QUESTIONING THE CULTURE OF COURT:
Resistant narratives, imagined possibilities and the regulation of sexuality in UK asylum law

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ABSTRACT

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At the heart of this thesis lies a broad concern with the relationship between law, subjectivity and the possibility of resistance. I consider the way that law is deployed as a mechanism of determination and classification on the one hand, and as a mode of resistance and contestation to such classification on the other. Drawing from Drucilla Cornell's concept of the 'imaginary domain' and Michel de Certeau's work on 'micro-resistance' I explore this paradoxical positioning of law as a site of both subjectification and resistance. Alongside Cornell and de Certeau I rely on critical narrative as a key mode of agency and subjecthood that transgresses normativity in terms of its form and function. Although there has been much important work produced on narrative, predominantly through Critical Race Theory and legal consciousness literature, my work emphasizes the importance of narrative as a mode of agency, and as a method for social change within specified legal environments such as the courtroom and the legal academy.

The specific focus of the thesis rests on the production of testimony by lesbian and gay refugees seeking asylum in the UK as members of a particular social group. The thesis asks whether it is possible for asylum seekers to produce resistant narratives and transgressive identities in a legal environment, and whether in so doing, they are able to challenge the *formalism* and *formulism* of the court. I use *formalism* to denote the protocol of court, inclusive of the establishment of legal relations between parties, and *formulism* to denote the way in which testimony is provided in order to address the grounds of the *Convention Relating to the Status of Refugees*. I argue that whilst the spaces for transgression and resistance in court are limited, lesbian and gay asylum seekers nonetheless challenge legal power structures in important and persistent ways. Although the court is not always willing or able to hear or respond to such transgression, resistances, nonetheless, play an important role in maintaining the agency of asylum seekers before the court.

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CHAPTER ONE

Colonial legacies, neoliberal imperatives and the claim to asylum

Introductory overview

At the heart of this thesis lies a broad concern with the relationship between law, subjectivity and the possibility of resistance – resistance to the violence of law's classification and subjectivisation and the contingent legal effects of normalization and repudiation. I consider the way that law is deployed as a mechanism of determination and classification on the one hand, and as a mode of resistance and contestation to such classification on the other. Drawing from Drucilla Cornell's concept of the 'imaginary domain'[1] and Michel de Certeau's work on 'micro-resistance'[2] I explore this paradoxical positioning of law as a site of both subjectification and resistance. Alongside Cornell and de Certeau I rely on critical narrative as a key mode of agency and subjecthood that transgresses normativity in terms of its form and function. Although there has been much important work produced on narrative, predominantly through critical race theory and legal consciousness literature, my work emphasizes the importance of narrative as a mode of agency, and as a method for social change within specified legal environments such as the courtroom and the legal academy.

The specific focus of the thesis rests on the production of testimony by lesbian, gay and bisexual refugees seeking asylum in the UK as members of a particular social group. The thesis asks whether it is possible for asylum seekers to produce resistant narratives and transgressive identities in a legal environment, and whether in so doing, they are able to challenge the *formalism* and *formulism* of the court. I use *formalism* to denote the protocol of court, inclusive of the establishment of legal relations between parties, and *formulism* to denote the way in which testimony is provided in order to address the grounds of the *Convention Relating to*

[1] Drucilla Cornell, *The Imaginary Domain: Abortion Pornography and Sexual Harassment* (Routledge, London 1995); Drucilla Cornell, *At The Heart of Freedom* (Princeton University Press, Princeton 1998).
[2] Michel de Certeau, *The Practice of Everyday Life* (University of California Press, Berkeley 1984).

the Status of Refugees (*Refugee Convention*).[3] I argue that whilst the spaces for transgression and resistance in court are limited, lesbian, gay and bisexual[4] asylum seekers nonetheless challenge legal power structures in important and persistent ways. Whilst the court is not always willing or able to hear or respond to such transgression, resistances, nevertheless, play an important role in maintaining the agency of asylum seekers before the court.

The asylum system in context

The current asylum system is desperately in need of reform if not abolition. State failure to adhere to humanitarian responsibilities under the *Refugee Convention* has given way to a system of defensive refugee management. The UK's retreat from international responsibility is predicated on two, in my view, illegitimate fears. The first of these is a concern that refugee protection is an alternate route taken by economic migrants and so-called bogus asylum seekers to enter the country. The second concern is fear over the 'real' and 'perceived' costs associated with humanitarian schemes such as asylum.[5] Underlying these fears is a long-standing

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[3] UN Convention Relating to the Status of Refugees 1951 and 1967 Protocol.

[4] Throughout the thesis I refer predominantly to lesbians, gay men and bisexuals, with little to no specific reference to the position of transgender individuals. I don't automatically include trans-identified persons in the usual LGBT moniker as I found no case law that specifically referred to trans-identified persons. There was reference in case law to cross dressing practises, but this does not necessarily constitute a transgender identity. Furthermore I did not interview anyone who identified as transgender. The issues that affect lesbians, gay men and bisexuals may be pertinent to trans person's, but concurrently there maybe other complex and intersecting issues and concerns at stake that cannot be reflected in the broad LGB profile. I did not want to falsely or tokenistically include trans persons without directly addressing their specific concerns. Hence when I do use LGBT it refers to a wider identity politics or an identifiable political movement that is specifically trans inclusive. Additionally, I generally do not use the word queer in order to define the sexuality of participants, as none of the participants actively identified as queer. Rather, I use the word queer in order to identify a politics or literature that distances itself from LGBT. The terminology that is used in case law in order to denote LGBT sexual orientation is homosexual. I move away from replicating this medicalised nomenclature when referring to queer or LGBT identified persons. I also acknowledge that more research needs to be carried out on the specific position of trans identified individuals, their notable absence from case law and wider secondary literature is a troubling finding, but a specific analysis of the position of trans individuals is beyond the scope of this thesis.

[5] For an engaging critique that combines an analysis of the economic labourer, colonialism/neo-colonialism, territoriality and the European Union see Patricia Tuitt, *Race, Law and Resistance* (Glasshouse Press, London 2004) particularly Chapter four; James C. Hathaway, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-oriented Protection' (1997) 10 Harvard Human Rights Journal 115, 117; James Slack, '£1billion a year cost of asylum claims' *Daily Mail* (London May 25 2007) <http://www.dailymail.co.uk/news/article-457531/1bn-year-cost-asylum-claims.html>; Paul Bracchi, 'Millionaires Row 2009: How hundred's of families get luxury homes on benefits far beyond the means of most working people' *Daily Mail* (London 15 January 2010) <http://www.dailymail.co.uk/news/article-1237061/Millionaires-Row-2009-How-hundreds-families-luxury-homes-benefits-far-means-working-people.html>; Deborah Mattinson, 'Labours

history of racism and xenophobia in Britain. These combined concerns have lead to state responses that have seriously constrained the ability of individuals from what are perceived as 'high risk' states (namely those in the global south) of being granted entry to the UK due to fears of overstay.[6]

The external protective measures imposed by the UK include travel visas,[7] requirements for a financial guarantor in the UK,[8] fines levied on carriers for transporting illegally or incorrectly documented passengers, to name but a few.[9] Internally, the UK has embarked upon the practice of refugee 'warehousing', which involves the incarceration of asylum seekers for 'indefinite' periods in detention centres and changes to case management practise with the implementation of the New Asylum Model (NAM).[10] In addition, responsibility for refugees has been meted out to privately run organisations in order to provide 'care' for asylum seekers and address basic needs.[11] An inadequate and overburdened asylum appeals system does not address the needs of asylum seekers and fails to provide an adequate level of justice. My emphasis in this thesis is to interrogate the asylum system, considering its

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catastrophic mistake on immigration: Brown's pollster reveals how it cost him the election... and is now damaging democracy itself' *Daily Mail* (London 7 August 2010) <http://www.dailymail.co.uk/news/article-1301039/Browns-pollster-reveals-Labours-mistake-immigration-cost-power-damaging-democracy.html> accessed 27 August 2011.

[6] Visa requirements have recently been implemented for travellers from South Africa, Bolivia and Lesotho in order to stop illegal migration flows. Travellers from specified countries must have visa's even if they are merely transiting through the UK i.e. in the UK for less than 48 hours. See - 'Countries to which the transit without visa concession does not apply'. <http://www.ukba.homeoffice.gov.uk/travellingtotheuk/transitthroughtheuk/transitdocuments/notransitwithoutvisa/> accessed 4 November 2010.

[7] The Home Office site for visa enquiries is: <http://www.ukba.homeoffice.gov.uk/visitingtheuk/> For a list of states with visa requirements see: <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appendix1/> accessed 27 August 2011.

[8] <http://www.ukba.homeoffice.gov.uk/visitingtheuk/sponsoringavisitor/documents/> accessed 27 August 2011.

[9] Carrier fines: <http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/transportindustry/rlon/> accessed 27 august 2011.

[10] For more on NAM see <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/briefings/Newasylummodel.pdf> accessed 25 august 2011. For a retrospective on the Conservative government's and new labour's immigration policy see Alice Bloch, 'A New Era or More of the Same? Asylum Policy in the UK' (2000) 13(1) Journal of Refugee Studies 29; the contract for deportations in the UK has changed from G4S to Reliance see Paul Lewis and Matthew Taylor, 'G4S loses UK deportations contract' *The Guardian* (London 29 October 2010) <http://www.guardian.co.uk/uk/2010/oct/29/g4s-deportations-contract-reliance> accessed 4 November 2010.

[11] See for example <www.refugeecouncil.org.uk>. For an outline of the recipients of 2008 Home Office funding see UK Border Agency, <http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/workingwithasylum/integration/european-refugee-fund/erfiii-fund-list-2008/> accessed 11 August 2010.

structural limitations and to argue that the manner in which this system position and constrains the identity of the individual constitutes a denial of justice.

The introduction provides an overview of the context from which refugee claims arise. I examine the colonial history of legislation prohibiting same-sex sexuality and reflect on the continued presence of colonial legal norms in a 'post-colonial' era. I highlight the current international legal measures attached to 'homosexual' activity and the penalties for transgression. I argue that the UK still has a responsibility towards its former colonial dependents. The UK's abnegation of responsibility and failure to consider discriminatory legislation in light of its colonial past, arguably, indicates a blinkered and complicit position for the courts to take when denying asylum seekers access to refugee status. A significant contextual factor in the creation of, and subsequent management of, refugees is neoliberal economics. I note the disparity in response to free movement provisions, highlighting how the UK responds overwhelmingly positively to the movement of goods, services and capital through its borders, but rejects the free movement of persons, particularly refugees and economic migrants/asylum seekers. I consider the troubling impact that neoliberal economics has had on the production of refugees.

There is, in part, an irony to my critique of neoliberalism and its impact on, and complicity in, the production of refugees. Whilst I argue that the overarching economic and political framework of neoliberalism is problematic in its generation of disparate levels of wealth and the damaging effects of these disparities – for example perpetuating conflict over resources, extreme poverty and the implicit and explicit financial support for dictatorial regimes – I nevertheless draw on a theoretical premise which has a liberal framework at its core. I rely on liberalism via Cornell's 'imaginary domain', which takes its inspiration from the writings of Kant and Rawls. My reason for maintaining a liberal framework, whilst concurrently critiquing neoliberalism enables firstly, a direct engagement with the linguistic, theoretical and political foundations of neoliberalism facilitating a dialogue between versions of liberalism that currently facilitate conservative immigration and asylum legislation. Secondly, through the imaginary domain, the legal system's liberal underpinnings can be analysed from a perspective that draws on a reworking of liberalism *pure*, relying instead on a liberalism informed by Critical Race, feminist, queer and post-modern perspectives. I argue that the current and particular form of 'liberalism' which

functions in law is excessively influenced by political and economic conservatism, and is underpinned by systemic racism, sexism, classism and homophobia.

In the penultimate part of the introduction I turn to the themes of the thesis and outline the theoretical approach taken. I draw on the 'imaginary domain' in order to deconstruct the foundations of gender and sexuality. Using an anti-essentialist analysis predicated on the work of Drucilla Cornell, I indicate how the imaginary domain can contribute to a critical analysis of refugee claims and constructions of sexual, gendered and racialised identity in legal environments. Following this I turn to Michel de Certeau's concept of micro-resistance and the use of strategies and tactics by refugees, which can have the effect of disrupting the power dynamics in court. Finally I explain the significance of critical narrative as resistant practice, taking into account how non-conformist engagements with the legal system can inform our understanding of the ways in which refugees give voice to their experience, challenging the *formalism* and *formulism* of the court.

Following this overview of themes I discuss the methodology used for my empirical research. I reflect on the process of data collection, the challenges of this collection, my position as interviewer and the inherent contradictions of the research process. I end by providing a brief outline of each chapter.

Colonial laws and the generation of illegal sexuality

The causes of, and responses to, sexuality based asylum seekers must be understood within two key contexts. The first of these is the legacy of colonialism. Colonialism is a key factor in the generation of migration flows. The social, cultural, diasporic, political and legal linkages between the UK and its former colonies make the UK an obvious draw for those seeking asylum. Furthermore, the imposition of colonial penal legislation criminalizing same-sex sexuality is one of the factors in the generation of LGBT asylum seekers. Criminalization not only puts LGBT persons at risk of state punishment and violence, but prohibitive legislation can perpetuate non-state persecutory violence as well. The second context is that of neoliberal political and economic policy. Although the origins of refugee policy and the generation of refugee population flows date back further than the rise of neoliberalism, the current "crisis"

is fundamentally shaped by neoliberal policies and values.[12] I begin with an analysis of the colonial legacy of prohibitive legislation.

Much of the legislation criminalising same-sex sexual activity originates from colonial legal norms stemming from the UK, France, the Netherlands and Germany. The creation and implementation of legislation prohibiting sodomy during colonisation was derived from a desire to control the native inhabitants and "civilise" the populace. Prior to colonisation the 'policing' of same-sex sexual activity was minor, and perceived as a social rather than legal problem.[13] This moderate indigenous response lead to accusations on the part of colonial forces that "native" cultures did not punish "perverse" sex enough.[14] Thus sodomy laws were both an attempt to assert Christian religious morality upon colonized subjects and embraced an ideology of "re-education of sexual mores".[15]

> Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, "native" viciousness and "white" virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.[16]

The validity of this colonially imposed legislation has been subject to challenge in several countries, most recently in the Indian case of *NAZ Foundation v Government of N.C.T. of Delhi and Others*.[17] The petitioners called for the repeal of section 377 of the Indian Penal Code (1860) demanding the court 'abandon this abhorrent alien

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[12] The UK's Border Agency (BA) website uses the language of 'management' stating '[t]he UK border Agency is responsible for securing the UK borders and controlling migration in the UK. We manage border control for the UK, enforcing immigration and customs regulation'. Gina Clayton has noted that since 2002 the Home Office has begun to use the terminology of management rather than control. She notes 'management instead of control implies dealing with a resource something that is inherently beneficial, and while setting rules and processes for how to handle the resource, getting the best out of it', Gina Clayton, *Textbook on Immigration Law* (3rd edn Oxford University Press, Oxford 2008) 39. The language of neoliberalism is used by the BA, where individuals are a resource to be both managed and exploited in terms of their potential to contribute to the economy. See Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20 Journal of Refugee Studies 172.

[13] A McKlintock, 'Imperial Leather' in Houston A. Baker, Manthia Diawara, Ruth H. Lindeborg (eds), *Black British Cultural Studies* (University of Chicago Press, Chicago 1996).

[14] For example see the Angolan Penal Code September 16, 1886 Articles 70 and 71. This legislation was directly inherited from the Portuguese Penal Code during colonisation. Also see Human Rights Watch, '*This Alien Legacy: The Origins of Sodomy "Laws" in British Colonialism* (December, 2008). For a sociological reading of the development of homosexuality see Jeffrey Weeks, *Sex, Politics and Society The Regulation of Sexuality since 1800* (2nd edn Longman, London 1989).

[15] *Weeks* (n 14) 8.

[16] *Ibid*; also see Kath Weston, 'A Political Ecology of Unnatural Offences: State Security, Queer Embodiment, and the Environmental Impacts of Prison Migration' (2008) 14 (2-3) GLQ: A Journal of Gay and Lesbian Studies 217.

[17] WP(c) No. 7455/2001.

legacy'.[18] The legislation reads: 'whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'.[19] Petitioners in the case called upon the British Government's Foreign and Commonwealth Office to apologise for the imposition of this legislation and to acknowledge the 'immense suffering' that it has caused. Furthermore the petitioners implied that 'queer Indians' were still bound by the law of the British Raj, a law they argued, that should have departed with the ousted colonial rulers in 1947 upon independence. There have been numerous claims to asylum stemming from this colonial penal legislation. The UK's response to the granting of asylum to LGBT Indian's and more broadly has not been uniform. Furthermore, the courts have consistently failed to recognise the nexus between the role of colonially derived legislation and the generation of LGBT refugees, thus abnegating responsibility for colonial law's continued effects.

Other colonial regimes such as France and Germany were less vociferous in their imposition of sodomy laws. French legislation regarding sodomy is still present in the penal codes of Cameroon, Benin and Senegal. France itself decriminalised sodomy in the late 1700s, exporting sodomy laws to some of its colonies as a means of social control rather than moral proselytizing. Other penal codes founded on British colonial legislation such as those of Iran, Nigeria and Malaysia have been updated with specific cultural and religious terminology. For example Iran refers to *hadd* penalties,[20] as outlined under Shariah law, as does Nigeria and Malaysia thus exchanging the Christian origins with current state religious law and practice.

At present there are 76 United Nations member states that have legislation criminalising consensual same-sex sexual activity.[21] The criminalisation of such

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[18] Sumit Baudh, 'Human Rights and the Criminalisation of Consensual Same-sex Sexual Acts in the Commonwealth South and Southeast Asia' The South and Southeast Asia Resource Centre on Sexuality (Working Paper, May 2008).

[19] *Human Rights Watch* (n 14) outlines the historical trajectory of sodomy laws in the UK. They note that in the medieval era sodomy, anti-semetic, anti-heretic, anti-turk and fear of the roles of sorcerers and sorceresses were common concern and prejudices. Buggery was punishable by death in the UK until 1861 with the last execution for sodomy taking place in 1836. The Offences Against the Person Act 1861 removed the death penalty in favour of imprisonment ranging from ten years to life. In 1885 there was a further amendment to buggery laws that included sexual acts carried out in private.

[20] *Hadd* crimes are offences for which the Qu'ran lays down absolute punishments with strict evidentiary practices.

[21] Daniel Ottosson, 'State Sponsored homophobia: A world survey of laws prohibiting same sex activity between consenting adults' (ILGA, May 2010). <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf> accessed July

activity can lead to both prosecution and persecution.[22] The penalties imposed on lesbian and gay sexual conduct vary widely from state-to-state, as does the level of enforcement. Punishment can include incarceration for a period ranging from ten days[23] to life,[24] extensive monetary fines,[25] commitment to an institution for psychiatric care,[26] or in extreme cases the death penalty.[27] The death penalty is ordinarily only given after repeated convictions as variously mandated by those states. For example, in the Sudan a third conviction for sodomy can result in either life

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26 2010; Amnesty International also recently commissioned a report on the legality of same sex-sexuality see <http://www.queeramnesty.ch/AI_LoveHateAndTheLaw_DecriminalisingHomosexuality.pdf> accessed 25 August 2011.

[22] Countries where consensual same sex sexual activity is illegal are Afghanistan, Algeria, Angola, Antigua and Barbuda, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Botswana, Brunei, Cameroon, Cook Islands, Costa Rica, Djibouti, Democratic Republic of Congo, Dominica, Egypt, Eritrea, Ethiopia, Gambia, Gaza, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Kenya, Kiribati, Kuwait, Lebanon, Lesotho, Liberia, Libya, Malawi, Malaysia, Maldives, Mauritania, Mauritius, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Nicaragua, Nigeria, Niue, Oman, Pakistan, Palau, Panama, Papa New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sao Tome and Principe, Saudi-Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, Sri Lanka, Sudan, Swaziland, Syria, Tanzania, Togo, Tokelau, Tongo, Trinidad and Tobago, Tunisia, Turkish Republic of Northern Cyprus, Turkmenistan, Tuvalu, Uganda, United Arab Emirates, Uzbekistan, Western Samoa, Yemen, Zambia, Zimbabwe. The UN recently released a statement condemning discrimination based on sexual orientation it was signed by 66 UN member states. Fifty-seven other member states that composed the Organization of the Islamic Conference signed an alternate statement the purpose of which is to block UN attention to claims based on sexual orientation and gender identity. Notably the United States also refused to sign the statement.

[23] Eritrean Penal Code 1960, Section 2: Sexual Deviation/Perversion, Article 600, between 10 days and three years; Algerian legislation: Penal Code 1966 Article 338, imprisonment between two months and two years. If one of the participants is below the age of 18 years, the older participant can receive a three-year jail term.

[24] Bangladesh Penal Code s.377 "Unnatural Offences"; Myanmar Penal Code Section 377 "Unnatural Offences" 'Transportation for life'.

[25] Cameroon Penal Code 1965, s.347. Monetary fines can be between 20, 000 and 200, 000 francs; Guinea Penal Code Art. 325 monetary fines of between 10,000 and 100,000 Guinean Francs. Morocco Penal Code 1962 Article 489 between 120-1000 dirhams. Niger Penal Code 1961/2003 Volume II. Title II:Chapter VIII: Section I: fines between 10,000 and 100, 000 FCFA.

[26] Dominica, Sexual Offences Act, 1998 article 15 'Buggery (for both men and women) is punished with up to ten years imprisonment. The court may also commit the offender to a psychological hospital instead of imprisonment'.

[27] Iranian Penal Code 1979, Art 110-112. Art 110 states 'The *hadd* punishment for homosexuality in the form of intercourse is the death penalty. The method of execution shall be at the discretion of the religious judge'. The legislation that relates specifically to lesbian sexual offences is Articles 127-134. The punishments mirror that of gay male sexual activity. Mauritanian legislation, Penal Code 1983 Part II, Chapter I, Part IV, section 308 differentiates between penalties for men and women. Article 308 states 'Any adult Muslim who commits an unchaste or unnatural act with a person of his or her own sex shall be punished with death by public stoning. In the case of two women the punishment shall be oriented towards the first paragraph of Article 306'. Article 306 outlines punishment of between 3 months and two years imprisonment and a fine. In Nigeria there is again a gender difference regarding punishment under the Zamfara Shari'ah Penal Code Law 2000 Article 131 punishes sodomy by 100 lashes of the cane if unmarried, whereas if the accused is married Article 132 provides for the punishment of stoning to death. Article 134-135 sets out the definition and punishment for lesbianism, women receive up to six months in prison and 50 lashes with a cane.

imprisonment or the death penalty,[28] whereas in Iran, a fourth conviction for homosexual acts can trigger the death penalty, but this is subject to the testimony of 'four righteous men'.[29] The death penalty is actively used in seven states,[30] in others it is still present in legislation but is not used. For example in Afghanistan although the death penalty could theoretically be given as a punishment for homosexual acts, no such sentence has been passed since the end of the ruling Taliban government.[31]

The prevalence of punitive legislation, which leads to prosecution, does not necessarily mean that this will constitute persecution for the purpose of asylum. In some states, Australia for example, in order for prosecution to attain a level constitutive of persecution under the terms of the *Refugee Convention*, the individual must prove that there is a 'serious detriment... because of his or her identity or status as a gay or lesbian, not just because of sexual activity'.[32] Thus it is necessary for the court to invoke a reading of sexual identity rather than just sexual activity. Persecution is predicated on an essentialist understanding of sexuality, considered to be an innate and unchangeable characteristic; correlative to this, the lifestyle of the individual becomes that which the individual is persecuted for. The relationships that the individual enters into, the ability to self-express alongside the response of the society in which the claimant is based, are all component parts of a claim to persecution, rather than just same-sex sexual practices.[33] Hence prohibitions on same-sex sexuality, such as sodomy laws, can fail as constitutive of a sufficient level of persecution.

The terminology used to describe homosexual offences relies on words and phrases such as 'carnal knowledge', 'offences against the order of nature', 'buggery', 'sodomy' and 'lesbianism'. In many of the statutes homosexual offences are placed

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[28] Sudanese Penal Code 1991 (Act number 8 1991) section 148(c)

[29] Articles 117-119 of the Iranian Penal Code outline the requirements for witnesses. Under article 119 the testimony of women, women and men, or a combination of Muslim and non-Muslim men will not constitute sufficient evidence of homosexual acts. If fewer than four men come forward bearing testimony to the witnessing of homosexual acts, those men can be prosecuted for 'malicious persecution' under Article 118 of the Penal Code.

[30] States that still maintain the death penalty are Iran, United Arab Emirates, Mauritania, Yemen, Nigeria, Saudi Arabia and Sudan.

[31] Afghanistan Penal Code 1976 Chapter VIII. Article 427.

[32] Kristen Walker, 'Capitalism, Gay Identity and Human Rights Law' (2000) 9 Australasian Gay and Lesbian Law Journal 58, 66.

[33] See *RG (Colombia) v SSHD* [2006] EWCA Civ. 57.

in the same category as the crimes of pederasty and bestiality.[34] Lesbian sex is not always directly referred to in all of the country legislation and therefore is not strictly an offence. The absence of legislative prohibitions on lesbian sex does not mean that sexual activity between two women would be tolerated. When women are explicitly mentioned in penal legislation the severity of the punishment can vary along gendered lines. For example in Nigeria the penalty for 'lesbianism' is much less severe than that for sodomy between men, but this is not always the case.[35] In Iran the death penalty can be given to women just as it would be to men. The absence of prohibitive legislation that would criminalise lesbian sex does not preclude a claim to persecution. Levels of social disapprobation, which attain the level of persecution, can be sufficient to make a claim for asylum on grounds of sexuality.

The socio-structural factors that affect women's expression of their sexuality differ significantly to that of men. The explicit lack of criminal legislation regarding female same-sex sexuality can have more to do with social attitudes to female sexuality more generally, considered as passive, private and embedded within patriarchal constructs of family and home. Moreover, the confinement of women to the private sphere can be detrimental to their ability to be sexual agents. Men are traditionally able to take advantage of their place in public life and are given the opportunity to have an independent sexual existence, whereas women's traditional confinement to the domestic curtails the opportunity for some women to form intimate same-sex relations.[36]

In states where female same-sex sexual activity is outlawed or socially proscribed levels of information on the safety and situation of lesbians are significantly less than that for gay men – to an extent female sexuality is disappeared. The effect this lack of information has on the adjudication of the presence and possibility of persecution in the sending state is twofold. A lack of prohibitive

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[34] Nepal Country Code 1963/2001 article 16. Burma Penal Code, Act 45/1860 Volume VIII, section 377. Mauritius Criminal Code section 250. Botswana chapter 08/01 Penal code section 164. Grenada Criminal Code Art 431.

[35] In areas of Nigeria regulated by Shariah law women may receive a maximum penalty of 50 lashes and six months imprisonment, whereas men convicted of sodomy, if unmarried, will receive 100 lashes and imprisonment for a period of one year and if married under section 131(b) will be stoned to death. In the Maldives men can receive a punishment of banishment for 9 months to one year and ten to thirty lashes, whereas women are subject to house arrest for a period of nine months to one year and in some instances will be whipped as well.

[36] C Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourse', in C. Mohanty, A. Russo and L. Torres (eds), *Third World Women and The Politics of Feminism* (Indiana University Press, Bloomington 1991).

legislation addressing lesbian sex can be interpreted by the asylum court as meaning no formal legislative prohibition equates to no prosecution and therefore no persecution. Secondly, human rights reports produced about states where male homosexuality is illegal are often used in cases involving lesbians providing an analysis that merely grafts the experiences of lesbians onto gay men. Using gay male sexuality as a template for the functioning of lesbian existence fails to take into account the social and structural differences related to gender.[37]

The linkage between sodomy as an offence, the legacy of colonialism, and the vociferous and ongoing criminalisation of lesbian and gay sexuality has encouraged the production of refugees. In the following section I consider the role of neoliberal economic and political policy and how these have contributed to the creation of asylum seekers.

Neoliberal economics and global refugee management

Neoliberalism, as the dominant form of global economic and political policy has a significant role in its effect on refugees. Neoliberalism is a contributing factor in the generation of refugees, shaping state responses to the management of asylum flows and refugee claims. In this thesis my consideration is of refugees entering 'western' neoliberal states, predominantly in the global north, with the notable exception of Australia. Western, neoliberal states have developed an approach to immigration and asylum legislation that is increasingly restrictive in scope, refining and redefining the type of migrants that can legitimately enter.

Neoliberalism and globalisation are the overarching frameworks within which the asylum system is located. Globalisation is a contested concept. I use it within the scope of asylum law to refer to the cross-cultural process of integrating political, economic and legal systems. In using the term neoliberalism I draw on the definition provided by David Harvey as:

> A theory of political economic practices that proposes human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong

[37] See Maja Horn, 'Queer Caribbean Homecomings The Collaborative Art Exhibit of Nelson Ricart-Guerrero and Christian Vauzelle' (2008) 14(2/3) GLQ: A Journal of Lesbian and Gay Studies 361; Roberto Strongman, 'Syncretic Religion and Dissident Sexualities' in Arnaldo Cruz-Malavé and Martin F. Manalansan IV (eds), *Queer Globalizations: Citizenship and the Afterlife of Colonialism* (New York University Press, New York 2002) 177; Caribbean Review of Gender Studies (2009) 3.

> private property rights, free market and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.[38]

Within this framework, human well-being is assumed to flourish through the activities of the market. Hence the state's role is to shore up the market through the encouragement of strong economic investment by private corporations and individual entrepreneurialism.

The legal response of western states to asylum seekers is somewhat uniform in its increasing restrictiveness around entry measures. States have turned to a system of 'global refugee management', which implicitly incorporates neoliberal political and economic ideology. By global refugee management I refer to uniform or aligned responses that are embedded in collective and international treaty laws and increasingly conservative national legislation that defines refugees' legal status and appropriates similar methods of internal processing of asylum claimants.[39]

The legal framework on which the UK's refugee law is predicated is linked to national and international legal networks, a point to which I return in Chapter five. The relationship between international legislation, national legislation and jurisprudence regarding asylum is significant – states rely on, and refer to, the jurisprudence and legislation that other states create, setting a somewhat common standard for asylum. The corresponding and connected relationship between state-to-state legislation is part of a system of global refugee management. In the next section I turn briefly to these neoliberal management processes that implicitly and explicitly regulate state responses and state receptivity to refugees. I then move onto a discussion of some of the broader economic and political factors that have the effect of creating circumstances, leading to the generation of refugees.

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[38] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, Oxford 2005) 2.

[39] For statistical information on claims to asylum in industrialized countries see UNHCR 'Asylum Levels and Trends in Industrialized Countries – First Half 2008' <http://www.unhcr.org/statistics/STATISTICS/48f742792.pdf> accessed 27 August 2011. For a breakdown of the claims to asylum worldwide see the statistical annex in UNHCR Statistical Yearbook 2007 <http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html> accessed 27 August 2011. Helene Pellerin, 'The cart before the horse? The coordination of migration policies in the Americas and the neoliberal economic project of integration' (1999) 6(4) Review of International Political Economy, 468, 469.

Globalising refugee management

The UK asylum process is predicated on three separate but mutually reinforcing tiers of law. The first of these tiers, which provides the framework for global refugee management, is international refugee law, chief of which is the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. The second tier comprises European Union (EU) legislation and the associated financial and security/policing schemes that fall under this remit. Financial schemes such as the European Refugee Fund (ERF) and the security of EU borders and waters through FRONTEX,[40] have been developed in order to disperse some asylum costs throughout the EU; corresponding legislation regulates the free movement rights of EU and non-EU nationals.[41] Finally there is country specific legislation, which outlines individual state responsibility to asylum seekers. In the UK, immigration and asylum legislation comes in the form of statutes, rules and guidelines.

de Wenden has noted 'no country can have an autonomous immigration policy due to international agreements'.[42] The intertwinement of multiply tiered asylum frameworks produces a system of law that combines the global and the local. The international impact of national legal decisions can be significant in terms of the scope of their influence. Progressive refugee case law, such as the decision rendered in the Canadian case of *Ward* v *Canada*[43] opened up the definition of 'social group' as referred to in the *Refugee Convention* to explicitly include sexual orientation even though the case itself concerned former membership of a paramilitary group. The definition of 'social group' derived from this case was then cited in UK jurisprudence in the case of *Shah and Islam,*[44] which included women under the terms of the *Convention* and, by extension, *in obiter* comments, lesbians and gay men. The problem with precedent forming international case law is that if the precedent being set is regressive then other states are able to follow such interpretations.

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[40] Frontex is an EU funded organization which provides 'added value to the border management systems of member states'. It relies on cooperation from third countries which "share the common goals of the EU" in order to stop illegal entry into the EU. Its remit ranges from policing and security, to training and assisting 3rd country state border agents. See <www.frontex.europa.eu> accessed 27 August 20.

[41] See Council Directive (EC) 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states [2004] L158/ 77.

[42] J. De Wenden in Alexander Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory' (2003) 16(3) Journal of Refugee Studies 274, 281.

[43] *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689.

[44] *R v Immigration Appeal Tribunal ex parte Shah; Islam v Secretary of State* [1999] 2 AC 629.

The current national and international asylum and immigration climate is incredibly restrictive. Over the last ten years there have been numerous changes and additions to legislation, which have altered the basis of claims to asylum and migration. The changes have ranged from new laws to combat the threat of terrorism, to the delineation of family formations so as to include lesbians and gay men and their civil partners.[45] Additionally, the legislation outlines a move towards the abnegation of financial responsibility on the part of the state, shifting responsibility onto partners, spouses or sponsors.[46] The impact of onerous financial burdens on immigrants means that the types of migrants most able to come to the UK are those with funds at their disposal. Investors, entrepreneurs, highly skilled workers, skilled workers are invited to stay in the UK so long as they have the requisite amount of funding available. Family class migrants, asylum seekers and economic migrants on the other hand are disparaged in the popular press as scroungers, taking benefits and stealing jobs.[47] Rarely are neoliberal economics and politics considered as part of the formula in the creation of political and/or economic migrants.

Neoliberal economics is essential to the way in which refugee management is carried out in the UK. Management of refugees has not just been about shifting financial responsibility to intimate partners, it has also shifted responsibility to broader political/economising schemes such as the European Union's, European Refugee Fund (ERF). The ERF disperses both the physical and financial burden of refugees throughout the EU.[48] Schemes such as the ERF, which privatise state

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[45] See <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/> for an up-to-date account of the changes to the Immigration Rules. On this site there are 8 pdf documents which indicate the changes to the immigration rules. The number of amendments varies in each document, some contain just a few pages of amendments others over 40 pages.

[46] See Immigration Rules HC 395; Asylum and Immigration (Treatment of Claimants etc) Act 2004, sections 19-25; section 3(2) of the Immigration Act 1971.

[47] Tom Harper, 'Jobs for illegals at Home Office as dozens of NHS and public bodies ignore immigration law' *Daily Mail* (London 7 January 2010) <http://www.dailymail.co.uk/news/article-1240204/Jobs-illegals-Home-Office-dozens-NHS-public-bodies-break-immigration-laws.html>; Padraic Flanagan, 'Police probe migration racket behind 360 sham marriages' *Daily Express* (London 30 July 2010) http://www.express.co.uk/posts/view/190026/Police-probe-migration-racket-behind-360-sham-marriages; Colin Fernandez, 'Somali Asylum seeker laughing over £2000 a week Kensington home paid for by benefits' *Daily Mail* (London 14 July 2010) <http://www.dailymail.co.uk/news/article-1294260/Council-kick-asylum-seeker-2m-house-say-neighbours.html>; A Little, 'Foreigners get 77% of new jobs in Britain as too many of us live on benefits' *The Daily Express* (London 12 August 2010) <http://www.dailyexpress.co.uk/posts/view/192697> all accessed 12 August 2010.

[48] 'The preparation of a common policy on asylum is a constituent part of the European Union's objective of gradually creating an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union. The European Refugee Fund fosters solidarity between Member States and promotes balance in the efforts they make in receiving asylum

responsibility, are an explicit part of the neoliberal response to the 'care' of refugees. The ERF funds charitable and non-governmental organisations to carry out many of the social welfare tasks that were originally part of the states responsibility. Although in many ways locally based organisations are often better equipped than government to deal with and understand the needs of refugees in their community, problems arise because of organisational dependence on government funding; funding which is increasingly diminishing, meaning finances are stretched further than is practically permissible. Additionally, organisations that are dependent on this funding may have to acquiesce to party politics when campaigning for refugee rights. One former refugee rights lawyer/campaigner spoke of the inherent problems of being dependent upon government monies but rejecting the government's response to refugees regarding voluntary return. The voluntary return principle was antithetical to the mandate of the organisation, but the organisation was heavily encouraged to advertise this as an option when giving advice to clients.[49]

Often the reason refugees are forced to return to their home state is due to financial subjection. Financial survival in the UK is impractical due to restrictions on working opportunities, lack of affordable housing, the indeterminate nature of detention and the asylum process itself, which fosters uncertain futures.[50] This broader economised response to the management of refugees is symptomatic of a neoliberal approach to the political and legal responsibility states owe to those seeking asylum and a disappearance of the receiving states role in perpetuating the production of refugees in the first place.

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seekers, refugees and displaced persons. The European Refugee Fund also supports Member States action to promote the social and economic integration of refugees. It provides practical support to help asylum seekers, refugees and displaced persons take an informed decision to leave the territory of the Member States and return home, should they so wish. Also, at the Commissions initiative, it finances pilot initiatives and exchanges between Member States.' The introduction outlining the principles and purpose of the ERF is neither inflammatory nor offensive, but gently places some of the buzz-words of asylum policy at the heart of its rhetoric. The goals of the EU focus on the creation of an area of 'freedom, security and justice' for those who seek legitimate protection. There is an implicit understanding in this sentence that freedom, security and justice is a relationship to be established between refugee, the European demos and the territory of the EU.
<http://ec.europa.eu/justice_home/funding/2004_2007/refugee/wai/funding_refugee_en.htm> accessed 27 August 2011.

[49] T Johnson, Interview with RH, Former refugee advocate (Canterbury 5 November 2006).

[50] 'Asylum Seekers left destitute' <www.politics.co.uk> accessed 31 January 2009; also see Owen Bocott and Natalie Hanman, 'Asylum seeker takes his own life after losing legal aid' *The Guardian* (London 1 August 2010) <http://www.guardian.co.uk/world/2010/aug/01/asylum-seeker-osman-rasul-death-legal-aid> accessed 11 August 2010.

Neoliberal economics and the creation of refugees

Recent studies on globalisation and the impact of wealth distribution have highlighted the growing disparity between the rich and poor in both old and new industrialised nations. The economic disparity between the wealthy and poor has increased both between and within states.[51] States unable to sustain economic growth were located predominantly in the global south. The statistics indicate that discrepancy in wealth distribution vastly increases child mortality rates, severely decreases life expectancy and increases lack of educational opportunities – 'half of the world's population live on 5.6% of world income'.[52]

Castle and Davidson note that disparate wealth distribution can lead to political and economic unrest. Because neoliberalism is an economic system that can afford to include and exclude individuals by relying on abstract economic rationalism, the effects of such reliance can propagate social unrest. The exclusion of individuals from particular spheres leads people to '[seek] meaning through particularistic identities based on ethnicity, religion, regionalism or nationalism'.[53] Making sense of identity and social worth in the midst of scarce resources can lead to behaviours which foster social and political unrest, and can lead to factional conflict, persecution and thus to the creation of refugees.[54]

Supplementing some of the problematic effects of neoliberal economic policy are the political contingencies that arise from forming economic and political relations between those located in the global north and the global south. Western states' financial investment has been an integral part in both shoring up, and undermining, dictatorial regimes in order to promote and support its own brand of democracy and its own brand of economic policy. For example the US's involvement in Iraq has been

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[51] US Census Bureau, 'Poverty' <http://www.census.gov/hhes/www/poverty/poverty.html> accessed 11 August 2010 for an indication of the growing poverty gap in the USA see Martin Ravallion, Shaohua Chen, Prem Sangraula, 'New Evidence on the Urbanization of Global Poverty' (2007) Population and Development Review 33(4) 667.

[52] Stephen Castles and Alistair Davidson, *Citizenship and Migration Globalization and the Politics of Belonging* (Palgrave, Hampshire 2000) 5.

[53] *Castles and Davidson* (n 52) 6. Alternatively Wendy Brown has classified neoliberalism as 'a radically free market: maximized competition and free trade achieved through economic deregulation, elimination of tariffs, and a range of monetary and social policies favourable to business and indifferent toward poverty, social deracination, cultural decimation, long-term resource depletion, and environmental destruction', *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press, Princeton 2005) 38.

[54] See UN News Service, *Economic, social, political trends endanger world's uprooted - UN refugee chief*, 6 October 2008, available at: <http://www.unhcr.org/refworld/docid/48ec79dac.html> accessed 11 August 2011 and Sara E. Davies 'Redundant or essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) International Journal of Refugee Law 703.

subject to contestation. Not only on the questionable basis of the legitimacy of invasion, or the problematic and sometimes hypocritical invoking of democracy, human rights etc., but questions have been raised over the seemingly preferential awarding of billion dollar contracts to US firms, rather than other 'coalition' state businesses or Iraqi investors.[55] The long history of US involvement in external political regimes, be it supporting the state or supporting anti-state forces, (seen for example in the US support of the Contra's in Nicaragua or the Afghan Mujehadin's conflict with the Soviet Union) can have devastating effects on the internal functioning of the state. The consequent, and often unforeseen effects of external investment in state supportive or state-subversion groups are the production of refugees escaping from the economic and political turmoil brought about by such regimes.[56]

The 'forced' migration of people across borders because of the social effects of neoliberal economic and political policy has the effect of generating economic migrants. Such migrants are viewed both legally and in the popular press as illegitimate or bogus asylum seekers. Economic migrants that enter the asylum system will be rejected on the basis that poverty is not persecutory and not a ground on which refugee status can be granted. Rarely conjoined in the public imagination is the relationship between the UK's status as a wealthy, globalised power exploiting 'developing' countries and the direct contribution this has to the economic failure of those states.[57]

British asylum judgments often indicate the financial implications of accepting certain types of refugees. Refugees that are deemed to place a heavy financial burden on health care are classified as undesirable immigrants.[58] Western governments' 're-branding' of the state through the endorsement of neoliberalism, and its concurrent move away from state as social provider, has created a populace that responds to, and

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[55] BBC News 'US firms win more Iraq contracts' (11 March 2004) <http://news.bbc.co.uk/1/hi/business/3500324.stm> accessed 13 July 2011.

[56] For more on the role of the US and UK involvement in supporting and undermining particular political regimes see Daryl Glaser, 'Does hypocrisy matter? The case of US foreign policy' (2006) 32 Review of International Studies 251, 254-261; Michael J. Hogan (ed), *The Ambiguous Legacy: US Foreign Relations in the 'American Century'* (Cambridge University Press, Cambridge 1999); David F. Schmitz, *Thank God They're on Our Side: The United States and Right Wing Dictatorships, 1921-1965* (University of North Carolina Press, North Carolina 1999).

[57] Misra Joya, Jonathan Woodring, Sabine Herz, 'The Globalization of Care Work: Neoliberal Economic Restructuring and Migration Policy' (2006) 3(3) Globalizations 317.

[58] See *R.G. (Colombia)* v *Secretary of State for the Home Department* [2006] E.W.C.A. Civ 5; *N* v *S.S.H.D.* [2005] U.K.H.L. 3. Toni A.M. Johnson, 'Flamers, Flaunting and Permissible Persecution' (2007) 15 Feminist Legal Studies 99.

is defined by, market terminology, and by processes of consumption and production. Refugees fail the neoliberal test of producing and their consumption of the minimum of social resources provides the press with fodder for their demonisation.[59]

The adaptation of market values to all spheres of existence undermines the idea of the state as beneficent protector; the state becomes that which can assist with minimising costs and maximising production. The implications of the cost reduction mandate results in the privatisation of the asylum and immigration regime, thus reducing costs and displacing the problem of refugees onto the private sector. Wendy Brown has written that:

> The privatization of certain state functions, does not amount to a dismantling of government but rather constitutes a technique of governing; indeed, it is the signature technique of neoliberal governance, in which rational economic action suffused throughout society replaces express state rule or provision.[60]

Immigration detention in the UK is a growth area with money to be made through the incarceration model established by the prison industrial complex.[61] The refusal of responsibility on the part of the state reframes the criteria for successful refugee management as the profitability of refugee management.

Economic success requires that detention centres remain perpetually filled to capacity, for each asylum seeker the corporate owners are paid a fee. In her report on the privatisation of detention centres Christine Bacon asks whether these companies are simply responding to 'market need', or whether they have had a much more direct involvement in creating demand.[62] Bacon's emphasis, drawing on the literature of the prison industrial complex, implicates private operators as having an originating role. The confluence of private organisations, government money and public mistrust of

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[59] For more on the way in which state responses to migration have shifted see Matthew J. Gibney, 'Liberal Democratic States and Responsibilities to Refugees' (1999) 93(1) The American Political Science Review 169; Charles B. Keeley, 'The International Refuge Regime(s): The End of the Cold War Matters' (2001) 35(1) International Migration Review 303.

[60] *Brown* (n 53) 44; also see Julia Sudbury, 'Transatlantic Visions: Resisting the Globalization of Mass Incarceration' (2000) 27(3) Social Justice 133 for an analysis of the evolution of prison privatisation.

[61] See E. Schlosser, 'The Prison Industrial Complex' (1998) 282(6) The Atlantic Monthly 51; Angela Y. Davis, 'Masked Racism: Reflections on the Prison Industrial Complex' Colorlines (10 September 1998) <http://www.colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html> accessed 12 August 2010; Julia Sudbury, *Global Lockdown: race, gender and the prison industrial complex* (Routledge London, 2005).

[62] Christine Bacon, The Evolution of Immigration Detention in the UK: The involvement of private prison companies' RSC Working Paper no.27 (University of Oxford, Dept of International Development) 15.

asylum seekers leads to a situation where claimants can be detained with little action taken against lengthy detention, and little public outcry over the catalogue of abuse experienced. The conditions in which asylum seekers are detained are subject to continued cost-cutting so as to maximise profits. Bacon notes that even the most basic provisions have been subject to budgetary slashes. For example, building maintenance, available services, food, clothing, medication and lower salaries for detention centre staff than other comparable sector workers. A recent report released by Birnberg Pierce and Partners, Medical Justice and the National Coalition of Anti-deportation Campaigns outlined the prevalence of physical, verbal and mental abuse from detention staff at all levels.[63] The abuse documented in the report, included use of racist and sexist language and indicated that beatings and physical intimidation were common-place.[64] The government's laxity in responding to institutional abuse and systemic racism can partly be blamed on a lack of public interest as to the welfare of asylum seekers, and a willingness to maintain a symbolic separation, whereby asylum seekers are held at private institutions in sites that constitute an inside/outside of the borders of the nation state.

The problems of the asylum system may seem daunting, pervasive and systemic. The confluence of neoliberal economics, social and legal defensiveness, and claims of expense and racial disharmony make the ability to challenge the asylum system seem impossible. Yet, as this thesis will show, refugees manage to challenge the oppressive structures of the asylum system, and resist the overwhelming dominance of the law that would render them outside of the care of the state. I explore that resistance through the imaginary domain, micro-resistance and critical narrative.

Intersecting themes

In this part of the introduction I outline the theoretical premise of the thesis. I indicate firstly how Drucilla Cornell's imaginary domain assists in reconceiving the identity of

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[63] Birnberg Pierce and Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns, 'Outsourcing Abuse: the use and misuse of state-sanctioned force during the detention and removal of asylum seekers' (Upstream Ltd, July 2008).

[64] Robert Verkaik, 'Investigation into claims of abuse on asylum seekers' (London September 30, 2008) *The Independent* <http://www.independent.co.uk/news/uk/home-news/investigation-into-claims-of-abuse-on-asylumseekers-946106.html> accessed 27 August 2011; Robert Verkaik, 'British guards 'assault and racially abuse' people during deportations' (5 October 2007) *The Independent* 1-3.

asylum seekers before the court. I draw on Cornell's imaginary domain partly because it is premised on the same liberal, legal tenets as the current legal system; and because it transgresses, challenges and develops those very same tenets via feminist, critical race and postmodern analyses of law. Secondly, I consider how micro-resistance to dominant norms becomes an activity that challenges the socio-structural limitations of the court, and can indicate an enhanced level of agency. Finally I explore how particular forms of critical narrative disrupt the interpretation of individuals before the court, and can displace normative readings of identity. The intertwinement of the imaginary domain, micro-resistance and critical-narrative within this thesis traverses the analytical sites of feminism, postmodernism, socio-legal studies and Critical Race Theory. These sites engage with the production of identity, the structural limitations of law, and possibilities for resistance - providing methods and modes of operation through which individuals negotiate their positions within and without normative paradigms of gender, sexuality, race and legal status in unique ways via claims to freedom rather than equality.

In introducing Cornell's work I touch on her use of freedom rather than equality, and how her conceptualisation of identity as untrammelled and in progress assists claims to refugee status. I discuss the imaginary domain at much greater length in Chapter two.

The imaginary domain

The 'imaginary domain' is primarily a psychological site for the production of self, a site that encourages freedom from normative projections of gender and sexuality. Cornell argues that individuals must have the space to reimagine their identity. For Cornell, the space of the imaginary domain in which we are able to renew the imagination 'and come to terms with who we are and who we wish to be as sexuate beings'[65] is a psychic space. In order to develop the self as reflected in the imaginary domain, the imaginary domain requires legal acknowledgment, respect and protection. There is no specific version of legal protection that Cornell proposes, but she suggests broad conditions that may enable the living out of the identity developed in the imaginary domain. Cornell posits that individuals must be respected as the source of their own configurations of identity, and that the law should protect those familial,

[65] *Cornell* (1995) (n 1) 8.

sexual, intimate versions so produced. Such protection would occur through the prohibition of state/social discriminatory practices or provisions which reify and denote as supreme particular versions of intimate familial and sexual formations, such as the heterosexual nuclear family; furthermore, that within specified harm limitations, no one person's version of the imaginary domain should detrimentally impact on another's.

The production of identity within the imaginary domain is not divested from the processes of socialisation which gives form to our sexed and gendered lives; however the reimagining of identity is an opportunity to create a version of self that can challenge normative paradigms of gender and sexuality.[66] Cornell defines the imaginary domain as:

> That psychic and moral space in which we, as sexed creatures who care deeply about matters of the heart, are allowed to evaluate and represent who we are. That love and sex are personal should be obvious. But what is less obvious is that most societies impose upon their citizens a conception of good, or normal, sexuality as a way of life, thus refusing them the freedom to personalise who they are sexually.[67]

The development of the sexed and sexually oriented self that forms within the imaginary domain is what Cornell refers to as the 'sexuate being'. The sexuate being 'represent[s] the sexed body of our human being when engaged within a framework by which we orient ourselves'.[68] Cornell's sexuate being is configured as aspiration and 'part of a project of becoming', of becoming a legally recognised *person*, with *personhood* described as going beyond the paradigmatic white, heterosexual male characterised by law.

For Cornell the freedom to orient ourselves as individuals, to create our own visions and versions of 'the good life' is at the heart of the imaginary domain. Subsequently the freedom to become a person is dependent on the minimum conditions of individuation; namely the conditions necessary in order to 'transform ourselves into the individuated beings we think of as persons'.[69] The conditions of

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[66] Cornell also notes what she refers to as 'internal tyrants' that inhibit the formulation of a free imaginary domain. By this she refers to the way in which norms of gender, sexuality and other indices interact in order to delimit and regulate the ways in which persons are able to construct sex and sexuality. See Drucilla Cornell, *Between Women and Generations Legacies of Dignity* (Palgrave, New York 2002) 30.

[67] *Cornell* (1998) (n 1) x.

[68] *Cornell* (1998) (n 1) 7.

[69] Karin Van Marle, 'In support of a revival of utopian thinking, the imaginary domain and ethical interpretation' (2002) 3 Journal of South African Law 501, 506.

individuation are bodily integrity; access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others; and protection of the imaginary domain.[70] For Cornell the fulfilment of these conditions would give rise to 'an equitable chance for the transformation of self into individuated beings that can participate in public and political life on an equal basis'.[71]

Cornell's use of freedom rather than equality is part of a critique of formal equality provisions, which she claims are based on aspiration to particular positions of privilege. Cornell argues that these positions of privilege are normative and hierarchical constructs of identity that stifle the imaginary possibility of those who occupy them and those that wish to ascend to them.[72] The imaginary domain moves beyond a comparative approach to equality. The imaginary domain challenges the emphasis placed on the compartmentalisation of formal legal identity categories as flawed and ineffectual, favouring more intersectional conceptualisations of self. It gives priority to the concept of freedom and it does this through a feminist/deconstructionist paradigm: 'the freedom that a person must have to become a person demands the space for the "renewal of imagination and the concomitant re-imagining of who one is and who one seeks to become"'.[73]

The importance attached to freedom, rather than equality, and rejection of the compartmentalisation of identity assists claims to refugee status by allowing for non-essentialised renderings of identity. The imaginary domain would have the effect of foregrounding the refugee as a person who can be evaluated as a full member of society bearing legal personality. If the imaginary domain were a recognised and functioning component of the legal system, it would bear the responsibility of having to protect a refugee's right to bodily integrity, free from physical and mental persecution. The imaginary domain would allow for an iteration of self that expresses difference and heterogeneity, rather than having to work within current models of identity production in court. Claims to personhood would centre the individual and protect their understanding of, and ability to live out their 'sexuate being'. Furthermore, this centring provides the basis for a system of adjudication that would provide the court with a more nuanced vision of the asylum claimant.

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[70] *Cornell* (1995) (n 1) 5.
[71] Karin Van Marle, "No last Word" Reflections on the imaginary domain, dignity and intrinsic worth' (2002) 13 Stellenbosch Law Review 299, 301.
[72] *Cornell* (1998) (n 1) 6.
[73] *Van Marle* (n 71) 301.

The imaginary domain is invested in liberal individualism. Its approach to law and the legal system is reliant on the one hand a new legal language, and on the other, the partial reinterpretation and partial maintenance of law's structural 'protective' measures. Cornell's concept of the imaginary domain is a useful heuristic tool to explore the way in which identity is currently constructed in legal venues. It considers the limitations of equality measures and provides a radical alternative that forces a rethinking of responsibility in constructing identity. The imaginary domain used in conjunction with current legal constructs, such as the *Refugee Convention*, highlights the limitations of globalised legal norms and provides an analytic tool through which to deconstruct and dramatically re-envision this system of law. But ironically, the imaginary domain's weddedness to law is its Achilles heel. Its reliance on a legal system which perpetuates hierarchy, rules, boundedness to categorisation, legal process and ultimately judgment are serious and detrimental limits to the efficacy and deconstructive potential of it as a tool for progressive social change. I develop this point in Chapter two and expand on a broader analysis of the law's need for categorisation in the latter half of the thesis. Nevertheless, despite its limitations, I rely on the imaginary domain as a step towards radical change within the legal system, particularly when used in conjunction with practices of resistance, critical narrative and a version of ethics predicated on the work of Iris Marion Young and Emmanuel Levinas. In the following section I indicate how critical narrative provides substance to the 'utopia' of the imaginary domain.

Critical narrative

Narrative is a key component in claims to asylum. All refugee claims rely on testimonials that create a "story" of relevant events and histories, providing the context for an application. The narrative produced at the initial interview with the UK Border Agency (BA) is the main piece of evidence relied on in the adjudication of claims by the BA or later by an immigration judge in an appeal court. Narrative has a central role to play in the making of identity and experience in court. In order for the claim and claimant to be cognisable to the judge, the story must possess some basic structural components (such as chronological coherence), provision of details (such as the type of persecution being attested to) and detailed recounting of why, when, where and how often this persecution occurred. When narratives fail to incorporate these

formal components the "story" can lose its integrity, be perceived as haphazard and therefore potentially false, rendering the claimant as untrustworthy and his/her claim for asylum as bogus.

Narrative is the medium through which asylum seekers create their experience before the court. As a medium, it has the ability to transgress the form it takes and the function it serves. Under interview conditions and in appeal hearings, the narrative produced responds to the pressurised environment of the court, to unexpected questions, to challenges to integrity and dignity. The responses can contain utterances and declarations that the court may not expect, and which asylum seekers may not have expected to impart. These moments of narrative transgression can have the effect of momentarily disrupting the court space and bring the dynamics into disarray. I discuss the impact and ramifications of this disruption in Chapter six, asking whether they can be classified as deployments of micro-resistance that challenge the *formalism* and *formulism* of the court.

I consider the resistant nature of narratives by analysing various sites of narrative production. The sites that I consider in Chapters three and four are bound in different ways by the formalities of their context. In Chapter three I turn to the production of narratives by critical race, lesbian and gay, and feminist scholars – all of who work within the guidelines of producing particular forms of academic literature. I look to see how narrative forms of academic literature resist or transgress expectation. The narratives produced in academia draw on personal experience, on techniques of storytelling, on fantasy, in order to highlight facets of identity, of legacies and on going battles with racism, sexism, homophobia and other forms of oppression. I ask whether the method of production of these resistant narratives in an academic environment informs and corresponds with the narratives produced by refugees that transgress the court's preferred mode of testimonial production. The narratives that refugees provide can fall outside of the court's expectation, because of factors including: over and under expression, accounts of physical and emotional trauma that the court may feel are unbelievable, and therefore which the court peripheralise as evidence. I discuss how the court responds to narratives that fall outside of expectation, outside of judicial understanding and whether these moments can be negotiated.

I posit narrative as the cypher, which decodes and makes legible the images produced in the imaginary domain. Narrative is the mechanism that interprets or

positions these images and thoughts in a way that may make them intelligible, but may also add complexity to the story, and perceptions of that story. Some of the proceedings that come before the UK asylum courts indicate a lack of understanding on the part of the judiciary as to the importance of sexual orientation to identity. In Chapter six, drawing on interview materials, using the concept of the imaginary domain and narrative theory, I consider how refugee claimants have engaged with the law. I focus particularly on their discussion of their sexuality, and how they have had to shape their responses in order to make themselves intelligible as lesbians and gay men.

Through interviews and court observations I explain in Chapter six, how the legal necessity to provide particular versions of sexuality acts as a direct infringement on the way persons present their conception of self, thus constricting the way individuals actualise their optimum sexual, affective and familial existence. The production of the imaginary domain and its utterance through narrative could provide a linguistic site to resist the imposition of dominant norms, and could challenge hierarchies of power, which can have the effect of forcing normative accounts of gender and sexuality. The ability for refugees to challenge the power dynamics of the court are, however, particularly constrained. Overt acts of resistance to the formalism and hierarchy of the court would potentially jeopardise their case. The ways in which power and the rejection of that power is manifested by refugees is through subtle moments of micro-resistance.

Micro-resistance

Micro-resistance manifests in court through multiple means including, but not limited to, the production of oral testimony, through body language, and through silence. I highlight the way in which oral and non-oral forms of communication can be indicative of modalities of resistance within the court space, imbuing the refugee with an active and embodied agency during the production of their testimony in court. Drawing predominantly on Michel de Certeau's *The Practice of Everyday Life*[74] I consider de Certeau's formulation of 'micro-resistance', and his concept of 'la perruque' which translates as 'the wig' – la perruque embodies connotations of

[74] *De Certeau* (n 2). I also draw on de Certeau's essay Michel De Certeau, Frederic Jameson and Carl Lovitt, 'On The Oppositional Practices of everyday Life' (1980) 3 Social Text, 3; Jeremy Ahearne, *Michel De Certeau: Interpretation and Its Other* (Polity Press, Cambridge 1995).

disguise and deception.[75] 'Micro-resistance' and 'la perruque' denote the ability to resist and transgress forms of systemic power in which individuals may be enmeshed and which may feel oppressive. de Certeau provides a mode for moving within and traversing this system of powers. He suggests resistance taking the form of using an employer's tools to make an object for your home or a secretary writing love letters whilst at work.[76] His, and my emphasis, is on the way in which people transgress the time and space of a regulated and quantifiable moment, place or space.

Within la perruque nothing is stolen, scraps are utilised, equipment is borrowed, and time is given an altered meaning.[77] 'La perruque', as a form of micro-resistance, is not the definitive catalyst for social change, nor a symbol of radical revolution, but micro-resistance possesses a certain capital, and that capital is vested in the everyday, in the mundane, and is an undermining of the machinations of everyday life. La perruque also has wider implications; it could include activities such as skateboarders using the front stoop of a corporate building to do tricks on in a bid for reclamation of space, and as a rejection of corporate imposition on that space. Another example could be the sport of 'free-running' (or 'Parkour'),[78] which has evolved from youths reclaiming their urban spaces, re-appropriating these spaces as a conscious or unconscious action against government and private industry policies which creates housing but doesn't provide parks and open spaces, or facilities to play in or engage with.

The tactics that the asylum seeker deploys are more likely to create hiccups in the smooth running of the legal process; the small disruptive practices impart a sense of agency. de Certeau defines tactics as:

> a calculus which cannot count on a "proper" localization...a tactic insinuates itself into the other's place, fragmentarily, without taking it over, without being able to keep it at a distance ... it is always on the

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[75] *De Certeau* (n 2).
[76] *De Certeau* (n 2) 25.
[77] *Ahearne* (n 74) 157-164.
[78] Parkour has gained in popularity since the mid 1990's and was recently taken up by Madonna in the 'Jump' video which was part of her 'Confessions on a Dance Floor' album and in the film 'Casino Royale' (Dir. Martin Campbell MGM Studios, 2006). Sebastien Foucan, who plays the part of Mollaka in the film, appears in the opening scenes of Casino Royale and is credited (although this is disputed) with inventing Parkour. For an interesting analysis of parkour in Gaza see George Azar and Mariam Shahim 'Free Running Gaza' (2011) Maysara Films Production for Al Jazeera <http://english.aljazeera.net/programmes/artscape/2011/06/201161912385797386 6.html> accessed 2 August 2011.

> watch for opportunities that must be seized on the wing. It must manipulate events in order to turn them into opportunities.[79]

The production of certain types of testimony – some oral, some visual, some silent are representative of a certain modality of tactic. Tactics have to take advantage of the opportunities which arrive, the opportunities may have never even been envisaged and thus the unconscious way in which they are appropriated because of context cannot be factored into the equation of what would be an appropriate response within a set of events. The tactic as a 'calculus which cannot count on a proper localization'[80] is the variable within the sum, it is the component that can only be relied on in its unreliance, it is the space of opportunism.

The structure of the court is formal; the walls bear the insignia of the crown. There is a raised platform behind which the immigration judge sits and beneath which the legal counsellors are positioned. The refugee is located, both legally and physically, at the centre of proceedings on their own table in the middle of court. Although an asylum hearing is not a criminal trial, the adversarial atmosphere established creates much tension and it is within the tension that I look for moments of micro-resistance. I view actions that are unexpected, usually momentary, often fleeting and thus tactical in their deployment. Manifestations of micro-resistance challenge the stereotype of the supplicant and deferential refugee. Through resistant moments the refugee begins to embody an enhanced sense of agency – their agency becomes performative, active, dynamic. The asylum seeker becomes more than just the narrative which they provided for the home office, they are more than the statement that the judge is given in his or her case pack. I look to instances such as becoming heated when adjudicator's and solicitor's consistently fail to understand the points that they have made in their statement; when questions are asked and answered time and again provoking an irritated or challenging response, looks of incredulity and interruptions by the claimant, clarification of experiences, throat clearing, arm and hand gestures, modes of dress (scruffiness), chair scraping, thumbing the table with a sharpened nail etc. These activities, and the qualifying of statements in the context of court, re-humanise the person before the judge and challenge the 'refugee as victim' narrative.

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[79] *De Certeau* (n 2) xix.
[80] *De Certeau* (n 2) xix.

De Certeau's response to latent power dynamics is through an articulation of resistance - a low level resistance that shifts the boundaries of power back and forth, oscillative in motion, indicating a blurred delineation around ideas of oppression, subordination, resistance and survival. It is these manifestations of power within society that necessitate the formulation of a space within which an individual can react, safely speak and iterate a sense of identity. Through a consideration of de Certeau's resistant practices and Cornell's space of the imaginary domain, I locate the multiple manifestations of power, and resistance to that power. The delineated contours of the imaginary domain, fused with an understanding of the idea of embodied resistance, provide room for the formation of a reimagined and emboldened self. Through the collation of observational data, interviews with refugees, solicitors, NGO groups, and qualitative literature reviews I discuss the points at which resistance comes to the fore, where non-normative conceptualisations of identity are projected and how this comes into being through varied mediums of communication, through speech, silence, body-language, dress etc. In the following section I discuss my method of data collection and the ethical concerns raised in the interview and observation process.

Research methodology

The questions that formed the basis of the empirical research, which is located for the most part in chapter six, were threefold – First, are asylum seekers able to resist the *formalism* and *formulism* of the court space? Second, what are the possibilities for transgressing the power differentials between the asylum seeker and immigration judge, and third, which acts, words or deeds on the part of the asylum seeker and the immigration judge indicate such a disintegration of hierarchies? These questions were directed at the performance of the actors in court, and were especially concerned with the small and insignificant occurrences that may have been expressions of defiance. The deployment of tactics by refugees was at the forefront of my thoughts. I focused on whether the narrative and testimony that the refugee provided contained its own powerful message, affecting the individuals in court in a way that displaces an understanding of the oppression/domination dichotomy. I considered literature discussing the medical symptoms of immigration judges and refugees as being prone to post-traumatic stress disorder. I explored whether this indicated an unexpected

vulnerability on the part of the judge, thus indicating the tentacular and non-localised nature of the impact of narratives and notions of power.[81] The empirical research indicated three main responses to the asylum system on the part of refugees, namely, the importance of narrating experience, feelings of being 'other' and of isolation, and finally enactments of resistance.

Participant recruitment

My initial exercises in recruiting participants for interview were via the Internet. I emailed lesbian and gay themed newspapers and magazines such as Diva Magazine, The Gay Times, The Pink Paper, Qx International Magazine, Wideopen Magazine asking to place a call in the letters section of each, requesting participants for interview. None of the magazines responded to the request and none published the letter. My next method of participant recruitment involved the Internet again. The UK Lesbian and Gay Immigration Group (UKLGIG) website listed solicitors firms that had some expertise in lesbian and gay asylum cases and indicated whether a lesbian or gay solicitor would be available for the case.[82] I emailed a number of firms on this site as well as those who ran UKLGIG. From this contact I managed to gather together a core of professionals who work with asylum seekers and were willing to be interviewed. In addition published refugee case law listed the name of the barrister under instruction. I 'googled' the names of barristers that had represented lesbian and gay asylum seekers and invariably the name of the chambers to which the barrister belonged would come up as a hit. I interviewed ten barristers and solicitors in total, with repeated interactions with three of the interviewees. UKLGIG, lead to interviews with other non-governmental organisations such as The Safra Project,[83] Amnesty International and an Australian Refugee Organisation based in Melbourne. As well as interviewing solicitors and barristers I also participated in courtroom observations. I attended the First Tier Tribunal Immigration and Asylum Chamber (FTTIAC) at Taylor House in Islington, London over two consecutive

[81] For more on this see Cécile Rousseau et al., 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 Journal of Refugee Studies 43; for an analysis of the impact on therapists of repeated exposure to traumatic images of holocaust survivors see Lisa Herman, 'Researching The Images of Evil Events: An Arts Based Methodology in Liminal Space' (2005) 11(3) 468.
[82] UK Lesbian and Gay Immigration Group <www.UKLGIG.org.uk> accessed August 10, 2010.
[83] The Safra Project <www.safraproject.org.uk> is a charitable organisation that, amongst other things, assists Muslim women claiming asylum on the grounds of sexual orientation

spring/summers from 2006-2007. In total I spent approximately eight weeks at Taylor House. I chose Taylor House as it is one of the larger tribunal centres and was conveniently located. There are numerous other hearing centres around the UK, there are three in London and a further 16 scattered throughout the country with only one in Scotland (Glasgow), one in Wales (Casnewydd) and one in Northern Ireland (Belfast).

My purpose in attending the hearings at Taylor House was to gain insight into what can happen at an asylum hearing and to understand something of the organisation and functioning of the court. The information that I gathered cannot be used to make absolute claims about this particular hearing centre. The information must be considered within its context and as limited in its ability to provide an over-arching declaration of the workings of the tribunal centre.[84] Furthermore it may be of importance to note a further limitation of the empirical research is that it is constrained in terms of recognising structural and cultural shifts in the administration of asylum cases at Taylor House over a longer period of time. I mentioned previously that observations were carried out over a period of about 8 weeks over two consecutive spring/summers, consequently, there may have been changes to the functioning of the court since this period.

It may be prudent to ask, what is the purpose of this data if it purports to be fragmented, incoherent and is prone to contestation and cannot be labelled as 'the' court experience? My response to this is that the data can be viewed as observations that took place at a specific time and place. The observations do not represent an infallible truth; they are my personal construal and response to a specific situation. Empirical research and its use in a thesis requires that certain requisites of veracity are met; such requisites include accurate and appropriate referencing, ensuring that an ethical approach has been taken in the collation and use of material (in this particular thesis via the fulfilment of Kent Law School's ethical review process), and that written work bears the hallmarks of academic integrity.[85] The subjectivity of this work comes through the actual interpretation of the data and its subsequent writing. This research can be considered contextually as an addition and expansion on an already existing body of literature. The information that I provide is not the essential 'truth'

[84] For a much more in-depth study of the Asylum and Immigration tribunals in the UK see Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge Cavendish, Oxford 2007).
[85] Kent Law School - Ethical Review <http://www.kent.ac.uk/law/research/resources/ethical_review.html> accessed 14 July 2011.

of the asylum hearing but is a response to my own experience within the court as a researcher and therefore must be considered within that framework.

The ethical responsibility I felt I had as a researcher changed over a period of time. Upon initially submitting the ethical review my intent was to interview approximately twenty refugees and a handful of barristers and solicitors. The focus of the research was to consider the way refugees responded to their court hearings rather than the way in which they responded to their barrister or the different approaches a legal representative could take. Under the 'ethical review checklist' I was asked to take into account any questions or circumstances which could pose a risk to the participants. This was to include forms of harm – physical, psychological and emotional – and I was asked to pay particular attention to 'the potential to cause distress and embarrassment'.

Some of the issues that I thought could be problematic for refugees were recounting stories that were painful or traumatic; stories could have included narratives of persecution and the experience of the asylum process including incarceration in detention centres. Additionally, some asylum seekers may have wanted to get involved in the interview process believing that I would be able to assist them in their case. I also considered the problem that participants may have felt that there was a power imbalance between them and me. The interviewees may have been nervous, intimidated, or hesitant. Furthermore refugees had no reason to trust me; I was just a researcher asking them to tell me their story.

At the time of writing the ethical review and answering the questions on the checklist I felt that I was being over cautious with my concerns. I had thought that the self selecting method I decided to use would adequately deal with participants inappropriate to interview because of excessive vulnerability and that only those capable and willing to contact me would do so. Additionally the remit of the interview was to talk about experiences in court and with asylum officials, rather than persecutory experiences. In terms of an ethics of care for the participants I was comfortable with my different areas of responsibility and was able to continue with the project with a clear conscience – this all changed over the course of the research period and I realised that my approach had been naïve and inconsiderate.

Upon meeting my first participant it became clear almost immediately that my 'objective' position as researcher was untenable. My first interview was with a gay refugee from Uganda called Phoebus, the next was a relatively short conversation

with a lesbian from Nigeria and the final direct interaction I had was with a gay Jamaican that I have called Alberto.[86] I did not officially interview Alberto and was only there to observe the hearing; I chatted with him at length before his hearing began. It became clear after the hearing that an interview was out of the question. Prior to the hearing Alberto had seemed nervous and preoccupied but generally in good spirits; after the hearing he was emotionally ragged. All three of the asylum claimants were in their own way incredibly vulnerable and I felt during the course of all of the interactions that in some way to have pursued a formal research interview would have been incredibly exploitative.[87]

My decision not to pursue refugee interviews, as an appropriate route from which to gain information, stems from an unease regarding my responsibility to the participants – too much was needed of both me and them. I'm not a counsellor, but it seemed that counselling and support from health professionals who could help them with the trauma of their often-horrific experiences was necessary. Talking to me seemed vastly inadequate. Additionally on a more practical note the individuals that I spoke too wanted to talk about how hard it was being a refugee, how the asylum system had treated them and generally about what they had been through to get to the UK; some of the problems that came up were about partners that they had lost because of suicide, illnesses that they were battling, incidences of racism and the sense of enormous loneliness and dislocation. If I had intervened during these moments when they clearly needed to express themselves and begun to ask my formal questions about the process it would have felt intrusive and exploitative. It seemed to me that the participants wanted someone to unburden themselves too, irrespective of whether I could help them with their case or not.[88] These occurrences and the intense vulnerability of the participants are what influenced my decision not to continue the interviews with refugees. In lieu of these one to one interviews, I collated data about the refugee experience through secondary sources such as the research carried out by lawyers, psychologists and anthropologists and through the information garnered from

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[86] For the most part the names of interview participants have been changed in order to protect their anonymity. Whereas the names of all the refugee participants are pseudonyms only some of the names of the barristers and solicitors have been changed. Some of the barristers and NGO representatives were happy to use their real names.

[87] There were numerous other requests I received by telephone asking for either representation or to act as an expert witness, which I had to decline.

[88] Elizabeth Peel, Odette Parry, Margaret Douglas & Julia Lawton, "'It's No Skin off My Nose": Why People Take Part in Qualitative Research' (2006) 16 (10) Qualitative Health Research 1335.

semi-structured, open ended interviews with NGOs, solicitors and barristers. The broader impact that my position on interviewing refugees had on the empirical research component of the thesis is significant; essentially it meant that the voices of refugees were again limited to secondary literature. Furthermore my discomfort in carrying out refugee interviews constitutes a limitation in terms of my attempt to use the empirical literature as a resource to draw on throughout the other chapters. Hence the empirical work I carried out, and its subsequent analysis, is mostly confined to Chapter six and is limited in its ability to inform and influence the other chapters focusing on the political promise of narratives.

The ethical role of the researcher

My initial expectations for writing up the empirical work and analysing the findings were that this would be a predominantly descriptive chapter informed by personal responses to the occurrences within the court. Although much of the empirical work is about my own interpretations, I have tried to go beyond this in terms of analysis; I have been receptive to responses that have challenged my expectations and relied on bodies of literature, which have both confronted and complimented my interpretation.[89]

Whilst carrying out the data collection portion of the fieldwork, I made particular effort, immediately following the interview or court observation, to note down any particular thoughts or feelings attached to the situation. I noted anything that may have struck me as odd, personal responses to information gleaned, personal responses to the people I was interviewing. What I found within these reflective moments was that I would remember certain events in more detail than I felt I had observed. Through this immediacy of recollection I had the opportunity to write these reflections in greater detail, contextualising the encounters, describing the atmosphere of the court, its physical layout, the mannerism of the participants, the looks pointed at me, at the ceiling, at the carpet, the playing with thumbs and fingernails, nervousness etc. This immediacy of reflection has allowed me to rely on an almost cinematic or storytelling presentation of events rather than a simple reliance on the notes that I made. My fear of relying on notes was that they would become the 'truth' of the

[89] Bridget Byrne, 'Narrative representations of the self in qualitative interviews' (2003) 4(1) Feminist Theory 29; Jon Mitchell, 'A Fourth Critic of the Enlightenment: Michel de Certeau and the Ethnography of Subjectivity' (2007) 15(1) Social Anthropology 89.

hearing or the interview. The sterility of the notes would have done a disservice to the very real experiences of those within the asylum system.

It is my responsibility as a researcher to acknowledge my subjectivity when viewing the court. Undoubtedly I view events through a particular lens of inquiry and this ultimately shapes the ways in which I recount unfolding events. Laurence Kirmayer wrote:

> Memory is anything but a photographic record of experience; it is a road way full of potholes, badly in need of repair, worked on day and night by revisionist crews. What is registered is highly selective and thoroughly transformed by interpretation and semantic encoding at the moment of experience.[90]

I am more than willing to acknowledge that the events I describe in court are more and less than what actually occurred. I am of no doubt that I missed vital components within the hearing because of my focus on particular aspects that connected with my project. I am sure these missed moments, these occurrences that were outside the scope of my vision or interest, would have added more nuance, greater depth and more detail to what I was considering and would have substantially contextualised the court experience. There is little I can say about these missed moments apart from acknowledging their importance and perhaps saying that these omissions are my fault entirely but that they do not diminish what I in fact did view and my interpretation of events.

Analytic tools and methods

Patricia Ewick and Susan Silbey's monograph *The Common Place of Law: Stories from Everyday Life*[91] centres on the concept of legal consciousness asking how people describe their relationships with law - as 'something *before* which they stand, *with* which they engage, or *against* which they struggle'.[92] Ewick and Silbey's direct interaction with their participants and in-depth interview technique enabled them to look at the micro constructions of peoples' responses to law. Their emphasis on the way individuals engage with the legal system provided a useful foundation for my

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[90] Laurence J. Kirmayer, 'Landscapes of Memory: Trauma, Narrative and Dissociation in Paul Antze & Michael Lambek (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge, London 1996) 176.
[91] University of Chicago Press, Chicago 1998.
[92] *Ewick and Silbey* (n 91) 47.

own approach to analysing law. Although I do not draw on their particular research questions I use a similar semi-structured open-ended interview technique as a useful template for carrying out research.

In order to investigate the different types of courts and decision making processes I drew on the work of John Conley and William M. O' Barr.[93] Conley and O'Barr outline five different adjudicatory styles 'the strict adherent to law, the law maker, the authoritative decision maker, the mediator and the proceduralist'.[94] The approach taken by the authors' has been adopted by numerous other academics, for example a recent article by Rosemary Hunter outlined Conley and O'Barr's approach to ethnographic research and the ethnographic classification of material investigating differing styles of adjudication.[95] The trajectory of methodological replication is also evident in work carried out by James Ptacek who refers to the work of Maureen Mileski. Ptacek considers 'judicial demeanour' and in addition to Mileski's styles of adjudication i.e. Good natured, bureaucratic, firm/formal and harsh, adds one more category, that of condescending and patronising. My reason for outlining the way in which ethnographic research is utilised and developed is to show that in order to answer specific research questions, slight shifts and greater awareness of different issues that arise means new categories of inclusion need to be created; the ethnographic template for law's research requires expansion and evolution.

Though many of these typologies may have been appropriate to use for my research I felt that their over arching themes had a different emphasis, and I did not want my research question to be subsumed by an ethnographic method that I felt would dominate my questions and my participants. Additionally, I could not have strictly categorised asylum claimants into particular typologies, as firstly they do not get the opportunity to say as much as the judge, and nor can they control the court space through hierarchical modalities of power. Hence, I appropriate the fragments of theory, the pertinent methodological grounds necessary to substantiate my own argument and that assist in answering my research questions.[96] I use the semi-

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[93] John M. Conley, William M. O'Barr and E. Allan Lind, 'The Power of Language: Presentational Style in the Courtroom' (1978) Duke Law Journal 1375; John M. Conley, William M. O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, Chicago 1990) 111; John M. Conley, William M. O'Barr, *Just Words: Law, Language and Power* (University of Chicago Press, Chicago 1998).

[94] Rosemary Hunter, 'Styles of Judging: How magistrates deal with applications for intervention orders' (2005) 30(5) Alternative Law Journal 231.

[95] *Hunter* (n 94) 231.

[96] Shane Phelan, 'Coyote Politics: Trickster Tales and Feminist Futures' (1996) 11:3 Hypatia 130.

structured interview technique of Ewick and Silbey alongside the court observation techniques of Conley and O' Barr, but rely on my own categories of identification to substantiate my research exercise.

Within those parameters of research technique I drew on the work of Rubin and Rubin and David Silverman in order to formally delineate my approach and also to generate self-reflexivity regarding my position as a researcher and my expectations of interviewees and the data generated. The qualitative interview technique I used was semi-structured and open ended.[97] I suggest the topic for discussion and then ask particular questions that guide the interview, allowing room for extrapolation. My intent was to find out what the interviewee's thoughts, feelings and opinions were on the process of claiming refugee status, rather than asserting my understanding of that experience. I wanted to give interviewees the space to be expressive, descriptive and explanatory. What this semi-structured format also allowed for was moving the interview in a direction where interviewees felt most confident but also asking them to think about issues outside of their area of expertise. Rubin and Rubin note that one of the skills of the interviewer in carrying out qualitative interviews must be the ability to listen. They note that the interviewer must pick up on key words or ideas and significant omissions. They highlight the importance of the tone of the response of interviewees or the level of emotion that may be evident. It is important that the researcher can respond to tone and has the ability to shift questions away from the topic and instead talk about why there is an emotional reaction to a particular question.[98]

Within the interviews there were three predominant 'rules' that I tried to establish regarding my role as interviewer. Firstly, to be sensitive, to be aware of the ways in which questions and responses are heard and understood and to recognise that ways of hearing and responding can differ between cultures. Secondly, that my own culture and relationship to the data, the project, the individual, and the topic highlights an investment within the interview which challenges notions of interviewer neutrality. Finally, that the purpose of the interview is to hear what others have to say about the asylum process and to ensure that my voice and my research questions do not

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[97] See R.K. Merton, M. Fiske and P.L Kendall, *The Focused Interviews: A Manual of Problems and Procedures* (2nd edn New York Free Press, New York 1990).
[98] Herbert J. Rubin and Irene S.Rubin, *Qualitative Interviewing The Art of Hearing Data* (Sage Publications, London 1995) 7.

dominate.[99] In some ways I tried to take on the ethos of interviewing expounded by bell hooks; to listen more, to talk less, to be gentle with participants who may have had little opportunity to give their voice a public site in which to speak, essentially allowing interviewees to 'talk back'.[100] Thus my purpose was to ask the questions, listen to what people had to say and from this explore the themes that arose.

In the remainder of this introduction I outline the thesis chapters.

The chapters – an overview

Chapter two – provides an in-depth consideration of Drucilla Cornell's 'imaginary domain'.[101] I use the legal framework of the imaginary domain to re-envisage claims to refugee status on the ground of sexuality. I argue that the form and function of the imaginary domain would enhance understandings of agency and expand on notions of identity and personhood enabling a more nuanced understanding of the claimant before the court. The imaginary domain's foregrounding of a legally protected right to a self-determined sexuality would render réfoulement as impermissible on the part of the incumbent state.

I draw on the theoretical premise of the imaginary domain in order to analyse four aspects of the asylum system. In the Chapter I propose freedom as opposed to equality before the law; freedom relies on non-static configurations of identity, dependent upon intersectional and non-normative self-determinative accounts of identity. The freedom/equality distinction is discussed via a critique of how sexuality and its expression are stifled and delegitimised within current equalities paradigms, and the effect this has on the granting of refugee status to sexual minorities. In this chapter I also reflect on the potential for the imaginary domain to destabilise the relationships that develop in court, drawing on what Cornell has termed the minimum conditions of individuation in order to enhance and affirm the agency, identity and dignity of the refugee claimant. The analysis also considers the production of

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[99] For more on this see Rubin and Rubin (n 98), chapter 2. Also see David Silverman, *Interpreting Qualitative Data Methods for Analysing Talk, Text and Interaction* (Sage, London 1993); bell hooks, *Talking Back: Thinking Feminist, Thinking Black* (South End, Boston 1989).

[100] *Hooks* (n 99).

[101] *Cornell* (n 1); Drucilla Cornell, *Just Cause: Freedom, Identity and Rights* (Rowman and Littlefield, New York 2000); Drucilla Cornell and Sara Murphy, 'Anti-racism, Multiculturalism and the Ethics of Identification' (2002) 28(4) Philosophy and Social Criticism 419; Drucilla Cornell, *Between Women and Generations: Legacies of Dignity* (Rowman and Littlefield Publishers, Maryland 2005); Drucilla Cornell, 'Thinking the Future, Imagining Otherwise' in Renee J, Heberle and Benjamin Pryor (eds) *Imagining Law: On Drucilla Cornell* (State University of New York Press, New York 2008).

testimony in court and the possible effect of foregrounding non-formulistic narratives and the reception this garners. Finally, I explore the way in which the imaginary domain can be thought of as a new site in which, and through which, identity and freedom can be produced, and how this production enables a more nuanced version of the refugee to make a claim before the asylum court.

Chapter three – moves away from the imaginary domain's framework of equality and personhood. In this chapter I consider the imaginary domain as a complementary theoretical resource in relation to the production of narrative in two key sites. The first of these sites is legal academia. The second is the production of testimony by expert witnesses in LGBT rights cases. In lieu of applying the imaginary domain to a single legal context I instead turn to the way in which the imaginary domain has purchase as a relational concept, complementing the narrative work of Critical Race theorists and the role of expert witnesses within LGBT rights cases which de/reconstruct terminology such as spouse, family, etc. The common linkage between the imaginary domain, narrative scholarship and the production of LGBT expert testimony is the role of resistance – resistance to norms of sexual, affective and familial organisation – resistance to normative methods of writing within the production of academic work; resistance to the imposition of heteronormative definitions of heterosexually invested terminology in the testimony provided by the expert witness. I examine the presence of resistance within these discourses and argue that the deconstructive emphasis of the imaginary domain, its reliance on freedom and personhood connects with the resistance work of Critical Race scholarship. I also argue that alternative sites and versions of resistance, may aid analyses of refugee resistance in an asylum court.[102]

There are of course also significant limitations as to how far analogies can be made regarding the nature of resistant mechanisms, narratives or tactics that refugees may be comfortable deploying. The concern of deploying resistant tactics within hearings may have significantly different origins in terms of reasoning and meaning.

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[102] For more on CRT as resistance work see Daniel G. Solorzano and Dolores Delgado Bernal, 'Examining Transformational Resistance Through a Critical Race and Latcrit Theory Framework: chciana and chicano students in the urban context' (2001) 36 Urban Education 308; Richard Delgado, *When equality ends: stories about race and resistance* (Westview Press, Boulder Colorado 1999); Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (NYU Press, New York 2001); Dorothy A. Brown, *Critical Race Theory: Cases, Materials and Problems* (Thomson West St Paul, Minnesota 2003). I use the term resistance to indicate a form of action which challenges and undermines normative conceptualisations of sex, gender and contextual behaviour, literary styles and terminological interpretation

Whereby some refugee tactics may be of a political nature, others may be much more personally founded, representative of a confrontation with the asylum system as it functions within that moment, rather than representing a broader political agenda of tactical engagement.

Chapter four – the resistant tactics of the women of Greenham Common is the focus of Chapter four. The narratives produced by the women of Greenham were explicitly shaped by their political position and informed their production of gender and sexuality in the courtroom. I draw on these productions in order to ask whether their politicised response in, and out of, the court could provide insights into the ways in which refugees either do produce, or could produce, narratives imbued with explicit and/or implicit resistance.

The women of Greenham Common protested against the presence of nuclear weapons in the UK from September 1981-September 2000, these protest often resulted in arrests and thus in court appearances.[103] The form of testimony the women provided brought into disrepute the *formalism* and *formulism* of the court space. The specifically feminist, anti-patriarchal, woman positive and women only politics was indicative of protest against nuclear armament and what nuclear armament symbolised in wider society - masculinist, patriarchal, militaristic dominance. I consider whether the resistant activities of the Greenham women challenged the *formalism* and *formulism* of law and whether this has legally and politically creative consequences. Through an analysis of the production of narrative by women whose identities are shaped by their politics, gender and sexuality, I question whether their politicised response to the court could provide useful insights into the ways in which refugees either do produce or could produce narratives imbued with explicit or implicit resistance. I turn to Michel de Certeau's 'repertoire of tactics'[104] as the guiding theoretical framework in order to analyse the in-court tactics of the women of Greenham Common.

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[103] For a brief outline of the history and motivation behind the creation of the camp see the official Greenham Common website <http://www.greenhamwpc.org.uk/> alternatively listen to the BBC Radio 4 documentary *The Ghosts of Greenham* <http://www.bbc.co.uk/radio4/history/document/document_20070716.shtml> accessed 14 February 2011; or alternatively 'Dear Kitty: Some blog' <http://dearkitty.blogsome.com/2006/09/03/britain-history-of-greenham-common-peace-women/> For some of the songs sang at Greenham see <http://www.davyking.com/Greenham.htm>; for an analysis of Greenham action through letter writing see 'writing the web' <http://www.feministseventies.net/Greenham.html> accessed 14 February 2011.

[104] *De Certeau* (n 2).

Chapter five – I analyse the judicial response to lesbian and gay claims to refugee status. The current framework for refugee protection is inadequate, perpetuating some of the discriminatory aspects of homophobia encountered in the home state by LGBT asylum seekers. The UK courts previous reliance on discretion in living out sexuality in the home state placed LGBT persons in a perilous situation. If individuals were not discreet they would bear the brunt of discrimination in their home state. The way in which the court navigated the territory of discretion was particularly tenuous. The courts did not insist that a person *had to* live discreetly, nor could the court impose a change of behaviour, this would constitute persecution. Rather, the court assumed that the individual would practise discretion voluntarily and thus not run afoul of state and social persecutory forces. I argue that even with the court's acknowledgement that the imposition of discretion is no longer permissible that the jurisprudence may well develop in a manner that endorses particular versions of LGBT sexuality setting a sliding scale of permissible LGBT behaviours as worthy/unworthy of protection. My concern is that this delimitation on LGBT relationships may further exclude those who do not subscribe to heteronormative patterns in their LGBT relationships and/or those who are seen to wilfully and flagrantly flout social norms.

This chapter also identifies the contrasting nature of the narrative of the refugee. I claim that case law has the effect of subsuming the voice of the claimant in favour of the legal arguments that substantiate claims to asylum. When placed in contrast to the explicit political narratives, as exemplified by the women of Greenham Common in the previous chapter, and the type of narratives which come to the fore during an asylum hearing itself as discussed in the following chapter, the place of refugee voice and its jurisprudential hijacking represents an concerning loss of refugee presence, of refugee agency.

Chapter six – in this chapter I sidestep the confines of case law and instead place myself within the asylum chamber (FTTIAC). I access the interactions between claimant, solicitor and immigration judge and view the environmental and personal dynamics played out between the parties in court. The dynamics formally structure the way in which testimony is given and received. I indicate the points at which the *formalism* and *formulism* of the court space is transgressed. In using the term *formalism* I refer to the rigid structures of the court process, its organisation, the hierarchical relationships that are developed between the interlocutors in court and the

exclusivity attached to legal sites. *Formulism*, on the other hand, refers to the method of argumentation used by the actors in court, the components that comprise defence and prosecution. I claim that whilst the spaces for transgression and resistance in court are limited, lesbian, gay and bisexual asylum seekers nonetheless challenge legal power structures in important and persistent ways. Although the court is not always willing or able to hear or respond to such transgression, resistances, nonetheless, play an important role in maintaining the agency of asylum seekers before the court.

Chapter seven – in this chapter I shift the emphasis away from resistance in court, and instead focus on the relationships that are developed between the parties in court - the asylum seeker, their legal counsel and the immigration judge. Drawing on an ethical framework I re-envisage the relationships between the interlocutors by focusing on the benefits of engaging with, and bearing responsibility for, the other. I draw on Iris Marion Young's concept of 'asymmetrical reciprocity', which is indebted to Levinas.[105] Levinas conceptualises the other as unknowable, irreducible and to whom we are obligated.[106] Young's work unpacks the relationship between locutionary positions; she relies on a response to the other that is suffused with generosity through what she terms 'the gift'. The 'gift' is a relational concept - 'opening up to the other person is always a gift; the trust to communicate cannot await the other persons promise to reciprocate'.[107] The gift's relationship with asymmetrical reciprocity requires each party to recognize and be open to the 'irreducible points of view of the other' and understand the 'irreversibility' of their subject positions.[108] I make this tentative turn to ethics as a way of repositioning the relationship of law and politics in a bid to foster an ethical response to the other that reaches beyond the asylum court.[109] Chapter seven is not a template for legal reform, rather it seeks to identify the challenges that intervene in the relationship between judge and asylum

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[105] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, Oxford 2000); Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy* (Princeton University Press, Princeton 1997).

[106] E. Levinas, 'Totality and Infinity: Preface to the German Edition' Totalitat und Unendlichkeit (Verlag Karl Alber, Freiburg in Breisgau 1987); E. Levinas, *Entre Nous: Thinking-of-the-other* Trans Michael B. Smith & Barbara Harshav (Continuum, London 2006); Sean Hand, (ed) *Facing The Other: The Ethics of Emmanual Levinas* (Curzon Press, Surrey 1996).

[107] Iris Marion Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought' (1997) 3(3) Constellations 340, 351.

[108] *Ibid.*

[109] For more see Thomas Spijkerboer, Gender and Refugee Status (Ashgate, Aldershot 2000); Also Peter Fitzpatrick,'Finding normativity: immigration policy and normative formation' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion?: Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart Publishing, Oxford 2009) 115.

seeker in-court. Via an ethical framework, this chapter establishes foundational principles, which could potentially mitigate the dynamics of the judicial/defendant relationship drawing on new testimonial methodologies that include a greater contextual awareness of the history, culture and economic and social legacies that have lead to the appearance of the asylum seeker in a UK court.

Chapter eight – in the concluding chapter of the thesis I revisit the ongoing state of the UK asylum system, noting the increasingly restrictive channels for legal entry into the UK. Restrictive entry policy for immigrants sits alongside an asylum determination system which has reduced by 75% the number of successful asylum applications over the course of ten years. I also reflect on the false hope given by positive refugee case law in light of the ruling in *HJ and HT v SSHD* [2010]. I express concern over the fact that just because discretion is no longer relied on by the judiciary in order to ensure claimant safety when returned to the home state, that nevertheless levels of permissible discrimination are still too high.

Having set the context for the functioning of the asylum system I draw together the themes of the thesis, the 'imaginary domain', 'critical narrative' and 'micro-resistance' and show how these themes have explored the wider functioning of the legal system and legal academia. I indicate when actors have been able to transgress the dominance of legal hegemony and how concepts such as the imaginary domain and critical narrative have facilitated those transgressions of the *formulism* and *formalism* of sites of legal engagement.

CHAPTER TWO

Re-envisaging refugee claims through the 'imaginary domain'

Introduction

Drucilla Cornell's 'imaginary domain'[1] traverses the disciplines of psychology, philosophy and law. Configured as a psychic space, the imaginary domain is a site that encourages individuals to imagine their optimum versions of sexual, affective and familial life, versions that may transgress norms of gender and sexuality that currently structure 'private' life. Within the conceptual framework of the 'imaginary domain' law is the social mechanism that protects the version of 'private' life envisaged. Law does not determine the form of the imaginary domain, but protects the individual's right to it and the conditions in which that version of private life can be lived out. Although Cornell does not specify the precise way in which the imaginary domain would be incorporated into the legal system, she draws on the philosophical underpinnings of law through a revised liberalism in order to give the imaginary domain legal tenancy. Relying on liberal philosophy informed by feminist, critical race and postmodern theory, Cornell engages with foundational legal principles of personhood, freedom, and rights to bodily integrity in order to give substance to the recognition of the imaginary domain in law. I discuss the legal invocation of the imaginary domain at greater length in the following part of this chapter. In conjunction with liberalism's philosophical tradition, the imaginary domain is also reliant on a self-determinative understanding of gender and sexuality, yet is not divested from the contextual and historical patterns that underpin and inform those identities.

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[1] Drucilla Cornell, *The Imaginary Domain: Abortion Pornography and Sexual Harassment* (Routledge, London 1995); Drucilla Cornell, *At The Heart of Freedom* (Princeton University Press, Princeton 1998); Drucilla Cornell, *Just Cause: Freedom, Identity and Rights* (Rowman and Littlefield, New York 2000); Drucilla Cornell and Sara Murphy, 'Anti-racism, Multiculturalism and the Ethics of Identification' (2002) 28(4) Philosophy and Social Criticism 419; Drucilla Cornell, *Between Women and Generations: Legacies of Dignity* (Rowman and Littlefield Publishers, Maryland 2005); Drucilla Cornell, 'Thinking the Future, Imagining Otherwise' in Renee J. Heberle and Benjamin Pryor (eds), *Imagining Law: On Drucilla Cornell* (State University of New York Press, New York 2008).

I use the heuristic possibilities of the imaginary domain to think about how claims to refugee status on the ground of sexuality could be dealt with in a more just and non-discriminatory fashion. I argue that the form and function of the imaginary domain as a conceptual framework, enhances understandings of agency and expands on notions of identity and personhood enabling a more nuanced understanding of the claimant before the court. The legally protected right to a self-determined sexuality, as envisaged by the structural parameters of the imaginary domain, would render réfoulement impermissible on the part of the incumbent state. Réfouling an asylum claimant, knowing that their sexuality would be subject to oppression, would undermine the legal protection of the imaginary domain, which is based on law granting dignity and respect to the forms that our intimate, familial and sexual life can take.

The imaginary domain delegitimises stereotypical representations of gender and sexuality using law as the medium to affirm and protect this shift. Normative constructs of gender can negatively impact on self-determinative understandings of sexed identity. As a conceptual project, the imaginary domain provides the possibility of a more open understanding of identity within law and it does this by engaging with the language of freedom rather than formal equality. The turn to freedom of identity, rather than the present legal understandings of equality of identity, positions identity as 'in progress', challenging current legal imaginings of the person before the court. Current legal constructs of the individual tend to rely on a compartmentalised and static approach to identity. The impact a static and divisible understanding of identity has on refugees is that the purported ability to separate out sexual identity from its infusion of gender, race, religion political opinion, had led to the legal legitimation of 'closeting' of refugees. Furthermore the separation of identity into discreet components perpetuates a lack of awareness as to how sexuality informs and is informed by race, culture, ethnicity, religion etc.[2] In contrast the formulation of identity that Cornell relies on is composed as the conflagration of multiple

[2] See *HJ (Iran) v Secretary of State for the Home Department* [2008] UKAIT 00044; *RM and BB (Iran) CG* [2005] UKAIT 00117; *S395/002 [2003] HCA 71; [2004] INLR 233.* I discuss the problem of the court's prior enforcement of closeting in Chapter five of the thesis referring to the recent jurisprudence of *HJ and HT v SSHD* [2010] UKSC 31. Prior to this case the judiciary relied on the discretion of the claimant in order to ensure their safety when réfouled back to the home state. The ruling in *HJ and HT* found presumed discretion to be an unacceptable and discriminatory imposition on the claimant. Even with the court's finding of assumed discretion as unacceptable the court nevertheless maintains an excruciatingly high standard of persecutory treatment to be met in order for lesbians and gay men to attain refugee status.

components of self, drawing on class, race, gender, history, context.[3] If asylum judges viewed sexuality as infusing the multiple components of identity, closeting would have been perceived as both impermissible and inconceivable.

Protection of the imaginary domain arises from the theoretical framework of liberal jurisprudence. Within this framework law grants individuals the right to an imaginary domain and the self-determined conception of sexed and gendered identity held within that. Law provides the structure to protect the form the imaginary domain takes so long as that form does not impact on others in a harmful or deleterious manner. The harm limitations proscribed are firstly, 'no one can use force or violence against another person in representing her sexuate being'. The second, the 'degradation prohibition', 'prohibits any one of us from being graded down because of her form of representation of her sexuate being'.[4] The term sexuate being refers to the sexed and gendered self. This 'self', though developed within a context specific social framework that orients and influences identity is constructed through self-determinative principles.

The purpose of the imaginary domain is to give the individual the freedom to become both their 'own person' and a 'legal person', recognised as a source of rights, respect and dignity. In order to establish legal personhood the imaginary domain relies upon the minimum conditions of individuation. Cornell outlines the minimum conditions of individuation as the bare essentials of equal citizenship and thus claims to personhood; they are:

> 1) bodily integrity, 2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others, and 3) the protection of the imaginary domain itself.[5]

I draw on the minimum conditions of individuation in order to underwrite the conditions through which claims to refugee status could be made.

This chapter will engage with the imaginary domain in order to explore four components of the asylum system. I will engage with Cornell's conceptualisation of freedom as opposed to equality before the law, considering the benefits this transition would have on the deconstruction of identity before the asylum court. Building on this

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[3] See Costas Douzinas, 'Human Rights and Postmodern Utopia' (2000) 11(2) Law and Critique 219; Stewart Motha and Thanos Zartoloudis, 'Law, Ethics and the Utopian End of Human Rights' (2003) 12 Social and Legal Studies 243.

[4] Drucilla Cornell, *At the Heart of Freedom* (Princeton University Press, Princeton 1998) 60.

[5] Drucilla Cornell, *The Imaginary Domain: Abortion Pornography and Sexual Harassment* (Routledge, London 1995) 4.

discussion the chapter examines how non-normative accounts of identity that draw on an intersectional understanding of self are stifled and delegitimised within the asylum court and the subsequent effect this has on the granting of refugee status to sexual minorities. Following this I reflect on the imaginary domain's ability to destabilise relationships established in court, drawing on the minimum conditions of individuation in order to develop and affirm the agency and identity of the refugee claimant. Throughout the chapter, I consider more broadly the way in which the imaginary domain can be thought of as a new site in which, and through which, identity and freedom can be produced, and how this production enables a more nuanced version of the refugee to make a claim before the asylum court.

The concept of the imaginary domain provides a framework through which to engage with legal structures and is an essential contribution to my critique of the asylum hearing and the position of the asylum claimant in court. In the following part of the chapter I outline the form and function of the imaginary domain and the key terminology deployed by Cornell. I then move onto a discussion of the imaginary domain's reliance upon the tenets of liberalism and how this reliance could inform the claim to refugee status.

The 'imaginary domain' as an aid to asylum?

At the Heart of Freedom sees Cornell focus on issues of pornography, abortion, adoption, fathers' rights, and lesbian and gay legal struggles within a predominantly North American context. These arenas signify sites wherein sex and sexuality have become *dispositive* of rights to personhood and citizenship.[6] That gender and sexuality are stationed as loci where law's protection becomes ambiguous, falling into a solipsistic default position reliant on essentialist and stereotypical representations of men and women, and lesbians and gay men is a troubling occurrence for Cornell - the imaginary domain is intended to counteract this.

The imaginary domain, if incorporated into law, would occupy a site that was directly related to the status of legal personhood and practices of self-determination. It would replace current provisions of 'equality' with a commitment instead to 'freedom'. Cornell visualises freedom as moving beyond the aspirational categories

[6] I follow Cornell's use of the term 'dispositive' as referred to in *At the Heart of Freedom* (1998), p.16, 21 and 60 as a factor which has an negative bearing on the status or interpretation of an individual.

of equality of, for example, gender, race, sexuality. These categories, she claims, have been subject to determination by legal and government policy around appropriate or encouraged identity or familial formations. Rather, freedom relies on individualist interpretations of a substantive 'quality' of life rather than a formalised but normative and potentially constraining 'equality' of life.

The current asylum system requires the court to assess the veracity of the identity of the refugee claimant. The court considers how the individual has been affected by the society from which they have fled and the relationship this bears to the alleged persecution. Claims to asylum on grounds of sexuality invariably involve individuals fleeing from situations where their sexuality or gender is degraded, demeaned and/or outlawed. The confluence of social and political disapprobation, the experience or threat of physical and/or psychological violence, and a desire to evade harm contributes to the production of refugees. Living in a state where non-normative sexuality can result in persecution often means that expressions of sexuality are stifled, self-worth is undermined and relationships are rendered as putatively unworthy of respect and protection.[7] Cornell notes the effect of not being able to 'play with' and 'act out the personae of lived sexuality' as part of a mechanism of degradation.[8]

Cornell establishes a framework of degradation through which to consider the impugning of sexuality. She notes:

> Someone is degraded when they are reduced to stereotypes of their "sex" or have imposed upon them objectified fantasies of their "sex" so that they are viewed and treated as unworthy of equal citizenship. We are degraded, in other words, when our "sex" is defined, symbolized and treated as antithetical to equal personhood and citizenship.[9]

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[7] The prevalence of homophobic violence is not jurisdictionally limited. It is easy to mark out certain states as having a particular problem with the legal and social endorsement of homophobia; Iran usually becomes the example of choice. Homophobic attacks and social disapproval frequently occur in the UK and US. In the UK context see for example the murder of Jodi Dubrowski - Martha Buckley, 'Gay man's killing "tip of the iceberg"' BBC News (16 June 2006) <http://news.bbc.co.uk/1/hi/uk/5080164.stm> accessed 2 August 2011; Paul Iganski, 'Criminal Law and the Routine activity of Hate Crime' (2008) 29(1) Liverpool Law Review 1; In the US context see The Matthew Shepard Hate Crimes Bill which was proposed but rejected by the Bush Administration; also see Loffreda, Beth *Losing Matt Shepard: life and politics in the aftermath of anti-gay murder* (Columbia University Press, New York 2000); Mary Swigonski, *From Hate Crimes to Human Rights: A Tribute to Matthew Shepard* (Routledge, New York 2001); *Matthew Shepard Act Local Law Enforcement Hate Crimes Prevention Act* of 2007 or LLEHCPA (H.R. 1592).

[8] *Cornell* (n 5) 10.

[9] *Ibid.*

Claims to equal personhood and citizenship are an implicit part of claims to refugeehood. The rejection of heterosexuality or gendered norms by lesbians, gay men and people with other non-normative sexualities transgresses expectations of gender and can result in denials to legal and social personality. Denial of the status of legal personhood can occur through multiple means, such as persecution by social actors, criminalisation of same-sex relationships, lack of legal acknowledgement or legal protection of relationships, or forced medical care as a curative response; such events constitute acts of degradation. One of the purposes of the imaginary domain is to vitiate these consequences and to legally protect impugned sexualities that would be subject to persecution or would render the individual as 'outlaw'.

Cornell writes, 'the freedom to create ourselves as sexed beings, as feeling and reasoning persons, lies at the heart of the ideal that is the imaginary domain'.[10] Cornell's ideal of the imaginary domain could be dismissed as nothing more than a sweeping, overly broad desire for the freedom to live sexuality and gender according to our emotional desires and needs, and to be in control of the form that our personal life takes without social disapprobation. However, on closer inspection, the detail of the imaginary domain deploys key terminology, which brings it back from the realm of the utopic to the realm of the earthly, the material and, more specifically, the legal. To posit the imaginary domain as purely utopic undoes some of the possibility of it as a mechanism for social change. The imaginary domain does ask us to dream our futures, but the expectation is that those futures could be manifested if the way in which society structured gender and sexuality was decoupled from normative formations of sex and sexed behaviour. The imaginary domain would give individuals the space to conceptualise their optimum vision of private life and legally protect the practice of living out that life.

Using feminist goals, which are about 'politically taking the chance to create new worlds',[11] the imaginary domain provides a framework in which the meaning ascribed to gender and sexuality can be re-learnt, re-scripted and re-understood. In order to create these new worlds and thus, new knowledges, Cornell relies on key terms: 'freedom', 'sexuate being', 'persons'. 'Freedom' for Cornell, contests the imposition of heteronormative sexual and familial norms as encouraged and endorsed by the state and as replicated and assumed by much of wider society. Encouragement

[10] *Cornell* (n 4) ix.
[11] *Cornell* (n 5) 27.

by the state of such norms is an illegitimate imposition of sexual, affective and familial scripts that exclude non-normative family formations and reinforce gendered roles. Cornell writes:

> Our emancipation from state-imposed sexual choices and from their reinforcement by the basic institutions of society demands much greater social equality...When all persons have this right to the imaginary domain, states can no longer force women to play the role of primary caretaker in families, either directly by law or indirectly by the manipulation of social institutions.[12]

Delegitimising the enactment of stereotypical gender roles would assist in decoupling associated sexual practices and forms of identification. Stereotypical gender roles would be replaced by respect for the self-determined form gender and sexuality takes. The place of equality within the discourse of freedom and the imaginary domain would no longer have equality resting on aspirations to particular positions of privilege, on which some arguments for formal equality have traditionally been based. Freedom's focus undercuts that privilege by relying on the individual to formulate the sexuate being in their imaginary domain and have that treated with parity in law; the imaginary domain would be subject to the harm limitations, which would preclude the use of force or violence against another when representing their sexuate being.

The purchase of the imaginary domain, for refugees in particular, rests in its ability to rethink the parameters of constituting, acknowledging and respecting the identity and agency of asylum claimants within the legal system. In an asylum court, the intersecting factors of race, gender and sexuality strike up a situation ripe for the denial of personhood, whereby reversion to stereotypical representations of the racialised, sexualised and gendered 'other' is common place. The UK asylum system has, in the past, failed to recognise the importance of living out lesbian and gay sexuality and has endorsed closeting. The court has only recently begun to acknowledge the illegitimacy and the danger of recommending discretion as a method of ensuring safety around sexuality. In discuss the asylum court's prior reliance on discretion at greater length in Chapter five.

In the following section I consider the role of liberalism in the construction of the imaginary domain and liberalism's place within the feminist literature that informs Cornell's work. I further indicate where law has abnegated responsibility by relying

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[12] *Cornell* (n 4) xi.

on reductivist formulations of sex and sexuality and how the imaginary domain could aid a more nuanced conception of identity.

The 'imaginary domain', liberalism and the journey to personhood

The imaginary domain evolves out of the liberal philosophy of Kant and Rawls and is then formulated into what Thurschwell has termed a 'radical feminist liberalism'.[13] This radical feminist liberalism negotiates a route traversing equality and freedom, is resistant to imposed definitions of sexuality and gender,[14] and draws on feminist conceptualisations and postmodern understandings of the status of identity.

The Kantian liberalism that Cornell relies on in order to provide legal protection is radically reinterpreted through the imaginary domain. Typically, liberalism relies on an understanding of the inviolability of the legal person and 'holds that the innate dignity of the person qua person demands equal treatment of all as a matter of legal, political, and moral right irrespective of the particular characteristics, including gender, that differentiate individuals from each other'.[15] Cornell's project fundamentally shifts the liberal legal construction of the person. Her understanding of the inviolability of the individual remains intact but the characteristic liberal neutral subject is disrupted. Legal personhood within the imaginary domain is transformed, encompassing an understanding of the person as particular and specific, displacing 'neutral' identity categories of the rational, objective actor.

The overriding critique of liberal accounts of personhood is the failure to acknowledge the impact of socially constructed positions of domination and oppression associated with particular identity categories.[16] Characteristics such as sex, race, ethnicity, age, sexual orientation and class, subsumed under liberal

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[13] Adam Thurschwell, 'Radical Feminist Liberalism' (1999) 51(3) Rutgers Law Review 745.
[14] *Cornell* (n 4) 10-11; The creation of the imaginary domain is a move away from the 'status of the degraded other', this sits alongside Cornell's 'demand for the equivalent evaluation of our sexual difference'. She asks 'if we [women] are not regarded as free how can we be responsible'.
[15] *Thurschwell* (n 13) 747.
[16] Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, Oxford 1999); Allen E. Buchanan, 'Assessing the Communitarian Critique of Liberalism' (1989) 99 Ethics 852; Michael Walzer, 'The Communitarian Critique of Liberalism' (1990) 18(1) Political Theory 6; Robert J. Cottrol, 'The Long Lingering Shadow: Law, Liberalism and Cultures of Racial Hierarchy and Identity in the Americas' (2001) 76(11) Tulane Law Review 11; Andrew Kuper, 'Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons' (2000) 28(5) Political Theory 640.

neutrality, deny the varied nature of the legal subject.[17] Feminist scholars have sought to expose the neutral subject, invariably given as white, heterosexual and masculine, as far from neutral and as bearing a privileged identity when dealing with claims to justice and equality.[18] So long as this 'neutrality' goes uncontested as a trope of the court environment, then the concept of legal personhood and the 'objectivity' of the court will nullify the lived experiences of those outside the normative standard. Thurschwell notes the particular impact this has on women:

> So long as the masculine remains the unspoken model of the person, making questions of gender equality and discrimination turn on liberalism's formal conception of personhood will render philosophically and legally irrelevant the real sexual differences that are integral to women's own personhood.[19]

In addition to women, lesbians and gay men have also shared a tenuous relationship with legal personhood. The historic denial of legal personhood to lesbians and gay men has come in numerous forms. The transitioning legal status of homosexuality from illegal to legal following the findings of the Wolfenden Committee (1957) had the effect of no longer making sodomy an offence for consenting adults, but did result in further regulation of sexual activity in a broader sense.[20] The effect this regulation had and continues to have is to delimit the free expression of sexuality and to place normative constraints on particular sexual practices as normal/abnormal, legal/criminal.[21] Social indicators highlighting a lack of legal personhood or a

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[17] See Simone de Beauvoir, *The Second Sex* (Everyman, London 1993); Ruth Evans (ed), *Simone de Beauvoir's The Second Sex: New Interdisciplinary Essays* (Manchester University Press, Manchester 1998) de Beauvoir referred to man as representing both the positive and the neutral.

[18] See C. Mouffe, 'Feminism, Citizenship and Radical Democratic Politics' in Linda Nicholson and Steven Seidman (eds) *Social Postmodernism: Beyond Identity Politics* (Cambridge University Press, Cambridge 1995); Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Anti-Racist Politics' (1989) University of Chicago Legal Forum 139; Nancy Fraser, *Justice Interruptus: Critical Reflections on the Post-socialist Condition* (Routledge, London 1997); Catherine MacKinnon, 'Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence' (1983) 8(4) Signs 635; Sylvia Walby, *Theorizing Patriarchy* (Basil Blackwell, Oxford 1990); Cornell writes 'if the paradigmatic person entered into the scales to resolve competing interests, and if the scope of the claims persons can make on society is conceptualised as sex neutral, she (or he) is unconsciously identified as white, straight and masculine...the scales are already tilted in favour of the paradigmatic person' in *Cornell* (n 4) 16.

[19] *Thurschwell* (n 13) 748.

[20] Sexual Offences Act 1956 (c.69) repealed by Sexual Offences Act 2003. See D. McGhee, 'Beyond Toleration: Privacy, Citizenship and Sexual Minorities in England and Wales' (2004) 55(3) British Journal of Sociology 357; F. Mort, 'Mapping Sexual London: The Wolfenden Committee on Homosexual Offences and Prostitution 1954-57' (1999) 37 New Formations 92; Johanna Kantola and Judith Squires, 'Discourses Surrounding Prostitution Policies in the UK' (2004) 11 European Journal of Women's Studies 77.

[21] See Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (Routledge, London 1995); Les Moran, 'Violence and the Law: the case of sado-masochism' (1995) 4(2) Social and Legal Studies 225;

regulated rendering of personhood include denial of marriage rights and relationship recognition, the policing of alternate sexual expression e.g. *R v Brown*[22] and the erasure of lesbian sexuality from the criminal sphere. All have and had the effect of constituting lesbians and gay men as both inside and outside of the law and as bearers of a dubious form of legal personality. Asylum jurisprudence and legislation has only recently begun to recognise that persecution on the grounds of sexuality can, in some cases, constitute a valid claim for asylum. Furthermore, the court's prior reliance on closeting, as sufficient to constitute protection from persecution, has only recently been deemed inadequate. Hence legal personality of lesbians and gay men is still a contested site for the apportionment of legal recognition and protection (I consider the broader legal issues of LGBT asylum seekers at greater length in Chapter five of the thesis).

Comparison of the complex identity of the refugee as placed against the liberal subject of law does a disservice to the rendering of justice in court. If the comparator group for adjudication within an asylum hearing is the traditionally empowered heterosexual, masculine, rational actor, recounting the identity of an LGBT refugee against this comparator distorts the interpretation of the individual before the court. How can LGBT identity become legitimate in court? Must LGBT identity acquiesce to heteronormative expectations in order to be intelligible?[23] Cornell's turn to freedom rather than equality assists in displacing the 'neutral', but symbolically powerful, liberal subject, and thus also displaces the necessity for manipulating LGBT stories in order to fit the 'neutrality' of liberalism. Essentially, by no longer predicating rights and recognition on a comparative equality framework and instead foregrounding the freedom of the self-determined subject, this may have the effect of displacing the neutral subject of law.

The imaginary domain questions representations of personhood as established by liberal legalism, indicating the broader benefits of freedom for fostering personhood. Under the terms of liberalism the person is to be granted 'equivalent representation before the law' in their 'absolute singularity'.[24] From the outset

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Sarah Lamble, 'Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid' (2009) 18 Social and Legal Studies 111.

[22] *R v Brown* 2 All E.R. [1993] 75.

[23] C. Johnson, 'Heteronormative Citizenship and the Politics of Passing' (2002) 5(3) Sexualities 317; Rosemary Hennessey, 'Queer Visibility in Commodity Culture' (1994-1995) 29 Cultural Critique 31.

[24] Fiona Jenkins, 'Vulnerability and the Imaginary Domain: On Drucilla Cornell's Liberalism and Philosophies of the Limit' (2004) 33 Women's Philosophy Review 9.

Cornell troubles this liberal construction as being only partially applicable and available. She posits that in reality such rights to personhood, rather than being derived from the fundamental status of human beings, are actually negated through the ramifications of social oppression in the form of, for example, racism, sexism, ableism, homophobia. Fiona Jenkins, in considering liberal individualism and reflecting on the assumption of personhood, notes the interaction with, and impact of, social context.

> Reflection upon the fundamental importance of culture, the acquisition of language, the operation of concrete social institutions and powers of symbolization has led many political thinkers to accept the conclusion that the individual derives her very existence from the historically contingent fact of social forms that represent her to herself as such. To be an individual has thus become dependent not upon the simple fact of one's singular birth, but upon the existence of a community prepared to acknowledge one as such.[25]

Community becomes the realm in which identity is recognised, fails to be recognised, or may be explicitly repressed. Cornell constructs individuals as able to envisage a self not absolutely determined by social context but as informed by it, as bearing the imaginative potential to go beyond it, and relies on a version of liberal legalism to protect that envisaged self.[26]

Cornell challenges the way in which traditional liberal legal understandings of self, limit identity. Jenkins, in considering the delimitation of identity, has positioned the individualised other as the individual who is 'violated through representations of others that deny the way in which the individual, who does not exist without representation provided by others, does exist, nonetheless, in excess of that representation'.[27] Jenkins indicates that though the individual comes into 'existence' via their perceived identity within society, that social representation is not the limit or sum total of their identity. The excess of identity discussed here, the unquantifiable alterity, has led and still leads to the denial of legal personhood within liberal legal environments (I develop an extended critique of this position in chapter seven). Certain traits of personality become the limit to what is constituted as a socially valuable and legally recognisable identity. What Cornell calls for through the imaginary domain is the ability to narrate the vision one has of oneself, calling on law

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[25] *Ibid.*
[26] *Cornell* (n 4) 38.
[27] *Jenkins* (n 24) 9.

to defend the constitution of that vision, within the scope of the harm limitation, and to embrace those 'excesses' of identity without defining, delimiting or denying them.

Janice Richardson has considered the structure of the imaginary domain in relation to Foucauldian notions of power, the role of the state, and Cornell's reliance on the individual as a subject with rights. Richardson's overarching critique of the 'imaginary domain' is that Cornell's understanding of the 'person' relies on the legal creation of what constitutes a person and that this is inherently limiting in terms of self-definition and self-determination.[28]

Richardson notes, 'being a person means being subject to law. This undercuts Cornell's ability to define ourselves; it makes law integral to our self-definition from the start'.[29] For Richardson, if the basis of the conceptualisation of self stems from an understanding of the person as legal entity, that legal entity is already infused with legally proscribed parameters. Although the structure of the imaginary domain challenges the regulatory nature of law, law's presence, and the explicit rationale that formulate the rights bearing subject, undermines a conceptualisation of self, untrammelled by legal norms. Recourse to legal mechanisms in order to bring about social change can fall into the trap whereby such mechanisms may manipulate the detail of law whilst maintaining the overarching and regulatory structure of law. The imaginary domain relies on law to give it protection and to make it a socially legitimate and entrenched provision for the protection of identity. Cornell desires the individual to be that source of definition of identity, but that definition is curtailed by legalistic limits and confines of acceptability and permissibility.[30]

I would argue that Cornell is aware of the limitations of a legalistic definition of personhood but exploits law's conception of personhood for her own means, using it to her own deconstructionist advantage. Cornell troubles the way in which she uses ideas of personhood and the way in which she envisages the role of law in individual lives. Richardson posits:

> Cornell stress's our ability to imagine ourselves differently - It is this indefinable and unregulated vision held within the 'imaginary domain' that is to be protected by law, but crucially not defined by law and only subject to the harm limitations. Furthermore, law itself is central to her

[28] Janice Richardson, 'A Refrain: Feminist Metaphysics and Law' in Janice Richardson and Ralph Sandland (eds), *Feminist Perspectives on Law and Theory* (Cavendish Publishing, London 2000).
[29] *Richardson* (n 28) 125.
[30] *Ibid.*

> definition of 'who we are today', because as part of our collective imaginary - we view ourselves as subjects with rights.[31]

The rights based paradigm of law and the central tenets of what it means to be a legal person are constantly foregrounded as the position upon which all other conceptualisations of the imaginary domain are mapped. Therefore, although law may not give us liberty or freedom in any absolute sense, the imaginary domain does help to reformulate the way in which law considers visions of the self, unconstrained by specific legal determinations.

The formulation of self is bound to conscience and consciousness and is what Cornell would refer to as the 'sanctuary of personality', 'in that who we are as unique beings is inseparable from how we mark out a life with its commitments, values and responsibilities'.[32] Cornell's imaginary domain has a foundation that relies on self-determination. She asks us to look to our imaginations, to consider what we can become rather than continue to view ourselves solely from within the social matrix in which we are already embedded.[33] Cornell asks that individuals be given the space to reimagine their gender and sexuality, to no longer have the equality paradigm as the goal of rights jurisprudence, and instead move toward a conception of rights that embraces the concept of the imaginary domain. The resultant structure would enable individuals to configure the form their sexed and gender identity may take within that space. The right to the imaginary domain should be granted to all, and that right should be protected, rather than defined, by the liberal framework of law.

The impact of the move from equality to freedom for asylum claimants

Identity claims predicated upon freedom rather than equality would, I suggest, destabilize the asylum courts' reliance on particular configurations of gender and sexuality and the socio-cultural significance accrued to those positions. I address the transition from equality to freedom by considering why the current model of equality law, which maintains a hierarchical and aspirational response to discrimination, is

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[31] *Richardson* (n 28) 130.

[32] *Cornell* (n 4) 38.

[33] Nedelsky has noted 'we must develop and sustain the capacity for finding our own law. The idea of 'finding' one's law is true to the belief that even what is truly one's own law is shaped by the society in which one lives and the relationships that are a part of one's life. Finding also permits an openness to the idea that one's own law is revealed by spiritual sources, that our capacity to find a law within us comes from our spiritual nature' Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 10.

problematic for Cornell. How would the imaginary domain challenge this? And how could the imaginary domain's foundation of freedom improve the position of the lesbian or gay asylum seeker?

Formal equality provisions, such as rights to gay marriage/civil partnership, have been accused of failing to deconstruct gender norms, of binding individuals to particular constructions of relationships, and reifying stereotypical western constructs of lesbians and gay men.[34] However, within asylum hearings, the versions of male homosexuality that the court responds to are those that replicate a vision of homosexuality that is sexually active, invested in the gay scene, and out of the closet. Rejecting stereotypical heterosexual relations of monogamous family life, this particular vision of gay male sexuality is heavily indebted to a western construct of the urban gay man, which is problematic in terms of its replication for asylum seekers.[35] For lesbians the parameters are slightly different; women will ideally be in a relationship, but the sexual element of that relationship need not be at the fore and they will be at risk of forced marriage and physical violence.[36]

The court's prior willingness to excise or closet sexuality from the broader aspects of life, such as work, social life, religion, ethnicity, culture, indicated a fundamental failure to recognise that private life informs public.[37] I argue that relying on freedom rather than equality would have two effects: constraints on the ability to live out sexuality would represent an impermissible limit to freedom – closeting in order to prevent major or minor threats of persecution would therefore constitute grounds for asylum as a violation of the right to bodily integrity within the terms of the minimum conditions of individuation. Secondly, freedom of sexual self-definition would alter the way in which identity is narrated in court. Freedom would give claimants an opportunity to contextualise their sexual history taking into account periods of freely chosen or enforced heterosexuality, and would engage with a

[34] See for example Civil Partnership Act 2004 (Chapter 33) and sections pertaining to wills, tax considerations, pension benefits.

[35] Some of the difficulties refugees have in replicating the western gay male lifestyle is that they cannot afford to participate in urban gay male culture and there may be problems with racism within those scenes. Furthermore, declarations of homosexuality can be difficult if the refugee is still firmly embedded within an ex-patriot community that may be hostile to such claims. I expand on this discussion to a greater extent in Chapters five, six and seven.

[36] See *Krasniqi v Secretary of State for Home Department* [2006] EWCA Civ 391.

[37] It is worth noting that although recent case law suggests that closeting/discretion ought no longer to be an option for the court, it remains to be seen whether there may be permissible levels of discretion invoked by the courts that would nevertheless still result in réfoulement.

narration of sexuality that would not have to follow particular stereotypical enactments of westernised homosexuality.

Traditional claims to formal equality for women, for example, endorse a configuration of rights based on the status of men as aspiration.[38] The imaginary domain however, moves beyond a comparison of the sexes towards a deconstruction of sexed identity. Cornell's concept provides for a status whereby individuals have the freedom to recreate versions of how they live out their sex, their gender and their sexuality. 'Cornell has long held that the ultimate goal of feminism should not be to empower women at the expense of men, but to liberate all from the oppressive confines of a gender system that, in myriad ways, restricts what it means to be a "woman" or a "man" – i.e., a sexed being – in all areas of social, economic and political life'.[39]

Critique of equality arguments has been levelled at the process of formal recognition.[40] Formal recognition of specific identity groups can have a harmful effect on those whose identities fail to be recognised or those who do not desire recognition; furthermore, granting recognition to groups often relies, inevitably, on a static conception of identity. For Cornell this is a problematic tension within the rights paradigm. She notes:

> The linking of recognition to authenticity such that stability is presumed, implicitly or explicitly raises some serious questions...Recognition tied to authenticity implies that it is already – constituted identities that are at stake; ...new formations of minority cultures can fall through the cracks. Only the form of minority culture acknowledged by the dominant culture – institutionally, socially, politically – will receive official status.[41]

Dependence upon a stable and "authentic" rendering of sexual identity is particularly problematic for lesbian and gay refugees. Social constraints and expectations of heterosexuality can mean that LGBTQ individuals perform normative sexuality publicly whilst privately having LGBTQ relationships. The purported 'antithetical' nature of these relationships can have the effect of making the claimant's story lack coherence and authenticity and thus constitute grounds for rejection. Lesbians and

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[38] *Cornell* (n 4) 6.
[39] *Cornell* (n 5) 149. This has been most lucidly explained by Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, Oxford 1990).
[40] Carl F. Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart Publishing, Oxford 2003); Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political Philosophical Exchange* (Verso Publishing, London 2003).
[41] Drucilla Cornell and Sara Murphy, Anti-racism, Multiculturalism and the Ethics of Identification' (2002) 28 Philosophy Social Criticism 419, 421.

gay men for reasons which range from a freely chosen opposite sex partner, to 'survival' and 'cultural' and 'social' expectation must often live out a publicly heterosexual life that includes marriage and children rendering their expression of lesbian and gay sexuality hidden and/or intermittent.

A further concern regarding the granting of formal rights to minority identities is that the current system for acknowledging and legitimating rights, dependent upon specific conceptualisations of those identities, may negate recognition of new minority cultural formations.[42] The imaginary domain, in contrast, provides a framework through which to reframe and rethink identity rights jurisprudence. Cornell vests responsibility for authorship of one's own life in the individual. She notes '[t]he imaginary domain gives to the individual person, and to her only, the right to claim who she is... Such a right necessarily makes her the morally and legally recognised source of narration and resymbolization of what the meaning of her sexual difference is...'.[43] Identity is for the individual to define, and ought not to be dependent on the status granted to it by legitimating legislation.

Equality law has, for Cornell, had a trajectory of recreating dynamics of accession, accession to paradigms of sameness. Cornell notes in *At the Heart of Freedom* and *The Imaginary Domain* the inadequacy of formal mechanisms of equality jurisprudence. She asks whether the replacement of formal equality with substantive equality would address the imbalance that can be found, for example, in family life. Beginning with a 'maybe', she then goes on to state:

> But we would still be taking an idealized representation of men as our measure of comparison....the gender comparisons inherent in formal equality confine us to traditions inseparable from the view that women are unequal to men, while excluding innumerable forms of sexual difference from the reach of justice. Implicit in our insistence upon freedom from gender comparison is the demand for the space to reimagine our sexual difference beyond the confines of imposed notions of what it means to be a man or a woman'.[44]

Cornell's desire for freedom from gender comparison is an aspiration to liberate all from the confines of normative enactments of gender and sexuality. The right to

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[42] For more on the critique of formal recognition of minority rights see Elizabeth Grosz, 'Drucilla Cornell, Identity and the Evolution of Politics' in Renee Heberle and Benjamin Pryor (eds), *Imagining Law: On Drucilla Cornell* (State University of New York Press, Albany 2008) 213; *Cornell and Murphy* (n 41) note 'politics of recognition need not be tied to any authentic or given identity but must also be bestowed on strategic or provisional identities...not just those with a ...recognizable history'.
[43] *Cornell* (n 4) 10.
[44] *Cornell* (n 4) 6.

sexual self-definition is part of escaping from the status of the degraded other and to demand recognition as a 'person' with all of the concurrent rights and responsibilities of that status.

The demand for personhood and the rejection of positions of degradation has long been a feminist project. Questions of how to render woman as the legitimate subject of rights requires a rethinking of the way in which they are constituted in society. Cornell's response is to configure sexuality through the 'sexuate being'. The sexuate being is used to 'represent the sexed body of our human being when engaged with a framework by which we orient ourselves'.[45] The frameworks by which we orient ourselves are the social norms, rules and expectations that encode the parameters of acceptable sexed and sexual identity. For Cornell the liberatory aspect of the imaginary domain is to be able to imagine and reimagine the multiple versions and visions of our sexuate being. Cornell notes, 'to even aspire to the self-representation of our sexuate being we need freedom to explore without fear of the representations that surround us.[46] The individual needs to be the legal and moral locus of what her 'sexual difference' means to her.[47]

The reformist and reimaginative work that the imaginary domain does is an addition to literature, which seeks to challenge the rendering of culturally subordinate groups. Law's construction of identity has been contested by marxists,[48] feminists,[49] postmodernists[50] to name but a few. Penelope Deutscher has suggested:

> what is needed is legal institutions not just limited to an affirmation of differences designated actual prior to legal change. What is needed is legal reform which *could create the conditions for inventing new cultural*

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[45] *Cornell* (n 4) 7.
[46] *Cornell* (n 4) 8.
[47] *Cornell* (n 4) 10.
[48] Paul du Gay, *Consumption and Identity at Work* (Sage Publications, London 1996); Chantal Mouffe, 'Post-Marxism: Democracy and Identity' (1995) 13(3) Environment and Planning D: Society and Space, 259.
[49] Shane Phelan, *Identity Politics: Lesbian Feminism and the Limits of Community* (Temple University Press, Philadelphia 1989); Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' (1991) 43(6) Stanford Law Review 1241; Chandra Talpade Mohanty, Ann Russo, Lourdes Torres (eds), *Third World Women and the Politics of Feminism* (Indiana University Press, Indiana 1991).
[50] Linda J. Nicholson & Steven Seidman (eds), *Social Postmodernism: Beyond Identity Politics* (Cambridge University Press, Cambridge 1995).

identities whose legitimacy of recognition did not rely on their being original, proper, nor in their lying before the law'.[51] [emphasis my own]

For Cornell the imaginary domain embraces the same qualities as those proposed by Deutscher, not just an affirmation of new or existing identity categories given status before the law, but creating the conditions that allow those identities to develop. Cornell posits the imaginary domain as a space in which 'law can give us the right to represent our sexuate being, and can protect the imaginary domain as a space we need to contest, imagine and engage with the meanings given to gender, sex and sexuality. But it cannot give us a substantive definition of what constitutes actual freedom for any individual person, because to do so would violate her right to self-representation of her sexuate being'.[52] The imaginary domain affirms Deutscher's premise that rights based on identity cannot and ought not to be dependent on formal legitimation through law but the conditions must be in place that would enable individuals to freely explore the way they constitute their own identity.

Claims to justice by women have also considered the problematic rendering of women as 'spectral' within the symbolic order; if women are not viewed as agentic beings in their own right, if they are not viewed as bearing agency within the social imaginary, how can they be rendered as persons? Gatens draws on Irigaray in order to problematise the perpetually unheard demands of women. She suggests, 'the imaginary is not confined to philosophers and psychoanalysts, but is a social imaginary which is taken to be reality, with damaging consequences for women who, unlike men, find themselves 'homeless' in the symbolic order'.[53] Gatens' use of homelessness represents the indefinite nature of woman within social reality. Within the social order woman is enacted as fantasy or ghost; she is the shadow of the masculine, lacking definitive form. Cornell has spoken in similar terms when considering degradation. For Cornell reductions to stereotypes of sex, objectified fantasies and the external symbolizations or definitions of sex, degrade women and

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[51] Penelope Deutscher in Ralph Sandland, 'Feminist Theory and Law: Beyond the Possibilities of the Present' in Janice Richardson and Ralph Sandland (eds), *Feminist Perspectives on Law and Theory* (Cavendish Publishing, London 2000) 106.
[52] *Cornell* (n 4) 176.
[53] Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (Routledge, London 1996) ix.

perpetuate their unreality.[54] Women are rendered as that which is not male but are determined by the masculine standard, existing as the phantasm of men.[55]

The essential predicate of the move towards freedom is to ensure that the version of freedom enacted by one does lead to the "unfreedom" of others. Cornelius Castoriadis wrote:

> I want the other to be free, for my freedom begins where the other's freedom begins... I do not count on people turning into angels, nor on their souls becoming as pure as mountain lakes... but I know how much present culture aggravates and exasperates their difficulty to be and to be with others, and I see that it multiplies to infinity the obstacles placed in the way of their freedom.[56]

Castoriadis's purpose resonates with the aspirations held by proponents of the imaginary domain. Castoriadis begins with a request for freedom for both self and other. He considers the intertwinedness of the individual with the social. By denying the other freedom, those that are granted freedom consolidate their position and further expropriate and deny the equal humanity of others. This concern has also been taken up by Judith Butler, who remarks on 'the cost of articulating a coherent identity position by producing, excluding and repudiating a domain of abjected spectres that threaten the arbitrarily closed domain of subject positions'.[57] Butler cogently highlights the exclusionary practices and the problematic nature of formal equality litigation. The bind of arguing from a foundation of static identity formation is that, on the one hand, this produces positive formal results for those who fit the judicial model of acceptable rights bearing subjects, but on the other, places those outside of this position as even more peripheral.

Cornell's project conceptualises a freedom, which although inculcated in law is not defined by law. Freedom is viewed as that which cannot be understood in terms of granting an individual a set of freedoms that are then denied to others, freedom must be conceptualised as the possibility for all to pursue their own vision and version of life.[58] She explains:

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[54] *Cornell* (n 5) 10.
[55] Also see Moya Lloyd, *Beyond Identity Politics: Feminism, Power and Politics* (Sage Publishing, London 2005).
[56] Cornelius Castoriadis, *The Imaginary Institution of Society* (Polity Press, London 1987) 92.
[57] Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, Stanford, 1997) 49
[58] Vikki Bell has written on the psychological impact that comes with the foreclosing of freedom and with the foreclosing of love in the context of bi-racial relationships that 'it's rather what it means to have one's desire formed as it were through cultural norms that dictate in part what will and will not be

> the psychoanalytic understanding of the process by which we assume responsibility for ourselves through claiming our own desire as a moral matter, moral in that it marks us as separate and responsible for who and how we desire, also could explain why we desire the freedom of others and not just negatively put up with it... we are dependant on others when we come into existence as subjects, and in my language as persons through the discourse of the big Other, our freedom is always social and relational.[59]

The excavation of a space, a psychic, moral, ethical space, in which to situate an understanding of the self outside of normative validations of appropriate claims to gender and sexuality is essential for freedom to exist. Through an acknowledgment of this space the possibility arises to reclaim one's voice, a version of that voice that claims sexuality. The broader project of proponents of the imaginary domain is to deconstruct understandings of gender and sexuality, providing liberation from normative representations of masculinity and femininity that stifle conceptions of self. In the following section I consider how the imaginary domain would aid the production of testimony and its impact on identity in court.

Producing testimony

When claiming refugee status, asylum seekers provide a written statement detailing their experiences of persecution and the grounds upon which persecution occurred. For those claiming asylum on the grounds of sexuality, it is essential to indicate the social and historical context out of which their claim arises. Context includes when they first realised they were LGBT, their past sexual history, their current sexual activity, how public or private their sexuality is, the physical and psychological ramifications of that public/private split, political involvement in

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a lovable object, what will or will not be a legitimate form of love' Vikki Bell, *Feminist Imagination: Genealogies in Feminist Theory* (Sage Publications, London 1999) 120. What Bell enunciates is the internalised effects of this negativity towards relationships and the profound impact this can have on the way in which the self polices its own desires and the way in which that desire is foreclosed by external forces and societal disapprobation. All of these things exasperate and aggravate the way in which an individual can imagine their optimum vision of their familial, sexual and affective existence. Creating new ways to combat internalised dictates is one of the strengths of the imaginary domain. Karin Van Marle has noted Cornell's reference to the 'internal tyrants' which constrict and conflict with an individual's sexuate being (Karin Van Marle, 'The Capabilities Approach', 'The Imaginary Domain', and Asymetrical Reciprocity': Feminist Perspectives on Equality and Justice' (2003) 11 Feminist Legal Studies 255, 260. Cornell refers to the hypnotic effect of these tyrants she notes that they 'bind us to images of ourselves, and imaginary demands on us that can prevent us from having a sense of entitlement and from claiming our own desire' Drucilla Cornell, *Between Women and Generations: Legacies of Dignity* (Palgrave, New York 2002) 30.

[59] Drucilla Cornell, 'Thinking the Future, Imagining Otherwise' in Renee Heberle and Benjamin Pryor (eds), *Imagining Law: On Drucilla Cornell* (State University of New York Press, New York 2008) 235

LGBT/feminist/activist groups or communities and any other factors that have contributed to their persecution. The narrative provided can, for some asylum seekers, be the only opportunity they have to explain their situation to officials in the incumbent state. Those whose cases fail and are refused leave to appeal come to the end of their legal journey within the UK. Those who are given leave to appeal may have to reproduce parts of their narrative at an immigration and asylum tribunal in front of judge and counsel. The future of the refugee within the UK is dependent on whether the immigration judge believes their story and thinks it worthy of the grant of refugee status. The testimony produced must be accessible, chronologically accurate and factually specific. It is important that the incidences of persecution related to sexuality come to the fore of the narrative.

Case law has shown that the asylum court's preferred image of gay claimants are those that are out of the closet, have an active sex life, are involved in activities such as political campaigns and have been subject to persecutory experiences, ideally violent and repressive rather than just acts of verbal or social intimidation. Additionally, lesbian or gay sexuality should be a continuous and ongoing desire within the life of the individual. The presence of an opposite-sex former or current sexual partner, or children from a former relationship, can undermine a claim to asylum on the grounds of sexuality. The court fails to take into account the social pressure to marry which leaves the individual with little or no room to contest social norms. The desire for a rendition of identity, which is unwavering in nature, helps little with claims to asylum and fails to allow for the social reality of living LGBT sexual life. For the court an individual is either LGBT or not, and the ability to not be, or the ability to closet sexuality has, in the past, rendered claims invalid. If the imaginary domain was acknowledged by law as the site in which an individual develops an understanding of their sexuate being, and consequently gave legal protection to the sexuate being, the purchase this would have for refugees would enable a more nuanced and less constrained version of sexuality to be produced in court, allowing for multiple narratives of the way individuals embody their own sexuality.

Leaving the home state in order to claim asylum because of the ramifications of sexuality marks for some the commencement of a narrative that vocalises hope for

an alternate type of sexual existence.[60] In order to produce a narrative of self, Cornell relies on the concept of the imago. The imago is 'a primordial image of how we hang together that each one of us lives out'.[61] The imago is fundamental to developing a definition of self. It is the framework upon which the sexuate being rests and provides a structure to the narrative that accompanies life. The imago is an essential component of self-conceptualisation. The imago allows for the individual to be able to claim themselves as a person before the law and incorporates an understanding of the self as the source of agency.

Cornell explains that from the moment most people are born, a sex is assigned and the ramifications of that sex are levied upon them. Throughout our lived experience our ego is developed in a manner that may be, for some, aligned with gendered identity, and for others may be aligned to a transgendered identity. This gendered identity, although physically manifested externally for many, is also intrinsically manifested within our conscious identity. Cornell notes:

> we cannot see ourselves from the outside as men or women, gay or straight, we see ourselves so deeply from the "inside" as "sexed" that we cannot easily, if at all, re-envisage our sexuate being. This inner 'sexed sense is the sexual imago that is the basis of the unconscious assumed persona through which we represent ourselves and indeed the ongoing narrative of ourselves. This intrinsic feature of our personality, fundamental to our identity, and thus intrinsically tied to our dignity is an intensely held part of who we envisage ourselves to be.[62]

The imago, as narrated by the individual in court, would represent their journey toward selfhood, indicating the complexities of this journey. Cornell's discussion of the road to selfhood begins with the definition of persona as 'what shines through a mask'. Cornell asks us to 'conceptually differentiate between the 'mask' and the 'self'.[63] The mask represents identity embedded in social expectation and gendered performance – a 'paint-by-numbers' composite, pre-mapped, pre-posed picture of social and sexual expectation. The 'self' is seen to reside behind the mask, a self that both conflates and conflicts with this 'masked' self. In differentiating between

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[60] This isn't always the case. There is an stereotypical assumption that homosexuality is performed in a particular way and for many refugee seeking LGBT identified individuals the way they live their sexuality here and at home does not differ, the effect that this has is that judges then assume that such individuals could live both here and there with little abuse. See *RG (Columbia)* [2006] EWCA 37; also Oliva M. Espin, *Women Crossing Boundaries: a psychology of immigration and transformations of sexuality* (Routledge, London 1999).

[61] *Cornell* (n 5) 6.

[62] *Cornell* (n 4) 37.

[63] *Cornell* (n 5) 4.

'mask' and 'self' Cornell believes the opportunity becomes available to visualise our potential and consider our options for self-definition. The ability of the person to shine through the mask is the ability of the person to view him/herself as whole and therefore to view him/herself as a person, but also to actualise, to vocalise a reimagined identity – the imaginary domain provides the necessary space for developing this self-conceptualisation.[64]

Cornell references the ways in which individuals have sought to express the identity, the 'sexuate being', captured within what could be perceived as an imaginary domain through mediums such as art and literature. *At the Heart of Freedom* sees Cornell using spatial metaphors in order to outline the inspiration for the imaginary domain. Cornell's definition of space is inspired by its use in feminist literature, with particular reference to the artwork of bell hooks and to Virginia Woolf's *A Room of One's Own*. When Cornell refers to hooks' desire to claim a space, she is responding to hooks 'contest with imposed personas' and her desire to 'imaginatively recollect herself'.[65] In order for hooks to escape from what she terms the 'matrix' of abuse, which involves the legacy of slavery within her life and the routinized 'abuse' and 'torture', 'seduction' and 'betrayal' by family, hooks turns to performance art and painting and these become her 'location[s] of recovery'.[66] Within this location of recovery, hooks begins to *re-present* herself. She creates the 'imaginary healer' whose role within the psyche is to see her differently. 'The ideal representative was imagined as from the other space and thus could come to embody the self not ensnared in the matrix of abuse'.[67] The division that hooks consciously creates within her psyche and which is physically manifested in her art allows her to envision the woman she wants to become. The psychic space that hooks relies on gives her the opportunity to imagine who she can be outside the tyrannical forces that dominate and demean her existence. hooks expresses through art that which resides in her psyche, and it is within the psyche that we can begin to reimagine existence. The art that hooks produces represents some of the formations and dreams located in the

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[64] *Thurschwell* (n 13) 758. The etymological basis to the word 'persona' is more performative and active than the concept of a mask allows. The mask seems immobile, it connotes an understanding of the public self as façade and this seems to somehow inhibit the dynamicism of identity. What the imaginary domain in correlation with this mask provides is the space in which to develop a sense of one's persona, thus perhaps reliance on the etymology rather than the use of persona that Cornell uses assists us in understanding Cornell's project.

[65] *Cornell* (n 4) 9.

[66] *Ibid.*

[67] *Ibid.*

imagination; art in this case becomes the physical manifestation of the images held in the imaginary domain.

Cornell also makes direct reference to Virginia Woolf's use of space in *A Room of One's Own*.[68] Cornell discusses Woolf's anguish over the battle for a room of one's own in terms of the physical space necessary for Woolf to write. Coterminous with the desire for space in which to write is a desire for the reclamation of psychic space, the space in which to develop dreams in freedom; a freedom that recognises that individuals are to be the author's of their own lives, but that in order to author their own lives they need to be able to exist in circumstances that encourage and foster such life chances. In Michael Cunningham's 2001 novel *The Hours*[69] we see Woolf portrayed as constrained not only by her role as the good wife, 'the angel in the house', but trapped by mental illness. *The Hours* maps Woolf's journey into depression. This journey passes through her desire to transgress the social mores of the time, the conflict between her external identity as daughter and wife, her desire to write, and her failed attempts to escape domesticity. The language necessary for Woolf to slip out of this role was difficult to vocalise in her domestic life, but she was able to narrate these feelings through her writing, which challenges and questions the conceptualisation of woman.[70] Woolf's writing could be said to have stemmed from an imaginary domain, the space within which one can claim self and give space to the development of that self. Both hooks and Woolf challenge and attempt to overcome the oppressive forces that twist and demean their identities. They rely on the imagination to express through words and art their desire to claim their own identity, to claim their bodies as their own and develop their own understanding of their personhood, untrammelled by social normativity.

To be viewed as persons, individuals must have the ability to decide the form and function that their bodies will take, essentially to have control over physical selves and be given the space in which to develop their vision of self. LGBT refugees are constrained over perceptions of unacceptable 'lifestyles' in the home state. Cornell relies on the minimum conditions of individuation, in order to garner personhood. The minimum conditions of individuation are:

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[68] (Traid Grafton, London 1977).
[69] (Picador, New York 1998).
[70] This is perhaps most evident in Woolf's *Mrs Dalloway* (Hogarth Press, London 1925) and *Orlando: A Biography* (Hogarth Press, London 1928).

> 1. Bodily integrity, 2. Access to symbolic forms sufficient to achieve linguistic skills, permitting differentiation of oneself from others 3. Protection of the imaginary domain itself.[71]

Bodily integrity ensures that individuals are able to live out their status as legal persons without being subject to physical or mental attacks. LGBT refugees experience such attacks because of their sexuality in the form of physical and verbal abuse, and general social disapprobation. The right to bodily integrity is a basic request to be free from persecution that would injure the physical or psychic self. The right to bodily integrity challenges the courts' prior use of closeting as a protective mechanism. Closeting has been the subject of medical, psychological and sociological studies and the literature indicates the negative impact closeting has on psychological well-being.[72] Sexuality informs identity, the court's prior request to suppress that component of identity is a request for the individual to deny certain aspects of their character, which may have negative ramifications for the individual. The suppression of identity impacts on physical and psychological notions of full bodily integrity.

The second of the minimum conditions of individuation requires access to 'symbolic forms sufficient to achieve linguistic skills, permitting differentiation of oneself from others'. These linguistic skills refer to an ability to speak of the self, and to name and define an understanding of self. There must be freedom through which to reimagine one's identity and to be able to vocalise that. Freedom means being able to embrace components of identity and sexuality without trepidation or fear and without the need to maintain an essentialist account of their form.

Cornell's later work considers the writing of Cornelius Castoriadis and his use of ideas around autonomy and subjectivity. She writes reflecting on Castoriadis' redefinition of autonomy as:

> The establishment of another relationship to the other and the subjects' own discourse, which allows that subject to slowly claim for itself decisions and choices that are figured as grounded in the subject ... In our struggle for individuation, and in our effort to claim our own person, which is always a process of reworking the way in which we imagine

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[71] *Cornell* (n 5) 4.

[72] Elizabeth McDermott, Katrina Roen, Jonathan Scourfield, 'Avoiding Shame: young LGBT people, homophobia and self-destructive behaviours' (2008) 10(8) Culture Health and Sexuality 815.

> ourselves, we slowly claim our own person as that in which our own choices and decisions have indeed become ours.[73]

Cornell acknowledges that individuals arise out of the social context within which they are embedded and that this can result in contestation over the idea one has of self versus the idea society imposes. Conscious efforts are necessary to rethink those normative inculcations of gender and sexuality, and transgression of those visions is a symbolic journey to find a less constrained version of self. The psychological and legal journey to speak of the self, in an environment that will not treat the individual as a degraded other but will instead dignify that identity with legal protection, is perhaps the fundamental point of a claim to asylum for LGBT refugees.

Conclusion: Is the 'imaginary domain' the path to freedom?

The imaginary domain is a concept that Cornell unashamedly posits as giving the individual the ability to dream their future. The dream of a new future is a call to change that explicitly draws on the imagination as a mechanism through which change can occur. The dream of a new future and the way in which that is achieved is somewhat utopic in its optimism. The imaginary domain is an addition to bodies of praxical thought, dedicated to mechanisms for social transformation as designed by a long line of activists, scholars and perhaps those that can only be referred to as daydreamers. Current mechanisms that pertain to social justice, for example, equality legislation stemming from both the UK and the European Union, were intended to combat particular discriminatory behaviours on a multitude of grounds, envisaging their own brand of social change. Formal legislation, whilst symbolically attractive and at times practically useful, has had the effect of further juridifying identities, giving those identities particular legal, and consequently, social meaning. The problematic consequences of this juridification is that whilst the implications of such legislation leads to assumptions of social equity and parity of treatment, it further delegitimises and excludes those not seen to fit within the equality rights paradigm. Additionally, the formulation of greater regulatory controls of legally permissible and

[73] Drucilla Cornell, 'Thinking the Future: Imagining Othrwise' in Renee Heberle and Benjamin Pryor (eds), *Imagining Law: On Drucilla Cornell* (State University of New York Press, New York 2008) 234.

impermissible identities impacts on what are taken to be legitimate sexual identities, therefore limiting freedom of sexual self-expression.

As indicated in the previous section, juridically legitimate identities are somewhat stagnant in the way in which they are legally conceived. That new grounds for equality can be added to legislation or that particular facets of identity can be included, shored up, or brought to the fore within jurisprudence can mean that the fine detail of identity may be partially negotiable. Nevertheless, law and legal equality relies on an understanding of the person as definable and definitive, and this of course presents numerous problems when searching for freedom within law. Costas Douzinas has written '[f]reedom is an ambiguous concept that starts from past determinations and crystallisations and continuously defies them in the name of an ever elusive and deferred future'.[74] The imaginary domain is a concept which is defiant by nature; it challenges social, cultural and legal conceptualisations that have crystallized into norms and instead vests the indeterminacy of identity with the individual. Determination of the imaginary domain is forever elusive; it is forever on-the-run.

The desire for freedom is a central goal of those advocating for the imaginary domain's incorporation into law. Within the framework of the imaginary domain, the individual is liberated from law's definitional confines but is concurrently protected by its overarching presence and imposition of notions of justness and rights to legal personhood. As a concept the imaginary domain never sets out to dismantle law as a structure, rather it acts as a device that contests the way in which identity and personhood are considered within it.

As a heuristic device the imaginary domain pushes the structure and the boundaries of law and redefines them. It provides a space within which to play with identity and challenges its constitution. Douzinas has written, 'whatever type of social recognition we may fantasize about, whatever dream of completeness gives us our sense of identity, they all include a claim to existential integrity...free of determination and able to resist external imposition'.[75] The importance of maintaining integrity and wholeness of self before law is a central component of what it means to be a legal person. Refugees, by legal definition, have their integrity challenged in numerous ways: in their experience of persecution; in fleeing

[74] *Douzinas* (n 3) 223.
[75] *Douzinas* (n 3) 234.

persecution; in arriving in the incumbent state and having to prove their identity; in having to prove their homosexuality. Proving that an individual is LGBT requires the ability to narrate the self and not to be stifled by manifestations of gendered, sexual and racialised normativity. Douzinas's existential integrity is a call to reframe the way in which the law frames identity, individuality and the claimant before the court.

A concept such as the imaginary domain would be a useful tool in rethinking the way identity is conceptualised before the law. The imaginary domain would help refugees to narrate their lives and would expect the legal system to respond to that narrative in a way that affirms the identity and dignity of the individual, so long as that identity does not transgress the 'harm' limitations. The imaginary domain is not, for Cornell, just a theoretical position that resides in utopia; the purpose of the imaginary domain is to engage with concrete contextual legal structures. The limits that law may set in recognising particular identities are precisely the boundaries that a device such as the imaginary domain engages with and attempts to deconstruct. The imaginary domain brings the 'potential' of identity into law; it brings to the legal system those imaginative possibilities that individuals wish to explore and live out without social disapprobation, and contests the restrictive legal limits that individuals currently grapple with.

In the following chapter I engage with literature that considers the way in which narratives are produced in legal environments such as the courtroom and in legal academia. I ask how individuals have challenged and transgressed normative methods of narrative production and have produced alternative conceptualisations of identity. I ask whether these particular productions of identity are akin to the production of an imaginary domain. I consider this by looking at two sites. The first of those sites is the production of narrative literature within academia, particularly the work of Critical Race, lesbian and gay and feminist scholars engaging with critiques of law. The second section considers the production of testimony by expert witnesses in court, and the way in which identity is narrated. I indicate the problematic position of the lesbian or gay expert witness and explore their interactions in the courtroom through their attempts to influence the decision of the court by playing up homonormativity.

CHAPTER THREE

The role of narrative in academia and in court

Introduction

In Chapter two I drew on the conceptual framework of the imaginary domain, positioned as a philosophically informed and legally acknowledged space that encouraged self-determinative understandings of sexual, affective and familial existence. The imaginary domain gave individuals the opportunity to envisage identity unconstrained by normative enactments of gender and sexuality. The factors that influence the production of normative sexed and gendered identity include, amongst others: social pressure in the form of traditional moral values, legal endorsement and reification of heteronormative behaviour and liberal constructs of the legal person. I claimed the imaginary domain facilitated traditionally excluded 'others' such as women, LGBT identified persons and people of colour to bear a legal personhood long since denied or afforded within particular normative legal parameters. The imaginary domain enabled individuals 'to represent and articulate the meaning of their desire and sexuality within the ethical framework of respect for the dignity of all others'.[1]

I suggested the imaginary domain was a useful concept for assisting claims to refugee status based on sexuality, rendering it impermissible to réfoul an asylum claimant back to a state where they would be subject to persecution because of their sexuality or where their sexuality would be subject to intense disapprobation. Violation of the sexuate being as developed in the imaginary domain would be an impermissible negation of personhood and would therefore constitute grounds for a claim to asylum. As a framework that challenges heterosexism and homophobia, the imaginary domain's emphasis on self-determination, its predication on freedom, and the foregrounding of the individual's narration of their identity provide alternate ways

[1] Drucilla Cornell, 'Autonomy Re-Imagined' (2003) 8(1) Journal for the Psychoanalysis of Culture and Society 144, 144.

of considering sexuality based asylum claims. The self-definitional and narrative basis to expressing the imaginary domain is a key component in liberating refugee testimony from the stultifying confines of traditional testimonial production. Narratives, inspired by the aspirations to identity held in the imaginary domain, could I argued, step outside of the traditional legal framework of appropriate formulations of sexuality and gender, embracing a more personalised account of the context, history and society that has contributed to and shaped identity.

In this chapter I shift the analysis away from the imaginary domain's engagement with legal understandings of equality and personhood. I turn instead to the way in which the imaginary domain has purchase as a relational concept, complementing the narrative work of Critical Race theorists and the role of expert witnesses within LGBT rights cases which de/reconstruct terminology such as spouse, family, etc. I consider the possibility and presence of resistance within academic writing, and the potential for resistance through the role of the expert witness in court. I argue that a concept such as the imaginary domain with its emphasis on a de/reconstructed understanding of freedom, equality and personhood could contribute to and work alongside critical race scholarship in academia as a useful resource for expert witnesses by assisting in deconstructing the normative framework of law.[2] One of the key points of connection between the imaginary domain, narrative scholarship and the production of LGBT expert testimony is the role of resistance – resistance to normative sexual, affective and familial organisation; resistance to normative methods of writing within the production of academic work; resistance to traditional interpretations of heteronormative definitions of heterosexually invested terminology in the testimony provided by the expert witness. More broadly the imaginary domain's relationship to critical narrative provides a mutual site for contesting the normative values and presuppositions of the legal system. The imaginary domain is a key site for envisaging change, for envisaging the future and

[2] For more on CRT as resistance work see Daniel G. Solorzano and Dolores Delgado Bernal, 'Examining Transformational Resistance Through a Critical Race and Latcrit Theory Framework: chciana and chicano students in the urban context' (2001) 36 Urban Education 308, 342; Richard Delgado, *When Equality Ends: Stories About Race and Resistance* (Westview Press, Boulder, Co. 1999); Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (NYU Press, New York 2001); Dorothy A. Brown, *Critical Race Theory: Cases, Materials and Problems* (Thomson West, St Paul Minnesota 2003). I use the term resistance to indicate actions that challenge and undermine normative conceptualisations of sexuality, gender or other behaviours including transgressive literary styles and terminological interpretation.

Critical Race theory would be the ideal medium through which to express these visions of change.

The purchase that CRT, alongside resistant concepts such as the imaginary domain, has for refugees is to highlight the in-roads that can be made into sites often perceived as impervious to new methodologies, modes of thought or resistant tactical engagement. CRT provides an excellent example of how legal academia can be permeated and disrupted by using the framework of law as a basis for analysis, whilst developing a genre of writing that is subversive in the context of normative expectations of academic jurisprudential commentary. Similarly the narrative interventions of the expert witness, although often acquiescent to the necessities of court, can in major and minor ways shift and distort judicial opinion and expectation and conversely distort the expectation of the expert witness and the political/social communities from which they come.

It seems essential to acknowledge that the position of the legal academic and the expert witness is vastly different to that of a refugee. Nevertheless it is my intent to show that there are techniques of resistance at play in both CRT and expert testimony that correlate to the micro-resistant tactics available to refugees. Critical narratives, the methodology and practice of which, draws on literary techniques intended to subvert normativity, is an exploration in how particular processes and practices can fracture coherent sites. Although there is not an absolute correlation between CRT practices and those resistant practices of refugees there may be slippages, crossovers and methods which inform an understanding of the major and minor ways subversive interventions by refugees can occur within an asylum hearing that are reminiscent of CRT practices and methods. For example the decision on the part of the refugee to withhold information that may damage themselves or those around them or that may be too intimate to share with a court; or the decision to tell the court not just the facts that lawyers require in order to make a case, but to explain to the court the micro and macro details that make up the context and circumstance from which an individual fled and which has personal and political meaning, rather than legal purchase for the claimant.

The power of Critical Race Theory (CRT) lies in its ability to highlight the embedded nature of racism and other forms of discrimination within the academy and wider society through use of non-traditional academic analysis, as exemplified through narrative and storytelling. In the first part of this chapter I discuss the limits

to, and liberation that Critical Race narratives offer to scholarly work. I consider the academic strictures that are placed on narrative writing and thus the limitations that may be placed on the expression of the imaginary domain within legal academia.[3] Scholastic legal work does not have explicit rules over the way in which its stories are constructed as compared to the courtroom, but the furore and critique surrounding much narrative work has shown expectation of a particular content and method within academic writing. Narrative in academia has bucked traditional jurisprudential method and carved out a niche, creating a genre that is resistant, defiant and creative.

The genre of CRT speaks to an engagement with the depth and surface of subjectivity. The inscription of racist discourse onto the skin was challenged and transgressed by CRT scholars. Academia became one of the key sites in which to rewrite the history and futures of people of colour. Writers such as Patricia Williams, Kimberle Crenshaw, Audre Lorde, Richard Delgado, Derrick Bell, Mari Matsuda, to name but a few, are engaged in this reformulation and reinterpretation of the style and content of academic scholarship.[4]

Not all CRT scholars engage with law; [5] my focus in this chapter is on those that do. My emphasis is also on the production of Critical Race Theory that comes out of the American academy. I focus on American CRT for numerous reasons – first CRT was developed in direct response to the exclusion of race from the centrality of

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[3] Within this chapter I am not seeking to take advantage of 'outsider' literature by falsely wedding it to a theoretical concept such as the imaginary domain. It is important to point out that Cornell's imaginary domain is not used in the narrative literature that I am using. My emphasis is to look at the work produced by narrative scholars and think about the way in which it has provided a fresh approach to legal scholarship and how a concept such as the imaginary domain would compliment narrative technique.

[4] Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, Cambridge Massachusetts 1991); Patricia Williams, *Seeing a Color-Blind Future: The Paradox of Race* (Virago Press, London 1997); Mari J. Matsuda, Charles R. Lawrence, Richard Delgado, Kimberle Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment (New Perspectives on Law, Culture and Society)* (Westview Press, Boulder Co 1993); Joan Wylie Hall (ed), *Conversations with Audre Lorde* (Literary Conversations Series, University Press of Mississippi, Jackson, Mississippi 2004); Audre Lorde, *Zami: A New Spelling of my Name – A Biomythography* (Crossing Press Feminist Series, Persephone Press, USA 1982); Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press Feminist Series, The Crossing Press, Berkeley 1984); Richard Delgado, *The Rodrigo Chronicles: Conversations About America and Race* (NYU Press, New York 1996); Adrien Katherine Wing & Jean Stefanic (eds), *The Law Unbound! A Richard Delgado Reader* (Paradigm Publishers, Boulder, Co. 2007); Derrick Bell, *Faces at The Bottom of The Well: The Permanence of Racism* (Basic Books, New York 1993); Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (Basic Books, USA 1989); Mari Matsuda, *Where Is Your Body? And Other Essays on Race, Gender and the Law* (Beacon Press, Massachusetts 1996).

[5] Tara Yosso, 'Whose culture has capital? A critical race theory discussion of community cultural wealth' (2005) 8(1) Race, Ethnicity and Education 69, 71.

scholarly work being produced within Critical Legal Studies.[6] Second, the legacy of slavery, the impact of colonialism and mass migration to the US, all play a particularly central role in the ways in which racist discourses have been and are still formulated. This history informs and provides a unique dimension to the stories and narratives produced by CRT and other outsider scholars. Finally the sheer volume of narrative writing produced in the US is vast and eclectic and provides the most comprehensive body of literature.

Narrative scholarship's engagement with law and society is not just based on singular accounts of the author's experiences; narrative scholars also draw on empirical data, do case law and legal policy analysis, and suggest models for legal reform. According to Delgado 'only one-quarter of the works could be described as written in the story-telling or narrative mode.[7] In this chapter I focus predominantly on the story-telling mode of analysis and its relationship to law and legal academia, and consider whether the imaginary domain is an ally in the production of this genre of literature. Furthermore CRT's use of storytelling as a method for engaging in legal discourse has some parallels with the production of testimonials by asylum seekers – with both speaking to the 'truth' of experience, and both to varying degrees vilified and discredited for producing such 'truths'.

In the second part of the chapter I discuss narratives production in the courtroom through the provision of expert testimony. I consider the conflicts experienced by expert witnesses who must subsume political argument to legal reasoning.[8] I consider the necessity to negotiate or minimise a radical politic in order to be seen as a credible expert witness. I discuss the way in which the imaginary domain of the expert witness could be perceived to be both produced, and mediated, in court. I claim that the imaginary domain of the witness may vacillate between a space of resistance to dominant cultural norms such as heterosexism, patriarchy,

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[6] Kimberle Crenshaw, 'The First Decade: Critical Reflections, Or A foot in the Closing Door' (2001-02) 49 UCLA Law Review 1343. Narrative as a political practice has been around prior to its use as an academic technique for example in the anti-racist, anti-slavery, anti-colonisation, feminist consciousness raising, black, latino/a, chicano/a consciousness raising circles, women's liberation movement etc.

[7] Richard Delgado, 'On Telling Stories in School: A Reply to Farber and Sherry' (1993) 46 Vanderbilt Law Review 665, 669.

[8] In Chapter four of the thesis I invert this analysis and discuss the in-court struggles of the women of Greenham Common who were explicitly political in their legal argumentation. Their use of cause supportive lawyers and expert witnesses was part of a strategy to espouse politics, rather than a desire to create an impenetrable legal defence to their actions.

racism etc whilst simultaneously asserting new conceptualisations of familial and intimate relationships. I consider this via the framework of recent case law, which has challenged terms such as 'family' and 'spouse' in relation to lesbian and gay rights. I ask how the reinterpretation of language can provide moments of resistance to normative impositions of meaning. I question whether the challenge over meaning enables some individuals to access and produce a legislatively materialised form of the imaginary domain, or whether the very act of definition contests the imaginary domain's impulse to remain indefinable.

Contextualising narrative

Outsider narratives, exemplified through the genre of CRT, highlight the entrenched nature of discrimination through a combination of the personal, the political and the legal. Analysis of the role of law in the garnering of formal equality for people of colour has an extensive scholarship.[9] A significant proportion of the analysis of the civil rights movement by legal scholars has focussed on technical legal doctrines, methods of legal reasoning and expositions of legal logic.[10] The rendering of decisions has been discussed using the jurisprudential language of 'rights acquisition', foregrounding law rather than racism in its critique.[11] CRT on the other hand centres the experience of living out racialised identity in society and the systemic nature of race based discrimination. Mari Matsuda has described the genre of CRT as:

> The work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that work towards the elimination of racism as part of a larger goal of eliminating all forms of subordination.[12]

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[9] R. Dyer, *White: Essays on Race and Culture* (Routledge, London 1997); Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness (Gender, Racism, Ethnicity)* (University of Minnesota Press, Minneapolis 1993). Kimberle Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas, *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press, New York 1996); Dorothy A. Brown, *Critical Race Theory: Cases, Materials and Problems* (Thomson West St. Paul, Minnesota 2003).

[10] See Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press, Oxford 2004); Abraham L. Davis & Barbara Luck Graham, *The Supreme Court, Race and Civil Rights: From Marshall to Rhenquist* (Sage Publications, Thousand Oaks California 1995).

[11] For a critical analysis of the foregrounding of law over the individual see Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (John Hopkins University Press, Maryland 1992).

[12] Mari J. Matsuda, 'Voices of America: Accent, Anti-discrimination Law and a Jurisprudence for the Last Reconstruction' (1991) 100 Yale Law Journal 1329, 1331.

The simplicity of Matsuda's definition of CRT belies its radical implication. Not only does CRT engage directly with the deeply entrenched place of racism within law, but, its wider purpose, 'to eliminate all forms of subordination', is an engagement in disrupting, reformulating and negating the entrenched power of the dominant majority within law and legal academia. I correlate some of the practices of CRT to the techniques of resistance performed by asylum seekers. Whereby CRT has it seems an explicitly political purpose this is not as overt or evident in the practices of narrative resistance performed by asylum seekers. Nevertheless there can often be a disruptive quality to an asylum testimony which transgresses the expectation of the court, for example by relying on non-legal narratives which draw on feelings, contexts and associated stories rather than presenting physical proof of that experience.

The centring of race within academic writing, and the methods established by CRT scholars through which to engage with racism, challenges the way academic writing in law is typically produced. Narrative's reliance on personal experience, auto/biography, imagery and metaphor, highlight's the contextual, the specific and the intimate nature of racism.[13] Sherene Razack sees the role of storytelling, within legal scholarship, as disrupting the 'positivist conception of knowledge'. She suggests the dissemination of information between the knower and what comes to be known in law is conceptualised as a straight line guided by objectivity and verifiability;[14] for Razack what CRT and storytelling disrupts is the difference in ways abstraction/specificity are invoked, she notes:

> The rule of law is the 'consistent application of prior stated rules,' a process theoretically uninformed by politics or ethics. Storytelling in law, then, is an intellectual movement that is 'a rebellion against abstractions.' Its purpose is to interrogate the space between the knower and the thing known'.[15]

The personal nature of storytelling or narrative complicates the formalised legalistic renditions of racism. Critical Race Theory however, draws on the instances of racism within the broad legal context of denial/acquisition of rights, but also considers

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[13] See Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, Cambridge Massachusetts 1991); Gloria Anzaldua, *Borderlands/La Frontera: The New Mestiza* (Aunt Lute Books, San Francisco 1987).
[14] Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (University of Toronto Press, Toronto 1998) 37.
[15] *Ibid.*

racism's contextual and historical embeddedness in the social and its constant underlying presence in the minutiae of everyday life.

As a method, feminists, lesbians and gay men, and other outsider scholars have also adopted narrative techniques.[16] Bettina Aptheker describes her use of stories as part of an oppositional approach to patriarchy, drawing on them 'because they are layered, because more than one truth is represented, because there is ambiguity and paradox'.[17] The juxtaposition of narratives to traditional legal discourse, the valorisation of 'ambiguity' and 'paradox', provide richness and texture to the interpretation of 'truth' and experience, and may, therefore, have purchase in the context of statements for claims to asylum.

Narratives produced by lesbian and gay asylum seekers have features that parallel CRT narratives. Asylum stories contain ambiguity, partly due to the context in which asylum seekers are asked to produce their story, and partly because the recollection of intimate behaviour and feelings may be experienced as more diffuse than for example an account of specific political events.[18] For lesbian and gay asylum seekers the narrative that is produced will often be the primary piece of evidence upon which their claim is founded. Unlike other applicants for asylum who may be able to substantiate their experiences through reports in the media or through their membership and affiliation to political, ethnic or social organisations, lesbian and gay asylum seekers rarely have the option of having their narratives corroborated by independent sources.

Because of the guarded nature of sexuality and relationships, the ways in which LGBT individuals are regulated and regulate themselves, i.e. the way they discover, experience or express their sexuality in court or at interview, is dependent upon the context from which they have emerged.[19] This difference in the rendering of sexuality between individual claimants and the hazy recollection of first experiences, of emotional and physical same sex attraction, can lead to perceived inconsistencies in

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[16] In this chapter I use the term outsider scholarship to refer to the writing produced by marginalised or non-dominant groups within academia for example African-American, Asian, Pacific Islander and South American, lesbian, gay, bisexual, transgendered, queer, feminist scholars in the American academy. The body of work which some of these scholars produced takes a narrative form, the narrative form is most aligned with the work of CRT scholars but has also been used by other groups.
[17] Bettina Aptheker, *Tapestries of Life: Women's Work, Women's Consciousness and the Meaning of Daily Experience* (University of Massachusetts Press, Amherst 1989) 254.
[18] Laurie Berg & Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum claimants' (2009) 22(1) Journal of Refugee Studies 195, 197.
[19] *Ibid.*

the asylum seeker's story. Exploration of the LGBT refugee's experience of their sexuality, and their ability to narrate that tale, has some correlations with CRT, particularly the experientially based component of CRT.[20] The personalised nature of discrimination, the emotional hurt, feelings of shock and anger, can all disrupt the 'objectivity' and 'distanced reason' in the recounting.

The mode of production of outsider narratives in academia provides a useful insight into the ways in which individuals can resist the formality of particular legal venues, such as the court. Although the parties in this instance are situated very differently, one in academia, the other traversing the asylum system, their contestation of legally inscribed spaces shares similar techniques. The disruption of linguistic hegemony through challenges to preconceived ideas and terminology, choosing not to follow appropriate methods/rules of presentation, use of emotion and personal experience to found claims, can effectively contest the form and function of spheres which are legally regulated.

In the following section I consider whether a tool such as the imaginary domain would be useful in the production of literature which conflicts with traditional academic format; I further explore whether CRT, as a template of resistant writing would be useful for asylum seekers. Subjectivity and emotional embeddedness have been grounds upon which both CRT work and LGBT refugee testimony have been challenged and negatively framed as sometime fantasy and often as outright lie.[21] If one of the important components of narrative is its ability to speak its particular truth, this correlates with asylum seekers production of their initial asylum statement; the statement is invested in a personalised account of events, whereby the micro issues of the asylum seeker's life are viewed against the macro grounds of the *Refugee Convention.*

The imaginary domain as ally to Critical Race Theory

As a medium for the production of the imaginary domain, narrative offers a connection between the depth and surface of subjectivity. Narrative can traverse the passage between that which connects the emotional, cerebral or imagined to its

[20] Mari Matsuda has used the term 'outsider narrative' see 'Public Response to Racist Speech: Considering the Victims Story' (1989) 87 Michigan Law Review 2320.
[21] See Daniel A. Farber & Suzanna Sherry, 'Telling Stories Out of School: An Essay on Legal Narratives' (1992-93) 45 Stanford Law Review 807.

manifestation through oration or literature. The imaginary life that exists in the imaginary domain is not fantasy; it exists in spite of and because of the social context in which it is embedded. If the dreams held within the imaginary are aspirations this does not negate or invalidate their content. Such imaginings may be said to exist because of the disquiet associated with current modes of life, love and relationships which enforce normative conceptualisations of appropriate ways to live out the personal as endorsed by the state. The imaginary domain provides a space for envisaging a dreamscape, and narrative provides a way of expressing these dreams. For refugees, the legal capital attached to their hopes and aspirations for the future comes to the fore through their testimonials, which indicate past persecutory experiences. The claim to asylum is the legal mechanism that will ideally help claimants attain the reality of a somewhat less perilous future. A legal concept such as the imaginary domain would aid this transition, bringing the imaginary into court and turning fantasy into a legal and material possibility.

In Tara Yosso's work on cultural capital and CRT, she identifies the ways in which communities of colour nurture cultural wealth and imaginary possibility in the face of structural inequality by invoking optimistic understandings of the future.[22] She notes the prevalence of what she terms 'aspirational capital'. Aspirational capital refers to the maintenance of hope and resilience in the face of 'real and perceived barriers'.[23] Adults and children within Chicana/o communities are encouraged to dream their futures without necessarily having the material resources to fulfil them. Yosso posits this optimism against a backdrop of statistics that indicate low educational outcomes for Chicana/o children; the community nevertheless maintains high expectations.[24] For Yosso 'these stories nurture a culture of possibility as they represent "the creation of a history that would break the links between parents' current occupational status and their children's future academic attainment"'.[25] The imagined possibilities, and their difficult transposition, does not negate or invalidate these dreams, rather it highlights the specific social, cultural, economic and corporeal difficulties of living out these imaginaries. The importance of aspirational capital is its

[22] Tara J. Yosso, 'Whose culture has capital? A critical race theory discussion of community cultural wealth' (2005) 8(1) Race, Ethnicity and Education 69.
[23] *Yosso* (n 22) 77.
[24] For an engaging critique of Latina/o schooling see Dolores Delgado Bernal, 'Critical Race Theory, Latino Critical Theory, and Critical Raced-Gendered Epistemologies: Recognizing Students of Color as Holders and Creators of Knowledge' (2002) 8 Qualitative Inquiry 105.
[25] Gándara in *Yosso* (n 22) 78.

ability to expose socio-structural features, which render some dreams unattainable, but does not forsake them. Aspirational capital bears some bonds with the imaginary domain; its derivation from a particular social context influences its form and expression and enables deeply held imaginings and commitments to be produced as vocalised aspirations, as narratives reaffirming the intimate bond between the internal/external rendering of self. Narrative becomes the cypher that decodes and makes legible the images produced in the imaginary domain.

The imaginary domain's navigation of depth and surface and its association with narrative, provides the mechanism through which the inner and the outer are in a constant process of transposition. The transposition of the inner/outer is set against a backdrop of work in philosophy that would seek to devalorise the mind/body distinction.[26] Drawing on the work of Elizabeth Grosz, Nicola Lacey has written, as part of her critique of the Cartesian mind/body split, of the 'depth and surface ... in human subjectivity'.[27] She points to three important feminist arguments in order to contest the valorisation and privileging of the mind over the body.[28] Firstly, that the absence of the body in philosophy and the reification of the mental – reasonableness and rationality are heavily invested in and associated with masculinity.[29] Secondly, that persons inhabit bodies and that this habitation informs the ways in which that body responds too and functions within its social context, and thirdly, the way the body is responded too in social practice.[30] She states:

> Analytically, bodies are actively materialised through iterative practices of citation within established cultural discourses such as law. This means not only that such practices give meaning to bodies but also that they shape the powers and capacities of different bodies. Politically, this process of cultural materialisation produces some bodies which matter and some which do not.[31]

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[26] See Richard Rorty, 'Contemporary Philosophy of Mind' (1982) 53(2) Synthese 323; for an overview see David J. Chalmers *Philosophy of Mind: Classical and Contemporary Readings* (Oxford University Press, USA 2002); for feminist engagement in the debate see (n 29) in this chapter.
[27] Elizabeth Grosz in Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, Oxford 1998) 108.
[28] *Lacey* (n 27) 107.
[29] For more see Mary E Hawkesworth, 'Knowers, Knowing, Known: Feminist Theory and Claims of Truth' (1989) 14(3) Signs 533; Susan Bordo, 'The Cartesian Masculinization of Thought' (1986) 11(3) Signs 439; Iris Marion Young, 'Impartiality and the Civic Public: Some Implications for Feminist Critiques of Moral and Political Theory' (1986) 5(4) Praxis International 381, 384.
[30] *Lacey* (n 27) 107.
[31] *Lacey* (n 27) 109.

Bodies are invoked and given meaning through their iteration within cultural discourses such as law. The meaning ascribed to those bodies comes from both the self but also from others. Typically those within law who are able to ascribe meanings to particular bodies have been in positions of power such as lawyers, judges, legislative makers etc. The ability of a class of individuals to inscribe meanings onto bodies has lead to some bodies being rendered as more significant than others, with other bodies bearing negative or stereotypical traits, for example, the woman as hysteric, the homosexual body as weak/diseased/perverse, the black body as sexualised/criminalised.[32]

The deconstruction of the mind/body dualism recognises that bodily corporeality has a social and cultural discourse mapped onto it. This mapping influences the way in which the individual configures their sense of self and the way in which that self is perceived by the wider population. The refugee has a particular narrative transcribed onto their corporeal selves, a narrative that is subject to the determination of the onlooker which may draw on an ungenerous and limited reading of the individual as either victim or scrounger; as poverty stricken or exploiting the benefits system; as either the willing or unwilling unemployed. These imaginary narratives sit alongside and are deeply influenced by other pertinent factors that rest on the body in the form of gender, race, sexuality and religion to name but a few and come to give refugee identity a troubling meaning within broader social discourses.

Individuals are influenced by the ways in which they are written and spoken of, the register used and the repetition of that particular discourse comes to reinscribe that meaning as 'truth'.[33] The work of Critical Race Theorists, amongst others, has challenged the inscription of meaning written on the body within and without a legal context. It has also challenged the mind/body split by specifically drawing on the experiences of racism which mark the body and which fundamentally affect an individual's engagement in social life.

Narrative scholarship's use of personal experience, informs both a particular and general understanding of society, providing a unique form of engagement with

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[32] L. Moran, *The Homosexual(ity) of Law* (Routledge, London 1996); L. Irigaray, *Speculum of the Other Woman* (Cornell University Press, Ithaca, NY 1985). In the following chapter I consider the way in which the bodies of the women of Greenham Common had meaning ascribed to them. Their political activity was embodied via feminism, which read the women as lesbians, as emotional, as unclean, as anarchic, as grotesque.

[33] Kendall Thomas, "If There is Such a Thing": Race, Sex and the Politics of Enjoyment in the Killing State' (unpublished manuscript, on file with author).

law.[34] Narrative scholarship highlights the systems and norms associated with patriarchy, racism, sexism, homophobia, ableism and class oppression and considers how liberal legal equality has perpetuated this.[35] The narratives produced in CRT both engage and disengage with direct discussion of the system of law, making law's proximity to the personal both immediate and distant.[36] Narrative scholars have also produced work that allows the personal story to remain central to the tale. In providing the reader with a central character, the social is mediated through this figure's narration, for example see *The Rodrigo Chronicles* by Richard Delgado.[37] This has the effect of exposing the grounds that mediate the life of the central character. Critical Race narratives contest taken for granted social structures, norms and truths and question the impartiality, neutrality and 'colour blindness' of law.[38] The narrative genre provides a tool through which a connection can be made - travelling the distance from personal experience to public vocality. The move away from a law-fixated analysis encouraged a move towards the literary and this move has been done with some success.

The narrative genre is neither absolute fiction (although of course it may be) nor does it follow the methodology of traditional 'black-letter' legal analysis. Narrative lies in the liminal space between these literatures. The authorial voice in narrative is prominent, more so than traditional academic writing; CRT's intent is to personalise the way in which racism, and racism in law, affects individuals. The confidence in expressing these moments of affectedness imbues CRT with an intimacy, contradicting the supposedly objective and neutral voice of the scholar. CRT also emphasizes the presence of scholars of colour and people of minority status in academic institutions and is an assertion that such identities will not be subsumed to normative narratives of law that deny or demean the presence of cultural, racial or ethnic minority groups.

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[34] See for example *Williams* (n 13) and her writings on her exclusion from a Manhattan based branch of Benetton.

[35] Patricia Ewick and Susan S. Silbey, *The Common Place of Law* (University of Chicago Press, Chicago 1998) 29-30; Richard Delgado, 'On telling Stories in School: A Reply to Faber and Sherry' (1993) 46 Vanderbilt Law review 665; Anthony Alfieri, 'Black and White' (1997) 85 California Law Review 1647.

[36] Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Perseus Books, New York 1992).

[37] *Bell* (n 36); Richard Delgado, 'Rodrigo's Corrido: Race, Post-colonial Theory, and US Civil Rights' (2007) 60 Vanderbilt Law Review 1691; Richard Delgado, 'Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents' (1996-97) 95 Michigan Law Review 1105.

[38] Patricia Ewick and Susan Silbey, 'Narrating Social Structure: Stories of Resistance to Legal Authority' (2003) 108 American Journal of Sociology 1328, 1331.

Narrative scholarship's use by other marginalised voices particularly lesbian, gay and feminist scholars, has explored the 'critical' connection between identity, systems of oppression, and feelings of outsiderhood.[39] The disruptive technique of narrative emphasises the impact that variations in genre and method have in the production of legal discourse. In the following part of the chapter I continue the discussion of what narrative scholarship has sought to provide in using non-traditional academic language and analysis and further consider the way in which narrative connects to the concept of the imaginary domain. I engage with some of the criticisms of the genre of CRT writing. Critiques centre on the discussion of 'truth' and accusations of essentialism in narrative writing. Some non-narrative scholars, or narrative sceptics, have expressed the opinion that traditional legal writing, through its use of particular methodologies produces work which is verifiable and therefore reflects a more valid version and vision of society and social truths; narrative sceptics argue that narrative scholars have not followed such a methodology and that narrative literature therefore is an inadequate version of legal literature.[40] I question the foundation of these claims of inadequate methodology, through a consideration of what constitutes accountable scholarship. Beyond the realm of legal academia I discuss the way in which particular methods of storytelling are dismissed as lacking substance and the correlation this bears to the provision of testimony by asylum seekers.

CRT: challenging 'neutrality'

In *The Second Sex*, Simone de Beauvoir wrote '[r]epresentation of the world, like the world itself, is the work of men; they describe it from their own point of view, which they confuse with the absolute truth'.[41] The reification and legitimation of certain knowledges and 'truths' has lead to the exclusion of experiences perceived as subordinate or illegitimate. Legal narrative has created a space within which to

[39] See Ruthann Robson, 'Beginning From (My) Experience: The Paradoxes of Lesbian/Queer Narratives' (1996-1997) 48 Hastings Law Journal 1387; Marc A. Fajer, 'Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship' (1994) 82 Georgetown Law Journal 1845.

[40] Daniel Farber, 'The Outmoded Debate Over Affirmative Action' (1994) 82 California Law Review 893; for an argument that straddles agreement and disagreement with CRT see Alex M. Johnson Jr, 'Racial Critiques of Legal Academia: A Reply in Favour of Context' (1990-91) 43 Stanford Law Review 137.

[41] H.M. Parshley (trs) Simone de Beauvoir, *The Second Sex* (Penguin Books, Harmondsworth 1986).

contest the purported neutrality of law.[42] What scholars highlight, and what many people of colour have experienced in their interaction with the legal system, is that the dominant structural/cultural basis upon which justice is rendered stems from particular positions of privilege and empowerment within society, notably white, patriarchal society. Further, that the values stemming from these positions have the ability to quash or dismiss the importance of other cultural referents as marginal, ancillary, subjective, lacking veracity and therefore as less important. The organisation of the legal system perpetuates the exclusion of outsider stories that would disrupt and challenge dominant social and cultural 'truths'. Sherene Razack notes:

> Legal rules and conventions suppress the stories of outsider groups. The fiction of objectivity,... obscures that key players in the legal system have tended to share a conceptual scheme... They are not seen to possess norms and values that derive directly from their social location and that are sustained by such practices as considering individuals outside of their social contexts.[43]

Law's foundation of systematic modes and methods of reasoning propagates the replication of particular bodies of belief, often underpinned by classist, sexist and racist assumptions. [44] For Critical Race Theory, the court's reliance on the concept of legal neutrality is part of a system of privilege, whereby those who benefit from that privilege fail to see it as 'an invisible package of unearned assets'.[45]

The relationship between narrative production in academia and narrative produced in court rests on contestation of dominant modes of discourse. The imaginary domain and narrative bear potential for displacing the coherence of dominant discourses; they create a space for the reinvention of legal academic writing, producing a site for the ongoing contestation over meaning in relation to normative understandings of social life.[46] Richard Delgado has observed law's

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[42] Iris Marion Young, *Inclusion and Democracy* (Oxford Political Theory, Oxford 2002) 71.
[43] *Razack* (n 14) 38.
[44] Peggy McIntosh, 'White Privilege: Unpacking the Invisible Knapsack' in B. Schneider (ed), *An Anthology: Race in the First Person* (Crown Trade Paperbacks, New York 1997) 120.
[45] Dolores Delgado Bernal, 'Critical Race Theory, LatCrit Theory, and Critical-Raced Gendered Epistemologies: Recognizing Students of Color as Holders and Creators of Knowledge' (2002) 8(1) Qualitative Inquiry 105, 111.
[46] For example contesting definitions of spouse and family within court, or indicating the way in which academic discourse may fail to consider issues such as intersectionality with regards to identity.

keenness to render itself as whole and to deny expansion of its foundations.[47] For Delgado, law is structured in such a way that it actively resists opportunities to develop. At stake in maintaining the status quo of legal discourse for those in more empowered positions is a fear of the loss of ability to determine the scope of legal language, a loss of dominance, the loss of a sense of cultural superiority, and a necessity to learn new social and cultural legal languages.[48] Furthermore, the expansion of legal discourse that incorporates alternative narratives that bear equal legitimacy demands dominant white society acknowledges culpability for current patterns of exclusion.

It has also been claimed that linguistic exclusion of cultural 'others' is sustained by structural and procedural exclusion. Procedural racism within law has been very effective in placing 'racial justice claims on the back-burner'.[49] Delgado notes the way in which white guilt is managed and black rights are denied. He indicates that instead of explicit racism what is erected instead is a system of procedural rules that invalidate black claims:

> We erect difficult-to-satisfy standing requirements for civil rights cases, demand proof of intent, insist on tight chains of causation...limit attorney's fees, decrease funding for agencies that litigate non-white cases, ... insist on remedies [that do] not endanger white well being...elevate equality of opportunity over equality of result.[50]

The systemic way in which law entrenches racism through mechanisms which hinder anti-racist practices are prolific e.g. the virulent backlash against positive discrimination in hiring practices.[51] The removal of the control of law from predominantly white hands has to come about through means that transgress the legal

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[47] Richard Delgado, 'When a Story is Just a Story: Does Voice Really Matter' (1990) 76 Virginia Law Review 95; also see Toni M. Massaro, 'Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds' (1988-89) 87 Michigan Law Review 2099.

[48] Kimberle Crenshaw notes, drawing on the work of Derrick Bell, how typically work that considered racism had always been tempered by an analysis of the way in which race related to and was reconciled with other components of law such as 'federalism, the free market economy, institutional stability...judicial activism and judicial overreaching'. CRT's emphasis, rather than subsuming race to the institutional or political specificity of traditional academic analysis, confronted 'how law contributed to the systems of disempowerment of African Americans more broadly', thereby eschewing the necessity to formalise discussion of race through the 'legitimate' prism of black letter jurisprudential analysis. Kimberle Williams Crenshaw, 'The First Decade: Critical Reflections or a Foot in the Closing Door' (2002) 49 UCLA Law Review 1347.

[49] *Delgado* (n 47) 106.

[50] *Ibid.*

[51] Other examples of positive discrimination include affirmative action programmes in educational settings; gender mainstreaming in employment; economic incentives in order to encourage young people from low-income families to stay in school, for example the UK's Educational Maintenance Allowance (EMA).

system from both within and without. Critical Race Theory is an explicit engagement in developing counter narratives which constitute acts of resistance towards the dominance of white liberal legalism and have the concurrent effect of transgressing, subverting and highlighting the systemic and systematic forms of racism in law and legal practice.

When narrative scholars produce work that challenges the format of legal scholarship, the impact and extent of these acts of resistance and their potential use in other scenarios become apparent.[52] The asylum seeker in court uses some of the techniques of narrative scholarship. The story the refugee tells is personalised and contextually specific or at least made contextually specific. Reference is made to the legal and political ramifications of their sexuality/gender/political/health status etc and then incorporated into their story alongside the persecutory elements that connect to the legal grounds of the *Refugee Convention.* Case law and country reports that would attest to this narrative must be produced. The refugee narrative must assert its own 'truth' and similar to academic narrative is sometimes perceived as limited by this personalised account of experience.

The subjectivity attached to some forms of CRT has left it exposed to contestation, but this does not invalidate it as an academic literature. CRT's strength lies in its ability to invoke the personal in order to substantiate the political. Evident in the writing of scholars of colour, and particularly in the work of lesbians of colour are narratives, raw in their recounting of racism and homophobia. Often, the imagery invoked and the tone used is emotive and can be confrontational. For example Gloria Anzaldua uses the language of 'counterstance' in order to explain the positionality of self and other within socio-cultural location. She notes, 'a counterstance locks one into a duel of oppressor and oppressed...The counterstance refutes the dominant culture's views and beliefs and for this, it is proudly defiant. All reaction is limited by and dependent on what it is reacting against'.[53] CRT is more than just a tool for challenging racism within law, it becomes a venue through which to narrate a subjugated history, it contests white realities and renders law permeable.

Creating a genre of work is key in making claims to the veracity of experience. Kim Lane-Schepple has noted that 'those whose stories are believed have

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[52] See Robert Chang, 'Closing Essay: Developing a Collective Memory to Imagine a Better Future' (2001-02) 49 UCLA Law Review 1601; also see *Crenshaw* (n 48) 1354-1359.
[53] Anzaldua in *Razack* (n 14) 45.

the power to create fact';[54] for refugees the narration of their story and the successes that have come out of their stories have provided useful precedents for other claimants to rely on. The legal and sometimes political impact of their claim goes beyond the confines of merely winning their own case and can have the effect of shifting understandings of sexuality and the way sexuality informs race, ethnicity etc. within other cases.[55]

One of the most important uses of narrative is pointed out by Susan Bell who has noted its transformatory potential:

> A central, if not the central, concern underlying narrative studies ... is to give voice to the subject. 'By allowing the silenced to speak, by refusing the flattening and distorting effects of traditional logico-scientific methods and dissertative modes of representation, narrative scholarship participates in rewriting social life in ways that are, or can be, liberatory'.[56]

The presence of an alternate voice, compared to the liberal subject of law - the voices of black, lesbian and gay, and feminist scholars, is indicative of diversity within legal scholarship and of multiplicity and expansion in the legal academy. In response to such diversity, and in response to the challenging of traditional legal methodologies, the backlash against narrative scholarship has arisen.

Critiquing Critical Race Theory

Critique of narrative scholarship has come in many forms: accusations of flawed reasoning, ignorance of the rule of law, lack of objectivity and insufficient use of empirical data are some of the claims levelled at the purportedly insubstantial foundation of narrative work.[57] In addition it has also been claimed that narrative scholarship indulges in a 'vulgar racial essentialism',[58] which is perpetrated through the metaphor of 'voice'. Voice refers to, for example, the representation of the

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[54] Kim Lane-Schepple, 'Foreword: Telling Stories' (1989) 87 Michigan Law Review 2073, 2079.
[55] UN High Commissioner for Refugees Protection Policy and Legal Advice Section Division of International Protection Services 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008 Geneva). <http://www.unhcr.org/refworld/docid/48abd5660.html> accessed 27 August 2011.
[56] Susan Bell in Patricia Ewick and Susan S. Silbey, 'Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative' (1995) 29 Law and Society Review 197, 199.
[57] Mark Tushnet, 'Coloquy: The Degradation of Constitutional Discourse' (1992) 81 Georgetown Law Journal 251; Daniel A. Farber and Suzanna Sherry 'Telling Stories Out of School: An Essay on Legal Narratives' (1992-1993) 45 Stanford Law Review 807; Nancy Levitt 'Critical of Race Theory: Race, Reason, Merit and Civility' (1999) 87 Georgetown Law Journal 795.
[58] See Jeffrey Rosen in *Nancy Levitt* (n 57) at 795; also see Randall L. Kennedy, 'Racial Critiques of Legal Academia' (1988-89) 102 Harvard Law Review 1745.

'authentic' lesbian, gay or African-American voice. Critics of narrative highlight that a singular voice does not have the authority to represent the feelings or opinions of the rest of that particular group.[59] Marc Fajer, amongst others, challenges this essentialist interpretation of narrative when he explains that most narrative scholars are not trying to assert an incontrovertible truth but are trying to explain a particular modality of treatment because of membership, or perceived membership, within that group.[60] The narratives produced may stem from personal experience, but that experience provides a lens through which social interaction can be viewed. Fajer notes, 'we can tell stories about ourselves, not so much to show how we are representative of our group, but how the society makes essentializing assumptions about us because of the groups to which we belong'.[61] Thus, narrative's emphasis lies not in speaking a truth for an entire group of people, but by looking at how an individual is articulated within society through cognisance of group affiliation. The skill of the CRT scholar is to shift the reader's understanding of that group through a nuanced explanation of self and place within that structure.

Fajer furthers this discussion of identity when he considers the term 'pre-understanding' in relation to group identity and stereotypical traits associated with certain groups.[62] Pre-understanding refers to the way in which 'tells' are connected to specific identities e.g. gay men as being artistic and effeminate.[63] 'Pre-understanding about a particular group can interfere with discourse about that group, because many people believe they 'know' important things about members of the group, things which are often not true about many group members'.[64] Fajer believes that narrative could have an important role in dispelling some of the myths associated with stereotypes. His emphasis lies not in the telling of narrative as the creation of a preordained truth or of exposing identity, lifestyle or experience as something fundamentally educational or informative; instead, Fajer's modest hopes are to emphasize the relevance of stories to the lives of those who are not part of the lesbian or gay or African-American experience, again indicating the scope of difference within and between differing groups.

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[59] *Kennedy* (n 58) 1747.
[60] *Fajer* (n 39) 1845-46.
[61] *Ibid.*
[62] *Ibid.*
[63] *Fajer* (n 39) 1847.
[64] *Ibid.*

Pre-understanding in an asylum hearing is significant in terms of the way in which the asylum seeker is appraised and in this context can be perilous. If the immigration judge has preconceived ideas about asylum seekers in general, about lesbians and gay men, about people of other races or ethnicities, about women, then the asylum seeker's individuality is subsumed under this pre-conception. The bearing this may have on an asylum seeker's application means that their claim does not get a full and thorough hearing on its individual merits but is homogenised, depersonalised and decoupled from the narrative provided which forms the basis of the claim. Additionally, my concern is that when there are repeated claims from certain states, this may have the effect of engendering in an immigration judge a conveyor belt approach to the adjudication of claims and it is this mechanistic, dehumanised process which invariably leads to the rejection of the asylum seeker's application.[65]

Narrative form has been labelled as 'seductive', through the use of extraordinary stories retelling extraordinary events.[66] Some scholars have speculated that such stories may hinder public dialogue regarding issues such as race and sexuality.[67] Stories are not seen to possess scientific rationality and they lack traditional legal reasoning.[68] I mentioned previously that narrative's mode of reasoning stemmed from a 'dialectical engagement' with liberal race discourse and critical legal studies; in addition it was also a response to institutional struggles regarding hiring practices and curriculum development.[69] The personalised nature of these struggles, and the associated theoretical and philosophical environment, bore a new type of academic that narrated their own conception of law. This type of scholarship within an academic setting forces a confrontation as to how some stories become deligitimised when they do not follow a particular path of reasoning or argumentation, and how those stories/narratives are then rendered as peripheral or illegitimate.

Considering this alternate modality of reasoning in relation to refugee claims, the claims which align themselves most closely to traditional legal methodologies i.e. concise, chronologically coherent, factually specific, and with physical or textual

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[65] Cecile Rousseau, Francois Crepeau, Patricia Hoxen, France Roule 'The Complexity of Determining Refugeehood: A Multi-Disciplinary Analysis of the Decision-Making Process of the Canadian Immigration Board' (2002) 15(1) Journal of Refugee Studies 43.
[66] *Levit* (n 57) 798-99.
[67] See *Farber and Sherry* (n 57).
[68] *Levit* (n 57) 798-808.
[69] *Crenshaw* (n 6) 1344.

evidence to shore them up, will be seen as more credible than those narratives that do not follow such a plan. Of course many refugee stories do not possess all of these qualities, can often be confused, and flip back and forth in time and place, which ultimately makes the immigration officer and judge upon appeal question the veracity of the claim. Challenging judicial expectation as to the way in which experience is recounted may assist refugee claims and help the judiciary to be more receptive to alternative narratives.

Narrative has also been accused of writing in a way that excludes others from an understanding of their own experience in relation to a similar occurrence. Ruthann Robson, in her discussion of consciousness raising activities of feminist groups, talks of an environment of shared stories. She notes, '[o]ne's own story spoken by one's self and recognizing one's own story in the stories of other women was itself an experience which would lead to a reconceptualization of the way one thought of one's life and of one's identity as a woman'.[70] Storytelling was intended to foster links between women. The recounting of experience was to show that, that experience was part of a network of power relations involving patriarchal domination and the maintenance of sex role stereotypes.[71] One of the critiques of consciousness raising was the problem of essentialism. The stories that one woman may have told would fail to correlate with the experiences of another, at points causing both listener and speaker to feel disenfranchised within a group.[72] Furthermore the process of consciousness raising would sometimes fail to challenge the harms women experience and fail to create a solution derived from women's stories.[73]

Nevertheless, Robson still validates and justifies the purpose of telling stories from a viewpoint of political action and personal narrating, she writes:

> Hearing experiences was intended to foster recognition of shared conditions and to reject the notion of individual pathologies. The goal was to forge an understanding that women's lives were constrained by political forces. It was not necessary that this goal be achieved by the particular method of sharing experience through consciousness raising; what was necessary was that this understanding would lead to political action to

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[70] Ruthann Robson, 'Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narratives' (1996-97) 48 Hastings Law Journal 1387, 1392.
[71] For an alternate consideration of this see Annette Kuhn and AnnMarie Wolpe, *Feminism and Materialism: Women and Modes of Production* (Routledge and Kegan Paul, London 1978).
[72] *Robson* (n 70) 1393-1394.
[73] *Ibid.*

> improve women's lives. Thus, the sharing of experience was never in and of itself a goal.[74]

Carol Smart's engagement with consciousness raising considers the place of 'truth' within narrative and the validity of individual experience. For Smart, 'Consciousness-raising links knowledge with strategy, breaking down isolation and constructing alternatives, ... consciousness is part of a struggle over meaning... [it] is about creating knowledge which can be liberating, [but] once it becomes a feminist truth it becomes another mode of disqualifying women who do not conform to that version of events'.[75] The anti-essentialist stance that Smart asserts complements Fajer's understanding of narrative. Narratives are told in order to highlight the systemic nature of certain types of oppression. Narrative discourse does not seek to assert an ultimate truth, merely to forge connections, to create a broader understanding of the way in which people's unique experiences intersect with one another.[76] The vocalisation of these experiences, and the subsequent envisioning of an alternate mode of living, corresponds with the enactment of the imaginary domain.

Narrative literature provides an opportunity for coalescence around certain themes, for connection to others who may share such experiences and/or for bringing to the fore experiences that fail to be engaged with. The intersection of non-dominant discourses, which stem from outsider narratives, not only provides connections between 'identity' groups, but also highlights a combinational understanding of identity. Narrative's ability to provide a basis for coalitional politics, (for example see works by feminist Latina lesbians in the next section) indicates that only by looking at specific incidences of racism, sexism, homophobia, gender discrimination, ableism, can we see how the grandiose score of law and institutional politics impacts on a diverse yet intertwined body of intersecting individuals.

Narratives, and the expression of particular understandings of oppressive activities, give way to writing that is a manifesto for change. Incidents of racism, sexism and homophobia, and resistance to these incidents, provide the material upon which narrative scholars create a modus for change. Delgado has noted:

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[74] *Robson* (n 70) 1394.
[75] Carol Smart in Margaret Davies *Asking the Law Question* (Sydney: Law Book Company, Sydney 1994) 73.
[76] Toni Williams, 'Re-Forming "Women's" Truth: A Critique of the Report of the Royal Commission on the Status of Women in Canada' (1990) 22 Ottawa Law Review 725.

> Majoritarian tools of analysis, themselves only stories, inevitably will pronounce outsider versions lacking in typicality, rigor, generalizability, and truth. The purpose of many outsider narratives is to put our very ordering principles, including these, in question. Empowered groups long ago inscribed their favourite narratives – ones that reflected their sense of the way things ought to be – into myth and culture. Now they profess to consult that culture, meekly and humbly in search of standards for judging challenges to that culture.[77]

The affirmation, corroboration and legitimacy of such a discourse is embedded in a taken for granted understanding that the current system of law which is in place is a natural phenomenon, rather than a phenomenon constructed out of the empowering of certain groups.[78] The work of narrative scholars therefore is crucial in challenging the hegemonic nature of legal discourse; Patricia Williams has noted that her intention in relation to narrative is to create a genre of writing that 'fill[s] the gaps of traditional legal scholarship'.[79] These gaps are the spaces in which outsider scholars can write their own interaction with the law. Narrative deconstructs the objectivity upon which legal discourse is supposedly based in favour of an explicit acknowledgement of the multiple interactions, manifestations and identities inherent within and without the individual.

The likelihood of narratives produced in an asylum court following the radical and resistant template of critical race theory is slim. Litigators involved in the framing of a case do not include material that would contest the hierarchy of court; a desire to include radical arguments that step markedly away from liberal individualist politics and the rule of law may alienate the judge and be irresponsible in terms of obligations to the client. Generally the arguments produced in court will be tempered, less political, and will follow the structure and format that the court expects, even when challenging material is being introduced. Thus, in court, individuals must generally acquiesce to the discursive parameters set by the institution. In academia, transgression of norms and use of political argumentation will not generally result in deportation, but may result, as was the case in the US, of an inability to get hired, to gain tenureship, the loss of academic reputation, institutional racism, excessive and

[77] *Delgado* (n 7) 676.
[78] *Williams* (n 13) 8-10.
[79] *Williams* (n 13) 7.

personalised critiques of work, lack of respect and further marginalisation.[80] The effects of this outsider status, and the hurt and anger which sit alongside it, have forced a space to open up in the academy, a space where this frustration can be expressed through narrative.

Ewick and Silbey note that 'the reality that lends itself to narrative is the conflict between desire and law'. 'Desire' and 'law' signpost the positioning of the imaginary domain within this field. Narrative's content expresses a desire to be seen and heard, to be viewed as a whole person rather than as an identity subsumed to a group, and yet juxtaposed to this, identity is still intrinsically tied to that group.[81] Narrative is given the task of becoming the medium through which to express the pains and pleasures intimately associated with desire, desire for change, desire for agency. Narrative functions as a resistant mechanism in the face of overwhelming norms, which seek to annul particular existences.

Moraga and Anzaldua have noted in their now foundational work, *This Bridge Called My Back*, the reason for compiling and producing the collection was:

> What began as a reaction to the racism of white feminists soon became a positive affirmation of the commitment of women of colour to our own feminism. Mere words on a page began to transform themselves into a living entity in our guts.[82]

Moraga's desire to express her own brand of feminism became an absolute need. The visceral quality of the 'entity in our guts' pushes the reader to envision a rebirth of identity. Viscera defined in relation to 'the interior organs in the great cavities of the body'[83] its intrinsicness, its connection to corporeality and the limits of that corporeality, attach the lived, flesh and blood feeling of the individual with an emotional understanding of subjecthood. Connection of the inner to the outer, the 'depth and surface', which signifies a desire to speak, to write, to perform self are a part of living out the imaginary domain. The voices of women of colour in the second-wave feminist movement were a bid to assert a presence in an environment

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[80] Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (Basic Books, USA 1989). In Chapter four I specifically reflect on the purpose of bringing political arguments into a legal venue, using the court as a site for political exposition.

[81] See Regina Austin, 'Left at the Post: One Take on Blacks and Postmodernism' (1992) 26 Law and Society Review 751. With regard to 'desire' and the 'law' see Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, Chicago 1998) 28.

[82] Cherrie Moraga and Gloria Anzaldua in C. Moraga and G. Anzaldua, (eds), *This Bridge Called my Back: Writings by Radical Women of Colour* (Persephone Press, Massachusetts1981) xxiii.

[83] H.W. Fowler and F.G. Fowler (eds), *The Concise Oxford Dictionary of Current English* (5th Ed, Clarendon Press, Oxford 1964).

that was dominated by a particular body of white, heterosexual women. The somewhat sexual exclusivity of the second wave feminist movement, and the wider exclusion of race and sexuality, had the effect of further circumscribing and controlling understandings of identity within a feminist space that purported to be inclusive and supportive.

The second edition of *This Bridge Called My Back* ten years later points to its importance as a text that still provides an essential dialogue for those new to the narrative genre and those long accustomed. Such works provide a physical resource for others to draw on. Reference to narrative as a genre of literature can help to legitimise it as a particular form of discourse. One of the concerns of this legitimation process is that although it symbolizes an expansion in academic literary forms, this incorporation and reification may lead to exclusion of other types of literature thus creating an alternate 'majoritarian tool of analysis'.[84]

Moraga states that 'silence is like starvation'.[85] She refers not to a physical starvation through lack of nourishment, but an emotional starvation. Moraga's struggle with her lesbianism, her inability and lack of opportunity to speak of her desire within and without feminist circles, and to connect that desire to her identity as a Latina woman, placed her in a situation of having a fragmented understanding of self. Moraga's fragmentation of self led to feelings of displacement in her position within society; her affiliations to her ethnicity, and her connections to her own multifaceted identity failed to be reconciled. Her eventual acceptance and commitment to the multi-dimensional characteristics of her life, and her creation of a space within which she could live out this life, represent the connection between the desire to be heard and understood by one-self and by others. The production of narrative by critical race and other scholars provides the reader with a glimpse of, or a vision of, an alternative way to live; a mode of life that challenges current normative conceptualisations of life and the values associated with those lives. It is this movement through the imagining of an alternate way of living, from vocalisation through to enactment, which is similar in process to the creation of Cornell's imaginary domain.

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[84] *Delgado* (n 7) 676.

[85] Cherrie Moraga, 'La Guera' in C. Moraga and A. Anzaldua, (eds), *This Bridge Called My back: Radical Writings by Women of Colour* (Persephone Press, Massachusetts 1981) 29.

The imaginary domain can be viewed as a psychic space within which the individual is given the opportunity to envisage their optimum familial, sexual and affective existence. The individual's conceptualisation of how they would wish to live beyond the potentially constraining context of their present, could be viewed as the first step to the creation of such a life. The shift from the imaginary space of these aspirations to their vocalisation or placement within literature is the journey toward their enactment. In vocalising or writing about a vision of an 'other reality', readers engage with this vision. Audre Lorde urges her reader 'to reach down into that deep place of knowledge inside herself and touch that terror and loathing of any difference that lies there'.[86] The imaginary domain could provide another structure or method for this, a method, which could lead towards an alternate understanding of self-conception.

Narrative, in this sense, is the tool with which we connect to others. Perhaps this is why narrative in academia, because of its ability to forge these connections, its ability to narrate its own truth, has challenged the dominance of other forms of legal writing. Shifting the foundations of legal 'truths', the basis of what some scholars have perceived as incontrovertible grounds, shakes the intellectual position scholars hold and the very basis on which academic privilege rests.

In conclusion, narrative within academia has been accused of essentialism, exclusivity, generalisation, of creating its own methodology, but perhaps most significantly, the accusation of a subjective rather than objective voice has been the loudest denouncement. In response to these critiques, I have outlined the distinctly anti-essentialist aspects of narrative that rely on an understanding of the contingency of identity, that speaks its own truth within the specificity of a moment. Wendy Brown writes:

> [o]ur words cannot be legitimately deployed or construed as larger or longer than the moments of the lives they speak from; they cannot be anointed as 'authentic' or 'true' since the experience they announce is linguistically contained, socially constructed, discursively mediated, and never just individually "had".[87]

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[86] Audre Lorde, 'An Open Letter to Mary Daly' in C. Moraga and G. Anzaldua (eds), *This Bridge Called My Back: Radical Writings by Women of Colour* (Persephone Press, Massachusetts 1981) 101.
[87] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, Princeton, New Jersey 1995) 40-41.

The articulation of experience is specific to its moment, it is no greater than the sum of its parts, and it is not an essential truth for the rest of society but may be a version of one's own truth within the space of that moment. Narrative has allowed scholars to align the personal with the political and it has done this on numerous levels. First, by bucking traditional legal methodologies, second desanctifying the way in which law can be engaged with and written about, third by contesting liberal legal neutrality. Narrative challenges to legal discourse in academia have been successful, its translation into court challenges has not been so firmly established. In the next part of this chapter I consider the position of the expert witness in LGBT rights cases and indicate their in/ability to transgress the *formalism* and *formulism* of the court space.

The place of narrative in court

The court environment differs significantly in its relationship to narrative. The court is more conservative, guided by legal rules of admissibility, standing etc.[88] Narrative's place, via expert testimony, forms a contested encounter with the law, where objectivity/subjectivity, reason/emotion, fact/fiction, political opinion/legal argument must be distinguished. The necessity for conservatism and clarity in the way an expert witness presents their testimony and presents their identity precludes, in some instances, the multi-faceted understanding of identity that we have seen in narrative work.

In this part of the chapter I consider the position of the expert witness in LGBT rights cases and discuss the conflicts that may be apparent in having to rely on legal arguments that clash with personal politics. I refer predominantly to the expert witness in LGBT claims argued under the *Canadian Charter of Rights and Freedoms*. I claim that the provision of testimony can transgress and resist the normative definition of terms such as spouse, family etc. thereby opening up a linguistic gap that challenges the dominance of legally infused terminology. I discuss how subsuming the personally held perspectives of the expert may impact on an individual's representation of their imaginary domain. Further, I argue that there are useful parallels that can be drawn from expert testimony in court and the testimony provided by an asylum seeker. Asylum seekers must sometimes frame their claim in a manner

[88] Russell Binch, 'The Mere Busybody: Autonomy, Equality and Standing' (2002) 40(2) Alberta Law Review 367.

that may not feel as if it sits naturally with their understanding of their sexuality; nevertheless their narrative must respond to the grounds of the *Refugee Convention* requiring a mediation of identity in order to conform to legal norms and patterns of presentation.

I focus on the provision of expert testimony in the Canadian context for a number of reasons. First, the admissibility of intervener statements in Canadian courts provides a rich resource for experiential narratives;[89] the evidential capacity and content of these narratives indicates acquiescence to legal discursive parameters but also challenges some of the overarching terminological interpretations. Second, the large volume of cases to have come before the Supreme Court of Canada using section 15 of the *Canadian Charter of Rights and Freedoms* has propagated the production of much 'positive' jurisprudence and subsequent formal legislation.[90] The jurisprudence has lead to the provision of rights for lesbians and gay men to spousal status, insurance benefits, health benefits, alimony, pensions etc. Third, the legal decisions handed down over the last 25 years have generated a swathe of academic critique as to their substantive impact and the impact of subsequent anti-discrimination legislation.[91]

I chose not to use the UK courts as my focus in this section as they do not have the same richness of narrative content. Although the court allows expert witnesses to give evidence, intervenor statements are not as prevalent in English law. Hence the Canadian jurisprudence, with its reliance on the narrative of intervenors, seemed a more useful parallel in thinking through testimony of experts and the testimony of refugees.[92]

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[89] <http://definitions.uslegal.com/i/intervenor/> An intervenor 'is a party who does not have a substantial and direct interest but has clearly ascertainable interests and perspectives essential to a judicial determination and whose standing has been granted by the court for all or a portion of the proceedings' accessed 27 August 2011. See James B. Kelly, Christopher P. Manfredi (eds) *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Law and Society Series, UBC Press, Vancouver 2010).

[90] *Part 1 of the Constitution Act 1982* s. 15 'Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

[91] For example see Brenda Cossman, 'Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms' (2002) 40(3-4) Osgoode Hall Law Journal 223; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto 1997).

[92] In the Canadian context the role of the expert witness is outlined in the case of *R v Mohan* [1994] 2 S.C.R. 9 the parameters of their role are much the same as the UK. The role of the expert witness in the UK is derived from the case of *The Ikarian Reefer* [1993] 2 Lloyds Rep 68. The expert should only act within the scope of their expertise and their role is to provide information in order to assist the court in the rendering of *its* decision. Polemics, politics and advocacy are to be excised from the testimony of

In cases involving claims to rights for lesbians and gay men it is useful if the court has an understanding of the position of lesbians and gay men in that society.[93] For example if litigation concerns the effects of exclusion from certain benefits schemes such as spousal rights under pensions[94] or family status for housing benefits,[95] sociological, psychological, and anthropological expertise can usefully contextualise and assist a broader understanding of the position of lesbians and gay men, and the effects of that exclusion. In order to be credible before the court, the expert witness must be perceived as having a voice that the court is willing to hear.[96]

Within court there are expectations that the expert will fulfil certain social, educational and professional criteria. Discussing expectations of articulacy, Iris Marion Young notes, 'norms of articulateness privilege modes of expression typical of highly educated people'.[97] The exclusive nature of law, and the legal profession more generally, propagate styles of manner and discourse whereby speech must be produced which is assertive, dispassionate and reasoned, rather than hesitant, circuitous, nervous, or emotive.[98] As I stated in the previous part of this chapter, these norms are entrenched within particular social and cultural sites of education. This form of speech is perceived within legal circles as neutral and therefore legitimate. In practice it is firmly wedded to the liberal, white male of law and is given preferential treatment over other forms of speech or behaviour associated with other cultural, ethnic or gendered groups.[99] In chapter six I consider the production of testimony in court, but look at the place of silence as a form of communication that transgresses typical production.

Articulacy is not just a quality of the educated, but education can foster the 'skills' of articulation and establish it as a valuable and privileged trait. Within the context of the Canadian Supreme Court, the educational qualifications of the expert, and their experience within their field, are called to the attention of the court; the

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the expert witness. The inclusion of expert testimony can be essential in shifting the courts preconceptions.

[93] What this immediately flags for concern is that the broad nature of understanding points towards an essentialist understanding of the meaning of sexuality, further signifying a splitting of sexuality from other components of identity, leading to a legalistic fragmentation of identity.

[94] *Egan and Nesbit* v *The Queen* [1995] 124 D.L.R. (4th) 609.

[95] *Fitzpatrick* v *Sterling Housing Association* [1999] 4 All ER 705.

[96] Lise Gotell, 'Litigating Feminist "Truth": An Antifoundational Critique' (1995) 4 Social and Legal Studies 99, 99.

[97] *Young* (n 42) 38.

[98] *Young* (n 42) 38-39.

[99] Fraser in *Young* (n 42) 38.

number and level of university degrees, positions in academia, positions in government bodies or funding councils, grants that have been awarded, and previous experience as an expert witness, all count towards whether the individual is seen as a legitimate source of information.[100] Thus where personal experience can be written into the narratives produced in academia, within a court context, those personal experiences would be less significant than the professional. The professional witness is seen as having an enhanced level of knowledge, and therefore has a greater degree of legitimacy and is subsequently a more reliable provider of 'truth'.[101]

When presenting evidence on identity, for example sexual identity, what is perceived as strong testimony is the provision of a distinct and incontrovertible argument; that the information given speaks both for and about a particular identity as having essential and stable features. The necessity to use arguments, which affirm essentialist discourses, has been strongly criticised by some as reductivist and exclusionary.[102] Relying on an essentialist trope of identity, and placing that within a legal framework, perpetuates law's self-referential quality and co-opts transgressive arguments around identity.[103]

The multiplicity of views on how to improve the legal, and annexed to this, the social position of lesbians and gay men places a great deal of responsibility on the expert witness. Within a court environment there is little room to put forward a multiplicity of views.[104] The arguments that shore up and affirm the essentialist rendition of identity, are shaped by the template of previous litigation strategy.[105] The effect a stifled litigation strategy can have on understandings of sexuality is that it can

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[100] Michael Lamport Commons, Thomas Gordon Gutheil, James T. Hilliard, 'On Humanizing the Expert Witness: A Proposed Narrative Approach to Expert Witness Qualification' (2010) 38 The Journal of the American Academy of Psychiatry and the Law 302; Adrian QC Whitfield, 'The Expert Witness: The Lawyers Perspective' (2009) 95 Heart 677.

[101] *Gotell* (n 96) 106. For an engaging analysis of the awkward positioning of the expert witness see Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (University of Toronto Press, Toronto 1994) particularly Chapter 7, pp.128-13; also Lise Gotell 'Queering Law: Not by Vriend' (2002) 17(1) Journal of Law and Society 89.

[102] For an analysis of same-sex spousal equality see Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press, Cambridge 2004) Chapter 5.

[103] Mariana Valverde, 'Social Facticity and the Law: A Social Experts Eyewitness Account of Law' (1996) 5(2) Social and Legal Studies 201.

[104] *Valverde* (n 103) 214; *Gotell* (n 96) 99; *Gotell* (n 101) 89.

[105] In addition what this also encourages is a view of identity as distinct from a more plural or intersectional conceptualisation of subjectivity. This is juxtaposed to the presence of other intervenor groups which try and make the connections between for example the granting of lesbian and gay equality and broader questions of equality connected to ethnic, religious and cultural groups. For example in Egan v Canada intervener statements came from EGALE, Metropolitan Community Church of Toronto, Inter-faith Coalition on Marriage and the Family, Canadian Labour Congress.

further ostracise individuals that do not fall into the nomenclature or scope of the definition that is being recounted in court. The involvement of social movements in legal strategy has raised concerns, for example Lucie White has pointed to the problem that 'legal strategies increase the community's ideological subjugation'.[106] Law supplants community ideology in favour of formal rights, this constitutes the writing in of legal legitimacy, but at the expense of political principles.

Valverde notes, regarding the expert testimony of sociologists in relation to sexuality claims, that, in effect, law is seductive in its ability to bind the expert to it.[107] The expert when called into court must construct testimony, often sociological based findings, as absolutes, with no room for interpretation, counter-interpretation or discussion of the nuanced aspects of research. Valverde highlights the uncontestable approach to sociology, whereby one must make declarative 'truth' filled statements, otherwise testimony could be seen as ineffective due to its lack of coherence and fact-finding.[108] She notes in relation to sexual orientation claims argued under the *Canadian Charter of Rights and Freedoms*,[109] 'it is legally necessary to produce arguments facilitating the 'reading in' of sexual orientation; hence the need for sociological statements about sexual identity as comparable to other already legally recognised forms of identity'.[110] This leaves the expert/activist in a position where their connection to the politics they are associated with is displaced in order to conform to and confirm the necessities of law. The problem lies for the expert in a reinvention of self within the court; moulding the understanding of an issue, allowing parameters to be placed upon this understanding of sexuality and mediating personal engagement with such issues. For the expert witness, this may result in a disassociation of self, and negation of the validity of the ways in which they comprehend their sexuality.[111] Narrative in this case is the tool through which the imaginary is quieted and must assent to an alternate vision of what constitutes the appropriate identity and politics of an expert witness.

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[106] Lucie E. White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power' (1988) 5 Wisconsin Law Review 699.
[107] *Valverde* (n 103) 214.
[108] Mariana Valverde, 'The Sociology of Law as a 'Means Against Struggle Itself'' (2006) 15(4) Social and Legal Studies 591, 592.
[109] Part I of The Constitution Act, 1982.
[110] *Valverde* (n 103) 212-213.
[111] Phyllis Chesler, 'Confessions of an Expert Witness' (1997-98) 19 Women's Rights Law Reporter 161.

UK Asylum claimants can also experience similar constraints to those of an expert witness. The rendition of sexuality that an asylum seeker gives must assert key claims legitimising their sexual identity. Within the statement provided the claimant will have indicated when they first realised they were gay, that this is a fixed identity trait, their first same-sex sexual experience, their subsequent partners, the lesbian and gay 'lifestyle' they live, and ideally that they are 'out', and living that 'out' lifestyle in the UK. These factors play into judicial expectations of lesbian and gay claimants, but often diverge from LGBT refugee experience, and it's these differences that must often be subsumed. For example if an individual has never had a same-sex experience but identifies as a lesbian or gay man, then this may cause significant problems in the rendering of their narrative.[112] Similarly, if an individual is married to, or has been married to, an opposite-sex partner, the court will question the veracity of their case. Further, if the claimant does not have the stereotypical traits of a lesbian or gay man, then this may also count against them. In Chapter six, I consider the presentation of the asylum seeker in court and note that although lawyers do not expressly ask their clients to perform a particular type of queerness, that passing as straight has resulted in the court finding the individual could hide their identity and therefore be réfouled.

Lisa Sarmas has provided a useful analysis of the inability of judges to empathise with the position of groups with identities dissimilar to their own. She considers the problem through an understanding of the difficulty of displacing dominant norms, which are taken as natural phenomena, and constituted as fundamental 'truths' rather than the socially constructed ideologies of a dominant group. Additionally, she fears that the social privilege of the judiciary further embeds judicial hierarchy and affirms the judiciary's 'stake in the status quo'.[113] Similarly Delgado has considered and confronted social constructionist understandings of truth in terms of legal decision makers, he notes '[n]arrative habits, patterns of seeing, shape what we see and that to which we aspire. These patterns of perception ...[tempt] us to believe that the way things are is inevitable, or the best that can be in

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[112] Birnberg Peirce and Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns, *Outsourcing Abuse: the use and misuse of state-sanctioned force during the detention and removal of asylum seekers* (Upstream Ltd, July 2008).

[113] Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1993) 19 Melbourne University Law Review 701; Also see *Herman* (n 101) at 140 she notes 'in lesbian and gay rights cases, what judges know about homosexuality is less a consequence of 'expert' courtroom interventions, and more the result of the sexual politics they bring to the decision making process – a politics informed by their social location and experience as well as any or all of several other sources, including religion, psychiatry, biology, feminism, and sociology'.

an imperfect world. Alternative visions of reality are not explored, or if they are, rejected as extreme or implausible'.[114] Is there, then, any use in providing narratives in court? Can narratives have a disruptive effect on legal reasoning? For Sarmas, the answer is yes, in spite of the potential for further entrenchment of judicial belief and subsequent judicial resistance. She notes

> The telling of outsiders' stories in and out of court might not achieve change overnight, but it may assist in the gradual process of fracturing dominant narratives and creating larger spaces in the gaps which appear. It can also help create a viable opposition through community building and consciousness raising within outsider groups.[115]

Sarmas uses the imagery of gaps and spaces in relation to the construction of narratives and the deconstruction of societal norms. If the origins of outsider narratives stem from groups traditionally perceived to be disempowered, the presence of such narratives may indicate a disruption in the structure of legal discourse in court and in academia. Outsider stories undermine the dominant narratives of familial, sexual and affective lives, thereby indicating the multiple ways in which relationships can be lived, rendering traditional heteronormative familial life as merely one version of family structure. Others have argued that the implication of narrative for legal redefinition is not that the family in its current form is deconstructed in any way, if anything, the structure of the monogamous two person family unit is further reinforced. Arguably queer co-optation into the family is neither radical nor does it challenge meaning; it further entrenches the privatised, neo-liberal, conservative familial unit.[116] The use of outsider literature in court decisions is not common-place but does occur. Herman notes Justice L'Heureux-Dube's use of feminist, and lesbian and gay literature via Adrienne Rich and Audre Lorde in her *Mossop* decision. Using feminist, lesbian and gay, and CRT literature is undoubtedly progressive, but nevertheless its use is still confined to the framework of the legal system in order to achieve social change.

Narrative within court suffers from the burden of meaning making. In order to make the meaning of homosexuality more accessible, experts have had to use

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[114] Delgado in Margaret Davies, *Asking the Law Question* (Sydney: Law Book Company, 1994) 66
[115] *Sarmas* (n 113) 726.
[116] K. Lahey, *Are We Person's Yet?: Law and Sexuality in Canada* (University of Toronto Press, Toronto 1999); B. Macdougal, *Queer Judgments Homosexuality and the Courts in Canada* (University of Toronto Press, Toronto 2000); M.B. Kaplan, 'Intimacy and Equality: The Question of Lesbian and Gay Marriage' in S. Phelan (ed), *Playing With Fire: Queer Politics, Queer Theories* (Routledge, New York 1997).

techniques that assent to the norms of court; that work within the confines of legal dictum, permissible evidence, and that are 'useful'; thus the narratives of experts are constrained in scope. These constraints may include the necessity for the witness to remain objective when they have an emotional connection to the situation at hand; the witness may have to modify their response when being questioned in order to be seen as coherent, thereby circumventing their own understanding of the issue in question; they may have to modify behaviour or dress in order to be viewed as credible.[117] Nevertheless, it can be argued that the expert witness and the discussion of non-normative identities has had an impact on the way rights based groups are viewed in and out of court.[118] Those who have litigated lesbian and gay rights have brought about a visibility and a naming and reading in of sexuality based identity within legal terms, and to a degree have transgressed those legal terms to positive legal effect.[119]

In terms of the imaginary domain's production of and mediation through narrative, the ability to express ways in which people would like their relationship to be acknowledged, and the form that their relationship takes, indicates a progressive movement for some towards the living out of the imaginary. Herman notes in her analysis of the *Mossop* case, the willingness of the tribunal adjudicator, Mary Elizabeth Atcheson, to consider definitions of family status as non-static, as 'broad' and with the potential for inclusion of 'non-marital' and 'non-biological' relationships.[120] The progressive understanding of terminology in a bid to be inclusive promotes a formal equality approach to an understanding of family. The terms themselves remain in use and the structures that they represent stand fast, but their application is no longer static. Thus lesbians and gay men can now claim to be family and are given the rights and responsibilities that go along with that, whilst the ideological underpinnings of family itself remains structurally intact. By co-opting previously excluded groups, the conservative understanding of family is further reinforced, and undermines the more transgressive politics that some queer activists and individuals would prefer. Those for example who are involved in relationships

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[117] See Yofi Tirosh, 'Adjudicating Appearance: From Identity to Personhood' (2007-08) 19 Yale Journal of Law and Feminism 49.
[118] *Herman* (n 101) 140.
[119] *Egan and Nesbit* [1995] 124 D.L.R.(4th) 609; *M v H* [1999] 2 S.C.R. 3; *Knodel v British Columbia* (1991), 58 BCLR (2d) 356; *Fitzpatrick* v *Sterling Housing Association.* [1999] 4 All ER 705; *Mossop* v *AG Canada* [1993] 1 S.C.R. 554; *Toonen v Australia.* <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5> accessed 21 March 2011; Eur Court H.R. Dudgeon Case, Series A, No 45.
[120] *Herman* (n 101) 134.

with more than one other person will fall outside the scope of the definition of what constitutes family and therefore different lines are drawn as to what is and is not legally permissible or endorsed. Marginalised queers get further marginalised and their position becomes further entrenched as outsider.[121]

Academic analysis of the co-opting of lesbians and gay men into heteronormative relations has been cautious in its acceptance of what claims to formal equality mean. Academia provides a useful sphere from which to maintain a watchful eye over the purported legal developments and their social implications. Valverde cautions that 'the analysis of 'equality rights' cases needs to avoid re-enacting, in our intellectual work, the erasure of the movement as performed not only by the legal process but also by the deployment of an expert who is in some ways a surrogate for the movement'.[122] We must ensure that legal change, does not become the driving impetus for political movements, nor that the expert witness becomes the singular voice for a movement; our political objectives should not be subsumed to law, or consider law, which grants formal equality, as the solution to broader systems of discrimination that perpetuate injustice.

In being granted formal rights, disunity may develop in understanding an individual's place within that new social and legal framework. No longer is the political movement the source of the formation of identity. Instead, the legally recognised definition of that identity becomes the legitimate version and becomes the basis of an acknowledged form of legal personhood. Traditionally gay men were written into law through prohibition of male same-sex activity, lesbians on the other hand by their very absence from law were non-existent and more likely to be the subject of medical rather than legal discourse. The gradual gaining of rights, via the legal acknowledgment of identity for lesbians, the decriminalisation of gay male sex, are in a sense the legal reading in of existence.[123] De Certeau notes:

> The act of suffering oneself to be written by the groups' law is oddly accompanied by a pleasure, that of being recognized (but one does not

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[121] See Susan B. Boyd, 'Family, Law and Sexuality: Feminist Engagements' (1999) 8 Social and Legal Studies 369.

[122] Mariana Valverde, 'Social Facticity and the Law: A Social Expert's Eyewitness Account of Law (1996) 5(2) Social and Legal Studies 201, 202-203.

[123] Gary Kinsman & Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (UBC Press, Vancouver 2010); Gary Kinsman, *Regulation of Desire: Homo and Hetero Sexualities* (2nd ed Black Rose Books, Montreal 1996); Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate Publishing, Surrey 2009).

> know by whom) of becoming an identifiable and legible word in a social language, of being changed into a fragment within an anonymous text.[124]

That fragment of identity within the text must continuously challenge the boundaries of what constitutes the language of recognisable relationships. In carrying out this discursive deconstruction, it is essential to derogate from the terminology of formal liberal equality in which the legal system is embedded and to turn to new modes of discourse. The writing of lesbians and gay men into anti-discrimination principles has been viewed as the 'fragmentation' of identity.[125] This fragmentation has been characterised as a form of violence – it is a violent assertion of heteronormative confines being placed on homosexual existence and a failure to see identity as derived from physical, social and cultural sites that forge the individual.[126]

The imaginary domain could be one option in attempting to create our optimal affective existence. The space of the imaginary would allow for an expanded understanding of the scope of relationships, thus constantly creating the space for personal and political invention. Again this type of reinvention of the scope and constitution of relationships can only come about through challenges to heteronormative ideals and an ongoing contestation over the meaning of these ideals. Through the vocalisation of alternate imaginings of relationships, resistances are created. By widening definitions in terminology, one of the consequences may be the creation of a space of manoeuvrability, the development of linguistic gaps. Kendall Phillips has written:

> Gaps...are not only the spaces from which resistances emerge, but also the space in which resistances are created.... The antecedent gaps within networks of power (and knowledge and subjectivity) are not only spaces for emergence, but must also be spaces of invention; spaces within which the possibility of new actions (or utterances or selves) can be imagined.[127]

It is Phillips' consideration of the discursive spaces, these 'spaces of dissension', which have a potential that is also generative. Phillips quotes Foucault when noting the generative quality of incoherence and contradictions within discourse:

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[124] Michel De Certeau, *The Practice of Everyday Life* (University of California Press, Berkeley 1984) 140.
[125] *Gotell* (n 96) 106.
[126] G.A. Yep, 'The Violence of Heteronormativity in Communication Studies: notes on injury, healing and queer world-making' (2003) 45(2-4) Journal of Homosexuality 11.
[127] Kendall R. Phillips, 'Spaces of Invention: Dissension, Freedom and Thought in Foucault' (2002) 35(4) Philosophy and Rhetoric 328, 332.

> Such a contradiction, far from being an appearance or accident of discourse, far from being that from which it must be freed if its truth is to be revealed, constitutes the very law of its existence: it is on the basis of such a contradiction that discourse emerges, and it is in order to both translate it and to overcome it that discourse begins to speak.... and, because it can never ... entirely escape it, that discourse changes, undergoes transformation, and escapes of itself from its own continuity.[128]

Foucault asserts that discourse is generated through the act of questioning, through the recognition of incoherence, challenging the interlocutor to create an alternate semblance of reality. Contradictions in meaning therefore, if we follow a Foucauldian interpretation, can help to evoke new linguistic and discursive spaces, where discursive battles generate contested terminology. However these contradictions begin, their conflicting interpretations generate that which is yet to be discovered or defined. This may have particular pertinence to forms of assumed knowledge located in unfamiliar political sites, such as LGBTQ political spaces; such spaces of occupation may be the sites where resistances can potentially emerge, where moments of connection and coalition have the opportunity to be created politically, socially and discursively.

Conclusion

In this chapter I have outlined the way in which the imaginary domain could be a complementary resource to critical race narratives. I have tried to indicate how Critical Race Theory has engaged with a conceptualisation of subjectivity that bridges the inner/outer and expresses this through the medium of narrative. I claimed that CRT bore some connection to the role of the imaginary domain, in trying to express personalised narratives, which sought to reclaim identities subsumed to the social and subsumed to law. Narrative literature is a genre of writing that engages with the inner/outer in terms of reconciling identity and confluences of identity within, in this particular analysis, academia and the court. Through creativity and a resistant politic to the liberal norms of academia, CRT has carved out its own space, its own genre of writing, and has centralised and focused discussion on previously disenfranchised identities. I indicated that narrative literature bore some parallels to refugee testimony; that disruptive practices, in the form of transgressive genres of literature provided by

[128] Foucault in *Phillips* (n 127) 333.

legal scholars, or transgressive modes of testimony provided by expert witnesses can subvert the space of the academy and the court – such techniques used by CRT scholars and experts and activists do, and have the potential to, form the ground swell for resistance work. The role of the expert witness in court, and the way in which their testimony is mediated by evidentiary requirements, means that often the court environment shapes their legal identity. I considered the subsumption of a 'radical' politic in order to be considered as the archetypal expert witness, and the impact this had on the witnesses understanding of their own identity and the theoretical impact it would have had on their conceptualisation of self, which I argued resides in the imaginary domain. Although such obvious methods and modes of linguistic and legal resistance may not be as readily available to refugees, resistance writing nevertheless indicates the possibility of transgressing institutionalised norms whether in academia or in the court.

In the following chapter I consider the legal and political positions adopted by the Women of Greenham Common. I consider the way in which their feminist politics disrupted the *formalism* and *formulism* of the court when they were giving testimony on their political activities. I discuss the ramifications of non-normative conceptualisations of gender and sexuality, which informed the way they provided testimony in court. I look for the moments of resistance in court, and the ways in which the women's collective political position was used to promote their political stance. I turn to the women of Greenham Common as an indication of how the norms of court can be resisted through the use of politics, but caution that such provision of testimony is in part unique to their particular position as women, as lesbians, as a political collective and as somewhat defiant of the ramifications of criminal conviction. These collectivised qualities are not available to asylum seekers in the same way as they were to the Women of Greenham, and therefore, I ask whether there are any corresponding grounds of connection between the overt resistance of the women of Greenham and some of the covert resistance expressed by asylum seekers.

CHAPTER FOUR

Badly Behaved at Greenham Common Women's Peace Camp: Possibilities for the production of a resistant narrative.

Introduction

In the previous chapter I examined the use of 'resistant' narratives produced by Critical Race theorists, feminists, and lesbians and gay men in academia, and as used by expert witnesses in Canadian equality rights cases. The production of resistant narratives in academia contested normative conceptualisations of academic writing, enabling a wider range of 'voices', 'identities' and politics to be produced without subsumption to legal academic norms. More specifically, as a genre of writing, critical narrative has challenged, and continues to challenge, racism, sexism and homophobia institutionally and in broader social contexts. I argued narrative has purchase for asylum seekers, as a method of contesting legal formality through the production of non-traditional responses to, and engagements with, law. In the second part of the chapter I claimed the expert witness, though compliant with legal *formalism* and *formulism*, sought to reinterpret the meaning of terms such as spouse and family to potentially transgressive effect. The context of the reinterpretation of terminology was a debate over whether the 'reinforming' of those terms further entrenched and legitimised the hetero/homonormative concept of family and essentialist accounts of identity, or, whether it was a tool for destabilisation of such norms.

In this chapter, I consider the place of resistance within court, through the production of testimony by the women of Greenham Common. The women produced testimony in a manner that challenged the *formalism* and *formulism* of the court. I use *formalism* here to denote the protocol of court, inclusive of the establishment of legal relations between parties, and *formulism* to denote the way in which testimony is provided in order to address the legal charges levelled at the defendants. I analyse the in-court tactics used by the women when protesting the presence of nuclear weapons

in the UK, and reflect on how the Greenham women's political objectives and political resistance outside of the courtroom were translated into behaviours inside the courtroom.[1] The protestors had a specifically feminist, anti-patriarchal, woman positive and women only politic. They protested against nuclear armament, and what nuclear armament represented on a broader scale – masculinist, patriarchal, militaristic dominance.

I consider whether the resistant activities of the Greenham women challenged the normative structure of law, asking whether this had legally and politically creative consequences. In exploring the production of narrative by women whose identities are shaped by their politics, I consider how this informs the performance of their gender and sexuality.[2] I ask whether this politicised response in and out of the court could provide useful insights into the ways in which refugees either do produce, or could produce, narratives imbued with explicit and/or implicit resistance.

I analyse some of the similarities and differences between the women of Greenham Common and the asylum seeker, in light of the differing contexts of community support. I consider for example the contexts that give individuals the confidence to transgress legal norms: such as the emphasis of balancing the loss/win of a case; the ramifications of those losses/wins; the importance of asserting a politics; developing a sense of entitlement in the court; demanding to be heard, and disputing authority. The women of Greenham confidently contested the authority of the court through strategic deployments of *resistant* behaviour; the asylum seeker on the other hand uses much more delicate and nuanced *tactics* in order to challenge the court.

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[1] For a brief outline of the history and motivation for creating the camp see the official Greenham Common Women's Peace Camp website <http://www.greenhamwpc.org.uk/> accessed 14 February 2011; alternatively listen to the BBC Radio 4 documentary *The Ghosts of Greenham* <http://www.bbc.co.uk/radio4/history/document/document_20070716.shtml> accessed 14 February 2011; or alternatively Dear Kitty. Some blog <http://dearkitty.blogsome.com/2006/09/03/britain-history-of-greenham-common-peace-women/> accessed 14 February 2011; for some of the songs sang at Greenham see Dance on the Silo's <http://www.davyking.com/Greenham.htm> accessed 14 February 2011; for an analysis of Greenham action through letter writing see Writing the Web: letters from the women's peace movement <http://www.feministseventies.net/Greenham.html> accessed February 14 2011.

[2] I use the word politic to describe the actions of the Greenham women instead of the more familiar politics; 'politic' connotes an approach that is derived from the citizen and is less reliant on an understanding of governance within an already organised political body. Although the women of Greenham Common did participate within the already established legal and political system, I argue that they engaged with these systems in a way that did not wholly acquiesce to the formal niceties of court or traditional modes of organisational governance thereby disrupting the *formulism* and *formalism* of those environments.

Thus, in this chapter, I consider the importance of the Greenham women's collectivity, their alternative and separatist lifestyle, and the liberation that this offered from normative enactments of everyday life. I discuss the ways this resistant politic was brought into legal venues and contrast it with the complex but more muted presence of an asylum seeker in court.

In discussing the concept of resistance, I turn to Michel de Certeau's 'repertoire of tactics'[3] and its relationship to systems of power and connect this to the in-court behaviours of the women during their protests. De Certeau defines a tactic as 'insinuat[ing] itself into the other's place fragmentarily, without taking it over in its entirety, without being able to keep it at a distance'.[4] The tactics used by the women were momentary, disruptive, often spontaneous, anti-hierarchical and irreverent. Tactics and techniques of resistance such as singing, dancing, poetry and political exposition were all used in court, in order to keep law at a distance, and politics close at hand. I consider the social dynamics that enabled the women to deploy such techniques, and, whether these methods of resistance could be taken up by asylum claimants. I focus on the collectivity behind the Greenham women's political actions, the transposition of these actions into court, and how this shifts the way in which individual engagement with the legal system may be experienced.

In Chapter six of this thesis, I contrast the production of testimony by Greenham women, with the way asylum claimants are constrained in the production of testimony that would transgress the *formalism* and *formulism* of court. The refugee's account of events relies unequivocally on the precise details that are provided within the testimony/narrative given to an immigration officer. The refugee's story is recounted throughout subsequent hearings and appeals and becomes the substance of the claim for asylum; the story becomes the asylum seeker. I ask whether there is the possibility for the asylum seeker to use their own politic, and to use their gender, race and/or sexuality in a way that challenges the normative space of the court.

However, in this chapter I begin by looking at the way in which the women of Greenham Common produced testimony in court. What were the justifications for the Greenham women's choice and style of protest? What was the motivation behind the

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[3] Michel de Certeau, *The Practice of Everyday Life* (University of California Press, Berkley and LA 1984).
[4] *De Certeau* (n 3) xix.

encampment and the explicit creation of a feminist/lesbian space, its anti-capitalist and anti patriarchal underpinnings, and the way these political motivations translated into the women's performance in court?

The women of Greenham Common – making camp

The story of the Greenham Common Women's Peace Camp begins in 1981 with the organisation of a march from Cardiff to Greenham USAF base by the group 'Women for Life on Earth'.[5] The march was a demonstration against the presence of cruise missiles in the UK. The group's actions intended to make the media take more notice of the issue of nuclear arms and thus raise awareness amongst the general public. Strategically placing women and children at the head of the march, and as the point of contact for press and media engagements, pitted the women against militarism and patriarchy and emphasized the threat nuclear arms posed to family. In an interview by Sasha Roseneil with one of the Greenham women who marched from Cardiff, the reason given to the 'why women?' query was: 'The march is led by women to show everyone that women are active and prominent in the peace movement. Men are welcome as supporters, but most of the speakers...will be women - ... most just unknown women who will be coming on the march to tell the world what they think of our society's priorities'.[6]

The local Newbury Corporation originally purchased the land the USAF base came to occupy in 1938. The intended use of the land was as an open space for the people of Newbury.[7] At the onset of World War Two, the land was requisitioned by the Ministry of Defence (MOD) for use by the RAF. Once the war had finished, the land fell into disuse, and rather than being returned to the local corporation, the MOD

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[5] Barbara Harford and Sarah Hopkins (eds), *Greenham Common: Women at the Wire* (The Women's Press, London 1985). Chapter 1 of the *Harford and Hopkins* book outlines the initial stages of organising the peace march from Cardiff to Newbury and the motivations of the small group of marchers. It discusses events such as the women chaining themselves to the gates of the USAF base, the arrival of more protestors and the increase in press interest in the activities of the women. The current archives for Women for Life on Earth are held in the Women's Archive of Wales. <http://www.womensarchivewales.org/en/collections/glamorgan_record_office/index.html> accessed February 1 2011.

[6] Sasha Roseneil, *Common Women, Uncommon Practices: The Queer Feminisms of Greenham* (Cassell, London 2000) 45.

[7] *Harford and Hopkins* (n 5) 7. The land once occupied by the USAF base has now been converted into a park/common land with a visitor centre, which outlines the history of the military base and peace protestors. See Greenham Common Trust <www.greenham-common-trust.co.uk> accessed 14 February 2011.

bought the land and in 1968 rented it to the US Air Force.[8] The decision to have cruise missiles at Greenham was taken by NATO on 12 December 1979.[9] In establishing a US Air Force base, infrastructural facilities were created for the efficient functioning and management of military personnel. The Greenham base had a school, shops, and entertainment facilities (a bowling alley), as well as missile silos constructed to be able to withstand the detonation of nuclear explosions a third of a mile away. The juxtaposition of nuclear warheads, against the day-to-day existence of military personnel and anti-nuclear arms protestors living in nothing more substantial than tepees and benders, was incongruous.[10]

The Greenham women argued that nuclear devices were problematic on a number of grounds. They claimed for instance that these devices could destroy humanity; that the presence of such weapons in the UK exposed the UK to the risk of accidental discharge of nuclear material. Furthermore, that the UK would become a primary object for attack and would be deemed culpable for the deployment of nuclear weapons against other states. Sasha Roseneil notes:

> This deployment of first-strike nuclear weapons was regarded as having two main consequences. It made the countries involved into targets for pre-emptory strikes by the USSR. Every person, and the whole eco-system of Europe, became the potential victims of nuclear war...; if nuclear weapons were fired from one's own country, the moral responsibility rested with the people in whose name the military was acting.[11]

The women at the peace camp took personal responsibility for the proliferation of such devices, noting the environmental and social impact they would have, and the dangerous position in which it placed states complicit in their propagation.

The motivation behind the creation of the Greenham Women's Peace Camp may have been founded on an anti-nuclear politic, but it was deeply intertwined with feminism. The meeting of these politics, one with a specific issue focus – nuclear disarmament, and the other – anti-patriarchal/feminist praxis, provided the framework through which to initiate and actualise the living out of an alternative community.

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[8] *Harford and Hopkins* (n 5) 7. For more on the history of Greenham see 'Greenham: a common inheritance' <www.greenham-common.org.uk> accessed 14 February 2011 and Sarah Hipperson, *Greenham Non-Violent Women v The Crown Prerogative* (Greenham Publications, London 2005).

[9] See *Roseneil* (n 6) Chapter 3 for an outline of the move towards nuclear weaponry and the process by which cruise missiles came to be stationed in numerous European countries.

[10] A bender is a piece of tarpaulin or other weather-proof sheeting placed over bent sticks and branches which act as supports for a makeshift tent.

[11] *Roseneil* (n 6) 41.

The desire to create an alternative community no longer regulated by heteronormative expectation bears resemblance to living out the imaginary domain; the women were able to decide how they wanted to express their gender, their sexuality and their relationships with one another. The camp's liminal positioning in society provided a de-regulated site for exploring new modes of expressing and experiencing sexual, affective and familial existence.

The creation of the peace camp at Greenham was a spontaneous event. The spontaneity gave way to longevity, and the camp remained in place for 20 years, with the last residents leaving in September 2000. The first group of women to arrive at the base chained themselves to the gates, reminiscent of the suffragettes of first wave feminism. The number of women arriving at the base and willing to remain ensured that there was a constant presence at the site.[12] As public support grew, donations began to arrive, ranging from food and firewood to gas canisters.[13] It was decided that a permanent encampment would be an important statement, particularly in light of the Commander of the USAF base telling the women 'stay here for as long as you like' and of course, taking him at his word, they did.[14]

Originally, the camp was not just a women only space; some of the men who had marched the route stayed on in support. Eventually a decision was made that it would be women only and men had to leave come nightfall. Following this decision the role of men in the camp was delineated as supportive rather than permanent.[15] The decision to create an all female space generated controversy amongst the women

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[12] Margaret Laware, 'Circling the Missiles and Staining Them Red: Feminist Rhetorical Invention and Strategies of Resistance at the Women's Peace Camp at Greenham Common' 16(3) (2004) NWSA Journal 18, 20. At one particular protest the 'embrace the base protest' 35, 000 women joined hands around the base. See Jean Stead, 'The Greenham Common peace camp and its legacy' *Guardian* (London 5 September 2006) <http://www.guardian.co.uk/uk/2006/sep/05/greenham5> accessed 14 February 2011; to view the 'Embrace the Base' video see Guardian Films, *Guardian* (London 12 December 2007) <http://www.guardian.co.uk/news/video/2007/dec/12/greenham> accessed 14 February 2011.

[13] *Harford and Hopkins* (n 5) 5.

[14] *Harford and Hopkins* (n 5) 17. For an insight into the days just prior to the Greenham Common occupation and the initial period afterwards see *Harford and Hopkins* (n 5) chapter 1. Also see *Roseneil* (n 6) Chapter 3, 'Beginnings'.

[15] *Laware* (n 12) 20. For more on the reflexivity of creating social group movements see William Gamson, 'Commitment and Agency in Social Movements' (1991) 6(1) Sociological Forum 27, 40. Gamson notes, drawing on the work of Melucci, 'the construction of a collective identity is a negotiated process in which the "we" involved in collective action is elaborated and given meaning - Some movement groups are even reflexive about this process – taking time to make the question of "who we are" part of their internal discourse. This is especially likely to happen ...when a group lacks an easily identifiable common social location in a class or ethnic group'.

campers, their supporters and the media. Lynne Jones writing at the time justified the women only nature of the camp; she stated:

> We see more hope for the future in the process emphasised by the women's movement – shared decision making and non-hierarchical leaderless groups, co-operation and non-violence – than in the hierarchical and authoritarian systems that prevail in mixed groups. We want a chance to develop skills we are not normally expected to acquire – organisational and practical ones – and to express those characteristics normally devalued in society at large; caring, compassion, trust.[16]

The women's reliance on qualities that were and are labelled as stereotypically 'feminine', were reclaimed in a manner that was empowering rather than denigrating.[17]

The ethos behind the camp was based, according to Roseneil, on 'four main strands of political theory and practice: radical feminism, anarchism, non-violence, and eco-feminism';[18] other factors such as non-hierarchy, individual responsibility and the right to self-expression were also fundamental components.[19] The women highlighted how militarism could not be separated from other forms of oppression such as patriarchy, female subordination, globalisation, and poverty. The anti-hierarchical principles upon which the encampment ran were also an attempt to pose an alternative to the way in which communities ordinarily functioned; any woman could be a spokeswoman for Greenham, all of the women were Greenham. Collective decision-making was the way in which actions and the functioning of the camp were

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[16] Lynne Jones, 'Perceptions of 'Peace Women' at Greenham Common 1981-85: A Participants View' in Sharon Macdonald, Pat Holden, Shirley Ardener (eds), *Images of Women in Peace and War*, (Macmillan, London 1987) 189. Tim Cresswell also notes that there was a concern on the part of the women that the presence of men would be more likely to prompt violence between the police and protestors, Tim Cresswell, 'Putting Women in Their Place: The Carnival at Greenham Common' (1994) 26(1) Antipode 35, 37.

[17] Maeve E. Doggett, 'Greenham Common and Civil Disobedience: Making New Meanings for Women' (1989-1990) 3 Canadian Journal of Women and the Law 395.
Critique of the women of Greenham Common came from the media, the law and the military and from some of the radical feminists of the women's liberation movement. Some radical feminists felt that the women's reliance on a narrative of passivity, non-violence, preservation of future generations, children, family etc was impliedly normative and 'contributed to the continuation of patriarchal, heterosexual, middle-class values', Tim Cresswell, *In Place/Out of Place: Geography, Ideology and Transgression* (University of Minnesota Press, Minnesota 1996) 139 – 141; also see B. Whisker (ed), *Breaching The Peace* (Only Women Press, London 1983). For a consideration of differing approaches to activism ranging from the 'we are just like you' arguments to the celebration of resistance by GayShame see Margot D. Weiss, 'Gay Shame and BDSM Pride: Neoliberalism, Privacy and Sexual Politics' (2008) 100 Radical History Review 88.

[18] Sasha Roseneil, *Disarming Patriarchy Feminism and Political Action at Greenham* (Open University Press, Buckingham 1995) 62.

[19] *Doggett* (n 17) 402.

instantiated. Jones notes an interaction in court between prosecuting council and a Greenham woman called Ceri:

> Prosecutor: I want to know whose idea it was? Who planned it?
>
> Ceri: It was nobody's idea because we all meet together, women from all over. A suggestion comes up and we discuss it.
>
> Prosecutor: Who suggested it?
>
> Ceri: No-one, I don't remember.
>
> Prosecutor: Who was involved in the discussion?
>
> Ceri: All of us.
>
> Prosecutor: All 44
>
> Ceri: No, more.[20]

The physical layout of the camp further undermined hierarchical organisation, 'it is impossible to dominate a group whose membership changes everyday, whose constituents are spread around nine miles of perimeter fence, and whose 'central' financial resources rotate on a weekly basis'.[21] The mutual respect and anti-hierarchical principles of the camp were attributes that were also taken into the courtroom, as invariably protests and trespassing onto USAF land resulted in prosecution.

In the following section I discuss the methods by which the women brought their political objections into the space of the courtroom. I discuss the women's transposition of their politics through four specific lenses: firstly through the subversion of gender; secondly through constructing a non-normative legal defence that confused the actors in court; thirdly the production of lesbian sexuality which confronted the heteronormativity of militarism, patriarchy and the legal system, and finally, through the production of a legal discourse that focuses on women and politics, displacing the centrality of law.

Courtroom Confrontations: Challenging gender formalism.

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[20] *Jones* (n 16) 193-194.
[21] *Jones* (n 16) 192.

The charges levelled at the Women of Greenham generally involved issues of trespass, breaches of the peace, and criminal damage carried out in the course of protests.[22] The cases were heard before Newbury Magistrates Court. Legal representation was carried out by the women themselves or through feminist lawyers and barristers who were sympathetic to the cause.[23] Some of the women challenged the charges that had been levelled, and pleaded not guilty, whilst others would plead guilty and then explain the reasoning behind their actions, using their court appearance as political platform. Outside of the guilty/not guilty dyad there were of course behaviours in court, now much documented, highlighting the way the women challenged the *formalism* and *formulism* of the court.

Roseneil has framed the women's activities as a 'refusal to play the parts assigned to them'; this refusal to play, to act out a role came across in newspaper reports at the time which cited the theatrical nature of the proceedings. *The Times* wrote of a 'carnival atmosphere of political rhetoric'.[24] The 'show' being put on in court was being staged as 'carnival', and the women of Greenham were the comic performers. I use the word 'comic' in the context of Mikhail Bakhtin's *Rabelais and His World*.[25] Bakhtin identifies three different categories of the comic – the clownish, the burlesque, and the grotesque.[26] The women of Greenham I argue are most closely aligned to Bakhtin's concept of 'grotesque'. The 'grotesque' should not exist in the world, it is for Bakhtin an 'impossible and improbable image'.[27] I argue that within court this improbability translates into an unintelligibility of the Greenham women's gender and sexuality.

Bakhtian grotesque is concerned with the 'body as a whole and of the limits of this whole'.[28] Bakhtin relies heavily on imagery of orifices, of bodily functions, of the transgression of the body's limits through acts of 'eating, drinking, defecation and

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[22] For more on this see Harriet Samuels, 'Feminist Activism, Third Party Interventions and the Courts' (2005) 13 Feminist Legal Studies 15, 25.

[23] In addition the expert witnesses that the women chose were often high profile supporters, well respected in their profession *Maeve Doggett* (n 17) 398 notes the testimony of e.g. E.P. Thomson, the Bishop of Salisbury, Dr Barbara Lowie.

[24] *Harford and Hopkins* (n 5) 106; *Roseneil* (n 18) 104-5.

[25] Tim Cresswell has also written on the women of Greenham Common through a Bakhtian frame of analysis. Cresswell uses 4 different categories to analyse the women, a. Dirt and smell, b. Food and the kitchen c. Sexuality d. Hysteria. Although we make similar arguments regarding the women, my analysis focuses on a greater intertwinement of Bakhtian grotesque and de Certeauian tactics, whereas Cresswell's lies more on the social regulation of the women.

[26] Helene Iswolsky (tr), Mikhail Bakhtin, *Rabelais and His World* (Indiana University Press, Bloomington 1984) 304.

[27] *Bakhtin* (n 26) 305.

[28] *Bakhtin* (n 26) 315.

other elimination...as well as copulation, pregnancy...the beginning and end of life are closely interwoven'.[29] The bodily functions of the Greenham women became important symbols of everyday life, placed in contradistinction to the clean, contained and hygienic air force base. The women were uncontainable, both in the expression of their politics within and without court, and in their bodily functions being performed in public on the edge of an air force base.

The Bakhtian nature of grotesque also relies on an understanding that 'authority and truth are relative'.[30] Bakhtin's theorisation of 'carnival' and the 'grotesque' correlates closely to both the way in which the women were perceived in court and in media reports, and the women's response to the assertion of the authority of the court.[31] The women stressed in their court appearances that respect would not be given on the basis of 'robes and rituals'.[32] The 'grotesque' nature of the women, and their creation of the carnival atmosphere, lay in relation to their defiance of court norms, their sexuality, their non-conformity to gender stereotypes, their scruffy appearance, their 'strange' clothes, their 'ugliness', lack of make-up and mud caked boots. The women of Greenham behaved in a way that was perceived as antithetical to their sex. Their noisy and disruptive behaviour, lack of respect for the court, overt politicisation and their unity and collectivity as an all female community created an air of circus to themselves, and the proceedings, placing them in contradistinction to expected visions and versions of womanhood. The way in which the women performed this oppositional femininity was often playful and had the effect of undermining the hierarchy of the court, thus using the legal 'circus' to their political advantage.

The refusal to 'play' the parts in court was a refusal to play firstly, the deferential defendant, and secondly, an appropriately gendered role. In Judith Butler's engagement with the 'materialization' of sex she explains that, '[sex] is not a simple fact or static condition of a body but a process whereby regulatory norms materialize "sex" and achieve this materialization through a forcible reiteration of those

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[29] *Bakhtin* (n 26) 317.
[30] *Cresswell* (n 16) 38.
[31] For an outline of Bakhtian grotesque as resistant to authority see Sarah Gleeson-White, 'Revisiting the Southern Grotesque: Mikhail Bakhtin and the Case of Carson McCullers' (2001) 33(2) The Southern Literary Journal 108, 110.
[32] Rebecca Johnson, 'Alice Through the Fence: Greenham Women and the Law' in John Dewar, Abdul Paliwala, Sol Picciotto and Mattias Reute (eds), *Nuclear Weapons: The Peace Movement and the Law* (Macmillan Press, Hampshire 1986) 160.

norms...'.[33] The reiteration of norms comes to enforce a particular performance of gender. Through the 'accuracy' of this performance a framework of recognition is established, sex is 'one of the norms by which the "one" becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility'.[34] The Greenham women transgressed this intelligibility; they performed gender outside of the indicators that make 'women' normatively intelligible. Their failure in the eyes of the judiciary and society because of their scruffy, noisy, political behaviour, their decisions to leave husbands and children behind, becomes an aberrant version of sex; they were 'unintelligible' bodies and therefore could only become bodies that matter through regulation and penality.

A further factor in the women's unintelligibility in court is their appropriation of the space of the court through 'sprawling', 'unpeeling layers of jumpers', 'singing', 'talking loudly', 'refus[ing] to stand' upon the entry of the magistrate, 'refusal to swear on the bible', 'offering to swear on the goddess instead', 'humming' by the women in the gallery if a police officer was lying.[35] These moments of transgression and unwillingness to curtail behaviour, in order to conform to the expectation of the court, are resistant in both major and minor ways. Roseneil's use of the term 'sprawling' denotes ungainly, unladylike behaviour; it also implies a requisitioning of space, a filling of space, and a declarative and affirmative right to take up that space, which subverts normalised modes of femininity and further constructs the women as Bakhtian grotesque. Bakhtin describes grotesque as 'interested in protud[ance]...special attention is given to the shoots and branches, to all that prolongs the body and links it to other bodies or to the world outside'.[36] The women in court were uncontained, their politics, their lesbianism, their feminism leaked into the space of the court. If we place this 'leakiness' in contrast to the usual appearances of individuals, particularly women in court, the stark differences come to the fore.[37]

In asylum hearings, court defendants are generally acquiescent; women are particularly quiet and deferential. In the asylum hearings that I have observed, there is a rigidity to the posture of the claimant. This rigidity of posture is generally to do

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[33] Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge, London 1993) 2.
[34] *Butler* (n 33) 2.
[35] *Roseneil* (n 18) 109.
[36] *Bakhtin* (n 26) 316.
[37] For more on the 'leakiness' of women's bodies see Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)ethics* (Routledge, London 1997) also Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (Sage Publications, London 2002).

with nerves; hands are placed neatly in laps, breathing is shallow, and tension seems to course through the individual's body. Although the asylum seeker is the centre of attention, there is a desire that the attention does not remain focused on them; generally it is the asylum seeker's representative who becomes the main focus. The women of Greenham on the other hand, behaved in a way that challenged that acquiescence, and wanted to be the focus of attention. In the following section I briefly consider an activity that seems fairly innocuous, but which represents something quite significant and it is the act of 'unpeeling layers of clothing'.

The removal of clothing by the Greenham women confronts the expectation of female subordination. Removing multiple layers of clothing challenges the idea that women shouldn't draw attention to themselves, they ought not be too comfortable as the court is not their space. The simple act of taking off numerous layers imparts a presence in the court, a non-transient presence that is not shame filled, but is confrontational, and willing to *protrude* into the space of the court, it sets up, what Audre Lorde refers to and to which I made mention in the previous chapter as 'counterstance'.[38] By making themselves comfortable rather than sitting in hot clothes, soaking up the tense court atmosphere and being apologetic, they indicate that there is little of the guilt or shame associated with court appearance, instead they are defiant and contest the space of the court through the development of their own contrary 'legal' responses.

Additionally the type of clothing worn by the women, the multiple layers, thick jumpers, big boots, hats, scarves are contrary to the clothing defendants usually wear i.e. smart, clean, ironed outfits. In one sense the women's clothing brings the austerity, the cold, the dirt and the everyday life of the camp, into the space of the court. Their clothing does not acquiesce to court norms and renders the authority of the court and deference usually given to the court as somewhat displaced. The outfits the women wore and the removal of layers of jumpers and the active and performative

[38] *Doggett* (n 17) 405-406 mentions one particular protest when the women chained themselves naked to the entrance gates at the USAF base and covered themselves in ash, bringing to mind images of Hiroshima. She notes the women as 'ugly, terrifying, naked and therefore vulnerable', the women took over the space of the gate and police were 'forced' to engage with and touch the women so as to remove them. *Cresswell* (n 16) 45 also notes police reluctance to touch the women he quotes a journalistic piece of the time 'what they dread [policeman] and find unforgivable is being ordered to lay hands on women who often deliberately and calculatingly stink' in a further interview one policeman feels the need to bathe before he can engage with his family. The women's bodies infect the policemen, their grotesque protrusion in the form of smell, skin, dirt, all contaminate the clean impenetrable body of the police force.

nature of the women lies in contrast with that of asylum seekers in court. Being performative and making a presence felt in court requires a certain level of empowerment and establishes a relationship that could be categorised as confrontational - explicit confrontation would be a dangerous strategy for an asylum seeker to take.

The collectivity around a cause such as Greenham, and encouragement from those in the women's movement, would certainly have assisted in helping the Greenham women feel more empowered and enabled them to take up their space in court. Gamson writes, 'public demonstration of commitment under conditions of risk help create solidarity and strengthen it. Movement identity is central to the willingness to undertake such risks'.[39] The support from other women provides an opportunity to resist the stultifying space of the court; it is these acts of resistance that are overt, declaratory, loud and boisterous which an asylum seeker cannot draw on.

The isolation that lesbian and gay asylum seekers experience from their communities, because of the threat of homophobia or the racism within the lesbian and gay communities in the UK, provides little help. The claiming of refugee status can be a solitary journey. The process of claiming asylum is intensely personal and not necessarily analogous to the cause of the Greenham women who had macro objectives at hand. Nevertheless, a correlation lies in the shift in politic that occurred at Greenham, from being about nuclear disarmament, to becoming a site of sexual liberation. The intertwinement of the personal and political alters the relationship of the women to the court, prosecution for political action on the USAF base, becomes about prosecution of sexuality and anti-patriarchal practices. Personal life is thrust into the space of the court, somewhat similarly to refugee narrative – except, where the women of Greenham *choose* to express private life in order to further political goals, the claim of the refugee can only be fought through the expression of the private.

Courtroom Confrontations: Performing defence

The unintelligibility of the women in court was further reinforced through their performances as defendant, replete with juggling, singing, dancing and costumes. This performance confuses the *formalism* and *formulism* of the court and has the effect of

[39] *Gamson* (n 15) 46.

making those who would uphold the norms of court into something akin to supporting actors. The role of the 'real' legal actor's — the judges, lawyers etc. cannot be performed under their own terms. The script the legal actors rely on has changed and the space of the court is no longer regulated by traditional legal means, the space has been overtaken through opportunism and tactical advantage.[40] De Certeau writes 'a tactic insinuates itself into the other's place fragmentarily, without taking it over in its entirety, without being able to keep it at a distance'.[41] The women were able to momentarily take over and deregulate the court, they turned the court into a space for political rhetoric, a space for entertainment and activism, the court became a political circus.

The women's performances in court allowed them to provide testimony outside of the normal formulaic parameters of evidence and to politicise these moments by connecting them to the wider issues of patriarchy and heteronormativity. Maragret Laware, using the work of Radner and Lanser on coding strategies, discusses the way in which women become dynamic and resistant through shifting the meaning inherent in language. Using the term 'juxtaposition' she notes, '"the ironic arrangement of texts, artefacts or performances," ... opens a space for women to insert their own meanings and calls attention to the existing inequities of the social order'.[42] The women inserted their own meaning into what the court, and the testimony that they gave, stood for.[43] The women transposed the politic of Greenham into the normative structure of the court, disrupting the legal hegemony in place. The disruption may not have had a long lasting effect on the court, but it did temporarily rupture the coherence and structure of proceedings.

The dynamic in court of the ab/normal and the 'grotesque' performance of gender and sexuality is also present in lesbian and gay asylum cases, whereby the refugee is rendered as the unknowable other, distinct from 'normal' human life. In Chapter six of this thesis, I consider the process of alienation in court based on differences of race, gender, sexuality and politics. In Chapter seven I consider how these differences and how this 'othering' process can be challenged and made less invasive and discriminatory in a court environment; I consider this through use of an

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[40] *Cresswell* (n 16) 42.
[41] *De Certeau* (n 3) xix.
[42] Radner and Lanser in *Laware* (n 12) 27.
[43] Also see Richard Vogler, 'Anti-Nuclear Defences: Aspects of Legality and the Peace Movement in England' in John Dewar, Abdul Paliwala, Sol Picciotto and Mattias Reute (eds), *Nuclear Weapons: The Peace Movement and the Law* (Macmillan Press, Hampshire 1986) 114.

ethical framework based on the work of Iris Marion Young and Emmanuel Levinas. In the following part of this chapter I consider the way in which discourse and behaviours around ab/normal, carnival and grotesque entered into the space of the courtroom through the production of sexuality.

Courtroom Confrontations: Politics and the production of sexuality.

Greenham Common Women's Peace Camp was a site where women felt free to express themselves personally and politically. The camp enabled the women to have relationships outside of heteronormative dictates. Within the space of the camp, same-sex relationships did not encounter opprobrium from the other Greenham women; lesbianism was a part of the politics of the camp. Roseneil refers to the 'gyn-affective' nature of relationships and that 'heterosexuality was de-normalized, rendered strange and problematic'[44] at Greenham. This understanding inverts typical heteronormative expectations, but correlates closely to what Judith Butler terms a process of 'collective disidentifications'. Butler notes, 'disidentifications can facilitate a reconceptualisation of which bodies matter, and which bodies are yet to emerge as critical matters of concern'.[45] The dominance of heterosexuality was fractured and displaced at Greenham, shifting the parameters of 'normality'. In an interview by Roseneil she quotes a woman called Linda, 'we were young raving dykes and we were holding hands and kissing in bus stops. We'd found our lesbianism and we'd found a place where we could be lesbians'.[46] The space of Greenham became a site within which to explore sexuality.

In the following section I discuss the limits of, and the liminality of that space, and the possibility of producing a sexually liberated politic in court, particularly in light of the constraining politics of the 1980's. A politics which saw the Conservative Government, lead by Margaret Thatcher develop policies that demonised and categorised gay men as AIDS carriers and limited local authorities ability to educate children about lesbian and gay families through section 28.[47] In the USA, the

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[44] *Roseneil* (n 6) 278-79.

[45] *Butler* (n 33) 4; for an analysis of contested space, identity, and disidentification see Chris Brickell, 'Heroes and Invaders: gay and lesbian pride parades and the public/private distinction in New Zealand media accounts' (2000) 7(2) *Gender, Place and Culture* 163.

[46] *Roseneil* (n 6) 286.

[47] Local Government Act 1988 S. 28, 2A (1) 'A local authority shall not - (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality. (b) promote the

Republican Party, lead by Ronald Reagan, celebrated the 'special relationship' of the US and UK and developed its own conservative responses to a burgeoning and gradually more outspoken LGBT/queer community, which had also been demonised by the political discourse on HIV. The political context of the 1980s perhaps brings into even sharper contrast the bravery and the transgressive nature of the women's expression of both their politics and their sexuality.

When politicised lesbian relationships spill over into the space of the court, the relationship reverts back to a perceived 'abnormal' sexuality. Lesbian relationships are abnormal against the backdrop of heteronormative conceptualisations of sex, love and family. The space of Greenham was certainly not a utopia but it did seem to function outside of heteronormative understandings of gender and sexuality. Hence, when the women were in court, the expression of their relationships and stark juxtaposition against the dynamic of the court turned the women into 'freaks' and fetishises their sexuality; the women become a Bakhtian 'impossible and improbable image'. They become an attraction to gawp at and their politicised identities, their feminism, their lesbianism, are used as weapons against them.[48] The women's embodiment of a subversive femininity, a 'grotesque' feminine was a further indicator of their freakish nature and of their separation from normal society.[49] Abigail Dennis, drawing on Bakhtin, has written that, 'the grotesque is particularly associated with the earthed physical feminine' she contrasts this against the classical body which she describes as 'flawless, finished, in stasis, inaccessible'.[50] The Greenham women buck their allegiance to the classical body and to that body's erudite completeness.[51] The women live in an all female camp, they had in addition eschewed their responsibility to womanhood in favour of political goals. This politic is not translatable in court;

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teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'.

[48] For a narrative of the feeling attached to being 'gawped' at from a disabilities perspective see Eli Clare, 'Gawking, Gaping, Staring' (2003) 9 (1-2) GLQ 257.

[49] For an analysis of subjecthood and the place of the freak or monster see *Shildrick* (n 49) 4. Shildrick notes 'In seeking confirmation of our own secure subjecthood in what we are not, what we see mirrored in the monster are the leaks and flows, the vulnerabilities in our own embodied being. Monsters, then, are deeply disturbing; neither good nor evil, inside nor outside, not self or other'.

[50] Abigail Dennis, '"The Spectacle of Her Gluttony": The Performance of Female Appetite and the Bakhtinian Grotesque in Angela Carter's *Nights at the Circus*' (2008) 31(4) Journal of Modern Literature 116, 124.

[51] Bakhtin may have gone further in his assessment of the women's transgression of femininity and their slide into the grotesque, for Bakhtin the grotesque is grotesque because it is an unnatural abhorrence, it is a 'specific negative phenomenon' that ought not to exist - *Bakhtin* (n 26) 306.

empowered, noisy, scruffy, dirty, public, freak, feminist, lesbian women challenged the court, and disrupted the framework of the gender normative legal setting.

Elizabeth Grosz notes that recognising the identity of the freak results in a narcissistic pleasure of assuring the individual's own boundaries and identity as dissimilar to the freak.[52] Reinforcing gender through the ascription of stereotypical traits is a ploy to further distance the Greenham women from the acceptable face of femininity. For example in a statement by the US Ambassador regarding the closing of Greenham he stated: "we are not here today because some individuals, well intentioned but innocent of the world's realities, kept vigils at our bases."[53] His choice of innocence, well meaning and vigil are terms stereotypically associated with women. The Ambassador's use of the word 'innocent' implies the women are not, and cannot be fully cognisant of, the necessity of nuclear weapons, and that their understanding of the role and purpose of such weaponry is hazy, misguided or misunderstood. The Ambassador's understanding of the women's protests at the base as constituting vigils reinforces the notion of women as able to politically participate, but only through spiritual acts. Vigils are often associated with mourning and motherhood and thus the Ambassador's words evoke appropriately gendered maternalism rather than the more masculine 'political activism'. It becomes important for the Ambassador to reassert the maternal rather than the activist because of the proximity of the women's bodies up against the military base, and particularly because it continues to render the women as low level disruption, rather than as serious demonstrative threat.

The women's politics are written on and performed through their bodies. The women of Greenham are not just juxtaposed to the judiciary or the normative vision of woman; they are also placed in comparison to the military body, and thus become even more distinct and liminal in terms of their place in society. The military body – strong, disciplined, impenetrable, goal oriented, masculine, capable, smart, clean and heterosexual, placed against the Greenham women – tangible, touchable, arrestable, vociferous, emotional, scruffy, lesbian, feminist. The distinction between these two types of bodies becomes even more apparent within the legal context; the gender dynamic that plays out between the two takes on a macro level importance. The women are not just railing against the soldiers themselves, but against the vast and

[52] *Cresswell* (n 16) 51; *Doggett* (n 17) 396.
[53] *Doggett* (n 17) 396.

impenetrable military might of the US. The women's incursions into the base show the penetrability of this megalith, and undermine the exclusive and dominant, metaphorically masculine, nature of the base. The US base is penetrated by women, wire cutters and mischief, and the court appearances are the equivalent of bragging rights.

Courtroom Confrontations: Women's legal discourse.

Court appearances by the women became politically useful moments of transgression, inserting anti-nuclear politics and sexuality into a legally regulated space. The court's discomfort with politics and sex, and their production through non-legal mediums, further disrupts the court's interpretation of the legal questions at hand i.e. what were the women charged with. When the women express their politics and provide their testimony through non-traditional carnivalesque mediums, for example dance, song, poetry, silence, shouting, defiance – it ceases to be a legal discourse; it becomes an excess within the court which must be dealt with rather than considered as an alternate form of testimony.[54]

Peter Goodrich has written:

> Law, as a linguistic register or as a literary genre, can be described linguistically or, more importantly, discursively, in terms of its systematic appropriation and privileging of legally recognised meanings, accents and connotations (modes of inclusion), and its simultaneous rejection of alternative and competing meanings and accents, forms of utterance and discourse generally, as extrinsic, unauthorised or threatening (modes of exclusion).[55]

The excess produced in court fundamentally challenges typical jurisprudential format and the traditional types of arguments being produced. Authoritative speech acts are given credence through established convention, through reification as rules or norms.

> It is through the invocation of convention that the speech act of the judge derives its binding power; that binding power is to be found neither in the subject of the judge nor in his will but in the citational legacy by which a

[54] For newspaper articles of the time outlining the carnival nature of the court see *Cresswell* (n 16) 41-51.
[55] Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan Press, London 1987) 3.

> contemporary act emerges in the context of a chain of binding conventions.[56]

These entrenched conventions, and the power that is legal discourse's traditional accompaniment, are absent from women's discourses on patriarchy, anti-militarism and pacifism. The women of Greenham did not have this conventional legacy to draw on, to give their words the authority to be recognised by the law, the military and wider society; their speeches have no formal 'citational legacy'. The women rely instead on what Renate Lachmann would describe as the suspension of prevailing laws.[57] The women create their own counter laws in order to challenge the entrenched conventions of the court.

The testimony that the women produced gave them the opportunity to 'hold court'; it gave them the space to explain their actions, and justify their political positions, outside of the ordinary parameters of legal evidence. Some of the Greenham women had not been involved in politics or direct political action prior to becoming involved in the peace campaign.[58] Greenham provided a venue for women to find their voice, to become spokespeople not just for a cause, but also for themselves. Helen John, a Greenham woman described as a mother of five, a nurse who decided to give up her career in order to look after her children, '[s]he was no feminist, and indeed had never knowingly met a feminist'.[59] In an interview with Sasha Roseneil she states:

> In the process of the ten days of being on that walk and getting very close to other women, and being freed from the responsibility of housework and children and all that for the first time in years, I was able to take a much more direct involvement upon myself as an independent woman. And it changed me.[60]

Kathleen Jones, in her article 'On Authority', considers women's ability to have their voice, and their own particular form of knowledge heard, and believes that female speech has long been subordinate. She notes, 'we may see how the dominant discourse on authority silences those forms of expression linked metaphorically and symbolically to "female" speech'. She continues, 'it is my claim that this discourse is

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[56] *Butler* (n 33) 225.
[57] Renate Lachmann, Raoul Eshelman, Marc Davis, 'Bakhtin and Carnival: Culture as Counter-Culture' (1988-89) 11 Cultural Critique 115, 122.
[58] For more on the personal stories of the Greenham Women see Sasha Roseneil (n 18).
[59] *Roseneil* (n 6) 46.
[60] *Roseneil* (n 6) 48.

constructed on the basis of a conceptual myopia that normalizes authority as a disciplinary, commanding gaze. Such a discourse secures authority by opposing it to emotive connectedness or compassion'.[61] The women of Greenham were driven directly by the emotive nature of the cause and their political and emotional attachment to one another. This connectedness is what gave sustenance to their politics, the sense of community, the ethic of care, and the non-authoritarian nature of decision-making.

The Greenham women did not have an official voice and certainly not an official voice willing to be co-opted and manipulated by the legal system. The women's anarchistic response to law was premised on an understanding that respect for the court would be given on the basis of 'individual actions, not by robes and rituals'.[62] The irreverent manner of the women, their rejection of traditional female roles, their dress, their vocality within court, and their adherence to what they saw as the fundamental importance of their protest gave them the impetus and the courage to politicise their activities within a legal setting.[63] The authority of the judge was not reified; the police presence did not scare them into submission. The traditional authority attached to positions within court was ignored.

In court, the women's desire to express the truth of their actions, and the public justifiability of such action was partially based on declarations of self-defence, protection of family and protection of wider members of society more generally.[64] The argument of self-preservation was endorsed as a legitimate concept through use of expert testimony. The women employed Dr Barbara Lowie for one particular court appearance so she could explain the medical effects of nuclear weapons. Dr Lowie outlined how the psyche deals with what it views as the potential catastrophic effect of such weapons; in Dr Lowie's view 'the individual realises she has no alternative but to act to avert the catastrophe'.[65] Testimony brought with it not just the view of

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[61] Kathleen Jones, 'On authority: Or, Why Women Are Not Entitled to Speak' in Irene Diamond and Lee Quinby (eds), *Feminism and Foucault Reflections on Resistance* (Northeastern University Press, Boston 1988) 120.

[62] *Johnson* (n 32) 160; Also see Adrienne Harris and Ynestra King (eds), *Rocking the Ship of State: Toward a Feminist Peace Politics* (Feminist Theory and Politics Series, Westview Press, San Francisco 1983).

[63] *Johnson* (n 32) 160-176. The women's choice of lawyer was also an important decision; they chose legal counsel who shared a similar political vision. The women were not afraid to dismiss their counsel if they felt they were either dominating their approach to activism or somehow eroding the politicised aspects of their actions.

[64] *Johnson* (n 32) 167.

[65] *Johnson* (n 32) 162.

the client, but the justifiability from the perspective of the expert witness of political action, 'turn[ing] [legal] defence into counter attack'.[66] The testimony that the women presented in court narrated not just the politics behind their actions; it was also a personal account of the way in which nuclear weapons challenged their existence.

The political justification of the Greenham women's arguments was never subsumed to the legal. The women's varied approaches to what they saw as the connection of nuclear weapons, to patriarchal society, lead to further connection with patriarchy acting as accomplice to homophobia, racism and class prejudice.[67] Some women read out poems of lesbian oppression[68] as their testimony in court; others refused to stop talking when asked questions[69] and felt it was their moral obligation to 'tell the whole truth'. Some women learnt that they were able to talk, and to continue talking when asked to stop. They learnt to deal with techniques of intimidation and how to remain calm and consistent when being interrupted.[70] These women were not just engaging with law, they were engaging with power. They were engaging with a system that had taught them to remain silent, to be deferential, to deny their understanding of the world.

What some of these moments enact, even in their transitory nature, is a micro-revolution, where women are able to see that they are capable of effecting change through 'revolutionary non-violence rather then passive resistance',[71] and are willing to bear the consequences of that action for their own idea of the greater good. Johnson notes, that after continued efforts by the judges to silence the women for their excessive behaviour, or chastisement for failing to stand before a judge, the judiciary began to turn a blind eye to these acts and omissions, realising that to pull the women up on each act would account for more court time than it was worth.[72] The techniques used in court had the effect of uniting the women's personal and political involvement.

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[66] *Vogler* (n 43) 116.
[67] *Johnson* (n 32) 161.
[68] *Ibid.*
[69] *Johnson* (n 32) 163. In Chapter six of this thesis I consider the ways in which LGBT refugees produce testimony though non-oral means, for example through body language and silence. I consider how and if the court is able to read these expressions and what it can mean when such expressions are ignored.
[70] *Johnson* (n 32) 176.
[71] *Johnson* (n 32) 158.
[72] *Johnson* (n 32) 169.

Through subversion of the discourse and tradition of the court, the women literally and figuratively, 'occupied' a legal site that they were able to manipulate and mould into another form. The political space they created was 'carnivalesque', undermining the control and dominance of the legal system, and this momentarily assisted their political arguments and enabled them to place their own stamp on the court. De Certeau refers to these occurrences as 'combatants stratagems', he notes 'there is a certain art of placing one's blows, a pleasure in getting around the rules of a constraining space'[73] and it is these moments of victory, small, sometimes unnoticed, but which contribute to survival, physical as well as emotional survival, that allow such resistant acts to claim a space, to create a space.[74]

Conclusion

In this chapter I have outlined the way in which the women of Greenham Common transposed an anti-nuclear, feminist politics into the space of the court. The women resisted the *formalism* and *formulism* of the court through multiple means; they challenged the formality of the court through activities such as singing, dancing, noise, scruffiness and through discounting the hierarchy invested in the court space. Their challenge to the *formulism* of the court came about through their modes and methods of producing testimony. Rather than try to construct a typical legal defence in order to defend their 'criminal' actions, some of the women used their court time to explain the ramifications of nuclear weapons, legal defence became political exposition. The women's challenge to the *formalism and formulism* of legal arguments, through their production of poems and story telling, highlighted the nexus between nuclear arms and gendered and lesbian oppression, intertwining arguments critiquing militarism, violence and patriarchy via a feminist politics.

The court responded to the women in numerous ways, sometimes through disapproval, through ignorance, through perturbance and through penality. I argued that the women challenged the court on three main levels: firstly, through their subversion of gender norms, which I indicated made the women intelligible as lesbians but unintelligible as women, as mothers, as family, as activists. They were unintelligible because of their appearances, which did not correlate with stereotypical

[73] *De Certeau* (n 3) 18.
[74] *De Certeau* (n 3) 18.

representations of femininity; because of their appropriation of the space of the court; because of their overt politicisation. The second way in which they transgressed and troubled the court was through their disruptive performances as defendants. The women disrupted the script of the legal actors; they shifted the format of arguments and rendered the space of the court as legal circus. The women inserted their own meaning into their legal defence. The third way in which the women disrupted the court was through their production of sexuality in court. Their sexuality became a legal excess, spilling into the space of the court and disrupting the heteronormativity of that legal site.

These resistant activities had at their core the transgression of normative ways of living; of transgressing sexed and gendered boundaries, of transgressing hierarchy, of transgressing sexuality, and of living out a version of sexual, familial and affective existence that reflected a way of living outside of heteronormative confines. Greenham was able to become that space because it functioned as a site that was regulated by feminist principles, individual responsibility, non-hierarchy and sexual non-normativity. Greenham Common Women's Peace camp was a site that could be perceived as embracing some of the qualities of the imaginary domain.

In the following chapter I discuss the legal regulation of, and the case law regarding, lesbian and gay asylum seekers. I discuss the way in which the judiciary approaches the 'issue' of sexuality within an asylum context and the problematic practise of closeting asylum claimants, which was held until recently, to be a legitimate form of protection from persecution.

CHAPTER FIVE

Indices of Persecution: the legal position of lesbian and gay refugees

Introduction

In the previous chapter I explained how the women of Greenham Common used their visions of alternative ways of living and created an anti-nuclear, feminist, lesbian positive camp located in the liminal space between an air force base and a market town. The way in which they narrated the ethos of the camp in court appearances was to combine the personal and the political in their testimony. The unseverability of the personal and political enabled the 'lived' version of what I referred to as their 'imaginary domain' to be entered into court.[1]

The politics of the women of Greenham had at its core a conceptualisation of sexuality and gender that defied social norms, and this inspired a series of resistant acts, tactics, and behaviours which the women drew on when presenting their cases. The community that the women developed in the camp was tight-knit, supportive and politically and ideologically motivated. These qualities gave sustenance to the women who were arrested and aided them when testifying before the court.

In the context of claims to asylum, the privilege of having community support and having the confidence to bring a transgressive and radical politics into court is rarely feasible. The individualised nature of asylum cases and the serious ramifications of rejection mean that asylum seekers are generally more restrained in their engagement with the legal system, rarely explicitly transgressing the *formalism* and *formulism* of the court space. Personal politics and conceptualisations of identity, though a key part in the claim to asylum, must be expressed in a manner which is

[1] See Costas Douzinas, 'Human Rights and Postmodern Utopia' (2000) 11 Law and Critique 219; Karin Van Marle, 'In Support of a Revival of Utopian Thinking: the imaginary domain and ethical interpretation' (2002) 3 Journal of South African Law 501; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart, Oxford 1998); Sara Murphy, 'Mourning and Metonymy: Bearing Witness Between Women and Generations' (2004) 19(4) Hypatia 142.

cognisable to the court and which follows the dictates of court etiquette, argumentation and appropriate and legally formatted lines of enquiry and questioning.

The centrality of political narratives was a trope of both the previous chapter on the political exposition of the women of Greenham Common and Chapter three on narratives produced by critical race theorists and the expert witness. The commonality of these chapters is their deployment of a resistant politics through transgressive narratives; a resistance that challenges the *formalism* and *formulism* of legal environments such as the court and legal academia. In this current chapter, the dearth of narrative deployment found in case law gives way to an analysis that instead considers the political context of the asylum system and the influence that has on legislation and judicial decision-making. I highlight the constrained nature of narratives produced in court, and through an analysis of the case law, question the disappearance of refugee voice. Snippets of refugee voices lightly pepper the cases, but such voices are subsumed to the legal ratio and contested points of appeal. By way of contrast, in the proceeding chapter I return to an analysis that centralises the voices, narratives and experiences of the actors in the asylum system by drawing on empirical research carried out over a period of two years. The empirical research involved interviews and in-court observations with asylum seekers, barristers, solicitors and NGO groups. This chapter consequently is the bridge that highlights the importance of context in producing political narrative. When can narrative be deployed? When can it be deployed safely and productively? When does it get stifled and in what context does it return to the fore?

In this chapter I analyse the judicial response to lesbian and gay claims to refugee status.[2] The asylum system, I claim, relies on essentialist categories of identity, fails to see discriminatory practices in the home state as persecutory and requires a perilously high level of risk and harm to be perpetrated on the individual in order for it to constitute persecution. The recent Supreme Court decision in *HJ (Iran) and HT (Cameroon)* [2010][3] has been lauded as a progressive intervention on the part of the courts for LGBT claimants. The case overturned law's reliance on a claimant's discretion when returned to the home state as an indicator of safety. I argue in this

[2] Throughout this thesis I refer to lesbians and gay men rather than lesbians, gay men, transgender, bisexual and queer persons. Lesbians and gay men formed the vast bulk of cases that I analysed. None of the claimants in the cases are actively identified as bisexual, transsexual or queer.
[3] *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31.

chapter that in-spite of this welcome ruling, the asylum system remains profoundly flawed and that the level of permissible discrimination is still too high.

In the second part of the chapter I discuss the process by which subjective understandings of persecution and torture are discussed as objective standards of legal interpretation.[4] In an asylum hearing the formal production of refugee testimony is guided by the *Convention Relating to the Status of Refugees* (hereafter the *Refugee Convention).*[5] An asylum seeker uses the *Refugee Convention* as the frame on which to build their case. The testimony the asylum seeker provides should outline in explicit detail the context from which their application stems, the incidences of persecution and anything else pertinent to substantiating their claim. Refugee narratives and testimony are an indictment of the failure of the formal protection of law in the home state and law's inadequacy in the incumbent state. In the home state, law can be the source of legitimised discriminatory legislation, which may lead to persecution. In the incumbent state, law fails asylum seekers by proceeding from a position where the asylum seeker is perceived as a fraud and secondly that it is legitimate to endorse some level of persecutory treatment.

The refugee testimony, which does not necessarily require further substantiating evidence such as witness or newspaper reports, is effectively a subjective account of experience; this subjectivity is given greater credence if objective information can be used to shore it up. I ask whether, in the absence of corresponding 'objective' evidence, the immigration judge has the ability to interpret the subjective evidence; will the judge be able to read the claimant's identity within

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[4] The standard of proof necessary to found a claim for refugee status is based on the premise that it is a 'public law enquiry into the need for protection rather than... an exercise in proving facts to a standard' (Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford University Press, Oxford 2006) 431). In the case of *R v SSHD exp Sivakumaran* the standard of proof required in an asylum hearing was framed in terms of 'reasonable chance', 'reasonable degree of likelihood', 'a serious possibility'. Additionally the fear of future persecution must be linked to the reason for the asylum seeker being away from their country at the time of the claim. In the case of *Kajac v SSHD* [2002] Imm AR 213, AIT (now known as the FTTIAC) referring to the jurisprudence of *Sivakumaran v SSHD* [1998] AC 958, held that the standard of proof should be considered in relation to a past set of events and as to whether there was a reasonable likelihood that persecution would occur in the future. Additionally the burden of proof of persecution sits with the asylum seeker and the standard of proof is 'reasonable degree of likelihood' of persecution and/or a 'real risk of harm'. Also see *Karanakaran* [2000] Imm AR 271, taken into account in a hearing is evidence of what has happened to individual's who would have been in a similar situation. Generally courts use expert witnesses, human rights reports from groups such as Amnesty International, Human Rights Watch and from the US State Department and the country reports produced by the UK Home Office.

[5] Convention Relating to the Status of Refugees 1951, as amended by the Protocol Relating to the Status of Refugees 1967.

the context from which they have fled and consider the asylum seeker's narrative as sufficient to be granted refugee status?

I claim there is a legal and linguistic gap in the nature of the testimony produced and the formal requirements of the *Refugee Convention*. The subjectivity of the experience narrated by the refugee explains the actions of persecutors meted out to an individual, and the relationship these actions bear to law; refugee law renders those experiences public and contestable, placing the claimant in the position of providing a story which is firstly automatically contested by the legal system and secondly forces a subjective account of events to take on the force of objectivity. This chapter aims to further develop the discussion in previous chapters regarding the process of identity formation, with a specific focus on the way in which identity is constituted in law. It further considers whether there is any scope for resistance to essentialist identity categories being developed in asylum law and broader human rights provisions, and how such resistance manifests in court and whether this is reflected in case law. In commencing, I discuss the current framework of the refugee process indicating the impact that international legislation and decision-making has on national jurisprudence.

The current framework of UK asylum law

The *Convention Relating to the Status of Refugees* was originally created to cope with the refugee crisis brought about by the Second World War. The *Convention* was initially restricted to individuals affected by events occurring prior to 1951 in Europe.[6] In 1967 a protocol was added to the *Convention* that removed both the geographical specificity necessary for claiming refugee status and the requirement that the claim for asylum was based on events that had occurred prior to 1951. The addition of the 1967 protocol was incorporated in order to manage the volume of political dissenters stemming from the Soviet Union and some African countries such as Kenya, Tanzania and Uganda.[7]

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[6] Gina Clayton, *Textbook on Asylum and Immigration* (OUP, Oxford 2004) 346-47.

[7] *Clayton* (n 6) 347; Also see Prakash A. Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (Cavendish Publishing Limited, London 2000) Chapter 6. Additionally for an interesting historical perspective on the creation of the 1967 protocol and the level of state involvement see P. Weis, 'The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties' (1967) 42 British Yearbook of International Law 39. Also see Sara E. Davies, 'Redundant or Essential: How Politics Shaped the Outcome of the 1967 Protocol' (2008) 19(4) International Journal of Refugee Law 703. Finally see *UNHCR Handbook on Procedures and Criteria for Determining*

The *Convention* defines a refugee in Article 1A (2) as any person who:

> ... owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, unwilling to return to it.

The formal requirements for gaining refugee status can be broken down into three particular grounds. Firstly, an individual must be able to demonstrate both an objective and subjective fear of persecution based on one of the enumerated grounds of race, religion, nationality, membership of a particular social group or political opinion. Claims for refugee status on the basis of sexuality generally fall under the 'membership of a particular social group' category. Secondly, they must be outside the country of nationality, and the state from which the claimant is fleeing must have been unwilling or unable to provide protection from persecution; or the individual no longer has a nationality and is outside of their former residence and cannot or will not return to that place of residence. The final obligation on the part of the receiving state is an obligation not to réfoul the claimant to the home state if there is the real possibility that he or she may be subjected to further persecution.[8]

The individual claiming refugee status must prove that there is no internal relocation alternative they could take advantage of. The problem with internal relocation for lesbians and gay men is that often it is not just state discriminatory policies which are oppressive but societal attitudes more broadly, which foster anti-lesbian and gay feeling. Moving to a different part of a state does not mean that an

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Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva January 1992). In 1969 the heads of State in Africa gathered in Addis Ababa to create the '*Convention Governing the Specific Aspects of Refugee Problems in Africa*', a full copy of the text can be found at <http://www.au.int/en/sites/default/files/Convention_En_Refugee_Problems_in_Africa_AddisAbaba_10September1969_0.pdf> accessed 27 April 2011.

[8] Art 33(1) 'No contracting state shall expel or return (réfouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'; E. Feller, V. Türk and F. Nicholson (eds), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press, Cambridge 2003) accessible via <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=419b79970&query=global%20consultations%20on%20international%20protection%20feller%20turk> accessed 27 April 2011. For discussion on the difference between repatriation and réfoulment see James C. Hathaway, 'The Meaning of Repatriation' (1997) 9(4) International Journal of Refugee Law 551, 558.

individual will be able to avoid the same discriminatory attitudes. In *Januzi v SSHD* Lord Bingham notes:

> The ...internal protection principle must ... be restricted in its application to persons who can genuinely access domestic protection and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized.[9]

This response is further endorsed by the European Union's Council Directive 2004/83/EC which states that there must be consideration of the sources, risk of persecution and the economic feasibility of relocation. Lord Bingham in *AH (Sudan)* further noted that prevailing attitudes in other parts of the country may impact on economic self-sufficiency, noting that barriers such as language, knowledge, educational skills, previous stay or employment there, local ties, civil status, age, life experience, family responsibilities, health, assets etc. may hinder the individual's ability to relocate.[10]

Asylum claims on the basis of sexuality have had some success in UK courts. There is no UK legislation at present that explicitly states lesbian, gay, bisexual or transgender (LGBT) persons are entitled to protection under the asylum system, but this has been tabled for inclusion by the government;[11] rather, LGBT claims for asylum have been 'read into' existing immigration and asylum legislation.[12] The implementation into domestic law of EC Directive 2004/38 through the 2006 Qualification Regulations provides further guidance as to the interpretation of the *Refugee Convention.* Significantly, section 6(e) of the Regulations provides legislative clarification on the definition of social group indicating that 'a particular social group might include a group based on a common characteristic of sexual orientation...'. In addition to this legislation, since the enactment of the UK *Human Rights Act 1998,* the

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[9] James Hathaway in Lord Bingham, *Januzi v SSHD* [2006] UKHL 5 paragraph 9.
[10] As outlined in *AH (Sudan) v SSHD* [2007] EWCA Civ 297. Council Directive 2004/83/EC 'On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted' [2004] OJ L304.
[11] Melanie Gower, Home Affairs Section, 'Asylum: Claims based on sexual identity' Standard Note: SN/HA/5618 (9 July, 2010).
[12] UK/ Immigration Act 1971 c.77; UK/ Immigration Act 1988 c.14; UK/ Asylum and Immigration Appeals Act 1993 c.23; UK/ Immigration and Asylum Act 1999 c.33; UK/ Nationality, Asylum and Immigration Act 2002 c.41; UK/ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 c.19; UK/ Immigration, Asylum and Nationality Act 2006 c.13, Immigration rules HC 395.

European Convention on Human Rights (hereafter *ECHR*) can be relied on by individuals in UK courts to challenge UK legislation and renders it unlawful for a public authority to act in a way incompatible with a right arising under the *ECHR*.[13]

In the following section, I discuss the jurisprudential journey towards the inclusion of lesbians and gay men as a 'social group'. I highlight the legal and political ramifications of incorporation. The inclusion of lesbians and gay men in the category social group opened the door to an official channel of the asylum process, giving a framework to claims that had previously had to rely on other grounds, which did not necessarily correspond to the experiences of sexual minorities. One of the problematic effects of this incorporation is the inscribing of sexuality as an immutable characteristic.

Lesbians, gay men and the social group definition

The inclusion of lesbians and gay men in the category social group has been a site of legal and political contestation.[14] Questions regarding the interpretation of social group have centred on essentialist understandings of 'group cohesion'[15] and 'immutability'.[16] The UK courts draw on a body of international case law in attempting to define and redefine the parameters of the social group definition.[17] The

[13] Paragraph 327 of the Immigration Rules (HC 395) defines an asylum applicant as 'a person who makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the UK's obligations under the Geneva Convention for him to be removed or required to leave the United Kingdom'. Paragraph 353 of the Immigration rules (HC 395) refers to the ECHR. The domestic source of the ECHR can be found at s 6(1) of the Human Rights Act 1998.

[14] In the Australian context see Christopher Kendall, 'Lesbian and Gay Refugees in Australia: Now that 'acting discreetly' is no longer an option will equality be forthcoming' (2003) 15(4) International Journal of Refugee Law 715.

[15] For a broader approach to group cohesion see *AG of Canada v Ward* (UN High Commissioner for Refugees et al intervening) (1993) 103 DLR (4th 1, 34); *Chan v Canada* (Minister of Employment and Immigration) (1995) 128 DLR (4th) 213, 247.

[16] An immutable characteristic defined in *Shah and Islam* with reference to the definition in *Re: Acosta* Lord Steyn 'a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed'. Also see N. LaViolette, 'The Immutable Refugees: Sexual Orientation in Canada (A.G.) v Ward' (1997) 55(1) University of Toronto Faculty Law Review 1; E. Ramanathan, 'Queer Cases: A comparative analysis of global sexual orientation-based asylum jurisprudence' (1996-97) 11(1) Georgetown Immigration Law Journal 1.

[17] For more on the definition of social group see T. Alexander Aleinkoff, 'Protected characteristics and social perceptions: An analysis of the meaning of 'membership of a particular social group' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press, Cambridge 2003) 263; James Hathaway, *The Law of Refugee Status* (Butterworth's, Ontario 1991); Karen Musalo and Stephen Knight, 'Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender Based Claims in the United States' (2001) 13 (1/2) International Journal of Refugee Law 51; James

category social group has a wide interpretation and has been used to enable the *Convention* to meet the needs of those not originally envisaged as requiring protection from persecution, such as women, unionised workers etc.[18]

Much of the initial case law that referred to lesbians and gay men did so in the wider context of claims for asylum based on political persecution through membership of political groups,[19] or membership of groups of dissenting workers.[20] In the *Refugee Convention* the category of social group comes at the end of a list of terms such as race, religion, ethnicity, all qualities deemed immutable. The US case of *Acosta*[21] furthered the notion of the immutability of these characteristics and aligned social group to international effect. In *Acosta* the US Board of Immigration Appeals referred to the relationship between immutability, social group and the characteristics of race, religion, nationality and ethnicity as:

> Each...describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of the individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed... The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared experience such as former military leadership or land ownership.[22]

The Canadian courts in *Ward v Attorney General for Canada* [1993][23] followed the jurisprudential interpretation outlined in *Acosta*. In *Ward* the notion of immutability and its relationship to particular social group was interpreted as taking three different forms; La Forest J. outlined a tripartite test for particular social group. Firstly, those defined by innate and unchangeable characteristics; secondly groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association and finally, groups associated by a former voluntary status, unalterable due to historical permanence.

Hathaway and William S. Hicks, 'Is there a subjective element in the Refugee Convention's requirement of "well-founded fear"'? (2005) 26 Michigan Journal of International Law 505.

[18] For more see Gina Clayton, *Textbook on Immigration and Asylum Law* (2nd ed OUP, Oxford 2006) 463.

[19] See *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689.

[20] See *Savchenkov v Secretary of State for the Home Department* and the case *Sanchez Trujillo v Immigration and Naturalization Service* (1986) 801 F2d 1571, US Ct of Apps (9th Cir) which involved a claim for asylum from young, working class El Salvadorian men who had not served in the military.

[21] (1985) 19 I and n211, US Board of Immigration Appeals.

[22] *Acosta* (n 21) 12.

[23] *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689. The facts of *Ward* consider the possibility of including a former member of a paramilitary organisation as part of a 'particular social group'.

The classification in UK jurisprudence of lesbians and gay men as members of a 'particular social group' was established in the case of *Shah and Islam*, which drew heavily on the *Ward* reasoning.[24] *Shah and Islam* concerned two Pakistani women accused of adultery and subject to domestic abuse by their partners and who had encountered physical and verbal threats from the wider community.

The claimants in *Shah and Islam* maintained they were subject to persecution on the grounds of gender and that gender constituted a 'social group'.[25] At the time the case went to court, gender was not a category recognised by the *Refugee Convention*, and women were not classified as constituting a social group. [26] The Court of Appeal rejected their claims for asylum; they based their reasoning on the fact that 'the members of the group must associate with each other, there must be some cohesiveness, interdependence or co-operation'. Drawing on the settled law established in *Savchenkov*[27] the court reasoned that 'the group must exist independently of the persecution, and groups such as "women subject to death by stoning for adultery" or "women subject to domestic violence without redress" incorporate the persecution into the definition.

The House of Lords overturned both of these justifications for denial of social group status. They confirmed that contact between group members was not essential; the groups are social groups in the sense of being recognisable in the context of the society in which they arise.[28] In answering the query as to whether the social group women existed independently of the persecution, the court surmised 'they were women in a society that discriminates against women. This was not to use persecution as a way of defining the group, but to acknowledge that women may be perceived as a group, if the society in which they are based discriminates against them - so the social group to be found was 'women in Pakistan' or 'women in a society that discriminates against women'.[29]

The House of Lords judgment rested on the question, is cohesiveness a requirement for the existence of a particular social group? Lord Justice Steyn noted

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[24] *Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah* [1999] 2 WLR 1015, [1999] 2 AC 629.
[25] *Islam and Shah* [1999] (n 24) 545.
[26] Both Shah and Islam had been subject to domestic abuse prior to and following the allegations, and were ejected from the marital home. The consequence of this ejection was social disapprobation from the local community, which manifested in physical and oral abuse.
[27] [1996] Imm AR 28.
[28] *Shah and Islam* (n 24) 658.
[29] *Shah and Islam* (n 24) 644-645.

that 'cohesiveness may prove the existence of a particular social group. But the meaning of particular social group should not be so limited'.[30] In *obiter* comments he discussed the linkage between abused women as a social group and 'homosexuals', noting:

> The unifying characteristics of gender, suspicion of adultery, and lack of protection, do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by the state. Conceptually such a group does not in a relevant sense depend for its existence on persecution.[31]

Following the finding that lesbians and gay men could be members of a 'particular social group', numerous other questions then arose navigating the new territory of sexuality based asylum claims.[32] Some of the issues raised for discussion in court concerned proof of sexuality,[33] concepts of identity versus activity,[34] the imposition of discretion upon same-sex relationships[35] (e.g. closeting), unacceptable internal relocation alternatives,[36] access to health care, and distinguishing between prosecution and persecution of same-sex sexual activity.[37] Prosecution of sexual activity such as anti-sodomy laws are not necessarily persecutory.[38] In *Jain*, which followed the decision in *Shah and Islam* a year later, the court took into consideration the criminalised status of gay sex in India, the slowly shifting social attitudes, the sporadic and arbitrary enforcement of law, and that such an 'atmosphere of discrimination' would lead to individuals being unable to have sexual relationships carried out with a sense of openness. The court indicated that it is not enough to prove that an individual is discriminated against, that discrimination must reach a sufficient level of persecution.[39] Factors such as criminalisation of homosexuality, threats of

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[30] *Shah and Islam* (n 24) 643; also see *Savchenkov* (n 27).
[31] Lord Steyn in *Shah and Islam* (n 24) 645. In his judgment at 643, Lord Steyn also notes 'drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the USA, the refugee status authority concluded in an impressive judgement that depending on the evidence homosexuals are capable of constituting a particular social group... [t]his view is consistent with the language and purpose of Art 1A(2).'
[32] For more on this see Jenni Millbank, 'Gender, Sex and Visibility in Refugee Decisions on Sexual Orientation' (2003) 18 Georgetown Immigration Law Journal 71; Derek McGhee, 'Persecution and Social Group Status' (2001) 14 Journal of Refugee Studies 20.
[33] *R v Secretary of State for the Home Department ex.parte Vraciu* 1995 Appeal No. HX/70517/94.
[34] *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238.
[35] *RG (Colombia) v Secretary of State for the Home Department* [2006] EWCA Civ 57.
[36] *Amare v Secretary of State for the Home Department* [2005] EWCA 1600.
[37] *OO(Sudan) and JM (Uganda) v SSHD* [2009].
[38] See *Jain v SSHD* [2000] INLR 71.
[39] *SSHD v Z, A v SSHD, M v SSHD* [2002] Imm AR 560.

prosecution, social disapprobation and government campaigns can all potentially be factors which would contribute to a claim of persecution, but are not necessarily sufficient to prove persecution to a level which is physically and mentally intolerable.[40]

The distinction that manifests in the discrimination/persecution discourses highlights the division in the way the courts consider discriminatory practices directed towards asylum seekers in their home state and those directed at UK citizens. Creation of anti-discrimination legislation pertinent to lesbians and gay men in the form of both UK and EU legislation was created in order to assist in the prevention and penalisation of discrimination based on sexual orientation.[41] UK law and legislature acknowledged that such discrimination was impermissible, unjust and recognised that lesbian and gay identity was worthy of respect. Asylum courts however are willing to endorse double standards in levels of permissible discrimination. UK asylum courts are explicit about only granting asylum status to individuals subject to discriminatory practices which reach a sufficient level of persecution; my claim is that the court's decision to send an asylum claimant back to their home state where same-sex sexual relations are illegal or heavily socially proscribed denies the asylum seeking individual the same rights and opportunities of living out their sexuality. This denial by UK asylum courts symbolically demeans the validity of LGBT sexuality, failing to give an adequate amount of respect to those relationships. The differential standard of protection being endorsed for citizens of the

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[40] See *Jain* (n 38). It is important to note that cases considering the notion of discretion have been particularly evident in claims based on sexuality for example in *R v Special Adjudicator ex p T* [2001] Imm AR 187 'the applicant was accepted to be a member of a social group, but there was no likelihood of persecution unless he 'flaunted' his sexuality. Also see *The Queen on the Application of M v IAT (SSHD Interested Party)* 2005 EWHC 251 (Admin) re: accusations of violation of Art 8 ECHR -That general pronouncements regarding country conditions for homosexuals should be avoided. *SSHD v Z, A v SSHD, M v SSHD* [2002] Imm AR 560 Scheimann LJ. *MN Kenya* [2005] UKIAT 00021 - how a person naturally expresses themselves in order to adjudicate the ramifications and change to behaviour that being sent home would wreak. Behaviour modification was also rendered problematic in *Ahmed v SSHD* [2000] INLR 1. Interference with private life is not always sufficient to constitute persecution *R (Dawkins) v SSHD* [2003] EWHC 373 Admin, *R (on the application of Bazdoaca) v SSHD* [2004] EWHC 2054 (admin), *V (Ukraine)* [2003] UKIAT 00005. Although the laws in these states criminalised sexuality it was found that there was not a likelihood of 'substantial discrimination, violence or abuse'.

[41] Article 13 Treaty Establishing the European Community (As amended by the Treaty of Nice); Employment Directive 2000/78; Employment Equality (sexual orientation) Regulations 2003; Directive 2004/38, Article 2 (2)(b); Immigration (European Economic Area) Regulations 2006. UK legislation - Gender Recognition Act 2004; Schedule 23 Civil Partnership Act 2004; Asylum and Immigration (Treatment of Claimants) Act 2004; Immigration rules HC 395; Employment Equality; UK/ Equality Act 2006 c.3; UK/ Equality Act (Sexual Orientation) Regulations 2007 Statutory Instrument 2007 No. 1263.

UK and those who would seek refugee status and thus become citizens of the UK is poles apart. The division reinforces the idea that lesbian and gay refugees do not deserve such a standard of protection, and that this protection is only applicable to UK nationals in context.[42]

Troubling implications of immutability

Recognition by high-level courts of the immutability of sexuality as a defining or intrinsic part of identity, the first ground considered in *Ward*, and reiterated in *Shah and Islam*, is for some lesbians and gay men a troubling construction. Although a finding of immutability or innateness has provided a precedent upon which lesbians and gay men can make a claim for refugee status and is a positive development in terms of formal recognition, the problematic construction of sexuality which presents itself under immutability is the potential preclusion of the way sexuality is viewed in broader terms, for example as a choice, or the way it perpetuates the rigid binary of hetero and homosexuality. For some lesbians and gay men, sexuality is politically motivated; it is neither a fixed nor static identity and ought not to have to be deemed innate. By inscribing sexuality as innate there is the potential to delegitimise those who have made a conscious choice or constructed their sexuality in non-binaristic terms.

Furthermore, in being granted rights based on immutability that which remains unchallenged and is essentially further reified is the status of heterosexuality. Stychin notes that:

> In general, a test of immutability underscores a view of so-called personal characteristics as essential, neutral, and historically continuous; rather than as historically specific, culturally changeable, and the outcome of a particular pattern of social relations' based upon oppression.[43]

The heteronormative framework within which lesbians and gay men are 'included' continues to cast the queer as other to it. Furthermore, an understanding that sexuality is not a static concept becomes alien. The inclusion of lesbians and gay men in the social group category, and thereby legitimised as a distinct identity deserving of legal protection, fails to deconstruct the normative basis upon which patriarchy and gender

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[42] *R (Dawkins) v SSHD* [2003] EWHC 373 Admin.
[43] Carl F. Stychin, 'Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada' (1995) 8(1) *Canadian Journal of Law and Jurisprudence* 49, 56.

normativity rests, perpetuating the very system that fosters homophobia.[44] The categorisation of immutable characteristics encourages the misguided legal understanding of identity as singular and discrete rather than plural and intersecting. The creation of more grounds of non-discrimination based on singular aspects of identity creates an increased sense of the divisibility of the person; this compartmentalisation turns the right's claimant into a non-coherent *mélange* of identity parts rather than a fully functioning human being experiencing life and experiencing discrimination through their race, gender, ethnicity, religion, sexuality, ability and disability. Finally, acknowledgement of immutable characteristics hierarchically ranks oppressions into those that have and those that have not been recognised, thereby further marginalising individuals that may not fit within the boundaries of the immutability nomenclature, and those who choose not to conform to the liberal interpretation of their identity.[45]

The problematic quest for justice in the form of formal equality provisions fails in its reliance on essentialised categories of identity and in the legalistic regulation of relationships. Reliance on a static conceptualisation of identity is a limitation imposed by the state that conforms to normative societal constructs. In Chapter two, I critiqued the position of the state/court in their formal equality provisions and argued for an alternate approach using Cornell's concept of the 'imaginary domain'. Cornell, I claimed, does not begin her project from a position of 'making up' for women's disadvantaged position in society; for her this would further posit women as degraded others intent on attaining formal equality with men. Instead, she begins at a point where women are recognised as 'free persons', 'provided with the full scope of rights, resources, capabilities, or primary goods that a theory of distributive justice defends'.[46] For Cornell, '*any definition* of what a woman

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[44] Stychin, drawing on the work of Didi Herman notes: 'Lesbians and Gay men are granted legitimacy, not on the basis that there might be something problematic with gender roles and sexual hierarchies, but on the basis that they constitute a fixed group of 'others' who need and deserve protection. Human right's frameworks thus pull in 'new' identities thereby regulating them, and containing their challenge to dominant social relations' in 'The Politics of Law Reform: Lesbian and gay rights struggles in the 1990's' in J. Bristow & A. Wilson (eds), *Activating Theory: Lesbian, Gay, Bisexual Politics* (Lawrence and Wishart, London 1993) 58.

[45] Also see Steven Seidman, Chet Meeks, Francie Traschen 'Beyond the Closet? The Changing Social Meaning of Homosexuality in the United States' (1999) 2:1 Sexualities 9. The authors discuss the problematic intertwinement of immutability and identity politics. They refer to repression of difference amongst lesbians and gay men; legitimising same-sex preference; isolation of gay movements from other movements and that normalizing gay identity leaves intact the organization of sexuality around the hetero/homo binary.

[46] Drucilla Cornell, *At the Heart of Freedom* (Princeton University Press, Princeton 1998) 20.

is makes the imposed definition, not the woman, the source of the meaning of her *sexual difference*'.[47] I claim that the concept of immutability, so deeply entrenched in law's ideology, further inculcates law as the mechanism which defines individuals and fails to recognise that a more self-determinative response to identity, rather than the legal system, are best placed as the source of an evolving definition of self. Such definitions of self can be productively informed by the interplay of sex, race, class, sexuality, ability etc in context, thus dismissing the necessity for static conceptions of identity.

Stychin, referring to Canadian jurisprudence, notes the problematic nature of formal equality provisions for lesbians and gay men argued under the *Canadian Charter of Rights and Freedoms.*[48] The paternalistic and problematic approach of the courts denies the possibility of individual agency in determining sexual orientation and practice.

> Homosexuality becomes defined as an innate inability to realize the heterosexual norm. A prohibition on discrimination in the name of human rights thus becomes justifiable because of the construction of sexuality as beyond individual choice.[49]

Thus heterosexuality and its trappings are invoked as the aspirational status and benchmark of sexually normative validation. The paternalism of the court codifies the acceptable legal limits as to what may constitute discrimination against a lesbian or gay man and what constitutes appropriate lesbian or gay behaviour. Lesbian and gay identity is rendered as secondary, inadequate, essential and therefore blameless. The construction of lesbian or gay sexuality as invested in choice, in politics, in desire, removes the conceptualisation of gender and sexuality as fixed.[50]

The problem with the immutable reading of sexual orientation and the 'social group' category for claiming refugee status is that it displaces the politics of LGBTQ sexuality, thus subsuming political opinion to identity within a particular social group. The socially transgressive nature of lesbian or gay sexuality can in itself connote an

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[47] *Cornell* (n 46) 20.
[48] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, (U.K.), 1982, c.11.
[49] *Stychin* (n 43) 57.
[50] For more on this see Eve Kosofsky Sedgwick *Epistemology of the Closet* (University of California Press, Berkley 1990). In the introduction and Chapter 1, 70, she states: 'The most obvious fact about this history of judicial formulations is that it codifies an excruciating system of double binds, systematically oppressing gay people, identities, and acts by undermining through contradictory constraints on discourse the grounds of their very being. That immediately political recognition may be supplemented, however, by a historical hypothesis that goes in the other direction'.

actual or imputed politic. A decision not to marry can indicate contestation over gender norms and defiance to both social and political normativity, placing the individual outside of the protection of the state, leaving them subject to incidences of persecution.[51] In the following section I consider what constitutes permissible levels of persecution and how this is defined along lines of sexuality.

What constitutes persecution?

There is no single definition of what constitutes persecution.[52] There have been numerous interpretations in case law and through organisations such as UNHCR that have provided guidance as to what may be perceived as persecution, but currently there is no definitive meaning. The Refugee Women's Legal Group suggested that 'serious harm + failure of state protection = Persecution', this formulation has been taken up by some members of the judiciary and was referred to in the case of *Shah and Islam*; it has also garnered some support from academics.[53]

Jurisprudentially the case of *Sepet v SSHD*[54] is referred to as the standard definition of persecution in the UK. In *Sepet* Lord Bingham defined persecution as '[a] strong word. Its dictionary definitions...accord with popular usage: "the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to repression or extirpation of it"'.[55] In terms of the time frame of persecution, past persecution is a useful indicator of what the individual has experienced but the individual must prove that there is a future oriented risk of persecution.[56] In *Katrinak* Lord Justice Scheimann wrote 'the past is only relevant inasmuch as it is one of the evidential factors which it is often, but not always,

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[51] For more on this point see Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan Publishing Limited, Bristol 2001) at 169-171. Also see the case of an Ethiopian lesbian *Amare v SSHD* [2005] EWCA 1600.

[52] UNHCR handbook 1992 paragraph 51-53 states 'there is no universally accepted definition of persecution and various attempts to formulate such a definition have met with little success. From article 33(1) of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights –for the same reasons—would also constitute persecution'. UNHCR (1992) paragraph 51; *Adan v Secretary of State for the Home Department* [1999] 1 A.C. 293, 305B-C affirms the breadth of interpretation to be given to international treaties such as the *Refugee Convention.*

[53] See *Shah and Islam* (n 24) and *Horvath v SSHD* [2001] 1 AC 489 both refer to this formulation.

[54] [2003] 1 WLR 856.

[55] *Sepet* (n 54) paragraph 7.

[56] For past persecution see *Demirkaya v SSHD* [1999] Imm AR 498; for future persecution see *Francis Katrinak v SSHD* [2001] EWCA Civ 832.

relevant to consider when deciding whether the claimant has a well-founded fear that he will be persecuted in the future if he returns to the country of his nationality'.[57]

The definition of persecution provided by James Hathaway in his 1991 text has also informed much national and international refugee jurisprudence.[58] Hathaway relies upon the categorisation of three different forms of persecution. The first category includes freedom from arbitrary detention, arrest, slavery, to be acknowledged as a person in law and to be exempt from retroactive criminal prosecution. The second category moves on to the freedom to be a fully participating member of society; included within this category is the ability to join trade unions, freedom of speech, the right to a fair trial, to be able to leave and return to one's country. The final category considers economic and social rights rather than the civil and political which were dealt with in the first two categories and includes the right to work, and references adequate standards of living including access to food, clothing, housing, education, and health, to name but a few.[59]

Although this is a comprehensive consideration of the potential forms that persecution can take, not all of these considerations have been acknowledged as legitimate grounds in current jurisprudence.[60] Being persecuted does not in itself mean that refugee status will automatically be granted; factors such as who is the perpetrator of persecution e.g. the state or private persons; is the level of persecution tolerable; is there a future oriented fear on the part of the refugee that the persecution will occur again; are some of the factors taken into account when assessing a claim.

Refugees experience persecution at the hands of many sources; those sources can include government actors, militia groups, the local community, family, 'friends' or acquaintances. In being threatened by a state actor, the individual rarely has recourse to law enforcement and may be 'unable or unwilling to avail him or herself of the protection of the state'. Additionally if a non-state actor is threatening the claimant and the state is unable or unwilling to respond, then this too may amount to a form of persecution.[61] For example in the case of *Horvath* which involved the

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[57] L.J. Schiemann in *Katrinak* (n 56) para. 3.
[58] James Hathaway, *The Law of Refugee Status* (Butterworths, Ontario 1991).
[59] James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge 2005); *Clayton* (n 18) 357 –58.
[60] For example reference to economic and social rights including housing, work, education etc are not recognised grounds for gaining refugee status in the UK. These grounds represent the claims of the now demonised 'economic asylum seeker' rather than political refugee.
[61] Helene Lambert, '*Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489; [2000] 3 WLR 379' (2001) 13 (1/2) International Journal of Refugee Law 16.

persecution of a Slovakian Roma family by 'Skinheads', the court noted with regard to the lack of protection by the state, 'the failure of state protection is central to the whole system (of international refugee protection)'. The court went on to note the prior jurisprudence of *Adan* where Laws L.J. stated:

> ...Our courts recognise persecution by non-state agents for the purposes of the convention in any case where the state is unwilling or unable to provide protection against it, and indeed whether or not there exists competent or effective governmental or state authorities in the country in question. This is what has been called the 'protection theory'. It is, as we have said, shared by a majority of the states signatory to the Convention and UNHCR'.[62]

In *Horvath* it was found that the family had been persecuted, but their failure to seek state protection was detrimental to their claim, as they had not exhausted all possibilities of protection. Thus a finding of persecution in the home state does not automatically guarantee protection by the host state.

There is also some discrepancy regarding what constitutes persecution deserving of international protection. The various forms of persecution that can be experienced by an individual are multiple and vary in the severity of impact. The 'persecution' perpetrated on or toward the asylum seeker must be at a level, which is objectively intolerable. Low-level persecution that is not life threatening or does not result in serious harm will not suffice. The claimant must be persecuted enough to both fear for their life (subjective understanding of fear) and must be able to prove to a court that this fear is objectively based i.e. the fear must be interpreted by the court, in relation to the specific social context from which the asylum seeker has fled, as constituting persecution. Thus, although in *HJ (Iran) and HT (Cameroon)* [2010] the decision of the Supreme Court was a positive and progressive intervention into LGBT asylum claims regarding the impermissibility of discretion as an indicator of safety, what problematically remains is the requirement of a finding of high level persecution, which goes beyond mere discrimination.

One of the problematic aspects of assessing permissible and impermissible levels of persecution is that it has the effect of creating hierarchies of persecution. Beatings, torture, rape, threats, blackmail and disappearance, are all tortuous scenarios and to attempt to create an objective legal standard and instil hierarchies of persecution is to dismiss the contextual specificity of the claims and the imminence of

[62] Laws LJ in *Adan* cited in *Horvath* (n 53) 177.

the threats associated. In de-contextualising persecution and attempting to compare like-for-like, or ranking the severity of experiences that denote persecution, the court may 'disappear' the claimant and negate the lived experience of their persecution within its specific context. The impact that hierarchies of persecution may have on LGBT asylum seekers specifically is that physical abuse and immediate threats to life will be considered as a more worthy claim when compared to blackmail, 'outing', threatening behaviour or other forms of psychological violence which arise out of discriminatory attitudes.

Discrimination as persecution?

Discrimination on the part of the persecuting state will not always constitute persecution. In *R v Special Adjudicator ex p T*,[63] referring to the ECHR jurisprudence handed down in *Modinos v Cyprus* and *Dudgeon v UK*, both of which involved a gay man's right to private life and consensual homosexual sex, T argued that there was a breach of his Article 8 right to private life if returned to his home state. The court acknowledged that there may have been a breach of his article 8 rights under the ECHR but this was not sufficient to constitute persecution, or to place T within the category refugee. The UNHCR handbook notes

> Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.[64]

This distinction became one of the controversial points of determination in the case of *Ward v AG of Canada*. The court had to reconcile Ward's past membership of a paramilitary organisation, his imprisonment for his activities as part of that organisation, and his subsequent role as 'supergrass', which placed him in a position of persecution from the Irish National Liberation Army (INLA). The UNHCR handbook goes on to note the circumstances when discrimination can be viewed as persecution:

> This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious

[63] [2001] Imm Ar 187.
[64] UNHCR Handbook (1992) para. 56. Also see *Ward v Canada* [1993] (n 15) discussing the former paramilitary activities of a member of the INLA and its impact on the right to refugee status.

> restrictions on his right to earn a livelihood, his right to practise his religion, or his access to normally available educational facilities.[65]

Recently there have been some positive decisions regarding gay men from Iran who were subject to very stringent prosecutory legislation. The extreme penalties meted out by Iranian courts amongst others, which include floggings and the death penalty, have meant that some UK courts have been more sympathetic to these cases. This is particularly in light of the relatively recent media focus on Mehdi Kazemi, a gay Iranian asylum seeker, whose 18-year-old partner was sentenced to death.[66] The facts surrounding this particular case are opaque; officially Kazemi's partner was hung for his part in raping a minor; unofficially, the media and LGBT Iranian activists reported that it was due to his sexuality.[67]

Generally state interference in an individual's private life legitimised through discriminatory legislation will not constitute a sufficient level of persecution.[68] The court has until recently drawn on reasoning that endorsed and used the language of 'discretion'. As I mentioned previously the judgement in *HJ (Iran) and HT (Cameroon)*[2010] represented a jurisprudential turning point for the court. In *HJ and HT* the court indicated that discretion could no longer be relied on as a guarantee of safety or as a permissible response by the UK courts in refusing an asylum application on the basis of LGBT sexuality. The UK asylum court's prior history of reliance on

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[65] UNHCR Handbook (1992) para. 54.

[66] It is prudent to note that Iran is only one of a host of countries that have particularly regressive legislation. In my introduction I gave a brief synopsis of some other states where punishment is equally severe. Queer Iranian refugees have become the cause célèbre, and the profile of queer Iranian cases is heightened whenever other political wrangles between the West and Iran come to light e.g. Iran's nuclear arms programme. For an interesting analysis of the demonisation of certain states related to their sexual politics and international status see Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Next Wave: New Directions in Women's Studies, Duke University Press, Durham 2007). In addition it is also worth noting that with regard to Medhi Khazemi his partner was charged with the rape of a minor rather than offences connected to homosexuality. Whether the charges were accurate or not is questionable, but incidences like this demonise certain states. Other states which have the death penalty for sodomy include Mauritania, Saudi-Arabia, Sudan, United Arab Emirates, Yemen, Nigeria (Nigeria - Only in the 12 northern provinces with Sharia law) for an up-to-date outline of the legal position of LGBTQ individuals see International Lesbian and Gay Organisation <http://www.ilga.org> accessed 28 April 2011. The impact of demonisation of certain states can lead to the problematic construction of for example Iranian society as always 'barbaric' and as Iranian refugees as always victims, which of course is not the case. See Robert Verkaik, 'Gay Iranian Granted Asylum' *The Independent* (London 21 May 2008) 6.

[67] BBC News Channel, 'Gay Iranian Deportation Reviewed' <http://news.bbc.co.uk/1/hi/world/europe/7294908.stm> accessed 28 April 2011; Everyone Group, 'Iran: Yong gay man sentenced to death' <http://www.everyonegroup.com/EveryOne/MainPage/Entries/2007/12/4_Iran,_Young_gay_man_sentenced_to_death.html> accessed 28 April 2011.

[68] See *OO (Sudan) and JM (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 1432.

discretion in living out sexuality in the home state placed lesbians and gay men in a perilous situation. If the individual was not discreet they would bear the brunt of discrimination in their home state. If the individual was discreet upon return, they had to re-closet their identity, living their sexuality in secret with the inherent risks that holds. The emotional and psychological strain of closeting due to oppressive social norms has been shown to lead to suicidal ideation and sexual risk taking etc.[69] Prior to *HJ (Iran) and HT (Cameroon)* [2010] the asylum courts did not insist that a person *had to* live discreetly, nor that they could impose a change of behaviour; this would constitute persecution. Instead the court assumed that the individual would voluntarily be discreet and thus not run afoul of persecutory forces. The appeal court in *HJ* [2009] phrased it thus:

> When assessing whether a person who is a homosexual would face risk of persecution or serious harm on return to his own country we must take a factual not a normative approach... we must focus on the factual issue of how it is likely he will behave given the evidence we have about how and why he has behaved up to now. It is wrong for a decision maker to apply a normative approach, which focuses on how it is thought an applicant should behave.[70]

The courts reasoning in the 2009 case at the Court of Appeal shows an incredible lack of understanding of the difficulty, and the peril, associated with closeting identity. The implied discretionary standard previously proffered by the court rendered the protection of lesbian and gay refugees wholly inadequate fostering further discriminatory treatment.[71]

The secrecy, denial and closeting that can accompany same-sex sexuality was consistently seen as a valid way in which to conduct private life and was for an extended period a fundamental component in legitimising the réfoulement of lesbian and gay refugees. In the case of *Jain* v *SSHD* [2000] the tribunal found that living discreetly as a gay man would ensure the claimant's continued safety and protection,

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[69] On the medical ramifications of closeting see Yoel Elizur, Michael Ziv, 'Family Support and Acceptance, Gay Male Identity Formation, and Psychological Adjustment: A Path Model' (2001) 40(2) Family Process 125, 126; Cheshire Calhoun, 'The Military Ban and the ROTC: a study in closeting' (1994) 27(3/4) Journal of Homosexuality 117; Susan Cochran, Greer Sullivan & Vickie Mays, 'Prevalence of mental disorders, psychological distress and mental services use among lesbian, gay, and bisexual adults in the United States' (2003) 71(1) Journal of Consulting and Clinical Psychology 53.

[70] *HJ (Iran)* [2008] UKAIT 00044 para 39.

[71] Although the violence experienced does not have to be sustained, if it is an incident of particular severity and with long-term ramifications then this may constitute persecution. See *Demirkaya v SSHD* [1999] Imm AR 498.

thus endorsing a life conducted beneath the 'socio-sexual' radar. The problem with life conducted under the radar is that a person no longer has the formal protection of the state and thus can be subjected to persecution with relative impunity. Persecution can then be carried out by family, by friends and by mob violence and the persecuted individual has no legal redress to the formal system of police and state protection, leaving lesbians and gay men in a legal hinterland. Examples such as the case of *DW (Jamaica) CG* [2005] UKAIT 00168 and *RG (Colombia) v SSHD* [2006] outline the difficult position in which claimants are left when there is little to no recourse to legal mechanisms. The claimants in these and other cases like them could not rely on the formal mechanism of state protection as the police tacitly endorsed and were sometimes responsible for further abuse of the claimants.

The UK court's prior reliance on the accessibility of state protection for lesbians and gay men and on the ability to closet sexuality through 'discretion' were false indicators of safety leaving the claimant in a position of vulnerability. Millbank has argued that the discretion threshold that would supposedly stave off this harm perpetuates the violence of the home state through the host state's judicial decision-making process. She notes, 'through the norm of invisibility decision-makers have continued to employ the violence of the law to force applicants back into their home country closets'.[72]

Outside of the courtroom and beyond the impact of refugee determinations, the closet and its accompaniment, discretion, have been posited as sites of resistance to heteronormativity and homophobia by queer communities.[73] Ironically, in the post *HJ (Iran) and HT (Cameroon)* [2010] era, its interesting to note that closeting as resistance may have purchase for LGBT asylum claimants in terms of the way in which sexuality is produced in court. If closeting is perceived as taking advantage of the space of silence within unsafe spaces, then the 'closeted as captives' to oppression analogy can be contested.[74] Seidman notes 'practices of concealment not only protect the individual from the risks of exposure but create a "protected" psychic space to imaginatively construct a gay self'.[75] Furthermore the gay 'self' presented to the court

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[72] Jenni Millbank, 'A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' (2005) 14 Social and Legal Studies 115, 120.
[73] Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7(2) Constellations 230; Steven Seidman, Chet Meeks and Francie Traschen, 'Beyond the Closet? The Changing Social Meaning of Homosexuality in the United States' (1999) 2 Sexualities 9.
[74] *Seidman et al* (n 73) 15.
[75] *Ibid.*

may be able to retain a level of control as to the facets of gay life accessed via the public sphere of court.

Similarly, Barbara Ponse, talking about the development of lesbian identity, has observed:

> The secrecy around gay life provides a protective milieu for trying on the lesbian identity in a favourable ambience. Once a lesbian identity has been acknowledged and accepted, the lesbian subculture created by the binding and separating of powers of secrecy supports and strengthens commitment to that identity, through associations with validating others.[76]

The closet provides a 'protective' barrier, wrestling with the encroaching forces of heteronormativity, and provides a liminal space in which to develop queer/LGBT sexuality and community. The citing of spaces, both literal and metaphoric such as closets, common land such as Greenham, and imaginary domains provides opportunities for individuals to develop their understandings of identity in contradistinction to social normativity; identity within these counter-cultural spaces has the potential to be developed and affirmed, making the abject the empowered.

Developing an identity that can transgress social and cultural expectations requires communal support in confrontation with, and transgression of, the individual's status as abject other. The abject individual requires the space to conceptualise their identity through repudiation/valorisation of particular identity traits. For example Sandoval-Sanchez conceives of the gay Latino body with AIDS as 'a body marked by race, ethnicity, class, sexuality and migration, a body that endangers and troubles the cohesion of the social order by destabilizing the borders between normal and deviant, insider and outsider, sameness and difference, health and illness, life and death.'[77] Identifying as part of what is considered an 'abject' community can be an important component in developing 'identity' within and without the closet. Writing in the context of the US, Sandoval-Sanchez notes that forging identity through abjection is a process of becoming, of performing that abjection as identity; for him it has 'the potential to disrupt normality. It is through unending acts of performative abjection that the marginalized other can gain a paradoxically powerful agency, can subvert and resist'.[78]

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[76] Barbara Ponse in *Seidman et al* (n 73) 16.
[77] Alberto Sandoval-Sanchez, 'Politicizing Abjection: Towards the Articulation of a Latino AIDS Queer Identity' in Brad Epps, Keja Valens, Bill Johnson-Gonzalez (eds), *Passing Lines: Sexuality and Immigration* (Harvard University Press, Harvard 2005) 311, 317.
[78] *Sandoval Sanchez* (n 77) 317-318.

Within the space of the court, the queer/LGBT asylum seeker is forced to render him/herself known through the performance of their 'abject' status, through narratives of persecution, abuse, torture, race, sexuality, exile etc. The status of abjection, and its relationship to the judicial regime, has had effects on the law's response at a public and private level. The law responds publicly by taking responsibility for the 'oppressed' other and incorporating them into an appropriate body of legal rights. Within that liberal legal framework, the information that the judge uses to make their decision must fit within a western judicial conceptualization of a persecuted LGBT identity – a persecution that is objectively perceived, through western legal precepts, as sufficient to require *Convention* protection.

Adjudication on queer sexuality in the asylum court is at odds with the usual position courts take in criminal cases or anti-discriminatory lesbian and gay legislation. The law generally prefers lesbians and gay men to be discreet with regard to their sexuality. For example if we consider the findings of the 1957 Wolfenden Committee which was convened to look at the law relating to prostitution and homosexuality, the Committee's report was couched in terminology which endorsed findings of toleration on the part of the law and discretion on the part of the homosexual.[79] Derek McGhee, referring to the work of Anna Marie Smith, suggests that 'the decriminalization of homosexual acts in the Wolfenden recommendations was to be achieved by promoting the idea of a tolerable homosexual, the antithesis of the flaunting, unassimilable 'bad gay'.[80] Recent legislation such as the *Civil Partnership Act* 2004 is symptomatic of the legitimating and co-extensively privatising of lesbian and gay relationships. Lesbians and gay men are ushered into formal institutions via relationship recognition, and thus apportioned the formal rights, responsibilities and respectability of the hetero/homonormative couple. Lesbian and gay partnerships that take advantage of this legal status, at least superficially, endorse a privatised and discreet vision of LGBT relationships.

In the context of an asylum hearing however, discreet 'lifestyles' have previously worked against claimants. Asylum courts have responded more positively to a performance of queer sexuality that is more stereotypical, that is camp, public, that is embedded in a gay scene, such qualities have been positioned as making the

[79] Nikolas Rose, *Governing the Soul* (Routledge, London 1990) 225. The Wolfenden report lead to the *Sexual Offences Act* 1967 which decriminalised homosexuality.
[80] Derek McGhee, 'Beyond toleration: privacy, citizenship and sexual minorities in England and Wales' (2004) 55(3) The British Journal of Sociology 357, 359.

individual more susceptible to persecution through a stereotypical reading of queer. The case of *RG (Columbia) v SSHD* [2006] provides an instructive reading as to the dichotomy between the court's perception of gay sexuality and the lived reality of it for a closeted asylum seeker.[81]

RG had led a 'quiet life' back in Columbia; he had a long-term partner and went to gay events once a month. RG had not experienced any actual physical violence but had been subject to blackmail and to threats to his safety via Guerrilla groups who carry out social cleansing of homosexuals, drug users, prostitutes and vagrants. In the UK, RG had maintained his quiet lifestyle; he still did not frequent gay clubs very often, but in court he expressed that he had become more open about his sexuality and felt able to express himself in a way that felt more natural. Lord Justice Buxton refers to RG's concern regarding his forced return to Colombia:

> Since he had been in the UK his mannerisms had changed so much that they were more open and overt through living in a society where homosexuality is better accepted... for that reason he would be identified as a gay person'[82]

RG's initial claims for asylum failed as the court felt that there was an insufficient change in his lifestyle when living in the UK and that his reasons for maintaining his closeted status in Columbia had been based on concerns about social disproval rather than fear of social cleansing. RG's is an authentic but failed court performance of gay identity — he has failed to become the asylum court's preferred image of gay men. The version of 'gay' that RG is living in the UK is a Colombian version, a version that can easily be transplanted back into the home state. There has been no 'significant' change in his behaviour since living in the UK and therefore his case would not be viewed as particularly strong.[83]

In a recent publication by Mitre House chambers on sexuality based asylum claims they discuss strategies to be used in court for proving that an LGBT claimant is

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[81] *RG (Colombia) v SSHD* [2006] EWCA Civ 57.

[82] L.J. Buxton, para. 2.

[83] RG arrived in the UK in 2001 and claimed asylum arguing that he faced persecution because of his sexuality and his HIV positive status. Around this time he became involved with another overseas national who was also claiming asylum in the UK. The Home Office refused RG's initial application. Consequently he appealed to the Asylum and Immigration Tribunal (AIT) in 2003, which also rejected his application. RG's subsequent appeal to the Court of Appeal, which relies on much of the reasoning provided by the AIT, was also rejected. RG has appealed against the Court of Appeal's ruling; a judicial review of the decision was to have taken place in May 2008 but this was cancelled at the last minute by the Secretary of State for the Home Department, following this RG was granted leave to remain.

LGBT and that they have established themselves in UK gay culture. They suggest evincing the way in which LGBT sexual or gender identity is present through for example the individual's presence in the bar/club/bathhouse scene. Secondly, whether the claimant has joined LGBT support groups; thirdly, whether they have friends willing to provide evidence of their sexuality; fourthly, mannerisms and any associated issues with stereotyping; fifthly, the presence of a girlfriend or boyfriend, and finally gender identity for transsexuals and how this is expressed and whether there is documented evidence in the form of statutory declarations and psychiatric reports to prove their claim.[84] Although these factors are used in order to win a claim for an asylum seeker, they have at their core a rendition of sexuality which is vested in a stereotypical representation of European/North American gay male sexuality. Hence RG falls outside of many of these requisites making him the wrong type of gay man to be given asylum in the UK. RG was not taking advantage of the 'accessibility' of the gay community in the UK and was only marginally more out of the closet in the UK than he was in Columbia; RG was not out of the closet to the degree the court viewed as potentially problematic if returned.

Foucault writes on closeting, 'closetedness itself is a performance initiated as such by the speech act of a silence – not a particular silence, but a silence that accrues particularity by fits and starts, in relation to the discourse that surrounds and differentially constitutes it'.[85] The process of 'coming out', of declaring a desire for same-sex relations relies on an emergent notion of the sexual self. The transition from the closet to the public sphere represents a journey, whereby identity is claimed and performed. Often lesbians and gay men experience feelings of empowerment in coming out, whereby the speech declaration represents an ownership over the self and the way that self is interpreted and recognised by others. It is also significant in that the naming of the self responds as Jeffrey Weeks would say to both 'a collective and personal' identity, thus evoking concepts of community and an implicit membership within that community which RG in this case did not have at his disposal.[86]

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[84] *"Determining Asylum Claims on the Basis of Sexual and Gender Identity"* (UK Lesbian and Gay Immigration Group, Immigration Law Practitioners' Association/ Mitre House Chambers (July 2008).
[85] Michel Foucault in Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, California 1992) 3.
[86] Jeffrey Weeks, 'The Sexual Citizen' (1998) 15(3/4) Theory, Culture and Society 35. From a critical geography perspective on the metaphorical and material ramifications of the closet see Michael P. Brown, *Closet Space: geographies of metaphor from the body to the globe* (Routledge, London 2000). Jeffrey Weeks, ' The Construction of Homosexuality' and Ken Plummer, 'Symbolic Interactionism and

In Chapter three, I referred to the work of Cherie Moraga, drawing on her discussion of the psychological ramifications of closeting and the difficulty of having to fragment identity. Moraga's identity as a Chicana lesbian involved in feminist politics was a journey to discover a sense of self that could reconcile the intersecting components of her identity. She writes with regard to her sexuality that 'silence is like starvation' and I see a connection between this phrase and a passage in *RG* [2006]; RG is asked what it would mean to re-closet his identity upon return to Columbia, he laments 'for me it would be to die'. What Moraga and RG seem to have in common are visions of a different future and the difficulty of having that future foreclosed by social and legal forces. Whilst I do not wish to imply or read too much into the context of their positions and thus create false alliances, both impart intense visceral responses that signify what it means to have an imagined future extinguished. For RG the ramifications of the Court's response, which assumes he will change his behaviour, rather than enforcing a change of behaviour upon him touches something deep; it is not just about behaviour modification, it is a return to secrecy and fear, an enforced return to a self that sits awkwardly and at times perilously in the social skin into which it was born.

The judicial regime of asylum adjudication has inculcated a process of restrained queer disclosure that normalizes and heteronormativizes queer life – queers are brought within the ambit of liberal jurisprudence as deserving of protection, and the law responds publicly by taking responsibility for the disenfranchised other. The information that the judge uses to make their decision is based on a partial queer disclosure that acquiesces to the necessities of the court. The narrative provided by the claimant is a partial rendering of queer/LGBT life; it is a performance of queer abject disclosure that the judge needs in order to render their decision. What comes out of the closet is a version of LGBT that is both legally palatable, understandable and which acquiesces to the necessities of the law.[87]

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the Forms of Homosexuality' in Steven Seidman (ed), *Queer theory/ sociology* (Blackwell Publishing, Oxford 1996).

[87] For more on the 'what if' of a queer judge see *Kosofsky Sedgwick* (n 84) 74-84. In the following chapter I expand on the notion of refugees as resistant actors, contesting the space of the court. I argue that these resistant behaviours though a moderated and understated form of resistance, are symptomatic of a heavily regulated environment, and that in spite of this environment asylum seekers persistently manage to find gaps and create momentary spaces of resistance in court.

The case of *RG (Colombia) v SSHD*,[88] was symptomatic of the court's prior response to questions of sexuality; the court's reliance on discretion, permissible levels of persecution, and a failure to understand the detrimental effects of closeting were an implicit part of the judicial decision making process. The heteronormative base from which the judiciary proceeded was an implicit factor in their rejection of RG's claim to asylum. RG was given responsibility for his own safety in a society where this was out of his control. The decision in *HJ and HT* [2010] however, revokes the court's reliance on discretion viewing it as an impermissible ground for return. Although *HJ and HT* is a welcome change to the court's previous approach, I maintain that there are still problematic elements in the court's rendition of lesbians and gay men and in the asylum system more broadly, for example the permissible levels of violence and discrimination that the UK court's still regard as failing to reach a sufficient level of persecution will continue to profoundly impact on the lives of LGBT asylum seekers.

Conclusion

In this chapter I have outlined the legal requisites for a claim to asylum. Fulfilling these legal requisites does not guarantee that a claim to asylum will be successful. Sexuality-based asylum claims are interpreted in a manner that can be ambiguous, indistinct and often shifting. The objectivity of the court is oftentimes couched in terminology that affirms and perpetuates discrimination and a heterocentrist view of what constitutes valid sexuality and the way that sexuality is performed and can be lived out. I have provided an outline of the ways in which refugee claims link together, touching on national and international jurisprudence and highlighting where conceptual difficulties arise, such as what constitutes permissible persecution and the wider social and political impact of case law and legislation that relies on immutable understandings of sexual identity. Furthermore, I argued that the courts' prior reliance on discreet behaviour perpetuated the prejudice of the home state within the UK and was a false indicator of safety and thus a violation of the principle of réfoulment.

The limitation in analysing case law in attempting to get closer to and listen to the story of the claimant is that the voice of the asylum seeker is rarely heard. Decisions are written in a manner that engages with law, legal arguments and the facts

[88] [2006] E.W.C.A. Civ. 57.

provided by a claimant. The claimant, though the central part of the case, is to an extent sidelined in favour of a broader jurisprudential analysis that engages with the principles at stake, rather than the particularity of the individual.

In the next chapter I continue the discussion of lesbian and gay refugees in court but refer to empirical research carried out over a period of two years. I present my observations of the dynamics of the court, a dynamic that does not displace the voice of the asylum seeker to such an extent. I consider the modalities of resistance used by asylum seekers in contesting the *formalism* and *formulism* of the court and the way in which the court confronts and challenges the identities and experiences of individuals.

CHAPTER SIX

'Standing in the way of control': Narrative, identity and resistance

Introduction

As Chapter five indicated, law's response to lesbian and gay claims for asylum had until recently perpetuated homophobia by re-closeting individuals. Although closeting is no longer a permissible expectation on the part of UK courts as a guarantee of safety, levels of discrimination acceptable to UK courts can still be perilously high. I claimed that the version of sexuality used by the court re-inscribed an essentialist understanding of the configuration of sexuality. The effect that this combined essentialisation of sexuality and permissible levels of discrimination had, and has, is to delimit the way individuals live out their current lives and envisage their future. The legal framework upon which an asylum seeker bases their claim, and, through this frame constructs their narrative, allows little room for transgressive narrations of sexed and gendered existence and is incompatible with a concept such as the imaginary domain. The narrative or testimony provided is the key point at which the asylum seeker can express their multifaceted identity. In my analysis of the case law, I found that the voice of the asylum seeker was subsumed by legal argumentation, and, that their responses to questions on sexuality were more reminiscent of 'sound-bites' than detailed explanations of the way they perceived their identity.

In this chapter I sidestep the confines of case law and place myself within the First Tier Tribunal Immigration and Asylum Chamber (FTTIAC).[1] I access the interactions between claimant, solicitor, barrister and immigration judge, and view the environmental and personal dynamics played out between the parties in court. These dynamics formally structure the way in which testimony is given and received. In addition to these in-court observations, I interviewed four asylum claimants, and had

[1] The FTTIAC was formerly known as the Asylum and Immigration Tribunal (AIT) it changed its name February 2010. For more information on the structural changes to the asylum appeals system see <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/immigration-and-asylum/first-tier/index.htm> accessed 19 May 2011. All of my in-court observations were carried out at Taylor House, Islington, London, over 2 summers, 2006-07 for a period that totalled around eight weeks.

numerous informal conversations with others. I interviewed ten solicitors and barristers whose clients were predominantly asylum seekers and migrants to the UK. Finally I interviewed NGOs; not all of the NGOs I spoke to dealt explicitly with lesbian and gay refugees and thus their knowledge of, and sensitivity to, LGBT asylum issues varied, these interviews and observations form the basis of this chapter.

The empirical part of my research is fairly small scale, in part because of my wariness around exploiting vulnerable interviewees, but also because I wanted my theoretical work informed by, rather than dominated by empirical methodologies; furthermore financial and time constraints influenced the limits to the gathering of data, as did difficulty gaining access to LBGT refugee communities and NGO groups. Hence this small-scale analysis of the workings of the asylum court is limited in terms of its analysis of the asylum system as a whole. My original intent was that the empirical work was going to form a central component of the thesis and influence to a greater degree the theoretical and critical work carried out. Because of the constraints outlined here and in the introduction, analysis of the empirical work is confined predominantly to this chapter and its resonance with the theoretical work carried out in the previous chapters is perhaps more limited that I intended. (For more on my methodology of data collection see chapter one of this thesis).

The theoretical work carried out in chapters 1-3 of the thesis provides a frame of inquiry for analysing the empirical data. The empirical work allowed me to observe the opportunities for asylum seekers to produce testimony that would challenge the *formalism* and *formulism* of the court, thereby disrupting both the official and administrative dynamics. I consider the dynamics of the court through use of three lines of thematic analysis – resistance, narrative and silence.

My understanding of the behaviours I recognised as resistant shifted quite significantly once I actually began the empirical part of the project. My initial perception of resistant acts of defiance such as anger, militancy, silences etc. could actually have been influenced more by post-traumatic stress disorder and nervousness, rather than being constitutive of resistant strategies. I code resistant behaviour therefore as ambiguous, subject to multiple interpretations, inherently contestable and often seemingly undetectable. I analyse the concept of resistance via an engagement with Michel de Certeau's *The Practice of Everyday Life,* which provides the theoretical framework for my analysis of strategies and tactics of resistance available to refugees.

In the second part of the chapter I analyse the character of narrative testimony produced in court, drawing on de Certeau's conceptualisation of resistance as developed in part one. Narrative is dependent on numerous factors: the type of persecution being attested to, cultural practices around narrative technique, fragmented memories leading to chronological irregularity, post-traumatic stress disorder, meanings that get lost in translation, and formulating stories in a manner which is legally cognisable to a judge. Thus narrative in court is a complex and ambiguous process of production, multiply influenced by the context of past and present. I argue that through the production of narrative, lesbian and gay refugees can claim ownership over their sexual identity. Claiming refugee status on grounds of sexuality can be an empowering gesture that contests both the homophobic' persecution of the sending state and the deeply entrenched heteronormativity of the UK court. I further claim that the intertwining of sexuality, race, gender and religion challenges the 'white' British ethnocentricity of the court, contests the judiciary's conceptualisation of a refugee, and the intersecting factors that culminate in the production of refugeehood. When asylum claimants narrate future expectations, they skilfully weave into their testimony a narration of the past, which indicates the context from which they fled, and a future, which hopes for something more. Through the conjoining of a past/future narrative the refugee constructs their place in the present, providing the court with a multiply layered story. The refugee has an active rather than passive presence within court, and they are, or at least ought to be, the source of their own version of the past, present and future. It could be argued that the place, from which those envisaged new futures arise, is the imaginary domain. The refugee may express that future explicitly in court or may express a more tempered version; how the refugee chooses to express themselves, their identity, and the narrative they produce remains to a degree in their control, a moment of contestable agency. Thus, although the framework of the *Refugee Convention* will shape the refugee narrative that is presented to the court, those narratives possess the ability to transgress the expectations of the court. The past/future narrative of the claimant is, arguably, undetermined.

The final part of the chapter focuses on the 'silences' present in testimony, and the implications of silence's production, considering the possible meanings inherent in this form of 'communication'. I argue that the ambiguous nature of silence constitutes part of its powerful presence. The silences that manifest in court possessed

an uncertain and indeterminate presence that added to the ambiguity of my interpretation of silence as a mode of resistance. Silence's indeterminacy, its difficult reading, relies on unspoken actions in the form of body language, in order to give it a 'contestable legibility'.

Framing Resistance

Drawing predominantly on Michel de Certeau's *The Practice of Everyday Life*,[2] I discuss the way oral and non-oral forms of communication indicate modalities of resistance within the asylum court. I argue that these forms of communication imbue the refugee with an active and embodied agency during the production of their testimony. I consider de Certeau's formulation of what he terms 'micro-resistance', and his concept of 'la perruque', which translates as 'the wig', and has connotations of disguise and deception.[3] 'Micro-resistance' and 'la perruque' are used to denote the ability to resist forms of systemic power in which individuals are enmeshed, and which, may feel oppressive. De Certeau provides a mode for moving within and traversing this system of powers through use of resistant tactics.[4] His and my emphasis is on the way in which people transgress the time and space of a regulated and quantifiable moment, place or space. During 'la perruque' nothing is stolen, scraps are utilised, equipment is borrowed, and work time is given an altered meaning.[5] Tactics can take the form of, for example, a secretary writing love letters at work or using an employers tools in order to make an object for the home.[6] 'La perruque', as a form of micro-resistance, is not the definitive catalyst for social change, or a symbol of radical revolution, but it possesses capital, and that capital is vested in the everyday, in the mundane, and is a constant undermining of the machinations of everyday life.[7]

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[2] Michel de Certeau, *The Practice of Everyday Life* (University of California Press, Berkeley 1984). I also draw on the essay Michel de Certeau, Frederic Jameson and Carl Lovitt, 'On The Oppositional Practices of Everyday Life' (1980) 3 *Social Text* 3; and Jeremy Ahearne, *Michel de Certeau: Interpretation and Its Other* (Polity Press, Cambridge 1995).

[3] *De Certeau* (1984) (n 2) 25.

[4] *Ibid.*

[5] *Ahearne* (n 2) 157-164.

[6] *De Certeau* (1984) (n 2) 25.

[7] For an important socio-legal study on everyday life, legal consciousness and individual engagements with law see Patricia Ewick and Susan S. Silbey, *The Common Place of Law: stories from everyday life* (University of Chicago Press, Chicago 1998); also see Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press, Chicago 1990); Austin Sarat and Patricia Ewick (eds), *Studies in Law, Politics and Society* (JAI, London 2001);

Multiple theorists have drawn on resistance as practice.[8] Shane Phelan, for example, has made use of Native American folklore in her use of 'coyote trickster' when addressing the possibilities of lesbian and feminist politics.[9] For Phelan the coyote trickster is able to:

> Challenge the ideas of identity, as they present a being with the ability to shape shift, to embody aspects of other beings whilst remaining "itself". They suggest a world in which caution and care are called for in which we cannot assume that we know who is who or what is what... First we cannot assume that common sense ideas about identities or political affiliations are accurate. Our certainties may turn out to be the means by which we are subjugated...feminists may gain from challenging traditional notions of moral actions in politics, looking for avenues for creative trickery rather than resolute moral clarity and integrity.[10]

Coyote trickster 'wrong-foots' the expected, causing it to trip on its own authority, exposing its vulnerability. The imposition of the unexpected, which ruptures the smoothness of proceedings, is a representation of resistance that is under-hand and unquantifiable and correlates to the type of resistance referred to by de Certeau. Although I do not rely on the work of Shane Phelan in this thesis, I find her use of coyote trickster, as a mode of resistance, a useful conceptualisation of a particular form of micro-subversion. Phelan outlines the capacity of folklore and metaphor to provide another way of looking at systemic forms of power and how such narratives have sought to challenge an understanding of the hegemonic nature of power through culturally subordinated stories.

The undermining of authority was also seen in the modes of resistance used by the women of Greenham Common to which I referred in Chapter four. In court the women challenged ideas of identity, especially stereotypical female identity. The women were noisy, overtly political and would not be hushed; in addition to this they were scruffy, sprawling and willing to take up both court space and time. The expectation on the part of the judiciary was that the women of Greenham would acquiesce, like most defendants, to the will of the court; the women clearly chose not to acquiesce in order to further their political goals. Such actions can be seen as

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Austin Sarat, '"...The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2 Yale Journal of Law and the Humanities 343.

[8] See Donna Harraway, *Symians, Cyborgs and Women: The Reinvention of Women* (Routledge, New York 1991); William Bright, *A Coyote Reader* (University of California Press, Berkeley 1993) and Gerald Vizenor, *Trickster of Liberty: Tribal Heirs to a Wild Baronage* (University of Minnesota Press, Minneapolis 1988).

[9] Shane Phelan, 'Coyote Politics: Trickster Tales and Feminist Futures' (1996) 11: 3 Hypatia 130.

[10] *Phelan* (n 9) 131.

'creative trickery', using gender expectation as a foil to disrupt the court, thereby deploying an alternate mode of politicisation.

The oscillation of power dynamics within the court when occupied by Greenham women indicates that the place of power is not static. A quorum of individuals working collectively can disrupt the workings of the court and turn that space into a political arena, even if it is only a temporary conversion. Refugees do not have these same opportunities at their disposal. They do not have the same type of in-court support; furthermore disruption of proceedings would likely jeopardise their case and excessive emotional outbursts may very well go unheeded. Thus, the tactics at a refugee's disposal differ to the women of Greenham; any resistance on the part of refugees must be covert, nuanced and deployed with the utmost care.

Michel Foucault has engaged with the place of power/resistance in his work *Power/Knowledge*,[11] *The History of Sexuality*[12] and in his writings on governmentality.[13] Foucault explains that power exists only when 'put into action', it is not a 'renunciation of freedom...the power of each and all delegated to a few', it is not the 'manifestation of a consensus'.[14] For Foucault there is no singular source of power, rather there are relationships informed by power and the manifestation of power in these relations is somewhat indeterminate in its positioning. Foucault notes '"the other" (the one over whom power is exercised) be thoroughly recognized and maintained to the very end as a person who acts; and that, faced with a relationship of power, a whole field of responses, reactions, results and possible inventions may open up'.[15] Foucault maintains the agency of the individual within these power relations. The actions of the individual are influenced by the assertion of power, but such influence is not absolute, and thus resistance to that influence still occurs.[16]

Macleod and Durrheim, in their discussion of Foucault and power, indicate that 'resistance is both an element of the functioning of power and a source of its perpetual disorder'. They maintain that 'Foucault does not see resistance as radical

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[11] Colin Gordon (ed), Michel Foucault, *Power/Knowledge Selected Interviews and Other Writings 1972- 1977* (Pantheon Books, New York 1980).
[12] M. Foucault, *The History of Sexuality* (Penguin, London 1981).
[13] Graham Burchell, Colin Gordon, Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, London 1991); Mitchell Dean, *Governmentality: power and rule in modern society* (Sage Publications, London 1999).
[14] Michel Foucault, 'The Subject and Power' (1982) 8:4 Critical Inquiry 777, 788.
[15] *Foucault* (n 14) 789.
[16] See Shane Phelan, 'Foucault and Feminism' (1990) 34 (2) American Journal of Political Science 421, 425.

rupture or overt revolution. There is "no single locus of great Refusal, no soul of revolt" but rather shifting points of resistance that "inflame certain parts of the body, certain moments in life"... This doesn't mean a reversal to a "single locus of great Refusal", but rather that alliances of shifting points of resistance around concentrations of power become a possibility'.[17] Refugee conduct can be interpreted as being guided by particular norms and expectations that apply within particular regulatory institutions, but such norms do not absolutely control refugee actions. For Foucault the regulatory nature of those institutions does not translate into subsumption of the individual, but nor does it constitute constant transgression.

Foucault provides an appealing framework of analysis. The mutuality of power and resistance is an effective account of power and its relations; but for the purposes of this chapter and this thesis I choose not to use Foucault and turn instead to de Certeau. De Certeau's attention to those things that do not take centre stage, or, work alternatively within a system, hold greater relevancy to the place of an asylum seeker in court. It is illegitimate to position an asylum seeker as having a relationship with power, which is comparable to that of an immigration judge in an asylum hearing; hence, I am drawn to the work of de Certeau and those who deploy other tactical measures to disrupt the place of power. Godzich has provided an explanation of the distinct foci of Foucault and de Certeau; he notes, 'Foucault's descriptions present a vast machinery of power; de Certeau's pit individual or small group efforts against this machinery as a mode of interaction that constitutes the lived experience of these people. He is, therefore, more attentive to the actual working of power as well as to the tactics ... that the neutralization of such vast powers require'.[18]

The nature of de Certeau's resistance bears greater resemblance to the way in which an asylum seeker is likely to be transgressive within the asylum system. De Certeau's understanding of power relies on a conceptualisation of strategies and tactics. A strategy, for de Certeau, holds power through its positioning as a 'proper' place. A strategy is the 'calculus of force-relationships which becomes possible when a subject of will and power (a proprietor, enterprise, city, institution) can be isolated from an environment'.[19] Strategies occupy sites, spaces or positions which are

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[17] Catriona Macleod and Kevin Durrheim, 'Foucauldian Feminism: The Implications of Governmentality' (2002) 32:1 Journal for the Theory of Social Behaviour 41, 55.
[18] Brian Massumi (trs), Michel de Certeau, *Heterologies: Discourse on the Other* (Manchester University Press, Manchester 1986) xiv.
[19] *De Certeau* (1984) (n 2) xix-xxi.

legitimate, have an air of permanence and are sustained by their status as proper institutions, firmly embedded within and endorsed by the dominant order. Tactics on the other hand are the 'weapons' that disrupt the smooth functioning of these strategic spaces; tactics create a space in environments that are defined by the control of strategised organisation.[20] The tactics that the asylum seeker deploys are more likely to create hiccups in the smooth running of the legal process; and it is the small disruptive practices, which seem graspable, and impart a sense of agency, which seem to be more realistic and actualisable for a refugee. I discuss de Certeau's use of strategies and tactics at greater length in the following section.

A further reason for rejecting Foucault as the frame on which to build arguments is more to do with being drawn to the poetic nature of de Certeau's expression and his engagement with the everyday, with normality, with the 'person' on the street. The poetry and artistry of de Certeau's work, particularly his elucidation of resistance and walking the city streets, has the effect of positioning de Certeau as a tour guide through his text. His descriptions of traversing the city streets, and the momentary reclamation of these spaces, is mirrored in the way he allows the reader to traverse the text. De Certeau's use of diversionary tactics, his unique form of expression and disregard for traditional sentence structure, represents a tactical syntax within the strategy of normative grammar. De Certeau's writing throws the reader off track into the messy cityscape of the text, full of potholes and signs that are diversionary but somehow lead the reader back to a point that is familiar but disorienting. De Certeau's traversing of the city streets and the unpredictability of deploying tactics of resistance that alter the way in which those streets are experienced, bears relation to the way some refugees traverse and alter the space of the court. In the following section, I outline the nuanced way in which refugees transgress the culturally normative dimensions of court, by bringing into focus the raced, sexed and gendered homogeneity of the court environment.

De Certeau, tactics and the space of the court.

The First Tier Tribunal Immigration and Asylum Chamber (FTTIAC) is organised in a manner that indicates it is a space subject to the formality of law. The FTTIAC judge sits on their raised bench facing the claimant, the insignia of the Crown is

[20] *De Certeau* (1984) (n 2) xix – xx.

positioned behind the judge, the claimant's solicitor and respondent solicitor sit at either side. The refugee is placed in the middle of the court with his or her interpreter, if they have one, sat next to him or her. This set-up configures the courtroom as a regulated and controlled environment and although this is not a criminal case, it feels adversarial. The way in which questions are asked, and the manner in which cases are put forward is, on both sides, an attempt to prove and disprove the 'facts' in question. Phrases such as 'the Appellant would have you believe' and the repetitive almost dogmatic focus on small, seemingly insignificant points of clarification, where the same questions are asked repeatedly, creates an atmosphere which is tense, and which can be aggressive rather than exploratory and focused on the indicators of persecution.[21] Thus the ways in which refugees may manifest resistant behaviour is incredibly limited and also incredibly dangerous. Explicitly resistant behaviour may anger the court and disrupt proceedings, thus resistance must be covert and tactical.

The tools of resistance at a refugee's disposal in a hearing are limited, but I see asylum seekers as being well placed in using tactics, and these tactics play a part in finding gaps and creating spaces in court. The production of certain types of testimony – some oral, some visual, some silent – are representative of a certain modality of tactic.

De Certeau defines tactics as:

> A calculus which cannot count on a "proper" localization...a tactic insinuates itself into the other's place, fragmentarily, without taking it over, without being able to keep it at a distance ... it is always on the watch for opportunities that must be seized on the wing. It must manipulate events in order to turn them into opportunities.[22]

Tactics take advantage of the opportunities that arrive. The tactic as a 'calculus which cannot count on a proper localization'[23] is the variable within the algebraic sum, it is the component that can only be relied on in its unreliance, it is the space of opportunity. The fragmentary nature of the tactic is an indication of not just the micro of micro-resistance, but of this micro's challenge to a dominant order. De Certeau's theoretical position does not establish a grand ideology of revolutionary possibility, instead he considers the question, if we are enmeshed in a web-like structure of power

[21] FTTIAC Taylor House (London 16 May 2006).
[22] *De Certeau* (1984) (n 2) xix.
[23] *Ibid.*

where 'silent technologies determine or short-circuit institutional stage directions',[24] how does society resist such extensive disciplinary techniques? It is these anti-disciplinary techniques that de Certeau probes, and which provide a useful mechanism through which to observe behaviours within court.

From my court observations, I conceive of the refugee as a source of tactics, the loose screw that jams up the efficient workings of the court. The refugee's presence disrupts the ease with which the court doles out its version of 'justice'. The story that the refugee tells clogs the court with its evidence, evidence not just taken from the statement of the asylum seeker in the form of words, but the evidence written on the body of the asylum seeker. Sexuality, race, religion, gender and the marks of torture constitute an alternate, unspoken testimony imprinted on the body of the refugee claimant. Furthermore, the anti-disciplinary quality of de Certeau's tactics evokes something about the spirit of alternative narrative production such as silence, which challenges the order of the court and which I discuss at length in the latter part of this chapter. It is the ambiguity of silences and alternative narratives, the 'perruque' element, whereby meaning or intent is unclear, muffled, or silently working towards an agenda of its own, which provides moments of tactical advantage.

Over the space of two spring/summers from 2006-7, I attended hearings held at the FTTIAC, Taylor House in Islington, London. In total I spent roughly eight weeks carrying out in-court observations. My initial in-court observations focused predominantly on manifestations of resistance, but as my research progressed I realised that some of the behaviours that I initially classified as resistant may have been borne from stress, frustration, and anxiety rather than resistance.

Differentiating between resistant behaviour and stress is problematic as, within the context of an asylum hearing, the two are intertwined and mutually propagating. I do not categorise resistant behaviour as that which manifests itself in outbursts of anger and frustration. The pairing of aggression and resistance would shift my understanding of resistance, which is based more on subversion rather than explosion. Furthermore, connecting aggressive behaviour and refugee identity is inaccurate and unrepresentative of the hearings I observed. The aggressive reactions that I did see were tempered by deference towards the immigration judge and the formality of the legal environment. Aggression, as I viewed it, only came to the fore in behaviours

[24] *De Certeau* (1984) (n 2) xiv.

influenced more by frustration and disappointment than rage. My reason once again for looking at these resistant moments is to see where an asylum seeker may have exercised agency in terms of making their presence felt in court.[25]

'Take that fear, place it to one side': Resistance, identity and the disruption of judicial expectations

Claiming asylum on grounds of sexuality may differ in its initial trajectory in comparison to other claims for asylum. Sexuality may not have been the original or primary ground for claiming asylum, other grounds such as gender or political or religious participation may have been more obvious or typical for claimants and therefore been the original ground for a claim.[26] The realisation that sexuality can constitute grounds for *Convention* protection can come as a surprise.

In my interviews with NGOs that assist LGBT/queer refugees, realisation that sexuality can be a ground for protection has been perceived as tremendously empowering. In an interview carried out with a lesbian-Muslim NGO called the SAFRA Project,[27] the project coordinator (TT) from the organisation, spoke of the reactions of women joining the group: 'they find out that they actually have a right to their sexuality and this can be profound and empowering'.[28] The tentative steps taken by women in the process of claiming asylum, coming out, trying to establish new links within a new cultural setting, are all steps towards embracing a sense of their own personhood and sexuality. TT noted with regard to this journey that the very first step of attending a meeting with the SAFRA project is part of 'tak[ing] that fear and plac[ing-] it to one side'.[29] This fear she explained was about taking control of specific aspects of your life, beginning to live out that life and live out an

[25] Cecile Rousseau, Francois Crepeau, Patricia Foxen, France Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision Making Process of the Canadian Immigration and Refugee Board' 15(1) (2002) Journal of Refugee Studies 43.This article analyses the psychological and psychosocial responses of the actors involved in asylum cases i.e. judge, lawyers and claimant.

[26] T Johnson, Interview with TT, Director, Safra Project (London September 2006); Telephone Interview with SW, Immigration Solicitor (1 June 2006); Interview with TB, Immigration Solicitor (London 23 May 2006) – All made similar observations during interview.

[27] The SAFRA project is an organisation that provides help and advice to lesbian Muslim asylum seekers. In addition SAFRA also acts as a meeting space and thus there is a social element to it as well.

[28] T Johnson, Interview with TT, Director, Safra Project (London September 2006).

[29] T Johnson, Interview with TT, Director, Safra Project (London September 2006).

understanding of sexuality.[30] The SAFRA project is there in part to provide the support that cultural and religious community would ordinarily provide. Such a network, upon which Muslim lesbians can rely, becomes a site for community, a space within which one can express faith in terms of religion, culture and sexuality, and create links and connections with those in similar circumstances; TT described it as a 'coming together through faith and sexuality'.[31]

Joining support groups and coming to terms with sexuality can be read as taking control of the way in which an imagined future is being projected. Becoming involved with organisations such as SAFRA is a resistant act; it subverts what the court expects: a deferential asylum seeker, with little knowledge of the system, external to the state, and dependent upon it, to a certain extent, for validation of their identity. By being informed, understanding the asylum process, and knowing that there is a community that can be relied on, such support alters the way in which an individual may engage with the asylum system and thus perceive their future.[32] Attending groups such as SAFRA may make it easier for asylum seekers to engage with mechanisms such as the law, making those systems appear less rigid, recognising that they are accessible and can be subject to disruption.

NGOs may also provide a politicised understanding of identity. Moving from a state where sexuality may be repressed and where political participation in lesbian and gay organisations may have to be anonymous and covert, to one where sexuality, within reason, can be more openly politicised, can be helpful on numerous levels, not least in proving an individual's commitment to their sexuality to the court.[33] For some lesbians, political participation gives meaning to the trauma that they may have experienced, whilst also enabling them to provide aid and advice to other incumbents to the new state.[34] This is analogous to the consciousness raising groups of feminists and lesbians as outlined in the outsider narrative literature I referred to in Chapter three. One of the purposes of consciousness raising groups was to raise awareness around common experience and to provide a forum to bring those experiences

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[30] T Johnson, Interview with TT, Director, Safra Project (London September 2006).
[31] T Johnson, Interview with TT, Director, Safra Project (London September 2006).
[32] T Johnson, Telephone interview with Phoebus, Ugandan refugee (10 May 2006). Also see Tamsila Tauqir, 'Diversity as Strength' accessible via <http://www.safraproject.org/publications.htm> accessed 23 June 2011; Paul Cambridge and Lucy Williams, 'Approaches to Advocacy for Refugees and Asylum Seekers: A Development Case Study for a Local Support and Advice Service' (2004) 17(1) Journal of Refugee Studies 97.
[33] T Johnson, Telephone interview with SW, Solicitor (1 June 2006).
[34] T Johnson, Interview with TT, SAFRA Project (London September 2006).

together, seeking solace in that coming together. The more an individual is seen to be embedded in a particular community, the more 'real' their sexuality becomes as a part of their life, a component that if denied by the court may constitute persecution under the terms of the *Refugee Convention.*

A further quality of the SAFRA project is that it helps women to both imagine and actualise their future.[35] Believing in a future that acknowledges the complexity of faith and sexuality and which supports an intersecting version of identity is an essential component for refugee claims. SAFRA aids in bringing those intersecting identities into court, confronting the courts limited understanding of what female Muslim sexuality looks like, what it means, and that it exists. The imaginary domain, as an alternate mechanism for envisaging this future, is a conceptual tool to consider the ways in which life is experienced, and acknowledges that preclusion of that experience can be stifling. Taking steps to make that future happen, through the claim to asylum based on sexuality, is both an act of empowerment and an act of resistance to forces that would preclude that vision. I claim that vision would benefit from the legal protection offered by, for example, a conceptual project such as the imaginary domain. In the following section I consider some of the literature that addresses the reinvention of lives touched by the refugee process and the place of narrative in recounting experience.[36]

Narrating the future

In a series of interviews with refugees claiming asylum in Canada, Marie Lacroix highlights the importance for refugees of feeling invested in the future, a future that contains a more integrated sense of self.[37] She notes the response of one of her participants who reflects on the legal hinterland that asylum seekers occupy, 'one can't dream of integrating and if one can't reinvent the future one is half dead'.[38] This sense of being stunted in the way in which perceptions of the future are generated, speaks to the idea of the self as fragmented. The claim to asylum is based on the past, marooned in the present and imagines the future. The asylum process places an

[35] T Johnson, Interview with TT, SAFRA Project (London September 2006).
[36] For an analysis of the role of the imagination as a device for healing see Laurence J. Kirmayer, 'Toward a Medicine of the Imagination' (2006) 37 New Literary History 583.
[37] Marie Lacroix, 'Canadian Refugee Policy and the Social Construction of the Refugee Claimant subjectivity: understanding refugeeness' (2004) 17 Journal of Refugee Studies 147.
[38] *Lacroix* (n 37) 161.

individual on the periphery of society. A refugee in and out of detention centres is physically present in the nation state, but it is the indeterminate and contingent nature of that presence, which impedes the imagining of a future.[39] The desire to re-imagine the future, to begin the process of reinvention, is a narration of survival, and giving voice to that can be resistant and empowering.[40]

Much of the literature regarding the importance of narrating experience for refugees centres on comprehending the events that have lead to the individual's current position. Words that arise repeatedly are rupture, displacement and responsibility.[41] Sabine Luebben who has worked with Bosnian refugees in Germany states, 'giving testimony has a lot to do with wanting to tell the truth, and showing the perpetrators, who prefer to remain in the dark, evidence of their crimes'.[42] Other refugees viewed testimony as 'a duty to members of their family who had been murdered...and whose stories they never wanted to be forgotten'.[43] Thus the sense of responsibility that refugees have represents more than just their own story and their own claim for asylum; it also represents the context of their experiences and their life prior to the persecution, part of a wider historical narrative of events that ought not to be forgotten.[44]

Furthermore, narrative allows the refugee to vocalise and order their experience. Ordering helps to make sense in temporal terms of a sequence of events, and can help with the project of reconstructing subjectivity. Marie Lacroix writes:

> A profound sense of rupture was expressed, especially by the older claimants, one which touches at the very core of their being...That profound disruption in their subjectivity brings them to a new point, that

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[39] For more on the detrimental health impact of detention on refugees see Zachary Steel and Derrick M. Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 Medical Journal of Australia 596; Laurence J. Kirmayer, 'The Refugees Predicament' (2002) 67 Evol Psychiatr 724.

[40] T Johnson, Telephone interview with SW, Solicitor (1 June 2006). Also see Martin Kemp, 'Hearts and Minds: Agency and discourse on distress' (2003) 10(2) Anthropology and Medicine 187. Nora Stejilevich, 'Testimony Beyond the Language of Truth' (2006) 28 Human Rights Quarterly 701.

[41] Alastair Ager, Margaret Malcolm, Sana Sadollah, Fiona O'May, 'Community Contact and Mental Health Amongst Socially Isolated Refugees in Edinburgh' (2002) 15:1 Journal of Refugee Studies 71. Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 Journal of Refugee Studies 248.

[42] Sabine Luebben, 'Testimony Work with Bosnian Refugees: Living in Legal Limbo' (2003) 31:4 British Journal of Guidance and Counselling 393.

[43] *Luebben* (n 42) 398.

[44] *Luebben* (n 42) 397-399. Also see Michelle Mckinley, 'Life Stories, Disclosure and the Law' (1997) 20:2 Polar 70; also Laurence Kirmayer, 'Landscapes of Memory: Trauma, Narrative and Dissociation' in Paul Antze and Michael Lambek (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge, New York 1996).

> of reconstruction of who they are...it's not only rebuilding their lives but rebuilding their subjectivity.[45]

Recounting traumatic events within the courtroom can engender flashbacks and feelings associated with interrogation, thus perpetuating post-traumatic stress. The inability to be able to recount events in court, may have the dual effect of rendering the claimant's testimony of no particular use, thereby making the claimant feel inadequate; and may also engender in the court a feeling that the hearing was a waste of court time. If an individual cannot state the nature of their claim to asylum and has to fabricate or omit pertinent components in a story, this isn't just an instance of perjury before the court, it's a denial of the lived experience, and the way in which that experience is acknowledged and validated.[46]

In an interview I carried out with a Muslim claimant called Nkoli, her case had been put in jeopardy by the unscrupulous actions of her solicitor.[47] She had told the solicitor that the basis of her claim was her sexuality. The solicitor told her she would have no chance of winning on that ground and that he was not prepared to take a case based on the homosexuality of his client to court. He then asked her if her parents were aware of her sexuality, and stated he knew people who knew her parents back in the home state.[48] The claimant proceeded with the false claim on the grounds that the solicitor recommended – the application failed. Upon its failure the claimant appealed and instructed a new solicitor to prepare the case. She told the new solicitor of the real grounds of the claim; grounds which he was prepared to take to court. The major problem that arose from this initial fabrication is that it was then viewed by the court on appeal as an attempt to manipulate the asylum system, because of the failure of the first case, thereby impugning Nkoli's credibility.[49]

The importance of maintaining narrative legitimacy is incredibly important. The way in which Nkoli was manipulated into making a false claim substantially diminished her agency and credibility. Nkoli's reluctant acquiescence in making a claim before the court, based on false grounds, indicates an enforced legal submissiveness toward her representative. Such dependence on legal representation can be disempowering, but her decision to change lawyers and pursue her original

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[45] *Lacroix* (n 37) 157.
[46] T Johnson, Telephone interview with Phoebus, Ugandan refugee (10 May 2006).
[47] T Johnson, Telephone interview with Nkoli, Nigerian refugee (November 2006).
[48] *Ibid.*
[49] *Ibid.*

claim is a tool of empowerment and it is a taking back, a taking of responsibility for the situation she found herself in, and a refusal to silence her sexuality.[50]

For a lesbian or gay man, having the opportunity to narrate their sexuality can be productive and empowering. To have that testimony denied, shaped or read in a way that does not correlate to the way in which they view their sexual orientation, and the persecution that has stemmed from this, is to deny the journey that the claimant has gone through, and renders their experience as inadequate and untrustworthy.[51] The inconceivability and faultiness of the story as interpreted by an immigration judge denies the consciousness of the claimant and detrimentally impacts on the agency and personhood of the individual. To deny identity, is to deny the way individuals imagine the constitution of their lives, and the control they have over their future.

Modes of expression and reception

The way in which testimony is expressed has a bearing on its reception. In Chapter three, in my analysis of the power of critical Race narratives as resistance work, I argued that transgressive methods and modes of expression could have a direct impact on normative frameworks and traditional sites of power. In this chapter I consider the methods, modalities and motivations of resistant narratives produced by refugees, and whether these narratives can challenge the judicial reading of identity.

An immigration judge is charged with the responsibility of recognising what is occurring in the narrative and as having the foresight to see the occurrences as based in fact or fiction. Walter Kalin has listed some of the requisites necessary in order for a story to be viewed as recognisable. He notes in order to have an 'undistorted interaction', five overlapping obstacles must be considered 'a) the manner in which the asylum seeker expresses him or herself; b) the interpreter; c) the cultural relativity of notions and concepts; d) different perceptions of time; and e) the cultural relativity of the concepts of "lie" and "truth".'[52] The provision of statements requires technical proficiency, the details within the response must be pertinent to the claim and the narrative must progress in a chronological and accessible manner.

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[50] Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge, Oxford 2007) 21.
[51] See *XY (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 911.
[52] Walter Kalin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing' (1986) 20(2) International Migration Review 230, 231.

Whether the presence of all of these factors would create an 'undistorted interaction' is contestable. The very nature of the court is a distorted interaction in itself.[53] The asylum court is suffused with power dynamics; the claimant's role in proceedings, and the formality of those interactions, disrupts, and distorts the testimony presented. The distorted engagements which occur during testimonial interactions are based on the markedly different positions occupied by, and needs of, the interlocutors: for example the dependency of the claimant on the provision of justice, dependence on the receptivity of the judge to the claimant's story and additionally the dynamics of race, sexuality, gender and all other factors indicative of disparities of power which contribute to the response of the court.

My observations of Alberto, a gay HIV positive Jamaican who applied for refugee status on the grounds of sexuality, is a useful example of the way in which a carefully constructed narrative can be deployed effectively, acquiescing to formal court behaviours when necessary, but still retaining ownership over testimony. Prior to Alberto's hearing, Alberto's barrister reminded him to keep his responses to questions short, 'no more than two to three' sentences.[54] The reason for such brevity is so that direct points can be asked and then answered, fulfilling the legal criteria that need to be affirmed. Long winded responses to questions can bring up extra points for clarification and discussion and can lead to an immigration judge thinking the applicant is making more out of his story than is necessary, is taking up valuable court time and is padding out the narrative.[55] Kalin notes this problematic aspect and states:

> If the asylum-seeker starts to explain something which he or she feels is important, but is perceived as irrelevant by the official. This may lead to a situation in which "both speakers utterly fail in their efforts to negotiate a common frame in terms of which to decide on what is being focused on and where the argument is going at any one time.[56]

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[53] See Martha Nussbaum, 'Feminist Critique of Liberalism' in *Sex and Social Justice* (Oxford University Press, Oxford 1999). Iris Marion Young, 'The Ideal of Community and the Politics of Difference' in Penny A. Weiss and Marilyn Freidman (eds), *Feminism and Community* (Temple University Press, New York 1995).

[54] T Johnson, In-court observations with Alberto (FTTIAC London 31 May 2007); T Johnson, Interview with SC, Barrsiter (London 22 May 2007).

[55] T Johnson, Interview with SC, Barrister (London 22 May 2007).

[56] *Kalin* (n 52) 233; *Good* (n 50) 22.

If an asylum seeker can make his story chronologically accurate, describing events in a coherent manner and focusing on only one occurrence at a time, this will be viewed as a successful account.[57]

Kirmayer has written that 'narrative provides the temporal structure that binds these images to a plot'.[58] Stories which flip back and forth in time and bring in characters that slip and slide out of focus are less likely to be followed as easily, and thus render the testimony incoherent. Incoherence has a negative effect on the forcefulness of declarative statements. Alberto's narrative was 'managed' incredibly well during the appeal. Alberto seemed very nervous during the hearing. This nervousness manifested itself in the rigidity of the way he sat, shallow and laboured breathing, glances towards me, glances that I assume were towards someone whom he perceived as an ally and as someone who could give him an encouraging look. The questions asked by Alberto's barrister were incredibly pointed. Alberto responded in the way his barrister had advised him, not in relation to content, but in relation to the length of response; a few brief sentences and then onto the next question, slowly building up the case around convention characteristics which would eventually lead to the granting of refugee status.[59] 'Playing' the court by knowing the techniques that they prefer, tactically working towards a fuller picture of the claimant and their case is a way of manipulating proceedings. Acquiescing to the court's desire for a particular type of statement, and manipulating that statement, saying only what is necessary in order to fulfil the required convention characteristics, could be considered a form of micro-resistance.

Other asylum appeals that I observed were not quite as ordered as Alberto's. At one of the first hearings I attended, I observed a 21-year-old man from Iraq claiming asylum on grounds of membership of a particular social group. His uncle had been part of Saddam Hussein's army. The uncle had targeted the claimant and his family who were politically opposed to the government at the time. The importance of consistency within a narrative is essential and it is not just what is said, but the terminology that gets lost in translation that can turn a case on its head, and render the

[57] Judges frequently interrupt the claimant's story and belittle and discredit what they are saying, T Johnson, Telephone interview with SW, Solicitor (1 June 2006).
[58] Laurence J. Kirmayer, 'Failures of Imagination: the refugee's narrative in Psychiatry' (2003) 10:2 Anthropology and Medicine 167, 170.
[59] T Johnson, In-court observations with Alberto (FTTIAC London 31 May 2007).

claimant unreliable.[60] The claimant in this hearing had in his initial statement mentioned that he had been shot in the leg. It later transpired that a rocket-propelled grenade had been fired at his home and that his leg had been injured during this attack. The immigration judge sought to clarify the point of whether he had in fact been shot. The claimant said no he had not been shot with a handgun, but that his home had been subject to an attack with a rocket-propelled grenade and that the damage to his limb had occurred as a direct result of that attack. Again the judge responded by saying 'so you have not in fact been shot in the leg?', the claimant again sought to clarify his statement. The judge then asked him why he had fabricated this part of his statement; the young man was becoming quite frustrated. He began to explain that at his initial interview, he had chosen not to have an interpreter present, and that he had not known (at that point, he was 16 years old) the word for 'rocket propelled grenade' and had only known the word for shot and bullet in English. For the next half an hour the discussion between the applicant, the applicant's solicitor, and the respondent solicitor revolved around this point. The point never got resolved - but what the point had the effect of doing was to displace the applicant from the centre of the story and focus instead on a sterile concept of terminology, and whether in fact misuse of the word 'bullet/grenade' constituted fabrication, and if it did, would this place the rest of the evidence and testimony in jeopardy.[61]

The narratives that are presented in court as the official story of the claimant often contain occurrences outside of the lived experience of the adjudicatory panel and the legal representatives present in court. Experiences of rape, torture, the deprivation of liberty because of political opinion, the deprivation of religion, the inability to form relationships with a same-sex partner, are all instances that may be outside of the gamut of lived experience of an immigration panel. This lack of personal experience may make it difficult for an immigration judge to fully understand the trauma associated with these experiences. Nevertheless there is no reason why an immigration judge cannot be sensitive to the experiences of those before the court, nor reflexive regarding the decision making process.

Laurence Kirmayer has observed:

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[60] T Johnson, In-court observations with Iraqi claimant (FTTIAC London 16 May 2006); T Johnson, Telephone interview with SW, Solicitor (1 June 2006).
[61] T Johnson, In-court observations with Iraqi claimant (FTTIAC London 16 May 2006).

> When stories deviate from our expectations for plausibility, intelligibility, order and coherence, we have several options: we can expand our vision of the possible; we can interpret the narratives as defective, indicating cognitive dysfunction or some other form of psychopathology; or we can question the motives and credibility of the narrator.[62]

The immigration judge within a hearing must constantly open themselves to the possibility of narratives that do not correlate with their own experiences. The ability to have a minor story fit within the scope of a grand narrative of how society works is essential.[63] The way in which a story is told, the terminology used, the characters that are included, must be familiar or recognisable, not in terms of having been actually experienced by a judge, but in terms of being perceived as that which could have possibly happened.

The difficulty of perceiving events that a refugee has attested to, as fitting within a grand narrative, was an integral part of the asylum hearings that I attended. Returning to the example of the young Iraqi whose leg was injured by the rocket-propelled grenade; part of the problem within this hearing seemed to be that the judge was not willing to believe that his uncle would simply go to the family home with a jeep and a group of soldiers and order those soldiers to launch a grenade at a house. These events do seem extraordinary, but it is these extraordinary moments that 'seem' outside of reality, which a judge has to process as being within reality.[64]

One way in which 'extraordinary' events are 'recognised' is through the use of expert testimony. For example medical reports on injuries sustained by the claimant and the provision of testimony that affirms the veracity of the statement become incredibly important in validating the refugee's experience. Nora Strejilevich has written:

> Society wants to use witnesses' accounts as evidence and testimonies are condemned in case they do not match evidence collected by other means. At this point testimonies' limitations become obvious, and they suddenly seem inappropriate and outdated.[65]

Oral testimony becomes something that is viewed as having an illegitimate status unless it can be validated by other accounts that affirm a series of events or cultural

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[62] *Kirmayer* (n 58) 167-68.
[63] *Kirmayer* (n 58) 173.
[64] T Johnson, In-court observation with Iraqi claimant (FTTIAC London 16 May 2006).
[65] *Strejilevich* (n 40) 703.

practices. Oral testimony needs to be validated as the truth of a series of occurrences, proven via physical evidence.

Another example of the way in which judicial perception was challenged by an alternate rendering of reality was in the hearing of Alberto, the gay Jamaican. One of the problems that Alberto had experienced, since he had been in the UK were threatening communications from the Jamaican ex-patriot community in London. The threats stemmed from a video that had been posted on the Internet. When in Jamaica, Alberto had been involved in the making of a video of his and another friend's joint birthday celebration. Alberto expresses his sexuality not just in his relationships with men, but also through cross-dressing. In the video Alberto was dressed as a woman, in a floor length sequinned evening gown, wearing carefully applied make-up and with hair extensions fashioned into a chignon. In the video Alberto was dancing in front of the camera, in a manner that I considered provocative. In the background of the video there were some images of men kissing and dancing erotically together. The immigration judge was incredibly affirmative of Alberto after watching the video, acknowledging that what he had seen was a true rendition of the way in which Alberto expressed his sexuality. The judge also acknowledged that the viewing of this video by certain members of the Jamaican community would result, if not in harm, then in serious problems of some sort.[66]

I refer to the video so as to highlight that narrative does not just come from testimony given in court, or from the statement given to the immigration official. Identity expressed through multiple mediums of narrative can challenge the imagination that a judge may have regarding what he expects of Jamaican men, Jamaican gay men or men in general. In this instance, the judge stated that 'he had seen all he needed to see' in terms of Alberto's expression of sexuality, but the judge also went on to acknowledge the serious ramifications of expressing that sexuality.[67]

Alberto deploys a version of gay male sexuality in court which is an almost perfect legal representation and which is given legitimacy by the response of the judge. Alberto is effeminate, under threat, vulnerable, and needs 'rescuing' from continually encroaching forces from back home.[68] The medium of video enabled a

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[66] T Johnson, In-court observation with Alberto (FTTIAC London 31 May 2007).
[67] T Johnson, In-court observation with Alberto (FTTIAC London 31 May 2007).
[68] One of the stock questions that I asked all of the solicitors, barristers and representatives from NGO's was whether they ever asked their clients to dress in a way which would play into the stereotype an immigration judge may have of a lesbian or gay man. I asked this question in order to

space for the articulation of 'forms of oppositional knowledge and identity' and a televisual manifestation of homosexuality that is legally cognisable.[69]

Acknowledgement that 'oppositional knowledges' bear legitimacy and possess capital in court is essential in leading to positive outcomes in asylum claims. Claims based on sexuality are a relative rarity in refugee proceedings, thus multiple modes of narrative may well benefit claimants, allowing for a more nuanced and rounded presentation of the identity of the claimant. Placing images of drag queens and gay men kissing within the space of the court immediately impacts on the sensibility of a judge, rendering his or her understanding of Jamaican men altered. The performance of lesbian or gay sexuality places the claimant firmly within the space of the hearing; his expression of sexuality is real and dynamic and bold. The imaginary possibility of what gay male sexuality is, is given a very real rendering. What Alberto's video seemed to impart was that the defendant embodies his sexuality and lives out that sexuality as a fundamental part of his identity.

Following the video, the judge read some of the web logs that had been posted which engaged with the content of the video. The comments posted on the web log were incredibly homophobic and made repeated use of the word 'battyman', a

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ascertain whether there was ever any overt manipulation of the court, playing into a heteronormative expectation of the performance of queer sexuality through dress. Although the response was an unequivocal 'no', it was on occasion followed by 'no, but', with lines such as, 'it's unethical to exaggerate, but don't dress it down', 'don't play the court be yourself and if that self happens to like dressing in boots and has short spiky hair then so be it'. (Interview with SW, Solicitor (1 June 2006) and TB, Solicitor (23 May 2006). The dominant sentiment that came across was encouraging the client to be confident in themselves, their appearance and their identity.

Although dress may seem like a superficial way in which to constitute one's sexual identity and an ineffective way of manifesting resistance, I think it might be significant for two reasons. Strategically, dress may be the first indicator of being able to buck the expectation of what an immigration judge would expect a lesbian or gay man to look like. Judicial expectation regarding lesbian presentation may be founded on a western configuration of the way in which sexuality, race and culture intersects with dress. Subverting that expectation by wearing dress, which is culturally or ethnically specific, can be powerful. The second reason for dress' importance is that wearing clothing or accessories that a refugee feels comfortable in may be empowering on a more personal level, engendering a sense of control over the self when everything else is being contested. Perhaps staying true to the way in which one identifies through clothing, the apparel of culture or religion may enable a claimant to retain a sense of dignity within the nullifying space of the court.

The way in which dignity is challenged in court is often through the hierarchical and condescending manner of an immigration judge. Tools for maintaining dignity are often vested in activities that see a brief flurry of responses by a refugee and then an almost immediate withdrawal back into the shadows of the court. Reclamation of dignity manifests in physical acts indicating discomfort, such as hand and eye gestures including rolling of the eyes, shuffling in the seat, excessively loud exhalations of breath and the throwing down of handbags. The way in which that which is not spoken is placed within the space of the court, becomes an unwritten part of testimony. The effect that such behaviour may have on the rendering of judgment is difficult to quantify, but such activity makes the refugee's physical presence felt.

[69] Anne Shea, '"Don't Let Them Make you Feel You Did a Crime": Immigration Law, Labor Rights, and Farmworker Testimony' (2003) 28(1) MELUS 123.

derogatory word used for gay men in Jamaica. The judge sought to clarify what this word meant. The other people present in the room at this point knew its meaning, but the judge did not, and there was something about the imbalance of knowledge of that term that put Alberto, metaphorically 'on top'.[70] Alberto and his lawyer were controlling the meaning of sexuality in court; they were controlling the way in which words of hate were being circulated and concurrently educating the judge as to the use of hate language within the wider community.[71] In this instance, Alberto and his barrister were in control; they guided the judge through the language and terminology of minority sexual identity and in some ways this was empowering and flipped the tables as to who needed who. The judge needed homosexuality translated into a parlance that he could recognise and place within his own framework of understanding. In this particular instance it was a framework that comprehended what constitutes prejudice, homophobia and persecution, and enabled a judge to render his decision.[72]

Although I interpret this moment of translation as a point when Alberto was in control, the ramifications of this shift in control could be perceived as problematic. Judicial ignorance of homophobic expression could be detrimental to the case. A lack of awareness of such terms may lead to intrusive questioning regarding sexuality and sexual acts, thus creating a narrative which is belittled and beleaguered by the necessity for cultural translation, turning testimony into a lesson on what it means to be a gay Jamaican. The questions and clarifications may also have the effect of dismissing the centrality of the claimant, and the claimant's voice, and instead places the needs of the judge at the centre.[73] Contextualising a claim into a register that is translatable into British culture has the effect of displacing the intrinsic value of that specific cultural narrative, subsuming it to a western legal understanding. The need to translate specific cultural moments into something recognisable to an immigration judge and to the interviewing immigration officers arose frequently for many of the Muslim lesbians that used SAFRA.

In an interview with TT of the SAFRA project, she outlined some of the ways in which the intersectionality of identity had provoked questions on the part of

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[70] T Johnson, In-court observation with Alberto (FTTIAC London 31 May 2007).
[71] For an analysis of the reclaiming of this term see Wesley Crichlow, *Buller Men and Batty Bwoys: Hidden Men in Toronto and Halifax Black Communities* (University of Toronto Press, Toronto 2003).
[72] T Johnson, In-court observation with Alberto (FTTIAC London 31 May 2007).
[73] *Kalin* (n 52) 236.

immigration officers that were crude in their understanding of the intertwining of faith and sexuality. Some of the questions that immigration officers had asked stemmed from a basic lack of understanding of the Muslim faith, questions such as 'if you're a Muslim why don't you wear a headscarf?', and 'why can't you just be a Christian?'.[74] Such questions by trained immigration officers seem astounding in their level of ignorance. When the question of a combination of sexuality and faith arose, an even greater level of unknowing was apparent on the part of the interviewer. Questions asked were, 'if your faith or culture is so important then why don't you stop being a lesbian?' There were also statements revolving around cultural intimacy. One particular interviewer asked, 'why don't you just move out of the family home to another part of the country?'[75] Failure to realise that cultural and social norms alongside economic constraints dictate that women do not have the same type of freedom as men in certain countries, show an alarming level of ignorance on the part of trained officials. TT outlined that the suggestion of leaving the familial home was not an option available to many of the women she had engaged with, additionally the ability to have lesbian relationships was then placed under enormous strain.[76]

Although many of TT's clients stated that there was an 'expectation' on their part that they would encounter racism and homophobia within the asylum system, there was surprise that issues of faith were so quickly dismissed. One of the problematic elements of these encounters, as outlined by TT, was that women were unwilling to complain about intrusive questions on sexuality and faith; many of the claimants feared that complaints would hinder their claim for refugee status.[77] Ignorance around questions of faith and sexuality on the part of both border agents and the judiciary can make claims to asylum even more difficult; in order to address these problems alternative methods, 'tactical' methods of providing information need to be deployed in order to confront the representations of gender, sexuality, ethnicity and religion held by asylum officials.

In an interview carried out with SW (immigration solicitor), she mentioned that levels of judicial discomfort regarding sexuality often lead to the curtailing of evidence necessary to fully contextualise a claim. Further that lesbian and gay

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[74] T Johnson, Interview with TT, Director, SAFRA Project (London September 2006).
[75] T Johnson, Interview with TT, Director, SAFRA Project (London September 2006); Telephone interview with SW, Solicitor (1 June 2006).
[76] T Johnson, Interview with TT, Director, SAFRA Project (London September 2006).
[77] *Ibid.*

sexuality was 'the skeleton in the corner of the room'.[78] The idea of the skeletal nature of sexuality within a courtroom is a powerful one and perhaps more significant than it may appear. If we consider again the example of Alberto, the gay Jamaican who cross-dresses, Alberto's sexuality was viewed through the video of him in drag. Following the video any questions about his sexuality were specifically directed towards identity rather than activity as a gay man. There was something about Alberto's hearing that was incredibly polished and compartmentalised, but asexual rather than homosexual. Alberto was presented as a member of the lesbian and gay community, unfairly targeted because of his identity as a gay man and as someone who cross-dresses. In the background of the video that Alberto appeared in there were images of two men dancing erotically together. This overt display of sexuality, of 'homosexuality', was the point at which the barrister rushed to turn off the video. The image of two men being erotically engaged with one another seemed to have the effect of 'over-sexualising' the context of Alberto's life. The information that was being provided in court was sufficient to read Alberto as gay but the images of two men dancing erotically together was dangerous, and over-sexualised Alberto, rendering him and his sexuality as a threat to the court. Whereas Alberto dressed as a woman, wearing sequins, and being coquettish and playful with the camera somewhat negated the threat of a hypersexual homosexuality. David Bergman has written in his study on 'camp':

> No "Real" man will allow himself to express fear of another man dressed in women's clothing. For most heterosexuals, the drag artist is the least threatening and most visible part of gay subculture, and consequently the first element of gay social practice that straight people are willing to confront, probably because they can feel superior to it.[79]

The feminisation of Alberto, the gentle manner in which he spoke, and the clarity and precision of response, the strong presence that his barrister had, and the excellent guidance and response to questions of identity rather than sex, were all factors which played into an image of Alberto as non-threatening, timid and feminised. It would be incorrect of me to suggest that the sex acts of refugees should have a role in the

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[78] T Johnson, Telephone interview with SW, Solicitor (1 June 2006).

[79] David Bergman (ed), *Camp Grounds: Style and Homosexuality* (University of Massachusetts Press, Amherst 1993) 6-7. For an analysis of camp and political action see Layli Phillips and Shamari Olugbala, 'Sylvia Rivera: Fighting in her Heels: Stonewall, Civil Rights and Liberation' in Susan M. Glisson (ed), *The Human Tradition in the Civil Rights Movement* (Rowman and Littlefield Publishers, Maryland 2006); also Jessi Gan, '"Still at the back of the bus": Sylvia Rivera's struggle' (2007) 19(1) Centro Journal 124.

conceptualisation of identity of a lesbian or gay claimant. My intent in pointing out the displacing of sexual activity though, is that it renders the lesbian or gay claimant readable and legitimate within a liberal identity rights framework. In so many other instances, lesbian and gay sexuality has been pathologised, biologised, analysed, critiqued as to its content, questioned, investigated, medicalised, criminalised and decriminalised. This raises the question of why sexuality is 'disappeared' in an immigration court, or, is rendered as a part of identity that is sterile and compartmentalised?

Alberto's narrative, his comportment, and the video of him 'performing' his sexuality all contribute to a confident reading of his sexual identity; a sufficient level of information was provided across a range of mediums providing a more nuanced vision of Alberto that challenged the imagination of the judiciaries understanding of gay male sexuality.

In the next part of the chapter I consider non-oral forms of communication. I discuss the place of body language and silence, the impact these components have in court and whether there are resistant motifs to their presence. I argue that silence must be read not as lack of engagement or as representative of a lack of investment in proceedings; it must be viewed as symptomatic of a range of possibilities, from an inability to speak of the trauma and the problems of Post Traumatic Stress Disorder, to a political act, which refuses to speak.

Unspoken communication: Silence in court

The following part of this chapter considers the nature of silence in refugee hearings. Asking whether the ambiguous and textured quality of silence can be a productive site of resistance and whether it can contest the *formalism* and the *formulism* of the court, or, whether the effect of silence perpetuates the problematic conceptualisation of the refugee as a subjugated actor whose voice is muted within a hearing. The equivocal nature of silence imparts a vulnerability to its interpretation, rendering it subject to the imposition of unsolicited meaning. Silence's indeterminacy, I suggest, should give pause to the court to proceed in a manner that invokes caution around such inference. My particular interpretation of silence is as a 'restive silence', an uneasy, tense, embodied silence. I focus on the effect of 'restive silence' as an indeterminate form of micro-resistance, which poses a challenge to the social and structural dynamics of the

court space. The ambiguity of silence and alternative narratives, the 'la perruque', whereby meaning or intent is unclear, muffled, or working towards an agenda of its own, provides moments of tactical advantage. Restive silence has no place in a court transcript but permeates the space of the court through its animation of the body. Restive silence is barely present, lingering in the long shadow of speech.

I conceive of restive silence as impatient and uneasy, dwelling just beneath the surface of the skin. Restive silence is exuded; it is felt rather than heard. It may be recognized but it is fleeting in its presence. Restive silence differs from restlessness. If restlessness is categorized as that which is perpetually agitated or in motion, averse to quiet or inaction, defined by its vocality and an active physicality, then restiveness differs in its form of expression. The feeling evoked by restiveness may be awkward, it may connote defiance, it may manifest through tension. It is also impatient, angry, and it may represent the intensely emotional feelings of an asylum seeker in court, but it is repressed, and its visibility shimmers beneath the skin.

I started to hear silence during court observations. Outside of speech there was something else that spoke to the court. Silence represented more than just vacant space. It was ambiguous, at points resistant and defiant, at others oppressive and foreclosing. Within law, there are specific circumstances when individuals can remain silent so as to not incriminate themselves;[80] but outside of law, and more broadly, silence's oppressive nature can be overwhelming. For example silences around sexuality, abortion, abuse, – such things become *unspeakable* and the silence that surrounds them can be stifling.[81]

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[80] See Daniel J. Seidmann and Alex Stein, 'The Right to Silence Helps the Innocent: A Game Theoretic Analysis of the Fifth Amendment Privilege' (2000) 114 Harvard Law Review 430. See recent case of asylum seeker who will not speak and thus is unable to be deported, BBC News, 'Mystery foreigner kept in prison' 6 September 2008 <http://news.bbc.co.uk/1/hi/england/cambridgeshire/7601706.stm> accessed 24 August 2011.

[81] See Linda G. Mills, 'On The Other side of Silence: Affective Lawyering for Intimate Abuse' (1995-96) 81 Cornell Law Review 1225. Cooper notes the force of 'omissions as power' considering the omission of subordinate forces, she notes 'the process by which dominant forces prevent the grievances of others from entering the political arena.' and secondly a 'lack of obvious activity on the part of dominant forces' in *Power in Struggle: Feminism, Sexuality and the State* (Open University Press, Buckingham 1995) 19. One example of resisting the court's demands for full disclosure was when an Zimbabwean woman who had been raped by members of the armed forces in front of her son chose not to allow her son to testify to this occurrence. She made this decision so that he would not have to relive those moments. For this woman control over her testimony and her son's exposure to the legal system were more important than the provision of evidence.
For a critique of silence as resistance see Dorothy E. Roberts, 'The Paradox of Silence: Some Questions About Silence as Resistance' (2000) 35 University of Michigan Journal of Law Reform 343.

Unspeakability of course has tremendous pertinence to the LGBT/queer community. There are a multitude of instances when LGBT/queer identified individuals have been silenced, for example through closeting, or have used the terminology of silence to indicate the intersection of an oppressive politics and marginalised identity. In the 1980's and early 1990's the New York-based activist group ACT UP used the 'SILENCE = DEATH' slogan in response to a lack of government action around HIV and AIDS.[82] 'SILENCE = DEATH' was an emblem that was stark and unequivocal. Its appearance on t-shirts, stickers, and badges was graphic in both actual and metaphoric terms, depicting black and white letters beneath a pink triangle, the triangle being the Nazi symbol for queers. The reclamation of this symbol 'connects gay action to gay survival, on the one hand, and homophobia to death from AIDS on the other'.[83] It is an explicit call to reject silence around AIDS awareness and an indisputable political linkage to the indolence of the Reagan and Bush administration and their unresponsiveness to demands for increased health care resources for HIV and AIDS care.[84]

The vocality of ACT UP's attack on silence was in stark contrast to the conventional public mourning practices in the form of candlelit vigils or the creation of the Names Project quilt. The anger and vocality of ACT UP and its transgressive behaviour, 'blood-bombs', 'kiss-ins', 'die-ins' harnesses the rage around the silencing of these deaths and becomes a guerrilla tactic of survival, becomes a vocal 'refusal of death'.[85] These activities force what is *unspeakable* into the realm of *speakability*, *speakability* for the sake of survival.

The asylum hearing becomes a venue where *unspeakable* occurrences stemming from persecutory experience must be given voice. However, the production of voice and unspeakable events is often stilted, filled with the gaps and omissions of the things left unsaid. The things left unsaid and the pauses that are present often pertain to violent and violative acts and the space of the courtroom does not induce individuals to be open about their experience, even though it is that openness that may

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[82] Act Up New York <http://www.actupny.org/> accessed 19 May 2011.
[83] Josh Gamson, 'Silence, Death and the Invisible Enemy: AIDS Activism and Social Movement "Newness"' (1989) 36(4) Social Problems 351, 361.
[84] *Gamson* (n 83) 360; B. Shepard, 'Introductory notes on the trail from ACT UP to the WTO in B. Shepard and H. Hayduk (eds), *From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalization* (Verso, New York 2002) 11.
[85] David Bell, 'Pleasure and Danger: the paradoxical spaces of sexual citizenship' (1995) 14(2) Political Geography 139, 148; Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, London 1997).

well assist the granting of asylum.[86] Sexuality becomes particularly difficult to recount especially if individuals have been met with hostility in their previous interview with a border agent, or have experienced persecution directly linked to their sexuality in the home state.[87]

In an interview carried out with an immigration Solicitor, (SW), I previously mentioned that she referred to sexuality as the 'skeleton in the corner of the room'.[88] Sexuality as skeletal referred to both judicial discomfort regarding sexual orientation which would have the effect of curtailing the evidence presented in court and the claimant's reluctance to disclose sexuality during solicitor/client meetings. For SW it became necessary to listen to, and be aware of, the silences and omissions in the narrative her client presented. The restive presence of sexuality within the story was skeletal, spectral, but nevertheless made its presence known through the gaps and omissions in life stories, through the things left unsaid.

This transition between moments of omission, speech and silence cannot be easily demarcated, one feeds into and influences the other. As Wendy Brown has written 'speech harbors silences; silences harbor meaning ...when speech ends the ensuing silence carries meaning that can only be metaphorized by speech thus producing the conviction that silence speaks'.[89] The presence of silence, trailing in the aftermath of words is infected with the imagery imparted by those words. During testimony this space for silence is often necessary for all involved, particularly if what has been recounted is emotionally taxing.

In one court observation, the representative of a Roma woman who had been gang-raped, along with her mother-in-law, whilst the woman's husband had been beaten and forced to watch, recounted these events. Upon concluding, the immigration judge took a few moments, first of all it seemed to process the

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[86] D. Bognor, J. Herlihy and C.R. Brewin, 'Impact of sexual violence on disclosure during home office interviews' (2007) 191 British Journal of Psychiatry 75; A. Chazaro, 'Witnessing memory and surviving domestic violence: The case of Rodi Alvardo Pena' in B. Epps, K. Valens and B. Johnson Gonzalez (eds), *Passing Lines: Sexuality and Immigration* (Harvard University Press, Cambridge, MA 2005) 365; J. Cohen, 'Questions of credibility: Omissions, discrepancies and errors of recall in the testimonies of asylum seekers' (2002) 13 International Journal of Refugee Law 293, 294.

[87] M.A Conroy, 'Real bias: How REAL ID's credibility and corroboration requirements impair sexual minority asylum applicants' (2009) 24 Berkeley Journal of Gender, Law and Justice 1, 28; B. Fairbarn 'Gay rights are human rights: Gay asylum seekers in Canada' in B. Epps, K. Valens and B. Johnson Gonzalez (eds), *Passing Lines: Sexuality and Immigration* (Harvard University Press, Cambridge, MA 2005) 239; Gregor Noll, 'Asylum claims and the translation of culture into politics' (2006) 41 Texas International Law Journal 496, 497.

[88] T Johnson, Telephone interview with SW, Solicitor (1 June 2006).

[89] Wendy Brown, *Edgework* (Princeton University Press, Princeton 2005) 83.

information, he shuffled his papers, he made a note, but didn't say anything apart from asking the appellant's representative whether his client would prefer a gendered court.[90] Such instances of silence are filled with the noisy aftermath of words imparted. The lingering presence of the images derived from the narrative infused the court, alongside the pale, anxious expression of the woman who had been raped, and whose body seem to be flooded with anxiety – she was visibly shaking and clearly nervous. These reactions seemed to communicate, in their own way, the intensity of that experience and the difficulty of having that recounted within a court environment. The culmination of the story, and the very physical and animated presence of the woman who was at the centre of it, filled the space with restiveness.[91]

The significance of restive silence extends beyond the immigration tribunal, expressed and experienced in various environments as fear, rage, anxiety, foreclosure, oppression.[92] Examples include: the voices heard and unheard at the Truth and Reconciliation Commission hearings in politically transitioning states;[93] the silence and silencing in court, viewed from a position of oppression based on gender, class and race;[94] and silence in the classroom and academic responsibility to consider the meanings of that silence, to name just a few.[95] Other scholars have considered silence as a resistant mechanism, as 'disrupting linguistic hegemony', particularly from minority linguistic communities who have referred to it as a site of communal resistance.[96] Resistance borne from an ability to include and exclude linguistic others,

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[90] T Johnson, In-court observation with Roma claimant (FTTIAC London 5 June 2007). A gendered court constitutes an all female court.

[91] *Ibid.*

[92] K Behnke (trs), Niklas Luhmann, 'Speaking and Silence' (1994) 61 New German Critique 25. Andreas Phillippopoulos-Mihalopoulos, 'The Vociferous Rupture: Silence, Law and Ignorance' (2005) 7 Organdi Revue 1. Barbara Bezdeck, 'Silence in the Court: participation and subordination of poor tenants' voices in legal process' (1992) 20 Hofstra Law Review 533; M. Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton University Press, Princeton 2005); Bill Rolston, 'Dealing with the past: Pro-state paramilitaries, truth and transition in Northern Ireland' (2006) 28(3) Human Rights Quarterly 652.

[93] *Rolston* (n 92); M.B. Dembour and E. Haslam, 'Silencing Hearings? Victim-witnesses at war crime trials' (2004) 15(1) European Journal of International Law 151; Nthabiseng Motsemme, 'The mute always speak: On women's silences at the Truth and Reconciliation Commission' (2004) 52(5) Current Sociology 909.

[94] *Bezdec* (n 92); *Constable* (n 92); Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (University of Toronto Press, Toronto 2001).

[95] Aruna Srivastava, 'Anti-Racism Inside and Outside the Classroom' in Leslie G. Roman, Linda Eyre (eds) *Dangerous Territories: Struggles for Difference and Equality in Education* (Routledge, London 1997).

[96] Margaret E. Montoya, 'Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse' (2000) 33:3 University of Michigan Journal of Law Reform 264, 266. Also see Kennan Ferguson, 'Silence: A Politics' (2003) 2 Contemporary Political Theory 49.

fosters an exclusivity that may be both symbolically and practically empowering in resisting the dominance of a linguistic majority.

Alternatively, Margaret Montoya looks at how silence and silencing can be 'used to draw and maintain the borders of racialized power' in court.[97] Montoya's consideration of the racial privileging inherent in legal language stems from interactions that show how people of colour are engaged with in law. She 'exhorts us to "ask questions about how relations of domination and subordination stubbornly regulate encounters in courtrooms," and to "direct our efforts to the conditions of communication and knowledge production that prevail, calculating" who can speak and how they are likely to be heard'.[98] The ways in which linguistic, racial and cultural minorities are likely to be heard is through a particular register, through a particular legal discourse embedded in a particular racial dominance. Montoya and Razack ask the reader to confront this hierarchisation of linguistic register, to consider what it is built on, and to challenge the exclusionary nature, and structure, of law. This particular line of analysis has direct pertinence to the way in which refugees engage with the court. Refugee hearings are deeply racialised, premised on a foundation of political aid and globalised legal obligation; such legal obligations stretch only to incidences of recognised persecution being inflicted on a legally recognised category of person. The individual must create a narrative that acquiesces wholly to the needs of the court, rather than to broader obligations to themselves, family or community. Alternative renditions of experience expressed through means that are alien to the court, such as silence, will fail to register with the court as a valid mode of testimony, therefore lacking useful legal content.

Nthabiseng Motsemme discusses the deployment of silence at the Truth and Reconciliation Hearings in South Africa.[99] Motsemme considers 'women's articulation of their languages of pain and grief through the language of silence'.[100] Motsemme's project highlights that, 'when we reject dominant western oppositional hierarchies of silence and speech, and instead adopt frameworks where words, silence, dreams, gestures, tears all exist interdependently and within the same interpretive

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For a view which questions the resistant mechanism of silence see *Roberts* (n 81) 343; Audre Lorde, *Sister Outsider: Essays and Speeches* (The Crossing Press, Alta Mira, CA 1984).

[97] *Montoya* (n 96) 266.

[98] Razack in *Montoya* (n 96) 294; L.M. Finley, 'Breaking Women's Silence in Law: The dilemma of the gendered nature of legal reasoning' (1989) 64 Notre Dame Law Review 886.

[99] *Motsemme* (n 93).

[100] *Motsemme* (n 93) 910.

field, we find that the mute always speak'.[101] Within the TRC hearings, silence or *unspeakability* becomes particularly important; especially when talking about the effect of violence and trauma on the body – such violence can often be rendered unspeakable. Motsemme notes 'this "unspeakability" is part of a struggle and a longing to speak fully about the experience of violence against the human flesh, and the near impossibility of doing so'.[102] Many refugees have been through similar experiences. Yet evidence of torture and abuse is often downplayed by the court and thus its effects on the psyche and the individual's ability to narrate such experience are unacknowledged, or at least not given sufficient attention.[103]

Restive silence's relationship to *unspeakability*, particularly *unspeakability* funnelled through trauma and pain, seems to traverse some of the same ground. Vocalising trauma through traditional linguistic means can be too immediate, too raw; yet the inadequacy of language still fails to capture the experience, while managing to evoke trauma. Restive silence takes on the responsibility of such trauma through the demise of language. It is this restive silence which travels over the body, that gives the body anima, and it is this that is potentially communicated through the body of the persecuted individual. This is not to imply that anyone can know or understand the pain that an individual goes through, or that a shared feeling or an empathetic response is being communicated. But the linguistic vacuum and resistance to typical legal expression that exist around the pain of recounting incidents of persecution needs to be negotiated; the court needs to find mechanisms that acknowledge the impossibility of speaking that pain whilst still acknowledging its very real presence. Motsemme drawing on the work of Scarry has argued 'that physical pain (or any systematic abuse to one's basic humanity) has the ability to destroy the sufferer's language as it has no referential content in the external world...it is this non-referentiality that prevents and inhibits the transformation of the felt experience of pain and suffering, ultimately leaving it to reside in the body'.[104] The inability to vocalise the experience of persecution will prove detrimental to the viability of an asylum seeker's case.

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[101] *Motsemme* (n 93) 915.
[102] Bakare Yusuf in *Motsemme* (n 93) 915.
[103] T Johnson, Interview with SC, Barrister (London 22 May 2007); SW, Solicitor (1 June 2006); *Kirmayer* (n 58) J. Herlihy and S.W. Turner, 'Asylum claims and memory of trauma: Sharing our knowledge' (2007) 191 British Journal of Psychiatry 3.
[104] *Motsemme* (n 93) 916.

The provision of testimony has been written as a means through which 'the wholeness of self' can be maintained.[105] Motsemme in her discussion of the provision of testimony at the South African Truth and Reconciliation Hearings discusses the role of silence as part of the language of 'pain and grief' that fails to be recognised. Motsemme, drawing on the work of Bozzoli, talks of the ways in which 'wholeness of self, body, the family, the home had been breached in ways that left the victims bereft of something precious'.[106] From a western legal perspective, silence within testimony in an immigration setting is rendered as omission. Omissions in testimony are perceived as having never existed; silence's meaning is not legible in a court transcript. When Motsemme uses the term 'breach', images of tearing, breaking and rupture are evoked, and it is in these fissures, where life is sliced or severed from which silence may emanate.

The legal implications of an inability or unwillingness to vocalize trauma in a manner intelligible to the court can lead to the labelling of testimony as lacking credibility, undermining the claim to asylum.[107] It is well documented that the psychological mechanisms that order and organise stories in these periods of violence are fundamentally disrupted.[108] How can such narratives be temporalised within these moments of trauma and crisis, and how can that difficulty be communicated through testimony?[109] It is essential that the court begin to respond to testimony in a manner that does not rely so heavily on the form of testimony's production, considering instead both the macro and micro impact of the context from which the individual makes their claim.

As discussed in Chapter five, the *Refugee Convention* of 1951 and its subsequent protocol of 1967, requires, in substantiating a claim of persecution, both an objective and subjective fear of persecution. The establishment of an objective fear of persecution by the claimant must draw on evidence that supports their fear as well founded. The problem with gathering such evidence is that the individual will generally be 'outside their country of origin, in an unfamiliar environment, with no

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[105] *Motsemme* (n 93) 910.
[106] Bozzoli in *Motsemme* (n 93) 910.
[107] Jenni Millbank, 'The ring of truth': A case study of credibility assessment in particular social group refugee determinations' (2009) 21:1 International Journal of Refugee Law 1.
[108] *Cohen* (n 86); L.M. de Sanctis, 'Bridging the gap between rules of evidence and justice for victims of domestic violence' (1996) 8 Yale Journal of Law and Feminism 359; M.T. Masinda, 'Quality of memory: Impact on refugee hearing decisions' (2004) 10(2) Traumatology 131.
[109] *Kemp* (n 40) 191; *Kirmayer* (n 39) 728.

familiar reference points, with no witnesses or documents, and with limited means of communicating with the country of origin. In addition to this, the state from which the claimant has fled is unlikely to be willing to provide supporting documentation'.[110]

The subjective aspect of fear and its relationship to persecution is complex. The roles of subjectivity and silence in the provision of testimony are grounds that must be handled with care by immigration officers and judges. There are numerous issues that affect the provision of testimony and hence the oration of a narrative of persecution and fear by an asylum seeker. The culturally diverse demographic of asylum claimants means that the way in which testimony is expressed varies from culture to culture, refugee to refugee. Willingness to express the explicit details of torture varies between claimants and this variation has a profound impact on the way in which the asylum seeker is perceived. The more demonstrative and expressive an individual is in providing a chronologically accurate, 'factual', and realistic linear narrative of persecutory behaviour, the greater their chances of being granted asylum. Additionally if the scars of torture and medical reports can endorse the oral evidence, then this strengthens the claim and posits the claimant as a reliable witness.[111] The effect that these strong formulaic factors have is that those who are unable to speak of certain instances, and are unable to provide a clear trajectory of their story, can be deemed liars, fraudsters, and so-called economic migrants, using a story to get ahead.

Inability to vocalise trauma often revolves around incidences of sexual assault for both men and women, and the denigration of dignity. The provision of testimony can perpetuate those feelings of degradation and become another source of trauma. In the interviews I carried out with the solicitors and NGOs, all mentioned the difficulty that both men and women had in recounting their persecutory experiences to them, particularly those that had been of a sexual nature.[112] Often the sexual nature of assaults had been left out of initial statements and interviews with solicitors or representatives. Omitting such information can have a profound effect on the way in which persecution is perceived in court. According to SW, omissions in testimony

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[110] Gina Clayton, *Textbook on Asylum and Immigration Law* (Oxford University Press, Oxford 2006) 430.

[111] T Johnson, Interview with TB, Solicitor (London 23 May 2006); D. Fassin and E. D' Halluin, 'The truth from the body: Medical certificates as ultimate evidence for asylum seekers' (2005) 107(4) American Anthropologist 597.

[112] In interviews with TB, Solicitor; SW, Solicitor; TS, Director SAFRA Project; SC, Barrister all mentioned this in their interviews.

become more obvious the more the conversation progresses, as the gaps in certain experiences come to light. SW mentioned that with one particular client, it was only when she began to probe more deeply the incidents of police brutality, and the motivation behind such brutality, that she became aware of the sexuality of her client and thus the motivation for persecution on the part of security forces and the specific type of abuse experienced.

Trauma detrimentally impacts on the individual's ability to respond to the grounds of the *Refugee Convention* in a manner that is sequential or legally cognizable. Post-Traumatic Stress Disorder (PTSD) is a common problem for asylum seekers and manifests itself in ways that are sometimes unreadable by the judiciary.[113] Hathaway and Hicks have noted that 'persons suffering from PTSD often do not exhibit outward signs of trepidation, but rather dissociate themselves from their reality... dissociation is a central characteristic of PTSD and that persons who dissociate are extremely fearful, despite their outward demeanour'.[114] The outward demeanour can take the form of emotional detachment; profound passivity and may lead to speechlessness.[115]

Pelosi has argued that:

> A claimant's vulnerable state of mind during the hearing may lead to emotional reactions or signs of distress that are misinterpreted by decision makers. Psychological fragility is often caused or reinforced by the intimidating surroundings of the hearing, by culture shock and bewilderment regarding unfamiliar signs and symbols, by fear of the hearings outcome or of being misunderstood, or by psychological symptoms caused by trauma, which might range from nervous laughter to blank and indifferent affect.[116]

At multiple points during the hearings that I observed, I saw behaviour that correlates to this description. For example the Iraqi claimant with the injured leg exhibited behaviour that lurched between indifference and disquiet; the young man was twitchy and nervous at some points and yawning and distracted at others.[117] This behaviour could simply be indicative of a tedious, frustrating and tiring court experience; but it

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[113] For a useful account of PTSD and its effects on refugee women see Andrea E. Bopp-Stark, 'Post-Traumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender Specific Persecution' (1996-97) 11 Georgetown Immigration Law Journal 167.

[114] James Hathaway, 'Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"' (2004-2005) 26 Michigan Journal of International Law 506, 519.

[115] *Hathaway* (n 114) 519.

[116] *Rousseau at al* (n 25) 51.

[117] T Johnson, In-court observation with Iraqi claimant (FTTIAC London 16 May 2006).

was the stark contrasts in behaviour and the restless animation that registered as restive.

Nervousness and anxiety manifest in various ways: over reaction and under reaction, constantly shifting in the chair, avoiding eye contact, sweating, distractedness, extreme tiredness. All of these factors affect the way in which testimony is provided in court and the way in which testimony is received. The restiveness and agitation associated with refugees in these circumstances are a culmination of resistance, frustration and a limitation of what can and cannot be said. Indicators of anxiety, and the misreading of this anxiety, can be perceived as being disrespectful towards the court and as showing a lack of interest or investment in the proceedings, which can harm a claimant's credibility and consequently their application for asylum.

Anxiety and nervousness are the predominant expressions of restiveness, but frustration as to meanings gone awry or misinterpretation of what is being said and the need for the repetitive confirmation of answers also leads to restiveness. I see these components as possessing some resistant capital in themselves. The manifestation of physical energy in court and of an agentic presence is essential in order that the judge sees the individual 'on trial'. It is important that the individual before the court is recognized as bearing agency, and in lieu of oral communication, the court needs to recognize and reflect on the physical and emotional tells which are produced, as supplementing testimony and contributing to credibility.

For lesbians and gay men in particular, credibility is a key site of the court's focus. Proof of homosexuality, gay identity juxtaposed with 'gay' identified sexual activity and levels of campness have all been raised in court as a means to delegitimize LGBT claimants' narratives.[118] The presence of an opposite-sex spouse or children can often impugn the claim to refugee status on grounds of sexuality. The court's assumption that an opposite sex spouse necessarily negates LGBT identity fails to take into account social and cultural values which strongly dictate that individuals 'must' marry; additionally the court fails to reflect on the fact that people come to terms with their sexuality at different stages of their life. Reticence on the part of the refugee to talk about sexuality because of shame, embarrassment or

[118] F. Hanna, 'Punishing Masculinity in Gay asylum Claims' (2005) 114 Yale Law Journal 913; D. Morgan, 'Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation asylum Cases' (2006) 15 Law and Sexuality 135.

cultural taboos around the subject of sex can preclude full disclosure. Furthermore an inability to disclose using specifically western terminology cognizable to an immigration judge can also detrimentally impact on the perception and thus credibility of an asylum seeker within a court space.

My purpose in identifying restive silence is intended to ask for greater consideration of the context from which an individual is coming and how this influences production of narratives. To be aware that some experiences will fundamentally affect the way in which a claimant will respond to legal mechanisms and that further evocation of traumatic experiences will not necessarily lead to any kind of substantive truth. Speech is inadequate and inexact, and fails to deliver the stories and experiences written on and through the body. In trying to interpret testimony, particularly the testimony of those subjected to torture, trauma, persecution, it is essential that the court relies on more than just words and language, they must begin to hear silence, and try and think through what that silence may imply.

Conclusion: Resistant space and ambiguous silence

Relying on empirical research carried out over two years I have analysed the *formalism* and *formulism* of the asylum court through three lines of thematic analysis – resistance, narrative and silence. My intent in this chapter was to assess whether there was the opportunity for refugees to resist the *formulism* and *formalism* of court. I considered the possibility and place of refugee resistance and its disruption of the power dynamics of the court. I partially viewed resistance as transgressive acts, as assertions of agency to be deployed with care and delicacy. In analysing the resistance of asylum claimants I relied on Michel de Certeau's conceptualisation of tactics as a form of micro-subversion, which undermines the hierarchy of the court in a way that creates a space for the self within the strategised space of the court.

Resistance, I concluded, is filled with ambiguity, but this does not negate its importance; it only means that the norms of court are policed in such a way that refugees must be careful in their form of transgression. The power dynamics in court, though firmly entrenched in many ways, can also be disrupted by tactical moves made by refugees. Some of the tactics deployed may be intentional, an explicit attempt to disrupt the court; others may be tactics of survival, responsive to the situation at hand,

an attempt to ensure the strongest narrative is deployed; others may be much more intuitive, knee-jerk reactions to immediate occurrences. Such tactics breathe life into claims, and into stories, and opens up the possibility of the court space being challenged by individual actors.

The additional presence of silence, and in particular restive silence, is a further factor in recognising a refugee's attempt to maintain ownership and control over their experience in circumstances that overwhelmingly foster feelings of powerlessness.[119] The long relationship between LBGT identity and silence has become a part of cultural imagination constitutive of queer sexuality. Silence regarding sexuality and the entrenched place of the closet has infused decision-making in the asylum court. The court's prior reliance on discretion was a judicial endorsement of homophobia and heteronormative lifestyle choices. I have indicated that sites, which would typically be perceived as oppressive such as the courtroom, the closet, can be considered as unstable structures vulnerable to tactical intervention. The ambiguous nature of silence and its residence within the shadow of speech renders it subject to multiple interpretations. In the context of court, where it is often subsumed to oral testimony, it is essential that the court not only acknowledge the important place that silence holds within testimony, but is cognisant of the cultural silences around same-sex sexuality and sexual practices and the meaning that those silences in particular may bear.

Restive silence therefore is a key component in understanding testimony. Restive silence embodies agency and anima; it embodies rage, anger, frustration, disappointment, fear, anxiety, all of which must be carefully policed during court based interactions. Restive silence is ambiguous in its presence, it is resistant and submissive, it is multifaceted and it is an exploration of the 'things left unsaid'; it is the thoughts and emotions that cannot be given voice but animate the body of the individual and communicate the incommunicable.

In the following chapter, reflecting on the difficulties of court based communication, I consider the ways in which the positions of the interlocutors in court could be dismantled and deconstructed in order to facilitate a more productive process of communication. I consider the possibility of an 'ethical' response to the

[119] *Kemp* (n 40); *Kirmayer* (n 39); J. Van Dijk, MJA Schoutrop and P. Spinhoven, 'Testimony Therapy: Treatment Method for Victims of Organised Violence' (2003) 57(3) American Journal of Psychotherapy 361.

Other as a way of assisting refugees in gaining justice and establishing relationships divested of the deeply entrenched hierarchies that currently suffuse the asylum court.

CHAPTER SEVEN

Reading the Stranger: Sexuality and asylum in the UK

Introduction

In the previous chapter I discussed the resistant tactics of asylum seekers in the asylum court. Resistance was ambiguous; recognition of it was subjective and contestable. Resistance manifested in multiple ways, through bursts of frustration, through the negotiation of terminology and testimony, and through what I termed 'restive silence', a silence laced with meaning. The ambiguous presence of resistance spoke to the court's structure, highlighting the hierarchy and formulism of the venue and the dangers of transgression. Drawing on the empirical research I gathered, and on anthropological and sociological studies that I discussed, expressions of resistance, I warned, needed to be covert, overt expressions had the potential to alienate the judge from the narrative being provided, and may have had a detrimental effect on the outcome of the case.

In this chapter I shift the emphasis away from resistance in court and focus instead on the relationships developed between the parties in court - the asylum seeker, legal counsel and the immigration judge. Drawing on the work of Iris Marion Young and Emmanuel Levinas I reframe the relationships between the interlocutors. I focus on the benefits that engaging with, and bearing responsibility for, the other may have on the provision of justice for refugees. I rely in part on Iris Marion Young's understanding of a communicative ethics based on 'asymmetrical reciprocity', which is indebted to Levinas' conceptualisation of the 'other' – the other as unknowable, and irreducible, and to whom we are obligated – in order to address the place of an ethics of responsibility.[1] Young's work unpacks the relationship between locutionary positions; she relies on generosity towards the other through what she terms 'the

[1] Michael B. Smith & Barbara Harshaw (trs), E. Levinas, *Entre Nous: Thinking-of-the-other* (Continuum,Publishing London 2006); E. Levinas in Sean Hand (ed) *Facing The Other: The Ethics of Emmanuel Levinas* (Curzon Jewish Philosophy Series, Curzon Press, Richmond 1996).

gift'.[2] The 'gift' is a relational concept - 'opening up to the other person is always a gift; the trust to communicate cannot await the other person's promise to reciprocate'.[3] The gift's relationship to asymmetrical reciprocity requires each party to recognize and be open to the 'irreducible points of view of the other' and understand the 'irreversibility' of their subject positions.[4] I make this tentative turn to ethics as a way of repositioning the relationship of law to the politics of responsibility, in a bid to foster an ethical response to the other that reaches beyond the asylum court.

Throughout the thesis I have indicated some of the moments where law and the legal process has failed asylum seekers. These failures have ranged from heteronormative conceptualisations of sexuality, cultural imperialism, cultural misunderstanding and an almost wilful ignorance of the complexity of discretion. Furthermore, the court, I claim, pays scant attention to the political, legal and economic factors that perpetuate the generation of refugees, and sidelines the physical, social and psychological effects of claiming asylum.

The asylum system and the legislation which gives it meaning are predicated on political responsibility, which takes the form of a legal obligation to those who become stateless through persecution on grounds of race, ethnicity, political affiliation or membership of a particular social group. The paradox inherent in the asylum system is perhaps the paradox inherent in all legal decision making processes in the UK that rely on liberal legal thought. Liberal legality assumes the objectivity and neutrality of the decision maker who applies the law in a manner that follows the principles of natural justice. The paradoxical nature of law as applied to the asylum court is twofold: if the maxim that all cases are to be tried on their own merits is valid, the way in which the asylum court notoriously functions is that often cases with similar fact histories are adjudicated on as if the narratives and case details are the same; the contextual specificity and individual experience is disappeared from the space of the court thus denying the legal maxim that all cases are tried on their own merits.[5]

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[2] Iris MarionYoung, 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought' (1997) 3(3) Constellations 340.
[3] *Young* (n 2) 351.
[4] *Young* (n 2) 351. Young posits asymmetrical reciprocity in conversation with Seyla Benhabib's work on symmetrical reciprocity. For Young, Benhabib's analysis encourages a sublimation and reduction of the individual. See Seyla Benhabib, *Situating the Self* (Routledge, New York 1991).
[5] Anthony Good, *Anthropology and Expertise in the British Asylum Courts* (Routledge, Oxford 2007).

The courts ready disposal of cases is influenced in part by judicial scepticism, when multiple migrants from the same state have similar, if not identical, narratives. The replication of narratives has the effect of making the claims appear bogus, impugning the credibility of the claimant. Secondly, the necessity for objectivity on the part of the judge effaces the relationship between the claimant and the immigration judge. The effect effacement has, is to distance the claimant from the judge, and render the claimant as merely another case on the court's docket. The reason why distancing is so problematic in an asylum court is that the asylum seeker's narrative turns on the sequence of events provided by the claimant. Supporting evidence can be relied on in order to substantiate a story, but some claimants only have their submissions as proof of experience, therefore producing a narrative that can be heard by the judge as plausible, understandable and recognisable, becomes essential.[6]

The heavy reliance on refugee claimant submissions creates an enhanced intimacy between the FTTIAC judge and the refugee, which is dissimilar to the usual judicial/defendant relationship. There is little to intervene in the relationship between asylum seeker and judge, apart from the potential presence of lawyers representing their respective clients (the claimant and the Secretary of State for the Home Department), an interpreter and in some cases witnesses. The judge has the opportunity to communicate with the asylum seeker in a manner that is atypical of legal environments; the burdens of proof and the formalities of court are of a less onerous standard.[7] Bearing this slightly more relaxed *formalism* and *formulism* of the court in mind, the site of asylum claims has the potential to be organised to a degree that is based on an enhanced receptivity to unsubstantiated narratives when compared to standards of proof required in other legal environments such as criminal courts.[8] Furthermore the asylum court purports to be non-adversarial in its organisation, this opens up a space in which the ethical could be centred, drawing on a process of dialogue rather than judgment.

What the legal strictures of the asylum court, and the overarching presence of a restrictive migration politics perpetuate, are a displacement of the ethical response

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[6] For more on this see Iris Marion Young, *Inclusion and Democracy* (OUP, Oxford 2000) 72-75.
[7] For burdens of proof see *R v SSHD ex p Sivakumaran* [1988] AC 958. Also see Chapter Five, footnote 4 of this thesis.
[8] For more on the *formalism* and *formulism* of court, and how these are contested, see chapters four and six of this thesis.

owed to the other. Centring the ethical, I argue, would help to counter the problematic dynamics which suffuse the asylum court in the form of racism, sexism, homophobia and wariness of the 'stranger'. Hence this chapter is not a template for the legal reform of the asylum system, rather, its intent is to identify the challenges that intervene in the relationship between judge and asylum seeker in-court; and to establish foundational principles, which could potentially mitigate the dynamics of the judicial/defendant relationship via an response founded in the ethical rather than the legal.

Transitioning through politics to ethics

In the following part of the chapter I sketch out how the disjunctive relationship between the political and the ethical can be usefully put-to-work if predicated on the basis of informing rather than replacing the other. I draw on the work of Vikki Bell and Sara Ahmed in order to think through the way ethics underscores politics. I use this methodological approach to deconstruct the relationship between the actors in court and to suggest ethically founded possibilities for renegotiating these interactions.

Levinas writes '[e]thics, as the extreme exposure and sensitivity of one subjectivity to another, becomes morality and hardens its skin as soon as we move into the political world of the third'.[9] The 'third' is the world that consists of 'government, institutions, tribunals, prisons, schools, committees'. Ethics bears an extreme vulnerability to the imposition of the third. When the 'third' intervenes in the intimacy of the encounter, ethics is displaced. The displacement occurs as an effect of the necessity for a supposed 'objectivity' that stems from the political world. For Levinas it is not the place of ethics to '"legislate for society or produce rules of conduct whereby society might be revolutionised or transformed. It does not operate on the level of the manifesto or call to order"... Ethics involves a response of one to one other; politics necessarily involves the appearance of the third'.[10] Levinas writes:

> From uniqueness to uniqueness – transcendence; outside all mediation, all motivation that can be drawn from a generic community – outside all prior relationship and all *a priori* synthesis – love from stranger to stranger,

[9] E. Levinas in Vikki Bell, 'On ethics and feminism: Reflecting on Levinas' ethics of non-(in)difference' (2001) 2 Feminist Theory 159, 165.
[10] *Bell* (n 9) 165.

> better than brotherhood in the bosom of brotherhood itself. A gratuity of transcendence-to-the-other interrupting the being that is always preoccupied with that being itself and its perseverance in being.[11]

'From uniqueness to uniqueness', Levinas recognises that bearing radical otherness, radical strangerness, is what lies in common with the other; 'the stranger is the other with whom one does not have anything in common – but who, in not being in common, one is paradoxically alike'.[12] Levinas links the 'love from stranger to stranger' to the bearing of responsibility to the other, drawing on the metaphor of the 'face'.[13] The face of the other is deployed and has been interpreted as both the abstract and the specific other that stands before you. Tom Burvill has argued, drawing on the work of Simon Critchley that 'the epiphany of the face and the discourse to which it gives rise "attests to the presence of the third party, of humanity as a whole... It is my responsibility before a face looking at me as absolutely foreign ... that constitutes the original fact of fraternity"'.[14] The abstract and the specific are no longer juxtaposed they become mutually constitutive. The face relates to humanity as a whole, drawing a response which is invested in the specific and in the abstract – this is a broader obligation of 'infinite responsibility' to the stranger.

The ethical responsibility to an infinite community of strangers has implications for the place of ethics in the constitution of politics. Vikki Bell argues that 'ethics cannot be regarded as the basis or cause of politics, it can operate as an 'inspiration' and check for politics by asking how open the possibility of response and responsibility is, and how attentive to the other political culture, and one's politics within it enables one to be'.[15] Sara Ahmed has also reworked and reconceptualised the Levinasian response to the other by thinking about what is at stake in our relational encounter with the other. She warns:

> We must be careful not to locate the particular in the present of a given 'who' we might encounter: rather, what is at stake, is the different modes of encounter that allow us to face (up to) others. A generous encounter may be one which would recognise how the encounter itself is implicated

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[11] *Levinas* (2006) (n 1) 171.
[12] Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality* (Routledge, London 2000) 149.
[13] Richard Cohen (trs), Emmanuel Levinas, *Ethics and Infinity: Conversations with Philippe Nemo* (Duquesne University Press, Pittsburgh 1985) 85.
[14] Levinas in Tom Burvill, '"Politics begins as ethics": Levinasian Ethics and Australian Performance Concerning Refugees' (2008) 13(2) Research in Drama Education 233, 234 -235.
[15] *Bell* (n 9) 169.

in broader relations and circuits of production and exchange (how did we get here? How did you arrive?).[16]

This particular approach to the ethical encounter enables a flexibility to develop, whereby relations are based on openness to the other, but stem from a position that acknowledges the context where interlocutors meet.

Iris Marion Young's work on ethical relations and the ethical encounter through dialogue takes a somewhat similar position, straddling the sites of the ethical and political. She notes, 'a condition of our communication is that we acknowledge difference, interval and that others drag behind them shadows and histories, scars and traumas that do not become present in our communication'.[17] There are correlations between Ahmed and Young's interpretation of the ethical encounter, both for example view the context from which interlocutors come, and the space within which they meet as significant, but there is a fundamental distinction. Where Young encourages the space of the 'interval' as crucial to an ethics of communication, a space in which questioning can take place in a bid to understand the other, Ahmed questions the usefulness of the 'interval'. Young relies on the establishment of a respectful distance through which to engage with the other, a distance that cannot be broached by a proximate encounter.[18] Ahmed challenges Young's idea that dialogue and questioning across space will serve the ethical encounter. Ahmed instead turns to an ethical encounter based on 'touch' that takes place 'between our mouths, and our ears, in the very proximity and multiplicity of this encounter. What allows us to face each other ...is also what allows us to move beyond the face, to hear and be touched by what one cannot grasp, as that which cannot be assimilated in a moment of recognition of either the other or the stranger'.[19] The site of touch becomes about consecutively holding 'proximity and distance'. Ahmed notes 'One does not stay in place, or one does not stay safely at a distance (there is no space which is not implicated in the encounter)'.[20] For Ahmed, rather than envisioning the 'interval' as a site across which a dialogue occurs, the interval is the site that contiguously embodies relational aspects of proximity and distance.

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[16] *Ahmed* (n 12) 152.
[17] *Ahmed* (n 12) 156; *Young* (n 2) 354.
[18] *Young* (n 2) 345.
[19] *Ahmed* (n 12) 158.
[20] *Ahmed* (n 12) 156-157.

Young and Ahmed's conceptualisations of the occupation of the 'space'/non-space between our interlocutors and its different configurations provide convincing accounts of its purpose and its presence. The place that my ethical engagement inhabits is perhaps part way between these positions. I am drawn to Young's 'asymmetrical reciprocity' as it firmly establishes the proposition that embraces the 'irreducibility' of the other. For Young there is an explicit willingness to develop a space for communication with the other, communication positioned as a 'gift' which doesn't rely on reciprocity and which doesn't rely on equality of power or status. Where this may seem like a fairly simplistic reliance, when considered in terms of the asylum court and the court's receptivity to open communication, the fundamental importance of that openness to communication is often precluded. What intervenes in that communicative site are the mechanisms and disciplining properties of law. Laws *formalism* and *formulism* quashes the receptivity of the court to mutual engagement and prevents a dialogically reciprocal relationship. Thus I draw on Young's asymmetrical reciprocity as a starting point for entering into a mode of communication, or at the very least, a mode of engagement between refugee and judge.

Following this grounding I depart from Young's analysis of how the space for communication occurs. Rather than perceiving the 'interval' as a projected site, which allows the passage of dialogue and questioning in order to engage with the other, I draw on Ahmed's conception of the space between two interlocutors as embodied, as 'holding proximity and distance',[21] containing the possibility of dialogic process but as never having that dialogue fulfilled in its totality. I use Ahmed's work in order to flesh out an understanding of what I term a *communicative legacy*. This *communicative legacy* is reliant on the ungraspable, on the unsaid, on the broader historical and political context from which the refugee has come, on the more immediate context from which they have fled and on that, which Ahmed would phrase as, the 'yet to come'. This *communicative legacy* would open up the 'conversation' that occurs during the asylum process and contest the notion of testimony as the indicator of the sole 'truth' of experience. Furthermore, *communicative legacy* would allow for greater receptivity for practices such as restive

[21] *Ahmed* (n 12) 157.

silence, and acknowledge the importance of the multiple forms of communication that are part of the dialogue of the court.

In the following part of the paper I use the work of Young, Ahmed and Doreen Massey. Bringing together Young and Massey allows for a combined analysis for the development of 'spaces of identity' and the political responsibility held within these spaces to function on the basis of an ethics that may act as the foundation for progressive political change. I flesh out what that intervening site between two interlocutors in a system based on judgment may contain and the possibility of that contracting/expanding space becoming infused with an ethics of responsibility – moving away from judgment and moving towards responsibility for the other; I analyse the *proximity and distance* between the interlocutors drawing on Massey's 'geographies of responsibility' in order to understand the composition of that space.[22] I begin by considering these ethical interventions in combination with Drucilla Cornell's imaginary domain, as a way of thinking both within and beyond the relationship of the interlocutors and consider how the imaginary domain, and imaginary more broadly, could underpin the ethical imperative.

Indeterminacy and the 'imaginary domain'

Self-determination is one of the key elements of Cornell's imaginary domain. The imaginary domain encourages and assists individuals in protecting their self-conceptualisations, maintaining the irreducibility of the individual, whilst acknowledging the self's relationship to the social. The imaginary domain is a psychological space in which personalised versions and visions of sexuality can be lived out, free from social opprobrium, within the limits of what Cornell terms the 'degradation prohibition' or the degradation limits.[23] These are the limits that preclude the use of 'force or violence against another person' or degrading treatment because of the way they represent their sexuate being.[24] The imaginary domain has an ethical basis, which contests the dominance of sexism and homophobia through a call to freedom, a freedom to conceptualise one's own subjectivity.[25] Cornell relies on the

[22] Doreen Massey, 'Geographies of Responsibility' (2004) 86B (1) Geografiska Annaler 5.
[23] Drucilla Cornell, *Moral Images of Freedom: A Future for Critical Theory* (Rowman and Littlefield Publishers Maryland 2007) 13.
[24] Drucilla Cornell, *At the Heart of Freedom* (Princeton University Press, Princeton 1998) 60.
[25] See Jaco Barnard-Naude, 'Book Review: Moral Images of Freedom: A Future for Critical Theory by Drucilla Cornell' (2004) 4 Law, Culture and the Humanities 295.

minimum conditions of individuation '1) bodily integrity, 2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others, and 3) the protection of the imaginary domain itself,'[26] in order to actualise this self-conception and leaves formulation of that self-conception to the work of the imagination. Imagination is a productive site, its indeterminacy and scope assists all individuals in rendering them fundamentally unknowable. The particular purchase imagination has for the production of refugee identity in court, is that – if one relies on the identity of refugees through the framework of Levinasian unknowability, and draws on Cornell's freedom from assumed personas, i.e. persona's which certain individuals are assumed to possess based on stereotypical and superficial understandings of identity – if such an understanding of identity were incorporated into negotiating the relationships between those in court, this would potentially counteract the imposition of stereotypical traits, making the individual refugee the source of the meaning of their identity. Additionally, this combined Cornellian/Levinasian basis redefines the modes of engagement of our interlocutors, foregrounding that engagement as part of a *communicative legacy*. The conversation to be had between two interlocutors would proceed from a position of unknowing, neither party would be in a position to apportion particular traits or qualities to the other; rather what could potentially occur is a process of communication which draws on the historical context of where the individual refugee has come from, the specific and broader events which have lead to their claim to refugee status, how they currently experience their identity and how they envisage their future.

Cornell's most recent work *Moral Images of Freedom* continues to rely on freedom from assumed personas. She refers to the 'imaginary domain' as an aesthetic idea. Drawing on Kant, she defines her version of aesthetic idea as 'that representation of the imagination that occasions much thinking, though without it being possible for any determinate thought, i.e., concept, to be adequate to it, which, consequently, no language fully attains or can make intelligible'.[27] The aesthetic premise of the imaginary domain ensures that it can never be determined, that it is vulnerable to contestation. In defending her use of the imaginary she writes:

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[26] Drucilla Cornell, *The Imaginary Domain: Abortion Pornography and Sexual Harassment* (Routledge, London 1995) 4.
[27] *Cornell* (n 23) 14.

> The psychoanalytic insight that who we are and even our most primordial sexual formations take place through the imaginary images that others have of us and that these imaginary images themselves can always be morally loaded. But, even if we begin our own struggle to become who we are as sexuate beings through an imaginary that is always already imposed, and indeed symbolized we still can at least as a matter of possibility rework those symbolizations'.[28]

The imaginary domain is a space for self-expression and symbolization and, used in conjunction with the work of Levinas, can be an ethical basis for a broader project committed to progressive, yet perhaps tentative social change. The imaginary domain moves away from the identity politics paradigm, which currently suffuses human rights and refugee convention discourses. Cornell's distancing of the imaginary domain from formal rights based and identity based political and legal constructs is part of a critical response to: the compartmentalisation of identity rights; the hierarchisation and legitimation of identity which occurs as a by-product of formal recognition; and the aspirational grasping at formal rights to sameness of equality without fully engaging with what that sameness implies or further reifies; and finally the exclusion of identities deemed illegitimate, which forecloses the potentiality of self-determinative understandings of identity being given legal recognition.

The imaginary, and broader incarnations of imagination, are sites that scholars have relied on to both conceptualise and create a platform for social change.[29] Feminists for example have long since used the idea of the 'situated imagination' as a route to accessing and valorising situated knowledge, particularly the situated knowledges of women.[30] The work of Stoetzler and Yuval-Davis for example, is grounded in the imagination as situated in and influenced by the social. But the social does not exclusively determine identity. They note 'on the one hand, imagination constructs its meanings while, on the other hand, it stretches and transcends them'.[31]

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[28] *Cornell* (n 23) 15.

[29] See for example Cornelius Castoriadis, *The Imaginary Institution of Society* (Massachusetts, MIT Press 1998); C. Wright Mills, *The Sociological Imagination* (Oxford University Press, Oxford 2000).

[30] Sandra Harding (ed), *Feminist Standpoint Theory Reader: Intellectual and Political Controversies* (Routledge, London 2004); Susan Heckman, 'Truth and Method: Feminist Standpoint Theory Revisited' (1997) 22(2) Signs: Journal of Women in Culture and Society 341 - For comments and reply to this article see Nancy Hartsock, Patricia Hill Collins, Sandra Harding in the same volume; another useful source is Ann Garry and Marilyn Pearsall (eds), *Women, Knowledge and Reality: Explorations on Feminist Philosophy* (Routledge, London 1996).

[31] Marcel Stoetzler and NiraYuval Davis, 'Standpoint theory, situated knowledge and the situated imagination' (2002) 3 Feminist Theory 315. Also see *Young* (n 6) 94 discussing the status and location of social group and effects on the development of identity within those groups. Also *Massey* (n 22) 5 talks about identities as relational.

Stretching and transcending knowledge of identity through use of the situated imagination would be a constructive, challenging and transgressive approach to thinking about the way in which refugees both identify and are identified in court. By acknowledging that the meaning of and the interpretation of refugeehood can never remain static due to new circumstances, ongoing political occurrences, or the emergence of alternative social groups such as lesbians and gay men have been viewed to be, the imaginary wholeness of what constitutes a refugee is given the space to render itself unknowable and indeterminate. The *unknowability* of the refugee and interlocutor as the basis for a dialogic relationship presents an opportunity for fostering intimacy between the two actors.[32] The *unknowability* of the refugee destabilizes the template for refugee claims under the *Convention*, providing a basis for unique identity formation rather than a reliance on a projected or perceived identity (which can lead to routinized and formulaic understandings of refugee identity by immigration judges).[33] Furthermore *unknowability* counteracts the judicial tendency of clustering together similar cases and dispensing of them in similarly dismissive fashions based on assumed knowledge. The mutual experience of unknowability broaches and probes the connection between the two central actors in the context of an asylum court. The unknowability of the actors involved in court

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[32] The manifestation of power and those invested with power are able to read lesbian and gay relationships, the lesbian and gay body, in their own language and through their own heterosexual lens. Heterocentrism allows a tracing of a heterosexual understanding of homosexual relationships over the actual constitution of a lesbian or gay relationship. Talburt notes:

> Their interlocutors [those who interlocute with gays and lesbians] occupy positions of some degree of power, for their knowledges, "real" or imagined, play a role in shaping the dynamics of exchanges and constructing the actions of the gay or lesbian subject/object of knowledge. Conversely, the very interlocutors who would categorize the gay or lesbian subject cannot be sure of their own knowledges.

The adjudicative reading of gay is based on the adjudicator's imagined experience of what gay means, this meaning is subsequently placed in the space of the hearing and is projected onto the identity of the lesbian or gay claimant thus having the effect of denying the actual identity of the lesbian or gay man. Susan Talburt, 'Open Secrets and Problems of Queer Ethnography: readings from a religious studies classroom' (1999) 12(5) Qualitative Studies in Education 525, 526.

[33] In order for a refugee to be granted asylum, certain prerequisites must be met as outlined in the *Convention*. As discussed in Chapter Five, the *Convention* demands that a refugee must show that they possess a well founded fear of persecution, that this persecution is dependent on their membership of a social group or through their identification as belonging to a particular ethnicity, religion or political organisation. Furthermore, the individual must be outside of their home country and have found that within the home state there was no recourse to mechanisms that would have or should have provided protection from such persecution. What can occur at a hearing is an inadequate rendering of the claimant's position, facts pertinent to the *Convention* and the UK asylum process are provided for the court's consideration, but such facts do not say enough. Facts speak to the legal doctrines and evidentiary practices and necessities that need to be fulfilled but they do not speak to the court of the subjective experience of the claimant, they reduce the claimant to a 'known' entity, which, paradoxically, denies the agency of claimant.

proceedings would encourage a space for dialogue, rather than formal testimony, thus symbolically moving away from the asylum chamber as a space of adjudication and instead rendering it a space for reciprocal communication.

I use 'unknowability' in the asylum court in two ways: firstly as part of a resistant strategy to maintain a refugee's agency. Unknowability ensures that the construction of identity by a claimant remains under their control, and that the subsequent and inevitable reading of this identity by an immigration judge can only ever be partial and incomplete. Secondly, I posit 'knowability' as a potentially problematic engagement with the refugee when an immigration judge purports to know the refugee through images and information given to them about sexual minorities. The formulation of identity, and the behaviours that are associated with heteronormatively based conceptions of gender and sexuality, propagate an adjudicative response that 'knows' the lesbian or gay man but only through terms of reference which have been normatively constructed in order to 'create' a cognisable lesbian or gay figure. For claimants traversing the asylum system, the importance of unknowability, and its relationship to the imaginary, is that it enables identity to be rendered fluid through the multiplicity of context-based encounters. Massey states, 'beings... are constituted through practices of engagement'.[34] Refugee identity then is not just shaped by experiences of persecution prior to the claim to asylum; the very act of claiming asylum alters the imaginative interpretation of the refugees' understanding of themselves, thereby undermining any fixed understanding one may have of the way in which interlocutors may respond to one another.[35]

Within the current conditions of the asylum system, the consequent effect of an unstable and shifting conceptualisation of identity would have negative ramifications in terms of the way the refugee is perceived before the border agent or immigration judge. Shifts in the construction of identity have the potential to undermine the coherence of the testimony produced, leaving the refugee open to accusations that new narrative additions are manipulating the court. If a concept such as the imaginary domain had purchase within the space of the court there would be an expectation that the narrative produced would be both experiential and evolving. Such an expectation would be a useful ally with psychological studies that have indicated

[34] *Massey* (n 22) 5.
[35] Sabine Luebben, 'Testimony work with Bosnian refugees: living in legal limbo' (2003) 31(4) British Journal of Guidance and Counselling 393, 399.

the process of claiming asylum has a profound effect on the way a claimant interprets the type of persecution they experienced and their relationship to their sense of their own past, present and future selves.[36] Thus moving away from the formalism and formulism of law, towards a dialogic process, holistic in its engagement with refugees, would enable a more contextual account of the events leading to the claim to refugee status to be developed. An ongoing engagement with the refugee through the practice of developing a *communicative legacy* would allow for multiple modalities of engagement, multiple forms of narrative, and rely on an expectation that the initial statement given to a border agent is merely the first part of an official form of communication for refugee status.

In the proceeding part of the chapter I engage more directly in an analysis that considers the composition of the intervening space between the interlocutors and whether this space has the ability to become a site of shared and productive dialogue. I begin with a brief consideration of the problem of cognoscibility in court and consider how a Levinasian interpretation of self/other can help us move beyond a critique of identity that relies on the problematic interpretation of 'knowing' the other through transposition of the self.

Unknowing and sites of engagement

The paradoxical fixity of 'unknowing' proves useful in counteracting the process of subjectivation that occupies the asylum hearing. In using the term subjectivation I refer to the court's determination of the identity of the asylum seeker through facts established and assumed through country reports, medical evidence and *Refugee Convention* lead testimony. I previously argued in Chapters five, six and in this chapter that the grounds of the *Refugee Convention* are inadequate as a response to understanding the context of an asylum seeker's claim and fail to provide a response that centres ethical practice. Legalities do not encourage dialogue to develop, nor do they broach the distance between the interlocutors. Legalities do not engage in the micro and macro factors that perpetuate the production of refugee's; rather law has an obligatory reliance on the *formulism* and *formalism* of the legal system. The broader impact this reliance has is to continue to render the refugee a stranger, rather than

[36] Carole Bohmer & Amy Shuman, 'Producing Epistemologies of Ignorance in the Political Asylum Application Process' (2007) 14 Identities: Global Studies in Culture and Power 603, 613.

bridging the intervening space of engagement in order to develop a relationship based on reciprocity.

Levinas writes:

> When we talk about consciousness, we are talking about knowledge: to be conscious of is to know; and in order to be just it is necessary to know: to objectify, compare, judge, form concepts, generalize etc. Faced with human multiplicity, these operations impose themselves and the responsibility for the other – which is charity and love – can go astray and therefore seeks truth...the very search for objectivity emerges in the ethical conflict, the acuity of which is assuaged by justice which is based on judgment.[37]

To know, in the Levinasian sense, is to objectify, to judge, and in judging fail our responsibility to the other. The displacement of charity and love through the act of judging requires objectivity, and objectivity displaces the immediacy of response to the other. Levinas makes the distinction that 'knowledge of another is not love of another'. Knowledge does not necessarily promote care or responsibility towards another. 'Knowledge' of the other, as opposed to care, is one of the fundamental failings of an asylum system intended to aid those in need of a generous response.

One of the factors that contribute to the failure to respond lies with the narratives developed and information deployed about asylum seekers. The asylum seeker is lodged or *known* in the public imagination as the needy other, accompanied by a second-hand story. The testimonial provided by the claimant and taken up by the court, is a limited *knowing* of the situation that the refugee is fleeing from; the story appeases the legal necessities but concurrently absents the claimant from the process.[38] The claimant's written narrative, rather than the claimant becomes the embodiment of the refugee experience.[39] Thus, the testimony provides what is legally necessary to further a claim for asylum so that it can be adjudicated on, but the context and history from which this testimony is borne can only ever be partial and incomplete. Furthermore the broader context of refugee claims, their basis in global

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[37] *Levinas* (2006) (n 1) 176.

[38] The standard of proof necessary to found a claim for refugee status is based on the premise that it is a 'public law enquiry into the need for protection rather than... an exercise in proving facts to a standard' (Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford University Press, Oxford 2006) 431. In the case of *R v SSHD exp Sivakumaran* the standard of proof required in an asylum hearing was framed in terms of 'reasonable chance', 'reasonable degree of likelihood', 'a serious possibility'. Compared to other types of legal hearing the immigration hearing does allow for a more subjective recounting of experience. Testimony can also come from friends, family, those who have experienced or know of the cultural details, media reports, human rights organisation reports, personal statements.

[39] Suzanne Metselaar, 'When Neighbours Become Numbers: Levinas and the Inhospitality of Dutch Asylum Policy (2005) 11(1) Parallax 61.

economic patterns, legacies of colonialism, slavery, racism and national and international conflict are important factors in the continued production of refugee claimants and directly implicate the UK, amongst others, as causative of the production of refugees. Factors such as the legacy of colonialism, and colonialism's past and present economic ramifications tend to disappear from the space of the court as cause and effect of refugee production. Omissions to references of broader globalised responsibilities foist blame back onto the individual, rather than the global political and economic mechanisms that have perpetuated and made necessary an asylum system that wilfully displaces its own responsibility in the generation of refugees.

Sherene Razack writes that the refugee hearing is a profoundly racialized space; she continues:

> lawyers/judges – the elites- the describers and the imaginers whose gazes construct asylum seekers from the 3rd world as either unworthy claimants or as supplicants begging to be saved from the tyranny of the 3rd world.[40]

Razack presents us with two visions of the refugee. The first is of the "fraudulent asylum seeker" who claims refugee status in order to gain access to the benefits of the first world. Benefits include access to health care, social services system, housing and monetary funds. The second vision of the refugee is the "legitimate claimant", begging for the state to recognise the 'horror' of living in a 'third world country' where tyrannical rule, corrupt leadership, and/or the perpetuation of violence is an 'implicit' part of culture - placed in direct contrast to the clean, white, liberal mechanism of politics and law in the receiving state. Razack further presents the refugee in the space of the hearing as a generic entity; one refugee is a manifestation of all refugee identities, thus occluding individuality. The process of having refugee identity confirmed relies on an administrative decision which places the liberal doctrines of law firmly at the centre of the decision making process.

In the observations I carried out, the refugee is in the midst of the court; the proceedings are intended to focus on his or her plight and flight from their home country. Nevertheless the formality of the court curtails the involvement of the claimant, rendering them sidelined as to the proceedings. In some cases it is only if there are inconsistencies within a hearing that the refugee as an individual comes to

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[40] Sherene Razack, *Looking white people in the eye: gender, race and culture in the courtrooms and classrooms* (University of Toronto Press, Toronto 1998) 88.

the fore. This is problematic in that if a refugee is there only to be questioned as to whether they have fabricated evidence or not, then the identity of the refugee is thrown into disrepute. If a refugee's only purpose is the refutation of false allegations, this taints the identity of the refugee and perpetuates a stereotype of the undeserving, economically avaricious asylum seeker, or as Razack would term it 'the unworthy claimant'. This positioning detrimentally affects the claim and delegitimises the claimant's use of court time.

As I discussed in Chapter six, the space of the court is an alienating venue, the *permanent* legal actors seem to have a legitimate presence; all others are passing through and have little capital within the court. The position that the asylum seeker assumes lacks permanence. The immigration judge will have no further contact with the claimant post this stage; this is a *relationship of transience*. Bauman has discussed in relation to the stranger on the street, the art of 'mismeeting', whereby '[t]heir point is to see while pretending that one is not looking...Provoking no response, neither inviting nor justifying reciprocation; to attend, while demonstrating disattention. What is required is scrutiny disguised as indifference'.[41] Although Bauman is talking of passers-by, the transience of the relationship seems familiar, with the judge looking over but failing to see the individual before them – this is a wilful disattention that determinedly will not engage with the claimant in any substantive sense. Bauman goes onto note that the crowd is 'faceless', a 'formless aggregate in which individuality dissolves'... 'replaceable and disposable'.[42]

In studies carried out by researchers, the agglomerative effect on judges who make refugee determinations is that after repeated hearings they fail to see the individuality of the asylum seeker, which may detrimentally impact on the provision of justice.[43] In the notes I made whilst in court, I referenced numerous times the lack of direct engagement with the asylum claimants – a lack of direct conversation or questioning and little to no eye contact even when directly conversing with the claimant. I don't believe eye contact would have fundamentally altered the relationships in court, but it is another factor that plays into the disappearance of the claimant. Much has been made of what eye contact means in different cultures, for

[41] Zygmunt Bauman, *Postmodern Ethics* (Blackwell, Oxford 1993) 155.
[42] *Ibid.*
[43] S. Lustig, N. Karnik, K. Delucchi et al., 'Inside the Judges Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey' (2008-09) 23 Georgetown Immigration Law Journal 57.

example avoiding eye contact as a form of respect. In the space of the court, parties produce particular culturally specific traits and idioms of behaviour which judges may or may not be aware of; but knowledge of such traits, and even an awareness of the legacies of such traits, doesn't necessarily mean that the court has any greater insight into the individual before them or how these legacies have played out in the refugee's own life.[44]

The process of identification within court is a practice that is mediated by the intervening space between interlocutors; the court setting directly impacts on the identification and interpretation of the parties to the hearing. Stuart Hall's conception of identification is described as 'a process of articulation, a suturing, an over-determination not a subsumption – there is never a proper fit, a totality'.[45] Hall's use of articulation, suturing, over-determination, and 'non-subsumption' of identity informs a metaphorical tracing, whereby the holograph of identity formations can touch the racialised and I would add, sexualised and sometimes, homophobic space of the court. The judge is given the statement produced by the asylum seeker; additionally he or she is given relevant country information about the claimant. The country information contains facts and figures about the history, political climate and tensions, which may be either historical or ongoing. There is information about the demography and geography of the country alongside other facts pertinent to the making of a refugee claim. At present, country information packs contain some information on the position of sexual minorities, but judges have had to rely on a diversity of sources. Such sources have previously ranged from Human Rights Watch and reports from Amnesty International to, in the Australian context, the Spartacus Gay Travel Guide.[46]

What country reports fail to tell is what else the judge considers when making their decision regarding the way in which they identify the claimant. These added adjudicative influences form a part of the intervening space between judge and claimant. The judge views the claimant as other to him/herself. The claimant may not be white, may not be straight, may or may not be religious, may or may not be a man, may have disabilities, and may have an illness; some of these identifying traits

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[44] *Razack* (n 40) 8; *Young* (n 6) 34.
[45] Stuart Hall, 'Who needs Identity' in Paul du Gay, Jessica Evans, Peter Redman (eds), *Identity a Reader* (Sage, London 2000) 17.
[46] Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia' (2002) 26 Melbourne University Law Review 144, 151.

are other to the judge. Such traits indicate and reinforce the 'othering' of identity of those before the court. Hall has written that 'identities emerge within the play of specific modalities of power....a product of the making of difference and exclusion, rather than a sign of...a naturally occurring unity'.[47] The adjudicator is able to project into the asylum hearing qualities that have stereotypically been assigned to asylum seekers. This may not come out as overt or blatant racism, but it does come out as an imaginary projection of identity traits, perpetrated upon asylum seekers, who may not identify with these imaginary projections. The ways in which a refugee can potentially resist the projection of identity is through the mechanism of *unknowability*. Unknowability could act as that which disintegrates or momentarily disrupts the assertion of identity.

For Levinas, the subsumption of the individual even in terms of witnessing or the possession of knowledge of another's suffering is viewed as incorporation.[48] Vikki Bell writing on Levinas notes, 'although this taking in may express itself through bodily sensations or movements, it is not suffering in oneself. Its exteriority cannot be interiorized. Levinas' argument in 'Useless Suffering' is that one's response to the suffering of others cannot be an attempt to share that suffering as if one were able to experience that same suffering'.[49] Following Levinas, Bell notes 'the challenge is to be able to respond without totalizing forms of incorporation that deny the alterity of the other, making the other the same as oneself, or making her part of an already written story'.[50]

The sense of being part of an already written story is incredibly pertinent to asylum claims and connects back to Razack's formulation of the constructed asylum seeker as holding one of two positions, supplicant refugee or unworthy claimant. The process of claiming asylum has the potential to incorporate the claimant into an already written story, exacerbating their displacement from the centrality of their narrative, providing a judge with space for assumption and determination. Bauman has written with regards to experiencing strangers, 'the more 'strange' the stranger is (the less knowledge I have of her), the less I am confident in my decision to assign her to a type'.[51] The *Refugee Convention* acts as a template within which identity and

[47] *Hall* (n 45) 17.
[48] *Bell* (n 9) 162.
[49] *Ibid.*
[50] *Bell* (n 9) 163.
[51] *Bauman* (n 41) 149.

thus assignment to a particular 'type' makes the stranger legally cognisable. In trying to make the stranger less strange they are written into a common narrative, a narrative that western refugee receiving states understand. Individuals are ascribed roles, helping to diminish anxiety around 'alterity', providing a specific and limited understanding of who the stranger is or is capable of being.

Levinas's reliance on unknowability represents a desire to maintain the irreducibility of the other as opposed to a subsumption of the other. The other is never reduced to the 'I' and thus is never that which is already known. Levinas sets out his relationship and responsibility to the other in *Totality and Infinity*:

> We name this calling into question of my spontaneity by the presence of the other ethics. The strangeness of the other, his irreducibility to the I, to my thoughts and my possessions is precisely accomplished as a calling into question of my spontaneity, as ethics. Metaphysics, transcendence, the welcoming of the other by the same, of the other by me, is concretely produced as the calling into question of the Same by the other, that is, as the ethics that accomplishes the critical essence of knowledge.[52]

Davis points to keywords, repeated over and over again, gradually building.[53] The central terms are, 'same', 'other', 'spontaneity' and the overarching theme of irreducibility, threading its way throughout all of the sentences. Levinas's quest to know the other is brought about by the 'spontaneity' of response towards the other, an ethical and immediate duty, implying a boundedness to the stranger. The relationship that is at stake when negotiating this passage between self and other is 'the site [of] both ethics and knowledge'. Levinas's concern in knowing the other is that this runs the risk of purporting to understand the other as a totalised, and therefore, objectified subject. The unknowableness of the other renders their identity transformatory; it renders individuals as unreadable and thus un-objectifiable. Bauman has written that:

> A truly anonymous Other is outside or beyond social space. Such another is not truly an object of knowledge - apart, at best, from a subliminal awareness that there is ...potentially a human who could be an object of knowledge... she is not human at all, since humans we know are always 'specific' humans, classified humans... The humans who inhabit that space do not have identities of their own, they derive identities from the classes to which they belong – or rather to which they have been assigned.[54]

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[52] Levinas in Margaret Davies, *Asking the Law Question* (Law Book Co. of Australásia 2002) at 36.
[53] *Ibid.*
[54] *Bauman* (n 41) 149.

The context for a claim to asylum is dependent upon these classifications, to assign, to compartmentalise, and to prove to which class a refugee belongs in order to make the strangeness a little less strange, and a little more readable within the confines of a court. Thus how do we simultaneously demand anonymity whilst having to engage with and manage legal classification? I tentatively address this complex and somewhat unanswerable question in the following few pages, returning to the concept of *communicative legacy*.

Kogler notes, 'Levinas's work makes it clear that the other is metaphysically beyond being, is defined by infinity, is an individual which is unspeakable, beyond thematization, beyond objectification.[55] My concern regarding the invocation of the other as 'Metaphysically beyond being' is that it has the potential to abstract the other to the point where they lack material form or substance. Metaphysicality annuls experience that manifests in physical actions upon the body in the form of rape, beatings, torture, verbal abuse and psychological scarring etc. The physical and psychological effects of these activities leave their own imprints. How can that intensity of physical experience be 'beyond being', beyond a conception of the known-ness of the individual? I do not wish to imply that the physical and emotional scars of persecution constitute the identity of an asylum claimant, but what is essential to bear in mind is that these incredibly real, corporeal experiences have the ability to shape identity and form an intrinsic part of what constitutes the refugee's understanding of self. The disappearing of the scars and traumas of abuse, the disappearance of the individual, can have broader politically problematic consequences divesting certain individuals from their corporeal realities and experiences.[56]

It may be of use to turn to an oft-quoted piece from Levinas regarding the turn towards the face of the other.

> you turn yourself towards the other as towards an object when you see a nose, eyes and forehead, a chin and you can describe them. The best way of encountering the other is not even to notice the colour of his eyes, one is not in a social relationship with the other.[57]

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[55] Hans-Herbert Kogler, 'Recognition and Difference: The Power of Perspectives in Interpretive Dialogue' (2005) 11: 3 *Social Identities* 247, 255.
[56] *Ibid.*
[57] Levinas in Sara Ahmed, 'This other and other others' (2002) 31:4 *Economy and Society* 558, 562.

For Levinas the other is rendered faceless in the encounter, their physical appearance does not or ought not to register. A problematic element of this passage turns on the dehumanising effect of seeing the face, nose and eyes of what we recognise to be another person and of failing to acknowledge the specificity of that person, potentially rendering the Other as inanimate/indistinct within that moment. Does this unknowing of the other lead to the same space of dehumanisation as defined in the refugee hearing, where insufficient information and lack of connection to the refugee helps to create an atmosphere conducive to dismissal?

Sara Ahmed's engagement with Levinas provides a pathway for negotiating the terrain of self and other and develops a method for negotiating the demand for anonymity whilst engaging with and managing the necessity for legal classification. Ahmed begins by referring to a concern with Cynthia Willett's consideration of difference and particularity, she quotes Willet, who writes: 'without the possibility of individual self expression, the Other is denuded of its speaking. Denuded of her accents, cries and lamentations the Other...is in her embodied specificity, effaced'. Ahmed's concern with Willet's reliance on narrative is that the expression of self through narrative implies a movement towards an understanding of the truth of self, which, for Ahmed, is inadequate. That 'we can gain access to the concrete difference and embodied specificity of a particular other at the level of her individual self expression' is not enough.[58] For the Other, who is given the liberty and space to speak, this liberty is insufficient with regard to its ability to tell of the self.

Within a refugee hearing much emphasis is placed on the statement that the asylum seeker provided upon initially requesting refugee status. Although this statement can be backed up by external reports of the country, media reports on the state, testimony by expert witnesses, the most important piece of evidence is the initial narrative. A particular problem associated with these narratives, is that if a refugee recalls additional incidents after the statement has been taken and wishes to include these incidents in the testimony provided in court, there can often be a concern on the part of the judge as to the veracity of the material. Narrative as a method of codifying experience, and as the form which provides the truth of persecution bears more weight than it ought to, or is able to. Rather it may be of more use to accept that the refugee's response to their statement will change as the asylum process is furthered and thus

[58] *Ahmed* (n 57) 561.

there is no need to deny the inclusion of these new experiences to their initial statement, thereby developing a *communicative legacy.*

Alternative modes of engagement, and modes of responding to, and conversing with, others is an essential component for rewriting the relationship between interlocutors. Ahmed suggests, rather than focusing on the particular individual, that we focus on the particularity of the 'modes of encountering others'.[59] These 'modes of encountering' others provides an alternative conceptualisation of the way in which we turn to the 'face of the other'. Levinas's reason for turning to the face of the other draws on a rejection of the objectification of the individual, and a rejection that the face is representative of the individual; Ahmed asks, drawing on Levinasian subtext, 'what is already at stake in allowing some faces to appear'?[60] In the appearance of and the turning to the face, the face is interpreted in light of its context - its sociality, construction, history, its effect and affect on the self and on others. Ahmed writes and I quote at length:

> Communication then does not take place in the present, nor is it about presence. For in the encounter in which something might be said or heard, there are always other encounters, other speech acts, scars and traumas, that remain unspoken, unvoiced or not fully spoken or voiced. Particular modes of communication do not involve the rendering present of the other's voice, precisely because they open an unfinished, unheard history, which cannot be fully presented, even if it is not absent. Such an ethics of communication would allow what cannot be spoken or voiced in the present to be opened or reopened, as that which remains ungrasped and unrealized, as an approach that is always yet to be taken.[61]

When Ahmed writes 'communication does not take place in the here and now' she displaces the importance of the moment of speech. What is said in that moment is not regarded as absolute, nor declarative but as contingent, and as in relationship to the past, present and future. Communication in this mode is uttered as that which has the ability to be viewed as both objective and subjective in the space of the moment. It is objective in that if we place the speech in the context of other speech declarations that have been made, there may be a connection, a chronology, a history, a pattern, from which this speech derives, but if we look at it subjectively then this new speech is an intervention into the space of the court and a locating of the Other.

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[59] *Ibid.*
[60] *Ahmed* (n 12) 146.
[61] *Ahmed* (n 57) 564.

Where Ahmed states the 'particular modes of communication do not involve the rendering present of the other's voice, precisely because they open an unfinished, unheard history, which cannot be fully presented, even if it is not absent', there are two important things that are at stake: Firstly, the response of the individual refugee within an asylum hearing, to which I have already spoken; and secondly the broader politics of asylum within global refugee production. The composition of the space of engagement between two interlocutors is an essential site for a politics underscored by an ethical imperative and an 'unheard history', wherein to develop a *communicative legacy*. The premise of Iris Marion Young's theory of asymmetrical reciprocity is to help our understanding that an assumed reversibility of subject positions is oppressive and subsuming. The reversibility of positions fails to engage with the presence of 'socially structured difference, which usually involves relations of privilege and oppression'.[62] The recognition of privilege and power is absent from a reflexive consideration of the positioning of the interlocutors in an asylum court and from the construction of the asylum system and *Refugee Convention* leading to the legal imposition of stereotypical traits. The individual asylum claimant can neither give a full rendering of their experience that has directly lead to their claim for asylum, nor can they provide an narrative which outlines and implicates the broader social, legal and political structures that perpetuate claims to asylum.

The intervening space between the interlocutors holds a history that incorporates and involves not only the parties to the dialogue (the judge and asylum claimant) but the legacies and histories that form a part of the historical derivation of the dialogue. Within the structure of liberal legalism, and through the framework of the *Refugee Convention*, dwell the legacies of colonialism, the excesses of neo-liberal democracy and economics. Such factors have an ongoing impact on legal, political and economic structures that create refugees through the disparate distribution of wealth and poverty worldwide. This broader narrative demands a wider responsibility to the other, based not on tenets of law, but on social responsibility and a refusal to engage in exploitative behaviours. Massey has written that 'responsibility...derives from the relations through which identity is constructed'.[63] The positioning of refugee claimants and their identity within the asylum system has been constructed by the legal context within which they are enmeshed. In order to be a refugee, particular

[62] *Young* (n 2) 346.
[63] *Massey* (n 22) 10.

necessities are implicated: persecution, violence, ongoing fear, such qualities are essential in order to bear the benefits of the *Convention*; But what is also implicit in this is the entrenching of the west/global north as saviour and the east/global south as victim. These *Convention* structural and ideological dictates influence the intimacy of the encounter between refugee and immigration judge, re-enforcing positions of saviour and victim. Moira Gatens writes, 'we are responsible for the past not because of what we as individuals have done, but because of what we are' she continues, 'for just as the past continues in our present so is the distant also implicated in our here'.[64] The UK's prior legacy of colonialism and its current positioning in the global economic order bears a direct responsibility for the creation of conditions that foster refugees. This does not just implicate the UK government as the bearers of responsibility; such an implication involves individuals such as immigration judges and the cases they will adjudicate on, and a wider public culpability and responsibility. The intimacy of the encounter between immigration judge and refugee must speak to a broader narrative beyond the individual refugee's story and implicate wider narrative configurations of the refugee.

The UK's history and responsibility in the production of refugees is disappeared from the narratives presented in court. The detrimental effect this has is to foist the responsibility of refugee status back onto the individual claimant rather than broader networks of power. Massey posits that 'If we think space/place in terms of flows and disconnectivities rather than territories...then what should be the political relationship to those wider geographies of construction'?[65] The UK's role as coloniser, and its continued engagement in global neo-liberal economic practices, ought to imply a reciprocity of access to the UK, formulating a wider global responsibility to the social, political and economic spaces which the UK engages with. Such an understanding of UK responsibility requires a broader discursive framework upon which asylum would rest; it requires a new imagination of what territoriality, and citizenry annexed to territoriality, means; and further, it implies that the narrative supplied by a refugee claimant must be supplemented with a broader social, historical and cultural understanding of the place of UK law, politics and economics in the history and production of global refugee flows and its subsequent management. This is a call not just to liberalize the way in which asylum and immigration is adjudicated

[64] *Massey* (n 22) 9-10.
[65] *Massey* (n 22) 6.

on, but a request to see the asylum process in itself as problematic in terms of its foundational premise; the way in which the asylum system is administered and the way it reifies the victim/saviour dichotomy without a reflexive awareness of a broader social politics needs to be fundamentally revised and underscored by an ethical imperative.

CHAPTER EIGHT

Conclusion

Introduction

Questioning the Culture of Court: Resistant narratives, imagined possibilities and the regulation of sexuality in UK asylum law emerged in the context of an increasingly xenophobic media that positioned asylum seekers as illegitimate entrants to the UK. According to the mainstream/conservative press, asylum seekers were amongst other things, economically motivated, health tourists or closet terrorists taking advantage of a liberal legal system, disrupting the true purpose of the *Refugee Convention.* Asylum seekers were posited in the media as altering the face of the nation in terms of race and culture and accused of ghettoising parts of the country.[1] The UK was full; no more immigrants were wanted or needed.[2] Constructed as burdensome to an already over stretched social services system, refugees were then as they had been previously targeted, as illegitimate and unnecessary;[3] 'accused' of claiming benefits, causing unemployment, taking social housing and fostering a criminal underworld implicated in the trafficking of both goods and persons.[4] These narratives are ongoing, indeed

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[1] Tiania Stevens & Claire Morrisroe, 'Ghetto Britain' *The People* (London 5 September 2004) <http://www.people.co.uk/archive/other/2004/09/05/ghetto-britain-102039-14605644/> accessed June 23, 2011; Philip Johnston, 'Asylum housing policy 'creating refugee ghettos' *The Telegraph* (London 23 December 2005) <http://www.telegraph.co.uk/news/uknews/1506140/Asylum-housing-policy-creating-refugee-ghettos.html> accessed 23 June 2011; Caroline Gammell & Peter Allen, 'Bulldozing "The Jungle" will not stop immigrants coming to UK' *The Telegraph* (London 23 September 2011) <http://www.telegraph.co.uk/news/worldnews/europe/france/6218879/Bulldozing-The-Jungle-will-not-stop-immigrants-coming-to-UK.html> accessed 23 June 2011.

[2] One of the group's that continues to make the call for a cap on migration is the very conservative Migration Watch, <www.migrationwatchuk.org> accessed 23 June 2011.

[3] See Paul Gilroy, *There Ain't No Black in the Union Jack* (Routledge, London 2002).

[4] Colin Fernandez, 'Somali asylum seeker laughing over £2000-a-week Kensington home paid for by benefits' *Mailonline* (London 14 July 2010) <http://www.dailymail.co.uk/news/article-1294260/Council-kick-asylum-seeker-2m-house-say-neighbours.html> accessed 23 June 2011; Matthew Hickley, 'Hundreds of girls rescued from traffickers in Britain are snatched back and forced into prostitution' *Mailonline* (London 4 January 2008) <http://www.dailymail.co.uk/news/article-505958/Hundreds-girls-rescued-traffickers-Britain-snatched-forced-prostitution.html> accessed 23 June 2011;Daily Mail Reporter, 'Ukranian illegal immigrants lived life of luxury after conning HMRC into paying out £4.5 million in tax rebate scam' *Mailonline* (London 4 July 2010)

the term 'asylum seeker' has in the last fifteen years become synonymous with economic migrancy, and refugee has become a byword for fraudulence and legal abuse. Refugee identities were and are still being written and made 'true' through a media set to panic mode.[5] The nationalistic discourse established about refugees has become both the cause and effect of purported public opinion, which fuelled and continues to fuel political responses to the 'problem' of asylum seekers, propagating more restrictive legislation.

In conjunction with the political and media response to refugees, was the narrow application of legislation and case law through the Border Agency, asylum and immigration tribunals, now known as the FTTIAC, and the subsequent appellate courts. Conservative readings of the *Refugee Convention*, alongside restrictive and regressive legislation ensured that successful refugee applicants were few. Furthermore the systematic cutting of legal aid for asylum claimants detrimentally affected the availability and quality of representation at the initial claim and appeal stages.[6]

Year on year government figures proudly laud the decreasing number of successful applications for asylum. In 2002 the figure stood at 85,565 applications for asylum.[7] In 2004 this figure had dropped to 33,930[8] and by 2010 stood at 17,790.[9] The decrease in successful asylum claims and increasing rejection rates correlates, to

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<http://www.dailymail.co.uk/news/article-1291880/Ukrainian-gang-jailed-4-5m-tax-saw-live-luxury-life-fast-cars-flash-houses.html> accessed 23 June 2011.

[5] Gabriela Quevedo, ''Bogus' asylum seekers and other nonsense' (2011) 365 Runnymede Bulletin 4 <http://www.runnymedetrust.org/projects-and-publications/bulletin.html> accessed 15 June 2011.

[6] Afua Hirsch, 'Fury as "superb" training scheme for legal aid lawyers faces axe' *Guardian.co.uk* (London 11 July 2010) <http://www.guardian.co.uk/law/2010/jul/11/legal-aid> accessed 23 June 2011; Steve Hynes, 'The price of real legal aid' *Guardian.co.uk* (London 1 August 2009) <http://www.guardian.co.uk/commentisfree/2009/aug/01/legal-aid> accessed 23 June 2011; Refugee Council, 'Response to "Proposals to the reform of legal aid in England and Wales"' <http://www.refugeecouncil.org.uk/policy/responses/2011/legalaid> accessed 23 June 2011.

[7] Home Office, Asylum Statistics: 1st quarter 2003 UK <http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs2/asylumq103.pdf> accessed 15 June 2011.

[8] Home Office, asylum statistics 1st quarter 2005 UK 2nd edition <http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs05/asylumq105.pdf > accessed 15 June 2011. Also see for an accessible overview of the statistics ICAR, 'Analysis of asylum and refugee statistics' <http://www.icar.org.uk/9556/statistics/analysis-of-asylum-and-refugee-statistics.html> accessed 15 June 2011.

[9] Home Office, Control of Immigration: Statistical summary quarterly 1st quarter 2011 <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/control-immigration-q1-2011-t/> accessed June 15 2011. For an accessible breakdown of the asylum statistics .see Refugee Council, Refugee Council Information: asylum statistics (March 2011) available at <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/briefings/Asylum%20Statistics%20Updated%20Mar%202010.pdf > accessed 15 June, 2011.

a degree, to increasingly restrictive immigration legislation and the fast-track processing of asylum applications which has rendered almost void the ability to appeal a negative determination; the fast-track process has been subject to critique from numerous quarters ranging from the Refugee Council to UNHCR and legal practitioners.[10]

The position of LGBT asylum seekers within these figures has only recently been subject to statistical review. Figures for sexuality based asylum claims were not previously collated. In July 2010 data released by the UK Lesbian and Gay Immigration Group[11] and Stonewall[12] indicated a 98% refusal rate for individuals claiming on the basis of sexuality compared to an average refusal rate of 78%.[13] The government has included in BA guidance the non-réfoulment of LGBT claimants to countries where the death penalty is used as punishment for homosexual acts. Whether this change to the guidance criteria will have any substantive impact on the positive reception of LGBT claims remains to be seen. Perhaps more significant is the case *HJ (Iran) and HT (Cameroon)* v *SSHD* [2010],[14] which stated that the court's reliance on discretion as protection was an illegitimate expectation and impinged on the human rights of LGBT asylum seekers. My concern remains, that even with these recent steps-forward in case law and the formal inclusion of sexuality in BA guidance that, as this thesis has highlighted, the legal system's reliance on the threat of, and actualisation of, high levels of harm still leaves sexuality claims dangerously exposed to negative determinations.[15] The quantifiability of what constitutes persecution will still potentially undermine LGBT claimants, particularly where the judiciary is

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[10] Sharon Oakley and Katrina Crew, 'Working against the clock: inadequacy and injustice in the fast track system' (BiD 2006) <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html> also see UNHCR, 'UNHCR and UK work to improve refugee status' <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4905e1d44&query=UK%20fast%20track%20policy> accessed 15 June 2011.

[11] UK Lesbian and Gay Immigration Group, 'Failing The Grade: Home Office initial decisions on lesbian and gay claims for asylum' (London April 2010) – see <http://www.uklgig.org.uk/docs/publications/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf> accessed 23 June 2011.

[12] Stonewall, *No Going Back: Lesbian and gay people and the asylum system* (London 2010) accessible at <www.stonewall.org.uk> accessed 23 June 2011.

[13] *UKLGIG* (n 11) 2.

[14] *HJ(Iran) HT (Cameroon)* v *SSHD* [2010] UKSC 31.

[15] The government is also failing to collect statistics on the number of people making claims on grounds of sexuality, there is therefore no way of knowing whether individuals are being réfouled back to state's where they may be persecuted because of their sexuality. See Karen McVeigh, 'Gay asylum claims not being counted despite pledge, admit ministers' *The Guardian* (London 1 May 2011) <http://www.guardian.co.uk/uk/2011/may/01/gay-asylum-claims-not-being-counted?INTCMP=SRCH> accessed 15 June 2011.

unwilling to see discrimination, intimidation, blackmail, casual violence, targeted violence, job-loss, homelessness, threat-of-disappearance, arbitrary arrest and detention as insufficient evidence of a requisite level of persecution. Furthermore the UK court's implicit and sometimes explicit, racism, sexism and homophobia will continue to infuse and shape the rendering of decisions. The broader impact of the incorporation of LGBT claimants into asylum policy, rather than contesting the current system of asylum and recognising its flaws, will shore up the structure and functioning of its administration adding yet another category to the one size fits all *Convention* grounds.

Though the asylum system is in significant need of legal reform, *Questioning the Culture of Court: Resistant narratives, imagined possibilities and the regulation of sexuality in UK asylum law* has not been about legal reform *per se*. Rather than relying on the possibilities of the current legal system as having the ability to fundamentally alter the nature of the asylum process, or believing that the current legal system bears the competence to challenge and transgress the hierarchies of power, and the dominance of racism, sexism and homophobia that currently inform judgments and legislation, it has instead turned to an alternate conceptualisation of law; the thesis has relied, in part, upon a new theory of legalism on which the right to legal personhood turns, a legal personhood which informs legal conceptualisations of identity both within and without the asylum process; a theory which calls for freedom rather than equality and it does this, as I have shown throughout the chapters, by drawing on Drucilla Cornell's *imaginary domain*. Supplementing the imaginary domain I used two key concepts, critical narrative and resistance, these concepts gave depth and substance to the imaginary domain, by developing a less utopic and more substantive understanding of how the imaginary domain could impact on, and aid in, broader struggles of anti-racist, anti-sexist and anti-homophobic practices. Critical narrative, and practices of micro-resistance, have brought contextual and material substance to the somewhat visionary qualities of the imaginary domain, adding a more substantive element, connecting it to people's everyday lives and interactions with law and the legal process.

In this conclusion I address these three concepts, considering their trajectories and shifts in trajectory across the chapters. I begin with the imaginary domain and what it offers to an analysis of refugee law and conceptualisations of identity. I then move on to consider how critical narrative and micro-resistance have informed my

analysis of both the asylum process and broader sites of legality such as legal academia and the activist court space. All three of these concepts are mutually constitutive, and, used in conjunction, they unpack the intersecting legal and political discourses and machinations that inform the current workings of the legal system. Furthermore these concepts interrogate the *formalism* and *formulism* of legal spaces, highlighting the possibilities of transgressing the norms that police these sites. In summation I briefly indicate the future trajectory of this research.

The 'imaginary domain': an ally to critical narrative and micro-resistance

I explained in Chapter two that the 'imaginary domain' was a psychological space in which to reimagine personal understandings of gender and sexuality, and to ensure that non-normative formations of gender and sexuality would not negate a person's right to legal personhood; furthermore identity as envisaged by the individual was to be protected by law using the concept of freedom rather than formal equality. The equalities framework of liberal democratic states critiqued by Cornell, was implicated in the stifling conceptual confines of normative imaginings of sexed and gendered identity; whereas the Cornellian version of 'freedom' was based on an openness to reconceptualising these 'categories'. The imaginary domain provided an alternate legal framework to consider both the specific legalities of a claim to refugee status and broader understandings of the way identity is conceived.

The imaginary domain gave vision to new ways of thinking about intimate life and intimate futures. Cornell notes, regarding the reconstitution of kinship groups, that the imaginary domain is a crucial site for those dreams:

> It allows the sexual imago in and through which we come to represent ourselves ... it is the psychic space in which we are allowed to freely imagine ourselves as sexuate beings, representing ourselves as persons who define our own moral perspectives in matters of sex, love and intergenerational friendship... it allows for imagined modes of relationships that help us give body to the ways we wish to set up our intimate relationships.[16]

The emphasis on the right of individuals to both imagine and shape their own lives beyond legislative constructs of appropriate familial formations encouraged me to take advantage of the theoretical premise of the imaginary domain. The imaginary

[16] Drucilla Cornell, *At The Heart of Freedom* (Princeton University Press, Princeton 1998) 43.

domain was a key component in reconceptualising the position of lesbian and gay refugees and the contexts from which they had fled. Relying on the *freedom* associated with the imaginary domain provided a venue to rethink and reframe identity within the legal structure of the *Refugee Convention.*

In the introduction to the thesis I indicated that same-sex sexual activity was, as of August 2011, still outlawed in over 76 countries. I explained how the criminalisation of lesbian and gay sex acts led, amongst other intersecting factors, to the production of refugees seeking asylum on the ground of sexual orientation. The claim to asylum on the ground of sexuality necessitates the formulation of lesbian and gay identity. In Chapter one I asked, as my starting point, where the place of lesbian and gay identity, and the production of refugees lay in terms of the legacy of post-colonialism, the role of neo-liberal economics and claims to rights based on sexual identity. Many of the countries that had, and have, regressive legislation with regard to homosexuality inherited this legislation from colonial legal instruments, for example the Indian penal code inherited its sodomy laws from the UK, as did Jamaica and many other colonised and formerly colonised states. I indicated how the systems, of what I referred to as *global refugee management*, were predicated on nationalism and neoliberalism explaining the mutually propagating relationship between the two and highlighting how the *Refugee Convention* formed an implicit link between nationalist politics and colonialist discourse. I argued that national asylum policies were inherently linked to one another; that these linkages established common grounds and common levels of refugee reception and 'care' in states; and that refugee narratives were subject to similarly high levels of proof of experience; and finally that the linkage between asylum policy, care for refugees and the privatisation of that care through the prison industrial complex had created a market for incarceration.

Cornell's version of intimate relationships was a useful theoretical intervention in analysing the position of LGBT refugees. The broad theoretical scope of the imaginary domain, provided a response to sexuality's boundedness within nationalist politics, colonialist heritages and identity politics; Cornell's version of 'freedom' endeavoured to challenge the normative boundaries established by nationalism, identity politics etc. by suggesting that a self-determinative concept of identity, rather than a legally endorsed vision of identity, would better serve liberal constructs of justice. The 'right' to freedom was dependent upon a vision of a legal system that recognised the individuated right to legal personhood, a legal personhood

that could not be rejected because of its failure to live up to particular normative values and judgments. Recognition of a specifically Cornellian version of legal personhood I argued, could potentially lead to an inviolable legal responsibility on the part of, in this instance, the UK asylum court. I claimed that social and state behaviour that precluded certain types of intimate family forms or expressions of gender and sexuality would be viewed as directly countering the ethos of the imaginary domain, thereby impinging on the right to legal personhood, and would thus be perceived as providing eligibility for a claim to refugee status. Additionally, the imaginary domain troubled the *Conventions* understanding of identity as fixed, enabling a much more open conceptualisation of both the grounds of the *Convention* and thus identification within those grounds.

The necessity of claiming a specific, static and oppressed sexual identity is essential in claiming *Convention* status as a member of a 'particular social group'. In the introduction and to a greater extent in Chapters five (*Indices of Persecution: the legal position of lesbian and gay refugees*) and six (*'Standing in the way of control': Narrative, identity and resistance*), I showed how the asylum seeker needed to make themselves and their sexual identity legally cognisable under the *Convention.* Sexuality, in legal terms, needed to be understood as innate, immutable and performed in a particular manner. The static nature of identification I explained, is troublesome for individuals whose identities do not subscribe to hetero/homo binaristic interpretations, and may be particularly difficult for refugees who experience disorientation in terms of their relationship to a particularly western style of lesbian and gay life.

My concern with the intertwinement of identity, the *Refugee Convention* and conceptualisations of an individual's own understanding of their sexuality, race, gender etc. was that from the outset there was a dissonance between legal and personal configurations of self. Following the terminology of the *Refugee Convention* and broader equalities provisions, the court required claimants to position identity as an innate and/or deeply held characteristic; furthermore that characteristic needed to be expressed through particular practices in a manner cognisable to the court. LGBT identified qualities or traits needed to take the form of having same-sex sexual encounters and relationships that are/were ongoing, characteristics such as campness, butchness, closeting etc. would confirm the court's preferred vision of the LGBT asylum seeker. A Cornellian approach fundamentally differed in interpretation from

the usual legal renditions of acceptable sexuality. Cornell positioned sexuality as shifting, diffuse, organic and with an explicit right to be brought into the public sphere. Drawing on Cornell's theoretical framework I called for a rethinking of the gendered norms used by the court that evoked ideas of appropriate and essentialised femininity, masculinity and sexuality more generally (see Chapters four and five). The evocations of sexuality expressed by asylum seekers and NGO support groups identified during the empirical research, as indicated in Chapter six, reflected a much more nuanced understanding of sexual identity than merely just having lesbian or gay sex and/or relationships. Cultural, ethnic, religious and socio-economic factors heavily influenced interpretations of sexuality. This is significant. If the marker by which asylum seeker sexuality is being compared in court is that of the western, independent, consumerist, the 'Soho' gay man, then the way in which sexuality is enacted within other contexts may be at odds and therefore unrecognisable as a manifestation of authentic 'queerness' by the asylum court.[17] The purpose of the imaginary domain was intended to provide an alternate way of conceptualising identity before the law.

Although the concept of the imaginary domain made use of law and legal structures, it provided a creative site for imagining the way in which sexuality could be constituted differently in law and in life more broadly.

> How we know who we are and how we have been formed sexually is part of a complex process through which we formulate a self with a personal story. Because who we could become in a society in which women were fully recognized as free and equal persons is not yet possible for us to experience, the process of re-imagining ourselves does not have an end point.[18]

As I outlined in Chapter six, refugees often spoke of having to re-envisage their future, both personally and professionally and to think through the way in which their intimate lives had shifted. Chapter six spoke of memory and the trauma of reinvention; it drew on narratives of reconciliation and reimagining of the self. Because refugees are embroiled in the asylum process which grants them a particular legal identity, these identities sometimes preclude full participation as free and equal persons in UK society because of the effects and the proliferation, of racism, sexism, homophobia, the status of exile and economic conditions. Imaginings of a future life

[17] Lord Rodger in *HJ and HT* [2010] (n 14) paragraph 78.
[18] *Cornell* (n 16) 186.

can be constrained, to an extent, by the reality of prejudicial social context. What these constraints on refugees give rise to is neither an absolute subsumption to oppressive social forces, nor a rendering of refugee as victim. Refugee responses to these constraints, as I outlined in Chapter six and seven, can have the effect of challenging oppressive structures and encourage resistance towards the domineering effects of the asylum system. For example the very claim to asylum by LGBT individuals can be a symbolic move away from the closet, a move towards a more open understanding of identity, and intimate familial formations. Further, the sites of political responsiveness and collective action, for example the role of the SAFRA project, or the UK Lesbian and Gay Immigration Group, which challenge the asylum system and provide support for those entering into it, can, to a degree, confront and resist the machinations of oppressive government action. The macro effect that these organisations have is to rewrite the narrative of claiming asylum; rather than being a site for abjection, it becomes a site of potential, a site of collective resistance.

Resistance to social and cultural normativity and the disruption of hierarchy was one of the key themes of the thesis. Beyond the framework of the imaginary domain, I relied on Michel de Certeau's practices of micro-resistance and the resistant political and narrative techniques of actors such as those suggested by Critical Race theorists and the activist women of Greenham Common. I drew on resistance as practise as a way to reflect on the ability of individuals to maintain agency over their identity, and to control, to a degree, accessibility to that identity. When I applied resistant techniques to an understanding of the agency of the refugee, I argued that refugees could potentially subvert the court space by deploying covert, micro-resistant measures, and disrupt readings of identity through speech, silence and body language in court. In order to demarcate the ways in which refugees embodied and embraced resistant practices, I analysed the place of resistance at various sites - through the production of critical race theory within academia, the production of expert testimony in court, and the behaviour of the women of Greenham Common in and out of court. I considered the ways transgressive behaviour can contest the *formalism* and *formulism* of a legal space: through the disruption of the administration and traditions of court; through the use of alternative narratives; and through the ability transgressive behaviour possessed to disrupt hierarchical relationships through alternate methods of relational interaction, such as storytelling, singing, silence and political exposition.

The narratives provided by critical race, lesbian and gay, and feminist scholars which I discussed in Chapter three bucked the typical format of academic writing, drawing on techniques of storytelling, which, to a greater and lesser extent, the authors intertwined with some form of legal analysis and commentary. Histories and traditions of narration were brought into an environment in which legal literatures' form and function were already established; established by those who developed and maintained law's exclusivity through the production of particular forms and methods of traditional 'black-letter' legal analysis. Conversely, narrative writing stemmed from the experiential, the historic, the personal, and this troubled the way in which academic literature had traditionally gained its 'cultural capital'. Proponents of narrative literature took experience and identity and placed these at the fore of their work, challenging the supposed neutral 'objectivity' of academic writing, exposing that objectivity as white, patriarchal and heterosexist.

Critical narrative, I argued, had tremendous purchase for an analysis of refugee testimony. Although critical narratives stemmed from a different legal environment to that of refugees, the parallels were significant. The law's dependence on a particular format for presenting narratives is often at odds with the way in which a refugee would ordinarily tell their story. In Chapter six I explained how narratives produced by refugees do not always follow the court's preferred method of communication. The statement a refugee provides often foregrounds thoughts and feelings rather than maintaining a focus on the chronological details and facts. Though this approach may act to the detriment of the claim, asylum seekers often spoke of the necessity of speaking that trauma and persecution as part of process of catharsis, even when it did not have direct legal relevance and purchase in court.[19]

Critical Race narrative's reliance on alternate forms of discursive engagement with law and wider society was criticised by other academics - 'narrative sceptics' - as unrigorous and overly emotional, in terms of style and content. CRT and narrative scholars produced work that spoke to the subjective impact of racism, sexism and homophobia amongst other things. Narrative's ability to evoke an emotional response from the reader, and narratives style of drawing on the personalised nature of discrimination, provided an important framework through which to consider

[19] Laurence Kirmayer, 'Landscapes of Memory: Trauma, Narrative and Dissociation' in Paul Antze and Michael Lambek (eds), *Tense Past: Cultural essays in Trauma and Memory* (Routledge, New York 1996). See Chapter six of this thesis, pages 169-171.

transgressive narratives opposing the dominance of normative institutional writing styles.[20]

Critical narratives importance as a method of contesting broader institutional structures of power and hierarchy is a key element in resisting the deeply embedded norms of law and of social life. Such norms, are implicitly and explicitly based on dominant narratives which occlude the validity of other voices, experiences and ways of living. Drawing on a Foucauldian framework, Kathleen Jones considers the role of authority and the feminization/degradation of certain voices noting 'we may see how the dominant discourse on authority silences those forms of expression linked metaphorically and symbolically to "female" speech'. She goes on to claim that, 'this discourse is constructed on the basis of a conceptual myopia that normalizes authority as a disciplinary commanding gaze. Such a discourse secures authority by opposing it to emotive connectedness or compassion'.[21] Compassion for Jones pulls individuals into the 'face to face' encounter, drawn to the 'specificity and particularity of actions and actors'. The personal dimension of the work of narrative scholars drew in readers with the intention of provoking a response. Transgressive narratives of race, sex and sexuality performed a key role in resisting the mechanism of acceptable forms of academic work, particularly within a legal environment, exposing some of the foundations of power and hierarchy. Narrative scholars developed their own methods of legal engagement, wrote their own 'manifestos/manifestas' for change. In a tangential way, what was also happening, was a reimagination of future life, narrating and charting ways to actualise that future through stories; in part my intent in this chapter was to indicate that the concept of the imaginary domain could work as an ally alongside Critical Race narratives – narrative, I posited, would be the cypher which made legible the images produced in the imaginary domain, leading to the disruption of oppressive systems of power.

Sherene Razack notes, 'storytelling in law, then, is an intellectual movement that is "a rebellion against abstractions". Its purpose is to interrogate the space between the knower and the thing known'.[22] The space between the knower and the

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[20] See Chapter three of this thesis 'The Role of Narrative in Academia and the Court' for an analysis of CRT and for a comprehensive analysis of the key readings.

[21] Kathleen B. Jones, 'On Authority: Or, Why Women are not Entitled to Speak' in Irene Diamond and Lee Quinby (eds), *Feminism and Foucault: Reflections on Resistance* (Northeastern University Press, Boston 1988) 120.

[22] Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (University of Toronto Press, Toronto 1998) 37.

thing known disrupts assumed knowledges. I indicated in Chapters four and seven that through this disruption there was the potential to shift, even if only momentarily, hierarchical constructs of power. Through disrupting assumptions about the identity of the academic of colour, the activist, the refugee, new narratives regarding individuals are created. These narratives are subjective accounts that do not claim to hold pan-applicable truths; they are, as Razack would say, a 'rebellion against abstraction' a rebellion against purported neutrality and objectivity, a neutrality that often has the effect of displacing and silencing the narratives of disempowered individuals.

In Chapter three I argued that one of the particular strengths of narrative was its ability to engage the listener. There was power in both the telling of the story and the reception that the story received. In Chapter seven I claimed that communication across this space of un/knowing is enhanced when done within a particular framework. In order to investigate the space of unknowing that sits betwixt claimant and judge I drew on, amongst others, Iris Marion Young's concept of 'asymmetrical reciprocity' and Drucilla Cornell's 'imaginary domain'. The imaginary domain's openness to new conceptualisations of identity, and Young's reliance on a premise of relating to the other in a manner which does not assume any absolute comprehension of identity, together provide a site for negotiating the way in which relationships can be understood. The move in the thesis towards a more ethically based understanding of relationships was in part a response to the failure of the current legal system's engagement with refugees, and specifically the failure of the judiciary and UKBA case managers to engage with claimants. It was my intent to show that facilitating communication across a space of acknowledged difference, a space of *unknowability*, would enable a much more reflexive and accommodating approach to working with unfamiliar narratives on the part of the judiciary and BA officials. Furthermore the turn to ethics was an attempt to try and reposition and reflect on the UK's responsibility in the production of refugees. If the court were to embrace an approach to refugee narratives, which drew on the broader contextual, socio-historical, socio-economic creation of refugees, the UK's responsibility for the perpetuation of refugee production would become more apparent and thus disrupt the current functioning of the *Convention* in UK law as something akin to a charitable gesture.

Throughout the thesis I have conceptualised the way in which identity is deployed, read and misread by a variety of different actors within different legal

environments. I indicated how these misreadings detrimentally impacted on traditionally disempowered individuals. The current legal provisions' reliance on singular, normative categories of identity have stifled rather than developed social and legal understandings of gender, sexuality, race and refugee status. Relying on Cornell's imaginary domain, I have indicated how a new legal turn towards a version of freedom rather than equality would help to deconstruct normative imaginings of identity and family formations as prescribed by law. The imaginary domain has provided a site from which to envisage future imaginings of identity. The imaginary domain, used in conjunction with Critical Race Theory and outsider narratives, engages with the way traditionally disempowered groups have resisted the social normativity and hierarchy of the majority within particular legal sites.

The stature and status of law, its complex intertwinement with politics and economics, persistently makes it an apparatus whereby its regulation of the individual is at odds with the way in which individuals conceptualise their own sense of being. The refugee as a vulnerable agent within the asylum system, and within UK society more broadly, is constituted by and subjected to hierarchies of power but is able, at intermittent points, to challenge and transgress these power structures to varying degrees.

This thesis calls for a move away from the manner in which the asylum system currently functions. The system's failure to provide a sufficient or consistent level of 'justice', its proximity and thus vulnerability to the misplaced prejudice of the public vote, leave it vulnerable to regressive and racist legislative enactments. My efforts to rethink the functioning of aspects of the legal system, culminating in a turn to the ethical, are intended to suggest that the state should accept its responsibility and its obligations to those who are forced from their home. This responsibility ought to be founded on an ethical mandate, which acknowledges that UK privilege is now and always was based on an exploitative relationship with 'others'. The UK political and legal system needs to reflect more deeply on its investment in neo-liberal economics and on its version of neo-liberal democracy that perpetuates disparities in wealth, causes political unrest and has the effect of creating refugees.

Cornell has written that 'what is possible cannot be known in advance of social transformation'.[23] Envisaging a more 'just' future alongside the circumstances

[23] *Cornell* (n 16) 185.

within which oppressive norms are created, and contesting those circumstances, isn't new nor is it revolutionary, but it may be part of a process of conceptualising new ways to live. Radical concepts such as the imaginary domain may seem somewhat fantastical, but their continual presence in the imagination of those seeking social change means that the future isn't set, that it is in process and can be subject to transformation.

Future directions

Questioning the Culture of Court: Resistant narratives, imagined possibilities and the regulation of sexuality in UK asylum law has a broad theoretical scope. Drawing on multiple literatures – feminism, postmodernism, ethics, Critical Race Theory – my intent was to engage with the asylum system from multiple perspectives. Yet even relying on these multiple literatures there remain some gaps and questions that I failed to address in my research.

One of the areas of asylum and immigration law that needs analysing to a much greater degree is the impact of neoliberal economics on the legal position of refugees, considered from a critical theoretical perspective. This thesis touched on some of the economic issues that have bearing on refugee flows but not to the degree that allowed for a nuanced and theoretically informed response. My intent therefore, when turning this thesis into a monograph, is to consider the critical nexus between the current brand of neoliberal economics that underpins the asylum system, and the impact this has on the production of refugees. More pointedly I intend to engage with how narratives articulated by refugees bear the marks of neoliberal politics and economics. I ask, are refugee narratives shaped by a particular political and economic discourse and what impact does that have on the claim to refugee status? Does a narrative informed by neoliberalism allow the economic migrant to assert a sense of entitlement to refugee status or does it further constrain refugee agency and delimit, to an even greater degree, access to western state citizenry? Furthermore how does the legal system imbricate neoliberal economics into its decision making process and how does this impact on the provision of justice for refugee claimants?

In Chapter six which saw the bulk of analysis of the empirical work, one of the failures of this chapter was its lack of engagement with the actual voices of refugees. I stated in the chapter that to have pursued interviews with refugees would have been

exploitative on a number of grounds – the refugees I did interview seemed incredibly vulnerable, and required more help than I could offer or indeed give. In order to somewhat redress the direct inclusion of the voices of refugees, my intent in the monograph is to draw on films and novels that engage with the refugee experience, such as Nick Broomfield's film *Ghosts* (2006), Angelina Maccarone's, *Fremde Haute* (Unveiled) (2005) and Jan Dunn's, (2005) film, *Gypo* – I intend to draw on these secondary sources not to replace the voices of refugees, but to try and compensate in some way for the lack of direct engagement with those that sit at the heart of this thesis in an attempt to access the refugee experience in a non-exploitative and non-intrusive way.

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