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Insecure Refugees: The Narrowing of Asylum-Seeker Rights to Freedom of Movement and Claims Determination Post-9/11 in Canada

Constance MacIntosh

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Abstract

This chapter has a modest goal: to track some legislative changes since 9/11 which impact on two rights of asylum-seekers where those changes are linked to or justified by security concerns. These are the rights of asylum-seekers to have their claim determined, and to not be detained. This article identifies how legislation restricting these key rights of asylum-seekers has largely been promoted as necessary for Canada to be able to protect its public from criminality and security threats. The article thus queries whether measures, especially those introduced under Bill C-11, The Balanced Refugee Reform Act[1] *and those proposed under Bill C-4,* Preventing Human Smugglers from Abusing Canada's Immigration System Act,[2] *actually enable greater security. It concludes that some of the legislative changes have no clear connection with enhancing security, and may result in incentives for asylum-seekers to avoid making their presence known to officials, thus creating new security concerns. The paper concludes by finding that some of the proposed legislative measures regarding detention will likely not withstand a* Charter *challenge.*

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1 Canada, Bill C-11, *An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act*, 3rd Sess, 40th Parl, 2010–2011 (assented to 29 June 2010) [Bill C-11]. The provisions of Bill C-11 have been incorporated into the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], although they come into force in a staggered fashion.

2 Canada, Bill C-4, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, 1st Sess, 41st Parl, 2011 (first reading 16 June 2011, second reading 21 June 2011) [Bill C-4]. This instrument was tabled as Bill C-4 in 2011. However, it was originally tabled as Bill C-49 in 2010, and so some published commentary on this Bill refers to the original designation. At press time, the Bill is in Committee.

Framing the Issues

Seventeen days after 9/11, the United Nations Security Council (UNSC) adopted a resolution that flagged the fact that persons who make refugee claims could be terrorists. The resolution called on states to take measures to ensure that refugee status is not granted to a person who has "planned, facilitated or participated in the commission of terrorist acts," and to ensure that refugee status is "not abused" by those involved in terrorist activities.[3] Given that the *Refugee Convention* excludes from protection those who have committed crimes against peace or humanity, as well as acts that are "contrary to the purposes and principles of the United Nations,"[4] or for whom there are "reasonable grounds for regarding as a danger" to the host state's security,[5] this resolution was substantively redundant. It was also quite pointed.

Read modestly, the UNSC resolution was a call to states to ensure they were respecting their existing obligations. That is, if terrorists were being granted refugee status or otherwise being shielded through the refugee system, then states were not properly administering the *Refugee Convention* and needed to revisit their protocols to ensure that those involved in terrorism were identified and excluded. Given the context and timing, the resolution flags the need for states to be alive to the possibility that the asylum system can be a potential route for terrorists.

The UNSC resolution resonated in many ways with concerns that were identified in the United States about the adequacy of front-end screening processes. However, the American assumptions about risky persons went beyond asylum-seekers, and they also assigned blame. Many declared that the 9/11 terrorist attacks were made possible by Canada practicing weak border controls and being naïve about risk. This perception may have been fueled by the then-recent story of Ahmed Ressam. Mr. Ressam, an Algerian citizen, tried to enter the United States from Canada in December of 1999 with explosives in the trunk of his car. His alleged target was the Los Angeles airport. Mr. Ressam had previously made an asylum claim in Canada, and was found not to be a refugee. However, his deportation was stayed. The reasons for the stay

3 *UN Security Council Resolution* SC Res 1373 (2001) Adopted by the Security Council at its 4385th meeting, on 28 September 2001, UN Doc S/RES/1373, (2001) at paras 3(f) & (g). Available online at <www.fatf-gafi.org/dataoecd/32/12/34254910.pdf>

4 *Convention Relating to the Status of Refugees (1951),* 22 April 1954, 189 UNTS 150, arts 1F(a)-(c), Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 4 June 1969) [*Refugee Convention*].

5 *Ibid*, art 33(2).

are not entirely clear.[6] There are indications that the stay was due to a decision to suspend deportations to Algeria, and because CSIS wanted to keep Mr. Ressam under surveillance. Canadian refugee decision-makers had not been duped, nor was Mr. Ressam dodging deportation through technical appeals or living underground. His presence in Canada reflected the exercise of high-order discretionary political decision-making. The threat he caused to the United States appears to reflect failures in CSIS surveillance. However, by 2001 his story—or parts of it—had nonetheless been "repeatedly cited as illustrative of the failings of Canadian refugee policy."[7] The singular fact that Mr. Ressam had once claimed refugee status in Canada displaced all other elements of the story in popular and political American imagination.

In the weeks following 9/11, the terrorists were consistently described as having gained access to the United States via Canada: that is, they were able to easily enter Canada in some fashion, and then take advantage of our lightly controlled shared border.[8] For example, on September 13th, a *Boston Herald* article indicated federal investigators believed "the terrorist suspects may have traveled … by boat" from Canada, and a September 14th article in the *Washington Post* stated that two of the terrorists were known to have "crossed the border from Canada" into Maine, and that others may have entered through Maine as well.[9] More inflammatory conclusions were published in the *New York Post*, which stated that "terrorists bent on wreaking havoc in the United States" came through Canada because it is "the path of least resistance."[10] One of the more colourful characterizations of Canada's border practices as naïve and insecure was offered by a former Senator for Colorado, who asserted shortly after 9/11 that "Osama bin Laden … could land in Ontario, claim he is Osama the tent maker … and walk unfettered probably into the United States."[11] Although the allegation that Canada's border practices were the weak link used by the 9/11 terrorists was discredited,[12]

6 For more details on this story see Audrey Macklin, "Borderline Security" in Patrick Macklem, Ronald J Daniels & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 388–89 [Macklin, "Borderline Security"].

7 *Ibid* at 388.

8 See e.g. *ibid*; Howard Adelman, "Refugees and Border Security Post-September 11" (2002) 20:4 Refuge 5 at 6.

9 Cited in Doug Struck, "Canada Fights Myth it was 9/11 Conduit," *The Washington Post* (9 April 2005) A20.

10 *Ibid.*

11 Cited in Alexander Moens & Nachum Gabler, *What Congress Thinks of Canada* (Vancouver: Fraser Institute, 2011) at 6.

12 See e.g. US, The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, (2004), ch 7. Here, the report discusses the routes by which the terrorists lawfully entered the United States.

the sentiments which it facilitated and legitimated have persisted over the past decade, both in the public and the political imagination.[13]

It is within this context, where inflammatory claims repeatedly resurface, despite being empirically discredited, that this article considers how state security concerns are intertwined with how Canada recognizes two interrelated rights held by refugees over the last decade. The first right is to have one's claim adjudicated. This right only arises if a state predicates its recognition of the full sweep of rights under the *Refugee Convention* on a formal determination of status (which is a common practice in northern and western states).[14] The right is supported by several sources, including Article 14 of the 1948 *Universal Declaration of Human Rights*, which recognizes the right "to seek and enjoy" asylum from persecution in other states. This right "can only be exercised if the asylum-seeker has the opportunity to have his or her claim heard by an authority competent to do so."[15] The right also arises because a person becomes a refugee when they satisfy the definition of refugee in the *Refugee Convention*.[16] That is, a state determination that a person is a refugee is a declaratory act, not a constitutive one.[17] Given that the fundamental right of a refugee is not to be returned to persecution, the only manner in which a state can comply with their core obligation is to presume all claimants to be refugees, or make a status determination.[18] Thus, for states that do not make the presumption, there is an implied obligation to verify whether a person who claims to be a refugee does indeed have that status.[19]

13 Adelman, *supra* note 8 at 6.

14 Governments may assume that those who claim refugee status are refugees, and only assess the particulars of a claim if there are exclusion issues. Indeed, "most less developed states—which host the majority of the world's refugees—do not operate formal refugee status assessment procedures." See James Hathaway, *The Rights of Refugees in International Law* (Cambridge: Cambridge University Press, 2005) at 181.

15 United Nations High Commissioner for Refugees, *Comments on Bill C-31* (Ottawa: UNHCR, 2000) at para 37.

16 The core elements of the definition in the *Refugee Convention*, *supra* note 4, are set out in Article 1. It defines refugees as persons who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

17 Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983) at 20.

18 See e.g. Reinhard Marx "Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims" (1995) 7:3 Int J of Refugee Law 383. Marx writes at 392 that "[t]he State where an individual seeks protection has a responsibility to identify its obligation by scrutinizing who is in need of protection." The prohibition against refoulement is in Article 33(1) of the *Refugee Convention*, *supra* note 4.

19 This obligation has been noted in a number of cases. See e.g. *Saas v Secretary of State for the Home*

The second right under consideration is freedom of movement. One of its sources is the *Refugee Convention*. Article 26 of the *Refugee Convention* provides that states "shall accord refugees lawfully in its territory the right to … move freely within its territory subject to any restrictions applicable to aliens generally." With regard to persons who enter a state without authorization, Article 31 provides that states are not to impose "penalties" on refugees "on account of their illegal entry or presence … coming directly from a territory" where they faced persecution "provided they present themselves without delay" to authorities and "show good cause for their illegal entry or presence."[20]

The term "penalty" is interpreted generously to include not being subjected to prosecution, fines or imprisonment due to the manner in which the refugee entered a state, regardless of whether their mode of entry violated national laws.[21] However, the *Refugee Convention* grants states discretion to impose some limitations, stating that countries "shall not apply to the movements of such refugees restrictions other than those which are necessary."[22] Such restrictions are only permissible until the refugee's status is "regularized," indicating that the Article 31 right, to only experience "necessary" restrictions on movement, accrue prior to a formal determination of their claim.

This article does not engage the debate on the exact scope of these rights.[23] Instead, it illustrates how Canadian legislation has narrowed its approach to these rights over the past ten or so years. It also considers how these changes

Department, [2001] EWCA Civ 2008 (Eng. CA, Dec 19, 2001). The Court found at para 12 that "[t]here is no doubt that this country is under an obligation under international law to enable those who are in truth refugees to exercise their Convention rights… Although Convention rights accrue to a refugee by virtue of his being a refugee, unless a refugee claimant can have access to a decision-maker who can determine whether or not he is a refugee, his access to Convention rights is impeded."

20 *Refugee Convention, supra* note 4, art 31(1).

21 Hathaway, *supra* note 14 at 411–12; Goodwin-Gill, *supra* note 17 at 158.

22 *Refugee Convention*, *supra* note 4, art 31(2).

23 Their scope is controversial. The UNHCR and many scholars and refugee advocates have expressed concerns that these rights are interpreted too narrowly, or are violated, by some states who claim to be compliant. These concerns relate to practices such as routine extra-territorial detention and refusing to adjudicate the claims of asylum-seekers whom a state intercepts outside of their geographic territory (e.g. in international waters). See e.g. Andrew Brouwer & Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (2003) 21:4 Refuge 6; Janet Dench, "Controlling the Borders: C-31 and Interdiction" 19:4 Refuge 34. For a recent example of a government action that was found to violate the *Refugee Convention*, *supra* note 4, see "Australia court rules out refugee 'swap' with Malaysia," *BBC News* (31 August 2011) online: BBC News <http://www.bbc.co.uk>. For the leading text on the *Refugee Convention*, *supra* note 4, see Hathaway, *supra* note 14.

are often entailed within and therefore justified by a discourse that increasingly links asylum-seekers to concerns about security and criminality.

Due to length limitations, this article primarily engages just two key legislative moments. The first is when Canada enacted the *Immigration and Refugee Protection Act* [*IRPA*][24] in 2001 and some amendments to *IRPA* which were introduced shortly after 9/11. The second moment is when Canada introduced extensive amendments to *IRPA*'s refugee provisions in 2010 through Bill C-11, *The Balanced Refugee Reform Act*[25] and Bill C-4, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*.[26]

Canada and the Right to Freedom of Movement

It was shortly after 9/11 that Canada enacted *IRPA,* which brought in a new legal regime for immigration and refugee matters.. However, *IRPA* was not drafted in response to 9/11.[27] A key event which informed discussions about refugee claimants occurred in 1999, when four boats carrying 599 Chinese nationals were intercepted off the coast of British Columbia. These individuals had paid, or were to pay, for being smuggled into Canada for the purpose of then transiting to the United States. After being apprehended and so thwarted from being able to attempt to work underground in America, the individuals all claimed refugee protection. Given the circumstances, it is not surprising that the claimants were seen as having economic motivations, as opposed to being people fleeing persecution.[28] The House of Commons Standing Committee on Citizenship and Immigration was subsequently asked to consider "the refugee status determination system and the security of Canada's borders"[29] in relation to this event. They tabled a report, "Refugee Protection and Border Security: Striking a Balance"[30] in early 2001. The title flags tensions between security and protection. However, the border security concerns discussed in this report were not centrally about terrorists or persons who

24 *IRPA*, *supra* note 1.

25 Bill C-11, *supra* note 1.

26 Bill C-4, *supra* note 2.

27 *IRPA, supra* note 1. The first reading took place prior to 9/11. The second reading post-dated it, on September 27th, 2001. The third reading in the House of Commons took place on June 13th, 2001.

28 Regardless of their motivations, several claimants were found to be refugees; a fact which highlights the complex matrix of circumstances behind decisions to move irregularly. See House of Commons, Standing Committee on Citizenship and Immigration, *Refugee Protection and Border Security: Striking a Balance,* 36th Parl, 2nd Sess, No 2 (22 March 2000) [Standing Committee Report].

29 *Ibid.*

30 *Ibid.*

pose major security threats using the refugee system as a conduit. While the Ressam story from 1999 may have raised these concerns with our American neighbours, Canada's security concerns took a different focus.

The report highlights how the refugee system could be exploited by those "who make unfounded claims … as a way of staying in the country" so as to work, and/or to "buy time until they can enter the United States." The prioritized threats from asylum-seekers which the border had to be secured against were associated with the economic impacts of people working illegally, of opportunistically drawing on the public purse, or of feathering the pockets of smugglers. Although these matters raise issues of criminal and socially undesirable behaviour, a causal connection to the safety or security of Canadian citizens is not apparent.

Despite the context in which they were writing, the 2001 Committee was opposed to casting suspicion on the merits of the claim of, or the character of, individuals claiming asylum merely because they entered Canada irregularly or with the use of smugglers. The 2001 Committee wrote that "[e]ven if refugee claimants' manner of arrival is irregular, we recognize that the flight to freedom is often fraught with peril, speed and the necessity to use whatever means are available to reach safety," and that persons with "genuine" claims may employ smugglers and use fraudulent documents.[31]

Nevertheless, the 2001 Committee did identify a need to restrict the movement of some asylum claimants. It recommended that persons who lack identity documents and refuse to provide information on how they entered Canada be detained, because this behaviour raised security concerns that require further inquiries. They also concluded that persons who were trafficked into Canada should be detained as they would otherwise be vulnerable to their traffickers and because "[f]or the traffickers, detaining their human cargo removes the financial underpinning of the whole enterprise." The report cautions that special facilities must be made available to hold all detained individuals, because "[m]igrants must not be presumed to be criminals or security risks." So on the one hand, the fact that an asylum-seeker refuses to co-operate with Canadian officials, or had been trafficked, were explicitly rejected as in and of themselves attracting a presumption of criminality or security issues. On the other hand, the 2001 Committee was sensitive to the broader picture and to considering the sorts of instances where, on the facts, it was reasonable to conclude that detention may be appropriate.

31 See "The Committee Study" in Standing Committee Report, *supra* note 28.

The 2001 Committee's recommendations largely affirmed the then existing legislation and its approach to freedom of movement. Under it asylum-seekers could be detained if their identity could not be established when they entered Canada,[32] or if there were reasonable grounds to believe that they were involved in criminality, were a security threat, etc.[33] In such instances, the legislation provided for immediate detention, but with a right to have the decision reviewed at least once every seven days.[34] In all cases, detention was linked to an individual justification, and not drawn upon as a general or presumptive practice.

Drawing in part on the 2001 Committee's recommendations, but also from other sources, *IRPA* brought several changes to the detention regime, changes which Anna Pratt observes are consistent with the trends that had been developing in Canada through the previous decades.[35] One change was that the power to detain due to identity concerns became exercisable at any time (not just at the point of entry). Commenting on these sorts of practices, Howard Adelman characterized such shifts as meaning that in some ways the "border" becomes everywhere for non-citizens.[36] Indeed, the expansion of practices that were historically only exercised at actual territorial boundaries has become a common feature of Northern states.

Although the general expansion of these practices in-land may cause greater insecurity for some non-citizens,[37] this specific expansion seems objectively reasonable. That is, if a person's identity is at issue, it is reasonable to conclude that public safety may require detention pending further inquiries, and so to extend this power in-land appears justifiable. More importantly, a robust detention review process remained in place, with the first review required to take place within forty-eight hours, the next within seven days, and subsequent reviews once within every thirty days.[38] A second relevant change was that decisions about whether to detain asylum claimants would now be informed by their mode of arrival. In particular, when assessing if detention

32 *Immigration Act*, 1976 SC 1976–77, c 52, s 103.1(1)(a) [*Immigration Act*].

33 *Ibid,* ss 103, 103.1(1)(b).

34 *Ibid*, ss 103.1, 103(6), (7).

35 Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005).

36 Howard Adelman, "Canadian Borders and Immigration Post 9/11" (2002) 36:1 Int Migration Rev 15.

37 See e.g. Benjamin Muller, "Risking it all at the Biometric Border: Mobility, Limits, and the Persistence of Securitization" (2011) 16:1 Geopolitics 91. For a collection of scholarship on these issues from a variety of perspectives, see Elia Zureik & Mark Salter, eds, *Global Surveillance and Policing: Border, Security, Identity* (Portland, Oregon: Willan Publishing, 2005).

38 *IRPA*, *supra* note 1, s 57.

ought to be imposed due to a person being a flight risk, the deciding officer was directed to consider whether the person was "vulnerable to being influenced or coerced" by a smuggling or trafficking organization.[39] Detention in this instance was justified on the basis of the claimant's perceived vulnerability, not because they were cast as posing a security threat.

The question of whether detention ought to be imposed on asylum claimants in a broader range of circumstances, or for longer periods of time, was discussed by a number of government committees. Responding to a 1998 legislative review that recommended augmenting detention practices, the 2001 Committee found no merit in modifying how Canada used detention in relation to asylum-seekers. They rejected using detention as a deterrent practice, or to punish those who violated administrative conditions.[40] On the one hand, given the substantial changes that *IRPA* did bring about, it can only be assumed that political leaders agreed there was no perceived general deficit in Canada's approach to detention when it came specifically to refugees. Importantly, the legislative changes were largely about how immigration officials were to exercise the discretion to detain.[41] On the other hand, Canada did enact the *Anti-Terrorism Act*[42] as a direct response to 9/11, and it does allow for indefinite detention. Although criticized by Kent Roach as overbroad and disproportionate,[43] the legislation cannot be criticized for isolating asylum-seekers as a particular source of terrorist risk, as the legislation contemplated that anyone in Canada could be detained.[44] Similarly, while amendments to

39 *Immigration and Refugee Protection Regulations,* SOR/2002–227, s 245(f) [*IRPR*].

40 Senate, Report of the Standing Committee on Citizenship and Immigration, *Immigration Detention and Removal* (June 1998) (Chair: Stan Dromiskey), online: Parliament of Canada http://cmte.parl.gc.ca/Content/HOC/committee/361/citi/reports/rp1031513/citirp01/09-rec-e.htm (see text preceding recommendation 13).

41 Although outside the purview of this article, these discretionary powers have not been exercised consistently, and so, presumably not fairly. The Canada Border Services Agency's report, *CBSA Detentions and Removals Program—Evaluation Study* (November 2010), online: Canada Border Services Agency http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html states at 18–19 that where an admissibility hearing is required, the norm for the Atlantic, Prairie and Pacific regions is to release the individual on conditions, while the norm in Ontario is to detain the individual until the admissibility hearing—unless the Ontario detention facilities were close to capacity, in which case individuals would be released. Thus, "foreign nationals receive different treatment, under similar conditions, depending on where they arrive" (3).

42 *Anti-terrorism Act*, SC 2001, c 41.

43 Kent Roach, "The New Terrorism Offenses and the Criminal Law," in *The Security of Freedom, supra* note 6 at 168. This volume provides a variety of perspectives on the legislation.

44 Canada moved quickly after 9/11 to enact the *Anti-terrorism Act, supra* note 42, which became law in late November of 2001. This statute permits the arrest and detention of persons whom a peace officer believes may intend to engage in terrorist activity. This legislative move did not target non-citizens or asylum-seekers for different treatment than citizens. Rather it created a legal framework where *all* persons in Canada could be detained without warrant or a trial. As Michelle Lowry notes,

the security certificate process and modifications to definitions of criminality could result in asylum claimants being detained who would not have been detained under the previous legislation, these provisions affected the liberty rights of all non-citizens.[45] These changes did not target the population of asylum-seekers as a source of unique concern, and it is with such targeted initiatives that this paper is concerned.

Legislation that specifically concerned itself with refugees and freedom of movement remained substantively unchanged after 9/11 until 2010. It was at this point that Canada introduced Bill C-4.[46] This legislation will impose penalties on asylum claimants regardless of whether or not they are confirmed as refugees. Many of these penalties involve mandatory restrictions on freedom of movement.

In particular, if a there is an "irregular arrival … of a group of persons," and either identity or admissibility issues cannot be addressed "in a timely manner," or if there are grounds to believe that the arrival involves smugglers who were working for profit or who have an association with a terrorist or criminal group, then the Minister can order that those individuals be labeled a "designated foreign national" ["DFN"], a status that has far-reaching consequences.[47]

With regard to the right of freedom of movement, all DFNs "must" be detained[48] for a year or until their claim has been determined.[49] Release from detention will otherwise only be granted if in the Minister's opinion "exceptional circumstances exist that warrant the release."[50] This contrasts strikingly

"domestic terrorism has proven to be as much a threat to nations as international terrorism …[and] terrorists do not need access to Western nations in order to enact terrorism against those nations: they can simply target embassies or military bases abroad": Michelle Lowry, "Creating Human Insecurity: The National Security Focus in Canada's Immigration System" 21:1 Refuge 28 at 32.

45 Many have written on the intensified focus on criminality and security concerns that generally permeate the *IRPA*, *supra* note 1, and some have considered how refugee claimants may be caught in the general sweep, or disproportionately affected. See e.g. Catherine Dauvergne, "Evaluating Canada's New Immigration and Refugee Protection Act in its Global Context" (2003) 41 Alta. L. Rev. 725; John A. Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation" (2002) 27 Queen's LJ 749; Francois Crepeau, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 Choices: IRPP 1 at 21–25; Accord Howard Adelman, "Canadian Borders and Immigration Post 9/11" (2002) 36:1 Int Migration Rev 15; Lowry, *supra* note 44.

46 Bill C-4, *supra* note 2.

47 *Ibid* s 5. This provision is proposed to be incorporated into *IRPA, supra note 1,* as s.20.1.

48 *Ibid* s 10(2). This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 55(3.1).

49 *Ibid* ss 11, 12. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 56(2) and s 57.1.

50 *Ibid* s 14. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 58.1.

with Justice Rothstein's characterization of immigration detention in 1994 as an "extraordinary" power, a characterization that reflected the severity of being detained without being charged with or convicted of a criminal offense. Now it would seem that *not* being detained is the extraordinary event, a situation that (as discussed below) is unlikely to pass *Charter* scrutiny.

If a DFN is recognized as a refugee, restrictions on freedom of movement continue. In particular, the individual will not be permitted to apply for a temporary or permanent resident permit for five years after their claim is determined.[51] According to *IRPA*, only persons with these permits may obtain travel documents.[52] Without travel documents, refugees recognized by Canada will not have the ability to lawfully board a plane back to Canada if they leave (and may also be unable to enter other states lawfully). This measure directly contradicts the *Refugee Convention*. Article 28 requires states to "issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require." Canada seeks to avoid violating this obligation by indicating that, for the purposes of Article 28, recognized refugees will only be "lawfully staying" in Canada if they have permanent residency or a temporary resident permit.[53] This approach is at odds with international law:

> a state's general right to define lawful presence is constrained by the impermissibility of deeming presence to be unlawful in circumstances when the *Refugee Convention* … deem[s] presence to be lawful.[54]

The *Refugee Convention* deems presence to be lawful once claimants present themselves to authorities to have their claim determined.[55] As observed by

51 *Ibid* s 7. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 24(5).

52 *IRPA*, *supra* note 1, s 31.

53 Bill C-4, *supra* note 2, s 9. This provision is proposed to be incorporated into *IRPA, supra* note 1, as s 31.1.

54 Hathaway, *supra* note 14 at 177.

55 *Ibid* at 173–86. The term "lawfully in" also corresponds with Article 13 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), which also recognizes rights to freedom of movement. The UN Human Rights Committee in *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, at para 4, determined that: "The question of whether an alien is 'lawfully' in the territory … is a matter of domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations." For a detailed discussion of the term "lawfully in" see Alice Edwards, "Back to Basics: The Right to Liberty and Security of the Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants" (2011) PPLA Review No 1 (UN High Commissioner for Refugees, Division of International Protection).

leading refugee law scholar James Hathaway, it would be an absurd proposition to conclude otherwise, as that would permit signatory states to not act on their key obligations.[56] Alice Edward's close study of the phrase "lawfully present" in international instruments affirms Hathway's conclusions.[57] To deem a person who has not only presented themself to authorities, but has also actually been determined to be a refugee, as nonetheless lacking lawful presence contradicts international law. Although speech acts have power,[58] Canada cannot render itself compliant with international law on freedom of movement by defining recognized refugees—known rights holders—into a state of unlawfulness. This is, however, what the legislation purports to do.

Recall how the bill operates: based on its language, if as few as two refugees arrive in Canada with uncertain identities and Canada's staffing levels make it administratively inconvenient to address those identity issues in a timely fashion, then those two refugees will be subject to automatic detention for up to a year and five years of restrictions on travel. Similar consequences will follow if a group of two refugees arrives in Canada and the asylum-seekers have paid a smuggler to help them or to provide them with false travel documents. These restrictions on the right of movement are clearly intended to be a punishment based on mode of arrival, so as to discourage persons who intend to claim asylum from engaging the services of smugglers. This is the case despite Canada's knowledge that refugees' flight may involve the "necessity to use whatever means are available to reach safety," including the use of smugglers and fraudulent documents.[59] It is also despite the fact that there is no empirical evidence that the threat of detention discourages people from seeking asylum,[60] and empirical evidence that over 90% of asylum applicants as well as persons *awaiting deportation* who are released into the community will report for hearings and follow other official requirements.[61]

Given that these measures can be expected to impose considerable hardship on persons fleeing persecution, and may also capture persons who arrive not with smugglers but perhaps just in a family group at an inconvenient time,

56 Hathaway, *supra* note 14, ch 3.1.2; Alice Edwards, "Human Rights" (2005) 17 Int'l J Refugee L 297.

57 Edwards, *supra* note 56 at 14.

58 For a discussion of "speech acts" see John Austin, *How to Do Things with Words,* 2nd ed (Cambridge: Harvard University Press, 2005); Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

59 Standing Committee Report, *supra* note 28.

60 Edwards, *supra* note 56 at iii.

61 *Ibid* at 2.

and will be very expensive,[62] how are the new measures justified? The analysis in this paper demonstrates that these measures cannot be divorced from pervasive security concerns, or the purported need to address perceptions that Canada may not control its borders. Relevant government statements read as though American accusations over the last decade have merit.

The Legislative Summary for the Bill positions it as a response to the "generally believed" position that "the law regarding the spontaneous arrival of refugee claimants must be stringent enough to counteract the perception that Canada does not have control of its borders."[63] Whose perception is being cited here and why does their perception matter? Such perceptions could be attributed to the American government. In 2009, the *US Homeland Security Secretary, Janet Napolitano, claimed that* "to the extent that terrorists have come into our country or suspected or known terrorists have entered our country across a border, it's been across the Canadian border." After making this statement, Napolitano clarified that she was indeed referring to the 9/11 terrorists, although "[n]ot just those but others as well."[64]

The context for Napolitano's statements was that of presenting arguments to justify the enactment of more stringent border control laws on the American side of our shared border, so as to counter the alleged weaknesses of Canada's border practices. She said:

> borders are important … for crime purposes and, in the isolated case, also for terrorism. And because, in part, our two countries have different standards for visas and who is allowed in our countries, there really are some things that the border helps to identify.

These sentiments were affirmed more recently by the American Commissioner for Customs and Border Protection. His testimony to Senate in May of 2011 reflected concerns that "potential terrorists were exploiting Canadian loopholes to gain entry to the United States."[65] Are these the negative percep-

62 *Ibid.* Edwards refers to a Toronto study at 85, where the cost of immigration detention was estimated at $179/day, while the cost of detention alternatives such as bail and bond was $10–12/day.

63 Daphne Harrold & Danielle Lussier, "Legislative Summary: Bill C-49: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act," Legislative Comment on Pub L No 40–3-C49-E (2010) (Ottawa: Library of Parliament, 2010) at 3.

64 "Interview with U.S. Homeland Security Secretary Janet Napolitano," *CBC News* (19 October 2010) online: CBC News <http://www.cbc.ca/news/canada/story/2009/04/20/f-transcript-napolitano-macdonald-interview.html>.

65 Colin Freeze, "US Border Chief says terror threat greater from Canada than Mexico," *The Globe and Mail* (18 May 2011).

tions—some false, some presented without empirical evidence—that Canada seeks to counter? Regardless, countering "perceptions" is a spurious justification for violating human rights and will not pass the test of proportionality that is required when asylum-seekers or refugees are detained.[66]

The Legislative Summary goes on to indicate that "large-scale arrivals" make it hard to assess whether individuals pose "risks to Canada on the basis of either criminality or national security."[67] The spectre of risk, and the assertion of a link between public security and these detention measures, is raised more explicitly in Public Safety Canada's official statements. In a 2011 news release on the legislation, they state that "Human smuggling undermines Canada's security." The news release then presents a list of how "our government is ensuring the safety and security of Canadians." The list describes "establishing the mandatory detention of participants [e.g., smuggled persons] for up to one year," preventing smuggled individuals who are recognized as refugees "from applying for permanent resident status for a period of five years," and "preventing individuals from sponsoring family members for five years."[68] Advancing the goals of promoting security and safety is a key government mandate, and smuggling operations may raise considerable security concerns, especially if used by terrorists or to enable organized crime networks. It is not clear, however, that the legislative measures actually promote security and safety. A one-year term of mandatory detention which is ordered due to administrative convenience has no connection to security or safety. Detention only serves this role when security concerns are, in fact, present. Detention which persists after identity and security concerns are addressed is also disconnected from promoting safety or security. Other measures, like preventing DFN from family reunification, do not have any connection to enabling the safety of Canadians, as family members are already only permitted to join recognized refugees if they pass security and criminality screening.[69] It would

66 As Alice Edwards, *supra* note 56 at 3, writes, "[the i]nternational legal principles of reasonableness, proportionality and necessity require that states justify their use of detention in each case by showing that there were not less intrusive means of achieving the same objective. The principle of proportionality must also be read as requiring detention to be a measure of last resort."

67 Harrold & Lussier, *supra* note 63 at 3.

68 Public Safety Canada, News Release, "Preventing the Abuse of Canada's Immigration System by Human Smugglers" (19 January 2011) online: Public Safety Canada <http://www.publicsafety.gc.ca/media/nr/2011/nr20110119–2-eng.aspx>.

69 This connection, between mandatory long-term detention and security needs, is also made in a speech delivered by the Honourable Vic Toews, Minister of Public Safety, who stated that "Our government is … taking action to ensure the safety and security of our streets and communities by establishing the mandatory detention of participants in human smuggling events for up to one year to allow for the determination of the identity of these individuals, their inadmissibility and their illegal activity." Public Safety Canada, Media Release, "Remarks by the Honourable Vic

appear that Canada hopes that by vigorously punishing those who use smugglers, it will dry up the market for smuggling into Canada. This strategy may, however, provide considerable incentives for asylum-seekers to attempt to live an undocumented life in Canada, and to provide a disincentive for making their presence known to state authorities.

Just as the Safe Third Country Agreement, discussed below, is considered to have resulted in more asylum-seekers entering Canada irregularly and therefore raising considerable security concerns, this measure could produce communities of people in Canada who seek to avoid detection; a formula that necessarily produces people who are vulnerable to exploitation by those who would turn them in. This potential outcome would intensify security and criminality risks, instead of lessening them.

In another news release about the legislation, Public Safety Canada provided a more fulsome description of the security concerns that it associates with unconfirmed identity:

> where identity is unconfirmed, authorities cannot identify potential security and criminal threats, including human smugglers and traffickers, terrorists, or individuals who have committed crimes against humanity. It is an unacceptable risk to release into Canadian communities individuals whose identities have not been determined and who could potentially be inadmissible on the grounds of criminality or national security.[70]

Persons with unconfirmed identities raise security concerns pending satisfactory identification and screening for safety concerns. As noted above, the existing legislation already permits detention on such grounds, which is obviously justified in the name of public safety. What the existing legislation does not permit, however, is detention as a form of punishment. It only permits detention where identity is *in fact* at issue, where the person *is* considered a flight risk, or if there *are* identified security or inadmissibility concerns. That is, the detention has an objective and individualized basis.[71] The proposed

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Toews, Minister of Public Safety: Human Smuggling and the Abuse of Canada's Refugee System" (22 October 2010) online: Public Safety Canada <http://www.publicsafety.gc.ca/media/sp/2010/sp20101021-eng.aspx>.

70 Public Safety Canada, News Release, "Protecting our Streets and Communities from Criminal and National Security Threats" (16 June 2011), online: Public Safety Canada <http://www.publicsafety.gc.ca/media/nr/2011/nr20110616–7-eng.aspx>.

71 Although, as Aiken has argued, even the existing provisions may be considered to be arbitrary and punitive, with "mere administrative convenience and suspicion … justify[ing] arbitrary and long term detention." See Sharryn Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14:2 RQDI 1 at para 46.

legislation substitutes claims of risk for reasoned argument: risk and security concerns simply do not continue *after* a person has been determined to not pose a threat.

These proposed legislative changes have provoked considerable criticism, as they clearly violate the right to freedom of movement recognized by Article 31(2) of the 1951 *Refugee Convention*,[72] which "denies governments the right to subject refugees to any detriment for reasons of … unauthorized entry or presence."[73] International law aside, this Bill's approach to detention will not withstand *Charter* scrutiny. It is inconsistent with *Sahin v Canada*[74] where Justice Rothstein characterized the power of detention under immigration legislation as "extraordinary,"[75] as it could be ordered without an individual having been convicted of a crime. As such, it necessarily has to be exercised in careful conformity with section 7 of the *Charter*, which recognizes the right of everyone "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."[76] It has been repeatedly affirmed by the Supreme Court that asylum claimants and other non-citizens in Canada possess *Charter* rights,[77] including the section 7 right to not be arbitrarily deprived of life, liberty or security of the person.[78] The test for determining whether a law is arbitrary involves proving that there is "not only a theoretical connection between the limit [on life, liberty and security] and the legislative goal, but a real connection on the facts."[79] It is hard to imagine how a one-year mandatory detention (which can be ordered on the basis that a "group" arrived and individual identity could not be addressed "in a timely manner") has a "connection on the facts" to depriving an individual of liberty after their identity is established and security concerns have been addressed.

72 See e.g. Amnesty International, News Release, "Anti-Smuggling Legislation Violates Refugee Rights—Media Release" (22 October 2010) online: Amnesty International <http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=5662&c=Resource+Centre+News>.

73 Hathaway, *supra* note 14 at 410–11.

74 *Sahin v Canada (Minister of Citizenship and Immigration)* (1994), 85 FTR 99, [1995] 1 FC 214.

75 *Ibid* at para 26.

76 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

77 See e.g. *Singh v Minister of Employment and Immigration,* [1985] 1 SCR 17, 17 DLR (4th) 422.

78 *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 SCR 350 at paras 90–94 [*Charkaoui*].

79 *Chaouilli v Quebec (Attorney General),* 2005 SCC 35, [2005] 1 SCR 791 at para 131.

Jurisprudence has also confirmed that non-citizens have the right to have detentions reviewed promptly.[80] When immigration detention is for an extended period, it will violate *Charter* rights if there is no "meaningful process of ongoing review that takes into account the context and circumstances of the individual case."[81] In the case of *Charkaoui v Canada (Citizenship and Immigration),* a mere three-month mandatory detention without meaningful review was found to violate the detainee's *Charter* rights. This was the case even though the detention was originally ordered on national security grounds.[82] The proposed legislation will thus fail on the supplemental issue of failing to provide for the required ongoing and meaningful review of whether the detention ought to be continued.

This narrowed approach to the right to freedom of movement is primarily justified through calls to ensure public security and safety. However, given that the grounds for being detained do not reflect whether security issues are still present, the disproportionality of the detention practices, and the bar against the detention being reviewed, the provisions are unlikely to pass *Charter* scrutiny.

The Right To Have One's Claim Determined

Whereas the erosion of the right to freedom of movement is tied to security concerns, the narrowing of the right to have one's claim determined has been framed as a security and criminality issue, with security concerns being dominant in 2001 and criminal or quasi-criminal concerns coming to the fore to justify changes in 2010.

The 2001 *IRPA* included numerous shifts that impacted on whether asylum-seekers would have their claim determined. Like its predecessor legislation, the *IRPA* includes terms which dictate when persons will be ineligible to have their claim determined. Several of these provisions refer to situations such as the person having already been recognized as a refugee, or having had a status claim denied.[83] The predecessor legislation also barred claim de-

80 *Charter*, *supra* note 76, ss 9, 10(c). The Supreme Court of Canada determined in *Charkaoui, supra* note 78 at paras 90–94, that the *Charter* rights of foreign nationals were violated under a legislative regime where they could be detained without trial if a security certificate was issued against them. The *Charter* violation arose, in part, because the detention decision was not to be reviewed for 120 days. One year of detention without a review to see if there is cause to detain would also seem to be indefensible.

81 *Charkaoui, supra* note 78 at para 107.

82 *Ibid.*

83 See e.g. the *Immigration Act, supra* note 32, s 46.01; *IRPA*, *supra* note 1, s 101.

termination if (i) the claimant had committed or been convicted of a serious crime *and* the Minister issued an opinion that the claimant was a danger to the public, or (ii) if the claimant was inadmissible due to security concerns, involvement with war crimes or crimes against humanity, etc. *and* the Minister issued an opinion that the claimant's entry was contrary to the public interest.[84] These restrictions are largely consistent with the *Refugee Convention*.[85] Under *IRPA*, the serious crime provision was modified. The danger opinion became required only if the crime took place outside of Canada. The other terms of exclusion, which result in the claim not being heard, require no such determination.[86] The decision to remove the need for an individualized assessment of actual risk to the community would seem to reflect a presumptive alignment between security and public interest concerns arising, and these identified grounds.

On its face, the right to have one's claim determined was not radically modified by the specific legislative changes in *IRPA* and *IRPR* as first enacted,[87] although as Lowry and others have noted the overall changes did create a heightened association between migrants, generally, and criminality.[88] More significant changes for refugees came through the Minister acting on statute-enabled discretionary powers. These include the power to impose visa requirements or sanctions on carriers who transport persons lacking proper documentation into Canada.[89]

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84 *Immigration Act*, *supra* note 32, s 46.01(e).

85 The *Refugee Convention*, *supra* note 4, identifies circumstances where the right of non-refoulement does not apply, or where the Convention does not apply. See e.g. arts 1(c)-1(f), 28, 32 and 33.

86 *IRPA*, *supra* note 1, s 101.

87 In practice, however, they have had a dramatic effect, as decision-makers are also immersed in the securitization discourse. The decisions on ineligibility from 1998 to 2008 indicate that judicial perceptions on what constitutes terrorism, a terrorist act, or a "serious non-political crime," have dramatically increased in scope and, indeed, today's "refugee claimants must be untainted by proximity to a terrorist organization or to its violent means." See Asha Kaushal & Catherine Dauvergne, "The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions" (2011) 23:1 Int'l J Refugee L 54 at 88. The authors observe that if the seminal refugee law case, *R v Ward* [1993] 2 SCR 689, 1 WLR 619 was heard today, the fact that Ward had joined a terrorist group would have resulted in his exclusion, despite his having never committed a terrorist act and having deserted due to his conscience while on his first assignment.

88 Michelle Lowry, "Creating Human Insecurity: The National Security Focus in Canada's Immigration System" (2002) 21:1 Refuge 28.

89 Whereas *IRPA*, *supra* note 1, s 11(2) and *IRPR*, *supra* note 39, ss 6 and 7(1) require all foreign nationals including visitors to obtain a visa prior to entering Canada. Section 7(2) of the *IRPR* sets out exceptions, which include being a national of a state designated under Division 5 of Part 9 of the regulations. The Minister has discretion to designate, or de-designate, a state. Canada imposes visa requirements on the nationals of refugee claimant source countries. The *IRPA* ss 148–50 sets out the obligations of carriers to not transport persons without proper documentations, and a framework for imposing penalties. Part 17 of the regulations, which the Minister has discretion

Another route by which the right to have one's claim determined was at least temporarily eroded was by Canada designating the United States as a "safe third country."[90] The predecessor legislation also permitted such designations, but had not been acted upon. Following 9/11, Canada and the United States negotiated an agreement that was then codified in the *Immigration and Refugee Protection Regulations* in 2004.[91] At its core, the agreement required that most asylum claimants who presented themselves at the shared Canadian/American land border be deflected back to have their claim adjudicated in the country through which they were transiting.[92] In its first few years, this agreement resulted in large numbers of persons who sought to enter Canada and have their claim determined here being turned back, and a smaller number of persons being deflected back from their attempt to enter the United States.[93] The impact for claims determination arises significantly from the fact that the United States will not hear a claim if the claimant has been in the United States for over a year.[94] In addition, Canada has tended to interpret the *Refugee Convention* more generously than has the United States, particularly when claims are based on gendered persecution,[95] and so individuals whose claims may have been recognized in Canada may instead have had their claims summarily dismissed in the United States.

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to amend, sets out specific cost penalties. For a detailed discussion of how measures are used to prevent refugee claimants from ever setting foot on Canadian soil, and others, see e.g. Francois Crepeau & Delphine Nakache, "Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection" (2006) 12:1 IRRP Choices 1.

90 *IRPA*, *supra* note 1, ss 5(1), 101(1)(e), and 102.

91 *IRPR, supra* note 39, s 159.1.

92 Under *IRPA*, *supra* note 1, s 101(1)(e), persons who enter Canada directly from a safe third county are ineligible to have their claim determined in Canada. The exceptions are set out in *IRPR*, *supra* note 39, ss 159.5 and 159.6.

93 Evidence adduced at a Federal Court hearing regarding the lawfulness of the agreement indicated that in its first year of operation, the number of claims made at the Canadian border fell from an average of 8,436/year to 4,000/year. See *Canadian Council for Refugees et al v Her Majesty the Queen*, 2007 FC 1262, [2008] 3 FCR 606 [*Canadian Council for Refugees*] (Factum of the Applicant at para 14), online: Canadian Council for Refugees <http://ccrweb.ca/STCA%20Factum.pdf>.

94 American practice is also to detail most asylum-seekers. The agreement is discussed in detail in Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2004–2005) 36 Colum HRL Rev 365 [Macklin, "Disappearing Refugees"]. Differences between Canadian and American practices are documented in *Canadian Council for Refugees*, *supra* note 93 at paras 144–240, rev'd on other grounds 2008 FCA 229, [2009] 3 FCR 136, leave to appeal to SCC refused, [2008] SCCA 422. While the decision was overturned on a point of law, the findings of fact regarding why American practices may endanger refugees were not disputed.

95 Sonia Akibo-Betts, "The Canada-US Safe Third Country Agreement: Why the US is not a safe haven for refugee women asserting gender-based asylum claims" (2005) 19 Windsor Rev Legal Soc Issues 105.

The Safe Third Country Agreement was rather implausibly characterized by the then Minister of Citizenship and Immigration as a measure to "help ensure the safety of Canadians in the fight against terrorism."[96] Although addressing the threat of terrorist activities is essential, it is not clear how the agreement's terms can be linked to safety or undermining terrorist activity, as the agreement only impacts on where claims are heard, and only then in those instances where claimants present themselves to officials and self-identify their intention to make a claim while at a land border. It could be that a vocal segment of Americans and Canadians believed themselves safer when decisions about non-citizens are determined under American procedures. Such a sentiment would resonate with the continuing (wrongful) assertions that Canada was the 9/11 terrorist conduit,[97] and has been expressed by Canadian critics of our asylum process.[98]

Regardless, the agreement has essentially failed. After a few years, the number of asylum claims made by people at Canadian in-land offices (i.e., not at the land border) increased. Canada Border Services attributes this increase to "irregular migrants entering Canada between POEs [Ports of Entry] … to avoid being turned back at the border based on the Safe Third Country Agreement."[99] That is, the agreement is believed to have resulted in *increased* irregular or illegal border crossings. It thus has had little long-term effect on the right to have one's claim determined (as long as individuals manage to cross the border illegally but safely), while presumably augmenting the market for smugglers who will not only get people to the border but also across the border and deep into the country.

96 Cited in Macklin, "Disappearing Refugees," *supra* note 94 at 414.

97 For example, in 2005, a Senator asserted in a congressional hearing and a press release that "as we all know, terrorists entered the U.S. from Canada on September 11, 2001," leading the Canadian Ambassador to the United States to observe in an interview with the Washington Post that the false linkage had become an "urban myth," which "took on a life of its own, like a viral infection": Doug Struck, "Canada Fights Myth It Was 9/11 Conduit: Charge Often Repeated by U.S. Officials," *The Washington Post* (9 April 2005) A20. Despite this reminder having been made in a prominent American newspaper, just eight months later another senator asserted: "We've got to remember that the people who first hit us in 9/11 entered this country through Canada": "U.S. senator apologizes for claiming 9/11 attackers came from Canada," CBC news, (21 December 2005) online: <http://www.cbc.ca/news/world/story/2005/12/21/border-senator-051221.html>.

98 In an interview shortly before the agreement came into force, James Bisset, a former Canadian ambassador, described in-land refugee claimants as "the greatest threat to North American security" because the claims process "undermines" American and Canadian border control. Cited in Michael Friscolanti, "Fewer refugees seeking asylum inside Canada: Claims fall by 35%," *The National Post* (18 June 2004).

99 Canada Border Services Agency, "CBSA Detentions and Removals Program—Evaluation Study" (November 2010) at 12, online: CBSA <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html>.

Security concerns were, however, largely absent in government statements on the 2010 reforms to *IRPA* through the *Balanced Refugee Reform Act*.[100] The discourse surrounding these amendments is firmly grounded in portrayals of asylum claimants as quasi-criminals, a discourse which Anna Pratt identifies as having a significant presence in Canadian discourse since the 1990s.[101] The tone of the press release for Bill C-11[102] affirms that the asylum process in Canada has been placed at risk through persons who abuse the refugee process, and that these reforms will address those problems. Specifically, it is drafted "in recognition that some claims for refugee protection are clearly fraudulent."

To call a claim fraudulent is to use very strong language—it suggests a clear and knowing criminal intention to deceive. Given the way the legislation is framed, an insinuation of fraudulent intent seems to be leveled against persons from states that are not, statistically speaking, significant refugee-producing countries,[103] despite the fact that "it is often refugee claimants who are among the first sources of information about new or intensified instances of human rights abuses."[104] Under Bill C-11, nationals from states that are not expected to "produce" refugees will be subjected to an expedited hearing process. If their claims are denied at first instance, the claimant will not be able to seek a stay of their removal pending judicial review. If a person's claim is not correctly determined the first time, their removal to their state of nationality may render the review process moot.

100 For Bill C-4, *supra* note 2, many of the changes were immediate upon the bill receiving royal assent on June 29, 2010, while others phase in over a two year period. Regulations to enable much of the new legislation were published in the *Canadian Gazette* on March 19, 2011.

101 Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005). See also Macklin, "Disappearing Refugees," *supra* note 94; Alexandra Mann, "Refugees Who Arrive by Boat and Canada's Commitment to the Refugee Convention: A Discursive Analysis" (2009) 26:2 Refuge 191; Lowry, *supra* note 88.

102 Citizenship and Immigration Canada, News Release, "The *Balanced Refugee Reform Act* moves closer to becoming law" (15 June 2010) online: Citizenship & Immigration Canada <http://www.cic.gc.ca/english/department/media/releases/2010/2010–06–15a.asp>.

103 The statute introduces a regime for identifying these states, which considers factors such as their human rights records and the historic success rates when their nationals have sought asylum in Canada: *IRPA*, *supra* note 1 109.1(1), *IRPR*, *supra* note 39, s 159.8.

104 Amnesty International cautions that "many human rights violations remain undocumented or poorly documented … [and that] it is often refugee claimants who are among the first sources of information about new or intensified instances of human rights abuse in countries": Amnesty International, *Amnesty International Canada's Brief to the House of Commons Standing Committee on Citizenship and Immigration: Fast and Efficient but not fair: Recommendations with respect to Bill C-11* (May 2010) at 6–7. The UNHCR has similarly observed that state conditions can change rapidly: "UNHCR Brief relating to Bill C-11, An Act to Amend the Immigration and Refugee Protection Act and the Federal Courts Act" (25 May 2010) at 6 [UNHCR Brief].

The Canadian government's stated justification for restricting rights in this fashion is that such measures are required to "discourage people from using Canada's asylum system as a way to jump the immigration queue." The integrity of the immigration system and a sense of fairness to those who seek to immigrate must certainly be maintained. However, there is a notable logical flaw here. If a person is *in fact* a refugee, and as a result is granted protection in Canada, then they are not "queue-jumping." Rather, they are experiencing the manifestation of Canada's obligation to protect people from persecution, an obligation which Canada freely undertook when it ratified the *Refugee Convention*.

To elaborate upon the inappropriateness of conflating the conferral of refugee protection with the processing of immigration applications, applications to immigrate are evaluated through an entirely different system. The "queue" for immigrating is not disrupted, nor does anyone lose their place in line by refugee claims being processed. It must be recalled that the refugee regime is a remedy for specific and narrowly defined human rights violations. It is only granted in the face of convincing evidence of persecution, and lack of state protection, where the individual's human rights are violated and they are targeted because of, for example, their race or religion.[105] It is not granted to a claimant merely because that person lives in abject poverty, comes from a state where no infrastructure exists to provide the population with safe drinking water, or will die from a treatable medical condition (and their home state does not subsidize health care).

Essential to the integrity of the system is the fact that if a claimant is determined not to be a refugee, then their claim is rejected. The individual will not suddenly be moved into an immigration processing queue—instead they will most likely be required to depart the country. Restricting the right to ensure that a decision was correctly made—by shortening the time line for making the decision, and modifying the appeal mechanism—bears no relation to preventing people from jumping to the front of a line that the person was not in.

All claimants will now experience a faster process—with an initial interview no sooner than 14 days after arrival, and then a hearing within either 60 or 90 days. These timelines raise the risk of inadequate evidentiary records being put before the decision-maker—which in turn raises the risk of claims

105 There are only five grounds of persecution that are recognized under the *Refugee Convention, supra* note 4, art 1, as granting a right of asylum. They are when a person is targeted due to their race, religion, political opinion, nationality, or membership in a particular social group.

not being properly heard. Procuring, certifying, translating and disclosing documents that must be obtained from home countries take time. Other key elements of preparing one's case, such as having the opportunity to consult with psychological experts and having those experts produce reliable reports, of procuring and developing a relationship with qualified counsel, and reviewing and responding to the country reports which the decision-maker will be relying upon also takes time. If a person is detained pending, for example, the receipt of confirmatory identity documents, the possibility of preparing a case becomes quite problematic. The right to have one's claim determined necessarily implies the right to be able to produce relevant, reliable and probative evidence. These timelines put the right to have one's claim fairly determined at considerable risk.[106]

Timeliness must be addressed for a plethora of reasons. Delays in determinations not only raise questions about whether the system is sound but also have considerable detrimental effects on persons who have been traumatized, and also result in increased costs to the system. At issue, however, is whether timelines that the federal government finds unacceptable are in fact the product of persons knowingly bringing fraudulent claims in numbers that overwhelm our system. While enormous delays have become the Canadian norm over the past few years due to a huge backlog of outstanding claims, empirical evidence to support the conclusion that the backlog is due to the high numbers of claims which are denied or are found "fraudulent" is absent. Rather, the delays have long been attributed to the long-standing deficit in the number of adjudicators sitting on tribunals for the Refugee Protection Division, a situation that was triggered when the federal government exercised restraint in appointing new members while it considered how the appointments process ought to be amended. This lull in appointments or re-appointments lasted several years. The Immigration and Refugee Board's Department Performance Reports consistently refer to a growing backlog due to being understaffed. For example, the 2008–2009 report states that "the PRD operated with approximately 40 fewer decision-makers than its funded complement … [which] hampers the RPD's ability to resolve more cases more quickly."[107] The 2005–2006 report similarly asserts that "the shortfall in final-

106 These and related concerns have been raised by several entities, including the Canadian Bar Association and the United Nations High Commissioner for Refugees. See Canadian Bar Association, "Submission of the Citizenship and Immigration Section of the Canadian Bar Association, Bill C-11, *Balanced Refugee Reform Act*" (May 2010) at 6–8; UNHCR Brief, *supra* note 104.

107 Treasury Board of Canada Secretariat, "Immigration and Refugee Board of Canada 2008–2009 Department Performance Report," Section II—Analysis of Program Activities, online: Treasury

izations and associated growth in the RPD's pending inventory" is attributed to the expected number of decision-makers not being appointed.[108] The claims have certainly been piling up, leading to delays in claims being determined. However, when the claims *are* adjudicated, the acceptance rates have been and remain extremely high. From 2005 to 2010 the percentage of claims that were heard and accepted ranged from 40% to 46%,[109] and the rejection rates *were consistently dropping,* from a high of 43% in 2005–2006 to a low of 38% in 2009–2010.[110] These figures do not suggest that the system is being over-run by fraudsters or abusers.

However, the 2010 legislative changes are presented as remedies to "resolve the problems that are crippling our broken asylum system."[111] What are these crippling problems? CIC explains:

> Most Canadians recognize that there are places in the world where the persecution of people is less likely to occur compared to other areas…. Yet many people from these places try to claim asylum in Canada and are ultimately found not to need protection. This suggests that they may be using Canada's asylum system as a way to jump the immigration queue.[112]

The insinuation is that persons whose claims are rejected are knowingly seeking to avoid the operation of Canadian law, to act unlawfully. But is a rejected claim evidence of abuse or fraud? The definition of a refugee is a narrow and technical one. Rejection only means that the person did not fit the definition: it does not mean that they did not fear for their life. For example, many of the rejected claims originating from Mexico in recent years reflect situations where the claimant lived in risk due to high levels of kidnapping, extortion,

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Board of Canada Secretariat http://www.tbs-sct.gc.ca/dpr-rmr/2008–2009/inst/irb/irb02-eng.asp#s2 [Treasury Board 2008–2009].

108 Treasury Board of Canada Secretariat, "Immigration and Refugee Board of Canada 2006–2007 Department Performance Report" online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/dpr-rmr/2006–2007/inst/irb/irb02-eng.asp#section2>.

109 Data drawn from Treasury Board 2008–2009, *supra* note 107, and Treasury Board of Canada Secretariat, "2009–2010 Performance Report for the Immigration and Refugee Board" online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/dpr-rmr/2009–2010/inst/irb/irb00-eng.asp>.

110 *Ibid*. The yearly figures do not add up to 100%. This is because the reports present data on claims that were heard in a given fiscal year in three categories: accepted claims, rejected claims, and claims which had been heard but the decision had not yet been rendered.

111 Citizenship and Immigration Canada, News Release, "The *Balanced Refugee Reform Act* moves closer to becoming law" (15 June 2010) online: CIC <www.cic.gc.ca/english/department/media/releases/2010/2010–06–15a.asp>.

112 Citizenship and Immigration Canada, News Release, "Backgrounder: Safe Countries of Origin" (30 March 2010) online: CIC <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010–03–30b.asp>.

police corruption and violent organized crime.[113] However, given the requirements of the *Refugee Convention*, refugee status would not be recognized if the individual could live safely anywhere in the whole country of Mexico, if they were targeted for persecutory treatment for a reason other than their race, religion, nationality, political opinion, or social group membership, or if in the opinion of the adjudicator there was more the individual could have done to get their state to protect them such as seek entry into witness protection programs.[114] As a result, people who have experienced persecution and may fear for their lives, and who therefore may reasonably believe that could be granted asylum, will not qualify for refugee protection.

This sort of distinction is missing from CIC's public communications, which instead emphasize that most asylum claimants knowingly seek to deceive Canada. CIC asserts that "Given that 58% of claims in Canada are unfounded, these figures suggest that Canada is a destination of choice for many unfounded asylum claimants,"[115] and that the changes are necessary to ensure that "people in need get quick protection while false claimants are sent home

113 For a discussion of the level of violent organized crime, kidnappings, gang-related executions and police corruption in Mexico, see [2007] RPDD No 258. In this decision, the adjudicator describes some of the documentary evidence that has been collected on these activities. For example, he observes that in 2006 there were over 500 execution-style killings in one state alone (at para 11), and that in 2003 there was an estimated 3,000 kidnappings (at para 13). The adjudicator also found there was a noticeable level of police collaboration in kidnappings (para 14). The adjudicator ultimately articulated the conclusion that "illicit drug trafficking and illegal activities and corruption within the ranks of the police, the military, and state officials who have aided and abetted illegal drug cartels continues to be a problem in Mexico" (para 17). However, in this particular case, the adjudicator dismissed the claim for asylum, finding that although the claimant had been abducted and tortured by police at the request of a powerful illicit narcotics trafficker, that he could evade further persecution if he was to relocate to a large urban centre in another state such as Mexico City.

114 The definition of a refugee is set out in footnote 16, *supra*. One element of this definition is that claimants must prove that their own state is unable or unwilling to protect them. The jurisprudence has established that where a state is a functioning democracy, it will be presumed to be able to protect its own citizens from persecution. For a claim to succeed, therefore, the claimant must rebut this presumption, and "adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that state protection is inadequate." (See *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94; [2008] FCJ No. 399 at para 30.) To meet this standard, claimants may be required to pursue complaints against ineffective police officers, or to show that they pushed for special protections. For example, in cases coming out of Mexico where the persecutors are members of organized crime, a claim will fail if the claimant has not pursued such options as seeking to participate in witness protection programs. See *Re X,* [2007] RPDD No 253. Indeed, such a claim will fail even if the claimant was unaware that a witness protection program existed, or if they did not believe that they would qualify for protection under such a program (see *Re DHS,* [2003] RPDD No 169 at paras 125-126).

115 Citizenship and Immigration Canada, Backgrounder, "Challenges faced by Canada's asylum system" (30 March 2010) online: CIC <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010–03–30a.asp>.

quickly."[116] This language portrays those individuals whose claims are unsuccessful as "false" and "fraudulent," out to dupe the system, therefore justifying more restrictive treatment, as giving the misleading impression that all the unsuccessful claimants knew from the start that their claim would likely fail.

The *Preventing Human Smugglers Act,* a Bill whose terms are entirely embedded in security concerns, will also affect the ability of asylum claimants to have their claim determined. If claimants are designated, they then have different rights than other refugee claimants. In particular, the legislation would prohibit them from being able to appeal a negative determination, as well as a series of other decisions such as a determination that a claim has been abandoned or ought to be vacated.[117] It is also clear that living in mandatory detention will have a "significant impact on the ability of claimants to advance their claims" due to lack of access to counsel and interpreters.[118]

Concluding Comments

Benjamin Muller describes 9/11 as "bringing pre-existing issues and trends … to the surface,"[119] and as having accelerated the trend towards surveillance and risk management strategies,[120] while Audrey Macklin describes 9/11 as having solidified the "exteriorization of threat and the foreigner as the embodiment of its infiltration."[121] As has been well documented over the past few decades, many Western and Northern states have become increasingly interested in deflecting asylum-seekers.[122] While the horror of 9/11 gave undeniable urgency to ensuring security concerns are addressed, security concerns do not seem to provide an objective justification for many of the existing and proposed legislative measures described in this article.

An extremely telling illustration of Canada's shift to a more restrictive approach to freedom of movement, and its use of the rhetoric of security as a justification for such the shift, arises from comparing how the federal govern-

116 *Ibid.*

117 Bill C-4, *supra* note 2, s 17. This provision is proposed to be incorporated into *IRPA, supra* note 1as s. 110(2).

118 Canadian Bar Association, National Citizenship and Immigration Law Section, "Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*" (November 2010) at 7.

119 Benjamin Muller, "(Dis)qualified bodies: securitization, citizenship and 'identity management'" (2004) 8:3 Citizenship Studies 279 at 285.

120 Benjamin Muller, "Risking it all at the Biometric Border: Mobility, Limits, and the Persistence of Securitization" (2011) 16:1 Geopolitics 91 at 94, 97.

121 Macklin, "Borderline Security" *supra* note 6 at 392.

122 See e.g. Hathaway, *supra* note 14 at 998–1000.

ment responded to the 155 Sri Lankan Tamils found in lifeboats off the coast of Newfoundland in 1986 who claimed asylum, with its response to the 76 Sri Lankan Tamil asylum-claimants who arrived in 2009 on the *Ocean Lady*.[123] The 1986 arrivals were interviewed by an emergency team of immigration officials, and then the majority were also interviewed by the RCMP.[124] They were hosted in student residences at Memorial University until the interviews were complete, and then sent to be hosted by members of the Tamil community in Montreal and Toronto.[125] Canada issued these individuals Minister's Permits, which regularized their status and permitted them to work or study in Canada. There was public protest about these measures, especially when information came out that the Tamils had lied about their transit route and had come directly from West Germany where many had already filed refugee claims.[126] The government's response was striking. The then Prime Minister stated:

> (m)y government will do anything but allow refugees in lifeboats to be … turned away from our shores…. We don't want people jumping to the head of the line …. We don't want excessive delays. But there will always be human suffering and human misery and there will be people who come to Canada for freedom…. And if we err, … we will always err on the side of justice and on the side of compassion.[127]

Perhaps more pointedly, the then Prime Minister denied that there was any connection between securing the integrity of Canada's immigration system and refugee claimants, asserting that "it's not the presence of 155 frightened human beings searching for freedom and opportunity that's going to undermine Canada or our immigration policies."[128] The government screened the Tamils for security concerns and to ensure that none were members of the Tamil Tigers. However, the state's emphasis was on avoiding pre-judgment.[129] With regards to the 2009 arrival of 76 Tamils on the *Sun Sea*, all were immediately deemed flight risks and detained. The Minister's lawyers have aggressively fought against individuals being released. They have often drawn on stays and other means to delay the implementation of court orders to release

123 For a thorough and detailed comparison of these two arrivals, and that of the *Komagata Maru* from India in 1914, see Alexandra Mann, "Refugees Who Arrive by Boat and Canada's Commitment to the *Refugee Convention*: A Discursive Analysis" (2009) 26:2 Refuge 191 [Mann, "Refugees Who Arrive by Boat"]. Much of the discussion below follows leads from this article.

124 *Ibid* at 195–96.

125 *Ibid* at 196.

126 *Ibid*.

127 Joe O'Donnell, "Show compassion for Tamil refugees Mulroney urges," *The Toronto Star (*18 August 1986), cited in Mann, "Refugees Who Arrive by Boat," *supra* note 123 at 197.

128 Mann, "Refugees Who Arrive by Boat," *supra* note 123.

129 *Ibid* at 197–98.

individuals, orders which had been granted because judges determined there was no longer cause to continue the detention. In one case, a federal court judge found that to accept the Minister's arguments against release "would result in nothing short of an abuse of the court process."[130]

The 1986 Minister of State for Immigration rejected the conflation of refugee claimants with immigrants, asserting that "[t]here is a difference between an immigrant and a refugee and a refugee cannot wait for a number."[131] Such a distinction was not flagged in 2009. Instead the government emphasized that Canadian security interests were at issue and conflated the claimants with illegal immigrants of the worse kind. In particular, Alykhan Velshi, Minister Kenney's spokesperson, indicated Canada would not "become a place of refuge for terrorists, thugs, snakeheads and other violent foreign criminals" nor would they permit the creation of:

> a two tier immigration system: one tier for law-abiding immigrants who wait patiently in the queue, and a second, for-profit tier for criminals and terrorists who pay human smugglers to help them jump the queue.[132]

In just a sentence, asylum claimants who pay smugglers to assist them are not just inaccurately conflated with immigration "queue jumpers," but also become "criminals and terrorists." Such labels resonate with notions of immorality, being undeserving, as well as with risk. These sentiments coincide with much of the 2010 legislation, and seem to be gaining in popular support. A 2010 poll confirmed that 50% of Canadians believe the Tamils should be deported *regardless* of whether they are refugees and have no links to terrorist groups. [133]

The UN High Commissioner for Refugees observed back in 2006 that in "public opinion, there has been a blurring of illegal migration and security problems with asylum and refugee issues."[134] The response to this situation is to enable a recasting of the public imagination, so that refugees and refugee claimants are identified as the presumptive victims of insecurity, not

130 *Canada (Citizenship and Immigration) v B386,* 2011 FC 140, [2011] FCJ No 219 (TD).

131 "Tamils involved in criminal acts will be deported, minister vows," *The Gazette* (20 August 1986), cited in Mann, "Refugees Who Arrive by Boat," *supra* note 123 at 197.

132 Stewart Bell, "Tamil's ship alleged to have traces of explosives: Suspected gunboat," *The National Post* (3 November 2009), cited in Mann, "Refugees Who Arrive by Boat," *supra* note 123 at 201.

133 Angus Reid, "More Canadians are questioning the value of immigration" (9 September 2010), online: Vision Critical <http://www.visioncritical.com/wp-content/uploads/2010/09/2010.09.09_Immigration_CAN.pdf>.

134 Antonio Guterres, "Foreword" in UNHCR, *The State of the World's Refugees: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006) x at x.

its agents. A second and related response is to clearly distinguish between the refugee regime—as a remedy to specific and narrow human rights violations—and the immigration system, a distinction that was clearly understood by the Canadian government in 1986. Instead, Canadian legislative and government actions have served to further concretize these associations, making them conceptually synonymous in many instances. This has enabled core refugee rights to be eroded swiftly, based in many instances on linkages that are simply asserted to be present, instead of ones that must be specifically identified and supported by at least some evidence. Some of the legal changes to how Canada approaches the rights to freedom of movement and to have one's claim determined are sufficiently arbitrary that they will not withstand legal challenge: however, legal challenges are costly and time-consuming, and rights will be trampled in the meantime.