

## Working within the Asylum Advocacy Nexus: Epistemological Strategies for LGBT Country Condition Expert Witnesses

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### Abstract

*Given the increasing numbers of LGBT asylum seekers migrating from countries with high levels of violence with impunity against sexual minorities to the US, this article asks ‘What is the role of country condition experts in LGBT asylum trails? Who is considered an expert and what methods and forms of evidence constitute ‘expert knowledge’?’ Using a qualitative comparative analysis of expert witness testimony on Mexico country conditions for 141 LGBT asylum trials, this article outlines epistemological strategies for providing successful country condition analysis by identifying the types of evidence, arguments and legal barriers that routinely emerge within the legal-policy frameworks provided by immigration and asylum law. This article advances applied and theoretical knowledge valuable to scholars, policy makers and advocates working on the topic of LGBTQ immigration and human rights.*

**Key words:** LGBT immigrants, asylum advocacy nexus, US asylum law, expert witness, Mexico

### 1. Introduction

Mexico consistently ranks second among the most violent countries for lesbian, gay, bisexual and transgender (LGBT) persons, despite that it has passed some of the most progressive LGBT legislation in Latin America (Beer & Cruz-Aceves, 2018). A majority of LGBT Mexicans face discrimination and physical violence on a regular basis and hate crimes and violence against the LGBT population in Mexico are widespread and frequently go unpunished (Letra S, 2019). As a result, steady stream of LGBT persons have been leaving Mexico for the US (Barnes, 2019; Carrillo, 2017; Gates, 2013). This stream of immigrants, a majority of whom are undocumented and classifiable as asylum seekers or refugees, is representative of a larger trend of out-migration of LGBT individuals from countries with high or increasing levels of homophobic and transphobic violence (e.g. Latin America, the Caribbean, Middle East, Asia, Africa and Russia) to countries – such as the US - with relatively better conditions. Mexico is significant because it ranks second among the most deadly countries globally, behind Brazil, (Transgender Europe (TGEU) and Carsten Balzer, 2019) and hate crimes and violence toward LGBTQ individuals are widespread, endemic and frequently go unpunished (Letra S, 2014; Letra S, 2019).

Mexican country conditions for LGBT persons combine with geographical proximity and a long history of South-North immigration flows to produce a significant number of undocumented LGBT immigrants in the US. Many of these undocumented LGBT immigrants are unaware that they may qualify for asylum in the US and may end up residing in the US for months, if not years (occasionally decades in the case of those who migrated as children) before they become aware of their eligibility to claim asylum. This is due to lack of knowledge of immigration and asylum law, and lack of the substantial resources (time and funds) required to negotiate the US immigration and asylum systems. Often individuals only discover the possibility of making an asylum claim in the context of speaking with public defenders after getting picked up and detained by ICE or police. For those who do make asylum claims, almost all rely on a patchwork of immigration advocates - including public defenders, pro bono legal counsel from private law firms, immigrant rights organizations and a variety of expert witnesses - to administer the case, a process that can take up to five years or longer.

A vital role within the immigration-advocate ‘patchwork’ is that of the country condition expert whose testimony provides the detailed knowledge pivotal in obtaining a positive result. Much of the research on the role of expert witnesses in legal settings focuses on medical experts that can attest to the mental and physical health of ‘respondents’ based on their expert knowledge of well-recognized medical scientific fields (Wallace & Wylie, 2013). This article shifts the focus to ask ‘What is the role of *country condition* experts in LGBT political asylum trails? Who is considered an expert and what methods, behaviors and forms of evidence constitute ‘expert knowledge’?’ The answer to these questions is informed by a qualitative analysis of the processes by which country conditions expertise was acquired and utilized for 141 Mexican LGBT asylum trials in the US. More specifically, the article outlines the epistemological foundations for providing successful country condition analysis and testimony by identifying the types of evidence, questions, arguments and legal strategies routinely encountered within the legal-policy framework provided by immigration and asylum law. This paper advances applied and

theoretical knowledge valuable to scholars, policy makers and advocates working on the topic of LGBT immigration, asylum and human rights. To that end the paper first outlines relevant trends and debates within the 'expert witness' literature; then describes the methodology and data analysis; and finally lays out a set of epistemological strategies and tools for expert witnesses participating in asylum hearings.

## 2. Literature Review

Prior to 1980, geography and foreign policy dictated who the US admitted as a refugee (Ardalan, 2013). Asylum decisions were largely controlled by US foreign policy interests and the State Department played a key role in submitting advisory opinions recommending grants or denials of asylum. The Refugee Act of 1980 and final regulations passed by the Justice Department in 1990 established a more objective, human rights-based system of decision-making which mandates individualized determinations of asylum claims, with meaningful consideration by adjudicators of all reliable sources of country condition information. It is at this point that the expert witness in country conditions (among other areas) becomes a feature of successful asylum claims. While the applicant bears the burden of establishing eligibility for asylum, immigration judges, attorneys and expert witnesses share responsibility to develop the record and evaluate all relevant facts to determine if applicant has met the burden of proof.

Expert witnesses are persons with scientific, technical or other specialized knowledge, who can therefore provide access to forms of evidence (documentary and testimonial) that can be crucial in determining the outcome of asylum trials (Malphrus, 2010). To assess and establish who is an expert the standard is to review the credentials and professional experience of the expert (including cv, professional title, degrees earned, publication record) to determine whether they possess relevant, established knowledge and information; are independent, impartial and objective; and can be holistic in tone (Malphrus, 2010). Relying on the cv of experts alone can be problematic as it is highly selective document and is not fully representative of one's area(s) of expertise. Expert witnesses must often also explain in great detail in both the written affidavit and verbal testimony how they are competent in the subject matter and 'qualified through knowledge, skill, practical experience, training, education, or a combination of these factors' (Sapir, 2007, p. 3).

The movant must establish the expert's competency even when clearly documented as part of the file, however, in general the standard for qualifying an expert is a generous one. Federal Rules of Evidence provide standards for admission of expert evidence as relevant if 1) based on sufficient facts or data 2) testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case (Malphrus, 2010). The weight given to expert witness testimony, however, is up to the judge. For example, an expert witnesses' participation in activism, appearance as a witness for a large number of cases, and being paid a fee for testimony, can often lessen the weight of expert testimony. Additionally, the judge may examine the reasoning or methodology underlying the expert opinion, not the ultimate conclusion reached by the expert, to determine weight of testimony. For example, a judge may give more weight to expertise acquired in the course of conducting quantitative social scientific research on the LGBT population than to expertise gained by participation for many years 'on the ground' as an LGBT activist. While knowledge gained from both social scientific and activist efforts is arguably equally important to an asylum case, immigration attorneys are aware of the court's preference for scientific over experiential knowledge and tend to select their witnesses accordingly.

In general, the point of using an expert witness is to put a teacher on the stand, someone who likes to 'share secrets' and explain ideas to others makes a good witness (Kuchler, 2010). Typically, expert witnesses provide at a minimum a written affidavit containing a standard set of facts and will frequently provide in-person testimony in court or telephonically. Depending on type of expertise, the role of the expert can include: Substantiating claims of persecution on return; providing first-hand knowledge of country/region and whether an individual or group may be a risk if returned; providing political or conflict analysis of the security situation; contextualizing the claimants case; analyzing the national laws and judicial system; assessing the likelihood of authorities in the country to be able and willing to provide protection against human rights violations; explaining cultural and/or religious practices; evaluating documentary country of origin information; and conveying information from expert's own sources. Regardless of the many categories and roles of experts, they perform two functions: 1) scientific – collecting, testing and evaluating evidence and forming opinions; and 2) forensic – communicating that information and its basis to a judge and/or court (Sapir, 2007).

Early social science research on the role of expert witnesses within political asylum processes has primarily focused on how the legal-institutional framework shapes applicants' and experts' narratives so as to generate 'cultural silences', also described as 'epistemologies of ignorance' (Bohmer & Shuman, 2007), that reify one-dimensional stereotypes about country conditions and asylum seekers' LGBT identities. More recent research considers how participating in the asylum process produces an 'asylum-advocacy nexus' (Hepner, 2015) in which applicants and experts engage the law as advocates seeking social justice. At its core, these lines of research seek

to answer epistemological questions about how participation of asylum seekers, experts and other actors within the political-legal asylum process serves to produce legal knowledge.

Within the US political asylum framework the production of knowledge relies on power laden technologies of interrogation (Latour, 2010) and questioning (of both applicants and expert witnesses) that can resemble an inquisition.

For the applicant, asylum law requires that they prove the ‘nexus’ of their claim in that they have 1) well-founded fear of past and/or future persecution based on 2) membership within a race, religion, nationality, or a particular social group (e.g. ‘sexual minority’) or political opinion. As a result of the nexus requirement, a significant structural dimension of the asylum process is the repetitive questioning of applicants by immigration judges, attorneys and other asylum officials in the context of filing the application and participating in the hearing. As a mechanism for producing knowledge, the process of inquiry – whether favorable or not – can create a situation in which an individual is made to appear ignorant of their own circumstances by identifying contradictions and inconsistencies in recollection of facts. Indeed, the structure of questioning in asylum hearings often reveals conflicting, inconsistent or non-existing facts, which can make it seem an applicant is ignorant of various aspects of their experience and is thus rendered not credible and effectively ‘silenced’.

For example, because adjudicators often regard the narratives of asylum seekers as insufficient, applicants face pressure to produce documentary evidence which officials consider reliable. Ironically, lack of evidence (e.g. some documents don’t exist, others have been lost or are not available) is itself part of the condition of seeking asylum. Most applicants often have only their stories as evidence of persecution and membership in a particular social group, yet they still need to present evidence they were victims of violence based on membership in that group. Additionally, in the case of LGBT applicants, asylum officers and judges assume gender identity and sexual orientation are fixed categories, but in reality people often have multiple, intersectional and changing identities throughout their lifetime; for asylum seekers, having a ‘changeable’ identity is often a necessity for survival. Yet when subjected to the asylum process, applicants are required to simultaneously produce a stable identity and describe its destabilization within an essentialist framework that renders much of their lived experience invalid and invisible.

In this way, the political asylum process can be understood as a site of production of ‘cultural silences’ and ‘epistemologies of ignorance’ (Bohmer & Shuman, 2007; Shuman & Bohmer, 2014). Cultural silences refer to things that asylum seekers fail to tell the court, including immigration officials as well as their own lawyers and other advocates, largely due to cultural prohibitions of speaking due to shame, humiliation, or other conditions. When immigration bureaucrats attempt to elicit and evaluate the stories of the applicants to determine credibility and whether to grant asylum (or other remedies) cultural silences render particular narratives ‘untellable’, or epistemologically flawed, and consequently can undermine an asylum claim. Given that trauma narratives are typically characterized by an inability to recount or remember certain kinds of details, immigration officials often use such inconsistencies and other discrepancies as evidence the applicant lacks credibility. Officials interviewing an asylum seeker are looking for a coherent and consistent narrative and any inconsistency is considered a sign that the entire narrative is fraudulent. However, missing details rarely indicate a fraudulent claim but rather are a common feature of claimants narratives, and are produced by aspects of the interrogation process itself, including 1- cultural constraints faced by the applicant in reporting humiliating or horrendous experiences to a stranger, and 2- asylum officials’ inability to make connections that depend on knowledge of the claimants culture. In fact, cultural silences are also part of the ‘truth’ and are in and of themselves a form of knowledge and source of information (Bohmer & Shuman, 2015, pp. 156-157).

Expert witnesses can and often do participate in the “strategic essentialization” (Speed, 2006, p. 66) and silencing of the identities, histories and cultures of asylum seekers. However, expert witnesses can also serve to address cultural silences and epistemologies of ignorance by providing in their testimony an analysis of how “conflict and human rights abuses, North-South inequities, development dynamics, diasporic or transnational networks, and international and national immigration policies together form a shifting complex that structures and contextualizes the movements and claims of refugees and asylum seekers” (Hepner, 2015, p. 226). An effective expert witness realizes they are participating in a process in which the relevant facts may be less representative of the individual experience and more reflective of the specific requirements of asylum policy and law. Hepner’s concept of the ‘asylum-advocacy nexus’ (Hepner, 2015) is helpful for understanding how asylum procedures constitute a political economy of knowledge and identity that is co-produced by experts, advocates (lawyers and activists) and refugees themselves; the asylum-advocacy nexus is a circle of praxis, in which advocacy or activism enriches research and knowledge and vice versa.

Hepner (2015) problematizes three dynamics of the asylum-advocacy nexus: 1) the role of experts in engaging in a form of critically engaged activist research that produces powerful, yet problematic, forms of knowledge; 2) experience of seeking asylum itself as a form of agency and consciousness raising; and 3) how asylum procedures become sites of formation and contestation of transnational political identities and social power. In this article I

take up the first question of the vital, yet problematic, role of country condition expert witnesses' participation in the asylum-advocacy nexus. In so doing, this article expands the understanding of the role of the expert witness in creating, identifying and addressing cultural silences and epistemologies of ignorance embedded in the asylum-seeking process. The next section outlines the methodology for researching and analyzing the role of the expert witness, followed by a discussion that lays out a set of epistemological strategies and rubrics for expert witnesses participating in asylum hearings.

### 3. Methods

The data for this project was gathered via a qualitative action-based methodology. Largely derived from social movement and organizational development theory and practice, action-based methods are multiple and known by many names, including 'participatory research', 'action learning' and 'collaborative inquiry'. Action-based research seeks to address both the practical concerns of people in an immediate problematic situation and to further the goals of social science. "Thus, there is a dual commitment in action research to study a system and concurrently to collaborate with members of the system in changing it in what is together regarded as a desirable direction" (Gilmore, 1986, p. 161).

In this case, the specific practical concern is how to use qualitative social science knowledge and real-life experience as a basis for providing expert witness testimony on country conditions for Mexican LGBT asylum cases in the US immigration court system. From 1990-2010 I worked as both an advocate and academic researcher on topics related to HIV/AIDS activism and policy in Mexico and the US; much of my work involved immersion as an administrative volunteer in LGBT and HIV/AIDS community-based organizations in both the US and Mexico for extended periods. In 2009 I met a lawyer who was representing (pro bono) an individual from Mexico seeking asylum due to the discrimination and violence she had experienced as a transgender woman. After talking about my research background and areas of expertise, the lawyer asked if I would provide testimony on country conditions for transgender persons in Mexico. I agreed and after providing a written affidavit and in-court testimony we won the case. Since 2009 I have provided (in person or telephonic) pro bono expert witness testimony for 141 cases in immigration courts across the US including in California (Los Angeles, San Diego, San Francisco, Adelanto), Oregon, Washington (Seattle), Nevada (Las Vegas), New Mexico (Albuquerque), Arizona (Phoenix, Tucson), Texas (Dallas, Houston, San Antonio), Colorado (Denver), Georgia (Lumpkin), Illinois (Chicago), Michigan (Detroit), New York, New Jersey, Minnesota (Minneapolis), Florida. All of the cases were acquired via informal 'word-of-mouth' networks between legal counselors and advocates and as such represents a snowball sample population of LGBT asylum seekers in the US. The demographics (based on self-identification) of the 141 cases are presented in Table 1.

<b>Identity Category</b>	<b>%</b>	<b>(#)</b>
Transgender women	40.4	(57)
Transgender men	4.96	(7)
Gender non-conforming (8 present as female, one as male)	6.38	(9)
Gay men	31.9	(45)
Bisexual	6.38	(9)
Lesbian	5.67	(8)
HIV+	23.4	(33)
HIV+ non-gay identified men	4.25	(6)

Of note is that most (40.4%) of the cases involved transgender women, followed by gay men (31.9%); additionally, almost a third (27.65%) were HIV+. It is important to also note that a number of people claimed multiple identity categories – for example, as a 'gender non-conforming gay male who is HIV+' - such that the total does not add to 100%. Finally, not reflected in the table but also important to consider is that approximately 10 % of clients had significant mental health diagnosis such as PTSD, OCD, depression, bi-polar disorder and/or schizophrenia.

In order to extract relevant data from my long term experience as an activist and academic embedded in the LGBT and HIV+ populations, I employ a specific set of qualitative action-based methods and data analysis for this project, including participant observation, in depth interviews and consultations and document analysis. As stated above I participated as an expert witness in 141 asylum hearings within immigration courts across the US, as well as attended other relevant events, such as legal workshops and LGBT immigrant rights forums. Each hearing generated a minimum of three to five hours of consultation with legal advocates (mostly immigration lawyers and organizational activists) that systematically focused on several key -but often problematic - aspects of expert witness testimony process, including: 1) assessing client characteristics in relations to 'nexus' claim, 2) generating a written declaration that includes detailed description of expertise/qualifications and country conditions, and 3)

providing verbal testimony (inclusive of the direct and cross exams) in immigration court. Iterative analysis of the data (500+ hours of consultations and associated written materials) was driven by an analytic that focused on both identifying specific recurring epistemological challenges, or ‘weaknesses’, faced by the expert witness, and identifying specific knowledge-based strategies for mitigating those challenges and weaknesses. As stated above, the role of country condition expert can be pivotal in obtaining a positive result for challenging cases.

Answering these questions about who is considered an expert; what methods, behaviors and forms of evidence constitute ‘expert knowledge’; and how best to use that knowledge in the context of asylum hearings will provide applied and theoretical knowledge valuable to scholars, policy makers and advocates working in the area of LGBTQ immigration and human rights. More specifically, the goal for this article is to identify the challenges and successes associated with using expert witnesses, and to outline epistemological strategies, or tools, for providing successful ‘expert’ testimony within LGBT asylum hearings in the US.

#### **4. Discussion**

It is well recognized (Ardalan, 2013; Kuchler, 2010) that the key to successful asylum applications is the inclusion of country condition experts that can testify to specific situations. Yet the expert witness occupies a tenuous and complex position – they possess essential information that is not available to asylum applicants, and can often be regarded (based on access to ‘legitimate’ information, credentials, and so on) as more credible than the claimant. Ironically ‘second hand’ expert knowledge is often viewed as more legitimate than first-hand experience(s) recalled by those who actually experienced the persecution. However, even with experts, certain kinds of knowledge count, and other types do not, and the method of collecting and presenting the data may matter more than the actual content. In this paper, I analyze hundreds of hours and pages of notes and written declarations that comprised 10+ years of working as an expert witness for 141 LGBT asylum cases to identify specific epistemological strategies for guiding communication with client counsel and testimony for the immigration court itself. In proposing such strategies, this paper seeks to address the problematic of epistemological ignorance and cultural silences produced within LGBT asylum hearings.

Each client and case are unique, yet an iterative analysis of 141 asylum cases identifies a set of epistemological challenges – and strategies - in terms of what types of experience(s), methods and forms of evidence are considered by immigration judges and lawyers to produce ‘accurate and objective’ country condition knowledge. The first challenge is working with client counsel to assess how the experiences of the client support an asylum claim based on the ‘nexus’. Subsequent challenges include establishing the ‘expertise’ of the country conditions expert with the immigration court; providing written and verbal testimony regarding country conditions in a way that addresses the ‘nexus’ of the client’s asylum claim; and rebutting arguments and evidence produced by government attorneys and immigration judges.

The idea of an ‘asylum-advocacy nexus’ (Hepner, 2015) suggests that participation of experts, lawyers and refugees in asylum procedures co-produces both knowledge and identity; the asylum-advocacy nexus is a circle of praxis, in which advocacy or activism enriches research and knowledge and vice versa. For experts and advocates participating in asylum claims can be part of one’s career; for the asylum seeker it can ‘shape and give expression to changing consciousness and political-legal subjectivities. For legal counsel it can be part of full time (in case of public defender organization) or part-time pro/low bono work that adds meaning and variety to a corporate career. A significant part of the work involved as an expert witness is consulting with counsel regarding key details of the client’s case that inform the expert’s written and verbal testimony, as well as strategizing interaction with the judge and government attorney in the context of the expert’s direct, cross-exam and re-direct. Therefore, the expert’s position within the asylum advocacy nexus provides the opportunity to address ‘cultural silences’ and epistemological gaps by developing tools that facilitate strategic interaction – and information sharing - with client counsel, judges and government attorneys. The iterative analysis of consultations that comprise the data set revealed a recurring set of ‘strategic’ questions, or rubrics, that direct the expert’s interaction with key persons involved in the asylum case. To that end I will discuss the rubrics (see Tables 2-4) as developed for 1) consultations with client counsel regarding the details of the case and whether the client meets the nexus requirement; 2) the written brief on country conditions; and 3) giving testimony about country conditions at the asylum hearing, inclusive of interacting with the judge and government attorney in the context of the cross exam.

##### **4.1 Consultations with client counsel regarding the details of the case**

The initial consultation with client counsel should identify relevant details of the case in terms of whether the client meets the nexus requirement. Given that many LGBT asylum seekers have survived by hiding aspects of their identity, many often do not have or may be unable to clearly verbally articulate the linear development of an ‘LGBT identity’. There is often no clear cut ‘coming out’ process; indeed, asylum seekers often attempt to conform to heteronormative social expectations– even marrying and having children – to avoid persecution. Questions (see Table 2 Part A) that would determine membership within the particular social group (PSG) include: How does the client identify (in terms of gender and sexual orientation), and how openly is LGBT identity

expressed in daily life? Has the client ever been in a heterosexual marriage and/or have biological children? Is there a history of persecution or violence by state actors (police, military, public authorities) on the basis of LGBT identity? And how self-reflexive and articulate is the client in discussing their LGBT identity, past experiences of persecution and/or fears about future persecution? If asylum seekers are not able to articulate their LGBT identity, have a history of heterosexual relationships or marriage, and/or have biological children, their credibility may be compromised.

<b>Table 2: Assessing Client Characteristics and Capacity of Counsel Rubric</b>
<b>A. Client Questions – Particular Social Group (PSG) identity and past persecution</b>
<ul style="list-style-type: none"> <li>-To what particular social group(s) (PSG) does client belong?</li> <li>-What is the client degree of identification with PSG(s)?</li> <li>-What is the client’s degree of visible gender non-conformity?</li> <li>-Has client previously been married (in a conventional ‘heterosexual’ relationship) and/or have kids?</li> <li>-Has client been victim of violence in home country and by whom? Is there a history of violence by state actors (police, military, public authorities)?</li> <li>-How self-reflexive and articulate in describing identity and experience?</li> </ul>
<b>B. Client Questions – Asylum eligibility and socio-economic support</b>
<ul style="list-style-type: none"> <li>-At what age did client enter into the US?</li> <li>-When did client first file (within the one year period)?</li> <li>-Eligible for Asylum and/or CAT/withholding?</li> <li>-Previous immigration or criminal violations? Is the client detained?</li> <li>-What is client’s health status in terms of HIV and mental health diagnosis?</li> <li>-What is the client’s work history?</li> <li>-Is family supportive? Living in US or home country?</li> <li>-Are there other friends, co-workers, bosses, family members who will testify?</li> </ul>
<b>C. Counsel Questions</b>
<ul style="list-style-type: none"> <li>-Does Counsel have previous experience with LGBT asylum cases?</li> <li>-Does file have current country conditions documents?</li> <li>-Who is the assigned judge and what is his/her decision record?</li> <li>-Have you received a filing of country conditions documents from the government attorneys?</li> <li>-Where is the court? What are the logistics for providing in-person or telephonic testimony?</li> </ul>

Other important questions (see Table 2 Part B) that determine the nature of the claim and by extension the nature of expert witness testimony include: What was the age, date and method of client’s entry into the US? And did the client file for asylum within one year of entry? Does the client have any immigration or criminal convictions in the US? And are there ‘changed circumstances’ (e.g. an HIV or mental health diagnosis)? The responses to these questions provide information essential to establishing whether the client is eligible for asylum, versus a ‘Withholding of Removal’ or ‘Convention Against Torture’ (CAT) claim for which requirements are higher in terms of proving the likelihood of future persecution from government actors. Whether or not an asylum seeker has been a victim of violence committed by state actors is clearly important to showing past persecution and fear of future persecution. If the client came to the US as a child and/or did not experience harm by state actors, proving ‘past persecution’ is obviously impossible; in such cases it is imperative that client counsel and the expert witness provide evidence that future persecution by state actors is inevitable, and the state is unable or unwilling to stop such persecution by non-state actors. Additionally, many LGBT refugees arrive in the US without knowledge of asylum law and very frequently fail to meet the one-year filing deadline making them ineligible for asylum. In such cases, the client must instead seek relief via a CAT or withholding of removal claim which, as stated above, have higher evidence requirements for proving the likelihood of future persecution by state actors. Finally, those who have committed legal (immigration or criminal) violations are often only eligible for CAT or withholding of removal claims, and so are also subject to the higher standard. And if in detention, claimants are also forced to appear in the ‘detained docket’ in which judges and government attorneys are notoriously successful in maintaining a high denial rate.

Ironically, the violence experienced by asylum seekers (in both countries of origin and receiving countries) exposes them to increased physical and mental health risks that can often be relevant and helpful to their case. For example, a diagnosis of PTSD or HIV could be the basis for claiming ‘changed circumstances’ and thereby overcoming the one-year filing requirement. Another result of exposure to physical and mental health risks is that a significant number of LGBT refugees in the US have accessed services – and consequently become involved as volunteers or employees – from advocacy organizations. Having a consistent paid or volunteer work history and supportive

social networks in the US can mitigate weaknesses in some cases, particularly if co-workers, family and friends are able to provide a character statement for the court.

Finally, an essential part of consultation with legal advocates about a case is assessing their level of experience and knowledge regarding asylum trials, judge’s decision records and access to other key resources (see Table 2 Part C). To that end it is essential to ask counsel about their previous experience with LGBT asylum cases from Mexico, and if they have a complete file with current country conditions documents.

For counselors that have little experience, it is helpful to consult with organizations such as Public Law Center and Immigration Defense (in Los Angeles), Immigration Equality (in New York City) and the National Immigrant Justice Center (in Chicago) that can provide vital legal advice and additional current country condition information. It is also helpful to consult the decision record for the judge assigned to the case, available via the TRAC Immigration Reports website (see: <http://trac.syr.edu/immigration/reports/judgereports/>).

**4.2 The written brief: establishing expertise**

The written brief on country conditions (see Table 3 Part A) begins with stating the purpose of the brief and establishing the expertise of the witness. This is accomplished by providing a detailed explanation of specific qualifications and experience listed in the cv, as well as addressing any gaps in the expert’s knowledge or experiences. For example, publications and conference presentations listed in a cv may not reflect all lines of research activity especially given the lengthy nature of peer review process for most journals and books and the demands of teaching and service loads for most academics, and so must be explained in detail in the written affidavit. If the expert is called to testify at the asylum hearing, they will most likely also undergo a voir dire in which they further explain and answer questions about their qualifications prior to giving testimony about country conditions. In both the written brief and voir dire, it is important to explain in detail experiences relevant to establishing country conditions expertise, and to know how to explain that expertise to immigration judges and government attorneys in the context of an immigration asylum hearing.

<b>Table 3: Country Conditions Brief Rubric</b>
<b>Expert qualifications</b>
<ul style="list-style-type: none"> <li>-<i>Purpose of Declaration:</i> <ul style="list-style-type: none"> <li>-State whether in support of the application for asylum, withholding and/or CAT</li> </ul> </li> <li>-<i>Background and Expertise:</i> <ul style="list-style-type: none"> <li>-Outline current employment (length of time employed), job title, educational degrees, areas of instruction/expertise, etc.</li> <li>-Explain of basis of expertise (e.g. work, academic, research experiences); fluency with language and culture, etc.</li> <li>-Describe methodology and engagement with information sources (type and number of information sources; amount of time and types of experiences in country, etc.)</li> <li>-List relevant publications, including names of journals and conferences.</li> <li>-State any past experience in providing expert witness testimony; include number of cases.</li> </ul> </li> </ul>
<b>Country Conditions Analysis</b>
<ul style="list-style-type: none"> <li>-Explain in detail the nature of violence against LGBT persons in clients home country</li> <li>-Explain how cultural values motivate violence against LGBT persons</li> <li>-If relevant, explain how progressive policies have led to a backlash against LGBT persons</li> <li>-Explain how LGBT persons are targeted for violence and hate crimes due to trans/homophobia</li> <li>-Describe the culture of violence with impunity within the police, military and public security forces against LGBT persons</li> <li>-Provide conclusion on likelihood of future persecution</li> <li>-Provide selected references from sources cited in document</li> </ul>

Often it is necessary to explain the nature of the expert’s discipline (e.g. ‘what is sociology?’) and to describe what experts ‘do’ as professional academics, researchers or analysts. In general it is desirable for experts to have had experience of long-term residence in the country; deep knowledge of language, culture and major social, political and economic institutions; forms of long-term connection and embeddedness in the LGBT population; and have collected a large number and wide range of data points from a variety of knowledge domains (including but not limited to local news media, human rights reports from international human rights NGOs and US, Mexican and Canadian government and non-government sources; LGBT immigrant rights organizational literature; and news media and public opinion polls) that are systematically consulted and mapped on longitudinal basis. Additionally, the background and experience of the expert witness should ideally avoid or minimize experience as an activist so as to maintain objectivity. Finally, the written statement should state any past experience in providing expert witness testimony.

### **4.3 The written brief: Country Condition Analysis**

Once the expert's qualifications have been established, the brief outlines country conditions in as much detail as possible (see Table 3 Part B). In general, the brief should describe the nature of violence in terms of rates and statistics of hate crimes and murders and other types of harm experienced by LGBT persons. A strong country conditions statement will also explain how cultural values lead to homophobia and transphobia and motivate violence against LGBT persons. Most important is to clearly and convincingly describe if and how public security forces (police, military, public security guards, etc.) and public authorities (politicians, religious leaders) participate in a culture of violence against LGBT persons with impunity. If applicable, it might be necessary to explain how progressive policies have resulted in backlash against LGBT persons.

The brief should conclude with a statement on the likelihood of future persecution by government actors and a list of selected references from sources cited in document.

A well-researched and documented statement on country conditions must address several epistemological challenges. Specifically, in presenting country condition evidence (in both written and verbal formats), it is necessary to present information in a way that addresses the nexus of past and future persecution based on the applicant's membership within the LGBT population. A successful country conditions expert must anticipate and deal with a standard set of epistemological gaps that emerge from the problem of 'proving' the nexus. These 'gaps' emerge from assumptions made by judges and government attorneys about country conditions on the basis of faulty, partial or contradictory evidence. For example, judges and government attorney's will regularly use US Department of State (USDOS) Country Reports on Mexico and English language news media and tourism publications as 'evidence' that 1) anti-discrimination laws and legislative advances have been effective in protecting LGBT persons; and 2) there are 'internal flight alternatives' due to the relatively large LGBT population and annual gay rights events in large cities such as Mexico City, Guadalajara, Monterrey, and so on.

A savvy expert witness will address such gaps in the written brief (as well as via in-court testimony). For example, a content analysis of USDOS Mexico country condition reports from 1999-2019 reveals that large sections of the report are routinely copied and pasted from year to year. Moreover, USDOS reports tend to be contradictory in that they document some progress in terms of laws (e.g. legalization of gay marriage in Mexico City in 2010) and visibility of events (e.g. conferences and Gay Pride Marches), yet also contain evidence of ongoing forms of violence against LGBTQ persons and transgender individuals in particular. It is helpful to directly address the inconsistencies of USDOS country condition reports in the expert's written brief. To further rebut USDOS reports, expert witnesses should explain how they use information from more legitimate sources - such as local Mexican Spanish language news media, local Mexican NGO's and international human rights agencies - to show that a statement of 'no reports of violence' in a USDOS report does not mean there were no acts of violence or discrimination, but rather indicates a bias in reporting the incidents.

The DHS also relies on US-based English-language news articles from such sources as the Huff Post, Washington Blade, Yucatan Times, and so on, to document and argue that country conditions have changed for the better. Again, the expert should anticipate this strategy and explain in the brief how English language news and tourist publications are not valid sources of country condition information or evidence of progress as there is a world of difference between being an LGBT national versus LGBT tourist in Mexico. English language news and tourist publications tend to market Mexico as a 'gay tourist' destination, particularly after the 2015 Mexican Supreme Court ruling on gay marriage. The DHS regularly assumes that gay marriage legislation applies equally to all LGBT persons so it is also necessary to explain how same sex marriage provides no legal benefits or protection for transgender persons. Similarly, the existence of 'Gay Pride' events held in Mexico City, Guadalajara, Tijuana, and other large cities in Mexico, while important to international tourism and the local economy, do not necessarily represent a significant change in country conditions. Rather, Gay Pride events in Mexico are a combination of a celebration of rights recognized and respected, and an opportunity to bring visibility to demands for rights that are still contested.

### **4.4 In-Court Strategies: Pre-hearing logistics and interaction**

Submitting a written declaration on country conditions is certainly helpful for asylum cases, however, it will not be given much weight by the court unless the expert appears either in person or via telephone at the hearing to give testimony and answer questions from the judges and DHS attorney. Experts witnesses - and client counsel - must therefore be prepared to coherently handle the 'technologies of interrogation' (Latour, 2010) inherent in presenting country condition evidence in immigration court. The first order of business is logistical and involves pre-hearing interaction with the court (see Table 4 Part A). If in-person testimony is not possible (due to distance or schedules), counsel will have to file a motion to request telephonic testimony. Not all judges will allow telephonic testimony; some judges will require that the expert appear via video call, and others may request that you be available via a land line that is publicly verifiable as your 'work phone'. Additional pre-hearing logistics include establishing if simultaneous translation will be utilized, and how many other witnesses will be called. In both cases, the use of



simultaneous translation and testimony of other witnesses will invariably increase the time required for the hearing. Given that most courts schedule cases for a morning or afternoon session, it is almost inevitable that asylum hearings are continued for multiple sessions as not all witnesses are able to give testimony in one morning or afternoon session. Expert witnesses must be prepared to spend hours waiting to be called (either in person or via phone), only to be told to come back on date months – sometimes years- later.

<b>Table 4: Asylum Hearing Rubric</b>
<b>A. Pre-Session Interaction with Judges and DHS attorneys</b>
-Is the expert available in person or via phone (file motion for telephonic testimony)? -Will simultaneous translation be utilized? -How many other witnesses will be called? -Has the DHS submitted a filing of country conditions documents? -Will the DHS stipulate to the expert’s qualifications? -Is it possible to give entire testimony (inclusive of the direct, cross and re-direct) in one session?
<b>B. Expert Witness Direct</b>
<u>Background</u> -Would you please tell us your name? -What do you do for a living? -Have you submitted a declaration on that subject on behalf of ----? -Does your declaration accurately reflect your testimony? -There’s a curriculum vitae (cv) attached to your declaration. Is it accurate? -What academic degrees have you earned? -How long have you been employed as ----?
<u>Expertise</u> -What is the topic of your current research? -Does that include the status of LGBT persons in clients home country? -How have you carried out that research? -How do you keep your expertise current? -Have you testified before in immigration court regarding the conditions in clients home country for LGBT persons? How many times? -Were you admitted as an expert in any case? -What is the highest-level court for whom you have been accepted as an expert?
<u>Country Conditions</u> -Based on your research and experience, how are LGBT persons treated in clients home country? -Could you please tell us what homo/transphobia is? -Could you please explain how homo/transphobia manifests itself in clients home country? -How widespread is homo/transphobia in clients home country? -When you say that clients home country is not safe for LGBT persons, do you have any statistics that support that conclusion? -Do you cite to any of those sources in your declaration? -Who perpetuates homo/transphobia in clients home country? -In your expert opinion, why does this happen? -Can you share with us the nature and type of violence that exists against LGBT persons in clients home country? -Based on your research, is the government aware of the violence against LGBT persons? -What has the government done to try to stop it? -Could you tell us about any pro or anti- LGBT legislation that has been passed in clients home country? -Have those laws had an effect on the violence against LGBT persons? -Are hate crimes perpetrated against LGBT persons reported to the authorities? Why not?
<u>Questions regarding client</u> -I would now like to talk about –client name (C)-. Are you familiar with C’s case? -What materials did you review specific to this case in order to prepare your declaration and your testimony today? -As you know, C has testified that as a child, C suffered physical and sexual violence from C’s own family. In your experience, is this consistent with the current country conditions for LGBT individuals in clients home country? -C also testified that acquaintances at –LOCATION - attacked C physically. In your experience, is this consistent with the current country conditions for LGBT individuals in clients home country? -C also testified about a brutal physical attack, in which a group of policeman/military/public security beat C. In your experience, is this consistent with the current country conditions for LGBT individuals in clients home country? -In your opinion, what would happen to C if returned to clients home country? -In your opinion, is there anywhere in clients home country that C could relocate to avoid this violence? Why not? Why couldn’t C be safe somewhere like [large city]? -Do you think C has reason to fear for C’s life if returned to clients home country?
<b>C. Expert Witness Cross and Re-Direct</b>
-In your opinion is there underreporting of violence against sexual minorities in client’s home country? Why? -In your experience, does anything prevent the government taking and keeping accurate records of violence against sexual minorities? -Are you familiar with the US Department of State (USDOS) Country Reports for client’s home country? -Do you regularly review the annual USDOS reports for client’s home country? -Have you reviewed the USDOS most recent human rights report for client’s home country? -Is it representative of the limits of the USDOS Reports you’ve discussed?

If possible, it is also very helpful to the country condition expert if client counsel is able to have a brief conversation with the DHS attorney via phone or in person just prior to the hearing to determine if the DHS will submit a filing of country conditions documents, and whether the DHS will stipulate to the expert's qualifications. If the expert is able to see the 'evidence' of country conditions filed by the DHS prior to the hearing, they will be able to anticipate and address the epistemological flaws in the types of arguments and documents provided by the DHS in the direct exam portion of the hearing. Also, if the DHS stipulates to the country conditions expert's qualification, it is possible to abbreviate or entirely eliminate the voir dire and give more time to the country conditions portion of the expert's testimony. Ideally, the expert should be able to give their testimony – inclusive of the direct, cross and re-direct - in its entirety in one session. If time runs out and the hearing must be continued in the middle of giving expert testimony, the expert is at a disadvantage given that the judge and DHS attorney will have the opportunity to further investigate and ask take apart expert testimony in the intervening time.

#### **4.5 In-Court Strategies: Expert direct, cross and redirect**

The most pivotal aspect of the country conditions expert's role is the ability to give oral testimony at asylum hearings in a way that highlights key points in the written declaration in a coherent, detailed yet succinct, manner. Based on the iterative analysis of the 141 cases in the data set, I have developed a set of questions for the 'direct exam' that mirror the structure of the written brief, and strategically hone in on the key aspects of the expert's background and country conditions that should be emphasized at the asylum hearing (see Table 4 Part B). Experts and client counsel should ideally make adjustments to the questions to fit the circumstances of their specific case(s). Additionally, even for those with ample experience, experts and client counsel are well served to review the questions – and responses – in advance of the hearing to establish rapport and ensure that the direct goes smoothly. It is important to master the ability to provide details that amplify and emphasize key facts in the written testimony in an objective and succinct manner, and avoid digressing into detailed explanations of disciplinary or historical nuances that will lose the attention of the court and call into question the objectivity of the witness.

As stated above, the ideal situation is one in which the voir dire is abbreviated or eliminated entirely, and the witness can go directly into answering questions about country conditions. The set of questions proposed in Table 4 Part B is designed to emphasize and explain the historical and socio-cultural roots of homophobia (and transphobia, if relevant) within all sectors of society, but most importantly as manifested by the actions of state actors (especially police, military, public security forces and other government actors) despite the existence of laws preventing discrimination and anti-LGBT violence. The questions then shift to focus on the client's experience as connected to the larger context. The structure of the set of questions for the direct exam enables the expert witness and client counsel to preempt questions from the DHS about the possibility of 'internal flight alternatives' (e.g. moving to a 'gay friendly' city) and existing legislation (e.g. laws legalizing same sex marriage and adoption) and explain how such laws have routinely resulted in backlash and increased violence, particularly against those who are visibly gay or gender non-conforming.

It is particularly important to be judicious and somewhat conservative in the use of examples of violence and statistics as the DHS routinely attempts to trip up experts by calling into question their recall and use of statistics (and the sources of examples and statistics cited) during the cross exam. The set of questions proposed for the expert cross and redirect (see Table 4 Part C) reflect ways of addressing the standard questions deployed by DHS attorneys that attempt to call into question the expert's knowledge and use of statistics and examples of violence, as well as the use of epistemologically flawed forms of 'evidence' (e.g. USDOS reports and English language tourist publications and new media, etc.). Finally, experts and client counsel should be prepared to respond to seemingly random questions from the DHS, such as 'how many states are in Mexico?' or "How many people live in Mexico and what percent are gender non-conforming", etc. Such questions are intended to trip up the expert and undermine their expertise and country condition knowledge. Ultimately, a skilled expert will be able to turn any question – whether from client counsel, the judge or the DHS, into an opportunity to give voice to key facts and country condition evidence in their testimony.

## **5. Conclusion**

Immigration and asylum law and procedures have given rise to a body of knowledge co-produced by judges, lawyers, experts, and refugees themselves, all of whom are working within the 'asylum-advocacy nexus'. Given that the current trend is one of expanding the use of expert witnesses in immigration court and asylum hearings, such experts can utilize their position in the 'nexus' to play a significant role in determining the outcome of asylum trials.

In this paper, I use the lens of the written declarations and verbal testimony of the country condition expert witness to identify various types of evidence, questions and arguments that routinely emerge within the legal-policy frameworks provided by immigration and asylum law, and to suggest epistemological strategies to guide communication and information sharing with client counsel and with the immigration court itself.

Such strategies can be used by country condition experts and client counsel to mitigate cultural silences and epistemologies of ignorance that reify one-dimensional stereotypes about country conditions and asylum seekers' LGBT identities. Yet the use of experts in the political-legal asylum process will always have the potential to produce knowledge and agency, and well as ignorance and dis-empowerment. As Latour (2010) illustrates, the law is a powerful social force and its actors often lack a deep understanding of the subject matter it engages, in this case country conditions for asylum seekers and refugees. As a proxy for understanding, judges, lawyers and expert witnesses often resort to arbitrary metrics of the validity and weight of sources of information (e.g. greater regard for a peer reviewed article rather than direct experience) over others. Ultimately, law and legal judgements are generated not from facts, but rather from how arguments are constructed and what types of information are seen as legitimate, or not.

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