Looking Behind the “Rule” of a Well-Founded Fear:
An Examination of Language, Rhetoric and Justice in the “Expert” Adjudication of a
Refugee Claimant’s Sexual Identity Before the IRB

by

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Conclusion
ABSTRACTS

English

This thesis scrutinizes the IRB’s designation as an “expert tribunal” over the content of a “well-founded fear of being persecuted”. Firstly, it suggests that a decision-maker’s appeal to the “good reasons” and “say-so” of an “expert” authority serves only the interests of legal justice. Secondly, it looks behind the “rule” of a well-founded fear and considers the role of language and rhetoric in the “expert” construction of the “genuine” refugee claimant. Finally, it argues that the possibility of an ethical and responsible form of justice for the gay refugee claimant lies behind the “rule” of an authentic homosexual identity, in the moment of recognition of the distinct face and vulnerability of the gay refugee claimant.

French

Cette thèse propose une critique théorique de la nomination de la Commission de l’immigration et du statut de réfugié du Canada comme “tribunal expert” concernant le contenu de la définition d’une « crainte fondée de persécution ». D’abord, elle suggère que la référence par un décideur au « bon raisonnement » et à la « parole » d’une autorité « expertise » sert surtout les intérêts de la justice judiciaire. Deuxièmement, elle cherche au-delà de la « règle » d’une crainte fondée et analyse le rôle de la langue et de la rhétorique face à la construction du demandeur « authentique » au statut du réfugié. Enfin, elle suggère qu’une forme de justice éthique et responsable pour le demandeur homosexuel au statut du réfugié est possible et se trouve derrière la « règle » de l’identité homosexuelle authentique, au moment de l'identification de son visage particulier et de sa vulnérabilité.
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When we lose certain people, or when we are dispossessed from a place, or a community, we may simply feel that we are undergoing something temporary, that mourning will be over and some restoration of prior order will be achieved. But maybe when we undergo what we do, something about who we are is revealed, something that delineates the ties we have to others, that shows us that these ties constitute what we are, ties or bonds that compose us. It is not as if an “I” exists independently over here and then simply loses a “you” over there, especially if the attachment to “you” is part of what composes who “I” am. If I lose you, under these conditions, then I not only mourn the loss, but I become inscrutable to myself.

- Judith Butler

If knowledge is made, its making can be looked into.

- Clifford Geertz

**Introduction**

Imagine, if you will, the following scenario. An individual comes to Canada seeking entry as a refugee. This individual comes from a place of political instability. Everywhere, there is fear and uncertainty. Let us suppose that this individual has received a university education, is married, and maintains steady employment in their community. Their first language is a language other than English or French. Let us also suppose that this individual has been the victim of physical torture by members of the local law enforcement agency; their scars bear witness to the violence of this unprovoked brutality. In fear of being attacked again, this individual no longer feels safe in their home; they must leave their country. They purchase a one-way ticket for Canada and arrive with only a suitcase of clothes, a picture of their spouse and children, and a few dollars in their pocket. When this individual appears before the immigration judge, they are asked why they are making a claim for refugee status in Canada. The individual answers in their native tongue: “I was persecuted for being a gay person in my country. I am terrified of returning to my country because I know that they will come after me again. I am afraid for my life because of who I am.” The judge replies: “Your story does not comport with what I know to be the “gay reality.” I find that you do not possess the knowledge requisite of a genuinely gay person, nor do I find that your physical appearance and mannerisms reflect that of a true homosexual person. Your behaviour during the conduct of this hearing does not demonstrate that you are genuinely in fear of persecution. I find that you are not truly who you

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2 “A Lab of One’s Own” (1990) 37 New York Review.
3 This was the expression referred to in the case of *Re K.Q.H.*, [2003] R.P.D.D. No. 136 (QL) at para. 11, where the decision-maker made a negative credibility finding against the claimant based on their “...ignorance of the gay reality”. I will address the decision-maker’s use of this expression in Chapter 3 of this thesis.
say you are – because only I possess the expertise to determine this fact– and therefore I deny your request for refugee status in this country.”

The above scenario tells the story of two individuals who stand in opposition to one another at the doorway to the Law. It is a story that invokes the vivid imagery of the countryman and the gatekeeper in Franz Kafka’s parable Before the Law. In Kafka’s parable, a man from the country comes to the doorway to the Law seeking entry; but, he is told by a gatekeeper that he cannot be admitted “at the moment.” The gatekeeper explains to the countryman that he is only one of many gatekeepers, and that each one is more powerful than the next. The countryman waits until the final moments of his life to be told that the doorway has always been meant for him, but that it would now be closed. In both scenarios, a palpable sense of injustice looms over the gatekeepers’ dispassionate refusal to permit these individuals through the doorway to the Law. Professor Desmond Manderson astutely points out that Kafka’s parable raises a fundamental question about the purpose of law. For Manderson, this story is not only about “the guarding and nothing but the guarding” of the metaphorical gates to the Law; but, it is also about the countryman’s experience of being caught within the system of law, not as a subject but as a victim who lives the law as a nightmare. In this regard, the gatekeeper and the countryman’s conflicting notions of what it means to stand “before the law” creates a theoretical “stand-off” of meaning in which both men are ignorant of the law and already subject to it.

This thesis situates Professor Manderson’s notion of the metaphorical “stand-off” of meaning between the gate-keeper and the countryman in the context of the Canadian refugee determination process. In particular, it proposes that a powerful “stand-off” of meaning unfolds between the gatekeeper of the Immigration and Refugee Board of Canada (“IRB”), and the individual who seeks protection from persecution in their country of origin. This stand-off, I will argue, arises as a result of two competing notions of justice: the first derives from a conception

4 I use the large sense of the word “law” here to refer to the general notion of law as a system of legal rules, rather than one particular enactment of the law, for example.
6 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
of the refugee claimant as an individual whose only access to the protection of the laws of the state is achieved through their successful navigation of the IRB’s system of administrative justice; such a form of justice is “internal to the law”\textsuperscript{12} and has been identified by Professor Costas Douzinas as “legal justice.”\textsuperscript{13} Douzinas elaborates further on the dimensions of legal justice:

Law and justice are not opposed; they are linked in a paradoxical way. When law violates its established procedures and harms someone; when it does not recognize or uphold rights which have been given already or are reasonably expected; when it breaches basic principles of equality and dignity – in all these cases the law acts unjustly according to its own internal criteria of justice. We can call this first type of justice, legal justice because it is internal to the law and operates when the law matches its own standards and principles.\textsuperscript{14}

The second form of justice I will explore in this thesis stems from Douzinas’ particular conception of the Other “as an “infinite other”\textsuperscript{15} whose “singularity”\textsuperscript{16} must be respected; that is, an attempt to treat or adjudicate the infinite other’s “uniqueness” (which I cannot know) as a fixed proposition of law would at once violate that individual’s singularity or uniqueness.\textsuperscript{17} Douzinas summarizes this second conception of justice as follows:

But legal justice is only one facet of justice. A different conception of justice starts from the statement of the Jewish philosopher Emmanuel Levinas that justice exists in relation to the other person. The other is a singular, unique finite being with certain personality traits, character attributes and physical characteristics. But to me, she is also an infinite other, this finite person puts me in touch with infinite otherness. As phenomenology has argued, I cannot know the other as other, I can never comprehend fully her intentions or actions, I can never have an appropriate adequation or presentation, because no immediate access or perception of otherness exists. The otherness of the other means that she is never fully present to me; I can approach her only by analogy of the perceptions, intentions and actions available to my own consciousness.\textsuperscript{18}

... Theories and laws need to be applied; but every application would turn the uniqueness of the other into an instance of the concept or a case of the norm and would immediately violate their singularity. The only principle of justice is respect the singularity of the other. It takes the form of a universal imperative, an absolute command, but this is a strange law indeed law may be a misnomer, because unlike other theories of justice it gives no advance instructions or advice except to say be unique in your encounters with singular others.\textsuperscript{19}

\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid. [emphasis is mine].
\textsuperscript{15} Ibid. at 177.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid. [emphasis is mine].
It is this second form of justice that I shall argue resides “behind the rules” of legal justice – and, more particularly, behind the “rule” of a “well-founded fear of being persecuted.” For the refugee claimant who is asked to translate not only their experience (or fear) of persecution, but also to translate their sexual identity (in the case of the gay or lesbian claimant) in a manner that is fit for legal adjudication, the stand-off of meaning about the purpose of law is two-fold: firstly, a stand-off takes place in respect of the requirements of justice that lie behind the “rule” of a well-founded fear; and secondly, a further stand-off of meaning unfolds over the content of the “rule” of a “genuine” homosexual or lesbian identity before the Law. The question of another conception of justice – one which respects the singularity of the Other as Douzinas sets out above – has particular application to the plight of the gay or lesbian refugee claimant before the IRB. In the final Chapter, we shall consider this question of justice specifically within the domain of a decision-maker’s responsibility at law – that is to say, an ethical form of justice that arises prior to the articulation of a legal “rule” or text.

In the opening Chapter, my principal objective is to show that the pursuit of legal justice in respect of an individual’s claim for refugee status in the Canadian refugee determination process is, in many cases, motivated foremost by the IRB’s nebulous designation as an administrative “expert tribunal.” In this quasi-judicial setting, the IRB has explicitly identified its “expertise” over matters pertaining to, for example, “country conditions”; however, such a general claim of expertise, I argue, is problematic because it assumes that all decision-makers of the IRB necessarily possess “expertise”. It therefore does not account for a decision-maker’s potential abuse of their discretionary power in the adjudication of an individual’s claim of a well-founded fear. This thesis thus attempts to locate a theoretical model of expertise upon which the IRB (and its decision-makers) may (erroneously) defend its designation as an expert tribunal; it

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19 Ibid. [emphasis is mine].
20 Marianne Constable adopts this expression in her work Just Silences, infra note 103. In Chapter 2, I discuss the implications of Constable’s suggestion that justice lies “behind the rules” in the specific context of a “rule” of a “well-founded fear”.
21 Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force 22 April 1954) at art. 1(2). I shall hereinafter refer to this expression as a “well-founded fear”.
22 The phrase “responsibility at law” is particular to Constable’s discussion of Frederick Schauer’s account of “rule-based” decision-making; see Constable, Behind the Rules, infra note 195. I consider the issue of a decision-maker’s responsibility at law in detail in Chapter 3 of this thesis.
23 See infra Part B (i).
24 See infra note 56. The central focus of this thesis explores the question of expertise in respect of the rhetorical nature of the subjective element of the bi-partite test of a well-founded fear; it therefore does not expressly deal with the issue of expertise in respect of the issue of “country conditions”. See particularly Part B (i).

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means to situate the notion of “expertise” as an object of study in itself. In so doing, I seek to address, in particular, the following questions: What is the nature of expertise, and how does one (if one can) acquire it? What is the role of expertise in the refugee determination process and where does it derive from? What is the relationship between expertise and justice? How has the nature and use of expertise in the determination process of non-sexual orientation based refugee claims influenced the IRB’s claim of expertise in the adjudication of sexual orientation-based claims? Can the IRB, for example, truly maintain a position of expertise in respect of one’s sexual identity, and if so, what are the implications of this type of expertise for the relationship between law and justice?

In my attempt to answer these questions, the objectives of this thesis shall be three-fold. In Chapter 1, I attempt to demonstrate that the basis of the IRB’s designation as an “expert tribunal” is premised, in part, upon a fiction. In particular, I begin by considering Professor Manderson’s rich discussion regarding the Court of Shakespeare; and, more particularly, his conception of law as “...nothing but a fiction made real by the faith that others vest in it, in a word, myth”. Here, I will suggest that a “community of believers” have “made real” a particular fiction pertaining to the “expertise” of the IRB. Next, I attempt to show that Professors François Crépeau and Delphine Nakache’s recent findings pertaining to their multi-disciplinary analysis of the IRB suggest, inter alia, that the term “expert tribunal” does not embody, at present, a common understanding of its mission amongst its members. Adopting Professor John Hardwig’s model of expertise, I thereafter suggest that a potential theoretical basis of the IRB’s claim of expertise as an expert tribunal is rooted in a decision-maker’s appeal to the authority and “say-so” of an external authority over the content of a well-founded fear. This section specifically examines how a claim to expertise might be rooted in a decision-maker’s “good reasons” to believe the “good reasons” of an external authority’s “say-so” concerning a particular proposition (“p”). The final section of the Chapter considers the role of “expertise” within Robert Cover’s discussion of legal interpretation as a form of judicial violence which takes place on a “field of pain and death.” I situate Cover’s conception of legal interpretation within the context of an individual’s claim of a well-founded fear, and suggest that a decision-maker’s “good reasons” to “know” or “share” the pain of a refugee claimant’s

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25 See Manderson, As If, infra note 36 at 7.
26 See Crépeau and Nakache, Critical Spaces, infra note 59 at 116.
27 See Robert Cover, Violence and the Word, infra note 92.
experience (or fear) of persecution as a “fact” before the Law fulfills only the requirements of legal justice. It fulfills only the requirements of legal justice because a decision-maker’s attempt to “know” the pain of the refugee claimant requires that the public expression of the claimant’s pain satisfy the decision-maker’s “legal” – that is to say, internal (and arbitrary) and bounded – criteria of pain. At the end of the chapter, I suggest that there is, nevertheless, a way for a decision-maker to recognize the unshareability of the pain of the refugee claimant within a legal order such as the IRB. I turn specifically to Judith Butler’s illuminating conception of a “common corporeal vulnerability” as the basis for another conception of justice that lies outside the parameters of expertise and “behind the rules”.

In Chapter 2, I examine the “rule” of a well-founded fear and consider its relationship to language, rhetoric, and justice. In particular, I turn to the work of Professor Marianne Constable, who argues that justice lies “behind the rules”. The chapter considers specifically the question of expertise within Constable’s discussion of Frederick Schauer’s account of “rule-based decision-making.” This account of rule-based decision-making, I argue, delivers one form of justice – legal justice – to the refugee claimant who successfully performs their experience (or fear) of persecution before the Law’s subjective and objective requirements of a well-founded fear. The delivery of legal justice to the refugee claimant requires in many cases that the “say-so” of the claimant regarding her subjective experience (or fear) of persecution be corroborated with the “say-so” of an “expert” authority. The chapter turns to the work of Professor James C. Hathaway and William S. Hicks in arguing that the subjective element of a well-founded fear is superfluous; and, as such, a decision maker’s insistence on evidence of a subjective element represents, at base, an exercise in language and rhetoric. Further, the Chapter suggests that a decision-maker’s reliance upon the “expert” “say-so” of an external authority requires that a successful refugee claimant construct or “perform” their subjective experience (or fear) of persecution as an “identity of trepidation.” In this regard, I canvass the research findings of Cécile Rousseau and Patricia Foxen’s pertaining to the “lying” refugee, as well the work of Robert F. Barsky on the refugee as “productive Other” in the construction of a subjective “identity of trepidation”. In the final section of the chapter, I argue that an “expert” categorization of a claimant’s particular experience (or fear) of persecution defends not only a

28 See Frederick Schauer, Playing by the Rules, infra note 150.
29 See infra note 104.
form of legal justice that is internal to itself, but in some instances, the search for an “expert” identity of trepidation above all represents an exercise in what Clifford Geertz’s calls a “distinctive manner of imagining the real.” Such a search ultimately leaves the question of another conception of justice for the refugee claimant unanswered.

In the final Chapter, I argue that in the case of one particular type of refugee claimant – the gay or lesbian refugee claimant – another conception of justice lies behind the “rule” of not only a “well-founded fear”, but also the “rule” of a “genuine” homosexual or lesbian identity before the Law. The Chapter begins with an examination of Constable’s critique of the limits of Schauer’s rule-based decision-making; in particular, I focus on Constable’s particular argument that a decision-maker is not held “responsible at law” for their decisions. That is, Schauer’s account of rule-based decision-making, as Constable argues, does not provide a reason for a decision-maker to act except for what Schauer refers to as “social considerations.” Such social considerations, I argue, would include a decision-maker’s reliance upon the “say-so” of an expert in service of their search for an “identity of trepidation”. A decision-maker’s responsibility at law arises “prior” to such considerations, in a world that Constable argues “...is already there”; it therefore requires that a decision-maker do what they must in a moment that arises prior to the Law. In this moment, another conception – an ethical and responsible form of justice for the refugee claimant is possible. I consider this notion of a decision-maker’s responsibility at law within the search for the “rule” of a homosexual identity in one particular case in the U.K. regarding a gay refugee claimant name Iaon Vraciu. Drawing upon the work of Derek McGhee, I argue that the search for the “rule” of an authentic homosexual identity at the specific corporeal site of Vraciu’s anus (for evidence of a “fact” of homosexuality) at once represents not only the height of the imagination of the real, but ultimately an indefensible abdication of one’s responsibility at law.

The final section argues for another conception of justice for the gay refugee claimant that lies behind the “rule” of an authentic homosexual identity before the Law. Such a conception of justice resides within a decision-maker’s recognition of the distinct vulnerability

30 See Clifford Geertz, Local Knowledge, infra note 267 at 173.
31 See Marianne Constable, Behind the Rules, infra note 195 at 125.
32 Ibid at 129. Constable states: “The possibility of acting is not exhausted by reference to the social world. Action is grounded rather in a world that is already there, giving rise to the human recognition of the need and corresponding responsibility to act.”
33 See Derek McGhee, The Case of Iaon Vraciu, infra note 379.
and “face”34 of the gay refugee claimant. I turn first to consider the work of Judith Butler, and suggest that the possibility of an ethical form of justice for the gay refugee claimant lies in the recognition of a shared – but unknowable – “common corporeal vulnerability” between a decision-maker and the face of the refugee claimant. The recognition of one’s state of “unknowingness” relative to a claimant’s experience (or fear) of persecution or sexual identity gives rise to a moment of responsibility in an ethical encounter with the refugee as an infinite and singular Other; it thus reflects a re-orientation of the stand-off of the requirements of justice which unfolds between the refugee claimant and the gatekeeper to the Law. Such a moment, I argue, does not yet exist within the realm of Canadian sexual orientation asylum adjudication. The IRB’s search for a “linear trajectory” of sexual identity development, it appears, reflects an adherence to a fixed “rule” of an authentic gay or lesbian identity before the Law; it therefore does not answer the call to a responsible form of justice for the “other [O]ther”35 in a moment prior to the Law; one that lies behind the “rules”.

Chapter 1 – Before the Law: Law as Fiction and The IRB’s Status as an “Expert Tribunal”

A. Law as Fiction

i. The Court of Shakespeare and the IRB

I wish to begin this Chapter by suggesting that before the law there was fiction. Allow me to elaborate. The theoretical stand-off of meaning which Professor Manderson asserts unfolds between the gatekeeper and the countryman in Kafka’s Before the Law is, as I have outlined above, as much a stand-off about the purpose of law as it is about the requirements of justice. Professor Manderson’s discussion of the fictional quality of law is immediately instructive for the purposes of this thesis. In his discussion of the fictional “Court of Shakespeare”,36 Manderson argues that the “[l]aw is necessarily utopian, oriented towards a promise which it attempts to bring about but which does not yet exist.”37 This aspirational quality of law, Manderson asserts, is based upon law’s capacity to first act “... “as if” certain textual

34 See infra Chapter 3, where I discuss the conception of the “face” of the Other; see particularly infra Part C (ii).
35 See Jenni Millbank, infra note 494.
36 Desmond Manderson, “As If” – The Court of Shakespeare and the Relationships of Law and Literature” (2008) 4 Law Culture and the Humanities 3. [hereinafter “As If”].
37 Ibid at 6.
fragments...will have definite social consequences”38; and secondly he argues the principle purpose of law is to “articulate”39 a “not-yet-distant future.”40 As such, he argues that a common link exists between law and literature, in the sense that “[l]aw is nothing but a fiction made real by the faith that others vest in it, in a word, myth.”41 In this fictional world of law and myth, Manderson describes how the Court of Shakespeare “...imagines a community that will be bound by the law it creates, a community constituted by the shared belief in the value of the Court’s founding texts and perhaps by its faith in the Court’s own ability to render wise and just decisions – but this community does not yet exist.”42

Let us pause for a moment and consider the implications of Manderson’s discussion of the Court of Shakespeare for the objectives of this thesis. In my view, the hypothetical utopian character of the Court of Shakespeare as a “Field of Dreams”43 – which has yet to come to pass – provides a rich theoretical framework within which the IRB’s status as an “expert tribunal” represents in its own way a “field of dreams”. I find more particularly that in the arena of refugee determination in Canada, a community of “believers” have made real the fiction of law’s conception of justice for the “genuine” refugee as a question of legal justice – that is to say, justice delivered according to its own “internal criteria.”44 It is this “made real”45 of the fiction of law that separates the performance of the gate-keeper and the individual refugee claimant before the law from the force of the law; or, as we shall see later in Robert Cover’s work, the violence of law.46 As Manderson points out, “[w]ith law, it is different. When the performance is over, the “made real” of law continues to exert a hold over us.”47 I shall have much more to say about the performative aspect of law in Chapter 2; however, at this time, I wish to focus our attention on locating a potential source of the IRB’s designation as an “expert tribunal”. The discussion will be motivated by the following questions: Over what subject matters does the IRB claim “expertise”, and where does such a claim of expertise derive from? Might we be able to arrive at a theoretical justification for such a claim?

38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.
44 See Douzinas, Violence, Justice, Deconstruction, supra note 12.
45 Ibid.
46 See Cover, Violence and the Word, infra note 92.
47 Manderson, As If, supra note 36 at 7.
B. Law and Expertise – An Exercise in Fact-Finding or Fact-Making?

i. The IRB’s Nebulous Status as an “Expert Tribunal”

Let us recall that in the scenario I have described at the outset of this discussion, the gatekeeper states to the refugee claimant that he claims to “know” the “gay reality” better than the claimant does, and that based on his expertise in determining homosexual identity as a “fact” for the law, the claimant in question is found not to be who she claims she is, and as such is denied sanctuary. The facts of this scenario are, in part, based upon an actual case decided before the IRB.\(^{48}\) What strikes me as an urgent question in this quasi-fictional scenario is the basis of the decision-maker’s reasoning regarding his “expert” authority over the sexual identity of the refugee claimant. In Chapter 3, I query the basis of this particular decision-maker’s assumption of expertise in the “gay reality”; however, at this stage of the discussion, it is important that we first consider the nature of expertise generally and thereafter examine whether or not the IRB is, in reality, appropriately equipped to make such a claim of expertise in its adjudication of claims for refugee status. I will submit that, upon review, it is not equipped to do so.

Firstly, the Oxford Dictionary defines the term “expert” as, \textit{inter alia} “[o]ne who is expert or has gained skill from experience”\(^{49}\) and “[o]ne whose special knowledge or skill causes him to be regarded as an authority; a specialist.”\(^{50}\) Steve Fuller, who has written extensively on the topic of expertise, also notes the relationship between expertise and experience. The term “expert”, Fuller notes, is “...a contraction of the participle “experienced,”” [and] first appeared as a noun in French at the start of the Third Republic (about 1870).\(^{51}\) Whilst Fuller acknowledges that the use of the term “expert” at that time referred to the specialized training of an individual to speak authoritatively on a particular subject matter – in this way corresponding to the Oxford Dictionary’s definition – he nevertheless notes that:

\begin{quote}
[t]he first experts were called as witnesses in trials to detect handwriting forgeries. These people were experienced in discriminating scripts that appeared indistinguishable
\end{quote}

\(^{48}\) See \textit{supra} note 3.
\(^{49}\) Oxford Dictionary, “expert”, online: \(<\text{http://dictionary.oed.com/cgi/entry/50080430?query_type=word&queryword=expert&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=pxsg-RkhSaW-4647&hilite=50080430}>\).
\(^{50}\) \textit{Ibid.}\n
to the ordinary observer. Thus, the etymological root of “expertise” in “experience” was carried over as the semantically heightened way in which the expert experienced the relevant environment.52

Does the designation of the IRB as an “expert tribunal” fit the definition of expertise outlined here? That is to say, what is it about the IRB exactly that qualifies it with a type of authority rooted in “special knowledge” or “skill” acquired through experience?

As I have alluded to at the outset of this discussion, there appears to be a dearth of literature which answers this question directly. For example, in the IRB’s Report on Plans and Priorities (2008-2009), the Chairperson of the IRB, Mr. Brian Goodman, acknowledges that “[a]lthough the IRB is already recognized as an innovative, expert tribunal, we are continually seeking new ways to improve the way we deliver our services.”53 There is no further elaboration in the Report in respect of the source of the IRB’s characterization as an expert tribunal. In the 2005 case of Geza v. Canada54, the Federal Court of Canada (“FCC”) refers to a 1999 publication of the IRB entitled "Lead Cases Backgrounder.”55 It states that:

[t]he IRB is an expert tribunal. Knowledge on country conditions is a part of the expertise of the tribunal. The IRB is constantly seeking innovative ways to enhance its specialized knowledge of country conditions and to promote consistency in decision making. This is particularly important given the high volume of claims received each year by the IRB. The Board is therefore continually developing tools, such as the Chairperson’s Guidelines and commentaries on legal and procedural issues, that foster consistency and assist decision makers.56

In addition, section 20 of the Code of Conduct for Members of the IRB57 provides that:

Members have a responsibility to maintain a high level of professional competence and expertise required to fulfil their duties and responsibilities. Members are expected to pursue the development of knowledge and skills related to their work, including participation in ongoing training provided by the IRB.58

The most compelling and recent analysis of, inter alia the IRB’s “expert tribunal” status I have located in my research pertains to a recent study conducted by Professors François Crépeau and

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52 Ibid. at 342.
55 Ibid. at para. 5, referring to Immigration and Refugee Board of Canada, "Lead Cases Backgrounder” (March 1999).
58 Ibid. [emphasis is mine].
Delphine Nakache. In their article, “Critical Spaces in the Canadian Refugee Determination System: 1989 – 2002”⁵⁹, Crépeau and Nakache explore the individual and institutional strengths and weaknesses of the IRB. Their empirically-based research draws upon a series of interviews conducted with former IRB members and other actors of the IRB in three principal contexts: first, the process of appointment and renewal of IRB members; second, the relationships between IRB members; and finally, the IRB members’ treatment of evidence.⁶⁰ In their general findings, Crépeau and Nakache make the important observation concerning, inter alia, the role of “expertise” in the complex arena of refugee adjudication within the IRB – they write:

> Determining refugee status is an extremely complex decision-making process, possibly the most complex one in any given society. It possesses many unique characteristics. It cannot be easily compared to any other judicial or administrative process. It is informed by values and principles derived from the [Canadian Charter of Rights and Freedoms] as well as by international standards. It is set within a precise legal framework of specialized administrative justice. It must allow its actors to deploy their experience and expertise, but it must face its own specific challenges: the sheer number of claims to be dealt with annually is daunting; the consequences of a wrong decision can be lethal; the difficulty of obtaining ‘hard’ evidence makes the issue of credibility central; the psychological stress for the actors can be extreme; their lack of a common rights-based culture makes harmonization difficult.⁶¹

In addition, Crépeau and Nakache’s research generally found that “[p]aradoxically, the area perceived as being the greatest strength of the IRB – independence – was also perceived as arguably its greatest weakness.”⁶² Crépeau and Nakache note in particular how, on the one hand, the participants in their study “…lauded the fact that Board members are in no way bound to

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⁶⁰ Ibid. at 50. Crépeau and Nakache further explicate the source of the interviews: “We conducted interviews with sixteen former Board members: nine former Board members from Montreal (six francophone members, three Anglophone members); five from Toronto; one from Vancouver; and one from Ottawa-Atlantic. We also organised nine focus groups (four in Montreal, three in Toronto and two in Vancouver) with stakeholders: seventeen lawyers, nineteen NGO workers, ten health professionals and seven interpreters.” Further, at 55: “As to the former Board members themselves, because of the sensitive nature of the issues and the fact that the research team was perhaps perceived as having a ‘pro-refugee’ position, most of those who agreed to meet with the team belonged to a particular subset: with a few notable exceptions, they had a clear commitment to human rights and humanitarian values, and a complex, critical view of the IRB. Our information about Board members who do not share these attitudes is thus generally (though not entirely) indirect. On the other hand, the Board members we interviewed were generally very well-informed: many of them had been members for lengthy periods (often nine or ten years); six had had responsibilities as coordinating members or members of management, and therefore had a broader view of the institution as a whole.”

⁶¹ Ibid. at 56-7. [emphasis is mine].

⁶² Ibid. at 57.
follow government policies or positions when making decisions on refugee claims”⁶³; but then, on the other hand, indicated that “...political patronage with regard to appointments and renewals infringes on this basic principle of independence, as well as on the general competence (expertise and experience) of the [IRB] members.”⁶⁴

Whilst I do not wish to engage in an examination of either the history or complexities of the political appointment process of IRB members – for such an examination lies outside the the objectives of this discussion – it is nevertheless important to consider Crépeau and Nakache’s general finding that “…the political aspect of the appointment process had a very serious impact on the way the IRB operated and could result in the appointment and reappointment of incompetent [IRB] members.”⁶⁵ That is, whilst recognizing the “…long-standing judicial tradition that drastically reduces the leeway of the Prime Minister’s Office and dictates how politicians should reach the decision”,⁶⁶ Crépeau and Nakache rightly asserts that the IRB appointment process maintains no such tradition. Thus, “[b]eing friends with ‘X ’ seemed to have often been the sole criteria for appointing someone [to the IRB].”⁶⁷ Crépeau and Nakache’s research accordingly reveals that an apparent nexus exists between a decision-maker’s incompetence – that is, their lack of experience or “expertise” – and the political nature of their appointment to the IRB. In particular, Crépeau and Nakache observe that:

Members did not have the time to fully develop the expertise they were accumulating through the training and the hearings. They felt that the constantly had to prove something to the political master who held the key to their future in the IRB.⁶⁸

... Some [IRB] members knew perfectly well that they had not been appointed for their experience or expertise. They may have felt this inferiority complex due to not having the basics for the job. In that sense, they may have been very impressionable and they may have been looking for moral or political guidance. This guidance could have come from other members who are experts in the field, but it may also have come from other members who yielded political influence in the appointment system.⁶⁹

The introduction of a “merits-based approach” in 2004 to the appointment process sought to respond to a recommendation from the Auditor General of Canada in 1997 that the

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⁶³ Ibid. ⁶⁴ Ibid. ⁶⁵ Ibid. at 70-1. ⁶⁶ Ibid. at 71. ⁶⁷ Ibid. ⁶⁸ Ibid. at 65. ⁶⁹ Ibid. at 85.
government “should ensure that the selection process for Board members provides greater certainty that appointments or reappointments to the [IRB] are based on the qualifications needed to respond to the complexity and the importance of the task.” 70 From the point of view of critical space, the merits-based appointment process offers a place where debates are ultimately fostered in a respectful and collegial environment:

A merits-based appointment ensures that all members have, in principle, a certain amount of respect for other members, that is, respect for the level of experience and expertise that are responsible for their appointment. In that sense, it creates an atmosphere where the tribunal is an assembly of peers. All members have their strengths and weaknesses, but they are equals. Issues may be debated and divergences of opinion voiced without any hint of disrespect or insult for any other member of the tribunal, and none should be taken. Any other appointment mechanism creates huge distortions within the system and may foster an atmosphere of resentment and contempt within the tribunal. Such an atmosphere will not allow a vigorous critical space to flourish inside the tribunal: debates risk being stifled. 71

Although at the time of their writing, Crépeau and Nakache address specifically the 2004 reform, it should be pointed out that the IRB’s website currently does reflect an appointment process in which a potential candidate must now meet nine “behavioural competencies” 72 in their application for appointment to the IRB. These behaviour competencies include inter alia, communication, cultural sensitivity, information seeking, self-control, and judgement/analytical thinking. 73 These behavioural competencies appear to reflect the type of considerations outlined in the merits-based approach above. Thus, it would at least appear that the current appointment process is premised upon a certain set of skills possessed by a particular candidate to the IRB (which, in the aggregate, may be regarded as “expertise”), rather than upon political patronage. This is naturally a good thing in that administrative justice should, as Crépeau and Nakache rightly point out – not only be done but also be seen to be done. 74

71 Ibid. at 58.
73 Ibid.
74 Crépeau & Nakache, Critical Spaces, supra note 59 at 113. Crépeau and Nakache state in particular that: “According to the principle ‘Justice must not only be done, it must be seen to be done’, it also means that the public can reasonably believe that the person or Board entrusted with the power to decide can do so without interference or influence from any third party.”

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As we shall see in this discussion, my particular grievance is not *per se* with the politics of the IRB’s appointment process, so much as it is with exploring where the limits and possibilities of justice lie for an individual whose particular experience (or fear) of persecution is ultimately assessed against an institutional “expert” notion of this experience (or fear) which the law has *named* a “well-founded fear”. Interestingly, in their only reference to the word “expert tribunal”, Crépeau and Nakache’s article provide a description which, I find, attempts to set forth a particular meaning of the term “expert” in “expert tribunal”:

Normally, the members of an expert tribunal will develop a common understanding of the mission of the tribunal, will share common values that will serve as a foundation for the work of the tribunal, will discuss issues collectively in order to come to common solutions, will function with a great measure of collegiality in order to show that they are taking common responsibility for the fate of the tribunal, will protect by an impeccable behaviour the reputation of the tribunal, etc. In effect, they will partake in a common culture that values their independence from any external influence, because they are, they consider they are and they want to be perceived to be *the* experts in the field. The atmosphere inside such a tribunal will be geared towards the accomplishment of the mission of the tribunal.75

The language of Crépeau and Nakache here of an expert tribunal as comprising a community of individuals who share a “common responsibility for the fate of the tribunal” touches upon an important aspect of this thesis – that is, the issue of a decision-maker’s responsibility to the “Other” *at law*.76

I shall have much more to say regarding this issue of decision-maker’s responsibility to the refugee claimant as an infinite and singular “Other” in the following two Chapters; however, one particular element of the above description of an expert tribunal is important for us to note at this juncture. That is, Crépeau and Nakche’s statement that the members of an expert tribunal normally “...are, they consider they are and want to be perceived to be *the* experts in the field”77 assumes that the individual members of an expert tribunal possess the final authority over the content of a subject matter of adjudication. This thesis expressly attempts to challenge this assumption of expertise.

In both the context of non sexual orientation-based and sexual-orientation based claims for refugee status, I shall argue that the designation of the IRB as an “expert tribunal” has given

75 *Ibid.* at 116. [emphasis is mine].
76 In Chapters 2-3, I explore this particular notion of responsibility within Professor Marianne Constable’s discussion of Frederick Schauer’s conception of rule-based decision-making and its relationship to another conception of justice which, she argues, lies “behind the rules”, see particularly Chapter 3 at Part A.
rise to an adjudicative process whereby individual members of the IRB have inappropriately – and sometimes falsely – claimed authority over a subject matter which lies outside the purview of their knowledge or skill. In the area of non sexual-orientation based claims for refugee status, I suggest that decision makers of the IRB have unnecessarily claimed authority over the subjective element of the test for a well-founded fear; such a subjective element, as we shall see in the work of Hathaway and Hicks, is irrelevant to the issue of whether or not an actual risk of persecution exists upon an individual’s return to their country of origin.

In the case of sexual orientation-based claims for refugee status on account of an individual’s sexual identity, decision-makers have, in many cases, asserted authority over a fixed, “linear trajectory” of sexual identity development in their adjudication of whether or not an individual is, in fact, “who they say they are” – that is to say, a “genuine” gay man or lesbian woman. Such a fixed view of an individual’s sexual identity development raises a particularly urgent question: What makes a decision-maker an “expert” on the question of whether one is an “authentic” homosexual man or lesbian woman? The term “expert tribunal”, I argue, as it relates to the IRB’s expertise in respect of the content of a well-founded fear, or one’s sexual identity, is, in part, borne out of a decision maker’s search for an empirical verification of “who one is” as a “fact” before the Law. It is a view that is borne out of law’s capacity for fiction and for the imaginary. Indeed, a particular “community of believers”, who, by their apparent faith in the IRB’s designation as an “expert tribunal”, have “made real” an erroneous view of the IRB’s authority over the content of a well-founded fear. In the following section, I attempt to address the “made real” of this fiction in the context of Professor John Hardwig’s model of expertise. The section addresses an additionally urgent question – namely: what is the source of this community of believers’ faith in the IRB’s position as an “expert tribunal”?

ii. “I Have Good Reasons to Believe that ‘X’ Has Good Reasons to Believe”: John Hardwig’s Model of Expertise and Its Application to the IRB

In this section, I wish to consider the following notion of expertise advanced by Professor John Hardwig as providing a potential model of expertise regarding the IRB’s designation as an “expert tribunal”. He writes generally of a relationship of “epistemic superiority” between the layman and the expert:

appeals to the authority of experts often provide justification for claims to know, as well as grounding rational belief. At the same time, however, the epistemic superiority of the expert to the layman implies rational authority over the layman, undermining the intellectual autonomy of the individual and forcing a re-examination of our notions of rationality. The epistemic individualism implicit in many of our epistemologies is thus called into question, with important implications for how we understand knowledge and the knower, as well as for our conception of rationality.\footnote{Ibid. [emphasis is mine].}

Hardwig pushes this notion of epistemic authority and invites us to consider “...that there are good reasons to believe that $p$”,\footnote{Ibid. at 329.} where “$p$” refers to a particular proposition. He asserts that “[t]he usual answer to this question is in terms of evidence, “evidence” being defined roughly as anything that counts toward establishing the truth of $p$ (i.e. sound arguments as well as factual information).”\footnote{Ibid.} What is important to note here is Hardwig’s observation that “[t]here is evidence, then for the truth of $p$, but it does not follow that everyone has or even can have this evidence.”\footnote{Ibid.} Here, we begin to arrive at a potential justification for the IRB’s self-designation as an “expert tribunal”. That is, according to Hardwig’s formulation, one who is in possession of expertise is theoretically in possession of evidence that corroborates the existence of a particular proposition. Building upon this relationship between expertise and evidence, I find the following hypothetical scenario of expertise particularly instructive in providing an additional – though flawed – justification for the IRB’s position of expertise. Hardwig writes:

Suppose that person $A$ has good reasons – evidence – for believing that $p$, but a second person, $B$, does not. In this sense $B$ has no (or insufficient) reasons to believe that $p$. However, suppose also that $B$ has good reasons to believe that $A$ has good reasons to believe that $p$. Does $B$ then, ipso facto, have good reasons to believe that $p$? If so, $B$’s belief is epistemically grounded in an appeal to the authority of $A$ and $A$’s belief. And, if we accept this, we will be able to explain how $B$’s belief can be more than mere belief; how it can, indeed, be rational belief; and how $B$ can be rational in his belief that $p$. And our problems will be solved...or only starting.\footnote{Ibid.}

Hardwig’s proposal of expertise here offers a potential source of the IRB’s designation as an expert tribunal. If we replace the variable “$B$” with the term “member of the IRB”, it is possible, I submit, to conceive of a theoretical method by which such members of the IRB acquire a position of expertise in respect of a proposition over which “$A$” possesses evidence.
This model would appear to suggest that if “B”, - that is to say, members of the IRB, “…have good reasons to believe that A has good reasons to believe p”, then the belief of the members of the IRB in p is grounded in more than “mere belief”, that such a belief might even be called “rational belief”. In the following chapter, I will argue that Hardwig’s conception of expertise demonstrates that in many cases, the expertise of the IRB in assessing both non-sexual and sexual orientation-based claims for refugee status is predicated upon the formation of “rational beliefs” that derive from individual members’ reliance upon the evidence of external authorities, particularly social science and medical expert evidence. However, this type of basis for grounding a claim of expertise does not, as Hardwig suggests, “solve the problem”. Hardwig’s qualification of this model of expertise outlines the limits of an individual’s claim of expertise through an “appeal to authority”:

...we are then faced with the prospect, not formerly considered by epistemologists, of a very odd kind of good reason for belief: a reason that does not constitute evidence for the truth of p. For B’s reasons for believing that p are not evidence for the truth of p. We can see this by noting two things. (1) Although A’s evidence counts towards establishing the truth of p, the case for p is not stronger after B discovers that A has this evidence than it was before B found out about A and A’s reasons. (2) The chain of appeals to authority must end somewhere, and, if the whole chain of appeals is to be epistemically sound, it must end with someone who possesses the necessary evidence, since truth claims cannot be established by an appeal to authority, nor by investigating what other people believe about them.84

When applied to the context of individual members of the IRB, Hardwig’s above qualification suggests that an individual IRB members’ appeal to an external authority’s evidence of p would not, in fact, constitute in itself evidence for p. Thus, Hardwig’s assertion that “...truth claims cannot be established by an appeal to authority”85 or through “...investigating what other people believe about them”86 requires us to examine the types of external authorities which the IRB has relied upon in advancing its position of expertise. But, it is also necessary for us to examine the basis of truth claims emanating from individual IRB members who rely upon their own “knowledge” and “skill” and either reject the evidence of an external authority, or assign it minimal weight in the decision-making process (both situations potentially arising because the IRB member disagrees with the evidence, or does not understand its language).

84 Ibid. [emphasis is mine].
85 Ibid.
86 Ibid.
Hardwig argues that “...if the whole chain of appeals [of authority] is to be epistemically sound, it must end with someone who possesses the necessary evidence...”\textsuperscript{87} As I will demonstrate in the following chapters, this person, I argue, is the refugee claimant herself, whose particular experience (or fear) of persecution or sexual identity as a gay man or lesbian woman is, in some instances, simply “unknowable” by a third party adjudicator such as the IRB. Let us recall that the \textit{Code of Conduct} states in respect of the term “expertise” that members are expected to develop knowledge and skills relating to their work, which includes “...participation in ongoing training provided by the IRB.”\textsuperscript{88} If Hardwig’s suggestion that appeals to authority cannot ground a further evidentiary basis for a claim on truth, then one must wonder of what value is an IRB member’s participation in training to the acquisition of expertise? As we have seen above, Crépeau and Nakache’s findings note that former IRB members often did not develop the required “expertise” through training due to their concern with having to prove themselves to the “political master”.\textsuperscript{89} Hardwig offers an interesting answer that addresses specifically the issue of training:

\begin{quote}
The layman’s appeal to the intellectual authority of the expert, his epistemic dependence on the expert, and his intellectual inferiority to the expert (in matters on which the expert is expert) are all expressed by the formula with which we have been working: \(B\) has good reasons to believe that \(A\) has good reasons to believe that \(p\). But the layman’s epistemic inferiority and dependence can be even more radical – in many such cases, extensive training and special competence may be necessary before \(B\) could conduct the necessary inquiry. And, lacking this training and competence, \(B\) may not be able to understand \(A\)’s reasons, or even if he does understand them, he may not be able to appreciate why they are good reasons.\textsuperscript{90}
\end{quote}

Hardwig’s observation here regarding the limitations of a decision-maker’s capacity to understand \(A\)’s reasons as “good reasons” cannot be overstated. For as we shall see in Chapter 2, a decision-maker’s treatment of an expert’s evidence – in this discussion, I look specifically at psychological and medical expert evidence – is given little weight, or sometimes is dismissed entirely, due to the IRB’s demonstrated failure to appreciate why a particular expert’s reasons are “good reasons”. In other words, rather than considering the expert’s evidence in a respectful, diligent and conscientious manner, the decision-maker defers to their own “expertise”, which, in many cases, is not an informed opinion, but rather based upon a misguided assumption about the

\textsuperscript{87} \textit{Ibid}.
\textsuperscript{88} \textit{Code of Conduct, supra} note 57 at s. 20.
\textsuperscript{89} Crépeau & Nakache, \textit{Critical Spaces, supra} note 59 at 65.
\textsuperscript{90} Hardwig, \textit{Epistemic Dependence, supra} note 78 at 330. [emphasis is mine].
“genuine” content of a “well-founded fear”. In this thesis, I deal specifically with a decision-maker’s erroneous assumption that an individual refugee claimant’s “well-founded fear” must necessarily comprise a subjective element. This assumption of expertise – I argue – is conducive to the delivery of only one form of justice – that is, legal justice (though, as we shall see in Chapter 2, even then the delivery of legal justice may, on occasion, be subverted).

Hardwig’s model thus does not provide a theoretical basis for the acquisition of expertise of all decision-makers of the IRB in respect of the adjudication of a well-founded fear. Such a model, I suggest, does not exist. If we recall Crépeau and Nakache’s statement that normally members of an expert tribunal are necessarily “the experts” in the field, I would submit that such a generalization of expertise – even if pursued with the most sincere of intentions – cannot be achieved within the realm of refugee adjudication.

The question then becomes: Might there exist another way to arrive at an understanding of the term “expertise” as it relates to both the IRB as an “expert tribunal”, and a refugee claimant’s particular experience (or fear) of persecution? I believe there is. That is, this thesis will first argue that the refugee claimant as an “embodied” subject necessarily possesses “good reasons” to believe in a particular proposition (which, in this case, would satisfy the form of a “well-founded fear” or one’s sexual identity as a gay man or lesbian woman); and second, these “good reasons” (which may not even be expressed in a language sufficient for the Law) are, in some instances, the only reasons which satisfy this type of legal inquiry. In other words, what this thesis calls for is a view towards the refugee claimant’s particular experience (or fear) of persecution as itself an authoritative form of “embodied expertise”. In the latter scenario described above, the claimant represents the only expert “B” to whom the IRB may properly turn for expert testimony on her sexual identity and fear of persecution. If the IRB has a claim to any expertise under Hardwig’s model, it is derivative on recognition of the claimant’s embodied expertise.

I shall return to this notion of embodied expertise momentarily. However, before I do so, there is something more that needs to be said about the IRB’s fictional “expert tribunal” status here. I have already alluded to it earlier in this Chapter. That is, earlier I indicated that another conception of justice resides in an ethical form of justice that is, as Professor Constable asserts, responsible at law. Although I do not attend to a substantive discussion of Constable’s account of one’s responsibility “at law” until the following two chapters, it is important that we consider
here a preliminary relationship between the issue of a refugee claimant’s pain suffered on account of a refugee claimant’s experience (or fear) of persecution, and a decision-maker’s search for a “knowable” “fact” of pain before the Law. Facts are not simply “observable phenomena”⁹¹, as Professor Patrick Glenn has noted, but instead, they are, as I will argue, produced as much as they are found for the process of legal adjudication. It is through this process of legal adjudication and interpretation that a certain violence is visited upon the body of the refugee claimant who fails to “produce” or “perform” their experience of persecution as a “fact” before the law. This potential of legal interpretation for violence in the context of refugee adjudication is one that requires that we situate the issue of “pain” at the intersection of justice, expertise, and responsibility.

iii. The Unshareability of Pain and The Question of Responsibility

In his seminal writing, “Violence and the Word”,⁹² Robert Cover provides a thought-provoking discussion of the capacity of law – particularly legal interpretation – for violence. Legal interpretation, Cover states, “...takes place in a field of pain and death.”⁹³ Both the image of Kafka’s countryman who continues to wait whilst in pain at the end of his life for entry into the doorway to the Law, and the refugee claimant who has experienced persecution in their country of origin and must wait (sometimes, in physical detention) to claim sanctuary before the gatekeeper vividly invoke this metaphor of pain and death.

For Cover, “...pain and death destroy the world that "interpretation" calls up”⁹⁴; his reference to Elaine Scarry’s discussion on pain presents a theoretical source of the stand-off of meaning that unfolds between the gatekeeper of the IRB and the refugee claimant. He notes in particular Scarry’s observation that:

> [F]or the person, in pain, so incontestably and unnegotiably present is it that "having pain" may come to be thought of as the most vibrant example of what it is to "have certainty," while for the other person it is so elusive that hearing about pain may exist as the primary model of what it is "to have doubt." Thus pain comes unshareably into our midst as at once that which cannot be denied and that which cannot be confirmed. Whatever pain achieves, it achieves in part through its

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⁹¹Patrick Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2007) at 148-9. Glenn writes in particular that “[o]nce you let loose the notion of verifiable reality, however, outside of law, you have facts, and they exist simply as observable phenomena, outside of any matrix in which they might arguably exist according to non-factual (non-observable or, to be fancy again, metaphysical) assertions.”


⁹³Ibid.

⁹⁴Ibid. at 1602.
unshareability, and it ensures this unshareability in part through its resistance to language...

Prolonged pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.95

Let us recall that in our consideration of Hardwig’s model of expertise I suggested the only individual who could possess the evidence of a given proposition – where such a proposition is that of a “well-founded fear” – is the refugee claimant herself. Scarry’s description of pain reveals, on the one hand, an experience which demonstrates “...what it is to “have certainty”96; and on the other hand, it also constitutes an “unshareable” experience that cannot be contained within language. Such a dichotomous nature comports, in my view, with Hardwig’s model of expertise that suggests one cannot ultimately appeal to an authority for further evidence of the truth of a given proposition. In other words, for the refugee claimant who has experienced the “unshareability” of the pain of persecution (and now lives in fear of it if returned to their country of origin), Hardwig’s model would hold, I argue, that members of the IRB seeking “factual” evidence of this claimant’s fear of persecution may not ultimately rely upon what other “authorities” have to say about the claimant’s experience (or fear) of persecution to determine on a balance of probabilities if that fear is well-founded. The simple reason is, as Scarry suggests, that pain is unshareable; its dimensions cannot be “known” through an appeal to one’s personal knowledge or to the “good reasons” of an external authority. Yet, as we shall see in the following Chapter, decision-makers of the IRB have, in specific instances, inappropriately relied upon the “say-so” of an external authority in an attempt to locate empirical evidence of a claimant’s subjective fear as a “knowable” “fact” before the Law; such an attempt, as we shall see in Chapter 2, represents an exercise in language – specifically a language of rhetoric – as much as it does an exercise in what Clifford Geertz refers to as a “distinctive manner of imagining the real”.

Costas Douzinas and Ronnie Warrington have also discussed Cover’s conception of legal interpretation as a field of pain and death in, inter alia, the specific context of refugee adjudication.97 In particular, Douzinas and Warrington situate Cover’s discussion of the violence of legal interpretation within a quasi-fictional refugee hearing that echoes the plight of the gay refugee claimant I have described at the outset of this discussion:

96 Ibid.
A foreigner comes along to the house of the law. He says: "I am in fear". He asks to be admitted and to be given sanctuary. The immigration officer/judge demands: "Justify your fear, give reasons for it." He answers: "My father has been killed by the police of my country. My two sisters have been harassed. One of my cousins was arrested, taken to a barracks where he died of injuries. Before dying he gave particulars of my friends and relatives including myself. My other cousin has since been arrested and killed. Ah," says the judge "you must accept that fear is valid when it is based on the facts. And facts being what they are I can find them out as well as you can. Indeed better. I know the true facts from my newspapers and from reports by my agents and informers on 'the current political, social and law and order position at present pertaining' in your country. Let us have a look at the facts. People are being killed in your part of the world, some Tamils in particular. But then people are always killed in your part of the world. On the basis of the true facts as I know them I can find no systematic persecution of Tamils or of any group amongst you. There is no objective basis for your fear as you are under no 'real and substantial risk'. I cannot admit you at the moment."  

In this scenario, the sense of violence against the refugee claimant stems from the failure of the claimant to translate his particular experience of persecution into an acceptable format of "fact" fit for legal adjudication. This attempt to reduce the claimant’s experience (or fear) of persecution into an adjudicative "fact" before the Law touches immediately upon the question of a decision-maker’s responsibility in respect of a refugee claimant’s pain which they have suffered on account of their individual experience (or fear) of persecution. In the above case, the immigration judge presumes that he “knows” the refugee claimant’s pain of persecution as a "fact" fit for adjudication, because he “knows” the “true facts”. The judge’s particular reference to the word “know” calls our attention back to the Oxford dictionary’s definition of “expertise” – which I paraphrase – as someone who possesses particular knowledge or skill acquired through her experience regarding a particular subject matter. The subject matter we are dealing with in this instance is the content of a “well-founded fear” of persecution; and, more particularly, what constitutes a “fact” of a well-founded fear in the eyes of the asylum judge. The source of this

98 Ibid. at 128., discussing the case of Bugdaycay v. Secretary of State for the Home Department, [1987] 1 All E.R. 940 H.L. [hereinafter “Bugdaycay”]. At Note 21, Douzinas and Warrington state that:

“This is taken almost verbatim from the [Bugdaycay] case. It describes the experience of a Ugandan refugee who had been refused asylum and was being deported to Kenya, "a safe country", from where he had arrived in the U.K. The House of Lords quashed the decision on Wednesbury grounds accepting that the Home Secretary had not taken into account the fact that Kenya had returned Ugandan dissidents to Uganda in the past despite serious fears for their safety. This is the only instance in which an appellant won in these cases and, interestingly, it is also the only instance in which the House of Lords discussed the evidence produced by a refugee to support his claim of being a victim of persecution.”
“knowable” position of fact relative to an “unknowable” experience of pain appears to have a discernible answer in this scenario.

That is, if we recall Hardwig’s explication of expertise, the answer appears to lie in the judge’s appeal to an external authority that possesses evidence of the “well-foundedness” of the claimant’s fear of persecution – in other words, “objective” evidence of a well-founded fear. The immigration judge might well believe that he or she personally “knows” the “true facts” of the claimant’s “fear” based on their “good reasons” – as Hardwig puts it – to believe that the claimant’s fear of persecution is ill-founded because of the “good reasons” provided by “his” newspapers agents, and informers regarding the claimant’s “...current political, social and law and order position” in their country of origin. The immigration judge’s “good reasons”, then, according to Hardwig’s model, justify not only a mere belief, but a “rational belief” (once again following Hardwig) as to the authentic and “true” source of the claimant’s experience (or fear) of persecution.

At this juncture, I find Hardwig’s comments pertaining to one’s ability to become informed as to the “good reasons” of the expert particularly noteworthy to our consideration of the asylum judge’s reliance upon the “good reasons” of external authorities such as newspaper agencies and the like. That is, Hardwig writes that “[i]f I am not presently in a position to know what the expert’s good reasons for believing that p are or to understand why these are good reasons, I am obviously in no position to check the accuracy of what he tells me.”99 Further, he states that “[a] plausible and tempting suggestion is that, if I think I have the required ability, I should become informed so that I can assess the reliability of the expert’s reports and thus escape my dependence on him and regain my intellectual autonomy.”100 Whilst in the non-refugee context, such a suggestion might prove fruitful to an individual’s inquiry of the reliability of the expert’s report, the very nature of the type of “fear inquiry” conducted by members of the IRB does not permit for a decision maker to act responsibly towards a claimant who has suffered an unshareable pain (following Scarry) on account of their experience (or fear) of persecution. It does not do so even if the individual conducting the inquiry has taken appropriate steps to inform themselves of the expert’s “good reasons” for holding a particular belief about the claimant’s fear. The reason for this, as we have seen, is that a refugee claimant’s pain on account

100 Ibid. [emphasis added].
of their experience (or fear) of persecution cannot be shared for the purpose of establishing the relevant ‘facts’ before the law.

I do not mean to suggest that this necessarily precludes a claimant from receiving sanctuary on account of this pain, for as we shall see in the following Chapter, those who are able to present their well-founded fear in accordance with the subjective criteria comprising the (arbitrary) “rule” of a well-founded fear may be granted sanctuary on account of this demonstrated fear. I do mean to suggest, however, that the law has, in some glaring instances, erroneously attempted to translate the refugee claimant’s pain (on account of their experience or fear of persecution) as a “knowable” “fact” before a peculiar language of law. Accordingly, in the following Chapter, I examine specifically the language of the current legal test for a “well-founded fear of persecution” and suggest that its constituent “subjective” and “objective” elements pose significant challenges for an individual refugee claimant who must translate the pain of their experience (or fear) of persecution into a particular constructed category of “fact” for the gatekeepers of the IRB.

Thus, the question of whether or not a decision-maker may ultimately share in the pain of a refugee claimant (particularly the gay or lesbian claimant) – which, I argue is not possible– is not the central pre-occupation of this discussion; rather, the question is this: Is there some other basis upon which a refugee claimant’s pain on account of their experience (or fear) of persecution might still be adjudicated within a legal order, but which does not assume (or presume) a position of shareability with the pain of the refugee claimant? I believe that there is. In the final Chapter, I shall argue following the inspiring work of Professor Judith Butler, that this other basis for the recognition of a refugee claimant’s pain (on account of their experience (or fear) of persecution) within a given legal order rests in a decision-maker’s position of “unknowingness”; it arises on account of a shared “common corporeal vulnerability” we share with those who have suffered a “loss” of a kind which may be simply inexplicable (and I would add, inexplicable before the Law). This position of “unknowingness” relative to the claimant’s particular experience (or fear) of persecution (which the decision-maker cannot “know”) may serve not only as another basis for the recognition of the refugee claimant’s pain within a legal order of refugee adjudication, but also as a basis for another form of justice that respects the singularity of the refugee claimant.

102 See Judith Butler, Violence, Mourning, Politics, supra note 1.
In this paradigm of “unknowingness”, the source of a decision-maker’s “expertise” would derive from an external authority’s “say-so” about a claimant’s particular experience (or fear) of persecution; but, instead it would, in the language of responsibility propounded by Constable, require that a decision-maker do what they must in a moment that requires them to respond behind the “rules” to a prior call to act. Thus, a decision-maker who does not answer the call to act responsibly will necessarily be at a loss to appreciate the pain of the claimant (that is, he or she will be at a loss to see her pain as a basis for ethical decision-making) because, as we have seen, her pain is not recognized as an experience that is unshareable. Yet, for the decision maker who chooses to and actively responds to the call to act responsibly, the question of a claimant’s shareability of pain becomes a matter that may not be answered through any categorical interpretation of law. Instead, the only interpretation of law adequate to the prior call to act responsibly and presupposed by the unshareability of the claimant’s pain is a conscious recognition of the incapacity to “know” the claimant’s pain as a “fact” before the Law. I shall accordingly have much more to say in this thesis regarding both Constable’s language of responsibility and Butler’s proposal of a “common corporeal vulnerability” in the remaining chapters. However, our immediate task shall be to navigate the terrain of the legal “rule” of a well-founded fear and explore the limits of a language of expertise in the delivery of legal justice to the refugee claimant.

In this chapter, I have sought to establish a theoretical framework from which to scrutinize the IRB’s nebulous designation as an “expert tribunal”. Such a designation, I have shown, is premised upon a conception of law as fiction. Adopting Hardwig’s model of expertise, I have suggested that the basis upon which particular decision makers of the IRB may potentially maintain a claim of expertise over the content of a “well-founded fear” rests in decision-makers’ reliance upon their “good reasons” to believe the “good reasons” of an external authority over the content of a well-founded fear. Such a model of expertise, I have shown, only partly justifies the IRB’s claim of expertise as an “expert tribunal”. It does not explain how decision-makers of the IRB, in some instances, rely upon their own “expertise” and either give little weight or dismiss altogether the evidence of an external authority. In the result, following Manderson’s construction, I have attempted to demonstrate that a “community of believers” has “made real” a particular fiction underlying the IRB’s purported “expertise” over the “fact” of a “well-founded fear”. Such a form of adjudication preserves a form of legal justice whose criteria are internal to
itself, and which denies the singularity and uniqueness of the refugee claimant as an embodied subject. The legal interpretation of persecution based on a well-founded fear thus rewards those who perform their identity in a manner that meets the requirements legal justice; but for those who fail to articulate a pain (or fear) of persecution that cannot be expressed in a language of expertise – that is to say, one that cannot be “known” as a “fact” before the Law – such an interpretation results in violence upon the claimant.

In the following Chapter, I explore the “rule” of a well-founded fear and its relationship to legal justice from the point of view of rhetoric and rule-based decision-making in the works of Marianne Constable and Frederick Schauer respectively. I argue in particular that a decision-maker’s appeal to an expert authority’s “say-so” regarding their experience (or fear) of persecution – whether a psychological or medical expert, or an individual IRB members’ reliance upon their own authority – represents a central element in the rhetorical construction of a claimant’s “well-founded fear”. This construction of a well-founded fear is rhetorical because it relies needlessly upon a decision-maker’s successful search for a subjective element of a well-founded fear. In some cases, the reliance of a decision-maker upon the “say-so” of a professional expert for empirical evidence of a subjective element of fear represents an exercise in the imagination of the real. Such an exercise at once defends a form of legal justice that does not address a decision-maker’s responsibility at law; as such, it leaves the promise of an ethical and responsible form of justice for the refugee claimant – and more particularly, the gay or lesbian refugee claimant – unfulfilled.

In the last chapter, I sought to demonstrate that the nebulous designation of the IRB as an “expert tribunal” is premised upon a fiction regarding the source of the IRB’s “expertise” over the adjudication of a refugee claimant’s well-founded fear. Adopting the model of expertise propounded by Professor Hardwig, I have suggested that a possible theoretical framework upon which the IRB might ground a claim of expertise over such a “well-founded fear” rests in individual IRB members’ appeal to the “good reasons” of an external authority’s “say-so” about a particular proposition or “p”. For the purposes of this thesis, I have treated p as the claimant’s “well-founded fear of being persecuted”. Within this paradigm, the “good reasons” of the external authority “become” the “good reasons” of the IRB member, presumably because the “good reasons” of the authority are founded upon the authority’s independent appraisal of the evidence.

In this chapter, I wish to suggest that an expert authority’s “say-so” about a refugee claimant’s experience (or) fear of persecution represents a key component in the construction of a refugee claimant’s well-founded fear before the Law. This constructed notion of fear defends a form of legal justice that rests upon the power of language – and more particularly, the language of rhetoric. In this regard, I wish to conduct a critique of the IRB’s designation as an “expert tribunal” from the point of view of language and rhetoric. Firstly, I will address the role of rhetoric generally in and of modern law as set forth by Professor Marianne Constable in her work *Just Silences: The Limits and Possibilities of Modern Law*.\(^\text{103}\) In particular, I examine Constable’s discussion of the role of rhetoric in the changing conception of the “citizen”, “expertise”, and “social science”. Thereafter, I discuss the role of rhetoric in the division of the refugee body as a bifurcated notion of “subjective” and “objective” fear. Drawing upon the work of Professor James C. Hathaway and William S. Hicks – who argue that there is no subjective element in the test for a well-founded fear – I wish to argue specifically that the subjective element of a well-founded fear of being persecuted is, at base, an exercise in rhetoric. Secondly, I will draw upon Professor Frederick Schauer’s intriguing account of “rule-based” decision making and suggest that the rhetorical value of the subjective element of a well-founded fear lies in the “fact” of an


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“identity of trepidation”\textsuperscript{104} underlying the “rule” of a well-founded fear. I shall adopt Schauer’s description of such a factual basis to a given rule as the “factual predicate”\textsuperscript{105}. In particular, I will argue that if there is no subjective element in the bi-partite test for a well-founded fear, a decision maker’s reliance or rejection of psychological and medical expert evidence represents an exercise not only in rhetoric, but in what Clifford Geertz identifies as a “…distinctive manner of imagining the real.”\textsuperscript{106} Third, I consider the role of performativity in the construction of a refugee claimant’s subjective experience (or fear) of persecution as the “factual predicate” underlying the “rule” of a well-founded fear. I consider specifically this construction as an “identity of trepidation”, and examine its relationship to Rousseau and Foxen’s research on the “lying” refugee and Barsky’s description of the refugee as a “productive Other”.

In the final section, I explore how the law’s capacity for the “imagination of the real” has become a central component to the delivery of legal justice (which I describe as “citizen-expert” justice); it is a form of justice that locates the “fact” of a claimant’s “fear” at the juncture between the language and rhetoric of psychological and medical expertise, and the physical body of the claimant. Such a form of justice accordingly rewards the refugee claimant who successfully performs their “identity of trepidation” before the Law; however, it does not speak to the possibility of another form of justice for the refugee claimant that “lies behind the rules” of a well-founded fear.

As we shall see in the final chapter, Hardwig’s model of expertise leaves open the question of whether and how a particular decision maker’s reliance or rejection of the “say-so” of an external expert delivers to the refugee claimant a form of justice that is particular in its aspiration – in other words, it does not offer to the refugee claimant a different form of justice that first recognizes what I have identified in the last chapter as the uniqueness and singularity of the refugee claimant. In this regard, the final chapter of this thesis shall address how the rhetoric of expertise and expert language presents the possibility for a different form of justice than what I shall refer to as “citizen-expert justice”. This different form of justice compels decision

\textsuperscript{104} My use of the expression “identity of trepidation” in this thesis is predicated upon Hathaway and Hicks’ reference to “trepidation” in their study of the subjective element of the bi-partite test for a well-founded fear; see Hathaway & Hicks, Is There a Subjective Element?, infra note 161 at 507 where they state generally: “Rather than predicking access to [the Refugee Convention’s] protection on the existence of “fear” in the sense of trepidation, the Convention refugee definition requires only the demonstration of “fear” in the sense of a forward-looking expectation of risk.”

\textsuperscript{105} See generally, Chapter 2, infra, section C.

\textsuperscript{106} See generally Clifford Geertz, Local Knowledge, supra note 267; and more particularly, at 173.
makers to recognize a “prior call” to act responsibly towards the refugee claimant. In the case of the gay or lesbian refugee claimant, I shall argue that the law’s attempt to locate one’s sexual identity at the physical site of the body of the claimant represents not only the height of the law’s capacity for imagining the real, but a decision maker’s refusal to be held responsible “at law”107, as Constable aptly puts it. Let us turn first, though, to consider the requirements of legal justice for the successfully “constructed” refugee claimant.

A. The Role of Rhetoric in the Search for a Well-Founded Fear of Being Persecuted

i. The Relationship Between Law, Justice and Rhetoric

As I have stated at the outset of this chapter, my primary goal in this chapter is to demonstrate how the adjudication of a refugee claimant’s “well-founded fear of being persecuted” defends a form of legal justice that relies upon the successful performance of a claimant’s experience (or fear) of persecution before the Law; in this performance, the “say-so” of the claimant about their very particular experience (or fear) of persecution is pitted against the “say-so” of the decision-maker. It is in this arena that the question of “expertise” becomes a key aspect of the determination process. Who’s expertise – the claimant’s or the decision-maker’s – is more “truthful” than the other? In this chapter, I turn to consider how the definition of a “well-founded fear of being persecuted” represents a problematic question of “law” and “fact,” and gives rise to a form of legal justice that rewards only those who are successful in their performance of “fear” according to the law’s internal and universalist notions of what the word “fear” means for the one who has suffered an experience (or) fear of persecution. Accordingly, I wish to first consider the relationship between the kind of legal justice I claim is afforded to refugee claimants, and its relationship to language – and more particularly, to the role of rhetoric in refugee adjudication. Professor Marianne Constable’s discussion of the role of rhetoric in and of modern law, I find, provides us with a rich and compelling starting point for this chapter.

107 For Constable, the notion of decision makers being held responsible “at law” is articulated within her critique of Frederick Schauer’s account of “rule-based” decision making, the latter of which I explore in this chapter in the context of the “rule” of a well-founded fear of persecution. I do not, however, address Constable’s critique of Schauer’s rule-based decision making until the final chapter of this thesis. At this juncture, I simply wish to include Constable’s general criticism of Schauer’s rule-based decision making that “[i]n locating the “force” or rules in social pressure, Schauer nullifies the responsibility of rule-based decision-makers for their own decisions. Insofar as Schauer maintains that social conditions oblige rule-based decision-makers to make the decisions they do – whether in following or overriding rules – he suspends their capacity to act and be held responsible for what they do” (see Constable, Behind the Rules, infra 195 at 127.
Although Constable’s work is situated within the U.S. legal system, I find her account of the role of rhetoric both timely and instructive at this juncture in the discussion, not only because of what it has to say about the limits and possibilities of justice for the subject of law; but, more intriguingly for the purposes of this thesis, what it has to say about the role of rhetoric in the changing conception of the “citizen”, the “expert”, and “social science”.

In the opening passages of her work *Just Silences*\(^{108}\), Professor Constable sets out her thesis – namely that:

\[ \ldots \text{the justice of modern law lies precisely in positive law’s ostensible silences – which is not to say, despite the current predominant identification of silence with lack, that justice is absent. Neither is it to say that positive law is just. Rather, the conditions of justice, like those of Kantian equity – “a silent goddess who cannot be heard” – cannot be stipulated or definitely pronounced.}^{109} \]

Let us recall at the outset of this discussion I suggested that the stand-off of meaning which unfolds between the gay refugee claimant and the immigration judge is not simply a stand-off about the purpose of law, but also it is a stand-off about the requirements of justice. In my view, Constable’s general claim above that the “conditions of justice...cannot be stipulated or definitely pronounced”\(^{110}\) suggests that the *particular* conditions of justice for an individual seeking refugee status in a sovereign state are contingent upon that which lies *outside* the pronouncement of these conditions – in other words, justice for the refugee claimant lies in that which cannot be bounded to distinct and utterable legal categories. Constable’s words eerily remind us of Douzinas’ distinction between his explication of “legal justice” and “a different conception of justice”. Let us recall that for Douzinas, legal justice is “…internal to the law and operates when the law matches its own standards and principles.”\(^{111}\) A separate notion of justice for Douzinas “starts” with a general reference to Emmanuel Levinas’ observation that “…justice exists in relation to the other person”\(^{112}\), and that “[a]s phenomenology has argued, I cannot know the other as other, I can never comprehend fully her intentions or actions, I can never have an


\(^{109}\) *Ibid.* at 35.  [emphasis is mine].

\(^{110}\) *Ibid.*

\(^{111}\) *Ibid.*

\(^{112}\) *Ibid.* at 177.
appropriate adequation or presentation, because no immediate access or perception of otherness exists.”

Although Douzinas does not state so explicitly, I would submit that what separates his conception of legal justice from another notion of justice which recognizes the person’s “infinite otherness” is, at base, a question of language. In particular, what I am concerned with is how a language of “standards and principles” has come to “bind” individuals to universal and finite categories of “law”. But, how does language, in fact, acquire this power of influence over individuals in the first place? The answer, I argue, lies partly in the persuasiveness of language to compel action – in a word – rhetoric. In this regard, I wish to consider Constable’s discussion regarding the role of rhetoric and language in and of modern law. In particular, I am interested in exploring the implications for a language of refugee adjudication that, in its focus on the “rule” of a well-founded fear of being persecuted, reveals both the limits of legal justice and the possibilities of another kind of justice for the refugee claimant that lies in the “silences” behind the “rule” of a well-founded fear.

Constable argues that her work “reveals a multiplicity of legal silences and of possible implication for justice at precisely the limits of positive law where the language of power and the power of language run out.” It does so, in Constable’s view, by “[attending] to legal texts for what they say and don’t say about justice” through the use of rhetoric. For Constable, “[t]he rhetorician questions the logician’s eternal faith that ideas represented by words can be grasped irrespective of their utterance in particular times and places and languages. To the rhetorician, words do not necessarily represent propositions and neither words, ideas, nor propositions can be analyzed independently of their use.”

One might query here whether Constable’s explication of the “logician’s eternal faith” bears a particular resemblance to Manderson’s description of the faith of those in the “made real” of law as fiction.

In Constable’s view, the work of rhetoricians lies in their ability to read and to listen to what is and isn’t said in a given text; for the non-rhetorician – of which I profess I am one –

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113 Ibid. [emphasis is mine].
115 Ibid.
116 Ibid. at 16.
117 I find that her example of the phrase “law is too important to leave to the lawyers” reveals much about the ambiguity of language, about the non-universality of meaning of words – Constable queries: “[Rhetoricians] wonder, for instance, about phrases like “law is too important to leave to the lawyers,” a phrase with a lovely alliterative lilt. But does the phrase mean that
Constable summarizes three typical rhetorical components of a “legal event or text”\textsuperscript{118}. First, there exists an “addressee or subject, the “one” or “ones” whom law addresses...when it tells someone what to do\textsuperscript{119}; secondly, there is “a doing, the what to do law calls for”; and third, there is “a telling (of what to do) in a manner (with or without words) through which law presumes, addressees discern what must be done\textsuperscript{120}. Certainly, one might envision how the components of rhetoric set forth here apply to the “legal text” of the bi-partite test for a well-founded fear. Before addressing specifically this question, though, it is important that we first situate Constable’s account of rhetoric within her analysis of the change in the rhetorical use of the term “citizen” to “citizen expert” in the United States; the implications of such change, I find, bear significantly on the use of the term “expert” in the Canadian refugee determination process.

\textbf{ii. Rhetoric and the Emergence of the “Citizen-Expert IRB Member”}

Constable explores the role of rhetoric in the specific example of differing notions of the word “citizen”\textsuperscript{121} and its particular modern usage in the form of the “citizen-expert”\textsuperscript{122} in the United States. Although she writes specifically with respect to developments in the U.S. context, her discussion bears upon our consideration of the rise of a community of “citizen-expert” decision makers within the IRB. Constable describes the citizen-expert as a “user of services”, which represents “…the complement to the service provider (as “consumer” is to producer”)\textsuperscript{123}:

\begin{quote}
[t]he “user” combines the techniques of cost-benefit analysis and concern for economic efficiency with utilitarian calculations as to satisfactions – in new civic form.
\end{quote}

\begin{flushright}
\textit{law is too important to leave to the lawyers, but that it is all right to leave some less important nonlaw to lawyers (and what might that be?)? Does it mean that law is too important to leave to the lawyers, rather than too interesting or enriching or complicated (and how is it important?)? Does it mean that law is too important to leave to the lawyers, as opposed to those with whom it might otherwise safely be left- law professors, or judges, or legislators, or liberal artists or scholars, for instance?”
\end{flushright}

\textsuperscript{118} \textit{Ibid.} at 19.
\textsuperscript{119} \textit{Ibid.}
\textsuperscript{120} \textit{Ibid.}
\textsuperscript{121} \textit{Ibid.} at 21. Constable writes that “[c]itizen indeed carries with it a conception of law that tells the members of a polis to practice the virtues of the laws of the city.”
\textsuperscript{122} \textit{Ibid.}

Constable states that: “In 1997, President Clinton established an Advisory Commission on Consumer Protection and Quality in the Health Care Industry. The problems that health maintenance organization (HMOs) were meant to address – problems with the medical profession – had given way to problems with the very “health care providers” that had replaced doctors, nurses, and medical assistants. Clinton asked thirty-four “citizen-experts” to draft a “bill of rights” protecting Americans, in the words of one commentator, “from the corporations insuring their health.” Former patients became “health care consumers,” in Clinton’s terms, and were asked to take responsibility for declaring their rights”, citing Robert Hunt Sprinkle, “Corporation in Question: A Note on Managed Care,” \textit{Report from the Institute for Philosophy and Public Policy} 17 (1997) at 13.
\textsuperscript{123} \textit{Ibid.} at 22.
The user manipulates the things of this world, yet distinguishes between needs and desires. The user draws on experience of these needs to contribute to representations of the public or publics (in user surveys, for instance). But more importantly, as citizen-expert, the user engages with others within given social structures. Indeed, as an entity already situate in relations and dependencies with others, the service user – like all members of contemporary society – engages in a particular politics of association.\textsuperscript{124}

The implication of this type of “politics of association” in the United States has been, for Constable, the expansion of traditional notions of expertise in which the introduction of the rhetorical use of the term “user” now appears to connote a domain of “citizen expertise” which did not exist historically in the United States - she elaborates:

> The adoption –by state agencies, quasi-public organizations, and private parties alike – of the techniques of management, accounting, and evaluation that characterize market enterprises has meant that expertise no longer belongs either to specialists or to social researchers, planners, and efficiency experts, who were held accountable to professional norms and external goals. Expertise now belongs concurrently to the citizen – a citizen trained to community responsibility and appealed to, as responsible community member and local expert, to participate in government that increasingly administers what may loosely be termed the activities of everyday life – working, eating and drinking, learning, resting and recreating, traveling, reading, watching television, driving, and so forth.\textsuperscript{125}

 Constable identifies that a shift from the expertise of “therapeutic professions”\textsuperscript{126} – which, following Michel Foucault, she identifies as “public health, psychology, social welfare, city planning and so forth”\textsuperscript{127} – has “given way”\textsuperscript{128} to “...experts in the field of financial planning, management, administration, and public accounting, the latter experts rely increasingly for their “substance” on local knowledge, the input of the democratic citizen or local community member.”\textsuperscript{129} Constable’s example of the contrast between the “traditional model of crime and order”\textsuperscript{130} with a “community model” that responds to “citizen satisfaction with justice services”\textsuperscript{131} demonstrates this “sharing” of expertise; she writes in particular how “[b]ecause of the heavy dosage of citizen input and activity in the [community] model, professional effort

\textsuperscript{124} Ibid. at 22-23.
\textsuperscript{126} Ibid. at 24.
\textsuperscript{127} Ibid.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid. at 26.
\textsuperscript{131} Ibid.
tends to be judged on the basis of citizen satisfaction with justice services”¹³² rather than being held accountable “...for a set of professional standards that apply uniformly to all who are engage in the practice of justice.”¹³³

One might well inquire how the “sharing” of expertise amongst professional experts and “citizen-experts” is a “bad” thing; certainly, I do not quarrel with those who wish for the citizenry to become more empowered – and thus more active – in the administrative of justice. But, as we shall later see in this chapter, my quarrel (if one were to characterize it this way) is with a culture of adjudication in which the recognition of the “citizen’s” input and activity (here, I use the term “citizen” in reference to individuals of law and non-law backgrounds who are appointed to the IRB) in the decision-making process is disingenuously couched within the term “expertise”.¹³⁴ Accordingly, Constable’s discussion of the rhetorical foundation of the term “citizen-expert” offers an important perspective from which to consider the IRB’s “expert tribunal” status as founded upon the language and power of rhetoric. In this regard, I would submit that the domain of expertise regarding the adjudication of an individual’s claim for refugee status is now “concurrently” shared between professional experts – psychologists and physicians, for example – and what I shall call “citizen-expert IRB members”. Constable’s explication of this concurrent sharing of expertise between citizens and the U.S. criminal justice system in the context of the “emerging field” of “community justice” provides an intriguing parallel to a type of “emerging field” – perhaps even an emerging tradition – with respect to a “sharing” of expertise between social science and medical experts, and a community of “citizen-experts” who are comprised of individuals from law and non-law backgrounds appointed to serve in the capacity of IRB members.¹³⁵

In this emerging domain of “citizen expertise”, Constable stresses that “[t]he citizen takes the place of the fellow professional in judging professional performance.”¹³⁶ The citizen in this particular world (Constable states earlier that “[t]he language not just of philosophy, but of law, reveals worlds”¹³⁷) is not merely a subject to be acted upon by the law. Rather, Constable argues

¹³³ Ibid.
¹³⁴ See generally Chapter 1, supra; particularly Part B (i).
¹³⁵ See IRB GIC Competency Profile, supra note 62.
¹³⁶ Ibid.
¹³⁷ Ibid. at 21.
that “[c]itizens’ concerns and desires indicate what problems to address and enable policymakers to develop strategies whose success will in turn depend on the evaluations of citizens.”

Interestingly, Constable ties the notion of citizen-expertise to Professor Austin Sarat’s observations regarding the decreasing relevance of social sciences to the project of law. In particular, Constable refers to Sarat’s assertion that “[t]he social sciences, and especially sociology (the most social)...are today largely absent from national government and are experiencing their own internal drift and discontent.” Sarat, Constable states, “sees a relaxation of “the confident embrace of social science as the dominant paradigm for work that seeks to chart the social life of law.”” As such, this relaxation has given rise to “the decline of the social as a nexus of governing”, as Sarat pessimistically puts it. Constable further points out Sarat’s position that the “dismantling” of “[t]he most florid forms of the social” – which include “…social insurance, public transportation and housing, public health and social medicine, as well as socialism” – has yielded to “…the preferences of society and its ostensibly empowered service users.”

I find that Sarat’s view towards the “decline of the social” has particular application to this thesis. That is, I am tempted to query at this juncture whether in the context of refugee adjudication at the IRB, we have also witnessed a peculiar “decline of the social” in the context of refugee adjudication generally, and more particularly within the IRB. Specifically, what I am concerned with is the rise of a form (or perhaps tradition) of adjudication in which the expertise of professional experts – whether they be psychologists or medical experts – now “concurrently belongs”, as Constable puts it, to individual “citizen-expert” IRB members. This “concurrent” sharing of expertise between the professional expert and the “citizen-expert” IRB member, I shall argue, only partly defends Professor Hardwig’s model of expertise I have outlined in the previous chapter. It does so only partly insofar as the “good reasons” of a decision maker’s belief that a claimant suffers from a well-founded fear does not, in all cases, derive from their

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138 Ibid. at 26.
140 Ibid. at 27., citing Sarat, Visuality Amidst Fragmentation, ibid at 4-5.
141 Ibid., citing Sarat, Visuality Amidst Fragmentation, ibid. at 4-5.
142 Ibid. at 27.
143 Ibid.
144 Ibid. at 28.
145 Ibid.
reliance upon the “good reasons” of an expert authority, but rather upon the decision maker’s personal “standards” of justice. That is, the primary standard of satisfaction for decision makers, I shall argue, is the “rule” governing a decision maker’s search for a “fact” of a refugee claimant’s “subjective fear” of being persecuted. In this search for a “fact” of a subjective fear – to the exclusion of all other forms of evidence – the “citizen-expert” ultimately “...takes the place of the fellow professional in judging professional performance”\(^{146}\), thus holding the professional expert – and ultimately the claimant – to a standard of legal justice that is wholly internal to itself.

Equipped with this understanding of the rhetorical use of the term “citizen-expert”, it would therefore be appropriate in this chapter to examine its usage within the existing language of a well-founded fear of being persecuted. I will first consider the “who”, the “what” and the “how” of the existing “legal text” of the bi-partite test for a well-founded fear as a peculiar exercise in rhetoric; as such, my objective shall be to show that this bifurcation of the term “fear” into categories of objectivity and subjectivity reflects law’s attempt to create a universal and “shared” domain of expertise between “citizen-expert IRB” decision makers and professional experts over the content of a “well-founded fear”.

To assist in this analysis, I will draw upon the work of Professor Hathaway and William S. Hicks, who argue forcefully that there simply is no subjective element of the bi-partite test for a well-founded fear of being persecuted. Instead, Hathaway and Hicks argue that what should drive the test for a well-founded fear is evidence of an actual risk of persecution – based upon the totality of all the evidence presented before the decision maker. Hathaway and Hicks’ proposal for the elimination of the subjective element not only reveals its rhetorical origins in language, but it also raises a critical question regarding the reason for and purpose of expertise in the adjudication of a claimant’s experience (or fear) of being persecuted. In my view, a rhetorical analysis of the subjective element of the test for a well-founded fear ultimately reveals what the naming of categories of fear say and don’t say about the limits and possibilities of legal justice for the refugee claimant.

I will argue that the possibility of a different form of justice lies – as Constable argues more generally in relation to modern legal systems – “...behind the rules – in the law that

establishes what must be done when one needs to act.”

As we shall see, behind the legal “rule” of a well-founded fear, the body of the refugee claimant becomes scrutinized as an object of purported “expert” inquiry and scientific investigation, rather than as an embodied subject whose experience (or fear) of persecution or sexual identity is, in some cases, simply “unknowable”. Although the final objective of this thesis shall be to aspire to a recognition of a “common vulnerability” amongst all human beings as a prior call for decision makers to act responsibly at law towards the refugee claimant (in particular, the gay or lesbian refugee claimant), we cannot do so without first entering the realm of rhetoric and examining its role in the construction of a refugee claimant’s well-founded fear.

B. Rhetoric and the “Well-Founded Fear” Inquiry

Let us recall Constable’s summary of the three essential components of a rhetorical legal event or text: first, there is a “who” (or “addressee”) of the given legal event or text, a “doing” or “what” it requires, and a “telling” to the addressee of what to do in a particular manner. In this section, I am interested in examining the process by which these components are assembled in the context of the IRB’s adjudication of a well-founded fear. I shall refer to this process in this thesis as the “well-founded fear inquiry” conducted by decision-makers generally, and more particularly members of the IRB, who serve as the principal “addressee” of this particular “legal event”.

What I am concerned with in this section of the discussion is to show that both the IRB’s designation as an “expert tribunal” and the existing definition of a “well-founded fear” are, at base, “legal texts” premised upon the power of rhetoric. That is, the delivery of legal justice to the refugee claimant, I argue, depends not only upon what the “rules” “say” about what constitutes a “well-founded fear” for the gatekeepers of the law; but more importantly, it depends on the telling of these rules in a manner that compels decision makers to act in service of the rule without being held responsible “at law”, as Constable puts it. It is therefore important that we consider the nature and implications of the “rules” governing individual decision makers’ interpretation of a “well-founded fear”. To assist in this analysis, I wish to draw upon the

147 Constable, Behind the Rules, infra note 195 at 131.
148 See Hathaway & Hicks, Is There a Subjective Element?, infra note 161.
149 It should be pointed out that IRB members are not the sole addressees of the particular legal event regarding the “rule” of a well-founded fear. Certainly, the claimant herself exists also as a key addressee here in the adjudication of a well-founded fear. In this thesis, I address the claimant’s role as addressee within the context of their performance of an “identity of trepidation” before the Law.
writings of Professor Frederick Schauer, who has assembled an intriguing account of rule-based
decision-making in his work Playing by the Rules: A Philosophical Examination of Rule-Based
Decision-Making in Law and Life.¹⁵⁰

i. The Rhetoric of the Subjective Element of a “Well-Founded Fear”

To prepare for our discussion of Schauer’s rule-based decision making, it is important
that we first examine the existing definition of a “well-founded fear”. It is defined under Article
1(A)(2) of the Convention relating to the Status of Refugees¹⁵¹ as follows:

As a result of events occurring before 1 January 1951 and 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.¹⁵²

The UNHCR Handbook identifies that “[t]he phrase “well-founded fear of being persecuted” is
the key phrase of the definition [of a refugee].”¹⁵³ The Handbook notes that this phrase “replaces
the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying
the protection of their country) by the general concept of “fear” for a relevant motive.”¹⁵⁴ In four
key sections of the Handbook, the phrase “well-founded fear” is described as containing the
following: first, a “subjective” element “[s]ince fear is subjective”¹⁵⁵; second, the person’s

¹⁵² Ibid., at art. 1(A)(2).
<http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> at para. 38 [hereinafter “Handbook”]. In the Foreward of the Handbook, Director Moussalli, Director of International Protection for the Office of the UNHCR states at para. IV that it “...has been regularly reprinted to meet the increasing demands of government officials, academics, and lawyers concerned with refugee problems. The present edition updates information concerning accessions to the international refugee instruments including details of declarations on the geographical applicability of the 1951 Convention and 1967 Protocol.” Further, at para V., Moussalli states that “[t]he segment of this Handbook on the criteria for determining refugee status breaks down and explains the various components of the definition of refugee set out in the 1951 Convention and the 1967 Protocol. The explanations are based on the knowledge accumulated by the High Commissioner's Office over some 25 years, since the entry into force of the 1951 Convention on 21 April 1954”; and at para. VII: “The Handbook is meant for the guidance of government officials concerned with the determination of refugee status in the various Contracting States. It is hoped that it will also be of interest and useful to all those concerned with refugee problems.”
¹⁵⁴ Ibid., at s. 37.
¹⁵⁵ Ibid, S. 37 states, inter alia, that “...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.”
“fear” must be “well-founded”\textsuperscript{156} upon an “objective situation”\textsuperscript{157} and as such “...both elements must be taken into consideration”\textsuperscript{158}; third, an assessment of the subjective element is “...inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions”\textsuperscript{159}; and forth, “...an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record.”\textsuperscript{160}

Here, we see four explicit references in the Handbook to a “bifurcated” notion of “subjective” and “objective” fear, based upon a presumption of fear as necessarily “subjective”. This presumption of subjectivity has been sharply criticized as particularly problematic in the adjudication of an individual’s claim of a well-founded fear. For example, Professor James C. Hathaway and William S. Hicks provide an intriguing and compelling analysis of the “subjective” component of the bi-partite test\textsuperscript{161}. They argue forcefully that the subjective element should be altogether discarded from the existing test; that is, in their view, it is superfluous and ultimately “unhelpful”\textsuperscript{162} to the assessment of the veracity of a claimant’s evidence of a well-founded fear. I shall refer to Hathaway and Hicks’ position in this thesis as the “no-subjective element thesis”.

A focal point of Hathaway and Hicks’ no-subjective element thesis rests in its criticism of the evidentiary implications of the “subjective” and “objective” elements of the bi-partite test.

\textsuperscript{156} Ibid. at s. 38: “To the element of fear—a state of mind and a subjective condition—is added the qualification “well-founded”. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.”

\textsuperscript{157} Ibid.

\textsuperscript{158} Ibid.

\textsuperscript{159} Ibid. at s. 40. “An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.”

\textsuperscript{160} Ibid. at s. 41. “Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences—in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.” [emphasis is mine].


\textsuperscript{162} Ibid. at 508-9.
In particular, Hathaway and Hicks dispute the existing “categorical distinction” made between “subjective” and “objective” evidence of fear; in so doing, their analysis reveals the rhetorical nature and use of the words “subjective” and “objective” generally:

Implicit in the view that a subjective element is needed to allow for the admission of individuated evidence of risk is an assumption that evidence adduced by the applicant is qualitatively different than externalized evidence generated from more detached sources. Likewise, it is assumed that without a subjective element refugee status would be denied to persons who, for whatever reason, face a risk greater than would be revealed by the so-called objective (externally generated) evidence alone. It is thus predicated on a categorical distinction between so-called “subjective evidence” and externally generated evidence from “more objective” sources.\(^{163}\)

As Hathaway and Hicks rightly point out, there does not exist a difference in forms of evidence, but rather, “...the only appropriate distinction is between relevant evidence, which is admissible, and irrelevant evidence, which is inadmissible. The source of that evidence is simply immaterial.”\(^{164}\) Hathaway and Hicks express their reservations with respect to these categorical distinctions of “subjective” and “objective” evidence in no uncertain terms:

Not only is a subjective element unnecessary to secure the substantive admissibility of evidence adduced by the applicant, but there is a real concern that continued reference to “subjective” and “objective” evidence may actually interfere with the duty of decision makers to devote equivalent attention to all forms of evidence, regardless of their origin, and to accord weight to each piece of evidence based only on its probative worth. Properly understood, evidence adduced by the applicant and evidence from “more objective” sources are different in kind, but not in quality. Yet, the classification of evidence as subjective or objective based on its source creates de facto an evidentiary hierarchy under which decision makers may be led to overvalue “objective” evidence and devalue evidence labelled “subjective”.\(^{165}\)

This excerpt, in my view, represents the crux of Hathaway and Hick’s “no-subjective element” thesis. It reveals their concern not only with a “continued reference to “subjective” and “objective” evidence”\(^{166}\), but more distressingly, its implications for the creation of a “de facto” evidentiary hierarchy\(^{167}\) in which “objective” evidence of an individual’s “fear of being persecuted” may be “overvalued”\(^{168}\). As we shall see later in this chapter, “objective” evidence going to a claimant’s “subjective” fear has, in fact, been preferred over an individual’s

\(^{163}\) *Ibid.* at 546. [emphasis is mine].  
\(^{164}\) *Ibid.* [emphasis is mine].  
\(^{165}\) *Ibid.* at 548. [emphasis is mine].  
\(^{166}\) *Ibid.*.  
\(^{167}\) *Ibid.*.  
\(^{168}\) *Ibid.*.
“subjective” evidence at the expense of their duty to consider the probative worth of all evidence presented before the decision maker.\textsuperscript{169} In the result, such an evidentiary hierarchy, I would submit, has yielded a “shared” domain of expertise between the decision maker and the professional expert.

Hathaway and Hick’s identification of a potential linguistic rationale for the preference of “objective” evidence over “subjective” evidence ultimately reveals the powerful role of rhetoric in generating both a constructed language of “fear”, as well as the skeleton scaffolding for a constructed and shared language of “expertise”:

Fundamentally, “objective” and “subjective” are not neutral adjectives used merely as a matter of convenience. This is obvious even from a strictly linguistic perspective. “Objective” is defined as “external to the mind; real.”\textsuperscript{170} The word “subjective”, by contrast, is defined as “existing in the mind only...illusory, fanciful”.\textsuperscript{171} If there is truly a meaningful distinction between evidence labelled as “objective” and evidence labelled as “subjective,” it must be because the former is, by nature, more rational, more reliable, and more probative than the later. It would therefore be understandable that the legal mind might be inclined to prefer the “objective” over the “subjective.” Yet it surely follows that the result of a decision to classify evidence adduced by applicants for refugee status as “subjective” is that it is unlikely to receive the weight due it on the basis of a non-categorical appraisal of its probative worth.\textsuperscript{172}

Whilst Hathaway and Hicks claim that decision makers “…may be led to overvalue “objective” evidence and devalue evidence labelled “subjective””\textsuperscript{173} as a result of such problematic distinctions, they do not, in my view, go far enough in offering us a justification as to why decision makers are ultimately “led” to “overvalue” “objective” evidence and devalue “subjective” evidence in their quest to identify a claimant’s subjective fear. I wish to suggest at this juncture that part of the answer to this question of why lies, as Constable argues so eloquently, “behind the rules”. It is there, behind the rules of the well-founded fear inquiry that I shall consider Constable’s critique of Professor Frederick Schauer’s work regarding rule-based decision making. My purpose shall be to demonstrate that the delivery of legal justice to the refugee claimant depends upon the successful performance of their subjective experience (or fear) of persecution before the Law; it is a form of justice that is predicated foremost upon a decision-maker’s active obedience to the “rule” of a well-founded fear. As we shall see, the

\textsuperscript{169} See Rousseau et al., The Complexity of Determining Refugeehood, infra note 282.
\textsuperscript{170} 10 Oxford English Dictionary (2nd ed., 1989) at 643.
\textsuperscript{172} Hathaway & Hicks, Is There a Subjective Element?, supra note 161 at 549. [emphasis is mine].
\textsuperscript{173} Ibid. at 548.
“rule” of a well-founded fear is itself predicated upon what Schauer calls a “factual predicate” – that is to say, the underlying hypothesis of a given rule. In the context of refugee adjudication, it is the existence of a superfluous subjective element that fulfills the requirements of not only the factual predicate – and thus the “rule” of a well-founded fear – but also the requirements of legal justice.

ii. Frederick Schauer’s Rule-Based Decision-Making and “Prescriptive Generalization”

In his commentary on Kafka’s parable *Before the Law*, Professor Manderson addresses the plight of the countryman at the doorway to the Law and queries:

Is it that [the countryman] would never be admitted to the law and he destroyed himself by refusing to abandon hope? Or is it rather that he was looking for law as an object external to him, capable of answering his questions if only ever he reached it? Law was for this man a *noun*, a thing he didn’t have but needed. Instead, he might perhaps have realized that law was already all around him and in him, a verb not a noun, controlling and modifying him, structuring his expectations and his responses. After all, when we say ‘before the law,’ what do we mean? Temporally, it means prior to the law; spatially, subject to the law; and politically, protecting the law.\[174\]

In this section of the discussion, I wish to suggest that another sense of the term “before the law” exists in Professor Constable’s assertion that “[t]he justice of law lies somewhere behind the rules.”\[175\] That is, not only does the refugee claimant stand before the law in a political, temporal, and spatial way, but she also stands *before the rules of justice*. In this regard, I would submit that a potential justification behind the question of why a decision maker might appeal to the “good reasons” or “say-so” of an external authority in the assessment of a well-founded fear rests in a form of rule-based decision making which compels a community of decision makers to search *above all* for evidence of a “subjective fear”, a legal fiction that does not exist according to Hathaway and Hicks’ no-subjective element thesis. In this regard, what I am immediately reminded of here is Professor Manderson’s assertion regarding the “made real” of law’s capacity for fiction. In the context of this thesis, the “made real” of the IRB’s fictional designation as an “expert tribunal” may well stem from the faith that a community of “citizen-expert IRB members” has placed in the *rule* governing an *imagined* subjective element of a well-founded fear.\[176\] Within this imagined realm of subjectivity, one finds legal justice; but, another form of

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\[174\] Manderson, *Desert Island Disks*, supra note 7.

\[175\] Constable, *Behind the Rules*, supra note 195 at 111.

\[176\] See Part D of this chapter, where I discuss the search for the subject element of a well-founded fear as an exercise in what Clifford Geertz has identified as a “distinctive manner of imagining the real”.

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justice for the refugee claimant lies “somewhere behind the rules” governing the assessment of a well-founded fear.

I will now turn to consider the work of Professor Frederick Schauer regarding the nature of rule-based decision-making; in particular, I wish to focus on Schauer’s discussion of the role of “descriptive” and “prescriptive generalizations” in rule-based decision-making, and its relationship to the type of “distinct categorization” of which Hathaway and Hicks identify in respect of the subject and objective elements of the bi-partite test I have briefly addressed in the previous section. I will then address what Schauer calls the “factual predicate” or “hypothesis” to a given “rule” – in this case, the “rule” of a well-founded fear.

Professor Schauer embarks upon an ambitious “philosophical” and “analytic” project\(^\text{177}\) to examine “…the phenomenon of rule, the way in which prescriptive (or regulative) rules appear to play a large role in decision-making, most obviously in law but also in politics, in family governance, in religion and in life in general.”\(^\text{178}\) Schauer argues that “[r]ules appear all around us, but often our understanding of what they do and how they do it is a mystery, remaining mysterious even as we follow and break rules as part of our daily routine.”\(^\text{179}\) Schauer’s work addresses one particular form of ‘rule’ – that is, “regulative rules”. Schauer defines regulative rules as “…members of the class of prescriptive rules, which are distinguished from descriptive rules, the latter being used to state an empirical regularity or generalization.”\(^\text{180}\) In reference to prescriptive rules, Schauer observes that such rules “…ordinarily have normative semantic content, and are used to guide, control, or change the behaviour of agents with decision-making capacities.”\(^\text{181}\) In this regard, Schauer queries: “Are rules linguistic entities or behavioural phenomena? Is the force of a rule located in its meaning or in its sanctions or in the attitude of its addressees? How does the nature of a rule relate to the rule-independent preferences of its addressee?”\(^\text{182}\)

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\(^{177}\) See Schauer, *Playing by the Rules*, supra note 150 at viii of the Preface: “In pursuit of some better understanding of the nature of prescriptive rules, I employ methods that are, broadly speaking, philosophical and analytic. I do not, however, claim these methods to be anywhere near exhaustive. Much that is interesting about rules can be said from the perspectives of psychology, economics, sociology, decision theory, anthropology, and a host of other disciplines. But my emphasis here on a philosophical approach is premised in part on a belief that it is important for any discipline to have some clear conception of what it is investigating before the investigation can begin.”


\(^{179}\) *Ibid.* at viii.

\(^{180}\) *Ibid.* at 1.

\(^{181}\) *Ibid.*

In attempting to answer these questions – which, I find bear directly upon the kinds of questions that will animate our consideration of the “rules” governing the adjudication of a well-founded fear – Schauer begins with the “...assumption that rule-based decision-making is a subset of legal decision-making rather than being congruent with it.”

Schauer’s questions above foreshadow his attempt to demonstrate that:

[r]ules not only under-explain the legal system, but they also explain much that takes place outside of the legal system. Indeed, decision-making based on regulative rules permeates much of our social existence...On closer inspection it may turn out that some of what looks like rules, and are even called rules, are not rules at all. But my point is only that regulative rules intrude themselves into many corners of our lives, and it is thus simply mistaken to assume they are the peculiar province of that portion of our existence we describe as ‘the law’. 

A focal point of Schauer’s conception of rule-based decision making is his analysis of “rules as generalizations.” Schauer offers us a particular notion of what he means by the term “generalization” through an illuminating discussion of the relationship between the general and the particular in the promulgation of descriptive and prescriptive rules. Firstly, Schauer asserts that “[i]n employing descriptive rules, we report or explain a regularity or uniformity. The use of a descriptive rule thus presupposes a multiplicity of instances, making descriptive rules differ from singular observations in being general rather than particular...To assert the existence of a descriptive rule is necessarily to generalize.” For example, Schauer asserts that “[o]bserving that “as a rule the Alps are snow-covered in May’ is not the same as observing a snow-covered Alp.” Secondly, in contrast to descriptive rules, Schauer writes that “[t]here are no rules for particulars” . However, Schauer notes that “[i]nterestingly, the logic of the prescriptive use of ‘rule’ is similar [to descriptive rules], with prescriptive rules also being necessarily general.” In this regard, Schauer points to the example of a rule that prohibits people from “…walking on the lawn if a sign prohibits many people over time from walking on the lawn, but we would not describe as a ‘rule’ a particular instruction (rather than a reminder of a pre-existing rule) from a parent to a child not to walk on this lawn at this time.”

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183 Ibid. at 11.
184 Ibid. at 12. [emphasis is mine].
185 Ibid. at 17.
186 Ibid.
187 Ibid.
188 Ibid. [emphasis is mine].
189 Ibid. at 18.
190 Ibid.
For Schauer, generalization – whether descriptive or prescriptive – is grounded in categorization of the particular to the general.\textsuperscript{191} His explication of categorization is not, in my view, unlike Hathaway or Hick’s criticism of “categorical distinctions” of “subjective” and “objective” evidence, or as we shall see in Chapter 3, Douzinas’ conception of the face of the refugee claimant – which “…eludes every category”\textsuperscript{192}. Schauer writes:

The categories we employ are neither mutually exclusive nor rigidly distinct, but instead overlap and are nested within each other, such that a particular object or event is commonly a member of many of them. Because of this, particular objects, actions, events, or perceptions cannot mechanically be placed into a unique category, for no one of the simultaneously applicable categories of which any particular is a member has a logical priority over another. Instead as we think and talk we make the choice to depart from the particular, and make a further choice when we select the category within which to locate that particular.\textsuperscript{193}

I wish to highlight an important point to highlight in Schauer’s description above regarding the process of generalizing. That is, Schauer identifies that generalization involves making a choice about a given particular, which by nature, is incapable of being “mechanically placed” into a “unique category”. In this regard, I would submit that the choice of generalizing a refugee claimant’s particular experience (or fear) of persecution into a question of “subjective” evidence is exactly this: a choice. Schauer elaborates:

Choosing a direction and a degree of generalization are both subsequent to the decision to generalize in the first place. It is always in theory (at least if location in space and time are included) and usually in practice possible to refer to some particular with sufficient richness of detail that the particular becomes unique. This rich description of a particular would, to be sure, involve the use of general terms. Still, most of the particulars that we comprehend exist at the unique intersection of an array of non-unique properties, each of which is a general term, but all of which together describe the complete profile of this and only this particular.\textsuperscript{194}

A question that I wish to address in the final chapter of this thesis – particularly in respect of the negotiation of a gay or lesbian refugee claimant’s sexual identity before the law – is the extent to which decision-makers choose to generalize a claimant’s sexual identity at the outset do so as

\textsuperscript{191}\textit{Ibid.} at 19. Schauer states: “I will refer to choosing to go from the particular to the general as generalizing , and the product of that process as generalization. When we generalize we see particulars not in isolation but as examples of a type or members of a class.”

\textsuperscript{192}See Douzinas & Warrington, \textit{A Well-Founded Fear of Justice}, supra note 97 at 119; see particularly Chapter 3, Part C (ii) for a discussion of the “face” of the refugee claimant.

\textsuperscript{193}Schauer, \textit{Playing by the Rules}, supra note 150 at 19. [emphasis is mine].

\textsuperscript{194}\textit{Ibid.} at 20-1. [emphasis is mine].
a result of what Schauer refers to as “...a multitude of social considerations [that] lie prior to a rule: background justifications; social processes, decisions, and judgments; social or psychological factors; moral and political factors; and so forth.” For Constable, such social considerations do not ultimately speak to the need for an individual decision maker to act responsibly towards the claimant; a need which exists outside of the type of social considerations Schauer names here. Thus, one might well ask the following question: Does the person who chooses to generalize exercise responsibility for this choice? This question of responsibility is an important one, and one that Professor Constable addresses head on; but, I am getting ahead of myself.

When considering the above description of generalization in the language of the general and the particular, one might be tempted to ask herself: is this what is, in reality, happening in the refugee claimant’s situation? Is the test for a well-founded fear of being persecuted a genuine attempt to encapsulate the particularity of a claimant’s fear within a general description of “objectivity” and “subjectivity”? If so, when Schauer asserts that all of the general terms taken together describe “...this and only this particular”, is this, in fact, faithful to the process that, in reality, takes place within the adjudication process generally, and specifically within the IRB?

Schauer writes that “[g]eneralizations are thus selective, but as selective inclusions generalizations are also selective exclusions. In focusing on a limited number of properties, a generalization simultaneously suppresses others, including those marking real differences among the particulars treated as similar by the selected properties.” The bifurcated notion of a well-founded fear into “subjective” and “objective” elements represents, in my view, the type of selective “inclusions” and “exclusions” identified here in Schauer’s explication of generalization. Further, the “limited number of properties” of what does and does not constitute a “fact” of a “fearful” refugee claimant, does, I would argue, suppress other properties of a claimant’s genuine “fear” that separate it from other particular experiences of fear.

As we shall see in the following section, the “limited property” that presently defines a claimant’s subjective fear is evidence that the claimant “…stands in trepidation of being

195 Marianne Constable, “Behind the Rules”, in Just Silences: The Limits and Possibilities of Modern Law (Princeton: Princeton University Press, 2005) 111 at 125. [hereinafter “Behind the Rules”]. Constable further writes at 127 that “[f]or Schauer, rules have no force independent of social pressures. Thus rules provide no more than in Schauer’s words “reasons for action” (or reasons to believe that something is to be decided), and provide no reason to act (except through psychological internalization, rationalization, or socialization). Like social science, Schauer takes an external standpoint toward rules.”
196 Schauer, Playing by the Rules, supra note 150 at 21-2.
persecuted” – as Hathaway and Hicks term it – whether such evidence is adduced through the
claimant’s own oral testimony, through the evidence of a professional expert whose opinion
appears to speak for the (justifiably) silent refugee claimant, or through the decision-maker’s
reliance upon their own “expert” notions of fear. If evidence of “trepidation” represents the
accepted description of the particular experience of fear, this is because a choice has been made
to attend to “trepidation” as the direction and level of generality of a claimant’s fear. Indeed,
Schauer argues that:

...when the language user does decide to generalize, she then must choose a direction
of generalization and a level of generality, in the process rejecting an array of equally
accurate but extensionally divergent descriptions of the identified particular. The choice
of one correct description rather than another consequently highlights the chosen properties
for special attention.

iii. The Factual Predicate of the “Rule” of a Well-Founded Fear

In the process of generalizing, Schauer articulates a formula that he argues forms a part of
any given rule. The basis of this formula is the “factual predicate” which Schauer describes as
“...the factual conditions triggering the application of the rule.” For Schauer, the factual
predicate “...can be understood as [the rule’s] hypothesis, wherein “prescriptive rules can be
formulated in a way such that they commence with ‘If x’, where x is a descriptive statement of
truth of which is both a necessary and a sufficient condition for the applicability of the rule.”
As a simple example of a factual predicate, Schauer states: “If a person drives in excess of 55
miles per hour, then that person must pay a fine of fifty dollars.”

If we consider Schauer’s notion of a factual predicate in the context of the bi-partite test
for a well-founded fear, I would submit that a basic factual predicate or hypothesis underlying
the “rule” governing an IRB member’s assessment of a well-founded fear may take on the
following construction: “If an individual makes a claim for refugee status in Canada, then the

197 Hathaway & Hicks, Is There a Subjective Element?, supra note 161 at 506. Hathaway and Hicks state: “There is
general agreement that a fear is “well-founded” only if the refugee claimant faces an actual, forward-looking risk of
being persecuted in her country of origin (the “objective element”). But, it is less clear whether the well-founded
“fear” standard also requires a showing that the applicant is not only genuinely at risk, but also stands in trepidation
of being persecuted.” [emphasis is mine].
198 Schauer, Playing by the Rules, supra note 150 at 21. [emphasis is mine].
199 Ibid. at 23.
200 Ibid. [emphasis is mine].
201 Ibid.
202 Ibid.
203 Ibid.
decision-maker as primary addressee of the “rule” of a well-founded fear must find that the individual possesses both a subjective fear of being persecuted, and that this fear must also be objectively “well-founded”.” Yet, to be more precise, the factual predicate in respect of the “rule” governing the treatment of “subjective” and “objective” fear evidence could be posited as follows: “If an individual refugee claimant genuinely possesses a subjective fear of persecution, then this fear must be demonstrated with evidence of trepidation.” Similarly, regarding the objective element: “If an individual genuinely possesses a subjective fear of persecution that is “well-founded”, then there must be “objective” evidence presented to confirm the well-foundedness of the fear.”

If I am correct in proposing these factual predicates as forming the basis of the “rule” governing a decision-maker’s assessment of a well-founded fear, it is important, I think, for us to return to Hathaway and Hicks’ “no-subjective element thesis”, and to examine how their criticism of the utility of the subjective element disrupts a decision-maker’s reliance upon evidence of trepidation as the underlying factual predicate of the “rule” of a well-founded fear. In particular, I wish to discuss Hathaway and Hick’s criticism of the fact that evidence of trepidation, in most cases, accompanies a claimant’s “genuine” fear of persecution. \(^{204}\) It is in this context of a decision-maker’s (unnecessary) search for the existence of evidence of trepidation that I shall turn to consider the role of particular kinds of “subjective” expert evidence used to corroborate a refugee claimant’s “say-so” in respect of their testimony of fear.

My purpose shall not be to engage in a doctrinal analysis of the use of expert evidence in the determination process so much as it is shall be an attempt to demonstrate that the delivery of legal justice to the refugee claimant often requires a decision-maker’s consideration and reliance upon the “say-so” of professional experts (such as psychologists and physicians). That is, a decision-maker’s reliance upon such evidence defends, in many cases, their search for empirical evidence of trepidation as the underlying factual predicate of the well-founded fear inquiry.

As a consequence, the standards upon which these experts are ultimately judged are no longer specific to their profession (recall Constable’s example of community justice). Instead, in a community of “shared” expertise, the professional expert – whether they be a psychologist or a

\(^{204}\) See Rousseau et al., The Complexity of Determining Refugeehood, infra note 282 where they state at 47 that: “[i]t is entirely open to the IRB to base its decision on documentary evidence rather than testimonial evidence provided it has good reasons to do so after properly weighing the probative value of all the evidence presented at the hearing” (citing generally Menaker v. Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 1431.
physician – are all held accountable to a decision maker whose individual “expert” interpretation – and in some cases, outright dismissal – of a professional expert’s opinion performs an act of violence upon the body of the refugee claimant (who, in reality, may or may not stand in trepidation of being persecuted, but who nevertheless possesses a well-founded fear). As such, this form of “expert” legal interpretation recalls Cover’s assertion that a common meaning cannot be found between the decision maker and the refugee claimant who do not share the same “common texts” or “common vocabulary.”\(^{205}\) The same violence that results from this form of legal interpretation going to the subjective element is also true for other “experts” – for example, country condition and anthropological experts – though neither time nor space permit for us to consider this type of “objective” legal interpretation in this discussion.

In the following section, I will first address the role of rhetoric in the construction or performance of one’s legal identity. I will draw specifically upon the work of Professor Richard Mohr, who argues for a phenomenological view of both one’s legal identity and the notion of “personhood” as reflecting an embodied life. I shall argue here that the law’s view towards the refugee claimant’s “legal identity” is not an embodied view; but instead, it is a view of the claimant as an object who possesses a purported, but not yet demonstrated “identity of trepidation”. Secondly, I will situate Mohr’s discussion of the embodied “legal” person within Robert F. Barsky’s intriguing account of the refugee as a “productive Other” (who argues, inter alia, that the question of a claimant’s “authenticity” is inconsequential to the determination process). I will focus particularly on Barsky’s discussion of the role of “empirical facts” in the construction of the productive Other. Thirdly, I wish to consider Cécile Rousseau and Patricia Foxen’s insightful exploration of the “lying” refugee claimant (whose findings reveal, inter alia, that the label of “lying refugee” has been extended to the “identification” of entire groups of “lying peoples” who seek refugee status). The key question I shall seek to address is this: How has a decision maker’s search for a claimant’s evidence of “trepidation” given rise to a “constructed” and “bounded” refugee claimant who must not only supply their “say-so” regarding their experience (or fear) of persecution, but who must ultimately perform an identity of trepidation before the Law in order to satisfy the requirements of legal justice?

\(^{205}\) See Cover, *Violence and the Word*, supra note 92.
C. Constructing an “Identity of Trepidation” as the Factual Predicate of the “Rule” of a Well-Founded Fear

i. Performativity and The Construction of One’s Legal Identity

In this section, I wish to explore further the notion of “trepidation” as a constructed factual predicate underlying the bi-partite test for a well-founded fear. As such, we shall return to consider Hathaway and Hicks’ discussion of the nebulous nature of “trepidation” as the central basis for the assessment of an individual claimant’s well-founded fear. My aim is to show how the decision to choose “trepidation” evidence as the basis of a well-founded fear has given rise to a culture of adjudication of fear in which the “say-so” of an expert authority regarding a claimant’s “trepidation” appears to serve as a central component to the assessment of a claimant’s credibility in demonstrating her subjective fear for the law.

As I have noted earlier, the “say-so” of an expert might well assist a refugee claimant who is unable to overtly express their subjective fear for the law, but who nevertheless possess a genuine fear of being persecuted. For these refugee claimants – indeed for all refugee claimants – the doorway to the Law also represents, I argue, a doorway to the theatre of Law. It is on the stage of Law that the refugee claimant and the decision maker stand off against one another in a system of adjudication that perceives the individual claimant as a mere object of purported but not yet demonstrated fear. In order to gain sanctuary in the receiving state, a decision-maker’s search for the factual predicate underlying the “rule” of a well-founded fear becomes, I argue, a search for a particular identity of fear before the Law. In the case of the refugee claimant, it is a question of performing an “identity of trepidation” in order to be recognized as a legal subject before the Law. In this regard, it is important that we explore this notion of performance and identity in the context of both the “productive” and “lying” refugee as particular instantiations of an “identity of trepidation” before considering of how psychological and medical expert evidence serve a peculiar role in the rhetorical construction of a genuine refugee’s identity of trepidation. Although much has been written regarding the role of performativity in the context of gender identity and construction, I am particularly interested at this juncture in demonstrating its role in the construction of one’s legal identity generally, and more particularly in the context of the relationship between physical and psychological expertise and the construction of a refugee claimant’s “identity of trepidation”.
To begin, I wish to draw upon the writings of Professor Richard Mohr, who provides an illuminating account in his article entitled “Flesh and the Person”, of inter alia the role of performativity in the construction of one’s legal identity and one’s “personhood”. Whilst Mohr does not tackle expressly the issue of performativity in refugee adjudication, I find that his adoption of a phenomenological lens towards the notion of the performative and the “legal person”, in particular, nevertheless allows us to consider the search for a well-founded fear as a search for a specific type of legal identity I have referred to above as an “identity of trepidation”.

Mohr’s thesis is ambitious; he seeks to demonstrate “...the promise of a phenomenological reduction of our relation to the world that stretches the boundaries of self beyond the social, the personal and the cultural to physical flesh, at one extreme, and personhood at the other.” His chosen adoption of a phenomenological approach is deliberate; it focuses on “…those objects that make us subjects, which steps out of the ‘natural attitude’ by which we see them as means of proving ‘who we are’, purchasing goods or crossing borders, by ‘bracketting’ such approaches in order to reflect on them from another perspective.” In this regard, Mohr writes that “[t]he modern legal person...is an identifiable unit, to whom may be allocated responsibility, blame, entitlement or obligation. It certainly does not have to be flesh and blood. [His] interest here is to understand the relationship between the legal concept of the person and real people.” Further, Mohr seeks to examine “…what data our legal administration deems to be necessary to defining a legal person” and argues in this regard that “[c]ontemporary ideas and practices, despite their ancient origins, are also a product of more recent developments, from surveillance to the war on terror, and of technologies from photography to magnetic codes. How is it that we can be legally identified by a plastic card, a passport or a file server?”

Our legal identity, Mohr argues, “…needs to fix us with some constancy over time within a uniquely identifiable set of characteristics.” In this regard he writes:

We are to be identified as unique individuals on the basis of certain characteristics which result in a legal identity. Yet some of these characteristics are also adopted as

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207 Ibid. at 3.
208 Ibid.
209 Ibid. at 15.
210 Ibid.
211 Ibid.
212 Ibid.
part of a social or personal identity, something inherent and essential to our being. The purely physical characteristics of fingerprints or height are seen as randomly distributed or accidental characteristics, with little or no bearing on ‘who we really are’. From a forensic point of view, legal identity should, as far as possible, be unique, identifying one person as distinct from all others. It should also remain constant. The body, from birth to death, is the physical guarantee of this constancy in the eyes of the law.²¹³

Building upon this assertion here of the one’s legal identity as both “unique” and “constant”, Mohr notes that “[t]he data on legal documents are generally those that are regarded as unchanging and beyond our free will to revise.”²¹⁴ As such, the basis of one’s legal identity upon personal characteristics raises important implications in the “...interface between law and its subjects.”²¹⁵ Mohr queries: “Is it possible that, beyond a fixed and immutable identity there can be an evolving and dynamic legal person? Can personhood, deriving from its original legal sense, contribute to our understanding of our own lives, over time and in relation to our corporeal being?”²¹⁶

Mohr’s attempt to answer these important questions begins with a reference to Michel de Certeau, who he cites as observing that “…law “… ‘writes on’ our bodies using the techniques of text and identification, as well as less subtle instruments ‘from the police bludgeon to the dock’. Through these techniques flesh is changed ‘into a body. Such is the movement, to conform a body by means of tools to what a social discourse defines it as.’”²¹⁷ He further refers to Elizabeth Grosz’s enumeration of the various forms of “body engraving” that are used to construct bodies:

‘[T]he tools of body engraving – social, surgical, epistemic, disciplinary – all mark, indeed constitute, bodies in culturally specific ways; the writing instruments – pens, stylus, spur, laser beam, clothing, diet, exercise – function to incise the body’s blank page...The messages or texts produced by this body writing construct bodies as networks of meaning and social significance, producing them as meaningful and functional “subjects” within social ensembles.²¹⁸

As we shall see later in this chapter – and more particularly in the final chapter – the image of law “writing” onto one’s body through medical texts and identification corresponds, in my view, to the process by which the law “writes” onto the body of the refugee claimant a particular image

²¹³ Ibid. at 19. [emphasis is mine].
²¹⁴ Ibid.
²¹⁵ Ibid.
²¹⁶ Ibid. at 19-20.
²¹⁸ Elizabeth Grosz, Volatile Bodies: Toward a Corporeal Feminism (Bloomington, Indiana: Indiana University Press, 1994) at 117.
of a “fact” of a well-founded fear. Further, a type of “body engraving” – as Grosz puts it – marks the body of the “fearful” refugee in the form of “expert” judgments about the refugee claimant’s physical and psychological experience (or fear) of persecution.

Mohr describes that in Australia – the chosen venue of his examination – “...flesh is being ‘written’ into bodies and people are emerging as citizens, consumers and members of social groups.” He asserts that things like registration of births, immunization records, school enrolment and syllabuses, tax files and drivers licenses are “written” by the state’s “legal apparatus.” This writing is not, however, a passive process. Instead, Mohr speaks of how people are “...growing into their bodies” and observes in particular that:

As athletes, dancers, television viewers and beach-goers, people develop bodies, images of bodies, and ways in which their bodies relate to other which jibe with or cut across dominant expectations. In doing so they rehearse and expand the repertoire of personal-cum-physical identity. Whether we frequent the stadium bleachers or the glamorouos beaches, the gay bars or the coffee bars, we are exploring and choosing forms of being ourselves with others, as a person among people, going beyond the mere transformation of flesh to body.

Mohr’s suggestion of “going beyond the mere transformation of flesh to body” is important here; for it presents the possibility that individuals are not simply objects to be documented and categorized in the legal process. Instead, from Mohr’s point of view, “[w]e emerge from all this social, physical and legal interaction (or performance, in Butler’s terms) as embodied people, not, to be sure, from a tabula rasa, but with far more free will and consciousness than a deterministic model, or imprints on identity documents, would suggest.”

Still, Mohr recognizes that the construction of one’s legal identity takes the form of a stage character, and where “...modern techniques of bio-data and forensic evidence” are “...well adapted to the portability and narrative reconstruction required of legal narrative” – he reminds us that:

The event, crime scene or conversation cannot be brought into the courtroom as original experience, so it must be reconstructed out of narrative building blocks. The central concept of persona derives from the theatrical mask or the role of the character. Each of these representations of reality must be brought into legal argument in a form

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219 Mohr, Flesh and the Person, supra note 206 at 21.
220 Ibid.
221 Ibid.
222 Ibid. [emphasis is mine].
223 Ibid. at 23. [emphasis is mine].
224 Ibid. at 31.
225 Ibid.
that is manipulable, from which attributions can be reconstructed. These include the modern techniques of bio-data and forensic evidence, equally well adapted to the portability and narrative reconstruction required of legal narrative.\textsuperscript{226}

One can see a distinct role for the performative here. An individual – whether or not a refugee claimant – is charged with the task of performing the role of a character in order to \textit{become} a “person” before the Law. But, for Mohr, this “legal person” does not reflect an embodied life; instead, he argues, “[t]he data of forensic narrative and legal administration is abstracted and condensed so that it records only the elements from which reconstruction is possible, but \textit{not} the experience itself.”\textsuperscript{227} For Mohr, the “person” is “…a mask of forensic data and narrative possibilities, a set of representations \textit{but not} an experienced life.”\textsuperscript{228}

It is at this juncture that Mohr considers the implication of “rules” and the manner in which “…we live them out as acting subjects.”\textsuperscript{229} In particular, Mohr draws upon Margaret Davies’ “corrective” that “…law [should be seen] as a performance, not as a static set of norms’ in order to turn our attention back to the contingent and the heterogeneous, which brings into focus ‘the exception, the particular, the practical, the ethical and the other.’”\textsuperscript{230} There is, I find, a strong association with Douzinas’ conception of “a different form of justice” here – Mohr elaborates:

The link between the determinacy of bodily identification and the contingency of personal narrative reproduces the division within the person already seen in Boethius’s definition: \textit{nature rationalis individual substantia}. Law’s need to individuate requires a substance around which a boundary can be drawn. Yet the person also has a nature that is not so easily individuated. The boundaries cannot be drawn around our reason, which today can be understood as our shared understanding of and discourse about and with the world, as they can around our bodies.\textsuperscript{231}

If we recall Professor Manderson’s description of the stand-off of meaning which unfolds between the gatekeeper and the refugee claimant at the doorway to the Law, in my view Mohr’s

\begin{itemize}
  \item \textsuperscript{226} \textit{Ibid.}
  \item \textsuperscript{227} \textit{Ibid.} [emphasis is mine].
  \item \textsuperscript{228} \textit{Ibid.} at 31-2. [emphasis is mine]. See also Robert Barsky, \textit{Constructing a Productive Other}, infra note 232 at 73. Referring to Mikhail Bakhtin’s writing on “situatedness”, Barsky notes that: “[t]he person is situated not only in terms of a time, a place, a temperature, and so forth, but also in the history of all the nows that were here before the person arrived here (at the interview), and in a series of nows that the person uses to organize behaviour in a meaningful pattern insofar as s/he can in the present moment. All of those activities of answering the present moment, even as conceived as a function of past-future projections, is what is alive in the person. So temporality is non-reversible, the person represents a sequence insofar as s/he is a living system.”
  \item \textsuperscript{229} \textit{Ibid.} at 32.
  \item \textsuperscript{231} Mohr, \textit{Flesh and the Person}, supra note 206 at 37.
\end{itemize}
approach assists us in locating this stand-off within an arena of legal justice whose boundaries lie at the edges of one’s “bodily identification”. Outside of these boundaries, however, there exists another form of justice that lies in the “contingency of personal narrative”, as Mohr eloquently puts it. Accordingly, the stand-off between the refugee claimant and the gatekeeper as a question of justice also becomes a stand-off about one’s identity before the Law.

In the following section, I wish to also explore the role of expert evidence in the construction and performance of a claimant’s “identity of trepidation”. My focus here shall be to demonstrate that if there is no subjective element to the well-founded fear inquiry, then the use of expert evidence going to the finding of subjective fear is, at base, rhetorical in nature. In that regard, it is important for us to consider to what extent decision makers of the IRB participate in the rhetoric of expertise – that is to say, in a process of adjudication whereby accepting or rejecting the “say-so” of an external authority becomes merely an instrumental process in the search for a subjective element that does not, in reality, exist. Later in this chapter, I will argue that the search for the factual predicate of the subjective element – that is to say, an “identity of trepidation” – becomes not only a search for the “genuine” or “truthful” refugee claimant, but a search for a particular form of legal justice which resides at the meeting point between the language and rhetoric of expertise, and the physical body of the refugee claimant. Our immediate attention, however, shall be to address the notion of a constructed identity of trepidation within Professor Robert F. Barsky’s illuminating study of the decision-making process of the IRB; and in particular, the role of “empirical evidence” in the creation of the “productive” refugee claimant.

ii. Identity and The Refugee as a “Productive Other”

In this section, I wish to turn to Professor Barsky’s intriguing examination of the IRB’s treatment of two separate refugee cases from 1987 in his work Constructing a Productive Other. Barsky states that with respect to the expression “well-founded fear of persecution”, “[t]hese five words are, in a sense, what [his study] is all about.” As such, his “overriding goal” is to:

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233 Ibid.
234 Ibid. at 104.
235 Ibid. at 3.
...demonstrate the degree to which the Other who emerges from these transcriptions [of the refugee hearings] is diminished to the point of near non-existence because both the means of production employed by the parties to the hearing, and the method by which this hearing is constructed, act to diminish rather than complete the claimant.\footnote{Ibid.}

For Barsky, the term “production” takes on a particular definition regarding an individual’s attempt to navigate successfully the determination process; that is, it “…denotes the process of origination, creation, generation and construction (of the Other), but should not be taken in either the positive sense of improving something, or the cumulative sense of adding something onto an existing structure.”\footnote{Ibid. at 3-4.} In this regard, Barsky discusses how:

[i]n this particular case the constructed Other stands in the place of the original claimant as a doormat would stand in the place of a house; it bears little semblance to the interior space in which lived experience occurs, but rather fits into too-easily accepted bureaucratic procedure that requires a facade of self-justification rather than veritable representation.\footnote{Ibid. at 124.} For Barsky, such a constructed Other necessarily means that in the adjudication process, there is no room for a claimant to reveal their “authenticity”.\footnote{Ibid. at 123.}

I find Barsky’s work instructive to us in this discussion insofar as it attempts to demonstrate that “[f]or discourse analysis in general, and in [the subject case of the study] specifically, it is necessary to step outside of the text and provide the kinds of empirical information necessary to establish the power relations that so limit the range and conditions of possibility in the hearings.”\footnote{Ibid. at 74.} As such, Barsky recognizes that a reductionary process take place in which:

...the elimination of whole realms of knowledge and experience as practised during this hearing is in accord with a scientific criteria that is unsound for the issues at hand, because it pre-supposes that complex living structures can be filtered down to a small number of pertinent facts as though they were but physical compounds.\footnote{Ibid. at 123.} Barksy’s reference here to the connection between the elimination of “whole realms of knowledge and experience” and the filtering of “complex living structures” into “pertinent facts”
is most illuminating; it reminds us not only of Schauer’s conception of the “factual predicate” as premised upon “factual conditions” giving rise to the application of a rule; but, as we shall see, this “filtering” process is, in my view, also reflective of Clifford Geertz’s discussion of the manner in which the “rendering” of law as a set of adjudicative “facts” represents a “...distinctive manner of imagining the real.” Further, in Chapter 3 specifically, the question of a ”knowable”, empirical fact of one’s authentic or inauthentic homosexual identity before the Law shall become a live issue in our consideration of the case of Iaon Vraciu.

For, Barksy this reduction of experience to scientific “fact” is located within a “physics-inspired model of predictabilities and reversibility”:

There has been a long struggle in biology to establish itself as a hard science in the face of a physics-inspired model of predictability and reversibility. The use of this physical sciences-inspired empirical system for adjudication of Convention refugee claims carries in its train (dubious) preconceptions about how knowledge can be gathered, and once gathered how it can be assessed. A model of assessment based upon analogies from the physical sciences denies the characteristics distinguishing living from non-living things, with consequences that are harmful to those forced to rely upon such a system.

In the case of one particular refugee claimant from Chile – Mr. B – Barksy concludes that with regard to the testimony of Mr. B, “[t]he question here is not whether or not he is giving false testimony; the point is that our system is construed to discern Truth and Empirical Evidence. The claimant is therefore encouraged to testify in a manner that is highly formalized, emphasizing very specific elements of his past.” Ultimately, Barksy writes, “[t]his is a construction process, and the final product will be the construction of an Other by a claimant who has been made to feel Other to Canadian society since his arrival.” In this constructed Other, “[t]he claimant is not only expected to recount the events leading to his or her claim in a rational, linear manner, but [she] is...expected to provide evidence, usually in the form of

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243 Barksy, *Constructing a Productive Other*, supra note 232 at 75.
244 Ibid.
245 Ibid. at 143. “Now all of these claimants, including Mr. B., have arrived in Canada; Mr. B. arrived under false pretext (he did not leave Chile saying that he was off to claim refugee status in Canada) and he surrendered himself to uniformed officials. Under the tenets of the Immigration Act, he is now being asked to divulge all of the aspects of this secret life, to let down his guard and to freely recount his narrative of persecution and torture to uniformed strangers. He is asked to describe one of the most traumatic experiences imaginable (torture) in intimate detail. And he is asked to back up each statement with a linear description of events leading up to and following episodes of persecution with as many empirical details as possible. In short, someone who has learned that secrecy is the key to survival is now being told that exposure is the key to success.” [emphasis is mine].
246 Ibid.
247 Ibid.
documents or empirical facts, to back-up [her] story.”

In the case of Mr. B, Barsky thus observes how the interrogator in that case “... had attempted to ascertain through the establishment of empirical facts, evidence that the beating described actually occurred.”

Further, Barsky notes more generally here that claimants are often asked about the medical treatment they received in their country of origin; on occasion, evidence of their treatment by a physician in Canada will be produced by a physician. Finally, in making specific reference to the apparent importance for some Canadian officials of “bodily evidence for narrative” emanating from the claimant, Barsky appropriately leads us into the following section of this discussion, which considers more particularly his conception of the productive Other in the context of the “lying” refugee claimant.

In the following section, I situate Barksy’s notion of the productive refugee claimant in the context of Cécile Rousseau and Patricia Foxen’s illuminating research regarding the notion of the “lying” refugee claimant in IRB hearings. Following this, I will turn to consider how the use of psychological and medical expert evidence necessarily reduces the lived experience of the refugee claimant into a “pertinent fact” for the Law and demonstrates that “...the body of the Other is the scene of the Other’s validation as legitimate refugee.”

iii. Identity and The “Lying” or “Truthful” Refugee

In their 2006 study of the IRB entitled “Le mythe du réfugié menteur: un mensonge indispensable?” (“Rosseau-Foxen Study”), Cécile Rousseau and Patricia Foxen undertake a compelling examination of the role of myth in the assessment of the “truthful” and “lying” refugee claimant. Rousseau and Foxen’s explication of the mythic nature of the “lying” refugee claimant.

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248 Ibid. at 148.
249 Ibid.
250 Ibid.
251 Ibid. More particularly, Barsky writes that: “[s]ince no visible marks remain on the body of the claimant, the Canadian officials will have to rely on the veracity of details provided in order to rule on the case. This is not always the situation. Canadian officials looking for bodily evidence for narrative sometimes make reference during the hearing to physical marks which validate the story. They also demand as many details concerning the method of torture as possible, so that the most gruesome details are recounted by the persecuted claimant during the testimony.” However, see Rousseau et al., The Complexity of Determining Refugeehood, infra note 282 at 58 where the authors discuss the case of a claimant from Chiapas in which “…the chairwoman stated repeatedly that she did not want to hear a description of the torture suffered by the claimant, and that reading the [Personal Information Form] was sufficient evidence regarding that issue.” [emphasis is mine].
252 Ibid. [emphasis is mine].
253 Patricia Foxen and Cécile Rousseau, « Le mythe du réfugié menteur : un mensonge indispensable » (2006) 71 L’évolution psychiatrique 505. I was unable to locate the English version of this article; therefore, all errors in French-to-English translations are mine. [hereinafter “Rousseau-Foxen Study”].
does not stray far from our consideration in the opening Chapter regarding Manderson’s description of law’s capacity for fiction. That is, for Rousseau and Foxen, the mythic quality of the IRB rests in its ritual-like affirmation of Canada’s dual image as a territory of asylum and as a place that limits the entry of refugees – they write:

Dans le cas de réfugiés au Canada, le processus de détermination du statut de réfugié peut-être vu comme un rituel qui permet de fonder à la fois l’image du Canada comme terre d’asile et de limiter l’entrée des réfugiés. La Commission de l’immigration pour le statut de réfugié est le tribunal administratif chargé d’administrer ce processus décisif. Les membres de la commission travaillent dans l’ombre de ces différents mythes, celui du réfugié menteur et du Canada protecteur des droits humains.254

It is within this mythic backdrop of Canada’s dual image towards refugees that Rousseau and Foxen explore the nature of the IRB decision maker’s interpretation of a refugee’s narrative. They write generally that “[t]he interpretation of the refugee’s story in terms of conformity and deviance relies on expert (institutional) knowledge and on an expert experience that must appear to be founded on an objectification of truth and falsehood and that therefore assumes, from the outset, that such objectification is possible.”255 The emphasis that Rousseau and Foxen place upon the adjudication of a refugee claimant’s narrative against “expert (institutional) knowledge” and an “expert experience” cannot be over-stated.

The strength of the Rousseau-Foxen Study lies in the candid personal accounts and observations of its participants – former IRB members – regarding the notion of the “lying” and “truthful” refugee claimant. The participants in the Rousseau-Foxen Study included 17 former IRB members in Vancouver, Toronto and Montreal, all of whom represented diverse backgrounds and possessed experience at the IRB ranging from two to ten years.256 Rousseau and Foxen’s study found that two camps – if you will – emerged amongst the interviewed IRB members regarding their observations of the “lying” refugee. The personal views of these former IRB member are, in my view, indispensable in demonstrating that “citizen-expertise” defends a decision-maker’s search for an identity of trepidation as the factual predicate of the “rule” of a well-founded fear. For example, some members, according to Rousseau and Foxen,

254 Ibid. at 507.
255 Ibid. at 506.
256 Ibid. at 508. The impetus for this particular study stems from a 2002 study conducted by Rousseau et al., see infra note 278, which undertook a comprehensive multi-disciplinary analysis of the IRB based upon interviews conducted with 40 former IRB members.
spoke of actively seeking out the “lying” refugee at all costs (when the question of whether the refugee is lying or not is, as we have seen, immaterial under Hathaway and Hicks’ no-subjective element thesis), whilst other members recognized the underlying complexity of the act of lying and therefore were more inclined to question their own perceptions of the “lie” – they write:

Deux grandes positions vont alors se dessiner. Certaines commissaires vont chercher à démasquer le mensonge par tous les moyens et peu à peu affirmer être en mesure de la détection à coup sûr.\textsuperscript{257}

…

D’autres commissaires vont plutôt plonger dans la complexité et reconnaître la difficulté de leur tâche en acceptant de questionner leur perception du mensonge et en évitant d’en faire un axe central de la décision d’acceptation ou de refus.\textsuperscript{258}

In their observations of those IRB members who actively seek out the “lying” refugee, Rousseau and Foxen assert that contradictions and omissions in the claimant’s narrative indicate that the claimant is a liar, such contradictions and omissions then serve as a basis for a negative credibility finding (which, on its face, would result in a refusal of status). Yet, whilst for those IRB members who recognize the complexity (“la complexité”) of the process, these inconsistencies are difficult to pin down.\textsuperscript{259}

As an example, one IRB member speaks of a situation in which a refugee’s story has been “over-told” and would therefore be automatically refused by the decision maker because of the “déjà vu” of having already heard the same story before; the member speaks of a hypothetical case in which an Iranian refugee claimant would be automatically refused status by their colleagues because the story of the claimant’s escape from torture by police has already been told by previous claimants:

En Iran, beaucoup de gens se sont sauvés des hôpitaux après avoir été torturés par la police, en étant mis dans des chariots de buanderie. J’ai eu plusieurs cas où je me suis opposé à mon collègue (juge) parce qu’il avait déjà entendu cette histoire et que cela lui suffisait (pour rejeter le cas). D’abord, je n’ai aucun doute que certaines personnes se sont effectivement échappés comme ça. On voit ça dans les films en Amérique du Nord et c’est vrai que c’est un moyen de sortir d’un hôpital. Mais, comme c’est une histoire qui a été surutilisée, qui pouvait être vraie au début et a été utilisée encore et encore, c’est terrible parce que le prochain réfugié qui se sauve vraiment dans un chariot de buanderie, il est automatiquement refusé.\textsuperscript{260}

\textsuperscript{257} \textit{Ibid.} at 510.
\textsuperscript{258} \textit{Ibid.}
\textsuperscript{259} \textit{Ibid.} at 513.
\textsuperscript{260} \textit{Ibid.} [emphasis is mine].
In this case, the IRB member recognizes that what is at stake in this scenario is the potential for an Iranian refugee claimant to be automatically refused for re-telling the same story about the hospital laundry trolley (“chariot de buanderie”) in spite of the fact that their story might well be true on its face. This particular IRB member’s observations regarding the refusal of his colleagues to accept a refugee claimant’s story simply because it has been told before demonstrates that a refugee claimant’s “say-so” of trepidation – as a part of the subjective fear analysis – is insufficient on its own to warrant a positive grant of status, despite the fact that the refugee may suffer from a genuine experience (or fear) of persecution. In terms of Frederick Schauer’s discussion regarding rule-based decision making, I would argue that the IRB member’s observations here reveal a troubling division between certain decision makers who defend the subjective element – that is to say, an identity of trepidation – as the factual predicate of the “rule” governing a well-founded, and those who would defend a more nuanced and contextualized approach to the well-founded fear inquiry. In my view, this particular IRB member’s concern that the “next refugee” who tells the same story might automatically be refused status simply because of a perceived déjà vu (and, as such, is necessarily a liar) demonstrates their recognition of the possibility that regardless of how many times a story may be told, each story re-told may, in reality, represent a true account of the claimant’s experience (or fear) of persecution.

One reason why some decision makers may be particularly adamant about their search for an identity of trepidation is the use of recycled narratives by lawyers, advisors, and refugees in the adjudication process. Rousseau and Foxen note one IRB member’s recollection of a lawyer who appeared to have instructed the refugee claimant in question to study the “wrong story”:

« Juste pour vous donner un exemple: je me souviens d’un avocat, et je ne me souviens pas de son nom, Dieu merci, comme ça, je ne pourrai pas le révéler lors de cette interview, qui m’a demandé cinq minutes, et en sortant il a dit au client: « Tu n’as pas la bonne histoire, c’est pas cette histoire, tu n’as pas la bonne histoire ». Je ne sais plus si c’est au client ou à l’interprète qu’il a dit « Il n’a pas la bonne histoire ». L’avocat s’est trompé d’histoire la veille, en la lui donnant, en disant « Prends ça et étudie ». Il s’est trompé, alors le revendicateur se contredisait sans cesse avec les questions de l’avocat, il s’était rendu compte qu’il lui avait passé la

261 Ibid. at 513. Rousseau and Foxen observe in particular regarding the role of lawyers that: « Le rôle de certains avocats dans l’industrie des histoires est souligné comme étant problématique. À cours de temps ou d’énergie pour écouter de nouvelles histoires, certains poussent des histoires préprparées qui ne correspondent en rien à l’expérience du réfugié. »
Whilst neither time nor space permit for us to consider the role of legal counsel in providing competent representation for their clients before the refugee hearing, this particular scenario demonstrates the reality of a process of adjudication in which the claimant’s “say-so” has become the defective product of an ill-advised performance of the “wrong story” (mauvaise histoire).

In the last chapter, I argued that the interpretation of a well-founded fear” constitutes, in some cases, an act of violence upon the body of the refugee claimant. Here, what becomes apparent in the Rousseau-Foxen Study is their observation that the difference between a “lying” and “truthful” refugee claimant lies not in whether or not a contradiction exists in the refugee claimant’s story but instead it lies in the conclusion that is drawn by the particular decision maker who is tasked with subjecting this contradiction to legal interpretation. Rousseau and Foxen write:

Les contradictions sont un des arguments centraux des décisions negatives. Selon tous les commissaires elles sont légion : toutes les histoires en contiennent à différents niveaux et la question qui se pose n’est pas leur présence ou leur absence, mais l’interprétation qu’on en fait. C’est à ce niveau que les différences entre commissaires se creusent. Autant, et nous l’avons montré précédemment, certains utiliseront rapidement les contradictions comme des « preuves » de mensonge, autant d’autres chercheront à comprendre ce qui entoure la contradiction, ce qui peut lui donner un sens.

In this act of legal interpretation, Rousseau and Foxen note the observations of certain IRB members who are uncomfortable with the shift in the myth of the “lying” refugee to an entire “lying people” – one member speaks confidently of some groups of people who are more liars than others, and therefore required them to be vigilant in their understanding of each country’s profile over time:

« Je peux vous dire qu’à un moment donné, j’avais assez voyagé, ça me permettait

262 Ibid. at 513-4.
263 See Barsky, Constructing the Productive Other, supra note 232 at 122-3. Barsky notes: “If the claimant is reduced to describing a single kind of experience related to one element in his or her life – persecution – the s/he is destined to become the “generic” refugee, the story that has been heard before. Therefore accusations about refugees being told what to say (i.e. by their Counsel), backed up by evidence that many refugee stories are similar, become grounds for tightening up the system even though the system’s overall ground rules (stipulated in the [Immigration and Refugee Protection]Act) demand such limitation, and the method of questioning (imposed by the form) generally limits the kind of stories and therefore the kind of self-representation that is possible under the circumstances.”
264 Rousseau & Foxen, Rousseau-Foxen Study, supra note 253 at 514. [emphasis is mine].
de vérifier aussi bien des choses de par mes connaissances, mes visites. On dirait qu’il y a des peuples plus menteurs que d’autres. Je pense en particulier aux Zaïrois, c’était terrible, les Salvadoriens. Eux autres, c’était toujours des… Vraiment menteurs. J’ai décelé ça, l’évolution de ce que j’ai pu constater. Il y a eu une certaine évolution pendant le temps que j’ai été là, mais je me réenlignais au fur et à mesure, dépendamment du pays. Parce que dites-vous qu’on travaille quand meme là-dedans, il fallait étudier chaque pays. Il y avait ce qu’on appelle les profils du pays. Il fallait bien les étudier. »

This sense of vigilance towards seeking out not only the lying refugee, but an entire “lying people” extends to some members’ observations towards the use of expert reports in their assessment of the lying refugee. For example, one member notes their experience with “superb” psychological or medical reports, on the one hand, and others that were “much less sophisticated”:

« Je cherche quelque chose de plus sophistiqué que « les victimes de torture ont souvent l’air de mentir ». Il y avait des rapports (d’évaluation psychologique ou médicale) qui étaient superbes, parce que quelqu’un avait pris énormément de temps pour comprendre ce cas, et ça, ce n’est possible que dans 5% des cas. (Dans d’autres cas) j’avais un rapport psychologique qui disait « cette personne a de la difficulté à dormir la nuit, ils m’ont dit que c’était un symptôme de PTSD, alors je pense qu’il ont un PTSD ». Je ne blague pas, certains rapports n’étaient pas beaucoup plus sophistiqués que cela et je devais faire avec. »

In my view, this IRB member’s observations speak directly to the role of rhetoric in the IRB’s appeal to the expertise of a professional expert. That is, if, according to the member’s observations, only 5% of the time expert reports are of a “superb” quality which accurately reflect a patient’s diagnosis of a particular psychological disorder associated with their experience of persecution, then what must be said of the content of the remaining 95% of these reports? What must be said of the IRB’s claim to truly “know” the context of a claimant’s experience (or fear) of persecution?

Whilst one cannot confirm if the member’s percentages here are, in fact, accurate, there is nevertheless something particularly revealing, I find, about a culture of adjudication in which the majority of psychological reports might well reflect an expert opinion that is not, in reality, produced and assessed within the professional standards of expertise; but rather, it is assessed

265 *Ibid.* at 517. [emphasis is mine].
266 *Ibid.* Rousseau and Foxen state that « L’expertise est perçue comme une réponse potentielle qui pourrait être apportée à la question « Est-ce un symptôme de traumatisme ou un mensonge? » Dan les faits, elle peut aussi ajouter à la confusion. »
against the “standards of justice” of decision makers whose notion of justice resides within – and not behind – the “rule” of a well-founded fear.

In the following section, I wish to examine the extent to which the rhetoric of expertise in the well-founded fear inquiry has yielded a culture of adjudication in which “flesh is written onto the body” of the refugee claimant, in service of a decision maker’s search for an identity of trepidation as the factual predicate of the “rule” of a well-founded fear. We have already seen evidence of this in the observations of former IRB members who disclosed their concerns with the lack of sophistication in the quality of psychological and medical expert reports produced by the expert in question. The implications for a culture of adjudication in which an expert’s report or “say-so” does not, in reality, reflect an acceptable standard of professional expertise are grave; they raise important questions regarding the standards against which such expertise is ultimately judged.

I wish to push this grievance further in the following section of the discussion; specifically, I wish to suggest that in a decision maker’s quest to confirm a claimant’s identity of trepidation as the factual predicate underlying the rule of a well-founded fear, the admission of psychological or medical expert evidence – in particular, the medical certificate – becomes a source of “bodily identification” for an identity of trepidation that is not only constructed, but imagined. An imaginary “expert” identity of trepidation, I argue, represents at once a haunting exercise in what Clifford Geertz has referred to as the “imagination of the real.” I shall first consider Geertz’s explication of the imagination of the real generally before considering its role in the use of psychological and medical expert evidence in the refugee determination process.

D. The Rhetoric of Psychological and Medical Expertise: Participants in the Imagination of the Real?

i. The Imagination of the Real as a “Rendering” of “Fact”

At this juncture, I find it is important for us to remember that the refugee claimant who stands before the Law must not only perform an “identity of trepidation” (or, as Barsky puts it, an identity as a “productive Other”), but perhaps more to the point they must negotiate this identity of trepidation as a “fact” before the Law. It is here that I wish to consider briefly the contribution of Clifford Geertz’s work regarding the relationship between law and fact, and its role in what he calls the “imagination of the real”. Although this thesis does not undertake a substantive critique of Clifford Geertz’s panoply of anthropological writing, there is nevertheless
an important message in his work regarding the nature of law and fact that resonates with the objectives I have set out to demonstrate in this thesis.

In his work *Local Knowledge: Further Essays in Interpretive Anthropology*[^267], Geertz provides an illuminating account of what he identifies as a triplicate “explosion of fact”[^268], “fear of fact”[^269], and “sterilization of fact”[^270]. Geertz touches first upon an “explosion of fact” in the practice of law, and asserts, *inter alia*, that “[t]here is the vast increase in the use of expert witnesses”[^271] and a “technological restlessness, a sort of rage to invent, of contemporary life which brings uncertain sciences as electronic bugging, voice printing, public opinion polling, intelligence testing, lie detecting...”[^272] In this explosion of fact, Geertz perceptively argues that “...there is the general revolution of rising expectations as to the possibilities of fact determination and its power to settle intractable issues that the general culture of scientism has induced in us all...”[^273] Secondly, Geertz observes that “fear of fact” is apparent insofar as it relates to a “long-standing judicial emotion”[^274] of leaving the task of fact-finding to “amateurs to accomplish”[^275] – he speaks here of a “distrust of juries as ‘rational triers of fact’”.[^276] Geertz’s third observation regarding the “sterilization of fact” touches directly upon our consideration of a decision maker’s search for the refugee claimant’s identity of trepidation as the factual predicate underlying the rule of a well-founded fear. For Geertz, “[t]he skeletonization of fact, the reduction of it to the genre capacities of the law note, is in itself...an unavoidable and necessary process.”[^277] Geertz’s elaboration of this point is illuminating:

> The realization that legal facts are made not born, are socially constructed...by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education raises serious questions for a theory of administration of justice that views it as consisting, to quote a representative example, “of a series of matchings of fact-configurations and norms”[^278] or “a particular norm can be...invoked by a choice of

competing versions of what happened.”279 If the “fact-configurations” are not merely things found lying about in the world and carried bodily into court, show-and-tell style, but close-edited diagrams of reality the matching process itself produces, the whole thing looks a bit like sleight-of-hand.280

... 

The rendering of fact so that lawyers can plead it, judges can hear it, and juries can settle it is just that, a rendering: as any other trade, science, cult, or art, law which is a bit of all of these, propounded the world in which its descriptions make sense...the “law” side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real. At base it is not what happened, but what happens, that law sees; and if law differs, from this place to that, this time to that, this people to that, what it sees does as well.281

Geertz’s explication of law’s participation in a “distinctive manner of imagining the real” offers an additionally rich platform from which to explore further the objectives of this thesis – particularly in demonstrating the refugee claimant’s experience (or fear) of persecution as a performance not merely of a constructed identity of trepidation, but more urgently as a “rendering” of a “fact” of an identity of trepidation that satisfies the “fact-configurations and norms” of a well-founded fear before the Law. In this regard, there is a richness to Geertz’s discussion of the law’s capacity for the imaginary here that I argue uniquely informs our attempt to locate the limits of legal justice in the “skeletonized fact” of a “genuinely” fearful refugee claimant.

There are certainly parallels to be drawn between Schauer’s explication of the “factual predicate” of a given rule, Mohr’s imagery of “flesh written onto the body”, Barksy’s conception of the “productive” refugee, and Geertz’s notion of the imagination of the real. Further, in my view, Geertz’s explication of the law’s capacity for the imagination of the real reveals a compelling argument in support of Hathaway and Hicks’ “no-subjective element thesis”. That is to say, when Geertz states that “[a]t base it is not what happened, but what happens, that law sees”, and that “...if law differs, from this place to that, this time to that, this people to that, what it sees does as well” – do these assertions not reflect Hathaway and Hicks’ critique of the interpretation of fear as forward-looking, and not merely as a present-looking emotion of trepidation? Do they not also speak to Barsky’s remarks about the reduction of the refugee’s

279 Ibid.
280 Geertz, Local Knowledge, supra note 267 at 173.
281 Ibid. [emphasis is mine].
experience into empirical fact? Or Mohr’s description of law’s attempt to maintain one’s legal identity as a “fixed” and “constant” category over time? Geertz’s explication of law’s incapacity to picture what it cannot “see” resonates with each of these attempts by the law to restrict itself to a bounded and complete conception of the subject matter over which it is tasked to adjudicate. As we shall see in Chapter 3, this question of the law being unable to picture what it cannot “see” has particular application to decision-makers who choose to “see” a public expression of a refugee claimant’s homosexual or lesbian identity as the “authentic” or “genuine” expression of homosexuality or lesbianism before the Law.

In the following section, I suggest that a haunting connection exists between Geertz’s description of “fact-configurations” as necessarily “carried bodily into court” and the manner in which a refugee claimant’s fear of persecution is “carried bodily into the hearing” through the use of psychological and medical expert evidence. We have already considered briefly Barsky’s observations regarding the decision maker’s search for “bodily evidence for narrative” and Mohr’s consideration of “bodily identification” as comprising part of the forensic narrative of one’s legal identity; but, neither Mohr nor Barsky go further in addressing psychological and medical forms of “bodily evidence” from the point of view of legal justice, rhetoric or as a “distinctive manner of imagining the real.” This shall accordingly become my task for the balance of this chapter.

Indeed, when Geertz says that “what [law] sees does as well”, I find these words reveal an important relationship between our discussion of the IRB’s designation as an “expert tribunal” as premised upon a fiction, and the imagination of the real. To elaborate; this statement recalls Professor Manderson’s comments at the outset of this thesis regarding the “made real” of the fiction of law; in particular, I spoke of the decision makers of the IRB as comprising a “community of believers” who have come to “make real” the fiction of the IRB as an “expert tribunal” (which, as we have seen in the work of Crépeau and Nakache in the last chapter, does not appear to possess a clear definition, at least in its application to the IRB’s claim of expertise over the content of a well-founded fear). It is with this notion in mind, paired with Geertz’s language of the imagination of the real that I wish to suggest how the “made real” of this fiction is located at the meeting point between the “rule” of a well-founded fear, the language and rhetoric of psychological and medical expertise and the physical body of the refugee claimant.
In other words, this meeting point locates not only the “made real” of the law, but more urgently it locates the limits of legal justice.

ii. The “Say-So” of Psychological Expert Evidence and the Imagination of the Real

Although I have only introduced Geertz’s work at this stage of the thesis, I would submit that we have already seen evidence of the imagination of the real in this discussion. That is, Hathaway and Hicks’ no-subjective element thesis demonstrates that a decision maker’s continuing search for a non-existent subjective element may be regarded in my view as an exercise in the imagination of the real. More particularly, though, I would submit that the imaginary dimension of the decision maker’s search for the subjective element – that is to say, an identity of trepidation – is “made real” – at the crossroads between the “rule” of a well-founded fear, the language of psychological and medical expertise, and the physical body of the refugee claimant.

In this regard, I wish to first consider Cécile Rousseau et al.’s 2002 multi-disciplinary study of the IRB (“Rousseau et al Study”) within the context of Geertz’s explication of the imagination of the real.282 My objective here is to demonstrate how the Rousseau et al Study, particularly with regard to the treatment of psychological expert evidence, reveals certain instances of the imagination of the real – that is to say, instance in which the opinion and “say-so” of a psychological expert regarding the refugee claimant’s subjective fear is pitted – sometimes even arbitrarily dismissed – against the decision maker’s “imagined” “say-so” as the final “expert” on a claimant’s identity of trepidation. The Rousseau et al Study, as we shall see, reveals instances of the violence of “citizen-expert” justice in action; it is in these moments of violence that the possibility of another form of justice – an ethical form of justice – lies in the silence behind the “rule” of a well-founded fear.

The Rousseau et al. Study examined approximately forty cases decided at the IRB in Montreal (Canada) from a legal, psychological, and cultural perspective.283 A legal analysis of these cases found, inter alia, that “[e]valuation of the evidence from expert witnesses or reports (such as medical or foreign affairs experts) can be capricious.”284 The authors further found that:

283 No dates are given for the period in which these cases were decided by the IRB.
284 Rousseau et al., The Complexity of Determining Refugeehood, supra note 282 at 55.
…some Board members fail to carry out their duties effectively. They do not always know how to treat expert evidence, or they use it in ways which are clearly inappropriate. They tend to create an atmosphere in the hearing room that is not conducive to good-decision-making. They have also demonstrated difficulty in conducting a hearing correctly. Such basic rules of evidence and procedure are, however, of obvious importance for a tribunal that makes daily decisions concerning people’s life, liberty and security.\(^{285}\)

Rousseau \textit{et al.} cite one particular case in which a psychological expert report detailed the claimant’s post-traumatic stress syndrome as a result of being tortured, but which was dismissed by not only the Board Member, but the Chair herself. The authors’ account of the inappropriate treatment of this evidence is simply chilling:

The report included pictures taken immediately after his arrival in Canada showing his body covered with cigarette burns. A health professional had conducted six consecutive interviews of the claimant, making a thorough assessment of his condition and relating it to the details of his story. Nevertheless, the claim was rejected and the conclusions of the expert report summarily dismissed. One of the Board Members said during the hearing that he always took expert psychological reports ‘with a grain of salt’. It was further discovered, during the hearing, that he had not even read the report: after repeated requests from the lawyer, the Chair had to interrupt the hearing so as to allow the Board Member to read it. In addition, the Chair herself made dubious comments about the fact that she herself was a smoker, implying that she did not give much weight to the cigarette burn marks or to the expert report. These actions show a serious lack of appreciation as to the precise reason for having an expert report and what evidentiary weight it carries.\(^{286}\)

In a second case, Rousseau \textit{et al.} describe the dismissive attitude of a Refugee Claim Officer (RCO), who had himself “…acted as an expert”\(^{287}\) regarding the “Thematic Apperception Test (TAT) contained in an expert report”\(^{288}\), and who “…made disdainful remarks concerning the subjectivity of psychology, and in particular, of psychoanalysis.”\(^{289}\) Ultimately, neither the RCO nor the Board Members “…took the expert status of the psychologist concerned seriously and they declared that the report and the testimony were not credible overall, without any further explanation.”\(^{290}\) Further, in a third case, Rousseau \textit{et al.} discuss how Board Members had “…[shown] a lack of appreciation of the value of the expert report in explaining the

\(^{285}\) \textit{Ibid.} at 57. [emphasis is mine].  
\(^{286}\) \textit{Ibid}. [emphasis is mine].  
\(^{287}\) Guideline 8, Immigration and Refugee Board of Canada, online : <http://www.irb-cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/vulnerable.aspx#note3>.  
\(^{288}\) Rousseau \textit{et al.}, \textit{The Complexity of Determining Refugeehood, supra} note 282 at 55.  
\(^{289}\) \textit{Ibid.}  
\(^{290}\) \textit{Ibid.}
avoidance mechanisms seen in a traumatic situation, in the context of a mother’s desire to protect her son.\textsuperscript{291} In this particular situation, the claimant had omitted in her Personal Information Form (“PIF”) that her son “…had been burned by a Molotov cocktail thrown at their house”\textsuperscript{292}, and “…wanted to protect her son at all costs from being exposed to stimuli capable of triggering additional trauma.”\textsuperscript{293} However, the Board Members did not find the claim credible, even in spite of an expert psychological report that “…revealed the parents’ feelings of despair and powerlessness with regard to their son’s injuries.”\textsuperscript{294}

In each of the above three cases, the dismissive attitude of the Board Members, the Chair, and the RCO towards the content of the expert’s report calls into question their duty under the Code of Conduct to, \textit{inter alia}, “…maintain a high level of professional competence and \textit{expertise} required to fulfil their duties and responsibilities.”\textsuperscript{295} Turning to Hardwig’s model of expertise, the “good reasons” of the IRB members here are not based upon the apparent “good reasons” contained in the psychologist’s expert report. Rather, in my view, in each of these instances the “good reasons” of the decision maker to dismiss the opinion of the expert’s report are not rooted in an independent appraisal of the evidence to support the expert’s opinion – but instead they reflect a decision maker’s adherence to Clifford Geertz’s assertion that what the law “sees does as well”. In other words, a decision maker’s arbitrary dismissal of an expert’s report does not merely demonstrate a “lack of appreciation”, as Rousseau \textit{et al} note above, but what it urgently reveals, in my view, is the “made real” of law’s distinctive manner of imagining who the “real” refugee is before the gatekeepers of the Law. Thus, in the moment that the decision maker utters the words that she herself is a “smoker” (and thus implying that the evidence of the expert’s report regarding the claimant’s cigarette burns carried little weight), or the RCO who made “disdainful” remarks about psychology and psychiatry (and thus dismissed the expert report without any consideration), the “made real” of the fiction of the IRB as an “expert” tribunal is borne out of the decision-maker’s distinctive manner of imagining the real. That is to say, the pain of the claimant’s experience or fear of persecution is not found as a “fact” for Law, but here instead it is \textit{produced as a fact} and “made real” through the gatekeeper’s deference to their misguided assumptions pertaining to an individual’s experience of pain. In the result, the

\begin{itemize}
\item \textsuperscript{291} \textit{Ibid.} at 56.
\item \textsuperscript{292} \textit{Ibid.}
\item \textsuperscript{293} \textit{Ibid.}
\item \textsuperscript{294} \textit{Ibid.}
\item \textsuperscript{295} See \textit{Code of Conduct, supra} note 57 at s.20.
\end{itemize}
professional expert is held accountable to the citizen-expert IRB member’s particular standards and misguided - indeed, even false – notions of pain. 

I wish to consider one final case in which Rousseau et al. identify the influence of “direct avoidance” on one IRB members’ unwillingness to “…hear the traumatic story”\(^{296}\). Rousseau et al. explain that:

…the chairwoman state repeatedly that she did not want to hear a description of the torture suffered by the claimant, and that reading the PIF was sufficient evidence regarding that issue. She said: ‘The details being described, torture and all that, I don’t want to hear that’. The lawyer insisted that the claimant recount part of his story and she replied ‘Sir, I personally do not want to hear from him what has happened, what happened to his father or to his two sisters. I find it inhuman to ask him to repeat it […]. Maybe he experienced it; maybe… I don’t need that.’ The claim was rejected for lack of credibility.\(^{297}\)

The chairwoman’s personal reservations with not wanting to hear “[t]he details being described, torture and all that” reveals the capacity of violence not only of law, but more particularly of a decision-maker’s incapacity to “see” something other than what he or she wants to see. In this case, I would submit that the chairwoman – as a delegate of the Law - could not picture what she did not want to “see”. The decision-maker’s unwillingness to hear the refugee claimant’s account of their experience of persecution – who is then subsequently punished for a lack of credibility – demonstrates how what the law “sees” also “does” in the form of legal judgment; in other words, how the power conferred to particular members of the IRB in their pursuit of legal justice may be irresponsibly discharged. As we shall see in the final Chapter, the question of a decision-maker’s responsibility towards the refugee claimant represents a key component of another conception of justice for the refugee claimant – and, more particularly, for the gay or lesbian refugee claimant.

Let us, however, turn, to consider the role of the imagination of the real in the “writing” of an identity of trepidation onto the physical body of the refugee claimant. It is there that I

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\(^{297}\) *Ibid*. It is important to note Rousseau et al.’s observation that “…these expert opinions can also be misleading. Analysis of the medical and psychological reports shows that therapists have a tendency to predict the claimant’s behavior during the hearing, based on the therapeutic interview. The IRB hearing, however, presents a radically different environment from the secure patient-professional relationship. Although aimed at protecting the claimant, firm statements by a doctor or psychologist can often lead to problems later, because, if the actual testimony contradicts the prediction, the expert’s entire report may be called into question, thus damaging the claimant’s credibility.”

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shall propose that the rhetorical content of the well-founded fear inquiry meets at the crossroads between language, expertise, and the body of the refugee claimant.

**iii. The “Say-So” of Medical Expert Evidence and the Imagination of the Real**

In this section, I wish to turn away from the IRB momentarily to consider the imagination of the real at work in the French asylum context. Though I do not wish to consider French asylum law or policy in any exhaustive manner in this thesis, I find that the work of Professor Didier Fassin and Estelle d’Halluin in particular provides a further instructive lens from which to locate the limits of legal justice for the refugee claimant, at the meeting point between the “rule” of a well-founded fear, a language of rhetoric and expertise, and the physical body of the claimant. At the site of the physical body of the refugee claimant, a language of rhetoric and expertise “renders” the experience of the refugee claimant as a “fact” before the Law; at this meeting point between the language and the body, the requirements of legal justice are both met and replicated. As we shall see momentarily, Fassin and d’Halluin’s observations regarding the pairing of a claimant’s identity of trepidation with the use – or rather, mis-use – of the medical certificate in the French asylum process demonstrates a haunting and distinctive manner of imagining the real.  

Fassin and d’Halluin’s exploration of the expert medical certificate enlivens Geertz’s words that “[a]t base it is not what happened, but what happens, that law sees; and if law differs, from this place to that, this time to that, this people to that, what it sees does as well.”  

Fassin and d’Halluin have compiled a compelling account of the manner in which medical certificates are inaccurately judged as bearers of uncontested “truth” regarding the body of the asylum-seeker in France. Their thesis is intriguing if not provocative – that is, “...in contemporary societies—at least in those in which the state more or less fulfils its monopolistic function as regards legitimate violence—the body is no longer the political locus in which power is manifested but the place in which individuals’ truth about who they really are is experienced.”  

As such, Fassin and d’Halluin argue that “[f]ar from the generous ideals of the 1951 Geneva Convention, the management of refugees now falls under the mere logics of

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299 Geertz, Local Knowledge, supra note 267 at 173. [emphasis is mine].

300 Fassin & d’Halluin, Truth from the Body, supra note 298 at 597. [emphasis is mine].
immigration control: Narratives are less often believed and more proof is often requested. In this new context, the signs left on the body by the torturer become evidence for the state.”

Fassin and d’Halluin’s explication of the role of the medical certificate in “inscribing” evidence of “truth” in the body of the refugee claimant parallels, in my view, Mohr’s discussion of the manner in which “flesh is written into the body” in the construction of a “legal identity” – Fassin and d’Halluin write in particular that:

Even though the medical certificate has not replaced the need for an autobiographical account in which candidates for political refugee status try to prove that they meet the criteria of the 1951 Geneva Convention, it is requested more and more often to verify the validity of that account. Scars, both physical and psychological, are the tangible sign that torture did indeed take place and that violent acts were perpetrated. Like Thomas, the sceptical apostle in the Gospel, the French State needs to touch the wounds to believe.

The refugee’s body, thus, becomes the place of an inscription, the meaning of which relates to a double temporality: an inscription of power, through the persecution they suffered in their home country, and an inscription of truth, insofar as it bears witness to it for the institutions of their host country.

Fassin and d’Halluin speak of two paradoxes that arise from this double temporality of power and truth: first, they speak of the difficulty of the medical certificate in providing evidence of “physical marks” as they assert that “modern torture is typically secret”; and second, a paradox surrounds “...the increasing expectation of physical evidence simultaneous to the state’s decreasing confidence in the victim’s demonstration of it.” Fassin and d’Halluin’s article intriguingly refers to the “imaginary power conferred to the medical certificate” in a way that I would submit reflects Geertz’s notion of the imagination of the real. The authors point

301 Ibid. at 598.
302 Ibid. [emphasis is mine].
303 Ibid.
304 Ibid.
305 Ibid. Fassin and d’Halluin note: “In opposition to its classical counterpart, “modern torture is typically secret,” as Talal Asad affirms, because it is both illegitimate and illegal: When war is over or when the oppressor is defeated, the torturer may be brought in front of an international or a national court of justice (citing Talal Asad,” On Torture, or Cruel and Degrading Treatment” in, Veena Das, Arthur Kleinman & Margaret Lock, eds. Social Suffering (Berkeley, CA: University of California Press, 1997) 285 at 289. The war criminal’s elementary rule is, thus, to leave no physical mark. It is in this context of concealment favorable to all types of subsequent denial that the medical certificate assumes increasing importance in societies in which the victims of political violence are supposed to be accepted and protected. Although their word is systematically doubted, it is their bodies that are questioned; however, quite often these bodies speak little, for it is in the torturer’s interests to silence them. The second paradox relates to the increasing expectation of physical evidence simultaneous to the state’s decreasing confidence in the victim’s demonstration of it.”
306 Ibid.
307 Ibid. at 601. [emphasis is mine].
specifically to the opinion of one physician’s comment regarding the dubious nature of the medical certificate:

“In fact, it’s true and it’s not true. A certificate can’t ever serve on its own. If the account isn’t credible or coherent, if the information as a whole is probably going to be rejected, it is highly unlikely that the medical certificate will change anything. But if there’s a doubt plus the certificate, then it’ll be to the person’s advantage.”

Fassin and d’Halluin’s assessment of the role of the medical certificate is explored from four angles. First, they address a “political problem”. In particular, Fassin and d’Halluin argue that in the French asylum context, “[a]greeing on the necessity to provide evidence of marks on the body—which assumes that such marks were made (even though certain forms of violence are not physical) and that they remain visible (despite the fact that torturers find ingenious ways of ensuring that no evidence is left)—considerably reduces the scope of the Geneva Convention.”

Further, they assert that “medical certificates are not required to obtain refugee status, but the value granted to physical marks diminishes the principle of “fear of being persecuted,” which, by definition, has no physical translation.”

Secondly, the authors speak of an “ethical problem”, whereby in their attempt to assist refugees “…physicians and psychologists deprive them of their truth.” The reason for this, Fassin and d’Halluin suggest, is tied to the value of the expert’s word against the victim:

More generally, by requesting that the doctor certify that the person has been subjected to the treatment they claim to have undergone, more credit is granted to the expert’s word than to that of the victim. The certificate of the former, describing symptoms and signs, validates the account of the latter, reporting his or her personal experience. This depreciation of the asylum seeker’s word is obviously particularly problematic when the medical doctor has little to say about the facts, as in the case of sexual violence where the physical marks can rapidly fade. Psychological scars then sometimes replace the missing corporeal inscription of the trauma.

Thirdly, Fassin and d’Halluin address a “therapeutic problem”. In particular, the authors speak of a process whereby clinical activity has become “subordinated” to medical expertise: “[t]he conflict between expertise and care revolves around the very principle of the “therapeutic relationship”: By subordinating clinical activity to medical expertise, the confusion of genres runs counter to its effectiveness and induces a form of instrumentalization of the medical

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308 Ibid.
309 Ibid. at 602.
310 Ibid.
311 Ibid.
312 Ibid. [emphasis is mine].
professional."313 Taken together, these four factors reveal not only notions of the medical expert as simply an “instrument” in the determination of a well-founded fear, but they also shed important light on the emergence of the use of medical expertise as a “distinctive manner of imagining the real” – Fassin d’Halluin’s summary of the “validity” of the doctor’s expertise is telling in this regard:

The validity of the doctor’s expertise depends on the limitations of his or her competence in the medical field. Giving up the moral sentiment that originally prompted him or her to engage in this activity of “care and support” is the price to pay for the medical certificate to be credible and, therefore, effective. Consequently, doctors no longer talk of “emotion” in the account and no longer claim to “believe” the applicant’s words. They examine and describe “observed scars,” trying to affirm the probability of a link with the “alleged facts.” Finally, they state the compatibility between the two on the basis of the same expert’s logic as that of the occupational health specialist who expresses an opinion on an employee’s ability to work. The militant doctor has been turned into an expert of forensic medicine.314

Whilst these remarks pertain specifically to the expert working in the French asylum setting, the underlying implication here is far-reaching; that is, it appears to be that the opinion of the medical expert with respect to the claimant’s fear of persecution is only as good as its ability to render the experience of the claimant into a fact of an “observed scar” before the Law.

What then, are we to make of Faussin and d’Halluin’s remarks within Hardwig’s model of expertise? Can it still be said that a decision maker’s acquisition of expertise may stem from their “good reasons” to believe the “good reasons” of an external authority’s belief in a given proposition? Can it further still be said that a decision maker could defend such “good reasons” on the basis that the “good reasons” of the external authority upon whom they rely, has benefitted from the independent appraisal of the evidence? I do not believe that one could answer as quickly in the affirmative to both these questions.

In their article, Faussin and d’Halluin refer to the content of a medical certificate dated May 19, 1987, which exemplifies the medical expert’s “clinical” relationship to the victim of persecution:

Mr B.’s account of the circumstances of his arrest and torture and his subsequent internment in the N. jail is particularly detailed, coherent and sometimes even tinged with emotion. Yet the clinical examination remains poor. Thoracic pains appear to be related to a post-traumatic chondro-sternal arthritis that cannot be identified by X-ray. The fact that Mr B. has a missing tooth, whereas the rest of his teeth are in a good condition, is very likely to be due to the

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313 Ibid. [emphasis is mine].
stated cause. The abdominal scar cannot be related to a precise injury by Mr B., who says
that he more or less lost consciousness. On the whole the alleged facts are nevertheless
plausible. Certificate handed directly to the interested party.  

I find that Fassin and d’Halluin’s reference to the “therapeutic” content of this medical certificate
immediately transports us back to our consideration of the role of rhetoric in and of modern law
at the beginning of this chapter. In particular, I am reminded of Constable’s example of the
rhetorical use of the term “citizen-expert” whereby she suggests that the “citizen” has, as she
puts it, “...[taken] the place of the fellow professional in judging professional performance.”

In their article, Fassin and d’Halluin refers specifically address the role of rhetoric in the
instrumentalization of the medical expert and write that “[b]y following an established rhetorical
structure, the medical certificate, thus redefined in its informative content, takes on a different
social meaning.”

Accordingly, Fassin and d’Halluin compare the rhetorical structure of two medical
certificates: the first prepared in 1987 (which I have noted above), and the second in 2002.

Regarding the 1987 medical certificate, Fassin and d’Halluin note that “[t]he form of this type of
document is standardized. It starts with “I, the undersigned,” continues with the person’s
“statement,” his or her “grievances,” the “examination,” and finally the “conclusions.”

Fassin point out that in this certificate, the “statement” is “rather long: 36 lines” and sets out
the victim’s political circumstances, account of the arrest, and a detailed reporting of the physical
torture. In respect of the grievance section of the certificate, the authors note that these
include ““the thoracic pains,” “the absence of a tooth,” and “a scar on the abdomen” and
that “[t]hey represent the victim’s discourse on the sequels of the violence to which he or she
was made to submit.” Regarding the examination component to the certificate, the authors
further note that the physician’s certificate “adds very little” to the victim’s account. Finally,
in the concluding section of the certificate, Fassin and d’Halluin speak of the physician’s

315 “Comede archives, medical certificate” 19 May 1987. [emphasis is mine].
317 Fassin & d’Halluin, Truth from the Body, supra note 298 at 604.
318 Ibid.
319 Ibid.
320 Ibid.
321 Ibid.
322 Ibid.
323 Ibid.
remains that “[o]n the whole the alleged facts are nevertheless plausible”\textsuperscript{324} as “...[attesting] to a profound conviction attached to the narrative, far more than to a clinical truth read on the body.”\textsuperscript{325} The authors stress the “faith”\textsuperscript{326} of the physician in reaching this conclusion, despite the inability to “... to ascribe the physical signs with certainty to a violent cause...”\textsuperscript{327}

In contrast to the therapeutic structure of the above certificate prepared in 1987, the authors contrast its structure with the “rhetorical structure” of a medical certificate prepared in 2002. Specifically, Fassin and d’Halluin write that in the 1990s, the Comede\textsuperscript{328} in Paris introduced new standards for the preparation of the medical certificate, in which “[t]he new rule was to “try to be brief and accurate”, especially in the account”.\textsuperscript{329} As such, the authors note that certificates “...consist of only a few lines in an indirect style and with a distant mode”,\textsuperscript{330} and that “[e]verything concerning medical expertise is detailed [regarding the grievances and observations of the examination]”.\textsuperscript{331} In addition, the concluding section of the certificate does not permit the physician to exercise any type of “profound conviction” for the narrative of the victim – instead, they are required to “[d]raw a conclusion,”...by trying to “link up the stated facts and the observed sequels” and avoid any mention of “negative elements in the grievances or the examination.”\textsuperscript{332} In this regard, Fassin and d’Halluin note that the certificate is “...coldly standardized: “On the whole, the observations correspond to the patient’s statements.”\textsuperscript{333} One can see quickly here how the “rendering” of the physical body of the victim of persecution as a “fact” before the law derives not only from the performance of a refugee claimant’s identity of trepidation, but equally through the law’s “distinctive manner of imagining the real.”

This chapter has attempted to demonstrate the relationship between legal justice, rhetoric, and the “expert” construction of a refugee claimant’s well-founded fear before the Law. Drawing upon the work of Professor Constable, I have first attempted to demonstrate that a constructed notion of a well-founded fear – and more particularly, a subjective fear – defends a

\textsuperscript{324} See Comede archives, medicial certificate, supra note 311.
\textsuperscript{325} Fassin & d’Halluin, Truth from the Body, supra note 294 at 604.
\textsuperscript{326} Ibid. at 605.
\textsuperscript{327} Ibid. at 604.
\textsuperscript{328} Ibid. at 599. Fassin and d’Halluin note that the Comede is “a medical organization founded in 1979 to deliver health care to immigrants; it currently provides 10,000 consultations annually in a hospital in the south of Paris.”
\textsuperscript{329} Ibid. at 605.
\textsuperscript{330} Ibid.
\textsuperscript{331} Ibid.
\textsuperscript{332} Ibid.
\textsuperscript{333} Ibid.
form of legal justice that is predicated upon the power of language and rhetoric. The rhetorical use of the term “citizen-expert” has, I argue, given rise to a community of “citizen-expert” IRB members who occupy a “shared” domain of expertise with professional experts, and who, in many instances, hold such experts to their own personal “standards” of justice. Secondly, turning to Professor Hathaway and Hicks’ no-subjective element thesis, I have considered how Schauer’s rule-based decision making compels decisions maker to actively – though unnecessarily – seek out evidence of an identity of trepidation which serves as the factual predicate underlying the “rule” of a well-founded fear. I considered this search for an identity of trepidation in the specific context of the ‘lying’ refugee and the refugee claimant as a “productive Other”. Finally, I have considered how the construction of a refugee claimant’s constructed identity of trepidation materializes at the juncture between the “rule” of a well-founded fear, the language and rhetoric of psychological and medical expertise, and the body of the refugee claimant. In this reduction of a refugee claimant’s experience (or fear) of persecution into a “fact” before the Law, the requirements of legal justice – that is, “citizen-expert” justice – are fulfilled as a troubling exercise in the imagination of the real.

In the final chapter of this thesis, I wish to explore the role of rhetoric and the use of social science and medical expert evidence in the construction and performance of the gay refugee body before the Law. The construction of the “genuine” and “truthful” gay refugee claimant requires an additional “rule” to the “rule” of a well-founded fear; that is, before a refugee claimant is required to perform their “well-founded fear” before the law, they must first demonstrate they are, in fact, who they say they are – in short, they must perform their sexual identity before the Law. The factual predicate upon which this rule is based, I argue, is grounded upon distinct and fixed categorizations of what it means to be a gay man or a lesbian woman. As such, the rhetoric of language pertaining to the “genuine homosexual” shall thus become a live issue in the next chapter; I will accordingly return to address the plight of the quasi-fictional gay refugee claimant who is asked to “prove” who they say they are as an empirical “fact” before the gate-keeper to the Law.

The final Chapter suggests that Schauer’s rule-based decision making and Hardwig’s model of expertise leaves the question of “a different form of justice” for the refugee claimant unanswered. It does so because both Schauer and Hardwig do not place an ethical responsibility upon the individual decision-maker to act, or to ground a claim of expertise upon the good
reasons of an external authority in a manner that responds to Constable’s assertion of a decision maker’s prior call to act. In this regard, in attempting to address “another form of justice” behind the “rule” of adjudicating a gay refugee claimant’s sexual identity, I will examine this prior call to act from the point of view of the need that already exists to recognize the inherent vulnerability of sexual minorities, and to be held responsible at law for the “expert” language and investigative methods with which they choose to adjudicate the sexual identity of the gay refugee claimant.
Chapter 3: “Before the Law”: Answering the Call to Act and the Possibility of “Another Conception of Justice” for the Gay Refugee Claimant in Canadian Sexual Orientation Asylum Adjudication

In this final Chapter, I wish to return our focus to the quasi-fictional scenario of the gay refugee claimant who is asked not only to justify his fear of persecution, but to prove “who he says he is” before the gatekeeper to the Law. I have chosen to do so as I find that our discussion of the role of language and rhetoric in the “expert” adjudication of a well-founded fear has particular application to the adjudication of a gay refugee claimant’ sexual identity before the Law. Here, I will argue that in the case of the gay refugee claimant, a nexus exists between a decision-maker’s search for an “expert” “identity of trepidation” as the factual predicate underlying the “rule” of a well-founded fear, and the search for an “expert” sexual identity before the Law. For the refugee claimant who is able to successfully perform their “expert” “identity of trepidation” as a “fact” before the Law, the reward is sanctuary. In this moment of adjudication, the requirements of legal justice are met. Similarly, the gay refugee claimant who successfully “renders” their sexual identity as a “fact” gains the right to advance her claim for refugee status before the Law on account of this “proven” sexual identity. As we shall see, the search for a particular and fixed “expert” sexual identity pertaining to the homosexual man or lesbian woman has, in some cases, given rise to a culture of adjudication in which the requirements of legal justice are fulfilled at the juncture between language, rhetoric, and the body of the “factual” or “genuine” gay refugee claimant. While such a search for a fixed “expert” sexual identity may fulfill the requirements of legal justice, I shall argue that such a search ultimately absolves its decision makers from being held responsible at law.

This Chapter is divided into three sections. The first section addresses Professor Constable’s critique of the limits of Frederick Schauer’s rule-based decision making. In particular, I will examine Constable’s argument that rule-based decision making does not hold decision makers individually responsible at law because it does not require that they respond to a prior call to act responsibly; it is a call which exists before the law and behind the rules. I will further consider the implications of Constable’s conception of a decision maker’s responsibility at law within Manderson’s discussion of “apocryphal jurisprudence”.

The second section suggests that a nexus exists between the search for the “rule” of a well-founded fear, and the “rule” of a genuine homosexual identity before the Law. In particular, I will consider Derek McGhee’s provocative examination of the British case of Iaon
Vraciu, and suggest that the “factual predicate” underlying the “rule” of Mr. Vraciu’s homosexual identity is erroneously predicated upon a corporeal examination of his body for evidence of “genuine” homosexuality – much like the factual predicate of the “rule” of a well-founded fear is rooted in the “fact” of an identity of trepidation located at the meeting point between language, rhetoric and the body of the refugee claimant. Here, I deal specifically with the role of language, rhetoric, and expertise in the construction of the “authentic” gay refugee body; I explore how the reduction of a gay refugee claimant’s sexual identity to an empirical “fact” at the physical site of the claimant’s body reveals not only the limits of legal justice, but the height of the imagination of the real.

In the final section of this Chapter, I will address the possibility of another form of justice – that is to say, an ethical and responsible form of justice – within the realm of Canadian sexual orientation asylum adjudication. My aim shall be to determine whether there are moments in which the limits of language and rhetoric in respect of a particular decision-maker’s search for an “expert” and “factual” notion of a claimant’s sexual identity have “given out” to the recognition of a gay or lesbian refugee claimant’s “embodied identity” as itself an authoritative form of expertise. This notion of embodied identity shall call our attention to Butler’s proposal of a “common corporeal vulnerability” as comprising the theoretical ingredients for an epistemic re-orientation of a decision-maker’s capacity to “know” the “unknowable”; I shall accordingly argue that the recognition of this common corporeal vulnerability arises at once in the distinct and unique “face” of the refugee claimant, and presents the possibility for another conception of justice which is responsible at law. Following an analysis of the recent work of Jenni Millbank and Laurie Berg, the thesis concludes that despite the call towards the promotion of “critical spaces” within the IRB, it does not yet know a moment of an ethical and responsible form of justice – one that lies behind the rules of legal justice – towards the gay or lesbian refugee claimant.

A. Rhetoric, Expertise, and a Decision-Maker’s Responsibility “At Law”

i. Presumptive Positivism and The Limits of Frederick Schauer’s Rule-Based Decision-Making

In the last Chapter, I suggested that an “identity of trepidation” constitutes the underlying factual predicate of a “rule” of a well-founded fear. The constitution of such an identity of

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334 See Manderson, Apocryphal Jurisprudence, infra note 335 at 46.
trepidation requires, in many cases, not only the “say-so” of the claimant’s experience (or fear) or persecution, but the “say-so” of an external authority whose expertise renders the experience (or fear) of persecution into an adjudicative “fact” before the Law. As such, the requirements of legal justice in this regard are met and replicated at the boundary between language, “expertise”, and the body of the refugee claimant. In this section, I wish to examine the content of Constable’s criticism of this type of rule-based decision making as the basis of a different conception of justice for the refugee claimant – in particular, the gay refugee claimant. I seek in particular to situate Constable’s critique of Schauer’s rule-based decision-making – particularly her view regarding the failure of legal decision makers to be held responsible at law for their decisions – within Professor Manderson’s truly compelling discussion regarding a form of discourse referred to in the literature as “apocryphal jurisprudence”. The “apocrypha”, as we shall see in the following section, represents an orientation and a form of discourse wherein “…undecidability and contradiction provide the conditions of possibility of discourse, of language, and above all, of ethics, exactly because they provide the possibility of their betrayal.” Before turning to consider Manderson’s discussion of the “ethical turn” as a central concern of apocryphal jurisprudence, it is important that we first explore Constable’s critique of Schauer’s rule-based decision making, and thereafter query to what extent it might be viewed as an “apocryphal” critique of Schauer’s rule-based decision-making.

Constable focuses her criticism of Schauer’s rule-based decision making on “…the systemic analogue of a rule” – that is, on a system of rules he refers to as “presumptive positivism”. Constable summarizes presumptive positivism as follows:

Presumptive positivism names “the interplay between” recognized rules and possibly overriding considerations from the normative universe. A recognized or pedigreed set of rules or norms, which can be distinguished from a fuller and nonpedigreeable normative universe, presumptively controls decision makers. Presumptive positivism, Schauer suggests, “may be the most accurate picture of the place of rules within many modern legal systems.”

Let us recall that in the previous Chapter, I identified the three rhetorical components of a legal text set forth by Constable: there is a subject or addressee of the law, a “doing” by the subject or

336 Ibid. at 45.
337 Constable, Behind the Rules, supra note 195 at 112.
338 Ibid.
339 Ibid., citing Schauer, Playing by the Rules, supra note 150 at 206.
a “what” that the law calls for, and a “telling” of the law that presumes the subject is able to
discern “what must be done”. Constable accordingly scrutinizes Schauer’s rule-based decision
making on all three fronts. Recognizing that “[i]n presumptive positivism, the subject, the
telling, and the doing of “law” takes on a particular cast”, Constable identifies first that “[t]he
subject of this law...is a decision-maker, a psychologically and politically constrained rational
agent, who looks to the rules to set the agenda.” She goes on to state that as “[a] putative
rule-follower,” this ostensible agent need not act, at least in the sense of action as involving
initiation and judgment on the part of the actor.”
Schauer’s concern, Constable writes, is with a “particular social process” which he refers to as the “...the “design” of decisional
environments for such an agent.” In this environment, “...human beings themselves become
included within the resources and personnel of a technical world in which all is viewed as a
matter of cause and effect, means and ends.” Secondly, regarding the “doing” of law – and
more particularly, of “what law calls for”, Constable argues that “...presumptive positivism does
not explain how a rule tells an addressee to do” and it further does not “...account for [the]
need to act or to do.” This need to act exists because “...a question of action or of what to do in a particular case must already have arisen” prior to what Constable describes as the
“invocation of any rule.”

Thus, Schauer’s assertion that “...a multitude of social considerations lie prior to the rule
[such as] background justifications; social processes, decisions, judgments; social or
psychological factors; moral and political factors; and so forth” ultimately does not address or
attend to the question of the need for a decision maker to act in spite of such social
considerations. That is, in her view, “Schauer’s account of what lies prior to a rule in decision
making takes no notice of – or at best takes for granted as social – any pre-existing human need

340 Constable, Behind the Rules, supra note 195 at 124.
341 Ibid. at 125.
342 Ibid.
343 Ibid.
344 Ibid.
345 Ibid.
346 Ibid.
347 Ibid.
348 Ibid.
349 Ibid.
350 Ibid.
to act or any call or demand for decision or judgment.”\textsuperscript{351} In this regard, the “interplay” of these social norms and rules leads Constable to conclude that “...presumptive positivism explains decision making as resultant behaviour, rather than as initiated and responsive action.”\textsuperscript{352}

Finally, regarding the “telling” of law in presumptive positivism, Constable argues that Schauer’s rules “...provide reason for action, without giving reason to act.”\textsuperscript{353} Her elaboration on this particular rhetorical element (or lack thereof) of Schauer’s rule-based decision making is worth noting in its entirety, as it shall inform the basis of our consideration of the limitations of the “telling” of the “rule” of a well-founded fear:

Rules may explain what results from decision making, but they do not adequately account for how decision making “results”. The constraint of rules in Schauer’s account differs from the various forms of binding which law had traditionally taken and about which it variously tells. Giving reason to act, or transforming reasons for action into action, is precisely what law had done throughout the Western tradition. Whether as ultimate threat or as authoritative command or as constitutive claim or as obligation, law has named the ultimate appeal to a “must” or necessity in which an addressee is told what “must” be done. When one asks, “Why must I?” the answer has been law and the subject’s responsibility to it. “Must” lies behind the telling of rules, just as the need to act lies behind a subject’s doing or decision making.\textsuperscript{354}

...  

If Schauer’s rules, as psychologically internalized prescriptive generalizations that result from socialization, do not give reason to act, Schauer’s presumptive positivism, as descriptive claim, taking an external and sociological approach to systemic rule-based decision-making, provides no account of responsiveness to anything other than rules and social norms. It precludes responsibility at law.\textsuperscript{355}

On this view of presumptive positivism, one might well ask where the “must” of the “rule” of a well-founded fear lies. Does the IRB’s nebulous claim as an “expert tribunal” constitute the “must” – the “activating ingredients” as it were – which provides a reason for decision makers to first act, and then second, to act responsibly? In considering our previous discussion of the rhetorical use of the term “expertise” in respect of a decision maker’s treatment of psychological and medical expert evidence, I would submit that a decision maker’s reliance upon or rejection of a professional expert’s opinion fails to satisfy the “must” which

\textsuperscript{351} Ibid.  
\textsuperscript{352} Ibid.  
\textsuperscript{353} Ibid.  
\textsuperscript{354} Ibid. [emphasis is mine].  
\textsuperscript{355} Ibid. at 127. [emphasis is mine].
underlies the “telling” of a “rule” of a well-founded fear. In other words, the rhetoric of expertise in the adjudication of a well-founded fear does not account for the “moment” in which the “telling” of a rule “...activates its addresses and engages them in producing the rules’ results”.  

Constable writes:

In its answers to “Why must I?” law’s appeal to the “we in this world” transforms the “to whom it may concern” of rules into an address to “you.” Schauer, in his conceptual analysis of rule-based decision-making, provides no account of this moment. Presumptive positivism provides no account, other than vague references to social processes, of the telling of the “must” in what is to be done or of how rules address those whom they do...Presumptive positivism provides no account of how the telling of rules activates its addresses and engages them in producing the rules’ results.

A decision maker’s reliance or rejection of the “say-so” of a professional expert regarding a claimant’s experience (or fear) of persecution thus represents, in my view, an additional consideration in the list of “social considerations” which Schauer identifies as “reasons for action” – a position that Constable argues is “like social science” insofar as “Schauer takes an external standpoint towards rules”:

For Schauer, rules have no force independent of social pressures. Thus rules provide no more than in Schauer’s words “reasons for action” (or reasons to believe that something is to be decided), and provide no reason to act (except through psychological internalization, rationalization, or socialization). Like social science, Schauer takes an external standpoint towards rules.

Responsibility at law calls for “...the possibility of response given by the situation”. That is, “[g]limpsing behind the curtain of a rule, the responsible designer must not only succumb to and take part in social processes, but must also do what is called for. In doing what she must, she acts responsibly. Action is responsibly doing what one must or what law, in its response to a prior call or demand to act, itself now calls for.”

What is it, then, that “law” now calls for? Constable locates the source of the need to act – the “must” of the “telling” of the law – within a particular notion of freedom or “initiation of action”. This is not, Constable argues, freedom in the sense of “individual control” or

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356 Ibid. at 126.
357 Ibid. [emphasis is mine].
358 Ibid. [emphasis is mine].
359 Ibid. at 129.
360 Ibid. [emphasis is mine].
361 Ibid.
362 Ibid.
“absolute undecidability”, but instead, it is a freedom “...that does not consist of sociologically determinable decision-making processes that control agents who alienate freedom and relinquish choice from the outset.” As such, “[a]ction is grounded rather in a world that is already there, giving rise to the human recognition of the need and corresponding responsibility to act.”

There is much I find worthy here in Constable’s description of the non-sociological basis for responsible action in decision-making that motivates us to return to our consideration of both the requirements of legal justice, and the basis of Professor Hardwig’s model of expertise outlined in the opening Chapter of this thesis. In Douzinas’ conception of legal justice, as well as Professor Hardwig’s model of expertise, there is no account of a moment in which the individual decision-maker is held responsible at law. That is, those who act in service of the requirements of legal justice are not held “responsible” – in the sense of responsibility that Constable outlines here – precisely because the requirements of legal justice are internal to itself. Instead, those decision-makers in pursuit of the delivery of legal justice do so as mere “putative rule followers” of the “rule” of well-founded fear, as “ostensible agents” who, according to Constable’s observations above, “need not act, at least in the sense of action as involving initiation and judgment on the part of an actor.” This latter statement cannot be overstated, in my view; for a principle distinction between legal justice and a responsible form of justice lies in the propensity and wherewithal of the particular decision-maker for initiation and judgment – each of which, as we have seen in this thesis and shall see more particularly in this Chapter, cannot be presumed to be present in the moment of adjudication of a refugee claimant’s sexual identity before the Law.

Similarly, I would submit that Hardwig’s theoretical model of expertise does not hold responsible those who base their claim of expertise upon an appeal to the “good reasons” of an external authority regarding a claimant’s experience (or fear) of persecution; it does not do so because the model does not compel an individual to rely on the evidence (that is, the “good reasons” or “say-so”) upon which the authority in question relies. As such, Hardwig’s model of expertise ultimately serves the interests of legal justice, not the interests of a form of justice that necessarily responds to a pre-existing need to act.

363 Ibid.
364 Ibid.
365 Ibid.
366 Ibid. at 125.
Thus, if we return to consider the findings of both the Rousseau-Foxen Study and Rousseau et al Study, it is possible, in my view, to scrutinize individual IRB members’ over-emphasis, rejection or outright dismissal of the evidence of professional experts from the perspective of a decision-maker’s responsibility at law. A legal decision maker’s decision to search above all for the “fact” of an identity of trepidation as the basis of a “rule” of a well-founded fear is an irresponsible decision at law. Such individuals who adhere to the search for this identity of trepidation through an appeal to the social science and medical evidence of psychologists and physicians, for example, exemplify a type of decision making agent who, as we have seen earlier, engages in “sociologically determinable decision-making processes” and therefore “...[alienates] freedom and [relinquishes] choice from the outset.” In this regard, Constable’s assertion that “[t]he possibility of acting is not exhausted by reference to the social world” rings particularly true in this discussion. The “instrumentalization” of the medical expert in providing “objective” proof of a “subjective” experience (or fear) of persecution in the form of a medical certificate, the arbitrary rejection or minimal assignment of weight given to a professional expert’s opinion might all be characterized here as an exercise in irresponsible action because they serve the interests of legal justice - or, to be more specific – “citizen-expert” justice.

The question of “another conception of justice” thus ultimately remains unanswered in Schauer’s account of presumptive positivism. Whilst I would submit that rule-based decision making serves the interests of legal justice – and nothing more – Constable aptly states that “[i]n Schauer’s account of rule systems, as in much contemporary philosophy of law and legal theory, as in many texts of modern law, “justice” lies in silence.” In the following section, I wish to situate Constable’s critique of presumptive positivism – particularly her articulation of one’s responsibility at law – within Professor Manderson more general discussion of a form of discourse referred to in the literature as the “apocrypha.” As we shall see, our consideration of the role of language and rhetoric in the “expert” construction of the genuine or “fearful” refugee claimant does not stray far from Manderson’s presentation of the apocrypha and what it means to engage in “apocryphal jurisprudence.” Accordingly, within this larger discussion of

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367 Ibid. at 129.
368 Ibid.
369 Ibid.
370 Ibid. at 130.
Manderson’s account of apocryphal jurisprudence, I will demonstrate how in the case of one particular refugee claimant – a gay refugee claimant named Ioan Vraciu – the search for a “fact” of an authentic homosexual identity at the bodily site of the anus of this particular refugee claimant not only constitutes the height of the law’s imagination of the real, but it at once represents a complete and indefensible abdication of a decision maker’s responsibility at law.

ii. The Ethical Turn and the Apocrypha

Recall that at the outset of this Chapter, I noted that the “apocrypha” represents a form of discourse in which, *inter alia*, “…undecidability and contradiction provide the conditions of possibility of discourse, of language, and above all, of ethics, exactly because they provide the possibility of their betrayal.” 371 Certainly, some context would be warranted here. The “apocryphal” (the adjectival form of the “apocrypha”), writes Manderson, “…attempts to reclaim those aspects of law hidden by law’s power to name and unname.” 372 This reclamation of law is achieved through a number of perspectives and techniques which, Manderson notes, are themselves absent from mainstream jurisprudence. As such, four concerns of law figure prominently in his discussion of the apocryphal and apocryphal jurisprudence: law as discourse, law as tragedy, law as ethics, and law as style. As time does not permit for us to explore exhaustively each of these aspects of apocryphal jurisprudence in this thesis, I nevertheless wish to focus on one particular aspect – the “ethical turn”, as Manderson puts it – and its relationship to Constable’s account of an individual agent’s (lack of) responsibility *at law* in rule-based decision making.

Whilst Constable does not expressly characterize Schauer’s account of presumptive positivism within a language of ethics, I find nevertheless that her explication of a decision-maker’s prior need to act within a language of “responsibility” is closely tied to Manderson’s particular use of the word “responsibility” in his description of the ethical concern of the apocrypha. In calling upon the work of Jacques Derrida, Manderson speaks of how a perspective of “undecidability” and “contradiction” relates to individual responsibility – he writes:

This perspective, which has been developed in some of the more recent work of Derrida, argues for the inevitable singularity of the “madness of decision”, and consequently the impossibility of grounding the experience of justice within a framework of rules. A rule

371 Manderson, *Apocryphal Jurisprudence*, supra note 335 at 45.
372 Ibid. at 58. At 31-2, Manderson also states that: “[t]he apocryphal is not inauthentic but *apokrupto*, hidden from view. And at the same time, whatever interest the apocryphal yet possesses derives from its subversive position, not opposed to the canon but, far more subversively, outside of it.”
can never capture the complex judgment which responsibility requires, and which must always be experienced as both bound and unbound, unique and universal.\textsuperscript{373}

Manderson’s reference to justice, rules and responsibility here speaks directly, I submit, to Constable’s use of the phrase “responsibility at law” in her criticism of Schauer’s rule-based decision making. The “complex judgment” which responsibility requires appears to be rooted in an ethical consideration – indeed, an aspiration according to Drucilla Cornell– “…to a non-violent relationship to the Other and to Otherness more generally, [one] that assumes responsibility to singularity.”\textsuperscript{374} Notice the similarity here between Cornell’s reference to the word “Other” and “singularity”, and Douzinas’ description of another conception of justice as rooted in the recognition of the singularity of the “infinite Other”. This form of ethical responsibility is necessarily particular in its scope; it is one which “suggests that a responsibility must be accepted but cannot be defined; it must arise like a compulsion from within and not as a norm imposed from without.”\textsuperscript{375}

Herein lies what I consider to be the most compelling similarity between Manderson’s description of the ethical turn of the apocrypha and Constable’s account of an individual decision maker’s responsibility at law. The notion that a responsibility which “…must be accepted but cannot be defined” and which “must arise like a compulsion” corresponds, in my view, to Constable’s consideration of the “must” embedded within the “telling” of law, and which “activates” its addressees to act responsibly. The “compulsion” which Manderson writes must arise “from within” further captures Constable’s language of a world that “…is already there”\textsuperscript{376}, one which compels a decision maker to respond to a prior need through action. It is this responsiveness to action, this compulsion from within, that separates Douzinas’ notion of legal justice and another kind of justice predicated upon an ethical responsibility for the singularity of the Other.

Like Constable, who asserts that justice lies somewhere behind the rules, Manderson writes that a discussion of the apocryphal “…focuses on what is missing from a certain conception of law, about the resources that yet remain within it to speak of these absences and

\textsuperscript{373}Ibid. at 45.
\textsuperscript{374}Ibid. at 46., citing Drucilla Cornell, \textit{The Philosophy of the Limit} (New York: Routledge, 1992) at 62.
\textsuperscript{375}Ibid. [emphasis is mine].
\textsuperscript{376}Constable, \textit{Behind the Rules}, supra note 195 at 129.
failures, and about drawing our attention to how and where law gives out.”

Further, Manderson observes that:

A judgment of judging in terms of its ethics, including not least the ethics of interpretation that govern it, may not tell us how adjudication might be framed in the future (although it might) – but it tells us something distinct and interesting about the social, cultural, and even ontological meanings of law in particular cases. In understanding more, perhaps, we may find ourselves increasingly unable to provide categorical answers.

There is a simplicity, I find, to Manderson’s assertion above that draws us back to the opening Chapter of this discussion. That is, my attempt to expose the nebulous designation of the IRB as an expert tribunal is, I would argue, an attempt to reveal what is “missing” in the particular legal “conception” of the IRB as an “expert tribunal”; indeed of what is missing from the IRB’s general claim of “expertise” over a refugee claimant’s particular experience (or fear) of persecution. Further, this discussion has attempted to reach for a greater understanding, particularly in respect of the relationship between language, rhetoric and “expertise” in the adjudication of an individual’s claim of a well-founded fear. Perhaps most importantly, our consideration of these aspects of the adjudication of the “rule” of a well-founded fear has exposed us to not only the requirements of legal justice, but an ethical view towards the possibility of another form of justice that lies behind the “rule” of a well-founded fear.

In the following section, I wish to return to the field of refugee adjudication and situate both Constable and Manderson’s discussion of one’s ethical responsibility to the Other within the trajectory of one particular refugee claimant’s attempt to gain sanctuary in the U.K. This claimant in question was a Romanian citizen named Mr. Iaon Vraciu, who unsuccessfully claimed refugee status in the U.K. in 1992 on the basis of his political activities in Romania; however, through a series of appeals, had his claim heard de novo before the U.K. Immigration Appeal Tribunal (“IAT”).

B. The Abdication of Responsibility at Law: The Case of Iaon Vraciu and the Search for a “Fact” of a Homosexual Identity Before the Law

i. The Nexus Between the “Rule” of a Well-Founded Fear and the “Rule” of a Genuine “Gay” or “Lesbian” Refugee Claimant Before the Law

377 Manderson, Apocryphal Jurisprudence, supra note 335 at 46.
378 Ibid. [emphasis is mine].
380 See Vraciu, infra note 381.
In the first Chapter, I suggested that the pain (or fear) of persecution on account of one’s sexual identity is at once unshareable and incapable of expression in language. I further suggested that there are no “good reasons”, no “knowledge” or “skill” to be acquired through one’s experience which could ground a claim of expertise over another’s (or, an “Other’s”, if you will) sexual identity. The reason for this, I submit, is that one’s sexual identity is not a fact which can be “found”, but instead it is an intimate aspect of one’s personal life that may or may not be lived in the public domain. In the case of Iaon Vraciu, discussed below, we shall see that an attempt to reduce his experience as a homosexual man into a scientific “fact” raises troubling questions about not only the purpose of law, but more particularly about the requirements of justice. This section shall accordingly canvass the role of both medical and psychiatric “expertise” in the construction of a particular notion of the authentic homosexual man before the gates of both the law and legal justice.

Derek McGhee’s gripping examination of the case of Ioan Vraciu attends to the adjudication of Vraciu’s sexual identity before the IAT in 1995. The facts are as follows: Mr. Vraciu had previously applied unsuccessfully for refugee status in 1992 based on his political activity in Romania’s 1989 revolution. His appeal to the IAT in 1994 was dismissed after he revealed that he had disclosed that he was a homosexual, and that he fled Romania because of his fear of being arrested by the Romanian authorities following the arrest of his male lover. Vraciu appealed this decision of the IAT, and the case was sent subsequently sent back to the IAT for a de novo hearing in 1995.

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“Mr. Vraciu arrived in Britain on a lorry from Calais in September 1992 and claimed asylum that month. Initially the basis of his application as that he was involved in political activity in Romania during the revolution of 1989 and that he had also failed to report for military service because of illness. Mr. Vraciu’s initial application for asylum was refused on 11 November 1992. He appealed against the decision and the appeal was heard by the Special Adjudicator in June 1994 (this was Mr. Vraciu’s first IAT). During the course of this IAT MR. Vraciu announced, for the first time, that he feared persecution if he returned to Romania because he was a homosexual. He went on to tell the tribunal that his one and only Romanian male lover had been arrested and, fearing that his own arrest was imminent, he fled the country. Mr. Vraciu’s appeal was dismissed on 29 June 1994. Mr. Vraciu re-appealed to the tribunal on 26 October 1994 and it was directed that the matter be re-submitted de novo. The following analysis focuses primarily on the report of Mr. Vraciu’s second IAT, which was heard on 28 April 1995.”
McGhee’s analysis of the Vraciu decision deals with two central questions: first, he explores the question of authenticity – that is “who has the authority to know sexuality”; and second, he is concerned with “how sexuality in the form of intimate pleasure, preferences, practices, desires, etc. is to be knowable and translated into the ‘objective standards’ required by law.” In addressing these questions, I am particularly interested in demonstrating here how the chain of events leading to the meticulous scrutiny of Mr. Vraciu’s body for empirical evidence of a “fact” of homosexual identity bears little – if any – resemblance to “law”. In particular, I shall explore the extent to which the search for an authentic homosexual identity in Vraciu is premised upon a decision-maker’s search for the “factual predicate” – to adopt Schauer’s wording – which underlies the “rule” of an authentic homosexual identity. Such a factual predicate, as we will see momentarily, would consist of a view towards homosexuality as a “yes” or “no” proposition at the bodily site of Mr. Vraciu’s anus. This bounded and empirical view of homosexuality stands at once in stark opposition to an ethical form of justice whose constituent elements we have considered in both Constable and Manderson’s writings above. I wish to therefore argue that the search for the “rule” of an authentic homosexual identity – much like the search for a “rule” of a well-founded fear – can only deliver a form of legal justice to those who successfully perform a bounded and fixed notion of homosexual identity before the Law. Accordingly, then, the question of another form of justice – one which is responsible to the singularity of Mr. Vraciu and others similarly situated to him – becomes a particularly urgent question for the gay refugee claimant who stands in perpetuity at the doorway to the Law.

ii. The Search for the “Rule” of an Authentic Homosexual Identity in the case of Iaon Vraciu

While McGhee’s analysis pertaining to each of these issues refers to the use of various “knowledges” and “technologies” to render Mr. Vraciu’s experience of homosexuality to a “fact” before the Law, I wish to consider McGhee’s discussion of these issues from the particular point of view of a form of justice that lies “behind” the “rule” of an authentic homosexual identity – in other words, from the point of view of the apocryphal. It is through this perspective that I will argue that McGhee’s work reveals the complete absence of individual responsibility - of a prior call to action – in the conduct of the Vraciu decision. That is, I shall argue that Vraciu at once

382 McGhee, The Case of Iaon Vraciu, supra note 379 at 30.
383 Ibid.
represents a type of adjudication that offers no account of a moment in which the “telling” or the “must” of “law” activates the principal decision-makers’ responsibility at law for the singularity and “embodied identity” of Mr. Vraciu. As we shall see, the adjudication of Mr. Vraciu’s sexual identity abandons entirely the potential for a “non-violent” relationship with the Other, and instead stays fixated on the search for factual and empirical evidence that fulfills the “rule” of an authentic homosexual identity. Let us turn now to consider how the “say-so” emanating from the use of particular “expert” knowledges and technologies are employed to create “factual” evidence of sexual identity – evidence against which Vraciu’s “say-so” is ultimately judged.

The issue of evidence figures prominently in McGhee’s analysis of both the question of the authenticity of one’s sexual identity, as well as the acquisition of knowledge pertaining to sexual identity and its translation into an objective form before the Law. As such, McGhee is particularly concerned with the manner in which the “law” in Vraciu relied not upon Vraciu’s self-declaration pertaining to his homosexuality - but instead, upon the “facts” produced by a forensic investigation of the body of Mr. Vraciu. He writes:

Here, ‘the law’s’ desire to know Mr. Vraciu’s homosexuality or non-homosexuality was achieved by the enactment of sensorial rituals which were to penetrate the truth of his sexuality. Mr. Vraciu’s body and biography along with the bodies, especially the eyes and ears of forensic interpreters, were to meet and commune in order to satisfy the law’s desire for facts.  

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The article demonstrates how the law, in one of its institutional incarnations, works; how law needs facts to produce truths; and how law organizes knowledges by processes of inclusion and exclusion, and as a result perpetuates itself as a ‘closed space’ populated by authorized speaking subjects and authorized knowledges.”

Although he does not state so explicitly, McGhee’s consideration of the forensic production of Mr. Vraciu’s homosexuality (or non-homosexuality) as a fact before the Law focuses almost entirely on a discourse of “expertise” and the role of one particular actor in the case – Ms. Alexandra Pond, legal counsel for the U.K. Home Office - in vociferously advocating the position of a forensic “corporeal” search to corroborate Mr. Vraciu’s self-declaration as a homosexual man. It is accordingly important that we subject the “legal” basis of Ms. Pond’s

384 Ibid. [emphasis is mine].
385 Ibid.
recommendation here to scrutiny not only from the point of view of rule-based decision making, but more urgently, from the point of view of the apocryphal.

McGhee writes that in *Vraciu*, there was an “economy of knowledge”\(^{386}\) at play in the production of truth surrounding Mr. Vraciu’s sexual identity. This economy of knowledge distinguished legal from non-legal knowledge of homosexual identity. Legal knowledge, McGhee notes, “…is the ‘valued’ knowledge”\(^{387}\) in *Vraciu*. Further, McGhee points out firmly that “…it was Alexandra Pond who introduced this distinction and presented the legal technology based on the attempt, for the purposes of law, to connect evidence (fact or corroborative) with a self-declaration of homosexual identity, which in itself was of little value if unaccompanied by these forms of appropriate evidence.”\(^{388}\)

The chain of events - spearheaded by Ms. Pond – which led to the decision to pursue a bodily investigation of Mr. Vraciu’s homosexual identity is truly disturbing. The investigation begins in the British Parliament, wherein the *Hansard* notes the acceptance by the House of Commons Standing Committee on the Asylum and Immigration Bill regarding Ms. Pond’s request that “…doctors should test Mr. Vraciu to determine his sexuality”.\(^{389}\) According to Ms. Pond, Vraciu failed to provide sufficient evidence of his homosexuality. She argued, for example, that Vraciu made no efforts to locate the whereabouts of his lover following his arrest in Romania, and that Vraciu did not call his partner to give supporting evidence.\(^{390}\) In addition, Pond noted that Vraciu did not belong to any homosexual group or club, that nobody in Romania besides his male lover there was aware of his “position”, and that his room in the U.K. was “…lined with pictures of nude women.”\(^{391}\)

The result of this request to “test” Mr. Vraciu is a chilling attempt to locate his authentic/inauthentic homosexual identity at the specific “factual” site of his anus:

Mr. Vraciu’s homosexuality could not be authenticated from scrutinizing his appearance or ‘outward activity’, nor could it be authenticated from the appellant’s unauthorized self-knowledge. Homosexual identity, therefore, according to Pond, with the agreement of the tribunal, was to be read from the signs of private sexual acts left on Mr. Vraciu’s body by other men. This suggested production of a homosexual identity from the signs of sexual acts and particularly the traces, the hallmarks of scar tissue and (mis)use of the body, especially surrounding the anus and rectal tissue, was, according to Pond’s suggestion, the corporeal site

\(^{386}\) Ibid. at 34.  
\(^{387}\) Ibid.  
\(^{388}\) Ibid.  
\(^{390}\) See *The Case of Ion Vraciu*, supra note 379 at 13.  
\(^{391}\) Ibid.
where medical practices of truth could bring to light the signs of an authentic or inauthentic homosexual identity. The reasoning behind this suggested practice of truth reduced homosexual identity and the diversity of homosexualities to one act, sodomy, and to only one of the participants in these sodomitical activities, the passive partner.  

The reduction here of Mr. Vraciu’s experience of his homosexual identity to the bodily site of the anus is particularly violent. I am reminded of the quasi-fictional refugee claimant who is asked at the outset of this discussion to justify his fear of persecution before the gatekeeper – that is, before the asylum judge. The refugee claimant states that she is gay, and fears being persecuted for who she is if returned there. The gatekeeper states that [her] story does not comport with what he knows to be the “gay reality”. The judge thus “finds” that she neither possesses the knowledge requisite of a genuinely gay person, nor the physical appearance or mannerisms of a true homosexual person. The judge concludes by stating that he “finds” that the claimant is not truly who they say they are because only he possesses the expertise to determine this fact for the Law.

Both the judge in this scenario and the legal decision makers in Vraciu – whether Ms. Pond or the tribunal itself which endorsed her recommendation for a forensic investigation to authenticate Mr. Vraciu’s homosexual identity – participate in a search for a fixed and constant factual predicate to the “rule” of an authentic homosexual identity. The source of the factual predicate in the case of Mr. Vraciu is located at the site of the gay male anus. On such a view of homosexuality, it would be possible to “know” one’s sexual identity as a “fact”. McGhee’s reference to Douzinas and Warrington’s observation of the transformation of, inter alia, concrete individuals” into “legal subjects” – which we saw in the first Chapter – reveals here a telling example of such a transformation. At the doorway to the Law, the gay refugee claimant stands literally as an object of not any form of scrutiny, but of “expert” scrutiny. Only after the “expert” examination does the object then take on a particular legal identity not unlike the kind which Mohr has described arises through the flesh “written onto the body”, as he puts it. If, as Douzinas and Warrington write, “…singular and contingent events are metamorphosed into model ‘facts’…”, McGhee’s unsettling description of the ultimate objective of the law to “produce” “signs of the truth of homosexuality” between the “normal” and “abnormal” anus suggests that such a “model fact” of authentic homosexuality is “knowable”:

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392 McGhee, The Case of Iaon Vraciu, supra note 379 at 39. [emphasis is mine].
393 See supra note 3.
394 Douzinas & Warrington, A Well-Founded Fear of Justice, supra note 97 at 137.
The suggestion of this medical test for authenticating a self-declared homosexual identity was a technique whereby ‘the normal’ anus, that is, a male anus which had not been subjected to the trauma of sodomatic genital intercourse with other men, was to be compared with ‘the abnormal anus’ which allegedly will be identifiable by visual and corporeal traces of anal-genital trauma caused by these sodomatisical activities. These characteristic symptoms of abnormality, readable by the medical gaze, were to be taken as the signs of the truth of homosexuality, just as the male medical eye, according to Irigaray, investigates ‘the object’ woman by penetrating her interior ‘with speculative intent’ in search of her truth.395

In addition, in his 2008 article regarding the adjudication of sexual identity in sexual-orientation based claims for asylum in the U.K., Barry O’Leary tackles the complex issue of “proving” a gay or lesbian refugee claimant’s sexual identity before the Law.396 He argues against a view of homosexuality as premised upon evidence of sexual conduct. In particular, he writes that:

Sexual identity is not the same as sexual conduct. Sexual conduct is, of course, a very important part of sexual identity and will often be an important part of claims by lesbian and gay asylum seekers. It may be that the asylum seeker’s sexual conduct in the past is what led to their sexual identity being disclosed and them being physically abused or imprisoned. However, to focus solely on conduct can seriously harm the chances of the lesbian or gay asylum seeker obtaining the protection they need.

Identity and not just conduct should be the basis of the determination of any claim by a lesbian or gay asylum seeker.397

O’Leary is not alone in his criticism of sexual conduct as the “tell-all” sign of an authentic homosexual identity. As we shall see in the final section of this thesis, the “proof” of a gay refugee claimant’s “say-so” regarding their sexual identity often turns on the issue of whether the gay refugee claimant is “found” to be “gay enough” for the decision-maker. In this regard, the extent to which a decision maker’s “expert” search – particularly within the IRB – for corporeal evidence of an authentic/inauthentic homosexual identity will accordingly become a live issue in the final section of this discussion. Certainly, in Vraciu, the overarching focus of the Tribunal

395 McGhee, The Case of Iaon Vraciu, supra note 379 at 39-40, citing Luce Irigaray, Speculum of the Other Woman (Ithaca, N.Y.: Cornell University Press, 1985) at 144. The struggle to “prove” one’s sexual identity before the Law is a struggle for gay men and lesbian women as much as it is for a female who must “prove” or corroborate her “say-so” in respect of an allegation of sexual misconduct with evidence that marks the body of the victim. In this regard, see Kim Scheppel, “Manners of Imagining the Real” (1994) 19 Law & Soc. Inquiry 995, who undertakes an insightful analysis of Geertz’s conception of the imagination of the real in the creation of evidence in the now (in)famous U.S. case of alleged sexual misconduct involving Anita Hill and former Mr. Justice Clarence Thomas of the U.S. Supreme Court. [emphasis is mine].


397 Ibid. at 90-1. [emphasis is mine].
was to acquire empirical “expert” evidence of Mr. Vraciu’s sexual conduct; as McGhee observes, “Vraciu’s anus became, with the official request for its examination, a ‘searchable absence deriving its identity from relations with other people’.”\(^{398}\) Thus, “[t]he proof of Vraciu’s sexuality was thus to be produced from the corporeal evidence of his sexual relations with other men, particularly the alleged signs of trauma that the penetration of their penises left behind at the site of this anus and rectal tissue.”\(^{399}\)

In the end, however, an “expert” forensic, corporeal investigation of Mr. Vraciu’s body did not take place. Instead, the truth of Mr. Vraciu’s homosexual identity was corroborated through the “independent report” of a psychiatrist, who stated that in his opinion, Vraciu was who he said he was – that is, a homosexual. As such, “[p]sychiatric discourse was used by Mr. Vraciu and his representatives as a practice of truth which could both connect Vraciu’s unauthorized ‘truth’ and transform [his] fragments of biography into both a psychiatric authentication of his sexuality as well as evidence of it for tribunal purposes.”\(^{400}\) The psychiatrist’s “authoritative authentication”\(^{401}\) here reflects “…an order of discourse, an economy and hierarchy of discursive value before the law when it comes to knowledge of sexual identity.”\(^{402}\) Is McGhee’s observation of a “hierarchy of discursive value” here not similar to the type of “evidentiary hierarchy” of which Hathaway and Hicks criticize as misleading in their criticism of the subject element of a “well-founded fear”? Is this similarity a mere coincidence or a symptom of a deeper affliction underlying the law’s desire above all for an empirical and “knowable” truth?

McGhee aptly concludes that “Mr. Vraciu’s mouth, and the speech that was produced by it, became the source of the psychiatric technology which would transform his confessional ‘raw’ chatter (hearsay) into a factual product for the purposes of law.”\(^{403}\) The expert “say-so” of a psychiatrist, it would appear, rather than the particular and contingent “say-so” of Vraciu represented the “valued knowledge” which the law needed to satisfy its own internal criteria for the authentication of one’s sexual identity; in so doing, the law indeed delivered justice to


\(^{399}\) Ibid. at 40.

\(^{400}\) Ibid. at 42.

\(^{401}\) Ibid.

\(^{402}\) Ibid.

\(^{403}\) Ibid. at 43.
Vraciu, but only a “knowable” and fixed form of legal justice. Vraciu does not speak to the issue of a form of justice that is rooted in contradiction, difference, and “unknowingness”.

In my view, the Vraciu case at once demonstrates where the “law” has “given out” in a most egregious way. It demonstrates far more than an exercise in the imagination of the real (that is to say, the “rendering” of one’s experience of their sexual identity into a bounded “fact”); it constitutes an absolute and unequivocal abdication of a decision maker’s ethical responsibility to the singularity of the Other. It does so because of its attempt to locate the truth of a gay refugee claimant’s homosexuality within a language of expertise and empirical fact at the bodily site of the claimant’s anus. Such an act of “law”, of “legal interpretation”, is at once an act of indefensible violence against not only the bodily integrity of the gay refugee claimant, but against their “embodied” identity as a person simply living their life, as Mohr has outlined in the previous Chapter. As such, the conduct of the decision-makers in Vraciu demonstrates what is at stake in a system of law wherein the delivery of legal justice for the gay refugee claimant requires the “expert” performance of a “fact” of an authentic identity before the law. In this case, the law’s search for the claimant’s identity of trepidation on account of their sexual identity is preceded by a search for a “genuine” homosexual identity before the Law.

In the final section of this thesis, I seek to demonstrate that behind the “rule” of a fixed notion of homosexuality lies another form of justice for the gay refugee claimant, one which is responsible at law and which activates its addressees to respond to a prior call to action. Where does such a prior call to action lie for the gay refugee claimant? It lies, I shall argue, in the recognition of the distinct face and vulnerability of the gay refugee claimant. In respect of the face of the refugee claimant, I shall return to consider the writings of both Douzinas and Warrington, as well as the work of Jacques Derrida and Manderson. Thereafter, I will call upon the work of Judith Butler, who, as we have seen in Chapter 1, argues forcefully for the recognition of a vulnerability within an “ethical encounter” as providing the potential ingredients to “…change the meaning and structure of the vulnerability itself.”404

My aim in this final section shall be to examine to what extent the IRB’s “expert” adjudication of the sexual identity of a gay or lesbian refugee claimant responds to a prior call to recognize the face and vulnerability of the gay refugee claimant. In particular, I wish to consider the question of rhetoric in the IRB’s “expert” search for an authentic homosexual identity. In so

404 Butler, Violence, Mourning, Politics, supra note 1 at 30.
my foremost objective shall be to explore the extent to which the IRB’s claim of “expertise” over a gay or lesbian refugee claimant’s sexual identity corresponds to a language of responsibility that is responsive, non-violent, and engaged with the distinct face and vulnerability of an individual who has suffered a “loss” on account of their sexual identity that is simply “unknowable”. In other words, I am interested in locating a moment of recognition whereby the embodied identity of the gay refugee claimant is recognized as itself a form of embodied expertise which cannot be “known” as a “fact” before the Law. At the conclusion of this discussion, I will suggest that the rhetoric of “expertise” in the IRB’s adjudication of a claimant’s sexual identity does not, in all cases, answer the call to responsible action; and, as such, the question of another conception of justice for the gay refugee claimant remains unanswered.

C. Answering the Call to Another Conception of Justice? “Expertise” and the Construction of Sexual Identity in Canadian Sexual Orientation Asylum Adjudication

i. The Recognition of the Distinct Vulnerability of the Refugee Claimant

In the last section, I set out to demonstrate that the “expert” search for a “rule” of an authentic homosexual identity in the case of Vraciu located a particular and fixed notion of homosexuality within a particular factual predicate – that is, at both the specific site of Vraciu’s anus, as well as within the “say-so” of a professional psychiatrist who confirmed that Vraciu was who he said he was – that is, a homosexual. In this section, I wish to problematize this particular search for the factual predicate of the “rule” of a homosexual identity within a language of vulnerability, ethics, and justice inspired by the work of Butler, Constable, Derrida, Manderson, and Douzinas and Warrington respectively. My focus here shall be to consider the implications of these authors’ writings for a conception of justice which is grounded foremost in a recognition of the distinct vulnerability and unique “face” of the gay refugee claimant. Such a discussion shall invite us to return to the first Chapter of this thesis and re-address the question of the theoretical source of the IRB’s nebulous designation as an “expert tribunal”.

In particular, in delineating the limits of Professor Hardwig’s model of expertise, I seek to address whether the possibility exists for individual decision-makers of the IRB to ground a claim of expertise not solely upon the “good reasons” and “say-so” of an external authority, but instead upon a recognition of its incapacity to “know” – in other words, of its position of “unknowingness” relative to either a refugee claimant’s experience (or fear) of persecution, or

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405 See Douzinas & Warrington, A Well-Founded Fear of Justice, supra note 97 at 119.
their experience as a homosexual man or lesbian woman. This epistemological state of “unknowingness” is explored within Judith Butler’s compelling writing regarding the relationship between grief, loss, and vulnerability – in many ways reminiscent of a turn to the apocryphal – and it is to this text that I wish to now call our attention.

Butler’s central pre-occupation in her article entitled “Violence, Mourning, Politics”406 concerns the question of “...who counts as human?”407 Butler’s examination of this question is undertaken from the particular perspective of loss. That is to say, for Butler “[l]oss has made a tenuous “we” of us all.”408 She goes on to write that:

...each of us is constituted politically in part by virtue of the social vulnerability of our bodies—as a site of desire and physical vulnerability, as a site of a publicity at once assertive and exposed. Loss and vulnerability seem to follow from our being socially constituted bodies, attached to others, at risk of losing those attachments, exposed to others, at risk of violence by virtue of that exposure.409

Butler’s focus on the manner in which loss and vulnerability arise from the possibility of violence upon the body is most instructive for us in our attempt to arrive at a different conception of justice for the refugee claimant. The following quotation encapsulates Butler’s articulation of the limits of a language of law centered on the protection of an individual’s legal “rights” – a language which does not speak to justice in the form of passion, grief and rage:

I am arguing, if I am “arguing” at all, that we have an interesting political predicament; most of the time when we hear about “rights,” we understand them as pertaining to individuals. When we argue for protection against discrimination, we argue as a group or a class. And in that language and in that context, we have to present ourselves as bounded beings—distinct, recognizable, delineated, subjects before the law, a community defined by some shared features. Indeed, we must be able to use that language to secure legal protections and entitlements. But perhaps we make a mistake if we take the definitions of who we are, legally, to be adequate descriptions of what we are about. Although this language may well establish our legitimacy within a legal framework ensconced in liberal versions of human ontology, it does not do justice to passion and grief and rage, all of which tear us from ourselves, bind us to others, transport us, undo us, implicate us in lives that are not our own, irreversibly, if not fatally.410

While Butler does not refer to vulnerability per se in the above quotation – for such a reference I shall address momentarily – there is something I find particularly succinct and clear

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406 Butler, Violence, Mourning, Politics, supra note 1.
407 Ibid. at 11.
408 Ibid. at 10.
409 Ibid. [emphasis is mine].
410 Ibid. at 14. [emphasis is mine].
in her attempt to orientate us to a view of ourselves in a language that “does justice” to “...passion and grief and rage, all of which tear us from ourselves, bind us to others, transport us, undo us, implicate us in lives that are not our own, irreversibly, if not fatally.”\textsuperscript{411} It is a viewpoint that concerns an awareness of “what we are about” that lies outside of a language of “who we are” in the form of a legal “rule” or text; it is the possibility of orientating ourselves to a language of loss and grief that overtakes a part of us – our bodies – that we simply do not have control over. For Butler, our bodies are at once a site of mortality, vulnerability, and agency - bodies that are not fully our own:

The body implies mortality, vulnerability, agency; the skin and the flesh expose us to the gaze of others, but also to touch, and to violence, and bodies put us at risk of becoming the agency and instrument of all these as well. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension. Constituted as a social phenomenon in the public sphere, my body is and is not mine. Given over from the start to the world of others, it bears their imprint, is formed within the crucible of social life; only later, and with some uncertainty, do I lay claim to my body as my own, if, in fact, I ever do.\textsuperscript{412}

Butler’s description of the exposure of the “skin and the flesh” invokes Mohr’s language of the flesh “written onto” the body, and of how in spite of the legal identity which is created through such a writing process, the individual nevertheless lives her life as an embodied individual. Part of this embodied identity lies in the inexplicability of grief. Butler speaks of the way in which, for example, “...grief contains the possibility of apprehending a mode of dispossession that is fundamental to who [we are]”\textsuperscript{413}; and further, of how the “sociality of embodied life” qualifies the claim of one’s autonomy and “...the ways in which we are, from the start and by virtue of being a bodily being, already given over, beyond ourselves, implicated in lives that are not our own.”\textsuperscript{414} In result, Butler aptly observes – and this I find particularly revealing for our purposes in this thesis – that “[i]f I do not always know what seizes me on such occasions, and if I do not always know what is it in another person that I have lost, it may be that this sphere of dispossession is precisely the one that exposes my unknowingness, the unconscious imprint of my primary sociality.”\textsuperscript{415}

\textsuperscript{411} Ibid.
\textsuperscript{412} Ibid. at 15-6. [emphasis is mine].
\textsuperscript{413} Ibid. at 17.
\textsuperscript{414} Ibid.
\textsuperscript{415} Ibid. [emphasis is mine].

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At the concluding pages of her article, Butler insists upon a “common corporeal vulnerability,” which, in her view, appears to lie in the recognition of one’s unknowingness of the one she has lost, and its potential for the re-orientation of politics. She queries: “Can this insight lead to a normative reorientation of politics? Can this situation of mourning – one that is so dramatic for those in social movements who have undergone innumerable losses – supply a perspective by which to begin to apprehend the contemporary global situation?”

In my view, Butler’s proposal of a common corporeal vulnerability presents the possibility for a re-orientation of politics because it offers a re-articulation of the delivery of justice to the refugee claimant – and in particular, the gay refugee claimant. That is, the recognition of a shared common corporeal vulnerability presents the possibility for the law’s orientation towards a form of justice that “lies behind the rules”, as Constable puts it; it is an ethical and responsible form of adjudication in respect of either an individual’s claim of a well-founded fear, or their claim as a member of a particular social group – that is to say, as a member of a community of homosexual men or lesbian women. Although Butler points out that “[a] vulnerability must be perceived and recognized in order to come into play in an ethical encounter, and [that] there is no guarantee that this will happen”, she nevertheless argues that “...when a vulnerability is recognized, that recognition has the power to change the meaning and structure of the vulnerability itself.” Further, writes Butler, “...if vulnerability is one precondition for humanization, and humanization takes place differently through variable norms of recognition, then it follows that vulnerability is fundamentally dependent on existing norms of recognition if it is to be attributed to any human subject.”

If am I correct in my reading of Butler here, I would argue that her proposal of a common corporeal vulnerability calls upon us to consider to what extent individual decision makers of the IRB have first, demonstrated a recognition of the vulnerability of the gay refugee claimant who has suffered an inexplicable loss which we cannot “know”; and secondly, whether such a

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416 Ibid. at 30.
417 Ibid. At 28, Butler attempts to address these questions within, inter alia, the context of the transformation of the United States’ “...sense of international ties that would crucially rearticulate the possibility of democratic political culture here and elsewhere.”
418 Ibid. at 30. See also Judith Butler, Precarious Life: The Powers of Mourning and Violence (New York, NY: Verso, 2004) where at 29 Butler states that “we all live with ... vulnerability, a vulnerability to the other that is part of bodily life, a vulnerability to a sudden address from elsewhere that we cannot pre-empt.”
419 Ibid.
420 Ibid.
recognition, if it exists, has resulted in a change to the meaning and structure of that vulnerability.  But, before we proceed to an analysis of these issues within the IRB, however, another element, I argue, is required for the “coming into play” of a vulnerability in respect of the gay refugee claimant.  This element is that of the unique “face” of the Other.  I have referred to this notion of the face only briefly up to this point in this discussion; however, it is at this juncture that I wish to suggest that the ingredients for another conception of justice for the gay refugee claimant depends as much on a recognition of a shared common corporeal vulnerability between the decision maker and the claimant as it does upon a recognition of the distinct face of the individual which resists the law’s attempts to categorize their experience as an empirical fact before the doorway to the Law.  For the face of the Other ultimately requires decision makers to do what they must – that is, to see the gay refugee claimant as an embodied human being, and to respond to refugee claimant’s face in the moment of its call.

ii. The Unique Face of the Gay Refugee Claimant and the Moment of One’s Responsibility at Law

In this section, I wish to return to the writing of Douzinas and Warrington, who provide a compelling account of the “face” of the Other and its relationship to an ethical and responsible form of justice.  Here, my aim shall be to demonstrate that Butler’s proposal of a common corporeal vulnerability as a partial basis of another conception of justice for the refugee claimant - one which lies behind the rules of a well-founded fear – is intimately tied to the moment of recognition of the refugee claimant’s unique face.

Firstly, in outlining the characteristics of the “face”, Douzinas and Warrington’s assert that:

[t]he face is unique. It is neither the sum total of facial characteristics, an empirical entity, nor the representation of something hidden, like soul, self or subjectivity. The face eludes every category. It brings together speech and glance, saying and seeing in a unity that escapes the conflict of senses and the arrangement of the organs. Nor is the face the epiphany of a visage, or the image of a substance. Thought lives in speech, speech is (in) the face, saying is always addressed to a face. The Other is her face.421

On this view of the Other as existing in her “face”, the possibility for another conception of justice for the gay refugee claimant exists not in the moment of the application of the law, nor even in the future application of the law; but, prior to the law.  It is a moment in which

421 Douzinas & Warrington, A Well-Founded Fear of Justice, supra note 97 at 119. [emphasis is mine].
the recognition of the distinct vulnerability of the gay refugee claimant requires the decision
maker to see the refugee claimant as a unique and particular individual, and to either choose or
reject the call to the recognition of their face. This prior need for responsive action in the face of
the gay refugee claimant thus constitutes, in my view, the compulsion, the “must” of the law’s
“telling”. The source of this compulsion derives not from the kind of social or background
justifications of which Schauer argues provides the non-absolute reasons for individuals to act in
rule-based decision making. Instead, this moment at once demands our response and
recognition. It is a moment that therefore arises both before and behind the rules of law and
justice.

Douzinas and Warrington further explicate below the “call” of the face of the refugee and
the impossibility of explaining her face “in fear or pain” as an explanation of “true facts” or a
reduction to “objective reasons”:

Could it be that one of the reasons for the exclusion of the refugee from the process of
law is to avoid the call of her face? A face in fear or pain cannot be explained by "true facts"
or be reduced to "objective reasons". It cannot be subsumed to the generality of the norm
nor the uniformity of application that asks immigrants to leave before they can come
before the law. Neither the object of cognition nor the instance of a rule, the face of
suffering comes in its singularity to haunt its neighbours as much as its persecutors. Is not
this the reason why the firing squad blindfolds their victim? The executioner covers the head
of the hanged as a defence against the face upon which suffering gets indelibly and
indescribably inscribed and persecutes the persecutor.  

The face of the refugee claimant in the above excerpt at once places a burden upon the
individual decision maker – more particularly, an ethical responsibility – to do what they must
for an Other (and more particularly, the pain or fear of an Other) whom they cannot know.

Referring to Immanuel Kant’s conception of the “ethical imperative”, Douzinas and Warrington
explicate the burden that one must discharge in the face of the Other as an immediate respect that
must be shown for her:

In the face-to-face, I am fully, immediately and irrevocably responsible for the Other
who faces me. A face in suffering issues a command, a decree of specific performance:
"Welcome me", "Give me Sanctuary", "Feed me". The only possible answer to the ethical
imperative is "an immediate respect for the other himself... because it does not pass through
the central element of the universal, and through respect, in the Kantian sense for the law."

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422 Ibid. at 136, [emphasis is mine].
423 Ibid. at 119, citing Emmanuel Levinas in Jacques Derrida, "Violence and Metaphysics' in Writing and Difference
In this sense the face exists *before the Law*; it represents the impetus behind the type of "compulsion" of which Manderson speaks must "rise from within", as well as the constituent elements of a world which Constables writes "already exists". Further, in a similar vein to Butler’s assertion that our bodies are not completely our own, Douzinas and Warrington observe that “[t]he Other has always and already been within self, (s)he dispossess and decentres self. The face is a trace of otherness inscribed on the “ground” of self. And if such is the case, all return to self from otherness is exposed to this exteriority which leaves its trace but can never be fully internalised.”

If we return now to Butler’s claim that a common corporeal vulnerability is not guaranteed to happen in an ethical encounter, part of the reason for this, I would submit, is the failure of the law – and more particularly, the failure of individual decision makers – to recognize the unique face of the refugee claimant *at the moment of its call*. In this moment of recognition, Butler’s conception of a common corporeal vulnerability sustains an ethical and responsible form of justice for the refugee claimant.

In the final section, I wish to query whether within the realm of sexual orientation asylum adjudication, there exists a moment (or moments) in which individual decision makers have done what they must – that is to say, whether they have answered the call to the face of the gay refugee claimant. In other words, I am interested in uncovering particular moments which demonstrate an individual decision maker’s responsibility at law for a non-violent relationship with the gay refugee claimant. In seeking the answer to this question, we shall consider the extent of the IRB’s search for a “factual predicate” underlying the “rule” of a genuine homosexual identity before the Law. As we have seen in the case of *Vraciu*, the search for the “factual predicate” of Mr. Vraciu’s sexual identity located the authenticity of his homosexuality at the physical site of Mr. Vraciu's anus.

I will suggest at the conclusion of my analysis that the possibility for a different conception of justice – an apocryphal conception of justice rooted in one’s responsibility to the Other – exists for the gay or lesbian refugee claimant. However, such a possibility of apocryphal justice is contingent upon a re-orientation of the search for the “rule” of a genuine homosexual or lesbian identity from one premised upon the finding of “knowable” facts and categorical “expertise” to one premised upon the *recognition* of a refugee claimant’s sexual identity as itself

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424 *Ibid.* at 120.
a form of “embodied expertise”. Such a notion of “embodied expertise” ultimately reflects a
view towards sexual identity as a dynamic and fluid aspect of human nature; it therefore suggests
that behind the “rule” of a “knowable” sexual identity, there lies another conception of justice for
the gay or lesbian refugee claimant that resides in the recognition of the “unknowable”.

iii. The Moment of Recognition: Answering the Call to the Face of the Gay Refugee
Claimant in Canadian Sexual Orientation Asylum Adjudication

This final section addresses the possibility of another conception of justice for the gay
refugee claimant that lies behind the “rule” of an authentic homosexual identity in Canadian
sexual orientation asylum adjudication. My objective here is once again not to engage in an
exhaustive doctrinal analysis of the existing sexual-orientation based jurisprudence within the
IRB, for such an analysis has been aptly demonstrated in the research of notable scholars such as
Jenni Millbank, Sean Rehaag425, Nicole LaViolette and Catherine Dauvergne. My objective,
rather, is to take the issue of one’s responsibility at law in Vraciu, and assess whether in the
Canadian context, there exists a moment or moments in which justice for the gay refugee
claimant lies behind the “rule” of a (constructed) homosexual identity. In conducting this
assessment, I wish to draw particularly upon the recent pioneering work of Jenni Millbank in
respect of her case study of credibility assessment in sexual orientation-based claims for refugee
status; thereafter, I will then turn to consider Millbank and Laurie Berg’s recent discussion
regarding the construction of personal narratives of lesbian, gay, and bisexual asylum claimants.

Although they do not state so explicitly, we shall see momentarily how Millbank and
Berg’s work bravely advocates a view towards another conception of justice for the gay or
lesbian refugee claimant – one that encourages a turn away from a “linear” “expert” adjudication
of sexual identity development, and towards a view of refugee adjudication as a “critical
space”426 in which decision makers are positioned to actively answer the call to the distinct face
and vulnerability of the refugee claimant. In this critical space, I shall argue that the embodied
identity of the claimant may itself be recognized as an authoritative form of expertise before the
Law. Let us first, however, consider more generally the findings of Millbank’s recent 2009

425 For a comprehensive analysis of the IRB’s adjudication of claims for refugee status on the basis of bisexuality,
see generally Sean Rehaag, “Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada”
need not apply: a comparative appraisal of refugee law and policy in Canada, the United States, and Australia”,
426 See generally Crépeau & Nakache, Critical Spaces, supra note 59.
study pertaining to the credibility assessment of sexual-orientation based claims for refugee status.

In her 2009 article entitled “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations”, Millbank addresses specifically the issue of credibility findings in sexual-orientation based claims for refugee status in over 1000 cases in Australia, the UK, Canada and New Zealand during the period of 1994 to 2007 inclusive. Millbank’s article critiques, inter alia, decision-makers’ reasoning processes in their adjudication of a claimant’s sexual identity. In particular, she critiques the assumptions upon which decision makers determine whether a particular claimant’s story possesses ‘the ring of truth’. What exactly does the ‘ring of truth’ here mean? And who is the author of this definition? Millbank aptly observes:

Tribunals in all of the jurisdictions under discussion make reference to the ‘ring of truth’ in numerous determinations, usually (but not exclusively) in assessing testimony that is disbelieved. What exactly it is that ‘rings’ true or untrue rarely explicated. The term ‘ring of truth’ is a fascinating one because it posits the story itself as the active agent in the adjudication process and suggests that its truth is both self-contained and self-evident. It is the story that signals (or ‘rings’) its own truthfulness, rather than the decision-maker who is choosing (based on evidence, instinct, emotion, or a combination) to believe, or to disbelieve, in it or the person telling it. This notion of truth as objective and discoverable by a decision-maker who is a fact ‘finder’ – rather than, say, a probability estimator, one who knows that their state of knowledge can only ever be imperfect and who weighs various possibilities and decides to give or withhold the benefit of the doubt – is surprisingly prevalent given the well known vicissitudes of proof in the refugee context.

Millbank’s assertion above eloquently reflects the contrast between a decision-maker’s pursuit of legal justice (which arises from a “notion of truth as objective and discoverable by a decision-maker as a fact “finder”) and the pursuit of a different conception of justice that is rooted in a notion of truth as non-absolute; in this latter notion of truth, a decision-maker acts as a

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427 Jenni Millbank, “‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations” (2009) 21 Int’l J. Refugee L. 1 [hereinafter “Ring of Truth”]. Interestingly, at footnote 14 Millbank notes that: ‘In Canada the proportion of decisions where the applicant’s claim of a gay, lesbian or bisexual identity was disbelieved rose from 7% in the first phase of the study (accounting for 15% of negative determinations) to 22% of decisions in phase 2 (accounting for 28% of negative determinations).”

428 Ibid. at 5. Millbank’s article points to only one specific reference citing the phrase “ring of truth” – she notes at footnote 170: “Ironically, in one of a handful of cases concerning revocation of refugee status for misrepresentation (after it was established that the applicant who was successful on the basis of homosexuality had concealed a long term heterosexual relationship with one woman during the process and subsequently married a second woman), the applicant’s demeanour in the original hearing was characterised as ‘appropriate’ and his claim found to be ‘generally consistent’ with ‘a “ring of truth” to it’”, citing NZ Refugee Appeal No. 71185/98 (31 March 1999) at 5, status revoked in NZ Refugee Appeal 75376 (11 Sept 2006).

429 Ibid.
“probability estimator, one who knows their state of knowledge can only ever be imperfect and who weighs various possibilities and decides to give or withhold the benefit of the doubt...”

Millbank’s reference to a decision-maker’s recognition of their “imperfect” “state of knowledge” further supports, in my view, Butler’s earlier observation of the sense of dispossession and “unknowingness” which we feel at the loss of a person for whom we grieve and mourn, but do not necessarily know why we do so. Such a state of unknowingness, of uncertainty, marks the starting point of an apocryphal view of an ethical and responsible form of justice for the gay refugee claimant – one which ultimately sees the embodied face of the claimant (who has suffered a loss we cannot “know” on account of who they are) as the final authority and source of expertise over their sexual identity.

Indeed, Millbank’s work permits us to locate moments in which the pursuit of objective, discoverable “truth” and “facts” pertaining to one’s sexual identity stand off against the need for the recognition of a decision-maker’s unknowingness and uncertainty in the face of the claimant who stands before the Law. As such, I wish to consider this stand-off within Millbank’s examination of three central components of a refugee claimant’s (and by extension, a gay refugee claimant) credibility assessment: demeanour, consistency, and plausibility.

Firstly, concerning one’s demeanour, Millbank notes that “[t]he Canadian guidelines on credibility distinguish between subjective ‘impressions’ based upon physical appearance on the one hand (which it states ought not be relied upon), and what are characterised as ‘objective’ elements of demeanour, such as ‘frankness and spontaneity’ in providing an oral narrative.”

Notice here the reference to “subjective” and “objective” terminology not unlike the subjective and objective components of the bi-partite test for a well-founded fear. In response to this bifurcated notion of “subjective” and “objective” demeanour, Millbank asserts that “it is not at all certain that a clear distinction between ‘subjective’ and ‘objective’ elements of demeanour

430 Ibid.
432 Ibid. at 7, citing RPD Credibility Guidelines, ibid at para. 2.3.7.
can be drawn, or that the latter can justifiably be regarded as a reliable guide to truthfulness.”

In particular, Millbank points out that “...physical appearance and perception of manner continue to play a role” in respect of a decision-maker’s assessment of a claimant’s demeanour evidence. Additionally, Millbank refers to a series of unpublished Canadian cases in which she observes in a parenthetical remark that “[i]t is notable that in copies of expedited reports from the Canadian tribunal that, in contrast to reasoned decisions, are not intended for public release, refugee protection officers made assessments in recent years such as ‘no signs of being gay’, ‘effeminate voice and manner’ and ‘looked gay’. In these cases, which all were decided in 2005, it would appear that the claimant’s “say-so” about their sexual identity was ultimately insufficient to corroborate the law’s search for a particular appearance of “gayness” as an indicator of authentic homosexual or lesbian identity.

Millbank further points to a number of notable cases in which the claimant’s demeanour evidence negatively influenced their credibility assessment before the decision-maker. For example, in another parenthetical remark, Millbank cites the Refugee Review Tribunal of Australia’s (“RRTA”) 2004 decision in N04/48510 and the IRB’s 2004 decision in Hussain v. Canada respectively in which a refugee claimant and witness were disbelieved in their claim of being gay “because they were considered too relaxed and jovial in manner when giving evidence.” Millbank notes in particular that “in [Hussain], the witness was asked by the board what kind of condoms he used and his answer was then dismissed on the basis that a heterosexual man would be equally able to provide such information - begging the question why

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433 Ibid. at 7.
434 Ibid.
435 Ibid. Millbank notes at footnote 30 that these reports were “[o]btained under an Access to Information Request A-2008-00037 (7 July 2008).”
436 Ibid. citing TA4-04080 (18 Jan. 2005), Refugee Protection Office (RPO) Observations. Millbank notes at footnote 30 that the decision is not publicly available, but is on file with her and that the case was “ultimately positive to the claimant at hearing”.
437 Ibid., citing TA4-13131 (29 July 2005), RPO Observations. Millbank notes at footnote 31 that the case “also includes the comment ‘Female interpreter noted his great taste in colour coordination and fashion’”. She further notes that the decision is not publicly available, but is on file with her and parenthetically that the case resulted in a “(positive decision made on the papers, without hearing).”
438 Ibid., citing TA5-02888 (26 July 2005), RPO Observations. Millbank notes at footnote 33 that the decision is not publicly available, but is on file with her and parenthetically that there was a “(positive decision made on the papers)”.
441 Milbank, The Ring of Truth, supra note 427 at 10, referring to N04/48510, supra note 439 and Hussain, ibid.
such personal information was requested in the first place.” In another Canadian case in 2004 involving a male claimant from Ukraine, Millbank highlights that the IRB found him to be “vague and hesitant in his testimony with respect to his experiences as a homosexual person”; she stresses that “[i]n that case, it appears that the applicant was repeatedly questioned by a female [IRB] member about ‘how the situation developed from an invitation to tea to that of sexual intimacy.’ Although these cases stand apart from subsequent judicial guidance from the Canadian courts on the error of relying upon appearance to assess a claimant’s membership in a particular social group, Millbank concludes that “[t]hese findings are extremely problematic for sexual orientation claims and, also, do not augur well for the sensitivity or appropriateness of questioning and credibility assessment in other contexts, such as in claims involving sexual violence.”

Secondly, concerning the element of consistency, Millbank’s research demonstrates that this element of credibility assessment is uniquely tied to the claimant’s ability or propensity to publicly express a privately held identity. In this regard, she asserts that her research “found a disturbing number of cases in which decision-makers appeared to have a pre-formed expectation of how gay, lesbian or bisexual sexual identity is understood, experienced and expressed by applicants from a widely diverse range of cultures and backgrounds.” According to Millbank, minor inconsistencies in a claimant’s story should not be viewed as the “rule” but rather the exception to “truthfulness” – she writes:

Given that the experience of trauma and the passage of considerable time between events in the home country and adjudication of the claim are common, even ubiquitous, features of refugee claims, consistency in relating minor aspects of narratives should perhaps be seen as the exception rather than the ‘rule’ against which truthfulness is judged. Yet the equation of consistency with truthfulness was prevalent in this study, including in cases where the inconsistency was of a relatively minor or peripheral nature.

Millbank’s discusses the element of consistency from two perspectives: delay and a “consistent expression of (homo)sexuality.” Regarding the issue of delay, Millbank notes that

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442 Ibid. at footnote 48, citing Hussain, ibid. at para. 37.
444 Ibid.
446 Ibid. at 9-10.
447 Ibid. at 11.
448 Ibid. at 13. [emphasis is mine].
449 Ibid. at 15.
“[i]nterestingly, although delay was relatively commonplace in sexuality claims, it was rarely a major factor in negative determinations.”\footnote{Ibid. at 14.} As such, our attention shall focus on the second aspect of consistency outlined by Millbank – that is, consistency in the expression of a claimant’s homosexual identity. It is within this context of consistency that I shall argue a fixed and linear notion of a homosexual identity exists as the factual predicate underlying the “rule” of a homosexual identity. This fixed notion of homosexual identity shall then be explored within Millbank’s discussion of plausibility as the third component of a claimant’s credibility assessment, as well as in her recent work with Laurie Berg regarding the construction of sexual identity narratives in asylum adjudication.

Although in my research I did not locate a Canadian case similar on its facts to \textit{Vraciu} in which a specific recommendation was made for the corporeal investigation of the claimant’s physical body for evidence of homosexuality, the issue of sexual conduct has nevertheless in some instances occupied the IRB’s search for a “consistent” and “plausible” sexual identity narrative. Millbank writes generally regarding plausibility:

\begin{quote}
The difficulty with much ‘plausibility’ assessment is that it arises from assumptions about what is real or likely, and may rest far more upon speculation than upon evidence. This difficulty is exacerbated in sexual orientation claims because there is rarely any external form of proof of group membership. Moreover, even when available, evidence such as photographs of lovers, membership of lesbian and gay community groups, or testimony by a counsellor, is often disregarded as self-serving or staged.\footnote{Ibid. at 17, referring to N05/50659, [2005] RRTA 207; Yakovenko v. Canada [2004] RPDD No. 267; \textit{Re PTF}, [2000] CRDD No. 117; \textit{TA5-12778}, [2006] CanLII 61444 (IRB) at 8; Osayamwen v. Canada [2004] RPDD No. 655 at para. 18; \textit{Cole v. Canada}, [2004] RPDD No. 854 at para. 29; \textit{Re GPC} [2003], RPDD No. 444 at para. 11; \textit{Re GYJ} [2001], CRDD No. 46 at para. 6; Davydyan v. Canada, [2004] RPDD No. 288 at para. 24. [emphasis is mine].}
\end{quote}

In drawing upon LaViolette’s remark that “[t]here is no uniform way in which lesbians and gay men recognize and act on their sexual orientation”\footnote{Nicole LaViolette, “Coming Out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act” (2004) 49 McGill L.J. 969 at 996.}, Millbank rightly asserts that “[g]iven this divergence, it is worth considering what exactly constitutes a ‘plausible’ account of a homosexual self-identity.”\footnote{Millbank, \textit{The Ring of Truth}, supra note 427 at 17.} Interestingly, Millbank refers to LaViolette’s training material developed for the IRB in 2004 which reflect a “…series of open-ended questions that invite the applicant to tell their narrative of how they came to their own self-knowledge or experience of
'difference'..."\textsuperscript{454} of the three areas of inquiry\textsuperscript{455} proposed by LaViolette, Millbank notes that one in particular – lesbian and gay contacts in both sending and receiving countries – was "misapplied in practice"\textsuperscript{456} as a result of decision-makers who "...based their determination of plausibility on broad over-generalisations or stereotypes of gay culture or ‘lifestyle’..."\textsuperscript{457} Here, Millbank’s specifically refers to the IRB’s reference to ‘the gay reality’ in the 2003 decision of \textit{Re KQH}, a case which I alluded to in the quasi-fictional scenario depicted at the beginning of this discussion; it would accordingly be appropriate, in my view, for us to return to address the plight of this quasi-fictional gay refugee claimant who we might now more appropriately characterize as an individual who stands on the other side of legal justice at the doorway to the Law.

Given our previous consideration of the “expert” construction of the “genuine” and “fearful” refugee claimant as an exercise not only in language and rhetoric, but in the imagination of the real, we might well ask at this juncture: To what extent is the moment of a decision-maker’s “expert” search for a “ring of truth” or the “gay reality” rooted in a bounded and fixed notion of homosexuality that is itself borne out of a particular exercise in language, rhetoric, and the imagination of the real? To address this question, I wish to now turn to the recent work of Millbank and Berg concerning the construction of sexual identity narratives in asylum adjudication; their analysis in particular regarding decision-makers’ notion of sexual identity development as occupying a “linear trajectory” provides a compelling basis upon which I will suggest that the IRB’s search for a “ring of truth” or a “gay reality” does not answer the call to the face of the refugee claimant in the moment of its call– and, as such, it ultimately leaves the question of a responsible form of justice to be answered for another day.

\textsuperscript{454} \textit{Ibid.} See also, Berg \& Millbank, \textit{Constructing the Personal Narratives of LGBT Asylum Claimants}, infra note 458 where the authors state at 205-6 that: “In training materials developed for the Canadian refugee tribunal, LaViolette suggests that one may build a narrative of sexuality that is not about sexual activity through questions that explore, for instance, when the claimant came to realize their sexual orientation, what kinds of discrimination and repression were prevalent in their home society, details about any past or current relationships, whether the claimant has disclosed their sexual orientation to their family and friends and what difficulties they might have faced in doing so, and whether the claimant has spent time with other lesbians or gay men in their country of origin or country of asylum.”


\textsuperscript{456} Millbank, \textit{The Ring of Truth}, supra note 427 at 17.

\textsuperscript{457} \textit{Ibid.}
In their recent 2009 article entitled “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants”, Jenni Millbank and Laurie Berg tackle the relatively untapped arena of sexual identity adjudication (as opposed to adjudication of a well-founded fear on account of one’s sexual orientation) within the refugee determination processes of Australia, Canada, and the UK respectively. Millbank and Berg argue firmly that “[w]estern understandings of minority sexual identity development have been deeply influenced by the idea of a linear process of self-knowledge moving from denial or confusion to ‘coming out’ as a self-actualized lesbian or gay man.” Their assertion that decision making forums in Canada, Australia, and the UK have erroneously adopted a view of sexual identity as comprising a “linear “coming out” trajectory” is most instructive to us in the context of our consideration of the IRB’s “expert” search for a “gay reality” or “ring of truth” in claimant’s sexual identity narratives. That is, Berg and Millbank’s critique of the Canadian context permits us to identify moments within the IRB in which the “factual” identification of a claimant’s linear “coming out” story legitimates the “rule” of a fixed and linear notion of an authentic homosexual or lesbian identity.

A central axis of Berg and Millbank’s critique of the linear “coming out” trajectory reflected in decision-makers’ reasoning process focuses on the limitation of the “staged model of identity development” proposed in 1979 by Vivienne Cass, an Australian psychologist. Berg and Millbank state that “[a]ccording to this theory, the individual initially recognizes some homosexual feelings or thoughts which lead him to inwardly question his own, and others’, presumptions that he is heterosexual.” They go on to provide the following summary of the theory:

With a growing sense of a homosexual self-identity, the individual begins to experiment in same-sex encounters and may make contact with homosexual communities. Negative connotations of minority sexual identities may bring the individual pain and a sense of isolation and he is likely to prefer to remain hidden, ‘passing’ within the predominantly straight society. Only later does the individual reach a greater level of acceptance of his sexual orientation, selectively disclosing it to others and increasing contact with other homosexuals. Finally, the individual may achieve pride in, and a growing synthesis of, their identity with more positive self-regard, a deeper understanding of

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459 Ibid. at 206.


461 Ibid. at 206-7.
homosexuality as one integrated facet of the self and renewed congruity between the public and private selves. Over time, this psychological theory of sexual identity development has infused popular consciousness, shaping our cultural expectations of the ‘natural’ progression of sexual identity formation or standard ‘coming out story’.  

Can one not see here how the IRB’s search for the “ring of truth” or a certain “gay reality” in a claimant’s sexual identity narrative corresponds in some measure to the staged model of identity development summarized above? Berg and Millbank’s article accordingly examines this particular conception of a “linear staged experience of coming out” within the Australian, Canadian and UK jurisprudence; they suggest plainly that “the stage model may be all too readily collapsed into an assumption that the ‘final’ stage of identity synthesis will occur in conjunction with the adjudication process.” In other words, Berg and Millbank are concerned with the failure of decision-makers to recognize the diversity of individuals who self-identify as homosexual or lesbian, but whose public representations of this identity simply do not reflect the type of “congruity” between one’s public and private selves during the final stage of the staged model of identity development. In their view, the model “...can lead to the misapprehension that there is a single path to one ‘real’ sexual identity, from the same starting point;” as well, they argue that it ...“assumes that the whole drive of the process is for the individual to come to accept his or her one, ‘real’ sexual identity which is then acknowledged to the world at large.”

A number of scholars have recognized the difficulty of categorizing sexuality into discrete categories of sexual identities and behaviours. For example, noting the difference in fluidity of identity formation between gay men and lesbian women, Berg and Millbank draw upon the astute observation of Lisa M. Diamond and Ritch C. Savin-Williams that “‘[t]he notion of ‘true’ sexual minorities presumes categories where there may be continua, and ‘coming out’ presumes a single outcome where there may be several.” In addition, Professor Sean Rehaag recognizes the diverse spectrum of sexuality in his own work on bisexual claims for refugee

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462 Ibid. at 207, referring generally to Didi Herman, “‘I’m Gay’: Declarations, Desire, and Coming Out on Prime-Time Television” (2004) 8 Sexualities 7; and more particularly to Jenni Millbank, “‘It’s About This: Lesbians, Prison, Desire”’ (2004)13 Social and Legal Studies 155 at 166; and R. Robson. Sappho Goes to Law School (New York: Columbia University Press) at 87-111.

463 Ibid. at 207.

464 Ibid. at 210.

465 Ibid.

status; in particular, he writes that “[d]ebates regarding appropriate labels for sexual behaviours, sexual identities, and sexual orientations are one of the mainstays of discussions about what human rights have to say about sexual minorities.” Accordingly, Rehaag adopts a “loose term” of bisexuality in his research, noting that “[d]ebates about appropriate labels are, if anything, even more pronounced with respect to bisexuality than to other sexual minority identities.”

Are these observations here not reflective of Professor Glenn’s more general observation in Chapter 1 that everything is a “…matter of degree rather than of sharp boundaries” as the task of separation would prefer?

Such a fixed notion of sexual identity is well documented in Berg and Millbank’s work. For example, they point to cases in Canada in which decision-makers presumed that gay men and lesbian women recognized their sexual orientation during adolescence, and others in which the recognition of the cultural relativity of sexual identity nevertheless impeded the claimant from “…the power to categorize their own experiences.” As well, referring to the 2004 Canadian case of Laszlo v Canada, Berg and Millbank assert that “some decision-makers expected that members of sexual minorities would, as a matter of course, form a sense of group identity and either join or demonstrate knowledge of lesbian or gay groups.”

Of particular interest to us in this final section is Berg and Millbank’s focus on decision-makers’ apparent erroneous emphasis on the existence of a “‘progress meta-narrative’” in the claimant’s story – that is, whether or not the individual has reached an “…end point of self-actualization [and] is represented by entry (and assimilation) into the receiving country”.

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470 Berg & Millbank, Constructing the Personal Narratives of LGBT Asylum Claimants, supra note 450 at 208. In particular, the authors state that: “Applicants claiming to be homosexual whose only same-sex sexual experiences were early in life (and especially those who had later heterosexual experiences) were thus readily characterized by decision-makers as having a ‘youthful transient phase’ or ‘sexual play’ regardless of their claimed self-identity”, citing specifically N05/50659, [2005] RRTA 207 at 18; EK (Uganda) v Secretary of State for the Home Department, [2004] UKIAT 00021 at para 16.


472 Berg & Millbank, Constructing the Personal Narratives of LGBT Asylum Claimants, supra note 458 at 210.

473 Ibid. at 214.
Here, Berg and Millbank explicate how decision makers rely erroneously upon the assumption that individuals who have “come out” will live their homosexual or lesbian identity openly and freely whilst in the country of sanctuary, but up until this point will not experience “joy” or “freedom” in their country of origin.\(^{474}\) In one telling example of this “progress narrative”, Berg and Millbank refer to the FCC’s 2007 decision in *Dosmakova v. Canada*,\(^{475}\) which involved a lesbian claimant who was found to lack credibility due to her failure to express her “realization” regarding her sexual orientation – the decision-maker’s chilling remarks in this regard reflect a strict adherence to the staged model of identity development:

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\text{The claimant was asked when she realized about her sexual orientation. She replied that it was only when her relationship with N began [when the claimant was 56]. While this is unusual, it is possible. But things must be probably so, not just possibly so. On a balance of probabilities, I find that most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties, even if they suppress it, hide it, or fail to acknowledge it. On reflection in later life, they are cognizant of this perhaps latent sexual orientation. This was not the case with the claimant. She found out about her lesbian sexual orientation only when she began such a relationship. The claimant stated in her [application] that she was happy with her husband, although she was surrounded by women. While this is not determinative, it adds to the claimant’s lack of credibility.}\(^{476}\)
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Whilst Berg and Millbank note that the FCC ultimately overturned the IRB’s negative finding of credibility in *Dosmakova* on the grounds that this conclusion was “made on the basis of stereotype rather than evidence”, I am also reminded here once again of the violence that flows from this particular decision-maker’s attempt to locate the claimant’s lesbian identity within a fixed and “knowable” notion of sexual identity development. How is it that this decision-maker “knows” as a “fact” that “…most homosexual people have some realization with respect to their sexual orientation when they begin to explore their sexuality in their teens or early twenties, even if they suppress it, hide it, or fail to acknowledge it”? What’s more, in purporting to “know” this “realization” of being a gay man or lesbian women, does the decision-maker then also purport to “know” the pain of the loss which the claimant may well have suffered on account of their identity? Are the decision-maker’s remarks here not reminiscent of our earlier observations of the IRB’s search for a “ring of truth” or a “gay reality” in the identity

\(^{474}\) *Ibid.*  
\(^{475}\) *See Dosmakova, supra* note 469.  
\(^{476}\) *Ibid.*, at para. 11.
narrative of the claimant? Here, we cannot escape considering how they are at once tied to the
decision-maker’s position as an “expert” fact “producer”, rather than as an impartial fact “finder”
(or “probability estimator”, as Millbank puts it). Certainly, it would appear that at least in some
instances before the IRB, those who are able to perform their public sexual identity in a manner
that comports within a linear model of identity development are viewed as more authentically
gay than those who fail to corroborate their “say-so” with evidence of a public gay self. As Berg
and Millbank rightly observe, “…coming ‘out’ is not a single definable moment but an activity
that is continually repeated over time to a multitude of people in different contexts, with varying
meaning and effect.”477 As such, “[t]here is no reason to expect that most, or even many,
applicants will be in the final stages of an identity synthesis process at the time they leave their
country or when they make their way through the refugee determination procedures.”478

It is here that I wish to point out the specific case of Santana v. Canada,479 which in my
view represents an instructive example of a decision-maker’s recognition of their position of
“unknowingness” in respect of the loss suffered by the refugee claimant. In Santana, a lesbian
claimant from Angola had been granted refugee status in Canada in 2003 on the basis of her
sexual orientation. She claimed that “…she was a lesbian and that her personal history was
tainted by persecution, rape and other ill treatment suffered in her native Angola and Portugal
where she lived for a few years.”480 In 2006, the Refugee Protection Division vacated its decision
to grant Ms. Santana refugee status on the basis that she had misrepresented her lesbian identity
to the IRB in that “…once [she] arrived in Canada, she became involved in a romantic
relationship with a man, which led to marriage, that a child was born of this union and that her
attempts to sponsor him failed.”481 In rejecting the Minister’s position, the FCC held, inter alia,
that:

With all due respect, the Minister’s argument does not stand up because it would
mean that homosexual individuals deemed to be credible would have to remain celibate
until refugee status had been granted to them, before becoming involved in a
heterosexual relationship. That is not the issue. The Minister must establish rather
that the impugned decision allowing Ms. Santana’s refugee claim resulted from
misrepresentations of the significant fact that she was not or had never been a lesbian
and that, consequently, her story was no more than lies.482

477 Berg & Millbank, Constructing the Personal Narratives of LGBT Asylum Claimants, supra note 458 at 215.
478 Ibid.
480 Ibid. at para.1.
481 Ibid. at para.3.
482 Ibid. at para.7.
The human race is extremely complex, particularly when it comes to the sexuality of its members. In this case, there was no reason to believe that the panel had any more expertise than this Court to address this issue. At best, this Court can recognize that the panel does not have a specific knowledge of it.⁴⁸³

In this moment of recognition, the FCC not only recognized the lack of the IRB’s expertise in the adjudication of Ms. Santana’s sexual identity, but its own lack of expertise to address the issue. In particular, the FCC’s preparedness to unequivocally reject the tribunal’s position that Ms. Santana could not have been a credible lesbian woman if she had engaged in a heterosexual relationship prior to being granted status (as this was not the issue under scrutiny) demonstrates a recognition of its incapacity to “know” the complexity of Santana’s trajectory as a persecuted lesbian woman. The “loss” suffered by the claimant in this case, I would submit, pertains not only to the persecution she faced in her country origin on account of her lesbian identity, but particularly to the covert manner of negotiation of her sexual identity within a heteronormative environment. In this regard, one can see how the limits of a “knowable” expertise are exhausted in the face of a refugee claimant’s potentially fluid, dynamic, and “unresolved” sexual identity before the Law. Indeed, the FCC’s courageous finding that “[a]t best, the Court can recognize that the panel does not have a specific knowledge of [the sexuality of the human race]”⁴⁸⁴ reflects the type of action of which I have discussed fulfills an ethical and responsible form of justice for the gay or lesbian refugee claimant.

We are thus transported back to the series of questions which I posed at the outset of this discussion regarding the nature of expertise and the relationship between the IRB’s claim of expertise and the limits of legal justice. In these final moments of our discussion, the particular question of whether the IRB can truly maintain a position of “expertise” over the content of one’s sexual identity cannot, I submit, be answered without addressing the question of justice. Whilst Santana represents a moment of a decision-maker’s responsibility at law – that is to say, a moment of recognition of the decision-maker’s position of “unknowingness” concerning the complexity of human sexuality – it does not, however, represent a moment of justice in which the decision-maker must do what they must, in the moment that they must in the face of the Other.

⁴⁸³ Ibid. at para.8. ⁴⁸⁴ Ibid.
Where then does this leave the question of justice for the gay refugee claimant? If legal justice lies in the “rule” of a linear and fixed homosexual identity, then an ethical form of justice lies behind the rule of such a linear notion of one’s identity formation. It is there, behind the rule that another conception of justice lies in the recognition of the distinct face and vulnerability of the gay refugee claimant. Yet, I would submit that we do not yet know an instance in which the law has come to see the face of the gay refugee claimant at the moment of its call as itself constituting a form of “embodied expertise”. Whilst in 2008 the UNHCR issued a Guidance Note pertaining to the adjudication of claims on the basis of sexual-orientation – which might be well be viewed as a “norm of recognition” to follow Butler’s construction – it remains to be seen, however, how such a Note may facilitate the kind of ethical encounter in which difference, singularity, contradiction, and unknowingness necessarily underlie a decision-maker’s immediate responsibility at law for the distinct face and vulnerability of the Other.

Audrey Macklin has stated that “credibility determination is not about ‘discovering’ truth. It is, rather, about making choices – what to accept, what to reject, how much to believe, where to draw the line – in the face of empirical uncertainty.” It also, I argue, is about choices that we make in the moment that we are confronted with the face of the refugee claimant. Indeed, when Macklin states “[a]cknowledging that judging is about choosing, and not about discovering, shifts the focus of credibility determination in significant ways”, this act of choosing reflects well the burden which is placed upon a decision-maker to do what they must in a moment which lies prior to the law.

Professors François Crépeau and Delphine Nakache’s emphasis on the need for “critical space” (whose work we have considered earlier in the first Chapter) within the refugee determination process, as well as Millbank’s recommendation that the qualities of empathy and imagination above all others require “...investigation and change in refugee law on sexuality” suggest an orientation towards a form of justice that is more reflective, compassionate and open.

486 See Macklin, Truth and Consequences, supra note 431 at 140.
to the complexities of those individuals who must negotiate a system of refugee adjudication which itself exhibits its own institutional and individual complexities.

Firstly, concerning critical space, Crépeau and Nakache assert generally in their recent research on the IRB that “[it] can be understood through the Greek root *kritikos*: judgement or the conditions for judgement. The ability or willingness for an individual to think critically entails the existence of a space for judgement.” Drawing upon the work of Jürgen Habermas, Hannah Arendt, and Herbert Marcuse respectively, Crépeau and Nakache summarize that “...a critical space is a forum where ideas can be constructively debated, free from any pressure from the powers that be, supported by a consensus on the importance of the deliberation and a common understanding of its operative principles.” As I have already noted in the opening Chapter, Crépeau and Nakache provide a fascinating and compelling analysis of the role (or lack thereof) of critical space within three areas of the IRB: internal, jurisdictional and external critical spaces. It is accordingly within the “internal” and “jurisdictional” forms of critical spaces – the former which Crépeau and Nakache refer to as a “space of self-criticism”, and the latter a space of interaction between IRB members and *inter alia*, expert witnesses – that I find bears upon our discussion of the IRB’s “expertise” and the delivery of another conception of justice to the refugee claimant. For example, their criticism of the IRB’s lack of a “common institutional culture” makes specific reference to the issue of expertise and justice for the refugee claimant:

The [IRB] seems never to have been in a position, as a tribunal, to create a common institutional culture that would unite the Board members in their endeavour to bring justice to the refugee claimants. The common goal to try to establish the facts of each case was differently interpreted according to the basic premise from which the Board

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494 *Ibid.* at 53. Crépeau and Nakache summarize each of these critical spaces: first, they discuss “[t]he internal critical spaces, which are created by the institutional setting of the tribunal and which determine the vitality of the collegial administration of the tribunal by its members: it is a space of self-criticism”; second, “[t]he jurisdictional critical spaces [is] constituted by the interaction of the tribunal with its immediate partners in the decision-making process, and in particular the lawyers in the various procedures, but also the refugee protection officers, the interpreters, the minister’s representatives, the expert witnesses, etc. Included here is the critical space provided by the appeal or judicial review mechanism”; third, “[t]he external critical spaces [is] constituted by the relationships between, on the one hand, the tribunal and, on the other, governmental authorities, civil society and the media.”
members were working. While most probably tried to do their best to sift through the complexities and pitfalls of any hearing without preconceived opinion on the case, many seemed to think that refugee claimants will stretch the reality if needed and some believed that most claimants were outright liars. These preconceptions made for very different attitudes towards inconsistencies and discrepancies in the testimonies of the refugee claimant themselves and affected the appraisal of expert evidence. These attitudes could be linked to the way the Board members were appointed and therefore to how they conceived their role in the grand scheme of things, as protectors of the oppressed or as ultimate gatekeepers for Canada. 495

We see here evidence of how the question of another conception of justice for the refugee claimant is tied to Crépeau and Nakache’s call for the maintenance of key critical spaces within the IRB. Crépeau and Nakache’s further observation of the IRB’s “instilling” of a “feeling of being strong enough to resist external influence”, as well as the need for a “deep feeling of duty towards a common goal” invokes, I find, the call to a decision-maker’s responsibility at law for the recognition of the unique face of the refugee claimant:

[it] seems that no common expert institutional culture has been created that would instil a feeling of being strong enough to resist external influence, of being dedicated first toward the cause served by the tribunal, of allowing leadership to emerge in the tribunal solely based of the peculiar abilities of a particular individual to reason or explain issues, or to write clear decisions. 496

...the independence and the appearance of independence of any tribunal can be correlated to the coherence of its case law, to the assertiveness of its problem-solving, to its responsiveness to new issues, to the consistency with which it pursues its stated objectives. All these qualities will only result from a shared sense of purpose, from a clear set of principles, from a deep feeling of duty towards a common goal. Without a robust internal critical space, the absence of a common institutional culture resulting from similar prior experience and the expertise of its members may not result in the required consensus of principle and unity of action that signals the effective independence of a tribunal. 497

Although Crépeau and Nakache’s article does not deal specifically with the issue of responsibility as we have considered it in the language propounded by Constable, I would submit that their criticism calls for a turn away from the type of external influences which Schauer might well describe as social considerations in his rule-based decision making. The “instilling”, however, of a “feeling of being strong enough” to defend against these “external influences” is a

495 Ibid. at 112. [emphasis is mine].
496 Ibid. at 117. [emphasis is mine].
497 Ibid. at 120. [emphasis is mine].
question, I submit, that arises prior to the law. To recall my earlier comments, it is a question that strikes at the heart of one’s ethical responsibility to do what they must in the moment that they must; that is, to answer the call of the face and vulnerability of the refugee claimant – not out of a sense of one’s allegiance to the Law, but out of a compulsion which rises from within, as Manderson astutely puts it. It is a responsibility which ultimately must be discharged in a time that prior to and before the “rules” of law. The IRB, I submit, does not yet know such an urgent moment of responsibility and justice.

Secondly, Millbank aptly observes that “[the absence of empathy and imagination] means that many decision-makers are unable to see the other, the applicant, and cannot receive stories from them in any real way.” There is a link here, I find, between Millbank’s use of the word “see” and the face of the refugee claimant. That is, if we cannot see the face of the gay refugee claimant as Other, and recognize in this moment that their trajectory as a gay man or lesbian woman may not ultimately be “knowable” as a “fact” before the Law, then the subsequent recognition of a common corporeal vulnerability on account of this position of “unknowingness” cannot therefore bring about their humanization, as Butler so eloquently reminds us. Moreover, we may not ultimately “know” the trajectory of a gay man or lesbian woman because the “loss” which they suffer as an individual on account of a fluid and dynamic – but privately held – sexual identity in an overtly heterosexual world may not be shared through an appeal to a “rule” of an authentic homosexual or lesbian identity before the Law. The FCC’s recognition in Santana of the complexity of human sexuality confirms this position of “unknowingness” I have set out to demonstrate in this final chapter.

Yet, the question of an ethical conception of justice for the gay or lesbian refugee claimant in which his or her embodied identity is seen in the moment of adjudication as itself an authoritative form of “expertise” remains unanswered by the IRB. Butler’s reference to the violence suffered by those who are “…already not quite lives” is truly sobering in this regard:

> Violence against those who are already not quite lives, who are living in a state of suspension between life and death, leaves a mark that is no mark. There will be no public act of grieving (said Creon in Antigone). If there is a “discourse,” it is a silent and melancholic one in which there have been no lives, and no losses; there has been no common bodily condition, no vulnerability that serves as the basis for an apprehension

498 Millbank, Imagining Otherness, supra note 488 at 177. [emphasis is mine].
499 Butler, Violence, Mourning, Politics, supra note 1 at 24.
of our commonality; and there has been no sundering of that commonality.\textsuperscript{500}

If we recall one final time Kafka’s parable of the countryman who stands before the gatekeeper to the Law, the countryman is told at the end of his life that the door has always been meant for him, but that it would now be closed. Despite the countryman’s numerous appeals over the years of his life to request entry to the gates of the Law, the gatekeeper tells him that he cannot admit the man “at the moment”.\textsuperscript{501} In this single and fleeting moment, the gatekeeper’s refusal to admit the countryman is a refusal of her responsibility to do what she must, in the moment that she must, and \textit{in the face of the countryman}. It is a refusal of her responsibility to answer the call of justice to the refugee claimant as Other – and to the gay or lesbian refugee claimant in particular as the “other [O]ther”\textsuperscript{502} – in a moment that exists prior to the Law.

\textbf{Conclusion}

This thesis has sought to explore the nature of the IRB’s claim as an “expert tribunal” over the adjudication of an individual’s claim of a well-founded fear of being persecuted. In the first Chapter, I attempted to demonstrate that the IRB’s claim of expertise is founded upon a fiction – that is to say, upon a community of believers whose faith in one particular form of justice – legal justice – has “made real” its self-designation as an expert tribunal. I have argued that a potential justification for the IRB’s claim of expertise might lie in a decision-maker’s appeal to the “good reasons” and “say-so” of an external authority over the content of the “rule” of a well-founded fear. Such a theoretical justification does not, however, respond to the reality of decision-makers who either arbitrarily dismiss the evidence of an external authority, or reject it entirely in favour of their own “expert” notions of the content of a well-founded fear. The attempt by decision-makers to rely upon their “expertise” in an attempt to share in the pain of a claimant’s experience (or fear) of persecution reflects the law’s capacity for violence through legal interpretation. I proposed at the conclusion of this Chapter that through the project of deconstruction, a conception of the refugee claimant as an embodied subject frustrates attempts by the law to categorize her experience (or fear) of persecution into “expert” categories of law.

In Chapter 2, I examined the content of the “rule” a well-founded fear from the point of view of language and rhetoric. I argued in particular that the bifurcation of the bi-partite test for

\textsuperscript{500} \textit{Ibid.} at 24-5.
\textsuperscript{501} Kafka, \textit{Before the Law}, supra note 5 at 3.
\textsuperscript{502} Millbank, \textit{Imagining Otherness}, supra note 488 at 145.
a well-founded fear into subjective and objective components of fear serves only the interests of legal justice. Here, I explored the nature of Frederick Schauer’s conception of rule-based decision making, and its role in the “expert” construction of a genuine and “fearful” refugee claimant. I attempted to demonstrate that the IRB’s search for a subjective element of fear is unnecessarily premised upon a search for an “identity of trepidation” as the “factual predicate” of the “rule” of a well-founded fear. A decision-maker’s reliance upon an expert’s “say-so” regarding their subjective fear reflects, in many instances, not only an exercise in rhetoric, but in the imagination of the real.

The final Chapter explored the possibility of another conception of justice for one particular type of refugee claimant – that is, the gay refugee claimant. I first explore the limitations of Schauer’s rule-based decision-making, and argue that a decision-maker’s search for a subjective element does not ultimately hold them responsible at law. I argue that a nexus exists between the search for the “rule” of a well-founded fear and the search for the “rule” of an authentic homosexual identity before the Law. In the case of Vraciu, I suggested that the search for the “rule” of an authentic homosexual identity at the corporeal site of the male anus represented not only an exercise in the imagination of the real, but an indefensible abdication of a decision-maker’s responsibility at law. Another conception of justice rooted in difference, contradiction and uncertainty requires that a decision-maker respond to a prior call to do what they must – that is, to respond to the distinct face and vulnerability of the gay refugee claimant. A decision-maker must discharge this responsibility at the moment of the call of the face of the refugee claimant. The final section of the thesis considered the possibility of another conception of justice for the gay refugee claimant within the IRB. I suggested that in many instances, the IRB’s search for a “ring of truth” or a “gay reality” reflects a search for a “linear” model of sexual identity development, one that ultimately does not respond to the face of the gay refugee claimant at the moment of its call. An ethical and responsible conception of justice which recognizes and which sees the embodied face of the Other as itself an “unknowable” form of “embodied expertise” thus awaits the call of those who would look “behind the rules”.

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