Dirk Hoerder & Audrey Macklin

Separation or permeability

Bordered states, transnational relations, transcultural lives

Each and every empirical analysis of statehood, sovereignty, and territorial delimitation disrupts and contradicts the conventional understanding of states as clearly demarcated geopolitical entities. Historically, the concept of dynastic sovereign rule over a territory emerged after the carnage of the first European or Thirty Years' War of 1618-48. In it, one third of the central European population perished, and nobilities and rulers sorely missed the revenues of these once productive and taxpaying subjects. In the peace of 1648-49, their delegates established the so-called Westphalian state system that still exists at the beginning of the 21st century: To prevent another European war, rulers held sovereignty over their territory, borders were meant to be inviolable, neighbouring rulers were not to interfere with the internal affairs of other states.

However, these self-contained polities, in an economic and sociological perspective, were part of larger spaces. In the first place, their mercantilist policies attempted to attract economically active subjects from other states,

Dirk Hoerder teaches history at Université de Paris 8—Saint Denis, France. His most recent publication, with Christiane Harzig and Adrian Shubert, is The Historical Practice of Diversity: Transcultural Interactions from the Early Modern Mediterranean to the Postcolonial World.

Audrey Macklin is associate professor of law at the University of Toronto. From 1994-96, she was a member of Canada's Immigration and Refugee Board.

while politics of intolerance expelled men and women of unwanted variants of Christian religious creeds and practices: borders were permeable for migrants. Secondly, Enlightenment thought and the age of revolution changed the location of sovereignty to "the people" without, however, deleting the previous connection between sovereignty and territory: political theory became inconsistent. Thirdly, Europe's ruling nobility, whether intermarrying or fighting, was transeuropean, and dismembered or expanded territorial states to suit their interests. Finally, political thought, as well as the culture and language of the educated, were also transeuropean. French was the means of communication among intellectuals, German among artisans, Latin among Roman Catholic clerics. Political entities and cultural spaces expanded and contracted like an accordion depending on power relations and hegemonies of thought and culture.[1]

Notwithstanding these inconsistencies, the concept of bordered, territorial, culturally homogenized *nation*-states became the ruling paradigm in 19th-century Europe and, with colonial and imperial expansion, took hold in the "white" settler colonies that became the United States, Canada, and Australia. After the 1870s, when Germany and Italy had unified, and ideologies of national—genetic or bloodline—belonging been vested with allegedly "scientific" character, borders became less permeable. Passports were introduced, interdynastic relations became inter-"national" or, perhaps more correctly, inter-"state" relations.[2] The concept of bordered nation-states was, in the mid-20th-century period of decolonization, also imposed on states emerging from the European powers' former empires.

A perspective from "the people," individual men and women as well as families that lived in the constructs of state and nation, would have

1 David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995); Dirk Hoerder, Christiane Harzig, and Adrian Shubert, eds., *The Historical Practice of Diversity: Transcultural Interactions from the Early Modern Mediterranean to the Postcolonial World* (New York: Berghahn, 2003); Christiane Harzig, Danielle Juteau, Irina Schmitt, eds., *The Social Construction of Diversity: Recasting the Master Narrative of Industrial Nations* (New York: Berghahn, 2003).

2 John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000); Andreas Fahrmeir, Olivier Faron, and Patrick Weil, eds., *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (New York: Berghahn, 2003).

questioned the paradigm of self-contained monocultural polities as empirically unsound.[3] Throughout the 19th century, belonging was local and regional rather than national or statewide. The national languages were spoken by the educated, while common people expressed themselves in dialects often not mutually comprehensible. Furthermore, between 1815 and the 1930s some 55 million men and women left the European states—to which, by the racializing corollary of late 19th-century thought, they were said to be genetically tied—to conduct their lives in other societies-states-nations, mainly in North and South America. Far larger numbers migrated within and between European states.[4]

Based on the many issues raised by the dichotomy between political theory and everyday life-projects, we argue that states were historically less bordered and self-contained than public opinion and scholarly nation-state approach have since assumed. We will address, first, the permeability of borders in the period of mass migration at the turn to the 20th century, taking as examples migrants born in some region of Europe, China, or elsewhere who selected Canada as a destination. We will, second, discuss the period of the 1880s to 1940s during which the emergence of the working classes in the Atlantic world and "pauperism" prompted the emergence of transatlantic social thought and, by mid-20th century, a corollary to political citizenship as including socioeconomic security. Third, from the founding of the United Nations to the turn of the 21st century, a new stage of political interaction may be discerned. Democracies have become highly sensitive to developments beyond their borders and have become linked into a comprehensive multilateral system of organizations and legal rules. They may incorporate much of this into their own systems and also relate to these norm-sets with different degrees and magnitudes of compliance.

Pursuing the perspective from people's lives, we note that 21st-century Canada, as one of the most ethnoculturally diverse states with one of the

3 The concept is internally contradictory: according to political theory of post-dynastic states, each and every (male) individual is equal before the law. According to the ideology of "nation," those inhabitants of a state that by birth (or, perhaps, practice) belonged to the hegemonic "national" culture were privileged over those said to be of "minority" cultures.

4 Klaus J. Bade, *Migration in European History,* Allison Brown, transl. (Oxford: Blackwell, 2003); Dirk Hoerder, *Cultures in Contact: World Migrations in the Second Millennium* (Durham, N.C.: Duke University Press, 2002).

largest foreign-born populations in the world, is particularly attuned to these developments. The intersection of human rights and territoriality provide a fruitful site for examining Canada as *gidsland*. Our three case studies—the citizen abroad, the foreigner inside, and the asylum seeker—suggest that physical presence in a territory mediates the state response to rights claims by citizens and non-citizens alike. While Canada's record in protecting the rights of non-citizens within its borders earns it deserved praise, one cannot but notice the effort that Canada simultaneously expends on policing and preventing initial border crossings by those claiming human rights protection.

NATION-STATES AND TRANSCULTURAL LIVES FROM THE MID-19TH CENTURY TO THE GREAT DEPRESSION

In the 19th century, migrants from one society (rather than state) selecting a new space for their life-course projects in a different society and polity encountered few governmental regulations. In some European states an emigration consent had to be obtained, but hardly any state controlled its borders intensively. Few states required entry permissions and the passport system was developed and institutionalized only towards the end of the 19th century. In their own views, people moved between regions: from the space in which they had been socialized in early childhood and adolescence to spaces in which kin and friends lived and that provided access to jobs or tillable soil. Of the "immigrants" to the "unlimited opportunities of America" (the United States) around 1900, 94 percent moved to a particular place where friends or relatives lived and had advised them of job options. One third of these migrants returned or pursued multiple trajectories. They led transcultural lives between life-worlds rather than transnational lives between nation-states.[5]

In 1882, the Leveridge family, farming in a small town near Norwich, England, had its credit wiped out by a defaulting friend. Sequentially, the husband and then the wife with the children left for Canada. The rural

5 Recent scholarship has conceptualized lives in two societies as "transnational." Since migrants leave a particular cultural region and/or community and not an essentialized national culture, the concept of "transcultural" lives is more accurate. Peter Kivisto, "Theorizing transnational immigration: A critical review of current efforts," *Ethnic and Racial Studies* 24 (July 2001), 549-77; Dirk Hoerder, "Transculturalism(s): From nation-state to human agency in social spaces and cultural regions," *Zeitschrift für Kanada-Studien* 24 (2004), 7-20; Thomas Faist, *The Volume and Dynamics of International Migration and Transnational Social Spaces* (Oxford:

backwoods in Ontario were different in many respects. The family adapted to the new circumstances in a survival economy. Scarce resources demanded flexible responses. Once a basic economic security had been achieved, they set out to recreate aspects of Norwich. They asked relatives to send flower and vegetable seeds, particular types of clothing, and they read an English newspaper. At the same time, they tried to convince kin in England that their little town was a civilized place. Neither Canada nor the United Kingdom, as states, were important to them. Local developments mattered; local economic development provided options. The Hastings County segment of this transatlantic family struggled for independence from the Norwich family's help and, subsequently, hosted two relatives from Norwich.[6] Such family lives and local spaces were situated in states, yet distant from nation-state governments or alleged national identities. Society in England and prevailing norms of "honour," rather than a government, had forced the family to leave. Canada's government and society permitted the family to enter without formality as long as it supported itself.

At the western end of the Canadian state, men and women from particular localities of the four southern provinces of the colonized Chinese empire began to arrive in the late 1850s. Canada's government, geographically far more distant from Vancouver, British Columbia, than from Hastings County, Ontario, intervened far more proximately. Under racist notions current in the Atlantic Christian world, the transpacific migrants were of the "yellow" race, of non-Christian faith, and altogether inferior "Orientals." Following the US government's exclusionary measures of 1882, the entry of Chinese men (and the few women) was curtailed by a prohibitive entry fee, a "head tax."[7] The gendered trajectories of Chan Sam

Oxford University Press, 2000); Peggy Levitt, Josh DeWind, Steven Vertovec, eds., "Transnational migration: International perspectives," thematic issue of *International Migration Review* 37 (fall 2003). For a Canadian approach, see Lloyd L. Wong and Vic Satzewich, eds., *Transnational Communities in Canada: Emergent Identities, Practices, and Issues*" (Vancouver: UBC Press, 2006).

6 Anna Leveridge, *"Your Loving Anna,"* in Louis Tivy, ed., *Letters From the Ontario Frontier (1882-1891)* (Toronto: University of Toronto Press, 1972).

7 Subsequently, in 1907 and in 1928, migration of Japanese men and women was curtailed by "gentlemen's agreements" imposed on Japan by the two North American states. For a discussion of the historical context and its relevance to contemporary practices, see Audrey Macklin, "Can we do wrong to strangers?", in David Dyzenhaus and Mayo Moran, eds., *Calling Power to*

and his wives Huangbo and May-Ying Leong, as well as, intergenerationally, of their children reflect complex lives: a bifocal family—or two families?—in particular localities in China and in Canada, conflict between societal norms and tradition-bound as well as innovative life projects, rigid Confucian-Chinese prescripts for child-parent relations and rigid Christian-Canadian concepts of population composition.[8] Decisions about family economy and status in Guangdong's village society had to be negotiated and coordinated with those about work and the standard of living in Vancouver's Chinese quarters.[9] Such unwanted transcultural migrants had to deal with governmental fiats distant from their everyday lives.

Canada's government, intensely concerned with the "race" of the Canadian population, faced a further immigration issue. The territories of the prairies, wheat-producing hinterlands whose Native peoples were of no concern, were to be settled to put a stop to annexationist questioning of the borderline in the US. The resulting inter-national and transatlantic policy had to take into account that migrants from what the racialized legal apparatus of the times called "preferred groups" no longer came: Anglo-Saxons, the Celts (Irish excepted), the Teutons, and the Nordics. Thus, Canada's secretary of the interior, Clifford Sifton, changed transborder and transcultural public discourse. East Europeans, considered "dark" rather than "white," had to be accepted. In 1896, alluding to the English "honest yeoman" concept, he invited "stalwart peasants in sheepskin coats, born on the soil, whose forefathers have been farmers for ten generations." He meant peasants from Ukraine.

Account: Law, Reparations, and the Chinese Canadian Head Tax Case (Toronto: University of Toronto Press, 2005), 60-91.

8 Denise Chong, *The Concubine's Children. Portrait of a Family Divided* (Toronto: Penguin, 1994). This family biography, written by the granddaughter of the original migrants, fits the life of three generations into the frame of two states and two regional societies. It achieves a comprehensive perspective that many studies by historians lack.

9 James H. Jackson, Jr., and Leslie Page Moch, "Migration and the social history of modern Europe," in Dirk Hoerder and Moch, eds., *European Migrants: Global and Local Perspectives* (Boston: Northeastern University Press, 1996), 52-69; Hoerder, "Migrants to ethnics: Acculturation in a societal framework," in Hoerder and Moch, ibid. 211-62; Hoerder, "Labour markets, community, family: A gendered analysis of the process of insertion and acculturation," in Wsevolod Isajiw, ed., *Multiculturalism in North America and Europe: Comparative Perspectives on Interethnic Relations and Social Incorporation* (Toronto: Canadian Scholar's Press, 1997), 155-83.

His call for newcomers was successful. While he did not change the ideology of Canada as an English and French nation-state, the transborder migrants changed population composition as well as politics.[10]

Newcomers, regardless of origin, lived transborder lives. They initiated sequential migrations from their region of birth, a "home" that provided little sustenance. They supported relatives in European states during the ravages of World War I. Those Canadians who had arrived from local spaces in what from 1914 to 1918 became enemy states had difficulties understanding why they were labelled "enemy aliens." Such concern repeated itself—and included migrants from Asia—during the Great Depression and World War II. While states emphasized borders and nationality and engaged in international relations (as well as in the case of Canada in intra-imperial ones), migrants and their non-migrating kin lived in transcultural spheres. States had little interest and, according to the Westphalian doctrine, little say in their citizens' relatives' rights and wellbeing in other countries. Neither their human rights issues nor their economic wellbeing were of concern.[11]

ATLANTIC CROSSINGS: SOCIAL SECURITY AND HUMAN RIGHTS

Like migrants, ideas crossed the Atlantic, often carried by migrating scholars. The resulting climate of opinion transcended borders, as did social and political reform movements. Both influenced state governments. From the 1880s, the plight of urban workers, migrant or resident, and the labouring classes in general was at the root of new social thought. After the destruction of the two world wars, peace between states and human rights within them became the focus of a new international organization, the United Nations.

The problems of urban poverty in many industrializing cities and societies of the Atlantic world, as well as of farming families deprived of a livelihood through the mechanization of agriculture in the 1920s, provided the major impulses for the emergence of sociology as a discipline. Montreal's impoverished lower-class families had been visible to urban reformers

10 Male historians, for almost a century, quoted only this 10-second sound bite and relegated women and children to oblivion. Sifton, who knew that turning prairie sod into farms required family labour, had invited family units, men with "stout wives and a half-dozen children." John W. Dafoe, *Clifford Sifton in Relation to His Times* (Toronto: Macmillan, 1931), 142.

11 Dirk Hoerder, *Creating Societies: Immigrant Lives in Canada* (Montreal: McGill-Queen's, 1999).

since the 1880s, Charles Booth and Henry Mayhew documented poverty in London, and Jacob Riis photographed slums in New York City. Arnold Toynbee's London "settlement house"—a centre for reformers to live and work in the slums—formed the model for such reform attempts across societies. In Chicago, Jane Addams, Sophonisba Breckenridge, and many other women collected empirical data on social problems to convince legislators to pass reform measures. From such data, the men at Chicago University wrote their books. From the university's divinity school and department of sociology emerged the "Chicago school of sociology" that attracted Canadian graduate students, many of whom later taught at Canadian universities, McGill in particular. Approaches and solutions crossed borders just as the problems had done.[12]

In the international context, Canadian social scientists' emphasis on communities and social relations was remarkable. In Germany, the field was state-centred; in the United States, scholars were interested in the effects of urbanization and industrialization on the moral character of society. Britain's complex influence on Canada involved the pragmatist approaches of Scottish scholars as well as many English professors' aversion to empirical sociology. The papal encyclical *Rerum Novarum* of 1891 influenced French-Canadian sociology and the Association canadienne pour l'étude et la diffusion des sciences sociales emerged in 1892. McGill's social science research project was conceptualized in the frame of reference of the Société d'économie sociale et politique, (founded in 1905), the British Fabian society (mediated through Leonard Marsh from the London School of Economics), and US scholars' "laboratory" concept of societies. This transatlantic discourse did not shy away from questions of class and of remedial "collectivist" political strategies.[13] Canada's "Report on social security for Canada," published in 1943, was deeply influenced by the 1942 British report on "Social insurance and allied services." The latter's author, William Henry Beveridge, was an Oxford-educated economist born in India who had developed his thought as a resident at the London settlement house. Christian ethics via Catholic papal

12 Stow Persons, *Ethnic Studies at Chicago, 1905-45* (Urbana, Ill.: University of Illinois Press, 1987).

13 Marlene Shore, *The Science of Social Redemption: McGill, the Chicago School, and the Origins of Social Research in Canada* (Toronto: University of Toronto Press, 1987).

pronouncement and British Fabianism's class analysis thus made the transition to Canadian policy advocacy.[14]

Retrospectively, the right to social security as part of citizenship has been called the second generation of human rights after civic and political rights.[15] Due to the horrors of the Second World War, the Holocaust, forced labour, and a critique of colonialism, the United Nations was established and a human rights division became part of this new international organization. A Canadian, John P. Humphrey from McGill, was its first director and was instrumental in drafting the Universal Declaration of Human Rights, which was passed on 10 December 1948 by the UN general assembly. It declared the basic right of the individual—male or female, child or adult—to equality of opportunity regardless of race, ethnic or national origin, gender, colour of skin, or religion. This declaration heralded a revolutionary change in the theory and practice of international as well as intra-state national law and jurisprudence: it undercut the long outdated Westphalian concept of state sovereignty. Not only were international organizations to engage in support of human rights but, subsequently, state governments were called to actively support the human rights of individuals and groups outside of their borders.[16]

With human rights inscribed supranationally, the Canadian government had to take note that not all Canadians were being treated equally internally. The resulting debate was slow to include African-Canadians and Aboriginal peoples. But by the early 1950s, domestic servants and caregivers were in short supply and the relatively equality-supporting segment of Ottawa's administrators broke regulatory racial barriers and recruited nonwhite caregivers—the "first 100 girls" from the West Indies. Their lives, like those of all migrants, crossed borders. Even more, they lived particularly

14 While the Chicago School never discussed government intervention, the international context came to the US through President Franklin D. Roosevelt's and Eleanor Roosevelt's call for social welfare programs when Prime Minister Mackenzie King visited Washington. Fearing to be outflanked by the Conservatives, King, in the throne speech of January 1943, echoed the US goal of freedom from fear and want.

15 The first and most important summary is T.H. Marshall, *Class, Citizenship, and Social Development*, first edition, 1949 (Westport, Ct.: Greenwood, 1976).

16 An interim assessment of the consequences in Canada is John T.P. Humphrey and Ronald St. John Macdonald, eds., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979), esp. James Leavy, "The Structure of the Law of Human Rights," 53-75.

intense transcultural experiences since, entering the private sphere of family homes, they had to adjust fast with no recourse to a protected ethnocultural sphere of their own. They also had and have an—as yet little studied—impact on Canadian (and other receiving societies') national culture: Canadian-socialized mothers, in conservative circles styled "mothers of the nation," delegated socialization of their infants and young children to immigrant, "foreign" women of a different culture. Subsequent legislation gave the in-migrating domestics the status of immigrants rather than of temporary labourers. Thus, within the legal framework, they could bring in kin and establish communities. This reduction of the impact of borders in favour of transcultural lives and interstate responsibilities involved many debates and struggles.[7]

By the end of the 1950s, states' sovereignty over the (sovereign) people living in the respective border-enclosed territory had been breached. Since then major changes in practices have developed and are being developed—though military interventions in the name of human rights are sometimes motivated by the intervening state's economic and political-military interest more than by support for oppressed groups in the target society. The "climate of opinion" in the Atlantic world that influenced sovereign states' governments has become a body of international institutions and laws. In a way, the legal frames adjusted to what had long been the practice of migrants and their non-migrating kin.

MULTIPLE CITIZENSHIP, HUMAN RIGHTS, AND STATE ACTION

From one angle, the lived experience of transnational migration has changed little over hundreds of years. People move to seek better lives elsewhere, or to reunite with family. Structural factors, such as colonial,

17 Christiane Harzig, "MacNamara's DP domestics: Immigration policy makers negotiate class, race, and gender in the aftermath of World War II," *Social Politics* 10 (spring 2003), 23-48, and Harzig, "'The movement of 100 girls': 1950s Canadian immigration policy and the market for domestic labour," *Zeitschrift für Kanada-Studien* 19, no.2 (1999), 131-46. A description of racism encountered by caregiving women is found in Joyce C. Fraser's *Cry of the Illegal Immigrant* (Toronto: Williams-Wallace, 1980) who, as the title indicates, came from Guyana without legal immigration papers. For a description of the transition from a guest worker program to a modified immigration program, see Audrey Macklin, "On the inside looking in: Foreign domestic workers in Canada," in Wenona Giles and Sedef Arat-Koc, eds., *Maid in the Market: Women's Paid Domestic Labour,* (Toronto: Fernwood Press, 1994), Chapter 1.

military, and economic relationships between sending and receiving states, operate as vectors steering personal trajectories in particular directions. Within the constraints of available technology, migrants remain connected personally, culturally, and financially to their countries of origin. They move through transnational spaces, immerse themselves in the quotidian life of local communities, and live transcultural lives.

From another angle, the lived experience of migration has been radically transformed by the ascent of the territorially bordered state as hegemonic social formation, the emergence of human rights post-World War II, the decolonization of the south, and the accelerated connectivity of globalization. The compression of time and space associated with globalization enables migrants today to engage in ongoing forms of participation at multiple sites with a level of frequency and intensity that was unimaginable a few decades ago.

Both perspectives capture important truths and neither is comprehensive. Rather than choose between them, we build on an irony that emerges from the foregoing historical snapshots: prior to the consolidation of the bordered state, individuals could claim few rights from the sovereign, but also faced few political obstacles to mobility if life became intolerable where they were. Today, individuals can claim many rights from their state (in principle), but when those rights do not materialize, or are violated, or other places offer better opportunities, they encounter significant political and legal obstacles to transborder mobility.

Perhaps the temporal proximity between bordering of and by states, and the rise of human rights discourse, should not be surprising. Consolidation of the nation-state involved not only the creation of geographically defined borders around the state, but also the brutal—and sometimes genocidal—enforcement of mythologized borders around the nation. Shame at some of the excesses committed in the name of the nation-state led western states to articulate domestic, regional, and international human rights instruments that elevated the individual from the object of government authority to rights-bearing subject. Almost simultaneously, however, the expansion of rights into the domain of social welfare intensified states' interest in restricting access to the redistributive pie by, among other things, policing the geopolitical border against new entrants, and policing internal borders between citizens and non-citizens. And so the prodigious campaign over the last 50 years to recognize an expansive array of human rights has failed conspicuously to produce freedom of movement among its prescriptions.

Canada has a relatively strong culture of rights protection, a famously weak conception of national identity, and an underestimated system of border control. Rather than elaborate upon each of these characteristics, the remainder of this article will choose three liminal figures whose recent experiences illustrate the paradoxical interactions between rights and borders in light of these attributes: the citizen abroad, the foreigner within, and the would-be asylum seeker.

The citizen abroad

Maher Arar is a dual citizen of Canada and Syria (Syria does not permit renunciation of citizenship). He immigrated with his family as a teenager and acquired a post-secondary education as a computer engineer. He is one of four Canadian citizens who were detained in a Syrian jail as alleged terrorists, based on information gathered by Canadian officials. Arar's experience was distinctive in the sense that he did not travel voluntarily to Syria: in September 2002, Arar was in transit through New York en route from a family vacation in Tunisia to his home in Ottawa. US immigration officials intercepted him as he changed planes. They detained and interrogated him about alleged terrorist connections and, instead of then deporting him to Canada, transported him against his will to Syria. Arar was detained in Syria from October 2002 until October 2003. During that time, he received several consular visits from Canadian embassy officials, but always in the presence of his Syrian captors.

Arar has described how, for 10 months and 10 days, he was confined in a cell measuring three feet wide by six feet deep by seven feet long, and also tortured. He signed a confession which, after his release and return to Canada, he retracted as false and procured through torture. Canadian, US, and Syrian authorities have since admitted that they possessed no evidence that Maher Arar had committed any crime. At the time of this writing, a public judicial inquiry into Canada's role in Maher Arar's ordeal is in progress. The government has resisted disclosure of significant portions of evidence on grounds of national security and thereby affected the volume and content of available information.

Despite the restricted flow of information into the public domain, some reported testimony and evidence appear uncontradicted. Whether the Canadian government knew or consented to Arar's "rendition" by the US to Syria is still a matter of controversy, but an important source of US suspicion was information gathered by Canada and transmitted to US officials. This interstate transfer of information was effected without the usual precautions

governing what information would be conveyed, the way in which the information would be used, or to whom it might be disseminated. Moreover, the Royal Canadian Mounted Police and/or the Canadian Security Intelligence Services did offer to share their dossier on Arar with Syrian authorities.[18] Certain high-ranking officials, including then-foreign minister Bill Graham and Canadian ambassador to Syria Franco Pillarella, denied awareness that Syria engaged in torture, but other government officials who testified before the inquiry conceded knowledge that Syria reputedly tortured prisoners and admitted to suspecting that Arar himself was being tortured. It seems that certain branches of the Canadian government were keenly interested in obtaining whatever evidence the Syrians extracted from Arar. Regardless of whether Canada collaborated in Arar's rendition to Syria, the public record suggests a desultory commitment by the Canadian government to securing Arar's speedy release and return to Canada.[19]

As a Canadian citizen about to be removed from the US, Arar had the right to select Canada as the country of citizenship to which he would be sent, and Canada was legally obliged to admit him. He emphatically did not want to be sent to Syria. Had the US returned him to Canada, there would have been insufficient evidence or legal basis upon which to detain or charge Arar with an offence under Canadian law, including the antiterrorism legislation enacted post-9/11. Within Canada, Arar could assert his constitutionally protected human rights against potential violations by the state. In other words, Canadian security and police officials would know that they could not do within Canada's borders what Syria could do inside its prisons. Canada's robust culture of human rights protection appears to play a paradoxical role in the post-9/11 hysteria, where liberal states chafe under legal obligations to respect human rights and civil liberties. It is one thing to acknowledge that Canada is constrained by human rights and the rule of law more than a state such as Syria; it is quite another to exploit that fact to the detriment of a citizen abroad.

While it seems premature to accuse Canada of subcontracting torture to foreign regimes (a charge frequently lobbed at the US), one cannot but wonder about the willingness of some Canadian state actors to live off the avails

18 Two other Canadians incarcerated and tortured in Syria, Ahmad Abou El-Maati and Abdullah Almaki, have explicitly accused the RCMP of sharing information with their Syrian captors. *Globe and Mail*, 9 September 2005.

19 "Mounties warned against release of Arar," *Globe and Mail*, 27 November 2004, A1.

of Syrian persecution. Contrary to claims by proponents of postnational citizenship, the protection of human rights in a situation like Maher Arar's depends not on the persuasive force of international human rights norms, but on the ability and willingness of a state to apply its diplomatic resources in the name of protecting a citizen from violations of fundamental human rights by another state—in this case against a second state of citizenship.[20]

What does this suggest about borders and rights? The "rights quotient" for a given individual depends on the interaction of borders (defining the state one happens to be in) and status (one's legal relationship to that territory). For example, Canada provides a comparatively and comparably high level of rights protection to citizens and non-citizens in Canada across a wide range of circumstances. Where national security is invoked, however, even citizens abroad may attract less concern. Non-citizens within the state certainly face a system that casts an extremely broad net in designating persons as security risks and that seeks to deport individuals through an immigration process that, according to many critics, amounts to a secret trial. Although the supreme court of Canada declared in the case of *Suresh* that returning a person to torture would virtually always bring Canada into violation of its charter obligations toward an individual, the government continues to attempt to remove non-citizen terror suspects to such countries as Algeria, Morocco, and Egypt.

The option of expulsion is unavailable where the target is a citizen—unless, of course, the citizen somehow already finds himself abroad. What is novel—and frightening—about the case of Maher Arar and the plight of other citizens abroad is the prospect that a state's commitment to the protection of its citizens against the abuse of fundamental rights at the hands of another state might be subordinated or even negated in the name of combatting terrorism. While Arar's and other similar cases are certainly exceptional, they do raise new and disquieting question about the use of borders by states to manipulate the impact of status.

The foreigner within

Mavis Baker entered Canada as a visitor in 1981. She left four children behind in Jamaica. She worked "under the table" in various jobs, including

20 The fact that Arar is a dual citizen of Canada and Syria does not diminish the nature or extent of Canada's duties toward Arar. Article 3 of the League of Nations' convention on certain questions relating to the conflict of nationality laws, League of Nations, treaty series, vol. 179, page 89, (12 April 1930) provides that a state "may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." However, Canada is no longer a state party to this instrument.

as a domestic worker. She bore four more children in Canada who possessed *jus soli* citizenship. Baker developed postpartum psychosis after the birth of her last child, could no longer work, and received social assistance. She was eventually apprehended by immigration authorities and put into removal proceedings as a foreign national without legal status. Baker applied to the minister of citizenship and immigration for the exercise of humanitarian and compassionate discretion to prevent her expulsion. She presented evidence from her doctor and social worker of her improving health, and of the emotional and material harm that her removal would inflict on her and her Canadian children. Humanitarian and compassionate discretion is available as an exceptional remedy against removal for any non-citizen who falls afoul of Canadian immigration law. The power to exercise discretion is vested in the minister of citizenship and immigration, but delegated to immigration officers to administer on a routine basis.

The immigration officer who reviewed Baker's application made the initial negative recommendation, as recorded in the following notes (which the supreme court treated as the reasons for her rejection):

> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.[21]

Hearkening back to the earlier discussion of social citizenship and the postwar rise of the welfare state, it is worth noting that this commitment to

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21 *Baker v. Canada* [1999] 2 SCR 817, para. 5.

intrastate redistributive programs can simultaneously fortify exclusionary currents among those citizens who see foreigners as potential drains on state largesse.

Mavis Baker sought judicial review of her rejection, and the case eventually reached the supreme court. In a landmark judgement that transformed Canadian administrative law, the court ruled in Baker's favour. Two elements warrant attention for present purposes: first, the court found that even though Baker enjoyed no status in Canada and therefore no legal right (qualified or otherwise) to remain, the immigration officer still owed her a duty to act fairly in assessing her application for humanitarian and compassionate discretion. This approach represents the latest and most expansive repudiation of the traditional doctrine that holds that immigration is a privilege and not a right, and therefore migrants are disentitled from complaining about how the state determines whether they shall stay or go.[22]

Given the impact of the decision on Baker and her children, the court held that fairness required the decision-maker to provide her with an opportunity to state her case, to furnish reasons for his decision, and to evaluate her application in an unbiased manner. The court easily arrived at the conclusion that the decision-maker failed the third requirement. He relied on an inference that Baker's occupation, mental illness, and several children would result in her remaining "a strain on our social welfare system for the rest of her life," without addressing contrary evidence from her psychiatrist and others. The manner in which the reasons were written (the use of capital letters) and general tone demonstrated a "reasonable apprehension of bias."[23]

It is virtually impossible to read the immigration officer's text without detecting the underlying stereotype of an unskilled, promiscuous, crazy, black "welfare mother." The court does not explicitly mention racism or sexism as the particular form of stereotyping at work. At the same time, the court does preface its bias analysis by reference to the constitutive role of migration in the material and psychic production of the Canadian nation-state, and identifies these features as imposing a duty of sensitivity in assessing non-citizens' request for discretionary permission to remain in Canada.

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22 Indeed, the label "illegal" operates as a continuous re-inscription of this abjection of non-citizens generally, and undocumented migrants in particular, as existentially without rights.

23 *Baker v. Canada*, para. 48.

Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.[24]

A second important aspect of the court's judgement enhances the capacity of international human rights instruments to constrain the scope of discretionary power. Canada has ratified but not incorporated the convention on the rights of the child (CRC), meaning that the CRC formally binds Canada internationally but not within domestic law. Nevertheless, a majority of the court ruled that the "values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review." Using international law as one among various interpretive guides, the majority states that "[t]he principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H&C power." Relying on the notes excerpted above, the majority concludes that the immigration officer was not "alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision." The decision-maker exercised his discretion unreasonably, and the decision was set aside.

The court's respectful attention to international human rights norms (specifically, the requirement to take into account the best interests of a child) is especially significant in this case, even though it was not the only source of the norm cited or relied upon by the court. Because parliament has not formally incorporated the CRC into Canadian law, the court could have chosen to ignore it (as the dissent would have done). Instead, the majority considered the contribution, the influence, and the role of international human rights norms to transcend the formal rules for its "migration" into

24 Ibid., para. 47.

the domestic legal sphere. It is a gratifying coincidence that it would do so in a case involving a non-citizen whose initial rejection derived precisely from her transgressive act of border-crossing, and whose subsequent request for humanitarian consideration failed because of her alleged lack of value to Canada. While it would be unduly optimistic to view this case as vindicating a conception of postnational citizenship, by the same token, one might plausibly interpret it as expressive of a more fluid movement of human rights norms across jurisdictional borders.[25]

The asylum seeker

Pakistani physician Shazia Khalid was employed at a Pakistan petroleum plant when she was brutally attacked and raped by a senior Pakistani army officer. Her employers told her to keep quiet, warned her not to report the crime, and then drugged and confined her in a psychiatric hospital in order to discredit and silence her. With her spouse's support and despite Pakistan's notoriously misogynist rape laws, Shazia reported the crime. Government authorities responded by placing Shazia, her husband, and their son under house arrest for two months. Her husband's grandfather demanded that his grandson divorce his wife because her rape stained the family honour. The husband refused, so the grandfather assembled a mob to kill Shazia. The Pakistani government, embarrassed by the furor, warned the couple to leave the country or face being "disappeared." Then Pakistani authorities hustled Shazia and her husband onto a plane for London without their teenage son.

Upon arrival in London, Shazia approached Canadian authorities to inquire about asylum in Canada, where she and her husband have friends and relatives. Canadian high commission officials said no: they must apply for asylum in the UK because it was the first place they landed.

Canada is a party to the 1951 UN convention relating to the status of refugees, and the 1967 protocol, which prohibit Canada from *refouling* (returning) refugees to their country of nationality. Refugees are defined as persons who are outside their countries of nationality owing to a well-founded fear of persecution because of race, religion, nationality, political opinion, or membership in a particular social group. In 1993, Canada set a

25 The reasons for not regarding this case as exemplary of postnational citizenship include the fact that the decision still rests in the hands of domestic judges who are developing and applying national law. They conspicuously relegate the relevant international norm to a subsidiary role.

global precedent by launching the guidelines on gender-related persecution. The guidelines assist decision-makers to interpret the refugee definition in a gender-sensitive manner. For example, the guidelines advise decision-makers that rape can be persecution, that women can be a "particular social group," and that a state whose justice system systematically refuses to charge, prosecute, and convict rapists (preferring instead to criminalize the victim), fails in its primary duty to protect its citizens. The gender guidelines garnered international praise as a progressive, cogent, and timely promotion of women's human rights in the specific context of refugee determination. Along with the United Nations high commissioner for refugees' own efforts at the international level, Canada's gender guidelines have catalyzed similar developments in the United States, Australia, the UK, and elsewhere. They serve as an illustration of Canada's contribution qua *gidsland* to the evolution and advancement of human rights globally.

In general, Canada's refugee determination system, while not beyond reproach, tends toward interpretations and applications of the refugee definition that respect the legal obligation to protect refugees. Illicit political objectives relating to migration control or foreign policy exert rather less influence in Canada than in some other states party to the 1951 refugee convention. If Shazia Khalid could actually reach Canada, she would stand a good chance of succeeding in her asylum claim based on the gender guidelines.

Outside Canada's borders, it is another story: aside from selecting approximately 7,500 refugees annually to sponsor from abroad and permitting private citizens to sponsor an equivalent number, Canada expends considerable human and financial resources in preventing potential asylum-seekers from reaching Canada. Canada imposes visa requirements on refugee-producing countries (like Pakistan) and denies visas to anyone deemed likely to make a refugee claim. By truthfully explaining to a Canadian official her reasons for wanting to travel to Canada, Shazia virtually assured her own rejection. Many irregular migrants, including asylum seekers, resort to smugglers, fake documents, and other similar techniques to circumvent restrictive immigration laws that would deny them lawful entry. Canada posts immigration officers at airports abroad and deputizes airline officials to summarily deny boarding to anyone suspecting of travelling on false documents. The Immigration and Refugee Protection Act imposes penalties on marine and air carriers who transport improperly documented people.

Canada's geographic isolation from refugee-producing regions already makes it difficult for asylum seekers to travel directly to Canada. Canada

recently added to the challenge by concluding a safe-third-country agreement with the United States in order to deflect asylum-seekers who pass through the United States en route to Canada. The agreement requires asylum-seekers to lodge claims in the first designated safe country they reach, typically the United States.[26] Canada does not have a similar agreement with the UK, which means that the Canadian official who refused to consider Shazia Khalid's request had no legal authority to turn her away without inquiring into the substance of her claim for protection. But the practical obstacles to challenging the conduct of a Canadian official overseas are daunting. After all, the lawyers and the courts are in Canada. In principle, Canadian officials must act according to law whenever and wherever they exercise power conferred upon them by Canadian law. In practice, the state's power may exceed the law's reach when the state operates beyond Canada's borders.

But that is only one aspect of the state's relationship to borders, the people beyond them, and human rights. The state, ever more bound by international agreements or law, is also increasingly involved in international or transnational events and developments. Many natural or manmade catastrophes in some part of the world involve Canadian citizens or their non-migrating relatives. The human suffering caused in southeast Asia by the tsunami of December 2004 and the earthquake in Pakistan in November 2005 are recent examples. Global human rights concerns, like the anti-landmine campaign, reveal another dimension of the capacity of an individual state to contribute to the evolution of human rights consciousness and law horizontally across jurisdictions and vertically between states and the international community.[27]

26 See Audrey Macklin, "Disappearing refugees: Reflections on the Canada-US safe-third country agreement," *Columbia Human Rights Law Review* 36 (2004-05), 365.

27 For example, "Asian fusion: Canada looks east," *Canada World View* 25 (spring 2005).