

Recognition and narrative identities: is refugee law redeemable?

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Almost all the survivors . . . remember a dream which frequently recurred during the nights of imprisonment, varied in its detail but uniform in its substance: they had returned home and with passion and relief were describing their past sufferings, addressing themselves to a loved person, and were not believed, indeed were not even listened to.

Primo Levi, *The Drowned and the Saved* (Abacus, 1986), pp. 1–2.

[T]hose who have been forced out of all political communities . . . have lost all those parts of the world and all those aspects of human existence which are the result of our common labour, the outcome of the human artifice.

Hannah Arendt, *The Perplexities of the Rights of Man*, in *Origins of Totalitarianism* (Harcourt, 1973), p. 300.

It is pleasant, hard and pleasant at the same time because somebody understand[s] you. They understand you and that's the object, the purpose of my presence here.

Refugee describing experience before the Canadian IRB¹

1. Introduction

That an asylum seeker often has a transformative experience in their encounter with a status determination regime is uncontentious. The practical need for legal recognition of a pre-existing status as a 'refugee' for the purpose of protection marries with a very personal need for recognition of one's experience. The granting or withholding of either type of recognition

¹ Quoted by Cecile Rousseau and Patricia Foxen, 'Empathy and the Transmission of Trauma in the Refugee Determination Process', (2010) 47 *Transcultural Psychiatry* 70.

has consequences for the various identities created and new allegiances forged. Both depend upon the story told, and the manner of its reception.

This chapter initially arose out of my own anecdotal experience as a legal representative for refugees over many years. It found its genesis in reflections on the role I played in helping shape the stories that would be told to administrative decisions-makers by my clients, and my growing concern that I was complicit in a process of legal institutionalisation, distortion and even alienation of something 'authentic' in the refugee experience and identity. As will become apparent, I am no longer so damning of my role and that of my fellow lawyers and decision-makers, or indeed of the 'regulatory discourse' imposed by refugee law itself. The refugee has more agency, the law more promise, than perhaps appears at first blush. I am also more questioning of my own original assumptions about authenticity, categorisation and recognition.

Nonetheless, I retain a degree of discomfort. This chapter's objective is to examine the source of this discomfort by developing a better understanding of the narrative-identities created, received and circulated in the process of refugee status determination by the various players including the refugee, their legal advocate and the administrative decision-maker. Each approaches the refugee narrative with a different purpose and attitude towards the 'refugee' as a legal, cultural and performative category, and each is vulnerable to the impositions and limitations of the language and institutions of refugee law.

The chapter uses a mixture of tools to tease out this dynamic, including narrative-identity theory and the concomitant Hegelian 'recognition' literature,² which is having an increasingly important impact on human rights discourse. This is linked at the end of the chapter to theories of legal personhood and the place of autonomy in refugee legal discourse.³

As a preliminary caveat, I note that much of what follows is speculative or based on anecdotal impressions; as with so many writings in the area of identity formation, the theories will need to be tested by empirical studies that look more closely at specific refugee and practitioner narratives and experiences.⁴ It is also worth noting that I use the term 'refugee' throughout

to describe all those seeking asylum, as each presents a 'refugee' narrative. To use the term 'asylum-seeker narrative' would rob the analysis of its bite, and further disaggregate the already disjointed refugee identity.⁵

Section 2 introduces the reader to the basic categories, definitions and processes of refugee law, including the principles that inform the procedure for determining refugee status. The section notes the evolving nature of the discipline and the tensions within its key concepts as sites for contesting who is entitled to recognition as a refugee. Section 3 examines the increasing attention being paid to narrative in human rights discourse, and contrasts it with the mandatory self-narrative demanded by refugee law in which recognition of one's status and experiences takes on an anxious urgency that is as personal as it is political. Considering the institutional context within which the refugee narrative is generated, I consider the well-canvassed argument that 'governing narratives' and power imbalances operate to essentialise the refugee's identity and undermine their narrative autonomy. The section ends by asking whether refugee law is really so deterministic and disempowering, or whether its categories provide opportunities for a self-narrating identity to be shaped by those involved in the narrative. This is examined in more detail in Section 4 by way of the theories of Ricoeur and Taylor whose ideas of narrative as mediating temporal and ethical orientations, and providing a forum for inter-subjective recognition, are applied to the legal categories, concepts and processes within which the refugee narrative must be told. The section concludes with an analysis of the requirement in refugee law to *retell* one's story, a double-edged sword that provides a richer performative context for consolidating and enabling the refugee's new identity while simultaneously giving fodder to decision-makers to deny 'recognition' on the basis of a story's inevitable internal inconsistencies. The tendency for determination regimes to fixate on credibility is linked to the epistemological outlook of decision-makers working within a quasi-scientific 'culture of authenticity', acting as a significant obstacle to attempts within refugee law itself to accommodate a refugee's rich narrative. The final section looks at the actual legal person created by the refugee law regime from the perspective of Taylor's theories of

² See discussion accompanying n. 92. ³ See discussion at Section 5.

⁴ Some of this work has been started in other disciplines, notably psychology. See, e.g., Wolfram Fischer and Martina Goblirsch, 'Biographical Structuring: Narrating and Reconstructing the Self in Research and Professional Practice', (2006) 16(1) *Narrative Inquiry* 28; Ana Marie Fantino and Alice Colak, 'Refugee Children in Canada: Searching for Identity', (2001) 80 *Child Welfare: Journal of Policy, Practice and Program* 587-96; Renata Kokanovic and Meredith Stone, 'Doctors and Other Dangers: Bosnian Refugee

Narratives of Suffering and Survival in Western Australia', (2010) 8 *Social Theory & Health* 350; Laurence Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry', (2003) 10 *Anthropology & Medicine* 167. I acknowledge the assistance of Dr Mark Nolan in the identification of this relevant literature.

⁵ See Roger Zetter, 'More Labels, Fewer Refugees', (2007) 20 *Journal of Refugee Studies* 172, who describes the progressive 'fractioning of the label' of refugee over the past decade (180-4), albeit not from a particularly legal perspective.

expressivism and Butler's notion of precarity. It relates the theory of self-narration to that of self-proprietorship in liberal thought, identifying it again as both an opportunity and obstacle to the use of refugee law as a self-narrating discipline. The chapter concludes with a reflection on whether refugee law is redeemable as a vehicle for self-narration of new and meaningful identities and allegiances, and draws upon contemporary scholarship to identify future directions for exploring this question through empirical research.

2. Setting the scene – refugee law principles and processes

While a comprehensive treatment of refugee law is beyond the scope of this chapter, a basic understanding is required of the discipline's core definitions, the evolving nature of the interpretation of the Convention relating to the Status of Refugees⁶ as a 'living instrument',⁷ and the widely accepted minimum standards for accessible and fair refugee status/determination procedures. These provide the categories, concepts and institutional processes within which a refugee narrative must be told. As discussed later, 'refugee law' writ large may have an alienating gate-keeper function that operates to protect sovereignty and define 'otherness', but practitioners and the individual asylum-seeker must live within and attempt innovatively to employ the law as codified and interpreted through various legislative, administrative and judicial processes.⁸

⁶ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('Refugee Convention'). The Refugee Convention has been supplemented by the Protocol relating to the Status of Refugees, opened for signature 31 January 1966, 606 UNTS 267 (entered into force 4 October 1967).

⁷ This language has been borrowed from the jurisprudence of the European Court of Human Rights to apply to the Refugee Convention. According to Türk and Nicholson, 'courts in various jurisdictions have increasingly declared the Convention to be a living instrument capable of affording protection to refugees in a changing international environment.' See Volker Türk and Frances Nicholson, 'Refugee Protection in International Law: An Overall Perspective' in Erika Feller, Volker Türk and Frances Nicholson (eds.), *UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 3, 37–8. For an example of the principle in action, see especially *Sepet and Bulbul v. Secretary of State for the Home Department* [2003] UKHL 15 [11] (Lord Bingham), citing Sedley J in *R v. IAT, Ex parte Shah* [1997] Imm AR 145, 152; see also *R v. SSHD, ex parte Adan and Aitsegeur* [1999] 4 All ER 774, 795 (Lord Woolf MR).

⁸ Each country is accorded significant discretion in defining the parameters of the law. I have drawn primarily upon its interpretation in the Australian, Canadian and UK context.

2.1 Fear of persecution for a Convention reason

Article 1A of the Convention provides that the term 'refugee' shall apply to any person who:

owing to 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, owing to such fear, is 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Each of the components of this definition can be broken down into increasingly smaller constituent parts, and each has been the site of contest between those seeking either to expand or restrict the law's protective coverage. Thus the future 'persecution' which a Convention refugee must 'fear' is no longer understood in most jurisdictions merely by reference to serious breaches of a limited set of civil and political rights but extends to those fundamental rights incorporated in international human rights instruments, potentially including (albeit in limited circumstances) economic, social and cultural rights.⁹ Furthermore, the reference to 'persecution' rather than a 'persecutor', and to 'country' instead of 'government', has opened the door to interpretations that can encompass conduct by non-state actors, allowing refugees from 'failed states'¹⁰ as well as those fearing 'private' harm – including domestic violence – to be recognised.¹¹

⁹ See discussion arising out of James Hathaway's important 'hierarchy of obligations', especially in Michelle Foster, *International Refugee Law and Socio-economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007); and the codification of the definition in Europe (Article 9 of the Qualifications Directive 2011/95/EU (OJ L 337/9 20 December 2011): 'severe violation of basic human rights'), and Australia (Section 91R of the Migration Act 1958 (Cth): 'significant economic hardship', 'denial of access to basic services' and 'denial of capacity to earn a livelihood', where such conduct threatens a person's capacity to subsist).

¹⁰ See, e.g., *MIMA v. Haji Ibrahim* (2000) 204 CLR 1, 53–4 [151]–[154] (Gummow J); *R v. SSHD; Ex parte Adan and Aitsegeur* [2001] 2 AC 477, 522–523 (Lord Hutton). For a study of the progressive 'waves' of judicial armed conflict-related cases, see Hugo Storey, 'Armed Conflict in Asylum Law: The "War Flaw"', (2012) 31 *Refugee Studies Quarterly* 1.

¹¹ *MIMA v. Khawar* (2002) 210 CLR 1 [27] (Gleeson CJ) ('Article 1A(2) does not refer to any particular kind of persecutor. It refers to persecution, which is conduct of a certain character. I do not see why persecution may not be a term aptly used to describe the combined effect of conduct of two or more agents; or why conduct may not, in certain circumstances, include inaction.') See also *Islam v. SSHD; R v. IAT, Ex parte Shah* [1999]

The feared persecution must be linked to one of the Convention reasons of 'race, religion, nationality, particular social group and political opinion'. Again, each of these terms has been the subject of interpretation and codification, with 'particular social group' receiving the most attention as an evolving category that can incorporate groups not contemplated by the Convention's framers.¹² In the Australian context, this may nowadays include women, gender-based groups, conscientious objectors, occupational and caste-based groups, converts, and people living with a disability.¹³ 'Political opinion' has similarly been targeted as ripe for re-interpretation to include 'any opinion on any matter in which the machinery of State, government, society, or policy may be engaged',¹⁴ potentially extending to opinions on gender roles.¹⁵ As the United Nations High Commissioner for Refugees ('UNHCR') note in their guidelines relating to female genital mutilation, 'culture and tradition are not apolitical, but often interact with power relations and influence economic and social circumstances'.¹⁶

The call to interpret the Convention definition within specific social, cultural and economic contexts is the latest step in the 'living instrument' approach to treaty interpretation. Its susceptibility to such approaches still has a way to go, but judicial notice of the academic literature, based on

2 AC 629, 654 (Lord Hoffmann). The influence of feminist critiques of international law should not be underestimated. For a recent examination of the jurisprudence on non-state actors in refugee law, see Eeva Nykänen, *Fragmented State Power and Forced Migration* (Martinus Nijhoff, 2012).

¹² See discussion accompanying n. 77 and n. 82. The different approaches to this Convention category have been neatly segmented into those espousing an 'innate characteristic' or a 'social perception' test, and just as neatly – if so far unsuccessfully – merged by the UNHCR in an attempt at definitional reconciliation in UNHCR, Guidelines on International Protection: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, (7 May 2002) [11].

¹³ For a collection of examples of different particular social groups recognised by Australian courts, see Refugee Review Tribunal, 'Convention Grounds and Nexus' in *Guide to Refugee Law in Australia* (May 2012), 5.30–5.34.

¹⁴ See, e.g., UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, (7 May 2002), [32]–[34].

¹⁵ *Ibid.*, [34].

¹⁶ UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation (May 2009) 12 [26]. See also NZ Refugee Status Appeal Authority, *Refugee Appeal No. 76044*, 11 September 2008 (Roger Haines): 'The political opinion ground must be oriented to reflect the reality of women's experiences and the way in which gender is constructed in the specific geographical, historical, political and socio-cultural context of the country of origin'.

human rights principles and (increasingly) empirical interdisciplinary research, provides opportunities for this to occur.

None of these developments enjoy universal or uniform endorsement, and many seemingly progressive approaches can still be critiqued as imbued with an exclusionary ethic; categories, after all, define out as much as they define in. Moreover, other developments have seen the definition used to justify restrictions on those who can be 'recognised' as Convention refugees. Thus both 'protection' and 'well-founded fear' have been interpreted as supporting the development of an 'internal relocation' doctrine, excluding those whose fear is not demonstrably proven to extend to all parts of their country of origin, thereby placing what many consider to be unrealistic burdens of proof on the asylum-seeker.¹⁷ A range of other deflection and non-entrée techniques have ensured that an ever broader set of claims are treated as either manifestly unfounded, or not heard at all.¹⁸ Examples include cases of those who come from purportedly 'safe' countries (of origin or transit), or who have destroyed their documents. Meanwhile, courts in the post 9/11 era have largely deferred to the executive in their broad application of the exclusion clause in Article 1F for those suspected of certain crimes, setting a low standard of proof that is widely seen as shifting the balance away from the humanitarian purpose of the Convention as a concession to sovereignty.¹⁹

2.2 Determination of refugee status – the evolution of general procedural principle

As important as the definition for shaping the refugee narrative is the institutional and procedural context within which it must be told. International refugee law neither expressly mandates nor provides direct

¹⁷ See Michelle Foster and James Hathaway, 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in Erika Feller, Volker Türk and Frances Nicholson (eds.), *UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), p. 357.

¹⁸ See an overview of the various measures aimed at limiting access to proceedings, see Rainer Hofmann and Tillmann Löhr, 'Introduction to Chapter V: Requirements for Refugee Determination Procedure' in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), pp. 1107–118.

¹⁹ See Geoff Gilbert, 'Running Scared since 9/11' in James C. Simeon (ed.), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (Cambridge University Press, 2010). Article 1F excludes from the definition those reasonably believed to have committed international or serious non-political crimes.

guidance for the establishment of a status determination process. Yet despite this 'serious legal lacuna',²⁰ it is widely recognised that in order to meet other obligations under the Convention, not least the fundamental prohibition on forcible return or *refoulement* in Article 33(1), states parties must establish procedures for identifying those towards whom they have such obligations, and these procedures must necessarily be accessible, fair and effective.²¹ Those states unable to undertake assessments rely upon UNHCR processes structured around the same principles. While the exact content of such 'fair' procedures is left to each state to shape, jurists and judges have posited procedural principles on the basis of international instruments, both hard and soft, which arguably have the status of general principles of international law.²²

A useful starting point for identifying such practice is the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* ('UNHCR Handbook').²³ Regarded judicially as having 'high persuasive authority' as an aid to construing the Convention,²⁴ and variously touted by scholars as evidence of either *opinio juris* or state practice,²⁵ the

²⁰ See Hofmann and Löhr, above n. 18, p. 1087.

²¹ See, e.g., Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, para.1' in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), p. 1375, who note that the determination system 'must be fair, and procedural safeguards must exist to ensure the State concerned can honour its obligations'. These authors include amongst these obligations not just the non-refoulement norm in Article 33, but the non-penalisation rule in Article 31, and the right to seek and enjoy asylum in Article 14 of the Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). See also Hoffmann and Löhr, above n. 18, p. 1100 who argue by way of the principle of effectiveness ('procedural rules must ensure the effectiveness of substantive provisions').

²² Article 38 of the Statute of the International Court of Justice.

²³ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Re-edited, Geneva, January 1992, UNHCR 1979) HCR/IP/4/Eng/REV.1 ('UNHCR Handbook').

²⁴ *R v. SSHD, Ex parte Adan and Aitseguer* [2001] 2 AC 477, 608 (Lord Steyn) ('high persuasive authority ... much relied upon by domestic courts and tribunals'); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ('widely considered useful in giving content to the obligations that the Protocol establishes').

²⁵ See, respectively, Hofmann and Löhr, above n. 18, p. 1089; and Jane McAdam, 'Interpretation of the 1951 Convention' in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), p. 110. See also *R v. SSHD, Ex parte Adan and Aitseguer* [1999] 4 All ER 774, 755 (Lord Woolf MR) who considered the UNHCR Handbook to be 'good evidence of what has come to be international practice within art 31(3)(b) of the

UNHCR *Handbook* takes as its starting point the *sui generis* situation of the refugee. It thus stresses that the particular *vulnerability* of an applicant requires specially established procedures and decision-makers equipped with knowledge, experience, and 'understanding' of an applicant's particular difficulties and needs.²⁶ Consistent with broader principles of fairness, it emphasises that an applicant should receive guidance on the procedures to be followed, assisted in submitting his or her case, and given the right to appeal a negative determination.²⁷

As most refugees must prove their claims in the absence of supporting evidence, the UNHCR *Handbook* promotes a 'shared' duty to ascertain and evaluate relevant facts, including the examiner's role in producing necessary evidence, and the widely endorsed principle that an applicant be given the 'benefit of the doubt' when his or her claim is otherwise credible.²⁸ Similar practical realities require a procedure that recognises the apprehension an applicant may have in 'speaking freely' and giving a 'full and accurate account' before *any* authority,²⁹ and thus the need to 'gain the confidence' of the applicant 'to assist the latter in putting forward his case and in fully explaining his opinions and feelings'.³⁰ To assist this objective, the UNHCR *Handbook* recommends multiple hearings (or 'interviews'),³¹ and relaxing of the rules of evidence.³² Finally, it calls for authorities to 'apply the criteria in a spirit of justice and understanding'.³³

UNHCR's Executive Committee has continued to build upon these principles in subsequent soft law (non binding) conclusions. In 2000, it fleshed out procedural due process requirements as part of the Global Consultations on International Protection, promoting the 'right to receive guidance and advice on procedures, to have access to legal counsel, to be able

Vienna Convention'. Goodwin-Gill picks up this theme that it amounts to 'subsequent practice' establishing agreement on interpretation, especially given the circumstance of its preparation and capacity of states to express dissent in the Executive Committee itself: Guy Goodwin-Gill, 'The Search for the One, True Meaning. . .', in Guy Goodwin-Gill and Helene Lambert (eds.), *The Limits of Transnational Law* (Cambridge University Press, 2010) 212.

²⁶ UNHCR *Handbook*, above n. 23, [190]. The jurisprudential relevance of a refugee's vulnerability is evident in the decisions of the European Court of Human Rights. See, e.g., *MSS v. Belgium and Greece*, No. 30696/09 (2011) (ECHR (GC)) (Judge Sajó).

²⁷ UNHCR *Handbook*, above n. 23, [192(ii) and (iv), (vi)]. The Handbook does not say whether this should be a merits or judicial review; best practice is to provide for both administrative review and judicial oversight.

²⁸ *Ibid.*, [196]. Note that this works alongside the recognised burden falling on an applicant to prove their claim.

²⁹ *Ibid.*, [198]. ³⁰ *Ibid.*, [200]. ³¹ *Ibid.*, [199]. ³² *Ibid.*, [197]. ³³ *Ibid.*, [202].

to contact UNHCR; guarantees for personal interviews of all applicants by well-informed and specifically trained decision-makers, in particular as concerns applicants belonging to particularly vulnerable groups; to receive a written decision on their claim, and to have informed access to an independent appeal or review'.³⁴ Similar principles are now reflected in domestic and regional legislative instruments such as the EU's Procedures Directive and Australia's Migration Act 1958 (Cth) and related policies which incorporate procedural rights specifically tailored to the refugee's situation, from guarantees of confidentiality and recognition of an applicant's cultural origin and vulnerability, to the shared responsibility in ascertaining the facts of a claim.³⁵ Other policies at both international and domestic levels set out specific approaches for interviewing and assessing particularly vulnerable categories of claimants including 'unaccompanied minors', victims of torture, and those making gender-related claims.

In practice, the refugee determination process may start as early as the initial crossing into a country of refuge with a preliminary interview by a border official, or years after arrival when a migrant acts upon their fear of returning home by seeking surrogate protection. The initial decision is invariably an administrative one, with different jurisdictions providing differing review rights by administrative and judicial bodies. At the merits stage, authorities invariably invoke the above principles of a right to be heard by an independent and knowledgeable decision-maker through an interpreter in a confidential and culturally sensitive setting, principles that are reflected in common law administrative law's development of the hearing rule. Specialist departments, tribunals and courts, supported by country researchers and experts in refugee law, have established specifically tailored institutional mechanisms for dealing with refugee claimants and a significant body of global jurisprudence on the applicable law.

As with the substantive definition, theory and practice too often diverge even in those regimes that purportedly guarantee the most procedural rights. The 'safe' environment is rarely experienced as such, and the collaborative

³⁴ UNHCR, Global Consultations on International Protection, Fair and Efficient Asylum Processes, UN Doc. EC/GC/01/12 (31 May 2001), summarised in Hofmann and Löhr, above n. 18, p. 1092.

³⁵ These same instruments, of course, also remove basic rights and narrow access to determination regimes. See criticisms made of the EU Directive (in its draft form), for instance, in Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?', (2005) 7 *European Journal of Migration and Law* 35.

narrative process can quickly turn inquisitorial. This is most obviously seen in the prevalence of a widespread institutional preoccupation with assessing credibility, a 'presumptive skepticism'³⁶ that is notoriously infected by cultural and gender stereotypes, and based on a reasoning process that, despite judicial caveats and policy directives, often ignores both the unique experience of the refugee and the manifest problems of cross-cultural communication.

The following section starts the analysis of putting these laws and procedures in their narrative-theory context.

3. The refugee and human rights narratives – contrasts and contexts

3.1 *Self-narrative in the human rights movement*

We are living in an increasingly self-articulating society.³⁷ Our identities are shaped by the stories we tell about our 'selves' to the people, organisations and institutions around which our lives revolve. The narrating self as a subject of study has spread from literary theory to the social sciences and the law,³⁸ arriving finally in the past decade in the human rights arena where it has found a natural home. Telling persuasive stories about one's experiences is, after all, as old as the law itself, a discipline founded and still immersed in rhetoric, despite its positivist pretensions otherwise. As few experiences impact more powerfully on individual and societal identities than violations of fundamental human rights, it is unsurprising that human rights lawyers are looking to the role which

³⁶ Deborah Anker, 'Determining Asylum Claims in the United States: An Empirical Case Study', (1992) 19 *New York University Journal of Law & Social Change* 433, 451; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination', (2003) 17 *Georgetown Immigration Law Journal* 367 (noting the high rate of lack of credibility findings in UNHCR's field office in Cairo); Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals', (2007) 19 *International Journal of Refugee Law* 609, 611 (noting studies indicating that between 50–90 per cent of rejections appear to be based on negative credibility findings).

³⁷ James Holstein and Jaber Gubrium, *The Self We Live By: Narrative Identity in a Postmodern World* (Oxford University Press, 2000), p. 200 ('we've become a self-articulating society, collectively author(iz)ing particular selves').

³⁸ For a summary of the various forms the law and literature movement has taken, see Brian Bix, *Jurisprudence: Theory and Context* (Carolina Academic Press, 6th edn, 2012), ch. 20; see also James Boyd White, *Justice as Translation: an Essay in Cultural and Legal Criticism* (University of Chicago Press, 1990).

narrative can play in achieving their aims. According to such theories, human rights treaties and domestic mechanisms facilitate 'acts of remembering' that in turn issue an 'ethical call to listeners . . . to recognize the humanity of the teller and the justice of the claim; to take responsibility for that recognition; and to find means of redress'.³⁹ Central to this reasoning are certain assumptions derived, albeit usually only implicitly, from Hegelian-inspired notions of recognition, intersubjectivity and the consequences of a shared humanity that infuse contemporary rights discourse.

The place of narrative as a human rights mechanism has not received universal endorsement. Placed within a broader critique of the Eurocentric, neo-colonial aspects of modern human rights practice generally, some scholars have stressed the purported powerlessness of the (usually non-white) survivors of human rights violations who are positioned by the testimonies as passive, pitiable victims – a life stripped bare, to borrow from Arendt and Agamben.⁴⁰ As Makau Matua, one of the more eloquent critics of the discipline, has put it:⁴¹

A basic characteristic of the victim is powerlessness, an inability for self defense against the state or the culture in question. The usual human rights narrative generally describes victims as hordes of nameless, despairing, and dispirited masses. To the extent they have a face, it is desolate and pitiful. . . . In many instances, the victims themselves deeply believe in and openly declare their helplessness and plead for outside help.

It is arguable that refugee law provides for an analogous 'script' to be written by the norms and institutions of the human rights movement. Those 'recognised' by the system may be those most adept at positioning themselves within the dominant discourse of powerlessness, needing to be saved by the 'good' state of the country of refuge. As with the image of passivity that defines the 'genuine' refugee in the eyes of the public, so does refugee law potentially demand and impose a similar passivity on

³⁹ Kay Schaffer and Sidonie Smith, *Human Rights and Narrated Lives: The Ethics of Recognition* (Palgrave Macmillan, 2004), p. 3. See also Costas Douzinas, 'Identity, Recognition, Rights or What Hegel Can Teach Us About Human Rights', (2002) 29 *Journal of Law and Society* 379.

⁴⁰ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) [trans of: *Homo sacer: Il potere sovrano e la nuda vita* (1995)].

⁴¹ Makau Matua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001) 42 *Harvard International Law Journal* 201, 229.

behalf of the claimant, effectively silencing them by confining and directing their stories.⁴²

Yet in other respects, the categories of refugee law militate against exactly such a limiting narrative. Just as White and Perelman have tried to reclaim or redeem the mechanism of the human rights testimony,⁴³ so it might be that practitioners and refugees are demonstrably able to use the opportunity presented by the refugee determination regime to empower rather than mute.

3.2 Distinguishing the refugee legal narrative

Despite the repositioning of refugee law in the past decade back into the human rights pantheon, the refugee legal narrative does not fall neatly into a standard human rights box. Under most rights regimes, there is little if any societal or legal imperative to tell one's story of human rights violations. While this is changing as the human rights revolution progresses and legal mechanisms for enforcement, redress and even reconciliation proliferate, the survivor's voice is more often heard indirectly and informally than courtesy of an official process. By contrast, the refugee has long been in a situation where protection depends upon the telling of one's story. Whether she wants to or not, a refugee must speak. Moreover, she must speak in a legal context and, preferably, a legal idiom. As a necessary consequence of the individualised definition of a refugee, speech has become a precondition for recognition, protection and legal status that in the absence of official recognition remains remarkably 'thin'.⁴⁴ While some may have told their story before confronting the institutions of flight and protection (indeed, story-telling is a tried and tested coping and memory mechanism for survivors),⁴⁵ the compulsory confrontation with a refugee status determination regime necessarily transforms this narrative into a legal discourse.

The fact that the consequences of not speaking, or not telling a persuasive story about oneself, may result in a legally sanctioned return to violence and possibly death, thus creates a crucial self-narrating imperative. The threat of violence in the absence of a credible story in

⁴² This theme of passivity is taken up below. See text accompanying n. 60.

⁴³ Lucie White and Jeremy Perelman, 'Can Human Rights Practice Be a Critical Project - A View from the Ground', (2010) 44 *Loyola of Los Angeles Law Review* 157.

⁴⁴ See below, text accompanying nn. 144–6 and the discussion of precarity.

⁴⁵ Andrea Reiter, *Narrating the Holocaust* (2005) (Patrick Camiller trans, Continuum, 2000) [trans of: *Auf daß sie entstehen der dunkelheit* (1995)].

which an individual can be identified as being the specific target of persecution thus forces a novel, creative form of 'self'-reflection – an 'accounting', as Butler calls it. Discussing Nietzsche's focus on punishment and fear as the conditions within which a subject comes to question him or herself, Butler observes 'for urgent reasons, we must become self-narrating beings'.⁴⁶ This urgency that spurs the process of self-creation and narration frequently begins as soon as one crosses the border of the nation-state within which one seeks asylum. Thus the narrative of identity is intimately linked – temporally, geographically, emotionally, bodily – to that of shifting allegiances.

Unlike the human rights context, refugee status recognition and the protection it brings are not easily equated with redress, reconciliation or 'justice', although these are often palpable concerns of the refugee herself. The persecutor is not addressed except very indirectly,⁴⁷ and in order to create the 'safe' space for the story to be told the hearing is usually *in camera*, consistent with international procedural good practice. In several jurisdictions the refugee's name is kept anonymous in the public decision record, a reflection of the refugee's ultimate powerlessness to prevent or deter future persecution or retribution against oneself or one's family. To the extent that the interview situation represents a public space empowering a voice to be heard and a rights claim confronted by a society, it is thus very limited. Nor does the Refugee Convention or UNHCR Statute provide international forums for airing rights claims, unlike other human rights instruments that have treaty bodies, state reports and complaints mechanisms.⁴⁸ By contrast, the creation of such a 'public' space is identified by Smith and Schaffer as a pre-requisite for making possible a 'legitimizing process of telling and listening that demands accountability'.⁴⁹ The 'accounting' that occurs at the refugee hearing is a very different affair, the 'accountability' arguably

⁴⁶ See Judith Butler, *Giving an Account of Oneself* (Fordham University Press, 2005), p. 11.

⁴⁷ Where decisions are made public, they can amount to one state's executive or judiciary assessing whether the conduct of a foreign sovereign state amounts to a breach of international human rights law, with the implicit criticism that this represents. This has been discussed in the context of the 'act of state' doctrine in *R (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 [53], cited in *Habib v. Commonwealth of Australia* (2010) 183 FCR 62, 94 [105].

⁴⁸ Note, however, that the human rights treaty complaint mechanisms do not provide opportunities for individuals to 'be heard' in person; decisions (or 'views') are made on the papers.

⁴⁹ Schaffer and Smith, above n. 39, p. 2.

more personal and intimate, prioritising recognition over redress, state confirmation of status and conferral of protective rights over allocation of responsibility for past wrongs.⁵⁰

Certainly, in publishing decisions, states create a body of evidence that can be used by human rights advocates to call for responsibility and raise awareness, although this outcome is far from the minds of the creators of the narrative – the refugees, solicitors and administrative decision-makers. Moreover, the narratives produced in the published written decisions are frequently devoid not just of the personal but of personality, individuality and emotion;⁵¹ the system muffles and blends into blandness the refugee voice in order to provide an added level of protection. In this sense, the private, anonymous nature of the refugee determination procedure only partly achieves the 'deprivatization' of the self and its interpretation that institutional talk usually, even ideally, facilitates:⁵² the official written story is taken out of the private sphere, but simultaneously institutionalised, depersonalised and stripped bare to meet a standardised model of the 'refugee'. Given the refugee's emotional investment often over a long period of time in the legal process, and the cultural power of the written narratives that are produced, this *might* be a source of displacement in the refugee's life.⁵³ It is not, however, empirically proven. In my anecdotal experience, the written record rarely takes on such symbolic value, paling next to the experience of expressing one's story in the hearing, being 'heard' and receiving recognition.

3.3 *The refugee narrative in its institutional setting – structural impediments*

The narrative institutionalisation experienced by the non-citizen refugee is arguably exacerbated by their very powerlessness and liminality – an

⁵⁰ Asylum-seekers are increasingly using human rights regimes to air their claims of rights abuses with respect to both countries of origin and of flight. Refugee law itself, however, has no equivalent institutions, and thus supplies no such opportunities.

⁵¹ See conclusion for discussion of whether there is room for metaphor and irony in the institutional narrative.

⁵² See Holstein and Gubrium, above n. 37, pp. 153–61 on the deprivatisation of the interpretative activity.

⁵³ This is a phenomenon of narrative identity displacement, of course, not exclusive to the refugee experience. As Andrea Reiter warns with respect to holocaust literature, '[there are] epistemological consequences of expressing something in writing, namely, that the linguistic form of the story takes priority over the event itself.' Reiter, above n. 45, p. 3 (quoting Koselleck).

inevitable consequence of the interface of sovereignty with what Agamben calls 'the one and only figure of the refugee'.⁵⁴ This institutional aspect of the creation of refugee identity and experience is well addressed in the literature. Thus Zetter in an influential 1991 article answered the question 'who is a refugee?' with the blunt conclusion: 'it is one who conforms to institutional requirements'.⁵⁵ At the core of such arguments is the impact of the uneven power relationships that exist between the disempowered and vulnerable refugee and the bodies responsible for assessing their claim, shaping their narrative, and representing them to the public.⁵⁶ Again, this is a problem common to human rights and refugee narratives, each of which 'emerge in the midst of complex and uneven relationships of power' and a 'dialogic exchange between narrators'.⁵⁷ Influenced by the work of Arendt and Foucault, such studies see the refugee as yet another site of governmentality techniques for the production, discipline and domination of the subject, the refugee representing for Agamben the 'biopolitical' subject *par excellence*, whose 'bare life' can be controlled in a permanent state of exception.⁵⁸ As Owens points out in reviewing this literature, '[i]t has not been very difficult for critical refugee studies to present their subjects as vehicles of the circulation of disciplinary and biopolitical power' by

⁵⁴ Giorgio Agamben, 'Beyond Human Rights', in Eduardo Cadava and Aaron Levy (eds.), *Cities Without Citizens* (Slough Foundation, 2003), pp. 3, 4. See also Bishopal Limbu, 'Illegible Humanity: The Refugee, Human Rights, and the Question of Representation', (2009) 22 *Journal of Refugee Studies* 257.

⁵⁵ Roger Zetter, "'Labelling Refugees": Forming and Transforming a Bureaucratic Identity', (1991) 4 *Journal of Refugee Studies* 39. See also Zetter, above n. 5; Nelson Phillips and Cynthia Hardy, 'Managing Multiple Identities: Discourse, Legitimacy and Resources in the UK Refugee System', (1997) 4 *Organization* 159; Patricia Owens, 'Beyond "Bare Life": Refugees and the "Right to Have Rights"', in Alexander Betts and Gil Loescher (eds.), *Refugees in International Relations* (Oxford University Press, 2011); and the discussion of similar themes in the poverty law literature discussed by Robert Weisberg, 'Proclaiming Trials as Narratives' in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996), pp. 71–5. Gewirtz describes the 'formulaic genre' concerning 'the voice of the subordinated person facing the harsh power of the state bureaucracy and the struggle of the lawyer to recognize and give power to that voice.'

⁵⁶ See Zetter, above n. 55; Cynthia Hardy, 'Refugee Determination: Power and Resistance in Systems of Foucauldian Power', (2003) 35 *Administration & Society* 462; and more generally, Douzinas, above n. 5.

⁵⁷ Schaffer and Smith, above n. 39, p. 5.

⁵⁸ See the useful overview of Agamben's work and influence in Owens, above n. 55, pp. 134–41.

tracing the variety of 'discursive and institutional domains' that produce the 'figure of the refugee'.⁵⁹

For the most part, such studies look at law 'writ large' in its broader, disciplinary guises. In one study that specifically examines the determination regime from a sociological perspective, Hardy observes the distorting influence of the power imbalance as it operates within the all-encompassing inclusion/exclusion paradigm – a common theme in the socio-legal refugee literature. Such 'governing narratives' (in this case, the 'otherness' of the refugee) can create 'false certainties' which in turn adversely affect the purportedly independent decision-maker's findings. In this sense, the determination system can be justly accused of being complicit in the normative creation of otherness, a key mechanism in what Agamben has called the 'constitutive exclusion' by which refugees (or perhaps more accurately 'those not recognized as refugees') are simultaneously produced, regulated and excluded.⁶⁰

In the face of such a structural power imbalance and seemingly insuperable societal forces, it is unsurprising that the refugee often experiences a profound loss of control over the narrative, the hearing in which it finally takes place, and the outcome. Indeed, this very passivity is part of the governing narrative about 'refugees' employed and imposed institutionally by the determination regime. It reflects a trope that depicts the genuine refugee as helpless to protect herself from persecution, 'coerced' into flight ('they did not choose to leave'), and subject to the benign discretion of the foreign sovereign who may choose to protect those hapless souls whose worthiness is defined by their lack of autonomy. To reinforce this stereotyping, the refugee who displays too much autonomy is portrayed as duplicitous, a queue jumper, opportunist and liar, weaving tall tales to trick the authorities and therefore lacking in the requisite genuineness. The 'genuine' refugee is thereby characterised by passivity and certain essentialist qualities, which they are expected to display when appearing before the determination regime.

This culturally-specific essentialist discourse also plays a role in the social scripting of the new allegiance being forged by the refugee. Walker and Millbank, for instance, have demonstrated how those making claims based on sexual orientation in Canada, the UK, New Zealand and Australia are expected to express a culturally specific and *visible* type of

⁵⁹ *Ibid.*, p. 138.

⁶⁰ For Agamben this 'politicisation of bare life as such – constitutes the decisive event of modernity'. See Agamben, above n. 40, p. 4.

sexuality in their country of flight. As Millbank notes, there is an assumption that 'the inevitable outcome of relocating should be enthusiastic engagement in cultural manifestations of gayness, because that is how "freedom" is expressed.'⁶¹

Yet there remains a potential paradox at work here. By characterising the refugee as powerless in the face of such imposing structural impediments, the model of institutional determinism is arguably complicit in conforming to (if not validating) the dominant cultural narrative.⁶² In my experience, refugees are not so impotent, nor do they invariably feel disempowered by the determination process. Both the empirical and anecdotal evidence indicates that refugees are able to negotiate the legal strictures that would otherwise exclude them. Admittedly, this often takes the part of utilising the spectre of passivity which society demands of them. Razack, for instance, reports how some female refugees will play to certain societal stereotypes in the construction of their narrative in order to achieve recognition by portraying themselves as 'classic, passive, pitiable victims' of a 'barbaric culture'.⁶³ Similarly Zetter notes the different strategies employed by refugees to advance the distribution of specific social goods by playing certain roles defined by government regulation.⁶⁴

The governing narratives, in other words, can be used strategically by the refugee in telling their story. The risk, of course, is that this further consolidates an oppressive stereotype of powerlessness and passivity, reifying the very image of the refugee our society insists upon. As Butler might put it, the regulative discourse of refugee law structures

⁶¹ Jenni Millbank, "'The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations', (2009) 21 *International Journal of Refugee Law* 1, 18–19. See also Jenni Millbank, 'Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation', (2003) 1 *Seattle Journal for Social Justice* 725. A similar imposition of essentialised understandings of sexuality by those determining refugee status is noted in Walker's research. See Kristen Walker, 'Sexuality and Refugee Status in Australia', (2000) 12 *International Journal of Refugee Law* 175.

⁶² I note that this critique does not apply to the work of Millbank and Walker, as I discuss later.

⁶³ Natalie Oswin, 'Rights Spaces: An Exploration of Feminist Approaches to Refugee Law', (2001) 3 *International Feminist Journal of Politics* 347, 352, summarising the work of Sherene Razack, 'The Perils of Storytelling for Refugee Women', in Wenona Giles, Helene Moussa and Penny Van Esterik (eds.), *Development & Diaspora: Gender and the Refugee Experience* (Artemis Enterprises, 1996). See also Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (University of Minnesota, 2000), pp. 91–2.

⁶⁴ Zetter, above n. 55.

and coerces the performance of a certain refugee-ness that must appear stylised and natural, expressing an 'essence' that is a 'fabrication', 'manufactured and sustained through corporeal signs and other discursive means'.⁶⁵

The question I ask in the next section is whether refugee law is really so deterministic and disempowering, or whether an examination of the *detail* of its categories nonetheless reveals opportunities for greater autonomy and agency, for the creation of a more 'equal' recognition mechanism through which a subject (existing both within and outside the regulatory discourse) can exercise some control over her refugee narrative and thus experience a sense of autonomy and freedom in defining her own identity – and whether the advocate and decision-maker can play a role in interpreting and applying refugee law to achieve such outcomes. As I hope to show, Butler's framework also allows for this possibility; the law and its modes of 'recognition' do not and cannot produce 'closed' systems of identity – there is room for agency, in part through opening up the system to its own instability as it 'calls into being' what it 'purports to name', allowing the 'refugee' to resist and perhaps even redeem the very norms and institutions that have defined and confined her.⁶⁶

To consider this possibility requires a closer examination of the rules, categories and judicial interpretations of refugee law which frame and determine the refugee narrative. This is done using some of the ideas of narrative identity theory and recognition developed by two important thinkers in this field, Ricoeur and Taylor.

4. Finding a meaningful narrative identity in the categories of refugee law

The above section sketched the institutional context within which the refugee legal narrative is produced, contrasting its nature and purpose with the idealised human rights narrative, and highlighting the problems arising out of the power imbalances that structure and influence the telling, performing and reception of the 'essentialised' refugee story. If, however, the refugee subject is indeed a creation of and can only have agency within specific coercive rules and norms dictated by refugee law,

⁶⁵ See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990), pp. 173–80.

⁶⁶ See the interpretation of Butler's work in Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (Routledge-Cavendish, 2007), p. 124.

then it is necessary to examine these in some detail. To assist this examination, this section considers whether narrative-identity theory, popularised (for want of a better term) in academia by Ricoeur and the political philosopher Taylor, provides any insights onto the refugee narrative which must be told in the language of refugee law.⁶⁷

4.1 Mediating temporality

For Ricoeur, narratives play a 'mediating' role between a range of social, cultural, spatial, temporal and normative factors or 'contingencies' in one's lived experience which are often in 'discord'. In developing these ideas in *Oneself as Another*, Ricoeur argues that our narrative mediates between *descriptive* and *prescriptive* viewpoints, between the *fictional* and the *historical*, and the interpreter, interpreted and recipient.⁶⁸ These are (theoretically) unified, or consolidated, through 'emplotment' (a fancy word for character and plot) into one's personal, narrative identity.⁶⁹ Narrative thus acts as a process both of self-definition and recognition – a term not used by Ricoeur until later,⁷⁰ but linked to Taylor's work on the self which, as Laitinen has argued, is complementary to Ricoeur's in many ways.⁷¹ For

⁶⁷ Narrative identity is sketched briefly by Ricoeur in the third volume of *Time and Narrative*, Vol. 3 (Kathleen Blamey trans. University of Chicago Press, 1988), but is more fully elaborated upon in Paul Ricoeur, *Oneself as Another* (Kathleen Blamey trans. University of Chicago Press, 1992) [trans of: *Soi-même comme un autre* (1990)]. The idea of a narrative-identity is not new, and these authors build on a long tradition dating back to Aristotle's examination of 'mimesis' in *The Poetics*.

⁶⁸ See Ricoeur, *Oneself as Another*, above n. 67, pp. 114–15 ('A triad has thus imposed itself on my analysis: describe, narrate, prescribe – each moment of the triad a specific relation between the constitution of action and the constitution of the self').

⁶⁹ The concepts of the *ipse* and *idem* identities may be useful here, but are very difficult to summarise briefly, although Bernard Dauenhauer does an admirable job: 'Following a distinction in Latin between *idem* and *ipse*, Ricoeur holds that the self's *idem*-identity is that which gives the self, among other things, its spatio-temporal sameness. Its *ipse*-identity gives it its unique ability to initiate something new and imputable to himself or herself ... Without both sorts of identity there is no self. Because a self has both an *idem*-identity and an *ipse*-identity, it inhabits two irreducible orders of causality, namely the physical and the intentional orders. A comprehensive account of any genuine action must express the way it is related to both of these orders.', Bernard Dauenhauer, 'Paul Ricoeur' in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2009 edn).

⁷⁰ Paul Ricoeur, *The Course of Recognition* (David Pellauer trans, Harvard University Press, 2004) [trans of: *Parcours de la reconnaissance* (2004)].

⁷¹ Arto Laitinen, 'Charles Taylor and Paul Ricoeur on Self-interpretations and Narrative Identity', in Rauno Huttunen, Hannu L. T. Heikkinen and Leena Syrjälä (eds.), *Narrative Research. Voices of Teachers and Philosophers* (Sophi, 2002), pp. 57–71.

Taylor, one's narrative identity is primarily *ethically* directed. We experience the world in terms of values, desires and modes of life; and we shape our identities through a narrative directed towards what Taylor calls '*strong evaluations*', *orienting and constituting ourselves by what we value and what we identify with*.⁷²

A persuasive refugee legal narrative must similarly mediate the descriptive, temporal and ethical. From a strictly positive legal perspective – the one ultimately of concern to the legal representative and decision-maker – the determination of refugee status is, as Goodwin-Gill and McAdam have remarked, 'essentially an essay in hypothesis', an act of 'prophesying', to borrow Lord Diplock's evocative term.⁷³ This much is clear from the definition. A refugee is someone with a well-founded fear of persecution that might occur in the future, should they return to their country of origin. However, one of the best predictors of the future is what happened in the past. As the High Court of Australia confirmed in *Guo*, it is relevant for a decision-maker to consider the recurrence and regularity of previous persecution and the conditions under which it occurred, in order to establish the likelihood of its occurrence in the future.⁷⁴ The refugee advocate will therefore be concerned to elicit and highlight incidents of past persecution, but with the ultimate aim of strengthening the claim that such persecution is likely to occur again in the future.⁷⁵

Past events are also integral to the social identity that the law requires the refugee to demonstrate.⁷⁶ They may, for instance, help establish one's membership of a Convention category; after all, one is only a refugee if the persecution feared will be for reasons of one's (actual or perceived) race, religion, nationality, membership of a particular social group, or

⁷² Laitinen has argued that Ricoeur similarly sees an inherently ethical role in narrative identity in the form of self-evaluation. The positions are compatible.

⁷³ See Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd edn, 2010), pp. 54–5, citing Lord Diplock in *Fernandez v. Government of Singapore* [1971] 1 WLR 987, 993, concerning an analogous inquiry in extradition law.

⁷⁴ *Minister of Immigration and Ethnic Affairs v. Guo* (1997) 191 CLR 559, 572–4.

⁷⁵ Again, there is an analogous situation in the psychiatric setting. As Kirmayer has put it, the 'harmonisation' of these narratives is designed 'to bridge one world and the next ... cleaved apart by the violence of oppression, torture and forced migration'. Failure to bridge this 'radical disjuncture' can have personal and social consequences across the generations. See Kirmayer, above n. 4, 169.

⁷⁶ I use the term 'public' advisedly: the characterisation of refugee law as public has the tendency to exclude traditionally 'private' acts of persecution, exacerbating the gendered nature of the discourse.

political opinion. Past conduct may be *reflective* of one's affiliation (e.g. as an expression of one's political opinion), as well as *constitutive* of it (e.g. an 'exhibit' of some objectively identifiable 'common characteristic, attribute, activity, belief, interest, goal, aim or principle' that unites and makes 'cognizable' a particular social group).⁷⁷ Such past conduct and expressions may also demonstrate a likelihood to engage in certain conduct in the future, especially where to do so reflects the exercise of a fundamental right such as freedom of expression or belief, or an expression of one's sexuality.⁷⁸ This reasoning lies at the heart of judicial rejection of arguments that a claimant should modify a personal attribute (live 'discreetly' or in 'concealment') to avoid persecution in the future.⁷⁹ Indeed, this recent jurisprudence confirms a level of agency that lies at the heart of the refugee definition by highlighting the significance of the freedom of being able to express both one's individual and collective identity.

The law thus demands that a refugee's narrative relate how she has expressed or exhibited something about her 'self' in the past (and often the present) in order to establish her fear of future harm. One's past conduct is assessed as an expression of one's inner (even innate) 'nature'⁸⁰ – itself broadly understood by reference to one's attributes, choices or values, one's

⁷⁷ *Applicant S v. MIMA* (2004) 217 CLR 387 [69] (McHugh J). See also *Applicant A v. MIEA* (1997) 190 CLR 225, 241 (Dawson J). The Australian approach has been labelled the 'social perception' test, relying upon a level of potential, objective visibility of the group in question. For an analysis of this test in contrast to the 'protected characteristics' test as used in the US, Canada, New Zealand and the UK, see Michelle Foster and James Hathaway, 'Membership of a Particular Social Group', (2003) 15 *International Journal of Refugee Law* 477; Thomas Alexander Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003). For a recent critique of the 'social visibility' test as consolidating the public/private dichotomy and thus acting to the detriment of gender-based claims, see Fatma Marouf, 'The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender', (2008) 27 *Yale Law and Policy Review* 47.

⁷⁸ See, e.g., *Appellant S395/2002 v. MIMA* (2003) 216 CLR 473 [40] (McHugh and Kirby JJ); [82] (Gummow and Hayne JJ) and *HJ (Iran) v. SSHD* [2010] UKSC 31. Counsel in the latter case made the intriguing if infuriating argument that requiring an applicant who is gay to modify their behaviour on return amounted to taking 'internal flight within the self' to avoid persecution [20].

⁷⁹ See overview of arguments in *HJ (Iran) v. SSHD* [2010] UKSC 31.

⁸⁰ For the debate in the literature on whether a particular social group is defined by reference to 'innate' characteristics, see Walker, above n. 61.

history or experiences, as well as one's collective affiliations – which refugee law recognises as temporally located in a continuum with its legitimate present and future expression.⁸¹ In this sense, the structure of refugee law theoretically provides an ideal platform for a Ricoeur-like narrative that combines the self's spatio-temporal sameness (the *idem*-identity) and an expression of something imputable about one's self (the *ipse*-identity).

Such expressions are confined, of course, to the five Convention reasons. And no matter how flexible the 'particular social group' reason may have become in recent years (for instance in potentially covering traditionally private identities such as 'married women in Pakistan' or groups made cognisable by the conduct of non-state actors),⁸² or how widely we construe 'political opinion' to embrace non-traditional forms of dissent, the categories are necessarily limited,⁸³ thus restricting the nature of the identity expressed. The inevitable result is that the definition acts to exclude many who are otherwise in need of protection, especially those facing generalised violence or economic and social harm. While there may be other avenues for recognition of these claims,⁸⁴ the highly prized label of 'refugee' is frequently denied. The alternative is a narrative that is distorted by squeezing the refugee's story into categories imposed by the law. This in turn throws up questions of artificiality, conformity and authenticity.⁸⁵

That the law imposes restrictive conditions for a mandatory reflective narrative within which a degree of self-crafting occurs is not unique to

⁸¹ This schema is borrowed from James Hathaway who has categorised Convention reasons into '(1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, *since their history or experience is not within their current power to change*; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it'. See James Hathaway, *The Law of Refugee Status* (Butterworths, 1991), p. 161 (emphasis added).

⁸² See *Islam v. SSHD* [1999] 2 AC 629; *MIMA v. Khawar* (2002) 210 CLR 1.

⁸³ The courts have confirmed that 'particular social group' is not a 'catch-all category'. *Applicant A v. MIEA* (1997) 190 CLR 225, 241 (Dawson J); 260 (McHugh J). Helton's view that the category was intended to 'include all the bases for and types of persecution which an imaginative despot might conjure up' has not received any judicial or indeed much academic endorsement. See Arthur Helton, 'Persecution on Account of Membership of a Social Group as a Basis for Refugee Status', (1983) 15 *Columbia Human Rights Law Review* 41, 45.

⁸⁴ Notably in the development of complementary and subsidiary protection mechanisms. See Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2008).

⁸⁵ This is considered further below. See discussion in Section 3.3.

the refugee context. As Butler has demonstrated, variants of this dynamic are found in the work of Nietzsche, Adorno and Foucault.⁸⁶ Restrictions erected by rules and norms are an inevitable factor in the determination process, but should not be seen as either wholly deterministic or entirely undesirable. Indeed, the very narrowness but uncertainty of the definition can be credited for creating what Butler describes as an 'enabling and limiting field of restraint' – a field within which agency can paradoxically be expressed through a 'struggle with the unchosen conditions of one's life'.⁸⁷ Again, this is evident in the refugee narrative with the evolving nature of its basic categories of persecution, and with Convention reasons becoming the site of just such struggles as asylum-seekers narrate their experiences to determination regimes.

4.2 Recognition and the narrative's ethical orientation

For the refugee advocate, the concern to ensure the story told by their 'client' fits the pre-established categories and is 'forward looking'⁸⁸ must be a principal objective, more important than their vocational commitment to providing a 'voice' to the powerless. This is also where the 'narrative competition'⁸⁹ (or perhaps collaboration) between the client, the advocate and the decision-maker begins. Importantly, the advocate will now complement the story with 'objective' country information, which provides a context that the refugee herself is often unable to provide. Indeed, this parallel narrative is likely to be foreign to them, telling of different if analogous events and actors, and detracting from the uniqueness of their own narrative. Again, this new part of the story has a mediating function, designed to demonstrate the credible nature of claims about past events by seeing them as consistent with an objectively documented pattern – what Kirmayer calls the 'master narrative' – as well as establishing the likelihood

⁸⁶ See Butler, above n. 46, ch. 1.

⁸⁷ Ibid., p. 19 ('The norms do not produce the subject as its necessary effect, nor is the subject fully free to disregard the norm that inaugurates its reflexivity . . . If there is an operation of agency or, indeed, freedom in this struggle, it takes place in the context of an enabling and limiting field of contrast. . . . This struggle with the unchosen conditions of one's life, a struggle – an agency – is also made possible, paradoxically, by the persistence of this primary condition of unfreedom.')

⁸⁸ Hathaway and Hicks, for instance, insist on this orientation for all refugee law in their rejection of 'subjective' fear. See James Hathaway and William Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of "Well-founded Fear"?' (2005) 26 *Michigan Journal of International Law* 505, 535–43.

⁸⁹ This phrase is borrowed from Weisberg, above n. 55, p. 71.

(or 'real chance' in Australian terms) of the eventuality of future persecution.⁹⁰ However, in doing so it risks exacerbating the conforming, blending and depersonalising tendencies of the determination regime discussed above.

For the refugee, their narrative similarly acts to mediate the feared future and the traumatic past. However, the need for recognition of past persecution is motivated not solely by future fear but equally by 'the need to be seen and heard', to have one's experiences recognised and believed, and even to act as witness to the atrocities committed.⁹¹ This form of recognition is more akin to the influential Hegelian dialectic adopted by writers such as Taylor, Hoxheth, Fraser, Douzinas and more recently Butler⁹² in their formulation of a politics of (equal) recognition whereby identity is constructed dialogically through a process of mutual recognition.⁹³ Although this overlaps with the legal recognition strived for by the advocate – both forms of recognition are, after all, achieved through the differentially allocated norms and rules of refugee law – it is necessarily much more personal, or perhaps interpersonal (or intersubjective); a recognition of both an abstract and individual humanity. It explains why the administrative interview (or 'hearing') is such a crucial personal *and political* space, as well as legal *right*. As observed in the empirical work amongst asylum-seekers of Rousseau and Foxen in Canada, the refugee can find the experience of being 'understood' by another person as both 'hard

⁹⁰ See Kirmayer, above n. 4, 173. The 'master narrative' is not to be confused with the aforementioned 'governing narrative': the former concerns an 'objective' account against which the refugee's narrative is assessed; the latter contains cultural expectations and assumptions which direct the decision-making process.

⁹¹ For an empirical study of this phenomenon in the Canadian system, see Cécile Rousseau and Patricia Foxen, "Look Me in the Eye": Empathy and the Transmission of Trauma in the Refugee Determination Process', (2010) 47 *Transcultural Psychiatry* 70, 82–5.

⁹² I note that Judith Butler's initial scepticism of the popularity of recognition (see e.g., Butler, above n. 65, p. 183) appears to have been tempered in her recent re-working of Hegel's ideas. See Butler, above n. 46, and *Frames of War: When is Life Grievable?* (Verso, 2009), pp. 1–32. In the former, as Kathy Dow Magnus notes, Butler incorporates 'an innovative account of inter-subjective recognition into her discussion of the interpellated subject'. See Kathy Dow Magnus, 'The Unaccountable Subject: Judith Butler and the Social Conditions of Intersubjective Agency' (2006) 21 *Hypathia* 81, 82.

⁹³ Hegel posited that self-consciousness arose through a process (or struggle) of mutual recognition. For an overview, see Robert Stern, *Hegel and the Phenomenology of Spirit* (Routledge, 2002), ch. 3 ('The dialectic of the subject'); Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Joel Anderson trans, Massachusetts Institute of Technology, 1995) [trans of Kampf um Anerkennung (1992)], Part I ('An Alternative Tradition in Modern Social Theory: Hegel's Original Idea').

and pleasant. . . . *They understand you and that's the object, the purpose of my presence here*'.⁹⁴ The terminology used is revealing: the refugee justifies their very 'presence' by way of the need to be 'understood'. The word 'here' might mean the hearing, or the country of flight, or both; either way, it provides a temporal, geographical and even existential flavour to the statement.

For many others, however, the determination process falls far short of this ideal:

The experience of not being heard can be experienced by the claimant as completely catastrophic. It shatters [the] refugee's previous belief in humanity and their confidence in a more spiritual sense of Providence and in God. It also destroys their previously-held representation of Canada as a safe, benevolent, and just country.⁹⁵

Refugee law's insistence on a fair hearing as a core procedural right does not guarantee that a claimant actually experiences being 'heard' or, to echo the language of the UNHCR *Handbook*, 'understood'. A similar dynamic explains why the experience of *not being believed* is taken as a failure of recognition of one's humanity, a dehumanising and (in its legal effect) delegitimising of one's status by the sovereign state.⁹⁶ A lying asylum-seeker is not only not a refugee, they are barely a human being (or, to borrow from Arendt, they are reduced to a 'bare life'), let alone a full legal person.

The prevalence in determination procedures of issues of credibility has understandably dominated the academic literature on determination procedures,⁹⁷ and can be explained in many ways, not least as a function of cross-cultural miscommunication and the governing narrative of exclusion. However, it can also be seen as reflecting the fact that the refugee narrative itself is inherently an ethical one, in the sense that it is concerned with the meaning and justification of the rights and wrongfulness of actions, the virtue or vice of motivations, and the praiseworthiness or blameworthiness of the agents who perform them.

⁹⁴ Rousseau and Foxen, above n. 91 (emphasis added). Note the synergies with the UNHCR *Handbook's* advice (at [202]) that decision-makers 'apply the criteria in a spirit of justice and understanding'.

⁹⁵ Rousseau and Foxen, above n. 91, 84.

⁹⁶ Similar themes are taken up by Gregor Noll and Jennifer Beard, 'Parrhesia and Credibility: The Sovereign of Refugee Status Determination', (2009) 18 *Social and Legal Studies* 455. My thanks to Eve Lester for bringing this article to my attention.

⁹⁷ See statistics in Byrne, above n. 36.

Indeed, the very *language* of refugee law within which the narrative must be told provides a strong linguistic link to the ethical component of the temporal narrative. One must, for instance, have a well-founded 'fear', a word imbued with ethical content, defined in the OED as 'a particular apprehension of some *future evil*. . .',⁹⁸ in this case the evil of discriminatory harm. Although largely construed as an objective category, refugee law also provides for, even requires, an assessment of a refugee's *subjective* fear.⁹⁹ 'Persecution' is similarly an ethically-imbued concept, linked in the jurisprudence (and codified in legislation in Australia and Europe) not just to violations of 'fundamental' human rights¹⁰⁰ but to more evocative ethically-centred terms in human rights discourse such as 'human dignity' and 'the calls of common humanity'.¹⁰¹

There is also a crucial ethical orientation in the nexus component of the definition (persecution 'for reasons of'), which requires the persecutor to be 'motivated' by a discriminatory and therefore blameworthy impulse to target the refugee as a member of a Convention category.¹⁰² In other words, the ethical element of the refugee narrative arises not just because the refugee is seeking 'protection' – itself both an ethical and legal term – but as a result of conduct that is explicitly directed at and motivated by a person's identity, whether defined by one's immutable characteristics, deeply held values or commonly shared history and experience. The fact that one must identify with a Convention reason in one's narrative and express a subjective fear thus reflect a strong

⁹⁸ Oxford English Dictionary (1989), p. 780, cited by Hathaway and Hicks, above n. 88, 507.

⁹⁹ See UNHCR *Handbook*, [37] ('Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. *Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.*' (emphasis added)). For a critique of the tendency exclusively to emphasise the objective element, see B. S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems', (2004) 23 *Refugee Studies Quarterly* 55.

¹⁰⁰ See, e.g., Section 91R of the Migration Act (Cth) which lists a set of standard fundamental rights; EU Qualifications Directive ('severe violation of basic human rights'); Goodwin-Gill and McAdam, above n. 73, p. 91; UNHCR *Handbook*, [151].

¹⁰¹ *Chan Yee Kin v. MIEA* (1989–1990) 169 CLR 379, 429 (McHugh J: 'measures "in disregard" of human dignity may . . . constitute persecution'); *Chen Shi Hai v. MIMA* (2000) 201 CLR 293, 303 (McHugh J: 'whether it offends the standards of civilized society which seek to meet the calls of common humanity'.).

¹⁰² *Ram v. MIEA* (1995) 57 FCR 565, 568 approved in *Applicant A v. MIEA* (1997) 190 CLR 225, 284–5 (Gummow J).

evaluation, or (interpersonal) ethical orientation, that the refugee is seeking to be acknowledged.

Finally, the term 'recognition' speaks to an intimately ethical understanding of one's identity and, on the part of the receiver of the narrative, an ethical response to the 'other' who is seeking to be recognised. As Honneth has argued, the 'struggle for recognition' in society by marginal groups must be understood by way of a certain 'moral grammar' in which an individual makes a normative claim to recognition and respect. For Honneth, intersubjective recognition allows individuals to acquire the 'self-confidence, self-respect, and self-esteem' necessary for the full development of their identities and their capacity to participate in society with equal rights.¹⁰³ As Anderson explains, '[t]he "grammar" of such struggles [of recognition] is "moral" in the sense that the feelings of outrage and indignation driving them are generated by the rejection of claims to recognition and thus imply normative judgements about the legitimacy of social arrangements'.¹⁰⁴

Framed by a narrative that requires a strong ethical orientation, it is predictable that the failure to receive recognition can have such a devastating impact on the individual's world-view. The site of recognition – the administrative hearing itself, or more broadly that of the determination regime framed by its legal categories – necessarily becomes one of intense ethical and emotional significance for both the refugee seeking recognition, and the decision-maker whose role is to 'hear' their normative claim and decide whether it is one that merits recognition *in law*. The fact that this act of recognition is also one of 'protection' – again a term of art in the discipline – invests the process with added ethical import, going to what Butler sees as an apprehension of a 'life' that itself is 'produced according to norms that qualify it as a life or part of life'¹⁰⁵ and which results in 'the ethical problem of what it is to acknowledge or indeed to guard such a life against injury and violence'.¹⁰⁶

Given its resonances, it is unsurprising that 'recognition' is the term that is most often internalised by claimants, framing the dialogue about

¹⁰³ Honneth, above n. 93, pp. 129–34.

¹⁰⁴ Joel Anderson, 'Translator's Introduction', in Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, (Joel Anderson trans, Massachusetts Institute of Technology, 1995) p. xii. Following Honneth, Douzinas asserts, '[t]he struggle for recognition is the key ethical relationship or the main form of practical intersubjectivity', above n. 39, pp. 383–5.

¹⁰⁵ Butler, *Frames of War: When Is Life Grievable?* above n. 92, p. 3. ¹⁰⁶ *Ibid.*

their experiences and carrying the weight of the fears and expectations that accompany the confrontation with the determination regime.

The Convention contains one last relevant narrative cue to complement this immersion of the claimant in an ethical self-narrative. Under the legal definition, a refugee must not just face potential persecution, but must *be worthy of being* a refugee. This much is apparent in the operation of the exclusion clause in Article 1F of the Convention, designed by the framers to exclude persons from the definition where there are serious reasons for considering that they have committed international or serious non-political crimes. As part of the definition of the term 'refugee', Article 1F does not technically exclude refugees; it *defines* them in ethical terms on the basis of their past conduct and affiliations.¹⁰⁷ As the UNHCR and the courts have noted, a key purpose behind the exclusion clause is to exclude those *not deserving* of protection *as refugees*.¹⁰⁸ It is to be used (indeed, it theoretically operates automatically) even for those who have been officially punished already for their crimes, or whose conduct would never result in prosecution, or who are genuinely remorseful and rehabilitated.¹⁰⁹ This aspect of the regime is not necessarily apparent to the claimant who may treat their arrival in a country of refuge as an opportunity to repent of their 'sins' and claim protection in a genuine *mea culpa* at the border. In such cases, refugee law operates to ensure that one's conduct leaves an indelible stain on one's character that no narrative can remove. For those thereby excluded, other avenues of complementary protection may exist, but they will be denied the normative label of and recognition as a 'refugee'.

¹⁰⁷ Note that courts have confirmed that mere membership of a 'terrorist' organisation does not in itself result in exclusion. Complicity and individual responsibility must still be ascertained. See *SHCB v. MIMA* [2003] FCA 229 [17] (Selway J); see also CJEU, Joined Cases C-57/09 and C-101/09, *Germany v. B & D*, Grand Chamber, 9 November 2010.

¹⁰⁸ UNHCR, 2003 Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003) HCR/GIP/03/05, [2] ('The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees.'). This view has been endorsed in judicial decisions, for instance *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 1222. For other purposes underlying the exclusion clause, see Matthew Zagor, 'Persecutor or Persecuted', (2000) *University of New South Wales Law Journal* 164.

¹⁰⁹ Despite academic critique, no jurisdiction engages in a 'balancing' (or proportionality) inquiry.

4.3 *Retelling, performativity and the dilemma of authenticity in the self-narrating refugee law discourse*

The temporal and ethical elements of the refugee self-narrative are nowhere more apparent than in the retelling of the story which the determination procedure requires. From the moment they arrive in a country of refuge, a refugee must begin the process of repeating their story – to the authorities, to their legal representative, to torture and trauma services, to welfare agencies, in written and oral form, on each occasion translated, summarised, reworked, massaged and interpreted by the recipient, and all the time adding to an ever growing bureaucratic record of their experiences before and during flight.

As noted above, refugee law itself recognises that a story will unfold, the UNHCR *Handbook* recommending multiple hearings and the relaxing of the rules of evidence to facilitate their telling and reception. The subsequent creation of a lengthy and rich narrative has important and mixed ramifications. While allowing for the refugee's story to be expressed more fully over time as they build trust in the authorities and their advocates and as their memories and reflections mature and coalesce around certain themes, retelling also provides fertile ground for decision-makers to find contradictions which may throw doubt on the credibility of a claim. After all, a story will invariably change in the retelling. As memory researchers have pointed out, such distortion is exacerbated for those who have experienced trauma.¹¹⁰ Moreover the method for the elicitation of the narrative by the authorities is virtually tailor-made to produce discrepancies. As Evans Cameron notes, 'one likely could not design a retrieval methodology that would produce greater inconsistencies than one that gives its subjects a self-administered free recall form to fill out and then invites them to a face-to-face interview and asks them cued recall questions.'¹¹¹

The result is predictable. A changed story attracts accusations of fabrication, just as an unerringly consistent one arouses suspicions of coaching and artificiality. Refugees and their advocates have to become

¹¹⁰ See the literature canvassed in Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory', (2010) 22 *International Journal of Refugee Law* 469, 510 ('A subject demonstrates a 'high degree of consistency' when she directly contradicts only 20 per cent of her previous testimony, and is doing 'relatively well' when she misremembers only 20 per cent of her most memorable personal event dates from within the last ten weeks.')

¹¹¹ *Ibid.*, 507.

adept at negotiating this dynamic, but they face significant structural obstacles.

From the perspective of narrative theory, retelling is less problematic; indeed, it is virtually mandated. As Ricoeur has noted, narratives create a dialectic of innovation and sedimentation.¹¹² By retelling one's history of persecution for a Convention reason, the self-definition thereby created will solidify, become routine and habitual. This imperative is all the more compelling for the refugee whose status, identities, memories and allegiances are in flux. A statement made by a refugee shortly after arrival occurs 'during a time of anxiety and radical uncertainty, when the asylum seeker lacks a definite social status and familiar context with which to anchor and stabilise his self-understanding . . .'.¹¹³ Refugee law's categories, as argued above, provide one avenue for exploring this self-understanding through a progressive narrative recognition process.

Butler's work is virtually tailor-made for unpacking the mechanisms by which the narrative iterations of the refugee legal process create the conditions for the temporal and ethically-oriented narrating-self:¹¹⁴

[P]erformativity cannot be understood outside of a process of iterability, a regularized and constrained repetition of norms. And this repetition is not performed by a subject; this repetition is what enables a subject and constitutes the temporal condition for the subject. This iterability implies that 'performance' is not a singular 'act' or event, but a ritualized production, a ritual reiterated under and through constraint, under and through the force of prohibition and taboo, with the threat of ostracism and even death controlling and compelling the shape of the production, but not, I will insist, determining it fully in advance.

The danger, of course, is that a performance will be seen as such – a refugee playing the part, parodying the textbook 'refugee' in a ritual of self-imitation.¹¹⁵ As a result, the persuasiveness of the story may wane in the eyes of the 'objective' decision-maker, and the 'authenticity' of the story and thus of the individual be called into question. In a legal system

¹¹² Paul Ricoeur, *Time and Narrative Volume I* (Kathleen McLaughlin and David Pellauer trans, University of Chicago Press, 1984) [trans of: *Temps et Récit* (1983)], ch. 3 ('Time and Narrative: Threefold Mimesis'), pp. 68–70.

¹¹³ Kirmayer, above n. 4, 174.

¹¹⁴ Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (Routledge, 1993), p. 95.

¹¹⁵ For a fascinating account of this dynamic in popular culture, see Wendy Doniger, *The Woman who Pretended to be Who She Was: Myths of Self-imitation* (Oxford University Press, 2005).

that provides the discretion to assess credibility on the basis of demeanour as well as the internal consistency of one's story, this can be a serious liability. And should one innovate, adding to the story through linguistic creativity and internal reflection, the potential for contradiction is magnified, generating further credibility traps.

Despite its tendency to value linear, consistent accounts, refugee law has demonstrated some internal adaptation mechanisms to address the realities of the unfolding refugee narrative. Courts have long recognised that several factors, from cross-cultural miscommunication to¹ the impact of trauma on memory, serve to mould the unique development of a refugee's story over time. Over-enthusiastic dissection of multiple stories has been admonished, and guidance provided for realistic assessment of demeanour and consistency.¹¹⁶ Administrative policies have followed suit, including referring decision-makers to psychology studies that challenge the link between inconsistencies in recall of traumatic experiences and credibility. In Australia, for instance, both courts and

¹¹⁶ The causes of inconsistency are well canvassed in the literature and jurisprudence. A story told at the border, for instance, may be infected by what a refugee has been told to say by a people smuggler. It is usually told in relative ignorance of the law, and distrust, even fear, of all forms of government authority. The failure to mention events which may not seem of crucial importance, or are considered matters of shame – one's sexuality, an incident of rape – will often become the focus of the final interpreter in whose hands the refugee's fate lies. These factors are recognised by Courts and policy makers. For Australian case law, see the discussion in *Selliah v. MIMA* [1999] FCA 615 [2] (North and Einfeld JJ); and *MIMA v. SGLB* (2004) 207 ALR 12, 30–3 [73] (Kirby J), who cites *Selliah* and UNHCR *Handbook*, [198]–[200], noting '[t]here is no necessary correlation between inconsistency and credibility . . . Many factors may explain why applicants present with the appearance of poor credibility. These include: mistrust of authority; defects in perception and memory; cultural differences; the effects of fear; the effects of physical and psychological trauma; communication and translation deficiencies; poor experience elsewhere with governmental officials; and a belief that the interests of the applicants or their children may be advanced by saying what they believe officials want to hear. The Tribunal must be firmly told - if necessary by this Court - that the process is one for arriving at the best possible understanding of the facts in an inherently imperfect environment. It is not to punish or disadvantage vulnerable people because they have made false or inconsistent statements, or are believed to have done so.' Judicial notice has been taken of the work of scholars such as Hathaway, Kneebone and Taylor regarding inconsistencies in testimonies (e.g. *Kopalapillai v. MIMA* (Full Court of the Federal Court of Australia, unreported, 8 September 1998). See also *Perera v. MIMA* (1999) 92 FCR 6 (Kenny J doubting the accuracy of relying upon demeanour in credibility assessments given cross-cultural factors, especially when working through an interpreter), citing *Kathiresan v. MIMA* (unreported, 4 March 1998). For equivalent Canadian jurisprudence, see Evans Cameron, above n. 110.

the administration have referred decision-makers to the factors identified in Herlihy, Scragg and Turner's aptly titled 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interviews Study'.¹¹⁷

Yet determination regimes remain dogged by a credibility fixation,¹¹⁸ applying what Coffey calls a 'doctrine of recent invention' whereby the 'timing of a claim' is considered 'a measure of its probity'.¹¹⁹ Well-meaning attempts by judicial and administrative arms of government to set reasonable parameters for assessing inconsistencies in the different iterations of a refugee's story take us only so far in tackling a mindset influenced by the quasi-scientific predisposition of the legal system and its immersion in a 'culture of authenticity'.¹²⁰ It reflects a disjunct between law and practice that is unfortunately found throughout the discipline.¹²¹

Kirmayer is perceptive here, observing in his empirical research into the Canadian determination regime that '[decision-makers] hold an implicit epistemology in which a credible and truthful account is isomorphic with a single sequence of events. A truthful story is a fixed, reliable,

¹¹⁷ Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 *British Medical Journal* 324, referred to in Department of Immigration and Citizenship, PAM3: *Asylum Claims – Assessing Credibility*. See also Migration Review Tribunal / Refugee Review Tribunal, *Guidance on the Assessment of Credibility* March 2012, www.mrt-rrt.gov.au/Conduct-of-reviews/Guidelines/Guidelines/default.aspx. Decision-makers in Australia are guided but not bound by these policy instruments.

¹¹⁸ See statistics in Anker, above n. 36. Empirical work with decision-makers adds context to the data. Millbank, for instance, cites a study of Canadian tribunal members by Cecile Rousseau and Patricia Foxen who 'divide members into those who saw their role as being "lie detectors" and those who saw their role as one of dealing with complexity. . .'. Millbank, "'The Ring of Truth'", above n. 61, 29, citing Cecile Rousseau and Patricia Foxen, 'Constructing and Deconstructing the Myth of the Lying Refugee' in Els van Dongen and Silvie Fainzang (eds.), *Lying and Illness: Power and Performance* (Het Spinhuis, 2005).

¹¹⁹ Guy Coffey, 'The Credibility of Credibility Evidence at the RRT', (2003) 15 *International Journal of Refugee Law* 377, 389–90.

¹²⁰ Charles Taylor's development of a theory of recognition is designed in part to tackle criticisms of modernity's 'culture of authenticity' and its tendency to marginalise commitment to community. See Charles Taylor, *The Ethics of Authenticity* (Harvard University Press, 1991).

¹²¹ See, e.g., Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (Routledge, 2008), p. 256; Millbank also observes that the various gender guidelines adopted in Australia and the UK 'appear to have been honoured far more in the breach than the observance at all levels of the refugee determination process.' Millbank, above n. 61, 26.

and reproducible account of historically verifiable events.¹²² Moreover, as noted above, a credible story must not just be internally and temporally consistent, but must bear a similarity to the template 'authentic' story generated by depersonalised, anonymous accounts in reliable country reports. An internally and externally consistent story is thereby treated both as objectively verifiable and a reflection of some discernible and constant 'truth' about the identity of the claimant. It is a phenomenon not limited to the credibility discourse. As Chimni has pointed out, the objectivist turn of refugee law and its concomitant rejection of subjectivity provide little room for the type of reflexivity and autonomy that narrative theory would promote: 'what objectivism tends to do is substitute the subjective perceptions of the State authorities for the experience of the refugee.'¹²³ The impact of objectivism is intensified by the anonymous nature of the enterprise, and the tendency to write decisions in the third person. Truth, as Foucault has argued, is usually anonymous.¹²⁴

Recognition, an inherently subjective (or inter-subjective) activity, thus depends in part upon a fiction of objectivity.¹²⁵ This paradox lies at the heart of refugee law's capacity to provide an opportunity for an empowering self-narrative. The objectivist epistemology must be addressed if the discipline is to adopt more innovative attempts at bridging the various narratives.

Logic suggests that this pervasive theory of knowledge can only be successfully challenged by the direct application of other dominant discourses, such as from the field of psychology.¹²⁶ Unsurprisingly, refugee

¹²² Kirmayer, above n. 4, 170–2.

¹²³ See Chimni, above n. 99, 61. Chimni's observations concerned the relegation of an assessment of 'subjective' fear, but are equally applicable here. Note his citation of Costas Douzinas and Ronnie Warrington, 'A Well-founded Fear of Justice: Law and Ethics in Postmodernity', in Jerry Leonard (ed), *Legal Studies as Cultural Studies* (State University of New York Press, 1995), pp. 197, 209 ('all traces of particularity and otherness are reduced to a register of sameness and cognition').

¹²⁴ 'Once these disciplines crossed the scientific threshold of "formalization" and succeeded in developing procedures of concept formation, evidence, verification, etc., then the name of the author was no longer central to the authority of the text. Truth became more anonymous': Paul Rabinow, Introduction, *The Foucault Reader* (Pantheon Books, 1984), p. 24.

¹²⁵ See the exploration of this tension in Arthur Glass, 'Subjectivity and Refugee Fact-Finding' in Jane McAdam (ed.), *Forced Migration, Human Rights and Security* (Hart, 2008).

¹²⁶ It is worth noting that this brings its own pitfalls. As my colleague Mark Nolan and his students have observed in their in-class research, members of the Refugee Review Tribunal have selectively misused, misinterpreted and distorted the conclusions of psychology literature. See, e.g., RRT Decision N02/43965 [2003] RRTA 715 (1 August 2003).

advocates are increasingly using reports from torture and trauma counselors in their submissions, 'contextualising the asylum-seeker's testimony within relevant trauma literature'.¹²⁷ According to Fiske and Kenny in a West Australian study, applications prepared jointly by lawyers and social workers had a significant success rate in addressing credibility issues.¹²⁸ Such collaborations potentially open up the space for the eventual application of narrative theory that provides for a dynamic of innovation and iterability which refugee law in practice if not in theory currently finds difficult to accommodate.¹²⁹

5. Expressing a narrative – alienation or autonomy in the recognition of the legal person

The discussion so far has tackled refugee law and the procedures for the determination of refugee status from various perspectives, identifying both the obstacles to and opportunities for recognition of a meaningful self-narrative. One of the themes touched upon has been the ways in which narrative recognition entails the production and apprehension of the person. This final section considers the nature of the *legal* person which refugee law helps to shape in the recognition process, and the relevance in this context of a refugee's control over or alienation from their self-narrative.

A common strand in narrative theory is the Hegelian notion of externalisation, or what Taylor calls expressivism.¹³⁰ By expressing our internal and ethical orientations, we objectify and externalise an identity with which we can then identify. Expressivism can in turn be linked to Hegelian property theory according to which '[i]n becoming a person one must put oneself into the external world and then reappropriate the self through the appropriation of objects in the world'.¹³¹ As with much

¹²⁷ Lucy Fiske and Mary Anne Kenny, "Marriage of Convenience" or "Match made in Heaven": Lawyers and Social Workers Working with Asylum Seekers', (2004) 10 *Australian Journal of Human Rights* 137, 144.

¹²⁸ *Ibid.*, 154. I am indebted to Pasha Peyrovi for bringing this study to my attention.

¹²⁹ Many commentators have focused upon the training required of decision-makers to be more receptive to narrative tropes, including working with notions of empathy, imagination and cultural awareness. Some of these ideas are covered in the Conclusion.

¹³⁰ Charles Taylor, *Hegel and Modern Society* (Cambridge University Press, 1979), pp. 3, 133–4; Charles Taylor, *Sources of the Self* (Cambridge University Press, 1989), ch. 21 ('The Expressivist Turn').

¹³¹ Margaret Davies and Ngaire Naffine, *Are Persons Property: Legal Debates about Property and Personality* (Ashgate, 2001), p. 4. Although his theory of property is

enlightenment philosophy, this is ultimately a theory of freedom that arises from the autonomy which control over one's externalised identity provides: the act of self-appropriation helps a person realise subjectivity and thus achieve freedom, as control of such 'property' provides the means by which we relate freely with others.¹³² According to Radin, this mindset also lies at the heart of liberal jurisprudence's legal person who is only able through such individuation and self-proprietorship to enjoy and exercise legal rights in relation to other self-possessing persons.¹³³

It is a small step to apply this theory to narrative-identity theory whereby the self-proprietor is also the self-narrator. As our society places increasing value on self-articulation (or perhaps more accurately 'self-articulation'),¹³⁴ the narrative itself has become objectified and reified. One externalises one's story, and on its recognition one 'reappropriates oneself', in a way not dissimilar to Taylor and Ricoeur's theories of appropriation.¹³⁵ *To the extent that we control our own narrative, we control our legal and personal identities.* A complementary way to understand this dynamic from the perspective of political theory is in Pettit's notion of 'discursive control' as the source of personal freedom. Influenced by Locke's view of agency, Pettit observes:¹³⁶

[a]n agent's freedom as a person will naturally be identified . . . with the form of control that people enjoy within discourse-friendly relationships. An agent will be a free person so far as they have the ability to discourse and they have the access to discourse that is provided within such relationships.

As described above, the refugee story which the law demands is a collective effort by many players with sometimes conflicting priorities and perspectives about the story to be told. It is also a story that the refugee is not always equipped to control. At one level, this is consistent with the inter-subjective nature of the recognition process, and the

only one aspect of Hegel's approach to the self, the notion of self-proprietorship has influenced Anglo-Saxon conceptualisation of the legal person in both positivist and natural law jurisprudence. See further C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press, 1962).

¹³² Ibid., p. 7, relying upon the classic article by Margaret Jane Radin, 'Property and Personhood', (1982) 34 *Stanford Law Review* 957.

¹³³ See also Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge, 2007), pp. 89–92.

¹³⁴ Holstein and Gubrium, above n. 37, p. 30.

¹³⁵ See Laitinen, above n. 71, 2.1 ('The implicit, the articulated, the re-appropriated').

¹³⁶ Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford University Press, 2001), p. 70.

collaborative narrative facilitated by refugee law. As the UNHCR *Handbook* itself notes, there is a 'shared duty' involved in producing the narrative. By bringing social workers into the process, refugee advocates are arguably allowing a richer, contextualised narrative to be told. Yet as a result, the final, translated story which is the object of recognition (or withholding of recognition) may not be the one the refugee narrates, or which she thinks *is or should be* the object of recognition. This may in turn, at least at the level of theory, result in *misrecognition*,¹³⁷ even when refugee status itself is officially 'recognised'. To be misrecognised in this sense is, as Fraser says, 'to suffer both a distortion of one's relation to one's self and an injury to one's identity.'¹³⁸ This may in part explain the level of dissatisfaction experienced by those confronting recognition regimes.

It may even be that the objectification and institutionalisation of the story, and the subsequent misrecognition, results in a form of alienation from the narrative and thus, potentially, alienation from oneself – or abjection.¹³⁹ This is tangible in the context of the refused claimant for whom the *failure* to achieve recognition results in an almost total loss of personal, physical and political freedom. In the Australian context, it is manifested in the threat of mandatory detention regime for unlawful non-citizens (i.e., those not on valid visas),¹⁴⁰ the inevitable legal consequence of failure to achieve recognition should one refuse to return

¹³⁷ For Nancy Fraser, 'to be misrecognized is . . . to be denied the status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect or esteem'. See Nancy Fraser, 'Rethinking Recognition' (2000) 3 *New Left Review* 107, 113–14.

¹³⁸ Ibid., 109. An alternative but complementary view is Butler's argument that the very process of producing a narrative of oneself for recognition results in dispossession. See Butler, above n. 46, p. 36 ('If it is an account of myself, and it is accounting to someone, then I am compelled to give the account away, to send it off, to be dispossessed of it at the very moment that I establish it as *my* account.' See also Butler, above n. 46, p. 78.

¹³⁹ Magnus argues in her critique of Butler that 'the experience of self-alienation that defines the abject has much in common with the self-negating tendencies of socially imposed guilt.' See Magnus, above n. 92, 85 (emphasis added).

¹⁴⁰ See Sections 189, 196 and 198 of the Migration Act 1958 (Cth) and the interpretation of these provisions in *Al-Kateb v. Goodwin* (2004) 219 CLR 562 as providing for indefinite detention. As the UN Human Rights Committee has frequently pointed out, this statutory regime can result in individuals being arbitrarily detained in breach of Article 9 of the International Covenant of Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See *A v. Australia*, UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April 1997, [9.4]–[9.5]; *Bakhtiyari v. Australia* UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003, [9.3]–[9.4].

home voluntarily. Such persons have, through the alienation from their story, lost self-proprietaryship and thus ultimately their freedom, whereby freedom is a function of such possession.¹⁴¹ The unlawful non-citizen possesses, at most, a very 'thin' type of legal personality,¹⁴² and while it may well be, as Justice Deane reminded us in *Kioa v. West*, that an unlawful alien is not an 'outlaw',¹⁴³ they otherwise lose almost all capacity to insist upon their basic freedoms. When someone is in such a precarious legal position (what Butler calls 'precarity'), when their legal status is so thin, it is unsurprising to find them being treated as a species of property by the state.¹⁴⁴

This state of precarity is the inevitable outcome of what Butler describes as the differential operation of the norms of recognition¹⁴⁵ that allocate 'which lives are livable, and which are not'.¹⁴⁶ Those who fail to be recognised as Convention refugees risk being allocated a barely livable life. Legal recognition, by contrast, creates an almost full legal, albeit still subjected, person.¹⁴⁷

6. Conclusion

The production and reception of the refugee legal narrative is a complex phenomenon involving several narrators with sometimes conflicting stories and objectives. In many ways, it is unique, both in terms of its necessary structure and its promised outcomes of full legal personhood and surrogate protection. As a human rights story, it bears a resemblance to those told in other human rights forums. But without the promise of redress and reconciliation for past persecution, and in the charged context of 'otherness' that structures the experience of displacement

¹⁴¹ I am taking some liberties here with the work of Macpherson, above n. 131.

¹⁴² The notion of a 'thin' legal status is explored in the work of Douzinas, above n. 39, 388.

¹⁴³ *Kioa v. West* (1985) 159 CLR 550, 631 (Deane J).

¹⁴⁴ Davies and Naffine, above n. 131, p. 51.

¹⁴⁵ See, e.g., Judith Butler, *Undoing Gender* (Routledge, 2004), p. 2 ('[I]f the schemes of recognition that are available to us are those that "undo" the person by conferring recognition, or "undo" the person by withholding recognition, then recognition becomes a site of power by which the human is differentially produced.')

¹⁴⁶ *Ibid.*, p. 13.

¹⁴⁷ Axel Honneth, drawing upon Althusser's subjection thesis, insists that 'practices of recognition don't empower persons but subject them'. See Axel Honneth, 'Recognition as Ideology' in Bert van den Berk and David Owen (eds.), *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (Cambridge University Press, 2007), p. 323.

more generally, the more personal and constitutive aspects of recognition inevitably come to the fore – a need for recognition in one's story of a shared humanity, a breaking down of otherness, a recognised place in one's new country as both an individual and a vulnerable subgroup, and in return a recognition through the distribution of legal status by a 'just' host state.¹⁴⁸

The law, however, is an imperfect vehicle for the achievement of such a multiplicity of 'recognitions'. They require, for instance, a degree of empathy and intersubjectivity that the law ordinarily abhors. Moreover, as the last section demonstrated, the risk of objectification and alienation is great, and sometimes exacerbated by a legal process that differentially allocates precarity and legal protection. The power imbalance undoubtedly is partly to blame: as Zetter point out, refugees are particularly subject to 'donative discourses' imposed by institutions and more powerful players. For Zetter, one's original refugee 'story' is thereby 'relinquished to the bureaucratic dictates of 'case',¹⁴⁹ resulting in stereotyping, standardisation, loss of control, disaggregation and designation in a system that is ultimately non-participatory.¹⁵⁰ Compounded by the standardisation required of a 'credible' (or 'authentic') narrative and the objectivism that strips a story of its subjective quality, obstacles to the creation of a meaningful narrative-identity would appear to be virtually insurmountable.

But is this powerlessness overstated? If, as argued above, refugee law – its principles, categories and mandatory story-telling requirement – provides an opportunity, albeit imperfect, for a meaningful self-narrating identity to be generated through an intersubjective process of recognition, can the opportunities be grasped by the narrators – including decision-makers – to provide better forums for the refugee to experience self-articulation and control of their story, one more consistent with the dialogic form of recognition envisaged by Hegel and his contemporary followers?¹⁵¹ With the disempowerment that flight usually entails, the refugee legal narrative may provide the potential for a level of empowerment, sitting alongside

¹⁴⁸ I have deliberately avoided bringing questions of justice into the chapter, but note its potential relevance to the recognition discourse.

¹⁴⁹ Zetter, 'Labelling Refugees', above n. 55, 47. ¹⁵⁰ *Ibid.*, 44–5.

¹⁵¹ As Butler notes in *Frames of War: When Is Life Grievable?* above n. 92, p. 6: 'The problem is not merely how to include more people within existing norms, but to consider how existing norms allocate recognition differentially. What new norms are possible, and how are they wrought? What might be done to produce a more egalitarian set of conditions for recognizability? What might be done, in other words, to shift the very terms of recognizability in order to produce more radically democratic results?'

other narratives that the refugee must relate.¹⁵² After all, any recognition process mediated through the law will be simultaneously 'enabling and limiting',¹⁵³

Moreover, some of the critiques have a somewhat predictable and deterministic perspective. The proliferation of government agencies that require the refugee to tell their story in a different way in order to fit a particular refugee category may, to take up Zetter's concern, result in a disjointed refugee identity. And this *may* have an additional disempowering and alienating impact. Alternatively, it may merely reflect the multiple selves and personae we all take into society; less a manifestation of alienation and disempowerment than pluralism and complexity which need to be navigated by all members of a modern bureaucratic society. Nor is it necessarily a problem that there are several narrators. It is, after all, partly a collective story that requires mutual, intersubjective recognition.¹⁵⁴ 'Narrative competition' can sometimes in my experience involve 'narrative collaboration'.

Similarly, the concern that the system atomises and isolates the refugee into relatively disempowered (and thin) legal units, thus processing them into a subordinated place in our liberal society, may be somewhat overstated. As touched upon above, the refugee legal narrative *must* mediate between the refugee's collective and individual identity in that the refugee must fear individualised persecution because of a collective affiliation (perceived or otherwise).¹⁵⁵ To borrow from Nolan and

¹⁵² It is worth noting that similar structural critiques to those discussed in this paper can be levelled against the narrative process that takes place in the therapeutic setting. For instance, Schaffer and Smith argue '[w]hile giving priority to the voices of victims, the psychologist nonetheless situates those voices and stories within a therapeutic model of recovery, thus imposing a Western-based paradigm on structures of feeling and languages of suffering.' Schaffer and Smith, above n. 39, p. 46.

¹⁵³ A similar debate has occurred in the feminist refugee law literature, with those who argued for working strategically within the language of refugee rights seeing some progress in the gendered re-positioning of refugee law in the last decade.

¹⁵⁴ The intersubjective nature of the recognition process is reflected in the observation of Phillips and Hardy, above n. 55, 169: 'in the case of refugee discourse, it is not just refugees that are produced; so, too, are the immigration officers who admit them; the decision-makers who determine their status; the members of NGOs who provide them with services; the media which report on them; the public who read about them. The organizations involved also construct their organizational "subjectivities" ... their identities, through their discursive activities. In this way, discourses reproduce and transform institutional structures.'

¹⁵⁵ A political opinion can also be characterised to fall within this logic of affiliation, even if only as a non-affiliation with the dominant political grouping.

Branscombe, it therefore allows for 'the possibility of the simultaneous persistence and influence of both individual selves and subgroup selves that together can shape the definition of the human self' and, in turn, the rights a refugee possesses.¹⁵⁶ In this sense, the refugee's account of her fear of persecution and need of protection is also a unique way of 'showing allegiance' in a socially scripted way – a way of demonstrating both one's alien-ness by relating an identity forged in another country as well as arguing that there has been a fundamental breach in this original allegiance and an implicit request for a new allegiance, founded upon a process of recognition played out within and constituted through the legal language and rules of the host country.¹⁵⁷

At one level, the capacity for refugee law to be redeemed as a vehicle for self-narrating identity recognition is being realised, albeit unevenly – the evolution of its basic categories and processes over the past few decades has not always been progressive. While certain developments have undoubtedly furthered the West's non-entrée mechanisms (such as the notions of 'protection elsewhere' or the 'internal flight alternative'), the types of claims that can now be presented for refugee status have increased dramatically courtesy of purposive and liberal interpretations of the definition.¹⁵⁸ Furthermore, the jurisprudence on administrative pre-requisites for a fair and just determination procedure increasingly demand both an opportunity for telling one's story in a safe interview situation and that the *sui generis* experience of the refugee be appreciated as a legitimate factor in shaping the unravelling of the narrative which the law mandates be told. The law itself, in other words, can and sometimes does provide both the legal-rhetorical tropes and the venue for stories to be told and to unfold that are intimately tied to one's experience and identity.

From the perspective of theory, any recognition situation will contain within it the elements for a struggle between subjectivities. The political

¹⁵⁶ Mark Nolan and Nyla Branscombe, 'Conceptions of the Human Self and Human Rights: Implications for the Psychological Continuity of Less Inclusive Selves', in Fabio Sani (ed.), *Self-Continuity: Individual and Collective Perspectives* (Psychology Press, 2008), pp. 202, 210.

¹⁵⁷ Allegiance in this context operates as a kind of double bind that Jenkins discusses in Fiona Jenkins, 'Strangers Inside: Figures of Allegiance and Association', this volume.

¹⁵⁸ An Australian example of this concerns the rejection of the 'differential risk' approach to those fleeing situations of civil war in the case of *MIMA v. Abdi* (1999) 87 FCR 280, 291 in light of the 'broad, liberal and purposive interpretation' to be given to the text; this textual reading was upheld by the High Court in *MIMA v. Haji Ibrahim* (2000) 204 CLR 1.

and legal challenge lies in influencing the conditions within which this struggle will inevitably take place. Scholars and practitioners have started to employ innovative techniques to challenge the significant institutional and cultural obstacles to realise the law's potential. Although primarily concerned with addressing the factors that predispose decision-makers to make negative credibility findings, these studies provide direction for future empirical research aimed specifically at opening up the narrative space to a more effective inter-subjective recognition process within the law's current categories.¹⁵⁹ A starting place can be found, for instance, in the work conducted by Rousseau and Foxen in Canada, exploring the place of 'empathy' in the decision-making process by interviewing those who have been through the narrative system about their impressions and strategies;¹⁶⁰ or in Kirmayer's use of 'imagination' to bridge the various retellings of a refugee's story. A closer review of the approaches taken by feminist refugee lawyers to working within the restrictions of the system may similarly provide direction. For instance, Johnsen's work on the agency exercised by asylum seekers in hearings through use of 'restive silences' draws upon empirical research to show how the formalism and 'formulism' of the hearing can be 'disrupted'.¹⁶¹ As with these scholars' work, this research should go beyond the structurally limited written decision record in order to examine the practices of narrative identity formation amongst all participants in the 'recognition' process, as well as

¹⁵⁹ Most of the available empirical research around refugee determination procedures has focused on the issues of credibility and gender, identifying the barriers to communication and interpretation. The literature is voluminous. Representative articles in the Australian context include Kristen Walker, above n. 61. Guy Coffey, above n. 119; Jenni Millbank, 'Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia', (2002) 26 *Melbourne University Law Review* 144; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom', (2009) 13 *International Journal of Human Rights* 392. The literature is appropriately interdisciplinary. See, e.g., Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions About Human Behavior Underlie Asylum Judgements?', (2010) 22 *International Journal of Refugee Law* 351.

¹⁶⁰ Rousseau and Foxen, above n. 91. See also Millbank, above n. 159, who similarly argues that 'empathy and imagination' be employed by decision-makers in sexuality-based claims, employing the work of Robin West, *Narrative, Authority, and Law* (University of Michigan Press, 1993).

¹⁶¹ Toni Johnsen, 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings', (2011) 20 *Social & Legal Studies* 57, 59 ('the asylum court must rely on more than just language; it must begin to hear the meanings dwelling within silence and consider testimony a partial rendering of the refugee experience alongside the broader social, political and economic processes that perpetuate forced migration.').

examining their subjective understanding and strategic use of the law's categories and iterative processes. It should also be asked whether there is room in the refugee legal narrative for the use of literary tropes, which inform other human rights narratives such as metaphor, humour, irony and cultural references.¹⁶²

In taking such steps, I am not seeking a panacea for the structural imbalances and societal influences that direct the narrative-generating process, but a way to allocate more autonomy and discursive control to the refugee over a narrative process that already allows, through the law, for the potential recognition of a meaningful refugee identity.

I am still left, however, with a sense of discomfort with the above analysis. Is our very obsession with self-narrating selves part of the problem? Does it nonetheless leave the refugee claimant vulnerable to objectification and alienation?¹⁶³ Perhaps Weisberg is correct when he chides narrative legal theory as having a redemptive function for lawyers (and perhaps academics). 'To utter a popular trope like "law is essentially narrative"', says Weisberg, 'is simply to plead that law be treated as having a spiritual or emotional quality that might redeem the life of lawyers' who "crave enchantment."¹⁶⁴

¹⁶² An examination of the current use of such techniques in refugee narratives, e.g., as reported in RRT decision, should be undertaken.

¹⁶³ This echoes the Kantian concern with his contemporaries' obsession with possessive individualism.

¹⁶⁴ Weisberg, above n. 56, 63. The term 'crave enchantment' is borrowed from Richard Sherwin.