced by a particularly backward policy from a certain political field. This element is really used to get protection ... Yes, when I realised that the stories are all similar. ... [T]he first time I made an appeal before a Court, I had an asylum claimant who had brought me a page from a newspaper in Nigeria where there was a photo of a man on the ground full of blood and a photo of the applicant, wanted for homosexuality. And I thought ‘Damn, how will the judge not believe this story? It is also in the newspaper’. And in the commission they told me ‘Look, these are photomontages and in reality the story they bring is always this: relationship with the partner, partner killed because of being homosexual, escape ...’ And the grim, particularly violent element is always added in.

Similarly, a German judge, Oscar, said that:

the more you have listened to asylum claimants from a country, the sooner you will notice whether this really happens [claimants using fake stories] or if that is more likely. These are stories that are passed on from asylum claimant to asylum claimant and which they always try to use here [in court]. So, typical stories.

A similarity between stories can, however, also be due to legal representatives sometimes promoting ‘pre-prepared’ stories to their clients,60 which can lead to more rejections by the authorities. In any case, it is clear that such similarities prompt decision makers to use their power to undervalue testimonies and interpret evidence in a way that undermines it, thus producing testimonial and contributory injustice.

Interestingly, unique stories are also often seen as questionable, as they do not fit the scenarios familiar to decision makers.61 For example, Sofia and Emma, NGO workers in Germany, explained that asylum authorities may reject the ‘truth’ of a claimant’s testimony simply because it is different from other asylum claims:

one [woman] who has experienced forced prostitution in China, so from Uganda to China, then she had different [experiences], then fled to other African countries, where she was raped, and then [fled] again to Germany, where she has been almost forcibly prostituted. And ... she is also lesbian, and with her partner, so to speak, and different things ... escaped, and so, for the Federal Office, this is so blatant that it cannot be credible.

The perfect fit of testimonies with publicly known events or common perceptions of SOGI minorities is also a reason for decision makers to label a story as ‘fake’ and deny

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60 This has been observed in the Canadian context, for instance. See Rousseau and Foxen (n 4) 513.
61 ibid.
the claimant’s epistemic agency. Italian decision maker Roberto explained how, at a training session,

[w]e projected images of public facts, of things of this type [described in a case study] that happened in Nigeria, to show these things may happen ... the classic fake claim is produced like this, put together subsequently. That is, people know that these things happen in their country, they tell you with extreme precision what they read in a newspaper or they heard in their communities, but there is no ... ‘And have you had problems with your family? How did you live it?’, ‘Well’, ‘Are you in touch with your father or your mother?’, ‘Yes’, ‘And what do they tell you?’, ‘Nothing’ ... Everything is missing. The experience is an individual experience, unique, not repeatable but cannot be devoid of any form of perception.

In the UK, there are also concerns that SOGI claims may be ‘fake’ when claimants correspond ‘too neatly’ to SOGI stereotypes:

I think it is possibly the case that the people who see an advantage in making a claim based on [sexual] orientation will not really understand what [sexual] orientation is about, and will ... go in for a stereotypical presentation. Doesn’t mean to say that what could be perceived as stereotypical may not actually be someone’s choice, they may wish to advertise themselves in some way, but that is one type of thing, I think, which would tend to indicate ... a claim that didn’t have any sort of substance to it.62

It is a clear illustration of the discursive production of sexual orientation and gender identity that claimants are expected to fit Western stereotypes of what being an ‘out and proud’ LGBTIQ+ person means.63 At the same time, however, they must not fit those stereotypes too neatly or they will be accused of ‘faking’ their stories.64

Claimants from certain countries of origin seem to be regarded with particular scepticism by decision makers, who may use their institutional comfort to deny the ‘truth’ of those claimants’ testimonies. For example, Barbara, a lawyer in Germany, asserted that decision makers have basic prejudices against some countries of origin and assume that claims from those countries are always fabricated. These countries include Cameroon, Eritrea, Ethiopia, Nigeria, and The Gambia.65 As Daniele, a decision maker in Italy, explained:

I believe so, that there is an X number of [fake] claims, more or less significant depending on the country [of origin], because there are countries – and this is known informally – or nationalities in relation to which the simple fact of

62 Adrian, judge, UK.
63 The acronym LGBTIQ+ stands for lesbian, gay, bisexual, trans, intersex, queer, and others.
64 Danisi and others (n 14) ch 7.5.
65 Barbara, lawyer, Germany; Chiara, NGO worker, Italy; Celeste and Susanna, social workers, Italy; Damiano, lawyer, Italy; Diego, Giulia, Giulio, Jonathan, and Riccardo, LGBTIQ+ group volunteers, Italy; Emilia, judge, Germany; Nelo, Italy; Roberto, decision maker, Italy.
presenting this [SOGI] claim could be a disgrace, so it is very difficult for one to do it falsely. That is, it is very difficult for a Malian to present a claim based on sexual orientation falsely, if he is not homosexual. Because in this environment, from a cultural point of view, the origin, etc. it’s really a heavy thing. Instead, there are [countries of] origin for which the problem is minor. For Nigerians, for example, this type of claim is made with greater ease, even motivating one’s sexual orientation in a somewhat extravagant way … in sum, I must tell you the truth.

Daniele acknowledged that asylum claimants from some African countries are unlikely to ‘fake’ a SOGI claim, as there is enormous stigma associated with being a member of a SOGI minority, potentially even leading to exclusion from the diaspora community. Yet, the discourse of ‘fake’ claims persists in relation to some countries. Italian decision maker Roberto shared his scepticism about Nigerian claimants claiming to be gay:

since I’m here, I have only heard a Turkish national claiming asylum for being transgender … a Somali national for being homosexual, no one from Eritrea. It’s clear that the great weight [in SOGI asylum] of some nationalities [like Nigerians] makes you be more doubtful.

Similarly, Filippo, a senior judge in Italy, commented that some colleagues do not wish to listen to asylum claimants because they sell each other ‘absurd stories’, especially when they arrive from particular countries, such as Nigeria. This inclination to suspect the ‘fakeness’ of SOGI claims relating to certain countries of origin can worsen when decision makers are mainly, or only, allocated claims from certain geographical areas,66 and has a clear gendered dimension, as illustrated by this example relating to Nigerian women:

If you come from Nigeria or come from Benin City, you are 100 per cent a victim of trafficking. So whatever you say about why you ran away, the commission will use the lens of trafficking. And therefore it [the claim] is considered untrue, because you are a victim of trafficking.67

Julian, a SOGI asylum claimant in Germany, also spoke about the bias German decision makers frequently show towards female claimants from Uganda: ‘My interviewer was really biased. I entered and he said “Oh, you’re from Uganda, I guess you’re now going to tell me that lesbian story”. Before I could even start’. Such outright denial of claimants’ truthfulness on the basis of their country of origin evidences both testimonial and contributory injustice.

Epistemic injustice is increased by the fact that, in practice, the discourse of ‘fake’ claims also seems to raise the standard of proof, as decision makers appear to require further evidence to ensure the claimant is not fabricating their story.68 Bilal, a UK Home Office presenting officer, expressed such concern:

66 Rousseau and Foxen (n 4) 517.
67 Celeste, social worker, Italy.
68 Silver, Italy.
some people are exploiting the lack of evidence because you don’t need to produce any, so you can pretend to be, say, a gay man or woman, and be successful because you don’t need to produce any evidence. So there is, there is an avenue for … you know, because of that hole in the system being exploited.

Although asylum claimants (SOGI or otherwise) do need to produce evidence to support their claims, the perception that it is easy to succeed in (unsubstantiated) SOGI claims seems to be in the mind of this official.

In a more extreme example of testimonial injustice and abuse of institutional comfort, a judge during a 2018 court observation in Hesse, Germany, asserted at the beginning of the hearing that he did not believe the claimant, and intimidated a supporting witness by telling him that he could receive a 12-month prison sentence if he provided false information. For the judge, the claimant’s story was not credible: ‘This story is so deceitful, it’s unbelievable! He has five children and tells me that he is gay all the way! That is unbelievable!’ The assumption that a gay man could not biologically father children dominated the judge’s thinking, reflecting a stereotypical view that pervaded the appeal hearing with a presumption of ‘fakeness’.

The concern that witnesses may contribute to ‘fake’ claims was also highlighted by judges during the fieldwork, rendering witnesses victims of testimonial injustice as well. For example, a judge in the UK stated:

One issue we have had is witnesses who’ve given evidence in other cases … this can mean they are active in their own community but can lead to witnesses for hire. We had a situation [a couple of years ago] of claimants from Pakistan and [the] same witnesses came along … Then another issue is social media conversations … usually the other person isn’t called as witness, usually they say they don’t know where the person is, but this is evidence that I had a relationship with X. The problem is that falls foul of [the] view that we decide on the basis of oral evidence and if you can’t cross-examine, how much weight can you put on it?

The emphasis on oral evidence, despite the availability of other (written) evidence, is detrimental to SOGI claimants, as many potential supporting witnesses may not wish to offer oral evidence for fear of ‘coming out’ and being exposed to harm, stigma, or discrimination. It is a form of contributory injustice that becomes even more worrying when the skin colour of witnesses influences judges’ assessments of the genuineness of the claims. As an NGO volunteer in the UK observed: ‘If you take lots of witnesses to court, if they are white and middle class, they are believed’. Conversely, in a case relating to two Pakistani claimants, the judge said that a Pakistani couple were not ‘worth much’ as witnesses.

In the UK, for example, claimants are expected to submit evidence to support a sexual orientation claim, even if just in the form of an oral testimony: UK Home Office, ‘Asylum Interviews’ (Version 7.0, 2019) 31–32.

Ernest, judge, UK.

Joseph, NGO volunteer, UK.
Overall, there are clear signs that judges often believe that SOGI claims are fabricated, rendering the judges key actors in the epistemic injustice that entraps SOGI asylum claimants: ‘evidence doesn’t seem to persuade some judges at all’. Yet, there are also positive examples of judges who refuse to reproduce prejudices against such claimants or to contribute to the discourse of ‘fake’ claims. For instance, during an appeal hearing observed in the UK, a judge reassured the appellant that ‘the fact that you’ve had a son doesn’t mean you’re not a lesbian’. Silvana, a judge in Italy, suggested that the polemics of ‘fake’ claims are exaggerated and stereotypical, fuelled by the media. As she put it, we should be more concerned about the persecution and discrimination experienced by SOGI minorities around the world:

It is absolutely normal that you go to a country where homosexuality is not a crime from a country in which it is a crime. Instead, the question that should be asked is how come so many countries still criminalise homosexuality. If there were not so many countries criminalising homosexuality, there would be far fewer requests for protection, I believe.

The experiences shared by participants reflect serious degrees of testimonial and contributory injustice in the refugee status determination process. However, as the next part of the article shows, decision makers are not the only actors in the asylum system who determine which SOGI claims are seen as ‘true’ and which are seen as ‘fake’.

4. ‘FAKE’ CLAIMS DISCOURSE AMONGST CIVIL SOCIETY ACTORS

Civil society actors – understood here as the range of non-governmental actors active in the field of asylum, including NGOs, support groups, and legal representatives, as well as claimants and refugees themselves – also play a role in the power dynamics that shape the discursive construction of what is ‘true’ or ‘fake’ in SOGI asylum claims. While activists ‘contest the sexual and territorial borders’, they also ‘unwillingly contribute to their re-inscription’, thus becoming ‘border performers’ and reinforcing State formations. McGuirk similarly asserts that NGOs, while ‘ostensibly resisting these constructions, paradoxically create new ones, embedded in wider homonationalist discourses that promote a clear victim/savior binary’, mainly owing to the need to attract donations and media attention. NGOs working in this field thus dedicate much time and energy to grappling with ‘popular imaginaries’ concerning ‘people pretending to

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72 Bilal, UK Home Office presenting officer.
74 Simone Chambers and Jeffrey Kopstein, ‘Civil Society and the State’ in John S Dryzek, Bonnie Honig, and Anne Phillips (eds), The Oxford Handbook of Political Theory (Oxford University Press 2006) 363.
75 Jung (n 54) 333–34.
be gay to get asylum. Martorano notes that NGOs in the field of migration face tensions between their humanitarian and ethical values, on the one hand, and the bureaucratic demands of institutions, on the other, eventually replicating the asylum system’s selective policies of assistance for material and moral reasons. As this part explores, non-governmental actors often find themselves trapped in the ‘politics of truth’ of the asylum system and are pushed to contribute to the harmful discourse of ‘fake’ claims, even if unwittingly or reluctantly. Some are tolerant of this role; others resist it, refusing to judge someone else’s ‘truth’.

Some NGOs and support groups tend to adopt a relatively ‘hands-off’ approach in relation to determining the veracity of SOGI claims, showing understanding for possible contradictions and changes of narrative:

sometimes, even knowing that the story was false, we know of people who have had it [international protection], sorry if ... but on the other hand, people about whom we had no doubts and instead have not [been granted international protection] ... because they contradicted themselves, because when they arrived in Italy they said something else ... because they are stunned by the journey, because they are afraid, they don’t know what to expect, they don’t know that it [sexual orientation and gender identity] is a [ground for asylum request].

Others are more ‘hands on’, identifying claims they perceive to be ‘fake’ and thus using their relative power to become actors in the discursive production of SOGI and epistemic injustice. In line with scholarly work that has identified this phenomenon in the Italian context, the fieldwork conducted for the present project found this dynamic operating in support groups:

Let’s say that if they come into contact with us, we filter them out first, so we try not to pursue cases in which we don’t believe, but I would say that if I estimate the requests for assistance and those we decided to pursue, it’s more or less fifty-fifty.

Social workers employed in NGO contexts also shared these concerns:

I think in relation to The Gambia maybe [we have fake claims]. Because there was an absurd boom in 2014 in requests for reasons of sexual orientation, in the sense ... obviously also connected with the question that there is more information. I believe that many [claimants] before didn’t know that they had this

77 McGuirk (n 76) 271.
79 Anna, LGBTIQ+ group volunteer, Italy.
80 Martorano (n 78) 149–80.
81 Giulia, LGBTIQ+ group volunteer, Italy.
possibility, but also because they saw that other compatriots have had [international protection].

Without in any way belittling the essential work carried out by so many NGOs working with migrants and refugees, and while fully understanding NGOs’ need to prioritize limited resources, this approach translates – even if unconsciously – into a methodological homonormativity, in line with a tendency by solidarity movements to construct the ‘ideal subject of solidarity’. By doing this, ‘activists respond to and reconstruct the dominant rhetoric, a rhetoric on the basis of which queer and migrant people are excluded and their presence [is] made illegitimate’ Even though they may wish to resist the logics of normativity and unleash the power of queer politics, some NGO staff and volunteers – by acting as ‘preliminary judges’ and refusing assistance to those claimants whose testimonies are not believed to be ‘true’ mimic the culture of disbelief of decision makers and thus reinforce State-sponsored policies of subjection and assimilation. In the process, they deprive claimants of their epistemic agency.

Amongst these civil society actors are legal practitioners, who play a key role in guiding (or, sometimes, misguiding) claimants through their asylum journey, thereby co-producing the epistemic injustice that entraps them. Legal practitioners are often the first to be wary of ‘standard’ and ‘cyclical’ stories when approached by new clients. In Germany, for instance, one lawyer stated that:

It’s true that there are … refugees faking [sexual orientation or gender identity]. Probably more women than men, because for men, male homophobia is much bigger, so, I mean, that is certainly a bigger challenge for men … it happened to me that I was sent a woman by the lesbian counselling centre and then she came again a half year later and was pregnant and then told me ‘well, what should I have said, then?’ … That is surely very aggravating. But it happens – I think the figures are not that big.

Similarly, in Italy, Mara, a lawyer working for an LGBTIQ+ NGO, said that:

[W]e do make them follow a process and it is a psychological process, a journey with the mediator, with the operator, we try to make them participate in some activities that can also be language courses, to try to understand if there is a genuine interest … or whether it is only functional to obtaining the [NGO membership]
card. … Yes, yes [we do a screening]. Some [claimants] already arrive after the [interview with the] commission, with the rejection and when they have to do the appeal, then we become even more suspicious … It is obvious that we can never be completely sure, but, in short, we try to work on it.

In the UK, a volunteer with an LGBTIQ+ support group said that ‘[s]ome solicitors just don’t believe their LGBTQ clients, some feel very uncomfortable around the issue of sexuality as reason for protection.’ It is unclear whether this was on account of homophobia or for another reason, but such accounts reflect the role legal representatives play in the discursive production of knowledge about asylum claimants’ sexual orientation or gender identity and the epistemic injustice that results.

There is a sense that it is possible to ‘know the fake ones from the real ones’, despite the fact that determining the objective ‘truth’ about someone’s sexual orientation or gender identity is impossible, given the socially and culturally constructed nature of these notions. Both the scholarly literature and asylum policy largely ignore that claimants and refugees are themselves key actors in this ‘politics of truth’. As such, they are co-opted by the asylum system to perpetuate the epistemic injustice that underpins the system, and on which the system depends in order to achieve its aims. Some claimants who volunteer with NGOs and support groups are indeed keen on ‘sifting out’ those who do not seem to have ‘genuine’ claims:

So when somebody say, is he gay? First of all making intention clear, we send our missionaries on ground, we monitor the person, we know if he’s really a gay. And when we are satisfied … then we give him our membership card.

they [claimants] are the first ones not to want within the group people who are not really homosexuals, they do not want us to use up our reputation as an association for people who are not homosexuals, because they say ‘then, if we help everyone, the commission does not believe us anymore and therefore we cannot help more people.’

The need to preserve the reputation of NGOs and support groups in order to retain their capacity to support SOGI claimants thus leads to assessments of the genuineness of new claimants, sometimes rendering claimants themselves part of the epistemic injustice inflicted on one another. An NGO’s reputation cannot be sacrificed by ‘fake’ claims – something observed by Giametta in the French context and Martorano in the Italian context. In particular, fellow nationals of potential SOGI claimants function as subjective and powerful ‘filters’, acting as unofficial assessors of the ‘truth’ of their claims:

89 Survey respondent S110.
90 Alain, Italy.
91 Kennedy, Italy.
92 Giulia, LGBTIQ+ group volunteer, Italy.
I can’t tell you that we realise it immediately but only after a few questions, also because they [our group members] come from those same countries, etc, when a new one arrives and says I’m from The Gambia, I’m gay, we have ten from The Gambia who listen to him and, when they tell their story, they are able to contradict him or to notice inconsistencies and then we decide fairly quickly which cases to pursue.\footnote{Giulia, LGBTIQ+ group volunteer, Italy.}

now we have started to support the new guys with guys of the same nationality who were already with [our group] for many months, so that they are aware of the social and cultural dynamics of the country in question … and that they know how the society of the country in question reacts to homosexuals … who then speaks to us privately and tells us ‘Look, things in Nigeria don’t work that way. Society would never have reacted this way, so he’s lying.’\footnote{Nicola, LGBTIQ+ group volunteer, Italy.}

‘Genuine’ SOGI claimants not only take part in this discursive construction of ‘fake’ claims, but also express great frustration about such claimants:

I see a lot of straight men come here and say that they’re gay and they’re not gay and they got acceptance. And it kind of makes you feel, you know? Some type of way. Because you’re from Jamaica and you know these men are not gay.\footnote{Angel, Germany.}

It is not always clear how some claimants ‘know’ that other claimants are not members of a SOGI minority. Some members of focus groups in Germany felt particularly upset by the injustice of ‘fake’ claims and where this left ‘genuine’ claimants:

I had trouble with this Jamaican from the camp, and we know he is not gay because he told us, and even one time he caught an infliction because I was like saying to him ‘You say you’re not gay, then why do you come to Germany to seek refuge as gay? You are just mashing up Germany for people like us who really want to seek refugee status. You’re not gay, so why are you here?’ … Even a guy at our camp is not a gay and he got through. And his friend that is truly gay didn’t get through. He got turned down like us.\footnote{Trudy Ann, Germany.}

But the straight guys who come here and seek asylum, they just come to make money and they know after two, three years they can go back home because they have saved enough money. And the thing that they don’t understand, they come here and they spoil the opportunity that we as gay people get to come here and seek asylum.\footnote{Emroy, Focus Group No 1, Hesse, Germany.}

SOGI asylum claimants thus fear that ‘fake’ claims (or perceptions thereof) will hurt their chances of obtaining a positive decision, especially as decision makers may become suspicious about the increasing numbers of SOGI claims. This has also been
observed in the context of resettlement work carried out by UNHCR in Turkey, where SOGI claimants become self-appointed screening officers to determine the ‘inauthenticity’ and ‘un-deservingness’ of fellow claimants.99 While these concerns are understandable, it is important to acknowledge that, by adopting such a ‘filtering logic’, civil society actors find themselves unexpectedly co-opted into carrying out ‘perverse practices of policing’, border control, and surveillance,100 simultaneously becoming actors in the epistemic injustice underlying the asylum system.

The knowledge contributed and produced by NGOs, legal representatives, asylum claimants, and refugees may play an important and legitimate role in building reliable and up-to-date COI. Yet, such knowledge is not devoid of stereotypes and generalizations, and it can be used to the detriment of SOGI claimants with genuine claims.

The irony of supporters and refugees undermining the ‘truth’ of other asylum claimants did not escape some of the participants interviewed in this project, whose role in the system can be described as one of ‘counter-conduct’ and resistance against the epistemic injustice and dehumanization experienced by SOGI claimants. Seth, an NGO worker in the UK, articulated his frustration at these dynamics in striking terms: ‘“[A]s chief puff I decree that, you know, he is a member of my tribe, so therefore, you know … you know, grant him asylum”. You know, it is ridiculous. … And who am I to sit in judgement’. Responses to potentially ‘fake’ claims in host countries should thus be more sophisticated and socially aware:

> there is an exaggerated alarmism in relation to this specific subject, because it is true that we know … [of] an increase in the number of [SOGI] claims, which is understandably coherent with an increase in flows and consequently consistent with the greater awareness that now exists, and of the training that once did not exist. … The answers that were given to interpret or manage [an increase in ‘fake’ claims] were not of a social nature. They [the answers] have been from a perspective of demonisation, derision, denunciation, criticism.101

Some NGOs adopt a more constructive approach that avoids the traps of epistemic injustice, for example by offering support to any claimant who requires assistance, even if their claims may seem dubious.102 The use of the limited resources can still be rationalized by imposing some requirements. For example, Joseph, a volunteer with an LGBTIQ+ group in the UK, referred to requiring a minimum period of interaction with the NGO before a supporting statement is produced: ‘[Avoiding “fake” claims] is one of the reasons we said that we wouldn’t, we would not write support letters until people had been coming [to the group] for six months’. Other participants pointed out the risk of generalizing from individual experiences, and the difficulty of ‘faking’ claims:

100 Giametta (n 93) 147; Martorano (n 78) 172.
101 Vincenzo, LGBTIQ+ group volunteer, Italy.
I haven’t met anybody here that I don’t believe is gay. Because I also believe that it is an extreme hurdle for people from this cultural centre to apply for asylum on this [SOGI] basis anyway, if he is not really gay (if his family is here, that’s even out of the question). … Well, I think that’s difficult to do, culturally, since people would have to be good actors.\textsuperscript{103}

I cannot rule that out [‘fake’ claims], but for most people who reveal their sexuality or their sexual identity, I think that, … they do that very authentically … there are also very many risks that come with it and therefore it is also a particularly vulnerable status that one then has [as a SOGI asylum claimant]. And voluntarily exposing oneself to that, I do not know, I find that rather unrealistic.\textsuperscript{104}

It was also clear to some participants that attempts to assert the genuineness of SOGI claims replicated the injustice of some asylum authorities’ practices and prerogatives, which NGOs should not emulate:

‘How do I know if the person is really lesbian or gay?’ And that totally upsets me, because I think, when you grow up as a queer or lesbian person and face so many prejudices and somehow so much discrimination … Who would voluntarily choose this kind of ‘identity’ as an identity? … And I think, these are really rare cases where people would lie about this. … these are mostly people from the [decision-making] institutions that ask such questions and possibly … ‘so, they are not gay, lesbian, trans’ and that … they do not know … do not understand the complexity of living a queer lifestyle. And yes, the stigma associated with it in society, in the family, in the psyche of that person … And whether that is a lie or truth, that’s very … I do not know … absurd.\textsuperscript{105}

While not being able to completely rule out the possibility of claimants fabricating SOGI claims, these participants found it highly unlikely, considering the socio-cultural environment that asylum claimants have to navigate. Ashley, a psychotherapist in the UK, noted that ‘if you haven’t lived with the experience of clandestine sexuality, you won’t be able to fake or feign the language and methods and devices that you use to get through it’. Damiano, a lawyer in Italy, also emphasized how much more difficult life in reception centres could be once it was known that a claimant had a SOGI-based claim.

Moreover, it is important to recognize the desperate circumstances that may lead someone not to be entirely honest about their claim, as well as to understand the subjectively, socially, culturally constructed, and fluid nature of sexual orientation and gender identity:

But of course, there are cases of people – and one cannot blame them individually – who have experienced or have heard that being gay is a good reason to be recognised [as a refugee] and then try this. It is a way out of the delays in their individual situation.\textsuperscript{106}

\textsuperscript{103} Thomas, NGO volunteer, Germany.
\textsuperscript{104} Louis, LGBTIQ+ group volunteer, Germany.
\textsuperscript{105} Mariya, NGO worker, Germany (emphasis in original).
\textsuperscript{106} Thomas, NGO volunteer, Germany.
for somebody to come repeatedly month in, month out, to a LGBT support group and stuff, then if they are not LGBT, then maybe there is questions at the back of their mind [about their sexual orientation or gender identity] or maybe there is some, you know ... and even if they are not [LGBTIQ+], it is ok. 107

Above all, some NGO workers make a conscious choice not to assume the role of a decision maker or to follow the way the authorities exercise power: ‘We do not want to play BAMF 2 here’. 108 Crucially, and as the scholarship on epistemic injustice highlights, they demonstrate awareness of the fact that there is no verifiable ‘truth’ in respect of a person’s sexual orientation or gender identity:

you really can never know that. I’m not [able to], anyway, I could never tell if anyone is gay, lesbian, trans, bi, intersex, such a declaration can only be made about oneself, and even that is flexible, yes … that’s why I always take it as it comes. 109

my job is not to make that decision [whether someone is telling the ‘truth’ or not] and I find that if you let your mind go into that, you make that decision about whether or not somebody is telling the truth, I think that makes you a bad lawyer, because who am I to make that decision? … I don’t go there. … That is not my job. 110

Although such an approach may impose a higher workload on these NGOs, it seems to be accepted as a way for relevant NGO staff or volunteers to avoid having to make judgements. Given the impossibility of determining what is actually ‘true’, it is imperative to identify the key means to address the toxic effects of the ‘politics of truth’ and the vigilante approach that various actors in the asylum system – whether public authorities or civil society – may have towards SOGI claimants.

5. USING REFUGEE LAW AND POLICY TO VINDICATE SOGI REFUGEES’ OWN ‘TRUTHS’

The analysis so far has made it clear that: (1) it is not possible to determine the ‘truth’ about someone’s sexual orientation or gender identity, and (2) SOGI claimants see their epistemic agency seriously and continuously damaged by the asylum system (even if they reclaim agency in a variety of other ways). 111 While bearing in mind that ‘truth’ is not achievable, we also need to accept that – at least for the foreseeable future – asylum systems will continue to pursue some sort of objectivity. That being the case, this part attempts to discuss some policy-oriented means to alleviate the epistemic injustice experienced by SOGI asylum claimants. The proposals below fall

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107 Seth, NGO worker, UK.
108 Thomas, NGO volunteer, Germany. ‘BAMF’ stands for ‘Bundesamt für Migration und Flüchtlinge’, the German Federal Office for Migration and Refugees.
109 Matthias, social worker, Germany.
110 Deirdre, lawyer, UK.
111 In the words of Bohmer and Shuman, the ‘process deprives the asylum applicants of the right to determine what counts in their own stories’. Bohmer and Shuman (n 5) 624.
short of a transformative strategy, as suggested by Fraser (see part 2 above), and do not include all the measures that would be necessary at an individual, social, and institutional level in order to eliminate epistemic injustice completely in the asylum system. Nevertheless, they offer a pragmatic and realistic approach to mitigating the problems identified above, even within a generally hostile, populistic, and xenophobic political environment.\footnote{Danisi and others (n 14) ch 4.1.}

The ‘fake’ claims debate should include an honest acknowledgment of the possibility that some claims may not be entirely genuine, but the discussion cannot stop there:

I think there is an element of truth [in the ‘fake’ claims debate]. I mean, I think any system in the world, regardless of what, will be abused by some people, for some purposes. I think that is not something we can deny, I don’t think it is so much of a problem necessarily as it is often made out to be. I think there is a lot of fear around that. I also don’t think that the fact that there are some bad apples should prevent genuine cases from receiving the consideration that they actually deserve.\footnote{Jules, staff member, ILGA-Europe.}

Many participants acknowledged the desperation felt by asylum claimants to escape persecution and obtain international protection. Desperation can ‘legitimately’ make claimants lose ‘perspective’ and present stories that are not their own in the hope of increasing their chances of being granted international protection (for instance, if they know someone else was successful with that story).\footnote{Giuseppe, lawyer, Italy; Sofia and Emma, NGO workers, Germany; Terry, member of the European Parliament.} The lack of available information about SOGI asylum (that sexual orientation or gender identity can be the basis of a claim) when claimants arrive in Europe and/or lodge a claim – combined with claimants’ frequent lack of knowledge about the way SOGI minorities are treated in host countries, fear of discrimination by the host community and by their own diaspora, and internalized homo/transphobia – can also understandably lead claimants to embellish their fear of persecution.\footnote{Damiano, lawyer, and Valentina, social worker, Italy.} Additionally, Chiara, an NGO worker in Italy, made the point that, even if a claimant is not entirely honest in their testimony, this is not necessarily an ‘abuse of the system’, in the sense that the claimant may nevertheless be deserving of international protection. The focus should instead be on those who profit economically from ‘selling stories’ (such as smugglers),\footnote{Helena, staff member, European Asylum Support Office (EASO), now European Union Agency for Asylum (EUAA).} and from training claimants in how to use those stories:

We have also had reports that there are organisations that even train people on how to present themselves as being gay in asylum procedures, because even if the person is not necessarily gay themselves, because it will help your process. And that there are again, apparently, some organisations that charge for such services. ... I think that is a more pressing issue. I feel this is maybe a bit contentious,
I feel that anyone who is seeking asylum and who goes through all the effort and hassle and trouble of coming here and seeking asylum whether or not they are gay, whatever their sexual orientation or their gender identity, clearly there was a reason strong enough to motivate them to come, and they should be given a fair chance. So, I don’t necessarily have very strong qualms about people trying to maximise their chances … so long of course that it doesn’t count to a scale that it actually affects those who generally need this particular means. My problem would then become more with those who start to profit off it.\textsuperscript{117}

Media reports from the Netherlands and the USA, for example, affirm concerns that there are people who exploit asylum claimants by selling them stories of successful SOGI claims.\textsuperscript{118} The focus should thus be on those exploiting SOGI claimants rather than on the risk that some SOGI claimants may not be entirely ‘truthful’. In this context, the ‘filtering’ role played by civil society actors is unwelcome, and these actors’ doubts about whether a claim is genuine are often perceived as judgmental. Consequently, claimants affected by this exercise of power by civil society actors have expressed sadness and frustration at being dehumanized and deprived of their ‘truth’ by those from whom they seek support:

Because when we come to the groups, we need comfort. We need comfort. We need counselling, we need help. Not to be judged, not to be judged. There is no point why you judge me, when I come to the group, you wait to the Home Office to decide for me, why do you judge me? … You wait for the Home Office and you decide, yes. You don’t need to upset people.\textsuperscript{119}

Some participants also referred to the excessive ‘craving for truth,’\textsuperscript{120} and, more generally, how this pressure reflects the prejudice and arrogance of civil society actors:

I don’t like it either that an association says ‘Ah, but for me he is not gay’. But how can you say that? Again, the LGBTI community also has prejudices … And then, how can you pretend to have the right to judge that a person who comes from a country totally different from yours, does not speak your language, has a totally different mind-set, you say ‘for me he is not gay’. But on what basis do you say that? Even in that case, you have to … put aside certain prejudices that some LGBTI volunteers have, and think that in any case those who have to take a decision are the commission … and that the decision should not be made in the sense that the person must prove irrefutably that they are LGBTI, but that they can offer a story that is more or less coherent.\textsuperscript{121}

\textsuperscript{117} Jules, staff member, ILGA-Europe.
\textsuperscript{119} Miria, UK.
\textsuperscript{120} Giulia, LGBTIQ+ group volunteer, Italy.
\textsuperscript{121} Cristina, UNHCR official, Italy.
The ‘truth’ about SOGI asylum claims is unachievable, since both ‘truth’ and ‘fakeness’ about a person’s sexual orientation or gender identity are discursively produced by all actors in the asylum system. Nonetheless, from a pragmatic and policy perspective, it is important to use all the tools available to make the asylum system fairer for SOGI claimants and to enhance its epistemic justice. Five are identified below.

First, claimants should be provided with comprehensive information about key aspects of the asylum system when they first lodge their claim, including that sexual orientation and gender identity can be the basis for an asylum claim. The fact that this does not happen currently renders it more difficult for States to fulfil their obligation to identify claimants’ special procedural needs. Secondly, the right to free legal assistance and representation should be expanded beyond appeal procedures, as well as funded more substantially by domestic authorities, to ensure quality representation at all stages of the asylum procedure. This would allow SOGI claimants to lodge better developed initial claims, supported by evidence and informed by sound legal advice, which is not currently the situation in Europe.

Thirdly, asylum procedures need to be informed by greater respect for claimants’ rights and dignity, as well as a stronger spirit of empathy. This study’s fieldwork showed that this does not happen at present. It is essential to ensure that SOGI claimants have enough time to prepare adequately and present their cases effectively. More care needs to be invested in the choice of locations for asylum interviews, training in interview techniques, and the quality of interpreting services, as well as ensuring that claimants have an opportunity to clarify any apparent contradictions. Overall, a relationship of trust between the claimant and the decision maker needs to be fostered.

Fourthly, should a decision maker retain doubts after the interview, it is important to apply the principle of the benefit of the doubt whenever possible. It is clear that this principle is not currently applied with the consistency and scope it warrants, either at a domestic or an international level. This is compounded by the fact that the claimant’s self-identification in terms of sexual orientation or gender identity is not afforded sufficient value: it may not be the end of the matter, but it is undoubtedly the starting point.

124 Currently, and within the Common European Asylum System, this right refers only to appeal procedures: see Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, art 20.
125 ibid ch 6.
126 ibid ch 11.3.2.
127 ibid ch 7.4.1; Nuno Ferreira, ‘An Exercise in Detachment: The Strasbourg Court and Sexual Minority Refugees’ in Mole (ed), Queer Migration and Asylum in Europe (n 102).
point, and decision makers need to take that seriously. Rather, some decision makers go as far as reversing the presumption of truth reflected in the principle of the benefit of the doubt and believing that, in case of doubt, a story should be assumed to be false. Yet, not only is respect for the principle of the benefit of the doubt a legal requirement, according to UNHCR, it is also advisable from a policy perspective:

Because, you can even make an argument, I think, that if somebody is so desperate to stay, that they are actually willing to lie about their sexuality and tell you that they’re, they are gay or whatever, you know, where they know that within their own society this is something which is not seen as acceptable, which does put them at risk … You have got to be pretty desperate to lie about it, so you know … I belong to the group that tends to do benefit of the doubt.

Some decision makers do seem to be conscious of the need to adopt a lower standard of proof and apply the benefit of the doubt whenever possible:

it was bollocks [a ‘fake’ claim], really. And you do get cases like that, yes, of course, you do, yes, and it makes judges battle weary and cynical, of course. And you have got to put that on one side all the time. … But, you know, you remind yourself all the time, it is a lower standard, lower standard [of proof]. It is not a balance of probabilities, it is the lower standard, and if in doubt you must give, you must give the benefit of the doubt.

In conjunction with a lower standard of proof and the benefit of the doubt, emphasis should shift from the claimant’s ‘true’ sexual orientation or gender identity to the risk of persecution, conditions in the country of origin, and the quality of COI. This would better balance decision makers’ determination of the ‘truth’ of SOGI claimants’ membership of a particular social group with an analysis of the risks facing claimants if they are returned to their countries of origin.

Fifthly, decision makers would benefit from better training and working conditions, to avoid lack of preparation, burnout, and desensitization. This fatigue and loss of empathy over the years have been documented, for example, in Canada. Mandatory and regular training on general SOGI matters and SOGI-related COI – including the social and cultural nature and variations of SOGI – would equip decision makers with more appropriate knowledge and skills to deal with SOGI claims in a non-stereotypical

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131 Jubany (n 6) 87.
133 Jean, member of the European Parliament.
134 Harry, senior judge, UK.
135 Dustin and Ferreira (n 130).
136 Rousseau and Foxen (n 4) 517.
or uncynical manner. Moreover, as Helena, a staff member in the European Asylum Support Office (EASO, now European Union Agency for Asylum, EUAA), argued, decision makers are invariably affected by the stories of war, rape, and torture to which they listen on a daily basis. According to Jubany, the fact that (in Spain and the UK) there are fewer female than male decision makers also means that the female decision makers frequently listen to stories of rape and sexual violence, thus contributing to greater scepticism and desensitization. Finding that these stories must be to some extent ‘fake’ becomes a natural protective mechanism. States thus need to improve the training and working conditions of decision makers by providing mandatory and regular training, flexible working conditions, career breaks, and appropriate forms of staff support, including counselling and training in vicarious trauma and self-care, as well as abstaining from putting decision makers under any form of pressure to reject asylum claims.

None of these suggestions will help determine the ‘truth’ in SOGI claims; such an endeavour is doomed to fail. Nevertheless, the five broad recommendations delineated here can assist in increasing the epistemic justice of the asylum system for SOGI claimants – as well as potentially for all asylum claimants – as they have the potential to help claimants have a greater say (both quantitatively and qualitatively) in the discursive construction of the ‘truth’ of their claims. By pursuing greater respect for the right to information, investing in legal aid, improving asylum procedures, applying the principle of the benefit of the doubt, and improving the training and working conditions of decision makers, we could further reduce the already negligible risk of ‘fake’ SOGI claims. By setting the example and operating an asylum adjudication system that respects claimants’ ‘truths’ and does not indiscriminately label their stories as ‘fake’, civil society actors would, in turn, gradually discard their roles as ‘filters’ of ‘fakeness’. NGOs’ institutional reputations would not be damaged if they occasionally offered support to a claimant not being, or not having undergone, exactly what their testimony states, since what matters is to respect claimants’ rights and to treat them with impartiality and humanity. The principle of the benefit of the doubt, in particular, would support all actors in the asylum system in a journey towards greater empathy, belief, and respect, better fulfilling the aims of the international protection system. Crucially, this would support refugees’ struggles for epistemic recognition and, at the same time, give them more power to define their own identities and prevent asylum authorities from dictating the terms.

6. CONCLUSION

SOGI asylum claimants face the impossible task of proving they are queer enough but not too queer, proving they come from a country where SOGI minorities face enough risk of persecution but where there is not a generalized risk of violence, and, above all, proving the ‘truth’ of their claim where decision makers commonly have a mindset imbued with scepticism, cynicism, and prejudice. It is all too easy to consider a claim to

137 Jubany (n 6) 84.
138 Deirdre, lawyer, UK.
139 Danisi and others (n 14) ch 11.3.1.
be ‘fake’, which renders the asylum system deeply unjust from an epistemic perspective. By adopting the Foucauldian-inspired body of literature on epistemic injustice as a theoretical framework, this article has identified the crucial ways in which SOGI claimants are deprived of epistemic agency, not only by asylum authorities, but also by NGOs, support groups, legal representatives, and other SOGI claimants and refugees. While relying mostly on empirical data collected in Germany, Italy, and the UK, and notwithstanding any country-level disparities, both the study participants and the documentary sources confirmed that all actors in the asylum system to some extent contribute to discourses on ‘fake’ claims. This justifies the concern expressed in this article that asylum systems across Europe and elsewhere are designed in a way that seeks to establish a ‘truth’ that cannot be established, and to deny SOGI claimants their ‘truth’.

The topic of ‘fake’ claims is most often used by anti-migration and anti-refugee politicians as part of a xenophobic and racist rhetoric. This applies to asylum claims in general, and SOGI ones in particular, thus often also reflecting homophobia and transphobia. That may explain why discussing ‘fake’ claims seems taboo in academic circles and grey literature. Instead, this article has faced this issue without subterfuge: there may be SOGI claims that lack complete veracity, but then again, ‘truth’ in relation to a person’s sexual orientation or gender identity is illusory, since it is largely subjectively, socially, and culturally constructed. The theoretically informed and empirically grounded approach employed here may usefully be replicated in relation to other categories of asylum claims, such as those based on religious grounds or gender-based violence, which are also severely affected by discourses of ‘fakeness’ and difficulties with standards and burdens of proof.140

If ‘fake’ claims exist, they are undoubtedly few – ‘exceedingly rare’, in the words of Neilson and Adams.141 More importantly, nobody can claim the role of final arbiter of the ‘truth’, as any system of production of ‘knowledge’ and ‘truth’ is discursively constructed, shaped by power relations, and characterized by epistemic injustice. The ‘fake’ claimant – especially if thought of as a pervasive and dangerous phenomenon – is thus a myth: a convenient myth to help society make sense of a challenging situation, and design a solution for it.142 As Jean, a member of the European Parliament, said:

I think it [fake claims] is another part of the mythology. I would be very interested to see what the figures are on that, because I am willing to bet that most Member States don’t have them. … [I]t is one of those claims that … I think is invented for a purpose. … lot of countries work with the culture of disbelief, the idea that somehow, you know, this [sexual orientation or gender identity] almost

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142 Rousseau and Foxen (n 4) 507.
is a sort of privileged grounds for claim. … I cannot think of anything that I have seen in terms of evidence, that would back that statement, at all.

Another member of the European Parliament, Terry, had a similar view:

the step to say ‘I am a gay man’, or the step to say ‘I am a trans woman’, without being it, just, you know, to get asylum, and to have it easier … is so high [large] that the number of people who would actually do that and then can tell a credible story about how they were suffering from this, and how it made their life different, very difficult … that the attention that is given to this in the media is completely over the top.

In other words, if there is an ‘abuse’, it is an ‘abuse’ committed by States that construct ‘bogus asylum seekers’ and ‘irregular migrants’. Our response should thus be at a policy and social level, to facilitate legal and documented migration paths. This would help prevent people providing embellished accounts instead of their own stories because they are desperate.

There may only be discursively constructed ‘truth’ and ‘fakeness’ rather than objective ones. But to the extent that one is obliged to try to ‘prove’ something – as asylum claimants are – then systems and processes should facilitate epistemic justice as much as possible. Telling one’s story – even when including experiences of violence – can be empowering, but that is frustrated if the listener denies the experiences being recounted and thus dehumanizes the speaker. In fact, denying the claimant’s testimony can be even more traumatizing and distressing for the claimant than the original trauma. Yet, the need to safeguard the ‘integrity of the system’ is used as an excuse to search for models of decision making that can expunge ‘false’ SOGI claims. SOGI claims are thus a powerful example of the disturbing epistemic injustice that asylum systems produce.

Decision makers involved with SOGI claims enjoy a clear ‘institutional comfort’ that is used to facilitate testimonial and contributory injustice. This not only results in excessive and inappropriate use of discretion by decision makers, but also feeds into a toxic discourse of ‘fakeness’. While it may not be possible to completely domesticate such discretion and eradicate the discourse of ‘fake’ claims, it is realistic to combat and reduce the current testimonial and contributory injustices in SOGI claims. As explored above, the focus should be on ensuring respect for the right to information, investing

143 Valentina, social worker, Italy.
145 Rousseau and Foxen (n 4) 519.
147 Sertler (n 39).
148 Danisi and others (n 14) ch 7.
in legal aid, improving asylum procedures, applying the principle of the benefit of the doubt, and improving decision makers’ training and working conditions. A more transformative strategy – one that completely eliminates epistemic injustice in asylum systems – should be the long-term aim. Indeed, it is a moral obligation, and ‘to be human is to be moral, and you cannot have a day off when it suits you’.