



# Performance Anxieties: Interpellation of the Refugee Subject in Law

Trish Luker\*

## Abstract

Refugee law posits the refugee as a rights-bearing subject prior to legal recognition. The determination procedures from which legal protection may be availed to a person escaping persecution demand that the applicant be recognizable as a subject entitled to law's power to name her as a refugee. In this article, I draw on speech act theory to investigate the rhetorical structure of refugee recognition. Viewed as a performative speech act, refugee subjectivity emerges as a result of repetition and citation of tropes of "refugee-ness," which function to legitimate and naturalize certain representations as evidence of the grounds for protection. This places applicants in a paradoxical position: they must attempt to deliver their evidence as a performance of refugee-ness, but in making the narrative recognizable and understandable according to the norms of the legal process, the singularity, and possibly the authenticity, of the account may be lost. The argument is supported by empirical research conducted at the Australian Refugee Review Tribunal.

**Keywords:** refugee law, Australian Refugee Review Tribunal, speech act theory, performativity

## Résumé

Le droit des réfugiés positionne le réfugié comme un titulaire de droits avant même la reconnaissance de son statut juridique. Les procédures de détermination, selon lesquelles des personnes fuyant les persécutions peuvent être accordé une protection juridique, nécessitent que l'on puisse reconnaître le demandeur comme un sujet intitulé au pouvoir légal d'être nommé réfugié. Dans cet article, je m'appuie sur la théorie des actes de langage afin d'examiner la structure rhétorique de la reconnaissance du statut de réfugié. Considérée comme un acte de langage performatif, la subjectivité des réfugiés apparaît suite à des répétitions et des citations de tropes, où le « concept de réfugié » légitime et naturalise certaines représentations comme preuves de motifs de protection. Ceci met les demandeurs dans une situation paradoxale : ils doivent essayer de donner leur preuve en performant en tant

---

\* I thank Ben Golder, Matthew Zagor, and Katherine Biber for comments on an earlier draft and the anonymous referees for their constructive suggestions.

que réfugié ; toutefois, s'ils veulent faire en sorte que leur récit est reconnaissable et compréhensible selon les normes du processus juridique, la singularité, et possiblement l'authenticité de leur description peut être perdue. Cette hypothèse est supportée par de la recherche empirique effectuée par le Tribunal de révision des cas de réfugiés de l'Australie.

**Mots clés :** droit des réfugiés, Tribunal de révision des cas de réfugiés de l'Australie, théorie des actes de langage, performativité, subjectivité

## Introduction

According to international refugee law, refugee status precedes legal recognition: a person is a refugee prior to legal determination procedures, which have the effect of a declaration.<sup>1</sup> Subject to a credible demonstration of identity, legal recognition of refugee status requires the decision maker to determine if the applicant's account sufficiently coalesces with the criteria for the definition of a refugee, potentially resulting in her recognition as a rights-bearing subject. While the decision maker is required to assess whether the applicant's account is credible, even if it is not, recognition can occur if the account is sufficiently coherent and is consistent with available country information. As Audrey Macklin argues, the asylum process "tends to flatten out difference, demand simplicity over nuance, and compel the distillation of messy, complicated lives down to a manageable set of narrative fragments that can be inserted into the legal pigeon-holes of the refugee definition."<sup>2</sup>

The legal configuration of the refugee as a subject preceding recognition suggests a stable identity. However, at least since the 1990s, there have been developments in refugee jurisprudence that have resulted in expansion of the recognized grounds for protection, such that claims for asylum made by women on the basis of gender-based persecution, and by gay, lesbian, and bisexual claimants on the grounds of membership of a "particular social group," began to be accepted by refugee decision-making bodies in some countries. This indicates that the refugee identity is not a stable position preceding recognition, but subject to interpretive paradigms that reflect political and historical conditions and understandings. We might therefore say that it is the applicant's ability to perform "refugee-hood" as a recognizable identity that facilitates the creation of the subject.

Recent research I have conducted at the Australian Refugee Review Tribunal (RRT) indicates that there is a perception among decision makers that some applicants are attempting to construct their claims in order to meet the requirements of

<sup>1</sup> United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("Handbook"), (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979), Clause 28.

<sup>2</sup> Audrey Macklin, "Refugee Roulette in the Canadian Casino," in *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, edited by Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip. G. Schrag (New York: New York University Press, 2011), 137.

the refugee definition.<sup>3</sup> Tribunal members interviewed said that unscrupulous and sometimes unqualified migration agents are coaching applicants in what to say in order to meet the definition, often on the basis of previously successful claims. As one decision maker (“Member 1”) explained: “This really muddies the waters for me as a member because there may be a genuine refugee sitting in front of me, but . . . they have been told what to say in order to be successful with their claims. So they will ignore their true situation and they won’t tell me about that. They will tell me the story they have paid for.”<sup>4</sup>

The suggestion that some refugee applicants are constructing the narrative of their claims so that they appear as credible subjects through the delivery of insincere testimony raises questions about the formulation of refugee law as a process of recognition. If the subject is a refugee prior to recognition, what is it that the legal process demands of the refugee in exchange for legal rights? In this article, I read the legal process for refugee recognition as a rhetorical event, investigating its structure as a performative speech act. I argue that rather than preceding recognition, the refugee subject comes into being as a result of a process of naming, and that it is therefore more akin to an interpellation. In particular, I argue that the framework for recognition of the refugee in international law is structured by ambivalence, reflected in the rhetorical conventions and in the legal and political significance attached to the commonly articulated distinction between “asylum seekers” and “refugees.” As anyone familiar with refugee law and policy will be aware, it is not uncommon to encounter, in the introduction to a publication, some sort of proviso about the author’s choice of terminology—most often between “refugee” and “asylum seeker”—*and* a comment about the accuracy and/or political or ethical significance of this choice. Clearly, this indicates recognition of the importance of language in legal and political discourse, although it may not extend to engagement with post-structuralist conceptualizations of subject formation.

My engagement with the legal recognition of refugee subjects is motivated by interest in legal paradigms for proof in evidence law. The research that forms the basis of this article is part of a broader, ongoing, interdisciplinary investigation into standards of proof and evidentiary assessment in human rights claims. It is concerned with the contextual and political nature of truth effects in legal discourse. Here, I am proposing that as a legal process, refugee recognition is structured as an interpellation, whereby refugee subjectivity is brought into being as an effect of law, as a result of repetition and citation of tropes of “refugee-ness” that are recognizable to the decision maker. As a result, applicants may be placed in a paradoxical position because, in attempting to present their claim recognizably, the authenticity of the account may be lost. As I will go on to suggest, this means that we cannot understand refugee determination as a simple process of recognition; rather, we might view it as a performative site where neither the applicant nor

<sup>3</sup> I am grateful to the University of Queensland for the opportunity to conduct this research as a recipient of the UQ Postdoctoral Research Fellowship, hosted by the T. C. Beirne School of Law, 2010–2012. Thanks to Heather Douglas who acted as my sponsor for the fellowship.

<sup>4</sup> Member 1.

the decision maker has complete control over the narrative.<sup>5</sup> Of course, it is not only in refugee law that subjects are interpellated; legal processes of all kinds create identities in regulated, “flattened” ways.

In the first part of the article, I provide a brief account of speech act theory and an argument for its relevance to law. I then go on to investigate the use of this framework in an analysis of the legal process of refugee recognition, drawing on fieldwork conducted at the Australian Refugee Review Tribunal. During 2010–12, I conducted a small-scale pilot study into decision-making and credibility assessment at the RRT. The project included interviews with RRT decision makers and observation of hearings.<sup>6</sup> Highlighting some of the salient points made by the interviewees, I will draw on this research to investigate the consequences of the use of speech act theory as a framework for understanding the interpellation of legal subjects.

### Legal Speech Acts

The philosophy of language developed by John Austin introduced a theory of speech acts, which provided an account of language and its effects.<sup>7</sup> Austin concluded that *all* linguistic expressions are performatives, because, by making an utterance, a speaker performs a social act.<sup>8</sup> His theory of speech acts had a significant impact, because it facilitated the disruption of understandings of language as simply representational and ultimately contributed to the post-structuralist, anti-essentialist claim for the world-constituting power of language.

Contemporary understandings of subjectivity have drawn on speech act theory to posit the formation of identity as a process of interpellation that comes about through the address of the other.<sup>9</sup>

Speech act theory has been taken up in various theoretical fields and for different purposes; however, it has not attracted the attention within law that it deserves.<sup>10</sup> After all, the performative function of speech has obvious relevance to legal events, such as the delivery of a verdict or a sentence. Austin himself recognized this point—as well as the potential of speech act theory as a framework for a critique of legal positivism:

[I]t is worth pointing out . . . how many of the “acts” which concern the jurist are or include the utterance of performatives, or at any rate are or include the performance of some conventional procedures. . . . Only the still

<sup>5</sup> In a companion article, I argue for a revised standard of proof in refugee law, suggesting a rebuttable presumption of credibility, or truthfulness, on the part of the applicant seeking asylum: Trish Luker, “Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal,” *International Journal of Refugee Law*, 25 no. 3 (2013): 502–34.

<sup>6</sup> I acknowledge with thanks the permission granted by the then-senior registrar of the RRT, Denis O’Brien, to conduct the research.

<sup>7</sup> John L. Austin, *How to Do Things with Words* (Oxford: Clarendon Press, 1962).

<sup>8</sup> *Ibid.*, 138.

<sup>9</sup> Louis Althusser, “Ideology and Ideological State Apparatuses (Notes Towards an Investigation),” in *Lenin and Philosophy and Other Essays*, trans. Ben Brewster (London: New Left Books, 1971).

<sup>10</sup> See, however, Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008); Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (New York: Oxford University Press, 2011).

widespread obsession that the utterances of the law, and utterances used in say “acts in the law,” must somehow be statements true or false, has prevented many lawyers from getting this whole matter much straighter than we are likely to.<sup>11</sup>

It is not only legal decisions that function as speech acts; other legal practices and events also fit this rhetorical form. Indeed, as Marianne Constable points out, legal processes and procedures are saturated with speech acts. She argues that “legal sources and actors complain, rebut, instruct, appeal, threaten, testify, swear, object, overrule, enact, appoint, find, dismiss, amend, approve, deny, declare, agree, promise, qualify, hold, sentence,” that legal history “reads legal texts for what they *do* and how they do it.”<sup>12</sup> Indeed, Constable argues that because law claims authority through speech, it is the claiming in legal speech acts that “binds us to issues of justice.”<sup>13</sup>

Given the relevance of speech act theory to law, how might this rhetorical form function in the context of refugee law? Applying Austin’s formulation, a conventional procedure is required that includes the expression of legally meaningful terminology by authorized people in the appropriate manner; this procedure must be executed correctly and completely and, where necessary, sincerely; and the person must subsequently act accordingly. Based on the 1951 Convention Relating to the Status of Refugees,<sup>14</sup> the *Handbook* of the United Nations High Commissioner for Refugees (UNHCR) proposes a refugee recognition procedure for member states along these lines.<sup>15</sup> In particular, if a decision maker is satisfied that an applicant meets the relevant criteria, the applicant’s refugee status is recognized and she is declared to be a refugee, as a result of which she is granted rights-bearing entitlements. Using Austin’s formulation, once the conditions are met in the context, or “total speech situation,” the illocutionary force of the declaration that performs the act of recognizing the refugee can take place. As such, it is not the truth of the declaration (“We recognize you as a refugee”), nor even perhaps the truth of the applicant’s status as a refugee (“You are a refugee”), but the illocutionary force of the act of recognition of the refugee that has performative effect in law. As the UNHCR *Handbook* states:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>16</sup>

<sup>11</sup> Austin, *How to Do Things with Words*, 19.

<sup>12</sup> Marianne Constable, “Law as Claim to Justice: Legal History and Legal Speech Acts,” *UC Irvine Law Review* 1, no. 3 (2011): 631, 636–67.

<sup>13</sup> *Ibid.*

<sup>14</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1966, entered into force 4 October 1967) 606 UNTS 267.

<sup>15</sup> UNHCR, *Handbook*, Clause 192.

<sup>16</sup> *Ibid.*, Clause 28.

The legal procedures therefore have a declarative rather than constitutive function, which takes the rhetorical form: “If we believe that you meet the definition, we will recognize you as having rights.” It is actually not necessary for the asylum seeker to be telling the truth, nor indeed that she actually be a refugee, according to the definition. What is necessary is that the procedure is executed in such a way that she is recognized as, and named, a refugee.

Judith Butler clearly recognizes the value of speech acts to legal constructions of subjectivity when she makes inroads into debates about legal and political discourse and, notably, in her interventions around hate speech.<sup>17</sup> In Butler’s formulation, it is not only the authoritative status conferred on the speaker—whether a judicial officer, legal advocate, or witness—but the repetition of the procedures and conventions, the reproduction of Bourdieu’s legal *habitus*,<sup>18</sup> and the citation of prior practices in the form of precedent, which endows law with its force. Those who come before the law—defendants, litigants, applicants, and witnesses—must also engage in this reiterative performative practice.

In the context of refugee law, Butler’s emphasis on iterability and repetition is, as Matthew Zagor points out, “virtually tailor-made”<sup>19</sup> for the intensity of self-narration demanded of the refugee:

From the moment they arrive in a country of refuge, a refugee must begin the process of telling and retelling their story—to the authorities, to their legal representative, to torture and trauma services, to welfare agencies, in written and oral form, on each occasion translated, summarized, reworked and massaged by the recipient, and all the time creating an ever growing bureaucratic record of their experiences before and during flight.<sup>20</sup>

Butler points to the potential for infelicitous performance—such as misrecognition between the law and subject, refusal of the law by the subject, and even parodic performance—which calls into question law’s legitimacy. In this way, the performative may result in excess of the law’s intentions and, importantly, potential for slippage in signification.<sup>21</sup> Indeed, contrary to dominant narratives that position refugees as victims, Zagor argues that there is evidence that some refugees are able to actively negotiate the regulatory framework strategically to perform the requisite refugee-ness.<sup>22</sup> In this way, a refugee may be said to engage in a form of generative performance, exploiting the inevitable potential for slippage in signification, and, importantly, creating the conditions under which subsequent performative repetition further engenders forms of subjectivity potentially recognizable by the law.

<sup>17</sup> Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

<sup>18</sup> Pierre Bourdieu, “The Force of Law: Towards a Sociology of the Juridical Field,” *Hastings Law Journal* 38 (1986–87): 814.

<sup>19</sup> Matthew Zagor, “Recognition and Narrative Identities: Is Refugee Law Redeemable?,” in *Allegiance and Identity in a Globalised World*, edited by Kim Rubenstein, Mark Nolan, and Fiona Jenkins (Cambridge: Cambridge University Press, forthcoming) (manuscript on file with author).

<sup>20</sup> *Ibid.*

<sup>21</sup> Butler, *Excitable Speech*, 122.

<sup>22</sup> Zagor, “Recognition and Narrative Identities.”

## Performing Refugee-ness

Gregor Nöll describes the process of refugee status decision making as one that may involve an adjudicator being asked “to give credence to the incredibility of evil.”<sup>23</sup> In refugee law, an applicant’s account may not be consistent, coherent, or even plausible. It is often not possible to verify an account with reference to other forms of proof, such as documents or other witnesses. Furthermore, some grounds for recognition, such as membership of a particular social group, are particularly difficult to demonstrate other than through an applicant’s testimony or self-identification. These challenges are recognized in refugee law, where the standard of proof requires an assessment of the degree of probability that the events that allegedly led to a well-founded fear of persecution have occurred; even if aspects of the applicant’s claim are disbelieved, the decision maker must consider whether there is any other basis asserted that offers grounds for the protection being sought. In Australian law, the standard has been described as lower than the balance of probabilities; that is, there may be far less than a 50 percent chance that the claim is credible.<sup>24</sup> Furthermore, decision makers are required to ask themselves: “What if I am wrong?”<sup>25</sup>

The primary form of evidence in refugee law is oral testimony. Indeed, what an applicant says about her life and her experience of persecution is usually the only form of direct evidence available to decision makers. An applicant’s account takes the form of a first-person life narrative, through which she must attempt to demonstrate why she would fear persecution if she were to return to her country of origin. She delivers her testimony in a series of speech acts, which she hopes will support the credibility of her claim through the performance of refugee-ness. Her account—and by this I mean the speech (most often in an interpreted form), the mode of delivery, as well as the silences—function as the evidence for truth. It is not simply the truth or falsity of the content of the testimony, the access it provides to the truth through representation, but the conditions of discursive delivery that function to create meaning.

The grounds for recognition of the refugee subject are prescribed in the Convention, which specifies that only certain subjective characteristics may form the basis of a claim for protection: a refugee is a person who has “a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion.”<sup>26</sup> The notable absence of gender and sexuality as specified grounds for protection reflects the normative masculinity and heteronormativity of human-rights discourse characteristic of the post-World War II period in which the Convention was drafted and adopted. Notwithstanding the fact that women and children are estimated to constitute up to 80 percent of refugees internationally,<sup>27</sup> they have, until recently, remained largely invisible in

<sup>23</sup> Gregor Nöll, ed., *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden: Martinus Nijhoff Publishers, 2005), 3.

<sup>24</sup> *Abebe v The Commonwealth* (1999) 197 CLR 510 [190]–[193] (Gummow & Hayne JJ); [211] (Kirby J).

<sup>25</sup> *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *MIEA v Guo* (1997) 191 CLR 559; *Abebe v The Commonwealth* (1999) 197 CLR 510; *MIMA v Rajalingam* (1999) 93 FCR 220.

<sup>26</sup> Article 1A(2).

<sup>27</sup> <http://www.unhcr.org/pages/49c3646c4d6.html> (accessed 16 January 2014).

refugee law. Women seeking asylum have faced a difficult task in convincing decision makers that the persecution they face as women results from one of the specified reasons of race, nationality, religion, political opinion, or membership of a particular social group.<sup>28</sup> However, during the 1990s, women's claims for asylum on the grounds of gender-based persecution and membership of a "particular social group" began to be accepted by refugee decision-making bodies in some countries.<sup>29</sup> This recent trajectory of jurisprudence provides fertile ground for understanding the discursive production of the refugee subject.

The recognition of women's claims of gender-based persecution—persecution often occurring in the "private" domain of domestic, familial, and sexual relations—has shifted the narrative of refugee law away from its prior focus on harm perpetrated by or in the public domain.<sup>30</sup> The recognition of gender-based harm has the effect of reconstituting the subjects of refugee law; subjects are no longer exclusively men escaping violence perpetrated by the state, they are now also women escaping harm perpetrated by non-state agents, such as family members. Marking a further significant moment in refugee decision making, in 1999, the United Kingdom House of Lords found that "women in Pakistan" may constitute a particular social group for the purpose of a claim for asylum on the grounds of spousal violence.<sup>31</sup>

Women are now more visible within refugee law. However, this has necessitated a performance of refugee-ness that is recognizable to decision makers. This visibility also involves negotiation of an evidentiary paradox. The legal grounds for refugee recognition require that when presenting claims for protection, women must demonstrate their subjectivity as victims of persecution. Women, now visible within refugee law, make claims of gender-based persecution as subjects of third-world patriarchal oppression seeking liberated and autonomous lives in progressive Western nations.<sup>32</sup> In this way, a woman seeking asylum tailors and performs her claim through a narrative account that reiterates and re-inscribes familiar tropes of victimhood and dependence.

Sexuality-based asylum claims began to be heard in some signatory states at the same time as those relating to gender-based persecution. Initially, decision makers were dismissive of claims unless applicants were able to provide evidence of their sexuality and demonstrate that they had experienced persecution as a result of their sexuality becoming known in their country of origin. However, a similar public/private dichotomy as in gender-based persecution has emerged.

<sup>28</sup> Nicole La Violette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines," *International Journal of Refugee Law* 19, no. 2 (2007): 169.

<sup>29</sup> Canada was the first: *Canada (AG) v Ward* [1993] 2 SCR 689.

<sup>30</sup> Rachel Bacon and Kate Booth, "The Intersection of Refugee Law and Gender: Private Harm & Public Responsibility," *University of New South Wales Law Journal* 23 (2000): 135.

<sup>31</sup> *Islam v Secretary for the Home Department; R v Immigration Appeal Tribunal and Another; Ex Parte Shah* [1999] 2 WLR 1015. This was followed in the Australian High Court in *MIMA v Khawar* (2002) 210 CLR 1.

<sup>32</sup> See Natalie Oswin, "Rights Spaces: An Exploration of Feminist Approaches to Refugee Law," *International Feminist Journal of Politics* 3, no. 3 (2001): 347, 355; Julietta Hua, "Feminism, Asylum and the Limits of Law," *Law, Culture and the Humanities* 6, no. 3 (2010): 375; Constance MacIntosh, "When 'Feminist Beliefs' Became Credible as 'Political Opinions': Returning to a Key Moment in Canadian Refugee Law," *Canadian Journal of Women and the Law* 17 (2005).



Decision makers have commonly expected gay, lesbian, and bisexual claimants to hide their sexuality by being “discreet” in order to avoid persecution in their countries of origin.<sup>33</sup> Within this formulation of sexuality, being gay or lesbian requires that the applicant perform “*being sexual*,” by being able to recount their first experience of lesbian or gay sex as credible evidence of sexual orientation.<sup>34</sup> Toni Johnson points to the potential that such requirements for identity performance provide for agency on the part of applicants, the need for “queer abject disclosure” as legal proof.<sup>35</sup> However, as Jenni Millbank found when reviewing decisions from Canada and Australia, applicants seeking asylum on the grounds of sexuality during this period were presented with a paradox: being “too public” about their sexuality—which is how gay men are generally characterized—is interpreted as proof of acceptance of gay sexuality in the home country, and being “too private”—as lesbians are often characterized—is seen as evidence that discretion provides a shield from persecution.<sup>36</sup> Indeed, in classic Victorian style, lesbians were sometimes so privatized as to seem not to *exist*, as demonstrated by the gender-blind country information often relied on as evidence in decision.<sup>37</sup> The queer performativity required of applicants attempting to navigate the unpredictable permutations of refugee law, such as the expectation that they live closeted lives in order to minimize the risk of persecution, is characteristic of the subjectivization of the refugee.

The Australian High Court was, internationally, the first superior court to reject this line of reasoning, finding that two Bangladeshi men should not reasonably be expected to “co-operate in their own protection” by concealing their sexuality.<sup>38</sup> Applicants are no longer expected to be discreet and secretive about their sexuality.<sup>39</sup> While this has broadened the potential for sexuality-based claims, the shifting narrative of refugee subjectivity, which is now particularly apparent in primary-level decision making, requires that claimants demonstrate adherence to overt and stereotypically Westernized standards of gay and lesbian identity as the basis for credibility assessment, often resulting in disbelief of applicants’ claims if they are unable, for example, to identify gay popular-culture icons or demonstrate familiarity with gay social venues.<sup>40</sup> This is a version of queer identity familiar to Western decision makers. The shift is baldly illustrated in the fate of the Bangladeshi couple S395 and S396, whose claim, once remitted back to the Refugee Review

<sup>33</sup> Jenni Millbank, “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom,” *The International Journal of Human Rights* 13, no. 2–3 (2009): 391, 395.

<sup>34</sup> Jenni Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia,” *Melbourne University Law Review* 26 (2002): 144, 151.

<sup>35</sup> Toni Johnson, “On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings,” *Social & Legal Studies* 20 (2011): 57, 62.

<sup>36</sup> Millbank, “From Discretion to Disbelief.”

<sup>37</sup> Catherine Dauvergne and Jenni Millbank, “Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers,” *Federal Law Review* 31 (2003): 299, 321ff.

<sup>38</sup> Millbank, “From Discretion to Disbelief,” 392.

<sup>39</sup> *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. More recently, the UK Supreme Court has also rejected the expectation of discretion: *HJ (Iran) and HT (Cameroon) Secretary of State for the Home Department* [2009] EWCA Civ 172.

<sup>40</sup> Millbank, “From Discretion to Disbelief.”

Tribunal, was rejected because the decision maker did not believe that the couple were gay, despite the fact that the first constituted Tribunal had been convinced that this was the case.<sup>41</sup>

### Infelicitous Speech

Interviews I conducted with decision makers at the Refugee Review Tribunal indicate that there is a widespread view that some applicants for review of primary-level decisions by the immigration department are “constructing” their narratives by imitating previously successful claims. Decision makers maintain that applicants who lie are jeopardizing their chances, suggesting that if applicants simply *told the truth* about what had happened to them, the legal process designed to provide protection could properly take effect. However, they also acknowledge that it really is not possible to know, definitively, if an applicant’s claim is credible. As two members explained:

I know that even if he hasn’t told the truth about most things, if I am satisfied that his family isn’t in Afghanistan or isn’t contactable by him in Afghanistan then probably he is going to get over the line anyway . . . so I am not going to test everything to the nth degree because he doesn’t really need to satisfy me.<sup>42</sup>

The fact of the matter, and it is something that we often discuss amongst ourselves, is that in relation to certain claims, certain countries, if an applicant is successful in providing you with a coherent, consistent account of the past and future persecution and this is consistent with the country information, broadly speaking, that may very well be enough for a decision maker to decide in their favour. Which, when you really strip this to its bones, it comes down to very little; very little is required by an applicant to provide you, again depending on the country of origin, depending on the nature of claims.<sup>43</sup>

In refugee law, testimonial accounts by the claimant may be the only, or primary, evidentiary source. However, any personal narrative contains gaps, omissions, and elisions, particularly when it is an account of traumatic experience, as is often the case for a refugee. This is recognized in refugee law, where, as a principle, unless there are good reasons to the contrary, applicants are given the benefit of the doubt.<sup>44</sup> The UNHCR *Handbook* maintains that “[u]ntrue statements by themselves are not a reason for refusal of refugee status and it is the examiner’s responsibility to evaluate such statements in light of all the circumstances of the case.”<sup>45</sup> The RRT acknowledges that “[c]ontradictions, inconsistencies and omissions may arise in the evidence before the tribunal,” that traumatic experience may impact the “consistency of statements,” that applicants “may not be able to remember all the details of his or her personal history or reconstruct the chronological order of

<sup>41</sup> Discussed in Dauvergne and Millbank, “Burdened by Proof”; Millbank, “From Discretion to Disbelief,” 393.

<sup>42</sup> Member 1.

<sup>43</sup> Member 2.

<sup>44</sup> UNHCR, *Handbook*, Clause 196.

<sup>45</sup> *Ibid.*, Clause 199.

particular events,” “may forget dates, locations, distances, events and personal experiences,” and “may not reveal the whole of his or her story,” guiding decision makers to “consider overall consistency and coherence of an applicant’s account.”<sup>46</sup>

Zagor points out that the restrictive conditions characteristic of legal domains commonly demand a level of “self-crafting” of narrative identity.<sup>47</sup> He argues that the refugee narrative becomes a site of struggle—among the applicant, refugee advocate, and decision maker—in an attempt to make the story fit pre-established categories and requirements and a recognized pattern of behaviour.<sup>48</sup> As Macklin says, there may be a number of factors that influence how a claimant relates to the decision maker and therefore how she delivers her story.

She may have every reason not to trust anyone in authority. Experience may have taught her that the key to survival is telling the person in authority whatever he or she wants to hear. She may have been threatened by her smuggler not to disclose the actual means by which she arrived in her country. She may recite a story that did not happen to her because she was assured that it was a “winning script,” and because she has no story of her own or doubts that her own story will be taken seriously.<sup>49</sup>

These struggles for narrative authority may be characterized in Pierre Bourdieu’s terms as competitions for linguistic dominance, where the competence necessary for narration functions as a form of symbolic power within the field.<sup>50</sup> Bourdieu pays particular attention to the social conditions that endow a speaker with the competence to speak, such that “the competence adequate to produce sentences that are likely to be understood may be quite inadequate to produce sentences that are likely to be *listened to*, likely to be recognized as *acceptable* in all the situations in which there is occasion to speak.”<sup>51</sup> In the context of these struggles, the competence to narrate recognizable versions of refugee-ness serves to legitimate and naturalize certain representations that are acceptable in the legal domain. As we have seen, this is an ongoing struggle for narrative authority, for the dynamics within the field of legal determination have resulted in decisions that have expanded legal categories and thus redefined the refugee.

I suggest that it is in this way that the legal process leading to formal recognition of the refugee is structured as an interpellation. The individual, faced with the authoritative power of law, recognizes the call as an address made to her and, in an attempt to make herself recognizable, responds to it with a narrative account of her life.

<sup>46</sup> Migration Review Tribunal—Refugee Review Tribunal, “Guidance on the Assessment of Credibility” (March 2012), available at <http://www.mrt-rrt.gov.au/Conduct-of-reviews/default.aspx>.

<sup>47</sup> Zagor, “Recognition and Narrative Identities.”

<sup>48</sup> Ibid.

<sup>49</sup> Audrey Macklin, “Truth and Consequences: Credibility Determination in the Refugee Context,” *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*, International Association of Refugee Law Judges (IARLJ), 3rd Conference, 1998 (Haarlem: IARLJ, 1999), 134–140, 137. See also Donald Galloway, “Proof and Narrative: ‘Reproducing the Facts’ in Refugee Claims,” in *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, edited by Jeremy H. A. Webber, Rebecca Johnson, and Hester Lessard (Vancouver: UBC Press, 2011), 308–30.

<sup>50</sup> Pierre Bourdieu, “The Production and Reproduction of Legitimate Language,” *Language and Symbolic Power* (Cambridge: Polity Press, 1992), 55.

<sup>51</sup> Ibid.

The ideological function of the legal process is to prescribe the discursive space, the linguistic conditions necessary to the field in which a claim for protection must be articulated. Within the structure of identity formation as an interpellation, the subject who responds is indeed complicit in the process, but the conditions that establish the norms for narration—the “norms that govern the humanly recognizable”<sup>52</sup>—mean that the subject may not have complete control over the narrative. As Butler explains:

If I try to give an account of myself, if I try to make myself recognizable and understandable, then I might begin with a narrative account of my life. But this narrative will be disoriented by what is not mine, or not mine alone. And I will, to some degree, have to make myself substitutable in order to make myself recognizable. The narrative authority of the “I” must give way to the perspective and temporality of a set of norms that contest the singularity of my story.<sup>53</sup>

Butler suggests that attempts to give full and authoritative accounts of the self are inevitably undermined because we cannot bear witness to our own origins. When giving a narrative account of oneself, “I am always recuperating, reconstructing, and I am left to fictionalize and fabulate origins I cannot know. In the making of the story, I create myself in new form, instituting a narrative ‘I’ that is superadded to the ‘I’ whose past life I seek to tell.”<sup>54</sup> When asked to explain the basis for her application for protection, an asylum seeker is likely to draw on existing accounts in an attempt to construct a narrative that is recognizable to a decision maker. As a result, a level of narrative congruence occurs, a homogenizing of accounts where the uniqueness of individual stories is occluded.

In reality, there may be good reasons for an asylum seeker to lie. Australia’s policies in relation to refugees are notorious for their stringency and political volatility. Since 1992, Australia has placed in mandatory and indefinite detention any “unlawful non-citizen”—that is, any person, including a child, who is not an Australian citizen and who arrives in Australia without a valid visa, which is the case for anyone who arrives “unlawfully” by boat. The 1992 federal government’s response to the arrival of asylum seekers by boat was the introduction of the “Pacific Solution,” which involved the creation of zones of legal excision whereby “unauthorized arrivals” were detained and incarcerated indefinitely on Christmas Island and Nauru and denied access to the legal avenues for appeal of negative departmental decisions available to onshore applicants.

As these measures demonstrate, idiom is actually critical in the discourse of asylum. The incessant, repetitive rhetoric of government policy and media representations, which reiterates the language of “queue jumpers,” “illegals,” “unauthorized arrivals,” “boat people,” “suspected illegal entry vessels,” as well as the legally endorsed terms of “unlawful non-citizen” and “irregular maritime arrivals,” function to represent asylum seekers as criminalized and abject. Notably, the debate has been fuelled recently by attention to “people smuggling,” shifting the subject of demonization

<sup>52</sup> Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005), 36.

<sup>53</sup> *Ibid.*, 37.

<sup>54</sup> *Ibid.*

from the refugee to the perceived agent of removal. Susanne Gannon and Sue Saltmarsh describe the interplay between government rhetoric and regulation of refugee discourses as “performative technologies of citationality and relationality,” which threaten the intelligibility and viability of asylum seekers.<sup>55</sup> The notion of “intelligibility” is pertinent because it highlights the perception that there is confusion within the community about how to *understand* the subject of asylum.

### Anxieties of Naming

One way to characterize this hermeneutic confusion is encapsulated in the ambivalent semantic distinction that is drawn between “asylum seekers” and “refugees.” There is a view, held by government policy makers, NGO advocates, lawyers, and academics alike, that to distinguish the status of subjects in these terms is important, and that the failure to do so contributes to misunderstanding—that it results in both a failure to comprehend *and* an absence of empathy. Undeniably, within legal discourse, the distinction between an asylum seeker and a refugee is significant. An asylum seeker is someone who seeks the protection of a state, but who may or may not be found under international or domestic law to be a refugee. Being found to be a refugee is a legal determination of *status* that confers the right to the receiving state’s assurance of individual safety and security, political and religious freedoms, as well as the entitlement to work, housing, and health care.

Moreover, this distinction, which interpolates between a signifier that references a subject status prior to the legal process and one that signifies the referent of a rights-bearing subject, functions to maintain attention on questions of legitimacy. For example, a publication produced for members of the federal parliament states: “There is a difference between an asylum seeker and a refugee— asylum seekers are people seeking international protection but whose claims for refugee status have not yet been determined. Although those who come to Australia by boat seeking Australia’s protection are classified by Australian law to be ‘unlawful non-citizens,’ they have a right to seek asylum under international law and not be penalized for the ‘illegal’ entry.”<sup>56</sup> Similarly, the Refugee Council of Australia explains that “refugees are victims of persecution who have been recognized as fitting the definition of a refugee,” but also that “[t]he act of recognition of refugee status does not make someone a refugee. He/she has been a refugee all along: the granting of status merely makes it official. This is why it is important to presume that asylum seekers are refugees until proven otherwise.”<sup>57</sup> Such statements, while attempting to clarify and explain a semantic distinction in terms of its legal and political significance, actually contribute to an ambivalent discourse. After all, someone who is denied protection may actually be a refugee, despite being unsuccessful

<sup>55</sup> Suzanne Gannon and Sue Saltmarsh, “Sustaining Language/Existing Threats: Resistance and Rhetoric in Australian Refugee Discourses: A Response to Linnell Secomb,” in *Judith Butler in Conversation: Analyzing the Texts and Talk of Everyday Life*, edited by Bronwyn Davies (New York: Routledge, 2007), 163, 165.

<sup>56</sup> Parliamentary Library, *Asylum Seekers and Refugees: What are the Facts?* Background Note (Parliament of Australia, Department of Parliamentary Services, 2011), 13.

<sup>57</sup> Refugee Council of Australia, “What is the Difference between a Refugee and an Asylum Seeker?” <http://www.refugeecouncil.org.au>.

in meeting legal requirements such as convincing a decision maker of the credibility of her claim. Similarly, someone who is deemed by a legal process to be a refugee entitled to legal protection may not have previously identified herself as such.<sup>58</sup>

This fragmented identity is a perennial problem for the refugee seeking asylum, because demonstrating that she is who she claims to be—through documents and/or testimonial accounts—is central to the determination process. An identity that cannot be established, multiple identities, a false or uncertain identity, or statelessness may not only contribute to a failed claim to asylum, it may also result in indefinite detention if an asylum seeker cannot be deported to her country of origin.<sup>59</sup> An asylum seeker who is unsuccessful in acquiring recognition as a refugee has an ambivalent legal status. Like Zygmunt Bauman's description of the stranger, she is neither friend nor enemy; rather, she is outside this opposition.<sup>60</sup> Unlike friends or enemies, strangers threaten because they are unfamiliar and cannot be recognized as subjects, thereby presenting "hermeneutical problems."<sup>61</sup> Outsiders who claim asylum may not be recognizable as refugees and thus become "undecidables,"<sup>62</sup> raising questions of indeterminacy and ambivalence.

### Subjects of Recognition: At the Australian Refugee Review Tribunal

In this final section, I will investigate this ambivalent structure of recognition through examples of claims at the Refugee Review Tribunal. In Australia, initial assessments of claims for protection visas are conducted by delegated officers of the minister for immigration and citizenship.<sup>63</sup> If a claim is unsuccessful, an application for review of the decision can be made to the RRT. As a merits review tribunal, the RRT is not bound by formal rules of evidence, and members have considerable discretion in how they conduct hearings, generally taking an inquisitorial rather than adversarial approach.<sup>64</sup> Strict rules of evidence do not apply to fact finding in administrative review, notwithstanding that it must be rigorous and based on evidence with "rational probative force."<sup>65</sup>

Appeal hearings at the RRT of negative departmental decisions are conducted in private in order to protect the applicant.<sup>66</sup> During 2010–12, I obtained permission from the senior registrar and the applicants to observe ten hearings at the Sydney registry of the RRT and conducted interviews with seven decision makers (referred to as "members" of the Tribunal) in Sydney and Brisbane. In interviews, members reflected on the importance of narrative consistency to credibility, pointing

<sup>58</sup> Interestingly, these anxieties of naming appear to be a distinctly Australian phenomenon, resulting from the highly politically charged debates surrounding the policy of mandatory indefinite detention of asylum seekers who arrive by boat in Australian territory.

<sup>59</sup> Melanie Griffiths, "Anonymous Aliens? Questions of Identification in the Detention and Deportation of Failed Asylum Seekers," *Population, Space and Place* 18 (2012): 715.

<sup>60</sup> Zygmunt Bauman, "Modernity and Ambivalence," *Theory, Culture & Society* 7 (1990): 143.

<sup>61</sup> *Ibid.*, 146.

<sup>62</sup> *Ibid.*, 148.

<sup>63</sup> The principal class of onshore visas are Protection (Class XA), subclass 785 (Temporary Protection), and Subclass 866 (Protection).

<sup>64</sup> *Migration Act 1958* (Cth) s 420(2)(a).

<sup>65</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, 41.

<sup>66</sup> *Migration Act 1958* s 429. See *SZAYW v MIMIA* (2006) 230 CLR 486 regarding the difficulty in defining the term "in private" as used in the Act.

to the need for “internal consistency but not too much,” and suggesting that the appearance of an over-rehearsed story may actually suggest lack of credibility. One member said:

If they were simply telling me their story and it was word for word or phrase for phrase from their written claims I would be very concerned that they had just learned it off by heart and they were just regurgitating it. They weren't telling me about a lived experience they had had.<sup>67</sup>

As the member highlights, speech acts repeated verbatim acquire a ring of insincerity because the narrative path in truth telling tends not to be delivered in “straight lines.”<sup>68</sup> However, paradoxically, decision makers look for a level of narrative continuity as the basis for credibility:

I think human beings are not always totally consistent and you can't expect people who are nervous to be entirely consistent, but there has to be a certain reasonable level of consistency.<sup>69</sup>

Prior to one of the hearings I observed, the member told me that one of the key credibility issues raised by the claim was that only a few weeks earlier, she had heard another claim in which an applicant had said almost identical things about his family. The applicant whose claim I observed (Applicant B) was a citizen of Afghanistan, a young, Dari-speaking, Tajik Sunni Muslim man who had grown up in Pakistan. He had come to Australia on a student visa and had, at one stage, been living at the same residential address as another applicant (Applicant A). Applicant B claimed that he could not return to Afghanistan because the Taliban would suspect that he was working for the United States and would assume that he had become a Christian because he had been living in Australia and was able to speak English. The applicant was represented by a registered migration agent, who made a point of advising the Tribunal that he had not been acting in Applicant A's primary application. Applicant A had lodged his claim some two months after that of Applicant B, although the hearings occurred in the reverse order.

During the hearing, the member put to Applicant B the credibility issue raised by the resonance between the two claims. When the member asked the applicant if he could explain this, the applicant said that it was a coincidence and that a lot of students had been living at that address. In a discussion with the member after the hearing, she explained that the difference in credibility between one claimant and another may be apparent if one claimant presented a “compelling” argument. She also asserted the importance of country information in establishing the likelihood of a risk of persecution for the applicant if he returned. Notwithstanding the credibility issues raised, the member remitted the application for a protection visa for reconsideration by the department, with the direction that the applicant satisfied section 36(2)(a) of the *Migration Act*, being a person to whom Australia has protection obligations. In such a case, a delegate of the department is required to reconsider the application, having regard for any directions made by the Tribunal. In the decision, the member identified the credibility issue, stating:

---

<sup>67</sup> Member 1.

<sup>68</sup> Member 1.

<sup>69</sup> Member 1.

As to the fact that his claims are very similar to those of another applicant before the Tribunal, he has denied any knowledge of this and asks the Tribunal to accept that he has been truthful. I accept that his was the first of the two applications submitted, and that this may indicate that his account is more likely to be true than the similar account written by a person who shared his address for a period in early 2009. Therefore I have decided to disregard this coincidence of claims and to examine his evidence as it is.

However, while remitting the claim of Applicant B, the member affirmed the delegate's decision in relation to Applicant A, on the grounds that it lacked credibility. In a letter to the applicant,<sup>70</sup> the member pointed out:

Your claims are identical in many respects to those of another applicant before this Tribunal who according to information available to the Tribunal, also arrived in Australia on a student visa and with whom you were sharing an address in Sydney before each lodging Protection visa applications. You have not named this person to the Tribunal as someone you have ever known. The claims made by both you and the other applicant include that you were brought up in Peshawar, that your family returned to Afghanistan, that your brother worked briefly for [Company 3] in 2009, that he disappeared, that your father rang to tell you this, that your family then disappeared, that you have had no contact with your family since then and that you do not know their whereabouts. In light of these similarities, the tribunal could therefore infer that these claims are untrue.<sup>71</sup>

Applicant A then sought review in the Federal Magistrates Court, which set aside the decision and remitted it to the RRT, where a differently constituted Tribunal remitted it again to the delegate for reconsideration.<sup>72</sup>

It is clear from the trajectory of these claims—one travelling back and forth through the administrative hierarchy and the other successful in the first appeal—that a level of arbitrariness is involved in refugee decision making. We really cannot know whether or why Applicant A and/or Applicant B embellished or fabricated his claim. It is, as the member explained in the interview, entirely possible that both applicants had legitimate claims; it is also conceivable that one copied the other, or that they were in collusion with each other. Perhaps someone they trusted advised them to take this course. In performing a credible account of refugee-ness through the delivery of a recognizable narrative, Applicants A and B stuck too closely to the script, failing to engage in a sufficient level of improvisation; they performed their refugee-ness too literally.

## Conclusion

Refugee law posits the refugee as a rights-bearing subject prior to legal recognition. The determination procedures from which legal protection may be availed to

<sup>70</sup> Pursuant to s 424A of the *Migration Act 1958* (Cth) the RRT is required to draw to the attention of applicants “clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review” and invite the applicant to respond. Applicant A submitted a detailed statutory declaration in response.

<sup>71</sup> 1103901 [2011] RRTA 716 (22 August 2011). Identifying information is removed from published RRT decisions.

<sup>72</sup> 1103901 [2011] RRTA 716 (22 August 2011). The decision of the RRT is publically available on the AustLII website, however, the decision of the delegate to whom the RRT remitted the case for a final decision is unavailable.



a person escaping persecution demand that the applicant be recognizable as a subject entitled to law's power to name her as a refugee. In this article, I have drawn on speech act theory to investigate the rhetorical structure of refugee recognition. I have argued that, rather than being an identity that precedes legal recognition, refugee subjectivity emerges as an *effect* of law, through a process that takes the form of an interpellation. Viewed as a performative speech act, refugee subjectivity emerges as a result of repetition and citation of tropes of refugee-ness, which function to legitimate and naturalize certain representations as evidence of the grounds for protection. It is through the repeating of norms allied with law's construction of refugee-ness that the structure for recognition is established.

This means that applicants must attempt to deliver their evidence as a performance of refugee-ness, but in becoming recognizable and understandable according to the norms of the legal process, the account may lose its distinctiveness and thereby fail to appear credible. As developments in refugee law resulting in the expansion of the recognized grounds for protection demonstrate, legal understandings of refugee identity are subject to shifts in interpretive paradigms that reflect political and historical conditions. It is the performance of repeated and reiterative tropes of refugee-ness within the legal domain, as well as the related shifting narrative in the relationship between recognition of forms of subjectivity and oppression emerging from social movements, which functions as the field for refugee status determination.

This is not a legal argument for changes to the refugee recognition process; rather, it is an attempt to demonstrate the legal significance of rhetorical structures and the consequences for individuals seeking protection under refugee law. I have argued that contradictions and ambivalences in legal discourse may be politically mobilized to mark distinctions that underscore questions of legitimacy. This is demonstrated in the anxieties that have emerged around naming the refugee, particularly the distinction that is drawn between "asylum seekers" and "refugees." What is to be made of this uncertain and ambivalent semantic terrain? Butler suggests that it is in the slippage between the autobiographical and the parodic that forms of enabling resistance can be found. She claims that it is through implication in relations of power that agency is drawn—that through the occupation of an interpellation one may direct the possibilities of re-signification.<sup>73</sup> I have suggested that such forms of agency are revealed in the fieldwork I conducted, where the performance of refugee-ness as a reiterative parody may not result in the rejection of a claim; indeed, decision makers acknowledge that, at least in some cases, the more closely an applicant's story resembles an already-accepted narrative account, the more likely it may be that she succeeds in attaining recognition.

Trish Luker  
 UTS Chancellor's Postdoctoral Research Fellow  
 Faculty of Law  
 University of Technology Sydney

---

<sup>73</sup> Butler, *Excitable Speech*, 123.