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Introduction

To access state-based regimes for refugee protection, refugee applicants must speak. Within individualised processes for the determination of refugee status, refugees are required to present themselves before a decision-maker and convey, as best they can, the basis of their claim to protection. Generally, refugees must present their oral testimony in person, repeatedly and at length, unmediated by a legal representative or advocate, and in many cases without the benefit of documents, witnesses or other forms of evidence to support their claims. This book is about the oral testimony of refugee applicants. It is about the oral evidence that refugees are compelled to give, the stories they are required to narrate and the genres of storytelling they are required to master during administrative oral hearings for the assessment of refugee status in Australia and Canada. Specifically, the book examines how the testimonial evidence of refugee applicants is presented, interrogated and assessed within the refugee status determination (RSD) process and under domestic enactments of the Refugee Convention in both jurisdictions.[1] Its central question is what the presentation, interrogation and assessment of testimony during the oral hearing tells us about what is demanded of refugee applicants as testimony-givers and narrators within individualised RSD processes. It then asks what those demands, made of refugees and their testimony, reveal about the refugee subject whom Refugee Convention-signatory states judge as authentic, credible and ultimately, acceptable. I address these questions through the qualitative analysis of an original dataset of refugee oral hearings that took place before the Immigration and Refugee Board (IRB) in Canada and the former Refugee Review Tribunal (RRT) in Australia. Central to the book's project is the claim that we cannot understand how RSD operates, nor the black box of what is referred to as credibility assessment within RSD, without closely studying the oral hearing and its conduct in full. Such a study involves fixing our attention on the frequently surprising, unpredictable and largely unexamined and undocumented exchanges between decision-makers and refugee applicants within specific refugee oral hearings.

In examining the conduct and content of oral hearings in Australia and Canada, this book also aims to bring critical insights from within 'law and literature' scholarship, and its engagement with the relationship between law and narrative, to bear on how refugee

[1] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) – as amended by the *Protocol Relating to the Status of Refugees 1967*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('Refugee Convention'). For the definition as adopted in Canada and Australia respectively: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 96; *Migration Act 1958* (Cth) ss 5H, 36.

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testimony is both presented by asylum seekers, and tested and judged by administrative decision-makers. How does placing narrative at the centre of an investigation into RSD reveal dynamics of interaction and processes of judgment that are central to the inclusion or exclusion of refugee applicants and to the intractable problem of credibility assessment? Certain strands of law and literature scholarship and popular discourse alike have cast narrative as emancipatory, and celebrated personal narratives and storytelling for both their political power and ability to contest legal norms and authority. What, then, does a focus on the role of narrative within RSD do to disrupt conceptions of narrative as necessarily empowering or as enabling resistance? Against accounts of narrative and storytelling as disrupting law's authority, this book proposes a different account of the role and political place of narrative and narrative forms within (refugee) law and legal authority.

In my analysis of refugee oral testimony during the hearing, I argue that refugee applicants are required to meet a demand for narrativity and specific narrative forms in the presentation of their evidence, as well as to demonstrate a capacity to account for themselves in line with 'stock' narratives of refugeehood and asylum seeking. In the Australian and Canadian refugee hearings that form the book's qualitative dataset, genre and storytelling operated as disciplining forms and the demand for narrative was critical to and implicated in the refugee-receiving state's power to exclude. Further, these demands for narrative were made in the context of administrative oral hearings that, in their form and conduct, directly impeded a refugee applicant's capacity to meet these narrative mandates. As such, refugee applicants were expected to provide evidence in conventional narrative forms. And yet, by virtue of the form and conduct of the hearing, they were prevented from doing so. To put this another way, in the chapters that follow, I argue that a refugee applicant's presentation and explanation of evidence in a distinctly narrative form is a core aspect of the assessment of refugee credibility and acceptability; and that the RSD oral hearing, as the primary site where applicants must demonstrate this capacity, actively impedes a refugee's ability to meet this demand. Finally, this frequently unmeetable demand for narrative, alongside its disruption and fragmentation during the oral hearing, is directly implicated in state practices of exclusion and deterrence of refugees seeking asylum within their territory.

The specific sites of the reception and testing of refugee testimony at the centre of the book are the closed oral hearing rooms of the Canadian IRB and the former Australian RRT. As such, the book is about individualised, onshore or inland administrative processes of refugee decision-making within the Refugee Convention-signatory states of Australia and Canada. This means it is about the testimony and judgment of the minority of asylum seekers who are able to access RSD processes at a time when the possibility of entering the walled and securitised territories of Refugee Convention-signatory states has become more and more remote, and for certain people, effectively impossible. The hearing rooms tucked away in inner-city buildings in Australia and Canada and one-on-one oral exchanges between decision-makers and refugee applicants may seem both inconsequential to and disconnected from a global context in which the militarisation and externalisation of borders, forcible 'turn-backs' of people seeking asylum on land and sea, and criminalisation and incarceration of those who do reach state territory, determine the reality of what we call 'refugee protection'. However, as the book demonstrates, RSD and the crude processes for judging a refugee's credibility that it encompasses, persist as a critical site of refugee inclusion and exclusion. Indeed, in addressing the oral hearing as a central and underexamined event within refugee law, the book sets global trends of diminished

and fast-tracked processes of RSD against the critical role played by each refugee's ability to narrate and account for themselves in an attempt to access protection. Moreover, it presents the primarily closed and deeply individual spaces of refugee assessment, and their role in constituting the acceptable (and unacceptable) refugee, as connected to refugee law's gate-keeping and exclusionary functions.

My argument builds on the small but rich body of scholarship that has engaged with narrative and language within the law and politics of asylum-seeking and refugee status, often from within the fields of sociolinguistics, critical discourse analysis or literary studies rather than law.[2] Robert Barsky's foundational work on refugee testimony, which applied both literary and discourse theory to transcripts of Canadian refugee hearings, demonstrated that refugee applicants must not only *be* refugees, but they must be able to *present* and *construct* themselves as refugees.[3] For Barsky, the refugee hearing is primarily a test of the claimant's ability to construct an appropriate image of a 'Convention refugee' and to become a 'productive other' – in line with conceptions of a refugee set out within particular political and cultural discourses of the receiving state and of government decision-makers.[4] It is not the veracity of the claim that is tested within RSD procedures, but rather the claimant's competency in meeting the requirements of the process and in performing the style of speech and argumentation that the process requires. Jan Blommaert identified the problem of 'narrative inequality' or alternatively what Katrijn Maryns and Blommaert call an applicant's 'narrative resources' as shaping Belgian asylum determinations.[5] Blommaert argues that a complex set of discursive practices and language ideologies place unmeetable linguistic demands on asylum seekers, who are discredited for the use of disqualified or insufficiently narrative modes.[6] Blommaert suggests in turn, that narrative inequalities condition the distribution of social rights.[7] In line with this claim, I argue that such narrative inequalities (and narrative demands) within the RSD oral hearing find direct expression within existing credibility criteria, which absolutely 'condition the distribution' of access to asylum. Matthew Zagor's engagement with narrative and identity in refugee law also highlights the imperative of refugee speech and stylised forms of testimony, observing that

[2] See especially Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (John Benjamins, 1994); Jan Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' (2001) 12(4) *Discourse & Society* 413; Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20(2) *Journal of Refugee Studies* 248; Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22(2) *Journal of Refugee Studies* 195; Katrijn Maryns, *The Asylum Speaker: Language in the Belgian Asylum Procedure* (Routledge, 2014); David A B Murray, 'The (Not so) Straight Story: Queering Migration Narratives of Sexual Orientation and Gendered Identity Refugee Claimants' (2014) 17(4) *Sexualities* 451; Agnes Woolley, 'Narrating the "Asylum Story": Between Literary and Legal Storytelling' (2017) 19(3) *Interventions* 376; Carol Bohmer and Amy Shuman, *Political Asylum Deceptions: The Culture of Suspicion* (Palgrave Macmillan, 2018); Laura Smith-Khan, 'Why Refugee Visa Credibility Assessments Lack Credibility: A Critical Discourse Analysis' (2019) 28(4) *Griffith Law Review* 406; Marie Jacobs and Katrijn Maryns, 'Managing Narratives, Managing Identities: Language and Credibility in Legal Consultations with Asylum Seekers' (2022) 51(3) *Language in Society* 372.

[3] Barsky, above n 2.

[4] Ibid 5–6.

[5] Blommaert, above n 2; Katrijn Maryns and Jan Blommaert, 'Stylistic and Thematic Shifting as a Narrative Resource: Assessing Asylum Seekers' Repertoires' (2001) 20(1) *Multilingua* 61; Maryns, above n 2.

[6] Blommaert, above n 2, 414.

[7] Ibid 428.

'the refugee has long been in a situation where protection depends upon the telling of one's story. Whether she wants to or not, a refugee must speak; and she must speak in a legal context and, preferably, a legal idiom'.[8]

This book insists that the RSD process requires far more of applicants than merely meeting the legal definition of a refugee. In so doing, it also aims to highlight the fact that we still have little sense of how refugees contend with these narrative demands during the oral hearing, or resist or challenge them. Indeed, as becomes apparent in the hearing excerpts, applicants with 'narrative resources' to deploy were at times steadfast and explicit in refusing decision-makers' questions or re-narrations of their evidence. In these exchanges between applicants and decision-makers, the requirement for a kind of narrative competency was evident in the stock stories of 'genuine' asylum seeking against which applicant testimony was interrogated, but also moved beyond this. Applicants had to account for the *form* of their evidence. They were expected to be able to justify its narrative arc, the actions of various characters, the relationship between events and outcomes, and the details that they (as narrator) had included or excluded; and they were required to do so in the face of decision-makers' subjective, unpredictable and at times idiosyncratic questioning. Indeed, refugee applicants must relate complex evidence of a life left behind, of persecution, departure and arrival, in the form of a story that presents events plotted in time, with explicable and linear causative links, and, *most of all*, that resolves in a decision to become a refugee – even where no such resolution exists.

The remainder of this introduction is divided into four sections. First, I introduce the book's qualitative dataset and the sites of oral testimony it examines. Next, I provide my account of what we know about the immense failures and injustices of credibility assessment within RSD; I explain why compelling research on the dysfunction of credibility determination has resulted in so little change and how these insights shape the questions and findings in the rest of the book. I then establish the profoundly mediated, co-produced and constrained nature of what I imperfectly term 'refugee testimony' and present the book's structure and chapter overview. Finally, I outline how the testimony of the refugee applicants who participated in this research will be presented throughout the book.

1.1 The Oral Hearing in Context

The book presents a detailed, qualitative analysis of fifteen refugee applicants' oral hearings, which took place before the IRB in Canada and the RRT in Australia between 2012 and 2015.[9] Since the period in which the hearings and the qualitative aspects of this research took place, refugee law and policy in both jurisdictions have been anything but

[8] Matthew Zagor, 'Recognition and Narrative Identities: Is Refugee Law Redeemable?' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 311, 323.

[9] University of British Columbia Behavioural Research Ethics Board, *Approval Certificate No H12–01565*; University of Technology Sydney Human Research Ethics Committee, *Ethics Reference No 2011-486A*. The Appendix sets out the elements of each hearing, including the jurisdiction; gender of the applicant; basis of claim; country of origin; credibility determination; and outcome. Although I do not read the hearings quantitatively, for the sake of both interest and description, I note the data sample included: ten men and five women; and six negative outcomes and nine positive outcomes. All hearings and excerpts have been anonymised and de-identified to preserve confidentiality.

static. Notably in Australia this period has included reform to the administrative bodies charged with the assessment of protection claims. Indeed, in 2015, the RRT was amalgamated with the Administrative Appeals Tribunal (AAT), into a 'super tribunal' to deal with all Commonwealth matters of administrative review.[10] As a result, the RRT was replaced by the Migration and Refugee Division (MRD) of the AAT, albeit with minimal substantive change to the nature of administrative review provided within the new tribunal division or its fundamental operation. Then, as the manuscript of this book was being finalised, a new Labor Government in Australia announced the abolition of the AAT in its entirety, and plans for its replacement with a new administrative review body.[11] As I outline in Chapter 2, these changes were motivated by long-standing criticisms of the level of executive control over the Tribunal's process for the selection of members and, in particular, direct appointments of members with connections to sitting governments in the absence of a transparent, merits-based process.

Alongside reforms to the administration of and institutions responsible for RSD in Australia, Global North Refugee Convention-signatory states continue to be 'unwavering in their commitment' to avoiding responsibility under international refugee law and to implementing novel and extreme modes of refugee deterrence and *non-entrée* policies.[12] In both Australia and Canada, deterrence policies have moved both outwards from territorial and maritime borders to extraterritorial sites of migration control, and inwards to encompass reforms to RSD processes, including, but not limited to: early and opaque 'screening out' of certain applicants before claims are made in full; the rapid acceleration of RSD application timelines for select applicants; limiting access to and/or narrowing the scope of administrative and judicial review of primary decisions; and the withdrawal of government-funded legal assistance.[13] Indeed, tracing amendments to RSD in both states reveals that the quality of refugee decision-making has been progressively diminished for specific groups of asylum seekers, singled out for unique forms of deterrence or exclusion.[14]

Crucially for this project, though, in both Australia and Canada, the function, nature and conduct of the oral hearing – despite the reforms that have taken place around it –

[10] *Tribunals Amalgamation Act 2015* (Cth).

[11] Mark Dreyfus, Attorney General, 'Albanese Government to Abolish Administrative Appeals Tribunal' (Media Release, 22 December 2022).

[12] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-refoulement in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law* 235, 235.

[13] For examples of the acceleration of decision-making across time and jurisdiction, see Thomas Spijkerboer, 'Stereotyping and Acceleration – Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System (2005)' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers, 2005) 67; Angus Grant and Sean Rehaag, 'Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System' (2016) 49 *UBC Law Review* 203; Linda Kirk, 'Accelerated Asylum Procedures in the United Kingdom and Australia: "Fast Track" to Refoulement?' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart, 2017) 243; Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41 *University of New South Wales Law Journal* 1003; Jessica Hambly and Nick Gill, 'Law and Speed: Asylum Appeals and the Techniques and Consequences of Legal Quickening' (2020) 47(1) *Journal of Law and Society* 3.

[14] Kirk, ibid.

has remained remarkably fixed.[15] Moreover, the effect of these diverse reforms is that they have put even greater pressure on refugee testimony and its presentation during the first- or second-instance oral hearing, as vital to the success of a claim. In this way, where refugee applicants are granted access to an oral hearing – and this is not always the case[16] – reforms diminishing the quality of RSD have been implemented 'on both sides' of oral hearings, in terms of shortened timelines in the lead up to the assessment of testimony, and the limiting of the avenues, scope and quality of review following its presentation. As such, the legal and procedural stakes of an applicant's expression of their testimony have rarely been higher, at the same time as the injustices of giving and assessing refugee testimony, as charted in the following chapters, remain as intractable as ever.

The hearings in the book took place across four cities in Australia and Canada.[17] I accessed them through my in-person attendance at the hearing itself, or through the full audio recordings of a hearing, or both.[18] For each hearing included in the study, I also had access to the written decision and reasons. In Canada, the IRB is responsible for the first-instance determination of the claim. In Australia, the former RRT conducted *de novo* administrative review of an initial negative decision made by a delegate of the Australian Immigration Minister.[19] An oral hearing, with limited exceptions, is required before both the IRB and RRT.[20] Both bodies are required to determine refugee claims on the merits and in full, and in both cases a refugee applicant presents such testimony directly to a single administrative decision-maker.[21] The decision-maker directly questions and tests the applicant's oral evidence and holds substantial discretion over precisely how the hearing is run and what aspects of the claim are discussed and for how long. Interpreters frequently mediate these exchanges.

An applicant's lawyer or advocate may be present in both jurisdictions, but it is the decision-maker who questions the applicant in the first instance in Canada, and legal advocates in Australia have no right to question their clients during the hearing.[22]

[15] Ibid.

[16] As detailed in Chapter 3, in some instances governments have excluded select groups of asylum seekers from accessing RSD altogether or implemented procedurally unfair screening processes that effectively remove access to the RSD procedure: see Regina Jefferies, Daniel Ghezelbash and Asher Hirsch, 'Assessing Refugee Protection Claims at Australian Airports: The Gap between Law, Policy, and Practice' (2020) 44(1) *Melbourne University Law Review* 162.

[17] Sydney and Melbourne (Australia); and Montréal and Vancouver (Canada).

[18] The multiple forms of data were both a strength and a limitation of the project: a strength insofar as each form of data provides different kinds of information and representations of the hearing, and a limitation in that the 'comparability' of some data is undermined by the diversity of forms.

[19] Refugee applicants arriving by boat and without authorisation in Australia have variously been prohibited from accessing administrative review before the RRT and the AAT (discussed below) and subject to non-statutory processing regimes. Current RSD procedures for 'unauthorised maritime arrivals' are also addressed in Chapter 3, but for an account of RSD historically available to 'maritime arrivals' see Michelle Foster and Jason Pobjoy, 'A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's "Excised" Territory' (2011) 23(4) *International Journal of Refugee Law* 583.

[20] *Migration Act 1958* (Cth) s 425; *Immigration and Refugee Protection Act*, SC 2001, c 27, s 170(b).

[21] Though, a decision in the applicant's favour can be made on the papers in both jurisdictions: *Migration Act 1958* (Cth) s 425(2)(a) and *Immigration and Refugee Protection Act*, SC 2001, c 27, s 170(f).

[22] While advocates may be present in both jurisdictions, the applicant must present their evidence directly in response to the decision-maker's questioning. In Canada, an applicant 'may, at their own expense, be represented by legal or other counsel', though some legal aid is available in Ontario, Québec and British

Lawyers are both physically and figuratively 'to the side' of the presentation of oral evidence in each jurisdiction. Although the Canadian and Australian hearings took place at different stages of RSD, both the former RRT and IRB constituted the last stage of decision-making where an applicant presents their claim in an oral hearing before a decision-maker empowered to make findings of both law and fact.[23] Both Australia and Canada have ratified and domestically enacted the key obligations under the Refugee Convention, and each has a semi-independent, administrative decision-making body for the purposes of determining refugee claims.

The book's argument and findings are applicable to the assessment of refugee testimony in Global North refugee-receiving states where deterrence is a central aspect of the asylum regime and oral testimony is central to the RSD process. My analysis of the oral hearing in Australia and Canada raises questions that can be productively asked in other jurisdictions, particularly where the assessment of in-person oral testimony is governed by a version of the credibility criteria I describe below.[24] The book's findings contribute to a growing but still limited empirical literature on conduct of refugee decision-making, in relation to which Nick Gill and Anthony Good observe that 'it is remarkable that so little empirical research has been carried out into how RSD structures actually operate in practice'.[25] I agree. Despite the significant variance in the formal design and conduct of administrative RSD processes,[26] my arguments in relation to the dysfunction of credibility determinations within RSD and the assessment of oral testimony provide insight and lines of inquiry for all states with individualised, testimony-driven processes for RSD. Such research provides a much-needed 'antidote to the emphasis on either [only] legal doctrine or outcome' in studies of refugee decision-making.[27] While my data spans two jurisdic-

Columbia and advocates are permitted to question their clients and make submissions: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 167(1). In Australia, 'a person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person' and advocates are generally not permitted to question the applicant at all, though in practice they are permitted to make submissions at the close of the hearing: *Migration Act 1958* (Cth) s 427(6)(a).

[23] Unsuccessful applicants before the RRT were permitted to seek judicial review only. Applicants who do not succeed before the Refugee Protection Division (RPD) of the IRB may seek merits review before the Refugee Appeal Division (RAD), but an appeal to the RAD must generally proceed without a hearing. Certain exceptions exist, including if the Minister participates in the hearing and wishes to present evidence; if evidence is presented that arises after the original hearing or that was not reasonably available; and if in the Board's opinion the documentary evidence raises a 'serious' and 'central' question with respect to credibility, which would justify the Board allowing or rejecting the claim: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 110(3), (4) and (6).

[24] As the following section explains, since credibility standards are drawn from the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, this includes most Convention-signatory states with individualised RSD procedures: below nn 34, 37.

[25] Nick Gill and Anthony Good (eds), 'Introduction' in *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan, 2019) 6. Indeed, this collection makes a major contribution to empirical understandings of the operation of European RSD procedures.

[26] See for example Gill and Good's short, insightful summary of some key differences in fundamental aspects of procedure in European states: ibid 13 (figure 1.2).

[27] Gill and Good, above n 25, 19.

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tions, I do not adopt a formally comparative methodology. Instead, the book demonstrates the demand for narrative across comparable refugee-receiving jurisdictions, where the presentation of oral testimony and credibility assessment remain core elements of the determination process, with attention to relevant differences in law, practice and procedure in both jurisdictions.

The dataset of countless pages of transcripts, observational notes, reasons and audio files provides a detailed picture of the presentation and reception of oral evidence in the fifteen RSD hearings that I observed. I address the multiple barriers to accessing RSD and oral hearings or interviews in Chapter 1, which also explains the basis upon which particular hearings were included in the research, and how refugee participants were recruited. The scope and limits of the dataset are, in part, a consequence of the enduring difficulty of accessing executive and administrative refugee status decision-making in jurisdictions where RSD is not undertaken in open courts or tribunals, and only a minority of decisions are published. I treat the hearings, both individually and collectively, as a rich source of qualitative data and use close reading and grounded theory as the basis for each chapter's arguments and thematic analysis.[28] Indeed, my focus on RRT and IRB oral hearings locates the project within a body of important work exploring the day-to-day operation and outcomes of administrative refugee decision-making *despite* barriers to access. The challenges of accessing lower-level decisions, let alone the hearings in full, unites much of the work in this field, with valuable recent exceptions, some of which highlight the comparatively open nature of hearings within European Union jurisdictions.[29] Given the limited amount of work that has accessed or assessed the oral hearing and its conduct, the dataset and hearings provide a valuable source of data and insight.

Existing research on credibility assessment, alongside establishing the unique factors that render RSD as the 'most intensely narrative mode of legal adjudication',[30] are logical points of departure for the remainder of the book. As such, in the next section, I explain the bases, profound failings and gate-keeping functions of credibility assessment and set these against one of the book's unifying concerns: that credibility assessment and the appraisal of refugee testimony is 'often the single most important step' in the determination of refugee status.[31]

1.2 Refugee Testimony and the Intractable Problem(s) of Credibility Assessment

Scholarship addressing credibility assessment is best described as a sustained, multi-jurisdictional and at times exasperated critique of existing standards and practice.[32] Here,

[28] Further details about research design, including methods of recruitment of research participants, criteria for research participants' inclusion in the dataset and my approach to qualitative analysis are addressed in Chapter 2.

[29] Most notably here, the ethnographic studies included in Nick Gill and Anthony Good, *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan, 2019).

[30] Jenni Millbank, '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21(1) *International Journal of Refugee Law* 1, 2.

[31] Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) 17 *Georgetown Immigration Law Journal* 367, 367. See also Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff, 2005); UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report' (May 2013).

[32] Audrey Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context' in International Association of Refugee Law Judges (ed), *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (International Association of Refugee Law Judges,

I take stock of what scholars across disciplines have established about credibility assessment and the implications of this research for the immense burden placed on refugee testimony within RSD. I structure existing critiques of credibility assessment into three overlapping strands, each of which is implicated in the demand for narrative required of refugee applicants.

1.2.1 *The Credibility Criteria as False Proxies for Truth*

The Refugee Convention defines a refugee as a person who holds a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' in their country of origin and who is 'unable, or owing to such fear ... unwilling to avail himself [*sic*] of the protection of that country'.[33] An applicant's claim may fail because their evidence fails to meet one or more aspects of this definition. However, the determination of a claim to protection may also be based, in part or in full, on a decision-maker's finding that the person seeking protection cannot be believed. To put this another way, a finding that the evidence presented – or the person presenting it – is not credible (or, as is often the case, some slippage between the two). In determining this critical question of a refugee applicant's credibility, decision-makers must generally decide whether the applicant's account of their evidence meets the criteria of coherence, plausibility and consistency.[34] The controversial criterion of an applicant's demeanour also endures as a credibility standard in Australia and Canada, albeit one subject to repeated judicial caution as to its use and reliability.[35] These criteria are drawn from the UNHCR Handbook on

1998) 134; Kagan, above n 31; Cécile Rousseau et al, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board' (2002) 15(1) *Journal of Refugee Studies* 43; Guy Coffey, 'The Credibility of Credibility Evidence at the Refugee Review Tribunal' (2003) 15(3) *International Journal of Refugee Law* 377; Noll, above n 31; Millbank, above n 30; Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22(4) *International Journal of Refugee Law* 469; Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22(3) *International Journal of Refugee Law* 351; Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart, 2011) (especially chapter 5); Benjamin N Lawrance and Galya Ruffer, *Adjudicating Refugee and Asylum Status* (Cambridge University Press, 2015); Sean Rehaag, 'I Simply Do Not Believe: A Case Study of Credibility Determinations in Canadian Refugee Adjudication' (2017) 38 *Windsor Review of Legal and Social Issues* 38; Laura Smith-Khan, 'Different in the Same Way? Language, Diversity, and Refugee Credibility' (2017) 29(3) *International Journal of Refugee Law* 389.

[33] Refugee Convention, above n 1, Article 1A.

[34] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (HCR/IP/4/Eng/REV1, 4th ed, 2019) 44 ('the Handbook').

[35] While it is increasingly regarded as an unreliable and inaccurate indicator of credibility, demeanour remains a factor that decision-makers may rely on with caution. As the UNHCR *Beyond Proof* report sets out: '[a] determination of credibility by reference to demeanour has a subjective basis that will inevitably reflect the views, prejudices, personal life experiences, and cultural norms of the decision-maker': UNHCR, above n 31, 186. The Australian RRT Guidelines on credibility set out that '[t]he Tribunal should also be aware of the effect of cultural differences on demeanour and oral communication' and that the RRT should exercise particular care if it relies on demeanour in 'circumstances where a person provides oral evidence through an interpreter or where a person is not before the Tribunal and can only be observed via a video-link': Administrative Appeals Tribunal Migration and Refugee Division, 'Guidelines on the Assessment of Credibility' (2006, updated 2015) [6.1]. The Canadian IRB's guidance on credibility directs decision-makers not to rely solely on demeanour because it 'is not an infallible guide

Procedures and Criteria for Determining Refugee Status, which sets out that an applicant's statements 'must be coherent and plausible, and must not run counter to generally known facts'.[36] The Handbook is a UNHCR document, first produced in 1979 in response to requests from Convention-signatory countries for guidance on RSD procedures, and many Convention signatories have adopted some version of the criteria of consistency, coherence and plausibility as determinants of credibility.[37] This is true in Australia and Canada, where the criteria of consistency, plausibility and coherence are used to determine credibility, as set out within credibility guidelines and case law.[38]

In the face of the widespread adoption of these standards, the most fundamental and uncontroversial knowledge about how autobiographical memory functions calls into question consistency, coherence and plausibility as a basis for assessing the credibility of testimony.[39] That is to say, the criteria used to test refugee applicants' credibility are at complete odds with existing understandings of the relationship between first person testimony, autobiographical memory and how memory operates.[40] As a result, refugee law's indicia of credibility place unreasonable expectations on refugees' accounts of their past and, to put it simply, are absurd proxies for truth. Research bringing knowledge from the disciplines of psychology and psychiatry to bear on RSD processes has repeatedly critiqued and discredited the foundational, structuring assumptions and

as to whether the truth is being told, nor is it determinative of credibility'. However, the document nonetheless goes on to state that:

> [i]n assessing demeanour, the decision-maker ought not to form impressions based on the physical appearance or political profile of a witness, *but on objective considerations that flow from the witness's testimony,* such as the witness's frankness and spontaneity, whether the witness is hesitant or reticent in providing information, and the witness's attitude and comportment (behaviour).

Immigration and Refugee Board, 'Assessment of Credibility in Claims for Refugee Protection' (Legal Services, updated 2020) [2.3.7] (emphasis added); see also Jill Hunter et al, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41 *Federal Law Review* 471, 483.

[36] UNHCR, above n 34, 44. In its Note on Burden and Standard of Proof, UNHCR adds that '[c]redibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed': UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims' (1998) [11].

[37] The Handbook was released by the UNHCR as part of its supervisory responsibility under the Refugee Convention (Articles 35 and 36) and the 1950 Statute of the UNHCR (paragraph 8). It represents the 'accumulated views of the UNHCR, State practice, Executive Committee Conclusions, academic literature and judicial decisions' at national and international levels. It was rereleased in 1992, 2011 and 2019. In all subsequent editions, substantive content remains unchanged from the original version. The later editions, however, contain an updated list of the UNHCR's *Guidelines on International Protection*: UNHCR, above n 34, 1–2.

[38] Chapter 5 sets out in detail domestic credibility guidelines and jurisprudence.

[39] See especially Hunter et al, above n 35; Laurence J Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry' (2003) 10(2) *Anthropology & Medicine* 167; Jane Herlihy and Stuart W Turner, 'Asylum Claims and Memory of Trauma: Sharing Our Knowledge' (2007) 191(1) *The British Journal of Psychiatry* 3.

[40] Jane Herlihy and Stuart W Turner, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171; Evans Cameron, above n 32.

standards of credibility assessment.[41] Such research 'has provided compelling evidence to suggest that autobiographical remembering is not an exact replaying of an event'.[42] Moreover, this work examines and categorically rejects 'the assumption that people can reliably, consistently and accurately recall autobiographical memories' and that applicants who give discrepant or inconsistent accounts of their experiences are necessarily fabricating evidence.[43]

Notably, the requirement for consistency refers not just to internal consistency across countless retellings, translations and explanations, as well as with the events as they took place. It also assesses the 'external' consistency of an applicant's account, against facts about life in the applicant's home country and available 'country of origin information' (COI) about the conditions or circumstances that the applicant has fled. This brings not only the incomplete and uneven sources of 'accepted' COI into the frame, but also decision-makers' subsequent interpretation of them and their own pre-existing assumptions about life and culture in the applicant's country. Gibb and Good drily note that the frequent characterisation of COI as 'objective evidence' of external consistency is 'a formulation that seems to ignore the contextualization and interpretation to which all such knowledge is subject'.[44]

The dysfunction of the credibility criteria is exacerbated further still by the fact that refugee testimony is often, and often primarily, about traumatic events, violence or atrocity.[45] As Shuman and Bohmer write, trauma leaves gaps.[46] It disrupts the relationship between fact, memory and knowledge.[47] It distorts time and experience, in both the past and the present, and as some have argued, may exceed language itself and what is sayable.[48] Theories of traumatic memory suggest that the recall of traumatic events may have 'little verbal narrative to tie them together'; that they are 'not marked as being in the past'; and/or that they 'cannot be brought to mind by conscious attempts to recall'.[49]

[41] Herlihy and Turner, above n 40, 175.

[42] Jane Herlihy, Laura Jobson and Stuart Turner, 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum' (2012) 26(5) *Applied Cognitive Psychology* 661, 662. See especially Hunter et al, above n 35; Kirmayer, above n 39; Herlihy and Turner, above n 39.

[43] Herlihy, Jobson and Turner, above n 42, 662; Jane Herlihy and Stuart Turner, 'Should Discrepant Accounts Given by Asylum Seekers Be Taken as Proof of Deceit?' (2006) 16(2) *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 81.

[44] Robert Gibb and Anthony Good, 'Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures' (2013) 25(2) *International Journal of Refugee Law* 291, 321; see too Jasper van der Kist, Huub Dijstelbloem and Marieke de Goede, 'In the Shadow of Asylum Decision-Making: The Knowledge Politics of Country-of-Origin Information' (2019) 13(1) *International Political Sociology* 68.

[45] Herlihy and Turner, above n 40, 173. One key assumption that the authors challenge is that 'an experience of severe violence or torture will be so important that it will be remembered very clearly over the long term': at 73. See also David B Pillemer, *Momentous Events, Vivid Memories* (Harvard University Press, 1998).

[46] Amy Shuman and Carol Bohmer, 'Narrative Breakdown in the Political Asylum Process' (2021) 134(532) *The Journal of American Folklore* 180, 191.

[47] Dominick LaCapra, *Writing History, Writing Trauma* (John Hopkins University Press, 2nd ed, 2014) 41–42.

[48] Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press, 2002).

[49] Herlihy and Turner, above n 43; Herlihy and Turner, above n 39.

Studies of refugee claims made on the basis of gendered harms and sexuality, in particular, have demonstrated the exceptional injustice of the credibility criteria of coherence and consistency in the context of shame, trauma and the prevalence of delayed or difficult disclosure associated with such harms.[50]

These expectations of refugee testimony persist despite the fact that official RSD guidelines frequently and openly acknowledge that refugee testimony and in particular traumatic testimony cannot be assessed against the usual indicia of credibility,[51] precisely because it is marked by the absence of 'coherence, structure, meaning, comprehensibility'.[52] Indeed the *Beyond Proof: Credibility Assessment in EU Asylum Systems* report – an immense, multi-agency report aimed at improving credibility assessment within the European Union – attested to ongoing and urgent concerns about the quality and basis of credibility assessment.[53] Domestic, regional and international guidelines on credibility, gender and sexuality, as well as the UNHCR Handbook itself, highlight – at times with nuance and sensitivity – the difficulties faced by applicants in formulating and then presenting autobiographical testimony. However, credibility assessment must be understood as a political rather than procedural problem. I build this argument below, but the need to analyse RSD as steadfastly part of regimes of refugee deterrence is evident in the fact that existing credibility standards persist and that they do so in the face of extensive, intelligent and practical suggestions for reform.[54] Even where existing

[50] Helen Baillot, Sharon Cowan and Vanessa E Munro, 'Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10(1) *International Journal of Law in Context* 105; Debora Singer, 'Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge, 2014) 98; Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender and Asylum* (Routledge, 2013); Nicole LaViolette, '"UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": A Critical Commentary' (2010) 22(2) *International Journal of Refugee Law* 173; Berg and Millbank, above n 2; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13(2–3) *The International Journal of Human Rights* 391.

[51] Domestic guidelines in Canada and Australia are addressed in detail in Chapter 5.

[52] Molly Andrews, 'Beyond Narrative: The Shape of Traumatic Testimony' in Matti Hyvärinen (ed), *Beyond Narrative Coherence* (John Benjamins, 2010) 148; Shuman and Bohmer, above n 46, 191.

[53] UNHCR, above n 31. As the Beyond Proof summary report notes, '[a] distinctive feature of this research was its focus on the implementation of the credibility assessment in practice by first-instance decision-makers': at 9. Although the report only relates to EU Member States, it notes 'there is a pressing need for comprehensive and up-to-date guidance on credibility assessment'; that UNHCR has 'embarked on the review of its own guidance with a view to producing updated guidelines on credibility assessment that reflect recent developments in international refugee law'; and that the report's findings will be taken into account in the preparation process for new UNHCR standards: UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems: Summary Report' (May 2013) 8–9. While there was a second credibility report addressing credibility in the context of child refugee applicants and a UNHCR-convened Expert Roundtable on Credibility in 2015, there were no new UNHCR credibility standards at the time of writing. See UNHCR, 'Summary of Deliberations on Credibility Assessment in Asylum Procedures', Expert Roundtable in Hungary (2015); UNHCR, 'The Heart of the Matter – Assessing Credibility when Children Apply for Asylum in the European Union' (December 2014).

[54] See for example International Association of Refugee Law Judges, 'International Judicial Guidance for the Assessment of Credibility' in Allan Mackey et al, *A Structured Approach to the Decision Making Process in Refugee and Other International Protection Claims* (IARLJ, 2016); Gábor Gyulai et al, *Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual*, Volume 1 & 2 (Hungarian Helsinki Committee 2013, 2015).

policy and guidelines clearly state that expectations of coherence, consistency and plausibility should be modified, reformulated or abandoned altogether for particular types of claims or claimants, the normative framework remains central to the demands placed on oral testimony.

1.2.2 RSD Cultures of Suspicion and the Politics of Refugee Deterrence

Domestic refugee laws, policies and politics in Global North states are designed to achieve the deterrence of 'onshore' refugees, and failing that, their punishment. The endurance of discredited credibility criteria must be understood in this context. Researchers across jurisdictions have described RSD, and the determination of an applicant's credibility within it, as characterised by a 'culture of disbelief',[55] 'a culture of suspicion',[56] 'adversarial posturing'[57] and a 'presumptive scepticism'.[58] These descriptions are so common they have attained a sound bite quality within the field.[59] Their persistence across time and jurisdiction reflect the connection between refugee decision-making and the politics and practical consequences of state policies orientated towards refugee exclusion. Which is to say, states' systematic 'illegalization' of onshore refugees is directly implicated in the suspicion and doubt that structures credibility assessment and the judgment of refugee testimony.[60] Refugees who dare to cross a border without authorisation to seek protection are not only cast as 'illegal' and as 'security threats' through the racialised securitisation of migration, but totalised as 'illegals'.[61] What is at times lost in the legal literature on credibility is that it is *only* those who surmount state-imposed barriers and 'unlawfully' cross militarised borders – that is, those already cast as bogus – who ultimately appear before RSD bodies in order to be judged. Making this critical connection between ever-expanding global deterrence policies and the judgment of individual applicants within RSD, Michael Kagan writes that '[o]ne by one and case by case, asylum seekers must navigate the tension between refugee protection and migration control as they struggle to be deemed "credible"'.[62]

[55] James Souter, 'A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom' (2011) 1(1) *Oxford Monitor of Forced Migration* 48, 48. See also James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21(4) *International Journal of Refugee Law* 700, 703; Millbank, above n 30, 16.

[56] See Bohmer and Shuman, above n 2.

[57] Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role' (1998) 5 *Australian Journal of Administrative Law* 78, 94.

[58] Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) 19(4) *International Journal of Refugee Law* 609, 607.

[59] Souter, above n 55, 48. In suggesting that the idea of 'cultures of disbelief' has become a sound bite, Souter argues that the term 'denial' and a culture of denial more accurately describe the refusal of decision-makers to recognise refugee status within the UK: at 49.

[60] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008); Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement' (2005) 36 *Columbia Human Rights Law Review* 365.

[61] Dauvergne, above n 60.

[62] Michael Kagan, 'Believable Victims: Asylum Credibility and the Struggle for Objectivity Culture & Society' (2015) 16(1) *Georgetown Journal of International Affairs* 123, 124; see also Bridget M Haas and Amy Shuman (eds), *Technologies of Suspicion and the Ethics of Obligation in Political Asylum* (Ohio University Press, 2019).

The framing and explanation of a politics of doubt and distrust within RSD can be widened further still and connected to a broader, post-colonial literature explaining the figure of the 'illegitimate', racialised and fake refugee. Sherene Razack argues that settler colonial states' narration of the nation as 'besieged' by bogus asylum seekers conceals a racist logic. This 'simple' logic casts refugees arriving without permission (i.e., those who rely on onshore RSD) as unidentifiable, racialised masses betraying the state's trust, and seeking access to entitlements which belong to white, settler citizens.[63] The state, in such circumstances, is permitted to defend itself from exploitation by illegitimate, 'undocumented' masses, which in turn relies on a 'national story of white innocence and the duplicity and cunning of people of colour'.[64] As against the produced, Eurocentric image of a 'normal' asylum seeker – 'white, male and anti-communist' – post–Cold War asylum seekers are characterised as 'new', mass arrivals, abusing Western hospitality and without genuine claims to protection.[65]

These narratives of race and nationhood enter the hearing room and highly individualised processes of credibility assessment because, as I am attempting to underline, the refugee applicant giving testimony who is judged as dubious or deceitful is simultaneously the queue jumper, the bogus refugee and the economic migrant who dared to move across national borders and exploit the sovereign exception embedded within the Refugee Convention.[66] Bridging cultures of disbelief within RSD and states' physical and political acts of refugee exclusion (or expulsion) is critical to the assessment of the politics of refugee testimony during the oral hearing. To ignore such theorisation involves imagining the doubt that has defined credibility assessment as materialising out of thin air, or assuming that well-designed procedural reform could solve 'the credibility problem', which it certainly has not to date – despite the best efforts of exceptional thinkers and experts on the topic.[67]

Decision-making 'cultures of disbelief' or 'refusal mindsets' would present a problem in any adjudicative context. For refugee applicants, though, it is critical to note from the outset that these predispositions fly in the face of a core, structuring principle of RSD: namely that refugee applicants should be given the benefit of the doubt.[68] The imperative of affording refugee applicants this benefit is precisely because of the singular context of refugee decision-making, whereby a life or death decision must frequently be made on the strength of an applicant's testimony alone.[69] Instead of the benefit of the doubt, doubt itself shapes the reception of refugee narrative. Refugee applicants in turn must actively manage and

[63] Sherene H Razack, 'Simple Logic: Race, the Identity Documents Rule and the Story of a Nation Besieged and Betrayed' (2000) 15 *Journal of Law and Social Policy* 181. For an application of this argument to refugee law in Britain, and the category of refugee as a means for a 'generous' Britain to 'shed the association between its colonial history and the migration of its former subjects' see Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester University Press, 2021) 133.

[64] Razack, above n 63, 187.

[65] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350, 357.

[66] See especially Patricia Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Press, 1996).

[67] For examples of critical engagement with practical and procedural reforms, see above nn 53–54.

[68] UNHCR, above n 34, 43–44. For a clarifying account of this standard, and its practical operation in Canadian and UK refugee law, respectively, see Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge University Press, 2018) chapter 4; Anthony Good, '"The Benefit of the Doubt" in British Asylum Claims and International Cricket' in Daniela Berti and Anthony Good (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Routledge, 2015) 119, 121–26.

[69] UNHCR, above n 34, 43–44.

negotiate the burden of suspicion during the hearing, a challenge that is exacerbated by the conduct of the hearing that I describe in the book and the elusive, unreachable 'standards' of credibility assessment that they are required to fulfil.[70]

1.2.3 Gender, Race, Culture and Decision-Makers' Narrative Worlds

The credibility literature has plainly and repeatedly demonstrated that decision-makers bring their culturally specific, raced and gendered understandings of the world around them to the question of who refugees are, how they should behave and what amounts to credible testimony. While questions of decision-maker subjectivity and standpoint are nothing new to studies of fact-finding and judgment, the vast discretion afforded to administrative refugee decision-makers renders the regulation of their discretion and subjectivity a central theme in evaluating both RSD and credibility determinations. There are of course limits on how decision-makers apply their worldviews when determining the credibility of a refugee's evidence.[71] However, as Hilary Evans Cameron has shown, the challenges posed by decision-maker subjectivity and predisposition – and the challenges of fact-finding across culture, language and time – are exacerbated by the lack of a clear legal or normative framework for *basic* fact-finding within Canadian RSD and beyond.[72]

Studying RSD generally and determinations of credibility specifically, then, involves a study of refugee decision-makers just as much as an inquiry into burdens and standards of proof or the jurisprudence of credibility assessment. Large, data-driven, quantitative studies of refugee status assessments have demonstrated the central role played by individual decision-makers in determining RSD outcomes in multiple jurisdictions.[73] These studies have reinforced the role of the decision-maker through their analysis of vast disparities in decision-maker recognition rates, including evidence of decision-makers with comparable caseloads having overall rejection rates ranging from 95 per cent (for one decision-maker) down to 5 per cent (for another).[74] Statistical variance across comparable caseloads has led

[70] In one of the few studies addressing the conduct of first instance asylum interviews, Nienke Doornbos found that officers frequently tested applicants in regards to peripheral or minor details, which led to communication 'breakdowns' and the applicants being unable to articulate their claims: Nienke Doornbos, 'On Being Heard in Asylum Cases: Evidentiary Assessment Through Asylum Interviews' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff, 2005) 103.

[71] I address these in detail in Chapter 5.

[72] Evans Cameron, above n 68, 7–24 especially.

[73] For analysis in different jurisdictions and across various stages of decision-making, see Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag (eds), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009); Philip G Schrag, Andrew I Schoenholtz and Jaya Ramji-Nogales, *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security* (New York University Press, 1st ed, 2014); Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2008) 39 *Ottawa Law Review* 335; Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *University of New South Wales Law Journal* 1085.

[74] IRB decision-makers with major caseloads ranged in their positive grant rates from 7 per cent to over 95 per cent: Rehaag, above n 73. In the USA the recognition rate among immigration court judges deciding matters from the same country of origin in the same New York registry ranged from 5 per cent to 96 per cent: Ramji-Nogales, Schoenholtz and Schrag, above n 73. And in Australia the success rate of applications for judicial review before individual judges (rather than primary determinations) ranged from over 20 per cent to less than 1 per cent: Ghezelbash, Dorostkar and Walsh, above n 73.

to analogies of RSD with games of pure chance – a spin of the roulette wheel – based on the assigned decision-maker. This is the case even though, as others have argued, such quantitative findings regarding the impact of individual decision-makers must be read alongside other factors, including the presence and quality of legal counsel and advice.[75]

One of the insights of work addressing the highly subjective and even hunch-driven nature of credibility assessment[76] is that refugee decision-makers do not merely decide if an applicant's *evidence* is credible or meets the requirements of the Refugee Convention's definition of a refugee. Applicants must also convince decision-makers that they authentically fit the social and political category of 'refugee'. Razack, Makua Matua and Susan Masarrat Akram are among a number of scholars who have compellingly argued that presumptions about who or what is 'credible' and plausible within RSD frequently turn on orientalist and racialised characterisations of asylum seekers – of their countries of origin as barbaric; the liberal nation-state as saviour; and refugees as 'victims' in need not only of protection but of saving.[77] Omid Tofighian and Behrouz Boochani draw a direct connection between the exclusionary ideologies that hold up colonial border regimes and assertions of sovereignty, and the epistemic basis for contradictory and dehumanising tropes associated with refugees and displaced peoples. These include the 'desperate supplicant'; the 'trickster'; the 'tragic and miserable victim'; and the 'struggling [and battling] overcomer'.[78] These characterisations and expectations have been cast as a measure of one's 'refugeeness', an awkward term which in its capaciousness captures the demanding, contradictory and regularly dehumanising ways in which Global North states judge those seeking access to the category of 'refugee', and determine how 'acceptable' refugees ought to behave.[79] This has significant implications for exploring the place of narrative forms and 'stock' refugee stories in RSD. Refugees must adopt a form of passive victimhood and a desire to be saved from the indignity of illiberal and non-white cultures and beliefs;[80] however, as I seek to show, they must equally display agency, self-possession and a clear will towards liberal

[75] Jamie Chai Yun Liew et al, 'Not Just the Luck of the Draw? Exploring Competency of Counsel and Other Qualitative Factors in Federal Court Refugee Leave Determinations (2005–2010)' (2021) 37(1) *Refuge: Canada's Journal on Refugees* 61; Ghezelbash, Dorostkar and Walsh, above n 73.

[76] Macklin, above n 32, 134.

[77] Sherene Razack, 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender' (1995) 8 *Canadian Journal of Women and the Law* 45; Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201; Susan Musarrat Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 *International Journal of Refugee Law* 7. Razack argues that '[t]he simplest and most effective means' for women to gain protection on the basis of gender 'is to activate in the panel members an old imperial formula of the barbaric and chaotic Third World and by implication, a more civilized First World': at 69. See also Liisa H Malkki, 'Refugees and Exile: From "Refugee Studies" to the National Order of Things' (1995) 24 *Annual Review of Anthropology* 495; Liisa H Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization' (1996) 11(3) *Cultural Anthropology* 377.

[78] Omid Tofighian, 'Behrouz Boochani and the Manus Prison Narratives: Merging Translation with Philosophical Reading' (2018) 32(4) *Continuum* 532, 535; Behrouz Boochani, *No Friend But the Mountains: Writing from Manus Prison* (Picador, 2018) 365–66.

[79] Marie Lacroix, 'Canadian Refugee Policy and the Social Construction of the Refugee Claimant Subjectivity: Understanding Refugeeness' (2004) 17(2) *Journal of Refugee Studies* 147; Trish Luker, 'Performance Anxieties: Interpellation of the Refugee Subject in Law' (2015) 30(1) *Canadian Journal of Law and Society* 91.

[80] Mutua, above n 77; see too Jenni Millbank and Anthea Vogl, 'Adjudicating Fear of Witchcraft Claims in Refugee Law' (2018) 45(3) *Journal of Law and Society* 370.

freedom, a theme which shapes Chapters 3 and 6.[81] The refugee story must conform with cognisable and plausible narratives of refugeehood, *but* at the same time it must not be too 'scripted, rehearsed or borrowed' such that is deemed too generic and therefore also fabricated.[82] So while the refugee applicant's testimony must be plausible, coherent and consistent as a refugee story, there is no one model refugee story, or one fixed stereotype, with which a refugee must conform.[83]

As has been so frequently observed, there is no absolute requirement that a refugee be credible to be granted asylum.[84] And yet, incredible refugees are rarely granted refugee status. Further, despite clear guidance that coherence and consistency are incompatible with autobiographical memory as such, and absurd standards by which to judge attempts to disclose and account for traumatic events, the standards persist. Each strand of the problem of credibility charted here is entwined with the burden of speech and demand for narrativity faced by refugees during the oral hearing, and these critiques, which fundamentally reject the credibility of credibility assessment, move in and out of the foreground in each of the book's chapters.[85]

1.3 The Impossibility of Refugee Testimony in RSD: Law, Lawyers, Interpreters

Like so much scholarship addressing refugee decision-making and credibility assessment, in the book I refer to 'refugee testimony' to describe the evidence presented by refugees as the basis for a protection claim. However, the testimony that I describe and analyse is not purely the 'refugee's testimony'. Instead, it is speech co-produced, shaped and constrained by the socio-legal requirements of the RSD process and the multiple actors involved in its production in Australia and Canada. The evidence referred to as 'refugee testimony' is what Marie Jacobs and Katrijn Maryns carefully describe as 'co-constructed' and continuously mediated by multiple actors within the RSD process.[86] The cast of people co-producing refugee testimony within RSD include, at least, interpreters, decision-makers and lawyers involved in preparing a claim and advising an applicant. As Laurie Berg and Jenni Millbank put it, '[h]ow the asylum claim is articulated depends on the relational interaction between advocate or decision-maker and asylum seeker at every stage of the process'.[87] Barsky even notes the

[81] Simon Behrman also argues that refugee law requires asylum seekers to adopt an 'extremely limited and distorted form of agency', which as narrow as it is, includes an essential expression of agency in one's engagement with 'the process of refugee status determination as a precondition to receiving the benefits of asylum': Simon Behrman, 'Accidents, Agency and Asylum: Constructing the Refugee Subject' (2014) 25(3) *Law and Critique* 249, 249, 257.

[82] Bohmer and Shuman, above n 2, 29.

[83] Julia Dahlvik describes bureaucrats in the Austrian asylum administration system as 'reproducing and reinventing' the system, and the determination regime as 'volatile' and contingent on these processes of street-level beliefs and construction: Julia Dahlvik, 'Asylum as Construction Work: Theorizing Administrative Practices' (2017) 5(3) *Migration Studies* 369.

[84] Bohmer and Shuman, above n 2; Lawrance and Ruffer, above n 32, 10.

[85] Smith-Khan, above n 2.

[86] Jacobs and Maryns, above n 2; see also Maryns, above n 2; Smith-Khan, above n 2; Jessica Hambly, 'Interactions and Identities in UK Asylum Appeals: Lawyers and Law in a Quasi Legal Setting' in Nick Gill and Anthony Good (eds), *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan, 2019) 195.

[87] Berg and Millbank, above n 2, 196–97.

(former) role of hearing stenographers and the conditions of their work in the production of testimony in Canada, which was performed under subcontract, paid as 'piece work' and transcribed under difficult conditions, with varying degrees of accuracy.[88] The usually imperceptible and unacknowledged role that RSD decision-makers, in particular, play in shaping the oral testimony attributed to applicants is evident throughout the book. Laura Smith-Khan explains the problem with assigning sole authorship of texts produced in the application process 'discursively . . . to asylum seekers'; namely that they are held responsible for and judged as credible against communication that is produced by multiple actors, the content of which is simply not within their control.[89] This is a theme, finding and problem that comes to the fore in the analysis that follows.

This, in turn, highlights a limitation of this research: the hearing-based data cannot account for or evaluate the influence of other actors – and significantly of lawyers or interpreters – in shaping the testimony available for assessment. In my dataset, it is only when lawyers actively intervene in applicants' oral testimony or when there is an acknowledged issue with linguistic interpretation that these actors come into the frame of analysis. Here, research that has examined the fallibility of processes of linguistic and cultural translation (among lawyers, expert witnesses and interpreters alike) provides crucial context for the testimony represented here.[90] As Jacobs and Maryns have shown, lawyers, advocates and other actors may shape evidence through sincere misunderstanding or misinterpretation of testimony, but they may equally actively impose their own ideologies to reorient refugee narrative, imposing perceived markers of credibility or 'institutionally accepted forms of narration'.[91] My research, however, only assesses testimony in the form presented during the oral hearing, where it is reshaped by decision-makers and interpreters once again – but attributed, completely and finally, to the refugee applicant.

Finally, while a core aim of the book is to investigate how the event of the refugee oral hearing is conducted in Australia and Canada, it is not an institutional or ethnographic study of the decision-making bodies responsible for RSD in either jurisdiction. Ethnographic or bureaucratic studies of the 'asylum field'[92] stretch far beyond the study of a sample of refugee hearings or even of one decision-making body such as the RRT, AAT or IRB. Rather, such work reads asylum decision-making in the context of multiple, overlapping institutions and the tensions between them.[93] This scholarship has consistently found

[88] Robert F Barsky, *Arguing and Justifying: Assessing the Convention Refugees' Choice of Moment, Motive and Host Country* (Ashgate, 2000) (especially Chapter Three: 'Interpreting and Transcribing the Other').

[89] Smith-Khan, above n 2, 406, 426.

[90] See especially Hambly, above n 86; Smith-Khan, above n 32; Maryns, above n 2; Robert Gibb and Anthony Good, 'Interpretation, Translation and Intercultural Communication in Refugee Status Determination Procedures in the UK and France' (2014) 14(3) *Language and Intercultural Communication* 385; Jan Blommaert, 'Language, Asylum, and the National Order' (2009) 50(4) *Current Anthropology* 415.

[91] Jacobs and Maryns, above n 2, 3; but see also Stephen Meili, 'U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law' (2013) 36 *Boston College International and Comparative Law Review* 1123; Siobhán McGuirk, '(In)Credible Subjects: NGOs, Attorneys, and Permissible LGBT Asylum Seeker Identities' (2018) 41(1) *PoLAR: Political and Legal Anthropology Review* 4.

[92] John R Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* (Routledge, 2016).

[93] Ibid; see especially Gill and Good, above n 29; Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury Academic, 2011). For a formally comparative account of regimes and administrative systems of RSD in Australia and Canada, see Rebecca Hamlin, *Let*

that refugee decision-makers operate in extremely high-pressure environments and that they regularly face immense time constraints, resource challenges and backlogs. This is certainly the case in Australia, where as noted, the AAT itself is being disbanded and redesigned as this book goes to print, in part because of the intractable backlog of matters before it. Angus Grant and Sean Rehaag note that RSD in Canada involves a high-volume, high-stakes caseload and constant pressure to decide matters quickly.[94] Such pressures are connected to insufficient state funding alongside state imperatives to speed up asylum determinations – but equally, as I have argued, connected to rhetoric about dealing 'efficiently' with 'bogus' or 'opportunistic' claimants besieging (to use Razack's language) RSD mechanisms.[95]

In reading the rest of this book, though, constant calls from Global North states for more efficient and accelerated RSD will strike readers as at odds with the at times lengthy and painstakingly detailed exchanges led by decision-makers during hearings and circuitous discussions of aspects of evidence that seem ancillary to the refugee definition. The set of hearings that I present take place within, but cannot be fully accounted for by, high-level analysis of the broader 'asylum field' or governance of RSD as such. As I hope becomes apparent, reading the hearings in full, as complete qualitative texts, is the only way to think through and analyse the often-singular course of each hearing; the intimate and particular back-and-forth exchanges between refugees and decision-makers; and the demands made in real-time of refugee applicants and their testimony.

1.4 Judging Refugees: Chapter Overview

The chapters that follow integrate a theoretical and conceptual argument about the function of narrative within refugee decision-making and Global North states' demands of 'acceptable' refugees, with a detailed and intensely specific empirical analysis of how such demands manifested within fifteen refugee hearings. Following this introduction (Chapter 1), Chapter 2 presents the book's argument in favour of a critical politics of narrative. Specifically, it engages with the theoretical insights of law and literature, and law and 'outsider storytelling' scholarship as articulated by critical race, Indigenous and feminist law scholars, to explain how narrative and narrative genres are implicated in RSD and the politics of whom states cast as the 'credible' refugee. It also presents a working definition of narrative and of the 'model' Anglo-European narrative form, which I argue shapes the reception and assessment of testimony. In making a case for the use of narrative methods in evaluating refugee decision-making, the chapter critiques aspects of the 'law and literature' project that present storytelling and narratives either as distinct from legal discourse or as necessarily disruptive of law's authority.

Chapter 3 addresses the history of the refugee oral hearing in Australia and Canada. It explains how and why the oral hearing became a central event within RSD processes in each jurisdiction and traces the role of refugee testimony up until the introduction of a

Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia (Oxford University Press, 2014).

[94] Grant and Rehaag, above n 13.

[95] For examples of such rhetoric in Canada and Australia, see Anthea Vogl, 'A Matter of Time: Enacting the Exclusion of Onshore Refugee Applicants through the Reform and Acceleration of Refugee Determination Processes' (2016) 6(1) *Oñati Socio-Legal Series* 137.

semi-independent administrative process for RSD and into the present day. In setting the scene for my analysis of hearings before the IRB and former RRT, the chapter demonstrates that the introduction of an oral hearing before a semi-independent executive decision-maker in both jurisdictions represented a shift towards enhanced administrative rights and justice for onshore refugee arrivals. However, the chapter also establishes that formal RSD procedures were introduced as both states became increasingly focused on the deterrence of refugee arrivals and limiting onshore claimants. In both jurisdictions the same legislation that introduced statutory RSD procedures also implemented harsh new modes of refugee deterrence. Particularly in Australia, the hearing itself was implemented alongside mandatory detention and presented quite explicitly as a means to both insulate executive decision-making from judicial interference and identify and exclude 'bogus' claimants.

Chapters 4–7 form the heart of the book. Each chapter is dedicated to putting narrative to work in analysing the assessment of refugee testimony in the oral hearings and dataset. Chapter 4 argues that a distinct 'stock story' of who refugees are and how they behave featured throughout the observed hearings. This story, which I name the 'stock narrative of becoming a refugee', is one of refugee departure, flight and arrival and exemplifies the elements of model Anglo-European narrative forms presented in Chapter 2. Implicitly or explicitly, in form and content, the refugee stock story formed an all-too-neat normative standard against which refugee applicants' evidence – and credibility – was tested and judged.

Chapter 5 shifts from examining the demand for a particular refugee story during the hearings, to considering how narratives were used to test oral evidence. It presents a key finding from the hearings: that decision-makers often engaged in 'narrative contests' with the applicant, presenting their own counter-narratives of how events *should* have taken place if the story presented were to meet the credibility standard of plausibility. The chapter details how the criterion of 'plausibility' forges a direct link between credibility assessment and the narrative form, as well as the minimal law or policy that governs the testing of oral evidence during the hearing in Australia and Canada. In the chapter, a laptop, an injured shoulder and an escape from state custody all become subjects of and opportunities for narrative contestation. When engaging in these narrative contests, the narrative expectations of decision-makers were often deeply subjective, idiosyncratic and unpredictable. Decision-maker 'questioning' went beyond asking refugee applicants for further information or explanation. Instead, the hearings involved decision-makers presenting alternative, hypothetical accounts of events that would have taken place, if the story (and by implication the applicant) were credible. This chapter also demonstrates that in navigating these exchanges, certain applicants displayed high levels of agency and resistance vis-à-vis decision-makers' own narrative assumptions and their vast power to direct the applicant's evidence and the hearing.

These connected themes – of decision-makers' discretionary control over the hearing and applicants' attempts to control their evidence – are addressed in detail in Chapter 6, which takes up narrative theory's attention to the conditions for narration, audience and context. In this chapter, I argue that applicants' testimony was frequently and severely fragmented due to the structure and conduct of the hearing, the control exercised by decision-makers, and the manner and style of their questioning. The process of narrative fragmentation leads to the finding that, in the majority of hearings observed, the applicant was both expected to present testimony in a narrative form and then actively impeded from doing so. Further, where applicants displayed confidence and an ability to present evidence in a narrative

form – to 'argue and justify'[96] their own story – this was done in spite of, rather than because of, the structure and setting of the observed hearings.

Chapter 7 returns to an argument articulated in Chapter 1, namely that interrogating narratives within the hearing in terms of their (overlapping) genres, and with attention to implicit and explicit generic aspects of decision-makers' appraisal of testimony, provides further insight into the 'authentic' refugee whom state authorities are willing to accept. The chapter takes up Joseph Slaughter's engagement with the genre of human rights discourse, and his argument that we can understand the conception of human personhood evident within human rights discourse through the genre and plot of the *Bildungsroman* (the realist novel).[97] The chapter shows that Slaughter's account of the realist novel's plot trajectory, involving 'the movement of the subject from pure subjection to self-regulation' is evident in the testimonial forms required of refugee applicants.[98] Like the protagonist of the classic *Bildungsroman* and human rights narratives, refugee applicants were expected to narrate a linear progression from 'outsider' status towards full civic incorporation through the seeking of protection and the resolution of refugee status.[99] In this generic mode, the 'good' refugee's story moves steadily towards a resolution that *is* the seeking of refugee status and thereby, the realisation of a liberal personhood, marked by self-possession and autonomy, and readiness to become a refugee-citizen.[100] Finally, following what Agnes Woolley has described as 'the entanglement of literary and legal technologies in the asylum decision-making process', the conclusion (Chapter 8) returns to the book's central questions and arguments.[101] It considers the implications of the book's findings for the conduct and place of oral hearings within RSD, and the impossibility of a just assessment of refugee applicants' oral testimony against the current credibility criteria and the direct link between such criteria and a global politics of refugee deterrence, punishment and exclusion.

Presenting Refugee Testimony and the Oral Hearings

Every hearing included in my dataset involved an interpreter, even though at times the applicant spoke in the language of the Board or Tribunal (English or French). In the hearing excerpts reproduced here, I have edited out all speech not conducted in English but attempted to preserve the presence of the interpreter by indicating where the applicant is speaking directly and where the interpreter is speaking on behalf of the applicant. In each excerpt, I use the term 'Applicant' to denote where the interpreter is speaking for the applicant; 'Applicant in person' to denote where the applicant is speaking directly; and 'Interpreter' where the interpreter is speaking directly. The terms 'member' and 'advocate' are used in their ordinary sense.

[96] Barsky, above n 88.

[97] Joseph R Slaughter, 'Enabling Fictions and Novel Subjects: The Bildungsroman and International Human Rights Law' (2006) 121(5) *Publications of the Modern Language Association* 1405; Joseph R Slaughter, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (Fordham University Press, 2007).

[98] Slaughter, *Human Rights, Inc.*, above n 97, 7–9.

[99] Ibid 249.

[100] Mutua, above n 77, 201; and see Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2013).

[101] Woolley, above n 2, 378.

In this research, I present segments from individual hearings after contextualising them in relation to the applicant's claim, and where relevant, in relation to the conduct and sequence of the hearing. I note that the excerpts, in some instances, are quite long. They are often more than mere snippets and extend beyond a couple of lines of transcript. I have included these longer excerpts to convey a sense of the hearings and the dialogue within them – as messy or confusing as these exchanges at times were – and to preserve as much as possible of the affect and tone of the exchanges.[102] Of course, 'preserving' the hearing is not possible especially given the use of excerpts, the move from speech to text, and in absence of the interpreter's non-English translations. Hopefully, though, in the longer exchanges something more than the mere text is apparent, and the data adds value to the existing archive of published decisions, hearing summaries and brief excerpts from hearing transcripts. While some written decisions in Canada and Australia include short, verbatim excerpts from the hearings, they predominantly include the decision-maker's highly condensed summary of evidence, which in turn becomes the official and only record of the applicant's testimony and is yet another example of the decision-maker's role in co-producing testimony that is finally attributed to the applicant.

Finally, in writing on the law of RSD, and state-based procedures for judging refugee lives and entitlements, it is difficult to escape state-centric language and terminology. I primarily refer to the people included in this study as 'refugee applicants' because of my narrow focus on their interface with institutional processes for RSD and the domestic and international law that governs these procedures. At times I refer to 'irregular' or 'undocumented' migrants, but do so when explicitly referring to or analysing state-centric categorisations of people who seek to cross borders. I use the modifier 'onshore' to refer to all refugee applicant participants in my research. In Canada, those who seek status within Canadian territory are often called 'inland' (or sometimes 'point of entry') claimants. In Australia, they are called onshore applicants. I use the Australian terminology for the sake of consistency and clarity throughout the book. An appendix outlining the fundamental elements of each claim, including the applicant's country of origin, gender, alleged grounds of persecution and the hearing outcome is included at the end of the book.

[102] I note that I have included non-verbal aspects of the hearing, including pauses and some interpretations of tone and emphasis, in square brackets within the dialogue. While transcription conventions advise one not to 'interpret' tone, at times I have included my own interpretations – both because these struck me as valuable details as I observed the hearings, and because a 'pure' representation of dialogue and tone is beyond my reach in any event.