Legalizing Sexuality

Canadian Refugee Law, Queer Bodies & the National
Imaginary

by

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Abstract

Contemporary discourse on queer refugees expose continued systematic criminalization, discrimination and persecution that is reinforced through notions of inclusion and exclusion. The fear of persecution contributes to asylum seekers moving across political boundaries and confronting borders protecting the national imaginary of the state. This project explores the relationship between law and identity as it pertains to sexual orientation-based refugee claims in Canada. The theoretical frameworks of critical queer theory, critical feminist theory, and homonationalism illuminate the ways in which queer identities and practices are legally categorized to construct and protect the national imaginary. Fundamental flaws within the refugee apparatus coincide with assumed categories of sexual orientation and gender in legislation and case law, revealing interwoven relations of power. Through law, the state defines the space of habitation where layers of identity categories establish exclusion. Those excluded from the national imaginary are vulnerable to the dangers of discrimination and persecution.

Introduction

On September 3rd, 2015, the dead body of a 3-year-old Syrian boy was found on a Turkish beach. The boy and his family were rejected refugee claimants intending to seek protection in Canada.¹ On July 17th, 2016, Ugandan tabloid *hello!* published a story that outed Yvonne Niwahereza, putting her life in danger and criminalizing her sexual orientation as a lesbian. Her refugee claim to Canada was initially denied, so an appeal is being made for her protection.² On March 5th, 2017, with temperatures in Manitoba averaging -15C, Mamadou trekked through the thick forest from the United States into Canada with the hopes of seeking refuge. Mamadou was found severely frostbitten and improperly sheltered on the Canadian side of the border. As he initially tried to cross into Canada *legally* but was denied access because of the Safe Third Country agreement, an illegal crossing was his only option. Mamadou now faces possible deportation to his country of nationality, the Ivory Coast.³ Narratives of legal limbo, disbelief of claimants' stories, and significant risks taken by asylum seekers are not the only stories nor are these stories new. Rather, these stories reflect an ongoing global system that creates spaces of illegality, criminality, and a future of uncertainty for those at risk of becoming refugees.

¹ Slattery, Jill (2015). "Syrian toddler who drowned fleeing country with family was rejected from Canada." *VanCity Buzz*, accessed at: <http://www.vancitybuzz.com/2015/09/drowned-syrian-boy-refugee-rejected-from-canada/>.

² Keug, Nicholas (2016). "Gay Asylum Seeker Fears for Her Life if Deported to Uganda." *The Star*, accessed at: <https://www.thestar.com/news/immigration/2016/09/29/gay-asylum-seeker-fears-for-her-life-if-deported-to-uganda.html>.

³ Montpetit, Jonathan (2017). "Mamadou's Nightmare: one man's brush with death crossing U.S.-Quebec border." CBC News, accessed at: <http://www.cbc.ca/news/canada/montreal/safe-third-country-agreement-mamadou-quebec-border-trump-1.4023285>.

Global regimes of power and ideology embedded within the masculine hegemonic neoliberal⁴ system situate people into categories. These categories automatically create boundaries between who is incorporated into the category and who is excluded. Moreover, such boundaries may cause people to exist between categories due to the complexity of peoples' identities, experiences, narratives, and histories. Boundaries can both restrict the mobility of people across territorial boundaries as well as the movement of identities across ideological boundaries. For some migrants such as queer refugees, they are mobile in more than one way. "The crossing of borders through migration provides space and permission to cross boundaries and transform their sexuality and sex roles."⁵ Migration is both a spatial transformation of place and a conceptual transformation of identity, whereby the mobile body establishes a new sense of belonging in a new space. One form of migration is the category of refugee and asylum seekers. This legally defined category in part, becomes the identity of the subject that creates a universalized notion of experience and external assumptions regarding the narrative for all refugees. In general, a refugee holds the responsibility of proving the possibility of persecution in their home country or country of habitual residence. The narrative must prove that the country of origin is violent, backward, and discriminatory. Canada's position within the global refugee

⁴ For the purposes of this paper, neoliberalism will refer to the political-economic policies used to shift societal and economic factors to the private sector from the public. See Green (2011); MacPhail & Bowles (2008). These factors include, but are not limited to: health care, education, transportation, research funding, and so forth. The social piece of neoliberalism, for the purpose of this paper, refers to the greater individualization of responsibility and private ownership over material goods. This broad and general definition is influenced by critical feminist economists, anthropology, sociology, and critical queer theory, critical legal theory. See Lyon-Callo (2008); Farmer (2004).

⁵ Stychin, Carl (2000). "A Stranger to its Laws: Sovereign Bodies, Global Sexualities, and Transnational Citizens." *Journal of Law and Society*, 27(4): 601-25. P. 604. See also Oliva Espin (1999)

system operates within the international nation-state system and the boundaries that define exclusion and inclusion.

Some of the most vulnerable people in the world, asylum seekers and refugees, rely on these systems and structures to provide protections.⁶ Refugees are categorized into a socio-political limbo by legislation and political discourse, thus making them vulnerable to a form of statelessness.⁷ Moreover, available protective mechanisms, such as human rights, are blocked by ideological modes of social organization such as criminalization, illegalization, xenophobia, racism, homophobia, transphobia, and so forth. Together, these elements construct national boundaries acting as the political fences that enclose citizens within a given state, while simultaneously excluding those outside the borders. Political boundaries are reinforced by national immigration, refugee, and citizenship laws, defining whether a potential individual or group of people are included within political and social spheres or excluded as the *deviant other*. For the deviant other, they are left in legal limbo, a grey area within the black and white discourse of law.

In this thesis, I explore the relationship between law and identity as it pertains to sexual orientation based refugee claims in Canada. Through the theoretical frameworks of critical queer theory, critical feminist theory, and the concept of homonationalism, I illuminate the ways in which queer identities and practices are legally categorized to construct and protect the national

⁶ This project will not include a substantive discussion of agency within the refugee and asylum seeker context. However, it is important to note that agency does exist for each person or group seeking asylum. The actual *level* of agency varies according to those fleeing persecutions and therefore requires a substantial and comprehensive discussion that goes beyond the scope of this paper. Vulnerability of claimants is not to suggest that refugees have not agency. Nor, am I suggesting that they have absolute agency.

⁷ See Gündoğdu (2015) for a comprehensive analysis and interpretation of Hannah Arendt's discussions of statelessness, rightlessness, citizenship, and the space between access to rights and legal limbo.

imaginary. Identity is integral to both refugee claims and the national imaginary, however, identity requires comprehensive interrogation and interpretation by legislatures, judiciary, and IRB board members in the context of the refugee. In addition, the very identities implicated in a queer refugee claim ought to be contextualized within the cultural, political, legal, and social space that contributed to certain *queer bodies* requiring protection. This project is predominantly theoretical to show the broad discourse on the topic of queer asylum claims. More specifically, I highlight fundamental flaws within the refugee determination regime and legal system in Canada. Employing my theoretical framework to deconstruct the legal cases, I clarify the need to interrogate the concepts of sexual orientation and gender identity within the law. By interrogate, I mean a deconstruction and thorough understanding of these concepts as they are interpreted in complex processes such as refugee determination. A deconstruction of identity within the legal sphere means that categorical boundaries on who is allowed in will remain; however, those boundaries will incorporate a more inclusive knowledge of queer identities as they exist across cultures. It also means that the implications of refugee claim decisions are clearly comprehended by the decision makers, such as the IRB board members or the appeal courts. This project does not provide a roadmap for an idealistic conceptualization of purely open state borders,⁸ rather it shows that fundamental to a more inclusive state is a redefining of the national imaginary through the imaginations of refugees, immigrants, and citizens.

Within the refugee law context, exploring how the categories of sexuality and gender identity are taken up in legislation, court cases, and legal decisions expose the interwoven relations of power that exist between social life and legal life for citizens and non-citizens. As

⁸ An idealistic conceptualization of purely open state borders is an idea I support. However, given the scope of the project and the required articulation of such a future, I am not able to pursue such theorization here.

noted by Dhamoon, “sexual orientation as a system of sign-making [means] it becomes possible to examine the broader organization of privileging and subordinating systems of meanings and the effect of this on identities and social positions.”⁹ Citizenry acts as a significant form of humanization through the access to rights and responsibilities, but more directly, in defining the accepted individual identities that interact to create a spatialized national imaginary. Thus, the state becomes a space of habitation where layers of identity and performance categories interact within ideological modes of social organization or are categorized and excluded as the undesirables. Those excluded become essentially stateless or excluded from the national order and increasingly vulnerable to the exploitations and dangers of discrimination and persecution.

Positionality of Author

My interest in the topic of sexuality, refugees and stateless people based on categories of identity, ways of being, and so forth, emerged in a first-year cross-cultural course on sexuality and gender. Two years later I had the opportunity to work with young-adult refugees, where I was a part of the sponsorship and support team. During these early years of university, I “came out” as gay. Living in a northern community in British Columbia, I began to sense a need to speak out regarding issues of discrimination relating to sexual orientation, gender identity, racial and ethnic history. As a white male, I have challenged myself academically and personally by engaging with strong female voices and people of colour to deeply understand my power and privilege in Canada and the world.

My challenge in writing this paper is ensuring I include a diverse array of narratives and perspectives. Situating oneself within your privilege that shapes ideological perspectives on how society ought to be is a difficult and ongoing process. I also feel that my position as a gay man

⁹ Dhamoon, Rita (2006) "Shifting From 'Culture' to 'the Cultural': Critical Theorizing of Identity/Difference Politics." *Constellations*, 13(3): 354 - 373. P. 368

helps provide a lived experience perspective on parts of this work, while being objective and distant from other parts of this work. I am not a person of colour nor have I ever been a refugee. However, I have faced discrimination and the need to *cross social boundaries*. I chose to identify my position for this project because of the contentious and precarious concepts I am working with.¹⁰ In doing so, I provide the reader with an understanding of who authored the project by highlighting possible biases that shape the ways in which I engaged with the material. Moreover, I see it as an opportunity to simultaneously highlight my emotional connection to a portion of the topic, specifically the queer discourse, while also highlighting my more objective position to the topic of refugees and immigration. This thesis is not simply another theoretical academic discussion. Although at face value that is the objective, this project delves into the material reality of oppression, criminalization, normalization, conceptions of deviancy, the role of the state and law, and identity formation of people categorized within lower classes, visible minorities, and invisible minorities.

Outline

This project will be separated into several parts. First, I provide a theoretical analysis, chapter 1, beginning with an examination of discourse on categorization, power, and hegemony as these provide the foundation for *how* identity is constructed socially and legally. This foundation elevates integral discourses on sexuality and identity within the context of the state (re)production of a national imaginary. I then explore categorization within the legal sphere, first

¹⁰ In some respect, most research projects across disciplines ought to include a position statement. This statement reflects where there might be gaps in knowledge based on emotional connection or disconnect. Though some may disagree with a position statement, I have determined that it is important and necessary, specifically for this project and for other projects as well.

with a discussion of citizenship theory and law and then a discussion of immigration and refugee theory and law. This theoretical compilation and dialogue brings together theories and theorists from a range of perspectives that provide the framework to expose the relationship between identity and law. The theoretical discussion is followed by the methodological approach to the data required to put the theory into practice. Using the Canadian sexual minority refugee determination system, I expose fundamental tensions between law and identity by analysing critical discourses as they intersect in refugee legislation and some refugee claim decisions. I conclude by broadly arguing that the ways in which law and identity interact is fundamentally flawed, as is shown by substantial problems in the refugee legal system. I suggest avenues of additional discourse and the requirement for further scrutiny in the context of Canada, law, and identity.

The methodological section, chapter 2, addresses the ways I explored and chose specific cases and statistical data, using federal court cases and basic refugee claim statistics to supplement and further illuminate the issues exposed through my theoretical framework. This framework helped prioritize what data was important and how to analyze the data, which includes refugee claims and legislative changes or amendments. The statistical data shows the number of refugee claims within the specified timeframe. My theoretical framework shaped the search terms used for gathering the number of refugee claims and the organizations and theorists required for statistical and legislative analysis. Determining which cases to use was based on either their importance in case law, their importance in future legislation, or their ability to expose the issues in queer refugee claims.

Chapter 3 engages with the legislative histories of immigration, refugee, and citizenship laws and their role within an interacting system that shapes and reshapes the national imaginary.

The evolution of the national legal sphere is shown to be partly shaped by the evolving ebbs and flows of international legal state actors. These legal state actors, include but are not limited to, the United Nations (UN)¹¹, the United Nations High Commissioner for Refugees (UNHCR)¹², and international conventions, treaties, and agreements. Canada's legislation regarding immigration, refugee, and citizenship law embodies sexual orientation and gender identity discourse as it evolved through case law and legislative amendments. Going beyond the theoretical discussion of chapter 1, this chapter will act as a bridge between theory and practice. By linking critical discourse and practical actualities, it provides both a humanized picture of the current refugee system in Canada and a way of visualizing the ways in which law is driven by legal knowledge and processes, the social sphere, and political sphere.

Finally, I conclude that the many discrepancies in queer refugee claims reflect broader issues of law and identity, whereby, law is not necessarily the best approach to dealing with issues linked to identity. I do not propose eliminating identity categories within the legal sphere, specifically for refugee claims. Nor do I propose an elimination of law. Instead, I push for more transparency in our institutions and processes that determine refugee claims. I further push for more education and training, not just for Board members in the IRB, but for policy makers and legislators, as they are all a part of the legal machinery, and responsible for the necessary changes in the law. Greater inclusion means that there are those still excluded; however, the more comprehensive and informed the legal sphere becomes, the more humane the claims process will be for asylum seekers. Many court rulings and legislative amendments have attempted to include queer identities and question current heteronormative structures. However,

¹¹ United Nations High Commissioner for Refugees (2017), accessible at: <http://www.un.org/en/index.html>.

¹² United Nations (2017).

these court rulings and legislative amendments fall short in being able to dynamically ensure the terms that define Canada's borders are comprehensively defined. By comprehensively, I mean legal terminology ought to account for the many ways in which space, place, time, notions of belonging, and the human right to be able to live without concealing yourself, while also accounting for subjective interpretations by state actors. Legislation changes and case law developments tend to fall short of deconstructing identity terms, opting towards addressing bureaucratic or administrative issues instead. Therefore, this project focuses on the legal sphere, but emphasizes the intricate relations between the law, institutions, and subjective interpretations of the IRB members. Further research and socio-legal deconstruction of Canadian law and Canadian institutions will determine the best next steps for policy, law, and the refugee determination process.

Theory

Categorization, Power, Masculinity

Critical queer theory overlaps and is influenced by critical feminist theory, critical legal theory, post-structuralism, and critical race theory. These overlapping theoretical lenses provide a point of analysis to illuminate legal categorization of identities that include sexuality and gender identity, grounded in power relations that embody racialization and discrimination. Evolving out of queer theory and critical race theory, the concept of homonationalism compliments this analysis by further drawing upon contemporary theories of queer identity in relation to the state. Together these approaches provide a way of illuminating the socially constructed roots of heteronormativity and the emerging issues of homonormativity as they influence the creation and shaping of Canadian refugee, immigration, and citizenship legislation. In addition, this framework illuminates the relationship between legislation and categories of identity that are interwoven with assumed and accepted practices, behaviours and norms. The purpose of deploying multiple theoretical lenses ensures the discussion is not *categorically bounded*. To only use one theoretical lens simply isolates discourse, therefore, this project attempts to challenge rigid boundaries for interpreting what directly and/or indirectly shapes identity and ultimately constitutes the national imaginary.

Adopting a critical queer theory framework highlights the complex interplay between identity, institutions, law and the ways in which *unbounded* identity becomes violently bounded to enforced legal categories. Institutionalized normative identity categories exclude other categories or ways of being in spaces of liberal inclusion. The spatiality of identity produces material and immaterial or abstract conceptions of the “good queer,” “good citizen,” “good immigrant,” and so forth. To expose the ways in which categorization is created and thus

exclusionary,¹³ I focus on the categorization of identity through law. I emphasize how the role of masculinity shapes and is shaped by these institutions of power that consequently define the roles of femininity. In addition, I illuminate the role of masculine hegemony as the orchestrator of shaping heteronormative and increasingly, homonormative conceptions of “queer identities” that include performances, race, ethnic history, culture, social class, academic merit, and so forth. These normative identity categories are legitimized by the liberal state and are reflected in law; however, the epistemological foundation of these identity categories is unable to account for the fluidity of identity because legal categorization requires rigid boundaries.

In addition to examining the implications of these categories as they are manifested in citizenship, immigration and refugee law, I also explore their relationship to administrative law.¹⁴ Administrative law is generally the legal arena where individuals or groups directly negotiate with their identities and ways of being. Administrative law acts like the *frontline worker* of the legal sphere. Law is used to enforce our border and regulate the social relations of citizens through the categorization of “legitimate” identities and performances. Law employs the legitimization of state and majority consent to externally enforce defined identity categories that establish inclusive norms and exclusive deviant identities, expressions, and practices. Critical

¹³ For the purposes of this project, my examination of critical queer theory and feminist theory does not involve an exhaustive literature review, nor does it suggest these are two homogeneous bodies of scholarship. Instead, this project relies on the work of several primary scholars in these fields.

¹⁴ Administrative law regulates the day-to-day relations and operations between institutions of the State and the individual. Administrative law affects a wide range of public policy and regulation that is broadly approved and established by the legislators. These areas of concern include, but are not limited to: labour, health and safety, consumer and environmental protection, Human Rights, and privacy. These areas of Administrative concern overlap more broadly with areas of security, immigration, citizenship, trade, and so forth. For further reading, please see Fitzgerald, Patrick, Barry Wright, & Vincent Kazmierski (2010), “Looking at Law: Canada’s Legal System.” 6th Ed. *LexisNexis Canada Inc.*

scholars and activists continue to problematize certain categories of law and the ways in which the institution of law functions as a form of normalizing control.

Critical queer theory attempts to destabilize established identity categories and the ways in which people represent and perform their identity, and, more specifically, how states use law and hegemonic ideological structures to enforce these categories. Moore and Rennie state that critical queer theory and post-structuralism expose how “identity proves fluid and ill defined.”¹⁵ Jeffrey Weeks provides a conceptual framework for understanding sex, gender, and sexuality. Weeks argues that critical queer theory challenges individualizing explanations for gay abjection and more broadly, other categories of *Queer* identity.¹⁶ Sexuality is about the interplay between the body and society, a cultural invention that embodies temporal shifts in meaning.¹⁷ McLaughlin et al. (2006) shows that:

Queer writers explore the deconstruction and fluidity of transient identities and feminists explore the materiality of the body and the things done to women’s bodies such as rape and violence. The politics of queer are said to center on local activities of performative transgression, within which cultural realms tend to dominate, while for feminists the point of political engagement continues to aim for resonance with global struggle and the intent to participate in the state, political and economic arenas.¹⁸

Therefore, sexuality becomes a mechanism or tool to expose the various heteronormative and neoliberal assumptions of the individual. Furthermore, queer theory tends to separate gender and

¹⁵ Moore, Dawn, and Angus MacLean Rennie (2006). “Hated Identities: Queers and Canadian Anti-Hate Legislation.” *Canadian Journal of Criminology and Criminal Justice*, 48(5): 823-836. P. 823.

¹⁶ Weeks, Jeffrey (2011). “The Languages of Sexuality.” *Routledge*: New York, p. 2.

¹⁷ Mottier, Veronique (2008), p. xi-xii

¹⁸ McLaughlin, Janice, Mark Casey, & Diane Richardson (2006). “Intersections between Feminist and Queer Theory.” *Palgrave MacMillian*: Melbourne. p. 3.

sexuality categories which creates an opportunity for discussion within mainstream liberal feminism and the broad approach feminism takes in situating gender and sexuality together.¹⁹

Feminist theory attempts to dismantle the hegemonic masculine patriarchy that oppresses and subdues the feminine other. Feminist theory emerged as a way for female voices to be heard, predominantly the white liberal feminist voice. However, the voices of women of colour, queer women, and so forth have emerged as integral analytical frameworks within feminist theory. These additional voices have created a tension between the inclusion of race and white privilege in feminist discourse. Generally, feminism is concerned with power and social inequality.²⁰ Divergent from queer theory, feminist theory often positions sexuality as a part of gender. MacKinnon asserts that

Implicit in feminist theory is a parallel argument: the molding, direction, and expression of sexuality organizes society into two sexes: women and men. This division underlies the totality of social relations. Sexuality is the social process through which social relations of gender are created, organized, expressed, and directed, creating the social beings we know as women and men, as their relations create society.²¹

MacKinnon shows that sexuality is a mechanism of organization and categorization that exists, like relations of power, to construct the ways in which differentiated identities are controlled. Some feminist writers argue that situating sexuality within gender contradicts the primacy of gender in order to capture structural gendered oppressions shaping women and men's lives.²² At the "core of feminism is a struggle against the historical constitution of individual [masculine] identity with its collapse of the female into the biological or into the *naturally* ordained realm of

¹⁹ See Eve Sedgwick (1990); Gayle Rubin (1993).

²⁰ Catherine MacKinnon (1991). "Toward a Feminist Theory of the State." *Harvard University Press*: Boston. P. 4.

²¹ MacKinnon (1991), p. 3.

²² McLaughlin, Janice, Mark Casey, & Diane Richardson (2006), p. 3.

the functional.”²³ The conflation of sexuality with gender means that the discourse of sexuality and power often excludes gender as a construct of these discourses.²⁴

In the concomitant sexual paradigm, the ruling norms of sexual attraction and expression are fused with gender identity formation and affirmation, such that sexuality equals heterosexuality equals the sexual of (male) dominance and (female) submission.²⁵

Queer theory separates discourses of sexuality and gender in order to further differentiate the ways in which layers of identity categories and social processes accompany unique forms of oppressions, exclusions, and normalizations. Feminist theory conflates sexuality and gender to illuminate the ways in which sexuality discourse assumes specific paragons for sexual orientation and gender that disregard the less desirable.

Feminist theory has evolved over decades of tensions and deconstructions of gender to include a plethora of streams and branches. The 1960s use of “the personal is political” by mainstream liberal feminists stimulated debates about the public/private divide.²⁶ These debates have challenged mainstream liberal feminists to step back from their emphasis on the “liberal system of individual rights,” and engage with “other feminisms” such as post-structuralism, socialism, Marxism, Chicana, and Black lesbian.²⁷ For example, Kimberley Crenshaw asserts that the tension between racial identity and sexual identity is exposed through more privileged members, whereby black women are theoretically erased.²⁸

²³ Weed, Elizabeth (1989). “Coming to Terms: feminism, theory, politics.” *Routledge*: New York. P. xiii.

²⁴ MacKinnon (1991), p. 131.

²⁵ MacKinnon (1991), p. 131.

²⁶ Weed (1989), p. xiv.

²⁷ Weed (1989), p. xii.

²⁸ Crenshaw, Kimberle (1989). “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics.” *Chicago Legal Forum*. Pp. 139-167.

To say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people - and indeed one of the projects for which postmodern theories have been very helpful - is thinking about the way power has clustered around certain categories and is exercised against others.²⁹

Crenshaw asserts that the tensions within categories are problematic, however, deconstructing the power clustered around certain identity categories provides an opportunity for resistance. The *Combahee Rivers Collective* published a report in 1979, stating that “contemporary Black feminism is the outgrowth of countless generations of personal sacrifice, militancy, and work by our mothers and sisters.”³⁰ Finally, post-colonialist feminists, Ann Laura Stoler and Gayatri Spivak include the history of colonialism and contemporary empire that illuminates the centrality of state borders. Stoler asserts there is a “colonial politics of exclusion” encompassing citizenship, indigeneity, and race or whiteness, whereby “sexuality illustrates the iconography of rule, not its pragmatics.”³¹ For Spivak, post-colonial feminism has the potential to reinforce political domination.³² These varying feminist discourses contribute to problematizing gender, sexuality, legal categories and the role of the state by exposing power relations and hierarchies.

In conjunction with these varying theorizations of cultural and social process, political and social shifts contributed to literal changes for the lives of women, queers, people of colour, and other marginalized groups. During this period (white) men who traditionally had access to

²⁹ Crenshaw, Kimberle (1991). “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour.” *Stanford Law Review*, 43(6):1241-1299. P. 1296.

³⁰ Combahee Rivers Collective (1979). “A Black Feminist Statement.” *Off Our Backs*, 9(6): 6-8. P. 6.

³¹ Stoler, Ann Laura (1989). “Making Empire Respectable: The Politics of Race and Sexual Morality in 20th Century Colonial Cultures.” *American Ethnologist*, 16(4): 634-660. P. 635.

³² Spivak, Gayatri (1988). “Can the Subaltern Speak?” In *Marxism and the Interpretation of Cultures*, Eds. Cary Nelson and Lawrence Grossberg. *University of Chicago Press*: Chicago. P. 272.

all categories experienced a “renegotiation of the terms to access the divide,” even though femininity continues to be viewed as personal and private.³³ The renegotiation for white men refers to changes in gender roles coinciding with changes in gendered responsibilities and ultimately in the ways in which gender (and to an increasing extent sexuality) is experienced within the public sphere. “Everything becomes political through the transformation of the categories of the political and the personal, the gendered personal being.”³⁴ Thus, by bringing the feminine, queer, or racialized other out of the private sphere, associated identities and practices become public and therefore, political, essentially moving *towards* the stature of masculinity, heterosexuality, and whiteness. In a sense, the politicization of these categories must perpetually *come out* of the private sphere closet, blurring an already binary way of thinking.

These developments in feminist theory, through the inclusion of race, post-colonial studies, Black feminism, lesbian and gay studies, and so forth, contributed to the evolution of critical queer theory. Primarily, critical queer theory emerged out of feminist theory’s challenging of gender essentialism and the categories embroiled in power and knowledge production.

Categorization shapes the roles and responsibilities of individuals within relationships of power interwoven in the social and political spheres. Dipesh Chakrabarty refers to Karl Marx’s conceptualization of categories, where “even the most abstract categories, despite their validity – presumably because of their abstractness – [are] products of historical relations.”³⁵ Through Marx, Chakrabarty highlights the temporal elements of categorization, and the universal category

³³ Weed (1989), p. xiv.

³⁴ Weed (1989), p. xiv.

³⁵ Chakrabarty, Dipesh (1992). “Provincializing Europe: Postcoloniality and the Critique of History.” *Cultural Studies*, 6(3): 337–357, p. 338.

of capital.³⁶ “All past histories are now to be known, (theoretically, that is), from the vantage point of this category, that is in terms of the differences from it.”³⁷ However, Chakrabarty does not explicitly consider possible power relations or hegemony that exists within the categories of capital. Spade states how categorization acts to organize and sort the population based on characteristics.³⁸ Valentine’s ethnography works along these parameters, as he exposes the flawed assumptions associated with top-down categorization. The use of categories to organize and control people has been criticised and analyzed within many disciplines. What is the discourse by critical queer and feminist writers on categorization? How are categories deployed in the production of normative identities? What are the ways in which categorization occurs through hegemonic power structures that exist within and between individuals and the individual and the state? What is the role of the individuals and what is the role of the state in legitimizing hegemonies? Why does deconstructing the hegemony and power structures matter for conversations of identity, law and the state?

Hegemony, according to Connell (2016), is a “matter of institutions as well as beliefs,” such as gender segregated schools and systems of law.³⁹ Hegemony is a constant construction, renovation, and contestation of the social structures that oppress and maintain a social order.⁴⁰ For Hearn (2014), hegemony is structural power and ideology encompassing “technical and social relations of production”⁴¹ that prevent the individual from knowing.⁴² Hearn builds on a

³⁶ Chakrabarty (1992), p. 338.

³⁷ Chakrabarty (1992), p. 338. See Marx (1993[1857]: 469-512.)

³⁸ Spade (2015), p. 74.

³⁹ Connell, Raewyn (2016). “Masculinities in Global Perspective: Hegemony, Contestation, and Changing Structures of Power.” *Theory and Society*, 45: 303–318. P. 307.

⁴⁰ Connell (2016), p. 314.

⁴¹ Hearn, Jeff (2004). “From Hegemonic Masculinity to the Hegemony of Men.” *Feminist Theory*, 5(1): 49-72., p. 52.

⁴² Hearn (2004), p. 52. See also Luke (1974).

Gramscian⁴³ concept of power and hegemony, which states that the dominant class in society controls and presses its “definition of the situation.”⁴⁴ Important to Gramsci is the existence of coercion by the authority group, but also the existence of consent by the subordinate groups, which legitimized the power of the ruling class.⁴⁵ Within the Gramscian framework, hegemony is constructed by a web of political actors– the state, the law, capitalists, intellectuals, and so on with a concern for cultural practice.⁴⁶ Hegemony acts on and operates within structures and systems that determine the social relations of individuals based on categories of identity.

Hegemonic masculinity produces categories of inclusion through state legitimized citizenship and migration laws. However, masculinity is not a homogenous set of experiences, behaviours, desires, or ideals. There is no “essence of masculinity which transcends time and space, no single quality which is biological or psychological.”⁴⁷ These temporal and spatial qualities produce the gender categories of masculinity and in parallel shape femininity.⁴⁸ Masculinity becomes further defined by “the subordination of women and marginalized other.”⁴⁹ Butler’s conception of “to be” argues that an individual develops a sense of self in part by

⁴³ Hunt, Alan (1993). “Law, State, and Class Struggle.” In *Explorations in Law and Society: Towards a Constitutive Theory of Law*. Routledge: London, at 17-35. Hunt argues through Gramsci that hegemony is an active process involving consent through mobilization. (179-180). In addition, Hunt rightfully asserts that “the ideological struggle is not simply concerned with the conflict between general theories of society. It is concerned with every aspect of the way in which people think about, react to, and interpret their position...” (180). In other words, hegemony exists within social relations and within the individual social actors as they navigate the private and public sphere.

⁴⁴ Hearn (2004), p. 54.

⁴⁵ Day, Richard (2016). “Hegemony.” In *Keywords for Radicals*. Ed. Kelly Fritsch, Clare O’Connor, and AK Thompson. AK Press: Chicago. P. 187.

⁴⁶ Hearn (2004), p. 54.

⁴⁷ Weeks (2011), p. 110: here Weeks is citing Connell’s (1995: 605) global work on masculinity.

⁴⁸ Weeks (2011), p. 111.

⁴⁹ Connell (2016), p. 303.

knowing “[their] gender through opposition and difference.”⁵⁰ Through opposition to the feminine other, masculinity becomes encapsulated as the epitome of humanness. Femininity does not only refer to women but anyone who is not a white, heterosexual, wealthy male. However, it is important to recognize that masculinity is more complex. Connell and Messerschmidt (2005) call for a recognition of multiple layers, “potential contradictions,” and possible “contradictory commitments and institutional transitions” regarding the production and experiences related to masculinity and masculine hegemony.⁵¹ Masculinity must then be spatialized within the local and global context, interwoven with cultural history and political-economic systems. For example, the shift from the 1970s “neoliberalism (the radical market agenda) to neoconservative (adding populist appeals to religion, ethnocentrism, and security)” in the global north, and “processes of globalization” in the global south, have each had different impacts on gender relations.⁵² Gender relations, according to Weeks, is the intersection of power, production, and emotion.⁵³ There are a “host of masculinities coexisting, and interacting at the same time: hegemonic, subordinate, marginalized, and oppositional, all of which are shaped in specific historical circumstances.”⁵⁴ Therefore, masculinity is (re)shaped by shifts in the very order it created, as gender relations evolve between global pressures and local tensions.

For this project, hegemonic masculinity is recognized as existing in multiple forms, with white, male, dominant masculinity as the quintessence masculinity penetrating the socio-cultural context of Western countries and the global south. As Connell and Messerschmidt assert, there are potentially significant differences in the ways in which masculinity operates within social

⁵⁰ Butler (2006), pp. 30-31.

⁵¹ Connell, Raewyn & James Messerschmidt (2005). “Rethinking Hegemonic Masculinities.” *Gender and Society*, 19(6): 829–859. P. 852.

⁵² Connell & Messerschmidt (2005), p. 854.

⁵³ Weeks (2011), p. 111.

⁵⁴ Weeks (2011), p. 111; see Connell (2005).

and gender relations.⁵⁵ Within Western countries, specifically the United States and Canada, a certain form of hegemonic masculinity continues to subordinate some masculinities and further subvert women, people of colour, and sexually deviant others. Interweaving hegemonic masculinities and the construction of the subordinate other along uneven lines of identity categories, exists relations of power orchestrated by discourses that intimately mingle with the (re)production of knowledge and the creation of categories.

Following Foucaultian scholarship, contemporary forms of categorization are historically produced; they are shaped and reshaped by the connection between power and knowledge. Foucault states, “discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.”⁵⁶ Hunt and Wickham refer to discourse as “elements which make up if not always a coherent totality at least a wider frame of reference.” Discourse involves institutional and social practices that permeate legal categorizations, gender and sexual divisions, and other divisive lines of differentiation coinciding with physical and non-physical discourses. Foucault concerns himself throughout his collection of academic oeuvre with the emergence and history of discourses as a mode of organization. Outlining Foucault’s discussion of discourse, Hunt and Wickham assert how discourses “structure the possibility of what gets included and excluded and what gets done or remains undone.”⁵⁷ On the discourse of sex, Foucault states that multiple discourses of sex have existed, from taboos and prohibitions, to the “solidification and implantation of an entire sexual mosaic,”

⁵⁵ Connell & Messerschmidt (2005)

⁵⁶ Foucault, Michel. 1990 [1978]. “The History of Sexuality Volume 1: An Introduction.” Vintage, Ed. Robert Hurley. *Vintage*: New York P. 101.

⁵⁷ Alan Hunt and Gary Wickham (1994). “Foucault and Law: Towards a Sociology of Law as Governance.” *Law & Social Theory*, Pluto Press: London. P. 8.

nonetheless, this discourse “never ceased to hide the thing it was speaking about.”⁵⁸ In a sense, discourse does not hide, but exposes and shapes the subject or subjects since discourse does not necessarily need to be verbal or written, but can also include acts, experiences, etcetera. Discourse is grounded in the historical evolution of language, social norms, and motilities that change according to power relations and the subsequent knowledge produced.

This discourse of power and knowledge that positioned the masculine as dominant extends back to the Greek and Roman periods. During these periods, language mobilized masculinized ways of organizing and thinking about social relations, ultimately creating categories of knowledge that in-part shape contemporary Western law. Mottier shows how the ancients used categorization to control the masses by situating sexuality at the core of the social and political discourse.⁵⁹ Mottier states, “we draw on [...] categories to make sense of why we are: we define in part through our sexuality.”⁶⁰ Sexuality deceptively functions as an objective form of categorization that employs notions of natural or normal. For Foucault, he introduces the concept of ‘episteme’ to understand the process of organization, categorization, and stability within discourses.⁶¹

Episteme refers to historically enduring discursive regularities, the order, often unconscious, that gives rise to distinctive forms of thought which underlie the intellectual disciplines. The episteme provides ‘grids’ for perception, that is, impose a framework of categories and classifications *within which* thought, communication, and action can occur.⁶²

Hunt and Wickham simplify Foucault’s conception of episteme as a form of organization and categorization that coincide within apparatuses and social practices, asserting that Foucault is

⁵⁸ Foucault (1990[1978]), p. 53.

⁵⁹ Mottier (2008), p. 5.

⁶⁰ Mottier (2008), p. 1.

⁶¹ Hunt & Wickham (1994), p. 9.

⁶² Hunt & Wickham (1994), p. 9.

concerned with “the relationship between ideas and practices.”⁶³ Law as an apparatus broadly envelopes the public and private life, acting as the episteme grid within which perceptions of identity categories are created. Just as Mottier shows the Ancients use of sexuality in categorization of the masses, Foucault shows how the contemporary forms of sexuality embody this historical process of categorization and organization. Sexuality, sexual orientation, gender, performance of the self, and identity including race, ethnicity, citizenship, aesthetic, age, ability or lack of ability (both physical and mental), religion, culture, education level, class, masculinity, femininity, homosexual, heterosexual, transgender, bisexual, pansexual, legal sphere, political sphere, social sphere, public sphere, private sphere, illegal alien, foreigner, and the *Other* and so forth, are all forms of categorization. Categorization embodies and is the product of historical power relations that coincide with knowledge (re)production in the Foucaultian sense.

Foucault conceptualizes power as between and across all social relations, acting as a regulator, creator, and producer of norms and knowledge. Foucault articulates power not as a negative, but as a source of production. Foucault pushes against the liberal democratic assumption that “all is well whenever and wherever knowledge can flourish independently of power.”⁶⁴ Knowledge is a product and resource of power.

We should admit... that power produces knowledge (and not simply encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations... of knowledge must be regarded as so many effects of these fundamental implications of power/knowledge and their historical transformations.⁶⁵

⁶³ Hunt & Wickham (1994), p. 10.

⁶⁴ Hunt & Wickham (1994), p. 13.

⁶⁵ Foucault, Michel 1995[1977]. “Discipline & Punish: The Birth of the Prison.” *Vintage Books*: New York. Pp. 27-28.

The constitutive effects of power/knowledge construct the episteme grids of organization, communication, and categorization. For example, “the discourses on human sexuality involve linkages of power, knowledge, and pleasure.”⁶⁶ In other words, the categorization of identities within the social, political, and legal sphere are hierarchically designated by external languages and the multiple linkages that further shape these identities.

Foucault states that “[power] produces reality; it produces domains of objects and rituals of truth.”⁶⁷ Power’s production of truth shapes the production of knowledge and the outcomes of ideologically grounded forms of categorical regulation by the state. The regulation of the person by the state includes norm-producing mechanisms such as laws, rules, and policies.⁶⁸ Butler states that the regulation of the person occurs in two ways. First, the regulatory power, specifically the juridical form of power, acts upon, shapes, and forms subjects, essentially having a productive effect.⁶⁹ Second, the subject is “brought into being [...] through regulation.”⁷⁰ For Foucault, this state based regulation is understood as bio-power, the power that exists within knowledge produced through statistics and information gathered by state institutions. Regulation illuminates how power acts upon the human body as the site of control. Foucault outlines the historical role and form of the juridical power as,

For while many of its forms have persisted to the present, it has gradually been penetrated by quite new mechanisms of power that are probably irreducible to the representation of law. As we shall see, these power mechanisms are, at least in part, those that, beginning in the eighteenth century, took charge of men’s existence, men as living bodies. And if it is true that the juridical system was useful for representing, albeit in non-exhaustive way, a power that was centered primarily around deduction and death, it is utterly incongruous with the new methods of power whose operation is not ensured by right but technique, not by law but by

⁶⁶ Hunt & Wickham (1994), p. 13; See also, Foucault 1995[1977], p. 136-138.

⁶⁷ Foucault 1995[1977], p. 194.

⁶⁸ Butler (2004), 40.

⁶⁹ Butler (2004), 41.

⁷⁰ Butler (2004), 41.

normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus... in any case one continues to conceive of it in relation to a power that is always juridical and discursive, a power that has its central point in the enunciation of the law.⁷¹

Juridical power is a tool through which ideological discourse establishes norms that control citizens both within and external to the political sphere. Law, as a mechanism of the state, produces and “prohibits the manifest of sexual desire through sexual practice”⁷² where certain gender identities are excluded from the heterosexualization of desire.⁷³ Practice in this sense is the accepted and legitimized gendered rules, behaviours, and relations defined and regulated by the state through law. Heterosexualization of desire is the “production of opposition between feminine and masculine” within a cultural matrix.⁷⁴ Butler articulates how the category of gender acts along these lines to produce and normalize the masculine and feminine binary.⁷⁵ In this way, masculine hegemony defines gendered experiences and narratives, but also creates a hierarchy legitimized by the consenting political sphere⁷⁶.

Contemporary citizenship in liberal states continues to be defined along lines of gender, race, and sexual orientation that define not simply the good citizen but the good homosexual⁷⁷.

⁷¹ Foucault, Michel 1990[1978]. “The History of Sexuality: volume 1 an introduction.” *Vintage*: New York. Pp. 89-90.

⁷² Butler, Judith (2006). “Gender Trouble: Feminism and the Subversion of Identity.” *Routledge*: New York. P. 23.

⁷³ Butler (2006), p. 24.

⁷⁴ Butler (2006), pp. 24-25.

⁷⁵ Butler (2004), p. 42.

⁷⁶ Hannah Arendt conceptualized the differentiation between political sphere and the private sphere. The political sphere acts as a space where people are viewed as equals, where their differences are removed and they can act equally. However, once the citizen leaves this space, they are bound by the social customs reinforced by culture and society and are no longer equal. See Arendt 1998[1958], 1976[1966], 1963[2006]; Gundogdu 2015.

⁷⁷ Borrowing from the work of Anne Marie Smith’s good homosexual, Stychin (2002) shows how the good homosexual was understood as “law-abiding, disease-free, self-closeting” and “knew their place” (612). This concept is important throughout the discourse of homonationalism as it clearly depicts a specific type of homosexual that is historically rooted the

Jasbir Puar defines this as *homonationalism*, the continued extension of American (Western) nationalism and imperialism by regulation of racialized and queer⁷⁸ identities, within a framework of sexual exceptionalism.⁷⁹ David Murray situates homonationalism within the Canadian context, arguing that the regulation of sexual orientation and gender identity based refugee applicants contributes to hegemonic national Canadian identity myths.⁸⁰ The myths of Canada are international as much as they are national encompassing perceptions of inclusivity, the value of diversity and multiculturalism, and the sense of acceptance of all queer and racialized identities and practices. Homonormativity is the normalization of discourse and practices of homosexual identities and performances. Homonormativity is a politics and process that upholds and sustains dominant heteronormative assumptions and institutions.

Heteronormativity provides an essential framework for understanding hegemony and power that coincides with the principles outlined in homonormativity. Heteronormativity “conceptualizes how multiple, cross cutting variables have shaped possibilities for [immigration].”⁸¹ It normalizes discourse and practices “to cultivate and privilege a heterosexual population,” a population that is considered “natural and timeless.”⁸² Through this process of normalization and naturalization, a “subalternized social group” is produced.⁸³ Socially constructed categories of gender and sexual orientation are contingent on the history of power

1980s Britain. Broadly, it shows the ways in which *normalization* of citizen identities is based on normative ideals that continue to refer back to how a citizen ought to sexually behave, identify, and practice their various identities. So long as they occupy their rightful place and maintain a way of life comparable to the good heterosexual, then there is no issue.

⁷⁸ For a general discussion on the term see: Kouri-Towe, Natalie (2016). “Queer.” In *Keywords for Radicals*. Ed. Kelly Fritsch, Clare O’Connor, and AK Thompson. *AK Press*: Chicago.

⁷⁹ Puar, Jasbir (2007). “Terrorist Assemblages: homonationalism in queer times.” *Duke University Press*: Durham, p. 2.

⁸⁰ Murray, David (2016). “Real Queer?” *Rowman & Littlefield*: London & New York. Pp. 3-5.

⁸¹ Luibheid (2008), p. 296.

⁸² Luibheid (2008), p. 296.

⁸³ Luibheid (2008), p. 296.

within cultural and political spheres. Gender and sexual orientation are monitored through institutions and law, most significantly social service agencies and administrative law. What is hegemonic masculinity in the contemporary sense? What is its role and is this role sufficient in understanding the various oppressions and exclusions experienced by people who identify *outside* of the heteronormative binary?

Categories are not limited to the social sphere, rather, categorization exists within the political and legal spheres and blurs the boundaries of public-private divide.⁸⁴ The panoptic categories of the public sphere and private sphere produce other socially constructed categories such as sexualized and gendered social relations. The public sphere has historically been designated for the white heterosexual male, while the private sphere has historically been designated for the feminine, queer, racialized other. Each sphere establishes different roles for identity categories such as who has access to the rights and responsibilities guarded by citizenship ideology. Returning to my earlier discussion of classical conceptions of citizenship, this historical role of categorizing gender and sexuality determines *who is included* and *who is excluded* from public participation under the law. “The key feature of [the Roman] view of citizenship was equality *under* the law.”⁸⁵ The ways in which states categorically determine who is included to act and participate within the public sphere coincides with the ways in which institutions and laws actively include and exclude people, most significantly women, people of colour, sexual deviants, and so forth.

Through the current system of securitization and criminalization of illegal migrants and social delinquents, processes of inclusion and exclusion determine who is considered permissible

⁸⁴ See Boyd (1997).

⁸⁵ Bellamy, Richard (2008). “Citizenship: a very short introduction.” *Oxford University Press*: New York. P. 29.

and who is considered unworthy. The Ancient Romans situated law above people. In the current Canadian legal landscape, we linguistically position ourselves as below the law. In a sense, law occupies the position of divinity, as it is all seeing and incorporated into the lives and pieces of society and greatly legitimizes forms of organization necessary for unity and control in a liberal democracy. This correlates with the fact that the architects of modern law are often people with significant political and social power and exist within the acceptable layers of identity. Law operates within a jurisdictionally defined space as both a protector and an oppressor of the vulnerable; as a tool for inclusion and exclusion; as an apparatus for shaping the lives of people within a given space as it attempts to bridge contradicting binaries. The vulnerable in Canada include people of colour, (im)migrants, refugees, indigenous people, queer sexual and gender identities, women, children, the elderly, people with disabilities, and so forth.

Theorizing the role of law within specified contexts provide a comprehensive framework for working through sexuality and identity in relation to the state and the ways in which the state uses laws to legitimize belonging⁸⁶, access to rights, and determine the norms of conformity. Through homonationalist ideals and historically grounded heteronormative structures and systems, law becomes a tool that legitimizes the normative conceptions of what people ought to be. Foucault asserts this all occurs because of discourse and language, which transmits power into knowledge, thus creating notions of truth. These truths contribute to hegemonic masculinities, that are legitimized by the citizens to coerce and control a society with authority

⁸⁶ Belonging provides a conceptual understanding that can help *categorically* explain the ways in which individuals develop a type of relationship to a state. Phillip Darby (2006) defines belonging in two major ways. First, “as a singular relationship between an individual and a bounded nation-state, ethnicity, or community,” and “as a multiple category that is cobbled together from the affective experiences of recognition in diverse locales, vis-à-vis a range of actors” (68). Other scholars use the term belonging to explain experiences of migrants. Andreas Wimmer & Nina Glick Schiller (2002) refer to migrants as dynamic agents to understand emergent identities and belongings. See also, Strasser (2009) and Tošić (2012).

and ensure deviants or undesirables are not able to harm the state. Together, these relations of power and established acceptable identities create the national imaginary, an ideal imaginary designed to shape who is included and who is excluded, as well as what knowledge and truths are accepted and which ones are not. By understanding the categorical forms of control through law and their implications on identity, larger issues such as violence, oppression, economic inequality and so forth can be interrogated. Incorporating a discussion of sexuality and gender further exposes the ways in which legal categories attempt to define the boundaries of identification and control practices associated with identity and the human condition.

Sexuality & Identity

This section will explore the ways in which sexuality and identity are culturally understood within hegemonic systems. Focusing on gender expression and representation, I attempt to outline how sexuality and gender are narrowly categorized within a Western context. In this way, sexuality and identity are constituted by and constitute the space with which they exist. Borrowing from the work of Sarah Keenan, I establish how incorporating a post-modernist spatial framework in this discussion illuminates the embedded subject and overlooked factors.⁸⁷ Through this exploration I show that the ways in which sexuality, or broadly identity, is performed and represented is in-part a product of the cultural and social context dictated by the ideology of neoliberalism that instigates a form of racialized dominance, assumptions, and oppressions. Using work conducted within the fields of anthropology, legal studies, and political science, I explore the definitions and understandings of sexuality and gender identity within a matrix of mobility, migration, belonging, and the state. What is identity? Who determines an identity for an individual or group? Susan Falk Moore asserts that in terms of law, self-

⁸⁷ Keenan, Sarah (2015). "Subversive Property: Law & the Production of Spaces of Belonging." Routledge: New York. P. 5.

identification may be less important than legal identification, and that “identities may be imposed from the outside.”⁸⁸

Conceptualizing identity is complex as it encompasses spatial and temporal histories of culture⁸⁹, society, politics, and materiality. According to Strasser, identity and belonging are negotiated processes that include reference points such as gender, ethnicity, nationality, age, and social status.⁹⁰ Jelena Tošić argues, “these dimensions shape individual migration experiences, the ways identities are claimed or resisted, and the ways migrants act according to commitments and feelings of belonging to different forms of collectives, ways of life, value systems, etcetera.”⁹¹ For the purposes of this project, I assert that identity encompasses interacting layers of characteristics, expressions, performances, and histories that ultimately complicate social relations of power, oppressions, vulnerability, and contribute to the complex ideal of a national imaginary. What does it mean to become a part of broader identity categories or the epitome of the national imaginary? What are the legitimized ways of being? Who legitimizes these ways of being and ultimately the identity categories? Identity formation, in part, occurs through external acknowledgement.⁹² Charles Taylor, theorizing within the *liberal* Canadian context, asserts that

⁸⁸ Susan Falk Moore (2005). “Law & Anthropology: a reader.” Blackwell Publishing: Oxford. P. 177.

⁸⁹ For the purposes of this paper, culture will consist of beliefs, ideals, values, religions (plural for the Canadian context), social relationship structures, the shifts and changes of social and political expectations over time, the inclusion of multiple ethnic groups, shared histories, and so on. This broad understanding of culture predominantly comes from anthropological conceptualizations of nationality, nationalism, citizenship, mobility, Indigeneity, and the work of Benedict Anderson. See Goddard, Llobera, and Shore (1994); Anderson (2006[1983]); Ingold (2007); Davis (2009); Neveu (2000) & (2008); Allen (1999);

⁹⁰ Tošić, Jelena (2012). “Migration, Identity, and Belonging: Anthropological Perspectives on a Multidisciplinary Field of Research.” In *Migrations: Interdisciplinary Perspectives*.” Eds. Michi Messer, Renee Schroeder, and Ruth Wodak. *Springer*: Vienna. P. 114.

⁹¹ Tošić (2012), p. 114.

⁹² Coulthard, Glen (2007) “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada.” *Contemporary Political Theory*, 6: 437–460. P. 440.

“it is within and against the horizon of one’s cultural community that individuals come to develop their identities, and thus the capacity to make sense of their lives and life choices.”⁹³ Using a Hegelian framework, Coulthard summarizes Taylor, stating that our identities provide the background and orienting framework “against which our tastes and desires and opinions and aspirations” are understood.⁹⁴ This framework is further reinforced “through dialogue, recognition, and the absence of recognition.”⁹⁵ Along relations of power and knowledge, compendiums of discourse such as law, narratives, systems and structures act as a cacophony of legitimizing forces that create and recreate identity categories.

Compendiums of discourse are the external shapers and re-shapers of identity embedded within hierarchies of gender, sexuality, race, class, ethnicity, histories, amongst other categories. *Identity*, as a form of politics, has been utilized as a driving force for liberal legal and social inclusion during the feminist, gay and lesbian, and people of colour civil rights movements during the sixties and seventies.⁹⁶ These social movements exposed the layers of intricate identities that shape the experiences, narratives, and histories of oppression embedded within a specific spatial and temporal context. These movements are integral to emphasizing the ways in which identities shift over time and how their meanings are tied to the time and place of their

⁹³ Taylor, Charles (1994. “Politics of Recognition

⁹⁴ Coulthard (2007), p.441. See also, Taylor (1994).

⁹⁵ Coulthard (2007), p. 442. See also, Taylor (1994).

⁹⁶ The use of identity in this manner is a form of identity politics. Some critics of identity politics argue that it reduced the social movements to identity categories that simply defined the included acceptable identities, while excluding the other identities. (Keenan,2015), pp. 3-4.) Conor Reed argued that identity politics “maintained that only the most immediate alliances were possible under conditions of embattled retreat.” (Reed, Conor Tomas (2016). “Race.” In *Keywords for Radicals*. Ed. Kelly Fritsch, Clare O’Connor, and AK Thompson. AK Press: Chicago. P. 348.). In other words, the sole reliance on identity during this period meant that only certain identities won social and legal acceptance so long as these identities were in solidarity at the time of alliance formation.

creation or alteration. Keenan argues that “both space and identity are unfixed.”⁹⁷ Identity is produced and reproduced through space, which acts as the “medium through which the imaginary relation between the self and the other is performed.”⁹⁸ Space can act as the “reference system that is constituted by a vast multiplicity of different, dynamic forces; it is ever evolving and necessarily conceptual, social, and physical.”⁹⁹ In other words, Keenan asserts that identity is not at the centre, rather that the “sociality of space” includes the interconnections of the subject, law, space, and identity.¹⁰⁰ In the context of asylum seekers, the identity of the subject¹⁰¹ is assumed by the progressive liberal state to *fit* within universal identity categories recognized by the law and therefore, situates the subject at the centre of the legal *issue* rather than the broader spatial context. Using the case of Pamela George, an Aboriginal woman killed in 1995, and a study on violence against woman in Canada, Keenan shows how law is attached to the subject, and the subject carries space with them.

In both examples (Pamela George and the study), law was productive of identities that were mobile but always spatialized in a particular way. So, the woman in the care could move from place to place but would take her gendered space with her, including her vulnerability to being sexually assaulted and then disbelieved in court because the car was a ‘private’ space; and Pamela George could move out of the sex work district and even out of the zones of criminality in which Aboriginal sex workers are usually located, but a space of violence always went with her. It is clear from this work that the law plays a role in a conceptual and social space. The movement of this conceptual and social space attached to the subject has physical effects.¹⁰²

The spatiality of identity illuminates the relations of belonging and identity in relation to place and law. For immigrants, refugees, asylum seekers, and migrants, the space they are leaving is

⁹⁷ Keenan (2015), p. 30.

⁹⁸ Keenan (2015), p. 10; See also Gillian Rose (1996), p. 63.

⁹⁹ Keenan (2015), p. 11.

¹⁰⁰ Keenan (2015), p. 17.

¹⁰¹ To use the word of Keenan (2015).

¹⁰² Keenan (2015), p. 33.

impressed on their bodies. Queer refugees can leave the space of criminalization of queer practices, but the space of violence and danger moves with them, across borders and through time.

Legal identity categorization produces boundaries that reinforce the subject within the spatialized national imaginary. These boundaries are established through discourses such as documentation, administrative law, and the institutionalization of normative identity practices. Spade problematizes categorization and the impact on how an individual identifies, along with negative lived experiences for those identifying within LGBTQ+. Spade lists identity documents, sex-segregated facilities, and access to health care as realms of concentrated problems.¹⁰³ Joan Scott states that the “[individual] relationship to the law depends on sexual difference.”¹⁰⁴ While categories such as transgender or queer have the potential to be transformative and powerful,¹⁰⁵ a form of categorization fetishism produces rigid boundaries to encapsulate these very identities. This encapsulation contributes to categorical exclusion, such as the tension between self-identification and legal categorization, that contributes to isolation and alienation from autonomy. Context becomes integral to the power of identity categories. In the context of certain social actors such as support agencies, government institutions, and administrative law, they have produced “innovative cultural models to distinguish between gender and sexuality, as well as new ways of conceptualizing gender variance and homosexual desire.”¹⁰⁶ The models employed by these actors are fundamentally exclusionary and historically formed, contributing to

¹⁰³ Spade (2015), pp. 77-84.

¹⁰⁴ Scott, Joan (1989). “Gender: A Useful Category of Historical Analysis.” In *Coming to Terms: feminism, theory, politics*. Ed. by Elizabeth Weed, Routledge, p. 90.

¹⁰⁵ Valentine, David (2007). “Imagining Transgender: An Ethnography of a Category.” *Duke University Press*: Durham. P. 21.

¹⁰⁶ Valentine (2007), p. 235.

meanings associated with gender and sexuality.¹⁰⁷ There is a significant tension between institutionalized categories and personal experiences.¹⁰⁸ Personal, queer, transgender, sexual narratives of experience disrupt these categories, however, often it is the experience of the white and middle-class identities that affirm and reinforce difference.¹⁰⁹

Law produces and reproduces exclusionary categories of identity, exclusion from protection and access to life chances, while perpetuating violence, criminalization, and poverty.¹¹⁰ Spade argues that administrative law is the “place to look for how law structures and reproduces vulnerability for transgender population.”¹¹¹ This vulnerability could be expanded to women, homosexuals, people of colour, and various other layering combinations of these categories. Spade argues “that the anti-discrimination and hate crime law strategy actually misunderstands how power works and what role law has in the functions of power.”¹¹² Embodied within neoliberalism, this form of legal reform centers on individual rights and hate violence and does nothing for the disproportionate criminalization, homelessness, and immigration enforcement.¹¹³ Instead, the locus of analysis ought to be broadly looking at “*how* gender categories are enforced on all people in ways that have particularly dangerous outcomes.”¹¹⁴ Specifically, analyze the impact or what legal regimes do, rather than the intent or what law *says*.¹¹⁵ Using this intervention by Spade contributes to the ways in which law is used as a tool to manage conflict and violence within society, such as hate crime laws, but in many instances is

¹⁰⁷ Valentine (2007), p. 239. Valentine also points out other elements of categorical construction, activism, medicine, social structures, and social science.

¹⁰⁸ Valentine (2007), p. 120.

¹⁰⁹ Valentine (2007), p. 131.

¹¹⁰ Spade (2015), chpt. 1 and 4; Valentine (2007); See also, Puar (2007)

¹¹¹ Spade (2015), p. 9.

¹¹² Spade (2015), p. 9.

¹¹³ Spade (2015), p. 9.

¹¹⁴ Spade (2015), p. 9.

¹¹⁵ Spade (2015), p. 10.

unable to cope with the variability in identities, life chances, and so forth. Sexuality is problematic for legal categorization because of the complexities of practices and identities, and the layers of power, values, and norms that shape and are shaped by sexuality.

Sexuality is an umbrella category that encompasses the ways in which a person identifies, experiences, and performs their sexual desires within a specific spatial and temporal context. Following the deconstructive work of Foucault on sexuality, a critical and postmodernist conception of the term is highly rooted in the history. Foucault asserts that after centuries of open discourse on sexuality, the 17th century introduced Victorian style sexual repression that “coincide with the development of capitalism: it becomes an integral part of the bourgeois order.”¹¹⁶ Foucault provides a genealogical progression of sexuality that ultimately illuminates a history of the person becoming a subject, where their sexual identity is fundamental to how people are produced.

Sexuality is inextricably intertwined with structures of power. You cannot think about sexuality without gender: masculinity, femininity, cisgender, transgender, intersex, hermaphrodite, bi-gender, all configuring sexual possibilities and meanings. Sexualities, and their histories, intersect with histories of race, class, age, religion, and with geographies, urban and rural spaces, and increasingly cyberspace.¹¹⁷

Therefore, contemporary discussion of sexuality must be recognized within a fluid spatial and temporal context. In other words, as time and place change so does the meaning and practices of sexuality change. Sexuality exists in various forms that are understood within a historical and social context.¹¹⁸ According to Keenan “sexuality functions as property in particular spaces,”¹¹⁹

¹¹⁶ Foucault, Michel (1990 [1978]). “The History of Sexuality: Volume 1.” Vintage Books: New York. P. 5.

¹¹⁷ Weeks, Jeffrey (2016). “What is Sexual History?” Polity Press: Cambridge. P. 3.

¹¹⁸ Weeks, Jeffrey (2017). “Sexuality.” 4th Edition. *Routledge*: New York. pp. 98-109.

¹¹⁹ Keenan (2015), p. 129.

and Luibheid states sexuality is one form of “multiple relations of power.”¹²⁰ For Weeks, historicizing sexuality illuminates the power relations embedded within sexuality, whereby power is a process and regulator of sexual bodies through norms, subjectivities, and identities.¹²¹ “Power no longer appears as a single entity which is held or controlled by a particular group, gender, state, or ruling class.”¹²² The history of sexualities’ complexities and differentiations shaped across space and time, highlights the fundamental interconnections between sexuality and other identity categories such as race and gender.

The ways in which sexuality is lived and spoken is embedded within the complex and “conflicting dynamics”¹²³ of identity. Weeks argues that the obsessive categorization of the sexual tradition shapes our sexual and gendered lives through assumptions, beliefs, prejudices, rules and/or norms, methods of investigation and organization, and moral regulation.¹²⁴ This categorization of sexuality encompasses a “variety of languages... embedded in moral treatises, laws, educational practices, psychologically theories, medical definitions, social rituals, porn/romantic fictions, popular music, and common sense assumptions.”¹²⁵ Weeks reminds us that “the categories of race, gender, and class may be analytically separable but they are lived inextricably together, alongside other dimensions of difference,”¹²⁶ where power operates “subtly through.”¹²⁷ Through this operation of power, knowledge is produced and this power-knowledge relationship legitimizes categories that normalize what Foucault terms “the truth of being.”¹²⁸

¹²⁰ Luibheid (2008), p. 299.

¹²¹ Weeks (2017), pp. 58-59.

¹²² Weeks (2017), p. 59.

¹²³ Weeks (2017), p. 60.

¹²⁴ Weeks (2010), p. 6.

¹²⁵ Weeks (2010), p.8. See also, Weeks (2017) p. 68.

¹²⁶ Weeks (2017), p. 68.

¹²⁷ Weeks (2017), p. 69.

¹²⁸ Foucault (1979).

Sexuality produces gender, gender produces sexuality, and they are at times conflated into one. Weeks states that both gender and sexuality are structurally locked, they are complicated by heterosexual norms and binaries.¹²⁹ What is heterosexuality and how is it an institution in the social fabric?

Heterosexuality is often recognized as the dominant form of social control and the relational opposition to any deviant sexuality. This project has asserted this point, positioning it as one of the key pieces to understanding sexuality and identity within the law. Heterosexuality, however, is often undefined or untheorized because of its *naturalness*. Weeks states that the understanding of *what* heterosexuality is, is “taken for granted as the norm across all cultures... as the given natural form.”¹³⁰ This natural conceptualization has allowed heterosexuality to become institutionalized. It defines relations of power, domination and subordination of sexualities and gender, and the excludes the deviant *Other*.¹³¹ However, heterosexuality, like all *categories* of sexuality, is complicated by the intricacies of other identity categories, and the spatial and temporal context. Weeks asserts heterosexuality as a “series of practices” that include choice, coercion, love, and rape, and is obscured by “differences of age, gender, culture, and fantasies.”¹³² Therefore, the normalization of heterosexuality is fundamentally differentiated and must be assumed to exist in one form.

The assumed *natural form* and *universality* of heterosexuality across time and space is problematized by *deviant* bodies that perform their gender identity and experience their sexuality outside of the historically accepted behaviours and desires. These deviancies or other ways of being are categorized within different identities. One of the most historically rooted and

¹²⁹ Weeks (2017), p. 64.

¹³⁰ Weeks (2017), p. 139.

¹³¹ Weeks (2017), p. 139.

¹³² Weeks (2017), p. 139.

politically and socially charged words used to challenge heterosexual *naturalness* is *Queer*. Using the word *Queer*, Weeks highlights how the term's meaning evolved over several decades to become a form of discourse activism that challenges the ways in which gender and sexual orientation categories are understood. Initially uttered before the civil rights movements of the 1960s and 1970s as a term to describe the *deviance* or *abnormal* people in society, it evolved into a derogatory term to oppress homosexuals, lesbians, and transgender people.¹³³ In the 1990s, the term was *reclaimed* by the gay and lesbian community to challenge heteronormative conceptions of gender and sexuality. *Queer* instigates transgression and subversion of hegemonic heteronormative, masculine power with "radical implications of social constructions."¹³⁴ The queer category is intended as an anti-category, a Trojan horse in the battle of hegemonic identity categories. Mottier asserts that Queer is concerned with the "power of the binary divide that gave rise to the category" itself.¹³⁵ For Luibheid, queer "acknowledges that all identity categories are burdened by legacies that must be interrogated, do not map neatly across time and space, and become transformed through circulation within specific, unequally situated local, regional, national, and transnational circuits."¹³⁶ Finally for Kimberle Crenshaw, the reclaiming of the term *queer* correlates with how categories have meaning and consequences, but the process of meaning-making is not unilateral.¹³⁷ Crenshaw asserts, "clearly, there is unequal power, but there is nonetheless some degree of agency that people can and do exert in the politics of naming."¹³⁸ Although powerful in its ability to deconstruct the heteronormative and even at times, homonormative conceptions of natural sexualities, it potentially generates generalized narratives

¹³³ Weeks (2011).

¹³⁴ Mottier, Veronique (2008), p. 145.

¹³⁵ Mottier, Veronique (2008), p. 145.

¹³⁶ Luibheid (2008), p. 170.

¹³⁷ Crenshaw (1991), pp.1296-1297.

¹³⁸ Crenshaw (1991), p. 1297.

and identities. As such, Queer must be understood as spatially and temporally specific, whereby differentiated identities of intersecting identity categories exist.

The post-structuralist ethnographic work by Valentine provides a useful example of how queer-like terms, or non-normative sexuality and gender categories, challenge categorical assumptions.¹³⁹ *Imagining Transgender* exposes the issues of categorical complications and how they “upset the terms of a stable transgender community” during the early 1990s in New York city.¹⁴⁰ The categorical complication of identities, imposed by legal institutions and social service institutions, are products of meaning making and power through language. Specifically, *Imagining Transgender* accounts for the ways in which collective identities can be *imagined* through activism, legal and political categorization, social service institutions, and government institutions. For Valentine, the notion of a “transgender community and identity existed only within entities which are concerned to find a transgender community: social service organizations, social service activists, and activist discourse,” which produce an imaginary.¹⁴¹ These *imagined communities*¹⁴² are imagined constructs that are products of capitalist relations, power relations, and inequality, as well as the assumption of a shared identity.¹⁴³

The imaginary discussed by Valentine regarding transgender identity and the ways in which external institutions such as law or the state establish an identity category are grounded in

¹³⁹ Valentine (2007).

¹⁴⁰ Valentine, David (2007), p. 6.

¹⁴¹ Valentine (2007), p. 68.

¹⁴² “Imagined communities” is theorized by Benedict Anderson (1991), however, his conceptualization is partially different in that it generally refers to the establishment of a collective identity by the people within the community. However, there is a significant amount of space within his theorization that allows for the external forces that influence the creation of an imagined community. In Valentines ethnography, more emphasis is arguably held by the organizations than the people defined within the trans category.

¹⁴³ Valentine (2007), p. 103. Valentine argues further, on p. 106, that categories require a concept of identity, just like communities.

an imagined sense of what transgender means. For Stychin, the gay imaginary is historically spatialized by movement and travel “and the importance of a literal escape from the constraints of locality, family, and history.”¹⁴⁴ In the national context, it is the movement from the rural to the urban space. In the international context, it is the movement from a space of oppression and *backwardness* to a space of *liberal* ideals, values, and norms. The mobility of Valentine on his bicycle to produce the ethnography of identity categorization describes,

how social practices, discourses, sites, and people became part of the conceptual field of my research, shaped by an imaginary of a transgender community, but how, simultaneously, the people that I and my colleagues mapped into this imaginary confounded its terms.¹⁴⁵

Mobility is the physical movement of a subject, or the transformation of identity. Just as the transgender category in Valentine’s ethnography is based on the shifting identities of the subjects, so too are the sexual identities and gender identities of refugees and asylum seekers. Identities are constructed spatially by the physical movement of bodies and the embodied transformation of identity within the subject. These transformations create fluidity and thus conflict with the rigid categorical boundaries defined by the law and spatially defined within the state.

Just as law attempts to define identity categories within the borders, it also attempts to define identity categories on subjects outside of the borders seeking entry. The mobility and movement of asylum seekers is not necessarily recognized by the law or the receiving state. Instead, the identity of the subject is determined in the *backwards* home state and remains intact upon arrival in the receiving country. This “transnational judgement” of asylum claims

¹⁴⁴ Stychin, Carl F. (2000). “A Stranger to its Laws: Sovereign Bodies, Global Sexualities, and Transnational Citizens.” *Journal of Law and Society*, 27(4): 601-25. P. 603.

¹⁴⁵ Valentine (2007), p. 7.

contributes to “generating a racist, colonialist discourse.”¹⁴⁶ Broadly, the identities of citizens and non-citizens are deeply shaped and produced by the racialization of spaces and bodies. How is race implicated in the discourse of identity, space, place, and belonging? Rather, does the racialization of the queer body affect the ways in which these bodies are mobile?

Race, racialization, and racism, are complex processes of oppression that are mechanisms of power relations. Patrick Wolfe illuminates race and racism within the settler contexts of Australia and the United States, providing one way of understanding the multiplicities of racial oppression, exclusion, and violence. Racial constructions emerge within a temporal and spatial context. The heterogeneity of race practices, experiences, and histories are “couched in ideology: the distinctive notion of race that emerged in Enlightenment discourse on both sides of the north Atlantic.”¹⁴⁷ Wolfe argues that race is a “trace of history,” whereby the “colonized populations continue to be racialized in specific ways that mark out and reproduce the unequal relationships into which Europeans have co-opted these populations.”¹⁴⁸ He asserts that,

Just as, for Durkheim, religion was society speaking, so I shall argue, race is colonialism speaking in idioms whose diversity reflects the variety of unequal relationships into which Europeans have co-opted conquered populations.¹⁴⁹

Through these multiple forms of racial¹⁵⁰ management, race acts as a classificatory concept. Race is hierarchical and “links physical characteristics to cognitive, cultural, and moral ones.”¹⁵¹ In other words, the use of race as a form of identity categorization positions certain *types* of races

¹⁴⁶ Luibheid (2008), p. 179.

¹⁴⁷ Wolfe, Patrick (2016), “Traces of History: Elementary Structures of Race.” *Verso*: New York. P. 6.

¹⁴⁸ Wolfe (2016), p. 2. Wolfe includes a multiplicities approach to race, and states that “races” is the “traces of histories” (p. 5).

¹⁴⁹ Wolfe (2016), p. 5.

¹⁵⁰ See Devon Carbado & Mitu Gulati (2013). “Acting White.”, for an account of the ways that racial performance is at the root of many prejudices. They explore the concept of race and law through examples.

¹⁵¹ Wolfe (2016), p. 7.

above others based on linkages of physicality, cognition, culture, and morality. Therefore, racialization is the *process* of racism. Through “connections among sexuality, race, gender, nation, class, and ethnicity,”¹⁵² whereby racialization exists within the specific social formation surveillance and is controlled by the bio-politics of the state.¹⁵³ Racialization is “race in action” that occurs “prior to and not limited to racial doctrine,” and exists as different practices producing a specific spatial and temporal colonial dominance.¹⁵⁴ Historically performative, Wolfe asserts that racialization brings human groups “into being as inter-relating social categories with behavioural prescriptions to match.” Racialization produces race as a form of power relations that exists within and external to other categories of identity, within the law, and within and outside of spatial boundaries.

By incorporating the *concept* of race into the discourse of identity and law, the implications on queer subjects are further problematized. Referring to the work of Jasbir Puar and Amit Rai, Luibheid argues that “homophobic and racializing discourses and practices shape dominant constructions of terrorism and strategies of antiterrorism.”¹⁵⁵ As will become clearer in the following sections, “racial and neocolonial preferences have become less explicitly stated.”¹⁵⁶ More specifically, the racialized queer migrant continues to produce anxieties in the receiving state as they are viewed as coming “from neo-colonized regions.”¹⁵⁷ The neo-colonized region is backward, homophobic, and corrupt. The receiving state, such as Canada, is liberal, democratic,

¹⁵² Puar (2015), xi.

¹⁵³ Puar (2015), xii.

¹⁵⁴ Wolfe (2016), p. 10.

¹⁵⁵ Luibheid, Eithne (2008). “Sexuality, Migration, & the Shifting Line Between Legal and illegal Status.” *GLQ*: 14(2-3): 289-315. P. 306. See also, Puar & Rai (2002).

¹⁵⁶ Luibheid (2008), p. 174.

¹⁵⁷ Luibheid (2008), p. 174.

and inclusive. Connections between sexuality and race therefore reinforce and reshape the national imaginary of Canada.

Gender and sexual orientation categories operate within social relations that construct individual identity. Butler, conceptualizes gender and sex as a set of actions or behaviours that are performed through social institutions. Butler argues that while the individual is the author of their gender, “the terms that make up one’s own gender are, from the start” in the “sociality that has no single author.”¹⁵⁸ Butler shows that gender does not determine desire or sexuality, and that sexuality is extinguished, mobilized, and incited by constraints.¹⁵⁹ Gender is historical and performative, based on an anthropocentric conception of humanity.¹⁶⁰

Gender ought not to be conceived merely as the cultural inscription of meaning on a pre-given sex (a juridical conception); gender must also designate the very apparatus of production whereby the sexes themselves are established.¹⁶¹

In other words, Butler shows how the category of gender based on biological sex is defined and legitimized by law. Only the binary genders defined within law are legitimate, and all other forms of gender are deviant.

Specifically, the agency of individuals produces the possibility of action where there is no predetermined self, but where the meanings are produced through discourse and oppositions play out.¹⁶² Gender is “performatively produced and compelled by the regulatory practices of gender coherence.”¹⁶³ Gender is created through actions and behaviours that become representative of multiple identities. “There is no gender identity behind the expressions of gender; that identity is

¹⁵⁸ Butler, Judith (2004). “Undoing Gender.” *Routledge*: New York. P. 1.

¹⁵⁹ Butler 2006, p. 15.

¹⁶⁰ Butler 2006, p. 10.

¹⁶¹ Butler 2006, p. 10.

¹⁶² Butler (2006). This concept is expanded upon throughout the book, as well as in her other writings.

¹⁶³ Butler (2006), P. 34.

performatively constituted by the very expressions that are said to be its results."¹⁶⁴ In other words, gender identity does not exist so much as the expressions and performances. Gender identity is externally defined as a legal, social, and political category bounded to normative roles and practices. In the case of refugee claims, the claimant must represent sexual orientation within a Western construct.

The ways in which certain identities are excluded through hegemonic masculine language embedded in law and institutions, perpetually situates femininity and the deviant Other in the private sphere. The state controls the gendered and sexual practices and identities because this ensures *purity* of the national imaginary and a homogenous society devoted to the state powers. So how does this articulation of sexuality and identity within the law interact with mobile¹⁶⁵ identities? How are sexualized identities implicated within these hegemonic legal categories intended to control border crossings?

Crossing political boundaries as an internationally categorized refugee requires the protection of rights. For some it is economic, for others it is to reunite with family, and for millions more it is forced, due to the fear of persecution and violence. For some forcefully displaced, it is because of their sexual identity as *Queer deviants* where their bodies become sites of hate, state and community human rights violations, oppression, violence, discrimination, and death.

¹⁶⁴ Butler (2006), P. 34.

¹⁶⁵ In this project I will use the term “mobility” as Carl Stychin defines it. Mobility is the “idea uprooting; a concept closely tied to freedom of movement and, more generally, associated with the nomadic subject – the crosser of borders and boundaries (whether by necessity or choice)” (p. 602). Stychin asserts that mobility is the “legal right to free movement” and within the frame of sexuality, migration and travel are generally associated with the “movement towards a new place and a new life(style)” (602). Therefore, in the project, mobility will be used as an analytical tool to conceptualize identity categories as they exist within space and across time.

[The] distinction between *freely chosen* economic migration and *coerced* migration by political refugees, which continues to underpin migration scholarship and policy in the global north, urgently needs to be rethought to account for how most migrations in fact straddle choice and coercion.¹⁶⁶

Therefore, Luibheid reminds us to recognize the fluidity in the reasons people are mobile. Queer asylum seeker claims require a “racialist, colonialist discourse that impinges the nation-state from the asylum seeker.”¹⁶⁷ Luibheid states that through queer migration scholarship, “sexuality [is] constructed within multiple intersecting relations of power, including race, ethnicity, gender, class, citizenship status, and geopolitical location.”¹⁶⁸ Migration is a transformation of identity, affecting those who migrate and those “who stay at home,” and “in many instances, help to form transnational social fields, cultures, and politics.”¹⁶⁹ This transformation constructs sexual identities, communities, politics, and practices, which define “queer,” “deviant,” or “abnormal” as well as “normative or normal within a binary structure intimately tied to racial, gender, class, cultural, and other hierarchies.”¹⁷⁰ The complexities of queer migration emphasize the multiple reasons for people crossing political borders.

Law: citizenship

What is law, given this general genealogical context? How is law interpreted and understood? Before engaging directly with citizenship law and the subsequent migration and refugee law, there needs to be a discussion of law itself. Clifford Geertz famously stated that law is a way of “imagining the real.”¹⁷¹ According to Hoebel and Llewellyn, law controls behaviour

¹⁶⁶ Luibheid (2008), p. 178.

¹⁶⁷ Luibheid (2008), p. 179.

¹⁶⁸ Luibheid (2008), p. 170.

¹⁶⁹ Luibheid (2008), p. 170.

¹⁷⁰ Luibheid (2008), p. 172.

¹⁷¹ Geertz, Clifford (1983) “Local Knowledge: Further Essays in Interpretive Anthropology.” *Basic Books*: New York. P. 184.

to avoid conflict, whereby law's purpose is to clean up social messes.¹⁷² Along these lines, Butler states that "law produces and then conceals the notion of a subject before the law in order to invoke that discursive formation as a naturalized foundational premise that subsequently legitimates that law's own regulatory hegemony."¹⁷³ Eve Darian-Smith asserts that law is not simply rules of acceptable conduct, but exists within intersecting spheres "interpreted by people, in turn shaping their social relations and ways of operating in the world."¹⁷⁴ These theorists approach law from different perspectives that highlight the complexities in understanding the system and structure of law beyond legislation and acts, but to understand the interactions of law as a conceptual tool knit into societies.

Canadian citizenship provides legally defined rights and responsibilities to those born on Canadian soil (*jus solis*), those born to a Canadian parent (*jus sanguinis*), or those who immigrate to Canada and become *naturalized* as Canadian through the citizenship process. Citizenship is the membership into a political and social community that legally defines belonging. Citizenship law, as previously stated, has historically been the body of law that defines the exclusion and inclusion of people within the body politic. Classical ideals of citizenship began as a fundamental value that denoted civilization and tradition.¹⁷⁵ Fundamentally exclusionary, the ancient civilizations identified the "ideal citizen" as the patriarch of the household (*oikos*) where

¹⁷² Donovan, James. (2008). "Legal Anthropology: an introduction." *AltaMira Press*: Plymouth. P. 89.

¹⁷³ Butler (2006), p. 3.

¹⁷⁴ Darian-Smith, Eve (2013). "Laws and Societies in Global Contexts." *Cambridge University Press*: Cambridge. P. 3.

¹⁷⁵ Pocock, J.G.A (1995). "The Ideal of Citizenship." In *Theorizing Citizenship*. Ed. by Ronald Beiner, State University of New York Press. P. 29. Citizen, Greek *Polities* or Latin *Civis*, is equivalent to "human association allegedly unique to these ancient Mediterranean people." Pocock asserts that this myth is a unique determinant of Western identity. Athenians and Romans conceptions of citizenship. Pocock (1995), p. 33. A community of citizens becomes an ideal where speech and acts of decisions become embedded in the political realm.

slaves and women “left him free to engage” in political relations (*polis*).¹⁷⁶ The divide between public and private legitimized the European male as the ruler for humanity and the epitome of humanness, while the rest of humanity was viewed as less than and needing to be ruled. The citizen establishes rules to be ruled by, however, ruling becomes relative to the position and capacity to exert power.¹⁷⁷ The public conception of male/masculine and private conception of women/feminine is intrinsic to a discussion of law and identity.

Legal and institutional elements, such as public/private or masculine/feminine binaries, reinforce interwoven power relations concerning people and the state. Law, in its various areas of specialty, does not exist within a vacuum; rather, it exists within ideological constructs¹⁷⁸, power relations, culture, and knowledge production. Moreover, the complexity of law results in various layers interacting with each other in a multitude of ways. For example, how does citizenship, immigration, or refugee law interact to define the citizen? Foucault does not comprehensively interrogate what law is and what it ought to be, however, he states that law acts as “an instrument

¹⁷⁶ The classical ideal defined humans as “a cognitive, active, moral, social, intellectual, and political being.” Pocock (1995), pp. 31-32. Aristotle divided the public (*polis*) and the private (*oikos*). The *polis* consisted of persons and actions (the rulers), removed from the daily household affairs. The *oikos* consisted of things, where slaves and woman (the ruled) attended to the labour that could satisfy the patriarch to ensure *his* ability to engage with the *polis* (32).

¹⁷⁷ Pocock (1995), p. 31. “It is better to rule animals than things, slaves than animals, woman than slaves, one’s fellow citizens than the women, slaves, animals, and things contained in one’s household.” (p. 31.)

¹⁷⁸ In “Ideology” (2003) by Gordon Bailey and Noga Gayle, they simply define ideology as “systems of beliefs that guide our choices and behaviour’s and, indeed, justify our thoughts and actions” (p.2). They further demonstrate that power plays an integral role in producing and reproducing knowledge. Although a very complex term, this reading helps articulate the dynamic intersections of ideology, identity, and knowledge. See also: Himani Bannerji in “Keywords for Radicals” (2016), as she articulates the ways in which ideology creates an idealized (imagined and created) notion of a special kind of knowledge, interwoven within “hegemony, discourse, and representation” (p. 213).

of power which is at once complex and partial.”¹⁷⁹ In other words, law acts, law mobilizes, and law shapes and is shaped by power operating within and around instruments of legislative mechanisms. In this sense, decentralized power operates along “norms central to producing the idea of the national body as ever-threatened and to justifying the exclusion of certain populations from programs [...] and the targeting of these same populations for imprisonment and violence.”¹⁸⁰ Power acts to ensure the ideological processes of determining categories of inclusion and exclusion by operating through mechanisms of the state, such as citizenship and border regulation.

Forms of exclusion outlined by ancient civilizations established the foundation for modern civilizations to justify the construction of exclusion and inclusion categories. In contemporary discourse, citizenship is the “means of being free [and] the way of being free itself.”¹⁸¹ Legal categorization within citizenship provides a status that includes privileged access to rights and responsibilities. Pocock notes a fundamental shift in citizenship from “a political being” to “a legal being,”¹⁸² interlinked with private property and legal regulation of the body and social relations. Citizenship law focuses on the “acts of authorization, appropriation, conveyance, litigation, prosecution, and justification” in “relation to things regulated by law.”¹⁸³ It regulates the citizen’s relationship to other citizens, non-citizens, the state, institutions and organizations. The regulation of these social and political relations through citizenship law, actively excludes those not part of the political sphere of the state. New immigrants, refugees,

¹⁷⁹ Foucault, Michel. 1980 [1977]. “Power/Knowledge: Selected Interviews and Other Writings, 1972-1977.” Ed. Colin Gordon. *Vintage*: New York. P. 141.

¹⁸⁰ Spade, Dean 2015. “Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law.” Duke University Press. Pp. 2-5.

¹⁸¹ Pocock (1995), p. 32.

¹⁸² Pocock (1995), pp.34-35.

¹⁸³ Pocock (1995), p. 35.

temporary residents, people of colour, women, queers, and so forth experience differentiated forms of exclusion and belonging. Citizenship law does not act alone; rather, it works in tandem with immigration law and refugee law. This complex interplay within the legal realm is produced and reproduced by the political and social imaginaries of the state.

Some theorists provide an ontological conceptualization of citizenship rooted in an unchallenged state structure. For Michael Ignatieff, citizenship is a myth that haunts the public realm as a “means by which men realize human good.”¹⁸⁴ Citizenship, for Ignatieff, is integral to responding to local need within the paradox of the current global economy to “defend our interests and solving our problems in the international sphere.”¹⁸⁵ For Ignatieff, citizenship is necessary even with its flaws. Iris Young provides a more critical analysis of citizenship. Young criticizes the *ideal* concept of universal citizenship that permeates political theory, asserting the “equal moral worth of all person” that assumes “citizenship status transcends particularity and difference” in the political sphere.¹⁸⁶ Young further argues that the universal articulation of citizenship materially exists as laws and rules. These universal laws are not sufficient at addressing social justice and inequality and therefore, require special rights and group representation to “undermine oppression and [the] disadvantaged” in certain circumstances.¹⁸⁷ Finally, work by Will Kymlicka and Wayne Norman state, “citizenship is a status, a set of right and responsibilities, and identity; an expression of one’s membership in a political

¹⁸⁴ Ignatieff, Michael (1995), “The Myth of Citizenship.” In “Theorizing Citizenship.” Ed. by Ronald Beiner, *State University of New York Press*: New York. P. 53. The public realm for Ignatieff is a “necessary evil” for the functioning of man. He outlines tensions between the market economy and the citizen that show elements of citizenship myth are important to keep, while other are incompatible with modernity (p. 55).

¹⁸⁵ Ignatieff (1995), p. 76.

¹⁸⁶ Young, Iris (1995), “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship.” In “Theorizing Citizenship.” Ed. by Ronald Beiner, *State University of New York Press*: New York. P. 175.

¹⁸⁷ Young (1995), pp. 175-177.

community.”¹⁸⁸ They argue that many *groups* feel excluded from the “common culture” even with “common right of citizenship.” Kymlicka and Norman do not provide a new theory of citizenship, however, they show the potential issues with both common citizenship and differentiated citizenship. Rita Dhamoon provides a critical analysis of liberal multiculturalists such as Kymlicka and Charles Taylor. Dhamoon argues that “in Kymlicka’s theory of multicultural citizenship and Taylor’s theory of recognition, culture is employed as a code for specific ethnic groups, historical nations, and linguistic minorities.”¹⁸⁹ In any sense, mainstream liberal theorists such as Kymlicka and Taylor, whom Dhamoon takes up, and others such as Norman or Ignatieff, perpetually legitimize boundaries of identity categories within an essentialist and homogenizing conception of culture.

The ways in which citizenship is legally defined coincides with political and social conceptions of inclusion and exclusion, often through the discourse of culture. Liberal sentiment and political discourse defines people based on their culture, which according to Dhamoon, dismisses similarities between and differences within cultures.¹⁹⁰ Terence Turner highlights the danger of “reifying cultures as separate entities by over-emphasizing the internal homogeneity of culture in terms that potentially legitimize repressive demands for communal conformity.”¹⁹¹ Turner’s purported dangers in liberal conceptions of culture means that liberals “are limited to an additive response [to differentiated identities] because they conceptualize identity through

¹⁸⁸ Kymlicka, Will & Wayne Norman (1995), “Return of the Citizen.” In “Theorizing Citizenship.” Ed. by Ronald Beiner, *State University of New York Press*: New York. P. 301.

¹⁸⁹ Dhamoon (2006), p. 354.

¹⁹⁰ Dhamoon (2006), p. 355.

¹⁹¹ Turner, Terence. (1994). “Anthropology and Multiculturalism: What Is Anthropology That Multiculturalists Should Be Mindful of It?” In “Multiculturalism: A Critical Reader,” Ed. David Theo Goldberg. *Blackwell*: Boston. P. 407.

singular, unidimensional and distinct categories.”¹⁹² Dhamoon asserts this response is based on concerns of unity and perception of culture as a tool for self-realization and liberal freedom.¹⁹³ In other words, the liberal notion of culture coincides with the construction of a unified state *and* a multicultural entity designed to include difference, while maintaining a certain economic, social, and political environment. This expectation that cultural difference be unifying is therefore problematic. Dhamoon and Abu-Laban state:

political and social theorists suggest that in Western liberal democracies, whether intended or not, foreignness and especially the construction of the internal dangerous foreigners seem to coincide with discourses of nation-building, security, and race-thinking...¹⁹⁴ [Reproduces] the racialized Other and in giving legitimacy to (American, British, Australian, as well as Canadian) renationalization endeavours that can deflect criticism of imperialist agendas through discourses of democracy and liberal identity.¹⁹⁵

Thus, liberal notions of acceptance and diversity within discussions of multiculturalism act as a mask to cover issues of imperialism, racism, homophobia, and so forth. “Central to liberal democratic societies (specifically Canada)” the underlying position that “difference should be recognized but in such a way as not to threaten the existing order.”¹⁹⁶ Dhamoon’s critique of liberal conceptions of culture challenge the ways in which legislative bodies such as citizenship law are theorized, conceptualized, and enacted.

Culture, as a core feature of liberal constructions of individual identity legitimize exclusionary legislation and legal categories to protect the national imaginary of the state. Catherine Dauvergne terms this construction of the state, based on accepted cultural based categories as the *national imaginary*. The maintenance of the national imaginary through

¹⁹² Dhamoon (2006), p. 357.

¹⁹³ Dhamoon (2006), p. 358-359.

¹⁹⁴ Dhamoon, Rita & Yasmeed Abu-Laban (2009). "Dangerous (Internal) Foreigners and Nation-Building: the Case of Canada." *International Political Science Review*, 30(2): 163-183. P. 164.

¹⁹⁵ Dhamoon & Abu-Laban (2009), p. 180.

¹⁹⁶ Dhamoon (2006), pp. 359-364.

exclusive membership rights and responsibilities is fundamental to democratic liberal Western states such as Canada, which consist of immigrants and indigenous peoples, whereby citizenship acts the “principle effective hurdle to formal membership.”¹⁹⁷ “In the migration context, citizenship means the right to enter and remain.”¹⁹⁸ Dauvergne argues that the

citizenship law - migration law dichotomy functions to ensure for citizenship law a rhetorical domain of formal equality and liberal ideals. The messy policing of the national boundary by inquiring into debt and disease, criminality and qualifications, is left to migration law. [...] Migration law specializes in precisely this type of distinction. In the citizenship law – migration law coupling, migration law does this dirty work.¹⁹⁹

Dauvergne illuminates the deceptively inclusive notion of citizenship by showing how citizenship law shapes and is shaped by immigration and refugee laws. She states that citizenship law “perfects the exclusion mechanism of migration law by cloaking it in a discourse of inclusion.”²⁰⁰ Citizenship law and liberal inclusion exist along parallel lines of discourse by masking the reality of inclusion through exclusionary layers of intersecting identity categories and reinforcing spatialized boundaries of identity and territory.

Citizenship continues to play an integral role in the contemporary state within a global world of shifting state and government roles. Many categorically Western countries show a move in the national-spatial imaginary towards greater surveillance of the deviant other and protectionist approaches to borders with respect to economics and human mobility. This transformation correlates with the securitization of borders to protect the state from external threats. Post-9/11 terror based legislation has exploded in Canadian jurisprudence with an

¹⁹⁷ Dauvergne (2008), p. 121.

¹⁹⁸ Dauvergne, Catherine (2008). “Making People Illegal: what globalization means for migration and law.” *Cambridge University Press*: Cambridge. P. 121.

¹⁹⁹ Dauvergne (2008), p. 123.

²⁰⁰ Dauvergne (2008), p. 124.

increased incorporation of terms such as *national security*. National security²⁰¹ and its similes appear in “at least 33 federal statutes” and it (national security) is “structured as a legal basis for non-compliance with regular law.”²⁰² Before 9/11, Canada had no anti-terrorism laws, however, the omnibus Bill C-36²⁰³ created the Anti-Terrorism Act in 2001.²⁰⁴ In the context of immigration, specifically Bill C-24²⁰⁵ and C-51²⁰⁶ have implications for refugees, illegal immigration, and individuals deemed as a threat to the state. These bills are detailed in Appendix B, Table 4.2. Noteworthy, is that these bills further reinforce the possibility of stripping an immigrant of Canadian citizenship as well as forced deportation or detention, which was

²⁰¹ Craig Forcese (2006). “Through a Glass Darkly: The Role and Review of ‘National Security’ Concepts in Canadian Law.” *Alberta Law Review*, 43(4): 963. Forcese outlines the poor definition of national security within Canadian legislation and even within American law. He questions the efficacy of government use of the term, and questions if it is a *carte blanche* or legitimate tool for national security. According to the 1995 *Johannesburg Principles on National Security, Freedom of Expression, and Access to Information* principle 2 defines legitimate national security interests. It states: (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest. (Principles 1995, accessed at: <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>)

²⁰² Forcese (2006), p. 965.

²⁰³ Bill C-36, *An Act to amend the Criminal Code, the Official Secret Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism*. 1st Sess, 37th Parl, 2001.

²⁰⁴ Ian Macleod (2015). “Canada’s post 9/11 anti-terror laws.” *Ottawa Citizen*, accessed at: <http://ottawacitizen.com/news/national/canadas-post-911-anti-terror-laws>. See also, Forcese (2006).

²⁰⁵ Bill C-24, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*. 2nd Sess, 41st Parl, 2014.

²⁰⁶ Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*. 2nd Sess, 41st Parl, 2015.

previously enshrined in Canadian law, but has become easier for the government to enforce.²⁰⁷ Since 2001, almost a dozen clarification and omnibus Bills have passed into Canadian law that are designed to deal with security and surveillance of its citizens with the borders, foreigners within and outside of its borders, illegal aliens within and outside its borders, and to ensure the sovereign control over its territory and people.²⁰⁸ Through security and surveillance legislative practices, the state is able to reinforce the national imaginary through overt and coercive action that is legitimized by the citizens. Ferguson and Gupta argue that,

through specific sets of metaphors and practices, states represent themselves as reified entities with spatial properties... By doing so, they help secure their legitimacy, to naturalize their authority, and to represent themselves as superior to, and encompassing of, other institutions and centers of power.²⁰⁹

The state constructs a perception, in a Foucaultian sense, a “vertical encompassment” that impacts how, amongst others, “citizens imagine and inhabit states.”²¹⁰ This creates a routinization of bureaucratic practices,²¹¹ or what Bourdieu terms the *habitus*²¹² of citizens.

The homonationalization of citizenship that incorporates increasing security discourse, and the ways in which peoples’ identities are categorized at the border, produces a normative narrative of identity that “excludes many others who do not fit the narratives acceptable

²⁰⁷ Haydn Watters (2015). “C-51, controversial anti-terrorism bill, is now law. So, what changes?” *CBCNews|Politics*, accessed at: <http://www.cbc.ca/news/politics/c-51-controversial-anti-terrorism-bill-is-now-law-so-what-changes-1.3108608>.

²⁰⁸ For a larger list of bills see Appendix B, Table 4.2.

²⁰⁹ Ferguson, James and Gupta, Akhil (2002). “Spatializing States: Toward and Ethnography of Neoliberal Governmentality.” *American Ethnologist*, 29(4): 981-1002. P. 982.

²¹⁰ Ferguson and Gupta (2002), p. 983.

²¹¹ Ferguson and Gupta (2002), p. 983.

²¹² *Habitus*, as conceptualized by Pierre Bourdieu, is the social order of society as played out subconsciously through the activities of daily. For Bourdieu, the *habitus* was a piece of culture and society that are made up of systems of relationships. Shaping the *habitus* are social agents, the embodiment of power, and meaning-making through symbolism. Specifically, Bourdieu asserts that our understanding of the world comes from inside categories of knowledge and symbolic representation. For further reading see: “Bourdieu (1982) “Language and Symbolic Power.”

performances, characteristics, and/or aesthetics.”²¹³ The narrative of an individual or their way of being, may not coincide with the categorical label designated for them. How does a person navigate this form of top-down categorization? What are the elements of categorization that act upon and legitimize “normal” performance, aesthetics, and identification? How does the legal categorization of identity affect identification, performance, and aesthetics?

Law: immigration & refugee

National imaginaries are constructed within a geographic space enclosed by the political defined borders and fortified by immigration and refugee laws. These laws are implicated in the social, political, economic, and environmental systems and structure, shifting spatially and temporally, and ultimately shaping the ways in which people are mobile. The reasons people are mobile and ultimately migrate to foreign countries exists along a continuum. This continuum ultimately involves choice, freedom, coercion, and ability. State borders act as a barrier to the movement of people. Through state surveillance, securitization of the border, and legal categorization of who is allowed in and who is excluded, the mobile person must navigate a complex and ever evolving global system. In Canada, immigration laws and refugee laws work in tandem with citizenship laws, in part acting as gatekeepers to the rights and responsibilities within national borders.

Immigration law and refugee law legally categorize the ways in which people are able to immigrate into Canada, how they are able to, what determines their eligibility, and so forth. They also reinforce categories of inclusion and exclusion for “social citizenship.”²¹⁴ Social citizenship,

²¹³ Murray (2016), p. 5.

²¹⁴ Luibheid, Eithne (2008). “Sexuality, Migration, and the Shifting Line between Legal and Illegal Status.” *GLQ*, 14(3): 289-315. P. 290.

in the context of immigration, is historically grounded teleology of legal categorization.²¹⁵ This teleology crafts “the exclusionary immigration laws and administrative procedures [and laws],” which define immigrants and refugees as legal or illegal.²¹⁶ More specifically, the illegality of refugees refers to denied claims, whereby if the claim is denied and the claimant does not leave the country they become an illegal alien. Categorizing discourse defined by laws exclude immigrants and refugees from accessing the rights, benefits, and responsibilities from the social and political spheres. (Il)legalization is a genealogical process, per Luibheid,

The scholarship also makes clear that histories of racism, empire, and capitalism, remain central to the process that renders certain groups more likely than others to be deemed illegal [or legal].²¹⁷

Immigration and refugee law embody these histories; therefore, contemporary law not only produces illegal subjects, but reproduces the very identities of these subjects.

Refugee law regulates eligibility for humanitarian support, protection, and support as noted in the earlier section. Eligibility requirements operate within liberal justifications of discrimination that privilege certain experiences and identities, while positioning undesirable narratives and identities as the *Other*. Refugee law exists within the broader national and international legal and political context, and most significantly is shaped by conceptions of citizenship and borders.

Borders are the manifestation of citizenship, power, immigration, and law, which act as part of a team of gatekeepers making certain narratives accepted and others deviant, thus producing a national conception of belonging. The accessibility of borders is largely dictated by historically formed ideology that further shapes the laws of inclusion and exclusion. Ideology has

²¹⁵ Luibheid (2008), p. 290.

²¹⁶ Luibheid (2008), pp. 291-292.

²¹⁷ Luibheid (2008), p. 292.

established the current state of hyper securitization and fear of the *Other*, contributing to the continued scrutiny of people through processes of criminalization, illegalization, and racialization. The “nation” and “national security,” according to Kinsman and Gentile, are “collecting categories” that interweave national interests and maintain “capitalist social relations” including, amongst others, notions of gender, sexuality, race, and ethnicity.²¹⁸ The use of immigration and citizenship law creates “imagined borders” excluding *Others* based on health, safety, and undesirability, specifically immigrants and refugees, people of colour, sexually deviant practices, and the uneducated.²¹⁹ Imagined borders contribute to the formation of an “imagined community”²²⁰. This imagined community is bounded as a “unitary nation” or a “morally condensed symbol known as our country [that becomes] associated with a particular historical and social formation [that is] part of a specific ideological project.”²²¹ This ideological project both suppresses historical and social differentiation and shapes inclusionary and exclusionary practices and laws enforced at the border.

Mobility trends contribute to securitization and border permissibility that create “severe social anxieties” and fears of lost control, loss of national identity, “anxieties about the non-assimilable ‘other’,” and so on.²²² Stychin suggests that the “transgression of political boundaries,” whereby the boundary is the demarcation of space, defines “what is within” and “what is outside.”²²³ Furthermore, borrowing from Eve Darian-Smith, Stychin shows how “control remains connected to identity and space,” whereby the excluded identities and spaces

²¹⁸ Kinsman, Gary and Patrizia Gentile (2010). “The Canadian War on Queers.” *UBC Press*: Vancouver. P. 44.

²¹⁹ Kinsman and Gentile (2010), pp. 44-45.

²²⁰ Benedict Anderson (2006[1983]). “Imagined Communities.” *Verso*, New Edition: New York.

²²¹ Kinsman and Gentile (2010), p. 45.

²²² Stychin (2002), p. 607.

²²³ Stychin (2000), p. 608.

reinforce the internal identities.²²⁴ The state polices borders to reinforce the integrity of the territory and maintain the imagined identity. Beyond repression, policing, and exclusion, state spatialization occurs as state “benevolence” and “bureaucratic practice” existing out of ideology and embodiment.²²⁵ Therefore, borders are the physical result of spatialized conceptions of the imagined national identity that produce and reproduce accepted norms and ways of being.

The reproduction of norms through borders contribute to the categorization of sexual identities, gender identities, and accepted immigrants or refugee narratives. Categorizing norms shape the national desire for social control over sexuality and control over movement generally, as both sexuality and immigrants and/or refugees are products from “outside the bounds of normalcy and law.”²²⁶ The national desire to control borders and those moving across them coincides with the desire to control queer sexualities and gender identities. The appeal to citizenship for equality *under the law* further attempts to organize and categorize deviants into *acceptable* beings fit for a cohesive and functional nation state.

Regulated borders defined within citizenship laws and immigration laws produce homonormative subjects. According to Trevenen and DeGagne, the regulation and mobilization of these homonormative subjects at the border reinforces racialized and queer exclusions.²²⁷ They argue that queerness cannot be separated from racialization, as this combination slates “some queered bodies for life and other for death.”²²⁸ Discrediting sexual orientation asylum claims based on the *disbelief* the claimant as a *real queer* is one way the interpretation of refugee

²²⁴ Stychin (2000), p. 608.

²²⁵ Ferguson & Gupta (2002), p. 984.

²²⁶ Stychin (2000), p. 609.

²²⁷ Trevenen, Kathryn and Alexa DeGagne (2015). “Homonationalism at the Border and in the Streets: Organizing against Exclusion and Incorporation.” In “Disrupting Queer Inclusion: Canadian Homonationalisms and the Politics of Belonging.” Ed. OmiSoore Dryden and Suzanne Lenon, *UBC Press*: Vancouver. P. 100.

²²⁸ Trevenen and DeGagne (2015), p. 101.

laws is activated and reinforced by administrative law that shape bureaucracy. In addition, the employment of LGB, LGBTQ, LGBT, or Queer “refers to different organizations and communities” further contributing to the normalization of certain identities, while excluding others.²²⁹ Integrating queerness and race within a framework of homonationalism, provides a starting point for interpreting the political and legal mechanisms of state surveillance, criminalization, control, and normalization. From this perspective, the “state attempts to incorporate, “protect,” and maximize the productivity of some queered citizens, while excluding and targeting other queered citizens.”²³⁰ Homonormative subjects are defined within a Western context, and therefore, contribute to increased exclusion via the high number of *unbelievable* refugee claims and undesirable immigrants.

Spatialized border control by the Canadian state embraces surveillance and criminalization that is masked by the imagined liberal mask. Harsher and more invasive immigration requirements, specifically for queer refugees, is fueled by fear and the wide-spread narrative of Canadian borders being invaded by immigrants and refugees.²³¹ For example, tighter timeframes, more invasive investigations, greater surveillance of individuals and states, and so forth, complicates the immigration process for an already precarious and vulnerable population. Borders are a politically defined distinction between those within and those excluded. Borders determine who is able to enter and ultimately become integrated as a beneficiary of the national imaginary. These borders determine the meaning of acceptable identities and practices through interpretations by state gatekeepers. In other words, borders filter those entering to reinforce citizenship ideals.

²²⁹ Trevenen and DeGagne (2015), p. 102.

²³⁰ Trevenen and DeGagne (2015), p. 101.

²³¹ Trevenen and DeGagne (2015), p. 106.

What does this theory tell us with respect to queer asylum claims in Canada? What are the meta-narratives exposed through this theoretical analysis? How can theoretical discourse be applied to the statistical data, the case law, and legislative and policy reality? In other words, what does this theoretical framework do in explaining questions of law and identity, specifically in the context of queer asylum claims? This project outlines multiple lenses and approaches to the discourse of identity and law. By beginning with the discourse on categorization and the ways in which power and masculinity frame the boundaries of categories, I am able to show that identities are often externally defined. This means that the boundaries of identities are not completely created by the persons or groups that embody these categories. Rather, categories are applied to persons and groups whom are then expected to conform to these categories. Categorization is fundamental to the functioning of law. Law requires clear and concise boundaries to establish rules and regulations accepted norms of behaviour and identities and what deviancies are to be excluded. Sexuality is one of the many identities constructed and orchestrated by the law. Social norms and customs coinciding with culture, political engagement, social relations, and power, establish accepted notions of sexuality, specifically sexual orientation and sexual practices. Together, the categorization of sexuality by the law shapes the regulation of the borders, ultimately shaping who can enter the state and be part of the national imaginary.

This theoretical framework will be used to interpret and understand the legislation in Canada. Historically bound, the theory provides a way to understand the contemporary legal context as it pertains to immigration, refugees, and the establishment of a Canadian national imaginary. This theory will be applied to Canadian legislation and Canadian case law, while showing the many connections to the international community, the public sphere, and private

sphere. More specifically, theories of categorization, homonormativity, and mobility, will unravel the ways in which social assumptions of certain identities reinforce broader understandings of sexual orientation, sexual practices, desire, and what constitutes a fear of persecution. The ways in which legal categories are applied to individuals and groups has problematic tendencies that can inhibit people from entering Canada.

Methodology: the scope & data

To ground my theoretical analysis of laws relationship with identity, I performed a preliminary systematic review using the CanLII online database to search all Federal Court sexual orientation-based refugee claim appeals. “When a refugee claim is denied by the Immigration and Refugee Board, a claimant’s lawyer can apply to the Federal Court of Canada for judicial review.”²³² I also used case information compiled by *Envisioning Global LGBT Human Rights*. Together, I was able to compile several cases that demonstrate discontinuities in the case law and integral changes within the legislative sphere. To organize this information, I created several tables. Table 1 includes cases obtained from the Parliament of Canada web-document outlining precedent setting cases related to sexuality and sexual orientation. It also includes several integral decisions for interpreting refugee claims. These important cases were also analysed by several scholars included in this project to help substantiate the justification for their importance.

The second series of tables include a systematic breakdown informed by the theoretical framework outlined in the previous section. The search parameters are first by time, then by court type. For Table 2.1, the framework helped establish the identity categories present in a sexual orientation-based asylum claim in Canada. The terms included in this systematic review are not an exhaustive list of all the ways of identifying one’s sexual orientation. Table 2.2 breaks down the cases based on Court and Tribunal. For the purposes of this project, I only analysed cases from Federal Courts. By using cases at the Federal Court level, I am able to capture the decisions from previous decisions. However, focusing solely on the Federal Court limits the number of cases available for analysis and privileges the discourse to only those claimants with

²³² Sajnani, Rohan (2013) “Lesbian and Gay Refugee Issues: A Review of Federal Court Jurisprudence.” *Envisioning Global LGBT Human Rights*, Toronto.

the knowledge and capability to push for an appeal at the Federal Court level. A more comprehensive analysis would require inclusion of each court level, starting with the initial IRB hearing, followed by a comparison of decisions and processes by each court.

The third table includes all cases referenced in this project. These cases illuminate the problematic ways in which law is interpreted, the lack of legal engagement with categorical terms such as sexual orientation, as well as ways in which legal categories are placed onto the claimant. Accordingly, the claimant must conform *their* understanding of *their* identities within the accepted Western legal constructs. This conformity is the other side of homonormativity, whereby the action to *be* a good homosexual (lesbian, transexual, etcetera) is the action of the claimant as they attempt to work within the unequal power dynamics innate in homonormativity. Processes of homonormativity inherent in queer asylum claims become apparent with the more claims that are interrogated. Layers of identity are confronted with interwoven relations of power that dictate the knowledge the state uses to determine which identities are included in the national imaginary of Canada.

Table 1 outlines several precedent setting cases, and cases integral to the Federal Court decision process in refugee claim appeals. Specifically, I retrieved the first four cases from the Parliament of Canada website that provides a condensed report outlining important appeals and decisions for Canadian case law. The last two cases were derived from the academic work of the scholars I incorporated into this project. This table is structured in a specific format as it includes the number of reported citations of the case, three reference terms, and an explanatory/note section. The inclusion of reference terms, provided by CanLII, allows for another layer of analysis in how the cases *may* be applicable to questions about sexual orientation or gender

identity. The notes are general and are specific to immigration and refugee law, and sexual orientation and gender identity jurisprudence where possible.

Table 2.1 consists of a systematic review of the most common forms of sexual orientation identification used in these claims. For example, “Gay”, “Lesbian”, and “homosexual” appeared more often than “transsexual.” To narrow the large number of claims, I first searched all years, then recorded only courts and court appeals between December 01, 2013 – December 01, 2016. The most recent three years provide a manageable dataset for the scope of this project that provide a glimpse into the ways in which the law and identity are interconnected. No tribunals or similar legal institutions were included in the final results to keep the scope of the project narrow. In addition, all institutions deal with sexual-orientation and gender identity in different ways. The purpose of this project was not to analyse the plethora of ways *institutions* across the private and public sector categorize identity, rather, this project focuses on the ways in which laws categorize identity through apparatuses of the state. Even with this systematic break down, the overall volume of cases is beyond the scope of this project, reaching a total of 105 searchable Federal cases.

Table 2.2 breaks down federal level “refugee” cases reviewed in court and tribunals. The total number of “refugee” cases in courts or tribunals generated within the three-year time frame was 11 229. There were 2 287 Federal level cases, which included Supreme Court cases. There were 71 Federal Appeals Court cases. The entire list of cases compiled from the search results are available in the larger table upon request, as this table is over 288 lines.²³³ This larger table is

²³³ LaViolette (2013) cited a *Globe and Mail* (2004) report that between 1999 – 2003, “nearly 2,500 people from 75 different countries have sought asylum on the basis of sexual orientation.” Sean Rehaag (2008) stated that in 2004, 1,351 sexual orientation-based claims were decided in Canada. LaViolette (2013) provides the most recent statistics of 2009 to 2011, 561 sexual

broken down by country of origin of the claimant, decision, and systematic terms used to find the cases within the search parameters. These reference terms were specific to each case and provided by CanLII. I used reference terms to provide another layer of categorization. Some terms include, but are not limited to: Lesbian, Bisexual, Documents, Discredit, Gay Community, Implausibility, Prohibited Grounds of Discrimination, Risk, Review, Same-Sex, Transgender, Translation, Vigilantes, and Violence.

For table 3, I listed the cases used in this project to illuminate questions and issues highlighted in this project. The cases I used are based on the *Envisioning Canada* report and cases analysed by other scholars such as LaViolette, Rehaag, Gaucher, and DeGagne, amongst others. This table is not an exhaustive list of all refugee cases that could illuminate issues experienced by queer refugee claimants. A thorough and substantive analysis of queer refugee claims involving access to information from the Immigration and Refugee Board, along with court case databases such as CanLII would be required for a more comprehensive picture.

Case law does not exist in isolation since some decisions can contribute to legislative changes beyond the courts. To show this, I have included new legislation and legislative amendments that have shaped immigration, refugee, and citizenship law in relation to sexual orientation and gender identity. Table four lists several key legislations and legislative amendments referred to in this project however, I have included several Acts and laws that could not be directly incorporated into this project, such as security related legislation. The section 4 tables function as a historical timeline for legislation that can provide a glimpse into the evolution of Canadian legislation, and the ways in which the written discourse of inclusion and exclusion has evolved.

orientation-based claims were finalized before the Refugee Protection Division of the IRB, with 58% being granted protection.

In total, I include more than a dozen legal cases and several important Acts or legislative amendments that have shaped the contemporary legal system regarding sexual orientation, gender identity, and the ways in which refugee law and immigration law define these categories of identity. The cases are not sufficient in numbers to provide a generalized interpretation of the legal refugee system. Rather, they help illuminate areas of concern in law and identity categories and expose possible patterns of discrimination, exclusion, and misinterpretation. More specifically, the scope of this project provides an important collection of theories, legislation, and legal cases that continue to require further analysis and interrogation of sexual orientation-based refugee claims within the Canadian context. Broadly, more substantive academic literature is required to inform public policy and legislation at the national and international levels regarding sexual orientation, gender, race, ethnicity, and other forms of identity categories and the ways in which categorization shapes and is shaped by the state, legislation, and institutions.

As many of the cases are appeals, I will be able to gain insight into previous lower court decisions, and begin to outline the ways in which law and identity interact. I will further deconstruct these cases by applying critical queer theory, critical legal theory, and the concept of homonationalism. Appendix A contains the three tables with my preliminary findings. Appendix B contains the tables responsible for historically outlining Canadian legislation related to immigration, refugee and citizen law, as well as sexual orientation and gender identity. Further scrutiny and comprehensive analysis would be required for a stronger understanding of written and verbal discourse patterns, as well as discourse based on action, decision, and case outcomes.

There are several limitations inherent in the data collection for this project. One shortfall with CanLII is the limited number of cases uploaded to the database. Although it does act as a significant resource, a more thorough investigation would include an Access to Information and

Privacy application to the Immigration and Refugee Board and the Department of Immigration, Refugees, and Citizenship Canada. With respect to chosen cases, successful decisions are often not easily accessible without performing an access to information through the IRB. The reason successful decisions are often not easily accessed is because adjudicators are “not required to provide written reasons for positive decisions.”²³⁴ Published decisions selected by the IRB are based on “unusual fact situations or a new approach to issues” arises.²³⁵ In addition to accessing the cases, some key components of the refugee determination process are also difficult to access. LaViolette states,

Independent country information remains hard to find for many parts of the world, and current information is often general and descriptive – rather than specific and evaluative – about state protection. For example, the 2014 ILGA report *State-Sponsored Homophobia* includes very little analysis of the scope, impact and enforcement of laws that criminalize same-sex conduct and their impact on the availability of state protection.²³⁶

LaViolette highlights the fundamental issue with gathering accurate data regarding the country of origin or nationality for the asylum seeker. The difficulty in accessing country information often used in queer asylum claims creates a significant inability for the public to access and provide feedback or critical analysis. In conjunction with the difficulty for accessing country information, the Canadian Association of Refugee Lawyers noted that there is a problematic trend of connecting “levels of democracy to a presumption of state protection” because there is “no automatic link between the finding that a state is democratic and the extent to which state protection exists for an individual refugee

²³⁴ Rehaag (2008), p. 70.

²³⁵ Rehaag (2008), p. 70. See also Gaucher and DeGagne (2014), p. 6.

²³⁶ LaViolette (2014), p. 98.

claimant.”²³⁷ The difficulty in accessing the country information documentation and the difficulty in accessing successful claims are limitations of this project. Aside from these limitations, the theoretical discourse applied to the cases within this project provides an opportunity for continued discussion on the topic of queer refugee claims.

²³⁷ Canadian Association of Refugee Lawyers (2016). “CARL’s Submissions in Support of IRB Chairperson’s Guidelines for Assessing Claims Based on Sexual Orientation & Gender Identity.” *Report*, online at: <http://www.carl-acaadr.ca/sites/default/files/CARL%20subs%20for%20SOGI%20Guidelines%20final%202.pdf>. See specifically, part V.

Canadian Refugee Legal System

Immigration and Refugee History: National & International

In Canada, immigration law and policy is historically rooted in heteronormative white conceptions of the good subject²³⁸. The national imaginary of Canada rests on a history of immigrants settling *virgin* lands, whereby new immigrants predominantly moved from Europe and brought with them their families and hopes of establishing a *better life* in the new world. However, only immigrants from states of accepted ethnicity and cultural values were allowed entry into this *new world* of opportunities. Anwar states that “until 1956, immigrants of non-European origin were allowed to immigrate to Canada *only* if sponsored by a Canadian male, or if willing to work as farm workers or domestic servants.”²³⁹ In addition, the national imaginary, according to Anwar, consistently ignores the tragic and violent history of Canadian colonization.²⁴⁰ Thus, the historical image of Canada rests on racialization of the indigenous person within the territory, while racializing the country of origin to exclude certain immigrants.

Canada’s first immigration act, the *Immigration Act* 1869, focused on the safety of immigrants during their passage.²⁴¹ However, by 1885 explicitly racist acts and regulations were created to exclude unwanted immigrants. For example, the *Royal Commission on Chinese Immigration* 1885, was implemented to restrict Chinese immigration by applying a head tax that

²³⁸ A number of theorists use this term “good citizen” as an analytical tool for exclusion. I will borrow from Eithne Luibheid (2008), and use the concept of “good subject.” Good subject, according to Luibheid, is an individual who follows the norms of a neoliberal capitalist democracy and lives according to the values of the society.

²³⁹ Anwar, Arif (2014). “Canadian Immigration Policy: Micro and Macro Issues with the Points Bases Assessment System.” *Canadian Ethnic Studies*, 46(1): 169-179. P. 171.

²⁴⁰ Recent acknowledgements by the Federal government, as well as movements such as the Missing and Murder Women’s Inquiry and the current Ontario Superior Court case on the Sixties Scoop that will provide precedent for government liability.

²⁴¹ Canadian Museum of Immigration at Pier 21, “Canadian Immigration Acts and Legislation” Compiled by Lindsay Van Dyk, (Fact Sheet). Online: <http://www.pier21.ca/research/immigration-history/canadian-immigration-acts-and-legislation>.

was increased in 1887, 1892, 1900, and 1903.²⁴² The *Immigration Act* 1906, “expanded categories of prohibited immigrants.”²⁴³ This was followed by the *Hayashi-Lemieux Agreement* (Gentlemen’s Agreement) to limit the number of Japanese, and the *Continuous Journey Regulation* 1908, to restrict people immigrating from India. The subsequent *Immigration Act* of 1910 and 1919, along with immigration regulations, lead to the explicit exclusion of immigrants from undesirable ethnic and national backgrounds.²⁴⁴ Until this point, residents of Canada were subjects of the British Empire. The *Canadian Citizenship Act* 1947 created a new category of residency and reinforced the immigration laws of the state. This same year, Prime Minister William Lyon Mackenzie King made a speech addressing immigration. In part of this address he specifically referred to refugees and displaced persons. He stated,

The resettlement of refugees and displaced persons constitutes a special problem... Canada is not obliged, because of membership in the United Nations [sic] or under the constitution of the international refugee organization [sic], to accept any specific number of refugees or displaced persons. We have, nevertheless, a moral obligation to assist in meeting the problem, and this obligation we are prepared to recognize.²⁴⁵

In addition to recognizing the need for Canada to become a global player in refugee and immigration allowance, Mackenzie outlined three pillars unchanged in the Canadian immigration system: economic, family, and humanitarian.²⁴⁶ In the same speech, King demonstrated how the concepts of privilege and superiority have been the historical base of Canadian policy:

The policy of the government is to foster the growth of the population of Canada by the encouragement of immigration. The government will... ensure the careful

²⁴² Canadian Museum of Immigration at Pier 21 (2017).

²⁴³ Canadian Museum of Immigration at Pier 21 (2017).

²⁴⁴ Canadian Museum of Immigration at Pier 21 (2017).

²⁴⁵ Vineberg, Robert (2011). “Continuity in the Canadian immigration policy 1947 to present: taking a fresh look at McKenzie Kings 1947 immigration policy statement.” *Journal of International Migration and Integration*, 12(2): 199-216.

²⁴⁶ Vineberg (2011), p. 215.

selection and permanent settlement of such numbers of immigrants as can advantageously be absorbed in our national economy... with regard to the selection of immigrants, much has been said about the discrimination. I wish to make it quite clear that Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens... it is a privilege.²⁴⁷

King's statement is powerful because it outlines the underlying ideology and beliefs that drive Canadian immigration policy. This conceptualization of privilege permeates immigration and refugee law today, legitimizing racialization, homophobia, ableism, and criminalization through exclusionary laws. King is important because it was under his leadership that the first Canadian citizenship act was created.

Following the introduction of the Act 1947, the *Immigration Act* 1952²⁴⁸ adhered to historically grounded exclusions. In 1966, the *White Paper on Immigration Policy*²⁴⁹ laid the foundation for the *Immigration Regulations* 1967, a draft for the *Immigration Act* 1976.²⁵⁰ The White Paper pushed for greater inclusion and removal of overt racism. The 1967 regulations included some of the White Paper suggestions such as the removal of explicit racism and a shift to skilled immigrants and child sponsorship.²⁵¹ A fundamental change in the 1967 reforms was the move to an *objective* points-based system, or Points Based Assessment (PBA). The PBA created categories of eligibility, including "Education," "Linguistic Ability in English or French," "Work Experience," "Age," "Arranged Employment," and "Adaptability."²⁵² The PBA

²⁴⁷ Green, Alan G., & David Green (2004). "The Goals of Canada's Immigration Policy: A Historical Perspective." *Canadian Journal of Urban Research*, 13(1):102-139.

²⁴⁸ Immigration, Refugee & Citizenship Canada, "Forging Our Legacy: Canadian Citizenship and Immigration, 1900-1977." (Archived Fact Sheet) (IRCC, 2006), online: <http://www.cic.gc.ca/english/resources/publications/legacy/chap-5b.asp>.

²⁴⁹ IRCC, 2006. Online: <http://www.cic.gc.ca/english/resources/publications/legacy/chap-6.asp>.

²⁵⁰ Heritage Canada. "Immigration Acts (1866-2001)." (Archived Fact Sheet) (2016), online: https://web.archive.org/web/20150325130706/http://www.canadiana.ca/citm/specifique/immigration_e.html#1967.

²⁵¹ Canadian Museum of Immigration at Pier 21 (2017).

²⁵² Anwar (2012), p. 172-173.

does not apply to asylum seekers or refugee applicants, yet illuminates the emphasis on economic language to legitimize exclusions. The PBA privileges those with access to higher education, wealth, and skills training. This objectivity simply masks the exclusionary ways that Canadian immigration and citizenship laws are constructed to appear inclusive, but are fundamentally exclusionary.

Legislation and regulations enforced by the Canadian government reinforced the state's sovereign right to exclude, while masked by the liberal perception of objective statistics and data. Sarah Fine asserts that "we have become accustomed to an international system in which states claim the authority to control the admission of non-citizens into their territories and the terms of acquiring citizenship rights."²⁵³ Fine argues that "states routinely try to keep out all sorts of would-be entrants, for all sorts of reasons, with impunity."²⁵⁴ By impunity, there are minimal preventative mechanisms to ensure states are not abusing their control of excluding non-citizens. In one sense, the connection between a community and the state, consists of "a particular set of people" legitimizing their connection to territory through the state mechanisms of law and socio-political institutions.²⁵⁵ The state defines belonging by asserting sovereign control over the bodies that try to move in. Part of the state apparatus, refugee, immigration, and citizenship law construct the community within the nation-state, while attempting to exist as part of the larger international community. The international community relies heavily on international

²⁵³ Fine, Sarah (2013). "The Ethics of Immigration: Self-Determination and the Right to Exclude." *Philosophy Compass*, 8(3): 254-268. P. 254.

²⁵⁴ Fine (2013), p. 254.

²⁵⁵ Fine (2013), p. 262.

agreements, which help shape and instigate legal and social change in the countries that are a part of this community.²⁵⁶

Developed by unequal state actors on the global stage, international law forms the parameters of belonging to states by asserting the customs and rules regarding mobile people. The 1951 *UN Convention Relating to the Status of Refugees* [Convention] was the first international instrument to govern state obligations to refugees and asylum seekers.²⁵⁷ The Convention was later followed by the 1967 *Protocol Relating to the Status of Refugees*, which expanded the Convention to remove both geographic and temporal limitations.²⁵⁸ Both the Convention and Protocol are enforced by the United Nations High Commission on Refugees (UNHCR). A refugee is defined in the Convention under Article (1) as:

Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁵⁹

The convention further outlines the roles and responsibilities of the UNHCR and signatory states regarding refugee and asylum seeker rights. Dauvergne states that the commitment to non-refoulement means “refugees acquire indirectly a right to remain in the state where they have claimed refugee status for the simple reason that nowhere other than their state of nationality is

²⁵⁶ A critical assessment of the United Nations will not be included in this project, as it goes beyond the scope. However, it is important to point out that a number of theorists and scholars, along with community activists have pressured for change in the United Nations because it is often regarded as a legitimizing tool to further the imperial agenda of powerful Western nations, such as the United States of America.

²⁵⁷ See LaViolette (2013); *Envisioning Global LGBT Human Rights* (2015); Bradley (2013)

²⁵⁸ *Envisioning Global LGBT Human Rights* (2015)

²⁵⁹ The current definition of refugee was expanded under the 1967 Protocol. For the full 1951 Convention and 1967 Protocol, see the United Nations High Commissioner for Refugees at <http://www.unhcr.org/3b66c2aa10.html>.

required to welcome them back.”²⁶⁰ Queer, sexual orientation-based refugees, or gender-based refugee claimants have been defined within more recent regulations.

Sexual orientation-based refugee claims require further protection due to violent, oppressive, and criminalizing socio-political state environments relating to queer rights and protections. A refugee claiming asylum based on their sexual orientation means they are seeking protection from a state due to a fear of persecution in their home country or country of nationality. In 2012, UNHCR established *Guidelines on International Protection No.9* [Guidelines]²⁶¹, which provided guidance on claims for refugee claims based on sexual orientation and/or gender identity. The guidelines, as stated in the handbook, are “intended to provide legal interpretative guidance for governments, legal practitioners, decision makers, and the judiciary, as well as UNHCR staff.”²⁶² The Guidelines outline international human rights law in relation to sexual orientation and/or gender identity and refers to the *Yogyakarta Principles* 2007 [Principles], for the terminology.

The Principles, which directly influence the Guidelines, “address a broad range of human rights standards and their application to issues of sexual orientation and gender identity,” and provides *recommendations* to states.²⁶³ The Principles define sexual orientation and gender identity as:

²⁶⁰ Dauvergne, Catherine (2004). “Refugee Law and the Measure of Globalization.” *Law in Context*, 22(2): 62-82. P. 64.

²⁶¹ UNHCR (2012). “Guidelines on International Protection No. 9.” UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection, accessed at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

²⁶² UNHCR (2012). “Guidelines on International Protection No. 9.” UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection, accessed at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

²⁶³ International Commission of Jurists (2007). “Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.” Yogyakarta Principles, Available at: <http://www.refworld.org/docid/48244e602.html>. Preamble.

(1) Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. (2) Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms.²⁶⁴

The Principles are best understood as a whole, however, some important ones include Principle 2, which includes sexual orientation or gender identity into the grounds of non-discrimination; Principle 3 states that “everyone has the right to recognition everywhere as a person before the law”; Principle 6 argues for the assurance of the right to privacy, whereby a claimant has the choice to disclose or not to disclose information relating to their sexual orientation or gender identity.²⁶⁵ The principles also provide additional recommendations, for example,

(G) the UN High Commissioner for Refugees integrate these Principles in efforts to protect persons who experience, or have a well-founded fear of, persecution on the basis of sexual orientation or gender identity, and ensure that no person is discriminated against on the basis of sexual orientation or gender identity in relation to the receipt of humanitarian assistance or other services, or the determination of refugee status.²⁶⁶

In addition to being a party to these Principles, the IRB manages the claims of refugees and new immigrants through incorporating the Guidelines. The Guidelines provide a spatialized understanding of sexual orientation-based claims and gender identity claims by recommending an interpretive awareness of cultural and experiential differences. For example, section III on terminology reminds interpreters of claims that self-identification may not result in the *assumed*

²⁶⁴ International Commission of Jurists (2007). “Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.” Yogyakarta Principles, Available at: <http://www.refworld.org/docid/48244e602.html>. Preamble, p. 6.

²⁶⁵ Yogyakarta Principles (2012).

²⁶⁶ Yogyakarta Principles (2012).

or *known* terms that fall within LGBTQI.²⁶⁷ In addition, the Guidelines caution on issues relating to persecution²⁶⁸, concealment²⁶⁹, agents of persecution²⁷⁰, and outlines the parameters of Membership of a Particular Social Group²⁷¹. Together, these regulations provide a framework for managing refugee claims. According to Gaucher and DeGagne,

the Guidelines attempt to assist decision-makers in their assessment of credibility and harm in a way that accounts for the multifariousness of sexual orientation and gender identity. Refugee-receiving states, like Canada, are obligated to alter their determination practices so that they are consistent with the UNHCR's recommendations.²⁷²

The Guidelines clearly define what persecution is and how it may manifest in the narratives of claimants, the current global environment relating to the criminalization of same-sex relations, the concealment of sexual orientation and/or gender identity, agents of persecution, membership of a particular social group, and procedural issues.²⁷³

Canadian refugee law is in-part derived from the Convention and Protocol, included in the *Immigration and Refugee Protection Act 2002* [IRPA]²⁷⁴, section 96, as well as being inclusive of the international guidelines and principles.²⁷⁵ According to *Envisioning Global LGBT Human Rights*, the “explicit mention of LGBT asylum seekers was a watershed moment

²⁶⁷ UNHCR (2012). “Guidelines on International Protection No.9.” *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection*, accessed at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. See s.III, paras 8-11.

²⁶⁸ Guidelines No. 9, paras 16-25.

²⁶⁹ Guidelines No. 9, paras 30-33.

²⁷⁰ Guidelines No. 9, paras 34-37.

²⁷¹ Guidelines No. 9, paras 44-49.

²⁷² Gaucher & DeGagne (2014), p. 9.

²⁷³ UNHCR (2012). “Guidelines on International Protection No. 9.” *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection*, accessed at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

²⁷⁴ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Current to January 31, 2017.

²⁷⁵ LaViolette (2007), p. 171.

in international human rights law.”²⁷⁶ The international human rights regime and legal sphere have been progressively incorporating sexual orientation and gender identity discourse, yet more work is required to ensure protection and access to rights for vulnerable populations.

The process for a refugee²⁷⁷ claimant in Canada consists of claiming asylum either in a country outside of their own with the intent to come to Canada, or within Canadian borders. The legal guide concerning refugees and immigrants is the IRPA, enacted under Bill C-11²⁷⁸ to replace the immigration act of 1976. The branch within the Immigration and Refugee Board of Canada (IRB) responsible for determining refugee claims is the Refugee Protection Division (RPD). For the claimant, they must *satisfy* each of the elements of the refugee definition, with the ability to prove “sufficiently serious” fear of persecution.²⁷⁹ The enumerated grounds of persecution under section 96 of the United Nations Convention Relating to the Status of Refugees consist of the “fear of persecution by reason of race, religion, nationality, membership of a particular social group, or political opinion.”²⁸⁰ A sexual orientation-based refugee claim or a gender identity claim are considered ‘immutable characteristics’ with the ground of ‘membership into a particular social group.’ The legislative history and critiques of this approach to queer refugees will be elaborated on in the next section.

Due to the nature of refugee claims, the claimant’s narrative and supporting documentation are very important. Claimants make a public appeal to IRB members regarding their *fear of persecution*, while providing sufficient evidence and documentation. The claim is

²⁷⁶ Envisioning Global LGBT Human Rights (2015). “Envisioning LGBT refugee rights in Canada: the impact of Canada’s new immigration regime.”

²⁷⁷ Murray (2016) refers to Lisa Malkki (1995) who deconstructs the refugee category. Malkki outlines the refugee category as an “epistemic object of construction.” P. 4.

²⁷⁸ Bill C-11, *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*. 3rd Sess, 40th Parl, 2011.

²⁷⁹ LaViolette (2007), p. 172.

²⁸⁰ LaViolette (2007), p. 171.

either approved for refugee status or denied. If denied, the claimant can appeal to the IRB Appeals division. If the case is further denied, the claimant can appeal to the Federal Court. The Federal Court is the primary restraint on the IRB, to “identify errors of law and returning claims of redetermination.”²⁸¹ The process of assessing an IRB appeal involves the Federal Court to perform a *Standard of Review*, based on reasonableness and correctness that is grounded in fact and credibility.²⁸² In addition, the testimony of a claimant is presumed to be true,²⁸³ but may be “refuted by the presence of inconsistencies and contradictions in testimony, implausibility and where facts are presented are not what could reasonably be expected.”²⁸⁴ Murray describes the refugee system in Canada as “quasi-legal juridical structure,” “a process focused on the determination of the ‘credibility’ of a refugee claim is premised upon the assumption that truth can be deduced through analysis of factual evidence, which consists of, in most refugee cases, primarily oral narratives and written documents.”²⁸⁵ Sexual orientation or gender identity claimants must provide a narrative that is credible within the context of migration within a highly visible moment of state scrutiny.²⁸⁶ The process for a refugee claim in Canada involves an application, provision of documentation, assessment, and possible appeals, with an ultimate decision. For Queer refugees, or sexual orientation-based claims, the claimant must learn to occupy and describe the queer categories utilized by the IRB to ensure a credible and reliable

²⁸¹ Gaucher, Megan, and Alexa DeGagne (2014). “Guilty Until Proven Prosecuted: The Canadian State’s Assessment of Sexual Minority Refugee Claimants and the Invisibility of the non-Western Sexual non-Citizen.” *Social Politics: International Studies in Gender, State, and Society*: doi: 10.1093/sp/jxu029 (available online).

²⁸² *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII) at para. 34.

²⁸³ *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 (CanLII) at para. 6.

²⁸⁴ *Jiang v. Canada (Citizenship and Immigration)*, 2008 FC 775 (CanLII) at para. 15.

²⁸⁵ Murray (2016), p. 40.

²⁸⁶ Murray (2016), p. 41.

testimony, even if the claimant does not enter Canada with the same self-conceptions. Refugee claimants are

reminded repeatedly by their lawyers, per support group leaders and one another that there are a number of components, characteristics and assumptions utilized by IRB members to determine the credibility of a SOGI refugee claim, and that if they learn and understand these assumptions and characteristics associated with LGBT identities, and integrate them into an appropriate narrative of identity formation and persecution based on that identity, then they stand a better chance of a successful hearing.²⁸⁷

As explained by Murray and will become evident in the refugee claims to follow in the next section, queer refugees are expected to categorize and perform the assumed and expected identity categories that exist within a Western model, and adapt their initial way of being to this new model.

In 2012, the omnibus Bill C-31,²⁸⁸ received Royal Assent, fundamentally shifting Canada's position on refugees. Murray highlights that this bill was introduced to rectify "the fact that the system is clogged with false applications and the refugee backlog is due in part to fraudulent claims."²⁸⁹ Envisioning Global LGBT Human Rights further argues that the Act is anti-refugee and cracks down on "those immigrants who the government has not selected as economically advantageous or desirable."²⁹⁰ Some of the measures include: shortened application timelines, increased detention usage, "draconian measures of *irregular* arrivals," a rollback of the interim federal health program which exacerbated health inequalities within migrant communities, as well as privatization of certain responsibilities. Amongst these issues and others

²⁸⁷ Murray (2016), p. 45.

²⁸⁸ Bill C-31, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, 1st Sess, 41st Parl, 2013.

²⁸⁹ Murray (2016), p. 41.

²⁹⁰ Envisioning Global LGBT Human Rights (2015). "Envisioning LGBT refugee rights in Canada: the impact of Canada's new immigration regime."

outlined by Envisioning Global LGBT Human Rights, the Act implemented a Refugee Appeals Division (RAD), which “ensures written review of IRB decisions and will admit new evidence arising subsequent to, or not reasonably available before, a decision at the IRB.”²⁹¹ Although in 2016 the new Federal Government of Canada provided a substantially greater influx of resources to support an additional 25,000 Syrian refugees, a number of which were LGBT, the actual structure of Canadian immigration remains exclusionary and focused on economic benefits. The following section will highlight the history of sexual orientation and gender identity within Canadian case law and legislation. It will also outline several sexual orientation-based claims that illuminate the ways in which law and identity categories are in many ways disconnected. The space within which law, identity, and refugees interconnect is entrenched within the specific hegemonic white masculinity that has defined Canadian legal, political, and social history and establishes the boundaries of the *good* citizen, *good* immigrant.

Sexual Orientation & Gender Identity Based Refugee Claims

Legal cases provide empirical material that expose the ways in which sexuality, gender, and identity are taken up within the legal machinery that involves legislation, case law, policy, and legal professionals. The following legal cases provide a glimpse into how certain cases have embedded sexual orientation and gender identity into the law, while exposing the lack of discussion of these categories within state borders and at state borders. I will begin this section by analysing several precedent setting cases that played a role in defining working definitions of sexual orientation and gender identity used in refugee law. Moreover, these cases demonstrate how definitions established within case law can lead to broad changes in law. I then provide Federal Court Appeals refugee claims based on sexual orientation. These cases illuminate the

²⁹¹ Envisioning Global LGBT Human Rights (2015). “Envisioning LGBT refugee rights in Canada: the impact of Canada’s new immigration regime.”

ways in which law produces guidelines for understanding claimant narratives, in addition to reproducing the expectations placed on queer asylum seekers. The expectations on queer asylum claims is embedded within the Canadian epistemology invoking power, gendered, and sexualized notions of acceptable identities.

What are some of the key ideological assumptions shaping the queer refugee claim process in Canada? Broadly, these ideological assumptions are grounded in neoliberal and hegemonic masculinities that shape the ways in which gender expression and identity and sexual expression and identity ought to be. Specifically, these ideological assumptions assume that individuals ought to express, represent, and perform their sexuality as it corresponds to normative ideals. Normative ideals of sexual orientation and sexual identity construct organized categorical boxes that encompass and define how an individual ought to behave, the spaces that an individual ought to occupy, and the *types* of people or communities an individual ought to be affiliated with and know of. These normative and essentialist notions of being impact how a board member understands and interprets the narratives of queer asylum claims.

Canadian legal history for sexual orientation-based claims is relatively short, with the first recorded court case occurring in the early 1990s. Since the 1991 *Re R (UW)* decision, several Federal and Supreme Court cases have shaped progressive changes in legislation.²⁹² One of the most fundamental legal cases in Canadian history relating to protections based on sexual orientation and gender identity was *Canada (AG) v. Ward*²⁹³. In *Ward*, the Supreme Court of Canada confirmed that sexual orientation and gender identity can constitute the basis of a claim for ‘membership in a particular social group,’ even though the case was concerning membership

²⁹² LaViolette (2013), p. 3, referring to *Re R (UW)* [1991].

²⁹³ *Canada (AG) v. Ward*, [1993] 2 SCR 689 [Ward].

in the Irish National Liberation Army.²⁹⁴ The Justice in *Ward*, LaForest, defined ‘particular social group’ by identifying three categories. The first category was defined by an “innate or unchangeable characteristic,” which incorporated gender, linguistic background, and sexual orientation.²⁹⁵ The second is a group “whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association.”²⁹⁶ The third category consists of people “associated by a former voluntary status, unalterable due to its historical prominence.”²⁹⁷ The inclusion of sexual orientation and gender into ‘membership in a particular social group’ as an ‘immutable or unchangeable characteristic’ was integral for *queer* refugee claimants. However, the decision in *Ward* was problematic and has been criticised for reasons including the fact that *Ward* did not explore the meaning of sexual orientation.

The ‘immutability’ of sexual orientation and gender identity consistently shapes decisions in sexual orientation-based refugee claims, even though there is a societal and to some extent legal shift away from this conceptualization. “The immutability of sexual orientation was a key factor in *Egan v. Canada*²⁹⁸, the decision of the Supreme Court of Canada that brought sexual orientation into the ambit of constitutionally prohibited grounds of discrimination.”²⁹⁹ The decision, along with the *Haig*³⁰⁰ decision, contributed to the creation of Federal Bill C-33, to

²⁹⁴ LaViolette (2007), p. 174; LaViolette (1997), p. 3.

²⁹⁵ LaViolette (2007), p. 174.

²⁹⁶ Rehaag, Sean (2009). “Bisexuals need not apply: a comparative appraisal of refugee law and policy in Canada, the United States, and Australia.” *International Journal of Human Rights*, 13(2-3): 415-436. P. 418.

²⁹⁷ Rehaag (2009), p. 418.

²⁹⁸ *Egan v. Canada*, [1995] 2 SCR 513, 1995 CanLII 98 (SCC).

²⁹⁹ Rehaag (2008), p. 82.

³⁰⁰ *Haig v. Canada*, 1992 CanLII 2787 (ON CA). This case “held that sexual orientation constitutes an analogous ground of discrimination under section 15(1) of the Charter.” See Library of Parliament:
http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C16&Mode=1&Parl=42&Ses=1&source=library_prb.

include “sexual orientation” into the CHRA’s prohibited grounds of discrimination.³⁰¹ Most significantly, since the inclusion of the prohibition of discrimination on the basis of sexual orientation into the CHRA and the *Canadian Charter of Rights and Freedoms*, s.15, all Canadian human rights legislation prohibits discrimination on these grounds “either explicitly or implicitly”.³⁰²

Several Canadian scholars have emphasized serious flaws in the refugee determination apparatus that includes legislation and case law, specifically the ways in which sexual orientation is categorically defined and the process for a refugee claim. Rehaag states “case law reveals that sexual minority refugee claims continue in practice to be measured against relatively rigid and immutable understandings of sexual orientations.”³⁰³ The *immutability* of sexual orientation and gender identity was defined as a “factor of [a] *particular social group* [that] can be delineated for the purposes of Canadian refugee law.”³⁰⁴ Current jurisprudence “reflects an essentialist understanding of sexual identity as an innate and immutable characteristic.”³⁰⁵ This essentialist perspective asserts that individuals *fall into* categories of sexual orientation such as gay or straight or bisexual “naturally, completely, and unchangeably.”³⁰⁶ More specifically, essentialist juridical understandings of sexual identity are believed to “correspond to the life experiences of many minorities.”³⁰⁷ Therefore, as Rehaag asserts, current jurisprudence relating to queer identity rights is based on essentialist conceptions of queer identity that are further tied to norms and

³⁰¹ Bill C-33, *An Act to amend the Canadian Human Rights Act*, 2nd Sess, 35 Parl, 1996.

³⁰² Rehaag (2008), p. 64.

³⁰³ Rehaag (2009), p. 419.

³⁰⁴ LaViolette (1997), p. 4.

³⁰⁵ Rehaag (2008), p. 61.

³⁰⁶ Rehaag (2008), pp. 80-81.

³⁰⁷ Rehaag (2008), p. 81.

narratives.³⁰⁸ These norms and narratives reproduce certain cultural and political histories that coincide with notions of hegemonic masculinities, defining essentialist views of identities within a particular space. Essentialist understandings of sexual orientation legitimize the incorporation of sexual orientation into a “particular social group.” LaViolette outlines three fundamental flaws with the Supreme Court’s definition of “particular social group” for refugee law.

First, *Ward* inappropriately imports into Canadian refugee law the ‘enumerated and analogous’ test developed in the context of Canadian equality jurisprudence. Second, in relying on equality principles, the Supreme Court classifies sexual orientation as an innate or unchangeable characteristic, an assertion that cannot be factually ascertained. Third, the approach in *Ward*, which defines groups solely on the basis of innate personal characteristics common to all members of a group, fails to consider how societies and states classify and marginalize groups of people regardless of whether those individuals have personal attributes that are innate to their human constitution.³⁰⁹

In other words, LaViolette exposes the flaw with equality jurisprudence because it is not always able to account for the diverse and complex understandings of sexual orientation and gender classifications overlaid with cultural specificity. Although the Supreme Court of Canada has interrogation tests to identify discriminatory laws and government actions, the burden of proof continues to be placed on the claimant to prove their fear of persecution.³¹⁰ Given that the burden of proof is on the individual claimant reinforces the patchwork of laws that create and shape refugee law, which are not always sensitive to the unique context of refugees. This is not to say that the burden of proof ought to be entirely on the receiving state, but the burden needs to be shared between the claimant and the state. The refugee claim is based on the identity of the individual, but the basis of this fear is experiences of persecution such as violence. The

³⁰⁸ Rehaag (2008), p. 82.

³⁰⁹ LaViolette (1997), p. 4.

³¹⁰ Ontario Women’s Justice Network (2008). “The development of Canadian equality test: s.15(1) of the Charter.” *Archived Article*, accessed at: http://owjn.org/owjn_2009/legal-information/aboriginal-law/109.

Canadian Association of Refugee Lawyers list the issue of scarcity of documentation of abuse “because homosexuality is so heavily stigmatized to the point where sexual minorities feel uncomfortable or unsafe to express their sexual identity.”³¹¹ Documentation scarcity may also show that “sexual minorities cannot safely and openly live in their home countries,” or “it is unsafe for human rights advocates to properly document the real living conditions.”³¹² Therefore, the IRB may be required to look beyond country condition documentation by looking at contextual evidence such as state and non-state actor attitudes towards minority sexuality.

Legislative amendments and court rulings provide fundamental changes that broadly shape immigration law and challenge heteronormative laws, for example the changes in Canadian marriage laws in 2005.

The 2005 enactment of Bill C-38³¹³ authorizing same-sex marriage had implications for the country’s immigration scheme. [...] In January 1999, the government’s proposed program for modernizing immigration policy and law acknowledged that the recognition of common-law and same-sex relationships through regulatory changes would eliminate the recourse to discretionary administrative guidelines. Bill C-11, which received Royal Assent in November 2001, initiated this process of change.³¹⁴

Same-sex marriage legalization had implications for Canada’s immigration system as it legalized same-sex partner spousal sponsorship. Same-sex marriage spousal sponsorship claims are another example of how non-heteronormative immigration applications challenge the preconceived notions of sexuality and gender within Canadian immigration law. Another recent

³¹¹ Canadian Association of Refugee Lawyers, p. 21.

³¹² Canadian Association of Refugee Lawyers, p. 22.

³¹³ Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes, or the Civil Marriage Act*. Codified a definition of marriage for the first time in Canada. It expanded the conception of traditional marriage, and gave religious officials the right to refuse performing a marriage ceremony, 1st Sess, 38th Parl, 2005.

³¹⁴ Hurley, Mary C. (2003). “Sexual Orientation & Legal Rights.” *Government of Canada*, Law and Government Division, accessed at: <http://publications.gc.ca/Collection-R/LoPBdP/CIR/921-e.htm>.

example that shows the challenging of historical norms is the legislative amendment, Bill C-16.³¹⁵

The bill is intended to protect individuals from discrimination within the sphere of federal jurisdiction and from being the targets of hate propaganda, because of their gender identity or their gender expression. The bill adds “gender identity or expression” to the list of prohibited grounds of discrimination in the *Canadian Human Rights Act*³¹⁶ and the list of characteristics of identifiable groups protected from hate propaganda in the *Criminal Code*³¹⁷. It also adds that evidence that an offence was motivated by bias, prejudice or hate based on a person’s gender identity or expression constitutes an aggravating circumstance for a court to consider when imposing a criminal sentence.

This bill would add “gender identity or expression” to section 3 of the Act and section 318(4) of the *Criminal Code*. How this bill may impact immigration and refugee legislation is unclear. Given the interconnected characteristic of law, this potential legislative change could have implications for refugee and immigration law. Since the bill in its current form does not appear to deconstruct and define these terms nor does it appear to account for cross cultural interpretations of these terms, it appears this legislative amendment continues to perpetuate the lack of understanding for the complexities of identity categories. Bill C-16 relies on compartmentalized identity terms, and asserts that the “terms refer to a person’s understanding of what their gender is and how they choose to express it.”³¹⁸ These terms are complex and consist of preconceived notions that may impact the ways in which legislators understand self-

³¹⁵ Bill C-16, *An Act to amend the Canadian Human Rights Act and Criminal Code*, 1st Sess, 42nd Parl, 2016, Second Reading (2017).

³¹⁶ *Canadian Human Rights Act*, RSC, 1985, c. H-6.

³¹⁷ *Criminal Code*, RSC, 1985, c. C-46.

³¹⁸ Library of Parliament:

http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C16&Mode=1&Parl=42&Ses=1&source=library_prb

identification outside of a “nontraditional concept of gender.”³¹⁹ Due to the lack of legislative definition or understanding, only a superficial interpretation of the term is discernable within the current form of the Bill. These examples of immigration spousal sponsorships or legislative amendments within Canadian human rights and criminal law show the dabbling of law in the categories of sexual orientation or gender identity/expression, but evidences the incomplete legislative discourse dealing with complex identity questions.

These progressions in Canadian legislation and case law provide peripheral discussion on sexual orientation and gender identity, which leaves greater room for interpretation and subjective assumptions concerning queer identities. The complexity of human sexuality is beyond models - and the very laws that are constructed based on these models - that hold people to their claimed sexual identity. This complexity is further exacerbated by cross-cultural dimensions, “because even if one’s chosen terminology is accepted within one community, it may be inappropriate in communities located in other regions of the world.”³²⁰ Gaucher and DeGagne assert that Western refugee determination models conceptualize sexual identity as a linear progression, from discovery, to *coming out*, to comfortability and understanding of the self.³²¹ For example, the Board reviewing a bisexual claim of a woman from Saint Lucia denied the claim due to her *inconsistent* sexual relations.

A problematic part of the testimony is her reference to her being in a relationship with a man after the end of her lesbian relationship.... That finding of a relationship

³¹⁹ Library of Parliament:

http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C16&Mode=1&Parl=42&Ses=1&source=library_prb

³²⁰ Rehaag (2009), p. 416. Rehaag cites Gilbert Herdt, ‘Bisexuality and the Causes of Homosexuality: The Case of the Sambia’, in *Bisexualities: The Ideology and Practice of Sexual Conduct with Both Men and Women*, ed. Erin Haeberle and Rolf Gindorf (New York: Continuum, 1998), 164. Rehaag outlines the lack of terminology and recognition of homosexual and heterosexual categories within their history and culture.

³²¹ Gaucher & DeGagne (2014), p. 10.

with a man was preceded by a reference to her own testimony that she was bisexual. A review of the transcript indicates that she seems to have moved, over time, from heterosexual, to lesbian, to bisexual orientation, ultimately questioning the credibility of the claimant's accounts (*Christopher v. Canada 2004*).³²²

In another case, *Leke v. Canada 2007*,³²³ the Federal Court struck down a decision by the IRB that denied an application because the claimant's performance and gender expression of their sexual orientation did not *coincide* with the *norm* or *expected* behaviours of a queer person. "The board did not find that there is anything to be gleaned from the claimant's facial expressions, tone of voice or his physical [sic] that would, in and of themselves create an impression that this claimant was either homosexual or bisexual."³²⁴ The Board further doubted the *true homosexuality* of the claimant because he previously fathered two children.³²⁵ In addition to the perception of the claimant by the Board, the Board also asserted that "since others in Nigeria probably would not identify this claimant as a homosexual consideration of cruel and unusual treatment, punishment, or tortures are theoretical and abstract."³²⁶ The Federal Court exposed a number of flawed failings in the decision by the Board. The Court highlighted errors in how the Board interpreted the evidence, and made assumptions based on questions that were not even posed to the claimant.³²⁷ Furthermore, the Court stated that "it was perverse to disregard the facts before it that the applicant is now wanted by the police for homosexuality and is considered a disgrace to his children, wife, family, church and community."³²⁸ These two cases provide a

³²² Gaucher & DeGagne (2014), p. 12. *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1128 (CanLII).

³²³ *Leke V. Canada (Citizenship and Immigration)*, 2007 FC 848 (CanLII).

³²⁴ Sajnani, Rohan (2013) "Lesbian and Gay Refugee Issues: A Review of Federal Court Jurisprudence." *Envisioning Global LGBT Human Rights*, Toronto., p. 2; *Leke 2007*.

³²⁵ Sajnani (2013), p. 4; *Leke 2007*.

³²⁶ *Leke (2007)*, para 19.

³²⁷ *Leke (2007)*, para 16 to 20.

³²⁸ *Leke (2007)*, para 21.

glimpse into how some queer refugee claimants are *expected* to behave and act within this homonormative model defined through power relations and nationalist rhetoric. Claimants share their personal narratives within a public sphere shaped by a normalized system of hegemonic masculinity in Western culture, thus leaving claimants' private, feminine, other-selves to be exposed and vulnerable.

Western discourse on sexuality and gender is often considered part of the private sphere, the area of society designated for femininity and sexual practices. Rehaag cites Millbank's work, which highlights the problem with using the term *homosexuality* generally in refugee claims because it masks "the stark gender differences in the experiences of lesbians and gay men and the subsequent translation of these experiences into legal categories."³²⁹ Violence against lesbians often occurs in the private sphere, while violence against homosexual men is understood to occur in the public sphere.³³⁰ Masculinity, as previously outlined, shapes the ideological construction of genders within the private and public sphere. It predominantly reserves the public sphere for masculine behaviours and actions, while leaving the private sphere for the feminine and sexual minority *other*. Millbank outlines the fundamental distinction between public and private displays of sexual identity and sexual expressions or sexuality.

Men simply *own* and use public space in a manner that woman cannot. As long as public spaces – such as parks and toilet blocks – present a significant danger to women's safety, there is little possibility that such spaces could be used to express lesbian desire. It is unlikely that any woman would wander though the most deserted avenues of the most deserted parks in her city looking for sex with women, because what she would fear would be sexual assault at the hands of men.

³²⁹ Rehaag (2008), p. 73. See Catherine Dauvergne & Jenni Millbank, "Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers" (2003) 31 Fed. L. Rev. 299 at 302. See also Jenni Millbank, "Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation" (2003) 18 Geo. Immigr. L.J. 71 at 72-77 [Millbank, "Visibility"]; Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melbourne U. L. Rev. 144 at 148 [Millbank, "Otherness"].

³³⁰ Rehaag (2008), p. 73.

This is not to suggest that such spaces are safe for gay men – who face the danger of gay bashing as well as undercover police operatives – but the cultural constructions of masculinity render both the likelihood and fear of this occurrence less pervasive.³³¹

Millbank shows that the public space continues to be reserved for men, although to a lesser extent gay men or queer men. This has implications on the narratives in refugee testimonies. Millbank states how, “in general, it was easier for gay men to make out the public aspects of their cases,” yet there was a “constant theme in the cases regarding gay men being *too* public.”³³² The cases referenced here follow the divide between public and private, exposing the hegemonic masculinity embedded within the hierarchy of gender and sexual identity. The cases also illuminate the spatialized expectations for behaviours and identity expressions within the public and private spheres.

Decision makers on IRB Boards become public witnesses to the narratives of queer asylum claims, which include behavioural and representations reserved for the private sphere. In a 2015 study, by Envisioning Canada, refugee claimant participants pointed out their racialized and discriminatory experiences based on the issues already outlined in this project.³³³ The successful claimants also pointed out barriers, fears, and discrimination after the legal process where they were granted asylum in Canada. The successful candidates experienced the re-traumatizing task of having to share violence or abuse, sexual practices, and ways of being queer to prove their identity.³³⁴ One of these successful claimants, Val Kalende, questioned why “Canada’s refugee system is more interested in her sex life than the persecution she experienced

³³¹ Millbank, Jenni (2002), “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia.” *Melbourne University Law Review*, 26(144). P. 164.

³³² Millbank (2002), p. 169.

³³³ Canada Research Team (2015). “Is Canada a Safe Haven?” *Envisioning LGBT Refugee Rights in Canada*, online: <https://www.dropbox.com/s/nn9qork9zqi2da1/Is%20Canada%20A%20Safe%20Haven%20-%20Report%202015.pdf?dl=0>.

³³⁴ Canada Research Team (2015)

as a lesbian in her native Uganda.”³³⁵ The 2015 study and the research participants, such as Val, expressed the uncomfortable need to confirm their sexuality as it was understood in Eurocentric terms. The Western refugee determination model assumes that “those claiming refugee status, itself a public declaration of their sexual identity, are at ease with discussing their experience of sexual persecution.”³³⁶ Claimants are expected not only to share their story openly and directly within a public sphere, but also to act and express their queer identity publicly. This public act must also conform to Western ideas of queer identities, which include occupying specific spaces designated for queer peoples, engaging in consistent sexual practices that perfectly align with the stereotypical sexual identity, and being a part of the queer *community*.³³⁷

In several cases, Board members rejected claims on the basis of promiscuity, a claimant’s lack of engagement with the queer community, or the claimant’s perceivably poor understanding of queer society within Canada. For example, in *Buwu v. Canada*³³⁸ there was a lack of documentation from the claimant’s previous partners, even though the claimant only had one partner. The RPD found no credible basis for the applicant’s claim, stating,

[that] Malaysian culture, although it was not tendered into evidence... it is a well-known fact that Malaysians do tolerate gays and lesbians... That information can be found in country documents or just in general knowledge; the claimant was not able to produce any letters or affidavits from any former partners and when asked, testified that she did not believe she needed them and she had lost contact with those individuals.³³⁹

This case demonstrates the negligent interpretation of the claimants’ experiences, specifically disregarding her fears due to government documents that show a bettering of experience for queer people, while assuming that a person would maintain contact with every sexual partner. As

³³⁵ Keug (2015), *The Star*.

³³⁶ Gaucher & DeGagne (2014), p. 10.

³³⁷ See LaViolette (2007; 2013); Rehaag (2008); Sajnani (2013).

³³⁸ *Buwu v. Canada (Citizenship and Immigration)*, 2013 FC 850 (CanLII).

³³⁹ *Buwu* (2013), para 8.

noted previously, country documents are difficult to access. While it is problematic that the claimant did not recall names or lost contact with everyone in Malaysia, it is just as problematic that the IRB assumes a queer person has a certain level of promiscuity. It is also problematic that the Board relied on country documents, because, as LaViolette argues “[the] information does not probe the actual reality of protection.”³⁴⁰ In *Buwu*, the issue of documentation transparency at the institutional level becomes more apparent, and a concern for refugee claims based on sexual orientation and gender identity.

In a similar ruling, *Kornienko v. Canada*³⁴¹, the Board doubted a claimant because of a lack of any sexual or romantic encounters in several years, citing that a “truly gay man would not abstain in this way.”³⁴² The Board stated,

The claimant has been in Canada for almost three years. Upon questioning, he testified that he has not had any gay relationship and is not currently in a homosexual relationship for the time he has been in Canada, except for two isolated homosexual encounters in the summer of 2010 with Victor Kutalov. When asked why he has not been involved in a gay relationship given his activities in the 519-community centre and his participation in the 2010 and 2011 gay parades, his explanation was that, “I did not want any more to have sexual experience with anybody else. Nobody attracted me anymore other than Victor to the point of having a gay relationship other than Victor.” Although the lack of promiscuity may not be a determinative of the claimant’s sexual orientation, I am not inclined to believe that if the claimant is truly gay, he has lost all his interest in having a gay relationship because of Victor, with who he had a brief and casual homosexual encounter for 2 days almost two years ago. I am also not persuaded that given his exposure to the gay community for more than two years he has not found another “Victor,” if he were truly gay. Based on common sense and reason, I draw an adverse credibility finding on his testimony. On the balance of probabilities, the claimant is not what he claims to be.³⁴³

Both *Buwu* and *Kornienko* illuminate the ways in which sexual practices and behaviours of refugee claimants are regulated at the border. The practices and behaviours are only deemed

³⁴⁰ LaViolette 2014, p. 100.

³⁴¹ *Kornienko v. Canada (Citizenship and Immigration)*, 2012 FC 1419 (CanLII).

³⁴² Sajnani (2013), p. 4.

³⁴³ *Kornienko* (2012), para 3[11].

acceptable or *normal* when they conform to Western notions of sexuality. A homonationalist approach to refugee claims pressures the claimant to act in accordance with acceptable ways of being, or risk removal from Canada. More concerning is that these cases reflect some of the prominent assumptions of how a queer individual ought to be as they may sometimes be *not queer* enough. Thus, the sexual or gender identity deviancy follows the claimant from their place of habitual habitation to the receiving country.³⁴⁴

In addition to a lack of cultural and spatial understanding of sexual orientation and gender identity or gender expression, Gaucher and DeGagne consider that “sexual orientation is not enumerated” within Charter discourse. Legislation and court decisions do not interrogate the meaning of sexual orientation within national borders and within the context of refugees crossing political borders, from one spatial context to another. Gaucher and DeGagne assert that “recent decisions have emphasized the need for this framework to include characteristics fundamental to one’s human dignity that applicants should not have to change as well.”³⁴⁵ LaViolette shows that even with considerable progress in improving the system for gender related refugee claims, there needs to be a more sophisticated analysis of gender.³⁴⁶ Using the denied asylum claim, *P. (FV) (Re)*³⁴⁷, a Saudi Arabian woman, Nada, was denied refugee status because, among other things, “the Board suggested that Nada should obey the laws of general application that she denounces in all circumstances.”³⁴⁸ Since this claim, guidelines have been created and adopted to ensure more equitable and substantive interpretations of asylum claims are made. At paragraph 31 in the

³⁴⁴ The issue of refugees *not seen as queer enough* and facing discrimination in Canada is not isolated to the legal sphere. See “For a Gay Syrian refugee living in Hamilton, Ont., disconnect and loneliness bring new challenges” (2016) *The Globe and Mail*; “Canada’s asylum system re-victimizes LGBTQ refugees” (2015) *The Star*.

³⁴⁵ Gaucher & DeGagne (2014), p. 7.

³⁴⁶ LaViolette (2007), p. 214.

³⁴⁷ LaViolette (2007), p. 169. *P. (FV)(Fe)*, [1991] CRDD No. 1096 (QL).

³⁴⁸ LaViolette (2007), p. 170.

Guidelines, it asserts that no individual should be expected to conceal themselves. More recent cases continue to be struck down by the Federal Court because of decisions determining that the claimant ought to be able to hide their sexual orientation.³⁴⁹ For example, in *Okoli v. Canada*,³⁵⁰ the Federal Court found the denial of refugee status to a gay Nigerian man to be unreasonable. The Court found that the Board erred in finding that the ability for an ‘internal flight arrangement’ (IFA) to Lagos City is reasonable and plausible. The Board asserted that the claimant could live a *discreet* homosexual lifestyle.³⁵¹ “The Federal Court has repeatedly found such findings perverse as they require an individual to repress an immutable characteristic.”³⁵² Together these cases reflect a continuation of assumptions regarding sexual orientation, interpretations of the law related to reasonableness, and the notion that an individual must conform to the laws of their place of nationality.

The evolution of sexual orientation and gender identity within Canadian legislation highlights progressive changes that enable more protection for vulnerable minorities. The decisions in *Ward, Haig, Egan, P.(FV) Re*, amongst other major legal cases, set the stage for legislative amendments and changes. From the incorporation of sexual orientation and gender identity in the Charter and the CHRA, to recognizing sexual orientation and gender identity as *innate* or *immutable characteristics* within ‘a particular social group’ for refugee claims, Canadian legislation continues to become more inclusive. However, the IRB has demonstrated that the interpretation of the law in order to determine refugee status continue to perpetuate

³⁴⁹ Sajnani (2013), pp. 6-7.

³⁵⁰ *Okoli v. Canada (Citizenship and Immigration)*, 2009 FC 332 (CanLII).

³⁵¹ *Okoli* (2009), para. 34.

³⁵² *Okoli* (2009), para. 36. The Court cites *Sadeghi-Pari v. Canada* ((Minister of Citizenship and Immigration)), 2004 FC 282 (CanLII), para. 29. The Court struck down the Board’s ruling, indicating that certain findings of implausibility were made in a “perverse and capricious manner” (Sajnani (2014), p. 7).

heteronormative and homonormative conceptions of queerness. The Board's current application of the Guidelines, laws, and policies, onto asylum claims warrants further attention, as the interconnected and interwoven layers of identity problematize the very system designed to protect refugee claimants. As actors of the state, Board members exist within a complex matrix, positioned between the legal structures of the Canadian state, the IRB, and their personal conceptions of sexual orientation and gender. Thus, the members exist within a spatialized process that shapes their individual decisions on refugee claims. Though not all board members have the same assumptions, there are broad trends and assumptions exposed through decisions that can be discerned. A more thorough investigation of IRB decisions would be required. IRB members are not the only area of concern. While the Guidelines are relatively clear, legal interrogation of sexual orientation and gender identity is insufficient. Greater interrogation of sexual orientation and gender identity within Canadian law would provide the Board with a more substantial foundation to base their decisions and may help in understanding the implications of their decisions or assumptions. Racialization, homophobia, transphobia, biphobia, and stereotypical misconceptions of spatialized cultural histories are rooted in the regulation of borders by institutions such as the IRB to secure the state from external deviants or undesirable others.

Conclusion: Legal Boundaries, Fluid Identities

This project explores the relationship between law and identity as it pertains to sexual orientation-based refugee claims in Canada. Through the theoretical frameworks of critical queer theory, critical feminist theory, and the concept of homonationalism, I showed the ways in which queer identities and practices are legally categorized to construct and protect the national imaginary. “Legal distinctions are techniques of the nation-states power, which classifies migrants to delimit the rights they may have or be denied.”³⁵³ Borrowing from Foucault, legal categorization embodies power relations that produce knowledge and truths of the ways in which society ought to be. This illuminates the fundamental issues within the refugee determination apparatus in Canada, in relation to the global political, legal, and economic order. The exploration of sexuality and gender identity as these concepts are taken up by legislation, court cases, and legal decisions expose the interwoven aspects of social life and legal life for citizens and non-citizens.

Categories are created by the interweaving of hegemonic masculinities and relations of power that exist along the countless layers of identity. Categorization becomes not just a way of identifying, but becomes the mechanism through which exclusions are legitimized and the subject is either humanized or othered. Categories are fundamental in law. Law uses categories to construct parameters of good and bad identities, the rules and norms for social engagement, and actions and practices that are legitimized within the national imaginary of the state. The current global order is based on the neoliberal capitalist ideals of virtual profit, capital wealth, and a hierarchy of power. These pieces are metaphors of the hierarchies of power and knowledge; of individuals and state; of identities and categories. Hegemonic masculinities in a

³⁵³ Murray (2016), p. 7.

general Western sense have historically acted as the architects for designing the national imaginary, a state image based on culture, values, and ideals. This form of masculinity determines the binaries of inclusion and exclusion within a matrix of layered and fluid identities, performances, cultures, and ways of being. However, the subject, especially within law, has become centered within an unchanging cultural space that legitimizes racism, homophobia, gender roles, and other forms of exclusion. Identity is constructed from within a specific space and time that correlates with the cultural context and legally legitimized ways of being. In Western democracies, liberal responses to diversity and the masking of exclusionary discourse is founded on concepts of culture, of the other, of moral and value based assessment of the *good life*.

“[Benhabib] rightly argues that whereas analysis of culture becomes essentialized from the standpoint of the social observer, from the standpoint of the participant, culture is alternatively situated by narratives that arise from traditions, stories, rituals, symbols and material conditions.... Culture takes on meanings through webs of narratives”³⁵⁴

Culture is the legitimizing tool through which states design their national imaginary. In Canada, culture is further reinforced through law. In the context of refugee law and queer claims where identity narratives are essential, liberalism essentialises the accepted identity, interprets the subject as the culture they left, and assumes the divine role of determining fates. These fates belong to the vulnerable, to the ones without adequate protection from their state due to a wide range of issues.

Through categorization identities are constructed, which then reproduce the very categories themselves. Therefore, categories are ever changing just as identities are, yet, the law is not always capable of keeping pace with the evolution of identities. Sexual and gender

³⁵⁴ Dhamoon (2006), p. 358. See Seyla Benhabib (2002)

identities are two types of identities that constitute each other and shape each other, but also mingle with other identities. The racialized identity deeply problematizes the assumed clear boundaries of sexual and gender identities. Race, racism, and racialization weave within the most progressive articulations of social relations, but are reinforced by the white masculine hegemonies of Western liberal democracy. A homonationalist approach to creating the national imaginary is founded on ideals of belonging, citizenship, race, amongst other intersecting pieces of the human experience. Homonationalism is a conceptual approach to constructing laws and social norms that determine what it means to be queer. It acts as a regulator for the ways in which sexualities and genders are not only believed to be but how queers practice their sexuality and gender. The state projects a white homonormative ideal of the queer life that is monogamous and wealth seeking. Queer as a category challenges homonationalist and the normative assumptions originating from heteronormative interpretations of natural identities and ways of being. Homonationalism and heteronormative assumptions of the moral and *right* way to live shapes and is shaped by the legal sphere. In Canada, the legal sphere includes a mixture of court case law and state legislation to define the parameters of the good subject, the good queer, and the good citizen.

Citizenry acts as a significant form of humanization through access to rights and responsibilities and in defining the accepted individual identities that interact to create a spatialized national imaginary. Thus, the state becomes a space of habitation where layers of identity and performance interact within ideological modes of social organization or are categorized and excluded as deviants or the undesirables. Through citizenship, the citizen can access rights and protections under the law but also, are privy to the legitimization of their identity and practices if the law so approves. In the same frame, citizens exposed to laws that

delegitimize or label certain identities and behaviours as deviant, may experience serious repercussions. In either situation, the law is acting upon a body and the legitimization or level of exclusion varies according to each site of interaction. Therefore, in some serious situations such as for queer asylum seekers, the individual must leave their place of nationality in the hopes of being able to join a new space that accepts their identities and practices. Those unable to establish a new sense of belonging through the state's given legislation and social norms become stateless or excluded in some form from the national order and are increasingly vulnerable to the exploitations and dangers of discrimination and persecution.

The immigration and refugee regime in Canada coincides with a global system of economic and political processes interwoven with power and hegemonic systems of oppression. Immigration and refugee laws work together with citizenship laws, serving as multiple layers of gatekeeping and surveillance of the bodies trying to enter the state or change the state from within. Queer identities are often implicated in these systems, making them vulnerable to violence and oppression. In this global context of tension and violence, queer bodies are never rooted but constantly mobile. Just as queer identities can be conceptualized as fluid and ever changing, the subjects that embody these identities are required to find spaces that accept or safely acknowledge them. Mobility across state boundaries is more complex than simply moving, rather, mobility involves a physical and conceptual shift in discourse. Discourse shapes identity categories that also utilize discourse, a type of self-perpetuating relationship. Discourse in Canada with respect to sexual orientation and gender identity is specific to social norms and juridical context; however, refugees and asylum seekers exist within a space of transformation, which is not comprehensively explored in Canadian legal or social or political discourses. This lack of legal engagement with identity, and the infinite forms of sexuality and gender

expressions, practices, performances, and representation are reflected in the cases and legislation this project engages with.

Claimants applying for asylum in Canada are moving across political boundaries and natural borders in an attempt to choose a different future. However, the current state-based system is exclusionary at its core. The sovereign right to determine and control borders and territory is further justified within the context of national security, whether economic or political or violent. Throughout Canadian history, increasingly liberal laws were designed to adapt to the changing economic and political environment, as well as the social perceptions of the racial and queer other. From explicit racism to a point based system that excludes based on access to opportunity, Canadian immigration legislation is fundamentally exclusionary behind a liberal mask.

Several queer refugee claims highlight fundamental issues with the refugee system. From stereotypical assumptions about how a queer person ought to look, how they ought to speak, how they ought to perform their identities, along with, how they should practice their identities. In voyeuristic form, Queer refugees are asked about the number of partners they had in their home country and in Canada during the duration of their claim. They are expected to have a certain type of relationship, either monogamous and committed or promiscuous. Queer refugees are expected to bring their many identities from a particular space and transform that history into a narrative that conforms to the space they have entered. They are expected to be a queer based on Canadian assumptions, yet maintain the assumed violence and oppression from their home state. The subject, the queer refugee, is expected to leave the space of their narrative and carry only the pieces that the IRB wants to see, while excluding and adapting the rest of the narrative. Often,

queer refugees are sorted into a few layers, a few identity categories: vulnerable, oppressed, violated, exclusively queer person.

Legislation, case law, and claims show that law, the state, and their apparatuses lack in their ability to deal with identity in the way that society requires. Law is not so much the problem, but the facilitator of the problem of an exclusionary structure. This structure is based on national imaginaries, concepts of belonging, imagined communities, and the notion that there is an ideal way of life. Heteronormative and homonormative notions of one's sexual orientation and how one identifies, represents, performs, and practices permeates individuals. This ensures a united and homogenous society. In Canada, it means a united and homogenous diversity. The liberal mask of Canada appears colourful, diverse, and inclusive, attempting to show the world a friendly and grounded face. When the mask comes off, the diversity is dictated by legislated categorical ideals. These ideals construct and reconstruct the lives and experiences of those that do not conform.

Through the project, I have not provided an answer to the questions that I pose or the questions posed by scholars I incorporated. There are no clear answers, and not one theoretical framework can clearly articulate how to move forward. First, there continues to be ample work required in theorization and academic research in the Canadian context. Canada is unique in the sense that it has a very prominent and active indigenous population and a large immigration population relative to the total population. In addition, Canada often symbolizes a space of equality, diversity, and opportunity for everyone. Yet, Canada is a state within the capitalist neoliberal global order. It is not isolated. Second, Canada is similar to most if not all states because it continues to categorize individuals as citizens and non-citizens; as those with access to rights with responsibilities and those with the possibility of expulsion. Finally, this research on

identity and law must go beyond the national and global level. Current determination processes for refugees and asylum seekers show fundamental gaps in both the national and international systems, as only some are protected under law and have access to rights, and the rest are in a position of vulnerability and uncertainty. Further, the refugee's position within these systems demonstrate interconnections between racism and colonial histories that disrupt societal and cultural orders. The Canadian state must effectively address the issues that *historically caused* the refugee system or risk instability and greater vulnerabilities. Just as the stories in the media presented at the beginning of the project showed and the narratives exposed through the appeals, these stories have faces, families, and futures. Canada will continue to be bombarded by stories of vulnerability, violence, fear, and desperation and therefore, requires more legislative, policy, and research work to address refugee claims today and tomorrow.

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Appendix A: Preliminary Systematic Legal Case Review & Refugee-related Legal Cases

Table 1: Precedent Setting Cases related to Sexual Orientation & Gender Identity, CanLII & Parliament of Canada Database

Legal Case Names	Cited	Ref.	Ref. 2	Ref. 3	Explanation & Notes
<i>Haig v. Canada</i>, 1992 CanLII 2787 (ON CA)	47	homosexuality	prohibited grounds of discrimination	freedom of expression	Asserted that "sexual orientation" was excluded from s.15 of the Charter. It was later cited in 1996 under Bill C-33, An Act to amend the Canadian Charter of Rights and Freedoms to include sexual orientation among prohibited grounds of discrimination.
<i>Canada (Attorney General) v Ward</i>, 1993 2 SCR 689, [1993]	2710	Refugee	particular social group	Fear of persecution	Precedent set out to expand the definition of "particular social group" to include sexual orientation. Specifically, sexual orientation falls under the first of the 3 categories of "innate, unchangeable characteristic"
<i>Egan v. Canada</i>, [1995] 2 SCR 513, 1995 CanLII 98 (SCC)	315	Same-sex couples	Discrimination	distinction	The immutability of sexual orientation was a key factor in the Supreme Court decision, whereby sexual orientation is a constitutionally prohibited ground of discrimination under equality provisions of the <i>Canadian Charter of Rights and Freedoms</i> .
<i>Trembluk v. Canada (Minister of Citizenship and Immigration)</i>, 2003 FC1264 (CanLII)	6	homosexuality	judicial review	Stereotypical	The case was allowed for judicial review because the Refugee Protection Division of the IRB based assessment and decision based on stereotypical view of the lifestyle and expectations of homosexuality.
<i>Aire v. Canada (Minister of Citizenship and Immigration)</i>, 2004 FC41 (CanLII)	3	persecution	Lawful Sanction	Claimant	The case established that laws controlling certain sexual behaviour's are not necessarily persecutory. Rather, the case confirmed that in order for a law to be considered persecutory there must be sufficient evidence to show that the law is used in such a manner.
<i>Dunsmuir v. New Brunswick</i>, [2008] 1 SCR 190, 2008 SCC 9 (CanLII)	12783	Adjudicator	Reasonableness	Procedural fairness	Provided the Standard of Review for judicial reviews that comprise of correctness and reasonableness. The case defined the parameters for reasonableness and emphasized the importance of a contextual analysis.

Table 2.1: Systematic Review using Sexual Orientation Terminology, Legal Case Count, CanLII, Federal Courts, 2013-2016

Search Terms	Total # of Cases: all courts and tribunals	Total # of Cases: only Courts
Refugee	11 491	2 291
Refugee, Bisexuality	439	37
Refugee, Gay	909	49
Refugee, Homosexual	925	59
Refugee, Intersex	35	1
Refugee, Lesbian	595	43
Refugee, Queer	19	2
Refugee, Sexual Orientation	1,237	73
Refugee, Transgender	264	15
Refugee, Transsexual	55	5

Table 2.2: Refugee Legal Cases Count, CanLII, Federal Courts, 2013 to 2016

Parameters	# of Cases Generated
All Courts & Tribunals	11 491
All Courts	2 291
All Appeal Courts	71

Table 3: Refugee Legal Cases, Obtained through preliminary Systematic Review and Envisioning Canada Reports

Case Name	Year	Reference
<i>Re R (UW)</i>	1991	QL
<i>Valtchev v. Canada (Minister of Citizenship and Immigration)</i>	2001	FCT 776 (CanLII)
<i>Christopher v. Canada (Minister of Citizenship and Immigration)</i>	2004	FC 1128 (CanLII)
<i>Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)</i>	2004	FC 282 (CanLII)
<i>Leke V. Canada (Citizenship and Immigration)</i>	2007	FC 848 (CanLII)
<i>Jiang v. Canada (Citizenship and Immigration)</i>	2008	FC 775 (CanLII)
<i>Okoli v. Canada (Citizenship and Immigration)</i>	2009	FC 332 (CanLII)
<i>Kornienko v. Canada (Citizenship and Immigration)</i>	2012	FC 1419 (CanLII)
<i>Buwu v. Canada (Citizenship and Immigration)</i>	2013	FC 850 (CanLII)
<i>Ismaili v. Canada (Citizenship and Immigration)</i>	2014	FC 84 (CanLII)

Appendix B: Legislation and Legislative Amendments relating to Immigration, Refugee, and Citizenship Law and Sexual Orientation & Gender Identity

Table 4.1: Chronology of Canadian Acts and Legislation relating to Citizenship, Immigration, and Refugees, Various Sources

Acts	Year
<i>Immigration Act</i> Focus on ensuring safety of immigrants during their passage	1869
<i>Immigration Act</i> Expanded categories of prohibited immigrants	1900
<i>Immigration Act</i> Expanded prohibitions, with climate adaptability as one of the reasons to prohibit	1910
<i>Order-in-Council PC</i>	1911-1924
<i>Naturalization Act</i>	1914
<i>Immigration Act</i> Able to prohibit based on nationality, race, occupation, and class because of them peculiar customs, habits, modes of life, and methods of holding property.	1919
<i>Empire Settlement Act</i>	1922
<i>Chinese Immigration Act</i>	1923
<i>Order-in-Council PC 1931-695</i> Tightest immigration admission, restricted to only British and Americans	1931
<i>Canadian Citizenship Act</i> Residents obtain (new category) Prior = British Subjects	1947
<i>Immigration Act</i>	1952
<i>Immigration Regulations, Order-in-Council PC 1962-86</i> Eliminated over racial discrimination from Canadian Immigration Policy Focus on skills and child sponsorship	1962
<i>White Paper on Immigration</i>	1966
<i>Immigration Regulations, Order-in-Council 1967-1616</i> Objective Points System Categories of education, occupation, skills, employment, prospects, age, English/French proficiency, and character	1967
<i>Canadian Multiculturalism Policy</i> Defined refugee as a distinct class of immigrants	1971

<i>Immigration Act</i>	1976
<i>Canadian Human Rights Act</i> , RSC, 1985, c. H-6	1985
<i>Criminal Code</i> , RSC, 1985 c. C-46	1985
<i>Immigration and Refugee Protection Act</i>	2001

Table 4.2: List of Bills relating to Citizenship, Immigration, Refugees, Security, Sexuality, and Gender

Bills: New Acts & Amendments	Royal Assent & Coming into Law	Summary
Bill C-33 , <i>An Act to amend the Canadian Human Rights Act</i> , 2 nd Sess, 35 Parl, 1996.	1996	<p>1. Section 2 of the <i>Canadian Human Rights Act</i> is replaced by the following:</p> <p>2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.</p> <p>2. Subsection 3(1) of the Act is replaced by the following:</p> <p>3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.</p>
Bill C-11 Immigration and Refugee Protection Act <i>An Act to amend the</i>	2001	This enactment replaces the existing <i>Immigration Act</i> , providing clearer, modern legislation to ensure that Canada's

Immigration and Refugee Protection Act and the Federal Courts Act. 3rd Sess, 40th Parl, 2011.

immigration and refugee protection system is able to respond to new challenges and opportunities. The enactment provides for

- (a) objectives that reflect the values of Canadian society;
- (b) effective reporting to Parliament through a complete, consolidated annual report;
- (c) agreements that facilitate cooperation with provinces and foreign states;
- (d) a description of the major classes of foreign nationals - economic class, family class, and Convention refugees and persons in similar circumstances;
- (e) recognition of Canada's commitment to the principle of the "best interest of the child";
- (f) clear, objective residency requirements for permanent residents;
- (g) a strong, effective refugee protection program that incorporates the protection grounds of the Geneva Convention and the Convention Against Torture and the grounds of risk to life or of cruel and unusual treatment or punishment;
- (h) a more efficient refugee determination process through greater use of single member panels;
- (i) a Refugee Appeal Division within the Immigration and Refugee Board to enhance fairness and consistency in decision-making;
- (j) tightened ineligibility provisions for serious criminals, security threats and repeat claimants who seek access to the refugee protection process of the Immigration and Refugee Board;
- (k) formalization of a pre-removal risk assessment to review changed circumstances related to risk of return;
- (l) inadmissibility provisions for criminals, persons who constitute security threats, violators of human rights and persons who should not be allowed into Canada because of fraud, misrepresentation, financial reasons or health concerns;
- (m) clear detention criteria with authority to further clarify detention grounds in

		<p>regulations;</p> <p>(n) enhanced procedures for dealing with security threats through admissibility hearings and the security certificate process;</p> <p>(o) offences for human smuggling and trafficking with a maximum penalty of life in prison;</p> <p>(p) penalties for assisting in obtaining immigration status by fraud or misrepresentation; and</p> <p>(q) an immigration appeal system that enhances integrity and effectiveness while maintaining fairness and legal safeguards.</p>
<p>Bill C-36 Anti-terrorism Act <i>An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism.</i> 1st Sess, 37th Parl, 2001.</p>	2001	<p>Part 5 amends the Access to Information Act, Canadian Human Rights Act, Canadian Security Intelligence Service Act, Corrections and Conditional Release Act, Federal Court Act, Firearms Act, National Defense Act, Personal Information Protection and Electronic Documents Act, Privacy Act, Seized Property Management Act and United Nations Act. The amendments to the National Defense Act clarify the powers of the Communications Security Establishment to combat terrorism.</p>
<p>Bill C-38 Civil Marriage Act <i>An Act respecting certain aspects of legal capacity for marriage for civil purposes, or the Civil Marriage Act. Codified a definition of marriage for the first time in Canada. It expanded the conception of traditional marriage, and gave religious officials the right to refuse performing a marriage ceremony.</i> 1st Sess, 38th Parl, 2005</p>	2005	<p>This enactment extends the legal capacity for marriage for civil purposes to same-sex couples in order to reflect values of tolerance, respect and equality, consistent with the Canadian Charter of Rights and Freedoms. It also makes consequential amendments to other Acts to ensure equal access for same-sex couples to the civil effects of marriage and divorce.</p>
<p>Bill C-11 Balanced Refugee Reform Act <i>An Act to amend the</i></p>	2011	<p>This enactment amends the Immigration and Refugee Protection Act, primarily in respect of the processing of refugee claims referred to</p>

<p><i>immigration and Refugee Protection Act and the Federal Courts Act. 3rd Sess, 40th Parl, 2011.</i></p>		<p>the Immigration and Refugee Board. In particular, the enactment</p> <ul style="list-style-type: none"> (a) provides for the referral of a refugee claimant to an interview with an Immigration and Refugee Board official, who is to collect information and schedule a hearing before the Refugee Protection Division; (b) provides that the members of the Refugee Protection Division are appointed in accordance with the Public Service Employment Act; (c) provides for the coming into force, no more than two years after the day on which the enactment receives royal assent, of the provisions of the Immigration and Refugee Protection Act that permit a claimant to appeal a decision of the Refugee Protection Division to the Refugee Appeal Division; (d) authorizes the Minister to designate, in accordance with the process and criteria established by the regulations certain countries, parts of countries or classes of nationals; (e) provides clarification with respect to the type of evidence that may be put before the Refugee Appeal Division and the circumstances in which that Division may hold a hearing; (f) prohibits a person whose claim for refugee protection has been rejected from applying for a temporary resident permit or applying to the Minister for protection if less than 12 months have passed since their claim was rejected; (g) authorizes the Minister, in respect of applications for protection, to exempt nationals, or classes of nationals, of a country or part of a country from the 12-month prohibition; (h) provides clarification with respect to the Minister's authority to grant permanent resident status or an exemption from any obligations of the Act on humanitarian and compassionate grounds or on public policy grounds; (i) limits the circumstances in which the
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		<p>Minister may examine requests for permanent resident status or for an exemption from any obligations of the Act on humanitarian and compassionate grounds; and</p> <p>(j) enacts transitional provisions respecting the processing of pending claims by the Minister or the Immigration and Refugee Board.</p> <p>The enactment also amends the Federal Courts Act to increase the number of Federal Court judges.</p>
<p>Bill C-31 Protecting Canada's Immigration System Act <i>An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act</i>, 1st Sess, 41st Parl, 2013</p>	2013	<p>This enactment amends the Immigration and Refugee Protection Act and the Balanced Refugee Reform Act to, among other things, provide for the expediting of the processing of refugee protection claims.</p> <p>The Immigration and Refugee Protection Act is also amended to authorize the Minister, in certain circumstances, to designate as an irregular arrival the arrival in Canada of a group of persons and to provide for the effects of such a designation in respect of those persons, including in relation to detention, conditions of release from detention and applications for permanent resident status. In addition, the enactment amends certain enforcement provisions of that Act, notably to expand the scope of the offence of human smuggling and to provide for minimum punishments in relation to that offence. Furthermore, the enactment amends that Act to expand sponsorship options in respect of foreign nationals and to require the provision of biometric information when an application for a temporary resident visa, study permit or work permit is made.</p> <p>In addition, the enactment amends the Marine Transportation Security Act to increase the penalties for persons who fail to provide information that is required to be reported before a vessel enters Canadian waters or to comply with ministerial directions and for persons who provide false or misleading information. It creates a new offence in</p>

		<p>respect of vessels that fail to comply with ministerial directions and authorizes the making of regulations respecting the disclosure of certain information for the purpose of protecting the safety or security of Canada or Canadians.</p> <p>Finally, the enactment amends the Department of Citizenship and Immigration Act to enhance the authority for the Minister of Citizenship and Immigration to enter into agreements and arrangements with foreign governments, and to provide services to the Canada Border Services Agency.</p>
<p>Bill C-24 Strengthening Canadian Citizenship Act <i>An Act to amend the Citizenship Act and to make consequential amendments to other Acts.</i> 2nd Sess, 41st Parl, 2014</p>	2014	<p>This enactment amends the Citizenship Act to, among other things, update eligibility requirements for Canadian citizenship, strengthen security and fraud provisions and amend provisions governing the processing of applications and the review of decisions.</p> <p>Amendments to the eligibility requirements include</p> <ul style="list-style-type: none"> (a) clarifying the meaning of being resident in Canada; (b) modifying the period during which a permanent resident must reside in Canada before they may apply for citizenship; (c) expediting access to citizenship for persons who are serving in, or have served in, the Canadian Armed Forces; (d) requiring that an applicant for citizenship demonstrate, in one of Canada's official languages, knowledge of Canada and of the responsibilities and privileges of citizenship; (e) specifying the age as of which an applicant for citizenship must demonstrate the knowledge referred to in paragraph (d) and must demonstrate an adequate knowledge of one of Canada's official languages;

		<p>(f) requiring that an applicant meet any applicable requirement under the Income Tax Act to file a return of income;</p> <p>(g) conferring citizenship on certain individuals and their descendants who may not have acquired citizenship under prior legislation;</p> <p>(h) extending an exception to the first-generation limit to citizenship by descent to children born to or adopted abroad by parents who were themselves born to or adopted abroad by Crown servants; and</p> <p>(i) requiring, for a grant of citizenship for an adopted person, that the adoption not have circumvented international adoption law.</p> <p>Amendments to the security and fraud provisions include</p> <p>(a) expanding the prohibition against granting citizenship to include persons who are charged outside Canada for an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament or who are serving a sentence outside Canada for such an offence;</p> <p>(b) expanding the prohibition against granting citizenship to include persons who, while they were permanent residents, engaged in certain actions contrary to the national interest of Canada, and permanently barring those persons from acquiring citizenship;</p> <p>(c) aligning the grounds related to security and organized criminality on which a person may be denied citizenship with those grounds in the Immigration and Refugee Protection Act and extending the period during which a person is barred from acquiring citizenship on that basis;</p> <p>(d) expanding the prohibition against granting</p>
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		<p>complete to be accepted for processing;</p> <p>(b) expanding the grounds and period for the suspension of applications and providing for the circumstances in which applications may be treated as abandoned;</p> <p>(c) limiting the role of citizenship judges in the decision-making process, subject to the Minister periodically exercising his or her power to continue the period of application of that limitation;</p> <p>(d) giving the Minister the power to make regulations concerning the making and processing of applications;</p> <p>(e) providing for the judicial review of any matter under the Act and permitting, in certain circumstances, further appeals to the Federal Court of Appeal; and</p> <p>(f) transferring to the Minister the discretionary power to grant citizenship in special cases.</p> <p>Finally, the enactment makes consequential amendments to the Federal Courts Act and the Immigration and Refugee Protection Act.</p>
<p>Bill C-36 Protection of Communities and Exploited Persons Act <i>An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts. 2nd Sess, 41st Parl, 2015.</i></p>	2014 - 2015	<p>This enactment amends the Criminal Code to, among other things,</p> <p>(a) create an offence that prohibits purchasing sexual services or communicating in any place for that purpose;</p> <p>(b) create an offence that prohibits receiving a material benefit that derived from the commission of an offence referred to in paragraph (a);</p> <p>(c) create an offence that prohibits the advertisement of sexual services offered for sale and to authorize the courts to order the seizure of materials containing such advertisements and their removal from the Internet;</p> <p>(d) modernize the offence that prohibits the</p>

		<p>procurement of persons for the purpose of prostitution;</p> <p>(e) create an offence that prohibits communicating — for the purpose of selling sexual services — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre;</p> <p>(f) ensure consistency between prostitution offences and the existing human trafficking offences; and</p> <p>(g) specify that, for the purposes of certain offences, a weapon includes anything used, designed to be use or intended for use in binding or tying up a person against their will.</p> <p>The enactment also makes consequential amendments to other Acts.</p>
<p>Bill C-51 Anti-Terrorism Act <i>An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts.</i> 2nd Sess, 41st Parl, 2015</p>	2015	<p>Part 1 enacts the Security of Canada Information Sharing Act, which authorizes Government of Canada institutions to disclose information to Government of Canada institutions that have jurisdiction or responsibilities in respect of activities that undermine the security of Canada. It also makes related amendments to other Acts.</p> <p>Part 5 amends Divisions 8 and 9 of Part 1 of the Immigration and Refugee Protection Act to, among other things,</p> <p>(a) define obligations related to the provision of information in proceedings under that Division 9;</p> <p>(b) authorize the judge, on the request of the Minister, to exempt the Minister from providing the special advocate with certain relevant information that has not been filed with the Federal Court, if the judge is satisfied that the information does not enable the person named in a certificate to be reasonably informed of the case made by the Minister, and authorize the judge to ask the special advocate to make submissions with respect to the exemption; and</p> <p>(c) allow the Minister to appeal, or to apply</p>

		for judicial review of, any decision requiring the disclosure of information or other evidence if, in the Minister's opinion, the disclosure would be injurious to national security or endanger the safety of any person.
Bill C-16 <i>An Act to amend the Canadian Human Rights Act and Criminal Code</i> . 1 st Sess, 42 nd Parl, 2016, Second Reading (2017).	Second Reading (March 2017)	<p>This enactment amends the Canadian Human Rights Act to add gender identity and gender expression to the list of prohibited grounds of discrimination.</p> <p>The enactment also amends the Criminal Code to extend the protection against hate propaganda set out in that Act to any section of the public that is distinguished by gender identity or expression and to clearly set out that evidence that an offence was motivated by bias, prejudice or hate based on gender identity or expression constitutes an aggravating circumstance that a court must take into consideration when it imposes a sentence.</p>