

DISAPPEARING REFUGEES: REFLECTIONS ON THE CANADA-U.S. SAFE THIRD COUNTRY AGREEMENT^ψ

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I. INTRODUCTION: THE DISCURSIVE DISAPPEARANCE OF THE REFUGEE

Refugees are vanishing from the territory of wealthy industrialized nations. I do not mean that refugees are literally disappearing. Despite the best efforts of western governments to deter them, thousands of asylum seekers do manage to arrive and lodge refugee claims each year. I refer here not to the legal and material reality of refugees, but rather to the erosion of the idea that people who seek asylum may actually be refugees. This dispiriting turn in public sentiment is enabled by a series of legal and popular conjunctions that produce what I call the discursive disappearance of the refugee.

Here is how it works: all major western nations are signatories to the 1951 U.N. Convention Relating to the Status of Refugees ("Refugee Convention").¹ The Refugee Convention imposes

^ψ Some of the text of this article appeared earlier in Audrey Macklin, *The Value(s) of the Canada-US Safe Third Country Agreement* (Dec. 2003) (published by the Caledon Institute of Social Policy), available at http://www.maytree.com/PDF_Files/ValueoftheCanada-US.pdf.

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1. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19

certain obligations on a state party regarding a non-national at or inside the frontier of that state. Specifically, a state party must not *refoule*² a person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion.³ The Refugee Convention accords status to a migrant based on the reasons for the individual's flight from a country. Refugees are often contrasted with other migrants on the basis that the former are compelled to migrate to escape a threat to life or liberty, whereas the latter choose to migrate for an array of non-urgent reasons.

The refugee/migrant binary shares discursive space in the public realm with other classifications of border-crossers. Another is the legal/illegal prefix attached to migrants. This dichotomy is based not upon motive, but rather on the mode of entry. Legal migrants obtain official state sanction to enter, before or at the port of entry. So-called "illegal migrants"⁴ enter without prior permission, though the term may also encompass those who enter lawfully but then overstay their visas or violate their terms of entry by working without authorization.

The legal consequences of categorization are very significant. Asylum seekers at the border are entitled to make a refugee claim. Illegal migrants at the border may be summarily excluded. Refugees within the country cannot be deported, except under limited circumstances. Illegal migrants are deportable. Refugees merit protection. Illegal migrants are criminals whose border transgression offends deeply held beliefs about border control as the instantiation of sovereignty. Illegal migrants' outlaw designation exceeds the particular violation of immigration law and assumes a kind of existential, totalizing character: they are known simply as "illegals."

U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

2. *Refoulement* means the deportation of a refugee back to the country where he or she faces a well-founded fear of persecution.

3. Refugee Convention, *supra* note 1, Art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

4. I agree with critics who consider the term "illegal migrant" pejorative and prefer the terms undocumented or non-status migrant. I deliberately employ illegal migrant in the present article because it is the power and the impact of this label that I wish to highlight.

They are not merely people who have committed an illegal act; they *are* illegal. The events of September 11th have both cemented and intensified the nexus between the asylum seeker and criminality, finding its ultimate expression in the specter of the foreign terrorist.

In principle, the refugee/migrant and legal/illegal classification schemes are incongruent: *why* someone crosses a border bears no necessary relation to *how* they cross it. In practice, states encourage convergence between these two schemes by making it virtually impossible for an asylum seeker to travel legally to a western nation. While a few wealthy nations select a limited number of refugees from overseas, the numbers of refugees resettled annually is tiny, meaning that the overwhelming majority of refugees in western nations are not pre-selected, but instead arrive on their own initiative as asylum seekers.⁵

Most states deplore the arrival of asylum seekers. The spontaneous flow of non-citizens possessing a limited legal claim to entry represents a threat to sovereignty-as-border-control, even though it is an exception to which states voluntarily bind themselves by signing the Refugee Convention. Additionally, a significant segment of the public believes that many asylum seekers are frauds, that is, migrants with no fear of persecution who attempt to use the refugee system to circumvent otherwise restrictive entry provisions.⁶

States manage the contradiction between resisting self-selected migrants and pledging not to *refouler* refugees by doing everything possible to repel the spontaneous arrival of migrants likely to seek asylum.⁷ For example, states require visas from

5. In 2003, the total number of resettled refugees absorbed by the top ten countries of resettlement was approximately 55,000. At the start of 2004, the United Nations High Commissioner for Refugees (UNHCR) estimated that there were 9.7 million refugees and 985,000 asylum seekers among the 17.1 million persons of concern to the UNHCR. See UNHCR, *Refugees by Numbers 19* (2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/basics>.

6. See, e.g., *United States and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Comm. on the Judiciary*, 107th Cong. 28–38 (2002) (statement of Mark Krikorian, Executive Director, Center for Immigration Studies) [hereinafter Krikorian Statement].

7. See generally Matthew J. Gibney & Randall Hansen, *Asylum Policy in the West: Past Trends, Future Possibilities* 5-13 (Sept. 2003) (discussing the policy responses of Western nations to asylum and the utility of those measures).

citizens of “refugee-producing” nations and routinely deny visas to anyone deemed likely to make a refugee claim.⁸ The United States and Australia aggressively interdict boats on the high seas in order to deflect potential refugees before they reach territorial waters.⁹ Many states impose liability on air and marine carriers who transport undocumented or improperly documented migrants, thereby providing incentives for private transportation companies to behave as private (and unaccountable) delegates of state customs and immigration departments.¹⁰ Canada even posts visa officers at foreign airports, to check passenger documentation on planes bound for Canada.¹¹ When measures designed to prevent migrants from reaching territorial borders fail (as they inevitably do), some states even resort to retracting borders strategically, extruding chunks of their own territory and declaring them to be not-France, or not-Australia, or not-Belgium.¹² Of course, this designation only applies

from the viewpoints of the states and the asylum seekers), *available at* http://www.unu.edu/hq/library/collection/PDF_files/WIDER/WIDERdp2003.68.pdf (last visited Feb. 7, 2005).

8. See John Morrison & Beth Crosland, UNHCR, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* (New Issues in Refugee Research, Working Paper No. 39, 2001), *available at* <http://www.unhcr.ch/cgi-bin/texis/vtx/publ> (last visited Apr. 4, 2005).

9. See, e.g., Penelope Mathew, *International Association of Refugee Law Judges Conference: Address - Legal Issues Concerning Interception*, 17 *Geo. Immigr. L.J.* 221, 221–32 (2003) (discussing and comparing Australian and U.S. efforts to interdict refugees at sea); John-Thor Dalhberg, *A New World for Haitians*, *L.A. Times*, Sept. 4, 2001, at A1 (discussing U.S. policy towards Haitian refugees, including interdiction of boats at sea); Madeline Baro Diaz, *Rafts of Change*, *Sun-Sentinel* (Fla.), Aug. 1, 2004, at 1A (noting that in 1994, the U.S. policy towards Cuban refugees resulted in the interdiction of more than 10,000 Cubans during one week).

10. See, e.g., *Immigration and Refugee Protection Act*, ch. 27, 2001 S.C. 148 (Can.) (imposing obligations on vehicles and facilities operators to confirm the immigration documentation of persons they carry to Canada).

11. See Canadian Council for Refugees, *Interdicting Refugees* 29 (May 1998), *available at* <http://www.web.net/~ccr/Interd.pdf>.

12. See, e.g., *Migration Act*, 1958, §5 (Austl.) (defining an “excised offshore place . . . for the purposes of limiting the ability of offshore entry persons to make valid visa applications”). Similarly, the United States detains Cuban asylum seekers at Guantanamo Bay precisely because it is not the United States, despite the exercise of U.S. authority over the migrants.

for a very select purpose: since asylum seekers' entitlement to claim refugee status is triggered by reaching the frontier of the asylum state, if the border is no longer the border, the state can deny responsibility for entertaining the refugee claim.

The cumulative impact of the various measures designed to deter asylum seekers is to drive them deeper into the hands of smugglers and the world of clandestine, illegal and dangerous modes of travel. To the extent that their mode of travel and entry is not legal, and is indistinguishable from the mode of travel and entry of other migrants not encompassed by the refugee definition, they are easily assimilated into the category of "illegals."

Many critics of refugee regimes in western nations are quick to admit that there are millions of "real" refugees in the world today. These refugees, however, are necessarily elsewhere, suffering quietly and passively in squalid camps far away in places like Afghanistan, Ghana, Tanzania, and Iran. As soon as any of those people clamber onto the back of a truck, stow away in the hold of a ship, or board a plane with false documents, they become illegals. Of course, there would be virtually no other way for them to travel, because no state wants to receive them. In the result, refugees and illegal migrants somehow emerge as antithetical and mutually exclusive categories. The deserving refugee is always already "over there." If she managed to get here she must, by definition, be an illegal. And like magic, the refugee is disappeared from North America, from Western Europe, and from Australia, displaced by the pariah illegal. Although this refugee/illegal dichotomy is invidious and incoherent, its political resonance is undeniable.

From the perspective of policing the border, asylum seekers, even those whose claims to refugee status succeed, represent the operational failure to perfect border control. Had the myriad of non-entrée policies actually worked, the refugees never would have arrived at all.

To reiterate, I do not contend that the discursive disappearance of the refugee describes an empirical or legal reality. Instead, my argument is that refugees are increasingly being erased from our discourse, and further, that this erasure performs a crucial preparatory step toward legitimating actual laws and practices that attempt to make them vanish in reality. While such policies can never entirely succeed in preventing entry, they may reduce numbers, and they can and do consign a growing proportion of

entrants to the illegal category. As the number of illegals increases, so does the public clamor for more restrictionist measures, which further augments the illegal population. Refugees do not cease to enter, but they decreasingly enter as refugees.

The remainder of this article explores a recent policy instrument designed to constrain the movement of asylum seekers, namely the Canada-U.S. Safe Third Country Agreement ("Agreement").¹³ The Agreement was negotiated by Canada and the United States as part of a package of post-9/11 measures entitled the "Smart Border Action Plan,"¹⁴ and the Agreement went into force on December 29, 2004.¹⁵ Modeled on the Dublin Convention (now the Dublin II Regulation) of the European Union,¹⁶ the Agreement requires asylum seekers to lodge their refugee claims in the first country of arrival. In other words, asylum seekers on the U.S. side of the border who are attempting entry into Canada will be deflected back to the United States and vice versa.

Throughout the Agreement, a "third country" refers to a state through which an asylum seeker passes en route from her country of nationality to the destination state.¹⁷ Designating a third country as "safe" signifies a judgment that the country will provide refugee protection in accordance with the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees ("Protocol"), and will adjudicate refugee applications in a fair manner.¹⁸

13. Canada-U.S. Safe Third Country Agreement, Dec. 5, 2002 [hereinafter Agreement], <http://www.cic.gc.ca/english/policy/safe-third.html> (last visited Jan. 10, 2005).

14. U.S. Department of State, *U.S. - Canada Smart Border/30 Point Action Plan Update* (Dec. 6, 2002), at <http://www.state.gov/p/wha/rls/fs/18128.htm> (last visited Feb. 25, 2005).

15. Citizenship and Immigration Canada, *Safe Third Country Agreement Comes Into Force Today* (Dec. 29, 2004), at <http://www.cic.gc.ca/english/press/04/0420-pre.html> (last visited Feb. 25, 2005).

16. Council Regulation 343/2003, 2003 O.J. (L 50) 1; Commission Regulation 1560/2003, 2003 O.J. (L 222) 3.

17. See generally Agreement, *supra* note 13.

18. *Id.* at Preamble.

I propose to read the Agreement through a Canadian lens, because Canada was the instigator and proponent of the Agreement. I will use the preamble to the Agreement to illustrate how the legal text tacitly profits from the popular blurring of asylum seekers and illegals. I will also consider the extent to which the Agreement is likely to advance the principles and objectives attributed to it in the preamble.

II. THE CANADA-U.S. SAFE THIRD COUNTRY AGREEMENT

A. Overview of the Agreement

The Agreement begins with a preamble affirming both parties' international legal obligations to protect refugees on their territory.¹⁹ It expresses the parties' desire to "promote and protect human rights and fundamental freedoms," including those stipulated under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"). It also acknowledges the specific duty of *non-refoulement*, and re-affirms that the Agreement should neither undermine the identification of persons in need of protection, nor lead to indirect breaches of the principle of *non-refoulement*. While recognizing the parties' respective undertakings regarding asylum, the preamble also nods obliquely to domestic interests by citing the desirability of enhancing "the integrity of that institution [of asylum] and the public support on which it depends." Finally, the preamble expresses the conviction that the Agreement "may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing." I will return to a more detailed consideration of the preamble below.

The crux of the Agreement is Article 4(1), which states that "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry... and makes a refugee status claim."²⁰ The rule that an asylum seeker must make her claim in the "country of last presence" (i.e., the

19. *Id.*

20. *Id.* at Art. 4(1).

United States or Canada, wherever she first arrived) is subject to four exceptions. According to Article 4(2), a claimant will be admitted into the territory of the “receiving Party” for purposes of making a refugee claim if she:

(a) Has at least one family member in the territory of the receiving Party who has been accepted as a refugee or has lawful status, other than as a visitor; or

(b) Has at least one family member in the territory of the receiving Party who is over eighteen, and has an eligible refugee claim pending; or

(c) Is an unaccompanied minor, meaning that she is unmarried, under eighteen, and has no parent or legal guardian in either Canada or the United States; or

(d) Arrived in territory of the receiving Party with a validly issued visa (other than a transit visa), or without a visa because none is required to enter only the receiving Party.²¹

In addition, Article 6 of the Agreement grants either party the discretion to consider a refugee claim “where it determines that it is in its public interest to do so.”²²

The Agreement only applies with respect to refugee claims made at a land port-of-entry;²³ it does not apply to asylum seekers who make inland refugee claims from within Canada or the United States.²⁴ Note that between 1995 and 1997, Canada tried and failed to persuade the United States to enter into a safe-third country agreement that would have covered refugee claims made from within

21. *Id.* at Art. 4(2)(a)–(d).

22. *Id.* at Art. 6.

23. It does not apply to asylum seekers arriving at airports, presumably because airlines successfully opposed a regime that would assign them the task of shuttling refugee claimants back and forth between Canada and the United States.

24. This latter situation may arise if, for example, a person lawfully admitted on a visitor or student visa subsequently submits a refugee application while in the country.

the country.²⁵ One reason the present Agreement does not apply to inland refugee claims is the impossibility of determining whether inland claimants arrived via the United States. Refugee claimants who wish to pursue their claim in Canada have no incentive to disclose that they passed through the United States and every reason to conceal that fact. The task of establishing a person's route into Canada or the United States is obviated when the person concerned is literally standing at the Canada-U.S. border.

In broad terms, there are two elements to this Agreement. The first is a readmission component, which requires the country of last presence to accept the return of an asylum seeker from the receiving Party. Canada is obliged to "take back" an asylum seeker who attempts to enter the United States via Canada, and vice versa. The second element is the refugee determination component, which commits the party that ultimately admits the asylum seeker to adjudicate the refugee claim as well.

Under Article 3 of the Agreement, no refugee claimant who is subject to the Agreement may be removed to a country outside Canada or the United States until the refugee claim has been determined by one of the parties.²⁶ This provision is intended to preclude two related phenomena. One is known as "*chain refoulement*," whereby asylum seekers are deflected from one country to another, either informally or pursuant to successive "readmission agreements," until they are eventually returned to their country of origin without ever accessing a refugee determination process. The other consequence the Agreement seeks to avoid is the "refugee in orbit" scenario. This arises when country *A* designates country *B* as a safe third country, thereby entitling country *A* to refuse to adjudicate the claim of an asylum seeker who arrived in country *A* via country *B*. However, in the absence of a readmission agreement, country *B* may refuse to re-admit the asylum seeker, and send the person to Country *C*, who may in turn bounce the person concerned to Country *D*, and so on. The following episode illustrates how a refugee in orbit may ultimately be *refouled* without any country ever adjudicating his or her claim:

25. See Judith Kumin, UNHCR, Proposed US-Canada Accord Sparks Debate, Sept. 3, 2002, at <http://www.unhcr.ch/cgi-bin/texis/vtx/news> (last visited Jan. 10, 2005).

26. Agreement, *supra* note 13, at Art. 3(1)–(3).

In August 2002, a group of nineteen Guatemalans who feared persecution on grounds of political opinion (and, in some cases, race) arrived by plane at London's Heathrow Airport, apparently after stopovers in the United States and Spain. The British authorities returned them to Spain, which in turn sent them off to Miami International Airport. From there, United States immigration officials immediately *refouled* them to Guatemala. At no point in the process did any country assess their refugee claims, despite urgent pleas from Amnesty International to all three governments.²⁷

According to Article 8(3), the Parties agree to review the Agreement no later than one year after the date of entry into force.²⁸ They also agree to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in monitoring the Agreement's implementation, and will seek input from non-governmental organizations.

Article 9 states that both Parties "shall, upon request, endeavor to assist the other in the resettlement of persons determined to require protection in appropriate circumstances."²⁹ The purpose and relevance of this provision in the context of the Agreement as a whole seems obscure, given that government selection of refugees abroad for resettlement in Canada or the United States is a separate and distinct process. The reason for its presence in the Agreement only surfaced months after the first draft of the Agreement was issued. In August 2002, the Canadian Council for Refugees obtained a document entitled "Draft Note to Accompany a Canada-United States Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries," which had been drafted sometime around June 2002, but

27. Stephen Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection* 14 (Washington University School of Law Working Paper No. 03-03-01; Consultant's Report to UNHCR, Dept. of International Protection Working Paper, 2003) (citing Bill Frelick, *North America Considers Agreement to Deflect Asylum Seekers*, 7 *Bender's Immigr. Bull.* 1404 (2002)), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384640 (last visited Feb. 25, 2005).

28. Agreement, *supra* note 13, at Art. 8(3).

29. *Id.* at Art. 9.

not publicly disclosed.³⁰ The Draft Note requires Canada to resettle up to 200 persons per year, where those individuals are referred by the United States, and are “outside the United States and Canada... and have been determined by the Government of the United States of America and the Government of Canada to be in need of international protection.” Canada also undertakes to engage in coordinated action with the United States in the field of “migration control and refugee protection responses” in the event of “mass migration affecting either Canada or the United States.”

30. Note to Accompany a Canada-United States Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Dec. 5, 2002) (on file with author). The text of the Note was contained in e-mail distributed by the Canadian Council for Refugees on August 4, 2002. The full text reads as follows:

The Embassy of Canada presents its compliments to the United States Department of State and has the honour to refer to the Agreement between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (“the Agreement”).

In the spirit of its humanitarian traditions and longstanding commitment to assist individuals in need of international protection, Canada agrees, consistent with international principles of responsibility-sharing, to resettle up to 200 persons per year referred by the Government of the United States who are outside the United States and Canada, as defined in respective national immigration laws, and have been determined by the Government of the United States of America and the Government of Canada to be in need of international protection. The selection for resettlement to Canada of persons referred by the United States shall be conducted by Canadian officials in accordance with Canadian law and policies.

In the event of a mass migration affecting either Canada or the United States, Canada further affirms its commitment to joint consultations and co-ordinated action with the United States in order to implement appropriate migration control and refugee protection responses. Canada agrees that these responses shall include, inter alia, the use of refugee resettlement.

The Embassy of Canada assures the Department of State of its highest consideration.

Washington

December 5, 2002

According to the U.S. State Department, the objective of the Draft Note is to refer persons interdicted at sea by U.S. authorities to Canada.³¹ Each year, the U.S. Coast Guard intercepts decrepit vessels ferrying Cuban and Haitians fleeing their respective countries. The objective of this interdiction program is to prevent the people aboard from setting foot in the United States, where they might claim asylum. Haitians are summarily returned to Haiti with minimal or no inquiry into whether any of the migrants fear persecution. The situation with Cubans is slightly more complicated, since the United States currently refuses to resettle Cuban refugees, nor will it forcibly return them to Cuba. Many end up being detained indefinitely in Guantanamo Bay, and one could surmise that these Cuban detainees will be at the top of the list of those referred by the United States to Canada for resettlement. According to Bill Frelick, Director of Refugee Programs for Amnesty International in the United States, “[t]hey’re doing a little horse trading.... It’s basically come down to trading in people and it’s unseemly.”³²

Canada’s Governor-in-Council (Cabinet) issued regulations in October, 2004, which formally designated the United States as a Safe Third Country under section 101(1)(e) of Canada’s Immigration and Refugee Protection Act and incorporated the terms of the Agreement, though not the Draft Note regarding resettlement.³³ The

31. Nan Kennelly, U.S. Department of State, Remarks at the Consultation on the Safe Third Country Agreement (Aug. 2, 2002) (transcript distributed via posting to ccr@yorku.ca, the Canadian Council for Refugees listserv, Aug. 4, 2002) (copy on file with author).

32. Campbell Clark, *Plan to Send Canada Refugees from Ships Criticized*, *Globe and Mail* (Toronto), Aug. 5, 2002, at A4.

33. Dep’t of Citizenship and Immigration, Regulations Amending the Immigration and Refugee Protection Regulations, 138 C. Gaz. 1618 (Nov. 3, 2004), available at <http://canadagazette.gc.ca/partII/2004/20041103/pdf/g2-13822.pdf> (last visited Feb. 25, 2005). The Immigration and Refugee Protection Act authorizes the Canadian government to enter into the Safe Third Party Agreement and to make claimants subject to the Agreement ineligible to have their refugee claims considered in Canada, specifically “[a] claim is ineligible to be referred to the Refugee Protection Division if . . . the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.” Immigration and Refugee Protection Act, ch. 27, 2001 S.C. 101(1)(e) (Can.). For the earlier Canadian draft regulations, see Dep’t of Citizenship and Immigration, Regulations Amending the Immigration and Refugee Protection Regulations, 136

Immigration Manual, which contains directions guiding Citizenship and Immigration Canada staff in their interpretation and application of the law, was updated in early January 2005 to take account of the implementation of the Agreement.³⁴ The United States finalized its corresponding regulations on November 29, 2004.³⁵

B. Can the Agreement Live Up to Its Preamble?

Preambles to Canadian legislation and other public legal instruments typically exert minimal influence on judicial interpretation of legislation,³⁶ and operate more or less as statutory infomercials broadcasting to a lay electorate. The preamble explains why the law is needed, what it will do, and how it will benefit the citizens in whose name it is propounded. It bears emphasizing the obvious point that the objects of this law, namely asylum seekers,

C. Gaz. 3241 (Oct. 26, 2002), *available at* <http://canadagazette.gc.ca/partI/2002/20021026/pdf/g1-13643.pdf>. For the Standing Committee's report, see *The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration*, Joe Fontana, M.P. (Chair), House of Commons (Dec. 2002) [hereinafter *Standing Committee's Report*], <http://www.parl.gc.ca/InfoComDoc/37/2/CIMM/Studies/Reports/cimmrp01/cimmrp01-e.pdf>. For the government's response to the Standing Committee's Report, see *Citizenship and Immigration Canada, Government Response to the Report of the Standing Committee on Citizenship and Immigration* (May 2003) [hereinafter *Government Response*], *at* <http://www.cic.gc.ca/english/pub/safe-third.html> (last accessed Nov. 20, 2004).

34. See *Citizenship and Immigration Canada, PP1: Processing Claims for Protection in Canada*, § 17 (2005) 79-97 [hereinafter *Immigration Manual*], *available at* <http://www.cic.gc.ca/manuals-guides/english/pp/pp01e.pdf> (last visited Feb. 25, 2005).

35. See *Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry*, 69 Fed. Reg. 69,480 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 208, 212, 235), *available at* http://www.usdoj.gov/eoir/vll/fedreg/2004_2005/fr29nov04b.pdf (last visited Feb. 25, 2005); *Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry*, 69 Fed. Reg. 69,490 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 1003, 1208, 1212, 1235, 1240), *available at* http://www.usdoj.gov/eoir/vll/fedreg/2004_2005/fr29nov04b.pdf (last visited Feb. 25, 2005).

36. For a Canadian exception, see *R. v. Mills*, [1999] SCR 668 (taking judicial notice of the preamble to the government's "rape shield" law, which had been amended in response to an earlier judgment declaring the law unconstitutional).

have no voice or role in the conversation; the preamble does not speak to them, only about them.

Preambles often appeal to the norms, aspirations, and self-understanding of the nation, as a means of legitimating the proposed instrument. As such, they function as a bridge linking popular and legal normativity. The preamble furnishes a set of standards against which one can situate and measure the law. One can ask whether the norms expressed or implied in a preamble fairly represent, in whole or part, a given society's values. One can also ask whether the text of the law aligns with the values expressed in the preamble. For present purposes, I will confine my attention to the latter question. I will isolate various elements of the preamble and assess whether the Agreement is likely to promote, enhance, undermine, or subvert the values expressed in the preamble.

1. "Canada and the United States reaffirm their obligation to "provide protection for refugees on their territory in accordance with [the 1951 Refugee Convention and the 1967 Protocol]."³⁷

Rule of law ideology is sufficiently entrenched in Canada, that most Canadians accept the importance of honoring legal commitments, whether as individual or as state actor. Abiding by international legal obligations, including those relating to refugees, is simply a specific application of the general rule that we ought to keep our promises.

The Agreement denies access to Canadian territory by asylum seekers at the Canada-U.S. border. One might contend that since these individuals are not yet on Canadian territory (they are only at the port of entry), Canada has no obligation to protect them and may repulse them without violating international law. Under this view, there is no conflict between honoring Canada's international obligations and deflecting asylum seekers to the United States.

This Agreement is not the first or only tactic devised by the Canadian government to circumvent its international legal obligations by impeding access of asylum seekers to Canadian territory. Indeed, Canada is something of a pioneer in instruments of

37. Agreement, *supra* note 13, preamble.

interdiction. The tools range from carrier sanctions that punish private airlines and shipping lines for transporting improperly documented passengers, to imposition of visa requirements on so-called "refugee-producing" countries, to the interception and deflection of ships suspected of carrying migrants to Canada.³⁸ One might query whether the Agreement contradicts Canada's international obligation under the Refugee Convention to refrain from directly or "in any manner whatsoever" returning a refugee to the frontiers of a country where the refugee's life or freedom would be threatened.³⁹

By way of analogy, tax law distinguishes between "tax avoidance," which is legal, and "tax evasion," which is a crime. Does the Agreement represent avoidance or evasion of Canada's international obligations? Are such nuanced distinctions appropriate in the domain of human rights, where the stakes are not money, but rather liberty, security, and life itself?⁴⁰ In the context of the

38. See generally Canadian Council for Refugees, *supra* note 11 (exploring the principal measures of interdiction used in Canada and advocating for practices which protect refugee rights). The most notorious recent example is the deflection of a boatload of Sri Lankans departing from the African coast. Canadian immigration officials were notified that the ship was headed for Canada, and managed to interdict the ship and deflect it back to Sri Lanka without permitting any of the passengers to make refugee claims. At least one of the passengers was tortured by Sri Lankan officials shortly after his return. For a description of this episode, see Sharryn Aiken, *Manufacturing Terrorists: Refugees, National Security and Canadian Law* (Part 2), 19 *Refuge* 116, 124 (2001). On the other hand, Canada has not interdicted ships carrying undocumented migrants that have sailed into or near Canadian waters. In the last fifteen years, a handful of ships have arrived in Newfoundland, Nova Scotia, and British Columbia. The passengers disembarked in Canada and most pursued refugee claims.

39. Under the Refugee Convention, all parties agree to refrain from expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened." Refugee Convention, *supra* note 1, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

40. One might reasonably contend that the U.S. Supreme Court relied on just such formalistic distinctions when it upheld the practice of interdicting boats of Haitian asylum seekers on the high seas and denying them meaningful access to refugee determination. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (ruling that the 1951 Refugee Convention prohibited the federal government from *refouling* refugees from its frontiers, but said nothing about, and therefore left unregulated, the identical practice beyond the government's territorial waters).

Agreement, the relevance of these questions turns on the extent to which the protection that this Agreement permits Canada to withhold can and will be furnished by the United States. If the United States provides a significantly diminished level of procedural and substantive protection, then the Agreement allows Canada to do indirectly what it cannot do directly, namely deny refugees the rights to which they are entitled according to international and domestic law. A more systematic consideration of the U.S. asylum regime follows below.

2. "Acknowledging in particular the international legal obligations of the Parties under the principle of *non-refoulement* set forth in the Convention and Protocol, as well as the Convention Against Torture..."⁴¹

The principle of *non-refoulement* lies at the heart of refugee protection. Article 33 of the Refugee Convention permits derogation from the principle of *non-refoulement* only where the refugee poses a serious danger to the country of asylum.⁴² However, the Convention Against Torture permits no exemption from its prohibition on returning a person to face torture.⁴³ Complying with the Convention Against Torture, both Canada and the United States incorporate exceptions to the principle of *non-refoulement* into domestic asylum law. The United States expressly provides relief from removal where a person faces a substantial risk of torture.⁴⁴ Canadian law leaves open the hypothetical possibility of deporting a security risk to face torture in another country, although the Supreme Court of Canada has determined that such an action would only be considered in an "exceptional case."⁴⁵ On the issue of returning a person to torture,

41. Agreement, *supra* note 13, preamble.

42. Refugee Convention, *supra* note 1, Art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

43. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

44. 8 U.S.C. § 1231(b)(3)(A) (2000).

45. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 68 (noting that generally, where deportation would subject a refugee

U.S. and Canadian laws are similar; if anything, the United States offers superior protection against removal to torture.

As noted above, Article 3 of the Agreement forbids the removal of a refugee claimant unless one of the parties actually determines the claim for refugee status. Here too, the Agreement evinces a joint commitment to ensuring access to a refugee protection procedure in either Canada or the United States.

3. "Noting that refugee status claimants may arrive at the Canadian or United States land border directly from the other Party's territory where they could have found effective protection...."⁴⁶

The Agreement is premised on the idea that refugee claimants ought to apply for protection in the first country of arrival (as between Canada and the United States), rather than choose their preferred destination. This selectivity is disparaged in the expression "forum-shopping." The term connotes the idea that choosing the country of asylum is essentially an opportunistic abuse of the international regime of refugee protection. We value "playing by the rules," and forum shopping mocks those rules.

Why? One possible explanation for resistance to the exercise of choice by asylum seekers is the notion that refugee protection is a form of humanitarianism, motivated by kindness, not by duty. Recipients of generosity are not entitled to choose the donor in the hopes of maximizing the benefits they receive. Asylum seekers are the world's supplicants—and beggars can't be choosers. As then Deputy Prime Minister John Manley declared in June 2002, after initiating the formal process leading to the Agreement: "It's not a matter of shopping for the country that you want. It's a matter of escaping the oppression that you face."⁴⁷

A related rationale for opposing an asylum seeker's choice turns on credibility. One might suppose that if people genuinely flee

to a substantial risk of torture, deportation would violate the Canadian Charter of Rights and Freedoms).

46. Agreement, *supra* note 13, preamble.

47. Alisa Solomon, *Northern Closure: The U.S.-Canada "Smart Borders" Accord Sells Refugees Down the River*, Village Voice (N.Y.), Aug. 28, 2002, at 49.

their countries of origin out of fear of persecution, they will seek safe haven at the earliest opportunity in the first country that might offer protection. The inference is that asylum seekers who fail to do so are bogus. As the American anti-immigration activist Mark Krikorian elaborates: "Asylum is analogous to giving a drowning man a berth in your lifeboat, and a genuinely desperate man grabs at the first lifeboat that comes his way. A person who seeks to pick and choose among lifeboats is by definition not seeking immediate protection, but instead seeking immigration."⁴⁸

Krikorian insinuates that asylum seekers who do not make a claim in the first country of arrival are not really refugees, and are merely economic migrants trying to "jump the queue" and game the system. The refugee regime is just another strategy for illegals to defraud the state. It seems reasonable to suggest that Canadians value integrity and fair play. If the refugee system is indeed being exploited by undeserving people, Canadians might support a change to the system that would prevent further abuse.

However, asylum seekers may have other reasons for preferring to apply for refugee status in one country over another. These include wishing to maximize the likelihood of acceptance, presence of kin or friends, language or cultural affinity, and better treatment pending the determination of status (e.g., physical liberty, access to legal aid, work permits, social services, language training, and health care). Arguably, it is no more pernicious to seek refugee status in the country most likely to grant it than it is to apply for a job from the employer most likely to hire you.

The Agreement does selectively acknowledge the legitimacy of certain reasons for preferring to make a refugee claim somewhere other than the country of first arrival. Thus, a refugee claimant arriving at the Canada-U.S. border will be permitted to cross into her destination country and apply for asylum if she has a visa to enter that country (or comes from a visa-exempt country), has a family member in the destination country, or is an unaccompanied minor.⁴⁹ The family member must possess refugee status, or have some other

48. Krikorian Statement, *supra* note 6, at 29.

49. Agreement, *supra* note 13, art. 4(2).

lawful status other than as a visitor; if they have only a pending refugee claim, they must be over eighteen.⁵⁰

The exemption for asylum seekers with family members harmonizes with the value Canadians place on familial relationships as sources of emotional, social, and economic support. By allowing asylum seekers to apply for refugee status in the country where their relatives reside, the Agreement opens up the possibility that the family may ultimately be able to settle together in the same country. Indeed, the Agreement's relatively expansive definition of family indicates recognition of a broader concept of kinship responsibility, one which is embraced by many non-Anglo-European cultures. As defined in Article 1(1)(b) of the Agreement, the term "family member" includes "spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews."⁵¹

The Agreement does not encompass all relatives. The exclusion of first cousins seems arbitrary, since nieces, nephews, aunts, and uncles are listed as family members. On the other hand, the Canadian regulations encompass common-law (defined to include same-sex) partners in the definition of family members, unlike their U.S. counterparts.⁵²

50. *Id.* art. 4(2)(a)-(b).

51. *Id.* art. 1(1)(b).

52. *See* Dep't of Citizenship and Immigration, Regulations Amending the Immigration and Refugee Protection Regulations, 138 C. Gaz. 1618, 1619 (Nov. 3, 2004), available at <http://canadagazette.gc.ca/partII/2004/20041103/pdf/g2-13822.pdf> (last visited Feb. 25, 2005). In contrast, U.S. immigration law does not explicitly include protections for common law or same-sex couples. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (providing immigration benefits to "spouses . . . of a citizen of the United States," without specifically defining what a "spouse" is). Taken in conjunction with the Defense of Marriage Act, it is clear that U.S. immigration law does not protect common-law or same-sex couples. *See* Defense of Marriage Act, 1 U.S.C. § 7 (2000) (noting that when interpreting any federal law, ruling, or regulation, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife"). The Department of Homeland Security takes the position that it cannot include same-sex partners among the family exemption because "the Department cannot promulgate regulations that are contrary to law." *See* Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480, 69,482-3 (Nov. 29, 2004) (to be codified at 8 C.F.R.

A curious feature of the family member exemption is that it applies only if the family member possesses a secure legal status. To see the problem with this, assume an asylum seeker arrives on the U.S. side of the Canada-U.S. border. Her aunt lives in Canada without status, and thus does not fall within the Agreement's exceptions under Article 4(2)(a) or (b).⁵³ Therefore, according to the definition in Article 1(1)(f), the asylum seeker cannot join her aunt because the latter is an "illegal."⁵⁴ It is difficult to understand how the irregular immigration status of a relative detracts from the value of family re-unification, although the rationale might be that the aunt should be leaving the country herself rather than appearing to derive or confer the benefit of family re-unification from her illegal status.

The Article 4(2)(d) exception, created for visa holders or those who do not require visas to enter the destination country,⁵⁵ seems explicable as an application of the "keep your promises" rule. A visa or a visa exemption amounts to conditional permission to enter. The asylum seeker would have legitimate expectation that she could enter the country that issued her the visa, or exempted her from a visa requirement, and the destination country should not be able to defeat that expectation which it created and upon which the asylum seeker relied.

Article 1(1)(f) defines an unaccompanied minor as "an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States."⁵⁶ The regulations clarify that a minor traveling with an adult should be considered an unaccompanied minor unless the adult is "a parent or legal guardian."⁵⁷ The Article 4(2)(c) exemption for unaccompanied minors

pts. 208, 212, 235), available at http://www.usdoj.gov/eoir/vll/fedreg/2004_2005/fr29nov04b.pdf.

53. Agreement, *supra* note 13, art. 4(2)(a)–(b).

54. *Id.* art. 1(1)(f).

55. *Id.* art. 4(2)(d).

56. *Id.* art. 1(1)(f).

57. Dep't of Citizenship and Immigration, Regulations Amending the Immigration and Refugee Protection Regulations, 138 C. Gaz. 1618, 1626 (Nov. 3, 2004), available at <http://canadagazette.gc.ca/partII/2004/20041103/pdf/g2->

is framed in neutral terms, and appears motivated by a compassionate desire to spare minors the distress and possible trauma of being bounced from one country to another under the terms of the Agreement.⁵⁸ However, in practice the exemption will affect mainly Canada-bound unaccompanied minors coming from the United States. As it happens, Canadian and U.S. migration law diverge in relation to the treatment of unaccompanied minors. In the landmark judgment of *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada explicitly required that decision-makers take the best interests of children in Canada into account as a relevant consideration in immigration decisions affecting them;⁵⁹ the United States has not adopted this principle as a matter of law.

The difference between the practices of the two states surfaces most starkly in the detention of child migrants. The United States routinely detains unaccompanied minors who lack legal status in the United States and may be asylum seekers. This practice has been widely criticized by U.S. and international human rights organizations. For example, a 2002 study by the Women's Commission for Refugee Women and Children (a division of the International Rescue Committee) reported that: "In recent years, the U.S. Immigration and Naturalization Service (INS) has taken approximately 5,000 children into its custody annually. These children range in age from toddlers to teenagers.... Increasingly, among these minors are children fleeing armed conflict and human rights abuses."⁶⁰ Another report by Amnesty International USA extensively documents the treatment of minors in immigration detention in the United States. It comes to the following conclusion:

According to the [UNHCR], children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection.

13822.pdf (last visited Feb. 25, 2005).

58. Agreement, *supra* note 13, at Art. 4(2)(c).

59. [1999] 2 S.C.R. 817, 821; *see also* Immigration and Refugee Protection Act, ch. 27, 2001 S.C. 60 (Can.) (noting that "it is affirmed as a principle that a minor child shall be detained only as a measure of last resort").

60. Women's Commission for Refugee Women and Children, Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children 1-2 (2002), available at http://www.womenscommission.org/pdf/ins_det.pdf.

Unaccompanied children in the U.S. immigration system are routinely deprived of their rights in contravention of international and U.S. standards. Children should be confined and imprisoned only in exceptional circumstances or as a last resort, and then only for the shortest possible time. Unaccompanied children arriving in the U.S. are not only detained but are often held in facilities that routinely fail to adhere to both international and U.S. standards governing the detention of children. AI [Amnesty International] has documented violations of rights essential to protection from arbitrary detention, including access to counsel, to translators, and to telephones. Violations of the right to humane treatment have also been documented: some children may be housed alongside juvenile offenders, denied access to appropriate education and exercise, and may be subjected to punitive and degrading treatment including the excessive use of shackles and restraints and routine strip searches.

Freedom from arbitrary detention is a fundamental human right. The system of determining whether a child should be held in a secure or non-secure facility and whether a child should remain in detention is fraught with difficulties and inconsistencies, and in some cases may amount to arbitrary detention. The decision to continue to detain a child may rest on factors such as whether a parent has appropriate immigration status in the United States, the availability of detention spaces, the attitude of the official involved, or an arbitrary and unreviewed decision that a child is a flight risk.⁶¹

Although unaccompanied minors have been detained in the past in Canada, Canada's 2002 Immigration and Refugee Protection Act mandates that "a minor child shall be detained only as a measure

61. Amnesty International USA, *Why am I Here? Children in Immigration Detention 2* (2003), available at http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf. See also Human Rights Watch, *Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service* (1998) (describing abuses suffered by children in immigration detention within the United States), <http://www.hrw.org/reports98/ins2/> (last visited Feb. 25, 2005). For a recent article depicting positive changes in US practices, see Christopher Nugent, *Protecting Unaccompanied Refugee and Immigrant Children in the United States*, *Hum. Rts.*, Winter 2005, at 9–11, available at <http://www.abanet.org/irr/hr/winter05/immigrant.html> (last visited Feb. 25, 2005).

of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.”⁶² Generally, unaccompanied minors will be released into the custody of provincial child welfare authorities and placed in foster care or group homes. The main exception seems to arise where immigration authorities determine that detention is the only means of preventing smugglers from apprehending the children and transporting them out of Canada.⁶³

Given the exemption for unaccompanied minors, the structure of Article 4(2) may seem odd.⁶⁴ This article allows a claimant to apply for asylum in her destination country, and not her country of first arrival, where she has a family member in the destination country. However, under Article 4(2)(b), if the family member has not yet been granted lawful status, the family member must be over the age of eighteen.⁶⁵ Consider this possibility: a fourteen-year old enters Canada from the United States and makes a refugee claim. Before her claim is heard, her mother arrives at the U.S. side of the Canada-US border and wishes to enter Canada in order to apply for refugee status. She chooses Canada because her daughter is already there. Under the terms of the Agreement, she will not be permitted to enter because her family member (daughter) is under eighteen and has a pending refugee claim. Mother and daughter cannot reunite. If, however, their roles are reversed and the mother enters Canada first, the daughter will be able to join her.

It is unclear how the values of family unity and the best interests of the child would be served by these incongruous outcomes. The Agreement yields such perverse results because the drafters speculated that families would try to subvert the Agreement by

62. Immigration and Refugee Protection Act, ch. 27, 2001 S.C. 60 (Can.).

63. See, e.g., Tu Thanh Ha, *Ten Teens Ordered Held to Keep Away Smugglers: Immigration Adjudicator Says Protection Needed for Youths Found Hidden in Truck at U.S. Border*, *Globe and Mail* (Toronto), Sept. 14, 1999, at A4 (describing decision to detain minors to protect them from smugglers, even though such detainment is “exceptional”); Kim Lunman, *Police Assailed for Strip Search of Children: Young Boat People Mistreated, Lawyer Says*, *Globe and Mail* (Toronto), Aug. 25, 1999, at A1 (describing release of minors into custody of provincial child welfare agency).

64. See Agreement, *supra* note 13, art. 4(2).

65. *Id.* art. 4(2)(b).

sending a child ahead as an unaccompanied minor, after which the child could function as the “anchor.”⁶⁶ The family members would follow afterwards, and would qualify for entry because they have a family member in the destination country (the unaccompanied minor).⁶⁷ In order to thwart this strategy, the Agreement excludes refugee claimants under eighteen from the definition of family.

While the Agreement does take account of familial relationships, it does not acknowledge other significant links to a potential destination country, such as linguistic affiliation. Refugee claimants from Francophone countries, or states where French is a second language, might wish to apply for refugee status in Quebec, where language, culture, and a community of people from the same country of origin can minimize the trauma of dislocation. The value of promoting and protecting the francophone linguistic community is recognized in Canada.⁶⁸ In contrast, despite a sizable Hispanic population, the United States has only one official language and does not recognize any linguistic national minority, so the relevance or legitimacy of linguistic affiliation may not seem salient. Although Canada’s Standing Committee on Citizenship and Immigration proposed that the Agreement permit francophone claimants to make

66. See, e.g., Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480, 69,483 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 208, 212, 235) (“A key reason that age limits were included in the Agreement’s family unity exceptions was that neither government wanted to trigger an increase in the smuggling and trafficking of minors, sent ahead by family members for the purpose of serving as anchors in either country.”), available at http://www.usdoj.gov/eoir/vll/fedreg/2004_2005/fr29nov04b.pdf.

67. The steps involved would be as follows: First, send one of the children to the Canada-U.S. border as an unaccompanied minor. Second, the child will be admitted to Canada under the exception for unaccompanied minors. Next, the child makes a refugee claim in Canada. Finally, an adult family member seeks and obtains entry to Canada on the basis of having a family member in Canada, namely the formerly unaccompanied minor, now a minor refugee claimant. The remainder of the family can then assert the exemption for family members on the basis of the adult’s presence in Canada.

68. See Immigration and Refugee Protection Act, ch. 27, 2001 S.C. 3(3)(e) (Can.) (stating that the Act should be interpreted and applied in a manner that “supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada”).

their claims in Canada,⁶⁹ Citizenship and Immigration Canada summarily rejected the recommendation.⁷⁰

Finally, in considering the valid reasons why an asylum seeker might choose Canada over the United States, one cannot ignore the reception awaiting an Arab or Muslim asylum seeker arriving in the United States post-9/11. The Migration Policy Institute describes some of the immigration measures taken in the wake of September 11th in the following terms:

The U.S. government has imposed some immigration measures more commonly associated with totalitarian regimes.... [T]here have been too many instances of long-time U.S. residents deprived of their liberty without due process of law, detained by the government and held without charge, denied effective access to legal counsel, or subjected to closed hearings. These actions violate bedrock principles of U.S. law and society.... Rather than relying on individualized suspicion or intelligence-driven criteria, the government has used national origin as a proxy for evidence of dangerousness. By targeting specific ethnic groups with its new measures, the government has violated another core principle of American justice: the Fifth Amendment guarantee of equal protection."⁷¹

I will consider the specific laws governing asylum seekers below, but briefly mention here two other instruments directed at Arab or Muslim non-citizens: first, "preventive detention" of Muslim and Arab non-citizens in the aftermath of September 11th; second, the National Security Entry-Exit Registration System (NSEERS), commonly known as "Special Registration."

Following September 11th, the U.S. government detained hundreds of migrants of Arab or Muslim descent on "preventive" grounds, meaning that they were not suspected of any particular offense.⁷² Some had legal immigration status; some did not. In truth,

69. Standing Committee's Report, *supra* note 33, at 14.

70. Government Response, *supra* note 33, at Recommendation 11.

71. Muzaffar A. Chishti et al., Migration Policy Institute, America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11 8 (2003), available at http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf.

72. See *Uniting and Strengthening America by Providing Appropriate*

the United States had tacitly tolerated the presence of millions of undocumented migrants for decades, but following September 11th, immigration irregularities furnished a pretext for detaining and deporting aliens, especially those of Muslim and Arab background.

The Office of the Inspector General (OIG) for the Department of Justice issued two reports in the summer of 2003 that investigated and criticized certain aspects of the treatment of detainees.⁷³ Despite the “government’s attempts to shroud these actions in secrecy,” the Migration Policy Institute was able to obtain information about 406 detainees:

More than 1200 people—the government has refused to say exactly how many, who they are, or what has happened to all of them—were detained after September 11.... Unlike the hijackers, the majority of noncitizens detained since September 11 had significant ties to the United States and roots in their communities.... Almost half had spouses, children, or other family relationships in the United States. Even in an immigration system known for its systemic problems, the post-September 11 detainees suffered exceptionally harsh treatment.... Many of the detainees were subjected to solitary confinement, 24-hour lighting of cells, and physical abuse.... Many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers, and strangers based on their ethnicity, religion, name, or appearance.... Most important, immigration arrests based

Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272, 351 (2001). Although the USA PATRIOT Act requires that persons designated as “suspected terrorists” be charged or released within seven days of arrest, *see id.*, the Department of Justice relied on the regulatory power to detain any non-citizen, whether designated a “suspected terrorist” or not, for a “reasonable period” in the event of an emergency or other “extraordinary circumstances.” *See* Dep’t of Homeland Security Immigration Regulations, 8 C.F.R. § 287.3 (2004).

73. Office of the Inspector Gen., U.S. Dep’t of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>; Office of the Inspector Gen., U.S. Dep’t of Justice, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* (2003), available at <http://www.usdoj.gov/oig/special/0307/final.pdf>.

upon tips, sweeps, and profiling have not resulted in any terrorism-related convictions against these detainees.⁷⁴

In August 2002, the U.S. government introduced the Special Registration system to track the presence of men and boys from twenty-five countries, where the individuals do not hold permanent resident status or citizenship in the United States.⁷⁵ With the exception of North Korea and Eritrea, every country is predominantly Muslim or Arab. These males must report to immigration authorities to be fingerprinted, photographed, and interviewed under oath; failure to register is a deportable offence. Researchers for the Migration Policy Institute have described the Special Registration Program and its impact on the targeted groups:

The program evoked fresh memories of the post-September 11th detentions, in which 1,200 or more people were detained and held for immigration violations without being charged with a terrorism-related crime. Fear of Special Registration increased when registrants living in the [United States] legally were detained due to errors by immigration officials.

As a result of Special Registration, America has, for the first time in our history, become a place from which people flee. Hundreds of people from Muslim countries, some of whom have legal permission to live in the [United States], have fled to Canada. They feel a country that once welcomed them now targets them because of their religion or nationality. These immigrants are terrified of trusting a poorly managed program that has detained and deported many members of their community. Others, too scared to

74. Chishti et al., *supra* note 71, at 9; see also Anita Ramasastry, *A Flawed Report Card: How DOJ Mishandled the Post-September 11 Detention Process*, FindLaw's Legal Commentary, Aug. 1, 2003 (discussing disturbing practices by the Department of Justice regarding the treatment of immigration detainees after September 11, 2000), at <http://writ.news.findlaw.com/ramasastry/20030801.html> (last visited Mar. 8, 2005).

75. For a description of the Special Registration Program, see Lawyers Committee for Human Rights (now Human Rights First), *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* 43–46 (2003), available at http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf. The U.S. government also provides updates on the Special Registration Program at the website for the U.S. Immigrations and Customs Enforcement, Dep't of Homeland Security, at <http://www.ice.gov/graphics/specialregistration/index.htm> (last modified Oct. 26, 2004).

register but determined not to leave their new home, now live in fear of deportation.

It is unlikely that the Special Registration program will help capture terrorists. As a short-term security strategy, Special Registration is equivalent to asking terrorists to turn themselves in. The Administration's poorly planned efforts have only intimidated immigrants, discouraging them from turning to law enforcement authorities. This, in turn, makes it harder to improve national security.⁷⁶

Between the Special Registration Program's inception in August 2002 and March 2003, over 60,000 males were registered, over 2,000 were detained, and an unknown number were deported.⁷⁷ A recent Migration Policy Institute report examines the effect of targeted immigration enforcement and employment discrimination; it concluded that the government's actions have left Muslims and Arabs in the United States feeling stigmatized and doubly victimized, first by the events of September 11th, and then by the reaction to it.⁷⁸ Although in December 2003 the U.S. government suspended certain aspects of Special Registration targeted at aliens already in the country, the provisions of the program requiring foreign visitors to register at the border remain in effect.⁷⁹

Given this climate toward Arabs and Muslims in the United States, one can surely understand an Arab or Muslim asylum seeker's preference for Canada rather than the United States. I do not mean to imply that Canadian practice regarding Arab and Muslim asylum seekers, refugees, non-citizens, and citizens is irreproachable; it is not.⁸⁰ Nevertheless, I would venture to suggest

76. Maia Jachimowicz & Kevin O'Neil, Migration Policy Institute, *At War with Immigrants* (2003), at <http://www.migrationpolicy.org/news/042903LHL.doc> (last visited Nov. 28, 2004).

77. Maia Jachimowicz & Ramah Mackay, Migration Policy Institute, "Special Registration" Program (2003), at <http://www.migrationinformation.org/feature/display.cfm?ID=116> (last visited Nov. 28, 2004).

78. Chishti et al., *supra* note 71, at 15.

79. See *Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants*, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (to be codified at 8 C.F.R. pt. 264).

80. For example, at the time of writing, five men from North Africa and the Middle-East suspected of membership in terrorist organizations are the subject of

that the treatment meted out in Canada at present is less bad, or perhaps less often as bad, as the treatment such individuals receive in the United States. In the context of the Agreement, however, the fact that Canada may treat asylum seekers somewhat better than the United States does not redound to the credit of Canada. Quite the contrary; the worse the United States asylum regime appears, the worse Canada looks for insisting on an agreement that will forcibly divert people into that system.

4. “Convinced, in keeping with advice from the United Nations High Commissioner for Refugees (UNHCR) and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications and the principle of burden sharing...”⁸¹

This portion of the preamble conveys two messages. The first is that the opinions of the UNHCR and its Executive Committee are relevant—though not determinative—in ensuring that a regime complies with Canadian and American international obligations under the Refugee Convention and Protocol. In this regard, the UNHCR Executive Committee has stated that the preferred destination of asylum seekers should “as far as possible be taken into account.”⁸² However, the UNHCR has diluted its position since 1995, perhaps as a concession to Western states, who both wish to deflect asylum seekers and happen to be the UNHCR’s major donors. The UNHCR now tentatively supports measures to “ensure an appropriate allocation of State responsibility for determining refugee status.”⁸³

Security Certificates issued under Canada’s Immigration and Refugee Protection Act. These Security Certificates permit deportation via a process that permits, *inter alia*, arrest without warrant, indefinite detention without trial, non-disclosure of evidence to the person concerned and proceedings in the absence of the person concerned. *See* Immigration and Refugee Protection Act, *supra* note 10, §§ 76-87; Eilis Quinn, *I Am Just Asking for Justice: Detainee*, *Edmonton Journal*, March 27, 2005 at A5.

81. Agreement, *supra* note 13, preamble.
82. Canadian Council for Refugees, *supra* note 11, at 39.
83. UNHCR Comments on the Draft Agreement between Canada and the

The more contentious aspect of this segment of the preamble consists in the putative correlations between the Agreement and the “orderly handling of asylum applications,” and between the Agreement and “burden-sharing.” The phrase “burden sharing” portrays refugees as a liability for the nations that accept them. Interestingly, Canadian evidence suggests that refugees, like other migrants to Canada, make a positive contribution to the economic, social and cultural life of the country.⁸⁴ Quite apart from a cost/benefit analysis of refugees’ contributions to Canada, the expression “responsibility sharing” seems to capture better the fact that the refugee regime operates on the basis of duties voluntarily assumed by the states which accede to the 1951 Refugee Convention and the 1967 Protocol.

In any event, “burden sharing” in this context refers to the asymmetrical flow of refugee claimants between the United States and Canada. Herein lies the explanation for Canada’s eagerness to secure this Agreement: according to statistics compiled by Citizenship and Immigration Canada, between 1995 and 2001, about one-third of all refugee claimants in Canada entered at the U.S.-Canada border.⁸⁵ Of those claiming refugee status at a port of entry (as opposed to inland), 60% to 70% arrived via the United States.⁸⁶ In 2001, over 13,000 refugee claimants came to Canada from the United

United States of America for “Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries” (July 26, 2002) [hereinafter UNHCR Comments], at <http://www.web.net/~ccr/safethird.htm> (last visited Nov. 20, 2004).

84. Although refugees often struggle initially, the gap between the economic performance of most refugees and native-born Canadians closes in less than a decade. Over time, they rely less on social assistance than native-born Canadians. Additionally, Canadian cultural life has been immeasurably enriched by the talents of newcomers. The diversity and multicultural vibrancy of Canada—which most consider an asset—is directly attributable to those who came to Canada as immigrants and refugees. Assessing the economic impact of migration is admittedly complex and controversial. A useful survey of recent data is contained in Peter Li, *Destination Canada: Immigration Debates and Issues* 78–123 (2003).

85. Standing Committee’s Report, *supra* note 33, at 3. Ports of Entry are situated at the land border, in airports, and at marine ports.

86. *Id.* Ports of Entry are situated at the land border, in airports, and at marine ports.

States, and 95% of these claims were made at land border ports of entry.⁸⁷ During this same period, about 200 refugee claimants entered the United States from Canada annually.⁸⁸ The total number of refugee claims referred to the Immigration and Refugee Board in Canada rose to almost 45,000 in 2001,⁸⁹ but declined to only 25,750 by the end of 2004, with a backlog of 27,290.⁹⁰ Meanwhile, the United States received only 43,400 asylum claims in 2003, but has a backlog of about 335,000 undecided cases at first instance or appeal.⁹¹

Given that the United States has a population almost ten times that of Canada,⁹² the total number of refugee claimants received by the United States seems disproportionately small. The value promoted under the rubric “burden sharing” is the notion that each state should take responsibility for a proportion of the refugee flow that is commensurate with its population, or resources, or some combination thereof. And according to this metric, Canada seems to bear more than its “fair share,” but only if you are comparing Canada to the United States. Consider the distribution of Afghan refugees following the crisis that ensued after the U.S.-led invasion after

87. *Id.*

88. *See Solomon, supra note 47.*

89. Immigration and Refugee Board (Can.), Country Report (2001) (on file with author).

90. Immigration and Refugee Board (Can.), Country Report (2004) (on file with author).

91. UNHCR, 2003 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers and Other Persons of Concern to the UNHCR 6 (2004) [hereinafter 2003 Global Refugee Trends], available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics> (last visited Feb. 25, 2005).

92. The 2001 Canadian Census reports a population of approximately 31 million. Statistics Canada, Population and Growth Components (1851 to 2001 Censuses), at <http://www.statcan.ca/english/Pgdb/demo03.htm> (last modified Jan. 28, 2005). In contrast, the estimated U.S. population in 2001 was approximately 285,000,000. U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, and Divisions: April 1, 2000 to July 1, 2004, at <http://www.census.gov/popest/states/tables/NST-EST2004-08.pdf> (last visited Feb. 25, 2005).

September 11th. By the end of 2001, the distribution of Afghan refugees appeared as follows:⁹³

Canada: 11,400
 US: 7,400
 Iran: 1,482,000
 Pakistan: 2,197,800

Taking into account the population size and resources of Canada and the United States compared to Pakistan and Iran, the disparity between Canada and the United States dwindles to insignificance. The UNHCR estimates that by the end of 2003, Africa and CASWANAME [Central Asia, South West Asia, North Africa and the Middle East] each hosted 30% of the global refugee population, followed by Europe (25%), Asia and the Pacific (8%) and the Americas (6%).⁹⁴ To get a slightly different perspective, consider that in 2001, refugees comprised 70 of 1,000 inhabitants in Armenia, and 40 per 1,000 inhabitants of Congo.⁹⁵ For the period of 1990 to 2003, Canada ranked twelfth among 36 industrialized nations in terms of asylum applications per capita; the United States ranked twenty-first.⁹⁶

If doing our fair share is the value underpinning responsibility-sharing agreements, and we take this value seriously, perhaps we need to enlarge the frame of reference beyond the United States. Indeed, recognition of the asymmetry in refugee burdens worldwide casts the preamble's emphasis on Canadian and American "generous systems of refugee protection" in a dimmer light. Canada

93. UNHCR, *Statistical Yearbook 2001* 89 (2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics> (last visited Mar. 8, 2005).

94. 2003 Global Refugee Trends, *supra* note 91, at 2.

95. UNHCR, *Refugees by Numbers 2002* 12 (2002), available at http://www.irinnews.org/webspecials/idp/pdfs/unhcr_2002.pdf.

96. UNHCR, *Asylum Levels and Trends: Europe and Non-European Industrialized Countries, 2003* 9 tbl.2 (2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics> (last visited Mar. 8, 2005). For the period 2001–2003, Canada's rank dropped to fifteenth among forty-seven industrialized nations in terms of asylum applications per capita; the United States held twenty-eighth position. The total number of countries surveyed is fifty, but Italy, Russia and Ukraine did not supply the requisite data. Among the remaining forty-seven countries of asylum, Austria, Norway, and Sweden ranked first, second and third respectively, while Japan, Korea and Georgia ranked the lowest. *See id.* at 7, tbl. 1.

and the United States may look generous in relation to certain European states, but not when compared to many states in Africa or Asia.

Even if one confines the assessment to Canada and the United States, comparing officially documented asylum flows occludes another important factor: the United States hosts some 9.3 million undocumented migrants,⁹⁷ the so-called illegals. A study commissioned by the Canadian government estimates the number of non-status migrants in Canada at up to 100,000.⁹⁸ In other words, the United States has ten times Canada's population, and almost one hundred times the number of undocumented migrants. It seems reasonable to suppose that some fraction of those who comprise the United States' undocumented population consist of people whose reasons for coming to the United States might meet the legal definition of a refugee, but for various reasons choose to live underground instead of coming forward to claim asylum.⁹⁹ The observation that Canada receives a disproportionate number of persons who claim refugee status compared to the United States may be correct, but the picture it paints is highly distorted if one does not take into the account the huge disparity in the numbers of non-status migrants in the two countries. Canada may receive proportionally

97. Jeffrey S. Passel et al., *Urban Inst., Undocumented Immigrants: Facts and Figures 1* (2004), available at http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf (last visited Feb. 25, 2005).

98. Marina Jiminez, *Ottawa Eyes Amnesty Plan for 10,000 Illegal Workers*, *Globe and Mail* (Toronto), Sept. 11, 2004, at A11.

99. Jeffrey Passel of the Urban Institute estimates that about 750,000 persons enter the United States illegally each year. After subtracting those who die, return, or regularize their status, Passel estimates that the number of undocumented persons rises by about 350,000 to 500,000 per year. See Ben Winograd, *Follow the Stat*, *Am. Journalism Rev.*, Feb./Mar. 2005, at <http://www.ajr.org/Article.asp?id=3816> (last visited Feb. 26, 2005). I am hypothesizing that a fraction of the 350,000 to 500,000 undocumented migrants might qualify as refugees but do not claim asylum. A prospective refugee may not immediately claim asylum because she does not realize she might qualify for asylum, or because she fears the risk of detention, rejection of the refugee claim, and subsequent deportation. A person who does not claim asylum upon entry will likely join the ranks of the undocumented workers. The longer an asylum seeker remains underground in the United States, the more valid her fears, given the one-year filing deadline on asylum claims.

more declared asylum seekers, but it does not follow inexorably that it receives more refugees.

Finally, the preamble highlights the virtue of “orderly handling of asylum claims.” No one can deny that Canadians value order—we are notoriously polite, wait uncomplainingly in queues, and like to keep our streets tidy. Indeed, Canada exhorted “Peace, Order and Good Government” as foundational constitutional principles at the time of Confederation, in marked (and tepid) contrast to the U.S. Constitution’s exuberant embrace of “Life, Liberty and the pursuit of Happiness.”¹⁰⁰ Will this Agreement actually enhance the orderliness of refugee processing in Canada?

All other things being equal, fewer refugee claimants entering Canada will result in more efficient processing for those refugee claimants who are admitted, but only at the cost of less efficient processing in the United States, which will absorb the higher numbers. Many commentators (including myself) fully expect that the Agreement will deflect only some Canada-bound asylum seekers back to the United States. While the Agreement may initially thwart asylum seekers arriving on the U.S. side of the border, most observers anticipate that the effect will be temporary. Eventually, smugglers will divert asylum seekers who would otherwise present themselves at the Canadian border into a clandestine flow of undocumented migrants crossing the border surreptitiously.¹⁰¹ Instead of having their entry duly recorded by Canadian officials, they will try to enter the country surreptitiously and either live “underground” as non-status migrants, i.e. illegals, or make their refugee claim inland, since the Agreement does not apply inland. The former prospect circumvents the asylum system in favor of life outside the law, and the latter simply delays initiation of the process.

100. Compare The Constitution Act § 91 (Can. 1867) with The Declaration of Independence para. 2 (U.S. 1776).

101. Solomon, *supra* note 47. Even the Supplementary Information accompanying the U.S. Regulations acknowledges that the “Department [of Homeland Security] is aware of the potential for increased smuggling and trafficking after the Agreement is implemented.” Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480, 69485 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 208, 212, 235), available at http://www.usdoj.gov/eoir/vll/fedreg/2004_2005/fr29nov04b.pdf (last visited Feb. 25, 2005).

Neither of these outcomes promotes the orderly handling of asylum claims.

5. “Aware that such sharing of responsibility must... safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol and the Torture Convention are effectively afforded...”¹⁰²

This passage in the preamble affirms that the legitimacy of the Agreement depends on the fairness and integrity of refugee determinations in Canada and the United States. It is important to recall that Canada all along has championed this Agreement, given that it (hypothetically) offers Canada the opportunity to deflect thousands of asylum seekers into the United States. If the U.S. system does not secure full and fair treatment to asylum seekers, the blame ultimately redounds to Canada for insisting on an Agreement that will subject asylum seekers to an unjust system.

I alluded to this principle earlier, which is that Canada should not do indirectly to asylum seekers what it cannot do directly, namely, violate their fundamental rights. In circumstances where the treatment might amount to persecution, torture, or capital punishment, the Supreme Court of Canada has elevated this norm of non-complicity to a constitutional right. For example, in *Singh v. M.E.I.*, the Supreme Court of Canada first articulated the principle that Canada violates a refugee claimant’s “security of the person” by returning her to a country where she may be persecuted.¹⁰³ A corollary of that finding was a constitutional entitlement to fair procedures in determining whether a claimant meets the definition of a refugee. Several years later, in *United States v. Burns*, the Supreme Court of Canada reversed its earlier position and ruled that Canada should not, save in extraordinary circumstances, extradite a person to face capital punishment.¹⁰⁴ In *Suresh v. Canada (Minister*

102. Agreement, *supra* note 13, preamble.

103. [1985] 1 S.C.R. 177, 207.

104. [2001] 1 S.C.R. 283, 289.

of *Citizenship and Immigration*), the Court arrived at the same conclusion regarding torture.¹⁰⁵

The broad norm that these legal decisions evoke is domestic accountability for violations of fundamental human rights which the Canadian state does not directly perpetrate, but rather enables or facilitates others to commit beyond Canada's borders. Unaccompanied minors are not the only refugee claimants in the United States subject to violations of fundamental rights. Many international and refugee law scholars have examined the U.S. asylum regime, both before and after September 11th, and found it deficient. For example, Professor Patty Blum concluded in 1997 that "United States refugee law and policy continues to diverge from the aims and requirements of international refugee law."¹⁰⁶

Concerns about the U.S. asylum regime encompass both process and substance. The United States resorts to detention of non-citizen entrants (including asylum seekers and children) more frequently than does Canada. The terrorist attacks of 2001 precipitated even greater systematic reliance on detention. In March 2003, Tom Ridge, then Director of the Department of Homeland Security, announced the automatic detention of "asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated... for the duration of their processing period."¹⁰⁷ It is not unusual for asylum processing to take several months or even years. The UNHCR has criticized this

105. [2002] 1 S.C.R. 3, 68.

106. Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 *Berkeley J. Int'l L.* 38, 50 (1997). See also Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 *Stan. J. Int'l L.* 117 (2001) (using the Illegal Immigration Reform and Immigrant Responsibility Act to illustrate the repercussions of Congress' power to violate international law through legislation subsequent to treaty ratification).

107. Press Release, Dep't. of Homeland Security, Operation Liberty Shield, Mar. 17, 2003, at <http://www.dhs.gov/dhspublic/display?content=4234> (last visited Feb. 27, 2005). Note that Operation Liberty Shield was officially terminated a month after its inception, however, the status of asylum applicants from countries designated under the former program remains unclear. See Human Rights First, *Operation Liberty Shield Quietly Terminated*, May 15, 2003, at http://www.humanrightsfirst.org/media/2003_alerts/0515.htm (last visited Feb. 27, 2005).

blanket imposition of detention as inconsistent with international legal norms in several respects.¹⁰⁸ First, the practice discriminates on the basis of a prohibited ground (nationality). Second, detention must not be used to deter asylum seekers from the legitimate attempt to obtain refuge from persecution. Third, where detention is used to prevent absconding or for security reasons, “international standards dictate that there must be some substantive basis for such a conclusion in the individual case.”¹⁰⁹ Neither nationality nor illegal method of entry furnishes sufficient justification for detention.¹¹⁰

Recently, U.S. immigration authorities have begun charging newly arrived asylum seekers with the criminal offence of entering the country with false documents.¹¹¹ This practice appears to be in direct contravention of Article 31 of the 1951 Refugee Convention, which states that: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees... provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”¹¹²

108. See UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect> (last visited Apr. 4, 2005); see also Standing Committee of the Executive Committee of the High Commissioner's Programme, UNHCR, Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice (1999) [hereinafter Detention of Asylum Seekers and Refugees], available at <http://www.unhcr.ch/cgi-bin/texis/vtx/excom> (last visited Feb. 27, 2005).

109. Detention of Asylum Seekers and Refugees, *supra* note 108, at 3.

110. UNHCR News Stories, UNHCR Concerned About US Detention of Asylum Seekers (Mar. 21, 2003) (stating that “blanket mandatory detention based on nationality varies from accepted international human rights norms and standards”), at <http://www.unhcr.ch/cgi-bin/texis/vtx/news> (last visited Feb. 27, 2005); Detention of Asylum Seekers and Refugees, *supra* note 108, at 2 (noting that in general, the 1951 Refugee Convention prohibits the detention of asylum seekers because of their illegal entry).

111. See Dan Christensen, Hurdle for Asylum Seekers (Oct. 14, 2004), at <http://www.fiacfla.org/inthenews.php#67> (last visited Feb. 27, 2005); Tanya Weinberg, *Asylum Seekers Face U.S. Charges*, Sun-Sentinel (Fla.), Apr. 16, 2003, at 1B.

112. Refugee Convention, *supra* note 1, art. 31, 19 U.S.T. at 6275, 189 U.N.T.S. at 174.

The 1996 expedited removal procedure is one of the most sharply criticized elements of U.S. immigration law.¹¹³ Persons in expedited removal proceedings may make an asylum claim, but first must prove to an asylum officer that they have a “credible fear” of persecution. If they fail to satisfy the asylum officer, they may request review by an immigration judge, but if they cannot establish a credible fear, they will be *refouled* without further opportunity to fully present their refugee claim. Asylum seekers in expedited removal proceedings are also subject to automatic detention, and release from detention is a matter of discretion.¹¹⁴ Academics, NGOs, and the UNHCR have uniformly deplored expedited removal as unjust in its conception and problematic in its implementation.¹¹⁵

113. See 8 U.S.C. § 1225(b)(1)(A)(i) (2000). The process authorizes front-line immigration officials to render an unreviewable decision that a person seeking admission is improperly documented or otherwise attempting to enter (or aid another’s entry) through fraud or misrepresentation. An immigration officer may issue a removal order that bars admission for five years, or encourage the person to “voluntarily” abandon the attempt to enter in order to avoid the five-year ban.

114. For the most thorough analysis and evaluation of expedited removal, see the Expedited Removal Study, a multi-year study conducted by a team of U.S. legal academics and researchers led by Prof. Karen Musalo of the University of California Hastings School of Law, at <http://w3.uchastings.edu/ers/> (last updated July 9, 2004). See also Symposium, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 Notre Dame J.L. Ethics & Pub. Pol’y 1 (2001) (describing the study, analyzing the study’s data and recent changes, presenting case studies of people affected by expedited removal, and discussing broader policy issues)[hereinafter *Expedited Removal Study: Report on the First Three Years*].

115. Since the United States introduced expedited removal in 1997, the UNHCR has expressed concern that the program violated international legal standards regarding access to asylum, legal representation, the treatment of vulnerable and at-risk populations, and review by an independent body. See UNHCR, *UNHCR Reports on US Expedited Removal Process*, 6 Update on the Americas 13 (2004) (noting that the UNHCR conducted a six-month study of the U.S. expedited removal process, and documented its findings and recommendations for the U.S. Department of Homeland Security), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=NEWS&id=405ea67a4&page=news> (last visited Feb. 27, 2005). Studies by academics and non-governmental organizations revealed that immigration officials improperly encourage asylum seekers to withdraw their applications, fail to refer asylum seekers to the credible fear interview, detain asylum seekers, and even remove asylum seekers to countries where they may be persecuted. See *Expedited Removal Study: Report on the First Three Years*, *supra* note 114; see also Lawyers Committee for Human Rights (now Human Rights First), Refugee Women at

According to the Supplementary Information accompanying the U.S. regulations implementing the Agreement, Canada-bound asylum seekers deflected back into the United States will not, except in rare circumstances, “be subject to expedited removal because they will not meet the definition of ‘arriving alien’” that triggers the expedited removal process.¹¹⁶ For this reason, the U.S. regulations do not explicitly confirm that persons returned to the United States under the Agreement will not be subject to expedited removal. However, it is worth noting “arriving aliens” are not the sole class of entrants subject to expedited removal: the U.S. Attorney General possesses unreviewable discretionary authority “to designate certain other aliens to whom the expedited removal provisions may be applied, even though they are not arriving in the United States.”¹¹⁷ After September 11th, and under cover of national security concerns, then U.S. Attorney General John Ashcroft exercised this statutory authority in order to declare asylum seekers arriving by sea subject to expedited removal.¹¹⁸ So although Canada-bound asylum seekers are currently safe from expedited removal, the U.S. Attorney General retains sole and unreviewable discretion to extend the process to them.

Moreover, Attorney General John Ashcroft reduced the opportunities for independent review of asylum decisions by directing the Board of Immigration Appeals (BIA) to clear a backlog of 56,000 cases in about six months.¹¹⁹ One of the BIA’s tasks is to hear

Risk: Unfair U.S. Laws Hurt Asylum Seekers 5 (2002) [hereinafter *Refugee Women at Risk*] (“Mistakes are in fact inevitable given the summary nature of expedited removal and its lack of procedural safeguards.”), available at http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf (last visited Feb. 27, 2005).

116. Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480, 69,484 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 208, 212, 235), available at http://www.usdoj.gov/eoir/vll/fedreg/2004_2005/fr29nov04b.pdf (last visited Feb. 25, 2005).

117. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002).

118. *Id.*

119. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309 (proposed Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280); Eric Schmitt, *New Rules Are Proposed for Appeals of*

appeals from first level asylum decisions. According to Professor Alex Aleinikoff, “[m]any, many cases are decided at a speed that makes it impossible to believe they got the scrutiny a person who faces removal from the United States deserves.”¹²⁰ One board member signed more than 50 decisions in one day, or about one every ten minutes based on a continuous nine-hour day.¹²¹

Another difference between the Canadian and U.S. asylum systems lies in the availability of legal aid. Whereas most refugee claimants in Canada are eligible for legal aid,¹²² there is no state funded legal aid for asylum seekers in the United States and the proportion of represented asylum seekers is, accordingly, much lower.¹²³ The crucial role played by competent counsel in facilitating a fair and thorough presentation of a refugee claim cannot be overstated. According to a study compiled by Andrew Schoenholtz and Jonathan Jacobs, “represented asylum cases are four to six times more likely to succeed than [unrepresented] ones” in hearings before an Immigration Judge.¹²⁴ Yet in the United States, only one-third of all asylum-seekers are represented at the affirmative application stage before an Asylum Officer.¹²⁵ Although two-thirds were represented before an Immigration Judge, this number does not include the large number of “no-shows” who abandoned their claims by not appearing before the Immigration Court.¹²⁶ According to Schoenholtz and Jacobs, in fiscal year 1999 “over 6,000

Immigrants, N.Y. Times, Feb. 2, 2002, at A9 (discussing the proposed rules, which would allow a single member of the Board of Immigration Appeals, rather than a three-judge panel, to decide most immigration cases appealed to the Board).

120. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times, Jan. 5, 2003, at 1.

121. *Id.* Note that one consequence of the streamlining initiative at the BIA has been a surge in cases pursued to the next level of appeal, the federal courts. See Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Continue to Overwhelm Federal Courts*, Legal Intelligencer, Jan. 19, 2005, at 7.

122. Andrew Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immigr. L.J. 739, 754 (2002).

123. *Id.* at 739.

124. *Id.* at 740.

125. *Id.* at 742.

126. *Id.*

unrepresented affirmative applicants were eight times more likely than represented affirmative applicants to abandon their claims at the Immigration Court stage."¹²⁷

United States asylum rules impose a one-year time limit for making an asylum claim on those already present in the United States.¹²⁸ Exceptions to this rule exist, but the concern remains that the one-year filing deadline can, does, and will arbitrarily disqualify persons who are in need of protection. Given the present political climate in the United States, and the widespread use of detention, it would hardly be surprising if some asylum seekers in the United States opt to go underground for as long as possible for fear of making a refugee claim and ending up in detention. Yet, if caught after a year, they would be precluded from making an asylum claim, and also face *refoulement*. Furthermore, if asylum seekers subsequently attempt to enter Canada to pursue a refugee claim (with less likelihood of detention), the Agreement would deny them access. Thus, it is conceivable that such an individual would not, in fact, have her claim adjudicated under either the Canadian or U.S. system prior to being returned to her country of nationality, contrary to the requirements of Article 3(1) of the Agreement.

Another area of divergence between the Canadian and U.S. systems is the treatment of female asylum seekers, especially those claiming asylum on grounds of gender-related persecution. One longitudinal study on expedited removal found that the program has a gendered impact: a greater proportion of women than men are removed via expedited removal (compared to regular immigration proceedings).¹²⁹ Human Rights First speculates that female asylum seekers often may fear disclosing to U.S. immigration officials the gender-related reasons for their flight; shame, ignorance of the possibility of seeking asylum, trauma and re-traumatization through shackling, strip searches and intimidation, may all contribute to their silence.¹³⁰ Although immigration officials have discretion to release a person from detention pending determination of an asylum

127. *Id.* at 744.

128. *See* 8 U.S.C. § 1158(a)(2)(B) (2000).

129. *Expedited Removal Study: Report on the First Three Years*, *supra* note 114, at 50–51.

130. *Refugee Women at Risk*, *supra* note 115, at 6–8.

claim, the policy is administered arbitrarily and inconsistently.¹³¹ The devastating impact of prolonged detention on any refugee may be compounded by gender and culturally specific factors, such as the denial of privacy, re-traumatization and depression, separation from children, and sexual, physical, verbal, and emotional abuse by immigration officials.¹³² An analysis of the one-year filing deadline for asylum claims yields similar concerns about the U.S. policy's gendered impact.¹³³

Of particular concern is the fate of women fleeing domestic violence. According to the Canadian Immigration and Refugee Board's groundbreaking guidelines on gender-related persecution and refugee status, women who flee private violence in circumstances where the state is unable or unwilling to protect them may be recognized as refugees.¹³⁴ The United States also has guidelines on gender-related persecution, but at present, the fate of women with claims of gender-related persecution appears more precarious under U.S. law than Canadian law.¹³⁵ For example, in 1999 the Board of

131. See Human Rights First (formerly Lawyers Committee for Human Rights), In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security 12 (2004), available at http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf.

132. See Refugee Women at Risk, *supra* note 115, at 9–14 (providing an overview of the impact of prolonged detention on refugee women). As a specific example of the abuses suffered by female detainees, note that in October 2000, the Women's Commission for Refugee Women and Children reported "widespread" abuse of detainees, especially women, at the Krome immigration detention center near Miami. In reaction to the report, female detainees were moved to the Turner Guilford Knight Correctional Center, however, a follow-up report by the Women's Commission found that the abuses continued. See Women's Commission for Refugee Women and Children, Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center (2000), available at <http://www.womenscommission.org/pdf/krome.pdf>; Women's Commission for Refugee Women and Children, Innocents in Jail: INS Moves Refugee Women from Krome to Turner Guilford Knight Correctional Center, Miami (2001), available at http://www.womenscommission.org/pdf/ins_tgk.pdf.

133. Refugee Women at Risk, *supra* note 115, at 14–16.

134. Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution (Nov. 13, 1996), at http://www.irbcisr.gc.ca/en/about/guidelines/women_e.htm (last visited Nov. 21, 2004).

135. See Refugee Women at Risk, *supra* note 115, at 4 (describing briefly

Immigration Appeals rejected a domestic violence-based asylum claim by Rodi Alvarado, a Guatemalan woman.¹³⁶ Although former Attorney General Janet Reno vacated the Board's decision in the Alvarado case,¹³⁷ Attorney General John Ashcroft subsequently dismissed several members of the Board of Immigration Appeals who had been appointed by the Clinton Administration, including three of the five members who had dissented in the Alvarado case.¹³⁸ He then declined to render a decision for two years in her case, and only in January of 2005 did he remand the case back to the Board of Immigration Appeals for a re-hearing.¹³⁹

Despite the recommendation of the Standing Committee on Citizenship and Immigration,¹⁴⁰ Canada refused to exempt women fleeing gender-related persecution from the Agreement. The Canadian government instead indicated that it would review the comparative treatment of gender-related cases as part of the overall monitoring of the Agreement.¹⁴¹

Taken on their own, each of these elements of the U.S. system is worrisome. Taken together, they cast into serious doubt whether the United States is able and willing to provide a full and fair refugee status determination procedure. One might contend that it is not for Canada to dictate to the United States how it should conduct refugee determinations, as long as it meets the minimum international standards. There are two responses to this assertion: first, the UNHCR has also expressed concern about each of the

the U.S. policies towards female refugees, and the limitations of those policies).

136. *In re R-A-*, 22 I. & N. Dec. 906 (A.G. 2001, BIA 1999), available at <http://www.usdoj.gov/eoir/vll/intdec/vol22/3403.pdf> (last visited Mar. 3, 2005).

137. *Id.*; see also UNHCR, *Asylum case could set precedent on gender-based persecution*, 6 Update on the Americas 14 (2004) (discussing in general the status of Ms. Alvarado's case), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.pdf?tbl=NEWS&id=405ea67a4&page=news> (last visited Mar. 5, 2005).

138. George Lardner, Jr., *Ashcroft Reconsiders Asylum Granted to Abused Guatemalan*, Wash. Post, Mar. 3, 2003, at A2.

139. *In re R-A-*, 23 I. & N. Dec. 694 (A.G. 2005), available at <http://www.usdoj.gov/eoir/vll/intdec/vol23/3504.pdf> (last visited Mar. 3, 2005).

140. Standing Committee's Report, *supra* note 33, at 8-9.

141. See Government's Response, *supra* note 33, recommendations 2-3.

aforementioned aspects of the U.S. system;¹⁴² second, the issue here is not Canada's entitlement to judge the U.S. system in the abstract. Rather, the question is whether it comports with Canadian values and, ultimately, Canadian law, to expose a refugee claimant to a regime that is not merely different and possibly less fair, but also falls short of the international legal standards binding upon both the United States and Canada.

Apart from the relative merits of the Canadian and U.S. refugee determination systems, the Agreement adds a new stratum of bureaucratic decision-making to each country's border-control procedures. Citizenship and Immigration Canada's Immigration Manual has been revised to set out the procedure for determining whether a Canada-bound refugee claimant qualifies for one of the exemptions under the Agreement.¹⁴³ Under the procedural guidelines, in order to remain in Canada an asylum claimant must demonstrate on a balance of probabilities that she comes within one of the Agreement's exceptions.¹⁴⁴ The Manual provides sample questions to ask refugee claimants in order to ascertain whether they have family members in Canada¹⁴⁵ or are unaccompanied minors.¹⁴⁶ Proving on a balance of probabilities that one comes within an exception engages delicate issues of credibility determination: linguistic and cultural differences, fear, intimidation, disorientation, and ignorance of the process may separately and in combination adversely affect claimants' ability to establish their case. The Manual adverts to at least some of these constraints,¹⁴⁷ and also requires that the claimant "have a separate decision-maker, who was not involved in preparing the proposed determination, review any proposed determination" and "give the claimant a chance to respond" before

142. See UNHCR Comments, *supra* note 83.

143. Immigration Manual, *supra* note 34, § 17, at 79. A "Statement of Principles" governing procedural issues was issued shortly after the Agreement was signed, and appears as an appendix in the Immigration Manual. *Id.* app. C, at 105.

144. *Id.* § 17.2, at 80.

145. *Id.* § 17.9, at 86.

146. *Id.* § 14.3, at 58–60.

147. See, e.g., *id.* §§ 14, 17.8, 17.9.

making a final eligibility determination.¹⁴⁸ The separate decision-maker is described only as a "Minister's delegate,"¹⁴⁹ who in practice will probably be a senior immigration officer.

Given the importance of an exemption determination, and in light of the various impediments to verification of family relationship or age in the context of an examination at the border, access to representation by counsel could be crucial to some claimants. Although the criteria for exemption appear objective and straightforward, the process of gathering, verifying, and drawing inferences from the available evidence (testimonial and documentary) may prove more complex and more subjective than one might suppose.¹⁵⁰ The Immigration Manual rehearses verbatim the vague assurance in the Statement of Principles that "provided no undue delay results and it does not unduly interfere with the process, each Party will provide an opportunity for the applicant to have a person of his or her own choosing present at appropriate points during proceedings related to the Agreement."¹⁵¹ However, the Manual supplies no content to the terms "undue delay," "unduly interfere," or "appropriate points." Moreover, the Statement of Principles presumes that a claimant will be aware that representation may be possible, will know how obtain it, and will request access to counsel from the immigration official. Implementation of the Agreement is still too recent to know if claimants request representation, from whom, and how frequently

148. *Id.* § 17.13, at 91.

149. *Id.*

150. For example, the Manual advises immigration officers seeking proof of family relationship to ask the claimant for the relative's birthday, profession, and status in Canada. *Id.* § 17.9, at 86. However, in some societies, birthdays are neither recorded nor celebrated annually, and so it is not uncommon for individuals to be unaware of their siblings' dates of birth. For other reasons, claimants may be unaware of relatives' occupation and legal status. Even locating relatives in a phone book or data base may prove difficult due to variations in the English or French spelling of non-English or non-French names. I base these observations on my own experience as a Member of the Refugee Division of Canada's Immigration and Refugee Board, from the period of 1994–1996. See Audrey Macklin, International Association of Refugee Law Judges, *Truth and Consequences: Credibility Determination in the Refugee Context, in The Realities of Refugee Determination on the Eve of a New Millennium* 134 (1998).

151. Immigration Manual, *supra* note 34, app. C, at 105.

their requests are honored. The tenor of the Statement of Principles clearly prioritizes expedience over the benefits of representation, presumably in furtherance of the preamble's objective of promoting the "orderly handling of asylum applications."¹⁵² It remains to be seen if this can be reconciled with the other putative objective of securing "access to a full and fair refugee status determination procedure."¹⁵³ After all, a refugee determination procedure can only be as full and fair as the process which determines eligibility for that procedure. It is difficult to reconcile the need to deal with these predictable procedural issues in a fair manner with the additional objective of promoting the orderly and expeditious handling of asylum claims at land border ports of entry.

6. "[R]esolved to strengthen the integrity of that institution [of asylum] and the public support on which it depends..."¹⁵⁴

The tone of this pronouncement invites the reader to infer that the integrity of the institution of asylum is crumbling and public support for it is dwindling. What is the cause of asylum's degeneration? The text of this passage does not explicitly link asylum and security. It need not do so—it goes without saying. In linguistics, a collocation is a pairing of words or a phrase that is so common and so specific that one can scarcely hear the first segment without hearing the other: "pitch [black]," "cruel and [unusual]," and "gossamer [thin]" are a few examples. Since September 11th, the glue binding asylum seeker and terrorist adheres just enough that invoking the former suffices to bring the latter to mind. The fact that none of the nineteen Saudi suicide bombers entered the United States as asylum seekers seems largely irrelevant. Indeed, a recent bill passed by the U.S. House of Representatives dispenses with all subtlety and proposes a series of restrictive, anti-asylum measures under the rubric, "Preventing Terrorists from Obtaining Asylum."¹⁵⁵

152. Agreement, *supra* note 13, preamble.

153. *Id.*

154. *Id.*

155. REAL ID Act of 2005, H.R. 418, 109th Cong. § 101 (2005). The provisions in section 101, *inter alia*, permit denial of asylum to otherwise credible claimants who do not furnish "corroborating evidence," require claimants to prove

Similarly, a particular narrative linking Canada's immigration system to terrorism has taken root on both sides of the border. It was neatly summarized in a recent Library of Congress Research Report helpfully entitled "Nations Hospitable to Organized Crime and Terrorism."¹⁵⁶ The authors characterize Canada as a "uniquely inviting" terrorist destination, owing to the facts that Canada is a liberal democracy with an entrenched bill of rights, boasts a technologically advanced economy, and features an extensive and undefended border with the United States:

[T]errorists... increasingly are using Canada as an operational base and transit country en route to the United States. A generous social-welfare system, lax immigration laws, infrequent prosecutions, light sentencing, and long borders and coastlines offer many points and methods of entry that facilitate movement to and from various countries, particularly to the United States. These factors combine to make Canada a favored destination for terrorists and international organized crime groups.¹⁵⁷

The absence of evidence supporting these allegations, and even direct refutation of specific accusations,¹⁵⁸ has not dispelled what the late Arthur Helton characterized as the myth of Canada as a non-profit organization that accepts everybody that arrives at its

the persecutor's "central" motive, and explicitly grant discretion to deny asylum based on demeanor. *Id.* These provisions apply generally to all asylum seekers and not only to those otherwise suspected of terrorism. The bill is opposed by a wide array of organizations. *See, e.g.*, Press Release, American Civil Liberties Union, ACLU, Allies Oppose Sensenbrenner's Anti-Immigrant Bill; Mean-Spirited Measure Would Hurt Persecuted, Undermine Privacy (Feb. 9, 2005), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17446&c=206> (last visited Mar. 7, 2005); American Immigration Lawyers Association, Overview of Amendments to the REAL ID Act (H.R. 418) as Passed by the House (2005), available at <http://www.aila.org/contentViewer.aspx?bc=10,911,6717,8584> (last visited Mar. 7, 2005).

156. LaVerle Berry et al., Library of Congress, Nations Hospitable to Organized Crime and Terrorism (2003), available at http://www.loc.gov/rr/frd/pdf-files/Nats_Hospitable.pdf (last visited Mar. 8, 2005).

157. *Id.* at 146.

158. I discuss some of the more notorious cases, including those of Ahmed Ressam and Nabil al-Marabh in Audrey Macklin, *Borderline Security*, in *The Security of Freedom* 383, 388–89 (Ron Daniels et al. eds., 2001).

borders.¹⁵⁹ A central element of this narrative is the claim that Canada's refugee system is uniquely susceptible to abuse by terrorists because it is easier to make a claim in Canada, many claimants qualify for legal aid, work visas, and limited public health care and social assistance, acceptance rates are higher than in the United States, and Canada does not automatically detain asylum seekers.

No one disputes national security as a value of great importance to Canadians. Although none of the perpetrators of 9/11 entered the United States as asylum seekers, and none had even been to Canada, the claim that Canada's asylum system is somehow particularly vulnerable to exploitation by terrorists has acquired the status of conventional wisdom. In actuality, where alleged terrorists made refugee claims in Canada, their claims were refused or abandoned. The refugee determination system did not fail; the problem was that removal orders were either not issued or not enforced.¹⁶⁰ Although Canada does have a very poor record of executing removals, it appears to be no worse than the United States and virtually every other liberal democracy on this matter.¹⁶¹

The overall acceptance rate for refugee claims decided in 2001 was around 58% in Canada,¹⁶² and around 48% in the United States.¹⁶³ The ten-percentage point disparity hardly seems great

159. New York Times Company Foundation, *Journalism Institutes: Homeland Security* (July 11–15, 2002) (comments of Arthur Helton), at http://www.nytc.com/company/foundation/homeland_helton.html (last visited Mar. 8, 2005).

160. See Audrey Macklin, *supra* note 158, at 389.

161. See Matthew Gibney & Randall Hansen, *UNHCR, Deportation and the Liberal State* 7 (Feb. 2003) (New Issues in Refugee Research, Working Paper No. 77), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RESEARCH&id=3e59de764&page=research> (last visited Mar. 8, 2005).

162. U.S. Committee for Refugees and Immigrants, *World Refugee Survey 2002 Country Report: Canada* (2002), at <http://www.refugees.org/samnam.aspx> (last visited Apr. 4, 2005).

163. U.S. Committee for Refugees and Immigrants, *World Refugee Survey 2002 Country Report: United States* (2002), at <http://www.refugees.org/samnam.aspx> (last visited Apr. 4, 2005). This figure represents the weighted acceptance rate of the Immigration and Naturalization Service and the Executive Office for Immigration Review combined.

enough to warrant labeling Canada as radically more generous and, of course, discloses nothing about the quality of decision-making. Moreover, recognition rates have declined markedly since 2001. By 2004, Canada accepted only 40% of all claims,¹⁶⁴ while the United States acceptance rate for the previous year was 37%.¹⁶⁵

Finally, if Canadian border control is so much more lax than that of the United States, how is it that in 2001, over 13,000 refugee claimants (about 35% of Canada's total intake) found it easier to enter the United States in order to reach the Canadian border instead of simply traveling directly to Canada?¹⁶⁶ Why were they not intercepted by vigilant U.S. border authorities as they entered the United States? One can only infer that it must be easier to enter the United States than Canada, a conclusion that seems to contradict the thesis that the Canadian border is a sieve.

Policymakers in Washington, Ottawa, and beyond know that every industrialized western democracy wrestles with the same intractable problems of undocumented entry, gaming of the system, backlogs in front-end processing, a genuine inability to gather security-related intelligence, and the futility of attempting large-scale deportation.¹⁶⁷ I would venture to say that the United States

164. Immigration and Refugee Board (Can.), Country Report (2004) (on file with author) (noting that out of 40,408 finalized asylum claims, 16,005 claims were accepted).

165. Marina Jiminez, *New Rule to Come into Effect that Could Reduce Refugee Claims*, *Globe and Mail* (Toronto), Mar. 9, 2004, at A4 (stating that the 2003 U.S. acceptance rate was 37%). A recent press release by U.S. Immigration and Customs Enforcement suggests that recognition rate has dropped to 28%. See Press Release, U.S. Immigration and Customs Enforcement, 11th Guilty Plea in Massive Asylum, Document Fraud Case (Feb. 11, 2005) (noting that "72 percent of all asylum claims are not legitimate"), available at http://www.ice.gov/graphics/news/newsreleases/articles/021105_11thGuiltyPlea.htm (last visited Mar. 8, 2005).

166. See Standing Committee's Report, *supra* note 33, at 3 (stating that in 2001, "13,497 people known to have come from or through the U.S. made refugee claims" in Canada).

167. The Netherlands is the latest state to attempt a massive deportation scheme that will entail expelling 26,000 failed asylum seekers. The controversial bill, which just passed the Dutch Lower House of Parliament, is opposed by about two-thirds of Dutch people, as well as human rights groups. See *Dutch MPs Approve Asylum Exodus*, BBC News Online, Feb. 17, 2004, at <http://news.bbc.co.uk/2/hi/europe/3494627.stm> (last visited Mar. 8, 2005).

does no better a job at actually resolving these problems than does Canada, for all the automatic detentions, special registration, expedited removals, asylum filing bars, and lower asylum acceptance rates.

Still, the perception of Canada as especially lax remains salient, both inside and outside Canada. A former Canadian ambassador, widely consulted by the media, recently dubbed Canada's refugee system "the greatest threat to North American security."¹⁶⁸ In early 2003, the United States issued a nation-wide security alert to capture five Pakistani immigrants who allegedly slipped into New York State from Ontario on false documents. New York Senator Hillary Clinton was quick to blame Canada; even after it turned out that the rumor was false, Senator Clinton refused to apologize, insisting instead that "because of the real deficiencies in security along our northern border, this hoax seemed all too believable."¹⁶⁹

Even Denis Coderre, Canada's Citizenship and Immigration Minister at the time the Agreement was signed, encouraged the Canadian public to associate the Agreement with security. In an open letter published in various Canadian newspapers, Coderre alluded to the Agreement as one of several measures "taken under the Canada-US Smart Border Action Plan... [to] help ensure the safety of Canadians in the fight against terrorism that this department is pursuing in collaboration with Canadian and US partners."¹⁷⁰ Yet, Coderre knew that Canada had been trying to

168. Michael Friscolanti, *Fewer Refugees Seeking Asylum inside Canada: Claims Fall by 35%*, Nat'l Post (Toronto), June 18, 2004, at A4.

169. Sheldon Alberts, *Clinton Refuses Ottawa's Call for Apology*, Nat'l Post, Jan. 10, 2003, at A7.

170. Letter from Denis Coderre, Citizenship and Immigration Minister, to Canadian News Editors (Jan. 10, 2003), <http://www.cic.gc.ca/english/press/letters/letter-terror.html> (last visited Mar. 8, 2005). In the last few months, Canada has begun detaining a few more refugee claimants who arrive without documentation, ostensibly in furtherance of Canada's security agenda and quite likely in order to demonstrate its resolve to the United States. In addition to detention's traumatizing and dehumanizing impact on refugee claimants—who are not, it must be remembered, suspected of committing any crime—detention is enormously expensive, and it is doubtful that its indiscriminate use confers any security benefit. It does, however, divert funds that could be spent elsewhere, whether on removals, clearing backlogs or perhaps even on settlement. It may also serve to deter refugee claimants from coming to Canada, and this may be its

persuade the United States to enter into an agreement since the mid-1990s, long before security issues came to dominate the agenda.¹⁷¹

The gap between public perception and reality regarding the nexus between refugees, terrorism, and Canada explains the paradox of the United States' assent to this Agreement. Consider this exchange between George Gekas, Chair of the House Subcommittee on Immigration, Border Security, and Claims, Kelly Ryan of the U.S. Department of State, and anti-immigration activist Mark Krikorian, about the benefit of the Agreement to the United States:

Mr. GEKAS. The staff has prepared one excellent question, I think. Explain how this safe third country agreement would prevent terrorists from coming to the U.S. from Canada? We will take an hour for your explanation. What is the theory?

Ms. RYAN. We don't, and we have never tied this particular agreement to the counterterrorism measures included in the 30-point action plan. This agreement is designed to make a regular process of asylum seekers.

...

Mr. GEKAS. But, you say not directly. But most of you agree that real action toward this agreement was taken after September the 11th, meaning by implication, that this could be another step taken to prevent unsafe border crossing.

Ms. RYAN. Negotiation of this proposal was undertaken after September 11th, and at the request of the Government of Canada as part of the 30-point action plan. We think it should be viewed in that context.

But it does not directly affect U.S. security.... So we view this as an important agreement in the context of the overall 30 points that Canada wants and that we are willing to agree to as a trade-off for the other important counterterrorism measures.

Mr. KRIKORIAN. I see this as having a small direct impact on counterterrorism and a larger indirect impact. The small direct impact would be that bad guys trying to get into Canada in order to take advantage of its more lenient asylum rules and its much other extensive social benefits for asylum applicants, in order to operate

ultimate, if illegitimate, purpose.

171. See, e.g., Kumin, *supra* note 25.

there and use it as sort of a launching pad for attacks in United States, as we have seen in the past, they wouldn't be able to do it....

Mr. GEKAS. Using your example, you are saying that it is safer for us to harbor a terrorist in the first instance than to permit them to go to Canada?

Mr. KRIKORIAN. If we lock them up in detention, yes. It certainly would be, because we would know who they were, where they were, and ideally, and this is not exactly in the purview of this, but ideally we would detain every single asylum applicant. But we don't have the capacity to do that.

But ideally, all applicants for asylum should be detained until their cases are decided. So, sure, I would rather have a potential terrorist locked up in New Jersey than working in Manitoba.

Mr. GEKAS. Yet it seems to me to me, subliminally, if not overtly, there is an antiterrorism flavor to this, which can be implied from the fact that there is no other such agreement pending with any other country.

...

Ms. RYAN. The United States or the Executive Branch has no intention now of entering into any arrangement with another country other than Canada. We are doing this agreement, if we go through with it, at the request of Canada, because they believe it is important for reducing their asylum backlog. We don't view this as a counterterrorism measure.¹⁷²

Mr. Gekas' first two questions proceed from the popular belief that asylum is a terrorist conduit, and thus the Agreement's rationale must lie in minimizing the security risk allegedly posed by asylum-seekers. But as he comes to realize that the Agreement is expected to produce a net increase in asylum seekers for the United States, he wonders how this outcome could redound to the benefit of the United States. Either asylum seekers are not inherently a threat to security, or the Agreement is inimical to the U.S.'s security interest. Although Mark Krikorian pitches the idea that the United States will be safer if it deals with asylum seekers itself, rather than

172. *United States and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Comm. on the Judiciary*, 107th Cong. 60-63 (2002).

leaving it to the [putatively] laxer, more lenient Canadian system, his argument is patently half-hearted. After all, Krikorian's mission is to oppose immigration to the United States and to demonstrate the inadequacy of the existing U.S. system, not to defend it. Ultimately, the U.S. government witnesses were constrained to admit that the Agreement did not advance U.S. security interests, and in fact was nothing more than a quid pro quo concession to Canada for various "other important counterterrorism measures" contained in the thirty-point border plan formulated after 9/11.¹⁷³

As a result, the alleged nexus between asylum seekers and terrorists plays a contradictory role in rationalizing the Agreement from the vantage point of the United States. It both explains and undermines the United States' willingness to assent to an agreement that it refused to sign a few years earlier. Even if U.S. policymakers know that the Canadian refugee system is not to blame for the presence of terrorists on U.S. soil, it may be worth the cost of adjudicating a few thousand additional asylum claims to reinforce the perception that the Canadian refugee system is dangerously lax, and that the United States can and will do a better job. It is always politically advantageous for one state to encourage its electorate to scapegoat another country for its problems. Moreover, some opponents of immigration commend the Agreement in the hopes that it will eventually link up with other, similar Agreements to create an unbroken chain of *refoulement* back to the country of origin.¹⁷⁴ Of course, if one insists that a failure to seek asylum in the first country of arrival irrefutably proves that the individual is a prospective illegal and not a refugee, then the return of the asylum seeker is not, by definition, *refoulement*. For example, Mark Krikorian, who likens asylum seekers to drowning people grasping at life-boats, endorses the Agreement despite its probable impact on the number of asylum seekers in the United States:

But even the likely increase in asylum claims is not an argument against this agreement. That is because the

173. *Id.* at 61 (statement of Kelly Ryan). The Canada-U.S. Smart Border Declaration and Action Plan is available online at <http://www.dfaitmaeci.gc.ca/anti-terrorism/can-us-border-en.asp> (last visited Mar. 8, 2005).

174. Note that such a strategy would require deletion of the provision in the present Agreement requiring either the United States or Canada to determine the refugee claim of a person subject to it.

agreement is best seen as a first step in reaching similar deals with other safe countries transited by asylum seekers, notably the member states of the European Union. Significant numbers of asylum seekers arrive on flights from western Europe to JFK and other East Coast airports, either independently or as part of organized smuggling operations. Application of the safe third country concept to all asylum claimants who passed through western Europe—where they should have applied for asylum if they were genuinely seeking protection—would reduce this flow significantly, increase the proportion who had legitimate claims to asylum, and allow generally for a more efficient and expeditious asylum process for those remaining.

But we will have no credibility in insisting on such agreements with EU nations if we reject this deal with Canada simply because it will lead to a modest increase in our asylum caseload.¹⁷⁵

It is ironic that the Dublin Convention is invoked as a model for other states to emulate, since available evidence indicates that the Dublin Convention never actually performed according to expectation, and there is little prospect that Dublin II will do much better. In 2001, on the eve of Dublin II (a European Council Regulation that revised and expanded the scope of the Dublin Convention), the Select Committee appointed by the U.K. Parliament to consider matters relating to the European Union made the following observations about the Dublin Convention:

105. A number of witnesses painted a somewhat depressing picture of life under the Dublin Convention, one of bureaucracy, mistrust and delays. The Commission's own analysis of the experience of the Convention discloses a wide variety of issues: the scope of the Convention (and the possibility of abuse by applicants changing the basis of their protection claims); the difficulty in securing adequate evidence to ascertain Member State responsibility; slowness in processing requests/transfers; problems of family reunification; costs and resources; the consequences of appeals against transfer decision having suspensory effect; and difficulties in the way Member States implement the Convention (including different approaches to the application of the Geneva Convention).

...

175. Krikorian Statement, *supra* note 6, at 35.

107. The vast majority (95%) of asylum applications are dealt with by the Member State in which they are lodged. Where the Dublin Convention regime is engaged, the number of asylum seekers actually transferred from one Member State to another amounts to only about 1.7% of the total applications for asylum. The Commission acknowledges that the Convention affects only a very small proportion of the cases which could fall within its scope.¹⁷⁶

Despite the evidence, the European Union proceeded with Dublin II,¹⁷⁷ and Canada continued to promote the Agreement with the United States.

C. The Safe Third Country Agreement and the Smuggling and Trafficking of Migrants

The text of the Safe Third Country Agreement remains within the boundaries of formal refugee discourse. It requires that the persons subject to it be regarded in law as refugee claimants by either the United States or Canada. It does not invoke the spurious “refugee/illegal migrant” dichotomy I described at the outset of this article. Yet in certain ways the preamble, and indeed the assent of the United States to the Agreement, are unintelligible unless one views asylum seekers through a security lens that casts their uninvited arrival as presumptively deceitful and potentially menacing.

The irony is that if implemented, the Agreement is more likely to produce illegality than reduce it. As noted earlier, many commentators predict that the Agreement will probably drive asylum seekers further into the hands of smugglers. To the extent that the Agreement erects one more obstacle to reaching Canada, market logic dictates that the price of smuggling will rise as the impediments to entry impose greater costs on the smugglers. Although the increased expense may deter prospective migrants in the short run, eventually asylum seekers and other migrants will borrow against

176. U.K. House of Lords, European Union – 19th Report pt. 3, ¶ 22 (Mar. 19, 2002), <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldcom/100/10001.htm> (last visited Mar. 23, 2005).

177. Council Regulation 343/2003, 2003 O.J. (L 50) 1; Commission Regulation 1560/2003, 2003 O.J. (L 222) 3.

the only asset they possess: their labor power.¹⁷⁸ Smugglers are often embedded in larger networks that organize entry into both the territory and the underground labor market of the destination state. Indebted migrants are inserted into the low-wage, exploitative jobs that industrialized countries everywhere depend on desperate people to do. Sometimes, smuggled migrants work off their debt and walk away; other times, they are deceived and trapped in conditions of perpetual indenture or outright slavery. In other words, they become trafficked persons. This downward spiral from smuggling to trafficking is greased by the escalating cost of clandestine entry, which in turn is generated by the heightened vigilance of states' exclusionary practices. One may defend this consequence as a regrettable externality of a justifiable state practice, but one cannot deny that it is also utterly predictable.

The phenomena of smuggling and trafficking have been compartmentalized and incorporated into U.N. Protocols.¹⁷⁹ Trafficking is also the subject of United States legislation.¹⁸⁰ The United States government has expended considerable energy on anti-trafficking as part of its foreign policy agenda. The campaign includes an annual ranking of all nations' practices regarding the eradication of trafficking in their territory.¹⁸¹ It would appear that

178. See Stewart Bell, *Officials Hail Progress in Fight Against Human Smuggling*, Nat'l Post (Toronto), Sept. 26, 2000, at A7 ("Due to the added risk and difficulties associated with bringing illegal migrants to Canada, smugglers have raised their fees to \$60,000 from the \$30,000 to \$40,000 charged last summer, according to immigration intelligence estimates, putting it beyond the reach of many Chinese and making other destinations more attractive.").

179. See *Revised Draft Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. Doc. A/AC.254/4/Add.1/Rev.6 (2000) [hereinafter *Smuggling Protocol*]; *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. Doc. A/AC.254/4/Add.3/Rev.7 (2000) [hereinafter *Trafficking Protocol*].

180. See *Trafficking Victims Protection Act*, 22 U.S.C. §§ 7101-7110 (2000) (setting out the policy instruments for combating trafficking into the United States and monitoring the conduct of foreign governments).

181. See, e.g., U.S. Dep't of State, *Trafficking in Persons Report* (June 2004) [hereinafter *2004 Trafficking Report*], available at <http://www.state.gov/documents/organization/34158.pdf> (last visited Mar. 23, 2005). For earlier

the implicit gold standard against which other states are measured is the United States government's evaluation of its own anti-trafficking endeavors.¹⁸² States whose practices fall in the lowest tier potentially face penalties in the form of withdrawal of various forms of non-trade and non-humanitarian related support from the United States.¹⁸³ By convenient coincidence, most nations allocated to the bottom rung have already been spurned by the United States for other reasons and already receive little to no assistance, such as North Korea, Cuba, and Burma; others are states with no effective governance structure, such as Equatorial Guinea and Sierra Leone.¹⁸⁴

Canada, along with most other western industrialized states, ranks in the first tier, meaning that Canada "fully complies with the [Trafficking Victims Protection Act's] minimum standards for the elimination of trafficking."¹⁸⁵ The 2004 appraisal of Canada's performance includes the following description:

Canada is primarily a destination and transit country for women trafficked for the purposes of sexual exploitation from China, South Korea, Thailand, Cambodia, the Philippines, Latin America, Russia, and Eastern Europe. To a lesser extent, men, women and children are trafficked for forced labor, and Canadian citizens are trafficked internally for the sex trade. Most transiting victims are bound for the U.S. In a recent criminal intelligence assessment, the Royal Canadian Mounted Police (RCMP) estimates that 800 persons are trafficked into Canada annually and that an additional 1,500–2,200 persons are trafficked through Canada into the U.S. Some

versions of the Trafficking in Persons Report, see the U.S. Dep't of State website, at <http://www.state.gov/g/tip/rls/tiprpt/> (last visited Mar. 23, 2005).

182. A recent popular (if sensationalist) account of sex-trafficking of girls and adolescents portrays U.S. anti-trafficking endeavors as desultory and ineffectual. Peter Landesman, *The Girls Next Door*, N.Y. Times, Jan. 25, 2004, § 6 (Magazine), at 30. Attorney General John Ashcroft responded with a letter to the magazine defending the administration's record. John D. Ashcroft, Letter to the Editor, *The Girls Next Door*, N.Y. Times, Feb. 15, 2004, § 6 (Magazine), at 6.

183. See 2004 Trafficking Report, *supra* note 181, at 31.

184. *Id.* at 39 (listing the following states in the lowest tier: Bangladesh, Burma, Cuba, Ecuador, Equatorial Guinea, Guyana, North Korea, Sierra Leone, Sudan, Venezuela).

185. *Id.* at 30.

observers believe these numbers significantly understate the problem.

The government's Interdepartmental Working Group coordinates and reports on the effectiveness of the national anti-trafficking policy. Senior government officials are speaking out more often, and more resources are being devoted to border control; a new RCMP anti-trafficking taskforce is also being created. For these reasons, Canada has been reclassified from Tier 2 to Tier 1.¹⁸⁶

Neither the preamble nor the text of the Safe Third Country Agreement refer explicitly to trafficking; neither the Trafficking Victims Protection Act nor the yearly Trafficking in Persons Reports acknowledge the existence of asylum seekers. The discourses of trafficking and asylum, as embodied in these discrete policy instruments, seem oblivious to one another.

Yet from a Canadian perspective, the trajectory of the Agreement seems bound to collide with the United States' and Canada's shared commitment to eradicate trafficking in persons. As noted earlier, many critics predict that asylum seekers who are desperate to reach Canada for whatever reason will simply take greater risks at higher cost to enter Canada clandestinely. As the peril and the price of entering Canada rises, so too will the incidence of trafficking in Canada. While each new additional barrier may succeed temporarily, ultimately, a bi-lateral refugee "burden-sharing" agreement between Canada and the United States is likely to exacerbate the very phenomenon that both Canada and the United States identify as a scourge and a human rights violation.¹⁸⁷

This predictable escalation in undocumented entry also means that the Agreement will not only fail in its putative goal of enhancing security, it may actually prove inimical to Canada's national security. When people initiate refugee claims at a port of entry, a process of record keeping begins; for example, claimants must keep the Immigration and Refugee Board as well as Citizenship

186. *Id.* at 228.

187. The survey of Canada in the 2004 Trafficking in Persons Report does not discuss the potential impact of the Safe Third Country Agreement on trafficking. However, I have brought this issue to the attention of U.S. diplomats in Canada who have, in the past, contacted me as a source of information about trafficking in Canada.

and Immigration Canada apprised of their address in Canada in order to attend their hearings. While it is true that refugee claimants may declare themselves at the port-of-entry and then abandon their claims in favor of going underground, most refugee claimants want their claims adjudicated and prefer legal status. Most claimants do appear for their hearings, despite the risk of rejection, and they remain in contact subsequently in order to complete the legal process.¹⁸⁸

The incentive to engage with the state does not exist where individuals enter clandestinely. Visibility is precisely what undocumented entrants seek to avoid. For migrants without status, the costs and benefits of living underground are at least known, unlike the risks of revealing oneself to authorities.

Surely it is a greater risk to security to have a population of undocumented migrants living underground than a population of official refugee claimants whose presence and whereabouts can be determined and tracked. Indeed, this was precisely the argument deployed by President George W. Bush in defense of his proposal to regularize the status of millions of undocumented migrant workers in the United States: "Our homeland will be more secure when we can better account for those who enter our country, instead of the current situation in which millions of people are unknown, unknown to the law."¹⁸⁹ Even if one accepts that security provides a justification for a safe third country agreement, this particular Agreement will at best have no effect on national security, and at worst, undermine it. The Agreement's impact on the security of refugees is less uncertain.

188. Exceptions exist, of course, and a certain percentage of refugee claimants "abandon" their claims by failing to appear for their hearings. For example, when the Fujian migrants appeared in 1999, the initial group who made refugee claims absconded, and it was widely suspected that they left for the United States, where their smugglers had arranged menial jobs whereby the migrants could repay their debt. Subsequent claimants were detained pending their hearings, subject to the special arrangements for minors as described above. See Rod Mickleburgh, *Canada Deports Chinese Migrants En Masse: 90 Boat People Depart Under Heavy Security*, *Globe and Mail*, May 11, 2000, at A1.

189. Ricardo Alonso-Zaldivar, *Catch-22 Seen in Immigration Plan*, *L.A. Times*, Jan. 9, 2004, at A14.

III. CONCLUSION

The Canada-U.S. Safe Third Country Agreement went into force on December 29, 2004. A definitive analysis of its impact on asylum-seekers would be premature. The impact on Canadian and U.S. refugee advocates is easier to observe, and a coalition has already formed to challenge the Agreement under sections 7 and 15 of the Canadian Charter of Rights and Freedoms ("Charter").¹⁹⁰ The relevant provisions state as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹⁹¹

Canadian jurisprudence has already established that "everyone" under section 7 "includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law."¹⁹² Although not entirely free from ambiguity, it seems very likely that physical presence in Canada extends to the port of entry,¹⁹³ and that the scope of "every

190. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 7, 15.

191. *Id.* §§ 1, 7, 15.

192. *Singh v. M.E.I.*, [1985] 1 S.C.R. 177, 202 (holding that a refugee claimant's section 7 right to security of person was violated by the denial of an oral hearing before a decision-maker).

193. See *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 (assuming without deciding that section 7 applies, and that a refugee claimant has no right to counsel for routine questioning at the port of entry).

individual” under section 15 is the same as “everyone” under section 7.

Although the structure of the section 7 argument will differ from that of the equality argument under section 15, the core of the Charter challenge will likely consist of several propositions. First, the United States asylum system violates international legal standards (procedural and substantive) to which the United States and Canada are bound by virtue of being party to the 1951 Refugee Convention. The United States violates asylum seekers’ rights through the treatment it metes out to them in the United States (e.g., arbitrary and discriminatory detention, criminal prosecution for undocumented entry, etc.), and by exposing them to *refoulement* (e.g., denying asylum to women fleeing domestic violence, application of the one year asylum bar, etc.). By diverting asylum seekers into a system that violates their fundamental rights, Canada itself violates refugee claimants’ right to security of the person under section 7 in a manner that does not accord with fundamental justice. Analogous Supreme Court of Canada jurisprudence has established that Canada violates the section 7 rights of citizens and non-citizens alike by extraditing them to face capital punishment, or by deporting them to face a substantial risk of torture.¹⁹⁴ To the extent that the Agreement is premised on the parity of the U.S. and Canadian asylum systems, and in particular their respective compliance with international law, the equality rights of asylum seekers are violated by coercively deflecting them into a system that is not only substantively and procedurally unequal, but one that violates fundamental rights.

Under section 1 of the Charter, a rights violation may be justified as a reasonable limit in a free and democratic society. Part of the section 1 analysis requires articulation of the objective of the law in question. The Safe Third Country Agreement is motivated by one objective: to reduce the number of asylum seekers entering Canada. Passively encouraging the public to view it as an anti-terrorism measure cynically exploits post-9/11 suspicion and xenophobia on both sides of the border, and cannot withstand close scrutiny. As it happens, Canada has witnessed a decline in asylum seekers since 2001, a trend that coincides with a global reduction in the number of refugees. Commentators and government

194. See *supra* notes 103–105 and accompanying text.

spokespeople attribute the overall downward trend since 2001 to the post-9/11 intensification of the various interdiction and deterrence mechanisms for preventing asylum seekers from reaching Canada.¹⁹⁵

Canada and the United States share a 5,000 mile non-militarized border. It bespeaks a curious faith in the instruments of state power to assume that turning away determined and/or desperate migrants from one of the tiny number of border posts sprinkled along that frontier will permanently dissuade them. Even if both states poured billions of dollars into building fences, erecting floodlights, and policing the border, the sheer geographic immensity of the undertaking defies achievement and common sense; money that could be spent on intelligence gathering, refugee determination, legal representation, and other costs will be diverted into a futile undertaking.

Will the Canada-U.S. Safe Third Country Agreement reduce the number of asylum seekers in Canada? Perhaps. Will it increase the number of non-status migrants in Canada? Probably. Will it radically change the number of refugees in Canada? Probably not. They will simply be known by another name: illegals.

195. See Friscolanti, *supra* note 168.