NORTHWESTERN UNIVERSITY

Ruling Sexuality: Law, Expertise, and the Making of Sexual Knowledge

A DISSERTATION

SUBMITTED TO THE GRADUATE SCHOOL
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

For the degree

DOCTOR OF PHILOSOPHY

Field of Sociology

By

Stefan Vogler

EVANSTON, ILLINOIS

September 2018

Abstract

"Ruling Sexuality: Law, Expertise, and the Making of Sexual Knowledge," brings together approaches from the sociologies of science, law, and sexualities to examine how the institutions of law and science jointly render sexual subjects legible to state institutions by measuring and categorizing sexualities. Through the comparative study of asylum claims by sexual minorities and risk evaluations of sex offenders—two settings where courts must adjudicate individuals' sexualities—my dissertation argues that legal institutions come to know sexuality in culturally contoured and organizationally specific ways that determine access to the rights of citizenship. Sociologists have considered the consequences of classification and measurement extensively and have also studied ways by which the state regulates sexuality. Yet we have not examined the ways that state institutions engage in classification and measurement practices when regulating sexuality and what consequences those practices have. In the legal situations analyzed in this dissertation, I demonstrate how state attempts to objectively measure the subjective and multivalent phenomenon of sexuality depend on non-state expert actors and lead to the constitution of sexual subjects as either acceptable or unacceptable sexual citizens.

Drawing on over 400 legal decisions and other documentary materials, 40 semi-structured interviews with legal and scientific actors, and hundreds of hours of multi-sited ethnographic observation, I offer a fine-grained analysis of how expert evaluative practices become institutionalized in legal settings and result in divergent understandings of sexuality within the law. In the case of sex offenders, forensic psychologists offer largely essentialist explanations of sexual deviance drawn from technologies meant to read the body, such as polygraphs and penile plethysmographs. By contrast, asylum advocates put forward more constructionist accounts of sexuality that are sensitive to sexuality's social determinants.

The juxtaposition of these cases is illuminating because of the rapid shifts in cultural conceptions of both homosexuality and sexual assault that occurred during roughly the same period beginning in the 1970s. "Ruling Sexuality" unpacks the institutional processes undergirding these changes in social understandings of sexuality, showing that these cultural shifts are anchored by institutional practices and highlighting the ways by which legal and scientific organizations and networks refract cultural currents to either create social change or reinforce hegemonic structures.

Part 1 analyzes how competing networks of expertise formed in the domains of sex offender and LGBTQ asylum law and articulated with already existing legal infrastructures to form unique ways of knowing sexuality in each area, what I call "epistemic logics." These ways of knowing sexuality were not, however, inevitable developments. My dissertation shows that the processes of establishing expertise regarding sexuality required considerable political work. Part 2 considers how epistemic logics affect what counts as empirical evidence of sexuality in legal proceedings and demonstrates how competing social scientific views of sexuality result in different forms of evidence predominating in each legal arena and ultimately result in divergent interpretations of sexuality. Finally, Part 3 shows that approaches to risk assessment (part of both asylum and sex offender hearings) reinforce particular ways of understanding sexuality and that sexual subjects in these arenas are constituted vis-à-vis their relationship to risk. In sum, "Ruling Sexuality" shows that how we *know* sexuality determines how we govern it. Understanding the knowledge practices employed by the state allows us to better comprehend the functioning of state power, including how it structures norms of citizenship and creates exclusionary boundaries based on sexuality, gender, and other social categories, and importantly, to recognize that "the state" is not uniform but that these processes vary across the many institutions of the state.

Table of Contents

List of Tables

Introduction

In 1985, the U.S. government faced a new challenge. For the first time, a gay man attempted to seek political asylum based on persecution he had faced in his home country due to his sexual orientation. Given the requirements of asylum law, the U.S. government was put in the position of determining the man's sexuality—that is, whether he was truly gay or simply trying to find a way to remain in the U.S. rather than being deported. Because of the immense stigma homosexuality carried in 1985, state representatives appeared mostly unconcerned with the possibility that the man could be lying. Instead, government attorneys argued that he could not receive asylum because homosexual behavior was illegal in the U.S. After a five-year appeal process, the man ultimately was allowed to remain in the country. But as more lesbian, gay, bisexual, transgender, and queer (LGBTQ) people sought asylum over the course of the 1990s and 2000s, the government faced the prospect of sorting the truly queer from the fraudulent. How was it to do so?

In a very different, though I argue related, setting, state governments faced a similar hurdle. In 1990, Washington state became the first of what would eventually be 21 jurisdictions to enact a "sexually violent predator" statute allowing for the indefinite civil commitment of sex offenders after their criminal sentences. But, as with asylum seekers, government adjudicators faced the challenge of determining what an individual's sexual identity was—that is, should a particular offender actually be labeled a pedophile, a sadist, an exhibitionist? Or did his past sexual behaviors not, in fact, indicate an inner sexual essence? Second, the government had to sort those whose sexualities posed a significant risk from those that did not. Although states could draw on past experiences with similar "sexual psychopath" laws from the mid-20th

century, many of those procedures had been discredited, forcing those statutes into disuse or repeal. How, then, was the state to discern a sex offender's true sexuality?

Though these two settings present similar questions—namely, how do we *know* someone's sexuality—the measurement and classification techniques, or what James Scott (1998) has called "grids of intelligibility," that have taken shape in these two legal complexes are dramatically different. In my dissertation, I argue that in these two very different contexts, how we come to *know* sexuality undergirds governance decisions regarding sexual others. I show how, through efforts to render sexual subjects legible to and thus manageable by state institutions, legal and scientific actors work together to coproduce sexuality as a regulatory category. In doing so, I draw attention to ways by which "the state" depends on nonstate actors—particularly various kinds of experts—to carry out and legitimate the day-to-day practices of classification and categorization of individuals.[1] Through its exercise of symbolic power (Bourdieu 1994; Loveman 2005), the state acts as a dominant force in the reification of sexual identities and naturalization of difference along the lines of sexuality, much as it has done with race (see e.g., Lee 1993; Loveman 2014; Marx 1998; Thompson 2016). A glimpse into these settings will begin to illustrate my argument.

The Chicago immigration court for detained claimants is housed in a nondescript government building downtown, a few blocks away from the main immigration court for the city. It is easy to miss if you don't know where to go, as I learned the morning I arrived to

[1] Political sociologists often refer to "the state" in their studies of state institutions, and I do so provisionally and for analytic ease throughout this introduction. However, I do not mean to imply that I view the state as a monolithic or unified entity. Rather, I view the state as a constellation of institutions, actors, and discourses that may even have conflicting goals at times and certainly vary in their practices. I similarly refer to "law" and "science" this way at times, though I also consider these to be multifaceted institutions comprising many organizations and actors.

observe my first asylum hearing. Once I found the right building, I passed through security with a few other visitors and proceeded to the security desk near the entrance where I told the guard that I was there for an asylum hearing, as Sarah, the lawyer who was allowing me to observe, had instructed me. The guard pointed me to a U.S. flag in the corner where I was to wait. Soon another guard approached and unlocked the door next to the flag, directing me to follow. We passed through another checkpoint attended by two more guards and down an elevator to the basement of the building, where he showed me to a hallway lined with a handful of chairs. This whole process struck me as rather circuitous to get to an ostensibly public courtroom. I was the first to arrive, so I took a seat and waited for the lawyer I was shadowing.

After everyone arrived, a clerk unlocked the courtroom. It wasn't much like what I was expecting to see. It looked more like a conference room than a courtroom. There was a table with six chairs in the center of the room. On one side was a computer, which I soon learned was where the Department of Homeland security lawyer (representing the government) sat. Sarah and her intern sat on the other side. The observation area where I was seated had only about eight chairs. An area to my left, against the wall, looked to be for a court reporter perhaps, but none was present. There were microphones at each spot at the table to record the proceedings (there is no written record of immigration proceedings, only the recording, which is controlled by the judge). There was an elevated judge's bench, also with a computer, which I would come to see as quite fitting: immigration judges are in many ways as much administrators as they are adjudicators. Judges often take extensive notes during hearings that they later use to deliver extemporaneous oral opinions at the conclusion of proceedings.

Soon after 9:00 AM the judge entered the courtroom. I would later learn that she was considered by the immigration lawyer community to be one of the "better" judges in the Chicago

immigration court, particularly when it came to LGBTQ claims. Unlike many judges, she insisted on conducting most hearings with detained claimants in person rather than via televideo, a technology that has received considerable criticism from immigrant advocates.

Soon after the judge arrived, Kofi,[2] the asylum seeker, entered, escorted by a bailiff. He wore the tan jumpsuit of the Kenosha County Immigration Detention Center and was in handcuffs. To my surprise, Kofi's handcuffs were left on for the entire hearing, despite the fact that this was a civil proceeding, and he was neither convicted nor accused of a crime. After a bout of trouble with the translator—a not uncommon occurrence—Kofi elected to proceed in English, despite his relatively limited grasp of the language. This can present a significant obstacle for asylum seekers, who are expected to be able to recount details of their lives and persecution coherently and with "proper" emotion. In any event, Andrea, Sarah's intern, began the questioning, essentially constructing a "coming out" narrative by asking questions like: when did you realize you were gay, when was your first sexual experience, did you ever have a boyfriend, have you ever told anyone in your family that you are gay? The testimony proceeded to cover questions of Kofi's persecution claims, and he concluded by stating that if granted asylum he wanted to "lead a good life as an openly gay man." Kofi's sexual orientation narrative seemed basically straightforward, consistent, and genuine. However, the government attorney on cross-examination latched onto one particular detail: that Kofi had tried to date a woman for a short period. "Did you ever have sex with a girl?" Kofi responded that he had when he briefly tried to date a woman to conceal that he was gay. "Did you have sex through to completion?" the lawyer persisted. Kofi replied that the encounter stopped before either of them climaxed and that

[2] This is a pseudonym, as are all names of asylum seekers, sex offenders, and other actors identified in my fieldwork. I use the actual names of most interviewees because they granted permission to be identified.

neither of them enjoyed it. He claimed that she could tell that he didn't know what he was doing and told him that he acted "like a woman" in bed. At the end of the hearing, the judge asked the final question: "To verify, the only gay sexual experience you had was when you were 11 or 12? And the only other was with a woman last year?" Kofi answered yes to both. Nevertheless, the judge ultimately found Kofi to be credibly gay and rejected the government argument that he had not proven his sexual orientation. She found it plausible that a gay man in Ghana would try to have a relationship with a woman to conceal his sexuality and that having sex with a woman didn't necessarily mean that Kofi wasn't gay. His asylum petition was granted.

Unlike the clandestine immigration court, the Cook County Criminal Court on the south side of Chicago is unmistakable. Along with the attached Cook County Jail, it occupies a huge swath of an area that has otherwise been left to deteriorate. On the morning I arrived to observe my first "sexually violent person" (SVP) civil commitment hearing, I passed through security and found my way to Judge Watkins' courtroom. Despite civil commitment hearings being civil, they are often held in criminal courts, as they are in Cook County. Again unlike immigration court, this courtroom was much more like the ones you expect, that is to say, the ones you see on television. Large wooden doors gave way to a gallery of rows of benches with a grand judge's bench at the front of court. There was an actual court reporter this time, seated in front of the judge's bench. A jury box was situated to the left, and the tables for the defense and prosecution were situated just in front of the railing partitioning the gallery from the area where the "action" happens, so to speak.[3] I found a seat among the crowd packing the room. Though court ostensibly convenes at 9:00 AM, the judge did not enter until 10:15, at which time he began

[3] Notably, the primary Chicago immigration courtrooms look quite similar to this, though on a smaller scale.

hearing a number of motions for criminal cases, disposing of most in only a few minutes each. By 11:30 the docket was complete except for the SVP hearing, and the gallery crowd was gone, leaving only me being eyed suspiciously by a bailiff who would intermittently insist that I wasn't allowed to write anything down during court (that's not true, and I would surreptitiously resume my notetaking after she moved on). After a short recess, the jury filed in followed by the defendant, Mr. Benton, led by a bailiff and in handcuffs. He remained restrained throughout the trial, but unlike Kofi, Benton had been allowed to don street clothes and was wearing khaki slacks, a button-up shirt and tie.

The trial began with the assistant attorney general's opening statement, during which she explained for the jury the requirements of declaring someone an SVP, that Benton had committed two sexual assaults, and that they would be hearing testimony from two doctors. Both diagnosed him with paraphilic disorder, antisocial personality disorder, and alcohol and cocaine abuse and would give their opinion that Benton is a sexually violent person. Next, Benton's defense attorney presented his opening remarks, highlighting for the jury that they must determine not just that Benton has a mental disorder but that his mental disorder must predispose him to future acts of sexual violence. Moreover, he continued, even though they would be hearing from psychologists, it was the jury's job to "put them to the test;" just because they are psychologists does not mean they are "infallible." Each of the psychologists then testified over the course of the two-day trial. Unlike the asylum hearing where Kofi was the primary witness and source of information about his sexuality, Benton never testified himself, and our only knowledge of his sexuality came from the two expert witnesses. Also different from the asylum case, testimony about Benton's sexuality concentrated heavily on acts and fantasies, which were used to deduce an underlying sexual preference. The psychologists recounted in detail exactly

what had happened during the two sexual assaults for which Benton had been convicted, and, moreover, they discussed how he talked about those incidents in therapy. SVP trials allow many things into evidence ordinarily not allowed, including certain types of hearsay evidence and normally confidential information obtained during psychological treatment.

Notably, during an extensive sidebar conversation during which the jury was dismissed, it came to light that one of the psychologists had partially based his diagnosis on a technology not usually allowed in Illinois courtrooms: the penile plethysmograph. This device is widely used among sex offender treatment providers and works by placing a silicone ring around a man's penis and gauging the extent of his erection (or lack thereof) in response to different types of stimuli. Advocates assert that the process measures sexual arousal, attraction, and orientation. Despite its prohibition as direct evidence, the judge felt no need to inform the jury that the technology underwrote part of the psychologist's testimony, and nothing of its use was ever mentioned in the jurors' presence. Nevertheless, in a rare turn of events, the jury ultimately found Benton not to qualify as an SVP. Though juries do not have to state reasons for their decisions, according to the prosecutor who tried the case and spoke with the jurors briefly after their pronouncement, it seemed that they were uncertain of the validity of the expert testimony because the evaluations had been completed more than a year and a half before the trial. They appeared to wonder whether Benton's sexuality was really still a danger or if treatment had substantially changed it or at least allowed him to control it.

As these vignettes begin to show, different ways of knowing sexuality have been institutionalized in these two legal complexes. Where asylum adjudications favor narrative evidence of sexuality contextualized within specific cultural settings, SVP trials lean more heavily on technologies meant to read the body or otherwise "objectively" measure or quantify

sexuality. Asylum hearings tend to draw on anthropological and sociological expertise while SVP trials depend on psychological and psychiatric knowledge. Whereas asylum decisions depend on assessing the risk a petitioner may face *from* his home country, SVP determinations depend on assessing the risk an offender poses *to* his community.

This dissertation traces precisely how these grids have taken shape and been institutionalized, which I show has been the result of contestations between both state and social actors and between rival networks of expertise vying for authority. Though it can appear at first blush that these two areas of law come to divergent conclusions about sexuality and how to measure it because they are concerned with different aspects of sexuality, that is only superficially true. As these vignettes show, although asylum law may purport to assess sexual identity and sex offender law to evaluate sexual behaviors, in practice these are often distinctions without a difference. The law is not uniform in its operationalization of sexuality, nor in its slippages. Behaviors frequently become identities; fantasies are taken to determine behaviors, and identities may be assigned that fail to accurately describe individuals.

This dissertation, therefore, is a study of how different notions of sexuality and sexual identity have come into being through contestations over legal and scientific knowledge-making. But beyond that, this study is about how those knowledge-making practices become institutionalized and affect how we govern. Who wields expertise in relation to sexuality? Who decides? What counts as evidence of sexuality? How should we classify and categorize individuals' sexualities? Who is a proper sexual citizen? I show that in the legal domains of LGBTQ asylum law and sex offender law different knowledge practices undergird decisions about what constitutes sexuality and how we should manage different sexual populations,

including defining the boundaries of sexual citizenship and what types of sexual subjects should be part of the polity.

In both cases sexuality works as a mechanism for sorting the moral from the immoral subject, the benign from the dangerous, the potential citizen who can be brought into the national fold from the permanent non-citizen who must be excluded at all costs. Where the LGBTQ asylum seeker is welcomed (if only lukewarmly) as a moral and acceptable sexual subject, the sex offender is banished to the margins of civil society or excluded altogether.

Though our cultural common sense may lead us to believe that the differences in classification practices can be explained by the apparent fact that homosexuality and sexual criminality are very different things, it is only very recently that such a distinction has appeared in legal, scientific, and popular discourses. In the epistemic paradigm that predominated in the United States for most of the 20th century, there was little to no conceptual distinction between homosexuality and various forms of sexual criminality, such as pedophilia, sadism, or exhibitionism.

Yet, today, it is such strong cultural common sense that being gay is *not* the same as being pedophilic or sadistic that many readers may balk at the juxtaposition. But that is precisely why comparing institutional responses to these two categories is so illuminating. Until 2003, for example, consensual same-sex sexual relations were still criminalized in 14 U.S. states. Until 1990, gay people were barred from entering the U.S. because they were deemed "psychopathic personalities." Before 1973, "homosexuality" was considered a paraphilic disorder, categorized in the same section of the Diagnostic and Statistical Manual (DSM) as pedophilia, voyeurism, and other criminal sexualities. Through the mid-twentieth century homosexuality and pedophilia were considered similar disorders of the male sexual impulse, while rape was considered a

natural outgrowth of male sexual aggression (Freedman 1987; Terry 1999), though today we are more likely to categorize rapists and pedophiles together. The penile plethysmograph was used in the "treatment" of gay men and pedophiles alike into the 1980s and continues to be used on sex offenders today. Yet, ways of measuring and classifying sex offenders are no longer acceptable methods for use on gay people. But this is a historically recent development. How, in such a short period, did our cultural understanding of sexuality become so completely realigned that we now consider homosexuality to be drastically different than sexual criminality?

By tracing the divergent ways that state institutions make sense of non-normative sexualities, I show that this seismic cultural shift is anchored to institutional changes that are the product of collective action. The state, I show, works as a powerful force for naturalizing social difference along the lines of sexuality and for reifying cultural changes around sexuality. As Chapter 2 and 3 show, organized groups vied for the ability to construct and implement their preferred interpretive schemas. In conjunction with extant cultural frames and institutional demands, these schemas form the basis of what I call "epistemic logics," or institutionalized ways of measuring, classifying, and knowing. In the same way that institutional logics (Friedland and Alford 1991) guide action in particular domains, epistemic logics guide organizational decision-making regarding how phenomena should be understood.

I develop the concept of epistemic logics throughout this dissertation, explaining how they become institutionalized (Part 1), how they affect understandings of sexuality, including what counts as empirical evidence (Part 2), and how they shape risk determination processes (Part 3). In doing so, I aim to illuminate the centrality of expertise—and in particular, non-state epistemic actors—in state legibility projects.

In order to address these issues that exist at the boundaries of traditional academic fields, I draw on work from a variety of disciplines and bring literatures together that are not often in conversation. This dissertation therefore speaks to three broad strands of scholarly inquiry: 1) knowledge formation (how state institutions, in conjunction with non-state expert actors, measure, classify, and know sexualities); 2) state power (how state and legal organizations use different forms of knowledge to govern individuals and populations); and 3) cultural boundaries and identity formation (how legal and scientific practices and technologies reify sexual identities and reinforce cultural distinctions, including the boundary between citizen and non-citizen). The remainder of this introduction assembles the theoretical scaffolding that structures my analysis throughout this study.

SEEING SEXUALITY LIKE A STATE

Classification and Statecraft

Classification and categorization are ubiquitous to modern science, politics, and social organization (Bowker and Star 1999; Espeland and Stevens 2008; Timmermans and Epstein 2010), and numerous scholars have noted the importance of state classification and information gathering practices for state-making and state administration (Appadurai 1996; Carroll 2006; Desrosières 1998; Emigh, Riley and Ahmed 2016; Loveman 2005; Thompson 2016). Indeed, James Scott contends that "legibility" is a "central problem in statecraft" (Scott 1998:2). Ranging from permanent last names to the standardization of language and land tenure practices, state legibility projects entail taking complex social phenomena and fitting them to standardized grids that allow states to record and monitor them. Such processes necessarily require simplification and the loss of local specificity. This has often meant a turn to quantification and standardization

(Desrosières 1998; Espeland and Stevens 2008; Porter 1995). A prime example is the census.[4] As Emigh and colleagues (2016:5) suggest, "Censuses are subtle, but powerful, tools that states use to control, order, and dominate their subjects through knowledge." Censuses take concepts that may be fluid and locally specific in practice, such as race, and reify them for a variety of governmental purposes, including economic extraction, legal subjugation, political representation, and social inclusion or exclusion (Loveman 2014; Marx 1998; Nobles 2000; Thompson 2016).

A central insight of this scholarship is that states rule not just through a monopoly of physical violence but also through the exercise of symbolic violence. As Bourdieu contends, "Through the framing it imposes upon practices, the state establishes and inculcates common forms and categories of perception and appreciation, social frameworks of perceptions, of understanding or of memory, in short *state forms of classification*" (Bourdieu 1994:13). The exercise of symbolic power allows the state not only to naturalize social categories, such as race or age, but it also allows the creation of a collective image of the nation, including who belongs and who does not (Anderson 1991 [1983]; Lee 1993; Loveman 2014; Nobles 2000; Thompson 2016). Greater attention to the state's symbolic power has generated considerable work that takes culture seriously in the study of states (e.g., Adams 2007; Clemens and Cook 1999; Gorski 2003; Norton 2014; Steinmetz 1999b; Wilson 2011). Loveman (2005) argues, for example, that the accumulation of symbolic capital may be a necessary prerequisite for states to effectively exercise physical force. Similarly, Norton (2014) suggests that an established "cultural

[4] An extensive literature considers the political nature and uses of censuses. See Anderson and Fienberg (1999), Desrosières (1998), Emigh (2002), Ketzer and Arel (2002), Lee (1993), Loveman (2014), Nobles (2000), Skerry (2000).

infrastructure" of state meaning making is needed to coordinate and guide state action, and Gorski (2003) contends that governance depends on the state's ability to mobilize religion and other meaning systems in support of its political projects. The literature on state classification and information gathering follows in this vein, yet despite a focus on cultural practices, it remains largely state-centric, which has led to calls for more attention to the "society" side of these state-society interactions. Emigh and colleagues (2016) suggest that the "state-centered" perspective has overstated the impact of the state in several ways, including ignoring the role and power of non-state social actors in influencing state information gathering.

Recent work has begun to address these gaps by highlighting the ways by which social actors resist classification and information gathering efforts or use them for their own ends (Appadurai 1996; Carroll 2006; Loveman 2007; Scott 2009). Others have shown that in some instances social actors also help state classification efforts by building social support and encouraging individuals to participate in state information gathering projects (Clark 1998; Curtis 2001; Rodríguez-Muñiz 2017) or by helping to craft the state's information gathering instruments (Emigh, Riley and Ahmed 2016). But this literature has largely overlooked the role of a critical group of social actors for state information gathering: non-state experts. Loveman (2014) has pointed to the importance of specialized actors and institutions *within* the state, and others have gestured to the importance of non-state expertise without developing it further (e.g., Lara-Millan 2017). Emigh et al. (2016) have given the most attention to non-state experts—or "census intellectuals" in their terms—in state information gathering efforts, arguing that they are vital for transforming common-sense categories into official state classifications. But their study looks at only one grand state-building project, censuses, without examining the role experts play in the day-to-day classification projects of state bureaucracies, which arguably constitute the

bulk of the state's classification work. And the historical nature of their study does not allow us to examine how non-state experts function in contemporary states. Finally, the non-state expert actors they identify—clergy, magistrates, and learned gentleman—are considerably different than the credentialed and, in many ways formally institutionalized, social science actors discussed in this study. Despite the relative absence of expertise in political sociological studies of the state, science and technology studies (STS) has produced a vast literature on how states use experts.

Expertise and the State

Filling in an area that much of the political sociology literature neglects, STS scholars have examined interactions between state institutions, state-making, and expert knowledges in a range of areas. STS work demonstrates that scientific experts have played a central role in state-making and the consolidation of state power and political order (Carroll 2006; Eyal 2006; Ezrahi 1990; Mukerji 1989; Mukerji 2009). In his analysis of science and modern state formation, for instance, Carroll (2006) argues that the advent of "engine science" transformed the activities of governing by allowing the state to view land, people, and the built environment as objects that could be manipulated and improved. Over time, he suggests, the social, economic, political, and natural orders get engineered together such that they appear more and more inseparable, an insight I develop in relation to sexuality in this dissertation.

Non-state experts have also been centrally involved in technical policy-making and advising state actors on technical issues (Brint 1994; Fischer 2009; Hilgartner 2000; Jasanoff 1990). Though scientists are often called upon to take the politics out of regulation, in practice, experts often face considerable political pressure or create new political skirmishes amongst state actors who vie for their preferred experts to be appointed to key positions. For example,

accusations by lawmakers that regulatory agencies allow political considerations to corrupt their scientific analysis has led to a steady decline of public faith in the capacity of such agencies to create scientifically sound and politically neutral regulations (Jasanoff 1990).

Accusations of bias are also common when experts weigh in on legal issues in court. Though expert testimony in courts has a long history, it is increasingly common in legal proceedings, as U.S. courts are asked to adjudicate more technical and scientific issues (Golan 2004; Jasanoff 1995). DNA fingerprinting, causation in toxic torts claims, forensic risk assessment, and other highly technical issues often require non-state experts to provide scientific context in both courts and legislative settings (Cole 2001; Jasanoff 1990; Lynch et al. 2008), a topic I return to shortly.

Perhaps the only STS study to consider the role of expertise in creating state classifications is Eyal's (2006) examination of how Middle East studies academics and military intelligence officials shaped understandings of the nation of Israel and, conversely, of non-Israeli Arabs. But his is predominantly a study of boundary-making rather than official state classification practices.

The general conclusion we can draw from scholarship on expertise and the state is that expert knowledges matter deeply for governance. As Jasanoff and Martello (2004:5) assert, "How we understand and represent…problems is inescapably linked to the ways in which we choose to ameliorate or solve them." Yet the importance of expert actors to state information gathering and classification practices has been under-specified and under-theorized. In an attempt to correct this oversight, I develop the concept of epistemic logics.

Epistemic Logics

Epistemic logics are institutionalized ways of knowing that guide action in organizational settings and vary based on institutional, cultural, and political factors. For example, the Federal Reserve may make decisions based on macroeconomic theories, while excluding other ideas and pieces of information, because the institutionalized epistemic logic dictates that path (Fligstein, Brundage and Schultz 2017). In the cases analyzed here, institutional actors draw on different cultural framings to make sense of sexuality and legitimate their approaches to measuring it. Saguy (2003) has shown how different cultural landscapes can result in disparate conceptualizations of the same legal concept of sexual harassment. Because "culture" is not a unified entity and can provide competing meanings of the same concept (Swidler 2001), this same process operates within a single legal culture. Such is the case for legal conceptualizations of sexuality within U.S. law.

Though they are part of a broader cultural toolkit, epistemic logics are not reducible to cultural schemas of interpretation.[5] They are more precise, guide action more directly, and take shape through the interplay of extant cultural, institutional, and political factors, on the one hand, and expert actors, on the other. For instance, a predominant cultural schema regarding sexuality is that it is inborn, unchanging, and locatable within the body in some biological substrate—perhaps our genes or hormones. This cultural framework suggests a particular epistemic logic. If sexuality is a bodily phenomenon, then we should measure it via the body, by looking for clues in our brains, genes, or even on the body itself or in how the body reacts. This epistemic logic predominates among forensic psychologists and, in turn, sex offender law where psychology is

[5] Here I am conceptualizing of cultural schemas as "generalizable procedures applied in the enactment/reproduction of social life" (Sewell 1992:7), or, more concretely, as "ordered, socially constructed, and taken-for-granted framework[s] for understanding and evaluating self and society, for thinking and for acting" (Blair-Loy 2001:689).

the institutionalized form of expert knowledge. A competing cultural schema suggests that sexuality is culturally and historically specific and that bodies are socialized into particular sexual behaviors and identities; it is not inherent in individuals. This schema calls for a different epistemic logic, one that looks more to cultural and historical context than to individual bodies to understand sexuality. This is the epistemic logic that sociology and anthropology bring to asylum law. Thus, epistemic logics will vary depending on which schema predominates in a given institutional setting, and they will produce independent effects distinct from broader cultural schemas. They give rise to different legal conceptions of sexuality, what counts as evidence of sexuality, and how sexuality will be measured and assessed, and they naturalize distinct sexual ontologies and identities.

The concept of epistemic logics borrows from the ideas of both institutional logics and epistemic cultures but is not reducible to either one. In their classic statement defining institutional logics, Friedland and Alford (1991:248-49) write, "Each of the most important institutional orders of contemporary Western societies has a central logic—a set of material practices and symbolic constructions—which constitutes its organizing principles and which is available to organizations and individuals to elaborate… These institutional logics are symbolically grounded, organizationally structured, politically defended, and technically and materially constrained, and hence have specific historical limits." Building on Friedland and Alford's work, Thornton and Ocasio (1999:804) defined institutional logics as "the socially constructed, historical patterns of material practices, assumptions, values, beliefs, and rules by which individuals produce and reproduce their material subsistence, organize time and space, and provide meaning to their social reality."

These definitions are similar to what I have described as epistemic logics, though they differ in important ways. First, they view institutional logics as being supra-organizational. Conversely, I suggest that epistemic logics are unique to particular organizational settings. We might consider them to be more specific elaborations of broader institutional logics. Friedland and Alford offered five primary institutional logics—those of capitalism, the state, democracy, family, and religion/science—that may structure individual and organizational activity and cognition. The logic of capitalism can travel from one organization to another and maintain its central logic of accumulation and commodification of human activity (Friedland and Alford 1991:248). In this sense, institutional logics are much broader than epistemic logics. Epistemic logics are specific to particular organizational contexts and would look different if they traveled to a different setting. The institutional logics of the state and science characterize both the asylum and sex offender legal complexes, but because of their specific constellations of institutional, cultural, and political constraints, each of their epistemic logics looks different. Thus, even though both complexes evince the same *institutional* logics, they approach the measurement and classification of sexual subjects very differently because their *epistemic* logics are distinct.

Secondly, although institutional logics are concerned with meaning-making and cognition, the concept does not necessarily foreground knowledge-making as does the notion of epistemic logics. In this regard, I draw from Knorr-Cetina's (1999) idea of epistemic cultures. She defines epistemic cultures as, "those amalgams of arrangements and mechanisms—bonded through affinity, necessity, and historical coincidence—which, in a given field, make up *how we know what we know*" (Knorr Cetina 1999:1). Again, this definition comes close to the concept of epistemic logics. But where Knorr-Cetina seeks to describe the "machineries of knowing" for

scientific fields, my goal is to understand how specific hybrid spaces come to know sexuality. That is, epistemic logics do not describe entire fields but only particular organizational spaces where different epistemic cultures come together to form unique and hybridized ways of knowing. In other words, even though anthropologists often provide expert testimony in asylum hearings, the epistemic logic of the asylum complex that I describe would not apply to anthropology as an entire field. Rather, when anthropologists testify in asylum proceedings, they know that they may have to adapt their practices to suit the setting in a way that may be very different from what they would do when talking to other anthropologists. Similarly, the epistemic logic dictating understandings of sexuality in SVP hearings would not apply to psychology as an entire discipline. The organizational cultures and institutional needs of science, law, and state administration come together in these two spaces to create distinct epistemic logics. In short, epistemic logics refer to the hybrid ways of knowing formed at the zones of intersection between the broader institutional logics that span social domains and the broader epistemic cultures that span scientific fields.

Epistemic logics themselves are shaped by cultural, political, and institutional factors. But once epistemic logics become institutionalized they take on a life of their own in defining what counts as empirical evidence of sexuality and how sexuality should be measured. Forms of expertise are therefore a mediating force between larger structural factors and ultimate state understandings of sexuality. But because understandings of sexuality are inevitably constrained by larger structural forces, I want to summarize some of the most salient factors that shape these distinct epistemic practices.[6]

[6] Much of the preceding discussion of epistemic logics would seem to apply to the concept of civic epistemologies, which Sheila Jasanoff defines as, "the institutionalized practices by which members of a given society test and

Cultural Frames

Sex offenders are considered a particularly heinous type of criminal in our culture (Douard 2008; Lynch 2002; Simon 1998; Small 2015), and these cultural frames inevitably find their way into state institutions.[7] Moreover, the cultural frame of medicalization powerfully structures how we view sex offenders and particularly sexual predators. Deviant sexualities have a long history of being pathologized, and whereas homosexuality has moved out of this frame, paraphilias such as pedophilia or sadism have not.

Unlike sex criminals, LGBTQ people are no longer viewed through the lenses of criminalization or medicalization. Rather, LGBTQ people are increasingly accepted in society, and this is reflected in the legal sphere where they are granted considerably greater agency than pathologized sex offenders. This, I would argue, also means we increasingly recognize the nuance of their sexualities and sexual identities. Thus, cultural currents around ideas of sexual fluidity and the variability of sexual expression can more easily penetrate the legal complex of LGBTQ asylum law, where the subjects under scrutiny are seen as more fully human and complex than the sexual predator, who remains more a cultural stereotype than a human subject.

Political Pressures

SVP laws arrived on the heels of the satanic ritual abuse panic of the 1980s in the midst of an acute sex panic over crimes against children. The first of these laws was enacted in

---

deploy knowledge claims used as a basis for making collective choices" (Jasanoff 2005:255). These collective "knowledge-ways" define what counts as expertise and objectivity, among other things, in specific contexts. However, Jasanoff conceptualizes civic epistemologies as characterizing whole societies (also see Miller 2008). With the idea of epistemic logics, I suggest that civic epistemologies are not unified but rather that ways of knowing vary across institutions within the same country.

[7] I am using the concept of cultural frames slightly differently than I used cultural schemas previously. Whereas schemas are generalized frameworks that structure cognition and action, frames are more specific ways of seeing particular objects, events, or, as in the case of sex offenders, groups of people. Thus, the key distinction between schemas and frames as I use them here is scale and generalizability.

Washington state in 1990 in direct response to a particularly heinous sexually motivated abduction and mutilation of a boy by a recently released sex offender. An outraged public demanded a response, and the Washington legislature obliged, passing the nation's first SVP law within months of the crime. This story fits with the wider "governing through crime" (Simon 2007) paradigm ascendant during this period, and scholars have pointed out the "popular punitiveness" of sex crimes legislation indicative of this political strategy (Cole 2000; Lynch 2002; Simon 1998; Wacquant 2009).

The form of SVP laws was also constrained by the downfall of the earlier generation of "sexual psychopath" civil commitment statues. These laws faced heavy criticism due to the subjective nature of dangerousness predictions that opponents contended resulted in many false positives. The new SVP laws, by contrast, outlined more explicit criteria for assessing risk, and clearer diagnostic guidelines and the advent of quantitative actuarial risk tools by forensic psychologists granted greater scientific and legal legitimacy to this new generation of civil commitment statutes and provided political cover.

Asylum for LGBTQ people likewise arose in a particular political context. Fidel Toboso-Alfonso, a Cuban man who arrived as part of the Mariel Boat Lift, lodged the first sexual orientation-based asylum claim in 1985. Though the McCarren-Walter Act made it officially illegal for homosexuals to enter the country, it was not politically expedient to deport a Cuban man in the midst of the Cold War when the U.S. maintained a policy allowing Cubans who made it to the U.S. to stay. The politically expedient move appeared to win out, and Toboso-Alfonso was granted withholding of removal, though the INS was obligated to appeal under the law and did so. However, the BIA ultimately sided with Toboso-Alfonso in 1990. Subsequently, in 1994, then-Attorney General Janet Reno declared Toboso-Alfonso's case precedential, meaning gay

people were officially recognized as a "particular social group" eligible for asylum. This declaration too arose out of a political compromise. In an effort to assuage his gay supporters during the "Don't Ask, Don't Tell" controversy, Bill Clinton offered asylum as an olive branch.

Institutional Constraints

Institutional mandates enable and constrain courses of action within each legal complex. Overarching institutional goals, for instance, partially structure the kinds of knowledge drawn upon by legal actors. The institutional goal of the asylum complex is to provide humanitarian relief and to determine those eligible for such relief, and the types of knowledge and expertise used are therefore geared toward that goal. Similarly, the institutional goal of SVP law is to regulate and contain those deemed sexual dangers, and knowledge deployed in that arena thus aims for clear assignations of individual risk. Greater needs for communication across organizational boundaries and greater internal and external oversight in SVP law compared to asylum law likely also leads to different knowledge practices, such as the more frequent reliance on quantitative information in SVP trials (see Porter 1995). Table 1 contains a summary of salient institutional factors.

Legal infrastructures—such as governing statutes, rules of evidence, and required levels of proof—also shape the kinds of knowledge deployed. Laws governing asylum are broad and have allowed activists to take advantage of considerable legal ambiguity (Vogler 2016). LGBTQ asylum law has therefore been shaped mostly by legal precedent and, more recently, agency guidelines and policies. Though common law jurisprudence has also considerably shaped SVP law, including determining whether technologies like the PPG are allowed as evidence, statues more directly dictate the type of expertise that courts call upon by requiring things like diagnoses of mental abnormalities. Thus, legal opportunity structures (Andersen 2005) and intellectual

opportunity structures (Frickel and Gross 2005; Waidzunas 2013) significantly overlap in these legal complexes.

Table 1 – Institutional Variables

	Asylum	SVP
Institutional goals	Determining eligibility for humanitarian relief	Determining individual dangerousness
Standards of Proof	Varies by type of relief: "well-founded fear" to "more likely than not"	Varies by jurisdiction: "substantially probable" to "beyond a reasonable doubt"
Legal Infrastructure	Broad governing statutes; mostly precedent and some agency guidelines	Detailed, specific laws dictate procedures; some precedent
Communication Needs	Limited mostly to immigration system	Significant communication across organizational and institutional contexts
Oversight/accountability	Limited; low public visibility; immigration judges have considerable autonomy; decisions appealed infrequently	High public visibility; decisions frequently appealed multiple times
Decision-maker	Judges; asylum officers	Varies by jurisdiction: judge or jury

Taken together, these cultural, political, and institutional variables influence how sexuality is conceptualized in asylum and SVP law by shaping divergent epistemic logics. Ultimately, these logics provide powerful cultural legitimacy for governance decisions.[8]

Max Weber (1978) and decades of subsequent political sociologists have asserted that *legitimacy* is central to modern state power. As Mara Loveman argues, Weber's definition of the state as an organization that claims the legitimate use of physical force already "yokes cultural and material power together" (Loveman 2005:1653). Indeed, "historical struggles over the

[8] For a more extensive discussion of how scientific expertise affects the legitimacy of state decisions, see Stryker (1994).

exercise of symbolic power were integral to historical struggles over the legitimate exercise of military, political, and economic power" (Loveman 2005:1652). Yet the cultural aspects of legitimate state authority have traditionally been neglected in favor of focusing on the state's exercise of material domination. By focusing on epistemic logics, I seek to highlight the importance of non-state actors and knowledges in supporting the legitimacy of state authority and power. In other words, state institutions must be able to render their own visions and categories of thought natural and self-evident before they can exercise legitimate physical power, such as forcibly detaining a sex offender indefinitely. They accomplish this, in part, by drawing on the social authority of science, in effect yoking together two of the most powerful truth-producing institutions in our culture—science and law. In order to understand how epistemic logics affect decision-making within state institutions, we must therefore consider how these two powerful social institutions know, a discussion I turn to next.

HOW LAW KNOWS/HOW SCIENCE KNOWS

This dissertation uses the concept of co-production to theorize how legal and scientific actors, institutions, and discourses mutually constitute sexuality as a regulatory category. The idea of co-production has been developed most comprehensively by STS scholars, particularly Sheila Jasanoff (2004), who proposes that the natural and social orders are produced together.[9] Jasanoff suggests that, "the ways in which we know and represent the world (both nature and society) are inseparable from the way in which we choose to live in it. Knowledge and its

[9] Though Jasanoff has provided the most comprehensive synthesis of the idea of co-production, many studies illustrate the concept. Notable examples include Shapin and Schaffer (1985), Bowker and Star (1999), Mukerji (1989), Carroll (2006), and Scott (1998).

material embodiments are at once products of social work and constitutive of forms of social life; society cannot function without knowledge any more than knowledge can exist without appropriate social supports" (Jasanoff 2004:3). This approach suggests that knowledge and social life are mutually sustaining and that knowledge is a vital resource in the management of society, not unlike Michel Foucault's (1977; 1980; 1990) well-known theorization of the power/knowledge nexus. The way we come to know some social object, such as sexuality, is intricately tied to the actions we take in relation to that object. These insights necessitate some consideration of how both law and science *know* their objects of inquiry.

The traditional view of science holds that truth and scientific consensus result from the objective reading of nature, free from social influence. This view reflected a belief in a unitary scientific method wherein scientists evaluated evidence in a disinterested manner leading to one valid conclusion. STS scholars have since shown that science is a deeply social enterprise and that the production of truth and consensus, while bounded by and oriented toward perceived properties of things in the world, are social accomplishments nonetheless (Latour and Woolgar 1979; Shapin 1994; Shapin 1995). As Latour (1987) argues, the construction of facts is a collective process. Whereas "completed" science assumes that things hold when they are true, "science in action" suggests instead that when things hold they start becoming true. Things become more true, in a sense, the more people are convinced of them. Laboratory ethnographies have also shown that deriving scientific conclusions is not a direct procedure leading to one endpoint; rather it is a process of interpretation that may have many possible outcomes. Or as Latour and Woolgar (1979:36-37) put it: "Despite participants' well-ordered reconstructions and rationalizations, actual scientific practice entails the confrontation and negotiation of utter confusion. The solution adopted by scientists is the imposition of various frameworks by which

the extent of background noise can be reduced and against which an apparently coherent signal can be presented." Research has also demonstrated that there is no single scientific method and that different scientific disciplines approach knowledge-making in slightly different ways depending on their object of analysis (Galison and Stump 1996; Knorr Cetina 1999). In sum, rather than speaking of a unitary scientific method or a single correct knowledge-making process, we must acknowledge multiple means of producing knowledge.

This understanding of knowledge production is as true of law as it is of science. The formalist view of law posits that legal decision making is a mechanical process of applying legal principles to a set of facts and thus that normative concerns such as morality and politics are irrelevant. Socio-legal scholarship, however, has shown that, like science, law cannot be extricated from the culture of which it is a part. Like STS scholars, socio-legal researchers have demonstrated that law does not operate under one unified, objective logic but rather that "law in action" takes many forms and often does not straightforwardly reflect law "on the books." Scholars who have analyzed "how law knows" have found that law's ways of knowing are multiple (Sarat, Douglas and Umphrey 2007; Valverde 2003). Austin Sarat and colleagues contend that "law's ways of knowing are as varied as are the institutions and officials who populate any legal system," and that, "all of law's ways of knowing are historically specific, evolving in response to developments both internal and external to law itself" (Sarat et al. 2007:1-2). Mariana Valverde and colleagues have shown in a number of studies that legal knowledges are hybrid, drawing on political rationales here, ethical ones there, science as needed, and a heavy dose of legal knowledge, and moreover, that many local epistemologies exist in various legal complexes (Levi and Valverde 2001; Moore and Valverde 2000; Valverde 2003).

However, law's knowledge-making dimension is not always recognized. Law students are generally told that law is only concerned with particular truths. But, Valverde (2003) points out, in pursuing particular truths, we usually also theorize about general truths and even whether truth can be found. She further asserts: "Law is usually examined…as a key site for the reproduction and contestation of various forms of power relations. But if power works through knowledge, it should prove useful to undertake an examination of some legal events and processes that highlight the knowledge dimension—the constitution, contestation, and circulation of truth in law or in respect to law" (Valverde 2003:1).[10] Sarat and colleagues similarly note that studying law's knowledge practices allows us to "understand law as an arena in which knowledge is both acquired and produced, in which knowledge is both absorbed from, but also radiated back into, the social and cultural world in which law is embedded" (Sarat et al. 2007:19). This, it might be suggested, is particularly important given law's symbolic power. Arguably, the law wields even more classificatory power than science because law comes with the backing of the state (Bourdieu 1987; Burnett 2007).

What happens, then, when these two institutions come together? Both, after all, are formal systems of inquiry designed to sift through evidence and derive rational conclusions. But their approaches to fact-finding differ. Law is always time-bound and must arrive at decisions at the end of hearings, whether the evidence is conclusive or not. Science, in many cases, would refuse to make a definitive conclusion. Law's logic is largely retrospective, depending on precedent and past events. Science's mode of inquiry is more prospective. Law, as a general rule,

[10] Jasanoff (2008:762) makes a similar point when she suggests: "So thoroughly are these institutions [science and law] enmeshed that close investigation of various dimensions of legal practice (e.g., evidentiary hearings, advisory committee meetings, patent litigation), and the actors who engage in them, is as likely to shed light on the production of scientific knowledge as studies of laboratory science-in-the-making or of scientific controversy."

places a premium on continuity. Even when precedent is overturned, jurists must still maintain the integrity of the legal edifice and restore equilibrium. Science, conversely, strives for change and the refinement, and sometimes wholesale overturning, of theories. Science, as Latour (2010:243) points out, "can tolerate gaps, but the law has to be seamless." There is a very big difference, he further suggests, between a Kuhnian paradigm shift and a change in case law. Revolutionary science may be admirable, but revolutionary law is most often terrifying.

Because of these differences, much of the research on the law-science relationship highlights competition and incompatibility between the two institutions (Jasanoff 2008).[11] These inquiries often suggest that law shapes science to its needs, what Susan Silbey has labeled a "law first" approach (Silbey 2008). By contrast, co-productionist work on the law-science relationship emphasizes that law and science jointly produce social and epistemological order and shore up each other's authority (Jasanoff 1995; Silbey and Ewick 2003; Stryker, Docka-Filipek and Wald 2012). Neither law nor science, in this view, are independent, self-regulating producers of truth. Both are social institutions constantly in interaction with other parts of our society.[12] Jasanoff (2008:772) suggests that "evidence, as the law's distinctive contribution to knowledge, is a hybrid product conforming to legal as well as scientific criteria of reliability. In both constructing and reinforcing dominant social understandings of expertise and evidence, legal spaces operate at

[11] Some scholarship, for instance, posits an incommensurable "culture clash" between law and science stemming from law's focus on "process" and science's ethic of "progress" (Goldberg 1994). Other scholars evince a strong concern that the adversarial legal process allows "junk science" to influence decision making and that judges and juries do not have the knowledge to determine what should rightfully count as expert evidence (Faigman, Porter and Saks 1994; Huber 1991). It may be true that "junk science" makes its way into courtrooms. But I am less concerned with adjudicating truth or "real" science than I am with examining precisely how certain ways of knowing come to be seen as valid in legal proceedings and how those epistemic practices affect social reality. Tenuous scientific claims may become "more true" as they circulate through society (Gieryn 1999).

[12] Research has shed light on the ways that science and law coproduce notions of expertise (Golan 2004; Lynch 2004), causation (Bal 2005; Jasanoff 2002), forensic evidence (Cole 2001; Lynch et al. 2008; Lynch and Jasanoff 1998), and the very boundaries of law and science (Jasanoff 2008; Silbey and Ewick 2003).

one and the same time as epistemic spaces." Co-production frameworks thus assert that law and science *both* produce social knowledge. This does not mean, however, that law and science always remain "pure" when they interact. Science may be molded to the needs of law, and law may concede authority to science on certain issues.

Perhaps the most abiding area of concern for scholars interested in the constitutive relationship of law and science has been around questions of expertise and scientific evidence in the courtroom. Law is more than a consumer of science; it also often sets the circumstances under which scientific evidence can be produced and used (Jasanoff 1995; Solomon and Hackett 1996). As Jasanoff (1995:10) asserts: "'Science,' for the law's purposes, is simply the composite of testimony presented in and around an adjudicatory proceeding, and its quality depends heavily on the skill and intentions of the lawyers who elicit the presentation. The facts that the law constructs (or reconstructs) are thus necessarily different from the facts that scientists construct to persuade their peers in their own rhetorically and procedurally distinctive surroundings." In other words, when science finds its way into court, it is often subsumed within the logic of the legal setting and may not retain its singular status as the primary producer of truth. What obtains, rather, is a particular picture of science as constructed in that specific legal setting. The result is a hybrid legal-scientific logic, for law is, above all, pragmatic and much less concerned with epistemological "purity" than science (Valverde 2003). Indeed, the most "scientific" knowledges are not always the most successful in legal settings. Rather, hybrid knowledge formats consisting of a variety of less reputable sources may be preferred to single-source, "purer" knowledge forms (Moore and Valverde 2000). Jasanoff (1995) shows, for instance, that even in "toxic torts" lawsuits where science holds considerable influence, courts often favor the testimonies of general practitioners who have seen the plaintiffs over the more relevant epidemiological

evidence. Similarly, Cole (2001) demonstrates how fingerprinting overtook bertillonage (the use of body measures) as the dominant method of identifying criminal suspects even though it was "less scientific." One reason for fingerprinting's success was its administrative ease: an untrained police officer could take good fingerprints, whereas the bertillonage system was more technically demanding. Lest we think these epistemically "impure" decisions are a thing of the past, such pragmatic moves remain part of the law-science relationship. As we will see in Chapter 7, part of the rationale for selecting items to include on actuarial risk assessments consisted of administrative ease and data availability.

Alongside these concerns with scientific techniques and technologies exist questions of expertise. Who is an expert? How is a court to decide on scientific issues when experts disagree? How much say should experts have? Jasanoff (1990; 1995; 2003) has provided some of the most thorough-going analyses of expertise in legal settings. She suggests that expert testimony in courts is particularly fraught because each side picks experts who can corroborate their stories, and then experts are exposed to adversarial cross-examination, which "only [brings] home the point that science in legal settings is always bound up with specific constructions of causation, blame, and responsibility" (Jasanoff 1995:44). Though experts are supposed to help with fact-finding, what courts in reality get are two carefully constructed representations of reality influenced by the interests, resources, and ingenuity of the proffering parties.

The law does, however, provide some guidance for adjudicating conflicting expert claims. The *Frye* standard, stemming from a 1923 case considering the admissibility of an early version of the polygraph, established that for expert testimony to be admitted in court, it must

have obtained "general acceptance" within the relevant professional field.[13] The 1993 Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*[14] rejected peer review and "general acceptance" (the *Frye* standard) as absolute markers of reliability and reaffirmed judges' power to assess scientific evidence. *Daubert* suggested four criteria for evaluating evidence: 1) Has the theory or technique underlying the testimony been tested and is it falsifiable? 2) Has it been peer-reviewed? 3) What is the technique's error rate, if known? 4) General acceptance (now just one criteria instead of *the* criteria). Though *Daubert* was intended to strengthen the quality of scientific evidence admitted in courts, in reality it appears simply to have had the effect of increasing judicial discretion (Solomon and Hackett 1996). Moreover, many states, including Illinois, which this dissertation uses as a case study, still apply the *Frye* standard, and though the Federal Rules of Evidence serve as a template for evidentiary rules in immigration courts, neither they nor *Frye* or *Daubert* strictly apply because immigration courts are part of the executive branch, not the judiciary.

Despite a rich STS literature on scientific expertise and evidence, however, little of it centers social science. Legal studies, by contrast, has devoted considerable attention to the role of social science in law (see Mertz 2008), including issues of stereotyping (Fiske 1991), fairness of the death penalty (Donahue and Wolfers 2005), and the impact of racial discrimination (Moran 2010). Although the impact of social science on legal decision-making remains unclear in many areas of law (Hull 2017; Moran 2010), this dissertation will show that judges routinely employ social science when adjudicating LGBTQ asylum and sex offender civil commitment

[13] *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923)
[14] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

cases and that social science carries considerable, though variable, influence in these two legal domains.[15]

In advancing this analysis, this study breaks new empirical ground for sexuality studies, legal studies, and STS. To the extent that any of these fields have addressed the use of social science in legal issues concerning sexuality, attention has been devoted to marriage, adoption, and sometimes discrimination claims (Adams and Light 2015; Ball 2014; Falk 1994; George 2016; Levit 2010; Powell, Quadlin and Pizmony-Levy 2015; Yoshino 2015). In one recent study, Stambolis-Ruhstorfer (2015) found that national political and legal structures influence what types of knowledge count as "expert" in legal debates over same-sex marriage and parenting. Whereas the French tend to turn to anthropological and psychoanalytic expertise, U.S. courts and legislatures are more likely to draw on economic and legal knowledges. Significantly, economic logics are completely absent in asylum and sex offender adjudications. Moreover, the types of expertise drawn on vary between the two legal contexts, suggesting that any generalizations about national legal cultures may be overstated. Rather, it appears that the types of knowledges drawn on in debates over sexuality-related issues vary not only across nations but also across legal institutions *within* the same country.

The other significant role social science, particularly psychology, has played in same-sex legal issues involves the debate about whether (homo)sexuality is immutable and whether sexuality is best considered a status or conduct. Halley (1996) notes, however, that both status- and conduct-based arguments have downsides in law and that neither is completely secure.

[15] Some scholars have found support for the notion that social science impacts legal decisions (Acker 1990; Fiske and Borgida 2008), but others argue that social science findings have little or no effect (Lempert 2013; Nelson, Berrey and Nielsen 2008).

Indeed, even when courts have ruled on gay rights issues, they have generally avoided defining or explicitly discussing sexuality and sexual orientation and how they can be identified (Goldberg 2002). (Notably, this is precisely what adjudicators must do in both asylum claims and sex offender civil commitment determinations.) Valverde (2003) further shows that social science knowledges regarding the immutability of sexuality often fall away or are not acknowledged by courts. For instance, when the landmark *Romer v. Evans*[16] case was argued before the Colorado Supreme Court, Evans, a gay man and the lead plaintiff, cited studies purporting to show that homosexuality was fixed and unchangeable, but the court completely ignored that part of the argument in its decision. Subsequently, when the case went to the U.S. Supreme Court, Evans completely dropped that argument. Nevertheless, the immutability question has been central to LGBTQ asylum law and remains tacitly in the background of many SVP decisions. Regardless of the specific legal issue, however, the consensus is that when social scientists testify in legal settings, they experience considerable role conflict in translating social science to the legal sphere, where claims generally must be more authoritative and less qualified than most social science, and ultimately most scholars find that social science is subsumed within this legal logic (Stacey 2004; Stambolis-Ruhstorfer 2015; Valverde 1996).

As the above discussion suggests, though some have considered how social science is mobilized in legal battles over sexual rights, few have analyzed how social science informs legal decisions about sexuality itself or how law and social science constitute sexuality. More generally, STS has simply neglected social knowledge making (Camic, Gross and Lamont 2011) until recently, and even now most of the work in that vein has focused on the "harder" social

[16] 517 U.S. 620 (1996), the *Romer* decision declared unconstitutional a Colorado state constitutional amendment preventing homosexuality or bisexuality from being a protected status.

sciences, such as economics (Fourcade 2009; Knorr Cetina and Preda 2005; MacKenzie, Muniesa and Siu 2008) and psychology (Lakoff 2005; Peterson 2015; Smith et al. 2002; Smyth 2001). This project seeks to contribute to the area of social knowledge by examining understudied subfields within it—anthropological, sociological, and psychological knowledge making—and by analyzing law as a realm of social knowledge production. This dissertation also begins to fill a gap in our understanding of how law constitutes sexual identity categories and, importantly, how social science contributes to these efforts in a relationship of co-production.

Because legal interpretations of phenomena quickly diffuse beyond the legal sphere to become the basis for universal knowledge, law possesses the power to, at least partially, define social reality. For example, legal scholars have shown that the law shapes racial and ethnic categories and identities (Haney López 2006; Pascoe 2009; Sohoni 2007). There has been less attention to the law's influence on sexual identities, but, as with race, the law works to constitute the very sexual subjects it aims to govern (Zylan 2011). This process delimits certain sexual expressions and experiences that are limited and narrowly constructed, yet appear as social fact. Because the institutional processes are masked, these particular sexual expressions take on the appearance of naturally occurring phenomena that are discovered, not created. Asylum hearings and sex offender assessments provide two illustrations of these reifying and boundary-making practices in action.

STS scholars have identified these processes at work in a range of settings. Bowker and Star's (1999) sweeping study of standardization and classification shows that categories are often political, yet through their institutionalization once-political classifications become "real" and naturalized, shaping the way we think about phenomena ranging from race to illness and

beyond.[17] The social processes of commensuration and quantification, both integral parts of modern science, politics, and social organization, similarly obscure lived reality through abstraction and aggregation in order to make decisions appear more rational and objective (Espeland and Stevens 1998; Espeland and Stevens 2008). State and bureaucratic legibility is often a driver of classification, standardization, and quantification. Porter (1995), for instance, argues that bureaucrats vulnerable to political pressure have been pushed toward quantification by a political climate pervaded by distrust of unarticulated expertise and the belief that numbers offer objectivity. Government bureaucracies have thus been receptive to science but have also tried to remake science to fit the confines of bureaucratic-legal modes of decision-making. In an illustration of this phenomenon, James Scott's (1998) wide-ranging survey of state-initiated social engineering asserts that a central problem of statecraft is legibility and that the state uses scientific methods to create simplified maps of intelligibility to administratively order nature and society and render them amenable to measurement and intervention. He argues that "The builders of the modern nation-state do not merely describe, observe, and map; they strive to shape a people and landscape that will fit their techniques of observation" (Scott 1998:82). These processes reduce complex, changing, disorderly phenomena into something more closely resembling the state's administrative grid.

Such insights are in line with what Foucault (1977) calls "disciplinary power." Power does not consist only of repressive dictates or the ability to bend others to one's will (as in a Weberian conception of power). Rather, Foucault argues that power in modern society is

[17] Timmermans and Epstein (2010) similarly argue that classifications and standards appear natural because the important political work that goes into creating them becomes invisible once they are established, and they are therefore extremely powerful in the establishment, maintenance, and transformation of social order.

increasingly exercised by surveilling individuals through innumerable institutions—ranging from schools to hospitals to the military—and creating norms of conduct. Power is thus dispersed throughout society, and particular institutions represent nodes within this network. Through the accretion of knowledge and creation of norms, disciplinary power creates new subject positions. The "dunce," or conversely, the "gifted student" can only come into being through the collection and analysis of large amounts of individual data through which "normal" performance is "identified". Similarly, the "homosexual," as such, did not exist prior to his appearance in scientific discourses of the late 19th century (Foucault 1990).

Philosopher of science Ian Hacking has been one of the most prolific scholars to apply Foucault's theories to scientific practice and has developed two ideas applicable here. His notion of "making up people" refers to "the ways in which a new scientific classification may bring into being a new kind of person, conceived of and experienced as a way to be a person" (Hacking 2007:285). His framework for analysis of this social phenomenon consists of five parts: 1) *classifications* of people into "kinds;" 2) *individuals* who inhabit these classifications; 3) *institutions* that shore up the classifications; 4) *knowledge* about the people in question; and 5) *experts* in the administration of categories. However, people are not static objects. Our investigations and classifications interact with the people we seek to describe and change them, and people, in turn, speak back to the categories in which we put them, perhaps changing the meaning of those categories. This is what Hacking calls the "looping effect" (Hacking 1995). Though Hacking develops these concepts in relation to science, both ideas can be applied to law, and both can be seen at work in asylum and sex offender assessment. The notion of the LGBTQ asylum seeker, for instance, did not exist until that classification was applied to a person through state institutions dependent upon expert knowledge. But over time, what "makes up" a LGBTQ

asylum seeker has changed and expanded, effectively shifting what it means to be queer in asylum law. Likewise, the concept of the "sex offender" is a quite modern invention. As recently as the 1950s, many considered non-injurious sex offenses to be nuisances rather than crimes warranting harsh punishment (Leon 2011). Today's conception of the sex offender reflects the on-going input of psychiatrists and other scientific experts, the media, state officials, activists, and many others.

RISK, BOUNDARY MAKING, AND SEXUAL CITIZENSHIP

As this discussion suggests, this dissertation adopts a queer constructionist view of sexuality. Rather than accepting the popular notion that sexual expressions and identities are rooted in one's biological makeup, this study adopts the perspective that sexuality does not exist as such until it is created as a cultural category. This line of thinking is generally traced to Foucault (1990), whose genealogical analysis of the concept of "sexuality" asserts that, in Western societies, sexuality was not understood as an aspect of one's inner identity until the late 19th century. Before that time, non-normative sexual acts were simply considered aberrant and perhaps punished as criminal, but they were not thought to be essential aspects of one's being. Foucault argues that the "homosexual" as a distinct type of person came about through the scientific examination and categorization of sexual "deviants." As he famously summarized, "The sodomite had been an aberration; the homosexual was now a species" (Foucault 1990:43). Borrowing from the confessional tradition of Christianity, psychiatrists compelled their subjects to provide detailed accounts of their sexual behaviors and desires in an effort to reveal the hidden truths of sexuality. Such confessionals formed the basis for authoritative scientific knowledge about sexuality, and over time these observations congealed into the permanent sexual identity

category of the "homosexual." Importantly, other analysts have pointed out that "heterosexuality" similarly came about at this time (Katz 1995).

However, as Eve Kosofsky Sedgwick (1990) has observed, the homo/hetero binary was not the only possible way of categorizing sexuality. It was simply the one that took root in the historical and cultural ferment of 19th-century Western Europe. A queer theoretical lens allows us to interrogate these historically contingent developments and to imagine social arrangements around sexuality that go beyond the homo/hetero dichotomy (Seidman 2003). This perspective also allows us to trace how particular sexual identities, expressions, and behaviors have been constructed as normal and deserving of rights while others have been deemed deviant and immoral. Legal and scientific knowledge practices and claims are vital mechanisms for the production of such truths. In demonstrating that notions of sexuality vary even today and even within the same national legal system, depending on the forms of evidence and expertise deployed and the institutional knowledge practices followed, I show that sexuality is a socially mediated phenomenon, not an essence pre-existing cultural ascription. Indeed, this dissertation reveals just how important institutions are in imparting sexual identities to individuals and populations.

State institutions are also central in granting individuals the identity of citizen and its concomitant rights and privileges. In determining who does and does not deserve entry into the category of citizen, the state creates and reinforces symbolic boundaries (Lamont and Molnár 2002) that define "the nation" and who belongs to it (Anderson 1991 [1983]). Traditionally, definitions of the nation have excluded sexual "others," including LGBTQ people. Heteronormativity, for instance, has long been a prerequisite for national belonging in the United

States (Canaday 2009; Luibheid 2002; Somerville 2005).[18] The ideal citizen must be able to reproduce the nation, after all. Queers not only could not fulfill this role, but they were also viewed as degenerates who, if they did reproduce, would produce less than ideal citizens.

Immigration policy has historically represented one of the most visible markers of national exclusion for sexual "others" (Cantú 2009; Epps, Valens and Gonzalez 2005). Luibhéid (2002) shows that the history of gay and lesbian exclusion at the border reveals much about how dominant groups consolidate their identities through the labeling and exclusion of others. In trying to identify "sexual degenerates," the immigration system contributed to the creation and regulation of sexual norms, identities, and behaviors. For instance, the Immigration Act of 1891 brought immigration under federal control and defined exclusionary criteria, including provisions barring persons guilty of crimes of moral turpitude. Though moral turpitude was never fully defined, it was understood to encompass (and used to exclude) sexual deviants (Canaday 2003). Canaday (2009) relatedly argues that U.S. citizenship and sexual identity have been intertwined since at least the end of the 19th century and that the homo/hetero binary structured citizenship in many ways, including defining the proper citizen as heterosexual.[19]

Inclusion in the realm of citizenship is a central issue in both asylum judgements and sex offender assessments.[20] Both adjudicate the fate of sexual outsiders' possible entry into the

[18] Critics note that citizenship continues to be largely heteronormative, that legal gains for gays and lesbians, such as marriage and military service, simply reinforce heteronormative values, and that such protections largely accrue to the most privileged gays and lesbians (Brandzel 2005; Cossman 2007; Puar 2007).
[19] Notably, the exclusion of sexual "others" at the border has historically paralleled and intertwined with the exclusion of racial and ethnic "others" (Canaday 2009; Nagel 2003; Somerville 2000).
[20] Citizenship is more than a legal status conferred by the state. It is also about belonging to a community, and it is significant at multiple levels, from the national to the local (Epstein and Carrillo 2014; Glenn 2010; Joppke 2007). As Evelyn Nakano Glenn (2010:2) suggests, "citizenship is constructed through face-to-face interactions and through place-specific practices that occur within larger structural contexts." However, this dissertation largely focuses on citizenship as a legal status conferred by the state and as a symbolic boundary demarcating inclusion in the nation.

national (and often local) community and also send larger signals about the boundaries of proper "sexual citizenship" (Weeks 1998). Asylum hearings determine whether a foreign sexual other will be able to enter the country as a potential U.S. citizen, whereas sex offender evaluations decide whether an internal sexual other may rejoin the polity as a full citizen, be relegated to the margins of society (via residency restrictions and curtailed civil rights), or be excluded from civil society completely and possibly permanently through indefinite civil commitment. These boundary-making practices are centrally structured around risk determinations. Although risk has received little attention in the literature on the creation of symbolic boundaries, this dissertation contends that risk has become a structuring theme in issues of sexual citizenship.

Though we might argue that tacit risk calculations have always been part of citizenship determinations (e.g., is this immigrant unlikely to integrate and therefore more likely to commit crimes or depend on state resources?), in the cases analyzed here, risk becomes explicit and highly salient. This might be expected in regard to sexual health, and indeed, scholars have shown that HIV risk and HIV status do define certain subject positions (Hoppe 2014; Norton 2013). But asylum determinations and sex offender evaluations make the relationship between risk calculations and sexual citizenship even more apparent because both processes explicitly invoke risk to justify outcomes. In other words, sexual subjects are defined vis-à-vis their relationship to risk.

Although assessing risk is central to both asylum law and sex offender law, the processes play out quite differently in each domain. Despite their differences, risk assessment processes in both domains create the conditions for knowing sexual subjects primarily through their relationship to risk. The LGBTQ asylum seeker exists only insofar as he faces the risk of persecution from his home country on account of his sexuality. The sex offender, similarly,

exists as a sexual subject in the eyes of the state only for the risk he poses to the nation because of his sexuality. Risk works as a mechanism for constituting these subject positions.

Furthermore, risk assessment practices in each domain reinforce particular ways of knowing sexuality already present in those legal arenas. On the one hand, for instance, until 1990 homosexuals were excludable from the United States based on the notion that they posed a risk to the nation due to their status as "sexual psychopaths." Post-1990, and partially through the mechanism of asylum, homosexuals became potential citizens worthy of national inclusion. Our conception of homosexuals shifted from an exclusionary risk paradigm that viewed them as *a risk to* the nation to an inclusionary one that viewed them as *at risk from* their home countries. A risk assessment process in asylum that focuses on whether sexual minorities are recognized as distinct social groups and how asylum seekers' sexual expressions are understood in their local cultures articulates well with a constructionist understanding of sexuality.

On the other hand, risk determinations for sex offenders revolve around notions of individualized sexual risk to the nation that position sexuality and sexual risk as an inherent characteristic of an offender, which resonate with essentialist notions of sexuality. Risk evaluations for sex offenders use actuarial risk assessment tools to predict the likelihood that an offender will engage in future acts of sexual violence. These tools work by aggregating data on large numbers of sex offenders and retrospectively identifying factors that seem to be associated with recidivism. Offenders being assessed are then compared to these group data to arrive at a risk level and predicted probability of future sexual violence. Such techniques are consistent with a turn to actuarialism in crime control and penal practices and with larger shifts in governance away from punishing concrete acts and toward policing risk (Castel 1991; Ericson 2007), or what Baker and Simon (2002) have called "governing through risk."

This “new penology” is primarily concerned with identifying, classifying, and managing groups sorted by dangerousness rather than rehabilitating criminals (Feeley and Simon 1992). Incapacitation is therefore a primary strategy for controlling the distribution of offenders in the population, and the language of probability and risk has replaced earlier discourses of clinical diagnosis and retributive justice. Risk itself is criminalized (Ericson 2007). Actuarial thinking, as Bernard Harcourt (2007) asserts, alleviates our guilt about profiling because we begin to perceive profiled groups as more criminal and thus deserving of punishment and policing. This idea is readily observable in the case of sex offenders, where notions of high recidivism rates and their inability to be controlled through conventional carceral methods legitimizes legal exceptions. Furthermore, the “new penology” and actuarial thinking go hand-in-hand with the theory of a permanently risky criminal “underclass” that cannot be rehabilitated. This precautionary logic has refigured the institutions of law and science in the management of sex offenders (Hebenton and Seddon 2009).

Asylum risk determinations use different risk calculation strategies that are more akin to clinical judgement or what Daston and Galison (2007) have called “trained judgement.” Asylum officers and immigration judges are entrusted as objective fact-finders and risk calculators. Working with far less concrete data than sex offender evaluators, asylum adjudicators must decide the likelihood that an asylum seeker will face persecution on account of his sexuality if returned to his home country. Adjudicators construct a representation of the claimant’s home country based on various forms of country conditions evidence, including human rights reports from the U.S. State Department and NGOs and expert affidavits and testimony, and tacitly determine if the asylum seeker’s probability of persecution meets the required threshold.

Despite their differences, both approaches to risk exemplify a shift in the exercise of state power toward what Foucault (2007) called "apparatuses of security." Rather than focusing on changing the individual, as disciplinary power does, security focuses above all on governing populations. Security aims to regulate groups and flows to maintain an optimal level of functioning rather than to reform individuals. This is not to say that disciplinary mechanisms disappear with a shift toward security (legal and scientific practices still create subject positions, as I discussed above), but regulating populations through statistical analysis and modifying the "milieu," or social conditions, become the dominant means of exercising power. Foucault understood this as a shift from "normation" (discipline) to "normalization" (security). Within the disciplinary exercise of power, the norm comes first, and individuals are molded to fit that norm; this is normation. Security, conversely, identifies norms through statistical analysis of populations and then attempts to "normalize" the population through interventions in the milieu. It is accepted that unfortunate events occur, but by identifying the circumstances that create the risk for those events, actors can attempt to intervene to maintain an optimal level for the maximization of life.

STUDYING LEGAL COMPLEXES

In studying asylum and sex offender law and the forms of expertise that inform them, I have attempted to avoid personifying both "law" and "science." "Law," as Mariana Valverde (2003:10) points out, is the "mother of all legal fictions," an abstract idea impossible to grapple with empirically. The same could be said of the nebulous "science." Rather, people interact with concrete "legal complexes": "ill-defined, uncoordinated, often decentralized sets of networks, institutions, rituals, texts, and relations of power and of knowledge" (Valverde 2003:10). Legal

complexes, unlike "law," can be empirically studied. By examining the actors, networks, institutions, and practices constituting the legal complexes around asylum and sex offender law, I can offer fine-grained analysis of how the epistemic practices of deploying expertise, evidence, and technologies of knowing in legal settings constitute sexuality.

Because I was interested in the relationship between sexuality and state power—and in particular, how state institutions attempt to govern sexuality and sexual subjects—I considered a wide range of sexuality-state issues for comparison, ultimately settling on asylum and sex offender determinations for a number of reasons. First, I wanted to disaggregate "the state" to analyze whether and how governance practices varied across different state domains. I sought to avoid reifying the idea of a monolithic state or, indeed, a concept of "the state" as a concrete entity that exerts independent force upon a distinctly separate entity called "society" (Abrams 1988; Mitchell 1999). The state/society divide is largely artificial and continuously permeable, and as much scholarship has attested, the state is a thoroughly cultural phenomenon (see e.g., Steinmetz 1999a). Thus, I adopt a Foucauldian approach to studying the state, viewing it as a complex and historically changing configuration of discourses, people, and institutions that sometimes have conflicting goals, interpretations, and approaches to a variety of issues. Rather than existing as an agentic entity detached from society, the state provides a "scheme of intelligibility for a whole group of already established institutions and realities" (Foucault 2007:286),[21] and, in fact, in Foucault's estimation, "the state is a practice not a thing" (ibid:277). In line with this theoretical orientation, I view state institutions as anchor points for cultural practices, including knowledge creation (Fourcade 2009), and therefore adopt a middle-range

[21] On this point, also see Mitchell (1999).

analysis that focuses on specific organizations as powerful "machineries of knowing" that configure the knowledge-making process (Epstein 2007:20). Organizations and institutions constrain action, create opportunities, make certain trajectories more tenable, and render particular arrangements unthinkable, resulting in institutionalized patterns of action (Clemens and Cook 1999; Vaughan 1999). Furthermore, organizations require "classification systems and standardized documents that regiment, restrict and reduce experience and understanding into easy digestible and communicable abstractions from more complex, dynamic interactions and situational logics" (Vaughan 1999:931). Thus, I wanted to select state-sexuality interactions occurring in different state domains.

Secondly, I was particularly interested in how state institutions "see" sexuality, as in Scott's (1998) well-known notion of "seeing like a state." I considered a range of sexuality-related issues with which the state concerns itself: same-sex marriage, adoption, military service, immigration, sex work, hate crimes, conversion therapy, and sex crimes. In the end, LGBTQ asylum and sex offender, specifically SVP, hearings both provided settings in which state officials were charged with determining individuals' sexualities. Moreover, both institutional settings often sought the aid of non-state experts, meaning that these two areas would allow me to examine in detail precisely how the epistemic practices of deploying expertise, evidence, and technologies of knowing in state legal settings constitutes sexuality.

Third, as historian of sexuality Regina Kunzel has argued, "One way to subject the social process of normalization and the categories of identity and experience defined as normal to historical scrutiny is to examine responses to what might be considered their border problems" (Kunzel 2008:9). As I describe extensively in Chapter 1, homosexuality and sexual criminality have historically been tightly linked. Yet, in recent years homosexuality, and especially

monogamously coupled "respectable" gays and lesbians, have arguably crossed the line to become part of what Gayle Rubin (1984) has called the "charmed circle" of acceptable sexual expressions and become delinked from criminality and pathology. Sexual offenders, conversely, remain strongly stigmatized. The comparison therefore allows me to analyze the ways by which (de)criminalization and (de)medicalization contribute to the constitution of sexual identities and the role that state institutions, in conjunction with non-state actors, play in naturalizing and reifying sexuality-based distinctions.

As a final point, I want to note that although I analyze epistemic practices that are drastically different and represent sexuality in very different ways, I avoid declaring one way "true" and another "false." I critique some aspects of the measurement and classification practices in both asylum and sex offender law, but in accord with the principle of symmetry drawn from the sociology of scientific knowledge, I attempt to scrutinize both domains through a similar analytic lens.[22] The divergent ways sexuality is understood are equally real in their respective institutional contexts and have material consequences, regardless of whether we as observers subscribe to those belief systems.

This methodological premise applies similarly to the fact that I am comparing institutional practices around sex offenders and LGBTQ people. Although I discuss this comparison in-depth in the Introduction and Chapter 1, it bears repeating here that I am not equating the two groups but rather using them as cases that illustrate how state institutions differentially define and govern sexuality. I also refrain from making moral judgments about the character of individuals I discuss in this study. As sociologist Loïc Wacquant says of his own

[22] The principle of symmetry insists that the same explanations should account for both true and false beliefs (Bloor 1991 [1976]).

examination of sex offender law, "it bears reaffirming here that the purpose of sociological analysis is not to indict or exculpate, but to explain and understand (which does not imply condoning or standing by morally unperturbed)" (Wacquant 2009:215). My purpose here is not to further entrench a particular moral view of sex offenders, but to analyze how it is that we have come to understand the figure of the sex offender in the way we do today.

To empirically study these legal complexes, I draw on over 400 legal decisions, 40 semi-structured interviews with legal and scientific actors in the fields, and multi-sited ethnographic observations. Triangulating multiple sources of data works as a robustness check for my findings and guards against the shortcomings inherent in any single method. Because both the letter of the law and its implementation vary across jurisdictions, multiple sources of data allow me to speak to different levels of analysis. Asylum law, for instance, is promulgated by the federal government, and agency policies regarding asylum officers and immigration judges affect the entire national system. However, federal appellate court decisions are only binding on immigration courts in that circuit (though in practice the courts mostly follow their sister circuits' precedents), and research shows that asylum grant rates vary widely between federal circuits and even between immigration courts in the same circuit (Miller, Keith and Holmes 2015; Ramji-Nogales, Schoenholtz and Schrag 2009). Conversely, sex crimes laws are mostly enacted and enforced at the state level. But the federal government has also threatened to withhold federal law enforcement funds from states that do not comply with its desired guidelines, resulting in sex crime policy that looks relatively similar across states. The federal government also has its own sex crimes laws, including a civil commitment statute.

In order to cover this patchwork of laws, I sampled legal decisions that cover many jurisdictions, selected interviewees from across the nation, and conducted observations in

multiple locations. I collected 184 LGBTQ asylum decisions from federal appellate courts in addition to relevant publicly available decisions by the Board of Immigration Appeals (BIA) and various NGO and government documents, and I interviewed immigration lawyers, activists, adjudicators, and expert witnesses from across the United States, all data that allow me to examine asylum practices across the country. Additionally, I conducted two years of field work with Advocates for Immigrant Rights (AIR), a non-profit legal organization in Chicago that has a national presence on queer immigration issues. Through AIR, I observed twelve asylum hearings in the Chicago immigration court, which allowed me to witness the real-time workings of the asylum process, though in only one locale.

Data for the sex crimes legal complex came from over 200 legal decisions sampled from an archive of several thousand cases (see the Methodological Appendix for a full discussion) that covered both state and federal courts. Interviewees, particularly psychological experts, were similarly drawn from across the country. I also conducted ethnographic observations at the professional meetings of the Association for the Treatment of Sexual Abusers and the International Association for the Treatment of Sex Offenders. These data allow me to speak to sex crimes policy across the nation. However, because sex crimes statutes are largely governed by states, I also conducted an in-depth case study of Illinois, selecting an additional 32 state legal decisions, over-sampling evaluators from Illinois, attending the bi-annual meeting for the Illinois chapter of ATSA, observing the bi-monthly meetings of the Illinois Sex Offender Management Board for two years, and witnessing two sex offender civil commitment trials in Chicago.

Thus, I have sought to collect data on both legal domains in a way that allows me to examine the institutions, actors, and practices at all levels of the legal complexes. For both legal complexes, I concentrated analysis on the years from approximately 1990 (the year the first gay

asylum case was granted and the first SVP law was enacted) to 2015. This period also roughly tracks the dramatic success of the LGBT movement in gaining legal protections and public favor and the simultaneous increase in scope and punitiveness of sex crimes laws. As I will discuss throughout this dissertation, these parallel trends are not mere coincidence but rather track the shift from homosexuals to sex offenders as the ultimate sexual outsiders.

Before presenting an outline of the chapters that follow, I first offer a brief discussion of each area of law to orient us as we proceed through the analysis to come.

LGBTQ Asylum Law

Asylum has become an important new route to citizenship for LGBTQ people (Cantú 2009; Carrillo 2010; Epstein and Carrillo 2014; Randazzo 2005). But the possibility of receiving asylum because of persecution on account of one's sexuality is a quite recent development. The 1951 United Nations Refugee Convention established five categories of asylum protection: race, religion, nationality, political opinion, and membership in a particular social group (PSG). However, the U.S. maintained policy focused on admitting refugees fleeing communist countries or the Middle East until passage of the 1980 Refugee Act, which brought U.S. asylum policy in line with the UN Convention.[23] Under the new guidelines, petitioners must prove either past persecution or well-founded fear of future persecution on account of one of the protected grounds. The 1990 landmark case of Fidel Toboso-Alfonso, a Cuban man who claimed persecution due to his homosexual identity, established that sexual identity could constitute a PSG. Then-attorney general Janet Reno declared that decision precedential in 1994, meaning that

[23] The 1980 Refugee Act also formalized a system through which individuals arriving in the U.S. could seek asylum. It did this, in part, by adopting the 1967 Protocol Relating to the Status of Refugees, which states that countries cannot deport those with a reasonable fear of returning to their home countries without fully evaluating their asylum claims.

sexual minorities no longer had to prove on a case-by-case basis that sexual identity constitutes a PSG. However, LGBTQ people must demonstrate that they *belong* to a protected PSG and that the PSG is persecuted, meaning that in practice they must prove their sexualities. Here it is helpful to look at the asylum process more closely.

The asylum process can begin in one of two ways depending on a petitioner's status. If a migrant is documented, arrives at a port of entry and immediately claims fear of persecution in his or her home country, or voluntarily goes to an asylum office within one year of arrival in the United States, s/he can apply for asylum affirmatively. This means that s/he receives a non-confrontational hearing with an asylum officer, who may either grant asylum directly or deny the claim and refer it to immigration court. If the applicant is granted asylum, s/he receives residency and the ability to begin the naturalization process a year later. If s/he is not granted asylum, s/he must plead the case to an immigration judge, at which point the process becomes identical to that of a defensive application, which occurs when a petitioner is already in deportation proceedings before claiming asylum. In a defensive application, an applicant faces an adversarial hearing before an immigration judge, with a Department of Homeland Security (DHS) lawyer arguing against the claimant. If the immigration judge denies the claim, an applicant may appeal the decision to the Board of Immigration Appeals (BIA). If that too fails, the claimant may appeal to a U.S. Court of Appeals. An asylum seeker can also appeal to the U.S. Supreme Court, but the Court has yet to hear a LGBTQ asylum claim.[24]

Given the apparent difficulty of proving one's sexuality and persecution on account of it, some critics have contended that LGBTQ asylum claims are more challenging to win, though

[24] It is important to note that appeals can generally only be made based on errors of law, not errors of fact.

others, including some judges and advocates, argue that queer claims require the same level of proof as any other claim and are therefore mostly treated fairly under the law (Harbeck 2010).[25] It is difficult to substantiate either assertion because the DHS does not track the number of asylees granted protection as sexual minorities. Immigration Equality, the largest queer immigration organization, reports that it helped over 1,100 people seek asylum between 2004 and 2014 (Millman 2014), but this is only a fraction of the total number of LGBTQ asylum seekers. In 2013, approximately 14% of the 25,199 successful asylees—about 3,500 individuals—fell under the PSG classification (Martin and Yankay 2014; Millman 2014), but we cannot know how many were unsuccessful or how many successful claims were for sexual minorities. However, the overall grant rate for asylum in the U.S. averages about 50%, though it varies dramatically by jurisdiction (Ramji-Nogales, Schoenholtz and Schrag 2009).

Sex Crime Law

Sex offenses have been the subject of moral panics throughout the 20th century (Freedman 1987; Rubin 1984), but beginning in the 1980s and into the 1990s, a series of sensationalized stories of sex crimes gave rise to a particularly punitive moral panic around sex (Lancaster 2011). One of the earliest and most dramatized incidents involved alleged satanic ritual abuse at McMartin preschool, a day care center in a well-to-do California suburb. The accusations of sexual abuse resulted in the longest and most expensive criminal trial in U.S. history and ended with the dismissal of all charges, but also brought up questions of expertise in relation to the interviewing of children who may be victims of sexual abuse (Nathan and

[25] Several of my interviewees felt that queer claims were not treated significantly differently than other claims. Some scholars, however, contend that the "credibility" requirement is particularly difficult for LGBTQ asylum seekers (Lewis 2014; Millbank 2009).

Snedeker 1995), continuing the long and fraught relationship between the "psych" disciplines and criminal justice.

Following McMartin, a series of highly publicized, though statistically rare, crimes against children engendered public cries for harsher punishment and increased surveillance for sex offenders. The first federal law passed in response to this moral panic was the 1994 Jacob Wetterling Act—named after a boy who was abducted and whose whereabouts remain unknown today—which required states to create sex offender registries. Congress amended this law in 1996 with passage of Megan's Law—again named for a child victim—requiring community notification of sex offenders living in the area. That same year, Congress also created a national sex offender registry. The latest amendment to this series of laws came in 2006 with the Adam Walsh Act (AWA)—also named after an abducted child—which requires sex offenders to provide more extensive registration information and increases the minimum required duration of registration for offenders, among other things.[26] In determining registration requirements, some states use a "risk tier" system based on crimes committed, while others conduct individualized risk assessments. Regardless, almost all states currently use risk assessment technologies in some decisions about sex offenders, including determinations ranging from probation requirements to treatment efficacy.

Though the use of actuarial and psychophysiological risk assessment technologies achieved prominence only in the 1990s, risk assessment in some guise has existed since the

[26] Perhaps the most notable change required by the AWA is the suggested tiering system of offenders based on offense type rather than calculated risk. That is, whereas some states use risk assessment methods to assign offenders to a "risk tier" for registration and notification purposes, the AWA mandates that states use a three-tier system based on offense or lose some of their federal funding for law enforcement. As of 2015, seventeen states are in compliance with the AWA, though according to the National Conference of State Legislatures, several states have elected to remain non-compliant because compliance would cost more than the loss of federal funds. Of the non-compliant states, some still use offense-based classification, but others employ risk-based classification of offenders.

1930s with the passage of "sexual psychopath" laws. During this period, ranging roughly from 1930 to 1955, sexual psychopaths were viewed as "deviants with a compulsive sex disorder who were running rampant among us and therefore must be identified, classified, and captured" (Freedman 1987; Leon 2011:29). At the same time, psychiatry was gaining professional legitimacy and used panic over sex crimes to increase its jurisdiction (Chauncey 1993; Sutherland 1950), implicitly promising that psychiatrists could identify, treat, and maybe even cure, sexual psychopaths (Cole 2000). Psychiatrists were therefore entrusted with the clinical evaluation of sex offenders in order to determine whether they would be amenable to treatment, should be sent to prison, or should be civilly committed in a psychiatric facility. However, civil rights challenges and a crisis of trust in psychiatry's ability to fulfill its promises meant that by the 1970s, psychiatry's role in the identification, treatment, and adjudication of sex offenders diminished considerably, and new professional groups stepped in to fill the void (Cole 2000; You 2013). Answering the call for more objective and reliable methods by which to predict the riskiness of offenders, a new form of expertise arose in the form of forensic psychology. These professionals rely on actuarial and psychophysiological technologies to predict future sexual conduct. Of the psychophysiological technologies employed, the polygraph is the most common—indeed, a representative from the Illinois Polygraph Society sits on the Illinois Sex Offender Management Board—but penile plethysmography, or phallometric testing, is still used in many states (Zilney and Zilney 2009). Despite criticisms of the accuracy and intrusiveness of these two technologies, they remain in wide use (McGrath et al. 2010).

While I address many of these legal developments, the primary focus of this dissertation is the new generation of sex offender civil commitment laws that arose in the 1990s, variously labeled "sexually violent predator," "sexually violent persons," or "sexually dangerous persons,"

laws, and the assessment practices surrounding these laws. For the sake of brevity, I will refer to these as "SVP laws." These statutes resulted from high profile sex crimes (though not an actual increase in the number of sex crimes) that induced a moral panic, particularly around child molestation (Jenkins 1998; Lancaster 2011). This new iteration of SVP laws began in 1990 in Washington state, where convicted sex offender Earl Shriner openly admitted to authorities that he planned to commit future acts of sexual violence. However, because his sentence was at an end, authorities could do nothing but release him.[27] Shriner was released and did, indeed, follow through on his statements, kidnapping, raping, and mutilating a seven-year-old boy. Within months of the crime, the Washington legislature voted unanimously to create the first SVP law allowing for the indefinite civil commitment of sexually violent offenders *after* they serve their criminal sentence. Almost every state subsequently considered some form of SVP statute, though many elected not to enact such laws for various reasons, including cost and legal challenges (Jenkins 1998). As of 2018, twenty states and the federal government have enacted SVP laws. Unlike the "sexual psychopath" laws, which sought to divert those "too sick" for punishment from criminal sentences into mental facilities at the front end, new SVP statutes are aimed at the "worst of the worst" and allow the government to seek the indefinite civil commitment of an offender after he has served his criminal sentence.

In most jurisdictions, all offenders who have committed "sexually violent" offenses are assessed as they near the end of their criminal sentence. If this initial evaluator believes an offender may qualify as an SVP, the offender undergoes a more extensive SVP evaluation. If this evaluation also suggests that the offender is an SVP, he receives a probable cause hearing before

[27] As Eric Janus (2006) notes, it was ironically the "tough on crime" switch to determinate sentencing that led in part to the inability of authorities to take preventative action against admittedly dangerous offenders.

a judge. Typically, fewer than 5% of sex offenders reach this point. If the judge finds probable cause (and they usually do), the offender is sent to the civil commitment facility to await his SVP trial. The trial itself may be conducted before a judge alone or a jury, depending on the jurisdiction, and the level of proof required to commit offenders also varies by jurisdiction, an issue discussed more in Chapter 7. Post-commitment, offenders are periodically reevaluated and may be recommended for conditional release if both the treatment staff and a judge agree that he is no longer a risk to the community.

Though many perceive SVP laws to be punitive, legislatures have been careful to specify that they are for community protection and crime prevention, not punishment, and courts have largely agreed with this rationale. By couching SVP laws within the civil realm, states have been able to fend off constitutional challenges based on ex post facto, double jeopardy, and due process complaints, and ultimately, the Supreme Court has deemed the laws constitutional in three high-profile cases.[28] Despite their "civil" appellation, however, commitment hearings look very similar to criminal trials. Defendants are entitled to lawyers, often have a right to a jury, and the required level of proof in many states is "beyond a reasonable doubt."[29] Finally, because criminal law cannot punish a "status" (i.e. a "dangerous person"), making SVP laws civil allows states to work around that obstacle. However, the Supreme Court *has* ruled that SVPs must be distinguishable from the "typical" offender.[30] This sorting and classification process necessitates the cooperation of psychological professionals for the diagnosis of mental disorders and the prediction of future sexual violence.

---

[28] *Kansas v. Hendricks* 521 U.S. 346 (1997); *Kansas v. Crane* 534 U.S. 407 (2002); *United States v. Comstock* 560 U.S. 126 (2010)
[29] Some states only allow for bench trials and use lower standards of proof similar to other civil proceedings.
[30] *Kansas v. Hendricks* 521 U.S. 346 (1997); *Kansas v. Crane* 534 U.S. 407 (2002)

Chapter Outline

The first chapter traces the historical emergence of the "sexual deviant" in late-19th and early-20th century sexology and medicine. Notions of both homosexuality and sex crimes took shape during this period, and at the time both were considered part of the same phenomenon. The same body of laws targeted homosexuals, pedophiles, and rapists alike. Though some early thinkers argued that homosexuality was "benign variation" and advocated for the decriminalization and depathologization of homosexuality, it was not until the mid-20th century that conceptualizations of homosexuality and other categories of sexual deviancy began to diverge significantly. The removal of homosexuality from the DSM helped this process, but stereotypes of the "homosexual pedophile" continue even today. This chapter therefore contends that it would be wrong to see no enduring relationship between the legal and knowledge politics of queerness and sexual crimes today. Indeed, 21st century approaches to studying sexuality—attempts to "locate" pedophilia and homosexuality in the same areas of the brain, for instance—keep this specter alive.

The remainder of the dissertation is divided into three parts that each cover a broad theme. In Part 1, I ask how different networks of expertise formed in each legal complex. I use the idea of "epistemic logics" to explore how historically contingent arrangements of actors, institutions, technologies, and knowledges have crystallized as temporarily stabilized ways of knowing sexuality in each legal domain. On the one hand, forensic psychology was able to displace psychiatry as the predominant form of expertise informing sex crimes law due to prevailing concerns with the subjectivity of psychiatric clinical assessments and forensic psychology's offer of greater "mechanic objectivity" (Porter 1995) in the evaluation process, in addition to the psychiatric profession's opposition to new civil commitment statutes (Chapter 2).

On the other hand, asylum advocates faced no entrenched expertise that had to be dislodged because their expert network formed contemporaneously with the development of LGBTQ asylum law (Chapter 3). However, they did contend with adjudicators' "common sense" approach to determining sexuality and had to find creative ways to introduce novel legal arguments about the social construction of sexuality.

Once established, epistemic logics significantly affect what counts as empirical evidence of sexuality in legal proceedings. Part 2 takes up this issue to demonstrate how competing social scientific views of sexuality result in different forms of evidence predominating in each legal arena and ultimately result in divergent interpretations of sexuality. Chapter 4 argues that sex offender decisions rely on actuarial risk assessments and technologies meant to read sexuality from the body, and Chapter 5 shows that asylum adjudications more often prefer narrative evidence of subjects' sexualities. I argue that this is due to epistemic stances that suggest either that sexuality can be directly assessed via the body, as in sex offender law, or that sexuality must be determined through indirect indicators, as in asylum law.

Part 3 analyzes the risk assessment processes in asylum and sex offender decision-making. In Chapter 6, I suggest that risk determinations in asylum proceedings depend on notions of "risky countries." Conversely, as Chapter 7 demonstrates, risk decisions in sex offender civil commitment trials create "risky individuals." The primary source of risk being assessed, then, is either the society or the individual. I examine the knowledge practices that constitute these entities through a close analysis of country conditions evidence and the notion of "persecution," in the case of asylum, and actuarial risk assessment tools, in the case of sex crimes.

I conclude with a consideration of how these legal and knowledge practices shape social conceptions of both sexuality and citizenship. I argue that as LGBTQ people have been tentatively welcomed into the realm of citizenship, we have created a new pariah group: sex offenders. While this shift is partially the product of the work done by the LGBTQ movement to change attitudes, I assert that these transformations are also anchored to concrete institutional practices of knowledge making about sexual groups and individuals. I suggest that we look more closely at how various forms of knowledge, particularly cultural definitions or risk, are used to define and redefine what it means to be a citizen in the twenty-first century.

Before proceeding, I must note a couple of things about my terminology. While I generally refer to LGBTQ asylum or LGBTQ people, at times I use "queer" as a broad catchall term for non-normative gender and sexual expressions and identities. "Queer" was seldom used by the actors in my research sites; rather my use of the word is purely as an analytical tool, both to capture the range of gender and sexual identities that exist in the world that cannot necessarily be reduced to "gay," "lesbian," etc., and to signal my queer theoretical approach to understanding sexualities. Though it may seem to be at odds with a queer theoretical lens, the reader will also notice that I predominantly use male pronouns throughout this dissertation unless I am explicitly discussing a woman or gender non-conforming individual. This is conscious and deliberate and meant to reflect the fact that most of the subjects I encountered in my research sites were men. The vast majority of sex offenders are men, and most asylum seekers are also men. This means that legal understandings of sexuality are often structured around male experiences and the male body. That being said, while I do think we must be cautious of generalizing studies of men to women and gender non-conforming people, my work in these sites suggests that many of the findings I discuss would apply very similarly to these groups. As

many scholars of classification have shown, states often create general grids and fit people to them, even when they fit imperfectly. I generally believe this to be the case in the legal domains I analyze here. Though they were developed for men, the classification schemes at work in LGBTQ asylum and sex offender law are often applied to people of other genders without many adjustments. I do not consider this schematic mismatch in depth in this dissertation, but it is certainly a topic worth more extensive inquiry.

Chapter 1
Kissing Cousins: Queerness, Crime, and the Politics of Knowing

Juxtaposing the social management of sex criminals with that of LGBTQ people, as this dissertation does, is sure to raise some eyebrows. But such concern is only warranted if one adopts a very narrow historical and theoretical scope. After all, until just over a decade ago, sex between consenting adults of the same-sex remained illegal in almost half of the states in the United States. In other words, gay people (who had sex, that is) *were* sex criminals until 2003 when the U.S. Supreme Court struck down the remaining anti-sodomy statutes. And until 1990, it was illegal for homosexuals to even enter the country. Rewind another couple of decades, and gay people were considered mentally ill, in the same vein as sadists and pedophiles. Go back a bit further, and we arrive at a time when the age of consent for girls was 10 years in most American jurisdictions, an age of sexual debut that we can only regard as pedophilic through a contemporary lens.

Some will shrug off these historical parallels and argue that science has corrected itself. We were wrong in the past, and now we know better. Being gay, we now know, is a qualitatively different thing than being a pedophile. But as this chapter will show, these past parallels are anything but history. While in mainstream public, expert, and legal discourse, gay people are no longer considered sex criminals, the professionals who work with sex offenders today *do* largely consider sexual deviations (or paraphilias as the DSM calls them) to be akin to sexual orientations, and the ways by which psychologists go about studying and understanding both homosexuality and sexual deviance are remarkably similar. For instance, researchers today look for the causes of pedophilia in the brains, hormones, and genes of individuals, just as they do with homosexuality. Homosexual and pedophilic sexual arousal, too, are conceptualized and

measured in remarkably similar ways. In short, what may seem at first blush to be a drastically unlike comparison is in actuality quite appropriate when contextualized. Indeed, that most people today would have a knee-jerk reaction against mentioning sex criminals and LGBTQ people in the same breath speaks to the powerful ways by which social institutions and processes shape our conceptions of sexuality.

The categories are closely linked in our cultural imaginary, and throughout much of the last century, there was no distinction at all between homosexuals and sex criminals. It is no surprise, then, that moral panics over sex crime and homosexuality have erupted at the same times throughout the course of the twentieth century. The "sexual psychopath" panic that began in the 1930s branded homosexuals and pedophiles alike as psychopathic and worthy of commitment in secure psychiatric facilities. In the 1950s and 1960s, children were warned that homosexuals *were* pedophiles, an equation that continued with Anita Bryant's "Save Our Children" campaign of the 1970s. The "satanic ritual abuse" panic of the 1980s was likewise especially suspicious of men who were around children (Nathan and Snedeker 1995). As gay people began gaining cultural recognition as people and citizens rather than criminals and psychopaths, society started to conceptually decouple homosexuality and sexual criminality.

The sex panic of the 1990s that led to a new wave of civil commitment statutes aimed at sex offenders featured gay people much less, instead creating a new specter: the sexual predator. Most often a pedophile, but often also a rapist, the sexual predator became the paradigmatic boogeyman, a danger to women and children everywhere. Yet the sexual predator continued to resemble the predatory homosexual of mid-century: dangerous, difficult to identify, insatiable, mentally unstable, and most of all, in need of new techniques to identify and control.

Given such historical and conceptual similarities, we stand to learn much about cultural processes of classification through comparing the treatment of homosexuality and sexual criminality. How do different disciplinary perspectives and techniques of measurement affect how state actors "know" sexuality and make governance decisions? The remainder of this chapter will expand on this brief historical overview by considering the "discovery" of sexuality by sexologists in the late-19th century before offering a brief sketch of sexuality's evolution over the course of the twentieth century in an attempt to show how scientific approaches to knowing sexuality affect broader social understandings of the relationship between gayness and sexual criminality. Lastly, I will discuss the techniques employed in science and law to measure and classify sexualities and show that bodily measurement and subjective narratives have historically stood as the predominant means of knowing sexuality. These two methods of ascertaining sexual truths continue today in various forms, though their use differs depending on institutional context. Examining how these techniques have been variously used on LGBTQ people and sex criminals will provide a framework for understanding the contemporary use of such technologies to "know" individuals' sexualities. I argue that institutionalized classification methods are, in fact, a mechanism for naturalizing social conceptions of sexuality, and following transformations in these techniques can help us understand how cultural change is anchored by institutional practices.

Sexology and the "Discovery" of Sexuality

The mid- to late-19th century witnessed an explosion of interest around sex and sexuality worldwide.[31] Much of this new concern for sex stemmed from the increasing visibility of new

[31] Though I concentrate on European and American sexual science, the contributors to Fuechtner, Haynes, and Jones' (2018) volume demonstrate that sexual science was a global phenomenon.

sexual subcultures in urban centers. As young men and women were freed from their traditional familial duties and increasingly migrated to more densely populated cities, they gained some anonymity away from the prying eyes of family and often found themselves in sex-segregated spaces, such as boarding houses (D'Emilio 1983; D'Emilio and Freedman 1988). As historian John D'Emilio (1983) argues, these social changes allowed the creation of a collective gay identity for the first time. However, even before such a collective identity formed, these nascent communities drew the attention of sexologists and law enforcement alike. Indeed, law and medicine mutually reinforced each other's fascination with the topic of sexual deviance, as medical experts were increasingly called to evaluate the mental state of individuals charged with sexual "perversions."

One of the earliest studies of sexual deviance to gain widespread attention evinces this mutual constitution. German neurologist Richard von Krafft-Ebing published *Psychopathia Sexualis* in 1886, subtitling his controversial book "a medico-forensic study." Many of the subjects featured in the book came to Krafft-Ebing's attention through the legal system, for which he often provided testimony regarding offenders' mental states and moral responsibility. Given his position as a medical doctor, it is perhaps no surprise that Krafft-Ebing's theory of sexual perversion centered on the body, as did most of the early sexological accounts of sexuality. Krafft-Ebing was particularly interested in the brain, nervous system, and hormones, and his general explanation for sexual pathology centered on degeneration. In other words, sexual deviants represented a kind of regression toward a less developed stage of humanity. Coupled with his theory of degeneration, Krafft-Ebing also believed, as most sexologists at the time did, that homosexuality was the result of gender inversion. Inversion and degeneration were integrated in Krafft-Ebing's theory, as he explained: "The secondary sexual characteristics

differentiate the two sexes; they present the specific male and female types. The higher the anthropological development of the race, the stronger these contrasts between man and woman, and vice versa" (Krafft-Ebing 1965:28). Thus, inverts exhibit signs of physical and psychic degeneration by adopting the mannerisms of the opposite sex or desiring the same sex.

Taking a less pathologized stance, the German sexologist and activist Magnus Hirschfeld, also posited homosexuality as the result of inversion but rejected the notion of degeneration. Rather, Hirschfeld followed in Karl Ulrichs' path and believed that homosexuals comprised a third sex. However, like Krafft-Ebing, Hirschfeld was especially interested in bodily signs of difference between heterosexuals and homosexuals and believed that further research into the "internal secretions" (i.e., hormones) would reveal the cause of homosexuality. Given his belief in homosexuals as a third sex, Hirschfeld also suggested that hair, voice, musculature, and other bodily features differed between homosexuals and heterosexuals. Despite his rejection of the notion of homosexuals as degenerates, Hirschfeld did believe that homosexuals had weak nervous systems and therefore would probably produce weak offspring (Hirschfeld 2000). He thus posited that homosexuality may be a way of preventing degeneration by limiting reproduction.

Despite these rather pathologizing views, most European sexologists were sympathetic to homosexuals and believed that homosexuality should not be criminalized because it was an inborn abnormality, or if it was acquired then it was nearly impossible to change. Curiously, however, they tended to see all sexual perversions as similar in kind. For example, Krafft-Ebing categorized homosexuality (or antipathic sexuality) in the same group of "parathesias" (perversions of the sexual instinct) as sadism, masochism, and fetishism, and all of these were classified as "cerebral neuroses" (Krafft-Ebing 1965:34). And while Krafft-Ebing did not believe

that homosexual desires, per se, should be punished, he *did* suggest that *perversity* should be, by which he meant actual sex acts with the same sex. In particular, he believed that anal sex, or what he referred to as "pederasty" was especially pathological: "From what experience teaches, it may be said that, among the sexual acts that occur, rape, mutilation, pederasty, lesbian love, and bestiality may have a psychopathological basis" (Krafft-Ebing 1965:337). Equating lesbian love with rape and mutilation is particularly notable and likely reflects gender anxieties of the period. Krafft-Ebing made one further moral distinction, stating, "It is psychologically incomprehensible that an adult of full virility and mentally sound should indulge in sexual abuses with children" (Krafft-Ebing 1965:369). Thus, despite painting sexual perversions with a broad brush, Krafft-Ebing and others did make some distinctions among the perversions, often singling out child molestation as particularly pathological. However, as sexology traveled to America, it also became more punitive, as experts rejected the more sympathetic European stance regarding homosexuality and uniformly targeted "sex perverts," often pursuing homosexuals with particular zeal (Rosario 2002; Terry 1999).

Although American authorities shared with their European counterparts a view that willful vice should be distinguished from irrepressible psychopathology and that the latter perhaps deserved some sympathy, unlike many European sexologists, Americans by and large did not advocate decriminalizing sodomy (Kunzel 2008; Rosario 2002). Indeed, homosexuality remained thoroughly intertwined with ideas of sexual criminality for most of the 20th century in the U.S. For example, in the 1940s, consensual sodomy with a person over the age of 18 carried a maximum sentence of 20 years in prison in 15 states, and until Illinois reformed its laws in 1961, all U.S. jurisdictions enforced anti-sodomy statues (Jenkins 1998). Rape, pedophilia, and "sex killings" also came under more scrutiny at the turn of the century, thanks in part to an

outpouring of writings on sexual conditions engendered by the publication of Krafft-Ebing's *Psychopathia Sexualis* (Jenkins 1998). Terms such as "homosexual," "pervert," and "pedophile" entered the English language shortly after the book's publication. Thus, although the justice system had dealt with sex crimes prior to the late-19th century, it was not until the 1880s that American medicine and psychiatry began to think of "sexual perversion" as an essential aspect of one's identity rather than a temporary lapse in behavior (Foucault 1990; Jenkins 1998), which caused a critical shift in notions of sex crime. Ideas of bio-criminality taking root at this time helped cement this view of sex offenders as particular kinds of people and led to calls for "treating" perverts like other people with diseases under the bio-criminal model—through methods such as sterilization and quarantine. As historian Philip Jenkins explains, "The new positivist criminology was founded upon the radical principle that deviant acts were symptoms indicating underlying medical or biological flaws in the offender, conditions that demanded treatment or incapacitation" (Jenkins 1998:21). Dr. Frank Lydston, a leading medical authority on perversion in early-20th century America, recommended a procedure to cauterize the nerves to stem perverse impulses and also believed that extirpation of the ovaries and clitoridectomy would cure lesbianism (Terry 1999). Other methods of "treatment" and incapacitation during this time could range from quarantine to sterilization to castration and even execution (Leon 2011; Terry 2013).

Homosexuality and criminality were therefore tautologically related. Because prisons were key sites for the early study of sexuality in America, researchers often believed that "perverts" were of a distinctly criminal bent and thus that criminality and perversion generally co-occurred (Kunzel 2008). Historian Regina Kunzel further points out that "Oscar Wilde's well-publicized fate—his trials, conviction, and incarceration—ensured that, at this formative moment

in the public recognition of this new sexual type, 'the homosexual' would become ineradicably affiliated with criminality and the prison" (Kunzel 2008:47). Surprisingly, however, despite a new fascination with perversion and a dedication to the goal of protecting communities from its corrupting influence, sexual subcultures flourished at the end of the 19th and beginning of the 20th centuries (Chauncey 1994). This would change after World War I when social anxieties escalated over sex offences—including homosexuality, prostitution, voyeurism, indecent exposure, child molestation, and rape—giving rise to a more punitive stance toward sexual deviance.

The Birth of the Sexual Psychopath

Arrests for homosexuality increased in the late 1920s as public sentiment turned against the perceived excesses of the "Roaring Twenties" (Terry 1999). Because many such arrests were technically classified as sex crimes, it reinforced the impression that gay men and lesbians accounted for most violent sex criminals when in fact their arrests were often merely for congregating in public spaces (Terry 1999). Popular reporting about sex crimes around this time also promulgated the notion that homosexuals were child molesters and lumped homosexuals in with violent offenders, rapists, and child molesters. This was reinforced by a common assumption that homosexuals were trapped in an arrested stage of development that led them to seek out children to satisfy their perversions (Jenkins 1998; Terry 1999). Even the most sympathetic commentators discussed homosexuality alongside other dysfunctions and sexual crimes, ensuring that stigma was sure to attach (Jenkins 1998). The hysteria over sex crimes reached such a point that in September 1937 J. Edgar Hoover declared "War on the Sex Criminal!" in the *N.Y. Herald Tribune* and warned that "the sex fiend, most loathsome of all the vast army of crime, has become a sinister threat to the safety of American childhood and

womanhood" (quoted in Rosario 2002:76). As the United States entered World War II, psychiatrists made the screening out of homosexuals central to their profession and to the defense of the country (Chauncey 1993; Rosario 2002).

As psychoanalytic approaches to the identification and treatment of sexual perversion ascended in the 1930s, somatic theories continued to exist alongside them, and there was not yet a clear distinction between constitutional and environmental factors in the creation of perversion. Thus, this period and into the early-1940s witnessed the use of dramatic treatments for perverts, including hormone therapy, shock therapy, and on rare occasion, lobotomy, though these techniques quickly declined in popularity as psychoanalysis became the dominant paradigm by the end of the decade (Rosario 2002). Freudian understandings of sexuality posited that all perversions were rooted in early childhood and family dynamics and were the result of a failure to properly complete the sexual development process. Freud, in fact, suggested that perversion was present in everyone and could be brought to the surface if one is unable to obtain "normal" sexual satisfaction. This is because all perversions have their roots in childhood and everyone therefore passes through these sexual development phases, or as Freud explained, "perverse sexuality is nothing else than a magnified infantile sexuality split into its separate impulses" (Freud 1963:311).

These ideas have given rise to theories of homosexuality that remain in circulation today, such as the overbearing mother and absent father causing homosexuality, or that a bad sexual experience with the other sex can turn someone gay, or, conversely, that exposure to homosexuals can turn children gay. Despite viewing homosexuality and other "perversions" as mistakes in the sexual development process, Freud was sympathetic toward homosexuals and generally did not believe that homosexuality could be changed. Nevertheless, Freudian theories

implicitly linked homosexuality to pathology and crime by grouping it with other "perversions," including fetishism, masochism, sadism, voyeurism, and exhibitionism. Freud also occasionally made comments that would allow American psychoanalysts to make this connection, as when Freud wrote, "In my experience, anyone who is in any way, whether socially or ethically, abnormal mentally is invariably abnormal also in his sexual life" (Freud 1962:15). Despite Freud's sympathy toward homosexuals, American psychoanalysts largely discarded his views on that subject and instead pursued attempts to convert homosexuals into heterosexuals and adopted a generally hostile stance toward homosexuality (Rosario 2002; Terry 1999). For instance, Benjamin Karpman, a leading authority on sexuality, wrote in 1951 that "sexual psychopathy involves a type of behavior characterized by socially prohibited aggressiveness, by lack of regard for the unwilling participant; by being compulsive and irresistible in character; and by being committed under the influence of an exceptionally strong overwhelming urge, the tension of which is released by the particular behavior" (quoted in Jenkins 1998:59). Notably, undercurrents of Freud's drive theory of sexuality represented in this quote are still present in discourse on sex offenders today. Freud's ideas were also misinterpreted by American authorities to support the connection between homosexuality and pedophilia. That is, because homosexuality was the result of "arrested development" wherein the homosexual is stuck in a stage of sexual development that occurs in childhood, it was presumed that homosexuals were themselves interested in children (Jenkins 1998; Terry 1999).

These notions were amplified with the stock market crash of 1929 and the subsequent Great Depression, which engendered widespread social anxieties around the family and masculinity and brought a newfound scientific concern for male sexuality. This coupled with sensationalistic coverage of atrocious sexual crimes against children gave rise to a sex panic, and

the first iterations of "sexual psychopath" statutes were enacted in the late-1930s. Psychiatric authorities became concerned with two general sexual subtypes over the course of the decade: one lacking in masculinity, the effeminate homosexual, and one with an excess of masculinity, the hypersexual sexual predator (Freedman 1987; Terry 1999). The latter category included pedophiles, rapists, and "active" masculine homosexual men. Both types were linked via their psychological immaturity and maladjusted character that led them to prey on the innocent and to choose objects that could substitute for the proper heterosexual objects or to engage in "immature" acts, such as voyeurism, exhibitionism, or oral sex.

Curiously, whereas most sex crimes statutes previously specified the protection of women as their purpose, sexual psychopath laws and psychiatric discourse of the 1930s focused predominantly on protecting children and did little to prosecute violent crimes against women or even coercive incest by male relatives against children in their families (Terry 1999). Rape was therefore mostly undiscussed in the psychiatric literature of the time and instead focused predominantly on the twin specters of the homosexual and the child molester. As historian Jennifer Terry points out, "in much of the discourse on sex offenses, the rape of women was deemed closer to normal relations than homosexuality, since the perpetrator's sex object was normal, and his aim, though excessive, conformed to a basic gender ideology that positioned man as active agent and woman as receptive object" (Terry 1999:275). In line with this observation, records show that most offenders sentenced under sexual psychopath statutes were child molesters, gay men, and non-contact offenders, such as exhibitionists and voyeurs, while rapists were more likely to be sent to prison as "regular" criminals (Leon 2011). Although such offenders were supposed to receive therapy and be rehabilitated, in reality offenders deemed most like "useful citizens" were diverted from prison while those who seemed more "harmful"

were sent to prison, though little therapy happened in either location (Leon 2011). Notably, those typically deemed to be potential "useful citizens" tended to be white, while people of color convicted of sex crimes continued to be treated solely as criminals and sent to prison (Cole 2000; Jenkins 1998).

World War II brought an abatement of the sex panic of the late-1930s and early-1940s, and by the late-1940s considerable quantitative evidence showed that claims in the media and by the FBI of a sex crime wave of massive scale were overblown and that rates might even be dropping (Jenkins 1998). Kinsey's studies in the 1940s also showed that sexual practices in America were quite varied and that a large portion of the population could be considered sex criminals if the law was strictly enforced. Kinsey's findings, in particular, helped engender "reverse discourses" (Foucault 1990) as homosexuals used his studies to push back against the pathologization of gayness, instead embracing the label as a normal variant of human sexuality that was quite common among the U.S. populace (Igo 2007).[32] Yet in spite of these new findings, highly publicized crimes against children ignited another sex panic in the late-1940s and 1950s. The specter of the pedophilic predator was at the center of the panic, and as with the panic of the late-1930s, homosexuals were particularly targeted, even though arrest records show that the vast majority of sex crimes against children were committed by men against girls (Terry 1999). Many factors contributed to the notion that child molesters were homosexuals, including the assumption that homosexuals' psychosexual immaturity led them to prefer young partners and

[32] We might also consider this to be an illustration of what philosopher Ian Hacking (1995) has called "looping effects." That is, labeling humans often engenders responses from those subjects, who may react against, embrace, or change the meaning of the categories into which they have been placed. Classification may therefore become a dialectical relationship between "top down" and "bottom up" forces that results in shifting meanings of categories over time.

the insistence by psychoanalysts that homosexuals were compulsive, obsessive, and uncontrolled in their sexual impulses. The media frequently reported stories of child sexual abuse and child murder in the same stories that featured statistics on arrests of men involved in consenting activities with adults. Demonstrating this tight linkage, in the wake of a highly sensationalized pair of child murders in the early-1950s, California increased the penalty for consensual sodomy from 10 to 20 years in prison (Terry 1999). Kinsey's findings about the prevalence of homosexual activity also stoked fears that such behaviors were occurring right under the noses of authorities, and a growing climate of homophobia was fueled by Cold War xenophobia and a "strangers in our midst" mentality (Terry 1999). Although homosexuals had been prohibited from entering the U.S. on various grounds since the late 1800s, it was during this time that homosexuals were officially barred from entering the country as "psychopathic personalities" with the passage of the McCarren-Walter Act of 1952. This post-war sex panic solidified psychiatrists' place in the criminal justice system, as 21 additional states and Washington, DC passed sexual psychopath laws, and six states funded psychiatric studies of sex offenders (Jenkins 1998; Terry 1999).

By the 1960s, constitutionalist models of homosexuality had largely been marginalized in favor of psychoanalytic theories, but some psychiatrists and psychologists also began adopting behavioral methods to treat perversion, including avoidance conditioning. Among the earliest to adopt these methods was Czechoslovakian psychiatrist Kurt Freund, who administered apomorphine injections to induce nausea and vomiting while homosexual subjects were shown slides of nude and dressed men. For positive reinforcement, the same subjects were later given testosterone injections and shown films of naked and seminude women (Waidzunas 2015). Others used shock therapy wherein a man would be shown a picture of an attractive man, and if

he did not turn the image off quickly enough he would be shocked until he did (Leon 2011; Rosario 2002; Terry 1999). Various forms of aversion therapy were used on homosexuals throughout the 1960s and 1970s and even into the 1980s. Techniques derived from these therapies are used for some sex offenders today, including exposing offenders to noxious odors when they have deviant sexual urges.

The late 1960s saw the fragmentation of the term "sex crime," as various sexual behaviors, including homosexuality, became more accepted and were no longer viewed as on par with rape and pedophilia. Psychiatric and psychological experts began to change their views of homosexuality at this time, as well, thanks in part to research like Evelyn Hooker's demonstrating that homosexuals were generally as mentally well-adjusted as heterosexuals and did not suffer from psychopathology (Hooker 1957). During this period, experts confidently reported remission and cure of deviant sexual desires and asserted that sentencing sex criminals to prison was therefore not productive and, moreover, that recidivism rates for sexual offenses was generally low (Jenkins 1998). By contrast, today "psych" experts generally do not speak of "curing" paraphilias but rather "managing" them. Pedophilia, in fact, cannot be classified as "in full remission" in the DSM and is widely considered to be similar to a sexual orientation like gay or straight.

As gay activism gained traction after the Stonewall Riots, political pressure combined with considerable disagreement within the psychiatric discipline led to the removal of "homosexuality" from the DSM in 1973. Before this time, homosexuality was first classified as a "sociopathic personality disturbance" in the DSM-I and then a "sexual deviation," along with conditions such as pedophilia and sadism, in the DSM-II. However, even after homosexuality's removal, it was replaced with "sexual orientation disturbance" to appease opponents of de-

medicalization (Waidzunas 2015). The diagnosis also legitimated conversion therapy by regarding homosexuality as an illness if one found their same-sex attractions distressing and wanted to change them (Drescher 2015). "Sexual orientation disturbance" was replaced with "ego dystonic homosexuality" in the DSM-III, but this diagnosis was removed in the subsequent revision of the 1987 DSM-III-R. It was thus not until 1987 that the APA definitively recognized homosexuality as a normal form of sexuality. By contrast, paraphilic disorders such as pedophilia, exhibitionism, voyeurism, fetishism, sadism, and masochism remain in the latest version of the DSM.[33]

Despite the move toward de-medicalization, homosexuality remained criminalized in most jurisdictions, whether through prohibitions on sodomy, lewdness, or public congregating. Though the first state anti-sodomy statute was repealed in 1962, the majority of states did not repeal their sodomy laws until the 1980s and 1990s (see Table 1). In California, which created the nation's first sex offender registry in 1947, gay sex was included as a dangerous and registerable offense, along with child molestation and rape. It was only in 1979 that the California Supreme Court ruled that the lewd conduct law permitted the police to be too repressive of gay social life and prohibited the use of the law in semi-private spaces, such as gay bars (de Orio 2017). Subsequently, the 1983 California Supreme Court case *In re Reed* finally dropped the registration requirement for lewd conduct, deeming registration to be a punishment out of proportion to the crime (de Orio 2017). Homosexuality thus made incremental progress in its slow march toward de-criminalization.

[33] In an effort to de-pathologize non-normative yet consensual sex practices, such as BDSM (similar to the move to "sexual orientation disturbance"), the DSM-V now only considers paraphilias to be disorders if they cause one distress or involve non-consenting persons.

However, the link between homosexuality and pedophilia re-emerged in the late 1970s, thanks in large part to Anita Bryant's "Save Our Children" campaign, in which Bryant emphasized gay men's supposed predilection for child porn and involvement in organized pedophile rings. As historian Philip Jenkins asserts, pedophilia remained "central to antigay rhetoric until the mid-1908s, when it was largely replaced by the still more effective terror weapon of AIDS" (Jenkins 1998:125). Still, homophobia has rarely been far below the surface of sex panics throughout the course of the 20th century, including the satanic ritual abuse panic of the 1980s, which engendered homophobic attacks against male childcare workers (Nathan and Snedeker 1995). Even the most recent wave of panic beginning in the 1990s and giving rise to the new generation of "sexually violent predator" statutes featured a pedophile who molested and mutilated young boys as a central catalyst.[34]

Given the historically tight linkage between homosexuality and criminality, how (and to what extent) have the two become decoupled? This dissertation asserts that measurement and classification practices are one way to track this change, and indeed, that they are one primary mechanism for this shift in our cultural understanding of sexuality. The remainder of the dissertation will consider in detail how such changes occurred, but in the final section of this chapter, I want to first provide a bit more historical context for thinking about measuring sexuality.

[34] The release of convicted child molester Earl Shriner from prison in 1990 resulted in the passage of first contemporary SVP law in Washington state.

Table 2 – Year of decriminalization of same-sex sodomy

Year	State
1962	Illinois
1971	Connecticut
1972	Colorado, Oregon
1973	Delaware, Hawaii, North Dakota
1974	Ohio, Massachusetts
1975	New Hampshire, New Mexico
1976	California, Indiana, Maine, Washington, West Virginia
1977	South Dakota, Vermont, Wyoming
1978	Iowa, Nebraska, New Jersey
1980	Alaska, New York, Pennsylvania
1983	Wisconsin
1992	Kentucky
1993	District of Columbia, Nevada
1996	Tennessee
1997	Montana
1998	Georgia, Rhode Island
1999	Maryland
2001	Arkansas, Arizona, Minnesota
2003	Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Utah, Virginia

Measuring Sexuality

As this chapter has demonstrated, there have historically been two predominant methods of measuring human sexuality: bodily measurement or subjective reporting. Early sexology drew on both of these techniques, soliciting life histories and narrative accounts of sexual "deviants" as well as searching for physical differences between the bodies of "perverts" and "normal" people. Psychoanalysis moved more firmly into the "confessional" mode of sexual inquiry, as described by Foucault (1990). Mid-century behaviorists shifted back toward a focus on bodily measurement and response, using technologies such as the polygraph and the recently-invented penile plethysmograph. More recently, new technologies, such as fMRI machines and DNA

analysis, have allowed researchers to assess sexuality in novel ways that still view the body as providing an unmediated view into one's "true" sexual identity but attempt to bypass any assumed subjective elements to one's sexuality. Today all of these methods continue to coexist as accepted ways of measuring sexuality, though their acceptability varies across institutional settings and academic disciplines and by the kind of sexual subject being evaluated.[35] In what follows, I briefly consider these different approaches and their underlying epistemological and ontological assumptions about sexuality.

The body has long been viewed as the most reliable source for ascertaining information about one's sexuality. Although early sexologists encountered many of their subjects as patients and recounted details of their lives in lengthy narrative accounts in their publications, their theories—whether degeneration, inversion, or otherwise—centrally revolved around the body. For instance, nineteenth- and early-twentieth-century sexologists often suggested that homosexuals, or inverts, constituted a physically distinct "third sex," different from either males or females. Part of this argument relied on comparative anatomy, an approach, as Siobhan Somerville (2000) points out, that was drawn directly from scientific racism of the same era. Havelock Ellis believed that the genitals of homosexuals were generally less developed than the norm, and Magnus Hirschfeld thought that homosexual men had wider hips and pelvises than heterosexual men. Krafft-Ebing posited that homosexuality was a sign of physical and psychic degeneration. Sexologists further proffered that the voices, hair growth patterns, hair textures,

[35] This idea is central to sociologist Tom Waidzunas' work on sexual "reorientation" therapy. Through an examination of credibility struggles between the LGBT and "ex-gay" movements, Waidzunas shows that the APA has declared studies using phallometric testing to be the most objective and scientific while discrediting as unscientific those using self-report. This is, of course, very different than the asylum context that I will analyze throughout this dissertation, where phallometric evidence is rejected in favor of self-report, highlighting the importance of institutional context for making knowledge claims.

musculature, and skin tone of homosexuals differed from those of heterosexuals. One sexologist even claimed to have examined the ejaculate of four "passive" homosexuals and found that "not only was there absolutely no trace of spermatozoa, but also there was no secretion from the seminal vesicle, which was clearly evident by the absence of sperm crystals" (quoted in Hirschfeld 2000:166). Early sexologists also pursued lines of inquiry that look more familiar to us today, including attempts to trace the heredity of homosexuality and to analyze hormones, which they hoped would prove the inborn nature of homosexuality.

Somatic theories remained popular into the 1940s, and "treatments" for perversion often focused on the body, including shock therapy, hormone therapy, sterilization, castration, and, rarely, lobotomy (Rosario 2002; Terry 1999). Opposition to such dramatic and dangerous therapies was a central point of contention between the older generation of asylum-based psychiatrists and the younger psychoanalysts, many of whom completely rejected all somatic and congenitalist theories of sexuality (Rosario 2002). By the mid-1940s most scientific authorities agreed that homosexuality resulted from a mixture of psychological factors and social conditioning and that homosexuality could not be detected merely by examining individuals' bodies (Terry 1999). Psychoanalytic theories particularly gained ground after World War II. However, psychoanalytic ideas actually helped fuel the McCarthy witch hunts for homosexuals in the government because there was a fear that they couldn't be identified, producing considerable anxiety around homosexuals who appeared "normal" (Rosario 2002). Because it was difficult to identify homosexuals and they were incentivized to lie, psychiatrists began employing "objective" tests, such as the Rorschach, Goodenough (draw-a-man), MMPI, Cornell Selectee Index, vocabulary, and Terman-Miles Masculinity-Femininity, to determine who was homosexual (Hegarty 2003; Rosario 2002). Evelyn Hooker would show the following decade

that such tests were useless for distinguishing gay from straight people (Hooker 1957). The Lavender Scare also gave rise to the use of the polygraph to search for homosexuals in the government (Alder 2007).

In addition to these new "objective" techniques, psychoanalysts continued their talk therapy approach, with the guiding assumption that all perversions were rooted in childhood development and early family dynamics. Patients were therefore compelled to discuss intimate details of their entire lives, including their sexual behaviors and fantasies. Discarding Freud's sympathetic stance toward homosexuality, American psychiatrists and psychologists of the 1950s and 1960s used this psychoanalytic approach to attempt to convert homosexuals into heterosexuals. At this time, new behavioral theories of sexuality were also emerging.

Behaviorists approached sexuality in much the same way they did other phenomena—as learned behavior that could be conditioned. Thus, in the same way that Pavlov taught dogs to salivate at the sound of a bell through operant condition, behaviorists believed they could teach homosexuals and other sexual deviants how to respond to "proper" sexual stimuli. As discussed above, these "treatments" took the form of aversion therapy, using either drugs to induce nausea and vomiting or electroshocks. These therapies often employed the penile plethysmograph (PPG) to gauge arousal and determine treatment efficacy. First developed by Kurt Freund in Czechoslovakia in the 1950s, the PPG made its way to the United States in the 1960s. The PPG understood male sexuality to be located within the body and to be a learned physiological response to visual stimuli. As sociologist Tom Waidzunas explains, "within the rubric of behavior therapy, physiological arousal within a testing scenario was conceptualized as a form of behavior, regardless of one's ability or willingness to control it, given that consciousness was

considered epiphenomenal to begin with" (Waidzunas 2015:64). Unlike psychoanalysis, then, behaviorism returned to the body as the ideal way to measure sexuality.

The PPG, in fact, is still in wide use and continues to be understood as the gold standard for ascertaining individuals' sexual orientations and preferences in some domains. As Waidzunas and Epstein (2015) suggest, phallometric testing may be considered as a kind of confessional technology (a la Foucault) that seeks to bypass the subject by forcing the body to speak for itself. In this sense, phallometric technology follows in the scientific tradition that assumes sexual identity is inscribed on the surface or interior of the body and as one form of "truthing" technology, such as the lie detector, that attempts to objectively reach truth. They identify three key assemblages, or configurations of "discourses, objects, practices, and subject positions," within which the PPG has been central since its invention. Since the 1950s, it has been used as a test of sexual desire (e.g., are you really gay?). Freund first used the PPG to screen Czechoslovakian soldiers for homosexuality. Second, since the 1960s it has been used as a test of therapeutic efficacy (e.g., can we change your sexual orientation?). Finally, since the 1990s, it has been used as a test of sexual risk for sex offenders (e.g., how likely are you to molest a child again?). This final assemblage remains firmly in-tact today, and the PPG is considered to be ideal for measuring sexual arousal of many sex offenders and particularly for determining if individuals are pedophiles (Seto and Lalumiere 2001), though it is also used for rapists and sadists (Seto and Kuban 1996). The PPG also remains in fairly wide use in academic research on sexual orientation within the discipline of psychology.

Though the PPG is still considered the gold standard by many sex offender treatment practitioners, many other techniques that attempt to bypass the subject to get to the "truth" of sexuality have been developed because of concerns with the PPG's validity, invasiveness, and

cost. One of these methods involves monitoring one's viewing time of various images. The most popular tool using this approach is the Abel Assessment for Sexual Interest (AASI), which attempts to assess sexual interest by combining a test of viewing time of a series of non-nude images of adults and children with a self-reported sexual history and interest survey. The theory underlying this method is that individuals will look at images they are attracted to longer than those to which they are not attracted. Though the AASI and other viewing time measures get around the invasiveness and high cost of the PPG, it is clearly still susceptible to "faking." Moreover, because the AASI is owned by a corporation, most research conducted using it have been done by the Abel company, and much of the data used to develop the AASI has not been publicly released.

Galvanic skin response, often associated with the polygraph, has also been tested, though it has not attained widespread use (Kalmus and Beech 2005). However, the polygraph is widely used in the treatment, evaluation, and monitoring of sex offenders in the U.S. today. Similarly to the PPG, the polygraph assumes that bodily response reveals the truth, even when the subject does not.

"Objective" psychological tests have also been developed that seek to discern subjects' sexual interests. The most widely used of these appears to be the Multiphasic Sex Inventory (MSI), which is a survey instrument containing 300 true/false questions. Like viewing time measures, however, the MSI is similarly vulnerable to "faking," or lying in this case, and social desirability bias. Despite these limitations, the MSI does seem to be effective at identifying offenders' levels of denial but not necessarily for differentiating between types of offenders and their preferences (Kalmus and Beech 2005).

Researchers are also now pioneering approaches to studying sexuality that bypass the exterior of the body completely and instead look to the brains, hormones, and genes of subjects. Such research on homosexuality gained widespread attention with the publication of Dean Hamer's (1993) and Simon LeVay's (1991) research in the early 1990s, which found purported linkages between homosexuality and a small segment of the X chromosome in gay men and a cluster of cells in the brains of gay men that were smaller than those of straight men, respectively. Research of this kind is still in its infancy for sex offenders, but it is well underway. Unlike genetic studies of homosexuality, genetic studies of pedophilia have not yet generated significant findings (e.g., Alanko et al. 2016). Like neurological studies of homosexuality, however, studies of pedophiles' and rapists' brains have found varying and sometimes contradictory results. One finding that has been replicated concludes that pedophilic men have smaller amygdalae than non-pedophilic men (Poeppl et al. 2013; Schiltz et al. 2007). Notably, brain research on sex difference has also found that women have smaller amygdalae than men and has suggested that gay men's brains more resemble heterosexual women's brains than they do heterosexual men's brains (Savic and Lindstrom 2008), harkening back to early sexological notions that gay men were women trapped in men's bodies. In other words, both gay men and pedophiles have smaller amygdalae, according to some studies, which, regardless of intention, may promulgate the homosexuality-pedophilia link.

Other research continues to look explicitly at bodily differences between heterosexual and non-heterosexual or "normal" and "deviant" individuals, some of which also fuels the purported homosexual-pedophile linkage. For instance, pedophiles have been found to have IQs that are 10 to 15 points below average, to be 2.3 centimeters shorter than the average male, and to be more likely to be left-handed (Cantor et al. 2004). Other work has suggested that

homosexual men are also more likely to be left-handed (Lalumière, Blanchard and Zucker 2000). Similarly, psychological studies attempting to identify how gay men's faces, voices, or walks differ from straight men's rest easily with notions of the embodied nature of (homo)sexuality and sexual non-normativity.

In the end, these various epistemological approaches to measuring sexuality implicitly (if not explicitly for some researchers) suggest discrepant ontologies of sexuality, as well. On the one hand, behaviorist and other physiological methods assume that sexuality is largely an individual phenomenon that can be discretely located on or within the body. On the other, psychoanalytic and other approaches that rely on narrative and self-report suggest that sexuality may not be discernable from the body at all, but is instead a socially produced phenomenon that emerges through socialization, interaction, and learning. Rather than viewing sexuality as located, and thus detectable, within or on the individual body, such theories posit that sexuality can only be known indirectly through subjective accounts. This is somewhat consistent with the newest line of thinking regarding sexuality—social constructionism—which has been promulgated by critical humanist scholarship and disciplines such as anthropology and sociology. As anthropologist Carol Vance (1998) points out, there are different degrees of social constructionism regarding sexuality. At minimum, social constructionists believe that the same sex acts carry different meanings across cultures and throughout history and that sexual identities and the relationship between acts and identities are likewise variable. Going a step further, some constructionists would posit that the *direction* of sexual desire (e.g., homo- or heterosexuality) is not inherent to individuals but is constructed. Finally, the most radical strain of constructionism asserts that there is no pre-existing "sex drive" or sexual impulse but that it too is culturally and historically constructed. Regardless of which line of constructionist thinking one follows,

however, sexuality cannot be known only through the body as physiological methods would suggest. It must be discerned by placing behaviors, identities, and subjective understandings within a particular historical and social context.

Whether one adopts one view over the other holds significant consequences for how research on sexuality will be conducted and, importantly for this study, how legal institutions will seek to measure and classify sexual subjects. As this chapter has shown, historical conceptions of homosexuality and sexual criminality have been tightly intertwined, and the methods scientific, medical, and legal authorities have used to understand and control sexual non-normativity have been largely similar regardless of whether the deviation was called homosexuality, pedophilia, sadism, or otherwise. It was only in the 1970s that approaches to studying and legally regulating these various forms of sexual non-normativity began to diverge. However, even today we can see echoes of this historical legacy. Although our cultural understandings of homosexuality and pedophilia generally no longer group them together, many psychological researchers and practitioners *do* consider pedophilia and other paraphilias to be sexual orientations (Seto 2012). There is no longer a strong belief that we can *change* pedophilic orientation, but treatment providers do use less drastic forms of aversion therapy and conditioning—such as having offenders sniff ammonia when they have deviant thoughts or desires and training offenders to masturbate to healthy fantasies—to try to recondition arousal. When it comes to measuring sexuality, academic researchers do not distinguish different approaches for heterosexual, homosexual, pedophilic, or sadistic arousal. All are measured using the same techniques: plethysmography, fMRIs, EEGs, self-reports, and so on. This suggests that these sexual phenomena are not necessarily seen as ontologically distinct for researchers: they are all varieties of sexuality. Put another way, sexuality seems to be a multiplicity that still hangs

together as a somewhat coherent biosocial phenomenon (Mol 2002).[36] Culturally, we tend to see homosexuality and pedophilia as completely different things, yet their historical roots are intertwined to such an extent that they remain epistemologically interwoven. They are part of the same biosocial phenomenon that we call "sexuality," but we have fractalized "sexuality" in our cultural imaginations such that colloquially speaking of homosexuality and sadism in the same breath makes little sense, even if they are both products of the same biosocial substrate. In other words, we might say that homosexuality is one thing on the streets and another in the lab.

But what happens when the streets and lab come together in the space of the courtroom? Will we try to ascertain one's homosexuality in the same way we do one's pedophilia? Why or why not? In the remainder of this dissertation, I show that in everyday legal practice, when we seek to know one's sexuality, we do so in institutionally specific ways that reflect dominant cultural frames and the epistemological stances of the experts on which the law calls to adjudicate individuals' sexualities. Cultural attitudes that proclaim a strict differentiation between homosexuality and things like pedophilia and sadism are strongly felt in the arena of law, and as such, divergent conceptions of sexuality take shape within the law.

[36] Annemarie Mol suggests that objects are enacted through practices on an on-going basis. As she writes, "objects come into being—and disappear—with the practices in which they are manipulated. And since the object of manipulations tends to differ from one practice to another, reality multiplies" (Mol 2002:5). In her examination of atherosclerosis, Mol argues that the disease is *enacted* differently in the outpatient clinic (where it manifests as pain in a patient's legs) than in the pathology lab (where it is occluded arties under a microscope), and yet these multiple objects hangs together as atherosclerosis. The conception that will matter at any given moment depends on the sociomaterial setting in which it is enacted.

PART ONE:
Networks of Expertise and the Construction of Epistemic Authority

The previous chapter explained the historical relationship between homosexuality and sex crimes, showing that cultural, scientific, and legal understandings of sexuality are thoroughly intertwined, indeed, that law and science as institutions are embedded in and contoured by extant cultural schemas. Given this insight, the next two chapters demonstrate how changing cultural conceptions of sexuality became further entrenched within state legal institutions through the institutionalization of particular kinds of expertise in each legal complex. As different types of expertise with divergent views on sexuality are institutionalized within legal arenas, they contribute to upholding certain understandings of sexuality—what it is, how it can be measured, which sexual practices and identities are normal and which are not. However, claiming such jurisdictional authority rarely comes without struggle and negotiation, and this axiom certainly holds in the cases of asylum and sex offender law.

In the realm of sex offender law, a series of developments in the 1970s and 1980s created an opening for forensic psychology to expand its professional jurisdiction and set the stage for a substantial change in the institutionalized practices of sex offender assessment and management. Before this time, psychiatry largely managed sex offenders, but doubts over psychiatrists' abilities to accurately assess risk and treat offenders led to their withdrawal from the field. Forensic psychology, in turn, promised to deliver more accurate and objective assessment than clinical psychiatry could and asserted that treatment may even be possible. Consequently, forensic psychology secured for itself professional jurisdiction and authority in the penal management of sex offenders.

The expert structure in asylum law formed in a very different manner. In 1990, for the first time in the U.S., a gay man was granted withholding of removal (a form of relief similar to asylum) due to persecution he had suffered on account of his sexuality. Activists within the gay and lesbian movement quickly realized that there were many issues in the processing of asylum applications for sexual minorities, including a lack of understanding of sexuality and sexual identity among immigration authorities and insufficient documenting of dangerous country conditions for sexual minorities around the world. These activists mobilized to forge networks of lawyers, social scientists, and human rights experts who could educate legal authorities about both of these issues and to create a knowledge database that advocates around the country could draw on to win asylum claims. These activists were eventually successful in not only winning landmark precedential asylum cases but also co-writing government guidelines for evaluating LGBTQ asylum claims and training asylum officers and judges in these procedures.

These contestations over what disciplines and actors would lay claim to expertise regarding sexuality were the first step in the creation of institutionalized ways of knowing sexuality, or what I call "epistemic logics." As described in the Introduction, epistemic logics are institutionalized ways of measuring, classifying, and knowing that take shape through the interplay of cultural schemas, institutional constraints, and types of expertise, and they form the basis for constituting sexuality in the legal realms of LGBTQ asylum and sex offender law. Although epistemic logics are at least temporarily stable, they can change in response to a variety of factors—political, cultural, and institutional—as this section will demonstrate.

Because of their mutability, it is helpful to think of epistemic logics as pieces of assemblages. I borrow the concept of assemblages from Deleuze and Guattari (and in more direct form from Michelle Murphy (2006)) in order to simultaneously capture the institutional,

discursive, and material factors involved in enacting sexualities. Murphy defines an assemblage as "an arrangement of discourses, objects, practices, and subject positions that work together within a particular discipline or knowledge tradition" (Murphy 2006:12). The way elements of an assemblage articulate together make different qualities, aspects, and possibilities of sexuality perceptible, what Murphy calls "regimes of perceptibility." Further, as the term "enacting" suggests, an assemblage connotes an active process. As science studies scholar Annemarie Mol argues in her study of atherosclerosis,

> Epistemology is concerned with reference: it asks whether representations of reality are accurate. But what becomes important if we attend to the way objects are enacted in practices is quite different. Since enactments come in the plural the crucial question to ask about them is how they are coordinated. In practice the body and its diseases are more than one, but this does not mean that they are fragmented into being many (Mol 2002:viii).

She demonstrates that even though the atherosclerosis of the clinic (manifested as pain in a patient's legs) is different than the atherosclerosis of the lab (occlusion of the arteries), actors in both settings have as their referent a single disease. However, the techniques that make atherosclerosis knowable in these two spaces exclude each other. Thus, "If practices are foregrounded there is no longer a single passive object in the middle, waiting to be seen from the point of view of seemingly endless series of perspectives. Instead, objects come into being—and disappear—with the practices in which they are manipulated. And since the object of manipulations tends to differ from one practice to another, reality multiplies" (Mol 2002:5). I suggest something similar in regard to sexuality. Even though actors in the asylum and SVP contexts share "sexuality" as their referent, the techniques that make sexuality knowable differ

and enact sexuality in divergent ways such that we may speak of multiple sexualit*ies*, each with material consequences in its institutional setting. Each SVP trial or asylum hearing provides an opportunity to reinforce collective understandings of sexuality through the legal constitution of an individual sex offender or asylum seeker and the enactment of his sexuality in that space.

However, assemblages are also not fixed; they change slightly (and sometimes dramatically) over time and across locations. As we saw in the previous chapter, for instance, in the mid-twentieth century pedophilia and homosexuality were seen as similar in kind because they were both perversions of the natural male sexual instinct, while rape was viewed as a natural outgrowth of male sexual aggression. Today, pedophilia and rape are seen as more similar, and homosexuality is seen as a natural variation of human sexuality. This shift reflects changes in the epistemic logics dictating our social understandings of sexuality. More specifically, over the course of the twentieth century, the cultural and scientific discourse around sexuality was transformed as was the legal and political regulation of sexuality. The idea of an assemblage can capture these various moving parts without losing the complexity and interrelatedness of these different factors. That is, we may be tempted to attribute these changes to the rise of the gay movement or the "sexual liberation" of the 1960s. But that would be a reductive move that ignores the way that discursive shifts (cultural schemas, scientific knowledge), institutional changes (legal reforms, electoral shifts), and even material objects (bodies, technologies) articulate together in a manner that makes it difficult to disentangle one from the other as "the" causal force driving overall social understandings of sexuality. Rather, each aspect of an assemblage partially structures the others.

By comparing and holding the logics of the asylum and SVP legal complexes in tension with each other, I show that our understandings of sexuality are not straightforward expressions

of an underlying truth of human sexual nature, but that these "truths" are mediated by a host of cultural and social factors that dictate how we know what we know. In essence, actors situated within different contexts *enact* different sexualit*ies* in each legal complex. This is not to say that one epistemic logic materializes sexuality correctly and another does not, but that sexuality itself is a multivalent phenomenon that is constituted differently depending on its institutional, discursive, and material context.

The remainder of Part 1 will begin to explicate precisely how these epistemic logics took shape by considering how divergent expert networks formed in each legal complex. But first I take a brief detour to explain more thoroughly how I conceptualize expertise.

Expertise as a Network

Expertise has traditionally been understood as a property of individuals or groups, something that one possesses by virtue of credentials and socialization into a profession (Collins and Evans 2007). This "realist view" of expertise, however, is limited for several reasons, including the fact that it puts the sociologist in the normative position of deciding who is and is not an expert. Given the intricate negotiations over who will be able to make contributions to knowledge that take place within the social milieus I describe, this is an impossible position for the analyst. The analyst, moreover, is not the ultimate arbiter of expert authority; rather those decisions occur within the social world. It therefore makes little sense for the sociologist to deploy his own conception of who should and should not be an expert when such a task would fail to accurately describe the social setting. Furthermore, expert interventions involve concepts that have their own political histories that have been "black boxed." The history of these and alternative concepts, devices, and arrangements may be important in understanding how a problem was made relevant in the first place (Eyal 2013). Thus, Eyal advocates shifting the

analytical focus from experts to expertise and specifically exploring the "background of practices and the social, material, spatial, organizational, and conceptual arrangements that serve as its [expertise's] conditions of possibility" (Eyal 2013:871; Eyal and Buchholz 2010).[37]

With this analytical shift comes a reconceptualization of expertise "analyzed as networks that link together objects, actors, techniques, devices, and institutional and spatial arrangements" (Eyal 2013:864). Such an approach takes up the Latourian task of tracing "expertise in the making" rather than expertise as an already-formed object (Latour 1987). This type of analysis emphasizes that expertise is an on-going accomplishment, not a given fact, and that expert knowledge is "coextensive with the construction of a temporarily stable network" (Cambrosio, Limoges and Hoffman 1992:345). This move, Eyal (2013) points out, also necessitates a rethinking of power. If expert authority is dependent on a network, it behooves network actors to enroll as many allies as possible in the actor-network and to make those links in the chain as secure as possible (on this idea, also see Latour 1987). Rather than erecting rigid jurisdictional boundaries and seeking an expert monopoly, the most effective actor-networks will be characterized by "generosity." Generosity means that a network of expertise (as distinct from experts) becomes more powerful and influential if it can graft its modes of seeing, doing, and judging onto what others are doing, thus linking them to the network and securing their cooperation.

In sum, this conceptualization of expertise suggests that we trace the "conditions of possibility" for expert statements and performances. This approach is ideal for analyzing expertise at the law-science boundary for several reasons. First, it allows for the analysis of

[37] Foucault (2010 [1972]) advocates this approach, and it also underlies science studies work in actor-network theory (Latour 1987; Latour 1988).

jurisdictional struggles, which "often play an important role in setting up or impeding the conditions necessary for expert statements and performances to be formulated, repeated and/or disseminated" (Eyal 2013:873). This view of expertise also allows for the analytic separation of experts and expertise, between actors who claim jurisdiction over a task and the "capacity to accomplish this task better and faster" (Eyal 2013:869). Because the law typically needs a task accomplished efficiently and seeks out expertise to accomplish that goal, this approach to expertise is ideal.

Second, it permits us to make distinctions in forms of abstraction and transcription. Abbott (1988) argues that professionals gain jurisdictional supremacy by reaching an optimal level of abstraction, and thus the ability to redefine problems and tasks, defend them from interlopers, and seize new problems. However, there are no clear criteria for knowing an optimal level of abstraction aside from hindsight. Eyal (2013) proposes replacing "abstraction" with the notion of "immutable and combinable mobile" and following the chain of transcriptions by which expert statements and performances are conveyed along the network. As he suggests, "each transcription means that the statement/performance loses certain qualities it possessed before and acquires new ones, until it gradually becomes mobile, combinable and 'liquid' in the sense connoted by the term 'abstraction'" (Eyal 2013:874; Lakoff 2005). This is similar to the idea of a boundary object. As Star and Griesemer explain,

> Boundary objects are objects which are both plastic enough to adapt to local needs and constraints of the several parties employing them, yet robust enough to maintain a common identity across sites. They are weakly structured in common use, and become strongly structured in individual-site use. They may be abstract or concrete. They have different meanings in different social worlds but their structure is common enough to

> more than one world to make them recognizable, a means of translation. The creation and management of boundary objects is key in developing and maintaining coherence across intersecting social worlds (Star and Griesemer 1989:393).

Boundary objects, as I will explain further below, are key in allowing expert networks to graft new parties onto their mode of knowing. The Diagnostic and Statistical Manual (DSM) is a prime example in the case of forensic psychology. The DSM is widely recognized as an authoritative guide to psychiatric diagnosis, granting it a common identity that holds across domains. Yet in the employ of forensic psychologists working in the legal arena, the DSM also becomes plastic enough to adapt to the needs of courts.

Third, unlike the autism phenomenon investigated by Eyal (2013), the legal setting *does* make formal attributions of expertise to those who are being put forward as expert witnesses. At this interstitial space between law and science, then, expertise seems to consist of both a network and, in the immediate setting of the courtroom, an attribute of individuals. However, as Cambrosio and colleagues point out, "while knowledge and know-how can be said to be embedded in persons (both in the case of 'tacit knowledge' and of 'formal knowledge'), they cannot function as 'expertise' unless they become part of a network" (Cambrosio, Limoges and Hoffman 1992:345). Thus, we can easily understand expert "credentials" not to be individual possessions but rather indications of one's embeddedness within an expert network. A court qualifying an expert as such signals an acknowledgement by the court of this embeddedness. This will become clear in the following analysis, particularly in considerations of "lay experts" who lack many of the credentials we often assume to signal expert status.

Finally, this approach allows us to follow not only "expertise in the making" but also knowledge in the making as it occurs at the law-science boundary. Cambrosio et al. (1992:344)

highlight this possibility when they argue that "[f]acts are not first established by the scientific community and only afterwards mobilized in the political arena. Regulatory facts, i.e. facts which are expected to play a regulatory role, are the result of a hybrid construction process integrating heterogeneous elements and, for that very reason, achieve a robust status."[38] This is consistent with the co-production idea that the way that law and science articulate together in the asylum and sex offender domains produces hybrid ways of knowing sexuality—that is, distinct epistemic logics.

I am suggesting, then, that epistemic logics form through the interaction of networks of expertise and pre-existing structures of power. These pre-existing structures—such as ruling statutes or institutional norms—influence, though do not determine, the form and properties of expert networks. For instance, sex offender laws that dictate psychological evaluation of offenders create an institutional framework in which psychological expertise is given a leg up in relation to, say, anthropology. Asylum law, on the other hand, with its mandate to determine the risk of persecution for subjects in foreign countries sets up a much more favorable situation for anthropological expertise. Neither one of these structuring factors, however, over-determines the way a network of expertise will form, what shape it will take, or what functions it will serve. Once formed, and indeed in the process of stabilization, however, networks act back on these pre-existing structures to partially shape them, as well. Expert opinions, for example, may become the basis for precedential legal decisions. Thus, these previously crystallized structures

[38] Cambrosio and colleagues are, in fact, citing in translation Rip and Groenewegen (1989:156). This is also reminiscent of Gieryn's (1999) argument that science achieves credibility not in the laboratory but only through how it is taken up "downstream" and, further, that the epistemic authority of science only exists in local and episodic enactments where "sellers" proffer truth and "buyers" choose whether to use or believe it.

and newly formed (or forming) networks act on each other in a dialectical fashion to create at least temporarily stabilized frameworks for knowing.

At this point, I must clarify that, though I am using an actor-network-inspired conception of expertise, I understand that the idea of pre-existing structures is not consistent with the ontological commitments of ANT, and this usage is intentional. Actors do not form networks in a powerless vacuum devoid of already existing structural limitations. Rather, as I suggest, they encounter certain structural barriers that they must navigate, and in some cases displace, in order to successfully create actor-networks that can function to accomplish the desired tasks within some structural limits that cannot be easily altered. As I have argued, however, these networks *can* significantly affect the institutions and structures with which they come into contact, and, indeed, as my data show, this is precisely what forensic psychology and the hybrid expertise of asylum have done. My argument regarding the interaction of institutional structures and networks, then, is more consistent with what Frickel and Moore (2006:5) call the "new political sociology of science" with its commitment to demonstrating "the ways in which institutions and networks shape the power to produce knowledge."

Equipped with this understanding of expertise, I now turn to an examination of the "conditions of possibility" for the creation of a strong forensic psychology network of expertise, beginning with the institutional context that made its formation possible.

Chapter 2
Forensic Psychology and the Offer of Objectivity

In the late 1930s, states began passing "sexual psychopath" laws engendered by a moral panic around sex crimes. The panic declined somewhat during WWII but then resurged post-war, and by the late 1950s, 27 states and Washington, D.C. had some form of sexual psychopath law (Cole 2000; Freedman 1987; Prentky, Barbaree and Janus 2015). These statutes were backed by the authority of psychiatry, which promised to be able to identify, treat, and perhaps even cure sex offenders (Cole 2000). The laws took aim at those "too sick to deserve punishment," and therefore diverted those charged under these statutes away from prisons and into psychiatric hospitals. Unlike current SVP laws, sexual psychopath statutes disproportionately targeted low-level offenders, such as homosexuals and exhibitionists, under the "escalation" theory that posited that a "harmless" offense indicated a future propensity to commit heinous sexually motivated crimes (Burick 1968; Cole 2000; Kunzel 2017; Zilney and Zilney 2009). Some psychiatrists voiced concern over such theories and the vagueness of the term "sexual psychopath," which was not, in fact, a proper psychiatric diagnosis at all but a legal creation that provided a veneer of scientific legitimacy (Cole 2000; Kunzel 2017). The psychiatric profession never reached a consensus as to the definition of "sexual psychopath," and its legal parameters continued to vary from state to state. In California, an offender had to have an "utter lack of power to control his impulses," while in Iowa he had only to have "criminal propensities towards the commission of sex offenses" (Grubin and Prentky 1993:383). Treatment and cure—on which sexual psychopath statutes were premised—were therefore impossible since there was no recognized psychiatric diagnosis of sexual psychopathy (Cole 2000; Terry 2013). As a result, many academic psychiatrists abandoned the field, leaving only those psychiatrists willing to

work within the dominant legal framework (Leon 2011). However, enough of the psychiatric profession backed the laws to make them workable.

In addition to controversies around diagnosis and treatment, the "dangerousness" requirement also invited discontent both for its vagueness and the difficulty in proving someone's future risk. Because sexual psychopath statutes required a prediction of dangerousness to legitimate indefinite confinement, there was often significant slippage in the term "dangerousness" between dangerous persons and dangerous behaviors. Predictions of future dangerous behaviors thus often veered into the classification of people as dangerous "persons" (You 2013). These controversies remain in large part even today with current SVP laws, though the field of psychology has tried to remedy it with the use of quantified risk assessment, as I will discuss shortly.

By the 1970s, concerns with the accurate identification of "sexual psychopaths" provoked widespread disapproval, including among the psychiatric profession (Zilney and Zilney 2009). In 1977, the Group for the Advancement of Psychiatry (1977) issued a report condemning the laws and calling for their repeal. The President's Committee on Mental Health and the American Bar Association's Committee on Criminal Justice Mental Health Standards soon joined the call for repeal (Janus 2006; Prentky, Barbaree and Janus 2015). Additionally, a string of judicial decisions in the late 1960s and 1970s made it more difficult to involuntarily commit anyone who did not pose an imminent risk, and by the early 1980s most sexual psychopath statutes were either repealed or had fallen into disuse (Mansnerus 2017; Prentky, Barbaree and Janus 2015; Zilney and Zilney 2009).

The repeal of these laws signaled the end of psychiatry's dominance in sex offender management and the ascension of forensic psychology. Indeed, the 1970s was precisely the time

when forensic psychology was coalescing as a field concerned with sex crime. The group that would become the Association for the Treatment of Sexual Abusers (ATSA) began meeting regularly in 1977, and by 1985 had officially formed as a professional organization.[39] The switchover was largely complete by the mid-1990s, as evidenced by amicus briefs submitted in the landmark *Kansas v Hendricks* case upholding the new generation of civil commitment laws for sex offenders. The American Psychiatric Association (APA) submitted a brief against the constitutionality of the laws, while the ATSA submitted a brief (implicitly) supporting them.[40] In a narrow 5-4 vote, the laws were upheld.

The New Generation of SVP Laws

Forces in the late 1980s and early 1990s—including "tough on crime" attitudes and feminist efforts to increase awareness and punishment of sexual violence—gave rise to a new generation of sex offender civil commitment laws. Unlike the earlier laws aimed at those "too sick to deserve punishment," new SVP laws targeted the "worst of the worst." SVP statutes thus contain a three-pronged test for distinguishing this subset of offenders. First, an offender must have committed a "sexually violent crime," which is defined differently in each jurisdiction, but generally requires a contact offense such as sexual assault. The federal government, though, often seeks commitment for those convicted of possessing child pornography, a non-contact offense. Second, an offender must have a mental disorder or abnormality. Jurisdictions vary in the terms they use and the precise definition of mental disorder or abnormality, but Illinois'

[39] ATSA was founded as the Association for the Behavioral Treatment of Sexual Abusers, reflecting the dominance of behaviorism at the time.

[40] I say "implicitly" because ATSA stated that it did not take a position on the "validity" of the SVP Act but then went on to deconstruct the foundation of the Kansas Supreme Court's decision striking down the Act, effectively producing a brief in support of SVP laws. Moreover, the brief is labeled "in support of Petitioner," which in this case was the state of Kansas seeking to overturn the decision of the Kansas Supreme Court. See Brief of the Association for the Treatment of Sexual Abusers Amicus Curiae in Support of Petitioner, 1995 U.S. Briefs 1649.

definition is typical of most states: "'Mental disorder' means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."[41] The broadness of this definition (e.g., the condition can be "congenital" *or* "acquired" and affect "volitional" *or* "emotional" capacity) sets the stage for wide discretion for psychological professionals. The third requirement, as the definition suggests, is that the mental disorder must predispose an offender to future acts of sexual violence. These requirements, aside from the first, which is strictly statutory, necessitate the cooperation of psychological professionals in both the diagnosis of a mental disorder and the prediction of future sexual violence based on that diagnosis. The negotiations around this legal-scientific boundary form the basis of a shared network of expertise that encompasses a wide range of legal and scientific actors and shores up the authority of both law and forensic psychology.

Though I focus on SVP laws because they provide the most obvious site where decisions about individuals' sexualities are rendered, I do not mean to downplay the vast influence psychological professionals have in many areas of sex offender management. As Prentky, Barbaree, and Janus (2015) suggest, new sex offender laws promulgated since the early 1990s, including registration, treatment, and surveillance requirements—what they call a "psycho-legal management scheme"—have created a

> cottage industry of practitioners tasked with servicing all faces of the laws, from adjudication (requiring attorneys possessing a unique knowledge and skill set required for these special commitment hearings) and forensic experts (more often psychologists, occasionally psychiatrists, who offer opinions about dangerousness) to therapists

[41] 725 ILCS 207/5 (b)

> (typically masters-level psychologists who provide treatment) and custodial staff who provide security for a clientele that technically are no longer prisoners (Prentky, Barbaree and Janus 2015:xii).

As this quote suggests, the avalanche of new sex offender laws since the early 1990s has formed an institutional and legal landscape that engenders—indeed, requires—the creation of new networks of expertise to meet the needs of the state.

Where such laws have been passed, states have also generally created Sex Offender Management Boards (SOMB) tasked with filling in the details of implementation, including what credentials allow someone to become a certified treatment provider for sex offenders and how the state will handle evaluation and treatment of sex offenders in its custody or on supervised release (as most statutes do not specify *how* such things are to be done but merely that they are to be done). These boards provide a prime mechanism for "generosity" and the enrollment of allies in the expertise network. Members of SOMBs typically represent an array of groups, including law enforcement, corrections, probation and parole, prosecutors, public defenders, treatment and evaluation professionals, and victim advocates. The Illinois SOMB also counts two ATSA members (including a recent Illinois state chapter president) among its ranks. With their guidance, the SOMB adopted almost wholesale the ATSA treatment and evaluation guidelines for use in Illinois. This is not an unusual occurrence, as ATSA makes its guidelines available for just this type of use, and many states use them as a template, if not adopting them with minimal alteration, as Illinois has. The Illinois SOMB also provides trainings twice per year on a range of issues related to sex crimes that draw a diverse group of legal and psychological professionals, further strengthening its actor-network. ATSA often supports and provides continuing education credits for these trainings. SOMBs throughout the country also provide

spaces for the promulgation of the "containment model" (English 1998), a strategy that explicitly calls for multi-disciplinary and collaborative teams in the management of sex offenders. The containment model is now legally mandated in California, though many states use the approach.[42] As the California SOMB website states: "This sex offender management program has three required components: supervising (e.g., probation or parole) officer; sex offender treatment provider; and polygraph examiner, using a victim-centered approach. These three people are the core of the Containment Team, although other team members should participate at times (e.g., the registering law enforcement agency)."[43] This model thus puts supervision, treatment/evaluation, and surveillance in a tripartite relationship based around the premises of risk control. Indeed, the California laws further mandate that the offender's treatment provider conduct static and dynamic risk assessments and share the results with law enforcement.

Having specified the political, legal, and institutional frameworks within which forensic psychology has been able to ascend to its place as the predominant form of expertise in the management of sex offenders, I now want to turn my attention to the actual expert statements (i.e. psychiatric diagnoses and risk predictions) and trace their "conditions of possibility" (Eyal 2013:871; Foucault 2010 [1972]) as well as the way by which the production of such statements has allowed for the extension of the forensic psychology actor-network and the sharing of authority between law and psychology.

Claiming Diagnostic Authority

The sexual psychopath statutes of the 1930s-1970s required no specific diagnosis. One was deemed a sexual psychopath or not based on the subjective evaluation of a psychiatrist.

[42] See California Penal Code §§ 290.09, 1203.067, 3008, and 9003.
[43] Available at http://www.casomb.org/index.cfm?pid=1231. Last accessed 9-24-16.

However, "sexual psychopath" was not a clinical diagnosis, and there was therefore no consensus on how to diagnosis a "sexual psychopath," or indeed, what a sexual psychopath even was. It was, as *Boutilier* and several other court decisions made clear, a purely legal creation.[44] The advent of the first edition of the DSM by the APA in 1952 did not help clarify matters, as it did not include specific diagnostic criteria for mental disorders and took a psychoanalytic approach to diagnosis (Drescher 2015).[45] The same was true of the DSM-II. More explicit diagnostic criteria were finally added in 1980 with the publication of the DSM-III. By this time, however, psychiatry had largely exited the realm of sex offender adjudication, and "sexual psychopath" statues had been repealed or fallen into disuse.

This situation shifted somewhat with the new generation of SVP laws and the entry of forensic psychology. The new statutes required a diagnosis of a "mental abnormality." While still vague, psychologists could work within this framework, and they did so by drawing on a recognized source of psychiatric authority: the DSM. Though the DSM does not call its diagnoses "mental abnormalities," it *does* provide clear diagnostic criteria, unlike the purely subjective "sexual psychopath" designation of the earlier laws. Notably, no SVP statutes actually require a diagnosis from the DSM, only a finding of "mental abnormality," but by drawing on the scientific legitimacy of the DSM (and by extension the psychiatric profession despite the APA's opposition to using the DSM in this way) and rendering it a boundary object at the law-science nexus, forensic psychology professionals have been able to strengthen their actor-

[44] *Boutilier v. INS*, 387 U.S. 118 (1967). See Canaday (2003) for a detailed analysis of this case.
[45] The DSM is a manual published by the American Psychiatric Association that outlines standardized criteria for diagnosing and classifying mental disorders.

network.[46] Moreover, because the DSM provides specific diagnostic criteria, anyone can theoretically trace it backward to the diagnostic details in the DSM. Indeed, many defense lawyers in civil commitment proceedings do just this in order to dispute their clients' diagnoses.[47] Being able to defend these diagnoses is a key aspect of being able to construct a strong actor-network and fortify the links in that chain. Forensic professionals must also defend against some within their own ranks and from the psychiatric field, who have asserted that the concept of "mental abnormality" lacks a consistent operational definition. Therefore, debate continues around questions of whether "particular patterns of personality or behavior—such as rape—qualify for the category" (Janus 2006:38). I will return to these controversies shortly, but first I want to consider how forensic psychology has been able to fortify itself against these various attacks at all, let alone establish itself as a trusted form of scientific expertise. The Supreme Court decisions in *Kansas v. Hendricks* and *Kansas v. Crane* together provide a telling illustration of the way that the fuzziness of the term "mental abnormality" has allowed law and forensic psychology to negotiate jurisdictional boundaries, and ultimately, to share authority over the term in a process of coproduction.

The Kansas SVP law, enacted in 1994, was among the earliest of the new generation of civil commitment statutes and quickly faced constitutional challenge. The test case involved Leroy Hendricks, a man with a history of arrests for child sexual assault, including the

[46] Courts have also deferred to mental health professionals to determine whether a DSM diagnosis is necessary in SVP proceedings. The Seventh Circuit, for example, has ruled that "Whether a legitimate mental health diagnosis must be based on the DSM is a question for the members of the mental health profession, and, therefore, one to which we do not address ourselves" *McGee v. Bartow*, 593 F.3d 556, 576 (7th Cir. 2010).

[47] Many of my interviewees complained about this view of the DSM, arguing that the DSM is not a "cookbook" but a set of guidelines with significant room for professional judgement. Many expressed frustration with lawyers who cross-examine them based on a "cookbook" view of the diagnostic process and with courts that allow such interpretations.

molestation of two adolescent boys for which he was serving a sentence when Kansas elected to pursue civil commitment. Hendricks admitted that he could not control his "urge" to molest children, especially when he "gets stressed out."[48] He agreed with the state psychologist's diagnosis of pedophilia and further agreed that he was not cured of the condition and even that "treatment is bullshit."[49] The jury unanimously found Hendricks to be a sexually violent predator, and the court found that pedophilia qualified as a "mental abnormality" under the act. Hendricks appealed, claiming that the act violated the Constitution's due process, double jeopardy, and ex post facto clauses. The Kansas Supreme Court did not address his double jeopardy or ex post facto complaints but found that Hendricks' due process rights were in fact violated, and specifically, that the definition of "mental abnormality" used in the SVP Act did not satisfy the Constitutional requirement of "mental illness" for the purposes of civil commitment. The state of Kansas appealed, and the Supreme Court agreed to hear the case.

For its part, Kansas relied on a number of previous Supreme Court decisions upholding similar statutes that coupled "proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality,'"[50] including both Illinois' and Minnesota's sexual psychopath-era laws.[51] The state asserted that the SVP Act's requirement of a "mental abnormality" or "personality disorder" was consistent with these other statutes. Kansas was supported by amicus briefs from ATSA and the Menninger Clinic, a forensic psychiatric hospital, which both argued that "mental abnormality" was a workable term. The Menninger Clinic argued, for instance, that "Neither does the Constitution or prevailing historical practice

[48] *Kansas v. Hendricks* 521 U.S. 346 (1997), 355.
[49] Ibid., 355.
[50] Ibid., 358.
[51] *Allen* v. *Illinois,* 478 U.S. 364 (1986); *Pearson* v. *Probate Court of Ramsey Cty.* 309 U.S. 270 (1940)

restrict State civil commitment power to conditions that fit some technical definition of 'mental illness.' Adopting such an approach would inexorably wed the constitutionality of civil commitment statutes to a single phrase – 'mental illness' -- thereby elevating that term to the status of 'magic words.'"[52] Later the Clinic's brief drew on the DSM-IV's cautionary note about diagnosing mental disorders to argue that, "Psychiatrists themselves concede that they know of no definition that adequately specifies the precise boundaries of the concept of mental illness."[53] ATSA was less strident in its criticism of psychiatry, but it clearly staked out its professional jurisdiction and ability to work within the legal frameworks created by new SVP laws, stating: "The relevant question, though, is not whether clinicians or the legislature created this term [mental abnormality], but whether experts in the treatment and assessment of sex offenders can derive clinical meaning from this term. The answer to this latter question is clearly 'yes.'"[54] In a display of generosity that nicely illustrates the coproduction process at work, ATSA proceeds to argue that:

> 'Mental Abnormality' is governed by its statutory definition, and its clinical meaning is derived when professionals give it specific content. While the term 'mental abnormality' does not have a clinical definition, the term has been frequently used in mental health law. As a legal term, its application is governed by its statutory definition, as are other legal terms such as 'insane,' 'incompetent,' and 'gravely disabled.' Like other broad legal classifications of psychiatric or psychological conditions (such as mental illness, mental

[52] Brief of the Menninger Foundation et al., 1995 U.S. Briefs 1649
[53] Ibid.
[54] Brief of the Association for the Treatment of Sexual Abusers Amicus Curiae in Support of Petitioner, 1995 U.S. Briefs 1649.

disorder, mental disease, and mental defect), the term 'mental abnormality' becomes clinically meaningful when a psychologist or psychiatrist gives it specific content.[55]

Both the Menninger Clinic and ATSA also critiqued the notion that treatment for sex offenders did not exist, instead offering up their own services (or that of their members in ATSA's case) as evidence of treatment availability. ATSA pointedly concluded that, "Sex offender specialists are able to use the term 'mental abnormality' to identify a small subset of sex offenders who have specific paraphiliac disorders and who are at highest risk to reoffend,"[56] a statement that seems rather clearly to say, "We can do it if psychiatrists won't."

Hendricks, conversely, argued that "mental abnormality" was *not* equivalent to "mental illness" because "mental abnormality" was a term coined by the Kansas legislature, not the psychiatric profession. The APA agreed with Hendricks and filed an amicus brief arguing that the Act's "mental abnormality" requirement did not meet the "mental illness" condition for civil commitment, writing, "If 'mental illness' were freely subject to legislative definition (through new terms like 'mental abnormality' or otherwise), or if anyone 'crazy' or 'sick' enough to engage in repeated serious offenses could be civilly confined for that reason, the limits on deprivations of liberty to protect the public safety would quickly disappear."[57] The Supreme Court, in a 5-4 decision, sided with Kansas, writing that "the term 'mental illness' is devoid of any talismanic significance."[58] The majority further stated that "we have never required State

---

[55] Ibid.
[56] Ibid.
[57] Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, 1995 U.S. Briefs 1649.
[58] *Kansas v. Hendricks* 521 U.S. 346 (1997), 359. Notably, the phrase "talismanic significance" is the exact language used in an amicus brief from the Menninger Clinic: "Neither would be it prudent to stake the constitutionality of a State's civil commitment statute on whether that law expressly limited commitment only to the "mentally ill," even if the definition of the phrase were left to the State. Such a rule would elevate to talismanic significance the phrase "mental illness" -- in direct contravention of the Court's prudent position that labels or other

legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance… Often, those definitions do not fit precisely with the definitions employed by the medical community."[59] The important aspect of these types of laws, the Court continued, is that they set forth criteria relating to an individual's inability to control his "dangerousness" and that they are able to distinguish SVPs "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[60] This "volitional control" criterion became the subject of another appeal involving the Kansas SVP law, which I will return to shortly. But first, it is worth considering in more detail how the Court upheld the authority of law while simultaneously diminishing psychiatric expertise and shoring up that of forensic psychology.

First, the majority explicitly cited the preface of the APA's DSM-IV where it states that legal definitions, such as "individual responsibility" and "competency," for which psychiatric expertise is often sought by courts, need not mirror those advanced by medicine. It used this statement to assert law's prerogative in defining certain terms, in this case "mental abnormality." In a move that showed some acknowledgement of psychiatry, however, the Court further drew on psychiatry's own expert statements to justify its decision, writing that "the mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder."[61] It cited the APA's 1989

"magic words" should not be raised to constitutional significance" (Brief of the Menninger Foundation et al., 1995 U.S. Briefs 1649).

[59] *Kansas v. Hendricks* 521 U.S. 346 (1997), 359.

[60] *Kansas v. Hendricks* 521 U.S. 346 (1997), 360.

[61] Ibid., 360.

publication "Treatments of Psychiatric Disorders" to back this assertion. Significantly, it also drew on a paper by Gene Abel (a founding member of ATSA) and Joanne Rouleau (a forensic psychology researcher). In a revealing footnote the Court then pointed to debate within the "psychiatric" field (which was, in reality, mostly a debate between organized psychiatry and forensic psychology) to again assert the law's authority to decide between conflicting expert views. This view was upheld even by the dissent, wherein Justice Breyer wrote: "The Constitution permits a State to follow one reasonable professional view, while rejecting another… The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds."[62] Thus, while all of the justices acknowledged that psychiatric expertise (or psychological, as it may be) can help set the parameters of argument, they also clearly maintained law's privilege to adjudicate between competing expert claims. Both the majority and dissent proceeded to do just that, explicitly dismissing the APA's brief, which argued that the "mental illness" requirement was not met by Kansas' Act, and endorsing the amicus brief from the Menninger Clinic, which argued that the "mental illness" requirement *was* met. The Court also subsequently invoked ATSA's amicus brief to shore up its assessment of successful possibilities for treating paraphilias in a forensic setting. Ultimately, then, the Court maintained substantial autonomy for law to define for itself what constitutes a "mental abnormality." Yet, it simultaneously drew on the expertise of forensic psychology while disavowing organized psychiatry. This decision crystallizes the debate between psychiatry and forensic psychology over the evaluation and treatment of sex offenders and represents a moment when the expert

[62] Ibid., 375.

network cobbled together by ATSA and other forensic organizations displaced that of psychiatry in the penal domain. Perhaps most notable in this episode is the way that the forensic organizations deployed the DSM as a malleable boundary object in order to give the term "mental abnormality" meaning in the areas of both law and forensic psychology. Psychiatry refused to do so and instead insisted on maintaining the "pure" psychiatric term "mental illness," signaling a refusal to allow interpretive leeway across social worlds. This debate clearly echoes the controversy over the "sexual psychopath" diagnosis and whether it carried any clinical meaning. Whereas psychiatry seemed quite wary of becoming embroiled in another scandal, forensic psychology evinced clear willingness to fill the absence created by the APA's withdrawal.[63] The epistemic logic dictating how sexuality would be conceptualized in the SVP setting was clearly taking shape.

Less than five years later, the Kansas law faced a second Constitutional challenge that once again made its way to the Supreme Court. This case involved Michael Crane, an exhibitionist diagnosed with antisocial personality disorder, and hinged on the level of volitional impairment required by the Constitution in order to civilly commit a sex offender. Kansas sought successfully to commit Crane, but the Kansas Supreme Court reversed, stating that the Constitution, as interpreted in *Hendricks*, requires "a finding that the defendant cannot control his dangerous behavior."[64] The state of Kansas argued, conversely, that the SVPA and *Hendricks* required no such finding. As in *Hendricks*, ATSA and the APA submitted opposing amicus

[63] Though I do not address it at length, forensic psychologists' willingness to participate in SVP adjudications was certainly a bid for professional authority and jurisdiction, as several scholars have asserted about psychiatrist's willingness to do so during the "sexual psychopath" era (Chauncey 1993; Cole 2000; Sutherland 1950). Psychiatry is, of course, in a more secure professional position today than it was in the early- to mid-20th century and has less need for this jurisdictional foothold.

[64] *Kansas v. Crane* 534 U.S. 407 (2002), 411.

briefs. ATSA stated that it did not take a position for or against civil commitment of sexual predators, but it again filed a brief for the state of Kansas and took issue with the Kansas Supreme Court's rationale for striking down the law. Specifically, ATSA wrote, "the Kansas court's 'cannot control' substantive due process standard is untenable. Its first incarnation, the 'irresistible impulse' insanity test, has been largely rejected by both the medical and legal professions. Moreover, experts in the field would be unable, as a practical matter, to implement the 'cannot control' standard."[65] For its part, the APA again issued a lengthy critique of civil commitment for sexual predators, this time dedicating three full paragraphs to criticizing ATSA's brief specifically. The APA contended, contrary to ATSA, that "the very imprecisions of measuring degrees of volitional control do suggest that the idea cannot be fairly used to attach (profound) legal consequences unless the standard is set near the far end of the spectrum. As Kansas now insists, it is in the wide middle range of non-extreme cases that volitional 'impairment' would present substantial problems of consistent, workable, objective application."[66] Finally, it concluded, "Thus, *Hendricks* and *Pearson*, together with the need to avoid the difficulties that (as Kansas recognizes) afflict lesser versions of a 'volitional impairment' standard, support a limiting principle of such severe impairment as to avoid the large gray area: inability to control the conduct, as proved with a high degree of certainty."[67] The dueling positions thus set up a clear jurisdictional skirmish regarding expertise on the topic of sex offender mental health and assessment.

---

[65] Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae in Support of Petitioner, 2000 U.S. Briefs 957.
[66] Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law as Amicus Curiae in Support of Respondent, 2000 U.S. Briefs 957.
[67] Ibid.

In a 7-2 decision, the Supreme Court ruled that *Hendricks* did indeed require a diagnosis of a "mental abnormality" or "personality disorder" that made it "*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior."[68] It was not required, however, that an offender have "complete" lack of volitional or emotional control, as such an "absolutist approach," the Court asserted, would be unworkable. Once again, the Court invoked ATSA's amicus brief to back this point, and once again, it rejected the APA's brief backing Crane. Thus, the Court maintained its prerogative to adjudicate between competing forms of expertise. However, in a move that granted state psychological experts considerable leeway, the majority then wrote:

> We recognize that *Hendricks* as so read provides a less precise constitutional standard than would those more definite rules for which the parties have argued. But the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules. For one thing, the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment.[69]

With this decision, forensic psychologists' pivotal role in diagnosing sexual offenders with a "mental abnormality" that affects their volitional control was solidified. Though the state retained the ultimate authority to decide which "mental abnormalities" would qualify someone for civil commitment, the framework set up by these SVP statutes and Supreme Court decisions granted substantial autonomy to psychological experts in crafting diagnostic categories that fell within the bounds of such laws. Because forensic psychology was willing to relinquish some

[68] *Kansas v. Crane* 534 U.S. 407 (2002), 411.
[69] Ibid., 413.

expert authority by working within the legal framework prescribed by the state to provide diagnostic expertise that psychiatry was unwilling to offer, it was able to secure for itself a considerable domain of expertise within the system. Paradoxically, then, by giving up the exclusive privilege of defining "mental abnormality," forensic psychology actually expanded its epistemic authority and successfully grafted its mode of knowing onto the law. This is further illustrated by an analysis of the development of one of the most commonly used diagnostic categories for SVPs: "paraphilia not otherwise specified."

Authorizing Ambiguity: Paraphilia NOS

Those considered for civil commitment generally fall into two groups: child molesters and rapists. The DSM (since the third edition) provides a clearly defined diagnostic category for the former in the form of "pedophilia" or, in the newest version, the DSM-5, "pedophilic disorder." On the other hand, no clear psychiatric diagnosis for rapists exists. Illustrating the considerable diagnostic autonomy afforded to evaluators by the SVP statutes and court decisions, forensic psychology met this challenge with the advent of "paraphilia not otherwise specified, non-consent" (PNOSN).[70]

Paraphilia is, simply put, sexual attraction or arousal to non-normative stimuli. Paraphilic disorders are the most common diagnoses of mental abnormality in SVP proceedings (Levenson and Morin 2006; McLawsen, Scalora and Darrow 2012). Despite significant controversy regarding paraphilia diagnoses in general—and specifically paraphilia NOS, as I will discuss shortly—these diagnostic categories are usually accepted by courts because they are considered by psychiatry to be clinically valid categories that can be accurately and reliably assessed (First

[70] The DSM-5 update revised this term to "other specified paraphilic disorder," but I use the DSM-4-TR terminology because the switch did not occur until 2013/2014, so most of my cases use the older term.

2014). By definition, however, PNOS diagnoses are idiosyncratic and therefore not generally accepted or agreed upon by psychiatry (Frances and First 2011). Nevertheless, PNOS, along with pedophilia and antisocial personality disorder, constitute the bulk of mental abnormalities represented in civil commitment.

The DSM provides two primary criteria for diagnosing paraphilias. Criterion A states that paraphilias are "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors, generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months." Criterion B specifies that the person has either acted on those fantasies or urges or that "the behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning" (American Psychiatric Association 2013). It further outlines eight particular paraphilias and gives more specific criteria for them, including pedophilia, masochism, sadism, frotteurism, fetishism, exhibitionism, voyeurism, and transvestism. The residual category "paraphilia not otherwise specified" is meant to capture paraphilic disorders that either are too rare to be included as a specific diagnosis on their own (e.g., necrophilia) or do not quite fit the criteria of one of the other specified paraphilias. Forensic psychologists have used this latter caveat to create the now widely used diagnosis for SVPs of PNOSN, usually for serial rapists. Dennis Doren, former director of the Wisconsin SVP civil commitment program, is often credited with popularizing the diagnosis with the publication of his *Evaluating Sex Offenders* (Doren 2002), which outlines several considerations for making PNOSN diagnoses of sexual offenders and asserts the validity of the category.

However, significant professional controversy surrounds this category, with the split generally occurring between research psychologists and psychiatrists on the one hand and

practice-oriented forensic psychologists on the other, where the latter support the diagnosis. Indeed, the Chair and Editor of the DSM-4-TR revisions wrote an article vehemently decrying the use of PNOSN in SVP proceedings (Frances and First 2011). They express deep concern over the reliability of any PNOS diagnosis and particular concern over whether a paraphilia involving "non-consent" even exists. They point out that there is little research indicating that such a population actually exists and that the diagnosis may simply be medicalizing criminal conduct (i.e., rape). They explicitly state that they never anticipated the residual PNOS category being used in a forensic setting because it lacks empirical bases and clear diagnostic criteria. They additionally point out that many diagnoses in the forensic setting are occurring erroneously because of a small typo in the DSM-4 that was carried over into the DSM-4-TR; namely, that Criterion A for diagnosing paraphilias says that a paraphilia may involve fantasies, urges, *or* behaviors. The editors, on the contrary, state that a paraphilia *must be* a pattern of arousal, not simply behaviors. Overt behaviors are not enough to deduce a paraphilia. In the instance of PNOSN, it is not enough to find a history of rape. Rather, there must be evidence that the offender is primarily aroused by the non-consenting aspect of the situation to consider a PNOSN diagnosis. In a recent analysis of over 100 SVP cases where the PNOSN diagnosis was used, however, the majority of court decisions described only behaviors as diagnostic criteria or were unclear as to the criteria used (King et al. 2014). Finally, they note that "coercive paraphilic disorder" has been proposed as an addition to the DSM during every revision since the DSM-3 and rejected each time due to lack of empirical support.[71]

[71] There is, however, a sizeable contingent in the forensic psychological field that supports the idea of "coercive paraphilic disorder," and they have marshalled some empirical support for the concept. See Quinsey (2010); Stern (2010).

However, practice-oriented psychologists, and particularly SVP evaluators, generally appear to hold a different view of PNOSN. In direct contrast to Frances and First (2011), for example, Dr. Richard Travis, an evaluator in Illinois, said:

> The legal definition of mental disorder does not equal the DSM-5 definition of mental disorder, okay? Which is why when the Subcommittee on Paraphilic Disorders for the DSM-5… oh, they were brilliant in how they worded this in the DSM… They said, because the big deal in many courts previous to that was that this particular disorder, especially one they call nonconsenting…that was not a disorder that was specified in the DSM-4…The DSM-5 Subcommittee argued a lot about including something called paraphilic coercive disorder, which would've been the same kind of thing. It was not included… So what defense attorneys argued in court is paraphilic coercive disorder or non-consent was excluded from the DSM-5. Not included is not the same thing as excluded… Because the DSM-5 [is very broad] and it says many dozens of paraphilias have been identified and named, without saying what those dozens are. And it is important for the legal process to be able to diagnose a person with one of those paraphilic disorders… So the DSM-5 did not want to constrain evaluators who need to diagnose a person with a disorder when there is clearly some kind of disorder.[72]

Though Dr. Travis is referring to the DSM-5 (not the DSM-4 on which First and Frances worked), he gives a completely different impression of what the DSM workgroup on paraphilias intended. Where First and Frances insist they *deliberately excluded* any reference to a rape paraphilia and did not support its use in the SVP setting, Dr. Travis believes that the reason for

[72] Author interview with Richard Travis.

the broad wording was precisely to allow evaluators to craft categories useable in court. Many evaluators echoed Dr. Travis' sentiments. Dr. Isabel Davis, another Illinois evaluator, said in response to her frequent use of the PNOS category: "The DSM says clearly that they've only included about eight of the paraphilias in that section, but that there are hundreds more which they expect will fall under the other specified paraphilic disorder." Similarly, Illinois SVP evaluator Dr. Kim Weitl said of PNOS, "You can ignore it, but that doesn't make the disorder go away. Don't give it a name, but…" Some expressed bitterness at the APA for making their jobs harder by not including coercive paraphilic disorder in the DSM-5, and others suggested it was only a fringe of the discipline that disagreed with the diagnosis, a difficult assertion to support given the prominent psychiatrists who have publicly derided PNOSN. However, PNOSN clearly has considerable support, including among some members of the DSM-5 paraphilia workgroup. Dr. Richard Krueger, a member of that group, said of PNOS, "I think that's a valid sort of diagnostic category. I think the underlying issue is does somebody have a… diagnosis which puts them at increased risk for sexual reoffending… I think the civil commitment system is – huge problems with it, obviously… but I don't think that's a reason to discard the psychiatric diagnosis. The issue is more societal, basically." Dr. Krueger thus expresses support for the diagnostic category but equivocates somewhat in regard to its use in civil commitment.

Despite a vigorous professional debate and the ultimate exclusion of any sort of coercive paraphilic disorder from the DSM (including from the appendix of conditions warranting further research), courts have consistently supported forensic psychology's expert authority to use PNOSN in legal settings. One study of SVP decisions from 2008 to 2011 found that every court that considered the admissibility of a PNOSN diagnosis found it admissible (King et al. 2014). Often courts even acknowledge the controversy of the PNOSN diagnosis before ruling it

admissible, as did the Seventh Circuit in *McGee v Bartow* (2010).[73] In that case, McGee argued that the explicit consideration and rejection of PNOSN from the DSM indicated its invalidity. The court even cited several academic sources backing this assertion before stating: "A frequently cited difficulty in accepting a rape-related paraphilia diagnosis is that the lack of generally accepted standards results in poor diagnostic reliability; that is, different evaluators may be likely to reach different conclusions with respect to the same individual at unacceptably high rates."[74] However, the court then acknowledged the other side of the debate suggesting that PNOSN is a valid diagnosis. Notably, the court cited two prominent forensic psychologists to support its ultimate conclusion that PNOSN was admissible: Dennis Doren (the psychologist often credited with "creating" the PNOSN diagnosis and former director of the Wisconsin SVP program) and Amy Phenix (a member of the Static-99 workgroup and an oft-called government witness).

In a case just a couple of months later, the Seventh Circuit faced similar issues in *Brown v. Watters* (2010), where Dr. Doren had testified as one of the experts advocating the commitment of the offender under review.[75] Dr. Doren's diagnoses in this case included both PNOSN and another controversial diagnosis, antisocial personality disorder.[76] In fact, Dr. Doren's testimony evinced many of the concerns voiced by Frances and First (2011) regarding the misuse of the PNOSN category, including most notably that Dr. Doren's diagnosis seemed to be based largely on behaviors rather than arousal or fantasies. Doren argued that "Mr. Brown's

[73] *McGee v. Bartow* 593 F.3d 556 (7th Cir. 2010).
[74] *McGee v. Bartow* 593 F.3d 556, 580 (7th Cir. 2010).
[75] *Brown v. Watters* 599 F.3d 602 (7th Cir. 2010).
[76] Antisocial personality disorder (APD) has engendered much the same kinds of controversy as PNOSN because of its ambiguous nature, but even more so because some have estimated that at least 50% of criminals could be diagnosed with APD, and it therefore does not distinguish SVPs from more typical, non-mentally ill criminals.

documented sexual arousal during the attacks was… indicative of a specific interest in nonconsensual sex."[77] However, by definition a man must be "aroused" in order to commit a penetrative sexual assault, so this observation would seem to apply to any rapist. Dr. Doren went on to testify that Brown, in fact, did not exhibit several of Dr. Doren's own diagnostic criteria for PNOSN, such as an offense "script," a diversity of victims, and a propensity to offend in circumstances in which he was likely to be caught. Finally, on cross-examination, Dr. Doren was asked for a professional organization that endorses his clinical indicators for PNOSN, to which Dr. Doren replied that there "isn't a single one."[78] For his part, Brown called three expert witnesses of his own, two of which delivered opinions regarding PNOSN. Dr. Lynn Maskel, a forensic psychiatrist, testified that "psychiatrically the disorder [of paraphilia NOS nonconsent] does not exist," and Dr. Stephen Hart, a forensic psychologist, similarly asserted that Dr. Doren had "create[d] [a] fictional mental disorder."[79] The defense then moved for the disqualification of Dr. Doren's testimony arguing that it would not meet *Daubert* standards for expert testimony. The court quickly rejected that argument without going into any discussion of the proper evidentiary standards, and in the end, upheld Brown's commitment based on Dr. Doren's testimony, demonstrating considerable deference, not only to the lower court's determinations of expert authority, but also to the expert network supporting PNOSN.

Ultimately, forensic psychology was able to do what psychiatry was not. It accepted a less authoritative role for itself in the diagnosis of sex offenders (i.e. it accepted the fuzzy term of "mental abnormality" while psychiatry rejected it) and worked within the rough legal framework

[77] *Brown v. Watters* 599 F.3d 602, 605 (7th Cir. 2010).
[78] Ibid., 606.
[79] Ibid., 607.

created by the new laws. That is, it effectively rendered the DSM a boundary object in order to diffuse jurisdictional struggles and simultaneously advance its own way of thinking. However, by doing so, it gained allies within the legal and penal professions, as well as state and federal government, and thereby extended its chain of allies. Within the broad bounds of "mental abnormality," forensic psychologists were still able to apply their own expert views in making more specific diagnoses, and in some cases, such as that of "paraphilia not otherwise specified, non-consent," were able to craft diagnostic categories unique to this legal setting. Paraphilia NOS is now commonplace in SVP proceedings, and is a prime example of the creation of hybrid knowledge resulting from the "generosity" of the forensic psychological actor-network and the dynamic interplay of law and psychology.[80]

Actuarial Assessment and the Extension of the Network

Diagnosis is only one part of the issue that *Hendricks* and *Crane* present for the forensic management of sex offenders. The state must also show that an offender is likely to engage in future acts of sexual violence, and, as with its objection to psychiatric diagnosis for SVPs, the APA similarly opined that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."[81] Such insights arose out of the "sexual psychopath" era when one of the primary concerns with the statutes' implementation was the accuracy of dangerousness predictions (You 2013). Whereas research in the 1970s began to show that subjective clinical prediction was little better than chance (and sometimes worse), forensic psychology offered methods that appeared to be not only more objective but also more

[80] This interplay of several fields resulting in "hybrid" knowledges is similar to what Medvetz (2012) describes as an "interstitial field" or Stampnitzky (2013) refers to as a "hybrid field."
[81] Justice Blackmun's dissent quoting the APA's amicus brief in *Barefoot v. Estelle* 463 U.S. 880, 920 (1983).

accurate. This section details another method by which forensic psychology was able to extend its expert network: the advent of easy-to-use quantitative risk prediction tools.

Actuarial risk assessment technologies have a long history of use in the penal domain, dating back to at least the early 20th century when the Chicago-school sociologist Ernest Burgess designed a tool for the state of Illinois to predict inmates' likelihoods of success on parole (Harcourt 2007). The use of these tools to determine parole eligibility increased rapidly over the course of the 20th century, even as the number of states offering parole declined. At the same time, states and parole boards cut the number of items assessed in these tools and focused heavily on prior criminal history. The original Burgess model, for example, contained 21 items, but the U.S. Parole Commission eventually trimmed it to only seven, largely for administrative ease (Harcourt 2007). As actuarial thinking gained credence, technologies were developed for use in sentencing, probation/parole, and general violence assessment. However, as Karl Hanson notes, researchers and practitioners noticed that general violence assessment tools did not work well for sex offenders, who often did not resemble more typical violent offenders.[82] Facing this dilemma, in 1997, Hanson developed one of the first actuarial risk assessment designed specifically for sex offenders: the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR).[83]

The idea behind such tools, whether for general or sexual offenders, is relatively straightforward. They aggregate data on large numbers of offenders and follow them for a specified period of time to ascertain their recidivism rates. Researchers then retrospectively

[82] Author interview with Karl Hanson.

[83] This move fits readily with the more general trend that Feeley and Simon (1992) call the "new penology," which uses the language of probability and risk rather than clinical diagnosis, focuses on the efficient management of internal system processes rather than rehabilitation, and targets offenders in the aggregate rather than as individuals.

compare those who reoffended with those who did not to determine factors that seem to affect recidivism, and those factors become the basis for actuarial assessment. Offenders to be assessed are then compared to the sample group on the selected factors to predict one's likelihood of recidivism. In the case of the Static-99—created by Hanson and Thornton (2000) and now the most widely used risk assessment tool for sex offenders in the U.S.—both a relative and absolute risk level is predicted. That is, an individual receives a numerical score ranging from -3 to 12 that places him in a relative position to other similar offenders so that an evaluator may say, for instance, that John Doe received a score of 5 and therefore falls into the group that is 2.7 times more likely to recidivate than the typical offender. The score also comes with a point estimate and confidence interval of that group's predicted recidivism. A score of 5 would predict a 27.3% chance of re-offense over the next 5 years. I will discuss the development of these instruments in more depth in Chapter 7, but this brief sketch should provide a general idea of how these technologies work.

As this brief description might suggest, actuarial tools facilitated the expansion of forensic psychological expertise in a number of ways. First, the tools were designed for easy use by administration (Hanson and Thornton 2000; You 2013). The RRASOR contained only four items that were easily obtainable from an offender's administrative file and, indeed, was originally created explicitly for administrative use by the Canadian penal system for which Hanson worked.[84] Specifically, the RRASOR was meant to identify sex offenders' risk in order to match them to the proper rehabilitative program. The RRASOR was soon expanded into the Static-99, which incorporated the four items from the RRASOR and added another six. But like

[84] Author interview with Karl Hanson.

the RRASOR, the ten Static-99 items were ascertainable mostly from an offender's administrative record, making the tool easily useable by administrative workers, parole/probation officers, and social workers with minimal training. Thus, these technologies crystallized forensic psychological expertise regarding risk assessment and made it transportable across domains.

Second, the advent of actuarial risk prediction for sex offenders granted increased scientific legitimacy to forensic psychology. All of my interviewees cited the development of actuarial risk prediction as the most significant advance in the field. As former ATSA President Dr. Michael Miner commented, "the best research that has happened in this field since I've been in it has been around the area of assessment, the development of these actuarial assessment tools."[85] Similarly, Richard Krueger believed that "Karl [Hanson] has really revolutionized the whole notion [of actuarial assessment]."[86] It is hard to argue with these beliefs. Empirical studies consistently show that actuarial risk prediction is significantly better than clinical prediction (Janus and Meehl 1997; Prentky, Barbaree and Janus 2015). However, the most positive assessments still place the predictive power of these technologies at around 70%. This led many interviewees who viewed actuarial assessment as a great accomplishment to simultaneously acknowledge its limitations, particularly in regard to civil commitment, as Dr. Miner did:

> Karl Hanson and all of his students… have done a really great job of this kind of stuff, but it has major limitations, most of which I feel are glossed over and not considered. I mean… I am very glad that whenever a major decision in my life was done based on a test that had an [area under the curve] of .70, number one, I could study for that test, and

[85] Author interview with Michael Miner.
[86] Author interview with Richard Krueger.

> number two, there were other factors taken into consideration… I think our practice, whether we're talking assessment or treatment, is ahead of our knowledge base.[87]

Despite many opinions that actuarial assessments are still not accurate enough to make such significant life decisions, courts have readily taken them up as scientifically sound, and, in a show of "generosity," the inventors of these instruments mostly support this use. Hanson opined that he is "an advocate for…empirical risk assessment," but cautioned, like Dr. Miner, that it should only be "one piece of information" in SVP considerations.[88] Despite these caveats from researchers, practitioners and courts generally accept actuarial assessments.

Over 90% of jurisdictions now allow actuarial risk assessment tools in SVP proceedings (Prentky, Barbaree and Janus 2015). In Illinois, state prosecutors have successfully pursued *Frye* hearings in every county in order to ensure the admissibility of such technologies.[89] Several state supreme courts have likewise considered the admissibility of actuarial risk prediction and found it acceptable.[90] The Illinois Supreme Court case *People v. Simons* is illustrative.[91] In a bench trial, Simons was found to be a sexually violent person subject to civil commitment based on the testimony of two psychologists who both used actuarial tools—including the Static-99—to conclude that Simons was "substantially probable" (the legally mandated standard in Illinois) to commit future acts of sexual violence. Simons appealed on the grounds that the psychological testimony based on the actuarial prediction of his sexual risk should not be admitted because the

---

[87] Author interview with Michael Miner.
[88] Author interview with Karl Hanson.
[89] The *Frye* standard comes from *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923), which considered the admissibility of an early version of the polygraph. The court established that for expert testimony to be admitted in court, it must have obtained "general acceptance" within the relevant professional field.
[90] These include the Supreme Courts of North Dakota, Iowa, and Illinois.
[91] *People of Illinois v. Simons* 213 Ill. 2d 523 (2004).

actuarial technologies were not first subjected to a *Frye* hearing. The appeals court agreed. The Illinois Supreme Court, however, found that actuarial risk assessment (ARA) was not a new or novel technology, that at least 19 other states relied on some form of actuarial prediction to form opinions of sex offenders' recidivism risk, and that it enjoyed wide acceptance in the professional literature. In addition to extensively citing other courts to have considered the issue (all of which found ARA admissible), the Illinois court also cited many prominent forensic psychologists, including Hanson and Thornton, the creators of the Static-99. Quoting an article by two well-known forensic psychology scholars, the Illinois decision stated:

> The principle of actuarial superiority is not novel. It has been tested extensively, and has broad acceptance in the literature, both in general, and in the specific literature concerning sexual offending. Similarly, the science underlying ARA is not new. Statistical decision theory and its application to human judgment have been around for fifty years. The same methodology has been applied in numerous, diverse contexts, including weather forecasting, law school admissions, disability determinations, predicting the quality of the vintage for red Bordeaux wines, and predicting the quality of sound in opera houses.[92]

The decision goes on to cite another forensic psychologist who refers to ARA as a "quantum leap forward" in the "science of violence risk analysis."[93] Taken together, the Illinois court cited no fewer than ten forensic psychologists in its defense of ARA and ultimately found that the technology satisfied the *Frye* standard.

---

[92] *People v. Simons* 213 Ill. 2d 523, 542 (2004), quoting Janus and Prentky (2003:1486).
[93] *People v. Simons* 213 Ill. 2d 523, 542 (2004).

Like cases involving diagnosis and "mental abnormality," then, courts have also generally come down on the side of actuarial risk assessment. Unlike decisions about diagnostic issues, however, courts do not routinely consider the controversies or shortcomings of ARA. The quantitative nature of these risk technologies likely lends them an aura of objectivity that puts judges more at ease in comparison to the more subjective nature of diagnosing mental illness (see Porter 1995). However, as I will discuss in more depth in Chapter 7, processes of quantification, like those involved in the design of ARA instruments, always involve political decisions that are typically erased in the final product (Espeland and Stevens 2008; Espeland and Vannebo 2007).

In sum, as this section has shown, the epistemic logic found in the domain of sex offender law was created through the iterative interactions of legal institutional structures and the expert network of forensic psychology. The institutional context of the 1970s and 1980s created an opening for forensic psychology to offer a better way of solving the problem of the penal management of sex offenders. Discontent among legal actors, civil rights advocates, and even the "psych" professions with psychiatry's questionable track-record of handling sex offenders allowed forensic psychologists to step in. Whereas psychiatrists often relied on psychoanalytic techniques that could not be easily traced backward to their source and therefore seemed subjective, forensic psychologists employed diagnostic criteria from the revamped DSM-III that lent more transparency to their diagnoses. Forensic psychologist's ability to point to specific "objective" criteria for determining sexual deviance, coupled with their willingness to allow interpretative flexibility in the term "mental abnormality," made the DSM a powerful boundary object capable of bridging the law-science divide. Similarly, confronted with psychiatry's inability to accurately predict future sexual violence, forensic psychologists developed

quantitative actuarial technologies that were both technically superior to clinical judgement in terms of accuracy and, once again, traceable forward and back. Anyone could easily follow the steps of an actuarial assessment to see how a particular individual's risk was calculated.[94] These instruments had the added bonus of working mostly from administrative records, which meant they were useable not only by psychological professionals, but also by less skilled treatment providers and even parole and probation officers. While these technologies ceded some authority from psychology, they strengthened its actor-network.

The next chapter examines how a network of lawyers, activists, and academics capitalized on legal developments in asylum law to advance their preferred way of knowing sexuality in the newly created domain of sexual orientation-based asylum.

[94] The desire on the part of legal actors to be able to easily trace diagnoses or risk scores back to their source is indicative of what Porter (1995) calls "mechanical objectivity," which implies a check on personal bias by following set rules. Also see Daston and Galison (2007).

Chapter 3
LGBTQ Asylum and the Creation of New Legal Terrain

Unlike the domain of sex offender law, there was no pre-existing or entrenched form of expertise on LGBTQ asylum to displace. Rather, LGBTQ asylum advocates largely had to forge their own path. The challenge for would-be asylum experts was not displacing a pre-existing knowledge way but rather *creating* an entirely new form of expertise that simply did not exist before the political, institutional, and legal developments of the late 1980s and early 1990s. Documentation of country conditions for LGBTQ people, a requirement for proving persecution in asylum claims, did not exist in any consistent or consolidated form at the time. Similarly, awareness and knowledge of global sexual expressions and how to judge sexual identity narratives was lacking among government and immigration officials. "Common sense" was the accepted logic in 1990. Moreover, few immigration lawyers even knew about the possibility of someone claiming asylum based on their sexual orientation, which necessitated a consciousness raising strategy, not just for adjudicators, but also for practitioners. Yet while the institutional setting is quite different in asylum compared to that in sex offender law, the broad strategy of constructing expertise is rather similar. Following a legal-institutional reconfiguration, epistemic entrepreneurs mobilized to create a network of actors oriented around a socially informed, global perspective on sexuality and sexual identity. Rather than erecting rigid jurisdictional boundaries, these early actors used a strategy of generosity to enroll as many allies as possible, both inside and outside the official immigration authority structure. Though particular individuals are central to the expert network, their expert authority stems less from any particular credentials and more from the chains of allies subscribing to their way of knowing.

The first significant institutional opening came in 1985 when Fidel Toboso-Alfonso, a gay Cuban man, appeared before an immigration judge in Houston, Texas for deportation proceedings and attempted to claim asylum based on his sexual orientation. Toboso-Alfonso claimed fear of returning to Cuba because he had been persecuted for being gay. He alleged that he was forced to register with the government as a homosexual, submit to periodic medical examinations and detentions, and on one occasion was sent to a forced labor camp for 60 days because of his sexuality. Key to Toboso-Alfonso's case was his assertion that these punishments were due to his *status* as a homosexual, not because of any particular *conduct*. This was an important distinction in 1985, for many U.S. jurisdictions still outlawed sodomy (and the U.S. Supreme Court would uphold those sodomy statutes the following year). Ironically, Toboso-Alfono's lawyer drew on laws like these that specifically targeted homosexuals in the U.S. as evidence that homosexuals constituted a recognized "particular social group" (PSG). Ultimately, the immigration judge determined that homosexual identity could serve as the basis for a PSG and deemed Toboso-Alfonso's story credible and plausible, but because of a drug possession charge found him ineligible for asylum. The judge did, however, grant Toboso-Alfonso withholding of removal, a ruling that was subsequently appealed by the Immigration and Naturalization Service (INS). Indeed, the INS was compelled to appeal the decision because at that time the 1952 McCarren Walter Act designating homosexuals as "psychopathic personalities" unsuitable for entry into the country remained in effect. It was not until immigration reform in 1990 that this restriction would be repealed.

In its appeal to the BIA, the INS argued that "socially deviated behavior, i.e. homosexual activity, is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion "would be tantamount to awarding discretionary relief to those involved in

behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well."[95] The BIA rejected this reasoning and denied the appeal, finding instead that Toboso-Alfonso was persecuted because of his "status of being a homosexual." This 1990 BIA decision was the first to declare that "homosexuals" could constitute a PSG and thus be eligible for asylum because of their sexual orientation.

In 1993, an immigration judge directly granted asylum to Marcelo Tenorio, a gay man from Brazil, helping to solidify this area of law. Then in 1994, Attorney General Janet Reno declared *Toboso-Alfonso* precedent, meaning gay people would no longer have to prove on a case-by-case basis that they constituted a PSG in their home countries. These developments, along with the repeal in 1990 of the ban on homosexuals entering the country, set the legal and institutional stage for LGBTQ asylum advocates to begin agitating for further change.

However, it is also important to consider the political context for developments in asylum law. Unlike sex offender law, because immigration courts are part of the executive branch, changes in asylum policy can be affected by presidential administrations. Notably, for instance, it was under Bill Clinton that *Toboso-Alfonso* was declared precedent, and as will be discussed below, it was under Barack Obama that Immigration Equality was able to begin training asylum officers. On the opposing side, during George W. Bush's administration, Attorney General John Ashcroft pursued what is widely viewed as a purge of liberal judges from the BIA. Thus, the executive branch plays a more important role in the legal landscape of asylum than of sex offender law. But the executive branch is not the sole determining force. Toboso-Alfonso's case was granted under Reagan and affirmed by the BIA under George H. W. Bush. Moreover,

[95] *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

asylum policy is not solely determined by the executive branch. While some policies can be changed, and immigration judges can be dismissed to make room for those more ideologically similar to the current administration, much of the story is about precedential decisions and establishing institutionalized epistemic practices that cannot be easily changed with the whims of a particular administration. While Trump could appoint judges who would be less friendly to LGBTQ asylum claims, he could not undo the documented paper trail produced by the State Department on LGBTQ rights or the routine practice of using anthropologists and human rights experts as witnesses in asylum hearings. Nor could he reverse BIA or Circuit Court precedent.

Given these political variables, however, it is perhaps not surprising that the early 1990s (mostly after Clinton's election) witnessed the proliferation of organizations focused on queer immigration issues, including groups like the Lesbian and Gay Immigration Task Force (which would become Immigration Equality), the International Gay and Lesbian Human Rights Commission (IGLHRC), and the Midwest Human Rights Partnership for Sexual Orientation (MHRPSO, which would become AIR). These groups, among others, engaged in an extensive project of building networks of lawyers, academics, human rights workers, and other advocates with the explicit goal of influencing immigration policies for LGBTQ people. In regard to asylum, this network had three primary goals: 1) raise awareness of LGBTQ asylum in general, including educating lawyers and would-be asylum seekers; 2) build a knowledge base of human rights information regarding sexual minorities; and 3) improve the problematic processing of LGBTQ asylum applications. These groups have been extremely successful in their endeavors. The next two sections will consider how they have done so.

Building Human Rights Expertise

A statutory requirement for any successful asylum claim is proof of persecution. One part of this is a claimant's subjective fear, which is demonstrated through a petitioner's credible testimony and is discussed in the next chapter. The other requisite entails providing "objective" evidence of dangerous conditions for the claimant's PSG in the country in question. The problem for LGBTQ asylum seekers in the 1990s—and even into the 2000s—was that few sources of "objective" country conditions evidence covered LGBTQ issues. This included the U.S. State Department Country Reports on Human Rights Practices, which immigration courts generally prefer to use as an indicator of country conditions around the world. These reports almost invariably come into evidence in any asylum hearing, and case law allows these reports to be given significant weight. For instance, *Reyes-Sanchez v. U.S. Attorney General* dictates that judges may rely "heavily" on State Department Reports.[96] The Fifth Circuit in *Rojas v. INS* characterizes the State Department reports as "relatively impeccable sources" and states that they are "the most appropriate and perhaps the best resource the [BIA] could look to in order to obtain information on political situations in foreign countries."[97] The Ninth Circuit has said in reference to State Department Reports that "it is well-accepted that country conditions alone can play a decisive role in granting relief."[98] The First Circuit has gone so far as to say, "in certain circumstances," adjudicators may "give the contents of such reports appreciable—even determinative—weight."[99]

Given the weight State Department Reports carry, when they are silent on LGBTQ issues, several possible challenges arise. One possibility is an adjudicator assuming that no

[96] *Reyes-Sanchez v. United States AG*, 369 F.3d 1239, 1243 (11th Cir. 2004)
[97] *Rojas v. INS*, 937 F.2d 186, 190 (5th Cir.1991)
[98] *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005)
[99] *Pulisir v. Mukasey*, 524 F.3d 302, 310 (1st Cir. 2008)

mention of sexual or gender minorities in the report means there are no human rights abuses of such groups. For instance, a judge denied a gay HIV-positive Venezuelan man's asylum claim based in part on the fact that "the country report made no mention of human rights violations against homosexuals or individuals with HIV or AIDS."[100] In this case, the judge privileged the silence in the country report over the testimony of the director of Aid for AIDS, an organization that worked closely with the gay and HIV-positive community in Venezuela, who testified that the government of the country condones the denial of treatment of gay men with HIV by both public and private healthcare providers and refuses to prosecute employers who require HIV testing (and a negative result) as a condition of employment.

A second closely related issue arises when country reports include some information on LGBTQ issues but not enough to establish persecution. This is especially problematic for claimants who are detained and/or without legal representation and who may not have the resources to ascertain other sources of information on country conditions. As Neil Grungras, director of ORAM, said, "most country reports, if it does have LGBT, it usually has a very, very small section, and it is very inadequate…It usually lumps all the Ls, the Gs, the Bs, the Ts, the Is together, and it's not very illuminating if you're trying to find out what's really happening in that country."[101] Nielan Barnes, a sociologist who serves as an expert witness in asylum claims, further expounded on this issue:

> The government attorneys often will submit nothing to support their argument that country conditions are fine and if they do…they provide copies of tourist magazine advertisements and articles about how great Mexico, South America is if you want to

[100] *Paredes v. U.S. Attorney General* 219 Fed. Appx. 879, 883 (11th Cir. 2008)
[101] Author interview with Neil Grungras.

> come visit. Or they'll provide some of the U.S. State Department reports which are very problematic in that they have a lot of contradictory information, and often they will leave out major human rights violations that have occurred in those years. I've done a comparative analysis looking at all the U.S. State Department reports from 1999 to present and comparing what they say is happening in Mexico around gay rights and transgender human rights to what's really happening looking at various data points trying to triangulate the hell out of it to say, okay, well these murders actually occurred in these few years, and here's the U.S. State Department Report saying nothing about that.[102]

A veteran immigration judge echoed this sentiment, saying that "a lot of the country conditions reports are a little bit vague," before continuing on to assert that

> there are things within those State Department reports that are very helpful to judges in making decisions. But they are also limited in a sense that they say, so there have been no reports of political disappearances, however…this group reports X or that group reports Y, and then if you go back to those groups and see what are they actually reporting—wait a minute, there's a big problem there.[103]

Therefore, if the State Department reports are privileged above other evidence or serve as the only form of evidence in a claim, LGBTQ petitioners may not be able to provide sufficient objective evidence to meet the legal requirement of proving persecutory conditions.

Third, country reports may present only a bird's eye view that does not well reflect conditions on the ground. Attorney Peter Perkowski commented on this issue saying, "just because you can get married in Mexico City doesn't mean you don't any longer have roving

[102] Author interview with Nielan Barnes.
[103] Author interview with retired immigration judge.

hordes of gangs and/or police officers and governmental agents still harassing, beating, torturing, and murdering LGBT people."[104] But government lawyers will often use this argument against Mexican and many South American asylum seekers. Experienced immigration lawyers now often feel the need to recruit experts anytime they have cases from such countries. AIR, for instance, almost always tries to have an expert who can provide more detailed testimony about country conditions when they have Mexican claimants. Indeed, this view among advocates is supported by judicial decisions, such as that of Alejandro Gutierrez, a gay claimant from Mexico who was denied relief in part because "the State Department reports state that conditions are improving for gay and lesbian persons."[105]

To combat these issues, asylum advocates began building a network of lawyers, activists, and academics that shared information on country conditions and legal strategies. One of the earliest and most important organizations to address human rights violations of LGBTQ people was the International Gay and Lesbian Human Rights Commission (IGLHRC, now Out Right Action International), founded by Julie Dorf in 1990 in San Francisco. Fresh out of college and inspired by her time living and studying abroad in the Soviet Union where she encountered people who had been imprisoned for being gay, Dorf decided to create an organization dedicated to fighting for LGBTQ rights internationally. One major project for her organization involved aggregating country condition information regarding LGBTQ human rights. As she explains, she drew on the activist atmosphere around HIV/AIDS in San Francisco at the time to bring together like-minded people:

---

[104] Author interview with Peter Perkowski.
[105] *Gutierrez v. U.S. Attorney General* 576 Fed. Appx. 81, 84 (3rd Cir. 2014).

> [B]eing based in San Francisco in that period of a lot of activism primarily because of the AIDS epidemic… it was very easy to find other people like myself who had a deep connection and knowledge of communities in other parts of the world. And so through just personal networking and activism we pulled together a whole bunch of people like myself who had their own personal files documenting persecution in other countries, primarily Eastern Europe and Latin America. Those were the first regions of the world… where we had kind of depth of knowledge and a lot of immigrants… who lived in San Francisco or had come to San Francisco. So very, very early on we realized that documentation of our persecution was the name of the game in the human rights space.[106]

In these early days of creating a knowledge base, volunteers would gather every Monday night to scan newspapers and clip articles to begin building case files on various countries. These volunteers—and eventually a paid staff—would also call human rights workers in nations around the globe to get further information. IGLHRC then provided these files to lawyers who were willing to take on LGBTQ asylum claims, as Dorf further explains:

> [P]rimarily what we did as a service was in the small network of attorneys who were taking cases like this primarily… in New York and L.A… Attorneys would know to get in touch with us… and we would basically copy our country files and send them these packets of documentation to attorneys all over the U.S. and Canada and elsewhere in the world, you know, to help them in their claims. And sometimes we would provide expert testimony or find them the right expert testimony, that kind of stuff.[107]

[106] Author interview with Julie Dorf.
[107] Author interview with Julie Dorf.

Over the years, IGLHRC aggregated information on many countries and began digitizing their documentation to provide easier access to lawyers. Shortly after Dorf departed from IGLHRC in 2000, the asylum project was wound down, and the documenting and dissemination project moved to AIR, where it remains today.

Other organizations soon followed IGLHRC into the asylum arena. The Lesbian and Gay Immigration Rights Task Force (LGIRTF) was founded by lawyers in Los Angeles in 1994 and quickly formed working groups in other major cities. LGIRTF would eventually become Immigration Equality, the largest legal advocacy organization dedicated to queer immigration issues. Following IGLHRC's lead on documenting country conditions, Heather McClure, an anthropologist, formed the Midwest Human Rights Partnership for Sexual Orientation in Chicago in 1996, which eventually became part of the National Immigrant Justice Center under the auspices of the Heartland Alliance. McClure conducted her dissertation research in Guatemala and with Guatemalan asylum seekers in the U.S. and became one of the first experts to write an affidavit that she made available to any lawyers or experts seeking a model for how to prepare such a document for immigration hearings. These LGBTQ-focused groups further allied with NGOs such as Amnesty International and Human Rights Watch to better document human rights violations against LGBTQ people around the globe and to advocate domestically for improvements in the processing of LGBTQ asylum claims.

With this alliance between activists, lawyers, and social scientists, this network began lobbying the State Department to include information on LGBTQ people in its annual country reports. As McClure explains:

> one of the things that we did after I got back from Guatemala was to [get] in touch with everybody who I knew had country condition information. And believe me, it was like an

> afternoon of calls; there were so few people… And so I got in touch with as many people as I could and we formed a very informal group where we pooled our documentation, and I called the State Department and got in touch with the two people who really are the editors of the State Department's Human Rights Reports, and I asked them to take a look at our documentation. And they didn't promise anything, but it was such a clear gap, you know? And so I forwarded them all of our documentation. IGLHRC forwarded them all of their documentation. And we just started this campaign to try to convince the authors and editors of those Human Rights Reports to be more inclusive.

The State Department was responsive, and by the mid-1990s slowly began to incorporate LGBTQ information into the reports. However, many advocates still view the information included in these reports as inadequate and sometimes even misleading, and several groups continue to push for further improvements.

Nevertheless, this process of network creation resulted in change in the area of asylum policy and established a network of expertise on LGBTQ asylum issues. Activists such as Julie Dorf of IGLHRC became recognized experts in the field of LGBTQ asylum not necessarily because of her credentials (she holds only a bachelor's degree), but because of the way she fashioned herself into a "lay expert" at the center of what became a large and influential network. Indeed, Dorf, through her connections with former Congressman Barney Frank, was instrumental in getting Janet Reno to issue the directive to the INS to recognize gays and lesbians as a "particular social group" under asylum policy in 1994.[108] This is not to say that asylum advocates shunned credentialed expertise. McClure held a PhD from a prestigious university, as did many

[108] Frank's then-partner sat on the advisory board for IGLHRC.

of the academic social scientists who became part of the advocacy network. But lawyers and human rights workers not trained in social science research also became well-versed lay experts in issues of sexuality and sexual cultures around the globe. This becomes even clearer when we look to two of the other major goals of the early movement: education and consciousness raising.

Expert Educators

A major issue with processing LGBTQ asylum claims in the 1990s involved adjudicators' interpretations of sexuality. Most immigration officials lacked a sophisticated understanding of sexuality and sexual identity, and when it came to determining whether an asylum claimant had sufficiently proven his or her sexuality, many adjudicators simply fell back onto "common sense" judgements.[109] Because this was a new area of law in the early 1990s, many adjudicators simply did not understand how to process sexuality claims, what questions to ask, or what would count as persecution on account of one's sexuality. Furthermore, many immigration lawyers knew very little about this area of law if they knew anything at all. The expert network that formed around asylum in the early 1990s formulated strategies to combat these obstacles and, eventually, to institutionalize its epistemic authority.

One strategy was to conduct presentations and trainings with immigration officials, including asylum officers and immigration judges. These trainings began through local lobbying, particularly in San Francisco, where the asylum office was receptive early on to advocates' efforts. Heather McClure, through her joint project with Michael Heflin at Amnesty International, responded to a request from that office for training on human rights conditions for LGBTQ and HIV-positive people in Mexico and Central America. Julie Dorf and Lavi Soloway

[109] This "common sense" often involved stereotypes of effeminate gay men or "butch" lesbians, as I discuss in more detail in the next chapter.

likewise responded to the San Francisco asylum office's openness and conducted trainings there. AIR has also started conducting trainings for asylum officers in Chicago. After moving to New York, Immigration Equality began conducting trainings with asylum officers and immigration judges there. This eventually became a formalized arrangement when the DHS Office of Civil Rights and Civil Liberties held a "listening session" on LGBT issues, where Immigration Equality representatives suggested that asylum officers needed training on LGBT issues. DHS agreed, and in 2010, Victoria Neilson, former Legal Director of Immigration Equality, began training asylum office supervisors. Beginning in 2011, an LGBTI segment taught by Immigration Equality was added to the six-week training course that all new asylum and refugee officers must complete. These trainings provide one setting for asylum advocates to expand their actor-network through teaching not only content but also their preferred technique for evaluating LGBTQ asylum claims.

Additionally, this training is crystallized in the form of a manual jointly produced by Immigration Equality and USCIS. As a technology that bridges the divide between the social scientifically-informed asylum advocates and asylum adjudicators, the Immigration Equality-USCIS training manual is a key boundary object. For instance, the reading resources included in the module comprise both legal decisions and social scientifically-informed law review articles on LGBTQ asylum issues. The manual also guides readers to other key players in the asylum advocacy network, such as IGLHRC. It further details information on what kinds of questions are appropriate to ask in order to determine a claimant's sexuality, explains what kinds of persecution sexual and gender minorities often face that are unique to those groups, and even includes explicitly constructionist definitions of gender and gender identity. In the "LGBTI Terminology" glossary gender is defined as, "the social construction of what society values as

the roles and identities of being male or female; assigned at birth to every person; does not always align with gender identity," and gender identity is defined as "a person's inner sense of being male or female, both, or neither, resulting from a combination of genetic and environmental influences" (USCIS 2011:53-54). The manual similarly implies that sexuality is at least partially socially constructed by addressing the ways that sexual expressions, behaviors, and identities vary from culture to culture. For example, it states that, "the way that applicants express themselves may be different from what an interviewer would expect from an LGBTI person in the United States" (USCIS 2011:31). The manual also invokes the APA's statement against attempts to change people's sexual orientation. In these rather subtle ways, asylum advocates impart LGBTQ-inclusive techniques and social scientifically-informed knowledge about gender and sexuality in ways that can be easily incorporated into asylum adjudicators usual routines.

Speaking about one of the early trainings he conducted with asylum officers, Lavi Soloway commented:

> I remember one officer putting up her hand and asking me, and this is worth mentioning because there were many times in my career in courtrooms and asylum offices, particularly courtrooms – she put up her hand and asked us, 'If a male officer raped an individual who is now an asylum applicant and the asylum applicant claims or asserts that that violent act against him was because he was gay, how do we understand that because wouldn't that sexual act by the police officer mean that police officer was gay?'[110]

[110] Author interview with Lavi Soloway.

Sexual assaults like this are common in LGBTQ asylum claims, but without understanding the cultural context in which the penetrating man is not viewed as gay, an adjudicator could easily find no nexus between the claimant's persecution and sexuality. Advocates, however, have established an epistemic scaffolding in this area of law that implores adjudicators to account for cultural context and the cultural variability of sexuality.

In a similar vein, advocates have also worked to create ways of knowing sexuality that do not depend on explicit discussions of sex acts or stereotypes. Explaining the progress made in this area, Aaron Morris said:

> One of our pro-bono attorneys had a debrief with me after an asylum interview, and one officer did ask something pretty crazy, which was, "Are you a top or a bottom?" with the expectation that the person would know what that was and have an answer. And before she had a chance to object the client just said, "Oh, I'm a bottom," and it wasn't that big of a deal to him. But like, that's a [really] inappropriate question. None of that's really happened…since [Victoria Neilson] trained all the asylum officers. So they're pretty sensitive to LGBT issues and what is appropriate and is not appropriate.[111]

Indeed, guidance on the appropriate questions to ask has been institutionalized in the training manual created by USCIS and Immigration Equality: "The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about 'what he or she does in bed' is never appropriate" (USCIS 2011:34). This background work by advocates has established the basis for narrative accounts of sexual identity as the primary way of knowing sexuality in asylum policy, as I will discuss further in the next chapter.

[111] Author interview with Aaron Morris.

Another strategy for educating adjudicators was simply to make LGBTQ asylum claims and use them as opportunities to teach asylum officers and immigration judges about these issues first hand. Lavi Soloway explains that:

> [P]art of the training happens when attorneys are doing very good work and bringing very strong cases. And giving officers a chance in their actual role as adjudicators to learn all of this, to see it for themselves and to experience it as somebody asking probing questions and follow up questions. That's really the most important way to teach the officers about the context, the breadth, the nuance of these cases.[112]

Heather McClure similarly described how she used asylum claims to advance a more constructionist view of sexual identity that didn't posit identity as something one is born with and knows immediately but rather as something that develops over time and is culturally specific:

> So one of the things that I was struck by is that there are these unexamined assumptions that gay and lesbian people have been knowingly gay and lesbian their entire lives. And that comes with a very privileged perspective… [O]ur public discourse in this country is now assuming that gay and lesbian people are *here*… But that notion in the majority of the world was completely foreign and completely odd… [W]e wound up arguing [that] based on the realities of these men's lives that a sexual identity—the self-identification of being gay or lesbian—was so impossible to imagine that there wasn't language for it. There was no social space to explore it, to say nothing of personal space to explore it. So it just was beyond the realm of what was possible in the countries that most of these men

[112] Author interview with Lavi Soloway.

> [were from]… And we just argued well, *desire is different from identity*. And, you know, these gay men have loved men from time immemorial in their lives, but they didn't necessarily have the language or the support to claim that desire and transform it into an identity (emphasis added).[113]

As these quotes illustrate, asylum advocates became very well-versed in sociological and anthropological views of sexuality and sexual identity and brought those ideas into court with them, not only to educate adjudicators but also because it was sometimes necessary to be armed with such knowledge to win claims.

When lawyers aren't doing the educating themselves, however, they often turn to experts to provide written affidavits and testimony, and use these as opportunities to educate, as well. As Shannon Minter, Legal Director of the National Center for Lesbian Rights, explained, sometimes experts can be used to disabuse adjudicators of misleading stereotypes:

> [S]ometimes issues come up, like this used to come up a lot with – and it still does – with gay men and with lesbians… but how do you prove you're gay… that can be a problem if the officer has certain preconceptions of what a gay person looks like or acts like or what kind of history they have, and the person doesn't correspond to some stereotype or template that the person has. So it could be helpful to have an expert there to be, like, 'Hey, there's different kinds of gay people' or 'There's different kinds of transgender people, and a lot of people have a similar history to this person, and just because a person has this particular history doesn't mean that they're not gay or not transgender.'[114]

[113] Author interview with Heather McClure.
[114] Author interview with Shannon Minter.

Experts may also provide added cultural context around gender and/or sexuality in order for an adjudicator to understand why a claimant may face a threat. Suyapa Portillo, an Assistant Professor of Latino/a and Chicano/a studies who serves as an expert witness in asylum claims, discussed a case where she had to explain Honduran gender norms to the court:

> I had a woman—a butch woman now who in Honduras was like a feminine model but has transitioned into sort of a gender nonconforming butch. So oftentimes I have to explain what that means if she were to return to this part of Honduras where she was a reigning queen model looking like a man… Femininity and being thin and ultra-feminine is considered really important in Honduras and a sign of being a woman… what it would mean for her to go back to that hometown, and not only would she experience discrimination from family members and friends but then also from society in general. Newspapers would just really rip her apart.[115]

Thus, while lawyers representing asylum seekers often fashion themselves into "lay experts" on topics of gender and sexuality, courts sometimes want the added authority of a credentialed expert declaration.

Sometimes lawyers will draw on this type of social science expertise without calling an expert witness. Attorney Peter Perkowski explained that he will often use academic articles when he doesn't have access to an expert:

> I'm not going to say it's easy, but you can establish this whole macho culture through social science research, for example, without needing to have an expert. It's not as neatly

[115] Author interview with Suyapa Portillo.

> encapsulated as in an expert report but there are publications where you can point to that describe the macho culture and its effect on attitudes and things of that nature.[116]

As the experts I interviewed discussed, though, they do not often directly cite much social science research in their affidavits for asylum claims. They may explain social science concepts, as Suyapa Portillo did above regarding gender, but most often when drafting statements for courts, they primarily cite human rights reports and other sources in that vein.

Nevertheless, social science research does sometimes find its way into asylum proceedings and can make a substantial impact. Perhaps the most significant example is the precedent-setting *Hernandez-Montiel* case.[117] In its decision, the Ninth Circuit drew on a bevy of social science research in explaining its determination to grant asylum to a "gay man with a female sexual identity." Most of the court's use of social science scholarship appears in the section where it considers sexual identity as the basis for a "particular social group" under asylum law. Though this broad question had already been decided in *Toboso-Alfonso* and a handful of other cases throughout the 1990s, the Ninth Circuit saw fit to lay out its reasoning in some detail, presumably because "gay men with female sexual identities" was a new formulation of the broader category of "homosexuals" named in *Toboso-Alfonso*. It drew heavily on social science and legal scholarship with a more sociological slant to support this move. For instance, in asserting that "sexual orientation is set in place at an early age,"[118] the court cited legal scholar Suzanne Goldberg's article "Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men" in which she draws on sexuality studies

---

[116] Author interview with Peter Perkowski.
[117] *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).
[118] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

scholarship to explain what sexual orientation is and, in particular, that it is more than simply a behavior that one can easily change. The court proceeded to invoke the authority of both the American Psychological Association and the American Psychiatric Association to support this point. The decision also deployed early sexology researcher Alfred Kinsey (albeit somewhat erroneously), anthropologist Gilbert Herdt, and other constructivist legal scholars to assert that "sexual identity is inherent to one's very identity as a person" and, importantly for this case, that sexual identity may manifest itself outwardly in dress or appearance.[119] Where the BIA had deemed Hernandez-Montiel's PSG "homosexual males who dress as females," and thus suggested that he could simply stop dressing as a woman so as to not be identified as gay, the Ninth Circuit repositioned his outward appearance as part of his sexual identity and therefore something he should not be compelled to change.[120] Finally, the court buttressed its decision with the expert testimony of Latin American studies professor Thomas Davies.

Admittedly, *Hernandez-Montiel* is atypical in its extensive use of social science. Asylum decisions are more likely to cite human rights reports, and when they do reference social science, it is generally through expert witnesses. Notably, however, *Hernandez-Montiel* is frequently cited in asylum decisions as the basis for recognizing sexual minorities as a PSG. Indeed, it has been cited at least 134 times. So while social science research is not often directly cited, the very framework for recognizing sexual minorities as eligible for asylum came about in part due to the judicious deployment of social science. Moreover, as I have shown, immigration lawyers who

---

[119] The court cites Kinsey as supporting the idea that sexual identity is inherent to one's identity as a person. As a behaviorist, Kinsey would not have endorsed such a view, and indeed, he was an opponent of sexual labels during his lifetime.

[120] Legal scholar Joseph Landau (2004-2005) argues that the decision to protect outward displays of sexuality, such as dress and hair style, represents a larger shift in asylum jurisprudence toward protecting "performative" aspects of identity. I make a similar argument regarding courts' nascent recognition of the social construction of sexuality in asylum law (Vogler 2016).

routinely represent LGBTQ asylum seekers have cultivated a sophisticated understanding of gender and sexuality that they routinely present in courts and asylum offices. As sociologist Nielan Barnes, who frequently serves as an expert witness, said:

> Typically, the public defenders or public law centers that I'm working with and the pro bono lawyers, they're very sophisticated. Most of them are extremely – they get it. Either they already know what I've just talked about in terms of identity development and the process and the context, or they understand it very quickly if it's a new case for them.[121]

Thus, even when it is not in the form of academic articles and books, social science still finds its way into asylum proceedings. By translating social science concepts into legally cognizable arguments, asylum advocates transform these very concepts into boundary objects transposable across both legal and social scientific domains.

Early in the development of this area of asylum law, however, advocates faced the challenge of spreading this type of knowledge—or indeed, the knowledge that sexual minorities were even eligible for asylum—to other immigration lawyers. In response, several advocacy groups began holding workshops and clinics to teach lawyers the basics of LGBTQ asylum law. Beginning in the early 1990s, IGLHRC held clinics for lawyers the first Saturday of every month. Immigration Equality and AIR soon followed suit, and these clinics continue today. Organizations such as Immigration Equality, AIR, and NCLR also maintain networks of pro bono attorneys that they work with on an on-going basis and to whom they frequently refer clients. But perhaps the single most important action taken to spread knowledge about the nuts and bolts of the asylum process for queer people was the creation of a manual entitled *Preparing*

[121] Author interview with Nielan Barnes.

Sexual Orientation-Based Asylum Claims: A Handbook for Advocates and Asylum Seekers. Heather McClure, Lavi Soloway, and Chris Nugent created the first edition of this manual in 1997 and made it freely available to anyone interested in learning about sexual orientation-based asylum. They were particularly interested in distributing it to lawyers, but they consciously wrote it in accessible language so that asylum seekers themselves could understand the process, as most asylum seekers do not have legal representation. The manual contains information on topics ranging from the basics of immigration law to details of how to complete an I-589 (the asylum application) and what kinds of evidence claimants should prepare. The handbook is now in its third edition and continues to be freely available on Immigration Equality's website.

What I have tried to show is that, though it is not unified into a single discipline as is forensic psychology in the case of sex offender law, the hybrid expert network created by asylum advocates has been extremely successful in drawing on sociological and anthropological knowledge in combination with sophisticated lay expertise of gender and sexuality to shape the way asylum adjudicators understand sexuality. In fact, these experts have arguably been *more* influential in their efforts than has forensic psychology. To be sure, forensic psychologists command considerable authority in the management of sex offenders and have carved out significant professional discretion in diagnosis and risk assessment, and oftentimes their opinions in SVP hearings are determinative. Asylum experts, by contrast, more often wield less authority in the actual court setting. But they have, to a significant extent, contoured the epistemic background for knowing sexuality in asylum claims. From *Toboso-Alfonso* to *Hernandez-Montiel*, asylum advocates used legal decisions not only to win victories for queer claimants, but also to educate adjudicators about human rights and sexual identity issues and set standards for how courts should determine PSG status, persecution, and beyond. These efforts have led to a

decline in the use of stereotypes to determine claimants' sexualities and the consistent striking down by appellate courts of such decisions when they do occur (Vogler 2016). Beyond precedent-setting case law, the expert network of asylum advocates has institutionalized its epistemic authority in USCIS training of asylum officers and the inclusion of LGBTQ human rights issues in the State Department Human Rights Reports. Furthermore, organizations such as the NCLR and Immigration Equality now have rather easy and consistent access to the federal agencies that oversee the asylum process as a way of voicing concerns directly to immigration officials. Some early advocates now have positions whose sole duties involve liaising with the government. Julie Dorf, for instance, went on to co-found the Council for Global Equality, through which she works with the State Department and other governmental agencies on inclusive U.S. foreign policy.

Conclusion

This and the preceding chapter have explicated how different networks of expertise came together in the arenas of asylum and sex offender law to shape the epistemic logics of these legal domains. Though the precise processes that allowed each network to influence these state knowledge practices differ in the details, the overall picture is rather similar across domains. In both instances, state institutions expressed a new need for methods of rendering sexual subjects legible for state action, and institutional, legal, and political changes created an opening for epistemic entrepreneurs to insert themselves into the organizational "machineries of knowing" (Knorr Cetina 1999:2). This might be understood as a shift in the "intellectual opportunity structure," or what Waidzunas defines as, "those aspects of a multi-institutional field of knowledge production that render it more or less vulnerable to the activity of social movements and [scientific and intellectual movements]" (Waidzunas 2013:4). In the cases of sex offender

and asylum law, the intellectual opportunity structure is closely intertwined with, and perhaps nearly indistinguishable from, both the political opportunity structure (McAdam 1982) and legal opportunity structure (Andersen 2005). For forensic psychology, the most relevant changes included the relative withdrawal of psychiatry from the field of sex offender management and the passage of an array of new laws targeting sex crimes in the early 1990s that induced a need within state institutions for new methods of measuring and classifying sexual subjects. For asylum experts, developments included the 1990 BIA decision granting withholding of removal to a gay man and the recognition among advocates and government officials alike that relatively little was known about how to process sexuality-based asylum claims.

However, neither forensic psychologists nor asylum advocates attempted to claim exclusive epistemic authority over their respective issues. Rather, both proceeded through a process of "generosity" that attempted to enroll as many allies into their networks of knowing as possible through careful negotiations and the use of strategic boundary objects, such as the DSM and the USCIS training manual. Thus, forensic psychologists were unable to wholly control the definition of "mental abnormality," but by ceding some authority for themselves and cooperating with the existing legal structures, they were able to strengthen their expert network, bring legal actors on board, and institutionalize their epistemic authority more easily. Similarly, though asylum experts could not rewrite existing asylum laws to include sexual or gender minorities, they *could* use the elasticity of the law to create new "particular social groups" that included queer people and then teach as many people as possible how to make those same claims. Just as forensic psychologists used the DSM as a boundary object that could bridge the science-law divide, asylum experts drew on social scientific knowledge of sexuality that they strategically

translated into legally cognizable arguments and even government training manuals to enroll adjudicators and immigration authorities into their network of knowing.

While the processes of forming expert networks was similar across these two areas, the actual epistemic logics that resulted were dramatically different. This is particularly obvious when one looks at how sexuality is measured or determined and what counts as empirical evidence of sexuality in each domain. The next two chapters take up this task and ask more directly how the epistemic logics I have begun to describe here influence how state institutions classify sexual subjects.

PART TWO:
What Counts as Evidence of Sexuality? Differentially Defining the Empirical

In 2009, an Iranian gay man arrived in Germany to seek asylum from persecution based on his sexual identity. Under the requirements of the Dublin Regulation, because the man had passed through the Czech Republic first, he was required to return and lodge his complaint there. Germany, therefore, initiated proceedings to send the man back until it was revealed during those proceedings that the Czech Republic sometimes used something called phallometric testing to verify asylum seekers' sexual orientations. Phallometric testing uses an instrument called a penile plethysmograph, or PPG, to measure the tumescence of a man's penis in response to various visual and auditory stimuli. The most commonly used PPG consists of a silicone ring filled with mercury that is placed around a man's penis. As the penis grows, changes in the mercury send electrical signals to a machine that provides an output tracking size variations. Advocates of the technology assert that it provides an objective measure of one's sexual arousal and therefore one's sexual orientation.

The revelation that this technique was being used on asylum seekers in the Czech Republic caused outcries across the European Union and at the United Nations. The German administrative court reviewing the Iranian man's application refused to send him back to the Czech Republic where he might face such a procedure and criticized use of the PPG as degrading and a gross violation of privacy. Soon thereafter, the EU Agency for Fundamental Rights issued a report also condemning phallometric testing.[122] The UN High Commissioner for Refugees similarly denounced phallometry for asylum seekers.[123] The Organization for Refuge, Asylum,

[122] http://www.bbc.com/news/world-europe-11954499
[123] Available online at http://www.unhcr.org/4daed0389.pdf

and Migration devoted an entire report to attacking the scientific validity, legality, and ethics of PPG use with asylum seekers.[124] In May 2011, EU Home Affairs Commissioner Cecilia Malmstrom also criticized the procedure, saying, "The practice of phallometric tests constitutes a strong interference with the person's private life and human dignity. This kind of degrading treatment should not be accepted in the European Union, nor elsewhere."[125] Finally, in December 2014, the European Court of Justice, Europe's highest court, ruled that asylum seekers in Europe cannot be subjected to phallometric testing, even if they consent to it.[126] All of these criticisms and the eventual legal pronouncement rested, at least in part, on the rejection of the notion that sexual orientation, or even sexual arousal, could be accurately assessed by measuring penile tumescence. Determinations of individuals' sexualities, the court declared, must instead be based on claimants' testimonies.

In the Philippe-Pinel Institute in Montreal, the situation looks very different. Here, I entered a room aptly called "the cave," where researchers and psychiatric staff conduct PPG testing on convicted sex offenders. In the center of the large black-walled room stands a platform surrounded on three sides by 3-D projection screens through which the staff can create virtually any situation they wish populated with avatars custom designed to appeal to the sexual tastes of whomever is participating. These avatars are particularly useful for gauging the arousal of pedophiles, for they allow practitioners to get around the ethically dubious practice of using child pornography to assess the sexual arousal of child molesters. This sophisticated system, which

[124] Available online at http://oramrefugee.org/wp-content/uploads/2016/04/oram-phallometry-paper-2010-12-15.pdf
[125] https://euobserver.com/lgbti/32349
[126] Full decision available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=178902

cost around $1.5 million to create, allows programmers to manipulate every aspect of a virtual avatar, from facial features and body size down to nearly a dozen features of the avatar's genitals. I donned the 3-D projection goggles and ascended the platform to enter the virtual reality simulator, where a seductively posed, though clothed, woman appeared before me. As I sat in the chair and gazed around the room, the researchers leading the tour informed me that they could see where I was looking. The goggles not only allow the operators to create elaborate three-dimensional scenes but also to track the participant's eye movements. This allows them to know if the subject is attempting to avoid looking at the scene in order to control his arousal. I removed the goggles, and just as suddenly as she appeared, the virtual woman was gone, and I was back in a dimly lit room surrounded by white screens.

Unlike the outcry that ensued over the Czech Republic's use of phallometric testing of asylum seekers, such objections are generally dismissed when they involve sex offenders. Though the Philippe-Pinel Institute is the only place with such a sophisticated set-up, PPG testing similar to that done at the Institute is a routine aspect of legally mandated sex offender treatment and supervision in the U.S., Canada, and parts of Western Europe. In regard to use of the PPG on sex offenders, U.S. courts have heard the very same challenges levied by asylum advocates: that it violates the right to privacy, freedom from intrusive medical procedures, freedom from unnecessary searches, freedom of religion, and, uniquely to sex offenders, freedom from self-incrimination. With the exception of some circumscribed privacy protections, courts have dismissed these complaints, ruling instead that the state's interest in determining a sex offender's sexual desires outweighs the rights of the offender. Nestled within these judicial decisions is the tacit assumption that phallometric testing accurately assesses one's sexual desires

through the physical measurement of the erect—or as is usually the case with the PPG, the barely erect—penis.

Why do these two areas of the law come to such drastically different conclusions about the proper way to determine someone's sexuality? Part of the explanation, as we can begin to surmise from the above vignettes, certainly involves the more successful advocacy efforts of those representing asylum seekers in comparison to those (few) defending the rights of sex offenders. But a significant part of the story also revolves around the distinct epistemic logics guiding state decision-making. As the previous chapters illustrated, the epistemic machinery of these two legal complexes varies significantly, affecting how state officials determine what knowledges count as expert in each setting. The next two chapters take another step to analyze how, given their respective forms of expertise, both legal domains attempt to measure subjects' sexualities. That is, what counts as empirical evidence of sexuality? Just as the divergent epistemic logics dictate different forms of expertise, they also differently define the empirical. Though the types of expertise that inform legal decision-making in each domain do not directly determine what counts as evidence of sexuality, they significantly influence it. For instance, sociology and anthropology generally subscribe to a social constructionist view of sexuality, resulting in an understanding of sexuality as inextricably bound up with social forces. Forensic psychology gives significantly less consideration to social factors and instead focuses on the individual, allowing for a much more facile and direct connection between the body and sexuality. One result of these competing foci is a greater emphasis on the individual and the body in sex offender assessments and, conversely, a larger role for social context in asylum claims. However, experts do not wield the only or ultimate authority in defining sexuality. The types of evidence and expertise that influence decision-making are highly structured by the legal

institutions themselves and the norms that configure their environments. Rules of evidence, required levels of proof, governing statutes, and the definition of subjects under scrutiny (e.g., mentally ill criminal or deserving refugee) all partially dictate what forms of evidence "count" and how much weight they are granted.

Despite many differences, in both domains, a jumble of messy facts and opinions enter at one end, and neatly packaged objective legal determinations come out the other. Though both areas of law depend on a combination of narrative and bodily evidence to prove one's sexuality, the exact type of evidence and its interpretation vary considerably. This is the result of the extent to which actors believe the proffered evidence to be *direct measures* or *indirect indicators* of sexuality. Although both areas depend on both types of evidence to some extent, those in asylum adjudications tend to approach the measurement of sexuality through indicators, or signs, of a rather inaccessible subjective state, whereas experts and decision-makers in sex offender evaluations tend more often to believe their data to be direct measures of one's sexuality.

In her comparative study of high energy physics (HEP) and molecular biology, Karin Knorr Cetina (1999) shows that the two disciplines approach the empirical in quite distinct ways. The objects of knowledge for HEP are too small to ever be seen except indirectly by detectors, too fast to be captured and contained in a lab, and too dangerous to be handled directly. The existence of these particles can only be indirectly established by the footprints they leave when passing through specialized measurement devices. This is what Knorr Cetina calls "negative knowledge." It is not non-knowledge, but rather a type of knowledge based on the interpretation of signs. Whereas proper measurements in most fields count as evidence, measurements in HEP are virtually meaningless until placed in the context of a particular theory. HEP experiments thus operate in a space of liminal phenomena working with "things which are neither empirical

objects of positive knowledge nor effects in the formless regions of the unknowable, but something in between" (Knorr Cetina 1999:63). Molecular biology, on the other hand, is strongly oriented toward positive knowledge and relies on maximizing contact with the empirical world. Biological experiments depend on the ability of the researcher to manipulate physical objects. In this epistemic culture, measurements *are* data. The sign processes relied upon in HEP are constantly turned away from in molecular biology. "The signs in this case," as Knorr Cetina (1999:106) explains, "are not used as a window upon an underlying phenomenal reality that one seeks out as a clue to understanding. Rather, they are data in their own right…"

Knorr Cetina's comparison is rather similar to what we find when comparing asylum and sex offender adjudications, with asylum law often relying more on "negative knowledge" and sex offender law tending toward what is understood to be "positive knowledge." Though Knorr Cetina's use of "negative" and "positive" differs from ordinary usage of the terms, I adopt it here because it provides a helpful distinction in explaining my cases. Each domain's position vis-à-vis the PPG as illustrated in the opening anecdotes may help clarify this distinction. Where the PPG is accepted as a direct and objective measure (positive knowledge) of sexual arousal and orientation for sex offender assessments, it is rejected in favor of claimants' narratives (negative knowledge, as I explain below) for asylum decisions. As Chapter 1 showed, these two approaches—narrative analysis and bodily examination—have historically competed as the preferred methods of ascertaining someone's sexuality.

On the one hand, as Foucault has suggested, the confession has acted as one of the West's most highly valued techniques for the production of truth, especially in regard to sexuality. Though Foucault focused on the religious tradition of confession and its later adaptation for psychiatry, it is particularly apropos for legal settings, as well. Foucault (1990:61-2) suggests

that the confession is a ritual "that unfolds within a power relationship, for one does not confess without the presence (or virtual presence) of a partner who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it, and intervenes in order to judge, punish, forgive, console, and reconcile…" His statement captures well the dynamics of both asylum hearings and sex offender evaluations, where individuals are compelled to reveal the most intimate details of their lives for judgment by an authority figure that possesses the power to determine the credibility of the claimant's utterances. As this description suggests, the confession depends on a process of interpretation by an interlocutor. In other words, it is, like high energy physics, a science of signs. Moving back into the realm of psychiatry, Knorr Cetina (1999:40) asserts that,

> Analysis is the progression from outward signs (the patient's symptoms) to the motivating forces that are the elements of psychic activity. Unlike the previous type of science, psychoanalysis does not process material objects but rather processes *signs*. The office ritual of the couch and the way inquiry is conducted produces these signs. When they elicit and interpret these signs, psychoanalysts are *reconstructing the meaning and origin of representations*.

Thus, eliciting a sexual narrative is a process of producing signs that must be placed in the context of a particular theory to gain much meaning. In other words, narrative is a form of negative knowledge.

On the other hand, early medicine and sexology relied heavily on the body and physical signs of difference to identify sexual "deviants," often understanding homosexuals to be a "third sex" or degenerates. Therefore, many sexologists sought physical signs of difference on or in queer bodies by measuring body parts and positing that homosexuals had different voice, hair

growth patterns, musculature, and skin than heterosexuals. This approach located sexual difference on and in the body and, like scientific racism, depended on biological determinism to position sexually "deviant" bodies as evolutionary "throwbacks" that were less developed than "normal" men and women (Somerville 2000; Terry 1999).

Despite the commonalities with scientific racism, most sexologists were sympathetic to homosexuals and believed that homosexuality should not be criminalized because it was an inborn abnormality, or if it was acquired that it was nearly impossible to change. To this end, they also pursued lines of inquiry that look more familiar to us today, including attempts to trace the heredity of homosexuality and to analyze hormones, which they hoped would prove the inborn nature of homosexuality. Given this historical trajectory, it is perhaps no surprise that we still strongly associate the body with explanations of sexuality. Indeed, the more sophisticated techniques of modern science that have given rise to pronouncements of a "gay brain" or a "gay gene" reinforce this view. Similarly, psychological studies attempting to identify how gay men's faces, voices, or walks differ from straight men's rest easily with notions of the embodied nature of (homo)sexuality.

Though these studies often garner sensational headlines announcing the discovery of the "gay gene" and the like and are held up as proof of the immutability of homosexuality by the LGBT movement, the scientific consensus is far less settled. The landmark "gay brain" and "gay gene" studies, for instance, have never been replicated, and some researchers have even found results contradicting the original studies. Research examining the same phenomena often come to conflicting conclusions, and average effect sizes are generally quite small (Longino 2013). The best research today suggests that sexuality is most likely a product of nature and nurture, though researchers in different disciplines seldom even agree on what counts as nature and what

as nurture (ibid.). Maternal hormonal fluctuations, for example, may count as an environmental factor for a behavioral geneticist but a biological factor for a sociologist. However, these controversies are mostly hindrances to the legal process, which must arrive at a decision at the end of a hearing, regardless of the settled or unsettled status of the science. It must, in the face of uncertainty and given the evidence available, make a pronouncement regarding someone's sexuality, and it must do so in a way that maintains the legitimacy of law—that is, it must appear objective. Given such uncertainty, how does this happen?

The remainder of Part 2 will be devoted to explicating precisely what kinds of evidence each area of law draws on, how those pieces of evidence are put together to make determinations of individuals' sexualities, and what consequences these divergent epistemological practices have for understandings of sexuality in each legal complex. Despite their differences, sexual determinations in both arenas are the dual product of 1) how someone talks about their sexuality and 2) how their body and bodily acts become performatively implicated as evidence in that narrative. However, institutionally specific epistemic logics position these two types of evidence—narrative and bodily—differently such that narrative predominates in asylum hearings while bodily evidence and quantified indicators reign in SVP proceedings. Sexuality is therefore materialized quite differently in each domain with consequences for how sexuality is understood ontologically. That is, is it intrinsically identifiable in or through the body, or does knowing sexuality depend on social context?

Chapter 4
Asylum Seekers and Signs of Queerness

Evidence of sexuality for asylum seekers is heavily focused on the claimant's narrative. Indeed, the law allows for an asylum seeker's credible testimony to sustain his burden of proof without corroboration.[127] In practice, many adjudicators still want corroboration, and, in practice, many things aside from a claimant's narrative—including stereotypes and bodily demeanor—may play an evidentiary role. However, this chapter will show that narrative evidence tends to carry the day in asylum proceedings, and attempts to rely on purported bodily indicators of sexuality have been rebuffed by courts.

The Sexual Identity Narrative

For asylum seekers, the key aspect of a credibly constructed sexual narrative revolves around identity and its development.[128] The overall structure of the stories offered in asylum claims often follows the Western "coming out" narrative. As Berg and Millbank (2009) conclude from their study of Australian and Canadian LGB asylum claimants, those most likely to be successful are those who conform to Western notions of linear identity development and a fixed sexual identity. This is echoed in my own field work, where lawyers typically guided their clients through a series of questions meant to elicit just such a trajectory of identity development. Interviewees consistently reiterated the importance of this narrative. Victoria Neilson, former Legal Director for Immigration Equality, offers an illustrative response:

---

[127] 8 CFR § 1208.13(a)

[128] It is helpful to think of narratives, as Ewick and Silbey (2003) suggest, as collaborative productions between speaker and audience whereby subjective experiences are translated into common vernacular by using known cultural schemas. Narratives can thus connect the particular to the general.

> The most important thing is, with any kind of asylum case, the person's own testimony. The more you can get the applicant to talk about their own internal coming out experience, how he or she first began to realize they were gay, what their first romantic encounter was, how that came about, how that made them feel. If they had a more significant relationship, how that came about, what made that feel special for them, what lengths they had to go to keep that hidden if they were in a country where that would have put them in jeopardy. I think the more you can get someone to talk about those details the more credible they sound.[129]

The importance of a petitioner's narrative is similarly echoed in judicial decisions. The 2005 case of William Kimumwe demonstrates this point:

> The IJ's [immigration judge's] conclusion that Kimumwe has not established eligibility for asylum is simply not supported by the record. At the outset, I take issue with the IJ's statement that Kimumwe presented no objective evidence to confirm his homosexuality. It is unclear what type of evidence would satisfy the IJ. Kimumwe testified he was openly gay. He stated he realized he was gay when he was seven years old. He presented a letter from a Kenyan orphanage administrator, Kemba Andrew Waakl, indicating that Kimumwe was gay. After carefully perusing the record, I have found no evidence whatsoever that would contradict Kimumwe's claimed sexual orientation and accept that he is openly gay.[130]

---

[129] Author interview with Victoria Neilson

[130] *Kimumwe v. Gonzales*, 431 F.3d 319, 323-24 (8th Cir. 2005). This particular statement comes from Judge Heaney's dissenting opinion, but the majority also found Kimumwe's sexuality to be credible.

Here, the court emphasizes the importance of Kimumwe's testimony that he was openly gay and, furthermore, that the court accepts that testimony as a piece of *objective* evidence.

Also often part of these narratives is the movement from closeted in one's home country to "out" in the U.S. This movement "coincides with unidirectional spatial migration towards the nation of refuge, culminating in the liberating moment of the refugee hearing where the claimant can officially 'come out' to the state who will protect her and allow her the freedom to be openly 'gay' 'lesbian' 'bisexual' or 'transgender'" (Murray 2014:453). Savvy lawyers know this trope and will often conclude their questioning with queries designed to get at both the claimant's arrival at her "final" sexual identity and the sense that only the U.S. context can allow such liberatory sexual expression. For instance, Maria, a lesbian claimant from Mexico, said in response to being asked why she wanted to stay in the U.S. that "I want you to give me the opportunity to be me," and Liu, a gay Malaysian asylee, said that being in the closet would be "going against who I am."[131] In order to further draw out this idea, the final question from many lawyers will be, "If you are allowed to stay in the United States, what do you hope to do?" or "What will happen if you are not allowed to stay?" Kwame, a gay Togolese asylum seeker, offers an illustrative reply to the latter question: "I would have a miserable life. I would have to watch my back constantly, and I would probably end up in jail or killed. I want to have a family with another man someday, and I could not do that in Togo."[132] Petitioner's responses almost always include hopes of finding a partner, living openly as gay, and often having a family.

Implicit in this line of questioning is the assumption of a teleological development of sexual identity resulting in one final endpoint. However, this is not always how sexual identity

[131] Author field notes.
[132] Author field notes.

develops, even in the U.S. (Diamond 2008). People may identify as heterosexual but have same-sex sexual contact. Others may come to a queer identity without having same-sex sex. Still others may shift identities over time, even moving around from straight to gay to unlabeled and beyond. So while more typically "Western" narratives are common, a variety of narratives can achieve credibility when framed properly.

Though many critics have denounced the asylum process for requiring an "immutable" identity, in setting the standard for what constitutes a "particular social group," the BIA stated in *Matter of Acosta* (1985) that "whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences." This definition is more flexible than many critics assume. One could include religion, a category explicitly protected by the 1980 Refugee Act, in this definition of immutable. Even though one can change religions, it is protected as a trait that one should not be compelled to change. Sexual orientation is similar in this respect. In fact, the USCIS-Immigration Equality training module for asylum officers adjudicating LGBTQ asylum claims makes this clear in its definition of a "particular social group": "the group is comprised of individuals who share a common, innate characteristic – such as sex, color, kinship ties, or past experience – that members cannot change or… the group is comprised of individuals who share a characteristic that is so fundamental to the members' identity or conscience that they should not be required to change it" (USCIS 2011:16). The manual goes on to state that asylum officers can choose whether to classify sexual orientation, gender identity, or intersexuality as either innate or fundamental but that both characterizations are protected.

Bisexual claimants frequently disrupt preconceived notions of sexuality as either heterosexual or homosexual and fixed. As the Immigration Equality Asylum Manual states of bisexual petitioners, "Asylum adjudicators often want the issues in cases to be black and white. It is not hard to imagine an asylum adjudicator taking the position that if the applicant is attracted to both sexes, she should simply 'choose' to be with members of the opposite sex to avoid future persecution." [133] While questioning José Lopez, a bisexual Guatemalan man whose hearing I observed, the DHS attorney asked, "So being with a man is something you can control or not?" to which José, slightly confused by the question, answered yes. During redirect, however, his lawyer corrected the confusion:

> Lawyer: "The government attorney asked you earlier if you can control who you're with, and you said yes. But you can't control how you feel, right?
>
> José: "No."
>
> Lawyer: "And how do you feel?"
>
> José: "I notice pretty girls, but I am more attracted to men."[134]

José's lawyer here shifted the focus from a concrete act (being with a man) to the more subjective frame of feelings and attraction and was successful in getting her client recognized as bisexual by the court. When I asked Victoria Neilson if she had ever had a client who had past heterosexual relationships and how she went about showing that the client could still be queer, she offered a response that I quote at length for its edifying power:

> Sure, that comes up with some frequency. I think… some people are bisexual, and… I think that identity is probably more misunderstood than L, G, or T. I think there's sort of

[133] Available online at http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/
[134] Author field notes.

> a different narrative if somebody had a, say, heterosexual marriage in the past. One is like, "Well I didn't come out until later in life," which seems pretty easy to comprehend. Or it could be like "I kind of always knew I was gay, but I tried to marry to see if that could make me 'normal,'" or, "I tried to marry to please my family." I think that narrative works. I think a true narrative that's a little harder for an adjudicator to understand is, "Yes, I loved my husband, and that could've worked. But it didn't just because of our personalities. And now I'm in love with a woman, and that's who I want to be with the rest of my life." I think that is also true in some instances, but I think that can be harder for an adjudicator to understand, how like your sexual orientation is immutable and fundamental to identity if it's mutable.[135]

Though Neilson admits that bisexual claims are often more difficult, they are by no means impossible. Indeed, all of my interviewees had successfully represented bisexuals or claimants with past heterosexual experiences—sometimes even spouses and children. These cases depend heavily on claimants' credibility and how they will be perceived in their home country. As immigration attorney Michael Jarecki stated: "[T]here's just a heteronormative understanding of lifestyle in a lot of these countries and then there's 'other.'"[136] Thus, if one can show that a bisexual will be perceived as "other" in his/her home country, claims are winnable.

Some appellate decisions also suggest that the immutability standard has some flexibility. In 2005 the Ninth Circuit ruled on the case of Miguel Pozos, a (possibly) gay man from Mexico. Pozos admitted homosexual conduct while living in Mexico (part of his persecution claim included being forced to work as a prostitute) but insisted that he had not engaged in any

[135] Author interview with Victoria Neilson.
[136] Author interview with Michael Jarecki.

homosexual sex since coming to the United States. He testified that he continued to have sexual fantasies about both men *and* women and disavowed a homosexual identity. The decision states that "Both Pozos and the social worker who examined him testified that they did not know what Pozos's sexual orientation was," and later that "[Pozos] was diagnosed with sexual aversion disorder, and has eschewed sexual relations with either gender."[137] The court ultimately granted Pozos asylum based on imputed homosexual identity without ever settling on what his sexual orientation was. This case is unique but suggests that rigid sexual identity categories viewed as immutable are not always necessary for successful asylum claims, nor are linear sexual identity development narratives.

As these examples suggest, claimants are increasingly able to challenge entrenched understandings of sexual identity by enlisting the help of specialized lawyers and experts, who know how to shape unfamiliar narratives for American adjudicators and can testify to the diversity of sexual identities and experiences around the world. Francesca Polletta (2006) asserts that we understand stories in relation to familiar plotlines we have heard before, what she calls canonicity. New stories are therefore heard against a backdrop of familiar ones, and people try to fit new narratives into familiar plots. Familiar storylines thus create a common-sense belief system that can act as a barrier to those trying to effect social change. However, we also expect multiple meanings in narratives, which leaves room for individual interpretation, and this interpretability goes against the force of canonicity. Because of these characteristics, storytelling has the potential both to reinforce and challenge the normative order depending on the structural and cultural context.

[137] *Pozos v. Gonzales*, 141 Fed. Appx. 629, 632 (9th Cir. 2005).

An asylum applicant's story must do at least two things: convince an adjudicator that one is truly queer and demonstrate past persecution or legitimate fear of future persecution on account of that queer identity. As Jeffrey Alexander (2004) suggests, any successful cultural performance requires that speaker and audience share a common set of cultural codes, yet by simple virtue of being an immigrant, an asylum seeker is unlikely to share the same cultural codes as an immigration judge or asylum officer. Without this knowledge, or a lawyer with this knowledge, an asylum applicant's chances of success fall precipitously. Polletta and colleagues (2011:115) get at this issue at a more general level when they write: "Institutional personnel need a certain kind of story but need it be the client's story. The story must be at once conventional and authentic. For that reason, institutional personnel often coach clients on how to tell their stories properly." Susan Berger (2009) highlights this dynamic in her study of sexual orientation asylum claims where she finds that lawyers and other advocates sometimes help petitioners craft credible identities for presentation to immigration officials. Shannon Minter, Legal Director for the National Center for Lesbian Rights, describes the importance of having familiarity with the U.S. immigration system:

> It's not that people are fabricating or forcing their history into a particular narrative. It's helping them pick out from all the stuff that's happened to them and all the different, you know, infinite variety of detail and circumstance. They don't know necessarily what's relevant to an asylum officer, and…it's super helpful if they can have someone who knows what the process is and what an asylum officer is going to be interested in, help them be prepared with that information.[138]

[138] Author interview with Shannon Minter.

As Minter suggests, then, it may require assistance from someone familiar with U.S. cultural codes to translate some narratives into something recognizable to a U.S. audience. Returning to a consideration of the case of Geovanni Hernandez-Montiel introduced in Chapter 3 is helpful.

Hernandez-Montiel was a Mexican man who sought asylum in 1995 in the U.S. after being abused by his family and schoolmates and being raped and assaulted by the police. During his hearing, Professor Thomas Davies testified that different groups of homosexuals in Mexico face varying levels of abuse. Gay men who take the stereotypical "female" role, he stated, are subject to greater abuse and discrimination, and thus, "gay men with female sexual identities" constitute a distinct group in Mexico. The judge, however, found Hernandez-Montiel's social group to be "homosexual males who wish to dress as a woman [sic]" and concluded that his abuse was due to his choice to dress in women's clothing, not because he was gay. On appeal, the BIA agreed with the judge, classifying Hernandez-Montiel's social group as "homosexual males who dress as females" and further that "he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual."[139] The Ninth Circuit issued a decision in 2000 that roundly criticized both the judge and the BIA. Drawing on Professor Davies' expert testimony and a bevy of other social science research,[140] the court ruled that "gay men with female sexual identities" constitute a particular social group in Mexico: "Their female sexual identities unite this group of gay men, and their sexual identities are so fundamental to

[139] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1089 (9th Cir. 2000).

[140] The range of scholarship regarding sexuality cited is quite remarkable and ranges from legal scholars Susan Goldberg and Kenji Yoshino to anthropologist Gilbert Herdt to sociologist Martin Weinberg to the American Psychiatric Association and even Alfred Kinsey. A particularly notable passage citing an article by legal scholar Naomi Mezey suggests that we must separate the way we speak of sexual acts and sexual identities and, further, that the traditional heterosexual/homosexual binary is too restrictive (pg. 1094). The use of social science in *Hernandez-Montiel* is discussed more extensively in Chapter 3.

their human identities that they should not be required to change them."[141] The court further noted that "Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails."[142] Hernandez-Montiel was rescripted from a cross-dressing prostitute to someone with a fundamental sexual identity manifested through his physical appearance.

Some criticized this decision, claiming that the court conflated gender and sexuality. Sexualities scholars have argued for a distinction between gender and sexuality for some time (see e.g., Sedgwick 1990), so to suggest that sexuality manifests through gender presentation seems only to reinscribe stereotypes of feminine gay men and masculine lesbians. Critics subscribing to this view seem to prefer to classify Hernandez-Montiel as a transsexual.[143] This construction is overly narrow. First, Hernandez-Montiel self-identified as a "gay man with a female sexual identity."[144] Secondly, queer communities in Mexico use a variety of classificatory schemas to construct sexual identities, some based on gender role, others based on object choice, and still others, like Hernandez-Montiel's, that are a hybrid of the two (Carrillo 2002; Prieur 1998), and none of these necessarily map squarely onto institutionalized U.S. identity categories. Rather than conflating gender and sexuality, then, the decision sets a precedent for accepting sexual identities that are unfamiliar to Americans and pushes adjudicators to carefully consider cultural context.[145] Notably, Hernandez-Montiel's identity *did* require corroboration in the form

---

[141] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000).
[142] Ibid., 1094.
[143] Hernandez-Montiel's brief *did* say that he "may be considered a transsexual," though this seemed largely to be an attempt to make his identity legible to an American audience. The larger argument—and the one recognized by the Ninth Circuit—recognized Hernandez-Montiel as a "gay man with a female sexual identity."
[144] Author interview with Aaron Morris.
[145] Though one might note that this case could also be misinterpreted to suggest that Latin American sexualities are fully defined along gendered lines, risking a problematic neocolonial rendering of non-U.S. residents as "less modern" or "more traditional others."

of an expert witness, which is not unusual for an out-of-the-ordinary claim. Indeed, it is consistent with the notion of claimant's narratives as elicited *signs* that must be placed in a particular context to make sense. While the signs generated through the narratives of claimants with more recognizably Western identities may be easily interpreted by American adjudicators, it often takes an expert to provide the cultural context necessary to view "foreign" sexual identities as truly queer.

Cultural Context and the Interpretation of Narratives

Consistent with the notion of narratives as elicited *signs* that must be placed in a particular context to make sense, asylum claims always include information on conditions in the petitioner's native country. While some claims only use this information to corroborate assertions of persecution, many also provide cultural context for understanding sexuality cross-culturally. As one U.S. immigration judge stated:

> When you look at categories, and if a person identifies as queer or as bi or this or as that, what does that actually mean? . . . What you have to always do is really look very carefully at the information that exists about the culture and the country and the politics of the place the person's going to. And sexuality has very different nuances in these different countries.[146]

Similarly, sociologist Nielan Barnes, who serves as an expert witness in asylum claims, explained that she provides testimony "about identity development in a context where it's been repressed and contested, and so obviously it takes time and it's context specific."[147] She continued on to explain that non-U.S. queers may not offer consistently linear narratives that

[146] Author interview with retired immigration judge.
[147] Author interview with Nielan Barnes.

U.S. audiences are most familiar with, and may refer to themselves at various points as a gay male, a cross-dresser, or transgender, and may use those terms interchangeably. Her job is to explain "no, actually, this is part of the development of identity, and also for people who don't live in, say, white middle class USA or Europe that the coming out process looks entirely different and it means something entirely different."[148] Barnes thus emphasizes the importance that anthropological and sociological expertise may play in providing the necessary interpretive context for sexuality-based asylum claims.

The Ninth Circuit's decision in *Hassani v. Mukasey* (2008) lends support to Barnes' declaration. Hassani, a gay man from Iran, was denied asylum by an immigration judge based in part on the judge's assumptions about how a gay man would act. The judge found Hassani not credible based on those assumptions, and refused to allow his expert witness to testify to contextualize his testimony. The Ninth Circuit found this denial to violate Hassani's due process rights and granted him a new hearing, writing that "the record is peppered with the IJ's expressions of doubt where expert testimony might have bolstered Hassani's claims."[149]

Critics of the use of phallometry on asylum seekers also asserted the importance of cultural context in assessing individuals' sexualities. In its report criticizing this practice, the Organization for Refuge, Asylum, and Migration (2010:7) wrote:

> Human sexual response is highly subjective and varied, and differences in that response are magnified cross-culturally and among different sexual orientations and gender identities. It is therefore impossible to develop a single, standardized set of images to

[148] Author interview with Nielan Barnes.
[149] *Hassani v. Mukasey*, 301 Fed. Appx. 602, 604 (9th Cir. 2008)

accurately and objectively measure sexual response, particularly during plethysmographic testing.

The worldwide rejection of plethysmographic testing on asylum seekers highlights both the belief that sexuality, including arousal, depends on cultural context and the rejection of bodily evidence as the primary way of evaluating sexuality in asylum proceedings.

In sum, the above section demonstrates the importance of narrative and its interpretation for discerning sexuality in asylum claims. There is no assumption that sexuality is directly measurable by or accessible to adjudicators. Rather, carefully constructed stories about a claimant's attractions, feelings, and subjective identities contextualized within the petitioner's native culture act as signs or indicators of an underlying sexuality. As the next section shows, when judges have attempted to use bodily indicators, such as gender presentation or sex acts, as direct measures of sexuality, they have been largely rebuffed by appellate courts.

Bodily Acts and Gender Presentations

If, following Knorr Cetina, interpreting narratives represents the "negative," or indirect, method of measuring sexuality, then appeals to the body represent the "positive," or direct, approach. The previous section argued that narratives are the primary means of generating evidence to classify sexuality in asylum claims; this section will reiterate that point by showing how alternative forms of evidence are routinely rejected or circumscribed. However, I first must briefly address the ways by which the body *does* come into play for asylum seekers. Although precedent and agency guidelines prohibit using stereotypes or sex acts as direct indicators of a claimant's sexuality, petitioners and their lawyers still sometimes draw on these "common sense" conceptions of sexuality when making arguments.

Perhaps the most prominent way by which the body becomes important for asylum claims is through the use of gendered stereotypes to demonstrate queerness. Attorneys often describe their clients as gender non-conforming when it is true, and they do so for a reason.[150] As Aaron Morris states, "[S]tereotypes are my best friend and my worst enemy. If you walk in and you are like a male dancer hair stylist who is especially effeminate and meets the expectation of what a gay guy might look like, probably they're not going to be that concerned about your sexual orientation." On the other hand, he continues, "If you are more of a linebacker…who has either naturally developed almost no stereotyped sexual orientation aspect or attribute or has tried very hard not to do those things, then it's harder."[151] Claimants may even use such stereotypes when their culture subscribes to them. Kwame Twumasi, a gay Togolese asylum seeker, did just this during his testimony: "I was like a girl. Only difference is I have a penis."[152] Moreover, gender non-conformity often plays into persecution claims for queer claimants, as the case of Dennis Vitug (*Vitug v. Holder* 2013) demonstrates:

> From the age of three, Vitug knew he was 'different.' He was effeminate and played with Barbie dolls and other toys meant for girls, which his family resented. Throughout his childhood, Vitug was teased and bullied by his classmates for 'being a sissy'…In high school, Vitug continued to be teased and bullied by his classmates because of his perceived effeminate behavior and homosexuality. The principal called Vitug into his

[150] In six of the twelve hearings I observed, claimants described themselves or were described by their lawyers as gender non-conforming.
[151] Author interview with Aaron Morris.
[152] Author field notes.

> office numerous times, threatening to expel him if he did not change and 'act accordingly.'[153]

Even so, being an effeminate man does not guarantee a successful claim, and being masculine does not guarantee an unsuccessful one. As all of my interviewees proclaimed, and my observations corroborated, being "feminine" may help, but regardless of a claimant's gender expression, it is the overall narrative and evidence that make or break a claim. As Keren Zwick, Director of the National Immigrant Justice Center's LGBT practice, said, "it's consistency of behavior with a story."[154] Immigration attorney Daniel Tenreiro echoed this sentiment:

> I know there's been some controversy, and I totally disagree with some of the—like a *New York Times* article that was out there a few years ago that basically said you have to femme it up. I think, [if] you're a drag queen, then by all means be a drag queen and be who you are. But if you're not, I think that can actually really backfire because it's not going to be believable.[155]

As Tenreiro's quote suggests, *if* the body comes into play in asylum claims, it must fit within the overall narrative presented. Reiterating the importance of contextualizing all evidence of sexuality and gender, Heather McClure, an early advocate for LGBTQ asylum and anthropologist who served as an expert witness for many years, explained that during the formative years of LGBTQ asylum law, judges would say things like "you don't look gay. You look like a manly man to me." She therefore often explained that "codes of masculinity are different in different countries,"[156] and that basing decisions on U.S.-centric gendered

---

[153] *Vitug v. Holder*, 723 F.3d 1056, 1060 (9th Cir. 2013)
[154] Author interview with Keren Zwick.
[155] Author interview with Daniel Tenreiro.
[156] Author interview with Heather McClure.

stereotypes was inappropriate. Appellate courts now routinely strike down decisions using such logic (Vogler 2016).

In the particularly illustrative and highly cited *Razkane v. Holder* (2009) the Tenth Circuit vacated a judge's asylum denial based on inappropriate use of stereotypes to discredit the claimant. The unanimous decision included a strongly worded admonishment of such arbitrariness in the law:

> To condone this style of judging, unhinged from the prerequisite of substantial evidence, would inevitably lead to unpredictable, inconsistent, and unreviewable results. The fair adjudication of a claim for restriction on removal is dependent on a system grounded in the requirement of substantial evidence and free from vagaries flowing from notions of the assigned [immigration judge]. Such stereotyping would not be tolerated in other contexts, such as race or religion.[157]

In that same case, the government lawyer in immigration court asked Razkane's country conditions expert what would happen to someone who "looked gay" in Morocco, to which he responded "Ma'am, I'm sorry, I can't help you with that. I just don't know what it means to look like a gay."[158] Such statements work to debunk gender-based stereotypes and have moved evidentiary standards in asylum proceedings away from a focus on the body as a source of knowledge about sexual orientation.

This shift has also been institutionalized in the training module for asylum officers co-designed by USCIS and Immigration Equality. Seeking to address the issue of sexualized stereotypes, the manual states, "Some adjudicators mistakenly believe that social visibility or

[157] *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009).
[158] *Razkane v. Holder*, 562 F.3d 1283, 1286 (10th Cir. 2009).

distinction requires that the applicant 'look gay or act gay.' In this context, social visibility or distinction does not mean visible to the eye. Rather, this means that the society in question distinguishes individuals who share this trait from individuals who do not" (USCIS 2011:16). The manual goes on to explain that applicants may express themselves differently than LGBTQ people in the United States and may claim to be visible as a sexual minority in his or her home country even though s/he does not seem stereotypically gay by U.S. standards. It further elaborates that cultural cues regarding sexuality vary from culture to culture and that some applicants may not even identify with labels such as "gay" and "lesbian." Addressing this issue during our interview, Victoria Neilson said, "[S]omebody might not come in and say, 'I'm a transgender woman from Ecuador.' She might just come in and say 'I'm a woman' or 'I'm an effeminate gay man' even though they look like a woman...they don't have to adopt the… politically correct New York/San Francisco language to have an identity that should be protected."[159] As this suggests, it is not necessary to adopt a Western identity or enact a stereotypical gender performance to make an asylum claim, and adjudicators are increasingly aware that they cannot base universal notions of what it means to be gay on Western stereotypes.

The body often also comes into play for asylum seekers when actual sex acts are considered. However, as the following section shows, it is really a *narration* of the body and sex acts that is considered by courts, and is therefore less a form of "positive" knowledge than another type of "negative" narrative evidence consistent with the identity narratives described above. Like stereotypes, sex acts are more likely to be deemed relevant when they are part of a

[159] Author interview with Victoria Neilson.

larger narrative of discovering and expressing one's sexual identity, as we saw in Kofi's asylum hearing discussed in the Introduction.

In other situations, adjudicators explicitly reject any reliance on sex acts as a requirement for proving sexual orientation. After an immigration judge deemed Ingrida Mockeviciene "at best…a non-practicing lesbian" and rejected her asylum petition, the Eleventh Circuit expressed its skepticism with such reasoning, asserting that, "The fact that Mockeviciene had not been in a recent relationship with a woman is not probative of her sexual orientation."[160] In another case before the Second Circuit, the court rejected the immigration judge's rationale that "no one would perceive Ali as a homosexual unless he had 'a partner or cooperating person,'"[161] a statement that suggests people can only identify gay people if they are having same-sex sexual relations. Once again emphasizing the importance of placing indicators of sexuality in context, the court went on to write that the judges comment "appears to derive from stereotypes about homosexuality and how it is made identifiable to others. It is certainly not grounded in the record, which, as IJ Vomacka noted in another part of the decision, suggests that 'an unmarried adult man with no children would be suspected of being a contemptible homosexual in Guyana.'"[162]

Government attorneys and asylum officers do sometimes continue to ask questions about or base arguments on sex acts, despite consistent refusals by judges, and especially appellate courts, to accept such evidence as probative. For instance, I witnessed a government attorney argue that an asylum seeker had provided no evidence of his sexuality except his own "self-

[160] *Mockeviciene v. Attorney General*, 237 Fed. Appx. 569, 574 (11th Cir. 2007).
[161] *Ali v. Mukasey*, 529 F.3d 478, 491 (2nd Cir. 2008).
[162] *Ali v. Mukasey*, 529 F.3d 478, 492 (2nd Cir. 2008).

serving testimony" and that he had failed to obtain corroborating letters from the "only two people in the world who could unequivocally prove that he is gay."[163] In the attorney's argument, the only two people who could prove the claimant's sexual orientation were those with whom he had sex. The judge rejected this argument.

Recent guidance to asylum adjudicators now explicitly directs them to avoid asking probing and inappropriate questions about sex acts. United Nations guidance instructs officials that, "Enquiries as to the applicant's realization and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant's credibility" (UNHCR 2008:17). Likewise, USCIS (2011:34) training states that "The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about 'what he or she does in bed' is never appropriate."

Overall, these findings suggest that the body has become less important in asylum law over time.[164] Stereotypes and "common sense" cannot serve as the basis for a judge's decision, and though sex acts may be taken to signal queer identities at times, it is also clear that sex acts are not *required* to make a valid asylum claim and may not be enough to sustain a claim on their own. Indeed, guidance to adjudicators instructs them to avoid overly intrusive questions about sex acts in favor of questions about one's felt identity. Moreover, when sexual acts become part of a claim, they are not necessarily taken as *direct* evidence of one's underlying sexuality. Rather, like issues of gender non-conformity, sex acts are contextualized within larger narratives

[163] Author field notes.

[164] This may not be true when it comes to proving injury, however. As Fassin and D'Halluin (2005) note, the body serves as a source of truth in asylum claims for petitioners seeking to prove physical harm as a result of their persecution. Courts may want to see medical documentation and even the scars left by physical assaults. Indeed, Kwame Twumasi demonstrated this during his hearing when he lifted his shirt in court to show the judge scars on his back from being whipped.

and thus become further signs to be interpreted. For instance, Kofi's attempted intercourse with a woman, described above, was not dispositive of heterosexuality. Rather, it was placed in a larger narrative trajectory before conclusions about Kofi's sexuality were drawn. This is consistent with the overall finding that narrative evidence is the most determinative for asylum claims. As we will see in the following chapter, however, the process of measuring and classifying the sexualities of sex offenders looks quite different.

Chapter 5
Sex Offenders and the Detection of Deviance

Just as with asylum seekers, narrative and bodily evidence come together to support legal claims about sex offenders' sexualities. Unlike the "negative knowledge" approach found in asylum law that heavily weighs a claimant's identity narrative as a sign of an unobservable inner sexual self, however, much of the evidence in the evaluation of sex offenders depends on the assumption that one can directly measure sexuality. Signs themselves become data. An erect penis during a PPG examination *is* sexual attraction. Sexuality itself is materialized through the technology of the PPG. Similarly, sexual danger is given concrete form and quantified by actuarial risk assessments. While these assessments are not straightforward materializations of sexuality in precisely the same way as PPGs, they nevertheless purport to consider a bundle of indicators related to sexual violence and return an objective measure of an offender's future sexual risk. Overall, there is a greater effort in sex offender evaluations to distill or transform signs of one's sexuality into direct and positive measures of that person's sexuality. In other words, the process of interpreting indicators is not seen as interpretation so much as direct reading. This statement applies with different weight to the various types of evidence produced for evaluations, and I will consider each in turn in this chapter, beginning with the sexual narrative.

Narrating Deviance

In civil commitment hearings for sexually violent predators (SVPs), the sexual narrative consists of two key elements: the master file and the clinical interview, both of which are presented via expert witnesses.[165] The "master file," as it is referred to in Illinois, includes all of

[165] Both the state and defense may present expert witnesses.

the offender's records in the state's possession, which generally encompasses criminal, disciplinary, and medical records, and importantly, mental health and sex offender-specific treatment records. Anything an offender says in treatment becomes subject to court review, which can often incentivize offenders to avoid sex offender-specific treatment for as long as possible so as not to provide details that may be used against them in SVP hearings. Finally, though polygraphs and PPGs are not generally admissible in civil commitment proceedings, they may partially undergird an expert's testimony, in effect becoming part of the record without ever being formally acknowledged. Even if they do not influence the initial commitment hearing, polygraphs and PPGs will ultimately become important in determining an offender's progression through treatment, risk level, and potential for release.

The aptly named "master file" is perhaps the perfect illustration of what sociologist Dorothy Smith (1984:61) calls "textually mediated forms of ruling." It consists of a set of texts that allow details of an offender's biography to be crystallized, removed from their local context, and transported across time and distance. This file is the most important piece of any evaluation, for it forms the basis of the actuarial risk assessment and often of the psychiatric diagnosis, as well. In many ways, the master file allows the creation of "objectified forms of consciousness and organization" (Smith 2005:227). A psychologist tasked with evaluating a potential SVP may never actually interact with that person. It is not unusual for an evaluator to complete a risk assessment and give an offender a psychiatric diagnosis without ever talking to him because many offenders' lawyers instruct them not to speak with the state-appointed experts. Because of the offender's right to refuse to speak with the state psychologist, and thanks to the design of the actuarial instruments, the evaluation procedure is *designed* to make human interaction unnecessary for the legal process.

For example, in the SVP proceedings that I observed for Jordan Lowe, the state called two psychologists, one of whom had used the master file and conducted a clinical interview to arrive at his final assessment, and another who had based his conclusions only on the master file. Both produced the same actuarial risk scores, and both gave the same DSM diagnoses.[166] Dr. Brucker, who had conducted a clinical interview with Mr. Lowe, even testified that he first produced his report before speaking with Mr. Lowe (who had refused the initial interview on lawyer's advice), and that his final report completed after the clinical interview reflected only "slight" modifications: the interview did not change his ultimate conclusions. Furthermore, Dr. Brucker's responses to questions from both the state and defense drew almost exclusively on information from Mr. Lowe's master file. Both Dr. Brucker's and Dr. Wood's diagnoses of "paraphilic disorder otherwise specified: non-consent" depended only on master file information. During his deposition, Dr. Wood also mentioned that Mr. Lowe's PPG results figured into his conclusion, even though such tests are not admissible in SVP hearings in Illinois.[167]

Actuarial risk instruments provide an even clearer picture of how human interaction is rendered redundant in sex offender evaluations. As discussed in Chapter 2, actuarial risk assessments work by comparing an individual to aggregate data collected on a large sample of offenders along an array of factors determined by researchers to correlate with recidivism rates. Most actuarial tools are designed to use only information available from official documents. The Static-99R—the most widely used actuarial risk tool in the U.S.—is a ten-item assessment that

[166] Dr. Wood, who had not conducted a clinical interview with Mr. Lowe, gave the additional "possible" diagnosis of sexual sadism disorder, but stated that he needed more information to be sure.
[167] Dr. Wood's deposition became the subject of an extensive sidebar, during which the jury was dismissed. So discussion of the PPG was not introduced to the jury. However, it clearly informed Dr. Wood's opinion, at least partially, yet remained unacknowledged as a diagnostic tool.

requires information about the offender's demographics, criminal history, and victim information. An evaluator simply plugs in the answers to these questions, and a risk score ranging from -3 to 12 is produced along with a corresponding group recidivism rate. To obtain a recidivism prediction, an evaluator must choose the correct reference group for the offender, of which there are four for the Static-99R: routine, non-routine, preselected for treatment need, and high risk/high need. For instance, the predicted sexual recidivism rate for an offender who scored a six and was placed in the high risk/high need category (as most offenders being considered for SVP status are) would be 31.2% over five years and 41.9% over ten years. Through this process, an offender's biography is distilled into a set of numbers. This represents the process of creating ordered psycho-legal knowledge from a vast set of observations that may have several possible interpretations.[168] In essence, the Static-99R acts as an inscription device, and as Latour and Woolgar (1979:51) point out, "inscriptions are regarded as having a direct relationship to the original substance." In this case, the risk score, label, and predicted recidivism rate are taken to be directly related to the offender, and particularly to his sexuality and sexual risk.

Although it is often not completed in time for civil commitment proceedings, sex offenders must also provide a "sexual history" narrative. As the previous discussion illustrated, asylum seekers do something similar, but the questions they address typically inquire about their first recollections of same-sex attractions and perhaps sexual encounters. The interrogations sex offenders face delve much deeper into their intimate thoughts and behaviors, including the types of sexual fantasies they have and what they think about when masturbating. Significantly, sexual

[168] This is comparable to the process that occurs in a scientific lab, as described by Latour and Woolgar (1979). Scientists are confronted with enormous amounts of data that must be turned into ordered knowledge. Also see Star (1985).

histories of sex offenders often employ the polygraph, as well, which seeks to "objectively" measure via the body one's subjective testimony.

The polygraph works off the assumption that lying causes emotional changes that result in physiological responses in the body and, further, that we can mechanically read and interpret those bodily responses. It assumes that lying causes unique emotional, and hence physiological, changes that truth-telling does not—in other words, that deception is emotionally more difficult than honesty. In the 1923 *Frye* decision ruling an early version of the polygraph inadmissible in court proceedings, the D.C. Circuit Court skeptically wrote that "the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure" (quoted in Lynch et al. 2008:71). Polygraphs remain inadmissible in most legal proceedings today (Shniderman 2011). Nevertheless, polygraphs have a long history of use with sexual "deviants." Perhaps most notoriously, the polygraph was used during the "Lavender Scare" to ferret out suspected homosexuals working for the U.S. government (Alder 2007). Beginning in the late 1980s, Oregon became the first state to routinely use the polygraph in the treatment and management of sex offenders (Balmer and Sandland 2012), and by 2009, 79% of probation programs in the U.S. reported using polygraphs (McGrath et al. 2010). Thus, despite scientific controversy and its inadmissibility in court, the polygraph enjoys widespread use in the management of sexual offenders in the U.S., and courts routinely uphold its use for this population.

Though estimates of the polygraph's accuracy range from just better than chance to upwards of 90%, as Alder (2007) points out, the polygraph works less because of its scientific accuracy and more because people *believe* it works. It is thus less of a scientific test of truth than a tool for facilitating disclosure. Sidestepping questions of scientific validity, then, many

professionals who work with sex offenders subscribe to a view similar as Ahlmeyer and colleagues (2000:125): "the polygraph is not a test, but a treatment tool designed to elicit a client's admissions to past behaviors and monitor current behaviors. Many therapeutic interventions that do not meet the standards requiring adequate documentation of practice standardization, reliability, and validity, are nonetheless effectively utilized in the field." This opinion was echoed in a session devoted to polygraph use at the 2015 annual meeting of the Association for the Treatment of Sexual Abusers (ATSA), where the presenters delivered the take-home message that polygraphs can help obtain information—about number of victims, sexual acts performed, continuing fantasies, etc.—that you might not otherwise get. In fact, they suggested that offenders are fourteen times more likely to report data useful to assessment, treatment, and supervision when given a polygraph examination. Some in the audience voiced their reservations about using polygraphs and felt instead that they could get the same information by building a trusting therapeutic relationship with the offender, which is a real concern for many treatment providers given that, to the extent a polygraph is seen as necessary, it tends to send the message that the offender is seen as inherently deceptive. However, in the context of rapid legal decision-making, there is generally little time to develop a trusting relationship between a therapist and an offender.[169] Rather, adjudicators and evaluators often want a quick snapshot of an offender's sexual behavior or his compliance with treatment and/or probation conditions.

One common use of the polygraph involves the "sexual history interview," which an offender may complete at one or more various points on his journey through the legal system.

[169] For SVP evaluations, for instance, state evaluators, if they conduct a clinical interview at all, typically spend only about one to two hours speaking with the offender.

ATSA provides guidelines for conducting sexual history clinical interviews that many states adopt either fully or partially.[170] It suggests that a sexual history cover at least the following: history of sexual experiences, nature and frequency of sexual practices (including masturbation and risky sexual activities), paraphilic interests and behaviors (both abusive and non-abusive), history of sexually abusive behaviors, information about victims, context of abusive behaviors, and more (ATSA 2014:20-21).

Although treatment, including polygraph examination, is ostensibly voluntary while incarcerated or committed, an offender's refusal to submit to a polygraph may result in adverse repercussions. In a series of cases from Kansas, prisoners brought suit against the state for "withholding privileges" after their refusal to cooperate with treatment, including completing polygraph and PPG testing.[171] In all three cases, the courts sided with the state, determining that the prison's interest in rehabilitation outweighed the prisoners' privacy rights and, furthermore, that the prison was within its right to "withhold privileges" for refusal to participate in a voluntary program, even when "withholding privileges" included actions that seemed punitive, such as being sent to a higher security facility. Similarly, SVPs in Illinois generally will not be considered for conditional release until progressing to at least Stage 4 of treatment.[172] To move from Stage 2 to Stage 3, however, an offender typically must pass a sexual history polygraph.

Once offenders are released into the community, completion of sexual history polygraph examinations usually becomes mandatory as part of treatment. Dr. Donya Adkerson, a treatment

[170] Illinois has adopted the ATSA guidelines with almost no changes.
[171] *Lile v. McKune* (1998), 24 F. Supp. 2d 1152; *Pool v. McKune* (1999) 267 Kan. 797; *Searcy v. Simmons* (2000), 97 F. Supp. 2d 1055.
[172] There are five stages of treatment in the model used by the Illinois civil commitment program. SVPs are sometimes allowed to complete the fifth stage in community treatment under supervised release.

provider and risk evaluator in Illinois, elaborated on what concerns her when conducting a sexual history:

> So what our program looks for in a sexual history test is clarifying information that's going to impact safety planning… So what we're looking at—is there a history of sex beyond what we already know? Is there a more extensive history of sexual offending against children that's going to suggest that pedophilic orientation? Have they offended against males as well as females because that increases the risk level? Have they offended against strangers? Another factor that increases risks. Have they done other kinds of offending that we don't know about? So we're trying to get those parameters together that are going to help us do the best safety planning with the client to have a better understanding of their risk level.[173]

Like testimonies from asylum seekers that seek to construct a developmental narrative, sexual history interviews with sex offenders attempt to create a fuller picture of an offender's path to sexually deviant behavior. Unlike asylees' stories that concentrate on *identity*, however, sexual history interviews are concerned primarily with *behavior* and *desire*. Although sexual offenders are asked about sexual behaviors and desires, they are in effect supplied an identity. Just as the sodomite ceased being a temporary aberration and became the "homosexual" through his inscription in medical discourse (Foucault 1990), so today do "psych" professionals generally consider many paraphilias, like pedophilia or sadism, to be lasting orientations. In fact, the DSM

[173] Author interview with Donya Adkerson.

does not allow "pedophilic disorder" to be classified as "in full remission" as it does for other paraphilias.[174] When I asked Dr. Travis why this was the case, he responded as follows:

> Because that is one paraphilic disorder that is all about attraction to a particular…The thing about pedophilia is, it's not a desire to do a certain act or like something where your stress builds up and then you have to relieve it by showing yourself or, you know, get the excitement of looking in somebody's secret life when they don't know you're there…It would be like me having heterophilic disorder in full remission at some point, you know?... I'm terminally straight. And people who [are] aroused mainly by children, they're terminally that: aroused by children.[175]

Because these sexual subjectivities are highly medicalized and criminalized (Kunzel 2017; Mansnerus 2017), sex offenders can rarely prevent their narratives from being subsumed into these dominant discourses in the way that asylum seekers can sometimes successfully push against canonical understandings of sexuality. Through the sexual history confessional, sex offenders supply the details that allow state and medical officials to classify them as both criminal and mentally abnormal. Whereas asylum seekers may narrate and enact a particular performance of identity, the polygraph engenders—and even forces—the performative enactment of a deviant identity for the sex offender.

Another frequent use of polygraphs is the "maintenance test"—that is, a polygraph examination to ensure that an offender is abiding by the terms of his probation or supervised release and is not engaging in any behaviors that might lead to re-offense. Maintenance tests are

[174] Notably, a "typo" in the DSM-5 referred to pedophilia as a "sexual orientation." The APA released a correction stating that it should have read "sexual interest."
[175] Author interview with Richard Travis.

often legally mandated as a condition of an offender's release from prison, and in Illinois they typically take place every six months (generally at the offender's expense). Though offenders have challenged this condition in courts around the country, judges routinely uphold it, generally giving the rationale that it is reasonably related to the treatment and rehabilitation of the offender. Many courts further add that polygraph examinations are reasonably related to deterrence and public safety, as well. Thus, the polygraph acts at different stages—first the sexual history and later the maintenance exam—as both a confessional and surveillance technology that simultaneously constructs and verifies a sex offender's narrative.

In sum, sexual narratives by both asylum seekers and sex offenders often suggest an inherency to sexuality, though in different ways, and importantly, that inherency seems much more ingrained in sex offender risk assessments than in asylum hearings. For instance, though asylum seekers frequently insist that being openly gay is being "who I am," there is much less explicit discussion of sexual fantasies, desires, and behaviors than in the case of sex offenders. Asylum seekers also do not have to contend with a medicalizing discourse that views their sexualities as abnormal, leaving considerably more room for resistance and flexibility in the sexual identities they construct before the state. As Chapter 4 demonstrated, immigration officials have begun to accept narratives that evince an inchoate social constructionist view of sexuality. Even when asylum seekers make essentialist statements that might suggest a fixed internal state of sexuality, either in the mind or body, their narratives are not channeled through the actual physical body in the way that sex offenders' stories are—that is, through the technology of the polygraph. This is imperative, for, as Balmer and Sandland (2012:613) suggest:

> [T]hese confessional apparatuses are performative in that they serve to enact a deviant, criminal desire and thus function to constitute the offender as a [pedophile] there and then, thereby avoiding his deception or denial of his crimes and making him more amendable to risk-management strategies… An important consequence of the use of the polygraph and plethysmograph is that it constitutes the sex offender's abnormality as bodily and as fundamental.

This bodily abnormality articulates nicely with the medicalization of sexual deviance, rendering it nearly impossible for sex offenders to resist an "abnormal" label. This theme will become even more apparent in the following section, where I consider how the body becomes implicated as direct evidence of deviant sexuality.

Materializing sexuality through the body

A widely used technology for determining a sex offender's sexual preferences is the penile plethysmograph (PPG). Like the polygraph, which aspires to ascertain the truth of an offender's sexual narrative via the body, the PPG seeks to know a subject's sexual desires via bodily measures. As Waidzunas and Epstein (2015:3) argue, "phallometric testing 'materializes' male desire through a particular conjoining of bodies, knowledge, and technology that renders that desire perceptible and measureable." It further depends on what they call "technosexual scripts." Building on the idea of sexual scripts by pointing to the ways that technology mediates our understanding of sexuality, Waidzunas and Epstein argue that the PPG only works given the presumption of a "normal" man who responds mechanically to visual stimuli. Moreover, the PPG assumes that a flaccid penis cannot be indicative of any arousal state, that male arousal is completely centered on the erect penis, and that male sexuality is unemotionally task driven.

Such assumptions often go unremarked in risk adjudications for sex offenders where the erect penis indicates arousal, which in turn indicates orientation and presumably action.

In the commitment hearing of Jacob Sandry in Illinois, for instance, the court sought to determine whether the PPG was admissible as part of an expert's testimony. Its reasoning is unusually blunt but illustrates well the tacit assumptions adopted by most courts when considering PPG evidence:

> [T]he contours of our inquiry are limited to whether there is some reasonable connection between the methodology and what it seeks to measure… The reasonableness inquiry is fairly straightforward in this case. Quite simply, penile engorgement is a plausible measure of sexual arousal. This observation ends the reasonableness portion of the inquiry.[176]

In its final determination, the court continues:

> To conclude, since there is a logical, plausible, common-sense connection between sexual arousal and penile engorgement, experts who rely upon the PPG test, which purports to measure this connection, are being reasonable within the meaning of *Frye*. Moreover, since the test is widely used, it is apparent that it is accepted by a substantial number of those who work with sex offenders, though it is far from clear that this group constitutes a majority. Some of these experts consider it the best tool for assessing recidivism. These two factors satisfy the *Frye* test as articulated by the Illinois Supreme Court.[177]

With this decision, the court simultaneously upholds the validity of the PPG as a measure of sexuality and the authority of forensic psychology to assess that validity. Perhaps more

[176] *People v. Sandry* 367 Ill. App. 3d 949, 967 (2006)
[177] *People v. Sandry* 367 Ill. App. 3d 949, 975-976 (2006)

importantly, with its appeal to "common sense," the court also upholds its own authority to dictate what counts as authoritative knowledge. Thus, the law and forensic psychology mutually constitute and reinforce each other's authority.

In another Illinois commitment case, the state prosecutor attempted to make the connection between arousal and penile response very clear to the jury:

> [Pedophilia] is also told by tests that check your physiological responses to certain stimuli the way doctors talked, and that is the plethysmograph thing you heard about. Spend 30 seconds thinking about a plethysmograph. This is a test that determines or measures sexual arousal, basically involuntary reaction. Picture it. You are going in some sterile, the most unerotic setting you can ever imagine with several people all around you. There are people in the room in his case at least Dr. Wasyliw with all his machinery in what can never be described in a sensual kind of way and they show dirty pictures of little kids and they do it with this wire wrapped around the man's penis. A man who in Mr. Grant's word has a cloud of a sexually dangerous person hanging over his head. A man who has to be thinking in his head I am going to try to be as unaroused as possible. I don't know if a person would be thinking about Mickey Mantle's baseball scores or whatever but anything but arousal. And in that context they show him pictures of prepubescent girls and while trying to put himself into a mental cold shower he still has a 35 percent increase.[178]

Here, the prosecutor uses several rhetorical strategies to position the PPG as an objective and accurate assessment of sexual arousal, and even more pointedly (and performatively), to suggest

[178] *People v. Hughes* 338 Ill. App. 3d 224, 233 (2003)

that it reveals pedophiles: "[pedophilia] is *told* by tests that check your physiological responses…" He goes on to assert that the PPG measures involuntary response, which suggests that the defendant cannot control his sexual urges and helps to establish the desire/action nexus. Finally, he sets the scene of the PPG test as a sterile laboratory setting devoid of any erotic elements partially to overcome one of the shortcomings of the PPG and this particular defendant's results: a 35% increase in penile tumescence. It is typical of phallometric testing to have a quite small change in penile tumescence. Subjects rarely become "fully" aroused. Yet these rather small responses are taken as objective indicators of sexual arousal.

Not rarely, courts cite scholarship to back up their assumptions about the PPG. A commonly cited article is Jason Odeshoo's (2004) "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," a non-peer-reviewed law review piece. The Ninth Circuit cites this piece in its highly influential *United States v Weber* (2006) decision, quoting the passage that defines PPG testing as a procedure that "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses."[179] This sentence makes a direct connection between sexual attraction and erectile response, allowing courts to make that connection, as well. Other scholarship explicitly lays bare the plethysmograph's assumed connection between desire, arousal, and action. In *United States v. Rhodes* (2009), the Seventh Circuit cites psychologist Dean Tong's (2007) article in which he writes:

[179] *United States v. Weber* 451 F.3d 552, 555 (9th Cir. 2006)

> The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does.[180]

The majority of legal decisions regarding the PPG draw on this type of scholarship while avoiding more critical analyses. This simultaneously upholds the authority of forensic psychologists who administer the tests and courts to impose such testing.

Occasionally, courts do question the PPG. For example, in *U.S. v McLaurin* (2013), the court first explicitly laid out the assumptions of the PPG that are normally left tacit before using those logical leaps to strike a requirement that an offender undergo PPG testing as part of his supervised release:

> This examination involves the use of a device known as a plethysmograph which is attached to the subject's penis. In some situations, the subject apparently may be required, prior to the start of the test, to masturbate so that the machine can be "properly" calibrated. The subject is then required to view pornographic images or videos while the device monitors blood flow to the penis and measures the extent of any erection that the subject has. The size of the erection is, we are told, of interest to government officials because it ostensibly correlates with the extent to which the subject continues to be aroused by the pornographic images.[181]

---

[180] *United States v. Rhodes* 552 F.3d 624, 627 (7th Cir. 2009)
[181] *U.S. v. McLaurin* 731 F.3d 258, 259 (2nd Cir. 2013)

Rather than simply assuming that erectile response equals sexual arousal, this court makes that assumption explicit, in part to illustrate the invasive nature of the test. In the case of *Billips v. Virginia* (2007), a dissenting opinion makes the assumption very clear and goes further by highlighting the intellectual uncertainty surrounding the PPG and likening it to the polygraph:

> In sum, the available data about plethysmographs reveals a scientific community dramatically divided over their reliability and accuracy. The studies of plethysmographs vary drastically in their conclusions. Some reports show an extremely fallible method, susceptible to manipulation from the subject and often misidentifying the subject as a sex-offender or as a non-offender, while other studies report high accuracy rates. In this respect, plethysmographs and polygraphs, both of which measure physiological responses, are similar. Both require an *assumption* that the physiological response measured directly reflects the emotion and behavior purportedly being measured.[182]

My interviewees, too, acknowledged the shortcomings of the PPG despite using it in their own assessments of sex offenders. In discussing the PPG, Shan Jumper, Clinical Director of Illinois' SVP program, said,

> It's not a perfect test. Probably the most common thing that we see is, we get, as far as we can tell, a valid test that the guy shows no arousal at all… So he's not showing any arousal to healthy or deviant stimuli. And it's unlikely that that would be the case. And if that were true in the case, the person would be asexual, which isn't very likely. So a lot of times, it doesn't capture somebody's arousal.[183]

---

[182] *Billips v. Virginia* 48 Va. App. 278, 313 (Va. 2007)
[183] Author interview with Shan Jumper.

Here Jumper maintains faith in the test's ability to measure arousal *when it is present*. He places blame on the test itself rather than the assumptions about sexuality underlying the test. Thus, if the test does not show a man's arousal, it is not because the PPG is measuring something that does not actually capture arousal, but because that particular testing situation was an anomaly.

Conclusion

I have suggested that the dominant epistemological approaches to understanding and classifying sexuality in asylum and sex offender law differ with respect to what each domain considers empirical evidence of sexuality. Where asylum adjudicators tend to take a negative knowledge approach to determining someone's sexuality through the interpretation and contextualization of signs generated through narrative accounts, decision-makers in sex offender evaluations more often employ inscription devices meant to objectively materialize sexuality or directly represent particular characteristics of the offender. This is not to say that negative knowledge never informs sex offender assessments nor that positive knowledge never informs asylum determinations. Psychologists sometimes conduct clinical interviews with offenders in order to give diagnoses, but those interviews often carry less weight in comparison to the "master file" and psychophysiological testing. The master file, of course, contains textually mediated narratives, but those texts reflect direct behavioral observations of an offender and further become input for a highly determinative inscription understood to directly measure one's sexual risk: the actuarial risk assessment. Conversely, asylum adjudicators may consider sexual acts and conduct as evidence of one's sexuality, but these acts are really considered as part of a narrative. Thus, bodily acts are circumscribed within an overall epistemic logic that weighs a claimant's identity development narrative more heavily and rejects reliance on bodily indicators alone. Similarly, an asylum seeker's "demeanor"—a form of evidence dependent on direct

observation—may be taken into account in determining his credibility, but again, this must be placed with the overall context of the claim.

Ultimately, then, these two legal complexes differ in the underlying epistemological assumption of whether sexuality is directly discernable through technological interventions or must be surmised from indirect indicators. A possible objection to this assertion is that something like the PPG *is*, in fact, an indirect indicator. What I have tried to show in this chapter, though, is that this is not how the PPG and accompanying technologies are understood within this particular legal domain. Rather, it *reveals* one's true sexual arousal (and therefore orientation). If one shows arousal to prepubescent children during a PPG examination, the evaluator is likely to, at least provisionally, consider that person a pedophile. Similarly, one might object that actuarial risk instruments are likewise simply indicators. Once again, however, these instruments are taken to offer direct measures of one's sexual risk.

Additionally, a critic might simply say that all of these differences can be boiled down to the fact that asylum law is concerned with identity and therefore is trying to measure that, while sex offender law seeks to punish criminal sexual behavior and thus concentrates on that. My analysis, however, should have already made it clear that these lines are not nearly so crisp in practice. Asylum law *does* protect groups bound together by identity, but as this chapter also shows, courts have granted protections based on forms of conduct associated with queerness and even to those who reject queer identities but may have such identities imputed to them. Moreover, there is significant slippage in how sexual identity is understood in asylum law. Does it require sex acts? Explicit adoption of a certain identity? Sexual desire for particular bodies? Any and all of these may be taken as evidence of queerness depending on the context of the overall narrative. Conversely, sex offender laws ostensibly control sexual behaviors, but as the

label “sex offender” makes obvious, the state assigns a sexual identity to those convicted of illegal sexual behaviors. Furthermore, though civil commitment statues are careful to avoid overtly stating that they punish a type of person, it is quite clear that the “sexually violent person” label is a legal and social identity. And SVP proceedings, like those for asylum, vacillate between taking desires, behaviors, and identities as indicators of sexuality. A particular behavior may be the basis for an offender’s arrest, but his evaluation could reveal desires (e.g., arousal to children) that suggest an underlying identity (e.g., pedophile) not (yet) revealed through action. Thus, my analysis, while attempting to untie this Gordian knot of significations, reflects the ambiguity of the polysemous term “sexuality” as it is used in these arenas, and indeed, in society writ large.

I have attempted to demonstrate that because state actors are charged with ascertaining individuals’ sexualities, but “sexuality” is not defined, courts draw on pre-existing institutional logics and cultural schemas to create divergent ways of knowing sexuality in each legal realm. State knowledge is thus already socially and culturally structured before final decisions are rendered. Sexualities scholars have shown how cultural assumptions about sexuality influence scientific examinations of sexuality, producing knowledge about it that is already contoured by social forces (Fausto-Sterling 2000; Terry 2000). Similarly, I have shown that social forces shape how sexuality is constituted in state institutions by creating conditions under which divergent epistemic logics become institutionalized in different state institutions.

Despite all of this ambiguity, we can still draw some conclusions about how these different epistemic logics affect conceptualizations of sexuality in each legal arena. Assumptions about how sexuality is best measured simultaneously suggest beliefs about where sexuality is located. For forensic psychology and the legal culture of sex offender evaluation, the primary

belief is that sexuality flows from the individual and can therefore be gauged through measuring the individual body, monitoring his behavior, and ascertaining his desires. Sexuality in this paradigm is largely essential. The legal environment of asylum law and its contributory experts, on the other hand, provides space for social context. Though asylum seekers generally claim that their queer identity is "who I am," suggesting an essentialness to sexuality, there is also substantial recognition of the constructedness of sexuality. Asylum law has recognized that sexual identity categories vary around the globe, that a capacity for sexual fluidity exists, and that sexual acts carry different meanings in different cultures. By approaching the classification of sexual subjects in different ways, state institutions, in conjunction with non-state expert actors, powerfully contribute to the naturalization of differences along the lines of sexuality. In other words, divergent epistemic logics governing how state institutions know LGBTQ asylees or sex offenders help to reify the historically recent cultural shift distinguishing homosexuality and sexual criminality.

Certainly, the specific settings under consideration here are significantly different. One concerns the admission of a foreign subject; the other concerns the release or confinement of a convicted felon. Clearly, the stakes are different, as are the subjects under scrutiny. There is presumably a stronger presumption of dishonesty for a felon facing a possible lifetime of civil commitment compared to a civilian seeking refuge, though it should be noted that asylum seekers may also have an incentive to lie in order to remain in the country, and this alleged concern for fraud has led to stricter requirements in asylum applications.[184] I am suggesting,

[184] Concern for fraud was one stated reason for implementing a one-year filing deadline for asylum applications during the Clinton administration, and Trump administration officials have cited fraud as rationale for considering further restrictions.

however, that epistemic logics already reflect these political and institutional concerns. Forensic psychology was chosen in part because of the perceived objectivity of its evaluative and classificatory methods and its ability to categorize reticent subjects. Likewise, anthropological, sociological, and human rights experts are brought to bear on asylum adjudications because of their ability to evaluate and contextualize sexual identities and behaviors that may be illegible to U.S. state administrators.

The effects of these competing epistemic logics can also be seen in the risk assessment practices of each state domain. While asylum adjudications depend on assessing the risk a petitioner would face *from* his home country, SVP determinations revolve around calculating the risk the offender would pose *to* his community. Part 3 explains how these risk calculations play out and constitute sexual subjects as potential citizens or social pariahs.

PART THREE
Framed by Danger: Constituting Sexual Subjects through Risk

Risk assessment has become a central tool of modern governance. This, I contend, is as true for evaluating sexual subjects as it is for discerning the risks of toxins, environmental pollutants, and a host of other fixtures of modern society. Assessing risk is fundamental to both asylum and sex offender adjudications, although the processes proceed quite differently in each legal complex. Whereas asylum determinations depend on a qualitative and largely tacit calculation of the probability that a claimant will face persecution if returned to his home country, sex offender decisions employ actuarial risk assessment tools in an explicit, quantitative process of assessing the probability that an offender will commit future acts of sexual violence. Though their purposes and processes are different, risk assessments in both areas of law make risk a central element of sexual governance and in the definition of sexual subjects. In short, risk mediates sexual citizenship.

The following two chapters illustrate how risk has become central to the governance and classification of sexual subjects. I first show how risk calculations are performed in each setting and then how those risk assessment techniques undergird different forms of recognition for sexual subjects vis-à-vis risk. I ask: how is "sexual risk" rendered cognizable for legal decision making? What is seen as a "risk object" in these legal calculations? Risk assessment, perhaps more than any other technology of knowing, determines how state institutions manage sexual others, but at the same time it resonates with other ways of knowing sexuality. In asylum, risk is determined through a process that involves assessing the risk of a cultural setting for an individual or group of individuals (a "particular social group" or PSG). That is, risk is a structural and cultural characteristic of a particular country. This approach clearly resonates with

the asylum complex's ways of understanding sexuality presented in the previous chapter, which revolve around contextualizing sexual narratives within a specific cultural setting. In sex offender adjudications, risk is determined through a process of individualized assessment using tools that are universal, or understood to be anyway—actuarial tools, polygraphs, PPGs, mental health diagnoses, and psychological testing. In other words, the individual himself is seen as the source of risk. Structural or cultural factors are not considered, even though, for instance, more than 90% of sex offenders are men, suggesting a strong gender socialization component. Culture seems to be a factor only when it is *other* cultures.[185] Once again, these risk assessment practices are clearly in line with the more essentialist and individualized conceptualization of sexuality found in the sex offender legal complex. Although actuarial tools are presented as objective technologies that remove human judgement and bias from risk adjudications, as I will show in this section, subjectivity continues to find its way into these decisions. As research in other settings has shown, actuarial assessments often "black box" evaluators' discretion and present risk estimates as objective indicators, rather than acknowledging the subjective decisions that necessarily go into such determinations (Hannah-Moffat, Maurutto and Turnbull 2009). Despite one assessment approach being highly qualitative and "clinical" and the other being quantitative and actuarial, both are seen as objective assessments. The judge in an asylum claim is, in essence, positioned as an objective risk calculator in a similar way as actuarial risk assessment technologies are in sex offender hearings.

[185] Sita Reddy (2002) shows, for example, how American courts pathologize non-American cultures when they accept the "culture defense" by blaming "culture" for individual criminal acts perpetrated by foreign-born "aliens" while rejecting such arguments for U.S.-born minorities. This move also generally coincides with a reductive and monolithic portrayal of foreign cultures.

One goal of this section, then, is to demonstrate that risk is a culturally structured way of dealing with social problems. It is not a pre-existing, inherent reality. Because risks often remain invisible and are based on causal interpretations, they "initially only exist in terms of the (scientific or anti-scientific) *knowledge* about them. They can thus be changed, magnified, dramatized, or minimized within knowledge, and to that extent they are particularly *open to social definition and construction*. Hence the mass media and the scientific and legal professions in charge of defining risks become key social and political positions" (Beck 1992:23 emphasis in original). More generally, risks are open to cultural definition. In their statement of this cultural conception of risk, Douglas and Wildavsky (1992) argue that public concern with environmentalism shifted from a focus on national security to environmental risk not because the objective risks at issue changed but because cultural actors (namely social movements) reframed the debate. In other words, "Whatever objective dangers may exist in the world, social organizations will emphasize those that reinforce the moral, political or religious order that holds the group together" (Rayner 1992:87). In short, risk perceptions are central to the social construction of reality, and sexual risk definitions therefore evolve with cultural views. Risk assessments processes, I suggest, are thus also boundary-making processes that help to reify symbolic divisions between "good" and "bad" sexual subjects, between citizens and non-citizens. We can begin to see this if we look at the historical relationship between sexuality and risk.

Sexuality and Risk – A Brief History of Dangerous Subjects

Often when we think of sexuality and risk, it is in the context of sexual health, especially in relation to disease transmission and prevention (Epstein and Mamo 2017; Esacove 2013; Norton 2013). Feminist work of the last several decades has also brought the issue of sexual

assault to the forefront of thinking about the relationship between sexuality and risk (e.g., Vance 1984). Scholars have given less consideration to how risk has become a dominant lens through which to construct and regulate sexual subjects before the state. This has been a long-term strategy by the U.S. state, but it is crystallized in certain settings today more clearly and explicitly than it has been in the past.

Sexual others have long been portrayed as diseased or otherwise threatening to the nation. Narratives of contagion (Douglas 1992; Wald 2008) have been used to demonize queers by purporting that they would spread their "vice," contaminate the community or nation, and even bring death (most recognizably via HIV/AIDS) (Freedman 1987; Hoppe 2017; Lynch 2002). These ideas were codified into law in many arenas, including immigration, military, and welfare policy (Canaday 2009; Luibheid 2002; Shah 2012). However, while the idea of risk or danger certainly structured thinking around these policies and views, it is only recently that risk has crystallized as an explicit state strategy of managing sexual subjects. Even the "dangerousness" prediction called for under sexual psychopath statutes differed in quality from that which is performed today. Dangerousness for sex psychopaths was wholly tied to their diagnosis as a psychopath from which danger was deduced. Today, an explicit risk assessment process makes such determinations, and as Prentky and colleagues (2015:41) assert, "Though the constitutional underpinnings of [SVP] laws appear to put the 'mental disorder' and 'dangerousness' prongs on equal footing, in reality it is fair to say that most of the focus in the implementation of these laws falls on dangerousness. The mental disorder prong has little or no role in determining who is committed and who is not."

This emphasis on risk comes with a larger shift toward a precautionary logic that is refiguring the institutions of law and science in the management of sexual and violent offenders.

As Hebenton and Seddon suggest, this preventative logic can be seen in its strongest form in sex offender management, where there is an attempt, as Nikolas Rose puts it, to "bring the future into the present" (Rose 2002:212). This is accomplished through the "naturalization' of risk itself within the body of the dangerous person" (Hebenton and Seddon 2009:344). Naturalizing risk within the body of the sex offender legitimates the idea that exceptional legal measures, or what legal scholar Richard Ericson calls "counter-law," are needed to deal with these "anti-citizens." One form "counter-law" take is "laws against law": "New laws are enacted and new uses of existing laws are invented to erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of preempting imagined sources of harm" (Ericson 2007:24). In the case of sex offenders, courts have carved out exceptions to the Ex Post Facto, Commerce, and Confrontation clauses, as well as circumscribing double jeopardy and due process protections (Yung 2010). In an illuminating comparison of the *Lawrence v. Texas* and two Supreme Court decisions regarding sex offender registration and community notification rendered the same year (*Smith v. Doe* and *Connecticut v. Doe*), sexualities scholar Joseph Fischel (2010) shows that the humanity and careful consideration granted to the "homosexual" in *Lawrence* is denied the "sex offender" in *Smith* and *Connecticut*. Where Kennedy, writing for the majority in *Lawrence*, carefully deployed social science and history to rebut the arguments of *Bowers*, just three months earlier in *Smith*, he refused to do so (as did Rehnquist in *Connecticut*), instead relying on faulty assumptions that sex offenders have high recidivism rates. Furthermore, Kennedy suggests that making sodomy a registerable sex offense for gays imposes stigma, undermines human dignity, and amounts to state condemnation, but for other sex offenders, this does not seem to be the case. Fischel pointedly suggests that "This is because, for Kennedy, homosexuals are people. Sex offenders are not" (Fischel 2010:307). Indeed, this may not be an

exaggeration, as abundant scholarship documents public attitudes regarding sex offenders as monsters, animals, and generally less-than-human (Cole 2000; Douard and Schultz 2013; Lynch 2002; Mansnerus 2017; Simon 1998; Small 2015).

During roughly the same time as sex offenders were becoming the preeminent boogeymen, LGBTQ people were being conditionally welcomed into the national community. Though the United States has historically excluded and discriminated against sexual "deviants," the "queer exception" to legal protections has recently begun to fade (Kornbluh 2011). One of the earliest "exceptions" to disappear was the bar on gays entering the country, which was repealed in 1990, just months after the BIA affirmed an immigration judge's decision to allow a Cuban man to remain in the U.S. because of persecution he had faced on account of his homosexual identity . Though the gay movement faced setbacks throughout the 1990s, notably with the "Don't Ask, Don't Tell" compromise of the Clinton administration and a continuing HIV/AIDS crisis, it also garnered several victories, including legal protections in various states and the *Romer v. Evans* (1996) decision by the Supreme Court, ruling that a Colorado state constitutional amendment preventing protected status based on homosexuality or bisexuality violated the Equal Protection Clause. Notably, the following year, the Supreme Court upheld sex offender civil commitment statutes in *Kansas v. Hendricks* (1997). LGBTQ people continued to gain new legal protections and rights in the 2000s, including the striking down of sodomy laws, the enactment of hate crimes legislation, the ability to serve openly in the military, and the legalization of same-sex marriage. By contrast, during the same period, new laws requiring the public registration of sex offenders, community notification, GPS monitoring, and restricted residency, among others, were enacted and largely withstood legal challenge.

At the same time that sex offenders were increasingly portrayed as the ultimate threat because of the risks they *posed* due to their sexualities, queers were being increasingly recognized as citizens because of risks they *faced* on account of theirs. In an analogous way that sex offenders require legal exceptionalism because of their uniquely dangerous sexual natures, LGBTQ asylum seekers are granted an exception to usual immigration and naturalization practice because of their sexualities and the risk they face because of them, in an illustration of what Jasbir Puar calls "sexual exceptionalism." As she argues, "The contemporary emergence of homosexual, gay, and queer subjects—*normativized through their deviance* (as it becomes surveilled, managed, studied) rather than despite it—is integral to the interplay of perversion and normativity necessary to sustain in full gear the management of life" (Puar 2007:xii, emphasis added). Key here is that queers are normalized and welcomed into the realm of citizenship *through their sexualities* while a new perverse other is simultaneously created in the form of the sex offender. Nevertheless, risk remains a lens through which even these "accepted" sexual subjects are recognized. Risk assessment, then, works as a mechanism for separating the "good" from the "bad" and therefore also contributes to the proliferation of sexual identities based around risk: the queer asylee, the incurable pedophile, the insatiable rapist, the normal gay.

In the following two chapters, I consider how sexual risk is rendered cognizable, what aspects of sexuality are deemed risky, and precisely how risk is calculated within each legal complex in order to show how risk assessment techniques undergird different forms of recognition for sexual subjects.

Chapter 6:
Queer Subjects and the Construction of Risky Countries

Adjudicators in both asylum and sex offender law must make risk decisions in terms of particular standards of proof. For asylum claims, that standard is a "well-founded fear of persecution" if the claimant were returned to his home country. However, if a claimant is ineligible for asylum, which is a rather common problem for LGBTQ petitioners for a number of reasons, and must instead seek withholding of removal, the standard is substantially higher. Though courts and legislators do not give concrete quantitative thresholds, the Supreme Court has dictated that the standard for withholding is a "clear probability" of persecution or "more likely than not," which is generally interpreted as a greater than 50% probability.

This higher burden of proof, interestingly, comes through a consideration of risk in some respects. It is often a criminal conviction that renders a claimant eligible only for withholding rather than asylum. If the crime is serious enough, the burden shifts again, this time to a clear probability of torture (as opposed to just persecution) for relief under the Convention Against Torture (CAT). Thus, if an immigrant poses a greater potential risk to the U.S., as determined by his criminal history, he must meet a higher risk threshold to remain in the country. For many LGBTQ asylum seekers, however, the higher burden is often a result of missing the one-year filing deadline for asylum. On its surface this does not seem to reflect a risk concern, but it may in fact be understood that way. The stated reason for imposing the one-year deadline (part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) was that any "real" asylum seeker would obviously lodge a claim within a year of arriving. This stated rationale, whether true or not, reflects a purported concern for fraud.

But what exactly does "well-founded fear" or "clear probability" mean? Like all legal standards of proof, they are somewhat subjective. The clearest guidance on this question came with the Supreme Court's decision in *INS v. Cardoza-Fonseca* (1987). In the Cardoza-Fonseca case, an immigration judge had ruled that an asylum applicant had not shown that she was "more likely than not" to be persecuted if returned to Nicaragua and was therefore ineligible for asylum. The case hinged on whether "well-founded fear of persecution" (the standard for asylum from section 208(a) of the INA) was equivalent to "more likely than not" to be persecuted (the standard for withholding of removal from section 243(h) of the INA). The Court determined that the two standards were different, writing, "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place,"[186] and later that

> There is simply no room in the United Nations' definition for concluding that, because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no 'well-founded fear' of the event's happening. As we pointed out in *Stevic,* a moderate interpretation of the 'well-founded fear' standard would indicate 'that, so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'[187]

The Court thus established that even a 10% probability of persecution could qualify as "well-founded fear" for asylum. Yet in its concluding remarks, the Court left adjudicators discretion, stating

---

[186] *INS v. Cardoza-Fonseca* 480 U.S. 421, 431 (1987).
[187] *INS v. Cardoza-Fonseca* 480 U.S. 421, 440 (1987).

> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication…We do not attempt to set forth a detailed description of how the 'well-founded fear' test should be applied.[188]

While setting a general standard, the Court refrained from giving specific directions on how to apply that standard. So how do adjudicators actually decide if someone has a "well-founded fear" or "clear probability" of persecution? Before considering how these calculations play out in asylum hearings, it is worth considering what constitutes persecution, for this greatly affects how adjudicators make predictions of future harm.

In addition to determining whether a claimant is truly queer, asylum adjudicators must also decide if the petitioner has suffered past persecution or has a well-founded fear of future persecution. If the adjudicator finds the former, the asylum seeker is granted a presumption of future persecution, and it then becomes the state's burden to rebut that presumption. If the latter, however, the petitioner must prove both a subjective and objective fear of future persecution. The subjective prong depends heavily on the claimant's credibility and whether his narrative is consistent with the objective evidence. Objective proof of future fear of persecution comes primarily in the form of country condition evidence, including expert testimony when available, and will be discussed more thoroughly later in this chapter.

---

[188] *INS v. Cardoza-Fonseca* 480 U.S. 421, 448 (1987).

These requirements seem rather straightforward, but they are complicated by the fact that neither the 1980 U.S. Refugee Act nor the 1951 UN Refugee Convention define persecution. Nevertheless, it is widely understood to be "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" (Hathaway 1991:104-05). Thus persecution cannot be sporadic incidents but must be sustained persecution by the government or such that the government is unwilling or unable to stop it. U.S. jurisprudence dictates that persecution may be emotional, psychological, or physical and that adjudicators must consider the cumulative significance of experienced harm (Anker and Ardalan 2012).

The 1990 *Toboso-Alfonso* decision established that sexual orientation could be the basis for a PSG and thus that one could be persecuted for one's sexuality. However, LGBTQ people may face some dilemmas specific to them in proving persecution. The basis for persecution is often private acts, persecutors are often private actors rather than the state, and sexual assault often constitutes at least part of persecution claims. LGBTQ asylum seekers are therefore unlikely to resemble the paradigmatic claimant; that is, a man persecuted by his government for overt and public political actions and beliefs (McKinnon 2016). But case law has established that all of these things can constitute persecution, and, in theory, these precedents should apply equally to LGBTQ asylum seekers.[189] Nevertheless, it often seems like a rather subjective decision whether certain harmful acts rise to the level of persecution, and indeed, this likely

[189] For instance, courts have ruled that persecution can be emotional or psychological, as well as physical. See *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004); *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011). For cases determining that sexual assault constitutes persecution, see *Haider v. Holder*, 595 F.3d 276, 287-88 (6th Cir. 2010); *Ndonyi v. Mukasey*, 541 F.3d 702, 710 (7th Cir. 2008); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005). For cases establishing that private actors may be persecutors, see *Ornelas-Chazev v. Gonzales* 458 F.3d 1052 (9th Cir. 2006); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004).

accounts for some of the considerable variation in asylum grant rates between jurisdictions and even between IJs within the same court (see Ramji-Nogales, Schoenholtz and Schrag 2009).

Having considered the ambiguity of the term "persecution," how, then, do adjudicators actually decide if a claimant has met the required burden of proof? Unlike the sex offender civil commitment trials I will discuss in the next chapter, asylum hearings do not rely on any quantitative evidence that provides a numerical estimate of future risk. Rather, the process is more holistic and qualitative, and to a significant extent, relies on the judgement of the adjudicator. Regardless of the precise process, the risk assessment is the single most important part of an asylum hearing, for it determines whether the claimant will be allowed to remain in the U.S. or removed to his home country. As such, the risk assessment ultimately serves as the key mechanism for recognizing the LGBTQ asylum seeker as a sexual subject eligible (or not) for the rights of citizenship. He will either be deemed a legitimate asylum seeker and potential U.S. citizen due to the risk he faces from his home country (and the relatively low risk he poses *to* the U.S.) or simply an illegal alien. The 2010 case of Lucas Velez illustrates this idea.[190] Velez was found to be credibly gay and to have a subjective fear of future persecution, but the immigration judge (and ultimately both the BIA and 11th Circuit) determined that the abuses of queer people in Velez's home country of Colombia did not meet the threshold of persecution, that is, that Colombia was not "risky" enough for queers. In its decision, the 11th circuit wrote,

> At his original hearing before the Immigration Judge ("IJ"), Velez called an expert witness who testified about the practice of police, paramilitary groups and guerillas attacking "undesirables," including sexual minorities, called "social cleansing." Velez

[190] *Velez v. U.S. Attorney General*, 360 Fed. Appx. 103 (11th Cir. 2010).

> also submitted Country Reports for 1995, 1998 and 2000 to 2006 and numerous articles documenting violence against homosexuals in Colombia and social cleansing. The IJ determined that this evidence showed isolated incidents of private violence against members of the gay community, but did not establish that Velez himself would more likely than not be persecuted upon his return to Colombia.[191]

Where another judge may have found "social cleansing" campaigns to indicate a pattern or practice of persecution against sexual minorities, this judge did not. Without the requisite level of risk, Velez was denied his status as a queer asylee and instead simply deemed an illegal alien and presumably deported.

Constructing Risky Countries

Regardless of whether a claimant is found to have suffered past persecution or must prove well-founded fear of future persecution, country conditions evidence is a vital part of any asylum claim for establishing the danger a petitioner would face if returned to his home country. Though a claimant is presumed to face future persecution if he was found to have suffered past persecution, he still must guard against the government's likely argument that the country conditions evidence rebuts that presumption. A claimant must also guard against the argument that he could simply relocate within his own country to avoid localized persecution. This generally requires that an asylum seeker paint his home country as uniformly oppressive and leaves little room for nuance (Cantú 2005; Carrillo 2010). In other words, asylum hearings are a prime site where the U.S. is constructed as a liberated space while other countries and their

[191] *Velez v. U.S. Attorney General*, 360 Fed. Appx. 103 (11th Cir. 2010).

cultures are constructed as backwards and oppressive. Key tools in this process are governmental and NGO reports on human rights for sexual minorities.

Human Rights Reports

As discussed in Chapter 2, the U.S. State Department Country Reports on Human Rights Practices (the Reports) may be granted substantial, and even determinative, weight in asylum decisions. Asylum officers, immigration judges, the BIA, and appeals courts all generally defer to the Reports unless a critical mass of other sources compels a different decision. Quoting BIA procedural reforms, the Tenth Circuit wrote in *Halmenschlager v. Holder* that, "The most common facts about country conditions appropriate for administrative notice are those contained in country reports and profiles prepared by experienced foreign service officers in the Department of State who are experts on specific regions and countries,"[192] before going on to add, "As the courts have recognized, they, the immigration judges, and the Board owe deference to the Department of State on such matters of foreign intelligence as assessments of conditions."[193] Nevertheless, while they carry considerable weight, the Reports are not wholly determinative in most cases. The Second Circuit has ruled, for instance, that evidence from a Report is not binding on an immigration judge and cannot be used to automatically discredit contrary evidence presented by a claimant, and the First Circuit has said that while Reports are generally persuasive, their contents "do not necessarily override petitioner-specific facts-nor do they always supplant the need for particularized evidence in particular cases."[194] Similarly, the Seventh Circuit asserts that "because the State Department's country reports are so general –

[192] *Halmenschlager v. Holder*, 331 Fed Appx. 612, 621 (10th Cir. 2009).
[193] *Halmenschlager v. Holder*, 331 Fed Appx. 612, 621 (10th Cir. 2009).
[194] *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004); *Diaz-Garcia v. Holder*, 609 F.3d 21, 28 (1st Cir. 2010).

they may reveal which groups are at greatest risk, but not how much risk and not how the country's forces operate day-to-day – the administrative record needs concrete, case-specific evidence."[195] This is consistent with the argument presented in the previous chapter that determinations of individuals' sexualities in asylum claims depend on contextualizing narrative evidence within larger sociocultural contexts. Case-specific evidence comes most often from the claimant directly but may also be presented by experts, a topic I return to shortly.

However, the Reports are used as one of the primary resources for determining the risk an asylum seeker may face if returned to his home country and are therefore a key piece of how countries are constructed as risky to sexual minorities. For example, the 2010 Report for Mexico stated that, "While society increasingly accepted homosexual conduct, CNDH and the National Center to Prevent and Control HIV/AIDS stated that discrimination persisted. According to the National Center and the Mexican Foundation for Family Planning, societal discrimination based on sexual orientation was common, reflected principally in entertainment media programs and everyday attitudes" (U.S. State Dept. 2011:33). Here, despite increasing legal protections and more acceptance of homosexuality, the culture is portrayed as remaining hostile to queers as evidenced by media and "everyday attitudes." The 2012 Report for Jordan is clearer in outlining a dangerous sociocultural context for LGBTQs:

> Homosexuality is not illegal; however, societal discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons was prevalent. A number of citizens reported sporadic police mistreatment of suspected or actual LGBT persons. Some LGBT individuals reported reluctance to engage the legal system due to fear that their sexual

[195] *Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006).

> orientation would become an issue. There were reports of individuals who left the country due to fear that their families would punish them because of their sexual orientation (U.S. State Dept. 2013:16).

Again, although homosexuality is legal, social and cultural discrimination makes Jordan an inhospitable country for LGBTQ people. A similar pattern can be observed in a variety of NGO reports on conditions for sexual and gender minorities.

One of the most common tropes for characterizing countries as dangerous to LGBTQ people is through discussions of "culture," which is frequently presented as monolithic, irredeemably "traditional," and existing outside of political-economic factors (Cantú 2009; Carrillo 2017). As part of its background information on Honduras, a 2009 Human Rights Watch report states, "A culture of deep-rooted patriarchy and religious conservatism creates an atmosphere of intolerance that many times breeds violence" (Human Rights Watch 2009:8). Later, the report continues,

> Machismo in Honduras means that men who do not act like men (or women who are considered somehow not quite women) face hatred and violence for their refusal to conform to normative gender identities. A deep-seated misogyny drives this hatred and enforces gender norms. Religious strictures and legal provisions both reinforce and justify this revulsion and rejection (Human Rights Watch 2009:15).

The report also extensively discusses legal and structural obstacles faced by transgender and gender non-conforming people in Honduras, but it ultimately blames much of the violence on prejudice and cultural attitudes. This use of "culture" is especially prevalent in Latin American claims, but culture appears in other guises for other national contexts.

In the African context, concerns with attitudes toward gender also come up, as they did in Amnesty International's 2013 report on LGBTI rights in Sub-Saharan Africa: "Men who have sex with men also threaten dominant notions of masculinity where 'real men' are defined through their sexual relationships with women. Men who engage in same-sex sexual activity are often marginalized from the category 'men'" (Amnesty International 2013:48). However, the more widespread use of culture to paint a picture of risk for African countries comprised greater discussion of "traditional culture" and cultural values. In the same report on Sub-Saharan Africa, Amnesty International wrote,

> In many countries in sub-Saharan Africa, governments refer to culture and tradition to justify the violation of the human rights of those who are or who are perceived to be lesbian, gay, bisexual, transgender or intersex. Laws criminalizing homosexual activity are a legacy of colonialism, but this has not stopped national leaders from framing homosexuality as alien to African culture (Amnesty International 2013:32).

This is a different deployment of culture than the recourse to "machismo" discussed above, and indeed, it is one that African leaders sometimes use themselves when publicly decrying homosexuality. The Cameroonian Minister of Justice, for instance, wrote in 2006 that "by virtue of the African culture, homosexuality is not a value accepted in the Cameroonian society" (Amnesty International 2013:33), and a 2008 study found that 80% of South Africans believe that gay and lesbian people are "un-African" (ibid.).

Culture may also refer to popular culture. This comes up with some frequency in Jamaican claims and is echoed in Andrew Reding's 2003 report "Sexual Orientation and Human Rights in the Americas," where he writes, "In the Caribbean, Jamaica is by far the most dangerous place for sexual minorities, with frequent and often fatal attacks against gay men

fostered by a popular culture that idolizes reggae and dancehall singers whose lyrics call for burning and killing gay men" (Reding 2003:1).

Reding's report is interesting because it straddles the lines between human rights reporting and expert affidavit, independent research and government intelligence. Reding contracted with the U.S. government for many years to provide research on human rights and a variety of other issues, and he also maintained an affiliation with the World Policy Institute, through which he published his report on sexual rights in the Americas. Though Reding did not see himself as an advocate, but as a researcher fulfilling a need for more public information on issues he had been researching privately for the government, as one of the earliest and most comprehensive reports on the status of LGBTQ people in Latin America and the Caribbean, his report became a resource to LGBTQ asylum advocates.[196] Like the human rights reports that would come later from Amnesty International, Human Rights Watch, and others, Reding suggests that "culture" is to blame for much of the discrimination and violence toward LGBTQ people: "*Machista* ideals of manly appearance and behavior contribute to extreme prejudices against effeminate men, and frequently to violence against them…There is a strong social stigma attached to homosexuality, particularly where it comes into conflict with the highly-accentuated and differentiated male and female sex roles prescribed by *machismo*" (Reding 2003:8-9).[197] However, Reding was also careful to point out regional differences, suggest that conditions were improving significantly in many metropolitan areas, and even to contest figures on hate crimes against LGBTQ people in Mexico and Brazil that had circulated widely among LGBTQ

[196] Author interview with Andrew Reding.
[197] Indeed, Cantú (2005; 2009) singles out Reding for reifying and blaming Mexican culture for gay oppression without accounting for other factors, such as race, class, gender, or globalization.

advocates and in asylum claims, for which he faced criticism for hurting the cause. Though both sides of that debate have some merit, the reaction by asylum advocates against a call for greater nuance in human rights reporting demonstrates the precarious position asylum seekers from much of Latin America occupy.[198] To present anything less than a one-sided, and possibly reductive, argument is to risk losing the claim.

I realized this issue early in my field work with AIR when I was tasked with conducting country conditions research. The directions I was given included the stated goal that "Our research purpose is to look for news articles and reports on the client's home-country that demonstrate conditions that negatively affect the LGBT/HIV community." I was, however, also instructed to identify sources indicating positive developments and improving conditions, which were to be kept separate from the primary country file, presumably so AIR attorneys could be prepared for what they would likely face from the government lawyers. These procedures are, of course, unsurprising in our adversarial legal system where each side is expected—and obligated—to present the strongest case for their client. The government therefore engaged in the same process from the opposing angle, presenting only sources suggesting livable conditions for LGBTQ people. Ultimately, the newspaper articles, NGO reports, and other documents I was assigned to search for provided added context and detail to fill out the picture AIR wished to create of a claimant's home country, and often included detailed accounts of discrimination, violence, and even murder aimed at LGBTQ people.

[198] This situation is also illustrated by one expert witness with whom I spoke. Though he has been asked many times to serve as an expert witness for Mexican asylum claims, lawyers have typically withdrawn their request when he explains that to be true to his research, his testimony would be nuanced and include his observations that gay men can live fairly safely in some areas of Mexico.

In sum, culture is used in a number of different ways to paint countries as "backward" or uniformly hostile toward LGBTQ people, necessary endeavors to win asylum claims. Though certain uses of "culture" are more frequently deployed for particular countries or regions (tradition in Africa; machismo in Latin America), they are not exclusive to those contexts. Gender attitudes may be discussed for Africa, just as tradition may be considered in Latin America. Nevertheless, the goal is the same regardless: create a portrait of a country that is uniformly dangerous for the asylum seeker. Sometimes, though, documentation is not enough.

Expert Witnesses

When lawyers feel that they cannot put together a convincing enough case with only available documented evidence, they often recruit expert witnesses. Experts provide affidavits containing more detailed country conditions evidence and may also testify in court to support their affidavits. Lawyers typically draw on outside experts in one of two situations. First, existing evidence is unclear or contradictory. Mexico was frequently cited as a prime example of this, and AIR increasingly seeks out experts when they have Mexican asylum seekers. Mexico legalized gay marriage and adoption and has put in place anti-discrimination laws meant to protect LGBTQ people. From a bird's eye view, then, Mexico looks like a safe place to be queer. Experts who testify about Mexico, however, argue that the on-the-ground picture does not comport with this view and that the "culture" has been slower to change than the law. As LGBTQ people make legal progress, there may be a significant cultural backlash, or, as is often claimed in asylum cases, those responsible for ground-level protection of LGBTQ people—such as the police—do not enforce the new laws and may even be the persecutors. The second situation in which a lawyer may seek an expert is when limited evidence exists for a country. For instance, if a petitioner comes from Tajikistan, it is unlikely that many NGOs or other

organizations will have produced the type of evidence that they have for more populous countries.

Regardless of the specific reasons for seeking an expert witness, the primary goal is to create an image of the claimant's home country as hostile toward LGBTQ people. Like human rights reports, experts also often employ cultural tropes in their statements. For example, an expert affidavit for an asylum hearing I observed for an HIV-positive gay Mexican man opened with the following headline in bold: "'Machismo' motivates Mexico's violence against homosexual men, bisexual men, and transgender individuals." The opening lines of that affidavit go on to state that, "The animus that motivates the related persecution and torture of bisexual and transvestite individuals in Mexico is the Latin culture of 'machismo,' an attitude that values 'male-ness' and masculine qualities above all. This set of cultural values is a pretext for perpetrating acts of violence against sexual minorities who 'deviate' from the expected macho standard."[199] Another expert affidavit stated that, "I have observed a pattern of 'institutionalized homophobia/transphobia' that stems from Mexico's very traditional culture around gender and sexuality."[200] In rebuttal to the government argument that conditions in Mexico had improved for LGBTQ people and was evidenced by the massive Gay Pride Parade in Mexico City, one expert responded, "This event may have 'boosted' tourism and the visibility of LGBTQ rights in Mexico but did little in the long term to change cultural attitudes in Mexico."[201] Similarly, sociologist and expert witness Nielan Barnes asserted that government lawyers will often say things like, "They could just go to Mexico City because it's so progressive, and it's got – they

[199] Expert affidavit for Gabriela Martìnez case, on file with author.
[200] Expert affidavit for Juan Hernández case, on file with author.
[201] Author field notes.

could even change their gender on their birth certificate according to a 2003 law in Mexico City that was passed. That's held up as like, 'Oh, that's such a progressive place.'"[202] Her response to this suggestion brings the focus back to culture: "passing a law and then enforcing it are two entirely different things, and one of the things that happens is the uptick in violence, the pushback from the conservative elements in society, particularly the church and such and pro-family groups. And they mobilize."[203] Thus, experts often buttress claims of dangerous cultures, particularly for Latin American countries for which pure legal arguments cannot be easily made because of the decriminalization of homosexuality and even legal protections for sexual minorities.

Immigration lawyers are acutely aware of the need to make these cultural risk arguments for Latin American nations, as attorney Peter Perkowski illustrated when he explained how he refutes government arguments that sexual minorities are safe in Mexico: "you just need to point out that the changed country conditions still haven't actually infiltrated the cultural norms to a sufficient degree to change behavior. So just because you can get married in Mexico City doesn't mean you don't any longer have roving hordes of gangs and/or police officers and governmental agents still harassing, beating, torturing, and murdering LGBT people."[204] Perkowski explained that having a country conditions expert was beneficial because it was "very helpful to have kind of set out for the judge the cultural history of Mexico and its macho culture because that's what drives a lot of this violence."[205] Perkowski also relied on published social science research on "machismo" when he couldn't get an expert witness. Immigration attorney Lavi Soloway

[202] Author interview with Nielan Barnes.
[203] Ibid.
[204] Author interview with Peter Perkowski..
[205] Ibid.

explained that he believed it was important to bring in cultural factors because simply looking at the legal landscape can be misleading. Whereas the gay movement in the United States worked on changing attitudes for many years before things like same-sex marriage were culturally viable, "they [Mexican LGBTQ activists] actually have gotten a little bit more quickly to a formula that looks like what we have been doing – domestic partnership, domestic partnership adoption. But they haven't changed the public opinion, they haven't changed the environment."[206] These lawyers therefore seek expert witnesses and social science research that can fill in the cultural factors that may be missing from more macro-focused human rights and State Department reporting.

However, social science experts are acutely aware of the statements they are making. My interviewees reported sometimes feeling torn between a desire to help people get out of dangerous situations and the need to be ethical scholars who are true to their research. Speaking about her expert testimony on Honduras, Suyapa Portillo, who is Honduran herself, said,

> And the other thing is just having to say cultural things, you know what I mean? Having to say like there is a culture of my people and – you know it's problematic for us to have to write those things to prove that this is a dangerous society for LGBT folks because I feel like there's a cultural machismo here in the U.S. too, and so how we have to kind of split ourselves into writing functionally to help people get out, you know?[207]

She later explained that, "I'm very careful how I say things particularly around machismo…I don't want to say that the culture is inherently machista because that would be inappropriate, and it's not true. And so I say things like – so I cite academic research, you know, that would buttress

[206] Author interview with Lavi Soloway.
[207] Author interview with Suyapa Portillo.

some things that needed to be said around that without having to say that people are inherently machista, you know?"[208] All expert witnesses I spoke with suggested that getting this kind of nuance into their testimonies was sometimes difficult because of the expectations of the legal setting. As Nielan Barnes explained, "I have to provide sound bites, and I've worked it so I can do that. There's a structure in the questions that I give the lawyers to ask me during my direct [testimony] so that there's a given flow, that I'm not talking too long so that the information is kind of [handed to] them in sound bites so they're being spoon-fed the information."[209] Or as Portillo put it, "they want the short simple answers to the questions."[210] This can cause conflict between scholars' desires to be thorough and detailed in their testimony and the legal system's need to reach a quick and parsimonious conclusion on the risk a petitioner will face in his or her home country.

This need to make general statements about an entire country may also arise when experts are asked to rebut the idea that an asylum seeker could simply relocate within his home country, as one exchange from a gay Malaysian man's asylum hearing demonstrates:

> Judge: What does the Malay government do to discourage homosexuality?
>
> Expert: They have recently ratcheted up anti-gay discourse. They publicly say that gays shouldn't visit the country as tourists. They have now set up re-education camps for students suspected of being gay. They also sent out leaflets to parents with the signs that your kid may be gay and what to do about it.
>
> Claimant's lawyer: Is this limited to a particular geographic region of the country?

[208] Ibid.
[209] Author interview with Nielan Barnes.
[210] Author interview with Suyapa Portillo.

Expert: No, it's pan-Malaysian.[211]

Here, the focus is less about culture and more about the assertion that the asylum seeker would face a substantial risk of persecution regardless of where he lived in Malaysia.

If successful, all of these sources—the claimant's testimony, human rights data, and expert testimony—converge to create a portrait of a risky sociocultural setting to which it would be unconscionable to return the asylum seeker. In the case of asylum, then, sexuality is rendered a risk object only insofar as it puts an individual *at risk* if placed in a certain sociocultural setting. The source of risk is not sexuality, per se, but the sociocultural context of a country. A country's culture, in particular, often features centrally as a source of danger.

How, though, do adjudicators actually *make* the final decision? The next section takes a closer look at the risk determination process and how these various sources of knowledge contribute to it.

Making the Decision

While asylum decision-makers must make many decisions in the course of adjudicating an asylum claim, the most important is determining the level of risk a claimant would face if returned to his or her home country. If an adjudicator finds that sexual minorities are not persecuted in the claimant's home country or that the claimant himself would not be at substantial enough risk of persecution, the entire claim is lost. The adjudicator could conclude that the petitioner is credible, queer, and even faced violence, but if that violence does not meet the threshold of persecution or if the adjudicator determines that risk to sexual minorities has decreased enough in the claimant's country, the claim will be unsuccessful. As discussed above,

[211] Author field notes.

the requisite risk threshold for a claimant to receive asylum is "well-founded fear of persecution," which is generally considered to be approximately a ten percent probability of facing persecution. By contrast, the required threshold for withholding of removal is "clear probability" or "more likely than not," which is generally considered to be greater than fifty percent probability. However, as one judge suggested, adjudicators do not necessarily think in terms of probabilities:

> I think that most judges that I know really never thought in terms of the percentages, and that was really a legal construct to say it's a far less significant risk than if you were trying to prove eligibility for withholding of removal…So that's sort of where that standard came from, the *Cardoza-Fonseca* standard…So that's your standard, but it doesn't mean definitely every case where there's a 10% chance, you know.[212]

The judge here suggests ample room for discretion in asylum adjudications simply because any calculations of risk must be done by the adjudicator without any forms of quantitative evidence and with only vague guidelines.[213] Given the legal system's need for objective decisions, how do asylum adjudicators position themselves as objective risk calculators?

Making Subjective Choices into Objective Decisions

In the course of my fieldwork, it became clear quite quickly that different judges had different approaches to adjudicating LGBTQ asylum claims. This was a widely acknowledged fact among AIR staff, who hoped their cases would be placed with one of the "good" judges. After a particularly close call in a hearing, one lawyer lamented to me that she may have given

[212] Author interview with retired immigration judge.
[213] Notably, this judge openly admits that discretion and subjectivity enter legal decision-making, but as legal scholarship on actuarial risk assessment have demonstrated, discretion is often disguised or black-boxed in these tools (Hannah-Moffat, Maurutto and Turnbull 2009).

her colleague a "false sense of security" because she had said the judge presiding over the case was particularly good on LGBTQ cases. "She's good if you do your job," she corrected, but "we can't rely on an IJ [immigration judge] being lenient as our strategy to win." Implicit in her comments was that a different IJ likely would have denied the claim. The assumption that IJs determine asylum claims differently is well supported by large-scale evaluations of IJ outcomes (Miller, Keith and Holmes 2015; Ramji-Nogales, Schoenholtz and Schrag 2009). Judges themselves acknowledged the difficulty of calculating the risk a person might face in the future, partially because of the nature of sexuality: "I think the difference with LGBT cases is that the issue that gives rise to the threat of persecution basically is private conduct, and when the underlying reason for somebody seeking to harm somebody else is something that they're choosing to do in private, it makes it hard to assess objectively what's the risk that they would be harmed for that behavior."[214] Elaborating on this difficulty, the same judge suggested that the nature of persecution against LGBTQ people also complicates risk predictions because, "part of the conundrum of LGBT cases is that people are not able to act freely. So if they're going to behave differently how would they be perceived, and what are the chances that they would be harmed, and that's difficult to predict."[215] Thus, as this judge points out, sexuality-based claims may be particularly difficult because part of the persecution they face is being forced to be closeted and may therefore avoid some of the danger they would otherwise face if they were openly queer.[216]

[214] Author interview with retired immigration judge.
[215] Ibid.
[216] Marouf (2008) and Southam (2011) make this point, as well.

Moreover, the BIA may employ a different risk determination technique as well, as it did in the case of Miguel Rosiles-Camarena. Quoting from the BIA's decision, the Seventh Circuit wrote, "'[i]n assessing the probability of harm de novo, we may give different weight to the evidence than did the Immigration Judge.' The BIA proceeded to do just that. It accepted all of the IJ's findings of historical fact but disagreed with the IJ about the risk implied by those facts."[217] The Court went on to decide that the BIA had committed an error when it substituted its judgement for that of the IJ, but it clearly sympathized with the BIA's desire to create a standardized ruling on whether a given culture (in this case Mexico) was dangerous for gay men (the BIA believed it wasn't). Citing Ramji-Nogales et al., the Court later wrote that,

> Immigration judges display substantial disparity in evaluating claims for asylum or withholding of removal. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007). The Board thinks that it is entitled to curtail IJs' divergent approaches and believes that it can do so by determining whether particular countries are, or are not, hostile to particular political or social groups. Indeed, *we have urged the Board to make categorical decisions*.[218]

As of this writing, the BIA has made no such decisions. Absent concrete guidance, adjudicators attempt to "objectify" their decisions in several ways.

The most straightforward instance of this is when the government simply stipulates that some countries are "objectively" bad. As one IJ said, "I mean again some countries' conditions are just so bad… sometimes it's clear in an LGBT case that the conditions are bad enough in the

---

[217] *Rosiles-Camarena v. Holder* 735 F.3d 534, 535 (7th Cir. 2013)
[218] *Rosiles-Camarena v. Holder* 735 F.3d 534, 537-38 (7th Cir. 2013), emphasis mine.

home country that anybody who is gay would be at significant risk, so sometimes it's actually an easier case depending on the facts in the home country."[219] This occurs most often with countries where the government overtly punishes, or even kills, LGBTQ people, such as Yemen and Iran. Such cases may go on the "quick docket" in immigration court, where claims can be expedited if the government agrees to the form of relief someone is seeking. This happened for Sarah, a lesbian from Uganda, who received asylum after an approximately fifteen-minute hearing because the government stipulated to the fact that Uganda was simply "objectively" unsafe for her. Outside of these relatively rare cases, adjudicators must use other strategies to legitimate their decisions.

First, IJs often attempt to delineate concrete, objective reasons for their risk determination. Delivering an oral opinion from the bench on an asylum claim by Liu, a gay Malaysian man, one IJ offered an almost bullet-point style list to back up her decision. She began by citing the U.S. State Department Report indicating that there are laws criminalizing sodomy and immoral conduct, though they are rarely enforced. However, the country conditions expert testified that they are sometimes used and were in at least one high-profile case involving the Deputy Prime Minister, who was imprisoned for six years. The expert also testified, and documents corroborate, that police enforce the law extrajudicially and with impunity. At least two speeches in 2012 by the Prime Minister singled out LGBT people as undesirable. The government has set up reeducation camps for youth. The government condones hate speech and violence. After a lengthy list supporting her determination, the IJ ultimately concluded that "the Court will find that because the respondent is an openly gay Chinese man with effeminate

[219] Author interview with retired immigration judge.

characteristics, he has established well-founded fear of persecution and will grant his request for asylum."[220] Such overt declarations render the decision-making process more transparent. By offering a laundry list of reasons to support a decision, an adjudicator in effect makes what is ultimately a subjective decision resemble something closer to the mechanical objectivity preferred in bureaucratic decision-making. Each step propels any reasonable factfinder toward one conclusion: that Liu would face persecution in Malaysia. The style of delivery seems almost to remove human judgement from the equation, letting the facts speak for themselves.

This strategy can also be seen when adjudicators construct a chain of causality, so to speak, as in the case of Roxanne Isaacs, a lesbian from Guyana. Isaacs' claim for relief depended on her argument that each step in a chain of events was likely to occur. First, she would be identified as a lesbian because of her appearance. Second, she would be arrested and detained by Guyanese authorities because she is a lesbian. Third, she would be tortured (hers was a CAT claim) while in prison. The IJ, however, analyzed each step and concluded that each was not "more likely than not" and concluded that, "Isaacs may not establish a claim for CAT relief merely by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen."[221] Here, the decision is wreathed in the aura of conditional logic (if A then B; if B then C), again in a manner that seems to limit room for subjective judgement.

Another decision-making strategy that can be gleaned from the way judges deliver their opinions is to cite what they perceive to be the most objective sources of information first. We

[220] Author field notes.
[221] *Isaacs v. Holder* 353 Fed. Appx. 515, 517 (2nd Cir. 2009).

can observe this strategy at work in Liu's case above, where the IJ began her risk assessment by citing the U.S. State Department Report. In the Rosiles-Camarena case also discussed above, the Court stated that, "A sound prediction depends on country conditions, not (necessarily) on facts unique to the alien."[222] As Aaron Morris, the Legal Director for Immigration Equality, suggested, adjudicators view some forms of evidence as better than others in making risk determinations:

> I would say there's a tiered system about evidence and why some evidence is better than others. The State Department reports on each country every year. That's probably for better or worse what the U.S. government puts the most reliance on. Sort of a step down on that are other countries like the UK and Canada, which also do similar reports. Similar on that tier of good evidence are really reputable human rights groups like Human Rights Watch or Amnesty International. But also other really reliable news sources like the BBC or *New York Times*.[223]

This hierarchy of evidence is echoed in one immigration judge's explanation of how she assesses risk: "You go with the reports from various organizations including the Department of State but also including Amnesty International, Human Rights Watch, and there are some others, to see what are current conditions like."[224] Indeed, when specific sources of country conditions evidence are cited, the State Department Reports are by far the most common source. More than a third (38%) of the appellate decisions in my data set explicitly referred to the Reports. At the immigration court level, the Reports were introduced in all twelve cases I observed. When IJs

[222] *Rosiles-Camarena v. Holder* 735 F.3d 534, 538 (7th Cir. 2013).
[223] Author interview with Aaron Morris.
[224] Author interview with retired immigration judge.

delivered oral opinions from the bench, they frequently cited the Reports, followed by reports from other governments (usually Canada) and well-respected human rights organizations. IJs never explicitly invoked any forms of evidence further down the credibility hierarchy. Like the bullet-point listing of evidence outlined above, tying a risk decision to the U.S. State Department or Amnesty International gives the appearance of removing the subjective judgement of the adjudicator from the final determination.

In other instances, adjudicators attempt to use the purported objectivity of numbers and statistics to legitimate their risk calculations. Advocates frequently argue that Brazil and Mexico continue to be dangerous for LGBTQ people despite legal protections because of the high levels of violence, particularly murder, against them. Specifically, they point out that Brazil and Mexico rank first and second, respectively, for the most murders of LGBTQ people each year. However, some decisions turn these numbers around to support denials of asylum, as the BIA and Tenth Circuit did in the case of Marcelo Halmenschlager, a gay asylum seeker from Brazil:

> The unvarnished fact that 180 homosexuals were killed in one year is not remarkable in a country of over 180 million, particularly when the report does not identify the killings as murder, contains no mention of the reason for the killings or any description of the perpetrators…The reader is left to speculate--were they homophobic killings or were they motivated by other factors (jilted lovers, drug dealing, prostitution, etc.) and only coincidently involved homosexuals.[225]

The Seventh Circuit's *Rosiles-Camarena* decision employs a similar strategy in regard to Mexico. The IJ ruled that Rosiles-Camarena faced substantial risk because 148 people were

[225] *Halmenschlager v. Holder*, 331 Fed. Appx. 612, 622 (10th Cir. 2009).

murdered in Mexico between 1995 and 2006 because of their sexual orientation. The BIA disagreed with this assessment and

> observed that this amounts to 12 or 13 killings a year in a population exceeding 110 million, at least 2% of which is homosexual, making it unlikely (a risk of no more than 1 in 100,000) that any given gay man would be killed any given year. Expert testimony establishing that 'attacks on homosexuals are frequent' does not show the magnitude of risks, any more than expert testimony that 'auto accidents are frequent' would imply that a given driver (even one in a high-risk group, such as men under 25) is more likely than not to be injured.[226]

Thus, the BIA couches its decision in the objectivity of numbers, concluding that a 1 in 100,000 risk of being killed does not suffice for withholding of removal. Notably, however, the court remanded the decision to the BIA, reminding it that such numbers must be contextualized. The Court wrote, "For although we have mentioned so far only the statistical risk of death for homosexuals as a group, Rosiles-Camarena contends that he is at greater risk. He is not only gay and HIV positive but also 'out' and planning to live openly with his partner," before clarifying that acts far short of murder may constitute persecution and concluding that, "The question for the Board on remand is thus not whether aggregate data imply that Rosiles-Camarena is likely to be killed, but whether the IJ clearly erred in finding that he is more likely than not to be persecuted."[227] The Court thus rejects a straightforward statistical calculation of risk, instead ruling that aggregate statistical data can only go so far in determining individual risk. However, the general idea behind statistical inference still finds its way into risk determinations.

---

[226] *Rosiles-Camarena v. Holder* 735 F.3d 534, 536 (7th Cir. 2013).
[227] *Rosiles-Camarena v. Holder* 735 F.3d 534, 539 (7th Cir. 2013).

Analogical Thinking

Explaining how one decides how at-risk an asylum seeker might be, one former immigration judge said, "you do that by comparing them with other people who, to the extent you can ascertain, are similarly situated."[228] This kind of analogical thinking is precisely the logic behind actuarial risk assessment. You look at group-level outcomes—in this case, what happens to LGBTQ people in a particular country—and compare them to the individual case under consideration. The key difference, of course, is that judges' decisions are not quantified in the way actuarial estimates are. While this approach makes sense, it has also led some adjudicators to judge asylum seekers based on individual social visibility; that is, how identifiably queer is the claimant?

This led some judges to employ stereotypes of what they expected gay men to look or act like in order to evaluate whether they would be identified in their home countries for persecution. In the case of Mladen Todorovic, a gay Serbian man, the IJ wrote:

> The Court would first note that the respondent says that he is singled out for persecution because he is gay in his home country. The Court studied the demeanor of this individual very carefully throughout his testimony in Court today, and this gentleman does not appear to be overtly gay. The Court does not know whether he is or not, his testimony is that he is overtly gay and has been since he was 17 years old. Be that as it may, it is not readily apparent to a person who would see this gentleman for the first time that, that is the case, since he bears no effeminate traits or any other trait that would mark him as a homosexual.[229]

---

[228] Author interview with retired immigration judge.
[229] *Todorovic v. U.S. Attorney General*, 621 F.3d 1318, 1323-24 (11th Cir. 2010).

Similarly, in *Razkane v. Holder*, the IJ wrote that Razkane's "appearance does not have anything about it that would designate [him] as being gay. [He] does not dress in an effeminate manner or affect any effeminate mannerisms," and further decided that Razkane had not "shown that it is more likely than not that he would be engaged in homosexuality in Morocco or, even if he was, that it would be the type of overt homosexuality that would bring him to the attention of the authorities or of the society in general."[230] These two decisions evince a risk determination process dependent specifically on whether the claimants would be singled out as identifiably queer.

Indeed, this is not a strategy limited to judges. Claimants and their lawyers often point to gender non-conformity as a risk factor. As immigration lawyer Aneesha Gandhi explained, "they'll say when I was a kid I was bullied and beaten up, and we want to make sure we put that information in and then we have to kind of connect why are we putting this information in. Well, why did they do that to you? What was it about you that they didn't like? And a lot of them will say I liked to do girl things…the way I walked was more girly or I liked to play with girls instead of boys." Likewise, Maria, a lesbian asylum seeker from Mexico testified that she had a hard time growing up because she had four brothers, all of her friends were boys, she preferred to play with boys, and kids teased her because she was "different," calling her things like "marimacha," a derogatory slang term for lesbian. José Lopez, a bisexual Salvadoran asylum seeker, claimed he was raped because of his feminine appearance. Thus, appealing to gendered stereotypes is often a strategy used to demonstrate that a claimant would be at increased risk. This may be particularly true when a petitioner has not experienced past persecution and is making a future

[230] *Razkane v. Holder*, 562 F.3d 1283, 1286 (10th Cir. 2009).

persecution claim, perhaps based on changed life circumstances, such as transitioning genders. Heather McClure suggested that, "future persecution cases are really tricky and, in that case, it might be particularly important that the applicant come into that courtroom cross-dressed; you know, dressed as a transgendered [sic] person, because if they're willing to do that in a U.S. court of law, which is so extraordinarily formal, and they're willing to withstand the looks or the, you know, whatever response they may get, then it's more believable to the court that they would be willing to do that in their home country."[231] The assumption, then, is that being openly trans would increase their visibility and therefore their risk.

However, this individual visibility standard is not, in fact, how adjudicators are supposed to assess risk. The cases cited above—*Razkane* and *Todorovic*—were both struck down by appellate courts for unacceptable uses of stereotypes. As one judge suggested, however:

> I don't believe that the people who've been criticized for making comments that might be deemed as kind of stereotypical are actually guilty of stereotypical thinking. I think more they're trying to assess what's the actual risk of harm being inflicted. So if a person is a very out person as opposed to kind of a very conservatively dressed person who… somebody would be shocked in knowing that they actually were gay then I think it goes to objectively what's the risk of harm being inflicted on them if they return to a situation where gay people are really at risk.[232]

Despite her reasoning, this is still the incorrect standard. Rather, her analogical approach introduced at the beginning of this section is a more acceptable way to predict risk. Picking up on some of the cases where judges had employed an individual visibility requirement, the USCIS-

[231] Author interview with Heather McClure.
[232] Author interview with retired immigration judge.

Immigration Equality training for asylum officers corrected, "Some adjudicators mistakenly believe that social visibility or distinction requires that the applicant 'look gay or act gay.' In this context, social visibility or distinction does not mean visible to the eye. Rather, this means that the society in question distinguishes individuals who share this trait from individuals who do not" (USCIS 2011: 16). Thus, individual visibility may become *a* factor in risk determinations for some claimants, such as those who are visibly gender non-conforming, but it cannot be *the* determining factor.

In sum, asylum adjudications determine risk through a holistic process dependent on the trained judgement of judges who are afforded significant professional discretion. Judges consider evidence ranging from macro-level human rights and political conditions in claimants' home countries to individual-level information about applicants' personal circumstances. Risk is therefore rendered legally cognizable primarily through the subjective assessment of individual judges. In other words, judges are the risk assessment tools in asylum hearings. However, judges do try to make their decisions appear as objective as possible by explicitly listing forms of evidence viewed as more objective and reliable, engaging in analogical thinking, using logical inference, and sometimes drawing on the authority of numbers. Importantly for this analysis, sexuality is not the "risk object"—the source of harm—at all. Rather, the claimant's home country and culture are constructed as the risk object. Sexuality, in these calculations, is a risk factor; indeed, it is *the primary* risk factor. Even though sexuality is not the explicit target of risk calculations for asylum decisions, the risk faced on account of one's sexuality is the principal mechanism for constituting LGBTQ asylum seekers as legal and sexual subjects before the state. As the next chapters illustrates, this process is quite different for sex offenders whose sexuality *is* the source of danger.

Chapter 7:
Sexual Predators and the Constitution of Risky Individuals

"It's basically malpractice not to use them. I know some people don't like to use them, and I think that's crazy. When we go with our gut, we may as well be flipping a coin," explained Michael Kleppin, a sex offender therapist and evaluator in Illinois, to a room of about fifty therapists, lawyers, and probation, parole, and police officers who had gathered to learn about recent changes to Illinois' standards for the treatment and evaluation of sex offenders. But what is so crazy that not using it would be malpractice? Kleppin was referring to actuarial risk assessments, like the Static-99, Minnesota Sex Offender Screening Tool (MnSOST), and Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR), all tools designed specifically to be used with sex offenders. Although some clinicians continue to believe that their intuition, honed over years of working with sex offenders, is a better predictor of an offender's risk, studies consistently show that actuarial assessment outperforms clinical evaluation. As Kleppin pointed out in his presentation, clinicians who use unstructured clinical judgement are no better than chance (and sometimes worse) at predicting whether a particular offender will recidivate. By contrast, studies of the Static-99 put its predictive accuracy at about 70%. Because of the substantial difference in predictive power, many states now require that evaluators use certain actuarial tools when assessing sex offender recidivism risk for a range of legal decisions, from sentencing and probation to determining whether an offender should be civilly committed indefinitely.

In contrast to asylum risk determinations discussed in the previous chapter that rely on the subjective "trained judgement" of immigration judges, sex offender risk evaluations take a more mechanical, quantitative approach to assessing risk through the use of actuarial

techniques—though as I will discuss below, considerable professional discretion often finds its way into these evaluations, as well. Greater data availability in comparison to the asylum setting make these more sophisticated techniques possible, but the greater visibility of sexual assault as a social problem and the greater need for communication across institutions also push risk determinations for sex offenders to more closely resemble what Porter (1995) calls "mechanical objectivity." Despite these differences, risk assessments for sex offenders similarly serve to constitute legal and sexual subject positions. Just as judgments of the risk that an asylum seeker will face persecution determine whether he will gain access to the national community and the rights of citizenship, so too do decisions about a sex offender's risk of sexual recidivism determine his civil rights and liberties and the level of access he will have to civil society.

This may seem like an exaggeration or inapt comparison, but closer inspection shows it is quite appropriate. Although sex offenders are (typically) U.S. citizens, courts have carved out many legal exceptions to their Constitutional rights to privacy, due process, and double jeopardy, among others. Unlike other violent offenders, sex offenders are subject to public registration, residency restrictions, restrictions on free movement, prohibitions from using social media and sometimes the Internet at all, and many other curtailments of basic civil liberties. Decisions about the extent of such restrictions—including how long one must register, who must be notified of the ex-offender's presence, and where one can live—are often made through risk assessment. These constraints on the everyday rights of people who have been convicted of sexual crimes are generally justified by claims of exceedingly high rates of recidivism and assertions that such policies protect the wider community from the unique danger sex offenders pose. Protecting the public is certainly a worthwhile goal, but studies suggest that most of these laws have little or no effect on rates of sexual assault and may even increase risk by preventing

ex-offenders from reintegrating into communities. Nevertheless, the purported risk posed by sex offenders, especially those deemed "sexual predators" (a formal legal designation in many states), continues to drive public policy and legal decision-making.

The most striking example of how risk determines sex offenders' access to citizenship is illustrated by SVP laws that allow for the indefinite civil commitment of some sex offenders. As explained in the introduction, SVP statutes are aimed at the "worst of the worst" and allow the state to seek the indefinite civil confinement of a sex offender after he has served his full criminal sentence. Although civil commitment programs are supposed to be treatment facilities, in practice many offenders receive little to no treatment, and civil commitment often ends up being a de facto life sentence without the accompanying criminal conviction. A risk assessment can therefore serve to remove a sex offender from civil society forever. Put another way, it determines whether he will ever again have access to many of the most basic rights of citizenship.

Because of its parallels with asylum determinations vis-à-vis access to citizenship, in this chapter I concentrate on SVP adjudications. Specifically, I analyze how sexual risk is rendered legally cognizable, precisely how risk is calculated, and how risk determinations constitute the figure of the "sexual predator" as a particularly dangerous person requiring exceptional social control measures. First, I want to briefly consider the standards of proof employed in SVP proceedings and how they are interpreted and operationalized.

Predicting the Future "Beyond a Reasonable Doubt"

Just as petitioners must prove a "well-founded fear of persecution" in asylum claims, the state must prove that a sex offender is likely to sexually reoffend in SVP trials. However, unlike asylum law, which has one uniform standard for "well-founded fear" nationwide, the standard of

commitment varies across the country. Depending on the jurisdiction, a sex offender must be "likely," "more likely than not," or "substantially probable" to sexually recidivate. Courts in many states have attempted to clarify what these terms mean, but often their clarifications are less than clear, as I will discuss shortly. Compounding the confusion, SVP laws also have standards of proof that are distinct from the standards of commitment. Whereas standards of commitment apply to risk (i.e., how likely is this person to sexually reoffend?), standards of proof apply to the totality of the trial (i.e., did the state prove that this person is an SVP?). Standards of proof also vary across jurisdictions, with most states adopting the "beyond a reasonable doubt" standard of criminal trials, though some states use lower standards typical of other civil proceedings. See Table 1 for a summary of the standards of commitment and proof for all jurisdictions that have enacted SVP laws. Because I am concerned with risk determinations, I will mostly focus on standards of commitment for the remainder of this chapter.

What is a standard of commitment?

In Illinois, a sex offender must be found to "suffer from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence" in order to be adjudicated a "sexually violent person."[233] In Minnesota, by contrast, an offender must be "likely to engage in acts of harmful sexual conduct."[234] And Missouri offers yet another standard, stating that an offender must be "more likely than not to engage in predatory acts of sexual violence."[235] But what do all of these various terms mean? Is "substantially probable" the same as "more likely than not"? Is "likely" a higher or lower threshold than "more likely than not"? Many state

[233] Sexually Violent Persons Commitment Act, 725 Ill. Comp. Stat. Ann. 207/5(f) (1998).
[234] Sexually Dangerous Person Act, Minn. Stat. 253B.02(18c)(a)(3) (2011).
[235] Sexually Violent Predators, Civil Commitment Act, Mo. Rev. Stat. §632.480(5) (2012).

courts have tried to provide some definitional clarity to these terms, but others have refused to offer any guidance. Moreover, among those that have tried to clarify matters, no consistent definition of "likely" has emerged.

Table 3 – Standards of commitment and proof for civil commitment of sex offenders.

State	Standard of commitment	Standard of proof
Arizona	Likely	Beyond a reasonable doubt
California	Likely	Beyond a reasonable doubt
Florida	Likely	Clear and convincing
Illinois	Substantially probable	Beyond a reasonable doubt
Iowa	Likely	Beyond a reasonable doubt
Kansas	Likely	Beyond a reasonable doubt
Massachusetts	Likely	Beyond a reasonable doubt
Minnesota	Likely	Clear and convincing
Missouri	More likely than not	Clear and convincing
Nebraska	Likely	Clear and convincing
New Hampshire	Likely	Clear and convincing
New Jersey	Likely	Clear and convincing
New York	Likely	Clear and convincing
North Dakota	Likely	Clear and convincing
Pennsylvania	Likely	Clear and convincing
South Carolina	Likely	Beyond a reasonable doubt
Texas	Likely	Beyond a reasonable doubt
Virginia	Likely	Clear and convincing
Washington	Likely	Beyond a reasonable doubt
Wisconsin	Likely	Beyond a reasonable doubt
Federal	Unclear in statute	Clear and convincing

The California Supreme Court case *People v. Superior Court (Ghilotti)* provides one instance of such an attempt. In considering whether state evaluators had misinterpreted the meaning of "likely" to engage in sexually violent conduct, the court took the opportunity to clarify the term. Ghilotti, the offender, argued that "likely" should be understood as "'highly likely,' or at least 'more likely than not,'" while the state asserted that "likely" "does not mean

'probable' or 'more likely than not,' but refers to 'a significant chance, not minimal; something less than 'more likely than not' and more than merely 'possible.'"[236]

After consulting several sources on the definition of "likely"—including the Oxford English dictionary, legal dictionaries and thesauruses, common usage, legal usage in the United Kingdom, legislative intent, and other court decisions using a "likely" standard—the court ultimately disagreed with both parties and instead offered its own interpretation. The court concluded:

> '*likely* to engage in acts of sexual violence'… connotes much more than the mere *possibility* that the person will reoffend… the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if… the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community (italics in original).[237]

Thus, in California, "likely" can mean something less than 50%, though it is unclear precisely what a "serious and well-founded risk" might be. Presumably individuals could genuinely disagree over such terms. But applying the "well-founded" principle from asylum law would suggest that even a probability of recidivism as low as 10% could qualify an offender for civil commitment in California.

Illinois provides another example. The Second District Appellate Court of Illinois in *People v. Hayes* ruled that "substantially probable," the standard of commitment in Illinois, "means 'much more likely than not,' a standard higher than or equal to the 'likely' standard

---

[236] *People v. Superior Court (Ghilotti)*, 44 P.3d 949, 967-68 (Cal. 2002).
[237] *People v. Superior Court (Ghilotti)*, 44 P.3d 949, 972 (Cal. 2002).

found constitutional in *Hendricks*. However, we emphasize that this definition cannot be reduced to a mere mathematical formula or statistical analysis."[238] The court's assertion that the definition cannot be reduced to a quantitative calculation is significant here because recidivism probabilities on actuarial assessments very rarely exceed 50%. As Illinois evaluator Dr. Travis pointed out, "If you look at the recidivism [on] the actuarials, especially the Static-99R and the Static-2002R, a person can be very high risk, and yet when you look at their absolute risk, which is the probability assigned that this person will be charged or convicted of a sexual offense within a certain amount of time, it's below 50%."[239] This is likely why a number of courts to have considered the issue echo the Illinois court's contention that risk cannot be determined only through a statistical estimate, as the Kansas Supreme Court did when it wrote: "Nor is there support for suggesting that if an actuarial test is used, a particular percentage or category of risk must be shown on the actuarial risk assessment test before an offender may be characterized as a sexually violent predator."[240] Similarly, the Massachusetts Supreme Court declared:

> While likely indicates more than a mere propensity or possibility, it is not bound to the statistical probability inherent in a definition such as 'more likely than not,' and the terms are not interchangeable. To conclude that likely amounts to a quantifiable probability, absent a more specific statutory expression of such a quantity, is to require mathematical precision from a term that, by its plain meaning, demands contextual, not statistical, analysis.[241]

---

[238] *People v. Hayes (In re Hayes)*, 747 N.E.2d 444, 453 (Ill. App. Ct., 2001).
[239] Author interview with Dr. Travis.
[240] *In re Care & Treatment of Williams*, 253 P.3d 327 (Kan. 2011).
[241] *Commonwealth v. Boucher*, 880 N.E.2d 47, 50 (Mass 2002).

The North Dakota Supreme Court was the clearest in stating that by refusing to specify a clear threshold, it was preserving the discretion of courts and evaluators. The court wrote: "This definition prevents a contest over percentage points and the results of other actuarial tools, and allows experts to use the fullness of their education, experience and resources available to them in order to determine if an individual poses a threat to society."[242] Thus, as I will discuss further below, although actuarial risk assessment tools are understood by most to be objective, discretion is pervasive at many points in the SVP adjudication process, including in deciding how to operationalize terms such as "likely" and "substantially probable."

By refusing to give firmer guidelines, courts and legislatures open the way for significant discrepancies, not only across jurisdictions, but also from trial to trial and juror to juror. In one study of actual jurors who served on SVP juries, researchers found that 81.7% of jurors believed that a 15% estimated chance of recidivism meant that an offender was "likely" to reoffend, and more than half (53.6%) believed that even a 1% chance of reoffense indicated a "likely" recidivist (Knighton et al. 2014). The researchers concluded that jurors tend to view risk more in terms of the severity of potential harm than in terms of statistical probability and that when laws grant jurors discretion in defining tolerable risk, jurors find even statistically low degrees of risk intolerable.

This low risk tolerance is reflected in the success rates of states that seek to commit sex offenders. When I asked evaluators how often someone they believed to be an SVP was found by a court to be so, they invariably responded by saying nearly always. My exchange with Dr. Weitl, an Illinois and Missouri SVP evaluator, is illustrative:

---

[242] *Grosinger v. M.B.K. (In re M.B.K.)*, 639 N.W.2d 473, 477 (N.D. 2002).

> Author: How often is your recommendation actually the way that the court decides?
>
> Dr. Weitl: Pretty much always. In Missouri I think I had a 100 percent accuracy just because, especially in the early days… there were very few courts in the land that were going to say no when you're saying this guy is dangerous because he clearly is.[243]

Similarly, Dr. Travis said in response to the same question, "From the ones that I've followed up on or that I have knowledge of it's about 90 to 95% of what I recommend."[244] In perhaps the most measured response to that question, Dr. Adkerson, a treatment provider and occasional SVP evaluator, said, "The courts routinely respect my opinion, and I think it goes with my recommendations much more often than not."[245] Margaret Menzenberger, an Assistant Attorney General for the state of Illinois who has been with the SVP unit for over ten years, told me that she had only ever had one case where an offender was found not to be an SVP (I subsequently observed one of her SVP trials in which the offender was found not to be an SVP, bringing her total to at least two now). Certainly, these people could be exaggerating their success rates, and several suggested that courts went with their assessments because they were "very good at what [they] do" or because they "really rely on the science." However, audit studies suggest that they are likely telling the truth. One study in Texas found that juries committed 100% of the 26 offenders tried during the study period and that this resembled the history of the Texas SVP law: only one jury had ever found an offender not to be an SVP (Boccaccini et al. 2013). Other reports indicate that 95% of SVP petitions are granted in Florida and about 80% are granted in Minnesota (Prentky, Barbaree and Janus 2015).

---

[243] Author interview with Kim Weitl.
[244] Author interview with Richard Travis.
[245] Author interview with Donya Adkerson.

Given this information, though, how is risk actually determined in SVP trials? How is a person's sexual risk gauged in order to determine whether he meets the loosely-defined "likely" standard? Whereas in asylum hearings, a country and its cultural setting become the source of risk and an individual's sexuality a risk factor, in SVP trials, the individual is constituted as risky and the community as at risk from him. Through the diagnosis of mental disorders and the prediction of future sexual risk, forensic psychologists and courts co-produce the legal identity of the "sexually violent predator" as a distinct type of person, a unique risk object. Forensic psychology lends support to this legal construction by providing mental health diagnoses and actuarial risk assessments that serve as the basis for durable social and sexual identities for SVPs. Each SVP trial provides an opportunity to reinforce collective understandings of sexuality and sexual violence through the legal constitution of an individual SVP. The aggregate effect is to constitute "sexual predators" as permanently pathological and indefinitely dangerous.

Constituting the Sexually Violent Predator

A primary way that psychologists contribute to the construction of the SVP is through diagnosing offenders with mental abnormalities that become the basis for permanent legal and social identities. Drawing on the legitimacy of the DSM, forensic psychologists can authoritatively dictate medicalized identities that courts readily accept. Because the DSM provides explicit diagnostic criteria, adjudicators generally accept these diagnoses as objective and reliable (First 2014). Nevertheless, debate continues within the "psy" professions around questions of whether "particular patterns of personality or behavior—such as rape—qualify for the category [of mental disorder]" (Janus 2006:38) and also around the accuracy of particular diagnoses. As Dr. William Marshall, a well-regarded researcher and treatment provider, commented, "We need to realize when looking at these diagnoses applied in SVP settings… for

example pedophilia diagnosis, the inter-rater agreement…is .6. Inter-rater reliability for an important decision should be .8 or better. This is an important decision so .6 is nowhere near it. For [paraphilia] 'not otherwise specified' it's .4, which is even lower. And the other possible diagnosis is sexual sadism which is .4. So it is nowhere near meeting the criteria for reliability."[246] Similarly, commenting on the controversy around the "paraphilia not otherwise specified, non-consent" diagnosis for SVPs, researcher and treatment provider Dr. Robin Wilson said:

> I think it is over-diagnosed, and I think one of the reasons why it's over-diagnosed is because the American Psychiatric Association has completely abdicated its responsibility to give us a reasonable criterion set with which to actually make the proper diagnosis. So the fact that they just continue to say, "Nope, nope, nope," basically leaves practitioners out in the woods searching for the boundaries of what they can use to make this diagnosis.[247]

By refusing to include some form of a non-consent or rape paraphilia in the DSM, the APA, Wilson suggests, is contributing to the problem of inconsistent diagnosis. Nevertheless, psychiatric diagnoses carry considerable authority in both the legal and public spheres and serve as one basis for constructing SVPs, and, by extension, all sex offenders, as permanently pathological. In fact, today many forensic psychologists consider paraphilias, such as pedophilia and sadism, to be akin to sexual orientations. As Dr. Davis, an Illinois SVP evaluator, explained,

> I look at arousal on a spectrum, and it's just not male, female. We extend out to male/male, female/female, so if you extend it farther, in my estimation… the person

[246] Author interview with William Marshall.
[247] Author interview with Robin Wilson.

> could have arousal to children… In that regard, it becomes a lot more difficult to – we don't look at changing it. We look at intervening on it so that the person does not act on it against children. It has to be an ongoing intervention.[248]

Similar statements often appear in court decisions, as in the SVP hearing of Mark Broer in Washington state: "The trial court rejected the testimony of Dr. Wollert, that Broer's pedophilia is in remission. The court relied upon the testimony of Dr. Wheeler that paraphilias do not spontaneously remit and that Broer's condition is chronic and enduring, as well as Dr. Spizman's testimony that the current thinking is that pedophilia never goes into remission."[249] This legal-scientific conception of pedophilia in turn provides support for lay opinions of pedophilic sex offenders. In Small's study of lawyers who deal with sex offenders, she found that "Unlike other criminals, respondents categorize pedophiles as uniquely deviant. They perceive them to be incorrigible. The pedophile is unrehabilitative because his sexual urges are a core part of his being" (Small 2015:125).

In fact, however, most child molesters do not exhibit significant arousal patterns to prepubescent children or meet the DSM diagnostic criteria for pedophilic disorder (Seto and Lalumiere 2001).[250] Rather, their offense was situational and not necessarily an indicator of a pattern likely to be repeated. In other words, not all "pedophiles" are unrehabilitative, nor is a sexual urge to molest children a "core part" of their sexual being. As evaluator and treatment provider Dr. Donya Adkerson explained, "[I]t is common for people in media in current culture to refer to anyone who molests a child as a pedophile, and it's just not the case. There are

---

[248] Author interview with Dr. Isabel Davis.
[249] *In the Matter of the Detention of Mark Broer*, 2005 Wash. App. LEXIS 688.
[250] The 5th circuit even makes this error in *U.S. v. Ortega* 485 Fed. Appx. 656 (5th Cir. 2012).

pedophiles who molest. There are pedophiles who don't molest. And there are people who molest children that are pedophilic, and there are people who molest children who aren't pedophilic."[251] Yet lay understandings of the term "pedophile" as a distinct type of person are reinforced by the DSM definition of paraphilias as enduring arousal patterns and, specifically, the designation of pedophilia as akin to a sexual identity such as gay or straight. The DSM-5 even refers to pedophilia as a "sexual orientation," though the editors later issued a correction saying that it should read "sexual interest."

This view of sex offenders, and especially pedophiles, as unique and particularly monstrous, highlights the way that our culture grants excessive weight to sexual matters (Rubin 1984). This cultural view colors our penal approach to sex offenses, as exemplified in the exceptional measures we take to control them, such as Megan's Laws and GPS monitoring. As Karl Hanson, co-creator of the Static-99, pointed out, part of his rationale for creating an actuarial instrument specific to sex offenders was precisely because of this view in the penal system: "[T]he standard practice, and it's still the standard practice in many of our jurisdictions, is to automatically override sex offenders into a high risk category for correctional management purposes, just because they're sex offenders."[252] In creating the Static-99, he was partially working to dispel the myth that sex offenders are inherently more dangerous than other offenders simply because their crimes involved sex. While this approach may have gained some traction in Hanson's native Canada, in the U.S., separate risk instruments for sex offenders serve simply to reinforce the idea that sex offenders are special kinds of criminals.

[251] Author interview with Donya Adkerson.
[252] Author interview with Karl Hanson.

Significantly, the Supreme Court's *Hendricks* ruling established that treatment was not necessary to make SVP civil commitment constitutional. In its decision striking down the SVP statute, the Kansas Supreme Court wrote, "It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent."[253] Accepting the conclusion that treatment for SVPs might not exist, Justice Thomas, writing for the majority, stated simply, "We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law."[254] Indeed, the Kansas statute's preamble plainly states that, "In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior."[255] This language is echoed verbatim in several other SVP statues across the country, including Florida, Iowa, New Hampshire, and Washington. Such statements make it clear that rehabilitation is not a priority, and it seems that it wasn't even seriously considered at the time these statutes were enacted. Rather, legislatures and courts alike agreed that they were dealing with a permanently pathological person, not a dynamic individual. Though individualized assessment was required to commit an SVP, the legal actors involved clearly believed that individual would remain a

[253] Cited in *Kansas v. Hendricks* 521 U.S. 346, 365 (1997)
[254] *Kansas v. Hendricks* 521 U.S. 346, 366 (1997)
[255] Kan. Stat. Ann. § 59-29a01 (1994)

danger indefinitely. These understandings are further bolstered by the use of static risk assessment instruments, which I return to shortly.

As noted in Chapter 2, the *Kansas v. Crane* decision also helped to solidify forensic psychologists' pivotal role in determining whether an offender suffers from a "mental abnormality" that affects his volitional control.[256] Perhaps even more importantly, though, this case highlights the importance of psychological predictions of "dangerousness" for sexual predators. A psychiatric diagnosis, though certainly serving as the basis for a permanent penal and social identity, is not enough to designate someone an SVP. Rather, the mental abnormality must also predispose an offender to future sexual violence, and, per *Hendricks*, psychologists must be able to separate SVPs from more typical recidivists. This was particularly an issue in *Crane* because exhibitionism is not typically considered an extremely dangerous disorder. His commitment therefore depended to a larger extent on his anti-social personality disorder (APD) diagnosis. Research suggests, however, that a substantial portion of the male prison population—perhaps upwards of 60%—could be diagnosed with APD (Moran 1999). An APD diagnosis alone, then, may be insufficient to commit an offender, as it may not properly distinguish SVPs from other offenders.[257] A psychologist's prediction that an offender will continue to be dangerous indefinitely, however, can be more determinative in labeling someone an SVP.

Actuarial Risk Assessment and the Designation of Dangerousness

Predictions of dangerousness constituted an important part of sexual psychopath commitments, but the subjectivity of these predictions led to widespread concern about the

[256] *Kansas v. Crane* 534 U.S. 407 (2002).
[257] The 7th Circuit makes just this point in *Adams v. Bartow* 330 F.3d 957 (7th Cir. 2003), ruling that antisocial personality disorder may not be enough to commit someone, but APD in combination with evidence of sexual risk is sufficient.

validity of the process. However, while the new generation of sex offender civil commitment statues were being enacted, forensic psychologists were also creating what were presented as more objective means of assessing future dangerousness in the form of quantitative risk prediction tools. Karl Hanson developed the first of these instruments in 1997, and soon thereafter, he and David Thornton (2000) created the Static-99, which is now the most widely used actuarial risk assessment (ARA) tool for sex offenders in the United States.

Although actuarial techniques use group-based risk prediction, I suggest that the turn to actuarialism is continuous with earlier attempts to individualize punishment and the "will to know the criminal" (Harcourt 2007:173; Lynch and Bertenthal 2016) and is consistent with efforts at clinical risk prediction during the "sexual psychopath" era. Indeed, SVP evaluations resemble the parole system, which might be considered the epitome of individualized justice (Harcourt 2007). ARA, however, is seen as a purer and more objective view of the individual by both courts and forensic psychologists. Before taking a more in-depth look at how ARA constitutes the SVP as a legal and sexual subject, I first want to briefly consider the creation of actuarial instruments for sex offenders and, specifically, the development of what is now the most widely used actuarial tool for sex offenders worldwide: the Static-99.

Dangerous by Design

The use of actuarial methods in the penal domain dates back to the early-20th century, when University of Chicago sociologist Ernest Burgess designed an instrument for the state of Illinois to predict the likelihood that a prisoner would be successful on parole (Harcourt 2007). However, actuarial tools were not widely used in the United States until the 1980s and 1990s when instruments were designed to predict violent recidivism and the individual risk of prisoners, the results of which were often used for sentencing decisions and to sort prisoners into

different security levels (Feeley and Simon 1992; Harcourt 2003). ARA tools specifically for use with sex offenders began being developed in the mid- to late-1990s. Two of the earliest were the Minnesota Sex Offender Screening Tool (MnSOST), created in 1995 by a team of researchers for the Minnesota Department of Corrections, and the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR), introduced in 1997 by Karl Hanson, a researcher for Public Safety Canada. Though both tools showed promise, the MnSOST required considerably more information about the offender and more training for coders than the four-item RRASOR, which could generally be completed with minimal training using information found in most offenders' records (Barbaree et al. 2001). Nevertheless, both instruments were used to some extent by forensic psychologists and treatment providers, and some clinicians continue to use these tools. But both have been falling into disuse since the introduction of the Static-99 in 1999.

The Static-99 is a 10-item actuarial scale created by Karl Hanson and David Thornton and is a combination of the two researchers' respective scales: Hanson's RRASOR and Thornton's Structured Anchored Clinical Judgement (SACJ). Items from the RRASOR include prior sex offenses, age at release, victim gender, and relationship to victim (related or unrelated). The other six items came from the SACJ and were relationship status (ever lived with a partner for at least two years?), prior non-sexual offense convictions, index non-sexual violence (i.e. was the offender convicted of a non-sexual offense at the same time as his sexual offense), prior sentencing dates, convictions for non-contact sex offenses, and any stranger victims. As Hanson and Thornton explained in their article introducing the Static-99, "Many of the variables used in the Static-99 can be grouped into general dimensions that are plausibly related to the risk of sex offense recidivism, such as sexual deviance, range of available victims, persistence (lack of deterrence or 'habit strength'), antisociality, and age (young)" (Hanson and Thornton 2000:131).

However, selection of the variables was not guided by theory, but rather on the basis of observed correlations with recidivism. Hanson has acknowledged this possible shortcoming, writing that, "None of the items were intended to measure psychologically meaningful constructs; they were selected purely on the basis of empirical relationships with recidivism and ease of administration" (Hanson and Morton-Bourgon 2009:1). He has also forthrightly acknowledged that the Static-99 factors were chosen in part for administrative ease and because the information used for scoring the Static-99 is generally recorded in administrative records. Indeed, the instrument's low administrative burden likely accounts in part for the Static-99's widespread uptake.

But as Hanson suggested, the timing of an evaluative study of five actuarial instruments likely also aided the Static-99's ascent: "the next thing that happened is that Howard Barbaree did the comparison of four or five risk scales that were there, and Static-99 came out on top. This was a fluke, right? Because one of them's got to come out on top."[258] In fact, the RRASOR came out on top, with an ROC of 0.77, followed closely by the Static-99 with an ROC of 0.70, but the difference was not statistically significant (Barbaree et al. 2001). However, subsequent studies have shown the Static-99 to perform better than the RRASOR, and Hanson and others from the Static-99 workgroup have publicly recommended against continued use of the RRASOR because its norms have not been updated in line with the best available data and statistical techniques. The Barbaree study also showed the MnSOST not to be a statistically significant predictor of sexual recidivism, precipitating its decline in use. Interestingly, some studies have also shown other ARA instruments to be more predictive than the Static-99. One study found that the

[258] Interview with author.

Violence Risk Assessment Guide (VRAG) and Sexual Offender Risk Assessment Guide (SORAG), an off-shoot of the VRAG, were both more predictive of sexual recidivism than the Static-99 (though the differences were not statistically significant for all samples) (Harris and Rice 2003). Notably, however, the VRAG and SORAG require much more in-depth information about offenders to be fully scored, including phallometric test results and a psychopathy score from the Hare Psychopathy Checklist-Revised (PCL-R), both of which are unavailable for many offenders and have also faced significant criticism regarding their validity. Administrative ease, data availability, and its acceptably high predictive ability, then, have allowed the Static-99 to edge out its competition to become the most widespread sex offender ARA instrument in use today.

Because of its widespread uptake, the Static-99 is also continually revised. In 2002, a new version called the Static-2002 was introduced, which made small changes to the group norms and recidivism predictions, but did not perform significantly better than the Static-99, as Hanson explained: "we expected the 2002R to be sufficiently better than the 99 that it could replace it. It didn't turn out that way. It was a bit better, and I still think it's a bit better, but not hugely so."[259] In 2008-2009, both the Static-99 and 2002 were re-normed using new and much larger samples of offenders. Importantly, the new norms incorporated four samples from the United States, partially blunting the criticism often levied against the instruments in U.S. courtrooms that the samples used to norm the tools were all based outside of the U.S. (the original samples were all from the UK and Canada). Lastly, in 2012, both the Static-99 and 2002 became the Static-99R and Static-2002R (for "revised") with changes to the weighting of the age

[259] Author interview with Karl Hanson.

variable that allowed risk scores to decrease as offenders aged, in line with data suggesting that the likelihood of sexual recidivism significantly decreases with age.

Because of the advances in predictive ability of ARA for sex offenders, ARA is now widely accepted by courts, as discussed in Chapter 2. Many psychological professionals now echo Dr. Kleppin's sentiment from the beginning of this chapter that it is simply unethical not to use ARA given its much better accuracy compared to clinical judgement, especially for such important decisions as SVP determinations. This is not to say that ARA comes with no downside. The Static-99, for example, is the quintessential black box. The creators have provided information on the populations used to develop and norm the instrument and derive recidivism rates, and have extensively discussed why they chose certain variables over others. However, the algorithm and weighting behind the deceptively simple scoring check sheet (see Appendix 1) remain proprietary, and the creators have refused to turn over certain data sets to other researchers for re-analysis. Moreover, many ARA instruments, including the Static-99, lack a theoretical foundation, have low inter-rater reliability, and can sometimes act as cover allowing professional discretion and bias to enter legal proceedings disguised as objective quantitative calculations. Before delving more deeply into these issues, I want to consider how ARA technologies are actually used in making risk determinations of sex offenders and how these predictions serve to constitute the SVP.

Locating Risk in the Sexually Violent Predator

Legal scholar Eric Janus (2006:103-04) asserts: "As constructed by the predator laws, risk tells us something essential—rather than accidental—about the person. This characteristic—sometimes called 'dangerousness'—is portrayed as a stable ingredient of the person, a part of him even if it is not now visible." Risk assessments that consider only static or unchanging

factors, such as the Static-99, reinforce this conception because one's risk level can never change if only historical factors are considered.[260] This design gives the impression that risk is fixed indefinitely in the very person of the SVP. Judicial decisions bear out this assertion when they describe offenders as *being* "sexually dangerous," implying that dangerousness is an inherent quality of the offender. Court determinations that conclude that an offender *is* a "sexually violent predator" assign an identity label, not merely a punishment for criminal behavior. Expert affidavits further attest to this. As one Illinois evaluator wrote in his report to the court for an SVP hearing: "It is this examiner's opinion, to a reasonable degree of psychological certainty, that Mr. Lowe is dangerous – his mental disorders make it substantially probable that he will engage in acts of sexual violence."[261] In this formulation, Mr. Lowe's dangerousness is part of his makeup, a characteristic of him as a person. But this construction of the sexual predator has spillover effects for all sex offenders. Megan's Law, for instance, is premised on the assumption that treatment of sexual offenders is futile and that they will remain dangerous—indeed that they are guilty not just of bad behavior but of being bad people (Hoppe 2016; Simon 1998).

The notion that sexual offenders are inherently bad or dangerous is further evidenced by the rarity with which SVPs are released from custody. Minnesota and Missouri, for instance, are facing on-going legal battles over their civil commitment programs because of the way their programs have been enacted. Missouri has never released an SVP since the inception of its program in 1999. Minnesota has released only a handful since its program began in 1994 and

[260] The newer iterations of the Static-99, the Static-99R and the Static-2002, do allow risk to decrease with age. Dynamic risk assessment tools are also available, but they generally cannot be used with incarcerated individuals. However, most evaluators today will take into account dynamic factors in their overall assessment to some extent, although they will not be reflected in the quantitative recidivism estimates.

[261] SVP evaluation of Jordan Lowe by Dr. Edward Spencer, page 55. On file with author.

currently has the highest per capita rate of civilly committed sex offenders of any state in the country. Both programs have been accused of providing insufficient treatment and unclear paths for "patients" to progress toward release. An expert evaluation of the Minnesota program prepared for the court attests to these complaints.[262] As Michael Miner, one of the contributing experts in the Minnesota case, commented,

> We were twenty years into it in Minnesota and…this clearly appears to be an indefinite commitment program; this does not appear to be a treatment program since nobody seems to be successful. You know, what's the problem here? Is it that we truly have a bunch of intransigent people and, therefore, we can expect this to continue to grow? Or is there something wrong with both the way the law is written and the way it's implemented? And the answer was yes, in both cases.[263]

A 2007 report on SVP commitment programs nationwide likewise found that only about 10% of those committed since 1990 had been released by 2006 (Gookin 2007). As Miner's comments and SVP release data suggest, despite ostensibly being treatment programs, SVP programs appear to be aimed more at containing those who are viewed as "intransigent" rather than malleable or amenable to rehabilitation.

When they are released, offenders in general, and SVPs especially, face increased surveillance and severely curtailed liberties on where they can live and work, and even whether they can use a computer. Many face lifetime registration on public sex offender registries and often must notify the community of their presence. These often lifelong restrictions promulgate

[262] Available at http://stmedia.startribune.com/documents/Expert+panel+report+on+sex+offender+program.pdf. Last accessed January 9, 2017.
[263] Author interview with Michael Miner.

the idea that sex offenders are incurable deviants permanently possessed of a pathological sexuality. Ideas of enduring sexual pathology certainly draw support from many sources—including cultural stereotypes—but forensic science provides a powerful tool to reinforce these views, particularly when courts are searching for a rationale to treat sex offenders in exceptional ways. Quantified risk estimates offer perhaps the best justification for the notion that sex offenders are indefinitely dangerous. Unlike the "yes" or "no" dangerousness determinations of the sexual psychopath era, risk estimates are probabilistic, meaning there is rarely, if ever, a situation in which an offender would be deemed to have no risk. Thus, regardless of the numerical estimate, courts can use actuarial risk assessments as justification for the assumption that sex offenders will *always* be risky.

The 2016 decision by the Seventh Circuit in *Belleau v. Wall* illustrates this idea. Belleau had been declared an SVP by the state of Wisconsin due to two prior sexual assault charges involving children. After ten years in prison and five years of civil commitment, Belleau was released from custody based on the opinion of a psychologist that he was no longer more likely than not to commit future sexual assaults. Using the Static-99R, the psychologist estimated that Belleau's risk of recidivism was 16% at the time of his release from civil commitment and 8% at the time of Belleau's appeal, at which he argued that Wisconsin's requirement that all sex offenders released from civil commitment wear a GPS ankle bracelet 24 hours a day for life was unconstitutional. The district judge agreed that the statute was unconstitutional, precipitating an appeal to the Seventh Circuit, which reversed the district court. As part of its reasoning, the court cited the evaluating psychologist, who stated that "[I]t is well understood in my profession that

pedophilia in adults cannot be changed."[264] However, the court leaned heavily on the belief that sex offenders remain dangerous forever and used Belleau's actuarial scores to substantiate it, writing: "And even if we credit the 8 and 16 percent figures, the plaintiff can't be thought just a harmless old guy. Readers of this opinion who are parents of young children should ask themselves whether they should worry that there are people in their community who have "only" a 16 percent or an 8 percent probability of molesting young children."[265] The court later added "There is the further problem that the 16 percent figure is just a guess, and the even more serious problem that the figure implies that of every six pedophiles with characteristics similar to those of the plaintiff in this case one will resume molesting children after his release from prison."[266] Thus, the court simultaneously minimized the actuarial prediction as "just a guess" and held it up as proof that sex offenders are always dangerous. It sustained this logic with an unsubstantiated assertion drawn from a Supreme Court decision wherein the Court said that "The risk of recidivism posed by sex offenders is frightening and high."[267] Under the rationale followed by this court, then, a probability of recidivism as low as 8% may certify that someone remains a sexual danger. The quantification of risk in this scenario allowed the court to impute an enduring risk to almost any sex offender in a way that earlier subjective "yes" or "no" dangerousness determinations did not. Such probabilistic measures of risk create a policy climate aimed not just at reducing risk but at eliminating risk altogether, resulting in practices like civil commitment meant to remove certain sex offenders from civil society indefinitely (and perhaps permanently),

---

[264] *Belleau v. Wall* 811 F.3d 929, 933 (7th Cir. 2016)
[265] *Belleau v. Wall* 811 F.3d 929, 933-34 (7th Cir. 2016)
[266] *Belleau v. Wall* 811 F.3d 929, 934 (7th Cir. 2016)
[267] *Smith v. Doe*, 538 U.S. 84, 103 (2003). For an analysis of the flawed logic in this Supreme Court decision, see Fischel (2010).

residence restrictions for former offenders, and lifetime monitoring and registration. But actuarial risk assessment shapes and reinforces current policy aims in another way, too: by constructing the "sexually violent predator" as the biggest risk to society and thus as the subject needing the most resources.

Many sex offender statutes define "sexual predators" only as those who offend against strangers, excluding intrafamilial and other offenders known to the victim from the category. For example, the federal Wetterling Act defines predatory behavior as "an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization."[268] Actuarial risk assessment tools, such as the Static-99, give scientific backing to these legal definitions by classifying "stranger" offenders as more dangerous than non-stranger offenders. Some recidivism studies do, in fact, show that incest offenders may be less likely to reoffend than other types of offenders, but we also know that intrafamilial abuse is the least likely type of sex crime to be reported (Zilney and Zilney 2009). Even when the assault is not within the family but the perpetrator is still known to the victim, the crime is substantially less likely to be reported (Terry 2013; Zilney and Zilney 2009). Because actuarial tools are based only on offenders who have been convicted of a crime, they cannot capture this reporting disparity. Moreover, the factors scored on the Static-99R simply may not accurately reflect the seriousness of one's crime if it took place within the family. For instance, a married 35-year-old man who sexually abused his two daughters over the course of many years would receive a score of 0 on the Static-99R, placing him in the lowest risk category. By contrast, a single 35-year-old many who once fondled an unrelated boy would receive a score of 3, pushing him into the next

[268] 42 USC §14071[a][3][E][2001]

highest risk category. Depending on the way the assessment is scored, he may receive a 4, placing him in the "moderate-high" category. In other words, according to the Static-99R, a man who abuses his own daughter(s) over the course of many years would be considered less of a risk than a man who once touched an unrelated boy. For this reason, many would advocate not using such tools for intrafamilial offenders. However, such results reinforce the dominant cultural perception that "stranger danger" is the greatest risk when it comes to sexual assault and allows us to easily construct strangers as "sexual predators" through the use of risk prediction tools.

Furthermore, because most sex crimes are committed by those without any past violent offenses, focusing on individualized risk assessment rather than aggregate risk further drives policy to emphasize the danger of stranger and repeat offenders, who, as a group, pose the least risk (see Table 2). Nevertheless, those offenders who pose the greatest individual risk, according to tools like the Static-99 (i.e. "sexual predators"), draw the most attention and resources. For instance, a 2007 report found that the average annual cost of SVP civil commitment programs was $97,000 per person (Gookin 2007), and costs have continued to rise as more offenders are committed and few are released. In California that figure is nearly $139,000 per person per year as of 2016 (Mays 2018).

Table 4 – Group and Individual Risk

Offense history	Individual risk	Group risk
Prior conviction for a sex offense	Highest	Lowest
At least one prior conviction for a violent offense	Middle	Middle
No prior conviction for a violent offense	Lowest	Highest

Reproduced from Janus (2006)

How Accurate is Actuarial Assessment?

In addition to creating an image of sex offenders as indefinitely risky and incapable of change, actuarial assessments have been criticized for a number of other issues, prime among them is that they are not as highly predictive as many would like for making life-altering decisions. Most estimates of the predictive accuracy of the Static-99R put it at around 70%, leading some to be skeptical of their use for civil commitment decisions. Speaking of the Static-99, William Marshall, a well-regarded researcher and clinician, commented:

> [I]f you look at the area under the curve, for example, the risk assessment instruments, the best ones, have a .71. A .5 is chance, right? So .71 is not exactly something that's gonna get you a Nobel Prize, but it's significantly better than chance… They've had a very, I think, significant impact in the eyes of the law, particularly in courts. But I think they're a bit exaggerated in their – I mean nobody who testifies in these cases explains that, you know, .5 is chance and these are at .71. So we're looking for 1.0, so don't get too excited. But they present them as if they're knock down, unfortunately.[269]

Thus, while Marshall acknowledged the advances over clinical prediction that actuarial assessments represent, he was also skeptical of using such technologies for major decisions.

Oftentimes defense attorneys will use these critiques to highlight the shortcomings of actuarial assessments in civil commitment trials, as Jordan Lowe's attorney did in the following exchange with the state's expert witness:

> Defense: You used the Static-99R. That doesn't tell you anything about Mr. Lowe personally, does it? Just the group he's assigned to, right?
>
> Expert: Yes.

[269] Interview with author.

Defense: What is the error rate of that test?

Expert: The area under the curve is 0.71.

Defense: So three out of ten are wrong?

Expert: Yes.

Defense: And then there are different groups and different estimated risks for each group, but the developers don't give any objective criteria for choosing which group to assign someone, right?

Expert: Right.

Defense: For the routine group, a score of 7 has a recidivism rate of 18.8% over 5 years, and the high risk, high needs group has a rate of 37.9% over 5 years. Which group did you use for Mr. Lowe?

Expert: High risk, high needs.

Defense: So a 30% risk, but they're wrong 30% of the time?

Expert: Yes.[270]

In this case, the defense counsel's tactics were successful, and in a rare turn of events, Mr. Lowe was found by a jury not to be an SVP. However, in many more instances, despite such deconstruction of actuarials, courts and juries still find sex offenders to be unacceptably risky, as in the case of *U.S. v. Shields* where the court wrote:

> The question of Shields's risk of future offense was by no means an easy one. As each of the experts who testified at trial acknowledged, there is no crystal ball that an examining expert or court might consult to predict conclusively whether a past offender will

[270] Author field notes.

> recidivate. At best, offenders can be located, by means of an actuarial tool, within a population of individuals that share certain characteristics and that studies have shown to recidivate at a particular rate. These tools are, as the district court's appointed expert cautioned, 'moderate' predictors of risk.[271]

The court continued on to acknowledge that Shield's attorney "effectively elicited testimony highlighting the shortcomings of the actuarial tools," but interestingly that "The court granted 'little weight' to the raw scores returned by the experts' actuarial tools, and focused instead on the experts' evaluation of certain 'dynamic factors' (age, treatment history, and ongoing deviant behavior) that tailor the actuarial risk assessment to an offender's individual circumstances." The court's use of dynamic factors suggests that adjudicators may rely less on numerical estimates provided by actuarials and more on an expert's overall opinion.

In fact, the creators of the Static-99 suggested as much in their article introducing the instrument, writing, "It is likely that actuarial risk scales can improve on Static-99 by including dynamic (changeable) risk factors as well as additional static variables" (Hanson and Thornton 2000:131). They later state that:

> Static-99 does not claim to provide a comprehensive assessment, for it neglects whole categories of potentially relevant variables (e.g., dynamic factors). Consequently, prudent evaluators would want to consider whether there are external factors that warrant adjusting the initial score or special features that limit the applicability of the scale (e.g., a debilitating disease or stated intentions to reoffend). Given the poor track record of clinical prediction, however, adjustments to actuarial predictions require strong

[271] *U.S. v. Shields*, 649 F.3d 78, 89 (1st Cir. 2011).

> justifications. In most cases, the optimal adjustment would be expected to be minor or none at all (Hanson and Thornton 2000:132).

As I will discuss in the next section, many evaluators have taken seriously the warning that the Static-99 is not a comprehensive assessment. They have taken less seriously the admonishment that optimal adjustments should be minimal or none.

Nascent Dynamism?

Although only static instruments are typically introduced in SVP proceedings, researchers have developed dynamic assessments for sex offenders. The most popular is the Stable-2007, though it is designed for use with offenders living in the community. However, evaluators often use it as a guide for assessing dynamic risk factors in SVPs in what they label an "adjusted actuarial approach." All of my interviewees reported using this approach, rather than a "pure" actuarial approach, in order to customize their assessments to individual offenders. Explaining his adjusted actuarial approach, Illinois SVP evaluator Dr. Barton stated that he begins with the Static-99R and, "I see where that data takes me, and I incorporate it with the rest of the case specific data and then make a determination. I don't make adjustments to those instruments. I let those instruments run their course and whatever risk category they suggest, I take that into consideration."[272] Similarly, Illinois evaluator Dr. Weitl stated:

> I actually like using them for what I like to call the baseline, kind of a starting ground. So if the guy starts at the moderate low, say, then I've got a lot of work to do to get him up to more likely than not, which means a lot of other aggravating factors. Hanson's meta-analysis has identified a bunch of other risk factors that aren't included in the

[272] Author interview with Aaron Barton.

> actuarials. So, if I have a lot of those, maybe he's got a lot of victims that he got caught with, then I can maybe pull him up. But if he's scoring on a six or moderate high, I don't have to do a whole lot… that's my starting point, in my mind anyway. I think in that way, they're priceless. They're objective measures… So, it's kind of nice, it's just kind of comfortable as an evaluator to have that as a baseline.[273]

Thus, actuarials serve as the first step in an individualized assessment process. All evaluators I spoke with were confident their adjustments were warranted, and almost all mentioned something of Hanson's or another researcher's meta-analysis of risk factors, as Dr. Weitl did above, in justifying their methods. That is, evaluators seem by and large to believe they are compensating for a limitation of static instruments by making individualized adjustments. However, a meta-analysis of three studies to have compared a straight actuarial approach to an adjusted actuarial approach found that a straight actuarial approach was more predictive in all three studies (Hanson and Morton-Bourgon 2009). One of the included studies even found that clinical adjustments had an inter-rater reliability of less than chance. In essence, adjusted actuarial approaches may simply be allowing the biases of clinical assessment into the risk evaluation process under the guise of objective actuarial technologies, in effect black-boxing discretion. Interestingly, courts seem to evince a strong willingness to afford adjusted actuarial approaches determinative weight, perhaps because adjustments are most often necessary to reach the standard of commitment.

As the Fourth Circuit Court of Appeals stated in the case of Andrew Sheradin, "as we have previously explained, the determination of a particular individual's risk of recidivism may

[273] Author interview with Kim Weitl.

rely not only on actuarial tests, but also on factors such as his participation in treatment, his ability to control his impulses, and his commitment to controlling his behavior."[274] Even more clearly stating its reliance on factors outside of the static risk instruments, the Fourth Circuit in *U.S. v. Perez* wrote:

> Although the district court recognized and considered the statistical rates of recidivism based on the various actuarial scales, the court explained that it 'affords them less weight than respondent's past and current conduct, and the testimony of the experts as a whole.' The district court noted that each of the testifying experts identified several factors as indicative of Perez's lack of volitional control, including Perez's impulsivity, failure to cooperate while on supervised release, and his brazen and risky behavior despite previous legal sanctions. The district court also gave significant weight to Perez's lack of sex offender treatment and his apparent denial of pedophilic sexual interest.[275]

As these data indicate, courts routinely weigh both additional static and dynamic factors external to actuarial assessments in arriving at their final determinations. In the case of sex offenders, these factors rarely seem to decrease risk, but rather are used primarily to present an offender as *more* dangerous than his actuarial scores would suggest.

Rather than using dynamic factors to paint a picture of an individual capable of change, evaluators generally used these factors to generate risk estimates high enough to meet the legal requirements for civil commitment. In Illinois, for instance, the state must prove that an offender is "substantially probable" to sexually reoffend, which is interpreted to mean "much more likely than not." However, the Static-99R and Static-2002R very rarely produce a probability of

[274] *U.S. v. Sheradin*, 499 Fed. Appx. 305, 307 (4th Cir.).
[275] *U.S. v. Perez*, 752 F.3d 398, 411 (4th Cir.).

recidivism above 50%, meaning that evaluators *must* boost their risk estimates using dynamic factors to meet the legal threshold of commitment. Consequently, all of the evaluators with whom I spoke justified their recommendations for commitment based on an upward adjustment of the initial actuarial estimate, generally justified by dynamic criminogenic factors, such as deviant sexual preferences (often identified through use of the controversial penile plethysmograph), impulsivity, and poor problem solving skills. Defense attorneys attempt to turn dynamic factors in the other direction, arguing, for instance, that treatment has lowered an offender's sexual risk. These arguments are rarely accepted, suggesting that although dynamic factors are used to individuate, they rarely work to create a portrait of a dynamic risk subject. Rather, because sexuality is seen as fixed and as the source of danger for SVPs, rehabilitation is understood to take an extremely long time and may never be possible.

Another justification for upward adjustments is that actuarials only predict recidivism for up to ten years, but SVP trials must account for an offender's likelihood of reoffending over the course of his entire life. As Illinois evaluator Dr. Spencer wrote in his assessment of Jordan Lowe, "unlike assessments of recidivism, the statutory threshold for dangerousness is not time limited. Therefore, actuarial predictions of risk, however more accurate than predictions from other kinds of risk assessment, are nonetheless conservative and underestimate risk."[276] Dr. Spencer proceeds to state that, "With a score of 7 [on the Static-99R], Mr. Lowe is 5.25 times more likely to recidivate than the typical offender," and later that, "Mr. Lowe's estimated 5-year risk is 24.0%; at 10 years his estimated risk increased to 33.8%."[277] It is notable (though not unusual) that Dr. Spencer, like SVP proceedings more generally, commits the ecological

[276] SVP evaluation of Jordan Lowe by Dr. Edward Spencer, page 46. On file with author.
[277] SVP evaluation of Jordan Lowe by Dr. Edward Spencer, page 50. On file with author.

fallacy—making inferences about Mr. Lowe based on the group to which he belongs. Though this is a misinterpretation of how actuarials work, here I suggest it is a further indication of the belief that ARA provides an unbiased view of the individual. In the remainder of his 55-page report, Dr. Spencer justifies his conclusion that Mr. Lowe is an SVP by constructing a detailed narrative of Lowe's life, and particularly his criminal history, which, as Lynch and Bertenthal (2016) argue, has historically been understood as a prime means of knowing the individual offender.

Further indicating that actuarialism is driven by a "will to know" the offender is that both the Static-99R and Static-2002R now require evaluators to place offenders into one of four groups—each of which has different risk estimates—based on their individual dynamic and criminogenic needs. As Dr. Spencer's report explains, "Estimating an individual's risk to engage in further acts of sexual violence with the Static-99R requires calculating his relative risk (i.e., his Static-99R score), and then determining which sample provides the most appropriate absolute risk."[278] Dr. Spencer goes on to explain that the "routine sample" is the default, but if "there are reasons to believe the offender being assessed is not typical, then it would be appropriate to use the recidivism rates from Preselected or Non-Routine Samples. Such use, however, requires justification. If an offender has sufficient dynamic or criminogenic needs, it is reasonable to use Pre-Selected or Non-Routine norms." Dr. Spencer elected to place Lowe in the "High Risk/High Needs" group because of the extensive evaluation process that eliminates 96% to 98% of all offenders from commitment and because a court had already found probable cause to believe that Lowe was an SVP.

[278] SVP evaluation of Jordan Lowe by Dr. Edward Spencer, page 47. On file with author.

As some interviewees pointed out, the step of determining which group to compare an offender to is another point where evaluator bias may enter. Dr. Travis suggested: "each evaluator comes to things with their own perspectives, their own flexibilities and rigidities, and we're all different. I hate to say that sometimes it comes down to who's the evaluator, but sometimes it comes down to who's the evaluator and how do they see things…[some are] just more prone to see that people are dangerous than I am."[279] Dr. Franklin, a clinical psychologist and critic of civil commitment laws, asserted that,

> It's not necessarily the raw score, but it's how do you interpret that score? Like how much weight do you place on it? And then there's been these huge controversies over – and it's really technical – but like what norms do you compare this person to? So let's say this person gets a six or a five or something on the Static-99. Do you compare them to this group of people with "high risk norms," or do you compare them to kind of the aggregate of all the data that has been selected on the Static-99? If you compare to the high-risk norms, you're gonna get a high-risk guy. So that's been one of the things is that the government evaluators will always use the high-risk norms, which are less stable, less accurate.[280]

The end result of all of these machinations is generally to constitute the figure of the "sexual predator" as a permanently pathological and indefinitely dangerous individual incapable of rehabilitation. In summing up the decision-making process, well-known clinician and researcher Dr. Robin Wilson said:

---

[279] Author interview with Richard Travis.
[280] Author interview with Karen Franklin.

> One of the great difficulties in most civil commitment programs is that there should be a bar. And if you're above that bar, then you meet criteria, and you should be in the civil commitment center. If you're below that bar, you should be released to the community. The difficulty is that the bar to get in is relatively low; the bar to get out is relatively high. Theoretically, they should be identical, right? You either meet criteria or you don't. It shouldn't be differential depending on what it is that you're trying to accomplish. So it's relatively easy to civilly commit people; it's relatively difficult to release them.[281]

As this quote intimates, once an offender is deemed an SVP through the dual processes of psychiatric diagnosis and actuarial risk assessment, his legal and sexual identity is largely cemented.

In this chapter, I have argued that the figure of the "sex offender," and particularly the "sexual predator," is constituted jointly through legal and scientific mechanisms as permanently pathological and indefinitely risky. Through the diagnosis of paraphilias and the designation of dangerousness on account of those diagnoses, SVPs are given a durable legal and sexual identity. In the legal complex of SVP adjudications, violent sexual behaviors, such as child molestation and rape, cease being only criminal acts and become instead the basis for a sexual identity akin to gay or straight. Though both diagnosis and risk prediction are seen as rather objective because of their seemingly clearly delineated criteria and, in the case of ARA, the quantified language of probability, I have shown how both processes allow clinical judgement and bias to enter the assessment process in often subtle and unrecognized ways. For instance, the diagnosis of "paraphilia not otherwise specified" that is generally used for rapists has an inter-rater reliability

[281] Author interview with Robin Wilson.

of less than chance, yet it has been accepted by many courts that have heard SVP cases because of the scientific legitimacy granted by the DSM. Similarly, ARA is widely seen as a huge step forward in risk prediction, but courts rely on, and forensic psychologists employ, an "adjusted actuarial" approach that may cloak subjective discretion in the guise of numbers.

Conclusion

Risk assessments increasingly guide decision-making regarding criminal justice and wider governance issues, yet relatively little attention has been devoted to considering how risk assessments, understood as particular types of state "grids of intelligibility" constitute sexual subject positions. But sexual governance, no less than other state decision-making, appears to be increasingly structured by risk. In both SVP adjudications and asylum determinations, sexual subjects' access to citizenship is ultimately dictated vis-à-vis risk. In other words, whether they will be recognized as legitimate rights-bearing citizens by the state depends on the risk they pose and/or the risk they face. Juxtaposing these two risk assessment practices demonstrates that risk is not an ontological state or a pre-existing and fixed quality of people, places, or objects. Risk is a historically and institutionally specific way of imaging and dealing with particular issues (Ewald 1991; Rose, O'Malley and Valverde 2006).

Further, risk is emergent in relations between actors and institutions. Particular risk assemblages are actively constituted and reconstituted in interactions between actors and the institutions charged with rendering them legible and manageable by the state. Different discourses, technologies, actors, and institutional settings come together to give rise to divergent strategies for making sexual subjects knowable via risk. Risk discourses and practices are always imbued with moral meaning and shaped by cultural and political factors (Douglas and Wildavsky 1992; Ericson and Doyle 2003). This is evident in the legal settings analyzed here where courts

often invoke "science" to justify decisions or authorize common sense understandings of phenomena (Valverde, Levi and Moore 2005). In drawing on a mix of expert and non-expert knowledges, courts create new risk assemblages that are neither scientific nor anti-scientific (Moore and Valverde 2000; Valverde 2003). Thus, "risk assessments that were originally developed in a scientific context lose much of their scientificity as they are reworked into an assemblage whose logic is not scientific" (Valverde, Levi and Moore 2005:87). That is, the law may adapt science to its own needs while also drawing on cultural common sense and politicized discourses, ultimately producing hybrid risk assemblages that give us the dual figures of the sexual predator and the LGBTQ asylum seeker.

Of course, these risk assessment processes are quite different. Risk determinations in asylum proceedings depend on qualitative evaluations of a country's risk to a particular asylum seeker on account of his sexuality. Although judges attempt to make their decisions appear as objective as possible, they clearly depend on the subjective judgment of that adjudicator. By contrast, risk evaluations of sex offenders use quantified actuarial estimates of sexual recidivism to determine an offender's potential risk to a community. The quantification of risk and the "mechanical objectivity" of actuarial tools seems to take subjective judgment out of the equation, but as I have shown, substantial discretion remains in this process, though it is often black boxed to a significant extent.

These distinct risk adjudication processes undergird different forms of recognition of sexual subjects before the state. Where the asylum seeker may be recognized as an imperiled sexual subject in need of benevolent state protection, the sex offender faces the prospect of being labeled a "sexual predator" and a permanent risk to his community in need of constant state surveillance. These risk determination processes thus fit within the broader epistemic logics of

their respective institutional domains. The risk an asylum seeker faces can only be discerned by placing him in the context of a specific country and estimating what risk that setting will pose to him, similar to how narrative accounts of sexual identity development had to be placed in a particular cultural context, as we saw in Chapter 4. The risk a sex offender may present to his community, conversely, is decided through an individualized process that largely disregards social context, like what we saw in Chapter 5 regarding courts' determinations about sex offenders' sexualities.

Regardless of these differences, both processes reify symbolic boundaries around the category of citizen and make risk a central element in constructing that boundary. In the conclusion, I will consider what these practices suggest about the shifting meanings of sexual citizenship in the 21st century and their significance for state governance of sexuality.

Conclusion

This dissertation began by asking how "the state" attempts to objectively measure sexuality for the purposes of classification and state action. In the preceding pages, I have argued that the state does so in multiple ways. In fact, to ask how the state as a unified entity categorizes sexual subjects is an unanswerable question, just as asking how "law" or "science" know sexuality is misguided. The state, law, and science are all massive social institutions made up of numerous organizations and actors that have different (and sometimes competing) goals, practices, and guiding assumptions. As such, the way these entities know is multiple and organizationally specific.

Crucially, techniques of knowing are dependent on what I have called "epistemic logics," or institutionalized ways of approaching measurement, classification, and knowing that are formed through the interplay of cultural, political, and institutional forces and networks of expertise. These epistemic logics vary across state institutions and are highly dependent upon the forms of "outside" expertise and knowledges that inform state legal decision-making in a given arena. As we have seen, anthropologists understand sexuality rather differently than psychologists, and when these disciplines inform decisions, they do so in quite distinct ways. Decisions about which knowledges will guide state officials are both practical and political. The institutional need to decide if a sex offender poses a risk to the community necessitates a form of knowledge trained on the individual, while the need to determine the risk that an entire country may pose to an asylum seeker would seem to require a very different approach. Yet, as I have shown, skirmishes over professional jurisdiction, credibility struggles, and political maneuvering affect state knowledge-making as much as practical institutional needs.

This focus on sexual knowledge-making represents a unique and underexplored avenue for sexualities research, particularly by centering the role of expertise and technologies in regulating sexual subjects and constituting sexual identities. Despite rich potential, only a handful of scholars have brought STS and sexuality studies together.[282] Of those that have, most concentrate on health, reproduction, and the biomedical sciences. Yet knowledge about sexuality is produced in a range of institutions—including the social sciences, law, and the many branches of the state—with varying effects and consequences. Analyzing the deployment of knowledges and technologies in these many settings offers greater leverage for understanding sexual knowledge-making in its various forms and opens new theoretical and empirical lines of inquiry. Under what circumstances do various modes of knowing sexuality predominate? What consequences do these different knowledges and technologies have when used to know sexuality? How, and under what circumstances, do these different ways of knowing sexuality diffuse throughout the social world and with what effects?

"Ruling Sexuality" has begun to answer these important questions through an original comparative design and unique data sources. Studies of asylum, in particular, tend to rely on publicly available court decisions, which represent a very small proportion of all asylum claims. "Ruling Sexuality" is the first study to my knowledge that seeks to balance publicly available legal judgments with qualitative interviews of actors involved with LGBTQ asylum law and, most uniquely, with ethnographic observations of asylum hearings. This qualitative field work represents a wholly new source of data for studying LGBTQ asylum in the United States.

[282] Some notable examples of scholarship at the intersection of STS and sexuality studies include Epstein (1996; 2003; 2006; 2010), Epstein and Mamo (2017), Fishman (2004; 2010), Mamo (2007), Moore (1997), Oudshoorn (2003), Waidzunas (2011; 2013; 2015), and Waidzunas and Epstein (2015). With the exception of Waidzunas, however, these scholars predominantly focus on health, reproduction, and biomedicine.

Sociological studies of sex offenders and sex crimes are more numerous and methodologically diverse. However, "Ruling Sexuality" breaks new empirical ground with its extensive interviews with SVP evaluators and its courtroom observations of SVP trials. The substantive and theoretical focus of my study is also unique. Considerable work has examined risk assessment practices in criminal justice, including a handful of studies that have given at least some consideration to actuarial assessments of sex offenders (e.g., Cole 2000; Simon 1998). But few studies have closely examined the forms of knowledge and expertise that undergird sex offender policy in the United States.[283] Similarly, few studies of LGBTQ asylum (or asylum of any sort) consider the knowledges employed in that legal complex.[284] The close examination of these knowledges in both asylum and sex offender law provides a fuller understanding of how the state legitimates forms of social control, creates sexual knowledge, and categorizes individuals for subsequent state action.

Like studies of asylum and sex offender law, more general analyses of state policy-making also commonly neglect forms of knowledge and expertise that undergird such decisions. STS scholars have devoted the most attention to the role of expertise in state policy decisions, but they have not considered sexuality in this regard, and their work generally examines technical policy-making, such as environmental and chemical regulations, rather than the social policy decisions on which I focus (see e.g., Abraham and Sheppard 1999; Hilgartner 2000;

[283] Two notable exceptions are Douard and Schultz (2013) and Leon (2011). These studies discuss the importance of "psy" knowledges in sex crimes policy, and Leon analyzes the use of risk assessment technologies. However, both studies take a legal perspective and therefore do not fully consider how these knowledges and technologies produce sexual knowledge, how they are used to categorize, or how these knowledges become institutionalized as part of sex offender policy.

[284] The lone exception is Cantú's (2005; 2009) work, which critically examines the use of human rights reporting in LGBTQ asylum hearings to create reductive representations of foreign cultures.

Jasanoff 1990). Centering non-state expertise in social policy decisions represents a new direction for STS research on state policy-making.

In the remainder of this conclusion, I want to revisit this and the other central insights of this dissertation, with particular attention to what this study has offered to three areas of scholarly inquiry outlined in the introduction: knowledge formation, state power, and cultural boundaries and identity formation.

Expertise and State Knowledge Making

Abundant scholarship has examined state classification and information gathering practices, most notably in the form of censuses, but also in land surveys, the establishment of permanent surnames, and many acts of everyday classification and categorization (Anderson and Fienberg 1999; Kertzer and Arel 2002; Lara-Millan 2017; Loveman 2014; Scott 1998; Thompson 2016). Such work has largely approached these projects as state-centered affairs, and certainly, state institutions are central to these endeavors (Emigh 2002; Emigh, Riley and Ahmed 2016). However, focusing only on the state neglects the many social actors and institutions often involved in state knowledge making efforts. Non-state experts, in particular, are often vital for establishing and executing state-initiated classification projects. Yet little political sociological scholarship has centered non-state experts, and that which has done so focuses on their historical role in establishing state censuses, but tells us little of how they matter for carrying out everyday classification projects in the contemporary United States. This dissertation has begun to address this latter goal.

Specifically, I have argued that state legal institutions depend on non-state experts to create measurement and classification schemas for sexual subjects in order for state officials to make subsequent governance decisions regarding those subjects. More than that, I have

suggested, in line with sociologist Gil Eyal (2013), that we must reconceptualize expertise, not as the possession of individuals, but as a characteristic of a network of actors. This shift in focus is necessary if we are to capture the multiple and hybrid knowledges that inform state decision-making in the realms of LGBTQ asylum and sex offender law—and beyond. In these cases, this also means dissolving the always permeable and arguably artificial division between "state" and "society." We saw this most clearly in Part 1 of this dissertation.

The state-initiated projects of classifying sex offenders and asylum seekers required new forms of knowledge and techniques of measurement. If we understand expertise as the "capacity to accomplish [a] task better and faster" (Eyal 2013:868), then we must analyze the conditions of possibility that make it possible for state institutions to actually accomplish their task of classification. That happens, as I show, through the enrollment of an array of both state and social actors into particular networks of expertise. This may mean, as it does in the cases of asylum and sex offender law, that "expertise" is not epistemically "pure." It is a hybrid form of knowing that bridges state and social institutions as well as various modes of knowing.

This epistemic hybridity is on full display in the case of SVP adjudications, especially in the charged dispute over defining "mental abnormality." As Chapter 2 showed, the APA refused to concede epistemic authority to state legislatures, instead demanding that any civil commitment statutes proclaiming to be based on mental illness must conform to its own definition. The Supreme Court refused to play by those rules, and instead sided with forensic psychologists, represented most prominently by ATSA, which claimed that its members could work with the term "mental abnormality" as outlined in SVP statutes. In doing so, ATSA gained professional jurisdiction and authority for forensic psychology, but also began a process of enrolling state actors into its way of knowing. We might even say that ATSA and the state actors involved in

the legal complex of SVP law began a process of mutual enrollment. In exchange for its willingness to work within the bounds of established legal frameworks, forensic psychology was able to spread its influence and create new categories of mental abnormalities that are almost wholly unique to the SVP setting. The state, for its part, found a solution to its problem of classifying sex offenders and legitimated its new techniques of social control. In this way, it was very much a hybrid exchange, a two-way street that cannot be neatly separated into a "legal" or "state" mode of knowing, on the one hand, and a "psychological" way of knowing, on the other. Rather, a network of expertise bridges such divisions.

The asylum context offers a case that is both similar to and different from that of SVP law. It is similar in its hybridity, yet different in its approach to enrolling actors. Like the need to classify sex offenders, the necessity of categorizing asylum seekers also called for new techniques and knowledges. But this classification project was not state-initiated in the same way that SVP laws engendered new classification needs. Rather, state officials only realized their need for new techniques of knowing as they were confronted with the somewhat unintelligible figure of the LGBTQ asylum seeker. Convenience and common sense initially guided immigration officials as they attempted to classify asylum seekers based on stereotypes of effeminate gay men and masculine lesbians or intrusive lines of questioning that assumed congruence between sex acts and sexual identities. Rather than offering to support these efforts by the state, as in the case of forensic psychology, the expert network consisting of scholars, lawyers, and self-fashioned "lay experts" intervened to redirect the state's classification practices. However, similarly to ATSA, these social actors followed a method of "generosity" in their approach. Rather than claiming exclusive epistemic authority, they offered to work with state officials to craft classificatory schemas. They provided trainings to asylum offices that

expressed a need or desire to create better categorization criteria, and they used those opportunities as a foothold for expanding their methods of knowing, eventually culminating in the institutionalization of their epistemic authority in the form of a jointly designed training module on adjudicating LGBTQ asylum claims. Through these and the various other means outlined in Chapter 3, this network established a similarly hybridized form of state-society expertise in the asylum legal complex.

Part 2 of "Ruling Sexuality" further explored how established epistemic logics contour state knowledge making by examining how they differentially define what counts as empirical evidence of sexuality. I demonstrated that asylum adjudicators favor narratives of sexual identity development and "coming out" as evidence of one's sexuality. In this way, sexuality is understood as knowable only through indirect indicators that must be placed in particular social and cultural contexts. Asylum adjudicators have recognized nascent social constructionist arguments regarding gender and sexuality, including acknowledging that sexuality can be fluid and may change over the life course and that sexual acts and identities have different meanings in different cultures. This approach to knowing sexuality suggests a particular ontology of sexuality as well, one that does not necessarily assume a fixed inner sexual essence inherent in the body. Rather, it allows for social influences on sexuality and sexual identity.

SVP adjudications, conversely, depend much more heavily on direct bodily evidence, such as the polygraph and penile plethysmograph, and other forms of objective measurement, including actuarial risk assessments. These are understood to be direct measures of sexuality in the SVP legal complex. Rather than being indicators in need of context, technologies like the PPG are believed to be objective measurements that are universally applicable. Such methods suggest a more essentialist understanding of sexuality that views it as emanating from the

individual body. There is little room for social or cultural context. The measurements simply speak for themselves.

This notion of objectivity characterizes the risk assessment process for sex offenders outlined in Part 3, as well. Risk assessment in its various forms has ascended to become one of the most valued forms of knowing and decision-making in technocratic bureaucracies (Porter 1995; Power 2007), and this is certainly a truism of the asylum and SVP legal complexes. Part 3 of "Ruling Sexuality" argued that the different forms that risk assessment takes in these two domains both flow from and reinforce institutionalized means of knowing sexual subjects, and indeed, that they are primary ways of defining the bounds of proper sexual citizenship. The quantified, actuarial approach to risk assessment found in SVP trials is consistent with the broader epistemic logic of that legal arena that assumes that sexuality and sexual risk can be objectively measured through direct indicators and inscription devices. Actuarial assessments are viewed as providing an unbiased view of the individual in much the same way as one's criminal history has historically been understood in the justice system (see e.g., Harcourt 2007; Lynch and Bertenthal 2016). As I demonstrated, however, subjective professional discretion is present at numerous points throughout the risk assessment process for sex offenders, from deciding what "likely" to reoffend means to determining whether and how to adjust an offender's initial quantitative risk estimate.

This procedure looks quite different in the asylum context and is more in line with the overall epistemic logic of that arena. Lacking the kind of data that would allow adjudicators to make quantified risk predictions, immigration judges instead engage in a risk determination process that more closely resembles "trained judgment" (Daston and Galison 2007) and trusts decision-makers to be able to render unbiased decisions based on their professional experience.

To make their decisions appear as objective as possible, adjudicators typically invoke authoritative sources—such as the U.S. State Department, recognized human rights organizations like Amnesty International, and often academic experts—to bolster the credibility of their predictions. But like the risk assessment process in SVP trials, asylum hearings also allow considerable subjectivity, for instance, in operationalizing "well-founded fear." However, the Supreme Court has given some guidance to adjudicators in recognizing when fear may be "well-founded" (i.e., as little as a 10% chance can qualify) in a way that courts have largely not done for civil commitment standards for sex offenders. Like risk assessments of sex offenders that privilege a view of risk as emanating from individuals, though, risk assessments of countries that see risk as a product of social factors in asylum hearings clearly resonate with the broader epistemic logic of the legal complex. Regardless of their differences, both processes, I have argued, make risk a central frame through which to *know* sexual subjects vis-à-vis the state.

Knowledge/Power

A central contention of "Ruling Sexuality" has been that these different ways of knowing support different forms of state power and approaches to governance. Through a framework of coproduction, I have attempted to show that state institutions depend on knowledge to govern (and to legitimate that governing) and, conversely, that forms of knowledge require social supports. Knowledges are anchored to institutional practices just as institutional practices are guided by forms of knowledge. We can see this illustrated by the networks of expertise summarized above and described in detail in Part 1. But we can also see how divergent knowledges and classification practices make possible and legitimate different forms of governance in Parts 2 and 3.

For instance, if sexuality is inherent to an individual, as the epistemic logic in the SVP domain suggests, then it is legitimate to confine or "treat" those with dangerous sexualities. A logic that sees sexuality as the possession of an individual body makes for easier assignations of pathology and criminal blame and also suggests that the proper course of action may be to punish or treat that individual. Compare this to a feminist epistemology of sexual violence, which would more likely suggest that sexual predators are not the product of individual pathology but of a broader social ill that socializes men in particular ways. Such an outlook would likely call for rather different interventions than the ones we currently employ.

By contrast, the epistemic logic of the asylum arena suggests that sexuality is the joint product of an individual and his social setting. This is, of course, more consistent with the governance goals of the asylum complex, which seeks to provide humanitarian relief to those fleeing from oppressive social contexts. An epistemology that takes cultural factors seriously also makes sexual identities unfamiliar to American adjudicators more easily intelligible. Rather than seeking to assign blame or pathology to an individual, this epistemic outlook more readily allows for the identification of dangerous countries or cultural settings. The forensic psychological and anthropological forms of knowledge deployed in SVP and asylum law, respectively, thus support and legitimate the prevailing institutional governance goals of their legal complexes.

Categories, Boundaries, and Citizenship

Processes of classification are inevitably also processes of boundary making and identity formation. As I have argued throughout this study, classification and measurement practices crystallize cultural changes, but they can also engender social change, in part through creating new social identities and subject positions. The LGBTQ asylum seeker did not exist as an

identity until its ascription in legal discourse. And as I have shown elsewhere (Vogler 2016), asylum advocates have used the indeterminacy of the law in conjunction with their social scientifically informed perspective on sexuality to expand categories of legal protection beyond the "homosexual" man initially granted relief under that body of law. As Chapter 1 demonstrated, the "sex offender" category has undergone similar changes over the course of the twentieth century. Technologies like the PPG and actuarial risk assessments also enact sexual subject positions and create new sexual identities, such as the sexual predator and the pedophile.

Essential to all of these classifications, though, is risk. A central argument of "Ruling Sexuality" has been that risk increasingly structures decisions regarding sexual citizenship. Whereas non-normative sexualities of all kinds were once a priori excluded from the realm of citizenship, today it is increasingly risk rather than sexuality, per se, that demarcates the boundary between citizen and non-citizen. Whether they are the qualitative/clinical risk determination processes of asylum law or the quantitative/actuarial approaches of SVP law, risk assessments fundamentally determine sexual subjects' potential entry into the national community and their access to the rights of citizenship.

Beyond the demarcation of this important symbolic boundary, and despite their differences, both of these approaches to risk exemplify a shift in the exercise of state power toward what Foucault (2007) called "apparatuses of security." This form of power aims to regulate groups and flows—rather than to discipline and change individual bodies—through modifying social conditions. It is accepted that unfortunate events occur, but by identifying the conditions that create the risk for these events, actors can intervene to attempt to prevent or ameliorate such dangers.

These strategies are readily observable in the asylum and sex offender adjudication processes. Consistent with a larger movement away from rehabilitation in American penology (Feeley and Simon 1992; Garland 2001), penal institutions exert relatively little effort to reform sex offenders. Rather, the goal is to remove offenders from the population in an attempt to modulate crime rates. The civil commitment of sex offenders exemplifies these efforts. Offenders are assessed for their potential risk of sexual violence, and those found to fall outside the acceptable range of risk are simply removed from the population indefinitely and until such time as their risk falls to a level acceptable to the state. Of course, this may never happen. Missouri, for instance, is currently facing litigation because it has not released any offenders from its civil commitment program since its inception in 1999. Demonstrating the new penology's disregard for normation or rehabilitation, the Supreme Court went so far as to state in the landmark *Kansas v. Hendricks* (1997) decision deeming civil commitment of sex offenders constitutional that efforts at treatment were not even necessary. The purpose, instead, is simply to remove dangerous offenders from the community.

Though slightly less overt than in the sex offender realm, asylum also evinces a movement away from disciplinary power. Most prominently, the federal government sets limits on the number of refugees and asylees that can be allowed into the country; that is, it seeks to optimize the flow of immigrants into the nation. Secondly, though less obvious than the actuarial processes found in sex offender decisions, asylum adjudicators also engage in risk assessment that is based on the aggregation of data. Courts have established the acceptable level of risk of persecution to which an asylum seeker may be subjected in her own country, and decision-makers in individual cases tacitly calculate the risk a claimant is likely to face and determine

whether it exceeds the established threshold. If so, the claimant will be granted asylum; if not, she will be returned to her home country.

These shifts, I argue, also signal a reconfiguration of queerness in relation to citizenship. In *Terrorist Assemblages*, Jasbir Puar (2007) argues for a reconceptualization of biopolitics in which the "queer" is not a priori relegated to death and excluded from the nation. Rather, homonormative queers—those who seek the rights traditionally associated with white, middle-class heterosexuality—may be folded into life because they reinforce heteronormative institutions and nationalism, what Puar calls homonationalism. This limited inclusion of mostly white "respectable" queers is accomplished by creating a new sexual other that is completely beyond the pale of national inclusion—namely, the terrorist.[285] These accommodations allow for the creation of U.S. "sexual exceptionalism," or the idea that the U.S. is more accepting and safer for queers than countries of the global south and particularly better than those of the Middle East. The LGBTQ asylum seeker is an ideal subject to shore up this image. What better way to demonstrate exceptionalism than to protect those sexual subjects who are persecuted by their own (unexceptional and unenlightened) countries?

While asylum certainly is a mechanism for broadcasting American exceptionalism, it disrupts Puar's argument that white homonormative queers are the primary beneficiaries of state benevolence. On the contrary, asylum seekers are almost uniformly black and brown and do not always fit neatly into hetero- or homonormative narratives. LGBTQ asylum seekers, like all subjects before the law, must mold aspects of their claims to fit the U.S. legal system, and their

[285] Puar argues that terrorists are the new "queers" by reconceptualizing queerness as a process of racialization that "informs the very distinctions between life and death, wealth and poverty, health and illness, fertility and morbidity, security and insecurity, living and dying" (Puar 2007:xi). The terrorist in her reading, then, becomes a queer, non-national, perversely racialized other.

stories do often evince the familiar "coming out narrative." But asylum is *not* a strictly disciplinary process. Claimants do not have to fit one pre-determined norm to attain protection. Rather, as I have argued, asylum adjudicators have accepted a *range* of identity categories as eligible for protection. In other words, asylum is more precisely an apparatus of security than of discipline. This suggests, though, that there will be some sexual subjects who fall outside the bounds of acceptability. For Puar, these are queers of color, migrant queers and, paradigmatically, the terrorist (always already queered in her reading). I contend, rather, that the archetypically unassimilable queer is the sex offender.

This is illustrated most starkly by the civil commitment of certain sex offenders, a process that removes offenders from the community indefinitely and perhaps permanently. But even those deemed less dangerous retain the mark of their offense, often for life, through mandatory registration on public sex offender registries. Some states restrict where former sex offenders can live, and even in those jurisdictions that enforce no formal residency restrictions, community members often force ex-offenders out of the area. In Illinois, for instance, the Department of Corrections has been unable to establish transitional housing for former offenders being released from prison because each time they have found willing landlords, community members have protested and ultimately succeeded in getting such agreements terminated. The unintended result, however, is that former offenders are instead released unconditionally under less stringent surveillance requirements, possibly increasing the risk to that community in the long-run. Public antipathy toward the generic image of the "sex offender" guide these actions. But the blame does not rest solely with the lay public, as research similarly shows that lawmakers, police, courts, and even some of the psychiatric professionals who work with sex offenders exhibit such aversion (Douard and Schultz 2013; Lynch 2002; Small 2015). These

attitudes seem even to have affected decision-making by the Supreme Court, which has deployed false statistics regarding sex offender recidivism rates and overblown rhetoric to justify limiting the rights of those convicted of sexual offenses (see e.g., Fischel 2010). As more restrictions on sex offenders were enacted throughout the 1990s and into the 2000s, LGBTQ people were gaining wider social acceptance and winning new rights and legal protections.

Sexual risk definitions evolve with cultural views, and law and science are integral to these cultural redefinitions. LGBTQ people have been largely redefined not as a risk to the nation, as they once were, but as *part of the nation* or sometimes *at risk*, thanks in significant part to legal and scientific developments: the removal of homosexuality from the DSM, the striking down of sodomy laws, the integration of gays into the military, the creation of hate crimes statutes. Conversely, sex offenders have been culturally defined as particularly risky, again, due in large part to law and science: the continuing presence of paraphilias in the DSM, the creation of legal exceptions specifically for sex offenders, a shift in perceptions of (greater) harm caused by sexual assault. This is not to discount other sources of cultural change—especially social movements and the media—but these social actors often draw on law and science in making their arguments. Because of this, law and science act as two of the most important institutions in the construction of sexuality and the definition and redefinition of citizenship. It is therefore vital to examine the ways by which legal and scientific organizations and networks refract cultural currents to either create social change or reinforce hegemonic structures.

As two of the most powerful truth-producing institutions in our society, we look to law and science to settle social problems. And because of their social authority, they wield immense power to define those problems in particular ways and to send broader messages about the issues

they consider. This power can come with both positive and negative consequences. But regardless of their valence, the conjoined knowledge-making power of law and science requires careful attention, particularly as legal and scientific actors are increasingly tasked with making social judgements of major significance. These judgements, as we have seen with LGBTQ people and sex offenders, can quickly naturalize cultural shifts and become taken-for-granted truths. As social analysts and diligent citizens, we must be ready to examine these truth claims while holding in mind the axiom that truth is a social accomplishment.

References

Abbott, Andrew. 1988. *The System of Professions: An Essay on the Division of Expert Labor*. Chicago: University of Chicago Press.

Abraham, John, and Julie Sheppard. 1999. "Complacent and Conflicting Scientific Expertise in British and American Drug Regulation: Clinical Risk Assessment of Triazolam." *Social Studies of Science* 29(6):803-43.

Abrams, Philip. 1988. "Notes on the Difficulty of Studying the State." *Journal of Historical Sociology* 1(1):58-89.

Acker, J. R. 1990. "Social science in Supreme Court criminal cases and briefs: the actual and potential contribution of social scientists as amici curiae." *Law and Human Behavior* 14(1):25-42.

Adams, Jimi, and R. Light. 2015. "Scientific consensus, the law, and same sex parenting outcomes." *Social Science Research* 53:300-10.

Adams, Julia. 2007. *The Familial State: Ruling Families and Merchant Capitalism in Early Modern Europe*. Ithaca: Cornell University Press.

Ahlmeyer, S, P Heil, B McKee, and K English. 2000. "The impact of polygraphy on admissions of victims and offenses in adult sexual offenders." *Sexual Abuse* 12(2):123-38.

Alanko, Katarina, Annika Gunst, Andreas Mokros, and Pekka Santtila. 2016. "Genetic variants associated with male pedophilic sexual interest." *Journal of Sexual Medicine* 13(5):835-42.

Alder, Ken. 2007. *The Lie Detectors: The History of an American Obsession*. New York: Free Press.

Alexander, Jeffrey. 2004. "Cultural Pragmatics: Social Performance Between Ritual and Strategy." *Sociological Theory* 22:527-73.

American Psychiatric Association. 2013. *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. Arlington, VA: American Psychiatric Association.

Amnesty International. 2013. "Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa." London:Amnesty International.

Andersen, Ellen Ann. 2005. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor: University of Michigan Press.

Anderson, Benedict. 1991 [1983]. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso.

Anderson, Margo, and Stephen Fienberg. 1999. *Who Counts? The Politics of Censustaking in Contemporary America*. New York: Russell Sage Foundation.

Anker, Deborah, and Sabi Ardalan. 2012. "Escalating Persecution of Gays and Refugee Protection." *NYU Journal of International Law and Politics* 44:528-58.

Appadurai, Arjun. 1996. *Modernity at Large: Cultural Dimensions of Globalization*. Minneapolis: University of Minnesota Press.

Association for the Treatment of Sexual Abusers. 2014. "Practice Guidelines for the Assessment, Treatment, and Management of Male Adult Sexual Abusers." Beaverton, OR.

Baker, Tom, and Jonathan Simon (Eds.). 2002. *Embracing Risk*. Chicago: University of Chicago Press.

Bal, Roland. 2005. "How to Kill with a Ballpoint: Credibility in Dutch Forensic Science." *Science, Technology & Human Values* 30(1):52-75.

Ball, C. 2014. *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law*. New York: Oxford University Press.
Balmer, Andrew S., and Ralph Sandland. 2012. "Making Monsters: The Polygraph, the Plethysmograph, and Other Practices for the Performance of Abnormal Sexuality." *Journal of Law and Society* 39(4):593-615.
Barbaree, H. E., M. C. Seto, C. M. Langton, and E. J. Peacock. 2001. "Evaluating the predictive accuracy of six risk assessment instruments for adult sex offenders." *Criminal Justice and Behavior* 28(4):490-521.
Beck, Ulrich. 1992. *Risk Society: Towards a New Modernity*. London: Sage.
Berg, Laurie, and Jenni Millbank. 2009. "Constructing the Personal Narrative of Lesbian, Gay and Bisexual Asylum Claimants." *Journal of Refugee Studies* 22(2):195-223.
Berger, Susan A. 2009. "Production and Reproduction of Gender and Sexuality in Legal Discourses of Asylum in the United States." *Signs* 34(3):659-85.
Blair-Loy, Mary. 2001. "Cultural Constructions of Family Schemas: The Case of Women Finance Executives." *Gender & Society* 15(5):687-709.
Bloor, David. 1991 [1976]. *Knowledge and Social Imagery*. Chicago: University of Chicago Press.
Boccaccini, M. T., K. A. Rufino, R. L. Jackson, and D. C. Murrie. 2013. "Personality Assessment Inventory scores as predictors of misconduct among sex offenders civilly committed as sexually violent predators." *Psychol Assess* 25(4):1390-5.
Bourdieu, Pierre. 1987. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Review* 38:805-53.
—. 1994. "Rethinking the State: Genesis and Structure of the Bureaucratic Field." *Sociological Theory* 12(1):1-18.
Bowker, Geoffrey, and Susan Leigh Star. 1999. *Sorting Things Out: Classification and Its Consequences*. Cambridge: MIT Press.
Brandzel, Amy. 2005. "Queering Citizenship? Same-Sex Marriage and the State." *GLQ* 11(2):171-204.
Brint, Steven. 1994. *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life*. Princeton: Princeton University Press.
Burick, Lawrence. 1968. "An Analysis of the Illinois Sexually Dangerous Persons Act." *The Journal of Criminal Law, Criminology, and Police Science* 59(2):254-66.
Burnett, D. Graham. 2007. "Introduction: Cross-Examination?" *Isis* 98:310-14.
Cambrosio, Alberto, Camille Limoges, and Eric Hoffman. 1992. "Expertise as a Network." Pp. 341-62 in *The Culture and Power of Knowledge*, edited by Nico Stehr and Richard Ericson. Berlin: Walter de Gruyter.
Camic, Charles, Neil Gross, and Michèle Lamont (Eds.). 2011. *Social Knowledge in the Making*. Chicago: University of Chicago Press.
Canaday, Margot. 2003. ""Who Is a Homosexual?": The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law." *Law & Social Inquiry* 28(2):351-86.
—. 2009. *The Straight State*. Princeton: Princeton University Press.
Cantor, James, Ray Blanchard, Bruce Christensen, Robert Dickey, Philip Klassen, A. Beckstead, Thomas Blak, and Michael Kuban. 2004. "Intelligence, Memory, and Handedness in Pedophilia." *Neuropsychology* 18(1):3-14.

Cantú, Lionel. 2005. "Well-Founded Fear: Political Asylum and the Boundaries of Sexual Identity in the U.S.-Mexico Borderlands." Pp. 61-74 in *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings*, edited by Eithne Luibheid and Lionel Cantu. Minneapolis, MN: University of Minnesota Press.

—. 2009. *The Sexuality of Migration*. New York: New York University Press.

Carrillo, Hector. 2002. *The Night is Young: Sexuality in Mexico in the Time of AIDS*. Chicago: University of Chicago Press.

—. 2010. "Immigration and LGBT Rights in the USA: Ironies and Constraints in US Asylum Cases." Pp. 444-52 in *Routledge Handbook of Sexuality, Health and Rights*, edited by Peter Aggleton and Richard Parker. London and New York: Routledge.

Carrillo, Héctor. 2017. *Pathways of Desire: The Sexual Migration of Mexican Gay Men*. Chicago: University of Chicago Press.

Carroll, Patrick. 2006. *Science, Culture, and Modern State Formation*. Berkeley: University of California Press.

Castel, Robert. 1991. "From Dangerousness to Risk." Pp. 281-98 in *The Foucault Effect*, edited by Graham Burchell, Colin Gordon, and Peter Miller. Chicago: University of Chicago Press.

Chauncey, George. 1993. "The Postwar Sex Crime Panic." Pp. 160-78 in *True Stories from the American Past*, edited by William Graebner. New York: McGraw-Hill.

—. 1994. *Gay New York*. New York: Basic Books.

Clark, Kim. 1998. "Race, 'Culture,' and Mestizaje: The Statistical Construction of the Ecuadorian Nation, 1930–1950." *Journal of Historical Sociology* 11(2):185-211.

Clemens, Elisabeth, and James Cook. 1999. "Politics and Institutionalism: Explaining Durability and Change." *Annual Review of Sociology* 25:441-66.

Cole, Simon. 2000. "From the Sexual Psychopath Statute to 'Megan's Law': Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949-1999." *Journal of the History of Medicine and Allied Sciences* 55(3):292-314.

—. 2001. *Suspect Identities: A History of Fingerprinting and Criminal Identification*. Cambridge: Harvard University Press.

Collins, Harry, and Robert Evans. 2007. *Rethinking Expertise*. Chicago: University of Chicago Press.

Cossman, Brenda. 2007. *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*. Stanford: Stanford University Press.

Curtis, Bruce. 2001. *The Politics of Population: State Formation, Statistics and the Census of Canada, 1840–1975*. Toronto: University of Toronto Press.

D'Emilio, John. 1983. "Capitalism and Gay Identity." Pp. 467-76 in *The Lesbian and Gay Studies Reader*, edited by Henry Abelove, Michele Aina Barale, and David Halperin. New York: Routledge.

D'Emilio, John, and Estelle Freedman. 1988. *Intimate Matters: A History of Sexuality in America*. New York: Harper and Row.

Daston, Lorraine, and Peter Galison. 2007. *Objectivity*. New York: Zone Books.

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

de Orio, Scott. 2017. "The Creation of the Modern Sex Offender." Pp. 247-67 in *The War on Sex*, edited by Trevor Hoppe and David Halperin. Durham: Duke University Press.

Desrosières, Alain. 1998. *The Politics of Large Numbers: A History of Statistical Reasoning*. Cambridge: Harvard University Press.
Diamond, Lisa. 2008. *Sexual Fluidity: Understanding Women's Love and Desire*. Cambridge: Harvard University Press.
Donahue, John, and Justin Wolfers. 2005. "Uses and abuses of empirical evidence in the death penalty debate." *Stanford Law Review* 58:791-845.
Doren, Dennis. 2002. *Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond*. Thousand Oaks: Sage.
Douard, J. 2008. "Sex offender as scapegoat: The monstrous offender within." *New York Law School Law Review* 53:31-53.
Douard, John, and Pamela Schultz. 2013. *Monstrous Crimes and the Failure of Forensic Psychiatry*. New York: Springer.
Douglas, Mary. 1992. *Risk and Blame: Essays in Cultural Theory*. New York: Routledge.
Douglas, Mary, and Aaron Wildavsky. 1992. *Risk and Culture*. Berkeley: University of California Press.
Drescher, Jack. 2015. "Out of DSM: Depathologizing Homosexuality." *Behavioral Sciences* 5:565-75.
Emigh, Rebecca Jean. 2002. "Numeracy or Enumeration?" *Social Science History* 26(4):653-98.
Emigh, Rebecca Jean, Dylan Riley, and Patricia Ahmed. 2016. *Antecedents of Censuses from Medieval to Nation States*. New York: Palgrave.
English, Kim. 1998. "The Containment Approach: An Aggressive Strategy for the Community Management of Sex Offenders." *Psychology, Public Policy, and Law* 4(1/2):218-35.
Epps, Brad, Keja Valens, and Bill Johnson Gonzalez (Eds.). 2005. *Passing Lines: Sexuality and Immigration*. Cambridge, MA: Harvard University Press.
Epstein, Steven. 1996. *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley: University of California Press.
—. 2003. "Sexualizing Governance and Medicalizing Identities: The Emergence of 'State-Centered' LGBT Health Politics in the United States." *Sexualities* 6(2):131-71.
—. 2006. "The New Attack on Sexuality Research." *Sexuality Research & Social Policy* 3(1):1-12.
—. 2007. *Inclusion: The Politics of Difference in Medical Research*. Chicago: University of Chicago Press.
—. 2010. "The Great Undiscussable: Anal Cancer, HPV, and Gay Men's Health." Pp. 61-90 in *Three Shots at Prevention: The HPV Vaccine and the Politics of Medicine's Simply Solutions*, edited by Keith Wailoo, Julie Livingston, Steven Epstein, and Robert Aronowitz. Baltimore: Johns Hopkins University Press.
Epstein, Steven, and Hector Carrillo. 2014. "Immigrant Sexual Citizenship: intersectional templates among Mexican gay immigrants to the USA." *Citizenship Studies* 18(3-4):259-76.
Epstein, Steven, and Laura Mamo. 2017. "The proliferation of sexual health: Diverse social problems and the legitimation of sexuality." *Social Science & Medicine* 188:176-90.
Ericson, Richard. 2007. *Crime in an Insecure World*. Cambridge: Polity.
Ericson, Richard, and Aaron Doyle (Eds.). 2003. *Risk and Morality*. Toronto: University of Toronto Press.

Esacove, Anne. 2013. "Good sex/bad sex: the individualised focus of US HIV prevention policy in sub-Saharan Africa, 1995–2005." *Sociology of Health & Illness* 35(1):33-48.
Espeland, Wendy, and Mitchell Stevens. 1998. "Commensuration as a Social Process." *Annual Review of Sociology* 24:313-43.
—. 2008. "A Sociology of Quantification." *European Journal of Sociology* 49(3):401-36.
Espeland, Wendy, and Berit Irene Vannebo. 2007. "Accountability, Quantification, and Law." *Annual Review of Law and Social Science* 3:21-43.
Ewald, Francois. 1991. "Insurance and Risk." Pp. 197-210 in *The Foucault Effect*, edited by Graham Burchell, Colin Gordon, and Peter Miller. Chicago: University of Chicago Press.
Ewick, Patricia, and Susan Silbey. 2003. "Narrating Social Structure: Stories of Resistance to Legal Authority." *American Journal of Sociology* 108:1328-72.
Eyal, Gil. 2006. *The Disenchantment of the Orient*. Stanford: Stanford University Press.
—. 2013. "For a Sociology of Expertise: The Social Origins of the Autism Epidemic." *American Journal of Sociology* 118(4):863-907.
Eyal, Gil, and Larissa Buchholz. 2010. "From the Sociology of Intellectuals to the Sociology of Interventions." *Annual Review of Sociology* 36:117-37.
Ezrahi, Yaron. 1990. *The Descent of Icarus: Science and the Transformation of Contemporary Democracy*. Cambridge: Harvard University Press.
Faigman, David, Elise Porter, and Michael Saks. 1994. "Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying about the Future of Scientific Evidence." *Cardozo Law Review* 15:1799-829.
Falk, PJ. 1994. "The prevalence of social science in gay rights cases: the synergistic influences of historical context, justificatory citation, and dissemination efforts." *Wayne Law Review* 41:1-69.
Fassin, Didier, and Estelle D'Halluin. 2005. "The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers." *American Anthropologist* 107(4):597-608.
Fausto-Sterling, Anne. 2000. *Sexing the Body: Gender Politics and the Construction of Sexuality*. New York: Basic Books.
Feeley, Malcom, and Jonathan Simon. 1992. "The New Penology: Notes on the Emerging Strategy of Corrections and its Implications." *Criminology* 30(4):449-74.
First, Michael. 2014. "DSM-5 and Paraphilic Disorders." *Journal of the American Academy of Psychiatry and the Law* 42(2):191-201.
Fischel, Joseph. 2010. "Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary." *Duke Journal of Gender Law & Policy* 17:277-311.
Fischer, Frank. 2009. *Democracy and Expertise: Reorienting Policy Inquiry*. Oxford: Oxford University Press.
Fishman, Jennifer. 2004. "Manufacturing Desire: The Commodification of Female Sexual Dysfunction." *Social Studies of Science* 34(2):187-218.
—. 2010. "The Making of Viagra: The Biomedicalization of Sexual Dysfunction." Pp. 289-306 in *Biomedicalization: Technoscience, Health, and Illness in the U.S.*, edited by Adele Clark, Laura Mamo, Jennifer Ruth Fosket, Jennifer Fishman, and Janet Shim. Durham: Duke University Press.
Fiske, Susan. 1991. "Social science research on trial: use of sex stereotyping research in Price Waterhouse v. Hopkins." *American Psychologist* 46:1049-60.

Fiske, Susan, and E. Borgida. 2008. "Providing expert knowledge in an adversarial context: social cognitive science in employment discrimination cases." *Annual Review of Law and Social Science* 4(1):123-48.
Fligstein, Neil, Jonah Brundage, and Michael Schultz. 2017. "Seeing Like the Fed: Culture, Cognition, and Framing in the Failure to Anticipate the Financial Crisis of 2008." *American Sociological Review* 82(5):879-909.
Foucault, Michel. 1977. *Discipline and Punish*. New York: Vintage.
—. 1980. *Power/Knowledge*. New York: Pantheon.
—. 1990. *The History of Sexuality, Volume 1*. New York: Vintage.
—. 2007. *Security, Territory, Population*. New York: Picador.
—. 2010 [1972]. *The Archeology of Knowledge*. New York: Vintage.
Fourcade, Marion. 2009. *Economists and Societies: Discipline and Profession in the United States, Britain, and France*. Princeton: Princeton University Press.
Frances, Allen, and Michael First. 2011. "Paraphilia NOS, Nonconsent: Not Ready for the Courtroom." *Journal of the American Academy of Psychiatry and the Law* 39(4):555-61.
Freedman, Estelle. 1987. ""Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960." *The Journal of American History* 74(1):83-106.
Freud, Sigmund. 1962. *Three Essays on the Theory of Sexuality*. New York: Basic Books.
—. 1963. *The Standard Edition of the Complete Psychological Works of Sigmond Freud*. London: Hogarth.
Frickel, Scott, and Neil Gross. 2005. "A General Theory of Scientific/Intellectual Movements." *American Sociological Review* 70(2):204-32.
Frickel, Scott, and Kelly Moore (Eds.). 2006. *The New Political Sociology of Science: Institutions, Networks, and Power*. Madison: University of Wisconsin Press.
Friedland, Roger, and Robert Alford. 1991. "Bringing Society Back In: Symbols, Practices and Institutional Contradictions." in *The New Institutionalism in Organizational Analysis*, edited by W Powell and P Dimaggio. Chicago: University of Chicago Press.
Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
Fuechtner, Veronika, Douglas Haynes, and Ryan Jones (Eds.). 2018. *A Global History of Sexual Science, 1880-1960*. Berkeley: University of California Press.
Galison, Peter, and David Stump (Eds.). 1996. *The Disunity of Science: Boundaries, Contexts, and Power*. Stanford: Stanford University Press.
Garland, David. 2001. *The Culture of Control*. Chicago: University of Chicago Press.
George, MA. 2016. "The custody crucible: the development of scientific authority about gay and lesbian parents." *Law & History Review* 34:487-529.
Gieryn, Thomas. 1999. *Cultural Boundaries of Science: Credibility on the Line*. Chicago: University of Chicago Press.
Glenn, Evelyn Nakano. 2010. "Constructing Citizenship: Exclusion, Subordination, and Resistance." *American Sociological Review* 76(1):1-24.
Golan, Tal. 2004. *Laws of Men and Laws of Nature*. Cambridge: Harvard University Press.
Goldberg, Stephen. 1994. *Culture Crash: Law and Science in America*. New York: NYU Press.
Goldberg, Suzanne. 2002. "On Making Anti-Essentialist and Social Constructionist Arguments in Court." *Oregan Law Review* 81:629-62.
Gookin, Kathy. 2007. "Comparison of State Laws Authorizing Involuntary Commitment of Sexually Violent Predators." Olympia, WA:Washington State Institute for Public Policy.

Gorski, Philip. 2003. *The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe*. Chicago: University of Chicago Press.
Group for the Advancement of Psychiatry. 1977. "Psychiatry and sex psychopath legislation: The 30s to the 80s." New York:Group for the Advancement of Psychiatry.
Grubin, Don, and Robert Prentky. 1993. "Sexual psychopath laws." *Criminal Behaviour and Mental Health* 3(4):381-92.
Hacking, Ian. 1995. "The Looping Effects of Human Kinds." Pp. 351-83 in *Causal Cognition: An Interdisciplinary Debate*, edited by D Sperber, D Premack, and A Premack. Oxford: Oxford University Press.
—. 2007. "Kinds of People: Moving Targets." *Proceedings of the British Academy* 151:285-318.
Halley, Janet. 1996. "The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology." *GLQ* 3:159-252.
Hamer, Dean. 1993. "A linkage between DNA markers on the X chromosome and male sexual orientation." *Science* 261:321-27.
Haney López, Ian. 2006. *White by Law: The Legal Construction of Race*. New York: New York University Press.
Hannah-Moffat, Kelly, Paula Maurutto, and Sarah Turnbull. 2009. "Negotiated risk: Actuarial illusions in probation." *Canadian Journal of Law and Society* 24:391-409.
Hanson, R. K., and K. E. Morton-Bourgon. 2009. "The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies." *Psychol Assess* 21(1):1-21.
Hanson, R. Karl, and David Thornton. 2000. "Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales." *Law and Human Behavior* 24(1):119-36.
Harbeck, Dorothy. 2010. "Asking and Telling: Identity and Persecution in Sexual and/or Gender Orientation Asylum Claims." *Georgetown Immigration Law Journal* 25:117-50.
Harcourt, Bernard. 2003. "The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century." *The University of Chicago Law Review* 70(1):105-28.
—. 2007. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press.
Harris, G. T., and M. E. Rice. 2003. "Actuarial assessment of risk among sex offenders." Pp. 198-210 in *Sexually Coercive Behavior: Understanding and Management*, edited by R. A. Prentky, E. S. Janus, and M. C. Seto.
Hassani v. Mukasey, 301 Fed. Appx. 602 (9th Cir. 2008).
Hathaway, James. 1991. *The Law of Refugee Status*. Cambridge: Cambridge University Press.
Hebenton, Bill, and Toby Seddon. 2009. "From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age." *British Journal of Criminology* 49:343-62.
Hegarty, Peter. 2003. "Homosexual Signs and Heterosexual Silences: Rorschach Research on Male Homosexuality from 1921 to 1969." *Journal of the History of Sexuality* 12(3):400-23.
Hilgartner, Stephen. 2000. *Science on Stage: Expert Advice as Public Drama*. Stanford: Stanford University Press.
Hirschfeld, Magnus. 2000. *The Homosexuality of Men and Women*. New York: Prometheus Books.

Hooker, Evelyn. 1957. "The adjustment of the male overt homosexual." *Journal of Protective Techniques* 21:18-31.
Hoppe, Trevor. 2014. "From sickness to badness: The criminalization of HIV in Michigan." *Social Science & Medicine* 101:139-47.
—. 2016. "Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies." *Law & Social Inquiry* 41(3):573-94.
—. 2017. *Punishing Disease: HIV and the Criminalization of Sickness*. Berkeley: University of California Press.
Huber, Peter. 1991. *Galileo's Revenge: Junk Science in the Courtroom*. New York: Basic Books.
Hull, Kathleen. 2017. "The Role of Social Science Expertise in Same-Sex Marriage Litigation." *Annual Review of Law and Social Science* 13:471-91.
Human Rights Watch. 2009. "“Not Worth a Penny”: Human Rights Abuses against Transgender People in Honduras." New York:Human Rights Watch.
Igo, Sarah. 2007. *The Averaged American: Surveys, Citizens, and the Making of a Mass Public*. Cambridge: Harvard University Press.
Janus, Eric. 2006. *Failure to Protect*. Ithaca, NY: Cornell University Press.
Janus, Eric, and Paul Meehl. 1997. "Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings." *Psychology, Public Policy, and Law* 3:33-64.
Janus, Eric, and Robert Prentky. 2003. "Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability." *American Criminal Law Review* 40:1443-502.
Jasanoff, Sheila. 1990. *The Fifth Branch: Science Advisers as Policymakers*. Cambridge: Harvard University Press.
—. 1995. *Science at the Bar: Law, Science, and Technology in America*. Cambridge: Harvard University Press.
—. 2002. "Science and the Statistical Victim: Modernizing Knowledge in Breast Implant Litigation." *Social Studies of Science* 32(1):37-69.
—. 2003. "(No) Accounting for Expertise." *Science and Public Policy* 30(3):157-62.
— (Ed.). 2004. *States of Knowledge: The Co-Production of Science and Social Order*. London: Routledge.
—. 2005. *Designs on Nature: Science and Democracy in the United States and Europe*. Princeton: Princeton University Press.
—. 2008. "Making Order: Law and Science in Action." Pp. 761-86 in *Handbook of Science and Technology Studies, 3rd edition*, edited by Edward Hackett, Olga Amsterdamska, Michael Lynch, and Judy Wajcman. Cambridge: MIT Press.
Jenkins, Philip. 1998. *Moral Panic: Changing Concepts of the Child Molester in Modern America*. New Haven: Yale University Press.
Joppke, Christian. 2007. "Transformation of Citizenship: Status, Rights, Identity." *Citizenship Studies* 11(1):37-48.
Kalmus, E., and A. Beech. 2005. "Forensic assessment of sexual interest: A review." *Aggression and Violent Behavior* 10:193-217.
Kansas v. Hendricks, 521 U.S. 346 (1997).
Katz, Jonathan Ned. 1995. *The Invention of Heterosexuality*. Chicago: University of Chicago Press.

Kertzer, David, and Dominique Arel (Eds.). 2002. *Census and Identity: The Politics of Race, Ethnicity, and Language in National Censuses*. Cambridge: Cambridge University Press.
King, Christopher, Lindsey Wiley, Eve Brank, and Kirk Heilbrun. 2014. "Disputed Paraphilia Diagnoses and Legal Decision Making: A Case Law Survey of Paraphilia NOS, Nonconsent." *Psychology, Public Policy, and Law* 20(3):294-308.
Knighton, Jefferson, Daniel Murrie, M. T. Boccaccini, and Darrel Turner. 2014. "How Likely Is "Likely To Reoffend" in Sex Offender Civil Commitment Trials?" *Law and Human Behavior* 38(3):293-304.
Knorr Cetina, Karin. 1999. *Epistemic Cultures: how the sciences make knowledge*. Cambridge: Harvard University Press.
Knorr Cetina, Karin, and Alex Preda (Eds.). 2005. *The Sociology of Financial Markets*. Oxford: Oxford University Press.
Kornbluh, Felicia. 2011. "Queer Legal History: A Field Grows Up and Comes Out." *Law and Social Inquiry* 36(2):537-59.
Krafft-Ebing, Richard von. 1965. *Psychopathia Sexualis*. New York: Stein and Day.
Kunzel, Regina. 2008. *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality*. Chicago: University of Chicago Press.
—. 2017. "Sex Panic, Psychiatry, and the Expansion of the Carceral State." Pp. 229-46 in *The War on Sex*, edited by David Halperin and Trevor Hoppe. Durham: Duke University Press.
Lakoff, Andrew. 2005. *Pharmaceutical Reason*. New York: Cambridge University Press.
Lalumière, Martin, Ray Blanchard, and Kenneth Zucker. 2000. "Sexual orientation and handedness in men and women: A meta-analysis." *Psychological Bulletin* 126(4):575-92.
Lamont, Michèle, and Virág Molnár. 2002. "The study of boundaries in the social sciences." *Annual Review of Sociology* 28(1):167-95.
Lancaster, Roger. 2011. *Sex Panic and the Punitive State*. Berkeley: University of California Press.
Landau, Joseph. 2004-2005. ""Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual Orientation-based Asylum Law." *Fordham Urban Law Journal* 32:237-63.
Lara-Millan, Armando. 2017. "States as a Series of People Exchanges." Pp. 81-102 in *The Many Hands of the State*, edited by Kimberly Morgan and Ann Orloff. Cambridge: Cambridge University Press.
Latour, Bruno. 1987. *Science in Action*. Cambridge: Harvard University Press.
—. 1988. *The Pasteurization of France*. Cambridge: Harvard University Press.
—. 2010. *The Making of Law*. Cambridge: Polity.
Latour, Bruno, and Steve Woolgar. 1979. *Laboratory Life: The Construction of Scientific Facts*. Princeton: Princeton University Press.
Lee, Sharon. 1993. "Racial Classifications in the U.S. Census: 1890–1990." *Ethnic and Racial Studies* 16:75-94.
Lempert, R. 2013. "Growing up in law and society: the pulls of policy and methods." *Annual Review of Law and Social Science* 9(1):1-32.
Leon, Chrysanthi. 2011. *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America*. New York: New York University Press.

LeVay, Simon. 1991. "A Difference in Hypothalamic Structure between Heterosexual and Homosexual Men." *Science* 253:1034-37.
Levenson, Jill S., and J. W. Morin. 2006. "Factors predicting selection of sexually violent predators for civil commitment." *International Journal of Offender Therapy and Comparative Criminology* 50:609-29.
Levi, Ron, and Mariana Valverde. 2001. "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness." *Law and Social Inquiry* 26(4):819-46.
Levit, N. 2010. "Theorizing and litigating the rights of sexual minorities." *Columbia Journal of Gender and Law* 19:21.
Lewis, Rachel. 2014. ""Gay? Prove it": The Politics of Queer Anti-deportation Activism." *Sexualities* 17(8):958-75.
Longino, Helen. 2013. *Studying Human Behavior: How Scientists Investigate Aggression & Sexuality*. Chicago: University of Chicago Press.
Loveman, Mara. 2005. "The Modern State and the Primitive Accumulation of Symbolic Power." *American Journal of Sociology* 110(6):1651-83.
—. 2007. "Blinded Like a State: The Revolt against Civil Registration in Nineteenth-Century Brazil." *Comparative Studies in Society and History* 49(1):5-39.
—. 2014. *National Colors: Racial Classification and the State in Latin America*. Oxford: Oxford University Press.
Luibheid, Eithne. 2002. *Entry Denied: Controlling Sexuality at the Border*. Minneapolis: University of Minnesota Press.
Lynch, Michael. 2004. "Circumscribing expertise: membership categories in courtroom testimony." Pp. 161-80 in *States of Knowledge*, edited by Sheila Jasanoff. London: Routledge.
Lynch, Michael, Simon Cole, Ruth McNally, and Kathleen Jordan. 2008. *Truth Machine: The Contentious History of DNA Fingerprinting*. Chicago: University of Chicago Press.
Lynch, Michael, and Sheila Jasanoff. 1998. "Contested Identities: Science, Law and Forensic Practice." *Social Studies of Science* 28(5-6):675-86.
Lynch, Mona. 2002. "Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation." *Law and Social Inquiry* 27(3):529-57.
Lynch, Mona, and Alyse Bertenthal. 2016. "The calculus of the record: Criminal history in the making of US Federal Sentencing Guidelines." *Theoretical Criminology* 20(2):145-64.
MacKenzie, Donald, Fabian Muniesa, and Lucia Siu (Eds.). 2008. *Do Economists Make Markets? On the Performativity of Economics*. Princeton: Princeton University Press.
Mamo, Laura. 2007. *Queering Reproduction: Achieving Pregnancy in the Age of Technoscience*. Durham: Duke University Press.
Mansnerus, Laura. 2017. "For What They Might Do: A Sex Offender Exception to the Constitution." Pp. 268-90 in *The War on Sex*, edited by David Halperin and Trevor Hoppe. Durham: Duke University Press.
Marouf, Fatma. 2008. "The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender." *Yale Law & Policy Review* 27:47-106.

Martello, Mary Beth, and Sheila Jasanoff. 2004. "Introduction: Globalization and Environmental Governance." Pp. 1-29 in *Earthly Politics*, edited by Sheila Jasanoff and Mary Beth Martello. Cambridge: MIT Press.

Martin, Daniel C., and James E. Yankay. 2014. "Annual Flow Report: Refugees and Asylees 2013." Office of Immigration Statistics.

Marx, Anthony. 1998. *Making Race and Nation: A Comparison of the United States, South Africa, and Brazil*. Cambridge: Cambridge University Press.

Mays, Mackenzie. 2018. "We pay millions for sex offender therapy at Coalinga hospital. Most patients aren't in it." *Fresno Bee*, April 6, http://www.fresnobee.com/news/local/article207483999.html.

McAdam, Doug. 1982. *Political Process and the Development of Black Insurgency, 1930-1970*. Chicago: University of Chicago Press.

McGrath, Robert, Georgia Cumming, Brenda Burchard, Stephen Zeoli, and Lawrence Ellerby. 2010. *Current Practices and Emerging Trends in Sexual Abuser Management: The Safer Society 2009 North American Survey*. Brandon, VT: Safer Society Press.

McKinnon, Sara. 2016. *Gendered Asylum*. Urbana: University of Illinois Press.

McLawsen, Julia, Mario Scalora, and Charles Darrow. 2012. "Civilly committed sex offenders: A description and interstate comparison of populations." *Psychology, Public Policy, and Law* 18(3):453-76.

Medvetz, Thomas. 2012. *Think Tanks in America*. Chicago: University of Chicago Press.

Mertz, Elizabeth. 2008. *The Role of Social Science in Law*. Burlington, VT: Ashgate.

Millbank, Jenni. 2009. "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations." *International Journal of Refugee Law* 21(1):1-33.

Miller, Banks, Linda Camp Keith, and Jennifer Holmes. 2015. *Immigration Judges and US Asylum Policy*. Philadelphia: University of Pennsylvania Press.

Miller, Clark A. 2008. "Civic Epistemologies: Constituting Knowledge and Order in Political Communities." *Sociology Compass* 2(6):1896-919.

Millman, Joel. 2014. "The Battle for Gay Asylum: Why sexual minorities have an inside track to a U.S. green card." *Wall Street Journal*, June 13. Available at http://online.wsj.com/articles/why-sexual-minorities-have-an-inside-track-to-a-u-s-green-card-1402676258.

Mitchell, Timothy. 1999. "Society, Economy, and the State Effect." Pp. 76-97 in *State/Culture: State Formation after the Cultural Turn*, edited by George Steinmetz. Ithaca: Cornell University Press.

Mol, Annemarie. 2002. *The Body Multiple*. Durham: Duke University Press.

Moore, Dawn, and Mariana Valverde. 2000. "Maidens at Risk: Date Rape Drugs and the Formation of Hybrid Risk Knowledges." *Economy and Society* 29(4):514-32.

Moore, Lisa Jean. 1997. ""It's Like You Use Pots and Pans to Cook. It's the Tool": The Technologies of Safer Sex." *Science, Technology & Human Values* 22(4):434-71.

Moran, P. 1999. "The Epidemiology of Antisocial Personality Disorder." *Social Psychiatry and Psychiatric Epidemiology* 34(5):231-42.

Moran, Rachel. 2010. "What Counts as Knowledge? A Reflection on Race, Social Science, and the Law." *Law and Society Review* 44(3/4):515-51.

Mukerji, Chandra. 1989. *A Fragile Power: Scientists and the State*. Princeton: Princeton University Press.
—. 2009. *Impossible Engineering: Technology and Territoriality on the Canal du Midi*. Princeton: Princeton University Press.
Murphy, Michelle. 2006. *Sick Buidling Syndrome*. Durham: Duke University Press.
Murray, David AB. 2014. "The (not so) straight story: Queering migration narratives of sexual orientation and gendered identity refugee claimants." *Sexualities* 17(4):451-71.
Nagel, Joane. 2003. *Race, Ethnicity, and Sexuality*. New York and Oxford: Oxford University Press.
Nathan, Debbie, and Michael Snedeker. 1995. *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt*. New York: Basic Books.
Nelson, Robert, Ellen Berrey, and Laura Beth Nielsen. 2008. "Divergent paths: conflicting conceptions of employment discrimination in law and the social sciences." *Annual Review of Law and Social Science* 4(1):103-22.
Nobles, Melissa. 2000. *Shades of Citizenship: Race and the Census in Modern Politics*. Stanford: Stanford University Press.
Norton, Aaron T. 2013. "Surveying risk subjects: Public health surveys as instruments of biomedicalization." *BioSocieties* 8(3):265-88.
Norton, Matthew. 2014. "Classification and Coercion: The Destruction of Piracy in the English Maritime System." *American Journal of Sociology* 119(6):1537-75.
Odeshoo, Jason. 2004. "Of Penology and Perversity: The Use of the Penile Plethysmograph on Convicted Child Sex Offenders." *Temple Political & Civil Rights Law Review* 14:1-44.
Organization for Refuge, Asylum, and Migration,. 2010. "Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum & Refugee Status Proceedings." San Francisco:ORAM.
Oudshoorn, Nelly. 2003. *The Male Pill: A Biography of a Technology in the Making*. Durham and London: Duke University Press.
Pascoe, Peggy. 2009. *What Comes Naturally: Miscegenation Law and the Making of Race in America*. Oxford: Oxford University Press.
Peterson, David. 2015. "All That is Solid: Bench-Building at the Frontiers of Two Experimental Sciences." *American Sociological Review* 80(6):1201-25.
Poeppl, Timm, Joachim Nitschke, Pekka Santtila, Martin Schecklmann, Berthold Langguth, Mark Greenlee, Michael Osterheider, and Andreas Mokros. 2013. "Association between brain structure and phenotypic characteristics in pedophilia." *Journal of Psychiatric Research* 47(5):678-85.
Polletta, Francesca. 2006. *It was like a Fever: Storytelling in Protest and Politics*. Chicago: University of Chicago Press.
Polletta, Francesca, Pang Ching Bobby Chen, Beth Gharrity Gardner, and Alice Motes. 2011. "The Sociology of Storytelling." *Annual Review of Sociology* 37:109-30.
Porter, Theodore. 1995. *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life*. Princeton: Princeton University Press.
Powell, Brian, N Quadlin, and O Pizmony-Levy. 2015. "Public opinion, the courts, and same-sex marriage: four lessons learned." *Social Currents* 2(1):3-12.
Power, Michael. 2007. *Organized Uncertainty: Designing a World of Risk Management*. Oxford: Oxford University Press.

Prentky, Robert, Howard Barbaree, and Eric Janus. 2015. *Sexual Predators: Society, Risk, and the Law*. New York: Routledge.
Prieur, Annick. 1998. *Mema's House, Mexico City: On transvestities, queens, and machos.* Chicago: University of Chicago Press.
Puar, Jasbir. 2007. *Terrorist Assemblages: Homonationalism in Queer Times*. Durham: Duke University Press.
Quinsey, V. L. 2010. "Coercive Paraphilic Disorder." *Archives of Sexual Behavior* 39:405-10.
Ramji-Nogales, Jaya, Andrew Schoenholtz, and Philip Schrag. 2009. *Refugee Roulette*. New York: New York University Press.
Randazzo, Timothy. 2005. "Social and Legal Barriers: Sexual Orientation and Asylum in the United States." Pp. 30-60 in *Queer Migrations: Sexuality, U.S. Citizenship, and Border Crossings*, edited by Eithne Luibheid and Lionel Cantu. Minneapolis, MN: University of Minnesota Press.
Rayner, Steve. 1992. "Cultural theory and risk analysis." Pp. 83-115 in *Social Theories of Risk*, edited by S. Krimsky and D. Golding. Westport, CT: Greenwood Press.
Reddy, Sita. 2002. "Temporarily insane: pathologising cultural difference in American criminal courts." *Sociology of Health & Illness* 24(5):667-87.
Reding, Andrew. 2003. "Sexual Orientation and Human Rights in the Americas." New York:World Policy Institute.
Rip, Arie, and Peter Groenewegen. 1989. "Les faits scientifiques à l'épreuve de la politique." Pp. 149-72 in *La science et ses réseaux*, edited by Michel Callon. Paris: La Découverte.
Rodríguez-Muñiz, Michael. 2017. "Cultivating Consent: Nonstate Leaders and the Orchestration of State Legibility." *American Journal of Sociology* 123(2):385-425.
Rosario, Vernon. 2002. *Homosexuality and Science*. Santa Barbara: ABC-CLIO.
Rose, Nikolas. 2002. "At Risk of Madness." Pp. 209-37 in *Embracing Risk*, edited by Tom Baker and Jonathan Simon. Chicago: University of Chicago Press.
Rose, Nikolas, Pat O'Malley, and Mariana Valverde. 2006. "Governmentality." *Annual Review of Law and Social Science* 2(1):83-104.
Rubin, Gayle. 1984. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." Pp. 267-319 in *Pleasure and Danger*, edited by Carol Vance. New York: Routledge.
Saguy, Abigail. 2003. *What is Sexual Harassment?* Berkeley: University of California Press.
Sarat, Austin, Lawrence Douglas, and Martha Umphrey (Eds.). 2007. *How Law Knows*. Stanford: Stanford University Press.
Sarat, Austin, Lawrence Douglas, Martha Umphrey, and Conor Clarke. 2007. "Complexity, Contingency, and Change in Law's Knowledge Practices: An Introduction." Pp. 1-24 in *How Law Knows*, edited by Austin Sarat, Lawrence Douglas, and Martha Umphrey. Stanford: Stanford University Press.
Savic, Ivanka, and Per Lindstrom. 2008. "PET and MRI show differences in cerebral asymmetry and functional connectivity between homo- and heterosexual subjects." *Proceedings of the National Academy of Sciences* 105(27):9403-08.
Schiltz, Kolja, Joachim Witzel, Georg Northoff, Katerin Zierhut, Udo Gubka, Hermann Fellmann, Jörn Kaufmann, Claus Tempelmann, Christine Wiebking, and Bernhard Bogerts. 2007. "Brain Pathology in Pedophilic Offenders Evidence of Volume Reduction in the Right Amygdala and Related Diencephalic Structures." *Arch Gen Psychiatry* 64(6):737-46.

Scott, James C. 1998. *Seeing like a State*. New Haven: Yale University Press.
—. 2009. *The Art of Not Being Governed*. New Haven: Yale University Press.
Sedgwick, Eve Kosofsky. 1990. *Epistemology of the Closet*. Berkeley: University of California Press.
Seidman, Steven. 2003. *The Social Construction of Sexuality*. New York: W.W. Norton & Company.
Seto, M. C., and M. Kuban. 1996. "Criterion-related validity of a phallometric test for paraphilic rape and sadism." *Behav Res Ther* 34(2):175-83.
Seto, M. C., and M. L. Lalumiere. 2001. "A brief screening scale to identify pedophilic interests among child molesters." *Sex Abuse* 13:15-25.
Seto, Michael. 2012. "Is Pedophilia a Sexual Orientation." *Archives of Sexual Behavior* 41:231-36.
Sewell, William. 1992. "A Theory of Structure: Duality, Agency, and Transformation." *American Journal of Sociology* 98(1):1-29.
Shah, Nayan. 2012. *Stranger Intimacy: Contesting Race, Sexuality, and the Law in the North American West*. Berkeley: University of California Press.
Shapin, Steven. 1994. *A Social History of Truth*. Chicago: University of Chicago Press.
—. 1995. "Cordelia's Love: Credibility and the Social Studies of Science." *Perspectives on Science* 3(3):76-96.
Shapin, Steven, and Simon Schaffer. 1985. *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life*. Princeton: Princeton University Press.
Shniderman, Adam. 2011. "You Can't Handle the Truth: Lies, Damn Lies, and the Exclusion of Polygraph Evidence." *Albany Law Journal of Science and Technology* 22(2):433-73.
Silbey, Susan. 2008. "Introduction." Pp. xi-xxvii in *Law and Science, Volume 1: Epistemological, Evidentiary, and Relational Engagements*, edited by Susan Silbey. Burlington, VT: Ashgate.
Silbey, Susan, and Patricia Ewick. 2003. "The Architecture of Authority: The Place of Law in the Space of Science." Pp. 77-108 in *The Place of Law*, edited by Austin Sarat, Lawrence Douglas, and Martha Umphrey. Ann Arbor: University of Michigan Press.
Simon, Jonathan. 1998. "Managing the Monstrous: Sex Offenders and the New Penology." *Psychology, Public Policy, and Law* 4(1/2):452-67.
—. 2007. *Governing through Crime*. Oxford: Oxford University Press.
Skerry, Peter. 2000. *Counting on the Census? Race, Group Identity, and the Evasion of Politics*. Washington, D.C.: Brookings Institution Press.
Small, Jamie. 2015. "Classing Sex Offenders: How Prosecutors and Defense Attorneys Differentiate Men Accused of Sexual Assault." *Law & Society Review* 49(1):109-41.
Small, Mario. 2009. "'How many cases do I need?' On science and the logic of case selection in field-based research." *Ethnography* 10(1):5-38.
Smith, Dorothy. 1984. "Textually Mediated Social Organization." *International Social Science Journal* 36(1):59-75.
—. 2005. *Institutional Ethnography*. Lanham: AltaMira.
Smith, Laurence, Lisa Best, D. Alan Stubbs, Andrea Archibald, and Nay Roberson, Roxann. 2002. "Constructing Knowledge: The Role of Graphs and Tables in Hard and Soft Psychology." *American Psychologist* 57(10):749-61.

Smyth, Mary. 2001. "Certainty and Uncertainty Sciences: Marking the Boundaries of Psychology in Introductory Textbooks." *Social Studies of Science* 31(3):389-416.
Sohoni, Deenesh. 2007. "Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities." *Law & Society Review* 41(3):587-618.
Solomon, Shana, and Edward Hackett. 1996. "Setting Boundaries between Science and Law: Lessons from Daubert v. Merrell Dow Pharmaceuticals, Inc." *Science, Technology & Human Values* 21(2):131-56.
Somerville, Siobhan. 2000. *Queering the Color Line: Race and the Invention of Homosexuality in American Culture*. Durham and London: Duke University Press.
—. 2005. "Notes toward a Queer History of Naturalization." *American Quarterly* 57(3):659-75.
Southam, Keith. 2011. "Who am I and who do you want me to be? Effectively defining a lesbian, gay, bisexual, and transgender social group in asylum applications." *Chicago-Kent Law Review* 86:1363-87.
Stacey, Judith. 2004. "Marital suitors court social science spin-sters: the unwittingly conservative effects of public sociology." *Social Problems* 51(1):131-45.
Stambolis-Ruhstorfer, Michael. 2015. "The Culture of Knowledge: Constructing “Expertise” in Legal Debates on Marriage and Kinship for Same-Sex Couples in France and the United States." PhD Thesis, University of California, Los Angeles.
Stampnitzky, Lisa. 2013. *Disciplining Terror: How Experts Invented 'Terrorism'*. Cambridge: Cambridge University Press.
Star, Susan Leigh. 1985. "Scientific work and uncertainty." *Social Studies of Science* 15:391-427.
Star, Susan Leigh, and James Griesemer. 1989. "Institutional Ecology, ‘Translations’ and Boundary Objects: Amateurs and Professionals in Berkeley’s Museum of Vertebrate Zoology, 1907-39." *Social Studies of Science* 19:387-420.
Steinmetz, George. 1999a. "Introduction: Culture and the State." Pp. 1-49 in *State/Culture: State Formation after the Cultural Turn*, edited by George Steinmetz. Ithaca: Cornell University Press.
— (Ed.). 1999b. *State/Culture: State-Formation after the Cultural Turn*. Ithaca, NY: Cornell University Press.
Stern, P. 2010. "Paraphilic coercive disorder in the DSM: The right diagnosis for the right reasons." *Archives of Sexual Behavior* 39:1443-47.
Stryker, Robin. 1994. "Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change." *American Journal of Sociology* 99(4):847-910.
—. 1996. "Beyond History Versus Theory: Strategic Narrative and Sociological Explanation." *Sociological Methods and Research* 24(3):304-52.
Stryker, Robin, Danielle Docka-Filipek, and Pamela Wald. 2012. "Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science." *Law & Social Inquiry* 37(4):777-814.
Sutherland, Edwin. 1950. "The Diffusion of Sexual Psychopath Laws." *American Journal of Sociology* 56:142-48.
Swidler, Ann. 2001. *Talk of Love: How Culture Matters*. Chicago: University of Chicago Press.
Terry, Jennifer. 1999. *An American Obsession: Science, Medicine, and Homosexuality in Modern Society*. Chicago: University of Chicago Press.

—. 2000. ""Unnatural Acts" in Nature: The Scientific Fascination with Queer Animals." *GLQ* 6(2):151-93.
Terry, Karen. 2013. *Sexual Offenses and Offenders*. Belmont, CA: Wadsworth.
Thompson, Debra. 2016. *The Schematic State*. Cambridge: Cambridge University Press.
Thornton, Patricia, and William Ocasio. 1999. "Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990." *American Journal of Sociology* 105(3):801-43.
Timmermans, Stefan, and Steven Epstein. 2010. "A World of Standards but not a Standard World: Toward a Sociology of Standards and Standardization." *Annual Review of Sociology* 36:69-89.
Tong, Dean. 2007. "The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?" *AMerican Journal of Family Therapy* 35:187-202.
U.S. Citizenship and Immigration Services. 2011. "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex Refugee and Asylum Claims."
U.S. Department of State. 2011. "Country Reports on Human Rights Practices, Mexico." Washington, D.C.:U.S. Department of State.
—. 2013. "Country Reports on Human Rights Practices, Jordan." Washington, D.C.:U.S. Department of State.
United Nations High Commissioner for Refugees. 2008. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity."
Valverde, Mariana. 1996. "Social facticity and the law: a social expert's eyewitness account of law." *Social & Legal Studies* 5(2):201-17.
—. 2003. *Law's Dream of a Common Knowledge*. Princeton: Princeton University Press.
Valverde, Mariana, Ron Levi, and Dawn Moore. 2005. "Legal knowledges of risk." Pp. 86-120 in *Law and Risk*, edited by Law Commission of Canada Vancouver: UBC Press.
Vance, Carol (Ed.). 1984. *Pleasure and Danger: Exploring Female Sexuality*. New York: Routledge.
—. 1998. "Social Construction Theory: Problems in the History of Sexuality." Pp. 160-70 in *Social Perspectives in Lesbian and Gay Studies*, edited by Peter Nardi and Beth Schneider. London: Routledge.
Vaughan, Diane. 1999. "The Role of the Organization in the Production of Techno-Scientific Knowledge." *Social Studies of Science* 29(6):913-43.
Vitug v. Holder, 723 F.3d 1056 (9th Cir. 2013).
Vogler, Stefan. 2016. "Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims." *Law & Society Review* 50(4):856-89.
Wacquant, Loic. 2009. *Punishing the Poor*. Durham and London: Duke University Press.
Waidzunas, Tom. 2011. "Young, Gay, and Suicidal: Dynamic Nominalism and the Process of Defining a Social Problem with Statistics." *Science, Technology & Human Values* 37(2):199-225.
—. 2013. "Intellectual Opportunity Structures and Science-Targeted Activism: Influence of the Ex-Gay Movement on the Science of Sexual Orientation." *Mobilization* 18(1):1-18.
—. 2015. *The Straight Line*. Minneapolis: University of Minnesota Press.

Waidzunas, Tom, and Steven Epstein. 2015. "'For men arousal is orientation': Bodily Truthing, Technosexual Scripts, and the Materialization of Sexualities through the Phallometric Test." *Social Studies of Science* 45(2):187-213.

Wald, Priscilla. 2008. *Contagious: Cultures, Carriers, and the Outbreak Narrative*. Durham, NC: Duke University Press.

Weber, Max. 1978. *Economy and Society*. Berkeley: University of California Press.

Weeks, Jeffrey. 1998. "The Sexual Citizen." *Theory, Culture & Society* 15(3):35-52.

Wilson, Nicholas. 2011. "From Reflection to Refraction: State Administration in British India, circa 1770–1855." *American Journal of Sociology* 116(5):1437-77.

Yoshino, Kenji. 2015. *Speak Now: Marriage Equality on Trial: The Story of Hollingsworth v. Perry*. New York: Crown.

You, Jin. 2013. "Registering Dangerous Strangers: Psychology and Justice in the Politics of the Sex Offender Registry." PhD Dissertation, Virginia State University.

Yung, Corey. 2010. "The Emerging Criminal War on Sex Offenders." *Harvard Civil Rights-Civil Liberties Law Review* 45:435-81.

Zilney, Laura, and Lisa Anne Zilney. 2009. *Perverts and Predators: The Making of Sexual Offending Laws*. Lanham, MA: Rowman & Littlefield.

Zylan, Yvonne. 2011. *States of Passion: Law, Identity, and the Construction of Desire*. Oxford: Oxford University Press.

Appendix 1

Static-99R Coding Form

Question Number	Risk Factor	Codes		Score
1	Age at release	Aged 18 to 34.9 Aged 35 to 39.9 Aged 40 to 59.9 Aged 60 or older		1 0 -1 -3
2	Ever Lived With	Ever lived with lover for at least two years? Yes No		 0 1
3	Index non-sexual violence - Any Convictions	No Yes		0 1
4	Prior non-sexual violence - Any Convictions	No Yes		0 1
5	Prior Sex Offences	Charges 0 1,2 3-5 6+	Convictions 0 1 2,3 4+	 0 1 2 3
6	Prior sentencing dates (excluding index)	3 or less 4 or more		0 1
7	Any convictions for non-contact sex offences	No Yes		0 1
8	Any Unrelated Victims	No Yes		0 1
9	Any Stranger Victims	No Yes		0 1
10	Any Male Victims	No Yes		0 1
	Total Score	**Add up scores from individual risk factors**		

Translating Static-99R scores into risk categories

Score	**Label for Risk Category**
-3 through 1	= Low
2, 3	= Low-Moderate
4, 5	= Moderate-High
6 plus	= High

Appendix 2 – Methodology

I drew on a range of sources to generate my analysis in this dissertation: legal decisions, NGO and government documents, news coverage, interviews with various kinds of actors involved in both LGBTQ asylum and sex offender law and/or advocacy, and ethnographic observations in multiple settings, including immigration court, criminal court, NGO offices, governmental meetings, and professional conferences. These various data necessarily speak to different parts of the story I tell in this study, and sometimes one source tells a different story than another. This is precisely why I drew on multiple kinds of data. Official recorded accounts, such as those found in legal decisions, often tell only a small part of the story and conceal important aspects. In these instances, interviews and ethnographic observation can (and did) help fill in the gaps. For example, judicial decisions regarding sex offenders generally make no mention of how the penile plethysmograph affects legal decision-making. Yet in observing SVP trials and talking with evaluators, I learned that phallometric testing sometimes underwrites expert testimony in these hearings even though the technology itself is not admissible in court. By triangulating these multiple sources—documentary, interview, and observational—I was able to check one against the others, and use findings from one source to guide data collection and/or coding of others. In this way, both my data collection and coding were iterative processes. Coding of documents sometimes suggested new questions to ask interviewees, while my ethnography sometimes indicated things I should be attentive to when analyzing documents, and so on.

Document Analysis

As described in the Introduction, I drew on a range of documentary sources, primarily consisting of legal decisions, but also including NGO and government documents, legal statutes,

news coverage of asylum and sex crimes, and academic texts. Because asylum decisions are not publicly available unless they are appealed, I was limited in the cases I could select. Decisions at the immigration court level are audio recorded, but no transcript is generated unless the case is appealed to the BIA. At this point, the case still does not become public unless the BIA chooses to publish its decision, which it does with only a handful of precedential rulings each year. In the case of LGBTQ asylum, only one precedential decision has been published by the BIA—*Toboso-Alfonso* (1990), the first decision to grant a gay man withholding of removal. Asylum seekers can also appeal to a U.S. Circuit Court of Appeals if they are denied relief by the BIA. At this point, the Circuit Court's judgment becomes public, and these are the primary decisions I used for this study. To collect these rulings, I used Lexis Nexis, an academic database that catalogues legal decisions. I searched the database in several different ways to ensure that I was locating all relevant cases. I began by conducting searches using the following keywords: gay, homosexual, homosexuality, sexuality, sexual orientation, sexual preference, and lesbian. For each search, I used the "search within results" function to search for the keyword "asylum." Additionally, rather than searching for each keyword and then filtering by asylum cases, I also conducted searches using each keyword in conjunction with "asylum" (e.g., gay AND asylum). Ultimately, this process produced 184 LGBTQ asylum decisions, which I believe to be the entire universe of cases as of the time of my search.

I took a similar approach to locating legal decisions regarding sex offenders. But because there are many more sex crimes cases (including lower court decisions, unlike asylum) and I was interested in particular aspects of the law (e.g., civil commitment, risk assessment, use of technology and expertise), I modified my search techniques. I used the "core terms" search feature in Lexis to find cases containing "civil commitment" and "sexual," which returned 1,754

cases.[286] I selected all four U.S. Supreme Court cases for analysis. I then narrowed the search to only cases from 1990 to 2015—the same time frame for which I had asylum decisions—and selected all 66 rulings from U.S. Circuit Courts of Appeal. I next filtered for only U.S. District Court cases (n = 239), sorted the results chronologically, and then selected the first case and every tenth subsequent case for a final sample of 24 decisions. I subsequently repeated this search, limiting it to only include judgments from Illinois (n = 31), which I use as a case study in this dissertation.

To analyze the use of technologies in legal decision-making about sex offenders, I also conducted searches specifically focused on polygraphs and penile plethysmographs. I tried many methods of finding cases dealing with polygraph issues with sex offenders, but most procedures returned many hundreds of cases that were irrelevant. I ultimately used a search that looked for "polygraph" in the case overview and "sexual" as a core term, and limited results to U.S. Circuit Courts of Appeals decisions, resulting in 60 cases for analysis. Far fewer cases concerned phallometric testing (whose use as a keyword returned no results). Searching for "plethysmograph" in the case overview returned 73 cases for analysis, comprising both U.S. Circuit Courts of Appeal and state-level appellate courts. My final sample of cases dealing with various facets of sex offender law included 258 court decisions, ranging in scale from U.S. District Courts and state-level appellate courts to the U.S. Supreme Court.

I chose to focus on appellate decisions for two primary reasons. First, they are readily available and allow me to generate a large sample of cases from a range of jurisdictions. This

[286] Doing a general keyword search for words such as sexual, sex offender, or sexual offender returned more cases than Lexis Nexis could process, and I therefore had to adapt my search methods. I found that using the "core terms" search feature resulted in a more manageable number of cases that were also more relevant.

allows me to analyze legal decision-making both at the federal level and across the patchwork of state sex crimes statutes. Second, and more importantly, appellate courts set standards for lower courts. What Prentky and colleagues contend of risk assessment is applicable more widely: "appellate review can ensure uniformity in adjudication standards, and the development of a useable 'jurisprudence of risk' through the common-law process of rule articulation" (Prentky, Barbaree and Janus 2015:63). Because I am interested in general rules and processes through which state legal institutions render sexuality legible for governance, appellate courts are the ideal settings to examine, for they set those standards and review the procedures that lower courts use. Nevertheless, to account for the fact that most of the "action" of law does not occur in appellate cases, I supplemented my legal analysis with in-depth qualitative interviews and extensive ethnographic field work.

Interviews

I conducted 40 interviews with lawyers, activists, judges, administrators, researchers, and expert witnesses for both asylum and SVP hearings. Detailed information on interviewees is included in Table 5. I selected interviewees based on their centrality to the field, expertise on particular topics, or experience in either asylum or SVP law, or some combination of these factors. I identified most interviewees through my field work or background research, but some were suggested by other interviewees. I tailored interviews depending on the interviewee's professional position (e.g., I asked different questions to expert witnesses than to judges), and I sometimes made adjustments to questions for subsequent interviews based on my experiences with informants, what Small (2009) calls "sequential interviewing." Interviews generally lasted about one hour and were audio recorded and later transcribed for coding. I conducted interviews either in person (preferably) or over the phone.

Table 5 – Interviewee Information

Name	Position, Organizational Affiliation	Interview Date
Aaron Barton	Psychologist and SVP evaluator	6/22/2016
Aaron Morris	Immigration lawyer, Immigration Equality	8/14/2013
Alyssa Williams-Schafer	Coordinator for Sex Offender Services, Illinois Department of Corrections	11/23/2015
Amanda Sullivan	Paralegal, National Immigrant Justice Center	1/24/2014
Aneesha Gandi	Immigration lawyer, National Immigrant Justice Center	1/24/2014
Arjun Kapoor	Psychiatrist, private practice	12/12/2015
Ashley Reed	Paralegal, National Immigrant Justice Center	1/24/2014
Daniel Tenreiro	Immigration lawyer, private practice	9/16/2013
Donya Adkerson	Psychologist, private practice	2/22/2016
Evan Asher	Psychologist and SVP evaluator	4/13/2016
Guy Groot	Psychologist, Illinois Sex Offender Management Board	5/19/2016
Heather McClure	Anthropologist, formerly with Midwest Human Rights Partnership for Sexual Orientation	6/2/2016
Ingrid Lawson	Retired Immigration Judge, U.S. Department of Justice	11/20/2014
Isabel Davis	Psychologist and SVP evaluator	4/11/2016
Julie Dorf	Human rights expert, founder of International Gay and Lesbian Human Rights Commission (IGLHRC)	8/2/2016
Karen Franklin	Psychologist, private practice	8/30/2016
Karl Hanson	Psychologist, Canadian government	9/8/2016
Keren Zwick	Immigration lawyer, National Immigrant Justice Center	1/24/2014
Kim Weitl	Psychologist and SVP evaluator	5/31/2016
Laurie Rosenberg	former BIA judge	5/18/2017
Lavi Soloway	Immigration lawyer, co-founder of Immigration Equality	6/3/2016
Margaret Menzenberger	Assistant Attorney General, State of Illinois SVP Division	6/16/2016
Michael Jarecki	Immigration lawyer, private practice	2/7/2014
Michael Miner	Psychologist, University of Minnesota	9/8/2016
Michael Seto	Psychologist, University of Toronto	11/7/2017
Nathan Edwards	U.S. government researcher	8/2/2016
Neil Grungras	Immigration lawyer, Organization for Refuge, Asylum, and Migration (ORAM)	1/13/2016
Nielan Barnes	Sociologist, California State University, Long Beach	6/11/2016
Paul Schmidt	former IJ and BIA member, retired	5/25/2017

Peter Perkowski	Immigration lawyer, private practice	2/11/2014
Richard "Bo" Travis	Psychologist and SVP evaluator	3/8/2016
Richard Krueger	Psychiatrist, Columbia University	9/8/2016
Robin Wilson	Psychologist, private practice, formerly employed by Florida SVP program	4/7/2017
Shan Jumper	Clinical Director of Illinois SVP Program	2/29/2016
Shannon Minter	Legal Director for the National Center for Lesbian Rights	8/16/2016
Stephen Murray	Independent scholar, expert witness in asylum hearings	6/14/2016
Susanne Goldberg	Professor of Law, Columbia University	10/31/2016
Suyapa Portillo	Assistant Professor of Latino Studies, Pitzer College	8/18/2016
Vickie Neilson	Immigration lawyer and former Legal Director of Immigration Equality	8/14/2013
William Marshall	Psychologist, private practice	8/22/2016

Ethnographic Observations

The final component of my methodological toolkit involved multi-sited ethnographic observations. From July 2013 to July 2015, I worked with Advocates for Immigrant Rights (AIR), a pseudonym for a non-profit organization that advocates for and provides legal representation to LGBTQ asylum seekers and has a national presence on queer immigration issues. I aided with various aspects of case preparation—mostly country conditions research and small administrative tasks—in exchange for being able to observe their weekly case update meetings, in which the entire staff would meet to discuss on-going cases, new intakes, and other issues facing the organization. Through AIR I was also able to observe twelve asylum hearings in the Chicago immigration court. After my formal field work period ended in 2015, I continued to check in with AIR and occasionally returned to their offices for updates on cases that were on-going from my time there.

My field work for the sex offender legal complex took place from September 2015 to November 2017 and occurred in a range of settings. I observed the bi-monthly meetings of the Illinois Sex Offender Management Board (SOMB), which is tasked with implementing aspects of state sex offender policy, including setting standards for the treatment and evaluation of sex offenders in state custody, and making recommendations to the state legislature on policy needs. I also attended the 2015 annual meeting for the Association for the Treatment of Sexual Abusers (ATSA), the 2016 bi-annual meeting of the International Association for the Treatment of Sex Offenders (IATSO), the 2016 bi-annual meeting of the Illinois chapter of ATSA, and a risk assessment and evaluation training held by the SOMB in 2017. In addition to many informal conversations at these events, I also attended scholarly presentations, social events, and conducted some interviews at these conferences. Finally, I observed two "sexually violent persons" (SVP) trials in Chicago.

In all of these settings, I routinely maintained field notes concurrently and typed more extensive notes as soon as possible after being in the field. Unlike some field settings where carrying a notebook around and constantly scribbling notes in it would make the researcher obvious and perhaps intrusive, in these contexts, most participants were doing the same thing, and my note taking therefore did not seem out of place at all. Moreover, participants in my two long-term field sites—AIR and the SOMB—knew that I was a researcher and agreed to my presence.

Coding

I coded documents, interview transcripts, and field notes through an iterative holistic coding method, using both inductive and deductive approaches. Initial coding themes were generated deductively and focused on subjects drawn from my theoretical framework, such as

sexual narratives, evidence of sexuality, diagnosis, risk assessment, expert statements, and uses of technology. With these overarching themes in mind, I inductively generated many sub-codes for each category.[287] For example, within the broad theme of "evidence of sexuality" in the asylum context, sub-codes included stereotypes, gender non-conformity, corroborating letters, sexual experiences, and romantic relationships. Similarly, in the sex offender context, the "uses of technology" theme contained many sub-codes, including "use of polygraph" and "use of PPG" which each had many sub-sub-codes regarding admissibility, reliability, and specific uses (e.g., was it used for treatment, evaluation, or risk assessment?). Codes sometimes also overlapped. Sexual narratives, for instance, were coded as "evidence of sexuality," but they were also coded as "sexual narratives" for a separate analysis of the structure of the narrative (e.g., did it follow a typical "coming out" narrative?).

Other themes emerged inductively on subsequent readings of my materials. This was particularly true for various legal standards that I was not initially thinking about, such as legal requirements to meet the threshold of persecution in asylum. Indeed, while I was initially concerned with risk assessment practices for sex offenders, this was not a topic that I originally coded for in the asylum context. Rather, as I repeatedly read asylum judgments, I came to realize that determining whether a petitioner would face persecution if returned to his or her home country *was* a form of risk assessment. This also led to me developing codes around country conditions information, their sources, their credibility, and their legal admissibility in asylum hearings. This process ultimately resulted in approximately 150 distinct codes.

[287] My coding method is similar to that described by Stryker (1996).