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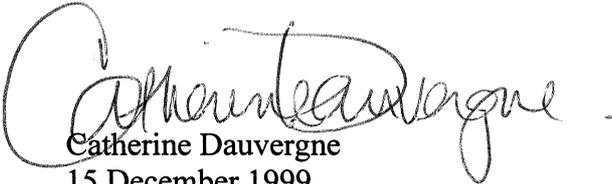
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Border Law: Migration and Identity in Immigrant Nations

A thesis submitted for the degree of Doctor of Philosophy
of the Australian National University

Catherine Dauvergne
December 1999

I declare that this thesis is comprised entirely of my own original work.


Catherine Dauvergne
15 December 1999

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One part of my research has included interviews with lawyers practicing in migration and refugee law in Ottawa, Toronto, Vancouver, Melbourne and Sydney. I have also interviewed members of the Canadian Immigration and Refugee Board, the Australian Refugee Review Tribunal, the Department of Citizenship and Immigration Canada and the Department of Immigration and Multicultural Affairs in Australia. Finally, I talked to a number of academics working in the area in both Canada and Australia. My conversations with all of these people have enriched my work immensely, as well as making the research thoroughly enjoyable. I am grateful for the time and energy which they have shared with me, and for the friendships that developed along the way.

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Abstract

This thesis develops a framework for analysing the interrelationships between migration laws and national identities. The framework is grounded in considering the place of migration law in liberal societies. Migration law plays a role in constituting the nation. It erects the boundary of the nation and contributes to the mythology which sustains the nation. While both nations and their migration laws belong to a liberal paradigm, liberal theory does not create a standard for what is just in migration law. It does not tell us how many people we should admit to our national communities, nor who those people should be. Rather than justice, liberalism generates a humanitarian consensus that permeates philosophical and political discussions of migration.

While we cannot assess migration law against a justice standard, we can assess it by analysing the national identity it both reflects and refines. We can determine if our migration laws are true to what we value about our own communities. We can reveal features of our nations that are hidden. Drawing on a rich literature describing the relationships between law and identity, this thesis examines the relationship of one particular kind of law – migration law – with one particular kind of identity – national identity.

The empirical work of the thesis focuses on humanitarian admissions to Australia and Canada. It looks at contrasts between the two programs but also draws conclusions based upon their similarities. The empirical work examines three settings where the law operates. The first setting is the refugee determination process. The second setting is humanitarian decision-making. The third setting is the jurisprudence of the highest courts of the land.

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List of Acronyms

CIC	Citizenship and Immigration Canada
CRDD	Convention Refugee Determination Division (of the IRB)
DIMA	Department of Immigration and Multicultural Affairs
IAD	Immigration Appeals Division (of the IRB)
IRB	Immigration and Refugee Board (Canada)
IRT	Immigration Review Tribunal (Australia)
MRT	Migration Review Tribunal (Australia)
RCO	Refugee Case Officer (Canada)
RRT	Refugee Review Tribunal
UNHRC	United Nations High Commission for Refugees

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- Immigration Act* RSC 1985 c. I-2
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Chapter One

Introduction

Human migration occupies a curious place in our collective imaginations at this juncture in history. The case that more people are on the move than ever before is a difficult one to make, considering how many more people there are in the world now and that the twentieth century has seen a tremendous growth in the regulation, and concomitant restriction, of population movements. It is in part these restrictions which engender the discourse of increasing migration, or at least of the increasing importance of migration as a factor in the organisation of human communities. Restrictions transform the issue of movement into one of migration; bringing a legal framework to travel that would have been analysed differently at earlier points in time. Entire nations understand themselves as nations of immigration, or in a related way, as multicultural nations because of the influence and importance of immigration to their populations. The myth of the global village represents a collapsing of boundaries and spaces between people. A wide array of technologies for compressing space and time by speeding communication and travel have remoulded our perceptions of the world. The past decade has brought a series of large scale environmental disasters that have caused people to move from their homes in huge numbers. Reflecting and contributing to all of these factors, migration occupies an important place in global public discourses.

This thesis analyses legal discourses of migration and develops a framework for understanding how those discourses are linked to how we understand ourselves and our attachments to national communities. Legal

discourses are a crucial component of broader discourses of migration as the formal rules of population movement are spelled out in legal terms. Popular discourses of migration therefore use the legal setting as a backdrop. Legal discourse is also important to the existence of the nation – defining its terms and limits and important parts of its symbolism. The nation is a mythic construct that draws on the law as one site of its construction. Without the nation, migration has no meaning as there are no borders to cross. Yet the nation does not simply analytically precede migration law, rather migration law is implicated in constituting the nation. The identity of the nation, the mythology which gives it form and meaning, does not exist in a world of isolated, similar entities. Rather, the identity of a nation is something that the individuals who belong to it participate in and contribute to. Migration is meaningful in this context because of how individuals experience it; because of the rupture it introduces to how we as individuals experience belonging, membership and the nation.

In establishing a theoretical framework for analysing migration law, I draw on the concepts of identity and nation and outline a relationship between them, which is mediated by and reflected in migration law. I draw on the literature on the interrelationships between law and identity to articulate the relationship between one particular kind of law - migration law - and one particular version of identity - national identity. Migration law reflects and reifies aspects of national identity because it is a key site in the construction of that identity. Using identity as an analytic tool is particularly appropriate for migration law because of the critique of law and legal reasoning which is embedded in the law and identity literature. The attention this draws to

hierarchies, categories and silences is especially apt at revealing the contours of migration law and the gradients of membership it contains. Considering the interrelationship of migration law and national identity contributes to that literature and refines that critique. In addition, assessment of this interrelationship provides the best way of evaluating migration laws as the liberal paradigm in which they exist does not generate a standard for measuring the justice or fairness of these laws.

The concept of nation is also central to my analytic framework. As migration law is meaningful only because of its relationship to the nation, any theoretical tool for approaching it must take account of the meanings and uses of that concept. Two strands of analysis are relevant for my framework. First, I understand the nation as mythic, imaginary or ideal. The nation is at least in part a contingent creation of those who believe in its existence. Second, I understand the nation as an ideal intertwined with the hegemony of liberal political theory. Nations and liberalism share a complex history. The emergence of nations as the central organising concept for human political existence parallels the emergence of liberalism as the dominant political philosophy. Each of these strands of analysis of nation contributes to my use of the concept national identity. While the nation is imagined, it is imagined in a liberal paradigm. The law that contributes to the construction of the mythic nation is also imbued with liberal assumptions, which in turn contribute to how the nation can be imagined.

My argument that migration law and national identity exist in a symbiotic relationship, and that each reveals something about the other, holds as a general proposition. Nonetheless, the contours of the relationship are easiest to see in

nations where immigration is an important part of the national ethos. For immigrant nations the relationships between migration law and national identity are heightened in intensity because in these nations, which have to some extent been “created” through migration, the importance of migration law as a site for the construction and reconstruction of national identities is enhanced. The mythology of migration is directly evident in accounts of the nation. For this reason, I have chosen to use nations of the New World as the particular examples I draw on in my thesis. The framework, however, has relevance beyond these new nations. The analysis which could begin by considering the formidable legal hurdles to permanent immigration to Japan,¹ or the symbolic importance of the German legal commitment to membership for ethnic Germans,² or the response played out in British nationality law to the dismantling of the British Empire,³ can be brought within this theoretical structure. These cases would undoubtedly contribute refinements, but due to the size of this project they only remain within the broad outlines of my analysis.

The thesis accomplishes its goals in two ways. Chapter Two articulates the argument about the relationship between migration law and national identity drawing primarily on the law and identity literature. The following three chapters pick up aspects of this argument and test them using comparative

¹ Hampton J, “Immigration, Identity and Justice” in Schwartz W F (ed), *Justice in Immigration* Cambridge University Press, Cambridge and New York, 1995 at 67. It was not until the 1990s that fourth generation Japanese born Koreans, whose ancestors had been brought to Japan as slaves, were given citizenship.

² Coleman J L and Harding S K, “Citizenship, the Demands of Justice and the Moral Relevance of Political Borders” in Schwartz W F (ed) *ibid* at 18.

³ Paliwala A, “Law and the Constitution of ‘Immigrant’ in Europe: *Racism and the Rule of Law*, Dartmouth Press, Aldershot UK and Brookfield USA, 1995 at 74; Dummett A and Nicol A, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, Weisenfeld and Nicolson, London, 1990.

examples from Australian and Canadian migration law. These empirical chapters follow the principal themes of the theoretical argument about the relationship between law and identity. One of the insights of the law and identity literature is that identity construction proceeds through a process of “othering” and that it is consequently often easier to see the contours of the other than to clearly perceive the self. Chapter Three examines the construction of the refugee as the ultimate other to the nation and uses this empirical focus to underscore how attention to identity draws attention to what is left out and silenced by legal discourse. Chapter Four then proceeds by looking at the reciprocal movement in the construction of identities, the reflection of an image of the self. The Chapter examines the humanitarian consensus shared by liberals who believe the nation’s borders should be closed and those who believe they should be open. Both agree that at some – undefined – point, needy outsiders must be admitted. Drawing on this consensus, humanitarian admissions to Australia and Canada are integral to the construction of those nations as good and generous. This category of admission demonstrates that even allowing the ostensibly most needy to join the community serves the national interest. Chapter Five picks up on the critique of rights discourses which is contained in the law and identity literature and argues that migration law provides one exemplar of rights discourses narrowing and constraining identities. By examining the variety of ways that rights discourses are deployed in migration law, this Chapter demonstrates that the identity based critique of rights discourses must be nuanced by an understanding of how rights operate in specific contexts and that the principal context of migration law is the backdrop

of national sovereignty and the liberal nation. The conclusions in Chapter Six bring the argument back to a further elaboration of the Chapter Two framework.

Accordingly, the main contributions this thesis makes are in clarifying the place of migration law in the liberal nation and in articulating the migration law – national identity relationship. These include insights about the relationship between law and identity construction, about identities and rights discourses, and about the place of migration and of humanitarianism in liberal theory. This is the first research to join these elements of contemporary legal and social theory. I set the framework of analysis against a backdrop of liberal theory because the assumptions of liberalism hold hegemonic sway over migration law. Using the insights about the boundary of the liberal community found in the work of Rawls, Dworkin, Walzer, Carens, Galloway and others, I conclude that liberalism cannot answer the most fundamental questions about justice in migration law. I therefore turn to the critical theoretical work of scholars like Minow and Fitzpatrick as a starting point for my elaboration of a framework for assessing migration laws in the face of liberalism's inadequacies. The answers my framework generates are outside the contours of liberalism, as of course they must be. Nonetheless, my framework acknowledges the vital role of those contours in setting the terms of the debate. My theoretical contribution to debates about migration law is original in explaining the intransigence of liberal debates about just migration, in acknowledging their importance, and in providing a way of moving beyond them.⁴

⁴ I have previously written about parts of this argument in "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 *Canadian Journal of Law and Jurisprudence* 323; "Confronting Chaos: Migration Law Responds to Images of Disorder" (1999) 5 *Res Publica* 23; "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall Law Journal*, in press.

The empirical work in the thesis serves in the first instance to illustrate and amplify the theoretical propositions. It also gathers together new material and puts it in a framework that yields fresh insights. Briefly put, the empirical work examines humanitarian admissions to Australia and Canada. It shares this comparative perspective with a number of studies on immigration in these two countries.⁵ This thesis does not aim to cover the full range of either country's immigration program, although the theoretical framework could be used in this way. Nor does the empirical work make an historical argument, although the argument that migration law plays a vital role in constituting new nations clearly can be used with historical resonance. My use of particular aspects of Canadian and Australian migration law is in the nature of strategic sampling. Rather than providing the whole picture, which I believe is well done by others, I have instead examined some areas in detail. For this close scrutiny I have selected areas that lend themselves to extending the critical literature on law and identity: the domestic refugee decision-making that engages questions of identity construction in legal process; humanitarian decision-making that engages key jurisprudential issues; and the role of rights, which returns to the impetus for much of the law and identity critique. None of the earlier comparative studies consider migration law in this degree of detail.

⁵ The two leading works are Hawkins F, *Critical Years in Immigration: Canada and Australia Compared*, New South Wales University Press, Sydney, 1989, and Adelman H et al (eds) *Immigration and Refugee Policy: Australia and Canada Compared*, Melbourne University Press, Melbourne, 1994. Hawkins' work focuses on the 1972-1986 time period from a sociological perspective. The Adelman collection gathers together twenty-two chapters co-written by Australian and Canadian academics and bureaucrats.

In addition to these two studies, Sean Brawley's book *The White Peril: Foreign Relations and Asian Immigration to Australia and North America*, UNSW Press, Sydney, 1995, considers immigration in the foreign relations of Australia, Canada, New Zealand and the United States over the twentieth century. Charles Sinclair's Ph.D. thesis *Who Would Want to Be a Refugee? A Comparative Analysis of Refugee Policy and Law in Australia and Canada*, University of New England, 1995, considers refugee policy and law-making in both countries in some detail. His work is primarily concerned with law-making and with refugee law in its international setting.

I have chosen Australia and Canada as examples because they are similarly situated nations sharing a population pattern and an approach to nation building through immigration. The empirical analysis is partially built by comparing and contrasting differences between the two cases. In many instances, however, migration laws in Australia and Canada illustrate the same point. That is, the differences between the laws and national identities of the two nations are not the most important part of the story told by the evidence. Sometimes the conclusion drawn is about similarity and parallels rather than about difference. The overall conclusion, played out with differing aspects of the law in each of the empirical chapters, is that the migration law of a nation is best understood, interpreted, and manipulated through close attention to that nation's understanding of itself. Some differences in Australian and Canadian national identity are made visible through migration law, and in turn differences in the law and its application in each country are explained by reference to national identities.

Australia and Canada are compelling examples for this argument because people in both places display some degree of angst about their national identity. Queries about the meaning of Canadian identity are arguably as much a marker of being Canadian as any other single factor.⁶ In Australia national identity is contested, and even the celebration of a national day is a source of introspection and debate.⁷ Given this, the coherent national images that are presented in migration law settings are all the more intriguing.

⁶ For one classic discussion of this see Grant G P, *Lament for a Nation: The Defeat of Canadian Nationalism*, McClelland and Stewart, Toronto, 1970.

⁷ In recent years, Australia Day celebrations commemorating the arrival of the first Colonial Governor have been the subject of debate. Re-enactments of Governor Phillip walking ashore and planting the British flag are slowly being replaced by celebrations of aboriginal heritage.

Although the main strand of theorisation in this work identifies similarities between the two nations, and asserts that these would be found elsewhere as well, considering humanitarian admissions allows me to also identify contrasts in the approaches of Canada and Australia. These contrasts are more evident in humanitarian migration than in family or economic migration patterns. Contrast is useful for refining the capabilities of the analytic framework. A focus on humanitarian admissions also connects well with the other elements of the framework. Humanitarianism occupies a unique place in the array of liberal arguments about just migration. The liberal humanitarian consensus makes humanitarian admissions a fruitful source of analysis. Humanitarianism is the only challenge to the sovereign liberal nation's control of its borders, and thus it provokes strong representations of that sovereignty. A further aspect of my argument is that migration law is harnessed to serve the needs of the nation. In some areas of migration, this argument is obvious, but the case of humanitarian admissions sets up the most serious challenge to this proposition and thus this category is vital to demonstrating the strength of the proposition.⁸

The United States is in many ways the paradigm of the nation of immigrants, the new nation, and the refuge for the world's huddled masses. Having asserted that my theoretical configuration holds generally and is particularly apposite in nations with these characteristics, some special justification for excluding the United States is required. There are three reasons. First, the United States is so overwhelming as to be unique. The scale

⁸ I canvass the reach of this argument in the cases of economic and family migration in my article "Beyond Justice: The Consequences of Liberalism for Migration Law" (1997) above n4. *Law and Jurisprudence* 323.

of emigration, of immigration rhetoric, and of world political hegemony, make it difficult to reason from the American case to any other. Any conclusion drawn can be countered with the claim that it holds only in the particular unparalleled American instance. Second, the enormous array of migration provisions in the United States means that to adequately canvass them would drive the analysis to a broader level of generality.⁹ One of the contributions of this work is to consider jurisprudence and legal provisions at a level of fine detail rather than broad coverage. Including the United States would have made a comparative perspective much more difficult to maintain. Finally, while I could have obtained enough information without working extensively in the United States, my work is grounded in the experience of living and belonging in both the places of which I write. Writing to capture the essence of attachment to place is immeasurably enriched by sharing that attachment, by living and breathing it, and puzzling over it in the minutiae of everyday life.

BACKGROUND TO THE STUDY

As the empirical approach of this thesis is to examine in detail some areas of migration law in Australia and Canada in order to illustrate an argument which is generally applicable in these countries and others, it is important to approach the analysis with some basic of understanding of the overall framework of the laws in each country. At the outset, there is a difference in terminology. In Australia, the law I am discussing is called migration law, in Canada it is called immigration law. The differences between the two legal frameworks are not related to the terminology. For the most part, I have chosen

⁹ Some sense of this is gained by looking at the statistical overview in Appendix A.

to use the Australian term because it is shorter and because switching to use the correct terminology for each place would introduce an unnecessary layer of confusion.

Migration to Australia is controlled by the *Migration Act 1958* (Cth) and in Canada by the *Immigration Act*, RSC 1985 c.I-2. Both Acts govern permanent and temporary entry provisions. Each legislative framework underwent a major overhaul in the 1970s aimed at making the law more “neutral” and “removing” racism.¹⁰ In Australia, this change is associated with the end of the infamous “White Australia” policy. The White Canada policy was never as succinctly articulated, but migration restrictions in the first six decades of the twentieth century did include at times a complete ban on Chinese immigration, a “headtax,” and targeted use of language testing.¹¹ Canadian provinces asserted themselves more vigorously than Australian states in the migration area and the ensuing legal battles meant that the Canadian national government could often further its interest in controlling the legislative power by arguing against racist provincial regulation. Law-making practices have been considerably refined since then, but language skills and money, and the race and gender biases they mask, remain important predictors of successful permanent entry to each country.

There are three streams for permanent migration to both Canada and Australia: economic, family and humanitarian.¹² In the past five years, the

¹⁰ Major amendments to the *Immigration Act*, came into effect in 1978, to the *Migration Act* in 1980.

¹¹ Bagambiire D, “The Constitution and Immigration; The Impact of Proposed Changes to the Immigration Power Under the Constitution Act, 1967” (1992) 15 *Dalhousie Law Journal* 428.

¹² See Appendix A. Coleman and Harding find this division is standard in the eight countries they survey: above n2.

economic stream has surpassed family to become the largest category of admission to each country.¹³ Economic migration offers admission to people who are highly skilled or have considerable funds to invest and therefore can be expected to contribute immediately to the national economy. The objective of family migration is to allow Australians and Canadian to be reunited at “home” with close family members. The past decade has, in both countries, seen a progressive narrowing of the definition of family so that now the category applies to spouses and children. Greater restrictions are placed on other family members, who must also bring so “economic advantage” in order to qualify.¹⁴ Both these categories of migration, thus, are overtly linked to the needs of the nation. In the economic category, the aim of policy makers is to tailor requirements narrowly to the changing labour market. In the family category the need is of individual members of the nation, but it projects and reinforces a state sanctioned vision of family and a view that this need is valued. Humanitarian admissions are less obviously linked to national need, but, as I explore in each ensuing Chapter, they nonetheless cannot be understood without considering the subtlety of their response to national need. This final category is considerably smaller than the first two,¹⁵ and is made up of people who are refugees or in other needy circumstances. In both countries, all migration applicants are subjected to health and good character screening. Both factors

¹³ This happened in Canada in 1995 and in Australia in 1997.

¹⁴ In Australia, these relatives come under the “Skilled Australia Linked” Category and in Canada applicants receive bonus points if they have relatives in Canada.

¹⁵ Humanitarian migration makes up just over 10% of admissions to both Australia and Canada at present. For details see Appendix 2.

are ripe for an analysis of their role as surveillance mechanisms and for a consideration of the discretionary applications of each.¹⁶

One of the central tools of the migration scheme in each country is the use of a "points system." An applicant for admission is assigned a certain number of points over a range of criteria¹⁷ which are then added up to determine eligibility. The points system is partially applied to relatives who cannot be considered part of the family stream and is applied differentially in subgroups of the economic stream. While the points system does not apply to refugees applying onshore or inland,¹⁸ those who are seeking resettlement from abroad are sometimes assessed on similar criteria as indicators of their ability to settle easily in Australia or Canada.¹⁹ The points system provides migration law with a veneer of neutrality, although of course, the criteria which merit points replicate biases of earlier formulae. As well, the points system is easily adjusted to meet particular policy goals. In Canada, the "occupational factor" criteria is sometimes reduced to zero, effectively ending any chance of admission for

¹⁶ There is, for example, an enormous difference between a 15 minute medical exam and a 90 minute one. Some interesting work is being done in this area; see for example Mosoff J, "'Excessive Demand' on the Canadian Conscience: Disability, Family and Immigration"(1998-99) 26 Manitoba Law Journal (In Press).

¹⁷ The Canadian criteria are education, training, work experience, occupational factor, pre-arranged employment, demographic factor [intended destination], age, knowledge of English or French, and personal suitability based on an interview. *Immigration Act* Schedule 1. The Australian criteria are employment, age, language skill, family, relationships, length of sponsor's Australian citizenship, location of sponsor. *Migration Regulations* 2.26 and 2.27, Schedule 6.

¹⁸ Due to the international obligations of the *Refugee Convention*; see Chapter 3.

¹⁹ Those with relatives or other ties to Australia currently have priorities "one" and "two" in Australia's humanitarian program. Those with "resettlement potential" are "priority three".

those in that occupation. The Australian policy of awarding “-25” points to physicians accomplishes the same end.²⁰

The biggest contrast between the two legal schemes is that in 1989 the Australian Parliament attempted to eliminate discretionary decision-making under the Act.²¹ Discretion is an important feature of any administrative regime, and is particularly vital if migration law is to respond to and reflect perceived national need. There are two results of the 1989 changes. First, the attempt to eliminate discretion is, of course, futile. Discretion insinuates itself into all bureaucratic decision-making. The 1989 changes merely narrow discretion and rest more of it in at the highest levels of decision-making. Second, the *Migration Act* is frequently amended²² to tailor it to national need as the scope for broad discretionary adjustments is reduced. The Canadian Act, in contrast, has been amended less than one quarter as often. However, as Chapter Four in particular demonstrates, there is a great range of discretionary decision-making under the Canadian Act.

Migration is managed in Canada by the national government department now known as Citizenship and Immigration Canada (CIC).²³ The corresponding department in Australia is presently the Department of Immigration and Multicultural Affairs (DIMA).²⁴ Migration decisions are made within the departments and by tribunals. In Australia the two relevant tribunals are the

²⁰ This amount to be deducted from points given under “employment qualification” *Migration Regulations* para 2.26(3)(c).

²¹ *Migration Legislation Amendment Act 1989* (Cth).

²² Thirty-two times between 1989 and 1995.

²³ Previously Employment and Immigration Canada.

²⁴ Formerly Immigration and Ethnic Affairs.

Migration Review Tribunal (MRT)²⁵ and the Refugee Review Tribunal (RRT). Both conduct merits reviews. In Canada, the three division Immigration and Refugee Board determines refugee applications at first instance and reviews other decisions in the immigration portfolio. In both countries the supervising court is known as the Federal Court.²⁶

A more detailed consideration of the migration laws of Australia and Canada is woven into later Chapters. The thesis does not, however, aspire to present a complete picture of the migration provisions in either country. Even in the humanitarian admissions area, my analysis focuses closely on some particular issues because the strength of the analysis cannot be demonstrated only through generalisations. In order to capture a full impression of the law in action, Chapter Three focuses on process questions, Chapter Four on Federal Court jurisprudence and Chapter Five on the highest level appellate jurisprudence, that of the Supreme Court of Canada and the High Court of Australia. First, however, Chapter Two elaborates the core of the thesis, the theoretical framework for analysing the relationship between migration law and national identity.

²⁵ This replaced the Immigration Review Tribunal (IRT) on 1 June 1999.

²⁶ See Appendix B.

Chapter Two

Theorising Law and Identity

This chapter describes the framework for my argument about the interrelationship of migration law and national identity and examines the theoretical structure of the key concepts. I begin by canvassing trends in the literature on law and identity, outlining the central themes of this growing body of work on which my analysis draws. The focus in these studies on the construction of boundaries and hierarchies makes it highly adaptable to my examination of migration law as a societal boundary. In addition, this work fits into a broader category of analysis linking law and social construction, of which my argument that migration law is constitutive of the liberal community is one example. The next portion of the Chapter examines the two central elements of my argument: identity and nation. I specify the ways I use each term and locate the terms in their interdisciplinary setting. Following these discussions, I consider the role of migration law in liberal society and how this role takes on added importance in countries whose dominant populations are composed of migrants. The discussion demonstrates the links between identity and nation. The subsequent section shows how migration law adapts to the needs of the nation. Finally, I conclude by drawing the elements together to present a framework for analysing migration law which fits within the law and identity literature.

A. LAW AND IDENTITY SCHOLARSHIP

A growing body of legal analysis links the concepts law and identity, although so far this work has not been described as a unified theory, and most of its practitioners would reject such a grandiose label. Nonetheless, the literature is related by a group of common themes. Studies of law and identity share a view of identity as a social construct and suggest that law has a key role to play in that construction. In addition, these analyses present a critical perspective on legal reasoning and legal process, focussing on particular ways law obscures and simplifies a pre-existing social reality. I review these aspects of what I term “law and identity theory” in order to integrate their explanatory power into my own theoretical framework. Finally, I examine what an identity perspective can reveal about rights, a particular characteristic of legal reasoning.

1. Identity as a Social Phenomenon

a. Putting Identity in Question

Legal analysts who use identity as an organising concept in their work share the perspective that identity is not a fixed essence but a variable, a site of struggle, a contingent result of contestation over meaning. Thus Martha Minow refers to “the negotiated quality of identities,”¹ and the “kaleidoscopic nature” of identity.² As identity is negotiated and malleable, it follows that there must also be at least the potential for multiple identities. Karen Engle and Dan Danielson argue that “...in order to generate more effective legal strategies, legal

¹ Minow M, “Identities” (1991) 3 *Yale Journal of Law and The Humanities* 97 at 99.

² *Ibid.* at 112.

consciousness should take account of the role of law in the constitution of identities and in the simultaneity of multiple identities and perspectives.”³

Elizabeth Mertz takes a similar position when she describes “the complex and mutually constitutive relationships that form between legal processes and social identities.”⁴ Duncan Kennedy takes an optimistic view of the role of an individual in negotiating identity, stating:

My view is that the identities celebrated both in modern multicultural rhetoric and in the traditionalist rhetoric of the mainstream are best seen as “positions” or “situations” within which people operate as free agents. Of course, the freedom is relative to the position or situation. But freedom does mean that we sometimes get to choose how to handle things after taking our identities into account. It does not mean that we can get beyond contextual constraint and do or be anything we want. And we can also choose to be loyal and true to our constrained identity positions, choose to be as little free as possible.⁵

In theorising the relationship between law and identity then, identity is never a given. It is a question, an object of analysis. It is bounded but its boundaries are to be explored and explained.

Putting identity at the centre of the inquiry into how law works, however, does not make it the end product or the dependent result of legal process. Rather, identity is in a middle position, neither a dependent nor an independent variable. It is, therefore, a useful concept for understanding both law’s potential for social transformation and its inherent conservatism. Reviewing the limitations of legal discourse Lisa Bower argues that gay rights activists must

³ “Introduction”, *After Identity: A Reader in Law and Culture* Danielson D and Engle K (eds) Routledge, New York and London, 1995 at xiii.

⁴ Mertz E, “Introduction to Symposium Issue: Legal Loci and Places in the Heart: Community and Identity in Sociolegal Studies” (1994) 28 *Law and Society Review* 971 at 972.

⁵ Kennedy D, *Sexy Dressing Etc*, London, Harvard University Press, 1993 at viii.

have “...an awareness of law’s capacity to constrain claims of identity and, at the same time, how they might deploy a strategic framework which seeks to articulate a subject who is not defined in unitary terms.”⁶ Danielson and Engle write of “the contradictory roles” that legal rules play in postcolonial struggles: “...legal rules are used on the one hand to facilitate the emergence of “authentic” identities, and on the other to control that emergence.”⁷ In a different context, discussing American aboriginal fishing rights litigation, Susan Staiger Gooding uses parallel language, asserting that “law can be a tool for colonising and for decolonising.”⁸ Linking the inquiry into identity in law to broad trends in social inquiry throughout the twentieth century, Minow states:

I suggest that the question about the identity of a group [...] will always be befuddling if it is detached from the purposes for which the question is being asked. Once the purposes are disclosed, the perspective of the inquirer and the perspective of the evaluator become critical. For some purposes, self-proclaimed identity will be most significant; for others, external community responses and understandings. But the perceptions of outsiders are not “objective” or removed from the interests of the outsiders themselves.⁹

When law requires the construction of an identity, it is always for some particular purpose. Thus the dilemma Minow describes is that of the particle physicist: if she seeks a stationary entity she will find one, if she calibrates her instruments to chart the motion of a wave, they will do so. Any inquiry into law

⁶ Bower L C, “Queer Acts and the Politics of ‘Direct Address’: Rethinking Law, Culture and Community” (1994) 28 *Law and Society Review* 1009 at 1014.

⁷ Above n3 at 188.

⁸ Staiger Gooding S, “Place, Race and Names: Layered Identities in *United States v Oregon, Confederated Tribes of the Colville Reservation, Plaintiff, Intervenor*” (1994) 28 *Law and Society Review* 1181 at 1185.

⁹ Minow M, *Making All the Difference: Inclusion, Exclusion and American Law* Ithaca Cornell University Press, 1990 at 355.

and identity must begin with the caution that law can both constrain identities and liberate them. Directing attention to identity, therefore, requires us to consider how this constraint or liberation operates, to investigate its mechanics. It also requires us to examine conditions under which law becomes either constrictive or liberating and to analyse to what extent and by whom these conditions may be strategically manipulated. Migration is a highly politicised area of law at present and as a consequence political and public debate is directed towards manipulation of the identities shaped in this law. As I detail later, migration law is structured to accommodate political ebbs and flows by easily constricting or expanding the national identity it portrays.

b. *Broader theories of social construction*

The assertion that law is implicated in the construction of identity belongs to a broader argument that law has a role in social construction. The term “constitutive theory” was first used by Karl Klare in 1979 to describe the proposition that law has a role to play in constituting social relations.¹⁰ Alan Hunt has developed the most fully articulated account of a constitutive theory of law, drawing on theoretical trends in the sociology of law, the critical legal studies movement, Marxist theory and Foucauldian social theory.¹¹ Hunt’s resulting theory relies more heavily on Marx than Foucault and more directly on the sociology of law than on critical legal studies. Despite these internal discrepancies in his argument, he addresses directly the central concerns I wish

¹⁰ As reported by Alan Hunt in, *Explorations in Law and Society: Toward a Constitutive Theory of Law* Routledge, London and New York, 1993 at 149.

¹¹ This is given in *Explorations in Law and Society: Toward a Constitutive Theory of Law*, *ibid.*

to highlight in theorising law and identity. In his words, the significance of his theory is that:

...it serves as a way out of the uncomfortable dichotomy between the importance and the unimportance of law. It serves to focus attention on the way in which law is implicated in social practices, as an always potentially present dimension of social relations, while at the same time reminding us the law is itself the product of the play and struggle of social relations.¹²

Hunt chastises critical legal scholars for failing to take theory seriously and for not paying sufficient attention to the problem of mediation, through which legal ideology and legal consciousness influence mass or popular consciousness.¹³

Hunt argues the “...thesis that law both constitutes and is constituted has to be pressed further. In this form it verges on the vacuous.”¹⁴ To meet this criticism, he draws on Gramsci’s concept of hegemony, Foucault’s understanding of disciplinarity and regulation, Jessop’s concept of “structural coupling” and Santos’ theory of locations of law to articulate a theory which gives an account of law’s relationship to the state, the usefulness of rights discourse, and the importance of boundaries in law. While Hunt does not make specific arguments about law and identity, the thesis that I and others who use these terms develop fits within his overall theory.¹⁵ Rights and boundaries are particularly important

¹² Ibid. at 3.

¹³ Ibid. at 148-150 and Chapter 7. The question of mediation is one that I take up through this thesis, by using a narrower theoretical framework than Hunt’s, tailored to examining some legal discourses and some legal outcomes.

¹⁴ Ibid. at 175.

¹⁵ Hunt himself makes a similar argument about E.P. Thompson’s work, stating that Thompson’s seminal book *Whigs and Hunters: The Origin of the Black Act*, Allen Lane, London, 1975, is an example of an application of constitutive theory; *ibid.* at 175.

to my analysis of migration law and national identity and I return to these aspects of Hunt's argument when developing my theory in those areas.

Considering law as one element in social construction, Stuart Hall's research team presented a study addressing the links between legal and social discourse that Hunt is concerned to see studied more thoroughly. *Policing The Crisis: Mugging The State and Law and Order*¹⁶ demonstrates how "mugging" was constructed as a "moral panic" in British society in the early 1970s. Hall and his co-authors identify law and legal discourses as influential in this process in several ways. For example, they argue that judicial statements on sentencing "muggers" were a response to public feelings, interests, and pressures outside the courtroom, and in turn contributed to "structuring the public perception of the 'moral panic'."¹⁷ They also argue that British citizenship law from the 1960s attacked the citizenship status of black workers and therefore contributed to the social circumstances allowing for the racial attribution of the "mugging" phenomenon.¹⁸ *Policing the Crisis* provides crucial documentation of the role of law and legal discourses in broader social phenomenon. British law both responds to social pressures (e.g. with heavier sentences for "muggers") as well as contributes to the atmosphere producing those pressures (e.g. through citizenship restrictions generating a black unemployed class).

A variety of legal scholars now make links between law and social construction. Marlee Kline links law and social construction in arguing that the

¹⁶ Hall S et al, *Policing the Crisis: Mugging the State and Law and Order*, Macmillan, London and Basingstoke, 1978.

¹⁷ Ibid. at 32.

¹⁸ Ibid. at 343.

courts construct First Nations women as “bad mothers” by contrasting them with an ingrained ideology of motherhood. The courts draw on an ideology of motherhood which exists outside the law and transform that ideology into a legal standard for the best interests of the child, incorporating that ideology’s cultural, racist and gender biases.¹⁹ Echoing *Policing the Crisis*, Abdul Paliwala argues that post 1960s British immigration law has been increasingly racist, and that “immigration control is as much about constructing through a culture of control the (black) immigrant community within the country as about preventing outsiders from getting in.”²⁰ Gary Peller argues that the dominant middle class core of the American civil rights movement constructed race and integration in ways which claimed neutrality and gained legal dominance, setting the stage for the emergence of “black nationalism”:

...enlightened whites helped *construct* and deploy a liberal understanding of racial justice that incorporated universalist and objectivist assumptions. This understanding rejected race consciousness as a categorical matter, in part as a way to avoid issues of *white* cultural identity that black nationalism brought to the fore.²¹

Patricia Williams also asserts a central role for law in building social delineations, arguing that:

Our system of jurisprudence is constantly negotiating the bounds of our communal civic body in the context of disputes about the limits of our physical edges (such as experimentation with foetal tissue, sales of body parts, and sterilisation), the limits of identity (male/female, citizen/non-

¹⁹ Kline M, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 *Queen’s Law Journal* 306.

²⁰ Paliwala A, “Law and the Constitution of the ‘Immigrant’ in Europe: a United Kingdom Policy Perspective” in Fitzpatrick P (ed) *Nationalism, Racism and the Rule of Law*, Dartmouth Press, Aldershot U.K. and Brookfield U.S.A., 1995, 77 at 91-92.

²¹ Peller G., “Race Consciousness” (1990) *Duke Law Journal* 758 at 840.

citizen, and so on) and the limits of life itself (wrongful death cases, right to die, and executions). Law negotiates these boundaries by constructing verbal guideposts and a whole range of representational lenses and filters through which we see each other.²²

While the argument that law is engaged in social construction has been most comprehensively asserted by critical race theorists, its analytic power is now brought to bear in many areas. The importance of this analysis for understanding racism in law, however, remains central and takes on particular significance in the study of migration law which is frequently a repository of racist sentiment. Equally, the fact that theories of law and social construction have been deployed by those probing racism highlights how a focus on identity fits well within this theoretical framework. Race is one element of socially constructed identity and law is one mechanism in that construction process.

c. Identity is relational

Another important theme uniting analyses of law and identity is that identity is relational. This perspective on identity, which can trace its roots to Hegel's philosophy and Lacan's psychoanalysis, is used in a relatively straightforward way in most legal analysis. One identity emerges only in contrast to another. This "other" is most frequently overlooked or submerged in legal reasoning. Attention to the way law constructs identities allows a consideration of these implicit others whose presence structures legal analysis.

Peller, for example, points to the way the black nationalist movement in the United States drew attention to racial difference and the constructed nature

²² Williams P J, *The Rooster's Egg*, Harvard University Press, Cambridge Massachusetts and London England, 1995 at 230-31.

of race and how, as a consequence of this, the constructed nature of white identity was also put in issue. The early integrationist analyses of the civil rights movement had not focussed on racial difference and therefore had allowed white identity to operate as an unquestioned background assumption:

...through the identification of racial identity and group consciousness as central to the structure of American social relations, the black nationalists of the 1960s also identified the particular aspect of avoidance and denial that white support of black liberation assumed - the commitment by whites to deny the centrality of race as an historically constructed, and powerful, factor in the social structure of American life. Understanding racism as a form of "discrimination" from an assumed neutral norm was the cognitive face of a widespread cultural flight from white self-identity.²³

Once black identity was made a central concern and critically examined, the white identity in *implicit* contrast to which it had been created also became subject to examination. Exploring difference brings the other into focus.

The relational aspect of identity is most often hidden, and is the object of inquiry for those exploring the identities created in law. Martin Chanock, for example, challenges the assertion that the South African common law is racially neutral. He argues that:

The creation of self and the exclusion of 'other' is basic to the nature of South Africa's laws in a more fundamental way than simply in the passing of discriminatory statutes.²⁴

While the law may appear neutral, Chanock argues that two separate systems of common law operate in South Africa, one applicable to blacks, the other to

²³ Peller, above n 21 at 842-43.

²⁴ Chanock M, "Race and Nation in South African Common Law" in P Fitzpatrick (ed) above n 20, 195 at 197.

whites. The neutral language of the common law obscures this distinction. A theoretical focus on identity facilitates unearthing it.

Martha Minow links the relational nature and malleability of identity to the observer's expectations. In her account, identity is constructed both in contrast to another and in response to pre-existing expectations. In many legal instances, these two influences on identity will be combined, for example when a refugee lawyer interviews a potential client for the first time, her assessment of her client's story will be influenced both by her expectations based on other experiences with refugee clients and on her understanding of the legal category of "refugee," which will operate either as an Other (because she assesses that the client does not fit within that identity) or as an expectation (because as the conversation continues she forms the view that the client will be able to make a successful claim). Discussing the story of a guardianship application for a special needs child Minow states:

The judge, the lawyers, and the parties in effect showed how an individual like Philip has an identity only in relation to others and how the description of his situation depends upon who is offering the observations.²⁵

Thus to fully examine identity in law is also to consider who is doing the identifying and how that process affects them, aspects which are raised as part of the identity based critique of legal method.

Kline's work on motherhood ideology in child welfare law also highlights the relational nature of identity. She states:

²⁵ Ibid. at 351.

...the expectations of 'good' mothering are presented as natural, necessary, and universal. The 'bad mother,' by corollary, is constructed as the "photographic negative" of the 'good mother,' again with the operation of racism and other such factors rendered invisible."²⁶

The photographic negative metaphor is particularly apt as the assumed or implicit 'other' is often hard to make out, and is rarely the focus of attention.

Karen Engle emphasises our tendency to overlook or ignore the other when she writes of the "exotic other female."²⁷ She argues that Western activists' arguments about female circumcision or genital mutilation in Africa are structured against a largely unexplored image of African women:

Although women's rights advocates rarely acknowledge the Exotic Other Female, I argue that their discourse is nevertheless dependent on her. The projection of the Exotic Other Female (as something "out there") seems to guide much of their advocacy.²⁸

In his discussion of the "constitutional subject" - the "we" in the American constitution's "We the people" - Michel Rosenfeld pushes this analysis of the unexamined other in a different direction. He argues that the constitutional subject can only be approached and understood in the negative; that it is much easier to determine what the constitutional subject *is not* than what it is. He concludes therefore "that it is ultimately preferable and more accurate to regard

²⁶ Kline, above n 19 at 315; internal citation to Marie Ashe "'Bad Mothers' and 'Good Lawyers': Reflections on Representation and Relationship" (Paper presented at the Workshop on Motherhood, Feminism and Legal Theory Project Workshop, Columbia University School of Law, December 4-5, 1992).

²⁷ Engle K, "Female Subjects of Public International Law: Human Rights and the Exotic Other Female" in D Danielsen and K Engle (eds), *After Identity: A Reader in Law and Culture* above n 3, 210.

²⁸ *Ibid.* at 212.

the constitutional subject as an absence.”²⁹ His analysis depends on the relational nature of identity as it requires that we understand the constitutional subject by looking at what it exists in contrast to. That is, that we develop the photograph from its negative. In my work, this perspective means that it is sometimes easiest to understand what it is to be Australian or Canadian by considering what it is not.

The relational quality of identity makes it a key concept for considering national identity and migration law. Migration law is directed outwards, at those beyond the nation’s borders. In labelling and controlling these others it builds a reflected image of the nation and those who are insiders. In addition, the relational nature of identity makes it a good tool in the search for exclusions and silences in law. Paying attention to the identities which are represented in and through legal discourses reminds us to search for the Others against which these identities derive their content. This perspective, therefore, draws attention to those most completely excluded by the law. This characteristic of identity creates an important intersection with legal reasoning, and is the key factor uniting several of the criticisms of legal reasoning examined in law and identity theory.

2. A Critique of Legal Method

Another important theme I draw on in analyses of law which use identity as an organising concept is a critique of legal reasoning and legal method. In broad terms, the argument is that legal reasoning is acutely categorical and

²⁹ Rosenfeld M, “The Identity of the Constitutional Subject” (1995) 16 *Cardozo Law Review* 1049 at 1054-55.

through its categorisations it creates, defines and constrains identities. The categorisation effect is related to the focus in legal reasoning on binary ‘either-or’ mechanics. The resulting categories have structured boundaries and are hierarchically related. In this section I consider these principal elements of the identity based critique of legal reasoning as well as how the legal process itself constrains and shapes the identities of those who engage with it.

a. Categorisation

Legal reasoning has a binary structure. It works through a series of ‘either-or’ choices, leading to an ultimate pronouncement in the same framework: guilty-not guilty, liable-not liable, eligible-ineligible. This structure alone is not unique. Human reasoning generally proceeds in this fashion, comparing alternatives and making choices. In legal reasoning, however, the process is simplified. There are ultimately only two alternatives, which are diametrically opposed to each other. Everything outside that narrow framework becomes irrelevant, either through formal rules of evidence and admissibility or through subtler techniques by which lawyers mould stories told to them about individuals into legal arguments. There is little room for compromise, for considering multiple alternatives, or for examining the ways the legal choices available obscure complicated situations. One of the most important skills learned by law students is how to analyse a complex hypothetical scenario and identify within it the legal issues arising. Instructors make an effort to pack exam questions with extraneous detail, imitating “real life,” so that bright students can distinguish themselves by strategically jettisoning much of the story. The legal argument narrows the factors to consider, thereby making the

question amenable to an either-or resolution. Martha Minow has likened this aspect of legal reasoning to the Sesame Street “one of these things does not belong here” game. In order to sort things into categories, we pay particular attention to one particular trait and ignore all others.³⁰ Lisa Bower considers the American Supreme Court decision in *Bower v Harwick*³¹ a paradigmatic example of this type of reasoning. In that case challenging the constitutional validity of Georgia’s sodomy law, homosexual identity was reduced by the Court to that particular act.³²

Patricia Williams describes this characteristic of legal reasoning when she argues that “theoretical legal understanding” in Anglo-American jurisprudence is characterised by “the hypostatisation of exclusive categories and clear taxonomies that purport to make life simpler in the face of life’s complication: rights/needs, moral/immoral, public/private, white/black.”³³ Binary categories are important to an identity based analysis of legal discourse because so many of the categories are used to identify individuals. The white/black categorisation which Williams refers to is only one of these. Other key legally bounded identities are innocent/guilty, sane/insane, adult/child. Each of these categorisations simplifies and fixes reality in an artificial way, particularly in cases at the margins: the woman who put a blouse in her shopping bag, forgot about it and left the shop (not guilty), the hermit who mails explosives to distant

³⁰ Above n 9 at 3.

³¹ (1986), 478 US 186 (USSC).

³² Bower L C, above n 6.

³³ Williams P J, *The Alchemy of Race and Rights* Harvard University Press, Cambridge Massachusetts, 1991 at 8.

cities in protest against civilisation (sane), the seventeen year old who lives on her own, caring for her child and completing high school by correspondence (child). And each of these identity labels has consequences in the lives of these individuals; consequences that affect their realities, even if the labels do not accurately reflect those realities.

b. *Hierarchy*

The oversimplification of realities by legal categories has various effects. One of the most important of these is that the categories have a hierarchical relationship with each other. In Minow's words, our language "...embeds unstated points of comparison inside categories that falsely imply a natural fit with the world."³⁴ To again use her words: "When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish - to discriminate."³⁵ Categorisation in legal discourses rarely lives up to its assertion of neutrality both because of the consequences attached to legal categories and because the categories are frequently constructed through assuming a background norm which is necessarily privileged in the process. The background norm, as unstated category, occupies the most privileged position. Iyer describes the process with precision:

Assignments of difference, or categorizations, are also expressions of hierarchies, assertions of power. When characteristics such as race and sex are perceived as differences, and are used to categorize people, they rarely merely distinguish among them. They are much more likely to be understood hierarchically....It is evident that to be in the speaker's position, to be the categorizer or comparison maker, is to occupy a position of power. It is empowering in two ways. First, doing the

³⁴ Above n 9 at 4.

³⁵ Ibid. at 3.

categorizing allows you to draw comparisons between yourself and others on the basis of *your* choice of characteristics.... Second, as categorizer, I can make myself absent from the process: I can create one side of the comparison as 'a difference' inherent in the person or group labelled by that difference, while constituting my particular constellation of attributes as the invisible background norm. Thus, Gwen is white, Claire is tall, and Joel is male. Regardless of what feature each of them might have chosen to distinguish them from me, the differences I choose become part of them, and my brown-ness, short-ness, female-ness, which are the points of comparison from which these differences emerge, disappear.³⁶

The hierarchical nature of legal categories is embedded in the way that they are formed and in who does the forming. While Iyer writes of categories used in anti-discrimination law, her argument is equally apposite to legal categories not already linked to discrimination. Labels such as migrant, citizen, resident, and alien also contain an implicit hierarchy which derives from submerging the point of view against which these labels are affixed.

Recent studies in First Nations law illustrate the hierarchical effects of legal categories as well as the reach of this analysis of the law. To claim under American land title provisions, indigenous groups must first be considered as "tribes." That is, a court must adjudicate their identity in a particular way before other aspects of a land claim will be considered.³⁷ Of the various American studies on this point, the most comprehensive is by Gerald Torres and Kathryn Milun.³⁸ Their analysis explores many facets of the *Mashpee* case,

³⁶ Iyer N, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's Law Journal* 179 at 185-86.

³⁷ Robert Post notes that group rights provisions give national courts a strong degree of control over group identity, and this is one example. See "Democratic Constitutionalism and Cultural Heterogeneity" (2000) *Australian Journal of Legal Philosophy* forthcoming.

³⁸ "Translating YONNONDIO by Precedent and Evidence: The Mashpee Indian Case" (1990) *Duke Law Journal* 625. Other studies exploring adjudication of the term tribe in the United States include: Carrillo J, "Identity as Idiom: Mashpee Reconsidered" (1995) 28 *Indiana Law Review* 511; Perry R W, "The Logic of the Modern Nation-State and the Legal Construction of

including the role played by precedent and by rules of evidence, and that the standard categorisation of “tribe” did not correspond to Mashpee experience.

Torres and Milun conclude:

The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus, the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible. The tragedy of power was manifest in the legally mute and invisible culture of those Mashpee Indians who stood before the court trying to prove that they existed.³⁹

This demonstrates the hierarchical effect of the legal category “tribe.” In order to assert certain claims, one must be within the category. To be outside it, in the realm of “not-tribe” is to lack standing, the legal term for voice. The categorisation scheme privileges the half of the binary opposition that it makes visible.

The issues of voice, visibility and hierarchy are all important aspects of legal reasoning which are brought to light in a focus on identity. Expressing a similar argument in the context of the law of intellectual and cultural property, Rosemary Coombe states that, “only by situating these claims in this context [of historical experience and contemporary political struggle] can we understand how supposedly abstract, general and universal principles (like authorship, art, culture, and identity) may operate to construct systematic structures of domination and exclusion in ...society.”⁴⁰ The hierarchical nature of legal categorisations, and the implicit background norms which ground them, make

Native American Tribal Identity” (1995) 28 *Indiana Law Review* 547; Staiger Gooding S, above n 8.

³⁹ Ibid. at 657.

⁴⁰ Coombe R J, “The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy” in Engle and Danielsen (eds) above n 3, 251 at 276.

legal discourse particularly suited for domination and exclusion, and masks these effects at the same time. The critical perspective on legal reasoning employed by theorists of law and identity aids in lifting this mask.

c. Boundaries

Law's categorical reasoning reifies boundaries. In order for categories to be meaningful they must be clearly demarcated. An analytic focus on identity brings boundaries into question as identities themselves are bounded. The two terms often occur together, each highlighting a different aspect of the law's identity labelling role. In migration law, which describes a border for the polity and specifies who may cross it, the concept of boundary is particularly important. In an overt way, migration law is about boundaries, and the identities that emerge on either side of them. Theorists concerned with law and identity consider ways that identities are contested. One important way an identity can be contested is at its boundary; that is, whether one is inside or outside a given identity group can be debated.⁴¹ This was the issue in the *Mashpee* case. The importance of boundaries in legal reasoning contributes to the inflexibility of the categories which are created. Minow argues that "these [legal] rules contribute to labelling by favouring a view of certain and clear boundaries rather than relationships."⁴² In her analysis, the law has difficulty addressing conflicts within relationships because its focus is the boundaries

⁴¹ The other principal way in which identities are contested is through debates over the meaning or expression of the particular identity, treating group membership as settled. For example, asking "what does it mean to be a citizen?" These two types of contestation can, of course, occur at the same time.

⁴² Minow M, above n 9 at 6-7.

between people rather than the relationships which necessarily emerge on either side of a boundary as an expression of that boundary.

Boundaries are also important in law because categorical reasoning relies on being able to treat certain questions as beyond the scope of inquiry or not at issue. That is, some things are clearly out of bounds. This mechanism works in many ways in the law, which also adopts and enshrines societal boundaries.⁴³

Thus analyses which consider law's methods for excluding and limiting arguments often raise the issue of boundary construction. Considering the effectiveness, for the capitalist class, of the nineteenth century distinction between "citizens" and "workers" Hunt states:

There is a literal sense in which law, and most explicitly property law, demarcates and enforces boundaries; but this notion of boundary maintenance has wider significance. In the case of the workplace boundaries have special import precisely because of the critical significance of the division between work and politics within capitalist economies; it is here that there is the distinction between the incorporation of the working class within the polity while excluding workers from full participation in the workplace. ... It is not that law creates this boundary but rather that once in place it is protected and reinforced by both legal ideology and legal practice.⁴⁴

An analysis of identity in law, then, introduces the concept of boundary in considering the contested bounds of identity and in doing so draws attention to other boundaries reified by the law. Both of these aspects of boundary are important to my study. Migration law establishes clear boundaries around identities such as citizen, resident, and visitor. It sets strict limits on categories such as bona fide spouse or refugee and provides tools for policing those

⁴³ One example which has been extensively considered by feminist legal theorists is law's adaptation of the public/private boundary.

⁴⁴ Hunt A, above n 10 at 325.

boundaries. It is also crucial to constructing the border or boundary of the nation, and the ways of crossing it.

d. *Individuals in the legal process*

A consideration of law and identity also yields insights about individuals who engage the legal process, both as professional actors – lawyers, judges, scholars – and individuals seeking legal outcomes. The process itself limits the identities of the roles these individuals can play. This is not to say that the legal process determines the identities of advocates, decision makers, or plaintiffs, but rather that it limits choices available to individuals in these roles. Further, the role one takes up in the process constrains what one observes about the process.

These themes have been explored by Gary Bellow and Martha Minow in their edited collection *Law Stories*.⁴⁵ One of their themes in considering law as narrative and in asking lawyers to reflect on the stories told in and by law was to raise... “questions concerning the construction and alteration of identities in the process of accommodating and challenging limits in law practice.”⁴⁶ They argue that “as they engage a legal problem, clients and legal workers experience shifts in the ways they see themselves and others and changes in the way they relate to and are seen by others.”⁴⁷ The form of legal reasoning means that one of a lawyer’s most important tasks is to shape her client’s identity into one that fits within a desirable legal category: not-guilty, competent, refugee. In order to accomplish this, some aspects of that identity must be highlighted, others

⁴⁵ Bellow G and Minow M (eds) *Law Stories*, University of Michigan Press, Ann Arbor, 1996.

⁴⁶ *Ibid.* at 3.

⁴⁷ *Ibid.*

downplayed. In an article in the same volume, Anthony Alfieri reflects on how poverty lawyers transform their client's own stories, imposing silences which amount to acts of narrative violence.⁴⁸ In migration law, successful outcomes mean being able to fit a particular identity label such as "bona fide spouse" or "dependent relative."

The lawyers building these cases and the decision makers presiding over them also project and are limited by identities cast for them as professional roles. Unlike the clients, however, these are identities which the professionals choose for themselves, whose contours they are trained and socialised to acquire. Identities of the individuals playing out roles on legal stages are important to explaining legal outcomes. But the variance between these identities is sharp. It is important to consider, as Minow does in a separate essay, the pattern of power relationships which underlie the emergence of particular identities. In her words, "...it is important to consider the contrast between choice and assignment. Who picks a given identity and who is consigned to it?"⁴⁹ One may "win" a legal result by successfully fitting the identity mould of "incompetent" or "abused wife" but fitting this mould carries its own legal and non-legal consequences.⁵⁰

⁴⁸ A V Alfieri, "Welfare Stories" in *ibid*, 31.

⁴⁹ "Identities" above n 1 at 112.

⁵⁰ This point is made in feminist critiques of the use of "battered women's syndrome" evidence in criminal law. See for example, Sheehy, E et al, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 *Criminal Law Journal* 369 and Leader-Elliott I, "Battered But Not Beaten: Women Who Kill in Self Defence" (1993) 15 *Sydney Law Review* 1.

This again points to the intermediary positioning of identity as neither wholly determinative nor wholly determined. The value of examining the identities of individuals in legal processes, however, is not that it can necessarily predict outcomes for us, but rather that it is instructive in showing how those with power over the process, the lawyers and judges, choose to construct themselves, and how the legal setting shapes the options they choose from. It also guides us to examining how legal discourse transforms one's experience of self into a legally mediated outcome. A theoretical perspective linking law and identity provides room, therefore, for considering these aspects of the legal process, as well as drawing critical attention to the categorical and hierarchical characteristics of legal reasoning. In the next section I examine in more detail one facet of legal reasoning, the role of rights.

3. Rights and identities

The debate over the utility of rights for progressive causes and the value of formal human rights instruments rages in all corners of the legal academy. The role of rights is vital in the migration context because what rights outsiders should have in a polity is a contentious question. Chapter Five of this thesis considers how this debate has taken shape in Canada and Australia and what conclusions can be drawn from that comparison. This section sets the stage for that discussion by considering rights as a core element of legal reasoning and demonstrates the insights that a law and identity analysis brings to rights debates. Rights discourses are a paragon of the type of reasoning which those concerned with identity in law argue is categorical, hierarchical and characterised by clear boundaries.

The language of rights permeates legal talk at all levels. We speak in terms of human rights, contractual rights, procedural rights and others. At one level our legal discourse can express any entitlement as a right. Rights are distinguished from privileges for some purposes, but even this distinction is laden with rights language. It may be a “mere privilege” to hold a driver’s licence, but it is nonetheless considered a “right” to have one’s application fairly decided.⁵¹ Obviously some rights are more important than others. International human rights scholars debate the merits of universal fundamental human rights provisions, a particular set of rights (whose boundaries are by no means clear) which are more important than other rights such as a right to fair consideration of a licence application or a right to practice as a physician. Rights discourse and legal discourse are almost synonymous. This has spillover effects into extra-legal discourses and people make rights claims in everyday life to address a myriad of situations ranging from the right to play loud music at midnight, the right to eat peanut butter,⁵² or the right to spank one’s own child.⁵³ I agree with Carol Smart’s characterisation of law as “the discourse of rights”⁵⁴ and with her analysis that the traditional mode of legal power is the extension of rights (as opposed to the creation of wrongs).⁵⁵

⁵¹ This is a core administrative law distinction. See Allars M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990, Chapter 6.

⁵² Grant I, “The Right to Peanut Butter” *Globe and Mail*, 26 November 1997.

⁵³ Australian parents probably do have this “right.” Canadian parents likely do not.

⁵⁴ Smart C, *Feminism and the Power of Law*, Routledge, New York and London, 1989 at 8.

⁵⁵ Ibid. at 12, 17 and passim. Smart rejects Foucault’s thesis that the legal form of power has been superseded by disciplinary power, asserting instead that law combines these two modes of power to retain its hegemonic sway. She states that “...the growth of legal rights which can be claimed from the state has induced the concomitant growth of individual regulation. Hence

Considering the ways in which rights and identities are linked provides one avenue for analysing the utility of rights. Categorical rights discourse, as the paradigmatic legal discourse, obscures and silences underlying social realities and complications. The assertion of a right creates the categories of “rights-holder” and “non-rights-holder” as a basic starting point in the analysis. This simplifying effect is a central tenet for those who argue that human rights instruments have little potential for social transformation.⁵⁶ Rather than join the debate as set out in these terms, however, I would like to draw out the linkages between rights and identity which are sketched in some work linking the two and to assert that a focus on identity can illuminate the question of when rights will be strategically useful and when they will not. Patricia Williams’ analysis provides a useful inroad to this perspective:

In law, rights are islands of empowerment. To be unrighted is to be disempowered, and the line between rights and no-rights is most often the line between dominators and oppressors. Rights contain images of power and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights. In principle, therefore, the more dizzyingly diverse the images that are propagated, the more empowered we will be as a society.⁵⁷

She links rights with the labels dominators and oppressors, and suggests that rights are generally empowering and can be created out of nothing. Rights are associated with particular identities, dominator and oppressor, but this structure

rights can be claimed only if the claimant fits within the category of persons to whom the rights have been conceded.” (at 162). While there is a struggle within legal discourses between new and old forms of power, law is at the same time extending its terrain in all directions.

⁵⁶ See Fudge J, “The Effects of Entreating a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada” (1989) 17 *International Journal of the Sociology of Law* 445; Glasbeck HJ, “From Constitutional Rights to ‘Real’ Rights – “R-I-G-HTS FO-R-WA-RD-HO”!?” 10 *Windsor Yearbook of Access to Justice* 468; Bakan J, *Just Words: Constitutional Rights and Social Wrongs*, University of Toronto Press, Toronto, 1997.

⁵⁷ Above n 33 at 233-34.

has inbuilt flexibility. I would add to this argument that a rights-holder identity can be more easily taken up by some groups than by others. Groups which occupy dominant social positions are more likely to be able to successfully assert rights claims.

This leads to another point which is recognised in literature linking law and identity. Rights are a phenomenon of collective identity. Hunt, who advocates strongly for the utility of rights, states:

Rights-in-action involve an articulation and mobilization of forms of collective identities. This does not imply that they need take the form of “collective rights,” but simply that they play a part in constituting social actors, whether individual or collective, whose identity is changed by and through the mobilization of some particular rights discourse. They articulate a vision of entitlements, of how things might be, which in turn has the capacity to advance political aspiration and action.⁵⁸

Rights are a form of collective identity because a “rights-holder” necessarily designates a group of individuals, even when the right is expressed as an individual right. While in Western law rights are most often or most successfully asserted by individuals,⁵⁹ they belong to categories. The “accused,” the “contracting party,” the “plaintiff” can each exercise rights, but each of these legal categories can be filled by any individual whose identity is adaptable to the confines of the category. For those who assert, as Hunt does, that rights contain the potential for social transformation, the mechanics for such a transformation would be a manipulation of the identities of the right-holder and the creation of new generic group identities which could become rights-holders. One way to

⁵⁸ Above n 10 at 247.

⁵⁹ Dauvergne C, “A Reassessment of the Effects of a Constitutional Charter of Rights on the Discourse of Sexual Violence in Canada” (1994) 22 *International Journal of the Sociology of Law* 291.

evaluate the likely success of such transformations would be to consider the extent to which the new identities differ from the old, recognising that in legal discourse change could not be more than incremental.

There is necessarily a trade off which comes from using this strategy, and Iyer's work points directly to it. Considering the protected grounds formulations used in equality rights instruments,⁶⁰ she states:

...no matter how long or inclusive the list of protected grounds or characteristics, the mechanical, categorical, or category-based, approach to equality embedded in such a structure obscures the complexity of social identity in ways that are damaging both to particular rights claimants, and to the larger goal of redressing relations of inequality. The categorical approach to equality fails to comprehend complex social relations.⁶¹

In other words, the price to be paid for using rights instruments as a legal strategy is that the identities that can be portrayed in rights arguments are limited. Some aspects of social reality will be lost in the process, some social realities will just not fit into the boxes provided. Rights narrow identities, and arguments about them, in particular ways which are related directly to the centrality of rights discourse to legal discourse. That is, rights discourse does this because it is legal discourse, and therefore what a law and identity analysis reveals about legal reasoning pertains in the arena of rights as well.

⁶⁰ That is, that equality rights instruments provide protection from discrimination on a number of grounds such as sex, sexual orientation, race, nationality etc. For example, the *Canadian Charter of Rights and Freedoms* states:

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.

One of Iyer's points is that even when the list of categories of protection is open-ended it is still a list and still categorically grounded.

⁶¹ Above n 36 at 181.

Minow analyses the tension at the centre of the rights debate by contrasting different versions of rights discourse:

...rights analysis contains a central instability. It starts with the idea that everyone enjoys the same rights but proceeds with the possibility that some special rights may be necessary either to remove the effects of past deprivation or to address some special characteristics of certain groups. Special rights, justified by differences, undermine claims of equal treatment predicated on sameness. Thus not only may the argument for special rights lose for lack of precedent; it may also refuel distinctions and inequality.⁶²

By linking her analysis of rights discourse to underlying sameness and difference, Minow makes a point that connects directly to the analysis of law and identities which she engages in elsewhere. Rights discourse incorporates and buries a particular view of which differences are legally relevant and which are superfluous. Among the most fully ingrained of these differences is the difference between a murderer and a falsely accused innocent. Some of the strongest and most revered rights protections are reserved for the criminal *accused* facing the coercive power of the state.⁶³ This is a crucial element of the western criminal justice system and I do not intend any criticism of these particular rights protections. What these rights do demonstrate, however, is that the current debate about the value of rights tends to focus on the value of rights for people seeking particular kinds of redress, often in the context of what is now called “identity politics.” It is for these “identities” that critics question the value of rights and sceptics frown upon their use. In contexts where we are, as a society, prepared to assume that there are no differences that matter, rights are

⁶² Above n 9 at 108.

⁶³ I discuss this in detail in “A Reassessment of the Effects of a Constitutional Charter of Rights on the Discourse of Sexual Violence in Canada” above note 59.

accepted non-contentiously. In the migration law context, the rights debate confronts these issues, as well as the question of whether non-members have any entitlement to legal rights at all.

The critique of legal reasoning and legal process which is grounded in an analysis of law and identity is applicable to the rights debate and informs that debate in several ways. It draws our attention to the link between rights and collective identities. It demonstrates how rights discourse is categorical and hierarchical and how it obscures pre-existing social realities. These insights can be used to assess when rights discourse will be strategically valuable and when it will be unlikely to succeed, or will succeed only at too great a cost to be worthwhile. Perhaps most importantly, considering rights and identities provides some insights into the issues of identity politics. At the centre of this issue is the question of how “identity” has come to be associated with marginalisation and how “rights” have come to represent the entire legal system. Critical assessments of identity in law call attention to how identities emerge through a process of silencing and othering. The identities which are made visible in identity politics appear against unstated background norms. The debate about how useful rights are to these groups, or about whether rights pander to special interests, often overlooks how well rights serve groups whose differences are accepted as irrelevant within the dominant legal ideology.

Having explored the aspects of law and identity scholarship that make it especially suited for my argument, I now turn to elaborating the central concepts my work builds on.

B. IDENTITY

Aside from observing that identity is a constructed product of relationships, the literature considering law and identity does little to explore what identity is, or how a *legally* constructed identity is experienced by an individual. The vagueness this cursory treatment generates can give way to confusion in the face of numerous studies across a range of disciplines which take identity as their focal point. Finally, the phrase ‘identity politics’ has emerged as a pop-cultural buzzword, further muddling the question of what social analysts mean when they talk of identity. I draw on social science and social psychology to clarify the aspects of the term identity I want to use here. I then explain how the questions I raise about identity in migration law are linked to identity politics but differ markedly from the body of work most often appearing under that rubric.

1. What is an identity?

Contemporary discussions of identity often reflect a debate between two poles labelled essentialism and constructivism. To simplify, the essentialist position is that at least some characteristics of identity are constant or innate, while the constructivist would argue that one’s sense of identity is wholly constituted within and through the intersection of various social discourses and processes.⁶⁴ The dominant view in the legal scholarship taking up identity as an analytic tool and an object of inquiry, is that identity is entirely socially

⁶⁴ Calhoun C, “Social Theory and the Politics of Identity” in Calhoun C (ed) *Social Theory and the Politics of Identity* Blackwell, Oxford UK and Cambridge MA, 1994, 9 at 12-20 presents an overview of this debate.

constructed. Although, of course, law is only one site of this construction. To put the position in a postmodernist's terms, an identity is a subject position contingent and temporarily fixed within a constellation of intersecting discourses.

However analytically satisfying the triumph of constructivism over essentialism may be, and despite its ability to give a particularly cogent account of identities represented in various legal texts, a constructivist account of identity does not fit particularly well with how we experience ourselves as individuals on a day to day basis. No amount of mental discipline really convinces *me* that *I* am a temporarily fixed subject position. Essentialism is easier to meld with one's everyday experience, which accounts for Calhoun's observation that

Essentialist invocations of races, nations, genders, classes, persons and a host of other identities nonetheless remain common in everyday discourse throughout the world. Pointing to the social and cultural histories by which they have been constructed has become the main way of trying to challenge the grip these essentialist identities have over us and the problems they create.⁶⁵

The insight that ought to be drawn from this experiential evidence is that the essentialism/constructivism debate is artificial at one level. Identity may be socially constructed, but when that construction is highly successful it becomes invisible, meaning that identity is experienced as *essential*. By making identity the object of inquiry, we can examine the social construction that underlies our lived experience and theorise the linkages between the two. In legal studies, this

⁶⁵ Ibid. at 14.

analysis is furthered by considering the role law has in making up the “social” in “social construction.”

The tension between constructivism and essentialism is subtly present in law and identity literature. The unifying theme that law somehow narrows and misrepresents social identities rests on an assumption that identity exists outside law. That, therefore, identity is either constructed elsewhere in the social system and then *re*-constructed imperfectly in law or that identity has at least a partially independent or *essential* existence. My purpose is not to take a position in the essentialist - constructivist debate but to acknowledge its existence and to underline the fact that theorists of law and identity have not engaged this debate to any significant degree, but at the same time have settled firmly on the constructivist side of the argument. While the resulting position may lack the satisfying comprehensiveness of social theory, it nonetheless provides a valuable advance and important insights for critical legal scholars.⁶⁶ It is possible to acknowledge that law constructs, or at least represents, identities which have an existence outside law without settling whether, ultimately, constructivism or essentialism gives a better account of modern identity.⁶⁷ The value in this intermediate posture is the vantage point it offers for understanding legal process and legal reasoning.

A framework for understanding the relationship between migration law and national identity requires consideration of identity at both an individual and a collective level. National identity is important because individuals experience

⁶⁶ Calhoun argues that it is “not productive to be simply for or against essentialism.” *ibid.* at 19.

⁶⁷ Legal academe is quite accustomed to this type of partial appropriation of theoretical constructs. See Duncan Kennedy, *Sexy Dressing Etc.* above n 5.

themselves as Australian, Canadian, American or some other nationality and this experience has some relevance in their individual lives. Nonetheless without the collective element (and leaving the discussion of “nation” to the next section), without some sense of the nation *as a collectivity* having an identity, there is no *source* from which an individual can draw in imagining and therefore making meaningful their own individual experience of national identity. An individual cannot have a national identity unless a considerable number of other individuals also participate in that shared identity.

John Turner’s work on the social psychology of groups is helpful in understanding how group identifications function for individuals.⁶⁸ His self-categorisation theory, or “social identity theory of the group,” provides an account “which rejects both the notion of a group mind (in the simple literal sense) and the individualism that denies the distinctive psychological properties of the group.”⁶⁹ To the generally shared assumptions that the individual possesses multiple conceptions of self and that the functioning of the self-concept is situation specific, he adds that cognitive representations of self derive from placing oneself into hierarchically arranged categories based on similarities and differences with others.⁷⁰ Turner’s account of group social identity is helpful in conceiving of national identity because it provides an account of the relationship between individual and collective identity and of the

⁶⁸ Turner J C, *Rediscovering the Social Group: A Self-Categorization Theory* Oxford and New York, Blackwell, 1987. His ideas are further developed in Turner JC, *Social Influence*, Open University Press, Milton Keynes, 1991.

⁶⁹ *Ibid.* *Rediscovering the Social Group* at 17.

⁷⁰ *Ibid.* Ch. 3.

changing relevance of a given identity to an individual. Both these aspects are important to the way I use identity in my analysis.

Turner argues that self-categorisations exist on three levels, the super-ordinate level of human beings, the intermediate level of ingroup-outgroup categories and the subordinate level of personal characteristics.⁷¹ Which self-category becomes important at a given point in time depends on characteristics of the individual person and of the situation. As self-categorisations depend on comparisons, when one category becomes the most relevant this accentuates “intra-class similarities” and “inter-class differences.”⁷² That is, there is what Turner terms a “functional antagonism” between importance of identifying at one level of self-categorisation and at other levels. In terms of my analysis, there is a functional antagonism between perceiving oneself as Canadian and perceiving oneself as a member of a smaller group such as Canadian women or Albertans, and still another functional antagonism between group and individual identities.

This is important in nations like Canada and Australia where the question of national identity is much debated and some people question whether there can be a national identity in any meaningful sense. My argument accepts this national angst about collective identity and asserts that migration law is a particular discourse in which identity as a collective phenomenon on a national level is of primary importance. Later in this chapter I detail the reasons for this importance (section D). At this juncture, I merely point out that the shifting

⁷¹ Ibid. at 45.

⁷² Ibid. at 48-9.

importance of a national identity, as well as its existence as a social phenomenon, can be accounted for in social psychology. In Turner's words, "at any given moment the similarities and differences between the person, ingroup and outgroup will vary..."⁷³ Linking this shifting importance to "group behaviours" which are familiar in migration settings such as stereotyping and discrimination, Turner continues:

...factors which enhance the salience of ingroup-outgroup categorisations tend to increase the perceived identity (similarity...) between self and ingroup members (and difference from outgroup members) and so *depersonalize individual self-perception* on the stereotypical dimensions which define the relevant ingroup membership.... the depersonalization of self-perception is the basic process underlying group phenomena (social stereotyping, group cohesiveness, ethnocentrism, co-operation and altruism, emotional contagion and empathy, collective action, shared norms and social influence processes, etc.)⁷⁴

In this analysis, the stereotyping and ethnocentrism which so often emerge in migration law discourses are in social-psychological terms an outgrowth of one's self-categorisation on the level of a national group.

Whether or not individuals identify as a national group will depend on the degree to which their subjectively perceived differences are less than differences perceived between them and other people.⁷⁵ Migration law discourse is a setting in which the perceptions of similarities and differences are most likely to align with the borders of the nation. Turner asserts that there are two "primary modes" for internalising group membership:

⁷³ Ibid. at 50.

⁷⁴ Ibid.

⁷⁵ Ibid. at 51-52.

(1) simply as a result of persuasive communications from credible, prestigious or attractive others (...from others with whom they identify), and (2) on the basis of public behaviour as group members leading to private self-attitude change.⁷⁶

The migration law setting provides various opportunities for these two primary modes of group membership internalisation to operate. As migration issues are frequently reported in the media, a large number of statements by credible and influential public figures are made widely available. Tribunal and judicial decisions themselves can function in this role. In the present political climate, where immigration is a frequently debated subject, many individuals will have opportunities to express their views in more or less public settings, whether across the back fence or at the parents' association meeting. In nations of immigrants like Canada and Australia, opportunities to express overt or subtle views about migration are woven into our everyday lives, into the same spheres where a sense of "national identity" is perceived to be absent.

The final point in Turner's theory which I wish to draw on is the account given of group behaviours. One of his overall objects is to demonstrate that while psychological processes belong only to individuals, it is nonetheless appropriate to consider group behaviour as separate and distinct, and that this behaviour can be explained by considering how individuals react and identify in group settings. He states that self-categorisation theory:

...demonstrates the postulate that psychological processes belong only to individuals is fully compatible with the idea of a psychological discontinuity between individuals acting as 'individuals' and as group members. Group behaviour is psychologically different from and irreducible to interpersonal relationships and yet this need involve no

⁷⁶ Ibid. at 53.

metaphysical notions of a group mind. If the theory proves valid, then the group has *psychological reality* in the sense that there is a specific psychological process, a self-grouping process, which corresponds to and underlies the distinctive features of group behaviour.⁷⁷

This aspect of Turner's theory is important to my work as my account of identity relies on stating that a very large group, a nation, can have a sense of identity and that this identity can affect the way the group behaves. As a group does not have its own psychological processes, this implies, therefore, that individuals acting as members of a group do or think certain things in response or in partial response to their sense of national identity. My argument is, of course, that this explanation will hold even in places like Canada and Australia where "nationalism" is viewed as a remote idea associated with "old world" rivalries and wars in emerging countries. The clarity which Turner's theory provides for describing the relationship between individual self-identification and group behavioural phenomena is especially valuable for my theoretical framework. In addition, my explanation of the interrelationship of migration law and national identity rests on the assumption that the importance of different aspects of identity depends on context, which Turner's research demonstrates a solid foundation for.

Keeping this grounding in social psychology firmly in mind, I will briefly consider how social theorists of identity have defined identity. These accounts of identity are very similar to those used – less self-consciously or carefully – in studies of law and identity. The common theme is that however much identity is considered to fluctuate and to be socially constructed, it is nonetheless crucial

⁷⁷ Ibid. at 66.

to how individuals make sense of their lives. A sense of identity gives important meaning to one's life and this meaning has a collective aspect to the extent that identity is derived from comparisons of oneself with others.

This collective dimension of identity means that identity has an inbuilt political potential. Homi Bhabha asserts that:

Within the pluralist framework that seeks to contain and resolve the debate, identity is taken as the referential sign of a fixed set of customs, practices and meanings, an enduring heritage, a readily identifiable sociological category, a set of shared traits or experiences.⁷⁸

That is, identity connects an individual to the setting in which they live. Even in conceptions of identity which emphasise its fluidity, the emphasis on identity as social connector is at the forefront, as in this description by Stanley Aronowitz:

We may now regard the individual as a process constituted by its multiple and *specific* relations, not only to the institutions of socialization such as family, school and law, but also to significant others, all of whom are in motion and constantly changing. The ways in which individuals and the groups to which they affiliate were constituted as late as a generation earlier may now be archaic. New identities arise; old ones pass away (at least temporarily).⁷⁹

Craig Calhoun, after outlining the potential pitfalls of taking either a purely essentialist or a purely constructivist view of identity emphasises that identity always embodies a tension between the individual and collective levels and that it is never successfully equated with self-interest. These tensions and inconsistencies form Calhoun's explanation for the fluctuating nature of identity. He states:

⁷⁸ Bhabha H, "Commitment to Theory" *Third Cinema Reader* (1989) 111 at 125, cited by Scott J W "Multiculturalism and the Politics of Identity" in Rajchaman J (ed) *The Identity in Question*, Routledge, New York, 1995.

⁷⁹ Aronowitz S, "Reflections on Identity" in J Rajchaman (ed.) *ibid.* 111 at 115.

To see identities only as reflections of “objective” social positions or circumstances is to see them always retrospectively. It does not make sense of the dynamic potential impact - for better or worse - in the tensions within persons and among the contending cultural discourses that locate persons. Identities are often personal and political projects in which we participate, empowered to greater or lesser extents by resources of experience and ability, culture and social organization.⁸⁰

Calhoun’s description captures our sense of the extent to which any “identity-box” never feels like a complete description of oneself, for as individuals we have many different labels, and experience ourselves as more than the sum of these disparate parts. While I may analyse some aspects of my experiences as typically of a woman’s experience or a Canadian’s view of the world, others are much less so, or are completely atypical. Thus to speak of an experience of national identity will never completely capture how a given individual will describe their own identity. In Turner’s terminology, national identity occurs at an intermediate level of identity rather than at a personal level meaning that it necessarily involves generalisation and abstraction. Migration law is one textual setting of these generalisations and abstractions.

I use the term identity in order to draw on the critical currents in legal theory which it is connected to. At the same time, I acknowledge that this legal scholarship leaves the answers to the full range of questions about the origins of identity to other disciplines. To specify what I mean by identity, I am drawing to some extent on work in social theory and psychology but this informs my use of the legal terminology, rather than making the analysis fully interdisciplinary. In order to discuss the relationship between migration law and national identity,

⁸⁰ Calhoun C, above n 64 at 28.

I use the term identity to speak about a group phenomenon which is experienced by individuals. National identity has both group and individual aspects which I draw on in different parts of my analysis. The experience of national identity, and the content of that identity varies with the situation. An individual's identity is the basis for their connections to the world around them and for their explanations of meaning in their own lives. Obviously, migration law is not a determining aspect in most peoples lives. I would suspect most people live their lives without any formal awareness of the migration laws of their home countries. Migration law is not determinative of national identity. Rather, migration law is one arena where national identity is reflected.

2. Identity Politics

In scholarly and popular discourse, the term identity has risen to prominence in connection with identity politics. This study draws on some of the themes in that work, but is not primarily about the issues which arise in the recurring identity politics debates. By focusing on national identity, I focus on a broader level of identification than is usually associated with identity politics. Minow describes identity politics as "...the mobilisation around gender, racial and similar group-based categories in order to shape or alter the exercise of power to benefit group members."⁸¹ Perry states that identity politics "...expresses a widely felt, weary cosmopolitan disdain for a certain sort of claim made against the state or its bureaucratic agencies on behalf of a broad

⁸¹ Minow M, "Not Only For Myself: Identity, Politics and Law" (1996) 75 *Oregon Law Review* 647 at 648.

range of collectivities.”⁸² Both definitions refer to debate *within* a national community. While the debate may be about the meaning of that community, it is also and significantly about exclusion.⁸³ Accordingly, the community is assumed to exist and to have some meaning and some established membership. The phrase identity politics is linked with advocacy by groups marginalised in different ways. It is also now at least tinged with political correctness.

My inquiry is directed primarily to the meaning of the national community itself rather than to debates within it. The two necessarily overlap. Contestations about exclusion and marginalisation within the national community crystallise in the community’s definition, whether that is self-definition or description by outsiders.⁸⁴ The voices of excluded groups raise important issues about migration law, and migration law is itself a site of exclusions. The values which find expression in migration law are those which prevail in internal contestations. My principal aim is to explore the contents and consequences of identity at a national level. I focus on what is translated into the migration law setting, rather than on the struggles over race, gender and class which ground this law. Using the term identity as an analytic tool allows me to draw on the insights of identity politics, and to take account of the

⁸² Perry R W “The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity” (1995) 28 *Indiana Law Review* 547 at 552-53.

⁸³ This is the defining characteristic of identity politics Wendy Brown’s analysis in “Wounded Attachments: Late Modern Oppositional Political Formations” in J Rajchman (ed) above n 78, 199. She argues that capitalism and disciplinarity “...breed the emergence of politicized identity, rooted in disciplinary productions, but oriented by liberal discourse towards protest against exclusion from a discursive formation of universal justice.” (at 205).

⁸⁴ Sherene Razack explores one example of this process in Razack S, “Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race and Gender” (1995) 8 *Canadian Journal of Women and the Law* 45.

exclusion and marginalisation which identity politics draws our attention to. Nonetheless, national identity has not typically been considered a catalyst for identity politics debates, aside from those cases of nationalist assertions of self-determination.⁸⁵ To consider national identity politics is to move the tensions of identity politics to their broadest level, for beyond the level of nations is that of humanity itself, which by its universalising vastness, and because of the absence of a comparator, makes all humans appear as individuals.

Having considered how the term identity is being used by legal theorists and how an understanding of that term is enriched by drawing on other disciplines, I now turn to an examination of the concept of nation to complete my description of a national identity. By considering these concepts in detail, I aim to extend the analytic power of the identity concept beyond its present usage in legal literature. Developing a full picture of the term identity allows me to then draw on different aspects of the concept to achieve greater nuances in my analysis.

C. NATION

1. Defining nations

It is axiomatic that if Australia and Canada have national identities, they must be nations. But the term nation itself has been subject to various definitions, and has ceded the ground in conventional political science and in international law to the less emotive “state” or the potentially redundant “nation-state.” The question of whether Canada and Australia are in fact *nations*, for

⁸⁵ See below at pp. 73-76 regarding a distinction between national identity and nationalism.

they are clearly both states and nation-states, arises more frequently in popular discourse in Canada where a “two nations” thesis is often articulated to explain the historical presence in Canada of both English and French speaking populations. I argue that Canada and Australia are indeed both nations, and that nation is best understood in a way that highlights the importance of law in general, and migration law in particular, to its existence. Nation is preferable to the term state for my purposes because of the emotive qualities which it conveys.⁸⁶

The most difficult aspect of using the term nation in the context of settler societies is sorting out to what extent the term refers to a people sharing an ethnic origin.⁸⁷ The assumption that goes with this is that the settler state itself does not generate an ethnicity; individuals cannot be ethnically “Australian” or “Canadian.” Canadian census forms inquire about ethnic origins, meaning origins elsewhere. In Australia, it is common to refer to “ethnic communities” or “the ethnic vote” as meaning some sub- and marginalised portion of the “Australian” community. While these terms are less common in Canada, a Canadian “multicultural” festival does not include “Canadian” culture, except in self-conscious appropriations of First Nations cultural symbols.

Anthony Smith explores the relationship between ethnicity and nationhood and concludes that all nations have at least some ethnic component.

⁸⁶ The term state has its own contested pedigree, but generally involves an alternative to nation which describes certain geopolitical factors as its definition.

⁸⁷ This is the meaning of nation referred to in the concise O.E.D., “1. a community of people mainly common descent, history, language, etc., forming a State or inhabiting a territory. 2. a tribe or confederation of tribes of N. American Indians.

He argues that “conceptually, the nation has come to blend two sets of dimensions, the one civic and territorial, the other ethnic and genealogical, in varying proportions in particular cases.”⁸⁸ He accepts the estimate that only ten percent of states are true “nation-states” and maintains that “most states aspire to become nation-states in this sense.”⁸⁹ Smith argues that there are two essential types of nations, those based primarily on territory and those based primarily on descent. Examining the emergence of nations in Europe, he finds that nations which have strong ethnic cores have been the most likely to thrive in the modern era. He further argues that nations without ethnic cores must “re-invent” them.⁹⁰ While many of the conclusions Smith offers about the nature of nations are insightful, for example that myth and memory are the *sine qua non* of nation,⁹¹ he never departs from the view that an ethnic core is associated with true nationhood. He implies that any re-invented ethnicity cannot be as successful in defining nation as an ethnicity with established historical roots in a “homeland.”⁹²

Smith’s analysis of nation embodies a contradiction which he acknowledges. At the same time that he asserts myth and memory are crucial to

⁸⁸ Smith A D, *National Identity* Penguin, London and New York, 1991 at 15.

⁸⁹ Ibid.

⁹⁰ Smith A D, *The Ethnic Origins of Nations* Blackwell, Oxford and New York 1986 *passim* and at 212.

⁹¹ Ibid. at 2.

⁹² For example, he states that in the struggle against decentralisation and ethnic/national forces “state elites employ the tactic of ‘bureaucratic nationalism’: they claim that their state constitutes a ‘nation,’ and the nation is sovereign and therefor integral and alone legitimate, with the result that nationalism becomes an ‘official’ doctrine and the nation is taken over by the territorial and bureaucratic state.” *The Ethnic Origins of Nations* above n 90 at 221.

the existence of a nation and may be deceptive or wholly false, he implies that some states are more nation-like than others because of an ethnic base that is “real” rather than mythic. All the while, he acknowledges that “in several states nations are being formed through an attempt to coalesce the cultures of successive waves of (mainly European) immigrants”⁹³ and offers America, Argentina and Australia as examples here. Smith’s analysis suggests that Australia and Canada cannot be nations in the true sense of the word. While I reject this view, I have raised it here because Smith offers a detailed and sophisticated argument for this prevalent view. In discussing Smith’s work I wish to emphasise both that he uses nation in a shifting way which would sometimes include Canada and Australia, and that many of the points he makes about nations do not depend on a strong and historical link to the land nor to a historical ethnic cohesion in the population.

In my view, the mythic elements of a nation are its vital characteristics, and the decisive reason for keeping the term separate from “state.” Benedict Anderson’s definition of nation conveys this. He describes a nation as “...an imagined political community – and imagined as both inherently limited and sovereign.”⁹⁴ This definition highlights the “imaginary” or mythic qualities of nations – indeed Anderson’s seminal work is entitled *Imagined Communities*. In addition, Anderson’s definition is preferable to similar others for my purposes because the elements he stresses correspond with my argument that migration law and national identity are interrelated.

⁹³ Above n 88 at 40.

⁹⁴ Anderson B, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (rev ed) Verso, London and New York, 1991 at 6.

Anderson's first criteria for the imagining of nation is that it be *limited*:

...because even the largest of them, encompassing perhaps a billion living human beings, has finite, if elastic, boundaries, beyond which lie other nations. No nation imagines itself coterminous with mankind...⁹⁵

Migration law is one expression of the boundary of a nation. In settler nations, this boundary is subject to remarkable elasticity, which Anderson allows for, but it nonetheless defines who can be or become a member of the nation, and who is to be excluded and the basis of such exclusions. Anderson's second criteria is *sovereignty*:

...because the concept [of nation] was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm. Coming to maturity at a stage of human history when even the most devout adherents of any universal religion were inescapably confronted with the living *pluralism* of such religions and the allomorphism between each faith's ontological claims and territorial stretch, nations dream of being free, and, if under God, directly so. The gage and emblem of this freedom is the sovereign state.⁹⁶

Sovereignty and migration law are inextricably intertwined. The central principle on which migration law in contemporary states rests is that nations have, as a consequence of sovereignty, the unconstrained power (and therefore the "right") to choose who will be admitted to their community and who will be excluded. International law leaves to individual states questions of criteria for citizenship and for temporary presence within their borders.⁹⁷ The issue of

⁹⁵ Ibid. at 7.

⁹⁶ Ibid.

⁹⁷ Although this development is relatively recent and was not firmly settled in international law at the start of this century (Brawley S, *The White Peril: Foreign Relations and Asian Immigration to Australia and North America 1919-1978*, UNSW Press, Sydney, 1995.

refugee admission, which might theoretically be understood as a constraint on sovereignty does not operate that way in practice. Even among those nations which are signatories to the *Refugee Convention*⁹⁸ refugee admissions are subject to politically determined quotas and surrounded by a rhetoric of national generosity rather than international obligation.⁹⁹

Anderson's final element in defining nation is *community*:

...because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings.¹⁰⁰

It is this element of nation which I set out to investigate through examining migration law. Migration law in both Australia and Canada expresses in various ways a vision of community, of what Anderson calls "a deep, horizontal comradeship." Migration law does this in part because of its involvement in setting the limits and expressing the sovereignty of the community, Anderson's first two criteria. My argument probes how community is expressed in this law and how the law serves the needs of the community.

Likewise, worldwide comprehensive restrictions on population movements are a twentieth century phenomenon (Dummett A and Nicol A, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* Weidenfeld and Nicolson, London, 1990 at 11).

⁹⁸ 1951 Convention relating to the Status of Refugees, 189 *UNTS* 150, entry into force 22 April 1954, as amended by the 1967 Protocol on the Convention Definition, 606 *UNTS* 8791, entry into force 4 October 1967.

⁹⁹ This is elaborated in Chapter Three. See also my article "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall Law Journal*, in press.

¹⁰⁰ Above note 94 at 7.

Anderson's use of "imaginary" as a descriptor of the national community is important for linking nation and identity on both the individual and the collective planes. He asserts that,

...all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined. Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined particularistically - as indefinitely stretchable nets of kinship and clientship.¹⁰¹

That is, a national community is not "knowable." While as a Canadian I have a sense of what it is to be Canadian and, in some settings, what Canadians "are like," this image is not derived from knowing all Canadians or even from surveying a statistically significant group, it is an image derived from the life experience of growing up in, being educated in, travelling abroad as a member of, the national community. It is, therefore, imaginary. To the extent that I identify as Canadian, or that I conceive of the nation itself as having an identity - as I clearly do when I think in terms of "Canada as a middle power" or "Canada as a humanitarian nation" - this imaginary plane on which the nation, as distinguished from the governmental apparatus, population and defined territory which makes it a "state," exists. This is what Anderson taps into with the phrase "imagined communities."

Anderson's study of nation joins the emergence of large-scale print technology, national vernacular languages, and capitalism as the prime factors behind the emergence of nations in the modern era. Importantly, he asserts that the new American states of the late eighteenth and early nineteenth centuries

¹⁰¹ Ibid at 6.

developed a sense of their own “nation-ness”¹⁰² well before most of Europe. To explain this riddle, Anderson turns to the importance of print journalism and the existence of these nations as administrative units since the sixteenth century.

On the latter point he states:

To see how administrative units could, over time, come to be conceived as fatherlands, not merely in the Americas but in other parts of the world, one has to look at the ways in which administrative organisations create meaning.¹⁰³

My argument about migration law in Australia and Canada takes up these points directly. I argue that Australia and Canada have in fact become “fatherlands” and that this has occurred within approximately the same time frame that Anderson suggests. In part, this is because of the period of time over which they have functioned as administrative units creating meanings. One of the sites in which this meaning is created, and an important one because of its position at the boundary, is migration law.

This argument dovetails that of Hobsbawm who asserts that while an ethnic base may be necessary for nationalist movements, it is not sufficient to create a nation, and... “not essential for the formation of national patriotism and loyalty once a state has been founded. ...nations are more often the consequence of setting up a state than they are its foundation.”¹⁰⁴ Hobsbawm makes the important point that the concept of nation is bound up with the idea of mass

¹⁰² Anderson’s term, at *ibid* 50. He is discussing principally the former Spanish possessions in Central and South America.

¹⁰³ *Ibid* at 53.

¹⁰⁴ Hobsbawm E J, *Nations and Nationalism since 1780: Programme, myth, reality*, 2nd ed, Cambridge University Press, Cambridge UK and New York, 1992 at 78.

participation. In his words, "...whatever else a nation was, the element of citizenship and mass participation or choice was never absent from it."¹⁰⁵ This then becomes part of the story of why nations emerged at the beginning of the modern era, as a sense of political consciousness at a mass level was becoming prevalent. One of Hobsbawn's central points is that nations are "dual phenomena." That is, they are

...constructed essentially from above, but which cannot be understood unless they are also analysed from below, that is, in terms of the assumptions, hopes, needs, longings and interests of ordinary people which are not necessarily national and still less nationalistic.¹⁰⁶

What Hobsbawn describes as a dualism corresponds with what I have asserted as the individual and collective aspects of national identity. Hobsbawn's argument strengthens the case for regarding national identity as implicated in both the political manifestation of the nation and the mundane experiences of its individual members. He urges that this dual form of the understanding of nation is critical to grasping the essence of a nation.

Hobsbawn also concludes that the formation of nations required a massive exercise in social engineering which he terms "the invention of tradition" because modern nations claim to be, *but are not*, rooted in antiquity.¹⁰⁷ He claims that because the modern "nation" consists of so many invented or constructed components and is associated with so many recent symbols and "suitably tailored discourses (such as 'national history'), the national

¹⁰⁵ Ibid. at 19.

¹⁰⁶ Ibid. at 11.

¹⁰⁷ Hobsbawn E J, "Introduction" in Hobsbawn E J and Ranger T (eds) *The Invention of Tradition*, Cambridge University Press, Cambridge 1983 at 13-14.

phenomenon cannot be adequately investigated without careful attention to the 'invention of tradition'."¹⁰⁸ And while the traditions may be "invented" and "false" the impulse to do so is almost primordial. In Hobsbawn's words, "the force of the sentiments which lead groups of "us" to give themselves an "ethnic"/linguistic identity against the foreign and threatening "them" cannot be denied."¹⁰⁹ Migration law and its associated rituals such as border examinations and oath swearing is one site for the invention of tradition. It is also an important location for the construction of "us" and "them" images. These images are bound up in the existence of the nation at its broadest political level and also in the experiences of the individuals pledging and saluting.

Writing of the settler society which has made the most unchallenged transition to the status of "nation," Hobsbawn asserts that problems of American national identity emerged because of massive immigration to the United States. "Americans had to be made. The invented traditions of the U.S.A. in this period [1870-1914] were primarily designed to achieve this object."¹¹⁰ That America may now more naturally be regarded as a nation than Australia or Canada, or that "American" may pass more easily as an ethnicity than Australian or Canadian may be merely a result of its longer history, its vastly larger population and its pre-eminent role on the world stage. These factors allows its

¹⁰⁸ Ibid.

¹⁰⁹ Above n 104 at 170.

¹¹⁰ Hobsbawn E J, "Mass-Producing Traditions: Europe 1870-1914" in E J Hobsbawn and T Ranger (eds) above n 107, 263 at 279.

invented traditions, and its associated “nation-ness” to loom larger in the global imagination than those of either Canada or Australia.

Australia and Canada are nations. They have a different pedigree than the nations to which the term first applied, but their vital distinguishing characteristics are the same. They are characterised by bounded sovereignty and a sense of community. Through their histories as administrative wholes, unifying traditions have been generated which their migration laws play a part in, reinforce and reflect. I would go so far as to claim that Australian and Canadian are emerging as quasi- or pseudo- ethnicities, and that this process is likely to continue over time, as increasingly individuals begin to understand themselves as “Australian” or as “Canadian.” This phenomenon can be observed in many areas, in literature, art and film, in politics and diplomacy. Migration law provides one microcosm for observing this growth of national identity which has the potential to become as strong an aspect of personal identity as ethnicity presently is in these countries.

2. Nation, law, myth

The existence of a nation depends upon a mythic foundation. This more than anything else is what the word nation offers emotively above and beyond the word state. Some of our sustaining myths are so much part of our mental landscape that we may no longer perceive them as such. For Canadians, the image of the red-coated mountie, the poor-but-proud habitant, or the portaging fur trader seem as much historical fact as national myth.¹¹¹ For

¹¹¹ And, of course, in one sense they are historical fact, or were initially.

Australians, a sense of nation is conjured by the bronzed Anzac,¹¹² by diggers at Gallipoli or by The Bush. The sources and sites of national mythology are myriad. Migration law functions both as a source of this mythology, in that part of the image of Australia and Canada relates to the successive waves of settlers who have come to these places, and as a site where mythic national images are enshrined and furthered.¹¹³

Migration law is only one of the many settings where national mythology is generated and reified, but this does not diminish the importance of national imagery to this law. The appropriate qualifier is, rather, that examining national identity's interrelationship with migration law will only provide one perspective on that identity. Indeed, other types of law are also enmeshed in the formation of national mythology and, thus, of nations. One of the transformations of the nineteenth century which made the state the main arena for most activities was the standardisation of administration and law throughout states.¹¹⁴ The existence of administrative, and hence legal, units in the Americas was key to the emergence of a sense of nationhood in those states in Anderson's

¹¹² Forgetting, as is essential to all myth-making, that the 'n' and 'z' stood for New Zealand when the word functioned as an acronym.

¹¹³ Audrey Kobayashi asserts that immigration law has a role in "changing the way Canada imagines itself as a nation" and that "the episodic nature of immigration, and of legal responses to immigration, has resulted in a successive re-imagining of Canada's national image and a re-negotiation of the terms by which we share a common landscape." in "Challenging the National Dream: Gender Persecution and Canadian Immigration Law" in Fitzpatrick P (ed) *Nationalism Racism and the Rule of Law* Dartmouth Press, Brookfield USA, 1995, 61 at 63.

¹¹⁴ Hobsbawm E J, "Mass Producing Traditions" above n 110 at 264. Writing of an earlier but parallel transformation, Bruce Mann discusses changes in Connecticut laws prior to the American Revolution and argues that social and economic changes leading to an expansion of the notion of community were accompanied by legal changes moving from a series of highly localized legal systems to a more integrated system characterized by abstraction and generalizable rules. Mann B H, "Law, Legalism and Community Before the American Revolution" (1986) 84 *Michigan Law Review* 1415.

analysis. Today we make the assumption that law is associated with nation; that when we say “the law” we mean the law in the place we are speaking of.

Speaking of law which is not national requires a qualifier, as in “international law,” “Islamic law,” “the common law,” and “customary law.” Peter Fitzpatrick expresses the relationship this way:

Modern law necessarily clings to nation as its epitome. From the early nineteenth century, law is seen as definitely attached to a rigidly demarcated national territory and as expressing the interests of a particular nation.¹¹⁵

Both law and myth are therefore important to the emergence of nations.

This equation highlights the mythic dimension of law;¹¹⁶ that law is interwoven in the way we imagine our world and our place in it. When we talk about what it means to be Canadian or Australian, thus tapping into the mythic dimension in which those identities exist, we also tap into the legal framework that provides those places with borders and constitutions, with citizens and with rights. Fitzpatrick states:

Although ... ‘the legal aspect’ varies in its significance for different nations, law is nonetheless central to the operation and often to the constitution of the nation: it erects and standardizes criteria of membership of the nation and of acceptable behaviour within it. Positive law, emptied of any necessary traditional content, was responsive to the imperatives of the nation state, including those of its self-construction. And, as Austin confirmed, the very ability to make law was the mark and preserve of independent political society. A deep existential attachment to law is often claimed to be characteristic of the people of the nation. In all, it is hardly surprising that law becomes a potent figure of national identity

¹¹⁵ Fitzpatrick P, “Introduction” in P Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law* (1995), xiii at xv.

¹¹⁶ On this point see Fitzpatrick P, *The Mythology of Modern Law* Routledge, London and New York, 1992, esp Ch 2 “Law as Myth”.

or that it remains capable of representing the purity and integrity of a race which claims to correspond to, or encompass or protect the nation.¹¹⁷

Law, therefore, is deeply important to the existence of the nation. It provides the baseline mechanical criteria for the existence of a state and it is one basis of the unifying mythology which provide staying power for the state, transforming it into a nation. This is true of all law associated with the state, of which migration law is an important instance. Joel Migdal argues that law is one of three crucial areas of state and society relations which ensure the endurance of state structures in the face of increasing globalising forces. He argues that this is in part because “much of what law – state and others – does is delineate a universe of meaning for people...”¹¹⁸ I argue that the delineation of a universe of meaning is a function which has some mythic dimensions. Further, the creation of a universe of meaning necessarily involves identity as it is through identity that individuals position themselves in regard to the social world around them.

The emotive power of the word nation, its imagery of sovereignty and unity, is seen when the term is taken up by groups seeking to evoke that mythology. The terms black nationalism, queer nation and deaf nation make this political statement. In the Canadian political context, an important example of the use of nation is the term First Nations to refer to Canada’s indigenous peoples. The accuracy of the term is undeniable, highlighting the historical precedence of the indigenes and emphasising that white Canada has had a negligent tendency to think of all indigenous people as one cultural group rather

¹¹⁷ Ibid at 117, citations omitted.

¹¹⁸ Migdal J S, “Why Do So Many States Stay in Tact?” in Dauvergne P (ed) *Weak and Strong States in Asia Pacific Societies* Allen and Unwin, Sydney, 1998, 11 at 26.

than many independent peoples. The successful integration of the term into popular Canadian discourse is in part due to the clarity its use brings in referring to groups such as The Assembly of First Nations,¹¹⁹ or the Saanich nation or Gitskan nation.¹²⁰

It is important to consider the First Nations when discussing migration law and national mythology for, salubrious linguistic innovation notwithstanding, the aboriginal peoples of both Canada and Australia are absent from the mythology of these “nations of immigrants.” Using the latter phrase explicitly denies the presence of the First Nations. The myth of a nation of immigrants is intertwined with visions of conquering a vast and empty land, and of “peopling” it with people from elsewhere, primarily Europe. Until very recently, this myth was supported by the legal doctrine of *terra nullius*,¹²¹ itself only overturned once its true usefulness had passed. That is, once the spread of European civilisation was so complete that even removing its own account of self-justification could not threaten its hegemony. Despite the fears raised by the *Wik* decision in Australia¹²² and the prospect of massive compensation payments following *Delgamuukw*,¹²³ Australia and Canada *are* nations of

¹¹⁹ Which is the largest Canadian national council of chiefs.

¹²⁰ Here as a substitute for the less honorific and very American term “tribe” and for the government imposed “band.”

¹²¹ This doctrine was rejected by the Australian High Court in *Mabo v Queensland (No 2)* (1991) 175 CLR 1. The rejection was finalised in the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

¹²² *Wik Peoples v Queensland* (1996) 141 ALR 248 (HCA). In *Wik* the High Court held that a pastoral lease would not necessarily extinguish native title to land. The decision was followed by an intense and acrimonious debate and by legislation restricting the reach of the Court’s ruling.

¹²³ Above n 121.

immigrants because the mythology and law which make them nations belong to these immigrants. The First Nations are first in linguistic retrospect only. The silence which the mythology of migration law and of nationhood confines aboriginal peoples to speaks its own powerful truth. These spaces were overtaken by migrants and made into nations by migration. Migration law and the mythology it engenders reflects the historical and legal oblivion which indigenous peoples in the these nations are now railing against.

Another aspect of a nation's existence is the territory it occupies. A nation is also a piece of geography, a space on a map. Even in this territorial dimension, however, both law and myth are implicated. The border which encloses the nation, which gives effect to the imaginary lines separating one nation's rocks and trees and fish from another, is a legal one. It is migration law which determines who can cross that line and under what conditions. It is migration law therefore which imbues that line with meaning in human terms. The territory of a nation is vitally bound up in its mythology. We cannot *think* Canada without also thinking of the Cold, the rugged terrain of the Canadian shield, the immense stretch of wheat-filled prairie. The word Australia raises a cloud of red dust in the mind; along with, incongruously, long stretches of sandy beach and an endless blue horizon. Thus even conceiving of nation in purely geographic terms we confront the importance of law and myth to understanding it.¹²⁴

¹²⁴ For more discussion of these issues see Bromley N K, *Law, Space and the Geographies of Power*, Guilford Press, New York, 1994. Donald J et al (eds) *Space and Place: Theories of Identity and Location*, Lawrence and Wishart, London, 1993; Hooson D (ed) *Geography and National Identity* Blackwell, Oxford UK and Cambridge Mass, 1994.

3. Putting nation in national identity

An individual's national identity is her sense of belonging to a nation, of being a part of a political, territorial and mythic unit. On the collective plane, national identity is the image of the nation projected in its mythology. This image is enshrined and adapted each time a politician appeals to national sentiment or an opinion leader calls on the populace to act as "good Australians." It is tested and refined each time a diplomatic delegation represents "Canada" in an international forum. National identity functions in all these dimensions simultaneously. Anthony Smith defines it as "complex and abstract":

A national identity is fundamentally multi-dimensional; it can never be reduced to a single element, even by particular factions of nationalists, nor can it be easily or swiftly induced in a population by artificial means.¹²⁵

Hobsbawm makes the point that while it is widely accepted that a mass level "national consciousness" accompanied the emergence of nations, little is known about what that meant to the masses involved.¹²⁶

It is also necessary to recall that any individual's identification with a given group may not be the most significant aspect of their identity at any point in time. This comes to the fore in discussing Australian and Canadian identity because many individuals in each country feel that other identities are more important to them, most or even all of the time.¹²⁷ This does not mean, however,

¹²⁵ Smith A D, *National Identity*, above n 88 at 14.

¹²⁶ Hobsbawm E J, *Nations and Nationalism* above n 104 at 130.

¹²⁷ At a conference recently where I presented a paper making reference to Australian identity an audience member challenged me, saying that "being Australian made no difference to her at all." This is the point I want to address here. While it may make no difference to her, she is still "being Australian."

that they do not have a sense of national identity which could become vital in some situations. It may be that they only subjectively identify as Australian when unexpectedly jailed in a foreign country or when mistakenly detained at a border crossing.

The situations in which most individuals *would* strongly assert their national identity lead to two points. The first is that national identity and nationalism are closely related but not indistinguishable phenomena. Nationalism has a political agenda, and is most often associated with an ethnic identity. Smith defines nationalism as, “an ideological movement,”¹²⁸ which captures what distinguishes it from national identity. As nationalism requires an ideological commitment, it will become an important aspect of an individual’s self-identification in a wider variety of settings than national identity. By talking of Canadian or Australian national identity I do not mean a commitment on behalf of a mass of the population to advance a particular set of interests, nor do I mean patriotism. Rather, I mean that most individuals in these countries, who are not visitors or temporary residents of some sort, locate themselves in the world with some reference to the mythic dimension of the Canadian or Australian nation. I mean that these individuals can make sense of a politician’s exhortation to support the Aussie battler or to make sacrifices in the name of Canadian humanitarianism. I mean that these individuals share at least some collective imaginings of the land, its hardships and its history. Alienkoff gives

¹²⁸ Smith A D, *National Identity* above n 88 at 73 and he acknowledges that the term has led to as much confusion as nation itself.

an example which draws out the extent to which national identity and sense of self are interwoven:

Imagine that you awake one morning to find that your American citizenship has been taken away. What springs to mind? That travel to Europe may be difficult without an American passport? That no country will seek your release if you become a hostage overseas? That it will be impossible to vote in the next presidential election? I doubt that any of these issues are on the top of your concern list. More likely you feel violated, naked. You ask, how can I not be an American? What am I, then? A part of oneself is gone.¹²⁹

This example is valuable because it provides a contrast between those situations where even my conjured sceptics would likely consciously claim their national affiliations and the foundational level at which individuals integrate a sense of national identity into their understanding of self. In the not-yet-post modern world, it is difficult to imagine ourselves as individuals without national attachments.

The second point raised by the apparent “weakness” of Australian and Canadian national identities is that, as emphasised in the literature on law and identity, identity emerges in contrast to an other. Even someone who rarely feels Canadian and who would argue that their Canadian identity is of no importance to their life, would likely claim to be Canadian at a border crossing or in a war zone. Fitzpatrick makes the point that for a nation to exist, there must be others, and because of this, the nation exists in a relationship with those others:

As universal, the nation can have no positive limits and would, without more, lack identity. ... This dynamic of identity inevitably results in the

¹²⁹ Aleinkoff T A, “Theories of Loss of Citizenship” (1986) 84 *Michigan Law Review* 1471 at 1495-96.

'failure' of the nation as universal. The nation must exclude the other - and so be non-universal - in order to be universal.

But as universal, the nation must also include what it excludes. It remains connected to the other. The other, in short, becomes the nation's double. There is a dual projection of identity onto this double.¹³⁰

Migration law is a discourse which brings the nation and the others into contact, thereby creating images and reflections of each. It is therefore a logical site to find representations of national identity.

D. MIGRATION LAW

1. Locating migration law in liberal settler societies

Migration law is an important site in searching for an understanding of national identity both because it is an interface between insiders and others and because of the specific role that migration law plays in liberal settler societies. The importance of migration law to settler societies, or nations of immigrants, is obvious in one sense. In cases where the majority of those who constitute the dominant culture and the elite of a nation consider themselves to have come from elsewhere, migration law plays a primary role in determining who those people, and therefore the culture and the elite of the nation, will be. Migration law literally constitutes the community, setting out the rules for who will be members of the community, who will be eligible to become members and who will be excluded. In both Australia and Canada, at different points throughout history, migration has been used to increase the population in general, or to increase the population in particular parts of the country. At present, Australia

¹³⁰ Fitzpatrick P, "We know what it is when you do not ask us': Nationalism as Racism" in P Fitzpatrick (ed) above n 20, 3 at 10.

provides incentives for new migrants to settle outside the major cities and has debated extending the reach of these programs.¹³¹ In the postwar period, assisted passage programs brought British immigrants to Australia, as part of a strategy of increasing the population through an immigrant intake of up to 170 000 per year.¹³² In Canada, Chinese workers were “imported” to provide the hard labour to fulfil the national dream of a cross-Canada railway link¹³³ and present federal immigration arrangements provide for Quebec to manage the flow of immigrants to that province, acknowledging the importance of migration to the culture and future of the nation. These policies were or are facilitated by the migration laws of each country.

For Australia and Canada, and for other settler societies like Argentina, the United States and New Zealand, immigration and the law regulating it have been central concerns of nation building from the outset. While the migration law of settler societies may today resemble similar provisions in other countries, the role of this law in nation-building and national mythology is very different. Brubaker makes this point in introducing his comparative study of European and North American migration laws:

...there is a basic difference between nations constituted by immigration and countries in which occasional immigration has been incidental to nation-building. Canada and the United States have a continuous tradition of immigration. They were formed and reformed as nations through

¹³¹ This program operates in the family migration scheme and provides sponsorship concessions and lower point thresholds for applicants.

¹³² Jordens A M, *Redefining Australians: Immigration Citizenship and National Identity* Hale and Iremonger, Sydney, 1995, Ch 2 “Seeking Workers for a New Australia” *passim* and at 26.

¹³³ Hawkins F, *Critical Years in Immigration: Canada and Australia Compared*, UNSW Press, Sydney, 1989 at xv-xvii; Bagabiriime D, “The Constitution and Immigration: The Impact of Proposed Changes to the Immigration Power Under the Constitution Act, 1867” (1992) 15 *Dalhousie Law Journal* 428.

immigration, and immigration figures prominently in their national myths.¹³⁴

The building of a national identity for immigrant nations requires the integration of the experience of migration into the national mythology. Discussing the role of English constitutional law in the construction of New Zealand, Kelsey writes:

Creating the settler nation required something more. Its boundaries had to coincide not just with a particular territory, but with a given people who constituted a *nation* - an entity which would provide the sources of their identity and the sole legitimate object of their political allegiance.¹³⁵

In settler societies migration law and the mythology constructed in and around it is a prior condition to the community. As such it is *foundational*, and constitutes the community in a way that *constitutional* law alone cannot. The foundational role of immigration and the legal regimes that facilitate and control it is reflected in Levinson's analysis of the loyalty oath for new Americans¹³⁶ and Kobayashi's study of how changes in immigration law are bound up with changing images of Canada.¹³⁷

Migration law is a prior foundational element to constitutional law because nations are established on a liberal model and liberalism presumes the existence of communities and assumes those communities to have closed

¹³⁴ Brubaker W R, "Introduction" in Brubaker W R (ed), *Immigration and the Politics of Citizenship in Europe and North America* University Press of America, Lanham USA, 1989, 1 at 7.

¹³⁵ Kelsey J, "Restructuring the Nation: The Decline of the Colonial Nation-State and Competing Nationalisms in Aotearoa/New Zealand" in Fitzpatrick P (ed), above n 20, 177 at 183.

¹³⁶ Levinson S, "Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths" (1986) 84 *Michigan Law Review* 1440.

¹³⁷ Above note 113.

borders.¹³⁸ Rawls theorises justice within a society he describes as a “closed system isolated from other societies.”¹³⁹ Individuals enter the community at birth and leave at death. It provides “...a complete self-sufficient scheme of cooperation, making room for all the necessities and activities of life...; citizens do not join voluntarily but are born into it, where...we assume they are to live their lives.”¹⁴⁰ Dworkin’s community of principle is marked by its closed borders and clear distinctions between insiders and outsiders.¹⁴¹ He asserts:

We treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as questions of what would be fair or just within a particular political group.¹⁴²

Walzer confronts the issues of membership in the liberal community more directly than Rawls or Dworkin, and argues that the question of membership precedes that of justice. While membership is the chief good to be distributed by a community, it is not subject to the constraints of his distributive justice model.¹⁴³

Various theorists have made arguments extrapolating liberal tenets to the migration law context, but there is little agreement about whether liberalism

¹³⁸ This argument is elaborated in my article “Beyond Justice: The Consequences of Liberalism for Immigration Law” (1997) 10 *Canadian Journal of Law and Jurisprudence* 323.

¹³⁹ Rawls J, *A Theory of Justice*, Oxford University Press, Oxford, 1971 at 8.

¹⁴⁰ Rawls J, “Justice as Fairness: Political Not Metaphysical” (1985) 14 *Philosophy and Public Affairs* 223.

¹⁴¹ Dworkin R, *Law’s Empire*, Belknap Press, Cambridge MA, 1986 at 208-12.

¹⁴² *Ibid.* at 208.

¹⁴³ M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* Basic Books, New York 1983 Ch 2: Membership.

requires open borders or closed borders.¹⁴⁴ The only point of agreement among liberals is that borders must be opened to the extent required by humanitarianism.¹⁴⁵ There are two important consequences of these features of liberal theory for migration law. The first is that liberal theory does not give a standard by which we can assess how many migrants, if any, a society which grounds its moral consensus in liberalism must admit. This contributes, from both an international and a domestic perspective, to the view that immigration and the nation's sovereignty are directly linked. The power to control migration is directly associated with sovereignty and derives from the prerogative powers of the Crown in common law regimes like Australia and Canada.¹⁴⁶

This linkage is hardly surprising for a type of law over which the executive retains close control and which falls outside democratic theory.

Unlike other laws in a democracy, migration law regulates those outside the polity.¹⁴⁷ The usual democratic arguments in support of laws: that they reflect

¹⁴⁴ Walzer argues that closed borders are required for justice, *ibid.* Donald Galloway also argues that liberalism supports a closed border position. See "Liberalism, Globalism and Immigration" (1993) 18 *Queen's Law Journal* 266 and "Strangers and Members: Equality in an Immigration Setting" (1994) 7 *Canadian Journal of Law and Jurisprudence* 149. For a contrasting view, see also Joseph Carens' various articles including "Aliens and Citizens: The Case for Open Borders" (1987) 49 *The Review of Politics* 251; "Membership and Morality: Admission to Citizenship in Liberal Democratic States" in W Brubaker R (ed.) above n 134; "Refugees and the Limits of Obligation" (1992) 6 *Public Affairs Quarterly* 31; "Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States" (1987) 37 *University of Toronto Law Journal* 413.

¹⁴⁵ I discuss this in detail in my paper "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall Law Journal*, in press. Walzer and Galloway, both take this position and Carens, reinforces this as a minimal requirement. See also Scanlon J A and Kent O T, "The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe" in Gibney M (ed) *Open Borders? Closed Societies? The Ethical and Political Issues* Greenwood Press, New York, 1988; P Singer and R Singer "The Ethics of Refugee Policy" in M Gibney (ed) above.

¹⁴⁶ See further the discussion in Chapter Four at 235-241.

¹⁴⁷ Both the Australian *Migration Act 1958* (Cth) and the Canadian *Immigration Act RSC 1985 c, I-2* create some offences which apply to citizens of their own nations. These offences make

the will of the people, that they have been passed in a constitutional manner by duly elected representatives, that the government has a legitimate mandate to enact them, are applied in the migration law context in a fashion which again points to the role of migration law in the liberal nation. The interests which are reflected through the democratic calculus in the migration law of a democratic nation are those of the members of the nation, of people who already clearly belong to that polity. Migration law serves their needs and regulates others, outsiders, to achieve that end. Those the law applies to do not democratically approve it.

The second consequence of liberalism for migration law is that humanitarianism dominates theoretical discussions of migration, even though the vast majority of immigrants to those nations with established migration programs are not admitted on a humanitarian basis.¹⁴⁸ Thus most of the theoretical energy is directed at an aspect of the migration debate that is not particularly contentious¹⁴⁹ and which makes only a small contribution to the overall migration intake. Humanitarianism is also closely intertwined with popular discourses surrounding migration. Both Canada and Australia seek to

up a very small percentage of the respective Act's provisions and are directed at citizens only in their dealings with outsiders, for example, fraudulent dealings as a migration agent (*Migration Act* Part 3 – Migration Agents and Immigration Assistance) or aiding, abetting or organising entry into Canada in contravention of the *Immigration Act*, s. 94.1.

¹⁴⁸ In 1997 (the last total available as at October 20, 1999) the United States admitted 112,158 "refugees and asylees" of a total 738,536 admissions (U.S. Immigration and Naturalization Service Web Site, <http://www.usdoj.gov/ins/>). In 1999 Canada planned to admit 22,100 – 29,300 refugees of a planned total of between 200,000 and 225,000 admissions (Annual Immigration Plan, tabled in the House of Commons, November 1998). In 1998 - 99 Australia planned to admit 12,000 in its refugee and humanitarian program of a planned total 80,000 admissions (Minister of Immigration and Ethnic Affairs Media Releases 27/96 and 28/96, 03 July 1996).

¹⁴⁹ In both Canada and Australia, there has been considerable popular support for the admission of "genuine refugees" see Hawkins F, above n 133 at 247-8.

build and uphold an image of themselves as humanitarian nations and international “do-gooders” on the basis of their contributions to and admission of refugees. Humanitarianism places the nation in a particular posture and reinforces sovereign power over admission to the polity. A humanitarian gesture is not something extended between equals, and it is not a question of justice. Rather, it is a question of bestowing. Humanitarianism embeds a profound inequality. It is something that the strong and powerful can give to the weak. When a nation admits individuals on a humanitarian basis, it does so in a gesture of goodness and of generosity, not because it must as a matter of legal obligation or even as a matter of justice. Rather, the nation does this because it is good, because it is rich and powerful and willing to share with the weak. The intertwining of humanitarianism and migration law reflects an image of the nation, and its nationals, as good. This is also a contribution to national identity, one to which I return in Chapter Four.

2. The “us-them” line

The boundary that migration law provides for liberal immigrant nations serves the needs of those polities in various ways. In the first instance, it is crucially bound up in the identity of the nation because it constitutes the community for which questions of justice and equality will be meaningful. It draws the line between “us” and “them,” bringing an “us” into being. The sovereignty of the nation thus created means that this boundary can be manipulated to serve its needs. At one level, this is what is at stake when immigration levels are raised to boost the population, or when skilled migrants

are recruited to a given sector of the economy. But in a less overt way the “us-them” line is manipulated to serve more deeply submerged needs of the “us” group. The humanitarianism which is enmeshed in liberal migration law nourishes images of the nation as powerful and good. The line between insiders and outsiders serves to galvanise national identity and unify disparate views. The boundary provides convenient scapegoats in times of high unemployment or stress on the welfare state. In order to meet these diverse needs, migration laws have particular characteristics.

As the needs of the nation with respect to migration are changeable, in response to conditions within the country and interpretations of what those conditions mean, the boundary of the nation must, as a first priority, be malleable. At the same time, it retains an appearance of stability required in its role as limit of the nation. The image of the other, the outsider, is manipulated in order that the reflected picture of those who belong can appear constant. In this way, changes in migration law help ensure that “Australian” and “Canadian” identities have some constancy. Fitzpatrick comments on the malleability of the nation’s limits:

The ruptured or radical double marks the point of constant, and unmediated exclusion, the point of ultimate alterity. The protean double is forever in transition from such ultimate alterity to the realized pure form of nation.¹⁵⁰

Migration law, which is renowned for its frequent changes in both Australia and Canada, achieves this through its stated aims and its structure.

¹⁵⁰ Fitzpatrick P, “ ‘We know what it is when you do not ask us’: Nationalism as Racism” in Fitzpatrick P (ed), above n 20 at 11.

The *Immigration Act* and the *Migration Act* both contain statements of purpose which are ultimately completely manipulable. Section 3 of the Canadian Act, under the title “Canadian Immigration Policy - Objectives” enumerates ten aims of the Act, ranging from supporting demographic goals and fostering the development of a strong and vibrant economy to upholding its humanitarian tradition and keeping potential criminals out.¹⁵¹ While these objectives are highly detailed, there are so many that almost any decision under

¹⁵¹ The full text of section 3 reads:

It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada and recognizing the need

- (a) to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population;
- (b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
- (c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;
- (d) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government and non-governmental agencies in Canada with respect thereto;
- (e) to facilitate the entry of visitors into Canada for the purposes of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;
- (f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms;
- (g) to fulfil Canada’s international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced the persecuted;
- (h) to foster the development of a strong and vibrant economy and the prosperity of all regions in Canada;
- (i) to maintain and protect the health, safety and good order of Canadian society; and
- (j) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity.

the Act would conform with at least some of them, without even minimal interpretive wordplay. At the same time, it would be almost impossible to conceive of a decision which would conform with *all* the objectives. This range of objectives lists the needs of the nation which immigration policy may be called upon to support. The list takes a non-exhaustive form, under the overall direction to “promote the domestic and international interests of Canada.” If these objectives are too few, standard statutory interpretation permits additions. The Australian *Migration Act* takes a more direct route to the same end. Section 4 of that Act provides that “the object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.”¹⁵² This statement is bolstered by three subsections providing specific examples of how non-citizens are to be controlled. The guiding principle is the national interest and the primary mechanism is control. Both Acts share the emphasis on the national interest, conforming overtly with the instrumental and constitutive role of migration law in liberal settler societies.

The difference between the two sets of objectives is primarily one of tone.

Both Acts put the national interest first and foremost, the Australian formulation

¹⁵² The full text of s.4 reads:

- (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
- (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
- (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
- (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

links this in a rigorous way to control. As the empirical work in Chapters Three, Four and Five demonstrates, Australian migration law and the mythology which surrounds and supports it is dominated by a control emphasis much more than the Canadian. While control is also important in the Canadian law, it is subverted and hidden to a much greater extent. This in turn is tied in important ways to differences between Canadian and Australian national identities, and to differences in national migration mythologies.

While neither section 3 of the *Immigration Act* nor section 4 of the *Migration Act* are substantive sections, they do guide the interpretation of the Acts and are therefore important. In addition, standard administrative law doctrine dictates that the purpose of an act is the sole constraint on any discretionary powers exercised under that act.¹⁵³ The Canadian Act spells out how diverse the potential meanings of the national interest are. The sparse case law in Australia which has considered section 4 demonstrates how little constraint the term “national interest” truly provides. One formulation of section 4 often referred to by the Immigration Review Tribunal is:

...the discretion to impose a condition on a bridging visa Class E should be exercised in the national interest in a manner so as to facilitate the effective regulation of the presence in Australia of non-citizens. But this discretion should be exercised in a beneficial manner to ensure that consistent with such regulation, the discretion to impose conditions and thereby in the long run to issue a visa should be favourably exercised. *It is not, after all, in the national interest unreasonably to detain people, at great fiscal and human cost.*¹⁵⁴

¹⁵³ *Padfield v Minister of Agriculture, Fisheries, and Food* [1968] AC997 (HL); *Re Australian Broadcasting Tribunal and Other.*; *Ex parte 2HD Pty Ltd* (1979) 27 ALR 321 (HCA).

¹⁵⁴ *Qing Mei Fu* IRT reference: N94/01303. Emphasis added. A colleague has pointed out to me that section 4 of the *Migration Act* is simply not regarded as important to the average migration law practitioner in Australia. To this, I have three responses. First, that the migration law serves the national interest whether or not is specifically acknowledged and the extent to which this is implicit supports my position that migration law plays this role in the national

The stated purpose of these two Acts demonstrates a need for mutability in the law which is provided by the structure of the substantive provisions in the Act. In the case of each Act, the all important provisions which influence the day to day decisions about who will be permitted entry and who will be excluded are not contained in the Act but in regulations and in executive pronouncements. In both countries, the target numbers, or quotas, which determine how many migrants in which categories are to be admitted are made by the responsible minister.¹⁵⁵ While in practice, in times when migration levels are a contentious political issue, these numbers are undoubtedly subject to scrutiny by Cabinet at the very least, the executive has direct control over this number.

The procedure surrounding these vital numbers again points up a difference between Australian and Canadian provisions. The Australian Act establishes a legal requirement that the target numbers cannot be exceeded and that excess applications will be “taken not to have been made.”¹⁵⁶ The Canadian Act provides only for “estimates.” Here again the Australian Act takes a more overtly controlling tone than the Canadian. The Canadian requirement that the

imagination. Second, that this perceived “lack of importance” is a inevitable as purpose statements are not substantive provisions of an act. Finally, the section was enacted shortly after a High Court decision stating that the purpose of a migration act was to facilitate entry into the country and some migration lawyers believe its aim was specifically to defeat this view.

¹⁵⁵ In Australia, these numbers must be gazetted, pursuant to section 39 of the *Migration Act*. In Canada, they must be tabled in Parliament as part of the Annual Immigration Plan, pursuant to s. 7 of the *Immigration Act*.

¹⁵⁶ Section 39(2).

numbers be tabled in Parliament is of little import as no opportunity is provided for review or comment by Parliamentarians.

The operation of the critical “points system” is also hidden from view in each system. In Canada, the details of the system, the actual points to be awarded, are contained in an appendix to the *Immigration Regulations*.¹⁵⁷ This ensures that they can be amended without democratic scrutiny of any sort as Canadian regulations, unlike Australian, are not routinely reviewed by parliamentary committee. While the requisite consent of Cabinet required for an Order in Council could theoretically be difficult to obtain, this procedure ensures that changes are made with the cloak of Cabinet secrecy, safe from public scrutiny. The points to be awarded in any category change frequently. For example, sometimes “occupational demand” for all occupations is reduced to zero, effectively halting all applications subject to this system except those from applicants with high demand employment skills.

The Australian points system is not as deeply hidden as the Canadian, it appears in the *Migration Act* Division 3, Subdivision 3. Nonetheless, the legislative provisions create only a framework, into which regulations insert substance. This provides some scrutiny of the categories named as the regulations are reviewed by parliamentary committee. Despite this difference from the Canadian scheme, the “pass” and “pool” marks for each migrant visa category, that is, the true “who gets in” numbers are still determined by the

¹⁵⁷ Schedule I of the *Immigration Regulations, 1978*, C.R.C. as provided for in Regulations 8 - 11.1. Points are awarded under the headings education, specific vocational preparation, experience, occupational factor [i.e. demand], arranged employment/designated occupation, demographic factor (based on destination within Canada), age, knowledge of French or English, and “personal suitability.” This last is determined in an interview, which is granted if one’s score on the other categories is sufficiently high.

Minister and gazetted, with a requirement that they later be tabled in Parliament.¹⁵⁸

Both the *Immigration Act* and the *Migration Act* establish frameworks for migration policy in the national interest. Rather than providing a statement of the relevant law, each provides a sieve into which a changing view of the national interest can be poured and thereby made law. One consequence of the specificity of the *Migration Act*, the attempt to remove discretion, is that the Act is amended relatively frequently. While the *Immigration Act* is formally amended much less frequently, an abundance of regulatory change provides a similar effect. In the 1993-94 the Canadian government did a substantial review of immigration policy including a year long nationwide public consultation process. The far-reaching changes resulting from the process were tabled in Parliament under the section 7 provision for an annual “immigration plan.” A year long legislative review, covering much of the same ground but with a view to amending the Act, was presented to the Minister in December 1998. In both countries, on-going pressure for changes in migration law are evident. This is necessary because migration law is the all important boundary of the nation. Its malleability, the constantly shifting of the “us-them” line, allows a coherent vision of “us” to persist, even though the actual substance of the national interest is incessantly adjusted.

¹⁵⁸ Section 96.

3. The identities emerging

The boundary provided by migration law facilitates the emergence of “us” and “them” identities on either side of that line. This process is a vital concern of law and identity theory.¹⁵⁹ The boundary line acts as a reflecting mirror, in which we can see, depending on our vantage point, images of “ourselves” - whomever we are - and images of the excluded “aliens.” These images necessarily exist together. While migration law is not the only site for finding images of a nation’s members and the excluded outsiders, it is important because of migration law’s constitutive role in society, and it provides particularly clear reflections because it brings insiders and outsiders into close proximity. Members and others are intertwined in the text of a migration law, and in each of its applications. The policy statements in the Canadian *Immigration Act* provide a powerful example. While the law itself is directed almost exclusively towards outsiders, the objectives refer almost entirely to Canada and Canadians. Canada has demographic goals, a cultural fabric, a *Charter of Rights*, and a humanitarian tradition. The aims of the Act carefully portray an image of Canadians, the outsiders targeted by the law are absent.

The identities which emerge around the boundary are a function of that boundary itself and of what migration law aims to achieve. Edward Morgan states:

In a nutshell, the goal of the legal process, in the immigration context, might be said to be to distinguish between peoples - to differentiate citizens from foreigners, or “us” from “them” - in a world of supposedly undifferentiated persons to whom human rights are due.¹⁶⁰

¹⁵⁹ See above pp. 34-36.

¹⁶⁰ Morgan E M, “Aliens and Process Rights: The Open and Shut Case of Legal Sovereignty” (1988) 7 *Wisconsin International Law Journal* 107 at 107.

To return to the insights of social psychology, different aspects of our identity become important in different settings. In migration law, national identity becomes key. But this effect at the level of legal discourse is supported by our own non-legal non-analytic experiences of feeling more Canadian when we are abroad, or cheering instinctively for each Australian athlete in the Olympics.

Minow writes:

Encounters with people of more varied ethnic, racial, religious and class backgrounds challenge an individual's sense of self and community. Perhaps identity becomes important when it becomes a question, and it becomes a question when individuals and groups are mobile and able to change some of their identifying traits. When people come in frequent contact with others unlike themselves they can both heighten and submerge their sense of distinctiveness.¹⁶¹

Migration law also reflects some of the tensions which Australians and Canadians feel about their national identities, some of the ambiguities and uncertainties are echoed in contradictory legal provisions and frequent shifts.

Morgan states:

In domestic and international legal discourse, aliens are a reflection of ourselves. Ultimately, it is because we cannot focus on a single, determinative self-conception that we cannot in a determinate way pronounce on the stature of foreigners caught up in our legal system. At one moment we think of ourselves as individuals, undifferentiated in nature, and therefore, rights, from the universe of persons whom the state might happen to confront. At the very next instant, we conceive of ourselves as nationals, with a differentiated stature from each polity's members that accords with the separate existences and equal rights enjoyed by the world's nations. Since we are simultaneously human persons and national peoples, it is little wonder that aliens are both included and excluded from our norms. They are our mirror image.¹⁶²

¹⁶¹ Minow M, "Identities" above n 1 at 112.

¹⁶² Morgan E M, above n 160 at 147.

Morgan captures a feature of the “us-them” distinction here. While the outsider is a reflection of “us” it is a difficult identity to pin down and describe because our own self-perception is ever shifting. This parallels precisely my earlier argument that migration law is highly flexible to accommodate increasing reshaping of the national interest.

Understanding the role and relationships on either side of a boundary is always easier when the boundary is absolute. Migration law provides a boundary, but also ways of crossing it. Crossing the boundary is particularly important for nations of immigrants. In addition to the “us” and “them” identities ensconced in migration law, other identity categories emerge. Resident - temporary or permanent, refugee, visitor are common labels and each nation with an on-going migration program generates its own variations. These identities provide bridges between us and them. They also ensure that some who are *inside* remain firmly identified as *outsiders*. This ensures that making the boundary relatively easy to cross will not erode its role in providing a reliable limit to the community.

One of the identifying labels used within migration law is “citizen.”

There is a growing body of theory which considers questions of citizenship, an important branch of which examines citizenship in settler societies.¹⁶³ Some of

¹⁶³ Young I M, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship” (1989) 99 *Ethics* 250; Habermas J “Citizenship and National Identity” reprinted in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge MA, 1996; Andrews G (ed) *Citizenship* Lawrence and Wishart, London, 1991; Barbalet J M, *Citizenship: Rights, Struggle and Class Inequality* Open University Press, Milton Keynes, 1988; Carens J, “Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States” (1987) 37 *University of Toronto Law Journal* 413; Hall S and Held D, “Citizens and Citizenship” in Hall S and Jacques M (eds) *New Times: The Changing Face of Politics in the 1990s* Lawrence and Wishart, London, (1989); Cooper D, “The Citizen’s Charter and Radical Democracy: Empowerment and Exclusion within Citizenship Discourse”

the most challenging work in this area demonstrates how citizenship is used as an exclusionary and homogenising ideology.¹⁶⁴ That is, how citizenship suppresses differences in identity and creates a unified identity along certain narrow dimensions. This strand of citizenship theory runs parallel to the questions I explore in this work. Nonetheless, my work differs from citizenship theory in several ways. I am interested in the law which regulates the boundary between members and non-members of a community and which regulates who may be admitted to live permanently in the community. This is a narrower concern than citizenship theory which, while concerned with questions of admission to membership, also investigates the consequences of membership, especially the rights and duties of members. These considerations play a much smaller role in this study, arising only in connection with considerations of rights members have in assisting others to enter the country permanently.

In addition, in both Australia and Canada, migration law is of more practical consequence than citizenship law for questions of membership. In real terms there are few meaningful distinctions between permanent residents and citizens in these two countries. The most meaningful membership distinctions are the hurdles set within the migration law. After permanent residency has been achieved within the migration law framework, citizenship is largely a matter of choice. In both countries, only citizens can vote, and in Canada only

(1993) 2 *Social and Legal Studies* 149; Kymlicka W, *Recent Work in Citizenship Theory* University of Toronto Faculty of Law Workshop Series, Toronto 1992; Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995; Rubenstein K, "Citizenship in Australia: Unscrambling Its Meaning" (1995) 20 *Melbourne University Law Review* 503; Berns S, "Law, Citizenship and the Politics of Identity: Sketching the Limits of Citizenship" (1988) 7 *Griffith Law Review* 1.

¹⁶⁴ See in particular I M Young, D Cooper, and S Hall and D Held all *ibid*.

citizens are have the constitutionally guaranteed right to “enter, remain in and leave Canada.”¹⁶⁵ Permanent residents convicted of serious crimes can now be deported in some circumstances.¹⁶⁶ In Australia, permanent employment in the national civil service is restricted to citizens. But, most importantly, the hurdle for becoming a citizen in both countries is low; one must be a permanent resident for a set number of years.¹⁶⁷ Decisions about whether one is acceptable as a member of the community are made at the migration stage rather than later.¹⁶⁸ Migration law rather than citizenship law constitutes the community and contains the most significant distinctions between members and others.

E. CONCLUSION: A FRAMEWORK FOR ANALYSING MIGRATION LAW

Drawing these elements together is the basis of my framework for analysing migration law. A critical focus on identity provides an ideal avenue

¹⁶⁵ *Charter of Rights and Freedoms* ss. 6.(1). Note however that ss. 6(2) states:

Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

All other *Charter* provisions do not make reference to citizenship.

¹⁶⁶ See further discussion in Chapter Five at pages 253-57. Canadian *Immigration Act* RSC 1985 c.I-2 s.24 and the Australian *Migration Act 1958* (Cth) ss. 201-202.

¹⁶⁷ In Australia, 2 years permanent residency is required; *Australian Citizenship Act 1948* (Cth) s. 13. In Canada, 3 years permanent residency is required, *Citizenship Act* SC 1974-75-76 c. 108, s5.

¹⁶⁸ I believe that the trend in both Australia and Canada is towards increasing the importance of citizenship, and that what I have said about migration law as being the crucial legal site for admission to the community may change in the future. Nonetheless, I believe that for the present the crucial decision that I am enquiring into is made when someone is granted permanent residence.

of inquiry into migration law. In legal studies, the term identity brings with it the insights of analysis of the role of law in social construction and the pedigree of critical race studies. Both of these aspects enrich an examination of migration law. The first because migration law is quite literally essential to the construction of nations. It puts a border around the community, constituting those for whom laws will be meaningful. In settler societies like Australia and Canada this role is enhanced as they have been peopled by individuals who have entered the community through provisions in the migration law, or, more rarely, in spite of provisions in the migration law prohibiting them. In either case, migration law is the newcomer's first encounter with the nation and the label it puts on an individual provides a context for their life within that country. Further, as liberalism provides no justice standard against which migration laws can be assessed, exploring the contours of the national identifications these laws construct is the best way of assessing the provisions. Although we cannot conclude that a given law is just or unjust in a traditional liberal sense, we can state what the law leads us to conclude about the nation, about what Australia and Canada value or find meaningful.

Crucially, identity is neither determinative of the law nor determined by it, but an intermediate position. To make use of that insight we must consider why that is so and how that position means the law can be manipulated. Migration law is not the only source of national identity in settler societies. It is a site which reflects aspects of that identity, but which is also well adapted to accommodating changes in identity perceptions which occur elsewhere. At an

individual level, the consequences of conforming to “refugee” or “entrepreneur” identity are always complicated and only ever a starting point for one’s experiences within the nation. Migration law communicates some messages about the values of being Australian or Canadian. It is also transformed and affected, in both its letter and its interpretation, by values and perspectives from other realms of national public life. Migration law reflects a picture of how the nation identifies itself, and in doing so reifies those aspects of national identity. To accomplish this role in the nation, migration provisions are highly malleable, accommodating and masking shifts in the national interest. Law and identity literature focuses on the fluid and negotiated quality of legally constructed identity which is so central to this setting, and thus is ideally suited for this framework.

The association of legal identity analyses with critical race studies brings an important perspective to an examination of migration laws because these laws are designed to discriminate and to exclude.¹⁶⁹ Migration law is a bold expression of the sovereign power of the nation, and of its absolute ability to control, to choose, who will be admitted to the community. This function is *discriminating* in the most neutral sense of the word. But it is much more than that as well. The histories of immigration to Australia and Canada are replete with overt racial discrimination. At present, the racial and gender biases of migration laws are obscured by genuine improvements compared with past practice, and by neutral language. By putting identity in the centre of the

¹⁶⁹ Dobson-Mack A, “Independent Immigration Selection Criteria and Equality Rights: Discretion, Discrimination and Due Process” (1993) 34 *Les Cahiers de Droit* 549.

analysis, the discriminatory effects of the law can be laid bare. The concerns of identity politics are appropriately raised in studies of migration provisions. The role of migration law in silencing and excluding some experiences remains important.

Analyses of law and identity have also been used to explore implications of categories, hierarchies and boundaries in legal reasoning. This analysis is incisive in migration law which is both overtly and implicitly involved in creating clearly bounded categories hierarchically related to one another. In migration law, where categories and boundaries are so patently exposed, it is crucial to push this analysis of legal reasoning further. Doing so allows us to examine not only the label on a given category such as refugee or temporary worker but also the subtle ways this label moulds the identity and therefore the experiences of the individual who either chooses or is consigned to that label. Careful attention also gives us information about the society itself which generates these categories. The boundary created by migration law reveals much about those who erect it around themselves. The essential “us-them” hierarchy is replicated in a multitude of binary categories which make up the day to day functioning of migration law. Rights discourse is also of pressing importance in the migration law context which forces the confrontation between members’ rights and the potential human rights of outsiders. The discourse of rights in migration law is diverse and contains lessons that move beyond a monolithic understanding of the roles and functions of rights.

The term identity enriches the study of nation because a nation exists in part at the level of individual beliefs and of mythology. National identity, the

sense an individual has of belonging to a particular geopolitical configuration, is a modern phenomenon. But the state as a collective or formal government apparatus does not have a sense of self – a sense of identity – that can belong only to individuals. National consciousness is generated through individual identification with symbols and myths portraying the nation. Migration law is implicated in this process in several ways. For both Australians and Canadians, part of our understanding of self is of belonging to a nation of immigrants, of people from all corners of the world who have gathered in search of a better life. This is, at its core, a migration myth. Migration law also expresses images of ourselves and of our collective values. It contains definitions of “family” of “skilled” of “deserving.” These definitions portray “us” to the world at large and also perform a double reflecting function. They reflect already existing beliefs and they reify those beliefs against further change. In this way, the identities in migration law are neither determined nor determining, but have a role to play in both processes, depending on the evolution of societal beliefs.

A focus on law and identity also highlights two central aspects of liberal theory. The emergence and importance of the sovereign nation is historically intertwined with the dominance of liberalism as an individual and political philosophy. The sovereignty of the liberal nation is nowhere more clearly expressed than in its absolute control over its borders and its membership. The closed community which functions as a base assumption of liberal theorists is the working model for modern nations. The ability to determine who will be let in, both territorially and to citizenship, are closely guarded powers of the state.

By considering how the state exercises these powers we can trace imprints of how the state identifies itself and its members.

In addition, liberalism is the basis for the long historical association of humanitarianism with migration law. The role of humanitarianism in migration law is complex. The liberal consensus that some individuals ought to be given the assistance of prosperous nations is one factor providing for the international consensus that refugees are “owed” some protection. But this consensus is closely framed by the nation’s sovereignty and carefully constrained by national goals and domestic political imperatives. Thus there is an on-going tension between the nation’s desire to be perceived as humanitarian and good, yet firmly in control of its sovereign borders.

Having established this framework for analysing the interrelationship between migration law and national identity, I now turn to the second part of the thesis which demonstrates the analysis in particular settings. The first setting for this is the domestic refugee determination process, the subject of Chapter Three.

Chapter Three

Constructing Others - The Refugee Process

This Chapter examines how refugees are constructed in Australian and Canadian law and considers what that process reveals about migration law as a site for assembling a picture of national identity and as the effective boundary of the nation. Of all the categories of people admitted under the migration laws to live permanently in these nations, the label “refugee” describes those who, at least theoretically, differ most markedly from the members of the nation. While family and economic migrants are selected because they have something the nation values – family ties or a contribution to economic growth – refugees are admitted because of something they lack – the protection of another state. This key difference means that the law governing refugee admissions and the way it is applied is a good starting point for seeing the principles set out in Chapter Two take shape. Identity construction proceeds through a process of constructing boundaries and of portraying the other as like “us”. It is often easiest to see first how the outsider or the absent other is constructed and to search within this construction for reflected images of self. As well, images of self and other are often easiest to see in areas of sharp contrast. Both these conditions are met in the case of refugee admissions. Refugees are not selected because of their family ties or economic potential, and for that reason they are simultaneously the most “unknown” of migrant categories and the group which represents the sharpest contrast with existing national values. Using identity as the fulcrum of analysis allows us to observe that the refugee is constructed as the ultimate other to the nation in order to be permitted entry. Refugees are the

most unlike us, as well as the most unknown, facilitating our imaginative construction of their identity. This process in turn creates a reflected image of how Australia and Canada, as nations, identify themselves.

Examining refugee law also allows me to begin drawing out two other aspects of the Chapter Two framework. First, as refugee admissions are one type of humanitarian admission, this area of the law provides examples of how liberal humanitarianism takes shape in the law and influences the shape that law takes. This theme is taken up further in Chapter Four which analyses humanitarian admissions outside the refugee stream and investigates the humanitarian consensus in detail. Second, refugee law provides a clear way of focussing on the importance of sovereignty to migration law as refugee admission is the only aspect of migration law that contains a potential challenge to national sovereignty.

To demonstrate how refugee law constructs the refugee as the ultimate other to the nation and how this process in turn reveals elements of national identity, I begin by describing the international legal regime which generates the legal standards both Australia and Canada apply in their refugee law. This starting point also allows me to anchor my analysis by examining the interrelationship of sovereignty and international legal standards and demonstrating the place of identity in the refugee definition itself. This points up key features of the legal framework which are a necessary precedent to considering how it is applied. I then comparatively consider the Australian and Canadian refugee admission processes, with particular emphasis on the decision-making processes in the refugee tribunals, and key roles played by

identity and credibility in refugee determinations. This refugee determination process raises salient questions engaging identity by bringing the potential refugee face to face with the nation in a setting dominated by legal reasoning and processes despite various efforts to temper this influence. In this setting the importance of background norms and silences – two factors which the identity-based critique of law highlights – are vital. The next section analyses the emerging refugee identities in each country, including how this identity interacts with those of other actors in the refugee process. The final section of this Chapter considers how refugee admissions fit into the broader migration schemes in each country and what insights can be drawn about migration from examining the othering process taking place in the refugee realm. It also takes up the challenge described in Chapter Two of testing linkages between legal and popular discourses about refugees.

A. REFUGEE AS AN INTERNATIONAL LEGAL STANDARD

1. The internationally accepted definition of a refugee

The relationship of the refugee and the nation is complicated at the outset by the dissonance between the meanings which are commonly associated with the word refugee and the legal definition of the term. The images which we associate with refugees may include those fleeing recent famines in Ethiopia, residents of Sarajevo whose homes were destroyed in the war which rendered Yugoslavia “former,” Chinese dissident defectors, and “boat people” from

China or the Middle East.¹ The *Oxford English Dictionary* defines refugee in a way which fits with these visions; “a person taking refuge, esp. in a foreign country from war or persecution or natural disaster.”² But the legal definition is much narrower.

Both Australia and Canada have adopted the international definition of a refugee for use in their domestic law.³ This definition was agreed upon in 1951 as part of the international response to the vast number of displaced persons in Europe following the Second World War. The definition built on a number of international agreements about refugees in the interwar period.⁴ A refugee was defined as any person who:

As a result of event occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a

¹ The Australian press has recently coined the compound word “boatpeople” to describe aspiring refugee claimants arriving this way. See Toohey P, “A Roo Shooter and his Ute Hold the Line Against Illegals”, *Australian*, 13-14 November 1999 at 1; Saunders M, “PM Seeks Wahid’s Sympathy on Illegals”, *Australian*, 26 November 1999 at 6; Shanahan D, “Illegal ‘plane-people’ Outnumber Boat Loads”, *Australian* 25 November 1999 at 3. This change appears to date from November 1999.

² *The Concise Oxford Dictionary of Current English*, Allen R E (ed), Clarendon Press, Oxford 1990. No alternative definitions are provided.

³ *Australian Migration Act 1958* (Cth) s 36 (2) states:

A criterion for a protection visa is that the applicant for the visa is a non-citizen of Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

The Convention and Protocol are described in the interpretation section (s.5) of the Act.

The Canadian *Immigration Act* R.S.C. (1985) c. I-2 defines “Convention” and “Convention refugee” in the interpretation section of the Act, s.2(1). Additional provisions drawn directly from the international instruments are set out in subs. 2(2).

⁴ It is notable that the post World War I rise of refugee movements coincides with the widespread introduction of passports and immigration restrictions. Dummett A and Nicol A, *Subjects Citizens Aliens and Others: Nationality and Immigration Law*, Weidenfeld and Nicolson, London, 1990, at 145.

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.⁵

In 1967 the temporal limitation in the definition was removed, as was the option of interpreting the definition to refer only to events which had occurred in Europe.⁶ The components of the definition are 1) being outside one's country and not able or willing to return there; 2) having a well-founded fear of persecution; 3) that the fear of persecution be on the basis of certain characteristics or "grounds." People who are starving or whose lives are fractured by civil war are not refugees under this definition. Anyone who has not crossed an international border is not a refugee. Of those people imagined above, the only group almost certain to be considered refugees are the Chinese defectors.

This points to two of the most significant ways the international legal definition of a refugee is limited. First, the Western powers who dominated the initial norm building process ensured that their ideological tradition of granting asylum to those fleeing the emerging Eastern bloc would be enshrined in the international agreement. This Western bias is at the root of making "persecution" a key factor in the definition and in the original time and place limitations, which operated to facilitate an understanding of the refugee as someone who came from Europe but for whom the world community bore some

⁵ 1951 Convention relating to the Status of Refugees 189 *UNTS* 150, entry into force on 22 April 1954, Article 1(A)(2). Original signatories had the option of reading "events occurring before 1 January 1951" as "events occurring in Europe before 1 January 1951"; Article 1(B)(1). Hereafter, the *Refugee Convention*.

⁶ 1967 Protocol relating to the Status of Refugees 606 *UNTS* 267, entry into force 4 October 1967, Article 1. Hereafter the *Refugee Protocol*.

responsibility.⁷ Second, the refugee definition is individualistic.⁸ It is impossible to say categorically that homeless Sarajevans, starving Ethiopians or Indochinese boat people are *not* refugees. Their individual circumstances may indeed bring them within the definition, and the inquiry is legally located at an individual level, but the labels I have given these groups do not refer to characteristics that would bring them within the refugee definition. The label Chinese dissident defector does, as dissident describes directly a political opinion directed at a state opposed to free speech and a defector has already left their country of origin.

The stringency and bias of the refugee definition have met with thorough and detailed criticism from many quarters.⁹ Formal responses to address these concerns have included broadening the mandate of the United Nations High Commissioner for Refugees to include responsibility for “persons of concern”¹⁰

⁷ Hathaway J C, *The Law of Refugee Status*, Butterworths, Toronto, 1991, at 6-10.

⁸ Goodwin-Gill G, *The Refugee in International Law*, 2nd ed, Clarendon Press, Oxford, 1996 at 8.

⁹ Some examples include Tuit P, *False Images: Law's Construction of the Refugee*, Pluto Press, London and East Haven CT, 1996; Hathaway J C (ed) *Reconceiving International Refugee Law*, M Nijhoff, The Hague and Boston, 1997; Goodwin-Gill G, “Refugees: The Functions and Limits of the Existing Protection System” in *Human Rights and the Protection of Refugees Under International Law* Nash A (ed). Hathaway J C and Neve R A, “Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection” (1997) 10 *Harvard Human Rights Journal* 115; Sinclair C, *Who Would Want to be a Refugee?* PhD thesis, University of New England, 1995, Hyndman P, “Refugees Under International Law with a Reference to the Concept of Asylum” (1986) *Australian Law Journal* 148; Melandes G, “The Protection of Refugees” (1974) 18 *Scandinavian Studies in Law* 153.

¹⁰ The UNHCR's 1997 Statistical Overview is entitled “Refugees and Others of Concern to the UNHCR” and states, “In recent years, the UNHCR's involvement with persons who have not crossed an international border, such as the internally displaced, refugees who have returned home (returnees) and persons threatened with displacement by, or otherwise at risk from, armed conflict, has increased substantially. In view of the above, and taking into consideration the rise in the number of persons granted temporary protection and those allowed to remain in countries of asylum on humanitarian grounds, it has become increasingly imprecise to talk about “refugees” without some further indication of the group concerned. In this report, the term

and the emergence of several regional norms defining refugees more broadly.¹¹ Australia and Canada both incorporate some humanitarian admissions into their migration programs which extend beyond the formal refugee program in recognition that many individuals seeking resettlement do not come within the refugee definition. Hathaway argues that while in the immediate postwar period a reasonable fit existed between national self-interest and the refugee definition, this convergence has diminished in recent years. That, in combination with a rising number of involuntary migrants whose circumstances fall outside the definition (even if nations were motivated to meet commitments under it) means that “refugee law serves fewer and fewer people, less and less well, as time goes on.”¹²

In combination these factors - a narrow definition of refugee, a dissonance between the legal and popular definitions, and reliance on international legal norms in this area - reveal key observations about how refugee law operates *within* nations. The international legal regime enshrines national sovereignty. It is a long established tenet of international law that nations have complete control over their own naturalisation and citizenship law, that is, over their own

"refugees and others of concern to UNHCR" has been used to address these various categories." www.unhcr.ch/refworld/refbib/refstat/1998/98intro.htm at 1-2.

¹¹ These are the Organisation of African Unity 1969 *Convention Governing the specific aspects of refugee problems in Africa* 1000 UNTS 46 entered into force 20 June 1974; the *Cartagena Declaration* entered into by ten Latin American states in 1984 OAS/Ser.L/V/II.66, doc. 10, rev.1 at 190-93. The Council of Europe has also recognised the existence of *de facto* refugees, but has not formalised this recognition, Council of Europe, Parliamentary Assembly Recommendation 773 (1976).

¹² Hathaway J C, "Preface" in *Reconceiving International Refugee Law* above note 9 at xxv.

borders and membership.¹³ While there are now some international legal norms which transcend sovereignty either because they apply directly to individuals¹⁴ or because a nation may be bound by them without specifically consenting to them,¹⁵ refugee law is not one of these. The refugee convention reads as a constraint on sovereignty in that it obligates states not to return refugees to persecutory situations.¹⁶ This amounts to requiring states to keep the refugee within their borders in many instances, because international legal norms limit deportation options by only requiring states to admit their own nationals. In addition to this protection against refoulement, the convention reads like a rights document, guaranteeing various rights to refugees while in protection granting states. The *Refugee Convention* is therefore similar in tone and form to many of the human rights instruments which are now considered to constrain national sovereignty at some level.¹⁷

¹³ Confirmed by the International Court of Justice in the *Nottebohm Case (Liechtenstein v Guatemala)* 1955 I.C.J. Reports 4. Nations have devised two basic regimes governing citizenship or membership: *jus soli* and *jus sanguinis*, belonging by being born there or belonging by being the child of a member. Variations and limitations on these two regimes explain most citizenship laws. Migration laws are not so easily categorised, but do relate directly to citizenship laws as citizens are automatically allowed entry into their nation of citizenship.

¹⁴ For example some human rights provisions, war crimes prohibitions.

¹⁵ Some aspects of the law of the sea have reached this status, as have international legal norms prohibiting genocide.

¹⁶ Formally, this protection is provided by the provision against "refoulement" in Article 33 of the *Convention*:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

¹⁷ For a general overview of this area see Brownlie I, *Principles of Public International Law*, 5th ed, 1998, Clarendon Press, Oxford, 1998, Chapter XXV, "Protection of Individuals and Groups: Human Rights and Self-Determination."

But the convention operates as only a minimal constraint on sovereignty in practice, especially in prosperous Western nations remote from most situations which produce refugees. In Australia and Canada, admission of refugees is guided by quotas or target numbers set by the government on a yearly basis. Since refugees are not actually crossing the borders in overwhelming numbers, as may be the case in Tanzania or Macedonia, the number of refugees to be accepted is not determined by an international legal obligation but by internal political wrangling. Any obligation to accept refugees from afar is rooted in moral suasion rather than legal requisite. While some international human rights conventions contain provisions allowing at least the option of an international forum to bring complaints to, there is no such forum for breaches of the *Refugee Convention*. In Hathaway's view:

International refugee law rarely determines how governments respond to involuntary migration. States pay lip service to the importance of honouring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders. Although the advocacy community invokes formal protection principles, it knows that governments are unlikely to live up to these supposedly minimum standards.¹⁸

While the *Refugee Convention* is not treated by states as a significant constraint on sovereignty - and therefore is not one - incorporating its language into domestic law allows governments to maintain that they are meeting their international obligations in this area. The narrowness of the legal definition of refugee, and in particular the requirement that a refugee be outside her own country to come within this definition, means that even if a nation chose to treat

¹⁸ Hathaway J C, above n 9 at xvii.

the convention as a robust constraint on sovereignty, the extent of this constraint in the case of nations distant from refugee producing situations would be slight. Instead, refugee law interpretation becomes a site of assertions of sovereignty, for expressions of the identity of the nation as nation. Deciding which refugees to admit and when becomes another potential tool in the construction of the national community.

2. The role of identity in the refugee definition

Using the term identity to explore the refugee definition is important in two ways; first because identity is a central component of that definition and second because “refugee” can emerge as an identity in and of itself. These two aspects facilitate the usage of refugee as a legal category which incorporates particular background norms and unstated perspectives, building an image of the nation which resembles a photographic negative. I take up the first aspect here and consider the second later in this Chapter. While the legal inquiry into whether one meets the refugee definition is individualistic, the permissible “grounds” on which persecution may be feared are largely group identity based. This narrows the definition, of course, a fear of persecution is not the only element. It also parallels a familiar trick of liberal legalism: the focus is on the individual but the labelling of individuals creates a group identity and regulates the boundary of that identity. This feature of legally constructed identities fits within John Turner’s description of how identity is experienced at both group and individual levels.

A refugee fears persecution on the basis of race, religion, nationality or membership of a particular social group or political opinion. The first four of

these grounds can be viewed directly as components of identity. Identity also sheds important light on political opinion, which I discuss separately. While an individual may not identify as a member of a particular race, religion, nationality or social group in all or even any circumstances, in an atmosphere of persecution this identity will become important whether or not an individual subjectively accepts it as important to them.¹⁹ The Nazi persecution of those with Jewish ancestry who did not view themselves as Jewish is an example which was easily available to the definition's drafters. Claiming refugee status on one of these grounds depends on being able to claim membership in an identity-based group. The process of asserting this claim will necessarily make this aspect of one's identity come to the fore. The law, therefore, shapes an individual's self-identification in this sense.

The importance of identity to the refugee definition is highlighted by the problematic jurisprudence interpreting the ground "membership in a particular social group."²⁰ In Australia and Canada, as elsewhere, the courts have been unsuccessful in providing a clear understanding of what will count as a particular social group. The leading Canadian case, *Canada (Attorney-General) v Ward*²¹ draws a highly problematic distinction between "what one is" and "what one does", the former meeting the definition and the latter not. The Australian High Court decision on point emphasises that particular social groups

¹⁹ See Chapter Two at pp. 45-58.

²⁰ See the discussion in Fullerton M, "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" (1993) 26 *Cornell International Law Journal* 505; Graves M, "From Definition to Exploration: Social Groups and Political Asylum Eligibility" (1989) 26 *San Diego Law Review* 740; Macklin A, "*Canada (Attorney-General) v. Ward* A Review Essay" (1994) 6 *International Journal of Refugee Law* 362.

²¹ (1993) 103 DLR (4th) 1 (SCC).

must be more than “merely demographic.”²² In each case, the court is grasping at a definition of particular social group which articulates a sense of belonging or identity. The Australian court relies on whether the group in question is *identifiable* in society.²³ It seems that in each country any group whose claims are familiar in identity politics debates would qualify as a particular social group. Identity politics can be viewed as having “pre-constructed” those groups outside the law, thus making them identifiable in the legal inquiry. This is one example of why the essentialist-constructivist debate is sidelined in law and identity literature. It is not incongruous to accept *both* that the law has a role in constructing identity (e.g. “refugee”) and that identities exist outside the law. This line of reasoning does not need to decide whether identities exist outside *all* social settings. The identity politics links with these claims also show the cultural bias of the law: groups which the receiving country has no experience of will be much less likely to be deemed “identifiable” and thus viewed as “particular social groups.”

The inquiry into whether a group is a particular social group is about one’s sense of self and about societal perceptions of selves, and about assertions of belonging (because voluntarily associated groups are captured by this ground). A person claiming refugee status on this ground fears persecution because of some aspect of their identity which is shared with others, rather than because of some individual characteristic. The jurisprudence can be viewed as aiming to

²² *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997), 142 ALR 331.

²³ *Ibid.* I consider this jurisprudence in detail in “Chinese Fleeing Sterilisation: Australia’s Response Against a Canadian Backdrop” (1998) 10 *International Journal of Refugee Law* 77.

draw parallels between “particular social groups” and races, religions and nationalities. The crux of each of these four grounds of potential persecution is that while the legal inquiry relates to the individual, the persecution must be directed at an individual *because of* their status as a group member.

Membership in a particular social group is also the ground which has been used as the legal support for implementation of the United Nations High Commissioner for Refugee’s (UNHCR) Women at Risk Program in Canada.²⁴ The legal inquiry therefore becomes: “in what circumstances does being a woman make one a member of a particular social group?”²⁵ Both Canada and Australia have implemented a responses to the UNHCR’s efforts to address the plight of women refugees which the UNHCR has worked for over a decade to publicise. That is, that while over 80% of those awaiting resettlement elsewhere are women and children, prosperous countries often accept more male than female refugees because men are more likely to be well-educated or English-speaking.²⁶ The guiding principle behind the Canadian approach is to encourage interpretation of the refugee definition which recognise that sometimes women

²⁴ See *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* Immigration and Refugee Board, Canada, 9 March 1993, updated 1996.

²⁵ Mawani N, “Introduction to the Immigration and Refugee Board Guidelines on Gender-Related Persecution” (1993) 5 *International Journal of Refugee Law* 240. Department of Immigration and Multicultural Affairs (Refugee and Humanitarian Division) One-Pager entitled “Australia’s Women at Risk Program”, see also Australia’s Migration Regulations, subclass 204: Women at Risk Visa.

²⁶ Canada has been criticised for this behaviour by European nations; reported in interviews with CIC officials, Ottawa, June 1997. Australia’s Women at Risk program makes a small contribution to addressing this disparity. While the program has now been operating for 10 years, male refugees still outnumber female (primary applicants stats from the Department of Immigration and Multicultural Affairs show the following: 1997/98 men 711, women 428; 1996/97 men 850 women 392; 1995/96 men 1035 women 510). The target number of women at risk visas is 420 in 1998/99 and 367 visas were issued.

are persecuted *because they are women*. Hence they should be recognised as refugees. The Australia program takes a different focus, aiming to assist women in their particular circumstances, even though they are not necessarily refugees. Under the Australian program, some Women at Risk visas are taken from the refugee target number and some from other humanitarian class targets, depending on the circumstances of the individual involved.²⁷ The key difference is that Canada *expands* the refugee definition while Australia keeps tight control over it. These various initiatives call attention to difficulties in meshing female identity with the refugee definition. First, by highlighting the definition's bias towards political and therefore male-dominated experience.²⁸ Second, by underscoring the difficulties of treating "women" as a social group. That is, this experience forms the background norm for the refugee definition. Observing identity function in the law is one way of highlighting this. Finally, by exposing the control imperative of the refugee definition which is threatened by the potential admittance of half of some populations as "social groups."

The fifth ground of eligible persecution in the refugee definition, political opinion, is not so obviously an identity label but nonetheless merges in identity based analysis as political opinion can be imputed by the prosecuting authority, in which case it functions in the same way as identity stereotyping.²⁹ In a twist

²⁷ Interview with DIMA staff, February 1998.

²⁸ Macklin A, "Refugee Women and the Imperative of Categories" (1995) 17 *Human Rights Quarterly* 213.

²⁹ Imputed political opinion was confirmed by the Supreme Court of Canada in *Ward*, above n 21 and by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 144 ALR 567 at 575.

on the Supreme Court of Canada's *Ward*³⁰ reasoning, being a refugee is who you are, not what is done to you. Returning to Minow's insights discussed in Chapter Two, we must pay attention to the integral distinction between those who choose identities and those who are consigned to them. The refugee standard is highly personalised both at this definitional level, and in its individualised application. Using the analytic tool of identity to examine the law and its application draws attention to the strictures of this definition, to the background norms it embeds, the incentives it creates for individuals to choose some identities over others and the role of both persecuting states and receiving states in consigning individuals to identity boxes.

Political opinion has been elaborated jurisprudentially in part through reliance on a strong sense of selves and of consciences.³¹ This reflects the Cold War backdrop to the negotiations leading to the *Refugee Convention* where the Western nations sought to protect their tradition of granting asylum to Eastern Bloc defectors. The case law supports this tradition by viewing political opinion as a belief that one ought not be forced to relinquish because of its importance to one's sense of self.³² The Supreme Court of Canada ruled that Mr. Ward, "who believes that the killing of innocent people to achieve political change is unacceptable,"³³ was persecuted by a paramilitary organisation because his conscience could not allow him to depart from this view, and

³⁰ Above n 21.

³¹ The range of views on whether a conscientious objection to military service can be grounds for refugee status provides an example. See the discussion in Goodwin-Gill G S, above n 8 at 54-59.

³² *Ward*, above n 21. This case has an influential status internationally; see *ibid.* at 49.

³³ Above n 8 at 40.

implicitly that the *Refugee Convention* protects politically linked expressions of conscience. This very personalised interpretation of political opinion links political and self-identity very closely, drawing the ground of persecution because of political opinion parallel to the other identity-based grounds. The approach implicitly divides political opinions into those which are linked to a sense of self and therefore which could ground status as a refugee and those which we would expect people to relinquish, for example a preference for voting Liberal to gain a personal tax advantage.

The refugee definition fits squarely into the role for migration law in the liberal nation which I described in Chapter Two. It could theoretically impinge on sovereignty but does not do so in any meaningful way in practice and thus becomes another mechanism for the nation to meet its needs and to constitute its community. Although it is written in the language of group membership and sense of belonging, it is honed by liberal legalism's commitment to analysis at the level of the individual. As it is taken up by sovereign nations it becomes imprinted with their sovereign identity. Simultaneously, it is a key element in the construction of refugee as an identity category with a precise relationship to that nation. Looking at the refugee admission processes in Australia and Canada provides a basis for deepening my analysis of the refugee standard and of illustrating the importance of identity to that standard and to the nation.

B. REFUGEE ADMISSION IN AUSTRALIA AND CANADA

1. Legislative Frameworks

Australia and Canada both have two ways of allowing people who meet the international definition of refugee to become permanent members of the community. Refugees are selected abroad and some of the people who arrive on their own in Australia and Canada are determined to be refugees and are allowed to stay on that basis. The two procedures are distinct. When refugees are selected abroad and brought "home," no international legal obligation is triggered. By all existing legal standards, a nation is free to take in refugees in this way or not. There may be some pressure in the international community to do this,³⁴ and there may from time to time be international agreements to facilitate this,³⁵ but there is nothing more. On the other hand, when a person has made it to Canada or Australia³⁶ and then claims to be a refugee the obligation under the *Refugee Convention* not to return a person to a place where they may be persecuted is triggered.³⁷ My principal interest in this Chapter is in considering how Australia and Canada respond to this international obligation.

³⁴ The United Nations High Commission for Refugees, for example, tries to exert pressure on states to take in refugees, and quasi refugees, from abroad.

³⁵ For example, the Comprehensive Plan of Action relating to Indo-Chinese refugees initiated in 1989 under which participating governments made specific commitments regarding issues such as resettlement, deterring clandestine departures, repartitions and regular communications. See "Statement of the Steering Committee: Reaffirmation of the Comprehensive Plan of Action" (1991) 3 *International Journal of Refugee Law* 367. This agreement was as much about limiting resettlement of refugees abroad as it was about facilitating it.

³⁶ By this I mean those who have physically reached the country, including those who make a refugee claim at a port of entry and therefore could be considered to not have legally entered the country. For a time in the 1980s, Australia made much of this legal distinction as a way of limiting refugee claims. See Crawford J and Hyndman P, "Three Heresies in the Application of the Refugee Convention" (1989) 1 *International Journal of Refugee Law* 152.

³⁷ Article 33, see above n 5 and surrounding text.

That is, how they respond to those who are already within the borders of the nation.

While offshore programs do not trigger an obligation in international law and therefore do not raise the intersection of sovereignty and rights claims, both Australian and Canadian offshore programs have features which should be noted at this point.³⁸ In Australia, the offshore program makes up the larger portion of refugees admitted³⁹ and is treated by the current Minister as being the neediest group.⁴⁰ As the Australian programs are formally linked, the offshore intake is reduced when onshore claimants increase. The effect of these provisions is to ensure a very high level of control over refugees admitted as most are preselected before arrival in Australia, and to ensure tight control over the total number admitted, as any unanticipated increase in successful onshore claims can be absorbed without increasing total numbers. The Minister uses the policy link between the two programs in anti-refugee rhetoric, claiming that those who gain admittance within Australia are stealing the places of the others.⁴¹ This ostensible result of the current system could easily be altered by the government, but not without sacrificing some degree of control.

³⁸ Although the refugee standard is used, therefore, offshore programs fit more directly within the ambit of humanitarian admissions canvassed in Chapter Four, see especially pp. 204-201.

³⁹ The targets for 1998-99 are 4000 refugees from offshore and 2000 from onshore. These numbers have been consistent over the past three years under John Howard's government .

⁴⁰ Ruddock P, Address to the Conference on Immigrant Justice, 6 June 1997, Sydney.

⁴¹ Ibid. Also, Ruddock P, Address to Australian Institute for Administrative Law Twilight Seminar, Canberra, October 30, 1997.

The overseas program in Canada is considerably smaller than the domestic program.⁴² The Canadian government has been criticised for using its offshore program as an adjunct of its independent migration program, that is for choosing offshore refugees who are well-educated and able-bodied and therefore likely to quickly become contributors to the Canadian economy.⁴³ This demonstrates that even in admitting the very needy, the usual logic of immigration – that the national interest is paramount – is not far from view. Educated, able-bodied refugees are most like the “us” group and most able to “fit in” to the community quickly. There is, of course, an economic angle to this: fewer settlement support costs. But it also reflects a vision of what the nation values.

The most interesting feature of the Canadian program is the opportunities which exist for private sponsorship. Following very successful private sponsorship programs during the Indochinese refugee influx of the 1980s, the Canadian government has now formalised opportunities for Canadians to increase the total annual number of refugees admitted through private sponsorships.⁴⁴ Private-sponsorship both allows the government an easy response to domestic pressure to act more humanely and allows it to withdraw from direct responsibility for admission totals. It also underscores the point

⁴² Although still slightly larger than the Australian program in raw numbers. In the Immigration Plan for 1999 (tabled in the House of Commons in October 1998) between 10,100 and 11,300 refugees will be admitted from abroad and 12,000 - 18,000 will be admitted in the domestic determination program (along with 2,000 - 3,000 of their dependants from abroad).

⁴³ This criticism was reported in two separate interviews with officials in Citizenship and Immigration Canada in June 1997. European nations are especially critical, arguing that Canada takes the “cream” of the refugee crop and leaves the nations who are closer to the crisis regions to grapple with the remaining refugees.

⁴⁴ 2,800 to 4,000 privately sponsored refugees are to be admitted in 1999 under subs. 6(3) and 6(4) of the *Immigration Act*.

Don Galloway makes about the moral duty of the liberal nation. That is, a nation must allow its individual members to help needy others if they choose to, but the nation itself does not have this duty.⁴⁵ In this account of humanitarianism, the obligation is privatised and thus the responsibility of the nation is drastically reduced. Some recent Australian developments such as community and church partial sponsorship of Kosovars in 1999 begin an Australian trend in this direction.

Refugee admission in both countries is part of their respective immigration programs. While refugee determination is set aside from economic and family migration, it is provided for in the same legislation and administered by the same department. Also, while the *Refugee Convention* would suggest that only temporary protection need be afforded for refugees,⁴⁶ those determined to be refugees are effectively given the right to remain permanently.⁴⁷ The internationally agreed definition of refugee has been written into the Canadian law since the immigration legislation was rewritten in 1978.⁴⁸ It has been

⁴⁵ See Chapter Two at pp. 76-82 and also Chapter Four at pp. 189-195.

⁴⁶ Making temporary protection the norm is a central aspect of Hathaway and Neve's plan for revitalising international refugee law, see Hathaway J and Neve R A, above n 9 at 156-169.

⁴⁷ In Canada the result of a successful refugee determination is the right to remain in Canada (subs. 4(2.1)) and the right to apply for permanent residency. In Australia, those determined to be refugees are given a "protection" visa (visa class AZ provided for under s.36 of the *Migration Act*) which carries the same rights and privileges as other categories of permanent residency visa, including the right to apply for citizenship after two years in the country. In November 1999 the Minister for Immigration created a new visa with reduced rights for refugees who arrive by boat. Holders of this three year temporary entry visa (subclass 785) have reduced entitlements to medical insurance, social security and no entitlement to family reunion.

⁴⁸ This is the year the present *Immigration Act* was proclaimed. The Canadian government is now preparing for another major alteration of its immigration legislation which could come to fruition by late 1999. While an independent investigative team given a year-long mandate to undertake public consultations and then make legislative recommendations suggested separating immigration and refugee admissions under a new *Immigration Act* and *Protection Act* (See *Not Just Numbers: A Canadian Framework for Future Immigration* (1997) Ottawa: Minister of

specifically referenced in the Australian law since 1980.⁴⁹ There is, thus, no difference in the refugee definition in the two countries. Significantly, however, the definition has been written directly into the Canadian legislation, whereas the Australian *Migration Act* makes reference to the *Refugee Convention*. The effect of this is to make international rules of treaty interpretation directly relevant to interpreting the definition in Australia⁵⁰ but to keep them at arms length in Canada.⁵¹ Therefore, in Canadian courts the refugee definition can be examined as a matter of statutory interpretation to which treaty interpretation rules such as interpretation in good faith⁵² are relevant but not binding. Expressed conversely, this means the refugee definition, while an integral part of Canadian law, is at arms length from Australian law. This difference is underscored by a 1991 Australian amendment providing that a protection visa will be granted when the Minister “is satisfied” that a person meets the convention definition. The High Court has determined that this alters the inquiry on judicial review so that the focus must now be on whether there is any evidence upon which the Minister could be satisfied that an applicant did or did

Supply and Services). The government has rejected this proposal. Following another round of consultations throughout 1998 Citizenship and Immigration Canada released its own reform proposals which would not remove refugee determination from the *Immigration Act (Building on a Strong Foundation for the 21st Century* (1999) Ottawa: Citizenship and Immigration Canada). Under this plan the refugee determination system would be modified but the basic model would be retained.

⁴⁹ The *Migration Act* first referred to the *Refugee Convention* in s. 6A(1)(c) which was introduced into the Act in 1980.

⁵⁰ Discussed by the Australian High Court in *Applicant A* above n 22 in each of the separate judgments.

⁵¹ The Supreme Court of Canada in *Ward*, (above n 21) considers some sources which are relevant to treaty interpretation but treats its enterprise as one of statutory interpretation to which the *rules* of treaty interpretation therefore have no application.

⁵² *Vienna Convention on the Law of Treaties 1969*, 1155 UNTS 331, Article 31.

not meet the definition.⁵³ These variations between how the Australian and Canadian law use of the definition demonstrate that the international commitment can be taken up differently, even in such similarly situated nations. The differences also ensure an additional layer of insulation for executive decision-making in Australia. This provides one way for the nation to imprint its identity on the law, even when the text of the law is identical. Incorporating the definition into domestic law directly strengthens its status because domestic law has higher status than international law in national legal systems.⁵⁴

Both Australia and Canada set annual targets for the number of refugees who will be admitted through the domestic determination process.⁵⁵ The Canadian target is a soft one as a range is specified (22, 100 to 29, 300 for 1999) and compliance with it is not rigorously required. The Australian policy of reducing overseas refugee numbers to accommodate the domestic target makes the target much firmer in Australia. The targets tell us two things. First that Canada is admitting approximately twelve times as many refugees as Australia when domestic landings are compared,⁵⁶ in the context of a much larger overall

⁵³ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

⁵⁴ This point is treated in more detail in Chapter Five, see pp. 290-291.

⁵⁵ This is a legislative requirement in Canada as part of the annual Immigration Plan under s. 7 of the *Immigration Act*. In Australia the targets are part of a well established process but are not legally required.

⁵⁶ The overseas intake programs are much more comparable, with Australia taking in 4000 refugees and 6000 'other humanitarian' migrants from overseas over the past few years. The Canadian figure for 1999 is 7,300 government sponsored and an additional 2, 800 to 3, 200 privately sponsored. This is strong evidence for Mary Crock's conclusion that "Australia has had a substantial overseas program for many years, upon which it has founded its international reputation as a caring and generous country." Crock M, *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998, at 124.

immigration program.⁵⁷ Second, that domestic refugee claims are not treated as rights claims by either nation. The logic of a target is antithetical to that of a rights claim. While both programs do partially reflect a right on behalf of a successful claimant not to be returned to danger because the targets can be expanded, this is countered both by measures ensuring that it is difficult to get to the country in the first place⁵⁸ and by rhetoric which equates refugee admission with the generosity of the nation rather than with its legal commitments.

In Australia, a refugee claim is first assessed by the Department of Immigration and Multicultural Affairs Refugee and Humanitarian Division. The applicant submits a written account of their story and is interviewed about 10% of cases.⁵⁹ Approximately 12% of claims are successful at this stage.⁶⁰

⁵⁷ For some time the annual immigration intake in Canada has been set at roughly 1% of the population whereas in Australia it is presently 0.3% of the population. The national Labour opposition party unveiled in February 1999 a plan to significantly increase the migrant intake. Whether this policy would survive a speculative Labour election victory is unknown.

⁵⁸ Both countries use carrier sanctions to penalise transport companies who bring in people without a prearranged right to stay. Australia also employs a universal visa system and makes the living circumstances of those awaiting refugee determination miserable (many claimants are denied work rights, access to state support was reduced in 1998, and some are put in detention) in a high profile effort to discourage refugee claimants. These measures all work to reduce the number of people who are in a position to assert this rights claim. A spate of boat arrivals in the first months of 1999 prompted calls for improvements to Australia's security net. (e.g. O'Connor M, "Forceful Need for Change in Shore Protection" *Australian* 14 April 1999 at 13; Wynhausen E, "Rusty Boats Beat Leaky Security" *Australian* 12 April 1999 at 1.) In September 1999 the Australian government proposed enhancing measures to allow confrontation with "boat people" on the high seas. *The Crimes at Sea Bill 1999* (Cth) extends powers beyond the territorial sea. It has been passed by the House and is now before the Senate. The Opposition has given its support in principle which will guarantee its passage. The *Border Protection Legislation Amendment Bill 1999* (Cth) strengthens a range of sanctions against "people smugglers". It has been passed by both houses and awaits the rubber stamp of royal assent.

⁵⁹ The Department would not confirm this figure in November 1999 and advised me to file a Freedom of Information request. I have generously estimated the rate based on conversations with refugee law practitioners in Sydney over the course of 1999. The percentage of claimants being interviewed is decreasing with increased economic pressures on this and other departments.

Unsuccessful claimants can seek a merits review before the Refugee Review Tribunal (RRT).⁶¹ The RRT alters the Department's determination in approximately 10% of cases.⁶² Judicial review of RRT decisions can be sought before the Federal Court and appealed to the Full Court of the Federal Court and the High Court. Migration cases comprise 65% of the Federal Court's administrative law caseload, which is a matter of grave concern to the government.⁶³ The Minister can replace a negative decision of the RRT with a favourable determination at his discretion, a procedure I discuss in detail in Chapter Four.⁶⁴ Very few RRT decisions are reversed by the courts.⁶⁵

In Canada, a refugee claim is considered in the first instance by the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB), usually on referral by Citizenship and Immigration Canada (CIC). Unsuccessful claimants may seek leave to appeal to the Federal

⁶⁰ Department of Immigration and Multicultural Affairs 1998-99 Annual Report at www.immi.gov.au/annual_report/annrep99/html. In that year, 985 protection visas were granted at this stage from 8,257 applications.

⁶¹ This Tribunal has been in operation since 1993. Its operation is outlined in Part 7 of the *Migration Act*.

⁶² This number has been steadily decreasing in recent years: 436 of 5,344 in 1998/99, 451 of 5,078 in 1997/98, 262 of 2,629 (14.7%) in 1996/97, 316 of 2,144 (16.3%) in 1995/96. See www.rtt.gov.au/finalnyr.html.

⁶³ Ruddock P, "Narrowing of Judicial Review in the Migration Context" (1997) 15 *Australian Institute of Administrative Law Forum* 13 at 16. The principal concern is that people who are not bona fide refugees engage in pointless judicial review and further appeals to prolong their stay in Australia.

⁶⁴ See pp. 226-232.

⁶⁵ In 1997-98 464 RRT cases were reviewed with 20 being set aside by the courts and 54 being remitted by consent (RRT Annual Report 1997-98). The government is attempting, for a second time, to add a privative clause which will ostensibly strictly limit the role of the Federal Court, Migration Legislation (Judicial Review) Bill 1998 (Cth). See Creyke R "Restricting Judicial Review" (1997) 15 *Australian Institute of Administrative Law Forum* 22; Crock M "Privative Clauses and the Rule of Law: The Place of Judicial Review within the Construction

Court, although this is granted rarely with the result that CRDD decisions were set aside in only 1% of cases between 1994 and 1997.⁶⁶ The Minister may also seek leave from the Federal Court. Once leave is granted, the Federal Court of Appeal and the Supreme Court of Canada are also open avenues.⁶⁷ An unsuccessful claimant may also seek to have the provisions of the *Immigration Act* waived on the basis of humanitarian and compassionate considerations.⁶⁸ In some cases, the CRDD will recommend this avenue along with its reasons for rejecting a refugee claim. A third option presently available for unsuccessful claimants in Canada is to have their circumstances assessed against the criteria of the Post-Determination Refugee Claimants in Canada class which provides permanent residency for some people in refugee-like situations.⁶⁹

The next section considers the refugee hearing process in Australia and Canada as the key site of refugee identity construction. While the RRT and the CRDD are not identically placed in the respective refugee determination

of Australian Democracy" in Kneebone S (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?* Australian Institute of Administrative Law, Canberra, 1999, 57.

⁶⁶ As reported in the IRB Performance Report 1998, available from the Board's website at www.cisr.gc.ca/perform/perform98/perform98e.htm.

The requirement to seek leave was introduced in 1989 and applies to all IRB decisions, not just CRDD decisions. No reasons for refusing leave are given by the court. This provision obviously limits the number of immigration cases reaching the Court and curbs the Court's influence over the IRB as few decisions are handed down. Australia considered but rejected a leave provision to reduce the flow of refugee cases to its Federal Court and finds the privative clause to be a preferred solution, Ruddock P, "Narrowing of Judicial Review in the Migration Context" above n 63 at 20.

⁶⁷ The refugee determination processes of Australia and Canada which I have sketched here are compared in detail by Charles Sinclair in his Ph.D. dissertation entitled, *Who Would Want to Be A Refugee?*, University of New England, 1995.

⁶⁸ This is provided for under s.114(2) and is discussed at length in Chapter Four see pp. 212-226.

⁶⁹ See s. 11.4 of the *Immigration Regulations*, 1978.

processes, their roles are highly comparable. Each tribunal is responsible for the majority of successful refugee determinations in the country, each tribunal provides the opportunity for face-to-face contact between the individual claimant and the state.⁷⁰ The tribunals are also similarly situated as being at arms length to the government and embody features of the ideology of judicial independence.⁷¹ They have similar legal staffs and information gathering apparatuses. Finally, the Canadian model was in place when the Australian model was established and undoubtedly served as an example, if only a negative one.

2. The Other in the Refugee Tribunals

Any comparison between the refugee tribunals in Australia and Canada will highlight differences between the two forums. While these differences draw attention to key facets of the process, I aim to also retain a focus on parallels between the two tribunals. This central site for the construction and dissection of the refugee as other has important similarities in each nation. Those similarities show how this stream of migration law fits within the framework of liberal migration laws I have described. By looking at similarities, along with some of the divergences, I outline how these tribunals carry out an othering function which is at the core of refugee identities. I look

⁷⁰ A small number of cases which go before the Australian RRT are resolved "on the papers". In 1996-97, 191 of 15, 139 cases or 1.3 % were decided on the papers. A further 25% percent of RRT cases are settled when the claimant fails to attend the hearing. In Canada when a claimant does not attend the hearing the claim is deemed abandoned and no decision is made.

⁷¹ This is more prominent in Canada where the IRB is described as a quasi – judicial body with the status of a superior court of record (Mawani N, Speech to the Canadian Bar Association, Toronto, 1 March 1997). In Australia the constitutional separation of powers doctrine ensures that the tribunal remains firmly located as part of the executive branch of government. This affects the strength of the independence of the judiciary ideology in the tribunal setting.

in particular at how identity and credibility are intertwined in the process, and at what counts as “proof” in these settings. To conclude the analysis, I step back from the similarities and consider what refugee othering contributes to an understanding of Australia and Canada as nations.

a. The Elements of a refugee hearing

A refugee hearing is intensely personal and the stakes are dramatic. The claimant tells a story and the ensuing decision determines whether they will be allowed to live the rest of their lives in a new and very different place. In observing the hearings⁷² the most challenging task was to remain an observer and evaluator rather than becoming completely immersed in the story. The first tribunal I saw concluded oral reasons by tritely saying “welcome to Canada and best wishes for your life here.” The burly, confrontational claimant and I were equally surprised to find ourselves weeping.

Both Australian and Canadian refugee hearings are symbolically charged: the nation is on display. The Canadian flag was displayed in each room I saw; in Australia the opaque glass which enclosed one wall of each hearing room was imprinted with the kangaroo and emu crest. Claimants, and the occasional witness, must swear or affirm that they will tell the truth, even though this ritual is evidently the barest of formalities as they are frequently disbelieved.⁷³ The hearings are closed to the public, adding to the sense of intimacy and the rooms

⁷² To assist in my analysis of the refugee process I observed RRT and CRDD hearings. I observed the CRDD in Ottawa, Toronto and Vancouver in June 1997 and April 1998 and saw a total of 13 hearings. I observed 8 RRT hearings in Sydney in January 1998. In each case I also interviewed the presiding tribunal member (or members in some Canadian cases) and discussed the case with the claimants’ legal representatives (all the claimants in Canada were represented but only one was in Australia).

⁷³See discussion below at pp. 143-145.

are smaller than most courtrooms in either country. At the RRT hearing rooms in Sydney, the doors have no handles on the public side. Those waiting to enter and tell their stories see only a keyhole. Even when their name is called, they cannot enter the room without an escort. The symbolic passage to the nation is complete in this one detail.

Both Tribunals were introduced at times when the nations were facing a sharp increase in inland refugee claims and the courts were demanding procedural protections for refugee claimants.⁷⁴ These opposing pressures contribute to hearing systems which strain to meet the divergent objectives of their originators. Recalling that legally constructed identities reflect the objectives of those who exercise power over the process, these opposing pressures lead to tension about refugee identities in the hearing process. The refugee hearing occupies a unique place in migration law because its features are a poor fit with the dominant paradigm of liberal legalism. Hearings are held in camera in both countries to accommodate the personal stories and the vulnerabilities of genuine claimants. For this reason they are immunised from the ideological need for justice to be seen to be done. One unintended result is to remove claimants from the procedural protections which visibility provides and to protect the hearing from scrutiny, which is therefore reserved for the written reasons.⁷⁵ The crucial process for construction of refugee identity is hidden from view. While the goals this achieves are vital and to conduct hearings in public would lose more than it would gain, it does facilitate public

⁷⁴ The role of the courts in establishing these “rights” is taken up in Chapter 5 at pp. 280-286.

⁷⁵ See below at pp. 151-153.

misunderstanding of the process and provide imaginative scope for speculation about the content and meaning of refugee identity. It facilitates the other remaining unknown.

The hearing is in both instances designed to be non-adversarial. In Canada this aim is reflected in the roles assigned to people in the room: the case is led by a Refugee Case Officer (RCO)⁷⁶ who does not “prosecute” the case but assists the tribunal by selecting issues to be explored and questioning the claimant.⁷⁷ In the model, the tribunal is constituted by two members and the claimant need only convince one.⁷⁸ The hearing is not conducted as though the claimant has a case to meet. Rather, the claimant, who is in most cases represented by counsel,⁷⁹ takes the lead in the hearing, with the Refugee Case Officer joining the proceedings later if necessary. Most Tribunal members play an active role in the hearings through establishing an agenda in a pre-hearing conference and through active questioning during the hearing. In Vancouver,

⁷⁶ Formerly Refugee Hearing Officer.

⁷⁷ The role and behaviour of Refugee Hearing Officers is one of the principal topics of James Hathaway’s *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, submitted to the Chair of the IRB, Ottawa, December 1993, a report which was commissioned to address concerns of inappropriate behaviour Refugee Hearing Officer practices and information gathering practices at the IRB. Practice in the CRDD has altered since this report and in my observations significant improvements along the lines Hathaway recommended have been made.

⁷⁸ The CRDD is moving away from this format. Many hearings are now led by only one member. However, this can presently only be done with the consent of the claimant. Most claimants do consent as their lawyers advise them at the members rarely differ in their opinions (Four claimants lawyers I spoke to at the CRDD in April 1998 estimated that it happens in only approximately 5% of cases.).

⁷⁹ Cuts in legal aid funding have had an effect on the number of claimants who are represented. The hearing system in Canada was devised with the presumption that the majority of claimants would be represented and alterations to adjust to the change had not taken place when I was observing the hearings in 1997 and 1998. I did not see any non-represented claimants despite choosing hearings to observe randomly and frequently moving at the last minute to accommodate no shows and procedural delays.

the layout of the hearing rooms deliberately differs from that of a court, with the Refugee Case Officer facing the interpreter, not the opposing party.⁸⁰ These efforts to move away from the adversarial model, to reflect both the informality and efficiency values of the tribunal and the fact that the claimant is not on trial, are only moderately successful in meeting that goal. Since lawyers represent most claimants, and many tribunal members are legally trained, implicit norms of the adversarial system do tend to dominate the proceedings.⁸¹ I only once saw a Refugee Case Officer sum up a case in a way favourable to the claimant, a move which was surprising after the other hearings I had seen and which the claimant's lawyer said was almost unheard of.⁸²

The Australian hearings have moved further from the adversarial model. The tribunal is constituted by one member and the hearing proceeds through the member putting questions to the claimant. Even when the claimant has a legal representative,⁸³ that person has no formal role in the hearing and can only address the tribunal if invited to do so. Most hearings proceed with only three

⁸⁰ This is not the case in Toronto and Ottawa. I am not familiar with hearing room structures in Montreal, Calgary and Halifax.

⁸¹ In *Rebuilding Trust*, above n 77, James Hathaway argues that refugee hearings in the CRDD achieve a non-adversarial format. I agree that the potential for this is provided but in the hearings I observed it was only occasionally achieved. One reason for the difference may be the changes in procedure, e.g. more applications are now dealt with in the expedited procedure so I would have seen a great proportion of claims regarded as containing difficult issues to resolve.

⁸² CRDD Hearing in Toronto, 17 April 1998.

⁸³ In 1996-97, 58.79% of claimants before the RRT had an "advisor" on the record (statistic generated at my request from the RRT database). At the RRT the term advisor can mean anyone, even a friend, who is assisting with the application. No statistics are kept on how many advisers actually attend the hearings, but tribunal members and refugee lawyers suggested in interviews that often the advisor would not attend the hearing as it was time consuming and therefore expensive for the client and their potential role in the hearing process was minimal.

voices in the room, the sitting member, the claimant and the interpreter. The Hearing Officer is a member of the administrative staff who starts the tape-recorder and swears in the claimant (and any others who may give evidence), then leaves the room. Their role is in no way parallel to the Canadian RCO. As with the CRDD, some RRT members have legal training and others do not. The hearing is a very private setting and the personal style of the member greatly influences how the event proceeds. Accordingly, whether that person is legally trained or not is likely the biggest factor in determining the extent to which the values of the adversarial system influence the hearing. Australian tribunal members receive far less initial and on-going training than their Canadian counterparts and never work as a team in the hearing room.⁸⁴ After I had observed eight different hearings and procedural matters in several others, one senior member commented that I had seen more of his colleagues at work than any of them had. The Australian hearing is designed to follow an inquisitorial process, but even those who are legally trained would not likely have training in the procedural mechanisms of the inquisitorial process.

⁸⁴ When new members join the RRT, they undergo a 5 day training period. This training includes an introduction to the Tribunal's role and function, an introduction to administrative arrangements, sessions on different aspects of the refugee definition, instructions on managing caseload and writing reasons. New members also observe two or three hearings before beginning their own. They receive regular written updates on legal developments and meet to discuss important cases from the Federal Court or the High Court. New members of the CRDD begin with a two week training period covering similar materials. In addition they complete sessions on job specific topics such as "weighing the evidence" and "assessing credibility" (copies of these training modules are on file with the writer). For the first six months of their tenure they sit as the second member in their hearings (this norm will likely change as more hearings are convened by single members). They also receive regular updates on legal developments. The IRB has a training department and offers on-going training modules for all tribunal members. A proportion of these sessions are tailored for CRDD members.

One reason for moving away from the adversarial format is to make the hearing less onerous for the applicant.⁸⁵ Hathaway points out that when the purpose of the hearing is conceived as being to assist the nation in meeting its legal obligations, there are no adversaries.⁸⁶ The hearing could be conceived this way in Canada but often seems not to be. In Australia, the RRT is a review tribunal. Accordingly, the refugee claimant is confronting the state which has already rejected her. This adversarial structure element is tempered, however, by the fact that the state does not send a representative to the hearing, only written reasons. Concerns over abuse of the refugee process are widespread in the popular discourse of both nations, belying the non-adversarial vision.⁸⁷ While a classic adversarial process is impossible in the tribunal setting, the difficulties of jettisoning it point to the overall complexity of refugee determination. The extent to which a non-adversarial process is achieved depends in part on the tone set by the individuals in the room, rather than on any difference in the Australian and Canadian formats. As well, judicial review of tribunal decisions plays a role in constraining procedure.⁸⁸ Here there is more

⁸⁵ Although it is notable that many tribunals have abandoned aspects of the formal adversarial process, such as the rules of evidence, in the name of cost and time efficiency.

⁸⁶ Hathaway J, *Rebuilding Trust* above n 77 at 6.

⁸⁷ Examples of this concern in Australia can be found in articles such as Toohey P, "A Roo Shooter and his Ute Hold the Line Against Illegals", *Australian* 13-14 November 1999 at 1; O'Brien N and Green P, "Boat People Influx a Matter of Crime", *Australian* 17 August 1999 at 4; Saunders M and Toohey P "Human Cargo, Return to Sender", *Australian* at 1, 12 November 1999; McGregor R, "Hardline Staunches Refugee Tide" *Australian* 20 January 1999 at 5. For Canadian examples see Bronskill J, "Thousands of People Smuggled into Canada", *Vancouver Sun* 25 August 1998; Jiminez M, "Report Identified Litany of Problems at Refugee Board", *National Post* 9 November 1998; Norris A, "Fast Track for Refugees Probed: Mounties Raid City Office of IRB Official *Montreal Gazette*, 25 November 1998; Godfrey T, "Terrorists Sneak in as Refugees", *Ottawa Sun*, 1 February 1999.

⁸⁸ *A v Veterans' Review Board* (1995) 38 ALD 315 which indicates the need for tribunals to adhere to tenets of fair process.

room for divergence between the two systems.⁸⁹ That is, while the Australian system is formally less adversarial because it takes the form of a conversation between member and claimant, it is not necessarily less of an ordeal for the claimant.

Moving away from the adversarial format is problematic when the hearing is set within a legal paradigm which relies on the adversarial system to protect the interests of the individual and to ensure fair process. While the adversarial system is not the only measure of fairness,⁹⁰ Australian and Canadian notions of what constitutes a fair hearing and of the extent to which an adjudicator is responsible for assisting someone appearing before them have been honed in a system presuming professional representation. Thus the federal court decisions which build the parameters for the Tribunals' actions assume the adversarial norms. While the RRT member is correct in saying to a claimant, "I am not responsible for making your case for you,"⁹¹ there is equally no one else who is responsible for assisting the claimant in making a case. In the CRDD hearings I saw, the "redirect" portion of the hearing often introduced new information or successfully clarified concerns evident in the Tribunal's questions which would be apparent to those familiar with refugee law. Although concerns are put to the claimants in the less structured RRT process, those whom I observed were not able to address them with the skill of a trained advocate. As well, RRT

⁸⁹ See below at pp. 279-296.

⁹⁰ In Australia the courts have explicitly held that fairness will vary with each setting: *Mobil Oil Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475.

⁹¹ This statement was made in a hearing I observed and follows the Federal Court decision in *Xiang Sheng Li v RRT*, 23 August 1996, Sackville J.(unreported).

members differed in *how* they pointed out concerns; some made direct reference to legal points, others were less precise so that only someone with a knowledge of refugee law could interpret their true concerns. Judges in a civil law system receive specialist training for their inquisitorial role, but the common law norm is that good advocates become good judges because the truth of any matter is honed through the clash of informed adversaries. When this norm is taken away, as in the refugee hearings, the values and norms of the inquisitorial system do not simply flow in to take its place. The adversarial system remains the operating background norm. The Canadian Federal Court has done more than the Australian to alter this in its scrutiny of tribunal procedure.⁹² In both instances, hearing format shapes the interaction between the outsider and the state and influences how the identity of each will be forged in their interaction.

The central role of the tribunal member in setting the tone for the hearing, especially in Australia, draws attention to another way that identity is constructed and played out in the hearing room. The member's identity is also constructed in this setting – although, significantly, this is an identity the individual chooses, rather than one to which they are assigned. Those who comprise the tribunals are very similar in both countries. Members are selected from among lawyers, bureaucrats and NGO members who have experience with refugees and refugee issues.⁹³ Most tribunal members come to the job with a

⁹² See below at pp. 149-50.

⁹³ CRDD members are appointed by the Governor in Council under s. 59 of the *Immigration Act*. An independent Ministerial Advisory Committee (comprised of members of the NGO and legal communities) was created in 1995 to advise on appointments. RRT members are appointed by the Governor-General under s. 459 of the *Migration Act*. In practice they are selected by a committee including the Minister of Immigration.

high degree of personal commitment to assisting refugees. The identity of the tribunal member emerges through the matrix of personal and role expectations in the setting, fitting within the social psychology framework Turner describes.⁹⁴ That is, they categorise themselves as members of the “group” and follow group norms. What a tribunal member believes about her role in this setting influences her approach to the hearing and, ultimately, her ruling.⁹⁵ As Minow and Bellow argue, when legal workers engage with a particular problem they experience shifts in the way they are seen by others, such as the claimants, and the way they perceive themselves.⁹⁶ These factors mean there are important differences in the way self-identifications of tribunal members affect Australian and Canadian processes.

There is less variation in the self-perception of roles by CRDD members because of their greater level of training and because of the greater number of people in the room. The training provides each member, directly and indirectly, with more information about how tribunal should act. These norms of behaviour are constructed and reinforced by working side by side with a colleague and by conducting a hearing with a Refugee Case Officer and a lawyer representing the claimant. These two factors mean that norms of behaviour and of self-identifications are likely to vary less in Canada, and certainly the behaviour of the tribunal members I observed displayed less variation in Canada. This will probably change as the CRDD moves to single

⁹⁴ See Chapter Two at pp. 45-53.

⁹⁵ See discussion in Chapter 2 at pp. 36-38.

⁹⁶ Minow M and Bellow G, “Introduction” in *Law Stories*, University of Michigan Press, Ann Arbor, 1996 at 3; see also Chapter Two at pp. 36-38.

member hearings. Having tribunal members do the same things in the same way promotes one view of fairness. While fairness is not the only value of importance in the tribunals and sameness is not the only path to achieving it, fairness is a crucial part of the rationale for providing a hearing and sameness is one of the easier fairness indicators to provide. The rationale for attempting to do this in a setting where little else can be standardised is strong.

The multiple players in the CRDD hearings mean that the identities at play can be divided into professional and claimant: insiders and outsiders: nation and other. For the Members, the Refugee Case Officers and the lawyers,⁹⁷ the hearing is a professional pursuit. It is one hearing among many and their personal stake in it is low. Many of these individuals know each other from earlier hearings and know that their paths will cross again, and of course the Tribunal members and the Refugee Case Officers work in the same office.⁹⁸ They chat informally during hearing breaks and have more in common with each other than with the claimant. This is true even for the claimant's lawyer. The collegiality which we could characterise as the sign of a good working relationship makes the demarcation between members and others particularly obvious. The claimant is an outsider to the nation necessarily, and in the hearing room this is underscored by their exclusion from the friendly banter and the professional courtesies. This insider-outsider demarcation is enhanced by

⁹⁷ Interpreters are not involved in this group to the same extent. This could be because they are often seen by the others as an extension of the claimant herself. Interpreters are often members of the same cultural community as the claimant which may account for this difference to some extent. Also, interpreters share a level of communication with claimants which is impossible for the others. During breaks in the hearings, I often saw interpreters talking with the claimants.

⁹⁸ Inappropriate informal contact between CRDD members and Refugee Hearing Officers was one of the key concerns investigated in *Rebuilding Trust*, above n 77.

the informality of the hearing room and the non-adversarial features which allow the common interests and common enterprise of the professionals to be evident, as opposed to a court where formality fixes roles. What the tribunal hears of the claimant is mediated not only by interpretation⁹⁹ but also by the questions and analyses of the Refugee Case Officer and the lawyer. These people strongly influence how the individual claimant's identity is constructed and to what purpose.

The structuring of the story by professionals is not so apparent in the Australian hearings. In the RRT the contact between tribunal and the claimant is more intimate, mediated only by interpretation, which fades into the background as the hearing progresses. While the tribunal member is part of a professional team within her working environment, in the hearing room she, like the claimant, is alone. There are fewer legal advisers in the RRT and their role is markedly more limited than in the CRDD. Accordingly, the opportunities for familiarity and collegiality are minimised. These factors contribute to the heightened intimacy of the Australian hearing process. The hearing unfolds as a long conversation between Member and claimant. The distancing devices, such as questions and directions of others, which map out the boundary between the two identities are minimal. This, in combination with the other factors making the RRT member's identity more flexible, means the Australian process is more open to the intertwining of identities which can potentially produce either empathy or bias. The boundary between the nation's representative and the outer-outsider is more malleable in this model than in the Canadian. There are

more opportunities for renegotiation of identities by both parties. The othering of the claimant is less obvious in the hearing room as there are fewer interventions guiding the story and the hearing proceeds often seamlessly, without the law's endless procedural interruptions. There is strong potential in this setting to move beyond or through an "insider" and "outsider" formulation and to escape the legal strictures which many argue are inappropriate in refugee hearings. However, this is largely untapped because of other factors shaping tribunal members' identity, because the process operates in the shadow of the law¹⁰⁰ and because of the influence of review by the Federal Court.

The most significant influence on the identity of RRT members is that of the institutional culture. The Principal Member remarked that he would have absolutely no way to influence the decisions made by individual members because of their uniformly high level of independence.¹⁰¹ This independence and personal commitment is part of the institutional culture, as is the knowledge that each claim under review has already been rejected by the Department and various pressures to keep the "set aside rate" down.¹⁰² Tribunal members work

⁹⁹ Not all claimants use interpreters but most do.

¹⁰⁰ This phrase is well known in literature on alternative dispute resolution. I first read it in Mnookin R and Kornhauser L, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950.

¹⁰¹ Interview with former Principal Member Shun Chetty, January 1998.

¹⁰² Some pressure on the tribunal comes from the current climate of hostility towards refugee claimants and concern over rising levels of claims which is now frequently reported in the mainstream press. Some pressure is also generated directly by the current Minister's hostility towards inland claimants (see above n 40 and n 41). In 1997 the Minister publicly stated that Tribunal members who set aside too many of his Department's decisions would not have their terms renewed Steketee M, "Tribunal Defends Refugees' Status", *Australian* 6 February 1997 at 2. This threat appears to have been carried out, according to my discussions with two former Tribunal members.

in a setting where 90% of the claims they hear are determined to be invalid.¹⁰³ This rate alone contributes to a view of tribunal member as a gatekeeper who must work to ensure that the correct determinations are made so that the entire inland refugee determination system is not ground to a political halt. The low set aside rate and the intimacy of the hearing where so much is dependent on the member herself, means that the RRT members work in a more stressful environment than CRDD members.¹⁰⁴ Their identities as tribunal members are also shaped by this stress. The RRT member's self-perception, shaped by these factors, is in turn the greatest influence on the tenor and outcome of the hearing in a system where there are so few players in the hearing room and such minimal training for members.

Attention to the identities in the hearing room demonstrates how many of the differences between the two systems can be explained by considering the construction of the Tribunal member's identity. This identity is key to the process when legal norms are put aside as inappropriate or unworkable and the Tribunal member stands in the place of the nation sizing up the other. The informality of the refugee hearing serves to make the identities involved in the hearing more malleable. While identity-based critiques of law point to the malleable and negotiated qualities of all legally constructed identities, these features are particularly important in these settings. The tribunal and the claimant come face to face in the hearing room and their interaction creates an

¹⁰³ See above n 60.

¹⁰⁴ Several RRT members commented on this in interviews in December 1997, Melbourne, and in January 1998, Sydney, particularly in light of the Minister's criticisms of the Tribunal for accepting too many claims.

image of the boundary of the nation. This construction is aided by the strong symbolism of the hearing context and the way the adversarial system becomes a hidden background norm to the process. In this setting, the identity of the individual is tested against that of the refugee category.

b. The Central Issues: Identity and Credibility

In a refugee determination hearing there are two central issues: identity and credibility. They are necessarily intertwined. By the time a claimant gets to a hearing, they are usually telling a story which fits within the refugee definition because in Canada they likely have a lawyer and in Australia they have already been through the Departmental process. The Tribunal is then faced with determining whether this person is who they say they are and whether the story is true. Is this person a Kenyan posing as a Somali? Was he really a member of the Mujahadeen? How are divorced women treated in Liberia? What needs to be proved and how it may be proven is markedly different in a refugee determination tribunal than in a courtroom setting. Proving identity and assessing credibility raise problems which deepen our understanding of the role of identity in refugee hearings and offer further insights into the encounter of the refugee claimant with the background norms of the nation and with the fitted form of the refugee definition.

The basic issue of identifying oneself is the starting point of a successful refugee claim. For most of us, proving our identities is done through documents; passports, birth certificates, drivers' licences. Our identity is genuine because it is certified and numbered by the state. These foundations for identity are destabilised in a refugee claim in several ways. Many people arrive

to seek refuge without documentation and are then faced with establishing their identity in other ways. These claimants pose a profound challenge to the refugee determination system as a core assumption of this and all other legal processes is a reliance on knowing who is the person standing before the tribunal. One's own account of self is not sufficient - a truth that most of us are spared confronting. Personal identity in this border-crossing scenario is about ties to a particular state, about membership in a given community, about belonging somewhere. As my framework of analysis suggests, these border crossing scenarios are where the group identity brought to the fore is national identity. Without documentation an individual's account of their identity is left to be assessed along with all other aspects of the story. The problem of undocumented arrivals is extensive¹⁰⁵ and the 1999 proposals to reform the Canadian immigration legislation aim to increase incentives to cooperate in the government's efforts to "establish one's identity" through increased security measure and detention for "claimants who refuse to cooperate".¹⁰⁶

Even when claimants arrive with some documentary evidence of their identity, it is often not the piece of paper that we as Australians or Canadians are expecting. Claimants arrive with military service records or baptismal certificates, only some of which are we have the capacity to conclusively decide

¹⁰⁵"More than half of refugee claimants do not present a passport or other legitimate travel document at the time they claim status. The majority of these claimants do not have any other identification." *Building On a Strong Foundation For the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* Supply and Services Canada, Hull Canada, 1999, Chapter 11 at webpage 3. (available on the Departmental Website at cicnet.ci.gc.ca). Given Australia's universal visa requirement, the problem is transformed into one of false documents or documents destroy en route. For one example see McGregor R, "Visa Officials in a Pickle Over Dodgy Documents", *Australian*, 8 December 1997, at 6.

¹⁰⁶ *Ibid.*, Ch 12 at Webpage 3.

the authenticity. A considerable number of claimants arrive with admittedly false documents, a necessary result of the now almost universal carrier sanction program which requires that transport companies must ensure all those boarding have appropriate travel documents or face heavy fines for non-compliance.¹⁰⁷ The array of documents from around the world which may be presented as proof of identity in the refugee process jars against the standard practices of legal systems which generally operate on the basis of narrowly defined rules about what kinds of documents, under what sorts of circumstances, will be viewed as authoritative.

The question of what oral evidence we can give of ourselves has been addressed in various ways in the Tribunals. I have seen Tribunals set up language tests to differentiate ethnic Albanians from Kosovar Serbs and quiz Somali claimants about the founding myths of their people. Claimants who assert identity with a particular religion are often asked about articles of their faith.¹⁰⁸ In Canadian hearings, which are more standardised, the "identity test" is often the first phase of the hearing. To begin, the claimant must have a known and stable identity, a starting point label, as without this the other issues do not matter. The stakes are high in the refugee hearing, as are the incentives to lie.¹⁰⁹

¹⁰⁷ *Migration Act* s. 229 provides that carriage of non-citizens to Australia without documentation carries a penalty of up to \$10 000, plus the cost of returning the person. Under the Canadian Act the penalty is up to \$10,000 for a first offence and up to \$50,000 for subsequent offence; *Immigration Act* s. 97.1.

¹⁰⁸ One Jewish lawyer who had represented many Jewish claimants from the former Soviet Bloc stated that he always tested his client's bona fides and was most suspicious of those who knew all the answers, as if they were making a studied presentation. This observation underscores that credibility is a fine line in all these sorts of "identity tests".

¹⁰⁹ There are a large number of people who may simply be said to 'feel they are refugees.' They want to escape situations where they are impoverished, oppressed, threatened by violence. They know that rich nations like Australia and Canada sometimes help people in misery. They

This original identity is a prerequisite to the refugee identity. Those with identity documents which are suspect are asked to give an account of how they obtained the documents and why the state would agree to provide them. Letters addressed to the claimant at the address they are fleeing are useful evidence, particularly if they are written in the "correct" language.

Proving identity often places the refugee claimant in an unresolvable dilemma. For many claimants obtaining identity documents from the state they are leaving is difficult or impossible. On the other hand, to travel to somewhere as distant as Australia or Canada, some sort of documentation is necessary.¹¹⁰ The incentives for genuine refugees to use falsified documents are high. In order to get into the position to make a refugee claim based on truthful evidence, one must tell some sort of lie along the way. To give a coherent account of one's identity that lie must be revealed, in a story which gives a full account of the lie. The false and the true identities are both an essential part of the refugee identity. The challenge for both the claimant and the decision-maker is not to

see that life in one of these places is much easier than the life they have come from, and so they claim refugee status. The dissonance between the popular understanding of 'refugee' and the formal legal definition may account for what politicians refer to as an abuse of the system. Most people seeking refuge from horrible life circumstances are not, legally, refugees, but may genuinely identify as refugees. Patricia Tuitt takes the provocative approach of considering all who seek refuge in a wide variety of circumstances as refugees and begins her analysis of refugee law by considering the vast number of refugees whose lives the law does not affect. From this starting point she inevitably concludes that "refugee law is at the margin of most refugees' lives..." Tuitt P, above n 9 at 23.

¹¹⁰ Except in the comparatively rare cases of boat arrivals in Australia, of which there had been only 3030 from 1989 to the end of 1998 (Department of Immigration and Multicultural Affairs "Key Facts in Immigration", available at the Departmental Website www.immi.gov.au/facts). In 1999 a marked increase in boat arrivals, and the government's response to them, sparked a national panic in Australia. The results of this are not yet known. As of 18 November 1999, 1,671 people have arrived by boat in 1999. See discussion in Chapter Six. It is possible to come from the United States into Canada without documentation but some documents would have been necessary to reach the U.S. originally.

trip over the lines between the two.¹¹¹ Both false and true identities, however, are intertwined in the "genuine refugee" identity as the need for a false identity enhances the likelihood of meeting the refugee identity threshold.

The story of identity in the refugee hearing is one part of the broader analysis of how the Tribunals decide whether to believe a claimant. The common law's ways of knowing are foreign to this setting. There are usually no witnesses to the story being told. The claimant's narrative is the key to the outcome. The formal rules of evidence are obviously unworkable in these settings and are inapplicable.¹¹² But it remains important to consider the values these rules represent, what is traded away for that necessary efficiency, and how the hearings are overshadowed by the absent evidence rules. However idiosyncratic those rules may be, they do represent an agreed upon code for accepting that certain things are true or known. Part of that code involves asking anyone giving testimony to swear an oath to tell the truth. This ritual is striking as each hearing room contains an assortment of holy books so that one may swear on the culturally appropriate symbol. Alternatively claimants and witnesses may simply swear to tell the truth. The contents of the oath do not change with the religion chosen, and no one I spoke to at the Tribunals could

¹¹¹ In one hearing I observed, the Tribunal was troubled by the Swedish passport the claimant had arrived in Canada with. Discussion for more than one hour turned on the extent of the claimant's ability to speak Swedish, as the gate agent (under the incentive of carrier sanctions) had signed an affidavit saying the claimant was Swedish speaking but the claimant stated he had merely memorised a few phrases to go with his fake passport. No one in the hearing room could speak Swedish and the claimant's lawyer asked that the gate agent be made available for questioning about his or her own Swedish skills and the extent of the interview. While the Tribunal refused and asserted that nothing turned on this point, the extent of questioning belied that.

¹¹² This is provided for in the Australian *Migration Act* subs. 420(2) and the Canadian *Immigration Act* subs. 68(1).

confirm that this form of oath swearing plays the same role in Muslim or Jewish cultures as it does in Christian ones. The assumption that a religious oath has the same function in any religion requires a more thorough examination. This serves as a symbol of how inadequate our interpretations of the other are in this setting. It also demonstrates how the evidence code – in which the belief that we are bound to tell the truth because we have sworn an oath is anchored - injects values into the process even though rules of evidence need not be followed.

Even beyond the narrow technicalities of the law of evidence, most of that code cannot be applied in a setting where the adversarial format has been set aside and the only witness is the claimant. The ideological foundation of the adversarial system - that the best way to the truth is through equal adversaries arguing from positions of self-interest - is absent in this setting.¹¹³ While the flaws in that ideology are easy to point to, no equally persuasive account of the pursuit of truth in legal settings has yet captured the common law imagination. The crucible of cross-examination, while available in modified form in refugee hearings, is inappropriate for those who have been persecuted and sometimes tortured and interrogated by states with little respect for human rights. Credibility assessments are further complicated by the use of interpreters and by cross-cultural communication.

Given this setting, particular techniques of proof have evolved for the refugee hearing. The dominant among these is extensive reliance on independently gathered documentary evidence of conditions in the countries that

refugees are fleeing. The RRT maintains a library of selected documents and has a fulltime staff of 10 who work on preparing country reports and responding to Members' queries. The Immigration and Refugee Board's Documentation and Information Research Centre is considerably more sophisticated. There are twenty full-time staff involved in the Research Program in the Ottawa headquarters and an additional fifteen positions among the other offices.¹¹⁴ The Documentation Centre works to an annual research agenda which is fine-tuned at monthly meetings, and also deals with specific member's requests. Both Tribunals rely on information gathered by newspapers, by NGOs - especially those concerned with human rights issues such as Amnesty International, by their own government's diplomats, and by other governmental sources, such as the annual reports of the United States' State Department. The Australian Tribunal draws on the resources of the highly-regarded Canadian IRB Documentation Centre.

The availability of this "country information" allows the Tribunal to assess the claimant's story against independently gathered information. It also allows the Tribunal to accept certain "facts" without evidence provided by the claimant. This documentary evidence is central to Tribunal proceedings in both countries and gives the hearings a character unique from other hearings in these legal systems. While much of this documentary evidence would not necessarily be accepted for proof of fact in an Australian or Canadian court, it has authoritative weight in the refugee hearing. Hathaway noted in 1993 that in the

¹¹³ The rules of evidence are absent in many administrative tribunals. However the shadow they cast over tribunal operation varies with each setting.

¹¹⁴ Interview with Graham Howell, Director of the Documentation Centre, June 1997.

CRDD "...nearly any piece of documentary evidence adduced has been received"¹¹⁵ despite the Tribunal's discretion to exclude documents if they are not deemed to be credible or trustworthy.¹¹⁶ The principal technique of proof is to assess the claimant's narrative against the situation described in the documents. Tribunal members are aware that circumstances can change quickly, and claimants are encouraged to bring recent news clippings with them.¹¹⁷ Newspaper clippings and NGO reports have a greater authority in this setting as the situations they describe are remote from the experience and the imagination of Australians and Canadians. They provide an alternative avenue to truth which a Tribunal member can then try to fit within the claimant's story.

Reliance on these types of documentary sources to measure credibility adds a measure of objectivity to the process, and the process is enriched and improved by the use of information from other sources.¹¹⁸ However, in the context of a refugee hearing where oral evidence, even when it is delivered in a way that fits with Western stereotypes of reliability,¹¹⁹ describes situations

¹¹⁵ Hathaway J, above n 77 at 22.

¹¹⁶ Subs. 68(2). The possibility of excluding documents on this basis is an example of the shadow which the law of evidence casts over the process despite being formally banished.

¹¹⁷ I observed this in several Canadian hearings and Susan Kneebone reports that claimants do also bring their own documentary country evidence to their Australian hearings to challenge their rejection at the Departmental stage; Kneebone S, "The Refugee Tribunal and the Assessment of Credibility: an Inquisitorial Role" (1998) 5 *Australian Journal of Administrative Law* 78.

¹¹⁸ This technique of credibility assessment by document analysis is strengthened by the practice in both Tribunals of having members specialise in claims from a given country or region. This allows a member to become familiar with the types of issues raised, with the range of documentary evidence available, and with the demeanour of claimants from that region giving evidence. All these factors can assist in overcoming the problems posed in assessing credibility.

¹¹⁹ Several Canadian refugee lawyers commented that they viewed their key role as preparing their client to tell their story in an acceptable way for the Canadian hearing context.

which are literally unimaginable, recourse to anything at all that is published takes on heightened importance. While CRDD members in particular are given considerable training in weighing evidence from diverse sources,¹²⁰ there is often only one source available and so this balancing act cannot be performed. Discussing an observation I had conducted, one CRDD Member commented that the Amnesty International Report had been his primary source of information in preparing for the hearing. When I then questioned him about another Amnesty International report condemning the Canadian refugee determination process, he rejected it as completely unfounded. My point is not to pillory one individual's reasoning, but to suggest that our acceptance of these documentary sources often depends on other sources of personal knowledge, which may be missing in the refugee hearing. The context is such that there will almost always be holes in the evidence and a decision about credibility will frequently involve a leap of faith which cannot be filled with newspaper reports of human rights abuses.¹²¹

Among documentary evidence, some sources are more reliable than others. Some refugee lawyers I interviewed in Australia asserted that the RRT placed an undue reliance on the information provided by the Australian

¹²⁰ Weighing evidence and assessing credibility are identified as separate training issues for the initial training of members. The Legal Services Branch of the IRB has produced separate reports on "Assessment of Credibility in the Context of CRDD Hearings" (39 pages), "Weighing Evidence" (50 pages) and "Commentary on Undocumented and Improperly Documented Claimants: Assessing the Evidence, Enhancing Procedures" (30 pages) to be used in initial and on-going training.

¹²¹ In the recent high profile Australian case of *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21, the RRT rejected the claimant's account of political persecution in part because there was no available newspaper account of a key event he described.

Department of Foreign Affairs and Trade.¹²² Of course, that alone does not pose a problem. What is more problematic is the location of the tribunal as part of the executive which generates that particular information. It is impossible to see if there is any political pressure on the Tribunal to accept DFAT's "word" but such pressure is not inconceivable in the current climate. The influence of DFAT information is also likely to be enhanced by scanty training in assessing evidence. A further Australian issue in the information stakes is that the RRT's information gathering resources are not available to the public. While claimants in Canada can access the resources of the Documentation Centre,¹²³ this is not the case in Australia and pre-hearing disclosure of information obtained varies from member to member.¹²⁴ Adverse information must be put to the claimant at the hearing but the inaccessibility of the documents gathered by the RRT means the claimant must discover documents on their own if they wish to present them.

As there is frequently little else to assess beyond the claimant's oral evidence and the documents,¹²⁵ Tribunal members test the claimant's evidence

¹²² My own examination of the High Court files in the *Applicant A* case confirm that this source is highly regarded. The stack of documents concerning the application of the one child policy in China was approximately 30 cms high and included reports from academics and NGOs. The DFAT information totalled approximately 10 pages, but it was the DFAT version of the policy which was taken up by the RRT and hence by the High Court. In reviewing RRT and CRDD reasons (see below pp. 151-163) I found that DFAT information was referred to in each case I examined and was frequently cited extensively. Although the parallel source of information is available to the CRDD (that is, information supplied by the Canadian Department of Foreign Affairs and International Trade), it was not referred to in any case I reviewed or hearing I observed.

¹²³ Although unlike members, claimants cannot lodge specific requests for information.

¹²⁴ Kneebone S, above n 117 at 17 and 21. An applicant may request that the RRT call certain witnesses, but the Tribunal retains discretion to refuse the request (s.426).

¹²⁵ There are some members of both Tribunals who have experience living in the regions which are producing refugees which aids in credibility assessment at one level. However, it is difficult for these members to express what this experience adds to the process in a manner which is acceptable on judicial review.

against their own earlier written accounts and look for inconsistencies in the stories. Overzealous use of these techniques is discouraged for good reason by the respective Federal Courts¹²⁶ but they persist in varying forms. This is firstly because this way of seeking the truth is so ingrained in our culture that it does not need the support of the ideology of cross-examination and is instead a grounding for it. We believe people who tell us the same thing over and over, no matter who asks them and how they word the question. Secondly, even if the tribunal can be partially non-adversarial, it nonetheless must find the facts and state which facts it believes. These "found facts" are then treated by reviewing courts as the facts generated by any other tribunal or court of first instance. Through a trick of the law, what is acknowledged as unknowable or only partially believed based on the work of a NGO or government report becomes a firm fact to carry forward. The fragility of the truths which the tribunals confront disappears at the instance of judicial review.

The review of the courts ensures that the rules of evidence cast a long shadow over tribunal procedures. While the evidence rules are banished, their

¹²⁶ Discussing the Federal Court jurisprudence on point the IRB Manual *Assessment of Credibility in the Context of CRDD Hearings* (1996) states at 30: The Court has cautioned the Board that it should not display excessive zeal in an attempt to find contradictions in the claimant's testimony. In *Attakora* ((1989), 99 *National Reports* 168 (F.C.A.)), the Court of Appeal recognised that, while Members have a difficult task when assessing credibility, the Board "should not be over-vigilant in its microscopic examination of persons who ... testify through an interpreter and tell tales of horror in whose objective reality there is no reason to believe" (at 169 per Hugessen J.A.). In *Mensah* (*Mensah, George Akohene v Minister of Employment and Immigration*, November 23, 1989, F.C.A. no. A-1173-88), the Court made it clear that it is important that the claimant not be placed in a "Catch 22" situation by finding that the claimant is not credible if either too many details or not enough details are provided. The Federal Court of Australia has criticised the RRT's assessments of credibility in a number of cases, for example: *Jorge Murillo-Nuez v Minister for Immigration and Ethnic Affairs* No. NG827 of 1994 (AnstLii database); *Sahra Abdullahi Elmi v Minister for Immigration and Multicultural Affairs* [1998] 1442 FCA; *Hossain v Minister for Immigration and Multicultural Affairs* [1999] FCA 957; *Bhattachan v Minister for Immigration and Multicultural Affairs* [1999] FCA 547.

discourse (credibility, trustworthy, probative value) and their results (found facts) are not.¹²⁷ While cross-examination is officially removed, its allure is irresistible. The values of liberal legality need stable identities and known facts. Where, as in refugee determination, this is not possible, the law can make it so. These characteristics are key to the hearing as identity construction process. By believing an individual's account of their identity, the tribunal makes that identity exist as a legal fact. By rejecting that account, the tribunal rejects the individual's identity, along with their aspiration of a refugee identity. The role of documentary evidence in the process of proving a refugee identity emphasises the place of the refugee as the ultimate other to the nation. We understand and believe the refugee on the basis of information gathered in foreign lands. Their stories are so unimaginable to us, so unknown and unknowable, that our usual methods of proof are unreliable or impossible. To make a refugee determination the tribunal must imagine that other place and situate the claimant within it.¹²⁸ This provides another way of distinguishing refugee from other migrants: we allow refugees to stay on the basis of their "other-ness", on the basis of knowing things we cannot imagine. Family and economic migrants are allowed to stay on the basis of knowledge which they share with us: knowing family, language, skills, professional standards,

¹²⁷ In Australia a number of cases have challenged inadequacy of tribunal reasons: *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24; *Mulalidharan v Minister for Immigration and Multicultural Affairs* (1996) 62 FCR 402.'

¹²⁸ One way of testing credibility which I observed in both tribunals is by using maps and asking the claimant to describe from memory the distances and travel times between places while the tribunal member looks at the map. Here the spatial dimensions of the nation are paramount.

economic trends. We measure them against the known and refugees against the unknown.

c. The final product: Tribunal decisions

The way that identity and credibility dominate the hearing process is, of course, reflected in the reasons of the Tribunals, but in significantly differing ways in each country.¹²⁹ Reasons of the Australian Tribunal make stultifyingly dull reading. The RRT is required to provide written reasons in each case, even where the case is so compelling that a positive decision is made on the papers¹³⁰ or in cases where the applicant does not attend the hearing. RRT reasons reflect a formula which includes a canvass of all the principal cases of the High Court and Federal Court on the contours of the refugee definition and often involves extensive and detailed citation of documentary sources which are considered in the decision. The decisions contain a number of boilerplate paragraphs, a practice which has been approved by the courts.¹³¹ In some cases, a claim is not made out even if the applicant is believed in full as their story does not fit within the contours of the definition and thus credibility is a minor issue in the

¹²⁹ This analysis is based on a review of two sets of reasons, in total approximately 100 tribunal decisions. The first set of comparisons comprise recent decisions regarding claimants from the People's Republic of China. I selected the PRC because both Australia and Canada see a significant number of claims from PRC nationals and it is a country where refugee advocates generally agree that some but not all claims come within the agreed definition. The second set is comprised of claims of feared persecution on the basis of sexual orientation. These decisions provide a rich source for an identity-based analysis of the Tribunals' approaches. See Table of Cases: Refugee Tribunal Decisions for a complete list.

¹³⁰ A negative decision cannot be made without offering the applicant an opportunity for a hearing, ss.424-425. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

¹³¹ This is particularly noticeable because I reviewed a number of cases from the same country. While I aimed to ensure I read the reasons of a range of Tribunal members, the practice of having members specialise geographically meant that I read several decisions from each member who has recently work on PRC claims.

claims.¹³² However, where an applicant's story suggests the potential for a positive finding, credibility assessment is crucial, with the Tribunal making statements such as, "The applicant varied and enlarged progressively over time the reasons for the demonstration,"¹³³ and "The Tribunal is not satisfied that the Applicant has provided completely accurate information."¹³⁴ The most important parts of any account are those which can be compared to the other sources of information in the credibility assessment process.

The CRDD reasons are more compelling reasons largely because the convention of the Tribunal is to focus narrowly and precisely on credibility issues. While the RRT discusses evidence in a general way, the CRDD, instructed by the Canadian Federal Court, isolates precisely contradictions in evidence and makes their reasoning about credibility explicit. CRDD decisions are much shorter, do not contain boilerplate, and deal primarily with fact rather than law. There are several reasons for this. First, the CRDD does not provide reasons in every case, and is only obliged to provide reasons in cases where claims are rejected after a full hearing.¹³⁵ Second, the CRDD has the benefit of a longer and more established jurisprudence and the use of pre-hearing conferences to narrow the issues to be discussed. In part, therefore, a narrow

¹³² It is notable that among the claims I reviewed, these tended to be cases where the claimant did not attend the hearing, lending some support to the Minister's 'abuse' theory.

¹³³ RRT Ref No. V98/09074 at 6 (of electronic version).

¹³⁴ RRT Ref No. V96/05071 at 8 (of electronic version).

¹³⁵ Section 69.1. Reasons for positive findings are written in a number of cases at the request of the Chair of the IRB. For example, reasons may be requested where there appears to be a divergence in practice between CRDD locations or where a newly arising type of claim is being considered. If the Minister seeks judicial review of a positive decision, written reasons will be provided.

focus on facts and credibility represents a type of maturity of the refugee determination process. The Tribunal itself stated in 1998:

Decisions of claims to Convention Refugee status have become increasingly difficult. The majority of claimants present a Personal Information Form [original application] including a narrative which, if credible, gives rise to a well-founded fear of persecution. Few claims are decided on definitional grounds, for example, whether there is a nexus to the definition. This is quite different than in the early years of the Refugee Division when many cases were decided on legal issues, for example that the claimant feared persecution by a non-state agent.¹³⁶

The RRT is still operating in the mode this decision associates with the CRDD's "early years." Finally, the fact that almost all claimants tell stories that fit within the definition easily undoubtedly reflects the greater involvement of lawyers in the Canadian process. Like the reasons of the RRT, the CRDD reasons demonstrate the crucial importance of documentary evidence as a test of the story.

It is tempting to assert on reviewing the cases that the CRDD is more likely to believe a story than is the RRT.¹³⁷ But this type of conclusion is impossible precisely because of the role of credibility in the process and the importance of assessing differences in the stories carefully, of considering how evidence is delivered and the effects of interpretation, trauma and culture in this process. In addition, the hearing processes are remarkably different, making it very hard to compare the conclusions. The written reasons, in whichever

¹³⁶ *Re SSW* [1998] CRDD No. 104 (No. U96-05945) at para 43.

¹³⁷ This must be considered too against the backdrop of the guiding courts' decisions in each country. For example, the CRDD will consider that someone fleeing compulsory or forced sterilisation under the PRC's one child policy may be a refugee, the RRT will not. A separate difference is reflected in the documents to be relied upon. The RRT generally finds that Christians in China are not persecuted, the CRDD is still finding persecution in some cases. Both Tribunals note that religious persecution in the PRC has been declining, but rely on differing documentary sources in their decision-making.

format, do little to convey the atmosphere of the hearing room and the subtleties of the process through which refugee identity is constructed. Both process and written reasons confirm that refugee determination decision-making occupies a space at the very limit of our system of legal decisions.

Considering recent cases dealing with claims made on the basis of feared persecution on the grounds of sexual orientation reveals the respective Tribunals' differing approaches to identity and credibility. This is confirmed by looking at how the Federal Courts review these claims. These claims provide a powerful example of the role of identity in refugee claims because they rely for the most part¹³⁸ rely on the "particular social group" ground of persecution and because sexual orientation as identity has had a prominent place in the evolving identity politics of both Australia and Canada. The construction of identity in these decisions points up some differences in the way the two countries approach both identity and credibility.

The Australian decisions first confront identity in these claims in their concern over whether the claimant is gay or lesbian. Predictably, given the extent to which individual tribunal members control the hearing process, the reasons vary enormously. The Tribunal's approach to this question reveals a view of the essence of identity as gay or lesbian. For some RRT members, sexual orientation is about particular sexual acts. In summarising evidence

¹³⁸ Sometimes a claim on the grounds of sexual orientation overlaps with a claim on another ground. See in the RRT table of cases: V95/03527, V96/04324, N98/21948, N98/241116, N98/24718, V97/06971, N98/25216, N99/27818. In the CRDD table of cases see: *Re FCB* [1999] CRDD No. 89 and *Re HGP* [1999] CRDD No. 188. I have not included claims made in the CRDD by lesbians which are considered under the guidelines on women refugee claimants in this list.

given about persecution the Tribunal notes that, “they had a sexual encounter, although not anal intercourse.”¹³⁹ In analysing a claim that where the applicant had not initially stated that he was gay, the Tribunal considered whether this identity could have been inferred and stated, “I am prepared to concede that it would be a reasonable inference from the fact of sexual abuse by organisation X that the applicant had become a homosexual.”¹⁴⁰ In analysing the question of membership in a particular social group, the Federal Court of Australia has recently stated that “the mere possession of some homosexual feelings might not necessarily be enough.”¹⁴¹

The Tribunal in these cases is clearly relying on conflating sexual orientation with sexual activity which then generates pressure on the accompanying credibility conclusions.¹⁴² One Tribunal stated that a claimant’s former lawyer “presumably realised that the applicant was homosexual.”¹⁴³ As the claimant had not disclosed this to his lawyer and was offering an explanation for lodging an earlier claim on different grounds, the Tribunal’s conclusion must surely reflect discriminatory stereotyping not explained in the reasons. While the Tribunal almost invariably states whether they find the claimant to be gay or lesbian, some members do this without focusing on particular sexual activities which therefore fosters a broader understanding of identity as gay or lesbian. “I

¹³⁹ N99/27499 at 3.

¹⁴⁰ V96/05496 at 5.

¹⁴¹ *F v Minister for Immigration and Multicultural Affairs* [1999] FCA 947 at 6.

¹⁴² The CRDD also engages in this type of analysis, although less often. In one case that Tribunal states that it accepts the claimant is lesbian, even though she is not in a relationship with anyone at present, *Re EKB* [1999] CRDD No. 175.

¹⁴³ V96/05496 at 5.

am satisfied that the applicant is genuine in his homosexuality. He stated that it was not so much a choice as the way he is.”¹⁴⁴ Another Tribunal member summarised evidence by stating, “He said that he recognised that he was gay for some time, yet it took several years to admit that it was an integral and permanent feature of himself.”¹⁴⁵ Rather than reflecting discriminatory stereotypes, these statements reflect the “particular social group” jurisprudence.

In the cases I reviewed, it was rare for the Tribunal to consider a claim without making a finding on whether the claimant was gay or lesbian.¹⁴⁶ This was a marked difference from the CRDD cases, where the *existence* of sexual orientation is often not treated as an issue in the case. In part, this may be due to the use of pre-hearing conferences where the RCOs and legal representatives assist in clarifying in advance what the issues are. Another potential explanation is the RRT’s convention of covering each potential issue in considerable depth in their reasons. Despite these potential influences, however, subjecting identity as a gay man or lesbian to a credibility assessment in each instance introduces an air of suspicion into the reasons and conveys the judgment that it is too “easy” to claim to be gay or lesbian and thereby gain passage into Australia. The Federal Court has recently criticised the Tribunal for not plainly stating their concerns to the applicant, but following *Eshetu v Minister for Immigration and Multicultural Affairs*,¹⁴⁷ the Court can no longer

¹⁴⁴ V96/04143 at 3.

¹⁴⁵ V95/03527 at 4.

¹⁴⁶ Some examples are: V96/04324, V96/04813, V98/09498, V98/09501, V98/09564, N98/23824, N98/24137, N98/22363, N9719558, N97/20044.

¹⁴⁷ Above n 121.

review on grounds of procedural fairness and thus cannot return decisions which display this error.¹⁴⁸ Constantly focussing on the question of whether one's identity as gay or lesbian is "genuine," in the RRT atmosphere of little standardisation, also ensures that the Tribunal reasons are a vehicle for the expression of individual member's own stereotypes and prejudices. As the refugee hearing brings the nation and the other into direct contact and establishes the meaning of the boundary between them, these factors become part of that boundary. Discriminatory stereotyping is reflected as national value and conforming to stereotype becomes a requirement of entry.

Both the RRT and the Federal Court have also addressed identity from the perspective of whether a gay man or lesbian can or should conceal the sexual orientation aspects of their identity so as to avoid persecution. This analysis does not fit the logic of other aspects of the refugee definition. That is, it is not a feature of refugee cases concerning religion or political opinion, both identifying markers which could be concealed, suppressed, or even changed.¹⁴⁹ Instead it points to the Tribunal's unease with sexual orientation as identity and to its difficulty in grappling with criminal sanctions against gay and lesbian sexual and social activities. In *Bhattachan* the Tribunal "put it to the applicant that homosexuality had existed in traditional Nepalese society, as it had in all societies, and asked whether he had considered living a secret gay life and

¹⁴⁸ *Hossain v Minister for Immigration and Multicultural Affairs* [1999] FCA 957.

¹⁴⁹ This might also be true of ethnicity or even race. Religion and political opinion are malleable in a way that sexual orientation is not.

perhaps even marrying as many had.”¹⁵⁰ This reasoning was rejected in the strongest terms in that instance by the Federal Court. The more recent Full Federal Court reasons in *Guo Ping Gui*,¹⁵¹ however, signal the appellate court may be prepared to take a different position. In a decision which rests heavily on the shift in judicial review signaled by *Wu Shan Liang*¹⁵² the unanimous court stated, “what precipitated the police action was not Mr. Gui’s membership of a particular social group but his conduct in a public place.”¹⁵³ The facts differ significantly from *Bhattachan* and therefore we can still hope the issue is not settled.¹⁵⁴

Surprisingly, however, even in cases which reject the argument that a “secret gay life” is an appropriate solution or in keeping with the intention of the Refugee Convention, the possibility is raised. While ultimately finding the claimant to be a refugee, and stating that it would be “unacceptable” to require someone to live a “hidden inconspicuous life,” the RRT in V95/03527 states that “neither heterosexuals or homosexuals have a right to behave indiscreetly” and that “persons should, to the extent that it is possible, co-operate in their own

¹⁵⁰ As cited in the Federal Court reasons, *Bhattachan v Minister for Immigration and Multicultural Affairs* [1999] FCA 547.

¹⁵¹ *Minister for Immigration and Multicultural Affairs v Gui* [1999] FCA 1496.

¹⁵² *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 292. See discussion in Chapter 5 at pp. 290-291.

¹⁵³ Above n 151 at para 28. Mr. Gui had been detained for three months after being caught kissing his boyfriend in a public park.

¹⁵⁴ The court notes that Mr. Gui “...was often able to organise homosexual parties and engage in social activities such as opera singing, fashion shows, watching gay videos and holding parties on a weekly basis” at *ibid.* para 13. This description is markedly different from the facts in *Bhattachan* and also displays the Tribunal’s view of “gay culture.”

protection.”¹⁵⁵ Similar comments, also in cases which led to positive findings, include:

My difficulty as a decision-maker, even when armed with the above reports on attitudes towards and treatment of homosexuals, is in deciding what the degree of risk would be for the applicant if he returns to Brazil and no longer hides his sexual orientation. I am of the view that if he were to exercise caution and steer clear of meeting places where homosexuals are likely to be attacked he would minimise the risk to himself.¹⁵⁶

And...

Even if one accepts the view that it is not unreasonable for homosexuals in the PRC to exercise discretion in giving expression to their sexuality, this does not end the matter. What does “discretion” mean in this context? When does the degree of discretion required to avoid the chance of persecution become unreasonable? How discreet must an applicant be? Clearly it cannot mean avoiding all homosexual activity, even adult consensual sexual activity in private, this being covered by the concept of “privacy” under Article 17 of the ICCPR....¹⁵⁷

The proposition that one’s sexual orientation could or should be hidden highlights a particular view of what constitutes identity. Identity here is treated as an optional accoutrement, not something integral to one’s being. In presenting identity this way, the reasons construct identity as a gay man or a lesbian as a lesser order of identity, somehow not the same as one’s ethnic or racial identity, or even as one’s gender.¹⁵⁸ The word “discretion” continues the presentation of gay or lesbian identity as being about sexual activity itself, rather than something about intrinsic self-concept. This version of identity also differs

¹⁵⁵ At 7 and 18.

¹⁵⁶ V96/04324 at 11.

¹⁵⁷ V96/04813.

¹⁵⁸ Claims to the CRDD made by lesbians are often dealt with under the Canadian guidelines on Gender Persecution.

markedly from the treatment of political opinion or religion in the refugee definition, which are treated as non-relinquishable because they are matters of conscience. While identity as a gay man or lesbian is not a question of conscience, oddly it seemingly would be accorded a greater level of respect if that were the case.

The CRDD and Canadian Federal Court construct identity based on sexual orientation in a markedly different way. In part this is accomplished by not always treating the question of whether the claimant is gay or lesbian as an issue which requires credibility testing. Even when this issue is tested, the analysis differs from some of the RRT approaches. In *Polyakov v Canada (Minister of Citizenship and Immigration)* the Federal Court upheld a decision where “aside from two homosexual encounters...the Board found that the applicant offered no evidence regarding his sexual orientation.”¹⁵⁹ In *Tchernilevski v Canada (Minister of Citizenship and Immigration)* the applicant’s own testimony regarding his identity was accepted even though the woman he was married to was pregnant at the time of the incidents he recounted.¹⁶⁰ In *Re EKG*¹⁶¹ the testimony of a friend (not a lover) that the claimant was gay was accepted without question.¹⁶² In these cases, the issue of identity as a gay man or lesbian is treated as being explicitly *not* about particular sexual activities. In this analysis, identity is therefore integral to one’s being, rather than something that

¹⁵⁹ [1996] FCJ No. 300 at para 5.

¹⁶⁰ [1995] FCJ No. 894 at para 3.

¹⁶¹ [1999] CRDD No 54.

¹⁶² See also *Re NWP* [1999] CRDD No. 3; *Re VPC* [1999] CRDD No. 191.

one does occasionally or not at all. This understanding of identity facilitates fitting these cases within the refugee definition as it presents an understanding of identity based on sexual orientation which makes it more like the other grounds of persecution.¹⁶³

The Canadian cases which I reviewed did not raise the issue of whether identity as a gay man or a lesbian could be hidden. In contrast, this set of cases contains several where the applicant was involved in gay and lesbian activist politics. The Tribunal considered that this participation fell within the ambit of protection from persecution.¹⁶⁴ The CRDD has also found that persecution because of dressing in drag was intolerable.¹⁶⁵ While the Australian cases concluded in several instances that criminal provisions outlawing gay and lesbian sexual activities did not in themselves amount to persecution,¹⁶⁶ the Canadian cases in contrast contain several examples of positive refugee determinations where homosexuality is not criminalised and other actions alone constitute the persecution.¹⁶⁷

¹⁶³ This also means the analysis of whether gay men or lesbians or homosexuals can constitute a particular social group under the refugee definition is not particularly important in these cases. Following the obiter of the High Court in *Applicant A and B v Minister for Immigration and Ethnic Affairs* above n 66, this also seems settled in Australia. Accordingly, I have not discussed the range of RRT and Federal Court views on this point.

¹⁶⁴ *FCB* [1999] CRDD No 89, *L.J. v Canada (Minister for Citizenship and Immigration)* [1996] FCJ no. 1042; *Re HFP* [1999] CRDD No. 188.

¹⁶⁵ *Re EHF* [1999] CRDD No.142.

¹⁶⁶ *F v Minister for Immigration and Multicultural Affairs* [1999] FCA 947; *MMM v Minister for Immigration and Multicultural Affairs* [1998] 1664 FCA. See also Millbank J, "Fear of Persecution or Just a Queer Feeling" (1995) 20 *Alternative Law Journal* 261.

¹⁶⁷ *Muzychka v Canada (Minister of Citizenship and Immigration)* [1997] FCJ no. 279; *Re EKB* [1999] CRDD No. 175; *Re UOD* [1999] CRDD No. 106.

My objective in this brief analysis is not to present a comprehensive overview of the analysis of refugee claims based on feared persecution on the grounds of sexual orientation in both countries. Rather, the principal issues that emerge in these reasons demonstrate the capacity of an identity based analysis to generate insights into the way the law is operating. These cases also highlight that the differences in Tribunal processes in each country contribute to different outcomes by allowing RRT members more influence over shaping how evidence is delivered and how credibility is assessed. The standardisation in the CRDD mitigates against translating stereotyping directly into law. The acknowledged problems of proving identity and credibility, which are highlighted in these cases, are one reason why they are the crucial issues in the refugee determination process.

In a setting which is impervious to what our legal system normally accepts as "proof" the identity of a refugee is constructed from pieces of stories told and documents preserved. The ability to detail personal experiences which dovetail with reported instances of human rights abuse become a key to establishing one's identity. This is, after all, what it is to be a refugee.¹⁶⁸ In the hearing room, the tentativeness of all potential truths is manifest. This setting is at the coalface of law's work in identity construction; from fragments of "evidence" which other legal processes would discredit and discard, something new is forged. Members prod at a story which has necessarily been recounted many

¹⁶⁸ A CRDD Refugee Hearing Officer offered the observation that, claimants who cry are usually telling the truth. It is hard to know what to do with this observation. I am, of course, tempted to be sceptical - how easy is it to fake tears I wonder. I recognise at the same time that being sceptical is not being true to the logic of the process. This law is aimed at some kinds of human suffering, it is important not to lose sight of that.

times and which equally necessarily has been lied about at some point. The role of the lawyer in constructing the refugee story is important. First in the sense that the professional advocate skilled in the pitfalls of legal definitions is best suited to telling the story in the most persuasive way. Second because a successful refugee story is one which is completely other, unknown. Having a lawyer shape the story, like using an interpreter, keeps the refugee at a distance, unknowable, other.

C. THE LESSONS OF IDENTITY

The process of fitting into the refugee category and thereby gaining permission to remain permanently in Australia or Canada involves the construction of an identity as other and then of an identity as refugee. The claimant must fit into the narrowly defined category which the nation views as most needy in order to be granted the privilege of membership. The prize that is offered is belonging, a new identity as a member of a new nation. This identity shift is poignant in settler societies, where the nation itself is new and all members can claim varying degrees of attachment to another nation.¹⁶⁹ The national identification of the refugee is reconfigured through this process which in a parallel movement brings a new identity into the nation itself. The law and identity relationship is displayed at several levels in this process. The refugee definition sets up a category in the migration law hierarchy. This identity is

¹⁶⁹ Indigenous peoples in settler societies also fit into this analysis as they have attachments with older nations, nations which have been pushed aside by the settler nation's development. The voices of indigenous peoples are absent from migration narratives. This is part of the mythological power of those narratives, they exist in order to validate an account of the nation which does not recognise the original inhabitants.

constructed within the text of the law but it then becomes a standard that individuals aim to fit within on the basis of other identity characteristics. Law does not simply construct the identity, but provides a map of which characteristics are important in the legal setting. In this way it acts as a standard for the identity of refugees as a group themselves within the society that approves them because of this identity – it provides some features of the group identity indicators of which Turner writes.

1. The Ultimate Other to the Nation

The importance of establishing identity in the refugee hearing points to the first phase in the nation's absorption of the other. Refugee claimants, many of whom cannot prove their self-identity, who cannot authenticate their membership of a state, are the extreme point of contrast with the nation itself. The claimant appears in the hearing room isolated and atomised. While we accept that all individuals are identified with some nation, our ways of knowing that identity are brought to the forefront here. The identity is proven through legal text: passport, visa, national identity card, military record. The imprimatur of the state is the chief value here, providing a succinct definition of what the law will accept as national identity. Barring that imprimatur, other identifiers can be offered. These provide a map of the constructs of mythological nation - of the collective imagination which is the signifier of belonging. What would we ask an Australian or Canadian in a hypothetical hearing elsewhere? Do you know the words to O Canada? What is fair dinkum? Where is Rockhampton? Which is further south Toronto or Vancouver? Explain the importance of ANZAC Day. Name the smell of the first snow of a prairie winter. Draw the

map in red sand with a gum leaf. In the absence of law, we offer these accounts of ourselves. To authenticate the documents, to *prove* they are real, we tell stories learned and relearned in primary school. Through this first phase of the refugee process, we ensure that we know the other *as other*. Not as some trickster who may take advantage of our goodness, but as someone who is genuinely linked to another named nation.

The identity labelling process also points to how little we know of this other. Their identity is reduced to a pinpoint - a passport printed on the correct type of paper, a number registered in the correct way, a nursery rhyme correctly recalled, the scars of a regime's favourite torture exposed. This pinpoint is what it is to be other: to be reduced to almost nothing, a blank space against which we can imagine otherness.¹⁷⁰ The refugee determination process hidden from view preserves the unknown otherness of the claimants in the public imagination – leaves us space to imagine, alternately, the horrors they have faced or the lies they are telling. The other is always largely unknown, constructed in opposition to the self in a move which reinforces and affirms the identity of the self. The refugee claimant, whose very identity is so tenuous as to be always at issue in a hearing and that the operation of our law must solidify it by finding it as a fact, plays this role for the new nation. Refugee law is structured to ensure that the refugee is everything, everyone, that we as members of a prosperous nation are not. Above all, a refugee is persecuted by their own nation.¹⁷¹ Their nation itself

¹⁷⁰ Recall the discussion in Chapter Two at pp. 27-28.

¹⁷¹ Both Australian and Canadian courts have now ruled held that persecution need not be by an organ of the state itself, but that the state must at least be complicit in the persecution to the extent of being unable or unwilling to end it; *Ward and Magyari* (unreported Fed Ct, O'Loughlin J. 22 May 1997) and *Dogra* (unreported, Fed Ct, Madgwick J, 28 April 1997).

has treated them in such a way that our nation feels compelled to allow them haven and allows the compulsion to acts as a constraint on sovereignty.¹⁷² We condemn the behaviour of the other nation in a gesture signifying that our standards are better.

The refugee is the ultimate other to the nation in part because their identity is defined so narrowly. When someone applies for admission as an economic or family migrant, their identity is closely scrutinised and recorded. Not only are the official state documents a sine qua non for the process but the picture of their identity is filled in considerable detail. Police certifications of good citizenship and detailed medical examinations are required. For some categories bank statements and employment histories are verified. The immigration process creates a concentrated pool of information about identity which for members, would be dispersed through the networks of the state. In the refugee category, the nation accepts that the same depth of information may not be available, and may not be susceptible to proof in the same way. While the emphasis on identity is maintained in all migration categories, it is the refugee who most closely fits the idea of other to the nation. Other migrants fit this role to some extent as part of the identification process ensures that they are labelled and categorised as *not one of us* and ensures that most of *them* will not be

¹⁷² Refugee law is frequently perceived in these political terms. Accepting refugees from a given state is viewed as a statement against that regime's policies, particularly its human rights records. During the Cold War, refugee policy of the United States was highly influenced by Cold War lines of allegiance, Gibney M and Stohl M, "Human Rights and US Refugee Policy" in Gibney M (ed) *Open Borders? Closed Societies? The Ethical and Political Issues*, Greenwood Books, New York, 1988 at 152.

admitted. But the refugee process does that and more, putting a cipher in the place of the outsider.

Once the identity of the claimant has been established, construction of refugee identity can begin.¹⁷³ "Refugee" is a narrow legal category box with specified borders. The claimant must fit within that box to become identified as a refugee, rather than an "illegal" or a "mere economic migrant", the category labels for the putative abusers of the system. As self and social identities are the crux of the refugee definition, sometimes the phase where identity is established fulfils all the requirements of the process. Identity alone is sufficient to ensure our belief in persecution and no further story about what has happened is needed. This is the case of those who established their identity as ethnic Albanians from Kosovo in the first half of 1999¹⁷⁴ or as Iraqi women alone in Australia in 1998.¹⁷⁵

¹⁷³ Robert Barsky has analysed the pre-1989 refugee determination process in Canada (which differed significantly from current practice) as an exercise in "constructing a productive other". His analysis draws extensively on literary and discourse theory and he pays particular attention to conditions of communication within a refugee hearing. While his methods are quite different from mine, as is the subject of his analysis, his conclusions run a parallel course to those I present in this section. He states:

In fact, one (albeit cynical) hypothesis is that the hearing could be seen as a test of the claimant's ability to construct an appropriate version of the "Convention refugee;" in this sense the measure of one's success in *constructing a productive other* as a refugee could be seen as a measure of one's future ability to *construct a productive other* as integrated citizen.

(Barsky R I, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing*, John Benjamins Pub. Co., Philadelphia and Amsterdam, 1994 at 6.)

¹⁷⁴ The campaign by Slobodan Milosevic against ethnic Albanians in Kosovo which emerged into war with NATO in March 1999 had begun at least a year earlier. I observed a hearing in April 1998 where a young man of this description was granted refugee status in Canada on that basis. The presiding Member commented that six months earlier he would have refused the claim, and that the standard information package had not caught up with the intensification of the campaign but that the Member's own attention to current affairs news reports led him to change his way of dealing with such claims.

¹⁷⁵ In recognition that identity often is all there is to a refugee case, Australian policy is to have what are known as "standing claims" available for particular groups. One hearing I observed in

That identity alone sometimes grounds a refugee claim highlights the interaction I referred to earlier of self and group identities in the refugee definition. The jurisprudence directs a two step analysis; the successful claimant is persecuted, and that persecution is carried out on the basis of one of the five underlying grounds. The formula is individualised, but some people, some identities, are persecuted so uniformly that an individual story of persecution becomes a redundancy. These are the easy cases - the exemplars of the refugee definition which was written in the aftermath of the Holocaust: Rwandan Tsutsi's, ethnic Albanians in Kosovo, ethnic Chinese in some parts of Indonesia.¹⁷⁶ But identity alone will not make a Tibetan in China a refugee, nor a Jew in Russia. The story of feared individualised persecution must be added. Group identity is one part of the equation, but personal identity as someone in whom the state takes an interest is also crucial.¹⁷⁷ When identity is not enough, the refugee must also *be identified* by the persecutor, be singled out and noted. The individualisation movement in refugee identity is political in that is defined by the actions (identification and persecution) of the state.

When the group or self identity of the claimant can be constructed to fit the definition, the refugee identity is completed. Otherness and individualised

1998 concerned a woman claiming to be an Iraqi citizen. The Tribunal Member was interested only in the truth of this assertion as a standing claim for Iraqi citizens was then in place.

¹⁷⁶ Of course, none of these groups come within the refugee definition until they leave their homeland. Also, Australian Prime Minister John Howard stated in early 1998 at a time of intense ethnically motivated violence in the aftermath of the Asian economic crisis that Chinese Indonesians were welcome to benefit from Australia's refugee program. This statement met with strong protests and statements of "clarification" from DIMA. This example illustrates the fleeting nature of our certainty about who fits in the category given its dependence on politics.

¹⁷⁷ The persecuting agent need not always be the state itself. This distinction is used in both Australia and Canada. See discussion in G S Goodwin-Gill, above n 8 at 66-69.

persecution become the passkey into the new nation. The legal framework categorises and names personal experience as “persecution” or “mere discrimination,” as based on specific grounds or generalised enough to escape the refugee definition by prevalence alone.¹⁷⁸ The refugee identity certifies one’s admission to the nation, but at the same time confines one’s experience of that new nation. “Refugee” is not a free-floating identity category with an existence outside the law. It is generated by legal pronouncement and then awarded as a prize through a specific legal process. The hearing process *determines* who are refugees and who are not. Refugees can stay in Canada and Australia because of their identity *as refugees*. Refugee identity is linked to the purpose for which it is created. For the nation controlling the process and recognising the definition as a constraint on sovereignty, the boundaries of the refugee identity are patrolled with an eye to controlling how large the constraint on sovereignty becomes. In the hearing room, the tribunal member and others in the room must determine whether refugee identity will become the entry to the nation or the barrier. For the claimant herself, the difference Minow describes between choosing and being consigned to an identity is a tricky one. At the hearing, a refugee chooses this identity and, if successful, becomes consigned to it as their identity within the new nation – an object of charity and beneficence. At one isolated point this identity is chosen as the best option. Nonetheless the question of choices must also incorporate the range of choices available. This

¹⁷⁸ This is one analysis of the *Applicant A* above n 22 case in Australia, dealing with China’s one child policy. For some judges, this was simply an application of generally applicable law (see in particular McHugh and Gummow JJ). See also Goodwin-Gill, above n 8 at 362.

range, as much as choice itself, reveals the power configurations underlying the identities.

Refugee identity provides a particular kind of entre to the new nation. They are not recruited because of their skills or their ties with us. Regardless of the extent of our commitment to multiculturalism, we expect that refugee identity will be a passing phase on the way to becoming "us."¹⁷⁹ Refugee fits in the hierarchy of migration categories at differing points depending on one's perspective. As migration is supposed to serve the national interest, some versions of the hierarchy place refugees at the bottom of the heap: we are helping them, they have nothing to offer us. In others though, refugee admissions are valued for their moral goodness; the value is not of the refugees themselves, but of the nation for admitting them. In either case, refugee is constructed as an identity within the nation, a label which individuals wear which conditions their legal entitlements.¹⁸⁰ While this identity label is

¹⁷⁹ At least when we admit them permanently that is the expectation. The Kosovar crisis marks a departure from the tradition of admitting refugees for permanent resettlement in Australia. Australia agreed to admit 4000 people for temporary protection, to be housed on unused military bases in remote areas. That is, to remain as isolated as possible from 'us'. This departure from tradition is in part due to reluctance to extent the annual admissions quota, and in part from a desire not to assist the Milosevic regime with its ethnic agenda. Canada agreed to accept 5000 refugees and stressed in official statements (e.g. Press Release, Minister Lucienne Robillard, 30 April 1999) that most will return to their homes. The difference is that they will be eligible to lodge applications with the CRDD so could potentially stay permanently in Canada.

The Western response to the Kosovo crisis may be the opening to make refugee protection a temporary standard, which James Hathaway has argued will revitalise the law (above n 9).

¹⁸⁰ Those determined to be refugee claimants are given more immediate access to state services than other migrants and are given access to settlement assistance. In Australia, recent changes in the law of reduced the entitlements of potential refugees to medicare and work permits while awaiting determination or appeal results in order to reduce incentives for claiming refugee status. The effects of these changes have yet to be full analysed, but they are testimony to the discourses of control and abuse of the system. Also, November 1999 proposals would limit welfare entitlements for refugees arriving on boats, even though they meet the refugee definition.

Canadian proposals for change in the 1999 document *Building on a Strong Foundation for the 21st Century* (above n 48) also reflect these discourses, for example proposals to introduce

supposedly temporary, it has a certain endurance. Speaking of the 1997 Young Australian of the Year who had settled in Australia sixteen years earlier, the Minister of Immigration stated that without a commitment inclusive to citizenship, "We would not have seen a five-minute standing ovation for this young Vietnamese refugee..."¹⁸¹ The pride with which Australians or Canadians identify their parents as having been refugees is one reminder that refugee itself is an identity, which has an existence beyond its legal category. The law sets up the category, but what happens beyond the law engages other social ordering systems as well.

The implications of refugee as identity are complex. Discussing the operation of the Women at Risk program in Canada, Audrey Kobayashi argues that the refugee determination process assures one's "otherness" and "status outside the normative realm of independent immigrants."¹⁸² While the successful claimant "...is potentially granted 'rights', [...] she is simultaneously marginalised as practises of gender- and racialisation reduce her access to social justice in the larger sense."¹⁸³ As the nature of refugee identity and the refugee determination process locate the refugee as the ultimate other to the nation, the endurance and potential for marginalisation of this label ought not surprise us.

stronger "incentives for cooperation" for undocumented refugee claimants, and to grant the Minister a right to intervene in CRDD hearings and to vacate refugee determination applications.

¹⁸¹ Honourable Phillip Ruddock, Minister for Immigration and Multicultural Affairs, "Immigration Reform: The Unfinished Agenda" Address to the National Press Club, Canberra, 18 March 1998 as reported on the Minister's website at www.minister.immi.gov.au.

¹⁸² Kobayashi A, "Challenging the National Dream: Gender Persecution and Canadian immigration Law" in Fitzpatrick P (ed) *Racism, Nationalism and the Rule of Law* Dartmouth Press, Aldershot, 1995, 61 at 70.

¹⁸³ *Ibid.*

Barsky's insights are equally apposite, as he argues that the refugee hearing¹⁸⁴ reduces an individual's identity so that "...the Other who emerges from these transcriptions is diminished to the point of near non-existence"¹⁸⁵ which in turn facilitates the construction of the new productive citizen. When refugees are admitted as permanent members of the community they are literally invited to change their national identity. This shift in identity is facilitated through a process which judges the old nation as bad and emphasises the goodness of the new nation.

In the current structure of both Australian and Canadian migration law, refugee identity is a stop on the way to new bonds of national attachment. Like family and economic migrants, this outsider can become a member. The conditions of that membership are their differences, their ultimate alterity, their essentialised identity. The refugee process constructs the ultimate other to the nation, and then allows them to enter the nation. These basic features of the refugee determination process are carried out similarly in Australia and Canada - similarly situated nations applying the same international legal standard. In turning now to the contrasts in those 'others' constructed by these two nations, we find traces of Australian and Canadian national identities.

¹⁸⁴ He is referring to the pre-1989 version of the Canadian hearing, which is more similar to the bureaucratic phase of contemporary Australian practice than to the current Canadian practice.

¹⁸⁵ Barsky, above n 173 at 3-4.

2. Images of the nation

Australian and Canadian refugee admissions processes have much in common and administrators in each country follow the other's actions closely.¹⁸⁶ Despite the overwhelming similarities of situation, the similar rhetoric, the close working relationship and the shared common law heritage, however, there remain significant differences in both the process and the outcomes of refugee determination which point to aspects of national identity. In this area of the law, as with family migration and economic migration, the operations of the immigration regime leave an imprint of national mores. Refugee admissions represent the hardest case for this argument as admission criteria in this category are not a direct statement of national needs and values. But even with refugee admissions, decisions about how the internationally agreed definition is applied and interpreted reflect national characteristics.

The refugee admission is treated more expansively in Canada than in Australia.¹⁸⁷ More people per capita are permanently admitted each year, the inland processing system is better resourced,¹⁸⁸ there is no routine provision for

¹⁸⁶ This close relationship was frequently mentioned to me by bureaucrats in both countries.

¹⁸⁷ The acceptance rate of the CRDD is considerably higher (approx 50% over past few years) than that of the Departmental process (13%) and the RRT (approx 10% over past 3 years). It is tempting to conclude from this that the Canadian system is more lenient, or that the law is interpreted more generously, but given that the source countries that claimants come from are very different, this conclusion is not a firm one.

¹⁸⁸ The RRT Administrative Expenditure total for 1997-98 was \$14 680 700AUD. The CRDD budget for 1997-98 (although not for the same 12 month period) was \$43 457 000 CDN. The figures are not really comparable for a number of reasons, including that the RRT made 6 508 decisions during this time and the CRDD made 25, 100. These figures reflect the costs of the more developed documentation gathering system and having two member tribunals at the initial determination stage. Far more is also spent in Canada on providing legal aid to claimants, an amount which is not seen here. What is hard to compare are the costs of having many failed claimants in Australia continue onto the RRT, which means that most claimants received two determinations on the merits, whereas they only receive one in Canada.

the detention of some classes of refugee claimants,¹⁸⁹ and those awaiting determination receive more extensive access to the social welfare net.¹⁹⁰ By contrast, the waiting time for an initial determination in Australia is considerably shorter than in Canada,¹⁹¹ and the Australian government assists more people per capita to arrive under its offshore humanitarian program. All of these factors point to refugee admission as having a more accepted place in Canadian culture. As I elaborated in Chapter Two, this does not make the Canadian system *better*. Since there is no just standard for who should be admitted to the liberal nation it is impossible to conclude that admitting more refugees, or more refugees per capita is better or morally superior. While individual morality will lead each of us to make a judgment about these issues, there is no standard for the liberal nation.

¹⁸⁹ Ss. 176-197 of the *Migration Act* provide for the detention of certain non-citizens in Australia. Unauthorised people who have arrived by boat between 1989 and 1994 were the first category of people for whom detention was mandatory. The provisions now extend to include more recent "boat people" and other unlawful non-citizens. Under the decision of the High Court in *Chu Kheng Lim and Ors v Minister for Immigration Local Government and Ethnic Affairs and Anor* (1992) 176 CLR 1, these provisions were upheld even though s.183 provides that "a court is not to order the release from immigration detention of a designated person." Claimants can also be detained in Canada, although it is discretionary rather than mandatory. Until 1999 it was not often used, although a number of boat arrivals in mid-1999 have been detained until their CRDP hearing (Minister of Citizenship and Immigration, Speech to Canadian Council for Refugees, Niagara Falls, 3 December 1999).

¹⁹⁰ In Canada refugee claimants are entitled to an employment authorisation if failure to grant one would result in hardship, to limited healthcare coverage (similar to Australia) and to some income support (levels vary by province of residence). See Ion S, "Benefits/Entitlements for Refugee Claimants: What They Get and Why They Get It", paper submitted in part completion of LLB at the University of British Columbia, 1998. In Australia, refugee claimants are now entitled to limited health care and may only work if they hold a visa which gives them this right. They are not eligible for social security but after a six month waiting period may apply for Asylum Seekers Assistance which provides a lower level of support.

¹⁹¹ Average processing time for the CRDD in 1997-98 was 12.5 months (Annual Report p.10). In Australia, Departmental statistics show that 60% of detention cases were finalised within six weeks, 33% of priority applications from people who have suffered torture and trauma were finalised within 3 months, 74 percent of applications from people in receipt of needs based funding for impoverished asylum seekers were finalised within 3 months and 57% of determinations were processed within 3 months. These statistics refer to the pre-RRT phase of decision-making (Annual Report, Website version, Sub-program 3.2 p.4).

The conclusion that can be drawn from the comparison is about the character of the nation. Canadian culture is more accepting of refugees than is Australian. This is partially linked to an overall tolerance for higher rates of migration and partially related to the fact that refugee admission is the most challenging branch of the migration program to control and strikes closest to the heart of national sovereignty. The two areas where I noted that the Australian refugee program is more expansive than the Canadian are instructive. A more efficient processing time allows the government to remove people who are not determined to be refugees in a shorter time, thereby reducing the amount of time that they are potentially assisted by the state and reducing the likelihood that they will develop significant ties to the Australian community, especially if they are in detention. The time difference may be illusory as unsuccessful refugee claimants have access not only to the RRT at a review stage, but also to the Federal and High Courts,¹⁹² but one aim of the system is clearly to have ineligible claimants leave as quickly as possible. The government is now working to introduce a privative clause which will strictly curtail access to the courts for unsuccessful claimants¹⁹³ to further this goal. The Australian preference for offshore refugees also fits in with the control ideology as offshore refugees have no legal claim to Australian protection and can be selected

¹⁹² Unsuccessful claimants at the CRDD in Canada can seek leave to appeal to the Canadian Federal Court for judicial review on the full range of grounds specified in the *Federal Court Act* RSC 1985, c.F-7, s.18. This leave is granted in about 1% of cases. At present, claimants unsuccessful before the RRT can ask the Federal Court to judicially review a decision, without seeking leave, on a range of grounds specified in the *Migration Act* (s.476). This range is narrower than the Canadian list. Most significantly, RRT decisions are not reviewable for breaches of the rules of natural justice (s.476(2)).

¹⁹³ First introduced as *Migration Legislation Amendment Bill No 5 of 1997* and reintroduced in 1998 as the *Migration Legislation (Judicial Review) Amendment Bill*.

according to any criteria which Australia chooses. In a revealing comment, one Immigration and Citizenship Canada official stated that that Department had tried to reduce the number of refugees admitted to be closer to the Australian scheme but had simply not been as "successful" because of citizen pressure.¹⁹⁴ Canadian refugee policy taps directly into this public sentiment through the private sponsorship scheme.¹⁹⁵

The operation of refugee law in both countries leaves an image of the nation with the quality of a photographic negative – stripped of its colour and oddly reversed. Australia is identified as striving for a homogenous identity despite its multicultural commitments, as concerned about the size of its population, as wanting a rigid and impenetrable border. As befits a nation founded on multi-cultures and north of a land border, Canada appears here as more committed to multicultures, given that the alternative is not possible, more concerned with fairness in process than with efficiency – even though the end result is not much different.

The control which the Australian nation imprints on its refugee law is an image of the control it wishes to exert over its national identity. Contemporary refugee law, even with its acceptance of the international definition of a refugee, does not escape the shadow of the White Australia Policy and the carefully constructed migration schemes aimed to reproduce the English nation.

Canadian refugee law tells a somewhat different story, paralleling in some ways

¹⁹⁴ Interview, June 1997.

¹⁹⁵ Private-sponsorship accounted for 2,659 refugee landings in fiscal 1997 (April 1, 1997-March 31, 1998). This scheme was introduced during the Indochinese refugee crisis of the 1980s and proved hugely successful.

the more contested White Canada policies. In a curious precursor to the bureaucratic comments above, the constellation of policies which constituted White Canada were less successfully implemented. The interpretations of the Refugee Convention in the national courts also contributes somewhat to this picture, a point which is further addressed by engaging the relationship between rights and identity in Chapter Five.

D. CONCLUSION: REFUGEES IN THE MIGRATION LAWS OF LIBERAL NATIONS

The differences in the refugee determination processes in Australia and Canada are revealing but are overshadowed by the similarities in the two systems which conform to the place of refugee admission in the migration laws of liberal nations. The process reflects and reinforces the identity of the refugee as the ultimate other to the nation, the extreme point of contrast. As well as occurring at the border of the nation, refugee determination occurs at the edge of the law, just beyond the reach of many of the core values of the common law. As refugee admissions are part of the immigration regime in both countries, they belong to the legal regime where there is no justice standard against which the nation's law or policy can be adequately measured. For all these reasons, using identity as an analytic tool to examine the refugee admission process is appropriate. Other legal and ethical assessments are severely limited in their applicability to this realm of decision-making precisely because it is an area of sovereign assertion that constructs an identity for the nation, an identity *as*

refugee, and finally by reducing pre-existing identities to a few narrow points, an identity as new member of the nation. A focus on the roles of identity in refugee law points to several conclusions about the place of refugees in liberal migration laws and about those laws more generally.

First, despite the placement of refugees within the immigration program, refugee admission and migrant admission raise different issues in the popular discourse of the nation as well as in its law. The Western nations which admit the largest numbers of refugees have historically welcomed immigrants. To admit people who are not welcome in their own homelands today joins the tradition in both Australia and Canada of admitting others seeking to rebuild their lives in places with more freedom. What is different, however, is the immigrant-refugee distinction. This distinction is a product of the twentieth century and reflects the relationship of each group to the nation. The traditional mythology of immigration in both Australia and Canada portrays immigrants as the builders and founders of the nation. Their courage, independence, hard work and sheer will are held up, in various ways, as important to establishing the prosperous nations their descendants live in. The role of immigrants as service providers for the nation remains a key plank of migration law and migration rhetoric.¹⁹⁶ Modern immigrants are supposed to bring economic resources or support for families. Refugees, however, are not viewed in this way. In the collective imagining of refugees, it is the individual who benefits from admission to the nation. The nation is generous and good, sharing its prosperity with the huddled masses.

This is a late modern turn in migration discourse. The “mere economic refugees” for whom Australian and Canadian public discourse exhibits so much scorn are no different from most of the founding immigrants.¹⁹⁷ But Australia and Canada are no longer in need of hardworking pioneers, and most of the founding waves of migrants would not be admissible under contemporary rules. The new world is no longer the unmapped frontier far from the safe hearths of Europe. These new nations of - former - immigrants have established identities and by many measures have eclipsed the living standards of the old world. National prosperity has grounded the establishment of the welfare state and it is no longer only the toughest who can survive here. In this climate, then, it is possible to divide newcomers into immigrant and refugee categories; the former serving the nation, the latter being served. This development becomes possible when the nation is no longer identified with the frontier.

A second set of conclusions about the liberal nation can be drawn from the distinct slippage between the term refugee and the term immigrant, a discursive confusion which demonstrates a degree of unease with separating the categories and offers a strong potential for political exploitation. The unease arises because the distinction between refugees and immigrants complicates the

¹⁹⁶ Both Australia and Canada have recently shifted to make economic migration a larger category than family migration. In Canada this shift came in 1995 and in Australia in 1997-98.

¹⁹⁷ This theme is seen often in the press. For example O'Donnell L, “When the Boat Comes In, *Australian* 17-18 April 1999 at 19; Ryszard P, “Charitable Cases Undermine the Integrity of the Refugee Net”, *Australian*, 20 November 1998, at 15. Canada's *Building on a Strong Foundation for the 21st Century* (above n 48 at Ch 11 p.3) states:

Some economic migrants apply for refugee status because they know that this avenue allows entry and possibly a lengthy stay in Canada, during which they are permitted to work or receive social assistance if needed. The abuse of the asylum process by migrants not in need of protection undermines the credibility of Canada's refugee determination system and diverts limited resources from the original purpose, which is to protect genuine refugees through an expeditious adjudication of their claim.

boundary between members and others. The outsiders are differentiated by this distinction. Decisions about admitting immigrants are in part made on the basis of what those people have in common with members of the community; we select people who can speak our languages, who can participate in our workforce, who already have close relatives among us and whose presence therefore meets the emotional needs of those we already count as members. Decisions about refugees are envisioned on an entirely different basis. Refugees are admitted because of what they lack: legal and actual protections from dangers we assume (usually rightly) do not occur within our borders. But once refugees are admitted they are treated as immigrants, expected to become like-us, to build the new identities we have created the space for by strategically reshaping and reducing their previous ones.¹⁹⁸ Thus refugees have a complex relationship with national identity building. They are expected to contribute in the way which all immigrants do to the identity of the nation, by first reflecting and then adopting national values and becoming members of the national community. Refugees through their neediness contribute to the identity of the nation as good, generous and prosperous, as does the refugee determination process which labels some other nation as "bad".

These dual facets of the refugee's relationship to national identity explain part of the slippage between the refugee and immigrant roles. Another part of the explanation is found in the complexity of the refugee definition and the fact that it does not parallel common understanding of the word. The opportunity

¹⁹⁸ The latest Canadian Government report at least partially recognises some of the problems of having the same expectations for both groups and recommends that refugees be given more than 1 year to "settle" (above n 48, Ch 11 at 1.)

for political manipulation is found in the lack of popular understanding of the differences between the two groups. One contemporary example is of “boat people” “queue jumpers”, as though they could simply join in line and wait their turn, whereas in reality they do not qualify for any immigrant queue.¹⁹⁹

Government officials can draw on public humanitarian good will towards refugees when immigration quotas are expanded and can tap into public hostility towards more open immigration when introducing measures which make refugee admission harder. While the issues ought to be analytically separate, they overlap in popular discourse. When the Australian Minister of Immigration says that the young woman named Australian of the year is a former Vietnamese refugee and an immigrant success story, he is of course telling a version of the truth.²⁰⁰ Although she was not an immigrant in a strict sense, the achievements which brought this honour to her belong to the mythology of migrants, not the abject need of refugees. The confusion in the first half of 1999 about whether refugees from Kosovo should be admitted to non-European nations permanently, temporarily or not at all reflects part of this confusion. In the United States and Australia public sentiment raged against plans to admit people temporarily and isolate them from the population.²⁰¹ Many

¹⁹⁹ This statement is part of the governing party’s policy statement in the recent national election:

The Coalition will not tolerate blatant queue-jumping. This practice unfairly benefits a minority at the expense of the majority with equal or superior claims to entry. (Liberal Party of Australia, *Immigration Building on Integrity and Compassion*, www.liberal.org.au/ARCHIVE...locx/immigration)

²⁰⁰ Hon Phillip Ruddock, Address, National Press Club, 18 March 1998.

²⁰¹ Shanahan D, “Anyone Who Had a Heart”, *Australian*, 10-11 April 1999, at 27; Murray J, “Noblesse Oblige Should Begin at Home, *Australian* 17 June 1999 at 13.

members of the public wanted the newcomers treated as immigrants even though they clearly were not. The strength of sentiment was so strong in Australia that arguably the discursive confusion was successfully deployed against government interests, even though in the end the matter was resolved at the international level by a UNHCR decision to keep the majority of refugees close to their former home to emphasise their temporary status and facilitate a return home.²⁰²

The final point to be made about the migration law of the liberal nation based on the discussion of refugee admittance emerges directly from the issues presented by this discursive conflation of the two identities. The international norms surrounding refugees fall short of an obligation to admit refugees, let alone to admit them as permanent members of the community. For some nations, admission of refugees is not a choice at all – refugees cross their borders uninvited and it becomes a real or political impossibility to invoke the coercive force of the state to remove them. It is no coincidence that this is not the case for most prosperous Western nations, for those who developed the refugee definition. Both Canada and Australia are distant from nations which are currently generating large numbers of refugees. The spectre of boat loads of Indochinese arriving on Australia's northern shores and Canada's long largely unpoliced border with the United States notwithstanding, neither nation has ever coped with a Kosovar exodus. For these nations, admitting refugees is a political choice which partly reflects genuine liberal humanitarianism. That is, while the *Refugee Convention* may not effectively limit sovereignty, the

²⁰² Overcrowding in refugee camps in near states led the UNHCR to ask distant states to take

humanitarian sentiment it embodies has a moral resonance in these nations.

This cannot be a complete explanation. And indeed much of the structure of contemporary refugee law would not exist if it were.²⁰³ The resonance of humanitarianism in this area of migrant admissions underscores the importance of looking behind that value to see its persistent importance to liberal understandings of migration law. I turn to that topic in Chapter Four.

refugees, even temporarily, by the end of April, 1999.

²⁰³ Patricia Tuitt argues that "refugee law is not motivated by exclusively humanitarian concerns - indeed, if the concerns of the law are humanitarian it is only marginally and incidentally so" above n 9 at 7.

Chapter Four

Reflecting Ourselves – The Mirror of Humanitarianism

In both Australia and Canada, the refugee program is only one of several ways in which migrants are admitted on a humanitarian basis. In this Chapter, I consider the full range of humanitarian admissions to each country. Through this discussion I extend the argument developed thus far in two directions. By considering the ways individuals and groups are admitted under the humanitarian rubric I broaden the conclusions about the othering process discussed in Chapter Three. Second, by considering the overall phenomenon and mechanics of humanitarian admissions I expose and draw conclusions about the role of humanitarianism in liberal migration law and about the importance of humanitarianism for the construction of the identity of the nation. These aspects of the Chapter refine and develop the Chapter Two discussion of the humanitarian consensus in liberal discourses regarding migration.

The core of the argument in Chapter Three was that the othering process contributes to constructing the nation's identity through its emphasis on those who are outsiders to the nation, who do not belong, and whose admission must be closely scrutinised. Through this process, the members of the in-group are identified in contrast. The others are everything that we are not, everything that we reject and quarantine. Considering the role of humanitarianism in migration law and in relation to national identification adds another dimension to the picture of national identity. Migration law not only portrays the nation and its members as having distinct values and attributes from outsiders, through humanitarianism it also paints the insiders as good, generous, and

magnanimous. Through this label both the nation and its members are portrayed as virtuous.

As established in the Chapter Two framework, humanitarianism occupies a curiously central place in migration discourses. Despite the relatively small proportion of migrants who are admitted each year to prosperous Western nations on humanitarian bases,¹ humanitarianism is an important aspect of migration discourses. On expelling a group of unsuccessful refugee claimants, the office of the Canadian Minister of Citizenship and Immigration issued a press release entitled “The Government of Canada Honours its Humanitarian Tradition.”² The Australian Minister of Immigration has stated proudly that “how we respond to the humanitarian crises that continue to plague the world defines us as a nation.... We are a nation that can be proud of its record of responding to refugee and humanitarian problems.”³ Humanitarianism is a rallying cry for those who feel that more refugees should be admitted⁴ and a point of pride held out by national representatives in international fora.⁵ In political discourses about immigration past and present, humanitarianism

¹ See Appendix A. See also Chapter Two, note 148.

² “Situation of the Chileans in Montreal: The Government of Canada Honours its Humanitarian Tradition” press release, Honourable Lucienne Robitaille, Minister of Citizenship and Immigration Canada, 28 September 1998.

³ Minister of Immigration, Honourable Phillip Ruddock, 26 March 1998, Address to the Victorian Press Club.

⁴ Despite the argument that onshore refugee admissions could be viewed as rights claims, see Ch. 3 at pp. 116-123. The rhetoric of rights is antithetical to that of humanitarianism.

⁵ “How we respond to the humanitarian crises that continue to plague the world defines us as a nation. How we act on the global stage conveys to others what we are.” Honourable Phillip Ruddock, Minister of Immigration in Address to the Victorian Press Club, Melbourne, 26 March 1998. In a similar vein, Honourable Eleanor Caplan, Minister of Citizenship and Immigration Canada, stated in a 3 December 1999 Address to the Canadian Council for Refugees meeting in Niagara Falls, “...if immigration has been a vital part of Canada’s social, economics and cultural success, our refugee system has earned us our reputation as a humanitarian leader in the world.”

occupies a place which belies its relatively minor contribution to annual migration intake in both Australia and Canada. Examining the construction of humanitarianism in this discourse sheds light both on its crucial role in migration discussions and on how migration law serves the needs of the liberal nation and in the process contributes to the identity of the nation.

The analysis in this Chapter begins with a discussion of the contours and the limits of liberalism's humanitarian consensus. It then outlines how humanitarianism is written into the Canadian *Immigration Act* and the Australian *Migration Act*. Drawing on this description, I consider how the Canadian courts have developed the notion of humanitarianism and how the Australian Minister exercises humanitarian discretion. The contrasts in Australian and Canadian deployments of humanitarianism provide grounding for the subsequent analyses of the differences between judicial and executive control of this aspect of the law, the particular identities of the beneficiaries of humanitarianism, and how humanitarianism points up differences between Australian and Canadian perceptions of the national self.

A. HUMANITARIANISM IN LIBERAL THEORY

1. The Humanitarian Consensus

Despite the absence of a liberal agreement about how many immigrants must be admitted by a just nation,⁶ liberal theorists writing about migration do agree that the borders of the nation must be opened to some needy outsiders.⁷ This agreement is articulated differently in the work of closed border theorists

⁶ Described in Chapter Two at pp. 76-82.

⁷ I have explored the humanitarian consensus in more detail in "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall Law Journal* in press.

than in that of those advocating open borders. The various ways that this humanitarian commitment is expressed are important to understanding its role in migration laws and its relationship to national self-identifications. It is also useful to consider how the rhetoric of humanitarianism masks other issues, and historical shifts, in migration to Australia and Canada.

For Walzer, whose seminal work *Spheres of Justice*, presents a comprehensive defence of closed borders as a necessary condition for the just liberal community,⁸ the principle of mutual aid generates particular duties to admit some outsiders. Admitting that the requirements of mutual aid are indeterminate, Walzer argues that the duty to provide mutual aid arises in cases of need or urgent need and when the risks or costs of providing such aid are relatively low.⁹ While this duty can sometimes be met by yielding territory – that is changing the geography rather than the composition of the community – or by exporting wealth,¹⁰ the needs of some outsiders are for membership itself and therefore can only be met by allowing them to join the community.¹¹ The guidance which this principle provides to the hypothetical liberal community is limited because Walzer asserts that at some unspecified point the community will be justified in closing its borders even to those who have a need for membership itself. The community faced with more needy outsiders than it can

⁸ Walzer M, *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983, see especially Chapter Two: Membership.

⁹ Ibid. at 33-34.

¹⁰ Massive increases in foreign aid are often hypothesised as the just alternative to massive increases in migration to prosperous Western nations. This is part of Walzer's argument as well. What these arguments ignore is that the political sentiments opposing open borders are equally opposed to implementing increases in foreign aid. Louis Michael Seidman discusses this in "Fear and Loathing at the Border" in Schwartz W F (ed), *Justice in Immigration*, Cambridge University Press, Cambridge, 1995, 136 at 142 and passim.

¹¹ Above n 8 at 48.

admit ought to then choose from among them on the basis of their connection with the community. That is, there is a higher obligation to those whose plight we are responsible for¹² or who are persecuted because they are like us in some way.¹³ Walzer's principles for humanitarian admission then are limited to those who cannot be assisted in other ways and who can be admitted with little impact on the community.

Not surprisingly given both the minimal and the indeterminate nature of this commitment, both Australian and Canadian current humanitarian admissions policies fit within these theoretical parameters. Walzer concludes that "the principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's understanding of itself."¹⁴ In Walzer's communitarian analysis, admission policies and community identity are, predictably, linked directly.¹⁵ Turning to other, avowedly non-communitarian perspectives, however, this link remains crucial. Furthermore,

¹² The culturally specific and dated example which Walzer refers to are Vietnamese refugees, *ibid* at 49.

¹³ Walzer distinguishes between refugees and asylees, using the terms in ways which do not correspond with their legal uses in Australia and Canada. He refers to refugees as those who have not yet entered the nation and asylees as those who meet the neediness standard which triggers the mutual aid principle and have already entered the country. The obligation to asylees is higher because "...its denial would require us to use force against helpless and desperate people, and because the numbers likely to be involved, except in unusual cases, are small and the people are easily absorbed." *ibid* at 51.

¹⁴ *Ibid* at 51.

¹⁵ Coleman J L and Harding S K, "Citizenship, Justice and Political Borders" in Schwartz W F (ed) above n 10 at 18 take a similar communitarian position arguing that political communities are entitled to exclude because of their characteristics as communities. They also assert that "refugees have a right to immigrate" (at 46). Their conclusions are based on a survey of current immigration laws and policies in 8 nations. Their assertion of a right to immigrate does not accord with international law, as was detailed in Chapter 3 at pp.102-109. The Refugee Convention does not grant any "rights" save the right not to be returned to a place where one will be persecuted for a Convention reason. Further, the obligations of the Convention are not triggered until the individuals have arrived in the country whose protection is sought and even at that the claims raised are not regarded as rights claims by most domestic courts.

while I agree with Walzer that humanitarian admissions can modify a community's understanding of itself, this modification is always accompanied and superseded by the nation's identity *as* humanitarian. This is the point I will return to after examining some other perspectives on the duty to admit needy outsiders.

Galloway's articulation of this argument is important because he advocates closed borders without specifically embracing communitarianism.¹⁶ In Galloway's view, the liberal state ought to function as a "self-help device for moral individuals."¹⁷ It is this function of the state which leads to the requirement that some humanitarian migrants must be accepted. While the state is morally free to close its borders to claims raised from outside, when its own members seek the admission of outsiders as a fulfilment of their own personal moral duties, then the state ought allow these admissions. He summarises the proposition this way:

It may be the case that some members of a community rightly identify it to be their moral duty to render assistance to an alien in need, not by giving that person money or other resources, but by providing shelter and a human support network. If the state prevented the admission of people for whom provision would be made by a member, it would be hindering that member's fulfilment of her moral duty. A liberal would be justified in criticising an immigration scheme which did not allow for private sponsorships.

... Insofar as there are citizens who are willing and able to provide for needy aliens, and who are also able to satisfy the needs of their dependants, it is incumbent on the liberal state not to create barriers which would impede them in their attempt to provide the conditions of autonomy to foreigners.¹⁸

¹⁶ Galloway asserts that "closed borders are consistent with 'pure' liberalism." Galloway D, "Liberalism, Globalism and Immigration" (1993) 18 *Queen's Law Journal* 266 at 286. Galloway's analysis of liberalism in immigration law is further developed in "Three Models of (In)equality" (1993) 38 *McGill Law Journal* 64, and "Strangers and Members: Equality in an Immigration Setting" (1994) 7 *Canadian Journal of Law and Jurisprudence* 149.

¹⁷ *Ibid.* "Liberalism, Globalism and Immigration" at 294.

¹⁸ *Ibid.* at 295-6.

In Galloway's analysis, the commitment to humanitarianism draws its principal support not from the need or other characteristics of those seeking to be admitted, but from the individual moralities of those who are members of the community. The identity which matters in this equation is that of the member, not that of the outsider. This demonstrates another aspect of humanitarianism which figures in my analysis. For Galloway, the personal moral duty to assist an outsider through physical support that could not be provided outside the community tells us something about the morality of the individual who holds this duty. That individual is someone we would call good, generous, or even (erroneously) selfless. This level of moral commitment is higher than what is required of members of the liberal community that Galloway describes, and would necessarily in his analysis be outside the norm.¹⁹ Humanitarianism is more than is expected, more than justice demands; it tells us several things about those who offer it and little about those who receive its benefits.

For theorists who advocate open borders to the liberal community, humanitarianism obviously plays a different role in the analysis as it is not treated as an exception to what is otherwise the rule. Interestingly, however, the open borders position is often supported through a detailed argument precisely about humanitarianism. Carens is one of the most prolific and theoretically thorough of the open border advocates.²⁰ His argument that liberalism supports

¹⁹ If it were not outside the norm his defence of closed borders would be internally inconsistent on this standard. This moral commitment crosses what James Fishkin describes as the threshold of heroism; Fishkin J, *The Limits of Obligation*, Yale University Press, New Haven, 1982. Fishkin's description of the central tension in liberalism between impartiality and individuality can be mapped onto this discussion. See further my "Amorality and Humanitarianism in Immigration Law" above n 7.

²⁰ Aspects of his position are elaborated in Carens J H, "Aliens and Citizens: The Case for Open Borders" (1987) 49 *The Review of Politics* 251; "Membership and Morality: Admission to

open borders draws on his claim that utilitarian, Rawlsian and Nozickian versions of liberalism converge upon this point and that the argument is further supported by extrapolating Rawls' original position device to the international plane.²¹ While his analysis of Nozick's argument is not grounded in a humanitarian argument, it is by considering admissions of a humanitarian character that he builds his conclusions about Rawls and about utilitarianism. Regarding the former, Carens urges that considering the Rawlsian principles of the priority of liberty and the perspective of the worst off we would be compelled to admit at least those whose liberty was not protected in their current situations as well as the worst off of the potential migrant pool.²² That is, we would be compelled to admit those who in our current migration regimes are considered to be classic political refugees and destitute humanitarian claimants. For the latter, Carens argues that when the greatest good of the greatest number is calculated particular attention must be paid to those outsiders to the nation who have the most to gain from entry. When their good is entered into the calculus, it is hard to deny admission.²³

This argument as well is concerned with the type of admission which is usually provided for in the various humanitarian categories, rather than under family or economic migration programs. Carens' argument that borders should

Citizenship in Liberal Democratic States" in Brubaker W (ed) *Immigration and the Politics of Citizenship in Europe and North America*, University Press of America, Lanham MD, 1989, 31; "Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States" (1987) 37 *University of Toronto Law Review* 413; "Refugees and the Limits of Obligation" (1992) 6 *Public Affairs Quarterly* 31; "Migration and Morality: A Liberal Egalitarian Perspective" in B Barry and R Goodin (eds) *Free Movement: Ethical Issues in the Transnational Migration of People and Money*, Pennsylvania State University Press, University Park PA, 1992, 25.

²¹ "Aliens and Citizens" *ibid.* at 258.

²² *Ibid.* at 260-62.

²³ *Ibid.* at 262-63.

generally be open,²⁴ even to those who do not raise humanitarian claims, is grounded in the same liberal consensus about humanitarian admission which I am sketching here. In arguing out the case for open borders, it is not the spectre of wealthy jet-setters with multiple citizenships, or of investors with financial interests around the globe which forms the back drop for the argument. Rather, this argument draws on the emotive power of vast disparities in wealth between nations in the world and the assumption that many people in poorer countries would prefer to live in more prosperous states.²⁵ To make their case, open border advocates appeal to the humanitarian impulse, even though most migration to prosperous Western nations is approved on family reunion or economic bases and has little to do with humanitarianism.

Peter and Renata Singer offer yet another perspective on the open border position which draws strongly on a humanitarian setting. Their version of the utilitarian calculus is that the doubling of refugee admissions to prosperous states could continue for a considerable time before the benefits to those being admitted would outweigh any detriment to the community.²⁶ In its extreme this argument is of course controversial²⁷ and suggests a commitment to radical global redistribution of wealth.²⁸ Their more modest view is that Walzer's mutual aid principle ought to be viewed much more expansively and that our

²⁴ Carens would allow the least possible restrictions if the sheer numbers seeking admission threaten national security, *ibid* at 260.

²⁵ The closed border argument draws on this image as well, of course, to vastly differing ends.

²⁶ Singer P and Singer R, "The Ethics of Refugee Policy" in *Open Borders? Closed Societies? The Ethical and Political Issues*, Greenwood Press, New York, 1988, 111. Their argument is a literal example of lifeboat ethics.

²⁷ Carens takes issue with aspects of it in "Refugees and the Limits of Obligation" above n 20.

²⁸ To this extent it echoes Carens' view that birth in a prosperous Western nation is the modern equivalent of feudal privilege, "Aliens and Citizens" above n 20 at 251-52.

understanding of 'need' should ground a considerable increase in admissions for permanent settlement even with no alterations to family or economic migrant categories. Where their argument parallels Carens' is in using the established humanitarian consensus as a building block in an argument for far-reaching change.

Another important branch of liberal theory about migration is formed by theorists who do not engage in the debate about whether liberalism requires open or closed borders but who, instead, assert on a pragmatic basis that the value of humanitarianism requires that more needy people be admitted to prosperous nations regardless of our views about the ultimate morality of borders. This avenue of theorisation is important both because it emphasises humanitarianism and therefore can reveal something about its contours and because it provides an agenda for political action in the world dominated by national sovereignty, by taking sovereignty as a given and seeking ways to manipulate politics within that framework.

Writing of the American setting, Kent and Scanlan articulate this position fully. They argue that while liberalism requires open borders, implementing such a policy is politically impossible.²⁹ They claim that a call for shifting immigration policy on the ground of a liberal conception of justice will be ever unsuccessful. Rather, given the paramountcy in American culture of rhetoric of political freedom and human rights, arguments which focus on the these types of claims by migrants will garner support. In other words, Scanlan and Kent assert that only humanitarian rhetoric will support a shift in the law in the

²⁹ Scanlan J A and Kent O T, "The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe" in M Gibney (ed), above n 26, 61 at 65.

United States and that other claims, regardless of their philosophical soundness, will fail to win sufficient political support.³⁰ In their view, those who advocate expansion of admission quotas are best to draw on the well established “myth of American generosity.”³¹ That is, they advocate enhancing and then courting the humanitarian self-identification of the liberal nation.

Seidman’s argument that any serious analysis of migration law and policy must take account of the limits of our capacity for empathy is similarly positioned. He argues convincingly that our capacity to care is partially associated with physical location within our borders.³² Given the curious nature of our compassion – that it seems to diminish at our borders, the politically possible humanitarian option in migration is to continue with restrictive laws but to also permit and accept very lax enforcement of them.³³ This treatment of the issue reveals that humanitarianism may be something that is unworkable as a legal standard. While our impulse may be to humanitarian gesture in a given scenario, we may be reluctant to make generosity the rule. This is another reason for its position in the traditional law versus discretion dichotomy. Equally, it may be difficult to formulate a rule based on humanitarianism because the concept itself is elusive. Like Scanlan and Kent, Seidman does not

³⁰ Ibid.

³¹ Ibid. at 63.

³² Seidman L M, “Fear and Loathing at the Border” in Schwartz W F (ed) above n 10 at 142.

³³ Ibid at 137. In some ways this corresponds with the current position in Canada. While many people are told each year that they must leave the country, few removal or exclusion orders are followed up (deportation orders are, however). Furthermore, Citizenship and Immigration Canada does not collect statistics on how many orders are complied with. In a private interview, one Departmental official suggested that it would not be in the Department’s best interests to try and find out who was actually leaving. In response to my question in a public forum in October 1997, the then Australian Minister for Immigration stated that his Department similarly did not keep statistics on enforcement of its various departure orders. This position also corresponds with the Canadian practice of allowing exceptions to various *Immigration Act* provisions on humanitarian grounds, see below at pp. 203-209.

argue that this is morally right, but, rather, that it is politically feasible. In his conclusion he states:

Membership is important not because it is a moral right that justifies exclusion, but because it is a political reality that blocks inclusion. We should not ignore that reality when we formulate immigration policy. But neither should we reinforce it so as to provide ammunition for those interested in justifying the status quo.³⁴

Both these analyses emphasise that when we argue for changes in the law to allow increased admissions, it is the language of humanitarianism which is most persuasive in liberal cultures. The humanitarian consensus runs through all strands of liberal theoretical discussions about immigration, which is itself an indicator of the potential instability of its meaning.

2. The meaning of humanitarianism

One important reason for the pre-eminent role of humanitarianism in immigration discourses is precisely that it is the point of convergence for those liberals who claim the need for closed borders, those who assert the importance of open borders, and those who claim that this intractable argument must be circumvented to achieve real change. For those who take up the question of just immigration on a theoretical plane, humanitarianism is the crux of the issue. Looking beyond this to specify the meaning of humanitarianism reveals its relationship to national identity in the liberal nation.

Every liberal theorist looking at this question argues that more needy outsiders ought to be admitted to wealthy Western nations.³⁵ At a minimum,

³⁴ Above n 32 at 144-45.

³⁵ Of those discussed above, this is the explicit position of Walzer, Coleman and Harding, Carens, Singer and Singer, Scanlan and Kent, Seidman. This position is also implied in Galloway's work, especially considering his argument in "Strangers and Members: Equality in an Immigration Setting" above n 16. Others who would support this position include Tushnet M, "Immigration Policy in Liberal Political Theory" in Schwartz WF (ed) above n 10, 147, and Adelman H, "Justice, Immigration and Refugees" in Adelman H et al (eds), *Immigration and*

this is the substance of the humanitarian consensus: by any liberal standard contemporary nations are failing in their moral obligations. Beyond this humanitarianism spells out little. Both Walzer and the Singers would agree that a nation must only admit those it has the capacity to admit, but that capacity would be defined dramatically differently in each argument. For Galloway, the limit of humanitarianism is unknowable, given that it depends on the individual moralities of all members. Carens' restriction for national security concerns is open, at least, to manipulation. For those taking a pragmatic position, the limit of humanitarianism will be drawn when its rhetorical political potential is exhausted. In any given nation this provides an imaginable limit, but not more. The humanitarian consensus tells us nothing about the numbers of economic or family migrants who ought to be admitted, and therefore adds very little to the core issues of popular political debate in Canada and Australia.³⁶

Humanitarianism cannot tell us how many immigrants a just nation should admit because at its core it differs profoundly from justice. Humanitarianism is the term describing all the best and most generous elements of liberal immigration laws. It sums up the emotional appeal of "give us your huddled masses" and defines our willingness to share our prosperity. Liberal humanitarianism, which is the pride of many nations which have comparatively open borders and are important international actors in questions of refugee

Refugee Policy: Australia and Canada Compared, Melbourne University Press, Melbourne, 1994, 63.

³⁶ In Australia and Canada popular debate and concern tends to focus on the overall number of new immigrants allowed, the vast majority of whom are in the economic or family migrant categories. This is not the case in Europe where popular controversy centres on admitting refugee claimants. This is partly because the older European nations are not 'nations of immigration', do not have on-going programs for immigration and only deal with the issue when faced with the demands of those already in their territory. These differences in setting would need to be accounted for in adapting my theoretical presentation of the relationship between immigration laws and national identity to 'old world' settings.

assistance, is based on inequality rather than justice. The central role of humanitarianism in immigration law makes the search for fair law and policy more difficult because it emphasises beneficence despite being ostensibly derived from a duty to needy outsiders.

Humanitarianism provides a stand-in for justice in the immigration realm, while reinforcing the boundary between an “us” group and a “them” group. Justice is a standard that implies, and applies, equality between individuals. Humanitarianism is the opposite; it is grounded in a specific type of difference created by material inequality. *We* have something, in the case of migration law membership in a prosperous rights respecting state, that *they* do not. Humanitarianism in migration law functions only because of the profound *inequalities* between members and non-members. When we are humanitarian we bestow, as a gift, something upon others who have no rightful claim to it.

Keeping humanitarianism as the central concept in immigration and refugee law ensures that the law is about what “we” can give to “them.” Humanitarianism is not a standard of obligation, as justice would be, but rather of charity. Humanitarianism defines us as good when we are able to meet the standard, and justifiable when we are not. As is the case with the principle of mutual aid, humanitarianism is very flexible. It does not provide principled guidance about whom to admit when. The obligation is minimal, depending on subjective perceptions of state capacity, of actions which can be taken with no risk or loss. It is well suited to the ways liberal societies use migration law to accommodate changing perceptions of national need, it can expand and contract easily with the domestic political environment. The elasticity of the boundary of

the nation has a perfect parallel in the concept of humanitarianism. The standard which humanitarianism provides for migration law is only to lay bare the complete dependence of this branch of the nation's legal framework on political consensus and rhetorical support. That is, this close examination of humanitarianism provides further support for Chapter Two's assertions about the roles of migration law in constituting the liberal nation.

The inequality which humanitarianism enshrines reinforces difference between members and others. Through this function, it contributes to defining the identity of the nation. Part of this shaping of identity is achieved through the othering process described in Chapter Three. That is, we find aspects of identity by looking at those who are excluded, or who benefit from our beneficence. The humanitarianism of our laws also defines us directly, without any reference to those "others," as good and as generous. The mirror of humanitarianism reflects us as members of a nation which does more than it is required to do, which is more than just, better than fair. This sentiment is reflected in the Australian Minister for Immigration's comments regarding the 1997 Australian of the Year who had come to the country as a refugee from Vietnam:

Those who applauded this young woman, not only applaud her individual courage and achievements, but, I suspect, applauded themselves for being members of a community that, as she said in her acceptance speech, welcomed her so unquestioningly.³⁷

Part of our humanitarianism is about just that, applauding ourselves. When humanitarianism is used in immigration laws and discourses it tells us

³⁷ Minister Phillip Ruddock, "Immigration Reform: The Unfinished Agenda" Address at the National Press Club, Canberra, 18 March 1998. Notes available on Departmental Website, www.minister.immi.gov.au.

something about ourselves as a nation – that is, the extent of our aspirations to goodness – and something implicit about our national identity – that is, how we go about balancing the needs and claims of insiders and outsiders. The self-conscious construction of ourselves as good becomes clearer through the examination in the next section of how humanitarianism is written into Australian and Canadian law.

While I demonstrate that humanitarianism enshrines inequality and circumvents justice, and often holds the position of a self-serving ruse in the law, I would also strongly urge that it is a discourse of immense value in both law reform and national aspiration. Although arguments about what is the just number of migrants to admit will never be resolved in a way which takes account of justice for those outside the nation,³⁸ aspiring to be generous and good introduces an important value to this law, even if it does not yield precision or clear standards and results in provisions which are difficult to interpret. The value of humanitarianism tempers, without altering, the blatant “self-centred-ness” of migration law. In analysing how this value is translated into legal effect, I conclude that the aspiration to generosity and goodness is often missed, in both Australia and Canada. Nonetheless, the rhetoric of humanitarianism is valuable because it calls on us to think beyond ourselves, even if we do fall short of the mark. While it is fraught with problems, it remains what is “best” about our liberal migration laws. Precisely because it is the point of liberal consensus, it is strategically, as Kent and Scanlan and Seidman suggest, the discourse which is most likely to be persuasive for those

³⁸ This is a proposition I discuss in Chapter Two at pp. 76-82. Analysing liberalism’s failure to provide a justice standard for migration laws is a necessary precursor to the argument here about humanitarianism as the effective “stand in” for justice in liberal migration laws.

aspiring to change the law to make admissions policies more open or more responsive to those in need.

3. Bifurcated Migration Laws

The place of humanitarianism in Western migration laws is a comparatively recent development. As I discussed in Chapter Three in regard to refugee law,³⁹ the importance of humanitarianism has emerged only in the latter half of the twentieth century. Specific provisions for narrowly defined refugees are one aspect of the broader migration stream encompassed by the term humanitarian. Two factors account for this emergence. First, it was not until the twentieth century that widespread immigration control and restrictive regimes became the norm.⁴⁰ Second, the move to restrictive immigration regimes directly harnessed migration laws to the needs of the sovereign liberal nation. Once this linkage has been made, the rationale for migration must be understood in terms of national objectives. In the cases of family reunification migration and economic migration the linkages are easily drawn.

When migration law is articulated as a means of fulfilling national ends, humanitarian migration emerges both as an exception, and as something which must somehow be fitted into the national need spectre, even if the connection is more subtle in this case. The need which is met by humanitarian migration is the need to define and understand the nation as compassionate and caring. The extent of our collective commitment to these aims is reflected in the amount of humanitarian migration we will tolerate. Humanitarian migration becomes the

³⁹ See Chapter Three at pp.102-104.

⁴⁰ Dummett A and Nicols A, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, Weidenfeld and Nicolson, London, 1990.

exception whereas in earlier times it would have been at least part of the rule. The starving Irish who fled to the Canadian colonies, those fleeing religious persecution who broke the earth of the Canadian prairie, the former convicts who chose freedom and remained in what was to become Australia, and the post-World War two migrants who manned the foundation of the contemporary Australian economy, and many or even most of the groups and individuals who originally grounded these nations of immigrants would all be humanitarian migrants by today's standards. The nature of migration, of what is at stake and of what type of person will serve a national need, has shifted. This is partially because Australia and Canada have become in the latter half of this century fully sovereign nations, and therefore completely in control of their borders. But the same shift has occurred even in Europe to a lesser extent. As migration laws in general stand as bulwarks against globalisation, migration increasingly becomes an option for the privileged. There is thus a bifurcation in the law between humanitarian and 'other' classes of migration. The notion of privileged and non-privileged migration is replicated within the humanitarian scheme as it is often the well-off who can pay for passage to a place like Canada or Australia and therefore gain the possibility of lodging a refugee claim, and, if the coincidence of other factors works in their favour have the nation treat their presence as a constraint on sovereignty.

The same logic no longer applies to humanitarian and non-humanitarian migrants. Evidence of this is seen in the Australian separation between its "migration program" and its "humanitarian program"⁴¹ and in the recommendation of the 1997 Canadian Legislative Review panel that the

⁴¹ Department of Immigration and Multicultural Affairs "Fact Sheet: Key Facts in Immigration" available on the Departmental Website, www.immi.gov.au.

present immigration regime be replaced with two new acts, one dealing with immigration and citizenship and a second dealing with “protection.”⁴²

Hathaway’s proposal to reform international refugee law by implementing a truly temporary standard for refugee protection in other countries also relies crucially on separating responses to those who need humanitarian assistance from the usual concerns of migration law.⁴³ While in the previous century settler societies were peopled by those we would now call humanitarian migrants, it seems the next century will see a further diminished place for permanent migration as a means to address humanitarian concerns.

This bifurcation of the logical underpinning of migration law contributes to the conceptualisation of humanitarianism and to articulating the relationship between migration law and national identity. Humanitarianism is an exception to the rule of migration serving the national agenda, but it is such a limited exception that it must bend to the national agenda in some ways. As a result, humanitarianism cannot be more than aspirational, even while that aspiration retains its own value. The role of the humanitarian impulses in identifying the nation as good and generous is elaborated through examining the Canadian *Immigration Act* and the Australia *Migration Act* in the next section.

⁴² *Not Just Numbers: A Canadian Framework for Future Immigration* available on the Citizenship and Immigration Canada Website at cicnet.ingenia.com. The proposal for two new acts was the centrepiece of the legislative review and was therefore discussed throughout the report. This aspect of the report was rejected. Citizenship and Immigration Canada’s response to the report *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*, cicnet.di.gc.ca/english/about/policy/1r

⁴³ Hathaway J C, “Preface” in Hathaway J C (ed) *Reconceiving International Refugee Law* (1997) at xviii and Hathaway J C and Neve A, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 *Harvard Human Rights Law Journal* 115.

B. LOCATING HUMANITARIANISM IN THE LAW

Despite humanitarianism having a similar place in Australian and Canadian rhetoric about immigration, the place it takes in the laws of each country is markedly different. A comparative analysis of these provisions illustrates and allows for refinements of my analysis above of the liberal consensus about humanitarianism. It also allows me to demonstrate important differences between the two systems, and to draw insights about national self identification in each place from those contrasts.

1. The Canadian *Immigration Act*

The contrasts are easiest to see if we start with the Canadian *Immigration Act*. The notion of humanitarianism appears at several key points in the Act. It occupies a prominent place in the regulatory regime under the Act and is further developed in the Policy Advice Manuals which outline for CIC bureaucrats the day to day application of the statutory instruments.⁴⁴ The combined effect of these three sources is to ensure that the concept of humanitarianism can potentially play a role in almost all aspects of Canadian immigration law.

One of the ten stated aims of the Act is “to fulfil Canada’s international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and persecuted.”⁴⁵ Stated thus, this objective serves both to explicitly locate humanitarianism as an objective of

⁴⁴ While the Policy Manuals are targeted towards the Minister’s own staff, in practice they are widely used by immigration refugee lawyers. They are internal documents of Citizenship and Immigration Canada updated as policy and procedures change.

⁴⁵ Section 3(g). The first part of the section, “It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognising the need (a)..., (b)...”

Canadian law and policy and to separate it from any form of legal obligation. The tension between these two poles is evident in the way humanitarianism is used in the Act. It also makes transparent – because it says so explicitly - that humanitarianism is a national tradition. Construction of tradition is integral to building nation and national identity.

Subsection 6(3) provides that the Governor in Council may designate classes of admissible immigrants, “the admission of members of which would be in accordance with Canada’s humanitarian tradition with respect to the displaced and the persecuted.” At present two classes are designated; “country of asylum class” and “source country class.”⁴⁶ These allow for the admission of individuals who would not meet the definition of a Convention Refugee⁴⁷ but who come from dire circumstances such that they would be considered refugees in popular parlance. In the past humanitarian designated classes have been identified more narrowly using labels such as “self-exiled persons designated class” or “Indochinese designated class”. This type of identity based designation more closely parallels Australian practice discussed below.

⁴⁶ The Country of Asylum class includes individuals outside their country of origin who have been and continue to be personally and seriously affected by a massive human rights violation, armed conflict, or civil war in their country of origin, and in respect of whom there is no possibility, within a reasonable period, of a durable solution.

The Source Country class includes those still residing in their country of origin who (a) have been imprisoned for exercise of civil rights pertaining to dissent or trade union activity, or (b) have been affected by civil war or armed conflict in their country of origin, or (c) would fit within the definition of Convention refugee had they been outside their country of origin, and in respect of whom there is no possibility, within a reasonable period, of a durable solution.

These definitions are set out in the *Humanitarian Designated Class Regulations* SOR/97-183. The regulations also provide that countries may be designated to meet the source country definition.

⁴⁷ See Chapter Three at pp.102-104.

Several of the appeal provisions in the Act make explicit reference to the possibility of lodging what is effectively known as a humanitarian and compassionate appeal. This is a non-legal appeal and does not depend for its success on an error in the earlier decision. These appeals are possible for Convention Refugees and persons with visas who are subject to a removal order⁴⁸ and also for Canadian citizens and permanent residents whose applications to sponsor the immigration of a family member has been refused on certain grounds.⁴⁹ Permanent residents facing removal orders can appeal “on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada,”⁵⁰ a provision which is broad enough to bring in humanitarian and compassionate grounds.⁵¹ Cases under this provision

⁴⁸ Section 70(2) Subject to subsections (3) and (5), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who has been determined under this Act or the regulations to be a Convention Refugee but is not a permanent resident; or seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking entry.

(3) An appeal to the Appeal Division under subsection(2) may be based on either or both of the following grounds:
on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
on the ground that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada.

⁴⁹ Section 77(3) Subject to subsections (3.01), (3.02), (3.1), a Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to subsection 1 [the applicant or the sponsor does not meet the requirements set out in the Act or regulations] may appeal to the Appeal Division on either or both of the following grounds:
on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

⁵⁰ Section 70(1)(b)

⁵¹ The broader formula does not always lead to a more sympathetic result. In *Kirpal v Canada (Minister of Citizenship and Immigration)* (1996) 35 Imm LR (2d) 229 (FCTD) the court held that under the narrower humanitarian and compassionate formula it was inappropriate to consider ability to pay for medical care and this need for care alone was the appropriate focus of consideration. In analysing “all circumstances of the case” under s. 70(1)(b) ability to pay and cost to the state would also be relevant factors.

frequently discuss similar factors to those considered where the appeal is on the basis of humanitarian and compassionate considerations only.

These appeal provisions fit into the analysis of humanitarianism and identity in two ways because they provide an avenue for the Federal Court to generate a jurisprudence of humanitarianism and because they are only accessible to certain individuals. These avenues are only open to individuals who already belong to the Canadian community, as citizens or permanent residents, or who have already been stamped with Canadian approval in the form of a visa or a refugee determination. As well, these appeals are not available to people who have been convicted of serious criminal offences or are suspected of having been convicted of such offences. The eligibility restrictions limit compassion directly, making it available to “upstanding members of the community.” This clearly reflects that we do not want to misplace our generosity – it goes to deserving members of the community. This is not the most needy group which comes in contact with our migration law, not the group that immediately springs to mind when we talk of compassion. What is going on here is evidently more than straightforward generosity.

The final key appearance of humanitarianism in the *Immigration Act* is in section 114(2) stating:

The Governor in Council may, by regulation, authorise the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person’s admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

The regulation which supports this section is similarly broad⁵² and the delegation of this authority from the Minister to his departmental officials has been approved by the courts.⁵³ This provision has been broadly interpreted to create a duty of the Minister to consider applications for exemption from various provisions of the Act on compassionate or humanitarian grounds.⁵⁴ This section is the basis for frequent exemptions from the provision that visa applications must be made outside the country⁵⁵ and for exemptions from various visa requirements.⁵⁶ The *Immigration Manual* gives some examples of what might warrant a humanitarian and compassionate response to aid in interpreting s.114(2)⁵⁷ but the Federal Court of Canada has plainly stated that the manual provides guidelines only.⁵⁸ The guideline status of the policy

⁵² Regulation 2.1 states

The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

⁵³ *Minister of Employment and Immigration v Jiminez-Perez* (1984), 14 DLR (4th) 609; [1984] 2 SCR 565.

⁵⁴ *Ibid.*

⁵⁵ Section 9(1)

⁵⁶ Rotenberg CL, "Humanitarian and Compassionate" (1989) 8 *ImmLR* (2d)295, noting that these are two of the three most common uses of humanitarian and compassionate grounds. The third occurs in appeals under ss.70 and 77 discussed above.

The program managers of visa offices have been authorised to waive selection criteria relating to independent immigrants as well as the requirement that an applicant must possess a valid passport or other travel document. To waive other requirements, a recommendation must be made to the Minister.

⁵⁷ The test in the Manual is that "unusual and undeserved or disproportionate hardship" is encountered. The Manual lists 11 "general case types: spouses of Canadian citizens or permanent residents, parents and grandparents, separation of parents and children, common-law and same-sex partners, de facto family members, unexecuted removals due to generalised risk, personalised risk of inhumane treatment, refugees who apply for landing too late, abusive relationships, inability to obtain a travel document, former Canadian citizens. *Volume IP5 – Processing Inland Applications for Landing on Humanitarian and Compassionate Grounds* at 15-24.

⁵⁸ *Yhap v Canada (Minister of Employment and Immigration)* [1990] 1 FC 722 (TD).

statements contributes to inconsistencies in the exercise of the s.114(2) duty.

Expressing disdain for the guidelines, the authors of the 1997 Legislative

Review stated:

They are used differently by different managers. Some managers will routinely use their powers under this section of the Act to permit over age dependants or an elderly parent to accompany an independent immigrant; others will do so only in very unusual circumstances. ...entire programs involving thousands of individuals have effectively been created under this broad and undefined umbrella. Some applicants will know of these practices, and will quite reasonably take advantage of them; others will not and be unwittingly penalized.⁵⁹

The *Immigration Act's* s.37 provision that the Minister may at any time issue a permit allowing an inadmissible or removable person to enter or remain in Canada is also a part of the humanitarian and compassionate framework because the *Immigration Manual* states that these permits only be granted on humanitarian and compassionate grounds or in the national interest. A total of 4059 permits were granted in the year ending March 30, 1997, which a ministerial press released proudly announced was a drop of 75% since 1992 when 12 000 were granted.⁶⁰ This tone echoes the political desire to respond to a prominent trend in contemporary public discourse about migration by limiting discretionary entries.⁶¹ In 1998, 2600 permits were issued, a stated decline of 35 percent over 1997.⁶²

⁵⁹ Legislative Review, above n 42, Chapter 10, at 1.

⁶⁰ "1997 Report Shows the Number of Minister's Permits Issued Holding at the 1996 Level" Citizenship and Immigration Canada, News Release 98-20, April 2, 1998.

⁶¹ Australian Immigration Minister Philip Ruddock is similarly proud of his rare use of discretion. Telephone interview with ministerial office, October 1998. See below pp. 226-231 re this discretion.

⁶² Minister of Citizenship and Immigration Canada, News Release 99-23, 29 April 1999. Figures are for the Canadian government financial year which ends on March 31.

The combined effect of these features of the *Immigration Act*, its regulations and Policy Manual is to provide that humanitarianism and compassion become a duty and a ground of appeal. These factors have led to the growth of a jurisprudence of humanitarianism which I discuss below. The provision allowing exemption from any regulation and the perpetually possible ministerial permit ensure that humanitarian and compassionate grounds can become a factor in any category of immigration decision. Considering the role played by these grounds alone provides a good illustration of how migration law is imbued with flexibility to meet the changing needs of the nation. As the standard of humanitarianism is difficult to pin down, and attempts to do so must be regarded as mere guidelines, its use in the law ensures the boundary can expand and contract without any perceptible legal or rhetorical shifts. This allows for responses, such as cutting the number of Ministerial permits, which address shifts in popular discourses. At the same time, the proliferation of the phrase identifies the Canadian nation and its members as humanitarian and compassionate, constructing the tradition the Act's objectives name.

2. The Australian *Migration Act*

The Australian *Migration Act*, by contrast, is not a document about humanitarianism. As discussed in Chapter Two, humanitarianism is not mentioned in the Act's objectives, nor anywhere in the text of the Act.⁶³ Humanitarianism is incorporated into the Australian migration scheme at a policy level rather than in the legal text. For example, the department gives processing priority to some types of applications with a humanitarian angle such

⁶³ See Chapter Two at pp. 84-90.

as orphaned relatives in compelling and compassionate circumstances and family members of those who hold a refugee or humanitarian visa.⁶⁴

The immigration stream offering permanent entry to Australia for refugees and others located offshore or found to be refugees while in Australia is named the Humanitarian Program. The label signifies that inland refugee claimants are not primarily regarded as rights claimants but as beneficiaries of Australian generosity. Approximately half of the admissions in this Program are granted on the basis of membership in designated identity based groups resembling the humanitarian designated classes used in Canada until 1997. This part of the Humanitarian Program provides the possibility of entering Australia to some individuals who do not meet the narrow refugee definition, provided their identity can fit in another, even more narrow, category. Admission is based on shared group identity characteristics and chances of receiving one of the visas available are enhanced by existing ties, usually family, to Australia. The availability of non-refugee visas in the Humanitarian Program is determined by regulation rather than being set out in the Act.⁶⁵

The final significant avenue for humanitarianism to play a role in admission to Australia is found in the discretion of the Minister to replace decisions unfavourable to applicants.⁶⁶ There is no legislative requirement that this substitution be made on a humanitarian basis, however when dealing with failed refugee applicants, the former Minister has issued, and the current Minister is using and rewriting, guidelines suggesting that this discretion will

⁶⁴ Department of Immigration and Multicultural Affairs Annual Report 1996-97. The current Annual Report does not reflect this priority).

⁶⁵ *Migration Regulation*, Schedule 2, sub-classes 201-217

⁶⁶ See below at pp. 226-231.

only be used for “persons of humanitarian concern,” in situations which closely approximate refugee status. Between 1995 and 1998, under two Ministers, 350 decisions were reversed.⁶⁷ The Minister’s staff estimate that less than one percent of the requests received for personal discretionary consideration result in a new decision.⁶⁸ It is accepted among those working in refugee law in Australia that high profile cases taken up by political friends of the Minister are most likely to succeed.

The contrast in the place of humanitarianism in Australian and Canadian legislation is stark. The overall effect is mitigated somewhat when we consider the entire legislation-regulation-policy panoply but it remains important to note that regulation and policy retain significant flexibility and can be changed with little or no public scrutiny. The contrast in the place of humanitarianism is somewhat surprising given the strong and similar place that it occupies in discourses of migration in each nation. The differential position of humanitarianism can provide some insights into national identities in each nation. Before proceeding to this analysis, however, it is important to consider how the structures of the two acts have influenced interpretations and uses of humanitarianism. In Canada, the prevalence of humanitarianism in the Act has generated a “jurisprudence of humanitarianism.” In Australia, the emergence in the 1980s of a rather different “jurisprudence of humanitarianism” is part of the

⁶⁷ 242 were decisions of the Refugee Review Tribunal (s.417), 62 were decisions of the Immigration Review Tribunal (s.351), and 42 were internally reviewed decisions which do not go to either specialist tribunal (s.345).

⁶⁸ Telephone interview, October 1998. No official statistics are available on the number of requests received. In 1998-99 the Minister used s.417 discretion in 108 cases, *Annual Report*, www.immi.gov.au/annual_report/annrep99

explanation for the *Migration Act*'s current structure, and can be compared both with the Canadian rulings and with the Minister's humanitarian discretion.

3. The Canadian Jurisprudence of Humanitarianism

Canadian courts are called upon to consider the grounds for humanitarian and compassionate consideration when an applicant who has been refused the benefit of s.114(2) applies for judicial review of that decision or when a visa holder or sponsor appeals a negative decision (ss.70 and 77). While the first group of cases are judicial review applications and the second are appeals, this difference has only minor effects on the resulting jurisprudence.⁶⁹ Many applications for judicial review are framed such that judges cannot avoid, or do not want to avoid, commenting on the specific circumstances that make up the alleged humanitarian and compassionate grounds, even if the end result of a favourable ruling is only to turn the matter back to the bureaucrats. Similarly, most appeals brought under ss. 70 and 77 are put forward both as arguments on the law or the facts, and as arguments for special relief on humanitarian and compassionate grounds. Accordingly, in many cases that canvass the question of humanitarian and compassionate grounds the decision is made on the alternative argument and returned to the first instance decision-maker. Both types of case, therefore, generate a volume of commentary from the Appeal Division of the IRB and from the Federal Court regarding the meaning of humanitarianism and compassion. The Supreme Court of Canada has handed down only two significant decisions in this area. *Minister of Employment and Immigration v Jiminez-Perez*,⁷⁰ where it merely affirmed the Federal Court's

⁶⁹ In general, Canadian courts are less deferential to administrative decision makers than Australian courts.

⁷⁰ Above n 53.

reasoning on humanitarian and compassionate grounds and, in July 1999, *Baker v Canada (Minister of Citizenship and Immigration)*⁷¹ where the Court went some way to addressing humanitarianism. I shall return to this case shortly after canvassing the lower court jurisprudence which preceded it.

There are a number of important caveats in considering this jurisprudence. The number of cases involved is vast, particularly those which involve requests for exemptions from a legislative provision.⁷² In the period between mid 1989 and October 1990, there were almost 40 000 requests for review on humanitarian and compassionate grounds under s.114(2)⁷³ and there is no reason to expect that this figure would have been significantly reduced in subsequent years. The cases that reach the Federal Court (or the IRB Appeal Division in the case of ss. 70 and 77) are those where the initial determination has been negative. Presumably, therefore, the jurisprudence of humanitarianism is concerned primarily with circumstances where the element of compassionate concern is not compelling enough to clear the hurdle at first instance and where the applicant has enough resources to continue the process. Finally, in order to narrow the cases, I have drawn on those appearing in the most comprehensive Canadian immigration law reporter and have cross referenced this selection with the most well known annotated version of the *Immigration Act*.⁷⁴ This

⁷¹ File No 25823, 9 July 1999, not yet available in *Supreme Court Reports*.

⁷² The Federal Court of Appeal held in *Jiminez-Perez*, above n 53 [confirmed by the SCC without reference to this point] that s.114(2) may exempt any application from a provision in the Act or the regulations.

⁷³ As reported in *Vidal v Canada (Minister of Employment and Immigration)* 13 ImmLR (2d) 123 at para 30.

⁷⁴ I have drawn on cases reported in the *Immigration Law Reporter* (2d) between 1987 and 13 November 1998 and have selected them from the Quicklaw electronic database service. I searched for cases which made reference to the section of the Act I was interested in and to the term "humanitarian and compassionate" grounds. This method generated a set of 110 cases

significantly narrows the field of cases and undoubtedly generates more variance than would appear were it possible to consider the entire range of cases decided.

All this having been noted, examining a small sample of these cases does serve to give the flavour of this jurisprudence and is unlikely to be misleading given that the final decision regarding when humanitarianism is important enough to override the strictly legal provisions of the *Immigration Act* usually rests in bureaucratic hands and that the early and leading cases have explicitly held that humanitarian and compassionate grounds, while subject to Departmental guidelines, must be determined on a case by case basis. Given that, as noted in the Legislative Review, entire migration programs have grown up under the provisions of s.114(2) and that access to the appeal provisions in ss. 70 and 77 is limited, the circumstances which generate these cases have significant similarities and patterns can be discerned.

Many of the cases under s.114(2) involve people seeking an exemption from the rule that applications for permanent residency must be lodged outside the country,⁷⁵ and a significant number in this group are spouses of Canadians or permanent residents. There are several themes which emerge in the cases. First, it is clear that while s.114(2) uses permissive language suggesting the

relating to s.114(2), 67 cases on s.77 and 60 cases on s.70. Many of the s.70 cases were not relevant and the analysis relates primarily to the s.114(2) and s.77 cases. I also referred to Marrocco F N and Goslett H M (eds) *The 1998 Annotated Immigration Act of Canada*, rev'd ed, Carswell, Toronto, 1998. A full list of cases considered is contained in Table of Cases: Canadian Humanitarian and Compassionate Grounds cases.

⁷⁵ Partially on the basis of how widespread these applications are, the 1997 Legislative Review recommended that spouses be allowed to apply for permanent residency from within the country, rather than developing a system of regularised exceptions. Until 1993, s.114(2) allowed for exceptions to be made on the basis of humanitarian and compassionate grounds *or* public policy. One of the relevant public policies was the Spousal Policy, which also fostered this program of regular exceptions. As "public policy" grounds are no longer specified in the Act, exceptions for spouses are now only possible on humanitarian and compassionate grounds.

decision is at the discretion of the Minister, the Minister, or more correctly her delegate, is under a duty to consider all applications made for exemptions.⁷⁶ It is equally clear the departmental guidelines are not determinative or exhaustive of potential outcomes.⁷⁷ Beyond these points, however, the jurisprudence takes up several themes in inconsistent ways.

Although it is an established administrative law principle that the standard of procedural fairness to be applied to particular decision varies with the context of that decision, in the case of s.114(2) rulings the notion of context seems to extend to the particular circumstances of the case. A line of cases establishes that a review of humanitarian and compassionate considerations does not require an oral hearing,⁷⁸ but conversely, in particular circumstances failure to interview the applicant will constitute reviewable error.⁷⁹ In *Vaca* the Court went so far as to state that a 'mere' thirty minute interview was insufficient.⁸⁰ The Court seemed to be responding to a particularly high degree of bureaucratic ineptitude.⁸¹ This theme recurs in the cases⁸² and it is hardly surprising that

⁷⁶ *Nijjar v Canada (Minister of Citizenship and Immigration)* (1997) 42 ImmLR (2d) 54 (FCTD) holding that the immigration officer had a duty to submit the application for consideration on humanitarian and compassionate grounds even when the applicants had not specifically requested this.

⁷⁷ *Yhap* above n 58.

⁷⁸ *Nanatakyi v Canada (Minister of Citizenship and Immigration)* (1994) 30 Imm LR (2d) 97 (FCTD); *Selakkandu v Canada (Minister of Employment and Immigration)* (1993) 22 Imm LR (2d) 232 (FCTD); *Carson v Canada (Minister of Citizenship and Immigration)* (1995) 95 FTR 137 (FCTD); *Charran V Canada (Minister of Citizenship and Immigration)* (1995) 28 Imm LR (2d) 282 (FCTD).

⁷⁹ *Chhokar V Canada (Minister of Employment and Immigration)* (1991) 13 ImmLR (2d) 282 (FCTD); *Vaca v Canada (Minister of Employment and Immigration)* (1991) 15 Imm LR (2d) 123 (FCTD).

⁸⁰ *Ibid.*

⁸¹ The scheduled hearing had not been held because the applicants' file was misplaced and the delay forced the applicants into the refugee processing stream to their disadvantage.

executive incompetence raises the courts' ire. What is more surprising, however, is that humanitarianism and compassion become the legal response to this annoyance. If this option did not exist in the legislation⁸³ the courts would be forced to choose between expanding the traditional grounds of reviewable error⁸⁴ and allowing some ineptitude to escape sanction. The "humanitarian" solution may, therefore, be a particularly apt one. However, it creates a basis for humanitarian concern which is at odds with a common sense understanding of humanitarianism and compassion. Compassion becomes compensation for having to deal with a frustrating bureaucracy, rather than with personal hardship. It communicates something about Canadian values but nothing about the person who is granted membership in that community.

The cases also take a variety of approaches to economic factors. Intuitively we reserve our compassion for those who are the most needy. Equally, money is our most common way of quantifying and comparing need. We might expect, therefore, that the benefit of a humanitarian and compassionate legal provision would go to those with the least money. Or, to put it another way, to those with the most need. Canadian courts treat economic factors in a variety of ways, none of which correspond closely with a common sense understanding of compassion. The policy manual states that "establishment factors" alone are not sufficient to ground an application for

⁸² See also *Muoz v Canada (Minister of Citizenship and Immigration)* (1995) 30 Imm LR (2d) 166 (FCTD); *Rizzo v Canada (Minister of Citizenship and Immigration)* (1997) 41 Imm LR (2d) 86 (FCTD); *Marques v Canada (Minister of Citizenship and Immigration)* (1997) 35 Imm LR (2d) 81 (FCTD) where costs were awarded to the applicant as an exceptional response to bureaucratic error; *Sandhu v Canada (Minister of Citizenship and Immigration)* (1997) 40 Imm LR (2d) 142 (FCTD).

⁸³ As the Legislative Review has proposed.

⁸⁴ See s. 8.1 of the *Federal Court Act*, RSC 1985, C.F-7

exemption on humanitarian grounds⁸⁵ and this has been repeated by the Federal Court.⁸⁶ Despite this, “establishment factors” often loom large in humanitarian and compassionate reviews⁸⁷ and it is difficult to predict when they will be a deciding influence. Certainly any competent application will include reference to how well established the applicant is in the Canadian community, and practitioners claim that these factors are highly important.⁸⁸ At the extreme, the court may regard establishment factors as decisive, as in *Muoz* where Justice Muldoon stated,

The exhibited documents attached demonstrate what valuable members of Canadian society are the applicants, parents and children alike. From praiseworthy accomplishments in employment to praiseworthy accomplishments in education and praiseworthy participation in their general residential community, it is evident that Canada is the better for their presence here. [...] from the evidence which the court sees herein, it would be highly astonishing if their h. & c. assessment [sic] were not positively favourable.⁸⁹

It is of course compassionate not to dislocate successful, happy families. But to use established success as a measure – even as one indicator among many – of who we ought to be most charitable towards is again counter intuitive. The *Muoz* family is far from the bottom of the hierarchy of need.⁹⁰ In *Vaca* the

⁸⁵ Above n 57. Many “establishment factors” have an economic dimension, such as holding a job, having a Canadian educational or training qualification or owning a house. Others include having friends and family in Canada and community ties such as links to voluntary organisations.

⁸⁶ *Vidal*, above n 73; *Pereira v Canada (Minister of Citizenship and Immigration)* 31 Imm LR (2d) 294 (FCTD).

⁸⁷ *Muoz* above n 82; *Cabalfin et al v Canada (Minister of Employment and Immigration)* 12 Imm LR (2d) 287 (TD); *Vaca v Canada (Minister of Employment and Immigration)* above n 78.

⁸⁸ Interview data, June and July 1997. A lawyer’s affidavit evidence presented in the *Muoz* case above makes the same point.

⁸⁹ *Muoz* above n 82 at para 5.

⁹⁰ These cases do often go the other way, but the reasoning has the same counter intuitive ring to it. In *Periera* the court held that self-sufficiency *alone* does not warrant a positive humanitarian and compassionate consideration and that the applicant would be denied an exemption because

Court attempts to separate the economic element from the factors under consideration in the humanitarian assessment, in recognition that economic success alone ought not guarantee that one can circumvent the usual application of the rules. Justice Cullen states, “The myriad letters and affidavits of support from family, friends and neighbours, the English language certificate, the doctor and the priest’s support, the purchase of a home, the participation in a business, all go to compassionate and humanitarian grounds – but they were not considered other than as economic establishment.”⁹¹ While this list reaches beyond economic factors, it does not reach beyond *success* indicators and demonstrating that Mr. Vaca is not among the most needy who would seek to remain in Canada.

The role of establishment and economic factors is simply unclear. One judge rules it is appropriate to consider ability to pay for medical expenses when weighing up factors in a humanitarian assessment⁹² another explicitly rules this factor out of bounds.⁹³ One judge allows a spouse to apply for permanent residency from within Canada to avoid having the rest of the family become dependent on the state.⁹⁴ Another upholds a denial of the benefit of s.114(2) to an individual in part because they had been in receipt of social assistance for

she had stronger family ties in her home country than in Canada. Neither factor has much to do with what we think of as humanitarian outside the migration law context.

⁹¹ Above n 78 at 13 of Quicklaw version.

⁹² *Sema v Canada (Minister of Citizenship and Immigration)* (1995) 30 Imm LR (2d) 249 (FCTD).

⁹³ *Kirpal v Canada (Minister of Citizenship and Immigration)* (1996) 35 Imm LR (2d) 229 (FCTD). Both these cases were s.77 appeals but this issue of what is appropriately considered under the term humanitarian and compassionate grounds is identical to the s.114(2) cases.

⁹⁴ *Smith v Canada (Minister of Employment and Immigration)* (1992) 18 Imm LR (2d) 71 (FCTD)

sometime.⁹⁵ The courts are obviously interested in the question of dependence on the state, and it is never presented in a favourable light, despite what could be considered a logical argument that those most in need of compassion may need state support as a matter of course.

The jurisprudence under the ss. 70 and 77 appeals provisions is scarcely more coherent. Interpretations of humanitarianism arise most often when an application for sponsored immigration of a family member has been rejected. In all of these cases, therefore, there is an argument to be made about the humanitarian value of reuniting the family. In this area as well, the Appeal Division and the Federal Court appear inconsistent. Allowing an appeal on humanitarian and compassionate grounds and noting in particular the sponsor's genuine commitment to her mother and sister the Appeal Division asserted that "in assessing compassionate and humanitarian grounds the Board must give effect to the Act's objective to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad."⁹⁶ In refusing a similar application⁹⁷ the same Board stated that:

It clearly cannot be that every appeal with respect to a close relative will warrant granting of special relief, notwithstanding the broad policy objective of s.3(c) [reuniting Canadians and permanent residents with

⁹⁵ *Orantes v Canada (Minister of Employment and Immigration)* (1990) 34 FTR 184 (TD).

⁹⁶ *Rudrakumar v Canada (Minister of Citizenship and Immigration)* (1996) 38 Imm LR (2d) 82 (IRB-AppDiv). Other cases where the closeness of the family is among the principal humanitarian and compassionate grounds include *Mena v Canada (Minister of Employment and Immigration)* (1990) 13 Imm LR (2d) 147 (IRB-AppDiv); *Chan v Canada (Minister of Citizenship and Immigration)* 28 Imm LR (2d) 317 (IRB-AppDiv); *Sall v Canada (Minister of Employment and Immigration)* (1993) 22 Imm LR (2d) 66 (IRB-AppDiv). In *Parmar v Canada (Minister of Employment and Immigration)* (1993) 21 Imm LR (2d) 102 (IRB-AppDiv) and *Chan v Canada (Minister of Employment and Immigration)* (1993) 21 Imm LR (2d) 259 (IRB-AppDiv) the Board examined the facts and found that the family was not particularly close and used this factor in their reasoning to reject the appeal on humanitarian and compassionate grounds.

⁹⁷ *Parmar* *ibid.* In both cases the sponsorship had initially been rejected because a mentally retarded family member was included in the application.

their close relatives from abroad]⁹⁸. [...] ...the desire to be reunited with family is the basis of all sponsorship appeals and is not a special factor warranting special relief.⁹⁹

While arguably the difference is that some families are closer than others, the language used to describe the families differs little and the family image which assessments are made against is that of a stereotypical Canadian family. Even if such a standard as degree of closeness is discernible, it is not being applied consistently in the jurisprudence. There are inconsistencies in what the Appeal Division says about the families it encounters, and it is these inconsistencies which leave a jurisprudential trace to be followed by courts, tribunals and bureaucratic decision-makers in the future.

Another theme which is prevalent in the appeal cases is the fragility of the line between an appealable error and a humanitarian consideration. This is especially apparent in cases where the application has been refused because one of the family members in the application is medically inadmissible. Following the leading case *Uppal*,¹⁰⁰ the courts are prepared to scrutinise medical opinions in detail and to consider alternative evidence.¹⁰¹ *Uppal* provides a way of

⁹⁸ *Parmar* ibid at 16 of QL version.

⁹⁹ *Parmar* ibid at 26 of QL version.

¹⁰⁰ *Uppal v Canada (Minister of Employment and Immigration)* (1987) 2 Imm LR (2d) 143 (FedCA).

¹⁰¹ *Tan v Canada (Minister of Citizenship and Immigration)*(1997) 40 Imm LR (2d) 113 (IRB-AppDiv); *Partab v Canada (Minister of Employment and Immigration)* (1989) 8 Imm LR (2d) 282 (IRB-AppDiv); *Nagra v Canada (Minister of Citizenship and Immigration)* (1997) 38 Imm LR (2d) 197 (IRB-AppDiv); *Rudrakumar*, above n 96; *Sidhu v Canada (Minister of Employment and Immigration)* (1994) 28 Imm LR (2d) 236 (IRB-AppDiv); *Lai v Canada (Minister of Employment and Immigration)* (1993) 22 Imm LR (2d) 185 (IRB-AppDiv); *Chan v Canada (Minister of Citizenship and Immigration)* (1994) 28 Imm LR (2d) 317 (IRB-AppDiv); *Sall*, above n 96; *Sidhu v Canada (Minister of Employment and Immigration)* (1991) 15 Imm LR (2d) 122 (IRB-AppDiv). A considerable number of these cases involve family members who have been refused because of mental retardation. The additional evidence used to counter the medical opinion in these cases is frequently a video of the person in question carrying out day to day tasks. The treatment of mental health in Canadian immigration law receives detailed treatment in Mosoff J, "Excessive Demand" on the Canadian Conscience: Disability, Family and Immigration" (1998-99) 26 *Manitoba Law Journal*, in press.

arguing that the medical refusal is invalid in law, when arguably the court is being influenced by what might accurately be called compassionate considerations. The difference is significant as winning in law (s.77(3)(a)) usually results in the matter being returned to the original decision maker, whereas the IRB Appeal Division or the Federal Court will exercise what is alternatively known as its “discretionary” or its “equitable” jurisdiction to grant special relief when it grounds its decision in humanitarian or compassionate considerations (s.77(3)(b)).¹⁰² A humanitarian and compassionate “win” is superior to a legal win not because of the stated law but because of what the Appeal Division is willing to do in the name of humanitarianism. In some cases, the original decision is simply overturned without a clear statement as to whether this is being done because of an appealable error or humanitarian consideration. While this is clearly shoddy decision-making, it highlights the affinity between an “unreasonable” medical opinion about a close family member who would never be left to burden the state, and a decision drawing explicitly on the extra-legal humanitarian and compassionate jurisdiction. These patterns show again that the concept of humanitarianism is being used to patch over difficulties in the law, rather than developing a jurisprudence which attaches some stable and inherent meaning to the term. It is arguable that there are fewer humanitarian and compassionate grounds cases under s.77(3)(b) than there would otherwise be if the medical refusal jurisprudence were not itself so malleable.

¹⁰² *Jeganathan v Canada (Minister of Citizenship and Immigration)*(1997) 42 Imm LR (2d) 186 (IRB-AppDiv); *Rudrakumar*, above n 96; *Sidhu v Canada (Minister of Employment and Immigration)* (1994) 28 Imm LR (2d) 236 (IRB-AppDiv).

One part of the story of the humanitarian jurisprudence, therefore, is that the theoretical flexibility of the concept is well reflected in the judicial interpretations. It does tend to support Seidman's observation that humanitarianism is a good basis for political compromise but not a workable legal standard. The Federal Court has stated that the words " 'humanitarian and compassionate' have some kind of objective meaning intended by Parliament."¹⁰³ Indeed, I have referred to some objective core of meaning in talking of the intuitive or commonsense meanings. An early formulation by the Immigration Appeals Commission, which is still occasionally referred to, captures most of that essence and also illustrates a key to understanding the fluidity of the term, when it states that compassionate or humanitarian grounds will depend upon "...those facts, established by evidence, which would excite in a reasonable man in a civilised community a desire to relieve the misfortunes of another."¹⁰⁴ But the standard is hard to assess. In one case failure to allow a pregnant woman to apply for permanent residency inland constitutes failure to "consider the application as a reasonable person would have done."¹⁰⁵ In another, a man whose house, farm and village were buried by a volcano while he was visiting Canada does not meet the threshold for humanitarian exception to the rule.¹⁰⁶ One explanation is that the situations are incomparable. Leaving the decision to the individual bureaucrat ensures that the courts do not have to establish a hierarchy of human tragedy. Nonetheless, the idea that some

¹⁰³ *Vidal* above n 73 at para 9.

¹⁰⁴ *Chirwa* (1970) 4 IAC 338. (a decision of the former Immigration Appeals Commission).

¹⁰⁵ *Drame v Canada (Minister of Employment and Immigration)* (1994) 29 Imm LR (2d) 304 (FCTD).

¹⁰⁶ *Mendoza v Canada (Minister of Citizenship and Immigration)* (1997) 41 Imm LR (2d) 71 (FCTD).

individuals deserve our humanitarian consideration while others do not relies on the assumption of just such a hierarchy. In yet another case, a man whose wife had withdrawn her sponsorship of his application claiming he was involved in criminal activities and was physically violent towards her was allowed permanent residency on humanitarian and compassionate grounds because the Board did not believe her allegations.¹⁰⁷ While this case is a exception, it is worth noting the extent to which the term humanitarian and compassionate grounds can stretch. There was nothing dire about his circumstances. The decision concentrates on his professional education and earning capacity and her lack of credibility.

The Supreme Court of Canada's *Baker*¹⁰⁸ decision will not, of course, end the diversity of views in the lower courts because it is addressing discretionary decision-making under s.114(2) that is left to the bureaucratic decision-maker.¹⁰⁹ The ruling does, however, set out clear directions. Ms Baker had been illegally resident in Canada since 1981. She had four Canadian born children and was the sole carer for two of them. She had been diagnosed as paranoid schizophrenic. As such, her case combines establishment and medical

¹⁰⁷ *Hundal v Canada (Minister of Employment and Immigration)* (1994) 26 Imm LR (2d) 47 (IRB-AppDiv). The Federal Court of Appeal upheld this decision in *Canada (Minister of Employment and Immigration) v Hundal* (1994) 167 N.R. 75, a ruling which has become the leading case on the separate issue of when a visa is valid. The wife did not give evidence before the Board. The Board notes that the applicant's sister did not believe his wife's allegation and also notes that Mr. Hundal held an engineering diploma and had gotten a good job in Canada while waiting for his appeal to be heard. The Board found the applicant to be trustworthy and rejected evidence that an Immigration Officer had found potential evidence of links with a Sikh militant movement in his possession when he arrived in Canada. The case is one of the more bizarre humanitarian and compassionate successes I have read.

¹⁰⁸ Above n 71.

¹⁰⁹ But note that Justice L'Heureux-Dube for the majority writes that, "It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions." (at *ibid* para 54.)

factors as well as presenting an individual in genuine need of state support. The officer reviewing her case stated:

The PC is paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at the Region.¹¹⁰

The Court held that the decision was both biased and unreasonable. Bias was found in the officer's emphasis on Ms Baker as a single mother with a mental illness, with apparent disregard for other evidence available.

Acknowledging that standards of bias vary with the context of the decision,

Madam Justice L'Heureux-Dube wrote:

The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualised, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.¹¹¹

Accordingly, the assessment of bias must take into account the interests of the nation as a whole, and in particular its interests as a nation with a founding mythology rooted in immigration.

¹¹⁰ Ibid at para 5. Capitals in original.

¹¹¹ Ibid at para 47.

The decision was unreasonable because it departed from the values underlying the grant of discretion: humanitarianism and compassion. Madam Justice L'Heureux-Dube wrote:

These words and their meaning must be central in determining whether an individual H&C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. [...] ... when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate consideration.¹¹²

While the content of humanitarianism is not specified, Justice L'Heureux-Dube's intent is that individuals like Ms Baker are at least potential beneficiaries. The ruling also exemplifies the annoyance with the bureaucracy that is a theme in the lower court decisions. This ruling, therefore, may have some potential to bring the jurisprudence of humanitarianism closer to its extralegal meaning.¹¹³

Canadian administrative and judicial interpretations of humanitarianism vary considerably. Even without accepting a complete radical indeterminacy of law, the humanitarian jurisprudence shows trends broad enough to contain a series of contradictory interpretations. It is unlikely that *Baker* will eliminate this. The body of Federal Court decisions belies the assertion of an objective standard. A considerable part of the jurisprudence concerns factors which do not accord with non-legal meanings of humanitarianism. While neither legal

¹¹² Ibid at para 66.

¹¹³ One additional reason that this may not happen is that the key issue in the case was whether the unincorporated *Convention on the Rights of the Child* had any bearing on the decision. The majority held that the issue was one of procedural fairness, but nonetheless referred to the convention in its analysis. Justice Iacobucci in dissent held that unincorporated treaties ought not be referred to, particularly as the majority had chosen to resolve the case without recourse to the *Charter*. These importance precedents may overshadow the one paragraph in the decision where humanitarianism is directly addressed.

nor non-legal understandings will ever be completely stable, the legal meanings clearly function as a guise at least some of the time. This accords with the place of the humanitarian consensus in liberal theory and with the place of migration law in the liberal nation. Humanitarianism is a loose enough term on which to build a consensus among the diverse strands of liberalism. The range of its interpretation, even just within the Canadian setting, demonstrates how fragile that consensus is and that it therefore cannot generate a standard for the moral behaviour of liberal nations. This same flexibility allows humanitarianism to function as a key feature of migration law's project of accommodating shifting national identities and priorities. Despite still fitting in the framework of liberal migration laws, the Australian approach to humanitarianism in migration law diverges greatly from the Canadian. The next section provides an sketch of that approach to facilitate comparative analysis.

4. Australian Acts of Grace

Under the *Migration Act*, humanitarian admissions to Australia are left in the hands of the Minister in charge of immigration, either through the power to reverse negative decisions or in the power to designate and alter the characteristics and quotas of the Humanitarian Program. Ministerial authority to substitute a more favourable decision extends to decisions of the Migration Review Tribunal,¹¹⁴ the Refugee Review Tribunal¹¹⁵, the Administrative Appeals Tribunal,¹¹⁶ and internal review decisions which are not subject to

¹¹⁴ Section 351. The jurisdiction of the MRT belonged to the Immigration Review Tribunal until 1 June 1999 when the IRT was disbanded.

¹¹⁵ Section 417

¹¹⁶ Sections 391 and 454. The option of either specialist tribunal referring a case to the AAT rather than deciding it is rarely used. In 1995-1998 the Minister did not overturn any AAT decisions.

tribunal scrutiny.¹¹⁷ Requests to overturn decisions of the RRT are the most significant of these as they make up the largest group of requests and the largest group of resulting ministerial actions.¹¹⁸ Importantly for my analysis, between May 1994 and May 1999 these decisions were made under the “guidelines for stay in Australia on humanitarian grounds.”¹¹⁹ The new guidelines are entitled “Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be In The Public Interest to Substitute A More Favourable Decision Under s345, 351, 391, 417, 454 of the *Migration Act*.” However, aside from more formal presentation and explicit warnings that this is a non-compellable discretion, little else has changed. Unlike the Canadian discretionary review on humanitarian and compassionate grounds, each application made for the Minister to exercise one of these powers must be reviewed by the Minister personally and there is no duty upon the Minister to even consider these requests. In both Australia and Canada the decision is discretionary, but the breadth of that discretion differs enormously.

The guidelines are issued from the Minister’s office and are not subject scrutiny outside the department before being made public. The 1994 guidelines were accompanied by a press release stating that they are aimed at people unable to sustain a refugee claim but whose “claims evoke a strong

¹¹⁷ Section 345

¹¹⁸ Official statistics on the numbers of requests received are not recorded by either the Department or the Minister’s office. Ministerial staff confirm that requests to overturn RRT decisions make up a significant majority of requests received. An examination of the tabled papers demonstrates that RRT decisions make of the majority of the Minister’s personal decisions here.

¹¹⁹ The guidelines in place from May 1994 to May 1999 had this title. The new guidelines issued 4 May 1999 are named “Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be In The Public Interest to Substitute A More Favourable Decision Under s345, 351, 391, 417, 454 of the *Migration Act*”.

humanitarian response.” The nature of that humanitarian response was circumscribed by noting that “Ministerial discretion is not designed to cover people seeking residence on compassionate, non-refugee related grounds such as family, medical or economic reasons.”¹²⁰ The current guidelines open by stating that “the public interest may be served by the Australian government responding with care and compassion to the plight of certain individuals in particular circumstances.” They provide a list of factors which may be relevant considerations including: threats to the person’s security, human rights or human dignity, individualised persecution, former refugee status, risk of facing torture or breaches of the Convention on the Rights of the Child or International Covenant on Civil and Political Rights. This formula encapsulates both the idea that this protection is aimed at those in refugee-like circumstances who fall outside the strict definition of a refugee and the principle that behaving in a humanitarian way is in the public interest.¹²¹

This principle is at the heart of my inquiry in this Chapter. While public immigration discourse so frequently echoes this coupling that it seems correct, its content is nebulous or worse. The public cannot be served by being humanitarian in the same direct way it can be by selecting migrants on the basis of economic need or family reunification. The public interest that is, however, served by being humanitarian is the need *to be seen to be* humanitarian. We as a nation, at the level of the individual, at the level of the political actor and at the level of the nation-as-actor on the international stage, derive some value

¹²⁰ Media Release B28/94, Minister for Immigration and Ethnic Affairs, 24 May 1994. People in such situations would ask for Ministerial dispensation under another section not covered by these guidelines but nonetheless open to humanitarian concerns. The tabled papers reveal that humanitarian considerations are sometimes listed in these instances.

from being humanitarian. The public interest that is served here is an identity building, a nation building, interest. The commitment to humanitarianism represented in these guidelines provides evidence for that enterprise. Through this commitment to do more than required by law, and to consider circumstances on an individual basis we construct an identity for ourselves – the “in” group - as “good.”

This role of humanitarianism is reinforced by examining the tabled reasons for Ministerial reversals under s.417.¹²² What is most remarkable about these reasons is the scant information they contain. In most instances it is impossible to discern even which country the individual concerned has come from.¹²³ The Ministerial statements are vague and formulaic, but we do learn about the formula. Each is three or four paragraphs. The first paragraph¹²⁴ describes the process the applicant has followed to this point, second paragraph purports to give some information about the actual case and the third paragraph almost invariably states:

In the circumstances, I have decided that as a discretionary and humanitarian act to an individual with a genuine on-going need, it is in the interest of Australia as a humane and generous society to grant the applicant a [...]visa.

¹²¹ Regarding the narrowness of the refugee definition see Chapter Three passim and especially pp. 102-107.

¹²² I examined all tabled “statements under the Migration Act” tabled between 1995 and November 1998, as compiled at my request by the staff of the Parliamentary Table Office. I have retained a copy of each statement in my files.

¹²³ Of the 242 statements examined, 8 contained the name of the country and 1 contained the name of a person. A further 29 were accompanied by a list of names (from which country of origin could be speculated) but the names were not linked to the stated reasons.

¹²⁴ Or first two paragraphs in the longer formula.

This specifies that the interest for Australia in humanitarian admissions is its interest as a humane and generous society. That interest is in both being - and being perceived as - humane and generous. If the perception were not important, this part of the formula would be unnecessary. This is also an important part of the formula given the incredibly small success rate of these applications.¹²⁵ Rejecting approximately 99 percent of these last ditch humanitarian appeals could be regarded as less than compassionate and perhaps this rhetoric provides some bulwark against that assessment.

The second paragraph of the formula, the “detailed one”, is also notable. The key to this aspect of the formula is the importance of the public interest and the particular circumstances and personal characteristics of the individual involved. The emphasis on the uniqueness of the individual reinforces that this is an exceptional admission and that as there are unlikely to be similar circumstances, arguments for similar treatment will be futile. There is no description of what the public interest in admitting this unique individual might be. Sometimes the paragraph mentions nothing more than these two factors. In most cases when additional information is given it echoes one of the phrases in the guidelines such as “personal hardship,” “safety at risk,” “genuine subjective fear,” “trauma,” or even – in a perfect tautology - that to return the person would be “inhumane.” One set of applications refers to assimilation to the Australian community and having been here for more than three years.¹²⁶ The level of vagueness ensures that merits of the Ministerial decision cannot be

¹²⁵ Staff of the current Minister, Hon. Phillip Ruddock, estimate that he reverses decisions in less than 1% of the applications he reviews, interview October 1998.

¹²⁶ This formula is reminiscent of the Canadian “establishment factors.” However, little can be drawn from the comparison as the Australian formulation does not contain enough information to elaborate.

publicly impugned and that the assertion by practitioners that only high profile applicants whose cases are taken up by colleagues of the Minister will be successful cannot be tested.¹²⁷ The requirement to table reasons amounts to little when this type of formulaic presentation is used and there is no way to link Ministerial statements to tribunal rulings on particular facts. There is also no way of comparing with instances where an application for grace is made but rejected. This reinforces the argument that humanitarianism is a useful concept in migration law partially due to its vagueness. Nothing more is revealed than the fact that it serves the interest of the generous nation and it is an exception related to unique circumstances. The guidelines and the humanitarian categories give us some further information, but in the end even less than the Canadian jurisprudence of humanitarianism problematically reveals.

The humanitarian aspects of the Australian law have not always been so carefully concealed. The current absence of humanitarianism as a clearly named concept in the *Migration Act* can be interpreted as a response to the courts' interpretations of the pre-1989¹²⁸ provision that permanent residence could be granted to any non-citizen legally in Australia who could demonstrate "strong compassionate or humanitarian grounds for the grant of a permit."¹²⁹ This provision allowed the courts an opportunity to interpret the concept of

¹²⁷ Interviews with refugee law practitioners in Melbourne, December 1997, and in Sydney, January 1998.

¹²⁸ In 1989, the *Migration Act* was significantly amended (*Migration Law Amendment Act 1989*, proclaimed December 1989) with the aim of reducing discretionary decision making under the Act. For discussion of the amendments see Cronin K, "Concerning Equity and Control: A Look at the New Immigration Law" (1990 - June *Law Society Journal* 50. Other articles in the June 1990 *Law Society Journal*'s "Forum: Immigration Law" discuss the effects of the amendments on particular parts of the immigration program. One of particular interest is Joel A, "The Edifice of Compassion" (1990) June *Law Society Journal* 67.

¹²⁹ Section 6A(1)(e).

humanitarianism, which proved to have a broad range of applications and contained the potential to develop in the disparate directions of the Canadian jurisprudence.

The Australian courts were no more able or willing than the Canadian to define humanitarianism. In *Ates* the Federal Court linked humanitarianism to the good of the nation with this expansive language:

...in the administration of good government there is not only room, but a legal duty, to consider, even, on occasion with compassion, the circumstances of particular cases. The prima facie strictness of the law is designed to achieve population security and national security. That strictness is to be justified also on the basis that, in the area of entry to this country, the law may be seen to be strictly enforced. But in this case there is no security or even economic consideration. [...] The law must be administered by the Minister in the best interests of Australia. So to do extends Australia's interests broadly regarded and embraces, on occasion and according to circumstances, the taking of decisions by reference to a liberal and even compassionate outlook appropriate to a free and confident nation and conscious of its reputation as such.¹³⁰

The High Court in *Kioa*¹³¹ accepted without comment the bureaucratic decision that a Tongan family with an Australian born daughter¹³² who had overstayed their visas to earn money to assist relatives whose homes had been destroyed by a cyclone did not present strong humanitarian and compassionate considerations. The merits of the decision were beyond review and, notably, natural justice was found to have been breached. But the High Court was much more restrained than the Canadian courts in its obiter. Commenting on the humanitarian admission provision Mason J. (as he then was) stated that strong compassionate or humanitarian grounds "...may be very much a matter of

¹³⁰ *Ates v Minister of State for Immigration and Ethnic Affairs* (1983), 67 FLR 449 at 455-6; note that s.6A(1)(e) was not at issue.

¹³¹ *Kioa v West* (1985) 159 CLR 550.

¹³² At that time, birth in Australia assured Australian citizenship. The *Australian Citizenship Act 1948* (Cth) has since been amended to provide that Australian born children inherit their parents visa status s10(2), *Migration Act* s.78.

opinion.”¹³³ Wilson J. stated that humanitarian grounds may have a relevance, “albeit attenuated” to a discretionary decision to deport, and that this may strengthen a claim that natural justice in this situation requires a hearing.¹³⁴

*Damouni*¹³⁵ and *McPhee*¹³⁶ both provide examples of the Federal Court attempting to weigh up factors for and against granting a visa on ‘strong humanitarian and compassionate grounds.’ Justice French in *Damouni* began by dissecting dictionary definitions of humanitarianism and compassion and isolated “hardship” as the common element to all the circumstances addressed.¹³⁷ Factors going to granting the visa on these grounds included fear of returning to their home country to face death or imprisonment, inability to go elsewhere, three young children at school in Australia and family support in Australia. On what Justice French termed “the debit side” were entering Australia on false premises, falsely claiming not to know their visa conditions, and the majority of their family members residing elsewhere.¹³⁸ Justice French remitted the case to the decision maker below with specific suggestions about humanitarian considerations. Mr. McPhee was similarly awarded reconsideration of his circumstances when the Court ruled that his juvenile record should not have weighed in the delegate’s deliberations and that the

¹³³ Above n 131 at 582.

¹³⁴ *Ibid* at 600.

¹³⁵ *Damouni and Anor v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97 (FC).

¹³⁶ *McPhee and Ors v Minister for Immigration and Ethnic Affairs* (1988) 16 ALD 77 (Fed Full Ct).

¹³⁷ Above note 135 at 102-3.

¹³⁸ *Ibid* at 110-111.

delegate failed to allocate sufficient weight to McPhee's sense of frustration.¹³⁹

While the approach of the Australian courts to humanitarianism was not permitted much time to develop, the balancing of factors which doubles as a notion of desert is present as it is in the Canadian jurisprudence. As well, humanitarianism was at least sometimes linked to the good of the nation in expansive terms and certainly the potential for further expansion seemed to have been obvious to lawmakers.

During the nine years this provision was in place admissions increased each year, paralleling the courts' expansive treatment of the provision.¹⁴⁰ Removing humanitarianism and other types of discretionary decision-making from the Act ensures the control over the content of the term humanitarian remains with the executive. As is evident in the Canadian jurisprudence, once humanitarianism is put to the courts in any fashion the language of duty and fairness inevitably becomes part of the equation and precedent has a role to play. This is part of the reason that the Canadian interpretations of humanitarianism are so counter-intuitive. Humanitarianism, outside this narrow migration law context, is not about fairness and desert, it is about bestowing something out of goodness. The Australian executive control approach, characterised by merciful individuated decisions, may preserve a meaning for humanitarianism which is closer to its extra legal meaning, even while far more people per capita and per application are turned away and the circumstances of those refusals are rendered invisible.

¹³⁹ Above n 136 at 80.

¹⁴⁰ Crock M, *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998, at 131.

C. HUMANITARIANISM AND IDENTITY

The contrasts between how humanitarianism is deployed in the Australian and Canadian laws allow for analyses of the relationship between humanitarianism and identity in Australia and Canada and for reflection on liberalism's humanitarian consensus. Three aspects of the legal positioning of humanitarianism are important to completing the portrait of its role in liberal theory and in liberal migration laws. First, significant differences can be explained by contrasting the effects of locating humanitarianism decision-making with the courts or with the executive. Second, attention to identity in the analysis requires considering who the 'beneficiaries' of these decisions are. Finally, drawing on these two phases of the analysis, the mirror of humanitarianism in which both the nation its members are reflected can be understood.

1. Legislative or executive control

The use of the term humanitarian throughout the *Immigration Act* ensures that Canadian courts have a significant role in determining interpretations and appropriate uses of the term. By contrast, in Australia, humanitarianism is reserved to the executive. One consequence of this difference is that we have far more evidence of Canadian interpretations of the term, and therefore it is much easier to see how the term is used in disparate situations and often counter-intuitively by the Canadian courts. Fewer conclusions can be drawn in the Australian case about the meaning of humanitarianism. There is at least the possibility that because humanitarian decision-making in Australia is carried out

on a case by case basis that it may be informed solely by concerns which are very close to extra-legal meanings.

The principal conclusions to be drawn from the locus of humanitarian decision-making go beyond what can be said about its meaning to the crucial questions of control and sovereignty. When the executive makes these decisions the government of the day retains control over the decision-making. Australia's quick abandonment of section 6A(1)(e) provides one example of this. Executive control over migration decisions keeps these decisions at the heart of the sovereign nation. Two important strands of analysis come together at this point. First, that immigration has long been associated with the core of national sovereignty.¹⁴¹ Legomsky argues that British immigration law is at least overshadowed by the royal prerogative, under which decisions relating to foreign affairs or to acts of state were completely beyond judicial review.¹⁴² Even in Britain this doctrine has lost much of its historical importance, and the federal constitutions of Australia and Canada dint its impact, yet the line of cases which Legomsky draws on to demonstrate the influence of the prerogative in immigration law¹⁴³ are part of the common law of both these former colonies. The strong historical link of control over immigration and nationhood itself is seen in these century old prerogative decisions, as well as in the early twentieth century removal of citizenship and migration concerns from the international

¹⁴¹ This is a cornerstone of Stephen Legomsky's explanation for the inordinate deference of British and American courts to immigration decisions. See Legomsky S H, *Immigration and the Judiciary: Law and Politics in Britain and America* Clarendon Press, Oxford, and Oxford University Press, New York, 1997, especially Chapter 4, "Patterns and Trends: A Descriptive View".

¹⁴² Ibid at 87-105 and passim.

¹⁴³ *Musgrove v Chun Teeong Toy* [1981] AC 272 (PC); *Poll v Lord Advocate* [1899] 1 F.823 (Ct of Sess); *Attorney-General for Canada v Cain* [1906] AC 542 (PC).

legal sphere to the domestic¹⁴⁴ and in the use of control over immigration at a national level as an argument for the establishment of both the Australian and Canadian confederations. Control over immigration, over its own borders, is defining of the nation. It marks out the nation qua nation, rather than mere colony or quasi-dependent state.¹⁴⁵ The second strand of analysis engaged by executive control in this area is that if migration law is to be harnessed to the needs of the liberal nation, there are strong incentives to control the contents and interpretations of the law.¹⁴⁶

Australian and Canadian approaches to humanitarianism reveal important differences about the strength of the national need for control over migration, which in turn tell us something about national mythos and identity building. Writing humanitarianism all over the *Immigration Act* allows the Canadian courts the latitude to “leave the door ajar”. Canadian discourses about immigration are much less concerned with leaving that door swinging than Australian discourses are. Canada lets in many more immigrants each year on a per capita basis¹⁴⁷ and sits north of what I proudly learned in primary school was the “longest undefended border in the world.” Even if Canada wanted to develop the same kind of “control culture”¹⁴⁸ as island Australia, it could not.

¹⁴⁴ Discussed in Brawley S, *The White Peril: Foreign Relations and Asian Immigration to Australasia and North America 1919-1987*, UNSW Press, Sydney, 1995.

¹⁴⁵ *The Montevideo Convention on Rights and Duties of States*, 1933, Art 1, 165 *LNTS* 19 states: The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.

¹⁴⁶ This argument is fully developed in Chapter Two at pp.82-90.

¹⁴⁷ Approximately 1% of the population, compared with approximately 0.3% of the population through the 1990s.

¹⁴⁸ This term was coined and applied to Australian migration law by Dr. Kathryn Cronin in “A Culture of Control: An Overview of Immigration Policy-Making” in Jupp J and Kabala M (eds)

The encroaching hordes imagery – which still lurks in the edges of Australian migration discourses - is not there either.¹⁴⁹ There has never been a sense in Canada that the massive population of the United States might suddenly want to come north. Thus Canadian politicians are much more confident in leaving humanitarianism to the courts, to relinquishing a bit of control. Control over the border, and the quest for an impermeable border, are close to the core of Australian nationhood. The universal visa system and the national panic over “boat people” are evidence of this.¹⁵⁰ Canada is by no means free of the culture of control¹⁵¹ but there are more counters to it. One important cultural difference is played out in the way the population debate intertwines with concerns about immigration. In Australia there is an on-going popular and academic debate about the maximum population of the nation. While there is disagreement about the number, the idea of a maximum is agreed upon.¹⁵² Despite geographic

The Politics of Australian Immigration Australian Government Publishing Service, Canberra, 1993, ch 5.

¹⁴⁹ This mythology has recently been revived by the Minister of Immigration’s comment that “whole Middle Eastern villages” are planning to pack up and come to Australia by boat. This comment attracted widespread attention in the Australian media in November 1999. McGregor R, “10,000 Illegals on Way, Says Ruddock” *Australian*, 16 November 1999 at 1, Saunders M, “Ruddock ‘Hysteria’ Makes Waves: Beazley” *Australian* 7 December 1999 at 4.

¹⁵⁰ Australia is the only major tourist destination and only major “Western” nation requiring every non-citizen entering the country to hold a visa. Regarding boat people, between the first arrivals in the late 1980s and mid 1999, approximately 3000 people arrived in Australia by boat. These arrivals prompted reform of the *Migration Act* to allow for non-reviewable detention of these people. Yet, if all boat arrivals had been allowed to stay, their numbers would make up less than 5% of the annual migration intake for any one of those years. This situation is challenged somewhat by the approximately 2000 arrivals in the second half of 1999. This significantly higher number is 2.5% of the migrant target for this year. It has returned the national panic to a daily news story.

¹⁵¹ Examples of this rhetoric are easy to pick from the Canadian press. “Immigrant Smugglers Switch Entry Route” *Edmonton Journal* 9 Feb 1999; Bronskill J, “Thousands of People Smuggled into Canada” *Vancouver Sun* 25 August, 1998.

¹⁵² Ruddock P, “Temporary Influx of the Highly Skilled Makes Sense” *Australian* 17 November 1999 at 17; Hodge A, “Plea to Populate to 50m or Perish” *Australian* 25 November 1999 at 3; Pradd D, “Refugee Alert Sounds Like a Wake-up Call” *Australian* 25 November 1999 at 13; Campbell D, “Just How Big a Nation Should We Aim to Be?” *Australian* 15 October 1996 at 13.

similarities (large tracts of empty land which are not easily made productive) this question is never put in Canadian debate. When migration and population meet in popular discourse, the concern is that population rate of increase may be affected one way or another by migrant intake. This is another manifestation of the control discourse, of the importance of control to the national imagination of itself. Locating discretionary humanitarian decisions with the executive, at the sovereign core of the nation, facilitates these nation-building, nation-controlling objectives.

Closely related to the difference in judicial or executive determinations is the construction of humanitarian decision-making as discretionary decision-making. Here the most fruitful aspect of the analysis is considering the interaction between humanitarianism and discretion rather than drawing out differences between the Australian and Canadian situations.¹⁵³ In both systems, decisions about humanitarian and compassionate considerations are made almost entirely on a case by case discretionary basis.¹⁵⁴ In many ways, these decisions are paradigmatic discretionary decisions. The indeterminacy of humanitarianism fits well in the discretion paradigm which Lacey describes as, “allowing the ideological gaps between the rhetoric and substance of the law to be managed.”¹⁵⁵ In humanitarian admissions, the ideological gap between

¹⁵³ Although this could certainly be done. The Australian humanitarian decisions fit within definitions of strong discretion, the Canadian are much closer to definitions of weak discretion. The Australian discretion is exercised at the highest level of the executive, the Canadian at a range of levels and sometimes even at the lowest. The range of discretionary decisions is much smaller in Australia than in Canada. These factors contribute to the earlier analysis of a stronger control culture in Australia.

¹⁵⁴ Subject to my discussion in the next section of the humanitarian categories of admission.

¹⁵⁵ Lacey N, “The Jurisprudence of Discretion: Escaping the Legal Paradigm” in Hawkins K (ed), *The Uses of Discretion* Clarendon Press, Oxford and Oxford University Press, New York, 1992, 361 at 364.

rhetoric and substance is particularly large. The nebulous content of humanitarianism allows for even more slippage than standard discretionary decision-making, and the legal device of discretion limits, even in the Canadian setting, judicial inquiry. While the classic description of the relationship between law and discretion states that law sets the boundaries within which discretion is to work,¹⁵⁶ writing humanitarianism into the law allows the discretionary element of the decision to overlap its legal borders. This is important to ensuring the complete flexibility of the migration law framework. In order for migration law to function at the behest of the constantly changing national need, and at the same time retain its appearance of stability and support the rule of law ideology, porous concepts like humanitarianism - to repair porous borders - are essential tools.

This type of discretionary decision-making fits within Schneider's "rule-building discretion" category because the rapidity of change makes the rules controversial, the discretion and the extent of the change are uncertain, and the rules must be replaced frequently.¹⁵⁷ Schneider asserts that this type of discretion is most useful in times of great social change, and could take issue with my use of his categorisation scheme on that basis.¹⁵⁸ But it is because of this that my assignment is most appropriate. Migration law is a perpetual setting of great social change. This is precisely why it is an important site of the construction of national identity, as a work in progress. I discussed in Chapter

¹⁵⁶ Discussed and summarised in J Bell, "Discretionary Decision-Making: A Jurisprudential View" in K Hawkins (ed) above n 155, 89 at 93.

¹⁵⁷ Schneider C E, "Discretion and Rules: A Lawyer's View" in Hawkins K (ed) above n 155 47 at 64.

¹⁵⁸ His other categories are khadi-discretion, rule-failure discretion, and rule compromise discretion, at *ibid* 61-65.

Two the important dual function of migration law in establishing appearance of stability and yet accommodating on-going shifts in understanding of the national self.¹⁵⁹ The framework of the Act ensures that ever shifting political whim and national need can be poured into the sieve and made law. The rules in migration are controversial, do require frequent change, and are highly uncertain, especially in humanitarian decision making. What the combination of the term humanitarianism and discretion allow is for this incessant change to be hidden, and for the law, the border of the community, our constituted identity, to appear stable. The Canadian law, with its high levels of humanitarianism and discretion is amended much less frequently than the Australian. This is the counterbalance to direct executive control. But stability is required nonetheless, and hence upholding the control ideology is even more vital in Australia.

2. The Chosen Ones

As an humanitarian admission is an act of grace, the identity of the beneficiary is highly important, just as it is in the humanitarian sub-category of refugee.¹⁶⁰ If precious membership to our national community it to be bestowed on one who does not bring us a direct benefit and to whom justice requires that we owe nothing, that *individual* must be deserving. The importance of the identity of the individual in humanitarian admissions is seen in the Canadian jurisprudence and is hinted at in the Australian ministerial decisions.¹⁶¹ As these types of admission are not pegged to a particular national benefit, identity

¹⁵⁹ See pp. 82-90.

¹⁶⁰ See Chapter 3 at pp.109-115.

is closely scrutinised. This scrutiny, as the cases, guidelines, and arguments show, goes two ways: to ensuring the person is sufficiently destitute to be deserving of our mercy and to ensuring that the person is acceptable as a member of the community. This accounts for some of the diversity in the law such as the contradictory emphasis in the Canadian cases on both need and establishment factors. The other in this scenario must be both apart and acceptable.

This dual scrutiny of identity is also related to the emphasis on individuality. As both the Australian and Canadian courts have said, humanitarianism is matter of emotion, of what stirs a compassionate response in an individual. Further, humanitarianism is analytically an exception to the rule, a way to circumvent the law, therefore it cannot be open to everyone but only to individuals. It is both individually defined and individually applied. This provides double strength resistance against any floodgates argument, which is indispensable to the control ideology. This is similar to the role of individualisation in the refugee definition but is heightened here as there is no group identity aspect to the analysis.

The humanitarian admission categories contribute to this analysis. In Australia, and in Canada until very recently, certain categories have been designated for priority humanitarian admission. While this may seem to depart from the linkage between humanitarianism and individuation, the category labels are highly identity specific, even moreso than the refugee definition. Categories open in Australia in 1998-99 included women at risk, Vietnamese in

¹⁶¹ My argument here provides further support for Legomsky's observation that judicial responses to immigration cases are highly sensitive to the status of the individuals involved. Legomsky, above n 141 at 265-66.

refugee camps, citizens of the former SFR Yugoslavia, minorities of the former USSR, Burmese in Burma, Burmese in Thailand, Sudanese, Sri Lankans, Ahmadis in Pakistan, Vietnamese repatriated under the Comprehensive Plan of Action or living in Germany.¹⁶² In addition to these requirements and others, each category contains a detailed list of specific identity requirements which an applicant must construct herself to conform to. For example, to come within the women at risk category, a woman must be subject to persecution, identified as “of concern” by the UNHCR, must be without the protection of a male relative, be in danger of violence, victimisation or abuse because of her gendered identity, and must not fit with another part of the refugee or humanitarian program. In addition to having to construct oneself this way, humanitarian program visa processing is also prioritised on the basis of degrees of connection to Australia.¹⁶³ Like the refugee, the humanitarian migrant must be not-like us in order to need our protection but also able to shed that identity and merge with the nation when required. The paradoxical requirement to be both other and not-other is overt here. These humanitarian entry categories are so narrowly defined that they do not detract from the argument that humanitarian concern is tied to individuals to facilitate control over it. Control is also facilitated by ensuring, in both Australia and Canada, that the categories can be created and dismantled by the executive, as can the number of visas accorded to each.

¹⁶² These are the special assistance categories for 1998-99. Other visas in the humanitarian program include refugee visa, in-country humanitarian visa, global special humanitarian visa, and emergency rescue visa. Very similar identity named categories in use in Canada prior to 1997.

¹⁶³ Highest priority goes to those with relatives in Australia, next to those with other close ties in Australia (friends, more distant relatives, past visits, especially for education or business), third to those with “resettlement potential.” These factors make the humanitarian categories mimic the priorities of family and economic migration.

These identity specific categories, the more generic categories which make up the remainder of the Australian program (in-country humanitarian visa, global special humanitarian visa, emergency rescue visa) and all of the current Canadian designated class program, are all alternatives to a broader definition of refugee. To that extent, they could be subject to the same analysis of identity as the refugee definition in Chapter Three. What is crucial in relation to these supplementary humanitarian categories is that both Australia and Canada (and other nations as well) choose this option rather than a more expansive definition of refugee. Using ad hoc humanitarian categories allows for direct manipulation of the identities to be admitted. The narrow defining of each category, like the narrow refugee definition itself, provide that identity constructions at the border can be closely scrutinised.

Considering who is chosen as deserving also communicates national values. In the Canadian humanitarian jurisprudence values of family independence and self-sufficiency are enshrined alongside a strong work ethic and a vision of economic and academic success as contributions to the national community. Family rather than state responsibility for weak members is valued. Australian decision-making is veiled but in the brief time when humanitarianism and compassion were before the courts the value of nuclear family and of certain contributions to society were referred to. The tabled discretionary decisions do communicate somewhat the importance of being able to become established in Australian society.

D. CONCLUSION: REFLECTING OURSELVES – THE MIRROR OF HUMANITARIANISM

From all of these elements we can frame the mirror of humanitarianism. Humanitarianism occupies an inordinate amount of space in rhetoric about migration and migration law because of the liberal consensus that the just nation must, at some unspecified point, open its borders to needy outsiders. Yet humanitarianism is no exception to the principle that migration law serves the national need. In the case of humanitarian admissions, the need most readily catered to is the need to be fair and right and even just, and the perhaps identical need to be perceived in this light. This need of the liberal nation is intertwined with the liberal consensus and both contribute to migration discourses of humanitarianism. The philosophical dissonance over the meaning of humanitarianism is paralleled in the various ways the law represents humanitarianism. The instability inherent in the term also makes it an apt device to ease the coupling of national need and migration law. Simultaneously it accounts for how intuitive and extra-legal interpretations of humanitarianism can so often diverge from the legal uses of the term.¹⁶⁴

Looking at the use and position of humanitarianism in Australian and Canadian migration law we see a subtly expressed difference in the power of a public and political discourse about control over immigration, control over borders, and therefore control over community membership and identity. The layers at which this control functions were expressed by then Justice Brennan when he defined the purpose of the migration legislation as “control of the

¹⁶⁴ I reject the radical postmodern position that would hold that humanitarianism has no core meaning. I hold instead that in our Australian and Canadian national communities there is a consensus of meaning about humanitarianism, even if it is not precise in its contours.

membership of the Australian people.”¹⁶⁵ In the comparison between the two nations we also see that the Canadian law is far more concerned with humanitarianism. While this multiplies the easily demonstrated contradictions and inconsistencies in legal manipulation of the term, it cannot detract from the fact that the Canadian law has a more generous face. This, backed up by the numbers, adds up to a more generous or humanitarian law no matter the extent of textual indeterminacy. Humanitarianism is closer to the heart of the Canadian rhetoric about migration than it is in Australia, closer to the tradition Canadian law-makers seek to construct, closer to the mythology that Canadians as individuals are willing to honour and reify.

The comparison of Canadian and Australian humanitarianism also deepens our understanding of the liberal humanitarian consensus. The consensus is exposed as a false non-agreement, strengthening the conclusion that liberal theory provides little guidance to moral behaviour in migration law-making. This absence of guidance is linked both to the hegemony of nation states – that each can and evidently does build its own humanitarian mirror – and to liberal legalism’s hermeneutics – that once a term is adopted and made legal the techniques of the law turn the term into a category and remove it from its extra-legal moorings.

Humanitarianism is about identity. The individual identity of the other who benefits from our grace is important, but only because of the light it reflects back on us. When we admit the deserving, we are good. We bestow grace and hold up that mirror to admire ourselves. The instances of this in Australian and Canadian migration discourses are myriad. Humanitarianism in migration law

¹⁶⁵ *Kioa v West* above n 131 at 626.

is often a self-serving ruse. But there are two critical qualifiers. Despite all of this, humanitarianism is the touchstone of consensus in liberal migration laws. It has theoretical and rhetorical weight across a wide range of liberal theory and it resonates in popular discourses. For these reasons it is the strongest mobilising principle we have for rallying to alter the law. To seek change in migration law, so that more people for more reasons may be admitted to share our prosperity we must appeal to the vanity through the mirror.

For the final qualifier I must address the obvious: that both Australia and Canada have over history taken in large numbers of some of the most needy people in the world.¹⁶⁶ The people in these waves of humanitarian migration have arrived from great distances, with national assistance, have remade their lives and found good and positive ways to make these nations their own, intertwining their identities with the other. These migrations have had little to do, however, with the texts of our migration statutes, and most of these people would be inadmissible today. They have largely been facilitated through spontaneous eruptions of popular and political goodwill. Australian Prime Minister Hawke's invitation to Chinese nationals after the Tiannamen massacre or Prime Minister Howard's recent, if recanted, expression to ethnic Chinese in Indonesia¹⁶⁷ are good examples, as is the outpouring of private citizen sponsorship of Indochinese refugees in the early 1980s for which the Canadian people, *as a nation*, won the UNHCR Nansen medal. This kind of

¹⁶⁶ This must be understood in the context of this distance of these countries from situations of human crisis. Howard Adelman made the point in 1994 that Canada addresses fewer refugee claims per capita than the average among western nations. (Adelman H, "Justice, Immigration and Refugees" in Adelman H et al (eds) *Immigration and Refugee Policy: Australia and Canada Compared*, Melbourne University Press, Melbourne, 1994, 63 at 90. There is no reason to believe this has changed. Australia addresses fewer claims.

humanitarianism is not counter-intuitive, but it is counter-legal. Once humanitarianism is moved into the texts of our law and policy, it loses what is most attractive about it.

The image of the nation that humanitarianism creates stands in stark contrast to the image of the nation when migration law intersects with rights discourse. When the other asserts a claim to justice rather than petitioning for mercy, the nation responds in kind. This intersection of rights, identities and the liberal nation is the subject of Chapter Five.

¹⁶⁷ At the time of heightened and violent against them in 1998, as part of the social turmoil following the Asian economic crisis. Reported in Shanahan D, "Refugee Door Open to Ethnic Chinese" *Australian*, 2 March 1998 at 1.

Chapter Five

Identities Rights and Nations

This Chapter scrutinises the interrelationships between migration law and national identity through the perspective of rights discourses. In doing so it takes up another aspect of the law and identity analysis set out in the Chapter Two framework and pushes the reasoning thus far in a new direction. Chapter Three considered the othering of the refugee determination process and the reciprocal emergence of national identity in contrast to this ultimate other to the nation. Chapter Four looked at how humanitarianism is located within liberal theory and liberal migration law to reflect a beneficent image of the nation and its members. Those two Chapters examine the identity construction process from contrasting perspectives: first from the outside, considering how the absent other reflects contours of the nation, and then from the inside by looking at how the nation seeks to present itself. In taking up the analysis of national identity through the perspective of rights discourses, these two analytic positions are brought together. Rights are the paradigm of legal discourse and identity-based critiques of rights discourses have emphasised how they embed both categorisations, such as refugee, and normative perspectives, such as the beneficent nation. Rights claims are raised at many instances in and around migration law. To some extent rights discourse does replicate the insider-outsider dichotomy, but attention to identities in migration law reveals that rights play a variety of more nuanced roles in migration law as well. My analysis in this Chapter uses identity as an hermeneutic tool as well as using national identity as a subject of analysis. Attention to identity allows us to explore variations in rights discourses in the migration law setting and to see

how these discourses contribute to the construction and reproduction of national identities.

In Chapter Two I considered how rights discourses are assessed in critiques of law which use identity as an organising concept.¹ Identity calls our attention to the categorical, hierarchical and tightly bounded nature of legal reasoning. Because of the pervasive presence of rights discourses in law, the idea of a “right” has become a vague catch-all. At the outset of this Chapter, then, I set out the range of rights which are deployed in migration laws in Australia and Canada. This serves in part to illustrate the plethora of rights discourses but also allows for the analysis of the hierarchy which exists between varieties of rights.

The analysis of rights in migration law also allows me to amplify and build on the identity based critique of rights. In this Chapter I take up and examine rights as “images of power,”² look at rights as a phenomenon of collective identity,³ and consider how the position of rights in migration law offers a particular illustration of Minow’s thesis that there is a central instability in rights discourse which hinges on the inability of this discourse to offer an adequate reckoning of sameness and difference.⁴ In contrasting Australian and Canadian migration law rights discourses, an important qualifier to the critique of rights discourses emerges. Since the rights deployed in migration law are

¹ See pp. 38-45.

² Williams P, *The Alchemy of Race and Rights*, Harvard University Press, Cambridge Mass, 191, at 233-34.

³ Hunt A, *Explorations in Law and Society: Toward a Constitutive Theory of Law*, Routledge, London and New York, 1993 at 247.

⁴ Minow M, *Making All the Difference: Inclusion, Exclusion and American Law*, Cornell University Press, Ithaca, 1990 at 108.

themselves hierarchically arranged, it is important to consider how rights interact differently with identities at differing positions in the hierarchy. In some contexts, “strong” rights open a space for more robust identities of rights claimants. The potential for multifaceted relationships between rights and identities is one of the themes I take up here. An understanding of these relationships is also of strategic importance as provides insights into when rights are likely to carry the potential for social transformations and when they will be inevitably tied to existing constellations of power relationships in society. This analysis, therefore, contributes also to that on-going aspect of the critique of rights discourses.⁵

The final step in the analysis of the interrelationship between migration law and national identity is to situate rights discourse in migration law at the border of the liberal nation. That is, to link my analysis of rights discourses in migration law to the broader analytic framework for migration law which runs through the thesis. While the analysis to this point allows for nuancing and extension of the identity based critique of rights, locating the analysis in that broader framework demonstrates the importance and strength of that critique. In the realm of migration law, once a claim is articulated as a rights claim, the liberal nation’s “right” to exclude all outsiders is triggered as an almost automatic response. For this reason, the most significant differences in migration rights discourses in Australia and Canada do not relate to Canada’s

⁵ This issue is address by Williams (above n2), Hunt (above n3), Minow (above n4) and others such as Bakan J, *Just Words: Constitutional Rights and Social Wrongs*, University of Toronto Press, Toronto, 1997; Fudge J, “The Effects of Entrenching a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada” (1989) 17 *International Journal of the Sociology of Law* 445; Bartholomew A and Hunt A, “What’s Wrong With Rights?” (1990) 9 *Law and Inequality* 1.

constitutionally entrenched human rights and the absence of entrenched rights in the Australian constitution, but to differing perceptions of national identity.

In Chapters Three and Four my empirical analysis focused on the day to day workings of refugee determination and humanitarian decision making. In this Chapter, I consider instead the most significant judicial pronouncements concerning refugee and humanitarian admissions to Australia and Canada. These highest court judgments provide a contrast to the day to day workings of the law discussed earlier. As contemporary higher court judgments in these areas are reasonably rare, I also examine some cases on related migration law topics which offer insights into rights and national identities. I proceed through the Chapter by first locating the array of rights discourses in migration law. I then take up the Chapter Three discussion of refugee claims as rights claims and the conclusions to be drawn here about the hierarchy of rights. The next section considers the substance of process rights, and the subsequent one considers cases decided under *Canada's Charter of Rights and Freedoms*. In the final section I draw out the linkages between rights discourses and the liberal nation which are foundational to the thesis as a whole.

A. THE VARIETY OF RIGHTS IN MIGRATION LAW

A straight forward functional definition of a right is that a right is any claim recognised by the law which some legal body will, in some circumstances, determine and enforce. This definition separates what I am discussing as rights from the use of the term right in popular discourse, and also from its use in aspirational and moral discourse. The second exclusion is troubling, for it excludes claims such as the “right to live in a clean and healthy

environment,” or the “right to a decent standard of living,” claims which have moral and political resonance in many societies including the ones I am comparing here.⁶ The point of narrowing the definition of a right this way is to focus the discussion on what the courts can and will do in the realm of migration law, and to draw a close connection between a right and a national legal system. At a rhetorical level, a rights claim may be free-floating. To be enforceable in law it must ultimately be harnessed to some national legal system. Increasingly, national legal systems are enforcing international law norms and this may one day become a matter of course. The moral and persuasive power of international law legitimates it as law in its own right,⁷ but the domestic legal systems of the world’s nations remain the proving ground for rights claims. The ability of a nation to reject rights determinations made in the international arena, even if this only happens occasionally,⁸ is evidence of the hegemony of national legal systems in this regard.

1. Rights and Privileges

The rights discourses of migration law cluster around two dichotomies I explore in this chapter: the right-privilege distinction and the substantive rights-procedural rights distinction. The short version of the story is that admission to

⁶ Indeed, a number of claims which I would exclude from the definition of rights are contained in international law statements of rights such as the *Covenant on Economic, Social and Cultural Rights* 1966 973 UNTS3 and the *Declaration on the Right to Development* 1986, GAOR 41st Sess., Supp 53 at 186.

⁷ Along with the willingness of nations to act in the international realm on the basis of international law. But even in this realm, it is the *nation* which functions as actor to make the law extant.

⁸ An example in the migration law area is the Australian government’s response to the United Nations Human Rights Committee ruling in *Australia v Applicant A*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) that conditions of detention of some refugee applicants were in breach of the *International Covenant on Civil and Political Rights* 1966 999 UNTS 171. The government distanced itself from the ruling and reaffirmed its practices.

the nation for non-members is a privilege and never a right and therefore the “rights” of those seeking entry are at most procedural. The simplicity of the story is an important part of understanding the limited potential for making rights claims the basis of legal change in migration law. It is also crucial to understanding the pre-eminent role of the nation’s identity to migration law provisions and outcomes. As outsiders claim no rights, this law reflects national self-identifications and priorities exclusively, rather than other claims.

That non-members have no right to entry is the brightest beacon guiding the development of migration law. In the words of Canada’s Justice Sopinka, “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.”⁹ The Canadian *Immigration Act* draws the right-privilege distinction under the subheading “Principles of Canadian Immigration Policy” in sections 4 and 5. Subsection 4(1) states that “A Canadian citizen and a permanent resident have a right to come into Canada...” subject to some exceptions for permanent residents. Subsection 4(2) defines the “right to remain” of the same group; subsection 4(2.1) sets out a right to remain for “Convention refugees” which is subject to significant qualifications and subsection 4(3) provides rights to enter and remain for people registered under Canada’s *Indian Act*¹⁰ whether or not they are citizens.¹¹ Immediately following these provisions, subsection 5(1) states that

⁹ *Chiarelli v Canada (Minister of Employment and Immigration)* (1992), 90 DLR (4th) 289 (SCC) at 303.

¹⁰ RSC 1985 c. I-5.

¹¹ The provisions of s.4 read in full:

(1) A Canadian citizen and a permanent resident have a right to come into Canada except where, in the case of a permanent resident, it is established that the person is a person described in

“No person, other than a person described in section 4, has a right to come into or remain in Canada.”

The distinction of right versus privilege is the core principle of Canadian immigration policy. While permanent residents, Convention Refugees and Indians¹² also have rights to remain (and enter in the case of permanent residents and Indians) these rights are qualified claims. For the first two groups, the limits are drawn by criminal behaviour. Over the past decade, the limits on these rights have been expanded by broadening the criminal behaviour exclusions under ss. 19 and 27.¹³ The rights of status Indians are also subject to the provisions of a separate governing regime. While it is difficult to deprive a

subsection 27(1) [setting out exclusions based on serious criminal convictions or suspicion of activities which could attract a serious criminal conviction].

(2) Subject to any other Act of Parliament, a Canadian citizen and a permanent resident have a right to remain in Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

(2.1) Subject to any other act of Parliament, a person who is determined under this Act or the regulations to be a Convention refugee has, while lawfully in Canada, a right to remain in Canada except where it is established that the person is a person described in paragraph 19(1)(c.1), (c.2), (d), (e), (f), (g), (j), (k), or (l) [relating to serious criminal activities] or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of more than six months has been imposed; or five years or more may be imposed.

(3) A person who is registered as an Indian pursuant to the *Indian Act* has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen.

¹² The identity label “Indian” is used in the Act and is the legally relevant category under Canada’s *Indian Act* RSC 1985 c.I-5. This term is no longer culturally appropriate in Canada where the First Nations people are increasingly use the name of their nation, or are “categorised” generically as First Nations peoples.

¹³ Amended by SC 1992 c.49. While the provisions are myriad an example is paragraph 19(1)(d):

persons who there are reasonable grounds to believe will commit one or more offences that may be punishable under any Act of Parliament by way of indictment, other than offences designated as contraventions under the Contraventions Act, or engage in activity that is part of a pattern of criminal activity planned and organised by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment;...

person of Indian status, not every member of a First Nation holds or chooses to seek this status. The rights of Indians within the *Immigration Act* underscore the uneasy relationship of First Nations with the migration law. First Nations are awkwardly positioned as neither members nor others, and thus distanced from the monolithic nation created in the law. This echoes the absence of First Nations in the immigration mythologies of Canada as nation. Despite the array of rights set out in sections 4 and 5, the only unassailable rights are those of the citizen to enter and remain.

The Australian *Migration Act* has the same effect, but achieves it in a more direct way through stating in its section 4 that its objective is to regulate... “the coming into and presence in, Australia of non-citizens.”¹⁴ This introduces a theme that resonates in many of the comparisons to be drawn between Australia and Canada in this Chapter. Canadian migration law is more overtly concerned with substantive rights. While Australian permanent residents and persons determined by Australia to be refugees can be excluded for approximately the same reasons as in Canada,¹⁵ their rights to remain are not enshrined as “principles” of Australian migration policy. They could bring similar claims to their respective courts, and seek to have them enforced in similar ways. The significance lies in what the nation chooses to say about itself in its law. To broaden the list of those with some basic rights claims makes the membership of the nation more diverse and more inclusive. That its promise may not be met in the Canadian setting can then become a legal argument with different rhetorical weight than the parallel Australian argument

¹⁴ This section is discussed in Chapter Two at pp. 85-87. Notably, each of the four subsections refers to the non-citizen/citizen dichotomy directly.

¹⁵ Migration Act, ss.200-203.

that a given subsection of the Act is being wrongly interpreted. This is a clear instance of the nation writing its aspirational self into the migration law. The specific reference to Indians in the Canadian Act focuses attention on the contested place of First Nations within the nation. A similar relationship exists, of course, in Australia but the *Migration Act* proclaims the message “we are all Australians,” submerging troublesome distinctions in that universalising statement. It also has implications for the hierarchy of rights and the covert power of rights discourses which are explored later in this Chapter.

Another lesson to be drawn from how the right-privilege dichotomy is written into migration law comes from its alignment with citizenship. Citizenship is the cornerstone of rights discourse because its universalising and homogenising impulse¹⁶ extends only to the border of the nation. That is, citizenship as a generic category is not homogenising in itself, rather it is the citizenship of some particular geographically and historically located nation which is universalised. Rights gain their power from their ability to be enforced by national legal systems. Citizens have the most secure and complete access to those systems. Citizens and rights are both attached to the nation. From the identity of the nation, citizens gauge some aspects of their self-identification. From that same identity of the nation, rights garner some of their substantive content. While other gradations of attachment to the nation exist (such as “permanent resident,” “refugee,” “Indian”) these are defined by how the rights they carry compare to the rights of citizenship.

¹⁶ See Ch 2 at pp. 92-94.

2. Rights in the courts

As those with a right to enter the nation without prior categorisation through migration law are limited to citizens and in Canada, Indians, the rights which surround the process of categorisation by the immigration law are crucial to those seeking to become members of the nation. In liberal nations, where suspicion of the power of the state is a component of the rule of law ideology, the procedural rights are arguably the most important which are accorded the individual. While citizens are entitled to superior procedural protections, non-citizens are not completely deprived of them.¹⁷ There are a myriad of procedural rights inscribed in the Australian and the Canadian migration laws. While there is not a right to apply for admission, applications do attract some of the rights associated with natural justice,¹⁸ rights to some kinds of information,¹⁹ and rights to be told of decisions and the reasons for them.²⁰ Some applicants have a rights to appeal decisions on their merits²¹ and rights to have those decisions judicially reviewed, or at least to petition the court to do so.²²

¹⁷ For example, in the Australian case of *Lim v Minister for Immigration* (1992) 176 CLR1 the High Court held that mandatory detention of some non-Australians was constitutional since it was applied only to aliens. The court's reasoning is linked to the legislative power of the Commonwealth government, but also acknowledges superior rights provisions for members.

¹⁸ In Australia, review on grounds of procedural fairness is restricted by s.476 of the *Migration Act*.

¹⁹ People entering Canada must be informed of their rights under the *Charter of Rights and Freedoms*, if they are detained *R v Kwok* (1986) 31 CCC (3d) 196 (OntCA). By contrast, there is no legal obligation to a dive boat people detained in Australia that they must complete a particular form to apply for refugee status; *Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583(FedCt).

²⁰ The *Immigration Act* provides that the CRDD must provide reasons in all cases rejected, s.69.1. Under the *Migration Act*, applicants in Australia receive reasons at each phase in the decision-making process.

²¹ Merits appeal is available in Australia to all refugee and most immigrant applicants; *Migration Act* Parts 5, 6, 7.

²² *Migration Act*, Part 8, Immigration Act ss.82.1-84.

The allotment of these rights form concentric circles with citizenship in the centre. A refugee in an overseas camp hoping to resettle in either Australia or Canada has no rights at all when that government's representative is making selection decisions. A person arriving in Australia with no documents and not asserting a refugee claim at the border does not even have the right to be told of their right to have legal assistance or of their right to make a refugee claim.²³ Someone applying for permanent residence status in Canada at an overseas post does not have a right to be heard in person by the decision-maker.²⁴ Someone detained in Australia because of arriving without a visa has only a limited right to have their detention reviewed by a court.²⁵ An unsuccessful refugee claimant in Canada does not have a right to have that decision judicially reviewed.²⁶ A rejected refugee claimant in Australia has the right to a hearing on merits review,²⁷ while their rights on judicial review are curtailed by legislation.²⁸ A permanent resident of Canada who has applied to sponsor a new immigrant can appeal the rejection of that sponsorship, although the individual who was

²³ Fang, above n19.

²⁴ *Muliadi v Minister of Employment and Immigration* (1986) 18 *Admin LR* 243 (FedCA).

²⁵ *Lim*, above n17.

²⁶ Although they do have the right to seek leave of the Federal Court to conduct judicial review. They may also seek humanitarian and compassionate review of their situation from the Department. See Ch 4 at pp. 203-209. Compassion is not a right.

²⁷ *Migration Act* s.411.

²⁸ *Migration Act* s.476. As discussed in *Minister for Immigration and Ethnic Affairs v Eshetu* [1999] HCA 21 and *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs* [1999] HCA 14. The *Commonwealth Constitution* provides some rights to judicial review in s. 75. The extent to which these rights may allow those shut out of the Federal Court by the *Migration Act* to move directly into the High Court is still an open question in my view. It remains open to that court to define the ground for prohibition, mandamus and injunction narrowly, although this has not been the case to date. Traditional and contemporary deference to the Executive as exemplified in *Abebe* and *Eshetu* suggests that such a narrowing may be on the cards.

rejected cannot.²⁹ A permanent resident facing deportation from Australia has access to the full range of review and appeal possibilities.³⁰ The concentric circles are not the same in each nation, but the principle is. The closer one is to belonging to the nation, the more rights one has in the migration realm. Citizenship is the centre of the circle, where one has the full bundle of rights, so much so that migration law is almost completely inapplicable to citizens save for some provisions providing sanctions for citizens who aid others in circumventing the law or where citizens can assist others in joining the nation through sponsorship. As the circles become smaller, the connection between the nation and the individual is more tightly drawn, until the centre where the nation and the individual are co-identified.

The concentric circles allow for comparison between Australia and Canada as well. By using this image to visualise these rights we can see that one can get further away from the centre in Australia than in Canada. That is, once a person has physically arrived on national soil, they can have no rights at all in Australia, except rights they need not be informed of and a right to be released from unlawful detention. In similar circumstances in Canada, a person must lawfully be told of their right to counsel. This may not amount to much, if we imagine the situation in which one might seek to enforce this right. How much does an uninformed and uncomprehending individual at port of entry really benefit from it? There are two counters to this. First, that not all individuals at point of entry are uninformed or uncomprehending; and second,

²⁹ *Immigration Act S.77.*

³⁰ With some limited exceptions (on national security grounds) this person could seek merits review followed by judicial review in the Federal Court and then the High Court of Australia.

that an accretion of minor rights distinctions does eventually amass a noticeable difference between the migration laws of Australia and Canada.

Australian and Canadian migration law are an appropriate backdrop for to considering the legal power and potential for social transformation of constitutionally protected human rights. Since 1982, the *Constitution Act* of Canada has included the *Canadian Charter of Rights and Freedoms*³¹ and Canadians have entered a robust conversation about whether the *Charter* improves or entrenches social and legal inequalities. Australia is a similarly situated nation, with a similar approach to immigration and with considerable parallels in its legal system, but without a constitutional rights document. The *Charter* does not replicate the *Immigration Act*'s statements about rights to enter and remain in Canada, but it does provide that "Every citizen of Canada has the right to enter, remain in and leave Canada" and that both citizens and permanent residents have the right to "...a) move and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province."³² Aside from this provision and from the right to vote and to minority language education, the *Charter* does not refer to citizenship, setting out instead rights for individuals, persons, and First Nations. The Supreme Court of Canada's first and ground-breaking equality rights decision, while not a migration matter, struck down provisions which prevented permanent residents from practising law.³³ The decision had considerable implications for the meaning of membership of the

³¹ Schedule B, Part I, to the *Constitution Act, 1982*

³² Section 6.

³³ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

Canadian community, but few for crossing the membership hurdle. In *Singh*³⁴ the Supreme Court of Canada established that anyone physically present in Canada has the benefit of the *Charter*, setting the stage for a meaningful test of the utility of the Charter for those applying inland to become members of the community. Section D of this Chapter considers *Charter* arguments which have been raised in the area of migration law. In the broader context of comparing migration rights discourses in both nations, the *Charter* has a covert effect on the way rights and identities can be manipulated in this area of the law.

International law adds little or nothing to the array of rights available to those who seek access to a country where they are not already citizens or residents.³⁵ There is no international right to enter a foreign country, or to leave one's own. Even the narrow potential right of genuine refugees not to be returned to face harm is so limited that it is at best a very weak rights claim. My next step in analysing the relationship of rights, identities and nations is to explore why the claims of refugees fail as rights claims and how this contributes to refugee identity and to the identity-based critique of rights.

B. REFUGEE CLAIMS AS RIGHTS CLAIMS

While *prima facie* at international law a refugee has no right to enter any country except that of their nationality, I also argued in Chapter Three that the Refugee Convention's³⁶ provision that refugees must not be returned to countries where they risk persecution does not *effectively* translate into a right to

³⁴ *Re Singh and the Minister of Employment and Immigration* (1985) 17 DLR (4th) 422.

³⁵ Discussed above in Chapter Three at pp. 106-107.

³⁶ *Convention Relating to the Status of Refugees 1951*, 189 UNTS 150 with *1967 Protocol Relating to the Status of Refugees*, 606 UNTS 267.

remain. I agree with Hathaway's assertion that, "The notion of refugee law as a rights based regime is largely illusory."³⁷ The reasons for this are related to the refugee's position as the ultimate other to the nation, and to the refugee's role as a humanitarian claimant seeking the mercy of the nation. A claim for compassion does not effectively function as a right because rights are grounded in equality but compassion is grounded in generosity and inequality. Efforts to shift the claims of refugees to some other basis have not been successful, in part because of the liberal humanitarian consensus surrounding the admission of outsiders. These factors draw the relationship between refugee identities, rights and the nation into a curious alignment which provides a fuller picture of the reasons for the weakness refugee rights discourses.

1. The Refugee Definition in the Highest Courts

Opinions of the highest courts in Australia and Canada interpreting the refugee definition can be analysed by considering the extent to which the interpretation is conducted within, alongside or at a distance from rights discourse. Broadly speaking, decisions which have been most favourable to refugee claimants have analysed that claim in the context of fundamental human rights. That is, they have identified refugees as "rights holders" of some sort, even while keeping some distance from the proposition that the Refugee Convention provides a right to remain in the country of refuge.

*Canada (Attorney-General) v Ward*³⁸ is the most comprehensive of the relevant decisions of the Supreme Court of Canada and the High Court of

³⁷ Hathaway J C, "Reconceiving Refugee Law as Human Rights Protection" (1991) 4 *Journal of Refugee Studies* 113. Hathaway argues that positive reforms in refugee law could be achieved by reformulating the law around the concept of a fundamental right to return to one's own state.

³⁸ (1993), 103 DLR (4th) 1 (SCC).

Australia as it deals systematically with many aspects of the refugee definition. It is also a rare unanimous pronouncement of the Supreme Court of Canada.³⁹ Writing for the Court, Justice La Forest begins by exploring “...the rationale underlying the international refugee protection regime”⁴⁰ and makes thorough use of the traditional sources of treaty interpretation including travaux préparatoires, academic commentary and prevailing authorities.⁴¹ He draws on the Preamble to the Refugee Convention to conclude that:

Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates. It sets out, in a general fashion, the intention of the drafters and thereby the inherent limit to the cases embraced by the Convention.⁴²

La Forest keeps the principle of human rights without discrimination at the forefront of his approach to all aspects of the refugee definition. It provides the justification for his use of Charter interpretation techniques⁴³ and his definition of a “particular social group.”⁴⁴ The *Ward* decision sorts and categorises a number of Federal Court of Appeal decisions which had preceded it. In keeping with the human rights focus, the decision takes a reasonably sympathetic

³⁹ Although the case was argued before a five member panel (of a possible nine) and Stevenson J. did not participate in the judgment.

⁴⁰ Above n38 at 12.

⁴¹ Interestingly, Justice La Forest moves to these sources without elaborating his reasons for doing so, in marked contrast to the High Court of Australia’s approach in *Applicant A and Anor v Minister for Immigration and Ethnic Affairs and Anor* (1997) 142 ALR 331. One explanation for this may be that the refugee definition is written directly into the Canadian law, see above Chapter Three at pp. 119-121.

⁴² Above n38 at 29.

⁴³ *Ibid* at 32-33.

⁴⁴ *Ibid* at 33-34. He states, “The meaning assigned to “particular social group” in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for international refugee protection” at 33.

approach to aspects of the definition presented to the court such as state complicity in persecution, the test for determining fear of persecution, and exclusions from the refugee definition. Justice La Forest, however, could not overlook Ward's dual citizenship and the case was returned to the IRB to consider whether Ward, an Irish citizen, could be adequately protected in Britain, where he also held citizenship. He was ultimately denied refugee status and returned to Britain.

The effect of the Justice La Forest's human rights focus is easier to appreciate in cases where there are varying opinions. In *Chan v Canada (Minister of Employment and Immigration)*⁴⁵ the majority dismissed the appeal on the basis of the evidence given before the CRDD. In an unjustifiable twist on the refugee definition, Justice Major wrote that the applicant had failed to establish "that his fear of forced sterilisation was objectively well-founded,"⁴⁶ neatly sidestepping the issue of whether forced sterilisation amounts to persecution and using the relaxed evidentiary requirements of a refugee hearing to argue that more anecdotal evidence should have been introduced. Justice Major made no mention of rights in any guise in his judgment.

In his strongly worded dissent, Justice La Forest cast his analysis in the human rights discourse he introduced in *Ward*. He linked refugee claims to

⁴⁵ (1995), 128 DLR (4th) 213. The CRDD had found that Mr. Chan was not a refugee and the Federal Court of Appeal agreed. (While formally the Federal Court of Appeal was engaged in judicial review, the decision amounts to an agreement.)

⁴⁶ Ibid at 268. Major J. makes also "assumes without deciding" that *Cheung v Canada (Minister for Employment and Immigration)* (1993), 102 DLR (4th) 214 (FCA, deciding that a woman who had fled China in fear of forced sterilisation was a refugee on the basis of persecution for being a member of a particular social group) was correctly decided (at 258) and refers to the standard of proof in a refugee hearing as "balance of probabilities" (at 268). These statements could have introduced considerable confusion into Canadian refugee jurisprudence were this decision not so clearly based on the majority's suspicion of the evidence given through an interpreter to the CRDD.

human rights violations directly, and rejects the argument that support for his position could lead to a flood of refugees to Canada's borders:

To alter the focus of refugee law away from its paramount concern with basic human rights frustrates the possibility that foreign persecution may be eventually halted by international pressure. To accept at a judicial level that fundamental human rights violations do not serve to grant Convention refugee status minimises one of the principle incentives the international community has to denounce foreign persecution and attempt to effect change abroad: to avoid a flood of refugee claimants.⁴⁷

He repeats the reference to "basic human rights" throughout the judgment and uses it to rework the definition of particular social group he outlined in *Ward*.⁴⁸

One of the most significant aspects of Justice La Forest's approach is that he does not qualify the human rights violations referred to in any way. While the rights violated must be "basic" the violations need not be "serious", "repeated", or otherwise narrowed.

A similar analysis applies to the Supreme Court of Canada's most recent decision interpreting the Refugee Convention, *Pushpanathan v Canada (Minister for Citizenship and Immigration)*.⁴⁹ Although the question of the appropriate standard of review for an IRB decision was not argued in the Trial Division of the Federal Court, or in the Federal Court of Appeal, Justice Bastarache began his analysis of the case from this point. Following the Supreme Court of Canada's "functional and pragmatic" approach to standard of review, this analysis starts with a focus on the legislative intent of the statute

⁴⁷ Ibid at 237.

⁴⁸ In "Chinese Fleeing Sterilisation: Australia's Response Against a Canadian Backdrop" (1998) 10 *International Journal of Refugee Law* 77. I argued that La Forest's definition is awkwardly worded and that this dissent provides further evidence of how unworkable it is.

⁴⁹ [1998] 1 SCR 982; [1998] SCR No. 46 (QL, paragraph references are to this electronic version).

creating the tribunal under review.⁵⁰ In a chain of reasoning which involves some slippage from strict logic, Justice Bastarache looked to *Ward* to determine that the purpose of the Refugee Convention is to protect human rights without discrimination. He then argued that the CRDD is not expert in human rights decision-making and uses this as a strong plank in his conclusion that a correctness standard of review should apply.⁵¹ The purposes of the *Immigration Act* and the expertise of the IRB as a whole (initially named as the tribunal under review) are fully addressed. After setting the opinion on a human rights footing, Justice Bastarache linked the exclusions from the refugee definition to human rights.⁵² He summarised the logic of the exclusions as “...that those who are responsible for persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees....”⁵³ Following this, his conclusion that drug trafficking does not “come[...] close to the core or even form a part of the corpus of fundamental human rights”⁵⁴ comes as no surprise.

Justice Cory, in dissent, opened his opinion by stating, “Mr. Pushpanathan was a member of a group convicted of trafficking in heroin with a street value of \$10 million.”⁵⁵ Justice Bastarache had minimised this aspect of the case by noting that the facts in the case were not in dispute. While the majority opinion

⁵⁰ Para. 26.

⁵¹ Paras. 42-47. This is the least deferential standard of review available under the pragmatic and functional approach.

⁵² Pushpanathan, a permanent resident, had been sentenced to 8 years jail after pleading guilty to trafficking heroin. When he was paroled, the Canadian government issued a deportation order. Pushpanathan applied for refugee status and the CRDD determined he was not a refugee because of the exclusion in Article 1F(c) of the *Refugee Convention* for those who are “...guilty of Acts contrary to the purposes and principles of the United Nations.”

⁵³ Above n 49 at para 63.

⁵⁴ Ibid para 72.

⁵⁵ Ibid para 78.

canvassed principles of treaty interpretation and UN human rights instruments, Justice Cory examines international drug trafficking and the links between drugs and crime. Significantly, he agrees with Justice Bastarache that the Refugee Convention is a human rights instrument,⁵⁶ but also states that human rights violations are not the only conduct central to the UN's purpose and principles.⁵⁷ Justice Cory sidelines the role of human rights in interpreting the Refugee Convention, without dismissing it altogether. He is careful to reject the Federal Court of Appeal's proposition that refugee status is a privilege and therefore that ambiguous exclusions should be resolved against the claimant. He asserts instead that, "the right to claim refugee status constitutes an important right, and any exclusions from that right must be interpreted in accordance with accepted principles."⁵⁸ Unlike Justice Bastarache, Justice Cory does not, however, use human rights discourse as the core interpretive principle for the Refugee Convention. In the Canadian jurisprudence those judges who aim to achieve a generous or broad interpretation of refugee status have done so by invoking the discourse of fundamental human rights.

A similar analysis of the High Court of Australia cases is revealing. The leading Australian decision on the interpretation of the refugee definition, *Chan v Minister for Immigration and Ethnic Affairs*,⁵⁹ establishes that a refugee must face a "real chance" of persecution and that the assessment of refugee status is to be made at the time of the determination in the receiving state rather than at

⁵⁶ Ibid para 127.

⁵⁷ Ibid para 126.

⁵⁸ Ibid para 136.

⁵⁹ (1989), 169 CLR 379.

the time of the claimant's decision to leave their home. Beyond these two points, little is agreed upon in the five opinions. The references to human rights in the judgment are not used as interpretive devices, but rather as references to actions which may *not* constitute persecution. For example, Justice Dawson states that it is unnecessary to determine whether "...other serious violations of human rights for the same reasons would also constitute persecution."⁶⁰ Justice McHugh states that exile or imprisonment "...is such a gross invasion of his human rights as to constitute persecution for reasons of political opinion..."⁶¹ and that "not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes 'being persecuted'."⁶² Both justices leave open the possibility that some human rights violations would not constitute persecution. While undoubtedly the Canadian Supreme Court would agree with this proposition, it signifies a different approach to the refugee definition and a distinctly different interpretive principle informing the jurisprudence.

Two of the justices in *Chan v Minister for Immigration and Ethnic Affairs* cast the intent of the Refugee Convention as humanitarian. Justice Toohy asserts that the "real chance" test "...gives effect to the language of the Convention and to its humanitarian intent"⁶³ and Justice Gaudron argues that the "humanitarian purpose of the Convention," along with the difficulty of finding facts in refugee determinations should "...curb enthusiasm for judicial

⁶⁰ Ibid at 400.

⁶¹ Ibid at 434.

⁶² Ibid at 429.

⁶³ Ibid at 407.

specification of the content of the expression ‘well-founded fear’...’.⁶⁴ The significance of these statements lies in the distinction between humanitarian discourse and rights discourse which I explored in Chapter Four.⁶⁵

Humanitarianism is rooted in inequality and mercy whereas rights are rooted in justice and equality. The difference between categorising the Refugee Convention as being about human rights without discrimination as *Ward* did and being about humanitarianism seems innocuous on its face. Nonetheless, the distinction positions subsequent interpretations of the refugee definition differently within liberal legal discourse. The power of rights rhetoric is missing from discussions of humanitarianism, as is the legal power of rights.

The analytic importance of rights discourse is highlighted in the *Applicants A and B v Minister for Immigration and Ethnic Affairs*⁶⁶ where the High Court of Australia interprets the phrase “membership of a particular social group” in the case of two PRC nationals fleeing the reach of the one-child policy. For Chief Justice Brennan in dissent, fundamental human rights are the key to interpreting the refugee definition. They inform the interpretation of persecution and, in turn, of particular social group:

If a putative refugee’s enjoyment of his or her fundamental rights and freedoms is denied by a well-founded fear of persecution for a reason that distinguishes the victims as a group from society at large, it would be contrary to the ‘principle that human beings shall enjoy fundamental rights and freedoms without discrimination’ [Refugee Convention Preamble]. It would therefore be contrary to the object and purpose of the Convention to exclude that putative refugee from the protection which the Convention requires Contracting Parties to accord.⁶⁷

⁶⁴ Ibid at 413.

⁶⁵ See especially pp. 195-200.

⁶⁶ (1997) 142 ALR 133.

⁶⁷ Ibid. at 336.

The other dissident, Justice Kirby, takes the opposite approach, stating that, “The appeal is not about ‘fundamental human rights’ as such, although clearly upon one view, they are affected. The appellants seek no more than the enforcement of Australia’s domestic law.”⁶⁸ The distinction here is crucial. It plainly indicates the superior power of domestic rights claims and the potential weakness that fundamental human rights, because of their universality, carry with them. Those claiming a right directly under the *Migration Act* raise a superior, specific, claim against Australia.

For the majority justices,⁶⁹ fundamental human rights are only discussed in reference to the Canadian cases which were argued. Their comments reflect the Court’s unanimous, but flawed,⁷⁰ view that the Canadian jurisprudence results from the *Charter of Rights and Freedoms*. The framework work of this decision closely resembles the more recent *Pushpanathan* case in the Supreme Court of Canada, with an emphasis on human rights corresponding with broader interpretations of all aspects of the refugee definition. Justice Kirby’s view, which moves the rights discourse to within the nation, is even more expansive.

In a recent refugee case brought in the High Court’s original jurisdiction to issue prerogative writs against Commonwealth officers⁷¹ Justice Hayne sitting alone explicitly rejected arguments put to him in human rights terms. The unsuccessful refugee claimant whom the government was attempting to

⁶⁸ Ibid. at 385.

⁶⁹ Dawson, McHugh and Gummow JJ.

⁷⁰ I discuss this in “Chinese Fleeing Sterilisation” above n48.

⁷¹ The case is *Re Minister for Immigration and Multicultural Affairs & Anor; Ex Parte SE* [1998] HCA 72 (25 November 1998, paragraph references are to the electronic version in the AustLii Database).

return to Somalia argued that the section of the *Migration Act* which made his removal mandatory should be interpreted in light of human rights obligations. In the words of the judgment: "...to remove to a place where the applicant's human rights may be violated was not reasonable and that the Act should be construed as not permitting or requiring action that would violate Australia's obligations under various international instruments concerning human rights."⁷²

Justice Hayne's response makes no mention of human rights:

To read the provisions of s 198(6) of the Act as limited in the way for which the applicant contends would, in effect, require the first respondent to exercise his power to permit the applicant to remain in Australia despite his having been refused refugee status. The power under ss 48B and 417 to permit persons such as the applicant to remain in the country are powers that are expressed as discretionary powers which the Minister is not under a duty to consider using. That being so, the construction of s. 198(6) for which the applicant contends is not arguable.⁷³

This response strikes the tone of procedural distancing which is typical of several recent High Court decisions about refugees to be discussed below.⁷⁴ It is shocking in the context of the *SE* case *not* to discuss human rights. British Airways was required to remove SE from Australia as he had arrived without documents on a British Airways flight. They arranged to do so with the help of an specialist, non-Australian company which intended to escort him in handcuffs and to be with him at all times at flight stopovers. Despite evidence that the Department had rejected the company's suggestion that SE be sedated to facilitate removal, Justice Hayne held that:

...it is not necessary to consider whether the obligation to remove an unlawful non-citizen carries with it a power to exercise any force or

⁷² Ibid at para 18.

⁷³ Ibid at para 19.

⁷⁴ At pp. 289-293.

physical restraint over that person until arrival at the first port of call or ultimate destination. It is not necessary to consider those matters because there is no evidence to suggest that the Minister or the Department or any officer of it threatens or intends to assert such a power over the applicant.⁷⁵

Obviously forcibly removing individuals from the country is a messy business. Nonetheless, it would be one thing for the Court to assert that the resultant human rights violations are a unpleasant accompaniment to a sovereign's rights, it is quite another to say that what British Airways chooses to do is none of our business. Despite this decision, SE was not removed immediately. The UN Torture Committee found that further attempts to remove him would violate the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁷⁶

Decisions of the highest courts interpreting the Refugee Convention are few. This is a new area of jurisprudential concern in each nation and the barriers to reaching the highest court are myriad. Nonetheless, each decision comments on a wide array of Federal Court decisions and sets a tone for those courts and for the refugee tribunals in each nation. Further, considering these cases bears out what my examination of the refugee process in Chapter Three found – that how a decision-maker approaches the factual situations which are so foreign to our legal systems has more influence on outcomes for individual claimants than how the highest courts guide the interpretation of the refugee definition. This is seen most dramatically in the contrast between the majority and dissenting opinions in the Canadian *Chan* case, where even at the highest appellate level the case turned on whether the claimant was viewed as credible.

⁷⁵ Ibid at para 13.

⁷⁶ 23 ILM 1027 and 24 ILM 535.

The role of human rights discourses in these decisions is closely aligned with the Courts' approaches to refugee identities.

2. Rights and Refugee Identities

The story told by these cases complicates the critique of rights discourses. When the refugee definition is interpreted within a rights discourse, that of fundamental human rights, the result is a broader reading of the law and consequently a more likely successful claim. That is, rights discourse is favourable for refugee claimants to this extent at least. Nonetheless, the role of human rights discourses reinforces the narrow version of refugee identity I discussed in Chapter Three and falls short of ensuring that refugee claims are treated as rights claims in domestic courts.

The discourse of fundamental human rights provides guidance in interpreting the Refugee Convention which draws on a vision of refugee identity and is strongly linked to international law discourses. In this discourse the refugee is identified as a holder of certain rights and as a victim of fundamental human rights abuses. The rights which are held are those fundamental to our humanity, rights which are held by all individuals. They are not rights to enter or remain in any nation, nor are they rights to be protected by a "foreign" nation. The discourse of fundamental human rights is closely linked to the international law context where it evolved and is marked with characteristics of that setting. Two of those characteristics which are important here are the simmering instability of fundamental human rights in the face of cultural relativity and the difficulties of enforcing human rights norms at all. A specific enumeration of fundamental human rights is difficult to achieve. There are strong links between the phrase and a sense of dignity and humanity; as is

echoed by Canadian Justice Linden in describing people refusing forced sterilisation as "...united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it..."⁷⁷ What is "fundamental" about fundamental human rights is often the emotional reaction provoked by their breach. This commonality – which parallels the definition of humanitarianism in Chapter Four - is not sufficient for the blunt reasoning of the law. It leaves a troublesome sense that we will know a fundamental human right when we see it. In combination with this difficulty of precise enumeration comes the recognition that fundamental human rights are related to our humanity, not tied to a national legal system. There is a strength and unity in this discourse which grounds legally powerful and strongly emotive decisions but it is not the same degree of strength which derives from, for example, constitutionally protected rights in domestic legal systems.

By linking the refugee definition to the discourse of fundamental human rights the refugee is identified as a rights holder. The refugee thus occupies one of Patricia Williams's "islands of entitlement."⁷⁸ But the island is a small one. The entitlement accorded to the refugee is nothing more than we would accord to anyone. As such the rights entitlement is minimal indeed, and the floodgates case for keeping it that way is strong. A successful refugee claim is based on fitting into the narrow configurations of the refugee definition. That is, identifying oneself as distinct from all others who have fundamental human rights in some ways. When the discourse of fundamental human rights is the interpretive tool it reinforces the identity of the refugee as a certain type of

⁷⁷ *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214 (F.C.A.).

⁷⁸ Above n2 at 233-4.

victim, because the breach of a fundamental human rights is only part of the definition. This accords with what the examination of the refugee determination process in Chapter Three demonstrated - a narrowing of identity to a mere pinprick and a strong appeal to the liberal humanitarian consensus.

The discourse of fundamental human rights identifies the refugee as a holder of certain rights and also identifies the refugee as a victim of certain types of rights breaches. It is because refugee identity is rooted in the breach of rights rather than in holding the rights themselves that the humanitarian impulse to view the refugee as deserving of compassion rather than justice is triggered. The identity as refugee is restrictive because in order to fit within it the individual must continue to be a figure worthy of compassion. Under the current Australian and Canadian programs of treating refugees as permanent migrants,⁷⁹ this puts the refugee in an impossible situation. As a migrant she is expected to assimilate and to serve the needs of nation; as a refugee she is expected to be unable to.

Even when a refugee claim is analysed using the discourse of fundamental human rights, which these cases show only occurs some of the time, it falls short of being a rights claim. The rights which are accorded to members of the nation are rights to enter and to remain. The *Refugee Convention's* provision that refugees not be refouled could constitute a right to remain only because it is impossible to expel individuals into some empty non-national space. Analysing

⁷⁹ In 1999 Australia introduced temporary refugee visas. First for ethnic Albanians fleeing Kosovo and then for East Timorese at the time when the international peacekeeping force led by Australia was deployed. In November 1999 the government introduced temporary protection visas for "boat people", Visa subclass 785. This is a significant difference as both the Kosovars and the East Timorese were brought to Australia from elsewhere and thus do not come within Australia's *Refugee Convention* obligations. Those arriving on boats do trigger the *Convention* obligation if they are determined to be refugees and if they reach Australian territorial waters.

the refugee definition using a discourse of fundamental human rights is not enough to counter the weight of quotas, political pressure and national sovereignty which ensure that refugees are allowed to remain because of the goodness of the nation rather than due to their fundamental right to stay. Moreover, the discourse of human rights is used to analyse what the other nation has done or failed to do for the refugee claimant. It assists us in understanding what persecution is, when a fear is well-founded, how to define a particular social group. Fundamental human rights are things breached by the others, not claims made against us. The analysis of fundamental human rights in these cases is focused outside the nation, not turned inward to look at *our own* behaviour or *our own* obligations. When the refugee raises a fundamental human rights argument it is linked to something that happened to them in the past and will happen to them in the future, rather than being some entitlement they are claiming in the present.

An important aspect of any critique of rights discourse is the understanding that rights are hierarchically arranged legal categories. That is, that some rights are better than others. The rights which command the most persuasive power are those most closely associated with the liberal legal tradition, and hence most relevant to the mythic struggle between the individual and the state. For this reason, the rights of the criminal accused are often more powerful than the more recently devised “rights” of victims of crime⁸⁰ and the civil and political rights expressed in the International Convention on Civil and

⁸⁰ I develop this argument in " Reassessment of the Effects of a Constitutional Charter of Rights on the discourse of Sexual Violence in Canada" (1994) 22 *International Journal of the Sociology of Law* 291.

Political Rights⁸¹ are regarded as more important than the social and group rights of the Covenant on Economic, Social and Cultural Rights.⁸² The potential right of a refugee not to be returned to a persecutory state is far from the core of liberal legalism as most liberal frameworks consider only what happens inside the state and it is consequently low in any version of the hierarchy of rights. While the individual may be involved in a struggle with the state, as a non-member her claims do not resonate within the nation. This is one more factor contributing to the failure of refugee claims for protection to function effectively as rights claims.

Despite all of this, the discourse of fundamental human rights remains the most persuasive alternative presently available for interpreting the refugee definition. As the highest courts' decisions demonstrate, it is the discourse of fundamental human rights which is invoked when judges seek to rule in favour of refugee claims, and broad appeals to fundamental human rights are effective in patching over infelicities in legal reasoning.⁸³ As well, any rights based discourse contains at least some transformative potential, some chance that the right in question may ascend the hierarchy of rights.⁸⁴ In Patricia Williams' words, all rights are "islands of entitlement."⁸⁵ An identity as a rights holder is a stronger base from which to mount an argument which resonates within liberal

⁸¹ Above n8.

⁸² Above n6.

⁸³ See especially Justice La Forest in *Ward*, Justice Bastarache in *Pushpanathan* and Justice Brennan in *Applicant A*, all discussed in the preceding section.

⁸⁴ Evidence of this is found in the *Pushpanathan* decision where Justice Cory, in dissent, states that there is an important "right" to make a refugee claim (above n49 at para 136) even though his approach to interpreting the definition is not grounded in rights discourse and his conclusions are unfavourable to the applicant. Depending on future developments, this may constitute some early evidence of a shift in Canadian legal discourse about refugees.

legalism than any other. The following section on the process rights illustrates this point further.

C. THE SUBSTANCE OF PROCESS RIGHTS

The traditional process rights are crucial in migration law's administrative decision-making setting. Given the linkage of admission decisions to the historically non-reviewable royal prerogative⁸⁶ and the absence of a substantive right to enter a nation, the development of procedural safeguards in migration law processes reveals a great deal about identifications of the nation and the potential right holder. Procedural rights are crucial to the liberal dichotomy between the individual and the state. The way these rights are constructed and deployed depicts both sides of that dichotomy. The range of potential differences is seen in contrasting judicial opinion regarding process rights in the migration area. Justice Kirby classifies the refugee claimant as similar to all other people in Australia by stating that judicial review does not entitle an applicant to be accepted as a refugee, "...it simply secures to him or her the basic entitlement, enjoyed by every person sheltering under the laws of this country, citizen or not...".⁸⁷ In contrast, Justice Callinan reinforces a strict distinction between "us" and "them" regardless of whether "they" are already in Australia and subject to the Australian legal system, with the view that the limited provisions for judicial review under the *Migration Act* "...gave entrants to Australia [...] certain rights in respect of what would otherwise be matters for

⁸⁵ See above at n2.

⁸⁶ See discussion in Chapter Four at pp. 235-241.

⁸⁷ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 292.

the executive exclusively...".⁸⁸ The distance between these two Australian perspectives marks the length of the spectrum. In discussing the substance of process rights I argue in turn that process rights depict those who hold them in substantial ways; that procedural rights are at the core of liberal legality and therefore closely linked to the nation itself; and that the Canadian *Charter* jurisprudence enhances the important slippage between substance and process rights.

1. The 1985 Watershed Decisions: *Singh* and *Kioa*

In both Australia and Canada an important procedural rights decision marks the watershed for migration law in the highest courts and introduces the contemporary era of migration jurisprudence. The Supreme Court of Canada handed down its decision in *Re Singh and the Minister of Employment and Immigration*⁸⁹ in April 1985, eight months before the High Court of Australia decision in *Kioa v West*.⁹⁰ Both cases concerned the meaning of natural justice for potential refugee or humanitarian entrants who were already in the country, and in particular whether claimants were entitled to be heard in person.

Singh was argued during the early days of the Canadian *Charter*, but the Supreme Court split 3:3 on whether to decide the case under the *Charter* or under the moribund *Canadian Bill of Rights*.⁹¹ Justice Wilson's *Charter*-based

⁸⁸ *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs; ex* [1999] HCA 14 (14th April 1999) at para 277.

⁸⁹ (1985) 17 DLR (4th) 422.

⁹⁰ (1985) 159 CLR 550.

⁹¹ SC 1960, c.44. Justice Beetz penned the opinion based on the *Bill of Rights*, with Estey and McIntyre JJ. concurring. The opinion must have surprised those involved in the case as no *Bill of Rights* arguments had been put to the Court. The rights-privilege distinction had previously been fatal to use of the *Bill of Rights* and in the realm of migration law it would surely have been seen by 1985 as almost entirely useless.

decision is the part of the judgment which is frequently cited and which looms large in Canadian mythic jurisprudence.⁹² She reasoned that the use of the term "everyone" in section 7 of the *Charter* meant that the provision applied to all who were physically present in Canada, regardless of citizenship and of whether they had been allowed through border controls or not.⁹³ The second step in Justice Wilson's analysis was to determine that the substantive right of a refugee not to be refouled triggered the interests in life, liberty and security of the person protected under section 7.⁹⁴ This reasoning introduces the important slippage between substantive and procedural rights in *Charter* jurisprudence which I discuss below.⁹⁵ It also provides some hint of a possibility of treating a refugee claim as a substantive right, within a confined framework.⁹⁶ On concluding that both liberty and security of the person were threatened by definition when a refugee was refouled, Justice Wilson concluded that procedures for refugee determination had to conform to section 7's "principles of fundamental justice". Although she concluded that section 7 would not always trigger a need for an oral hearing, "...where a serious issue of credibility

⁹² Eliadis F P, "The Swing from Singh: The Narrowing of Application of the Charter in Immigration Law" (1994) 26 *Imm LR* (2d) 130. Then Chief Justice Dickson and present Chief Justice Lamer signed on to the Wilson J. opinion. Beetz J. wrote the other opinion, to which Estey and McIntyre JJ. committed themselves. One potential reason for the influence of Justice Wilson's opinion in *Singh* is the relative profiles of the judges involved.

⁹³ Above n 89 at 456; see also 462 - 463 where a distinction is drawn from the American approach to the same question.

⁹⁴ Section 7 reads, "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."

⁹⁵ At pp. 296-309.

⁹⁶ For example, Justice Wilson states, "On these appeals this court is being asked by the appellants to accept that the substantive rights of Convention refugees have been determined by the *Immigration Act, 1976* itself and the court need concern itself only with the question whether the procedural scheme set up by the Act for the determination of that status is consistent with the requirements of fundamental justice articulated in s.7 of the *Charter*." Above n89 at 463-464.

is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing." In ruling that section 1 of the *Charter*⁹⁷ did not save the section 7 infringement, Justice Wilson stated that:

...it is important to bear in mind that the rights and freedoms set out in the *Charter* are fundamental to the political structure of Canada and are guaranteed by the *Charter* as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.⁹⁸

Both Justices Wilson and Beetz are concerned in *Singh* with an opportunity to know the case against oneself, with the reasons for decision and with determining procedural protections based on the consequences for the individual involved. They each conclude that while fundamental justice - either *Charter* or *Bill of Rights* style - may not always require an oral hearing, it does always require an oral hearing for those claiming refugee status when inside Canada. Bringing the decision under the *Charter* provided a way for Justice Wilson to link the issue directly to the values of Canada as a nation.

Mr. Kioa did not claim refugee status but, rather, sought to remain in Australia under the former section 6A(1)(e) of the *Migration Act*, strong compassionate and humanitarian grounds for the grant of a permanent entry permit.⁹⁹ All four of the majority judges held that the decision whether to grant an entry permit on this basis required that the decision-maker adhere to

⁹⁷ Section 1 reads:

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.

⁹⁸ Above n89 at 468.

⁹⁹ See full discussion of this section in Chapter 4 at pp. 231-234.

principles of natural justice.¹⁰⁰ They also agreed that in the particular circumstances of this case, natural justice included an opportunity to be heard.¹⁰¹ There was a range of disagreement, however, over which particular facts triggered the need to be heard. Justices Mason and Wilson held that the implication that Mr. Kioa had been involved in illegal activities or had generally been deceptive triggered a natural justice requirement that he be able to respond to this potential basis for a discretionary decision.¹⁰² Justice Wilson also stated that as strong humanitarian and compassionate grounds were in issue, "...this may strengthen the claim to an expectation to be heard in relation to such a decision."¹⁰³ Justice Brennan found that while a hearing had been required on these facts, the requirement could be overridden by the control objectives of the

Migration Act:

When the purpose for which the provision is conferred – control of the membership of the Australian people and their visitors – would be frustrated by giving a hearing, the principles of natural justice do not require that a hearing be given. But there is no reason to think that giving a hearing to Mr. Kioa would impair the Minister's control over the disposition of the Kioa family.¹⁰⁴

Justice Brennan thereby subordinated process rights to the needs of the nation, in reasoning which is consistent with strong executive control over

¹⁰⁰ Gibbs C.J. dissented. Mason, Wilson, Brennan and Deane JJ. comprised the majority.

¹⁰¹ Above n96 per Mason J. at p. 587, Wilson J. at 602, Brennan J. at 626 and Deane J. at 633.

¹⁰² Mason J. stated the proposition this way:

In the ordinary course of granting or refusing entry permits there is not occasion for the principles of natural justice to be called into play. [...] But if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter.... (ibid. at 587).

¹⁰³ Ibid at 600.

¹⁰⁴ Ibid at 626.

admission to the nation and the royal prerogative pedigree. Justice Deane, on the other hand, wrote an opinion agreeing that Mr. Kioa ought to have been heard before a decision was made and speculating that few situations would justify denying such an opportunity. He stated:

Putting aside cases of necessity however and in the absence of any clear legislative intent excluding or modifying the requirement of procedural fairness, it is difficult to envisage a case in which the particular circumstances would either exclude those requirements completely in relation to the making of a deportation order or so modify them that the person affected was not entitled to an adequate opportunity of being heard before he was subjected to the adverse effects of such an order.¹⁰⁵

Like Justice Brennan, Justice Deane situates his reasoning in relation to the needs of the nation. He opens his analysis by asserting that, “An alien who is unlawfully within this country is not an outlaw,”¹⁰⁶ and emphasises that “an alien is not without status or standing in the land...” and “...can invoke the protection of the law....”¹⁰⁷ Justice Deane recognises the importance of procedural rights to identities and how the removal of procedural rights reduces the substance of identity:

The making of a deportation order against a prohibited immigrant drastically and adversely changes his rights and, to some extent, dehumanises his status.¹⁰⁸

While Justices Deane and Brennan reached the same conclusion in *Kioa* their agreement is almost coincidental. Justice Brennan privileges the identity of the

¹⁰⁵ Ibid at 633.

¹⁰⁶ Ibid at 631.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid at 632.

nation and Justice Deane the identity of the person. What their opinions share is an overt acknowledgment of the interests at stake.

Singh and *Kioa* were both regarded as important victories for those in the most needy group of people hoping to join the Australian and Canadian communities. Both judgments contain some passages in which the judges reflect on the how the decision before them is linked to the needs and self-perceptions of the nation, and both judgments demonstrate the paucity of the term “procedural” rights for outcomes which are linked to substantive rights.¹⁰⁹ This latter point is underscored by how the respective governments responded to the decisions. In Canada, *Singh* was an important trigger for the establishment of the presently operative refugee determination procedure before the Immigration and Refugee Board. In Australia, *Kioa* was followed at a short interval by curtailing the operation of citizenship by birth.. In argument and in the press the fact that *Kioa* had an Australian born daughter who was a citizen was emphasised. While nothing turned on it in the judgment, each of the opinions addressed it. The Australian *Citizenship Act* was amended soon after to provide that only children born to citizens and permanent residents would become Australian citizens at birth.¹¹⁰ As well, since *Kioa* the discretion to allow someone to remain on humanitarian grounds has been made non-compellable and non-reviewable. Decisions under the *Migration Act* are no longer reviewable for compliance with the principles of natural justice. The story since *Kioa* is of increasing assertion of executive power over the

¹⁰⁹ For *Singh* this is true because of the influence the potentially substantive right not to be refouled has on Wilson J.’s reasoning. In *Kioa* this is the case because he has remained in Australia.

¹¹⁰ *Australian Citizenship Act 1948* (Cth) s.10(2).

migration area. By contrast, the post-*Singh* story in Canada is of moving refugee determination further from the core of executive control.¹¹¹

2. Narrowing process rights and identities

Decisions since this time have continued to reflect the initial directions established by these governmental responses, with the Australian Court being called upon to assess a successive range of executive assertions of control in this area and the Canadian Court operating under the maturing *Charter's* monopoly over rights discourse in that country. As well, decisions of both courts have continued to be identifiable on the basis of their positioning of the nation and the other in process rights scenarios.

In *Lim v Minister for Immigration*¹¹² the High Court held that the provisions requiring mandatory detention of boat people arriving in Australia were constitutional with the exception of the provision that "a court is not to order the release from custody of a designated person,"¹¹³ which the majority held had to be read down to permit a court to order the release of persons

¹¹¹ This will be curtailed if the recommendations of the 1998 Legislative Review are followed.

¹¹² (1992), 176 CLR 1.

¹¹³ *Migration Act* 1958 (Cth) s. 177 [called s.54R at the time the case was argued].

The mandatory detention provisions at that time applied only to "designated persons" defined as:

- a non-citizen who:
 - has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992;
 - and has not presented a visa; and is in Australia;
 - and has not been granted an entry permit; and is a person to whom the Department has given a designation by:
 - determining and recording which boat he or she was on; and
 - giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;
- and includes a non-citizen born in Australia whose mother is a designated person.

Section has since been reworded slightly. Section 189 provides for mandatory detention of unlawful non-citizens who are not boat people. Detention can be terminated by the grant of a bridging visa.

unlawfully detained.¹¹⁴ The impugned legislation had been explicitly enacted "in the national interest"¹¹⁵ and was an attempt to remove all process rights from a narrowly defined group of "aliens." Having concluded that the power to detain aliens applying for refugee status was incidental to the power to exclude or deport aliens, and further that this "application detention" was not punitive in nature, the Court therefore held that it was not a prohibited exercise by the executive of judicial power.¹¹⁶ It was precisely at the removal of process rights that the court balked. In this legislation, the various process rights attendant to having detention reviewed by a court are the barest minimum of what constitutes procedural rights.¹¹⁷ Protection against arbitrary detention by executive decree is a core value of the common law system, intertwined with the evolution of all process rights beginning with habeas corpus. The decision underscores how integral process rights are to liberal legalism and its rule of law ideology.

While the decision preserves these rights, its tenor is considerably different from that of *Kioa*, as it revolves around the constitutional "aliens" power. The identity of the appellants in the case is primarily as "alien." Attempts made in argument to raise issues related to the *Refugee Convention* or the *International Covenant on Civil and Political Rights* - which would have

¹¹⁴ Mason C.J., Toohey and McHugh JJ in dissent held that the section was to be read in this manner as it was written and hence that it was valid.

¹¹⁵ *Migration Act* s.176.

¹¹⁶ See Brennan, Deane, and Dawson JJ. above n112 at 30-32, Mason CJ. at 10, Gaudron J. at 53, McHugh J. at 71.

¹¹⁷ As Justices Brennan, Deane and Dawson state, "...citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth." *Ibid.* at 28-29.

framed the applicants as something other than alien - are not taken up in the opinions. Alien identity is intertwined with the legislation which empowers the executive to "designate" individuals for detention by naming the boats on which they arrive and then assigning "identifiers" to particular individuals.¹¹⁸ The assumptions embedded in this "us-them" distinction are put in issue by Justice Gaudron who cautions against equating "non-citizen" with "alien," noting that "...membership of the community constituting the Australian body politic, for which the criterion is now, but was not always, citizenship, is a matter of such fundamental importance that, in my view, it is necessary that the questions be acknowledged even if they are not answered."¹¹⁹ Justice McHugh also brings the Australian community to the forefront in his analysis by characterising the purpose of the legislation as "...to prevent the alien from entering into the community until the determination [regarding an entry permit or refugee status] is made."¹²⁰ This emphasises how detention contains these outsiders, despite the fact that the applicants are already within Australian territory. The case contrasts those identified as aliens, whose names and numbers are assigned by the state, with the Australian community. *Lim* leaves the nation with control over the identifiers of individuals and accepts reduction of their procedural rights on the basis of their alien status.

A series of cases since *Lim* have tested additional reductions in procedural rights accorded to refugee claimants and upheld them in each case, with the

¹¹⁸ Under the impugned legislation, the state asserts complete control over the identity of the other. The state names each of the boats that these people arrive on and then numbers each of the people. The combination of naming and numbering is the executive act which brings individuals within the scope of the legislation. Someone who arrives on a boat illegally, but whose identity is not redefined in this way by the state, is beyond the reach of the legislation.

¹¹⁹ Above n112 at 53.

¹²⁰ *Ibid.* at 71. See also 73.

opinions relying in part on contrasts between national and outsider identities. In *Fang v Minister for Immigration and Ethnic Affairs*¹²¹ the Full Court of the Federal Court considered the case of a group of ethnic Chinese who had been born in Vietnam and expelled to China where they had allegedly been resettled.¹²² The majority found that while the group was denied procedural fairness and the protection of provisions of international treaties, this was done expressly by Parliamentary intent and therefore could not be interfered with by the Court.¹²³ The procedures which were upheld included not informing those arriving of their right to make a visa application, not informing them of their right to legal advice, and requiring precise language to constitute a refugee claim. Rejecting the traditional statutory interpretation rule that strict compliance with particular forms is not fatal because of the evident Parliamentary intention to the contrary, the Court in *Fang* found that "... the prescription of the form is one of substance and is not merely procedural."¹²⁴

¹²¹ (1996) 135 ALR 583 (Full Court - Federal Court of Australia). Although this is not a High Court case, I have included it because its holdings are remarkable.

¹²² The group included some in a younger generation who had been born in China. Their claims included claims of very poor treatment and social ostracism in China.

¹²³ Summing up his judgment, Justice Nicholson stated:

This is a case in which parliament has negated the possibility of common law concepts of procedural fairness applying in favour of the non-citizen applicants. Parliament has achieved this by the enactment of ss45-57 and ss193(2) and 198(4) of the Migration Act. The inference from the findings of the trial judge is that the representatives of the relevant arm of the executive were well informed of this and avoided acting so as to place the applicants in the position where they had the means to apply for a protection visa when the course remained open to them, prior to its preclusion by legislation. While that executive conduct does not accord with internationally expressed goals relating to conduct in relation to refugees, the conditions for application of international law, as prescribed by Australian domestic law, are not present to enable international law to control that conduct. Furthermore, such conduct was supported by the enactments of the Australian Parliament which, to that extent, evince an intention in relation to non-citizens to negate the application of those internationally commended basic procedural requirements. Above n121 at 634-34.

¹²⁴ *Ibid* at 617.

This demonstrates perversely the substantive dimension of process rights. The majority's acknowledgment that these applicants are likely to have cultural and linguistic difficulties, as well as being traumatised, isolated and detained¹²⁵ did not inspire them to find ambiguity in the legislation.

Fang approved an important set of the executive's moves to limit procedural rights at the front-end of the refugee application process. The cases which followed upheld a narrowing of procedural rights in the post-decision phase. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*¹²⁶ the High Court held that a shift in the language of the *Migration Act* from empowering the Minister to make a determination as to refugee status to allowing that the Minister “may determine” that a person is a refugee “if the Minister is satisfied that the person is a refugee”¹²⁷ alters the focus of judicial review.¹²⁸ The decision has the effect of increasing the degree of curial deference to refugee determination decision-makers. In the plurality judgment the issue is presented as one of pure procedure. In his separate judgment, where he concurs regarding “satisfaction,”¹²⁹ Justice Kirby situates the decision at the border of the nation:

The decisions committed to them [refugee decision makers] are extremely important for the persons involved. But they are also important to Australia as a recipient nation. This is because the composition of the community is in question. Its conformity with an important international

¹²⁵ *Ibid* at 633 and *passim*.

¹²⁶ (1986), 185 CLR 259.

¹²⁷ *Migration Act* s. 22AA (at that time).

¹²⁸ Above note 126 at 275-275. The court does also hold that it is no longer the case that a decision as to “satisfaction” is unreviewable.

¹²⁹ *Ibid* at 295.

convention is at stake. Its reputation as a country of refuge which decides claims of refugee status according to the law is involved.¹³⁰

While this broader perspective does not lead to a different conclusion in the case, it serves as an important reminder of the contrast being played out between individual/outsider and the nation and the role of these decisions in constituting the boundary of the nation. The deference to the Refugee Review Tribunal is confirmed in *Minister of Immigration and Ethnic Affairs v Guo*¹³¹ in which the High Court warns the Federal Court against “...reading such [RRT] reasons with an over-zealous eye...”¹³²

In its most recent refugee decisions, the High Court has upheld the 1994 amendments to the *Migration Act* which reduced the grounds of review available to the Federal Court in considering refugee decisions.¹³³ In both *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs*¹³⁴ and *Minister for Immigration and Multicultural Affairs v Eshetu*¹³⁵ the High Court confronted cases where the RRT had dealt with credibility issues in problematic ways.¹³⁶ Despite this, the highest degree of deference is shown to

¹³⁰ Ibid at 292.

¹³¹ (1997) 144 ALR 567 (HC)

¹³² Ibid at 593 (per Kirby J in a separate concurring judgment).

¹³³ Part 8 of the Act, introduced by *Migration Legislation (Amendment Act) 1992*. RRT decisions can not now be reviewed on grounds of failure to observe procedures in the Act, inappropriate delegation, decision not authorised by Act or regulations, improper exercise of power, error of law, fraud or bias, no evidence. Decisions are not reviewable on the ground of unreasonableness or breach of the rules of natural justice. (Section 476).

As well, Part 8 removes some decisions under the Act from any type of judicial scrutiny.

¹³⁴ [1999] HCA 14 (14 April 1999)

¹³⁵ [1999] HCA 21 (13 May 1999)

¹³⁶ With regard to Ms Abebe, the RRT states that “The applicant now has a long history, much of it admitted by her, of having told untruths. Her claims as to fear and confusion wear thin after six or seven occasions of ‘clearing the state’ as it were.” (cited in above n134 at para 76). In Mr. Eshetu’s case, the Full Court of the Federal Court found the RRT’s conclusions about his

RRT decision-makers. The *Abebe* case approves the reduction of grounds of review scheme and *Eshetu* affirms that the Court will not permit the one plausible end run around this scheme which had remained.¹³⁷ As two of the dissenters in *Abebe* state:

...to define the jurisdiction of a federal court to determine controversies with respect to those rights and liabilities by excluding grounds for relief which otherwise would be available has the effect of restricting or denying the right or liability itself.¹³⁸

The judges conclude that this “...stultifies the exercise of the judicial power of the Commonwealth”¹³⁹ and is therefore a constitutional wrong. The more serious wrong is, of course, to the rights holders. To hold a right with nowhere to exercise it makes it merely rhetorical as it moves it outside my functional definition of rights.¹⁴⁰ The story represented by the recent High Court of Australia cases is one of increasing restriction of procedural rights for refugee claimants.

Procedural rights create a space for the identity of a refugee or other migration claimant to be articulated. In the High Court’s ruling about *Kioa* we

evidence to be so unreasonable that no reasonable decision-maker could have reached them. See Ch 3 pp. 134-151 regarding the difficulties of making credibility determinations in the RRT. Both sets of RRT reasons emphasise reliance on DFAT information and an processes of comparing evidence which would not likely be acceptable under CRDD procedures. In each set of reasons it is clear that the Tribunal has developed an attitude of exasperation towards the claimant.

¹³⁷ On the basis of s.420 of the *Migration Act* and argument was put to the Court that “substantial justice” incorporated necessarily the principles of “natural justice”. This argument was defeated in *Eshetu*.

¹³⁸ Above n 134 at para 143, per Gummow and Hayne JJ. Gaudron J. also dissented.

¹³⁹ *Ibid.*

¹⁴⁰ It is for this reason that I take issue with the conclusion of Gaudron and Kirby JJ. that “The effect of s.476(2) is not to relieve the Tribunal from observance of the rules of natural justice or to authorise the making of unreasonable decisions. Rather, it is to forbid the Federal Court from reviewing a decision on those grounds.” (above n134 at para 64). While they note that the Constitution protects the right to seek mandamus or prohibition in the High Court, the tenor of these recent decisions leads little room for optimism about the Court interpreting the criteria for those writs broadly.

learn a considerable amount about Mr. Kioa himself. While this is presented through the words of the original decision-maker, the intense scrutiny of that decision makes it important to each opinion comprising the judgment. In contrast, we learn comparatively little about either Ms Abebe or Mr Eshetu as the decisions really have little to do with them. The restrictions which narrow their procedural rights, also narrow the space for their identities to seep through into appellate judgment. The negotiated and malleable nature of legally constructed identity facilitates this restriction and calls to our attention how the court controls the appearance of the individual's identity to fit its jurisprudential objectives. In a parallel movement to this, the contrast between the individual and the nation is much less evident in the later decisions such as *Guo, Abebe* and *Eshetu* and was diminishing in *Fang* and *Wu Shan Liang*. As the identity of the individual is diminished, that of the nation overwhelms the balance so that the contrast between the two, which situates what is at stake in these cases, is no longer visible. The tension between the individual and the state which is traditionally portrayed in process rights embodies a recognition of the individual. As alien outsiders disappear from the equation, they lose this recognition. Rights express a relationship between people on either side of the boundary created by the right. In this setting, the nation's boundary is at issue. When the right diminishes, its holder disappears from view. The nation is, as Fitzpatrick expresses, aspiring to unattainable universality.¹⁴¹

These cases demonstrate the two ways that process rights are substantive. First, procedural rights are the substance itself of liberal legalism. In the enduring logic of the legal system, nothing is more significant than the rights

associated with being heard in a court. The falseness of the dichotomy between procedural and substantive rights is seen in the relationship between them: procedural rights are integral to the system, substantive rights are viewed as some type of additional entitlement.¹⁴² Without the so-called procedural rights there is no access to the system and thus anything of substance cannot be called a right at all under a functional definition of right. Procedural rights are given effect within national legal systems. The cases delimiting these rights also, therefore, describe these systems. They depict the nation both explicitly and implicitly as its boundary is constructed through the decisions.

The second substantive aspect of procedural rights is the space they create for the emergence of identity. While identity as rights-holder is restrictive and carries with it constraints in the extra-legal sphere, within that sphere it is crucial. Being identified as a rights-holder is the first step in being identified as one who deserves justice rather than mere compassion. Here the function of rights as “islands of entitlement” is evident. As a rights holder one can assert a claim; without a right one must beg the mercy of the state. Those who hold procedural rights are first identified as rights holders and in consequence accorded a legal space in which to make arguments which enrich perceptions of their identity. The two steps are intertwined, another aspect of the substance of process rights.

It is arguably because of the substantive importance of procedural rights that both Australia and Canada have moved recently to keep migration claimants, and particularly refugee claimants, out of the courts. Additionally,

¹⁴¹ See Chapter Two at n151.

¹⁴² This is one of the enduring problems, which has been identified by feminist theorists, of viewing equality as a substantive right – it diminishes its importance to liberal legalism.

procedural rights directly reduce the control of the executive over migration decision-making as these rights are at the core of judicial function, as was articulated in both *Lim* and *Abebe*. There is, therefore, a contrast to be drawn between Canada's move to institute the requirement that unsuccessful refugee claimants seek leave from the Federal Court and Australia's ousting of jurisdiction. In the Canadian case, the procedural right remains with the claimant, but its shape is altered. In Australia, the executive assumes control of the process. The distinction drawn is another example of how a contrast in the self-perception of the nation is translated into legal effect in migration law decision-making.

The Canadian Supreme Court cases illustrate the same story about the false dichotomy of procedural and substantive rights, and about the tension portrayed in these cases between the individual and the state. Similarly to the Australian cases, these cases are replete with images of the nation as the rights being articulated define the boundary between insider and outsider. In the Canadian context, however, contemporary arguments about rights entitlements are all contested either within or alongside the discourse of constitutionally entrenched rights. In the next section, I consider the role of the *Charter* in Canadian migration law and pay particular attention, as is mandated by the jurisprudence, to the substance of process rights. This continues the story to this point, and provides an avenue for assessing the potential of constitutional rights protections.

D. TESTING THE *CHARTER OF RIGHTS AND FREEDOMS*

As Justice Wilson's statement in *Singh* suggests, interpretation of the Canadian *Charter of Rights and Freedoms* has provided a platform for articulating a vision of the political fabric of the Canadian nation. The requirement that all *Charter* arguments are subject to section 1¹⁴³ has ensured that the vision of a free and democratic society, and of how Canada fulfils that description, is always in the background of *Charter* rights analyses. The "us-them" setting of border law decision-making reinforces the depiction of the nation as the relationship between insiders and outsiders is incessantly refined. An assessment of the value of these rights for those who are not full members of the Canadian community is complicated by the variety of circumstances in which the cases arise; and by the fact that to date there are only one or two leading cases in each of the key legal scenarios where a border is encountered (i.e. the refugee setting, extradition, deportation, removal, port of entry procedures). Despite these challenges for analysis, the picture that emerges is similar to that which developed in considering why refugee claims fail to be considered as rights claims and in analysing the diminution of process rights for refugee claimants in Australia. That is, in an analysis of legal rights which by its structure pits the individual against the state, the greater the space retained for the development of individual identity, the more likely that individual will be in successfully asserting a rights claim.

In *Canadian Council of Churches v Canada*¹⁴⁴ the Supreme Court of Canada rejected an argument that the Council, which has a long record of

¹⁴³ See above n97.

¹⁴⁴ (1992), 88 DLR (4th) 193 (per Cory J., writing for a unanimous court).

involvement in refugee advocacy, should be granted public interest standing to challenge a wide range of amendments to the *Immigration Act* which had been made in 1989.¹⁴⁵ The case is interesting both because of the procedural question it raises, and because of the language used to quickly settle it. The issue of public interest standing arises in contexts where the classic opposition of the individual and the state breaks down for some reason. The refugee determination scenario fits this analysis well as it casts the state in opposition to an individual who is not a member of the polity. This feature of the argument for the Council of Churches to represent refugee interests, however, was ignored by the Court in its reasoning. Despite noting at several instances that the Charter guarantees the rights of "Canadians" and "citizens,"¹⁴⁶ the Court does not note that those whose interests were being considered are not in this group. It is a curious omission given the attention the distinction between citizens and non-citizens had received in *Singh* seven years earlier. The Court explicitly rejects the argument that refugees as a group may have differing interests than individual claimants, or that they may face disadvantages in bringing litigation on their own behalf.¹⁴⁷ The case affirms the ideological link of most *Charter* rights to individuals and ignores that rights function in part as a phenomenon of group identity; for example, by generating a group of refugees entitled to raise similar claims. This further diminishes the potential of the *Charter* in the migration setting as the number of individuals inside Canada to assert these rights is much smaller than the numbers outside the country who cannot claim

¹⁴⁵ S.C. 1988, cc.35 and 36.

¹⁴⁶ Above n144 at 202-03.

¹⁴⁷ Above n144 at 205.

Charter protection but who may be considered part of any number of *groups* affected by immigration law. It also demonstrates that the logic of migration decision-making falls apart when the legally constructed differences between citizens and those more distant from the core of the nation are not examined.

Identifying the differences between citizens and others does not guarantee any particular result, but shows that the Court is grappling with the significance of the distinction. The issue in *Chiarelli v Canada (Minister of Employment and Immigration)*¹⁴⁸ was whether a series of deportation provisions infringed section 7 of the *Charter* by violating principles of fundamental justice.

Following the precedent that *Charter* rights must be interpreted in context¹⁴⁹ Justice Sopinka stated that the fundamental principle of the immigration law context is "...that non-citizens do not have an unqualified right to enter or remain in the country."¹⁵⁰ In this context, he held that no principle of fundamental justice was infringed by deporting permanent residents convicted of serious crimes regardless of the circumstances of the offence or the actual sentence, nor by determining *in camera* that an individual may be someone who will likely be involved in organised crime and as a result of that determination removing the right held by other permanent residents facing deportation to launch an appeal based on humanitarian and compassionate considerations. The decision to situate the reasoning in this criminal deportation case in the immigration context rather than the criminal context was crucial to the outcome as section 7 has been repeatedly used to reform the Canadian criminal law. In

¹⁴⁸ (1992), 90 DLR (4th) 289 (S.C.C., Sopinka J. writing for a unanimous court).

¹⁴⁹ *R v Wholesale Travel Group Inc.* (1991), 84 DLR (4th) 161 which distinguished the mens rea for the criminal context from the mens rea for the regulatory context.

¹⁵⁰ Above note 148 at 303.

the immigration context it is possible to conclude that "deportation is not imposed as a punishment"¹⁵¹ and therefore cannot be reviewed as to whether it is cruel and unusual and that permanent residency is a conditional status.¹⁵²

Section 7 of the *Charter* submerges the substantive - procedural rights distinction by its wording:

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.

The so-called substantive rights in the first clause; life, liberty, and security of the person are expressed in relation to the more-likely procedural rights described by the principles of fundamental justice. Fundamental justice itself has substantive elements, especially as it is to be determined in a given contexts. It is not contiguous with natural justice which may, in Justice Sopinka's words, "inform principles of fundamental justice in a particular context."¹⁵³ The substance of procedural rights is reinforced by section 7 of the *Charter* even in cases like *Chiarelli* where the court makes every effort to focus on narrow procedural questions only. The reason for this is that the link to life, liberty and security of person is always present in some degree.

In *Chiarelli* Justice Sopinka uses the rhetorical device familiar to *Charter* scholars of asserting that he need not decide whether deportation infringes the right to life, liberty or security of person because he finds no deviation from principles of fundamental justice.¹⁵⁴ This allows him to circumvent the

¹⁵¹ Ibid at 305. Paralleling the High Court of Australia's conclusion that "application detention" is not punitive. See above n116.

¹⁵² Ibid at 304.

¹⁵³ Ibid at 311.

¹⁵⁴ Ibid at 302.

important question of the place of deportation itself in a rights discourse. It also ensures a focus on procedure rather than on the identity of the individual to whom a right to life, liberty or security belongs. This rhetorical manoeuvre allows Justice Sopinka to not look beyond the border of the nation and to focus his concerns exclusively on things happening in Canada. The identity of the other is suppressed in the rhetorical shift which provides a concise illustration of how rights discourse narrows identities.

It is precisely on this point, whether to look beyond the border, that the majority and dissenting judgments in *Kindler v Canada (Minister of Justice)*¹⁵⁵ can be distinguished. Kindler had fled to Canada from the United States after being convicted of first degree murder in which the jury had recommended the death penalty. The Canadian Minister of Justice proposed to extradite him without seeking assurances that the death penalty would not be imposed.¹⁵⁶ For the majority judges who held that extradition without assurances did not breach the *Charter*, the case is primarily one about extradition. For the dissentients, the case is about the death penalty. In the first analysis, the sovereign nation and its border is central to the story, in the second the border disappears as the relationship between what happens on either side of it becomes the focus. Writing one of the majority decisions, Justice La Forest states, "the government has a right *and duty* to keep out and to expel aliens from this country if it considers it advisable to do so."¹⁵⁷ The link between extradition and the

¹⁵⁵ (1991), 84 DLR (4th) 438 (S.C.C.).

¹⁵⁶ Article 6 of the Extradition Treaty Between Canada and the United States, 1976, provides this possibility.

¹⁵⁷ Above n155 at 448, emphasis added.

protection of the nation is underlined in his statement that Kindler and the appellant in the companion case, Ng, "...would seem to me to be precisely the kinds of individuals the Minister would wish to keep out of Canada for the protection of the public."¹⁵⁸ In her majority reasons, Justice McLachlin highlights the uniqueness of the Canadian nation and judicial system as a justification for extradition:

...the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations. The simple fact is that if we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate. Canada, unable to obtain extradition of persons who commit crimes here and flee elsewhere, would be the loser.¹⁵⁹

This reasoning highlights Canadian values and identity, as does the *Charter* test of cruel and unusual punishment which is whether the punishment " 'sufficiently shocks' the Canadian conscience."¹⁶⁰ For both of the justices who penned majority opinions, the need to protect Canada from an influx of people fleeing the American legal system was crucial.¹⁶¹ Justice McLachlin refers explicitly to Canada's "...long undefended common border with the United States..."¹⁶² drawing on imagery of the legal nation and its boundedness and echoing a phrase familiar to generations of Canadian school children. That is, the decision taps directly into, and thereby reinforces, images of the nation.

¹⁵⁸ Ibid at 449.

¹⁵⁹ Ibid at 488. From January 7, 2000, The Hon. Beverley McLachlin will be Chief Justice of Canada.

¹⁶⁰ Ibid at 492. The 'shock the conscience' test originated in *R v Schmidt* (1987), 39 DLR (4th) 18.

¹⁶¹ Ibid at 450-451 and 495.

¹⁶² Ibid at 495.

For those judges who argued that extraditing Kindler to face the death penalty would offend section 7 of the *Charter*, the Canadian nation held a different place in the analysis. Justice Cory viewed the argument that any cruel and unusual punishment would be applied not by Canada but by the United States as "an indefensible abdication of moral responsibility."¹⁶³ The existence of the border is irrelevant to his assessment of the punishment and of morality. For Justice Cory the identity of the nation is a lesser value than the harm of the death penalty. Justice Cory also referred to the open border, but emphasised that to cross it a fugitive must first escape custody.¹⁶⁴ Justice Cory's presentation of Canadian values and identity situated these as belonging to the international community, rather than being unique:

...Canada has committed itself in the international community to the recognition and support of human dignity and to the abolition of the death penalty. These commitments were not lightly made. They reflect Canadian values and principles. Canada cannot, on the one hand, give an international commitment to support the abolition of the death penalty and at the same time extradite a fugitive without seeking the very assurances contemplated by the Treaty.¹⁶⁵

Canada is not a nation so unique that it must accept differences in order to make extradition function. Rather it is a member of the community of nations and of values. The opinions in *Kindler* present a clear contrast of visions of the nation faced with giving meaning to fundamental justice at the border.¹⁶⁶ In the extradition scenario the Canadian community must be protected, while in the

¹⁶³ Ibid at 479.

¹⁶⁴ Ibid at 480.

¹⁶⁵ Ibid at 481.

¹⁶⁶ Justice Sopinka's brief dissenting presents yet another variation on this theme as he focuses on the fact the Canadian Parliament had voted just four years early not to reinstate the death penalty despite public opinion polls favouring it (see *ibid* 452-455). In his analysis, the values of the community are reflected in the Parliament, whereas in the analysis of Justice LaForest, the opinion polls were influential (*ibid* at 447).

reasoning which begins with an analysis of the death penalty the importance of the nation taking a moral stand is highlighted. The tension in *Kindler* is a reflection of what Minow labels the instability of rights discourse which renders this discourse unable to give an adequate account of sameness and difference. In this instance, it is impossible for rights discourse to express in the same moment the importance of the boundary and the relationships between what happens on either side of it. In this tension, identity is manipulated and some parts of it are squeezed from the picture.

In the most recent important Supreme Court of Canada judgment in migration law, *Baker v Canada (Minister of Citizenship and Immigration)*,¹⁶⁷ Justice L'Heureux-Dube for the majority states at the outset that the question of what standard of procedural fairness is required in determining a humanitarian and compassionate appeal does not raise any *Charter* questions¹⁶⁸ and thus there is no need to address the *Charter* arguments made in the case. The appeal was allowed due to breaches of the applicable principles of procedural fairness. Justice L'Heureux-Dube holds that a determination on a humanitarian and compassionate appeal "...must be made following an approach that respects humanitarian and compassionate values."¹⁶⁹ While the decision to reject *Charter* arguments could have been made to avoid the overlap of substance and procedure which section 7 entails, or to circumvent a determination that deportation affects life, liberty or security of person, Justice L'Heureux-Dube's

¹⁶⁷ Court File number 25823, 9 July 1999. SCR version not yet available.

¹⁶⁸ Ibid para 11 of electronic version. For a further discussion of humanitarian and compassionate appeals under the Canadian *Immigration Act* and *Baker* in particular see Chapter Four at pp. 223-226.

¹⁶⁹ Ibid at para 74.

reasoning belies her commitment to decide the case on purely procedural grounds. Humanitarian and compassionate values are clearly substantive. Furthermore, the influence of the approach to international human rights instruments which has evolved under the *Charter* seeps into the analysis of the Convention on the Rights of the Child despite her statement that this Convention is inapplicable.¹⁷⁰ This case may signify the development of an approach to statutory interpretation in Canada which is influenced by the place the *Charter* has had in shifting the parameters of legal discourse in Canada.

The sum of these cases in the Supreme Court of Canada is not a compelling change in the debates or the outcomes of border law disputes under the influence of entrenched constitutional rights. The *Charter* has hastened acknowledgment of the falsity in the distinction between substantive and procedural rights, and has fostered the development of a jurisprudence which focuses overtly on national identity and values, but it has led to few changes for those crossing Canada's borders. Mr. Chiarelli, Mr. Kindler, the Council of Churches, and even Ms Baker were all told that the *Charter* did not assist them. Other less well known litigants such as Mr. Reza¹⁷¹ and Mr. Delghani¹⁷² have

¹⁷⁰ Ibid at para 69-71. By this I mean that the *Charter* has been interpreted with reference to international conventions since its inception (see *Ward* above n38 and *R v Keegstra* [1990] 3 SCR 697). This tradition of interpretation seems to have influenced L'Heureux-Dube J. to put more emphasis than would otherwise be possible on the weight of an unincorporated Convention. It is precisely on this point the Iacobucci J. disagrees with her (ibid at paras 78-81). This decision raises the same issue as *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 did in Australia and resolves it in a very different way.

¹⁷¹ *Reza v Canada* (1994), 116 DLR (4th) 61. Reza, a refugee claimant who had exhausted all avenues of appeal under the *Immigration Act* sought to commence an action in the Ontario Court arguing that various sections of that Act were inoperative under the *Charter*. The motions judge stayed his application. In a very brief judgment, the Supreme Court of Canada agreed.

¹⁷² *Delghani v Canada (Minister of Employment and Immigration)* (1993), 101 DLR (4th) 654. Delghani claimed refugee status at the airport and was denied counsel. He argued that his *Charter* right to counsel was infringed. The Supreme Court of Canada responded by stating that he had not been "detained" in the sense contemplated by the *Charter*, despite a line of cases

likewise found that the *Charter* has not changed their position before the Canadian courts. On the other hand, refugee claimants before the Supreme Court of Canada in the post-*Charter* era have met with considerable success. While *Singh*¹⁷³ was not solely a *Charter* decision, its most memorable judgment does rely on the *Charter* and its influence on refugee law in Canada has been far-reaching. Both *Ward*¹⁷⁴ and *Pushpanathan*¹⁷⁵ have extended the scope for refugee protection in Canada through their interpretations of the refugee definition. In *Ward* this was done explicitly with reference to *Charter* jurisprudence, even though the Court held that no *Charter* rights were engaged. In *Pushpanathan*, the *Charter* was not key to the Court's reasoning, but the *Ward* decision was, leading to a similar result.

Identity contributes to an understanding of these cases in two ways. First, the role of a refugee identity has considerable importance in these outcomes. While *Pushpanathan* and *Ward* had committed crimes similar to those of *Chiarelli* and *Kindler*, the Court portrays them as refugees rather than criminals. The importance of this distinction is highlighted by the dissent in *Pushpanathan* emphasising drug trafficking: when the criminal identity predominates a positive outcome is unlikely in the immigration setting. This effect also points to how rights represent collective identities. The refugee exists not as the individual before the Court but as a group, a category, which could potentially be before a court. The *Canadian Council of Churches* decision rejects this view

establishing that secondary immigration examination, the process Mr. Delghani was involved in, constitutes detention in the case of Canadian citizens (*R v Greffe* [1990] 1 SCR 755)

¹⁷³ Above n89.

¹⁷⁴ Above n38.

¹⁷⁵ Above n49.

and thus amounts to a statement of preference by the court to determine the rights and identities of the refugee individually, fitting more directly into liberal rights discourse.

In the refugee cases the influence of the *Charter* is covert. The *Charter* creates the space for an emerging and constitutionally legitimated discourse of human rights. This is a discourse in which the refugee identity can develop, in opposition to both a criminal identity and an identity as alien; it is an image of power. The *Charter's* influence on these cases serves as a vehicle for incorporation by interpretive convention of international human rights discourse and for a jurisprudential reflection on what values a free and democratic society would like to be seen to embrace. A similar analysis holds for *Baker*, even though there the interpretive movement occurs implicitly. This may signify a maturing of the *Charter's* role in this jurisprudence. As the critique of constitutional rights predicts, rights discourse tends to permeate all legal discourse once unleashed.¹⁷⁶

But considering the *Charter* in the migration setting, and especially in contrast to the Australian setting, allows a more textured analysis of the effect of rights discourses. The *Charter* has amplified the effect of procedural rights at the core of liberal legalism by emphasising their substantive effects. The percolation of rights discourses in Canada, led by the *Charter* creates a possibility of arguing about the refugee definition in fundamental human rights terms. While refugee claims do not function as rights claims, this discourses enlarges rather than constricts the potential for broad interpretations of the refugee definition's other, non-rights, aspects. Finally, however limited rights

¹⁷⁶ Fudge, above n5; Bakan, above n5.

discourses are, they contain a hierarchy of rights and therefore they unleash the potential of ascending that hierarchy. These cases certainly do not give rise to unbridled optimism but they do show that the potential of the *Charter* must be carefully assessed in each context, and that the identities at play are key to understanding those contexts, and that legal argument can be manipulated by considering the rights-identity linkages to encourage given outcomes.

Considering identity in the analysis also calls our attention to how the potential of rights discourse is disappointed in these cases. In cases where the claimants are ultimately unsuccessful, they are portrayed as alien others whose interests are pitted against those of the nation. Their differences from members of the community are emphasised, as is the fact that the nation tolerates their presence generously and does not have the same responsibilities towards them that it does towards its citizens. Despite the potential for the development of robust substantive/procedural rights under the *Charter* the section 7 cases in the migration realm have been almost entirely unsuccessful. Even *Singh*, which led to the development of the CRDD hearing process for refugee determinations does not explicitly require the full extent of procedural protections presently in place. Current proposals to largely replace the CRDD process with interviews by bureaucrats would also likely come within the letter of the *Singh* ruling and are certainly designed to do so.¹⁷⁷ While substantive procedural developments in the laws of evidence and crime have been some of the most significant *Charter* results, changes resulting from section 7 arguments about immigration

¹⁷⁷ *Building on a Strong Foundation for the 21st Century*, Supply and Services, Hull Canada, 1999, Chapter 11.

law have been minimal. The message sent by the Court is that in spite of *Singh*, non-citizens have fewer rights protections than citizens in a variety of areas.

This result then, is not so different from the result in the Australian High Court. Arguably, the *Charter* could be used to prevent the Canadian government from rolling back procedural protections to the same extent that the Australian government has done. While this would likely be the case, there is no way to conclusively state it, particularly recalling the strong similarities between *Singh* and *Kioa*. The biggest differences in the Australian and Canadian jurisprudence are not the result of the presence or absence of constitutionally entrenched rights, but rather relate to the respective governments' interactions with the courts in the area of migration law. The *Charter* is necessarily the vehicle by which immigrant rights arguments are brought before the Canadian courts. Nonetheless, the resulting jurisprudence is similar to that in Australia in that there have been no significant rights victories since the mid-1980s. Even *Ward* and *Pushpanathan* are not strictly rights cases, but revolve around interpretations of narrow slices of the refugee definition. The jurisprudence in both countries portrays the nation itself. Differences in those portraits, in the national identities, explain more about the differences in legal outcomes than the constitutional settings do.

E. CONCLUSION: RIGHTS DISCOURSES AND THE LIBERAL NATION

Rights discourses in migration law reflect the place of migration law in the liberal nation. Analysing the place of rights in the law and identity linkage is the final phase of my theoretical framework, tapping into some of the most

extensive identity-based legal critiques and pulling the argument directly back to its foundation stone: the inability to establish a justice standard for evaluating liberal migration laws. Migration law constitutes the community and responds to the perceived needs of the nation, the national interest. The principal problem of using rights discourses to bring about changes in migration law is that a rights-based argument triggers a rights-based response. In this area of the law, the most unambiguous right is the right of the nation to exclude all outsiders. The tension between any rights claim brought in the migration area and this sovereign right to exclude is frequently the difference which splits judicial opinions, as the cases in this Chapter illustrate. Rights exist in a hierarchy. The sovereign right to exclude the other is at the top of the hierarchy. Of the diverse rights that liberal legalism will recognise and put its considerable power behind, the right to exclude the other is paramount because the existence of liberal legalism is intertwined with the existence of the liberal nation. It is for this reason that evaluations of migration laws are best made by comparing the national self-identifications they reflect, generate, and reify.

Images of the nation are present implicitly and explicitly in this jurisprudence. The nation is represented in its sovereign right to exclude, and in statements about the national interest or the values of the national community. The nation is also represented in the procedural rights which balance the interests of individual and state. While in theoretical terms we can postulate some generic state in this equation, the terms a court reasons with always put the interest of some particular individual against those of some existing state. Because of this, the attributes of the nation are always a backdrop to the discussion. The emotive content and sense of belonging (which are reasons for

my preference for “nation” rather than “state”) permeate the state versus individual dichotomy when it is brought into a real decision-making setting. That is, the state cannot be separated from the content which the term “nation” injects it with. These characteristics of migration law jurisprudence reinforce its role as a vital site for constituting the nation. The nation is, after all, a myth. Understanding the diversity of factors which make the nation present in migration law jurisprudence helps understand how migration law operates as a site for the construction and re-construction of the national myth. The jurisprudence of the highest courts is particularly important because of its influence on lower courts and because of its role as a hegemonic social ordering discourse in legalistic societies such as Australia and Canada. The jurisprudence is not the extent of migration law’s role in constituting the nation,¹⁷⁸ but it is an vital part of it.

The central instability of rights discourse which Minow emphasises is crucial in migration law as the needs of the nation are themselves unstable. One of the most important tricks of migration law is to create the appearance of stability, of a core of meaning, which grounds the existence of the nation. Without borders, without some limit to the community, the nation could not claim existence. Accordingly migration law, which posits some control over the border and the membership of the community is essential to the enterprise. The framework of migration law allows adjustments in the national interest to be easily made into legal projections with a minimum of change. The need for an appearance of stability but an inherent flexibility is achieved through these mechanisms. Rights discourse runs a parallel course. In Minow's analysis, the

¹⁷⁸ See Chapter Two at 76-82.

inherent instability of rights discourse is due to the inability of rights to fully represent the relationship which they always express. In migration law, that relationship is between the insider and the outsider, the nation and the other. The right of one is always exercised against the right of the other, so that any expression of right somehow obscures the relationship between the two. The central instability is, then, a product of this relationship, a reaction of the contest which is set up by rights discourse.

In Minow's analysis of rights in other contexts, she focuses on the boundaries which are created in rights discourses and the identities on either side of those boundaries which rights discourses obscure. In the migration law setting, the boundary is that of the nation, and the relationship is between members and outsiders. Border law jurisprudence, as we have seen in the cases here, shows us again and again images of the nation and the other and manipulates them as a key reasoning technique. The manipulation of these images, the fact that the nation can be both the reason to reject extradition and the reason to permit it, shows us the instability which Minow discusses. Altering our perception of the other necessarily affects our perception of the nation as the two are defined by their boundary. This explains why the outsider/refugee is disappearing from view in the jurisprudence of a progressive removal of procedural rights in Australia. As the space generated by process rights for the development of an identity for the refugee/outsider is squeezed smaller and smaller, the nation takes up all the imaginary space that is left.

Attention to identity helps us to focus on what rights discourses obscure. It helps us to understand their categories and hierarchies. In migration

law, considering the overlapping effects of rights and identities reveals how the discourse of fundamental human rights can open a space for refugee claimants without making a refugee claim a rights claim. It demonstrates how gradations in procedural rights entitlements express gradations of attachment to the nation, of belonging, of identity, at the centre of which the identity of the nation and the individual overlap in the category of citizen. Considering identity helps build an understanding of when *Charter* rights are most effective, and when they are more likely to be overlooked. The migration law context brings together a number of rights discourses. Understanding the differences between them, and the ways in which they crosscut and reinforce each other, enriches our understanding of migration law and of rights discourses themselves. Both are necessary to predict legal outcomes in this area, to strategise for legal change, and to theorise the relationship between migration law and the liberal nation.

Chapter Six

Conclusions

The insights drawn from applying the framework of analysis I set out in Chapter Two to the refugee determination process, the place of humanitarianism in migration law, and the hierarchy of rights for potential migrants, suggest several clarifications of that framework. One set of clarifications comes from using this study to elaborate the way the concept identity is used in legal critique. First is to look at how identity is analysed as a social phenomenon and to consider how identity in law is positioned in the essentialist – constructivist debate. The relationship between migration law and national identity adds texture to what Hunt describes as the dichotomy between the importance and the unimportance of law¹ by providing examples and explanations of when law may be an important facet of the construction of identity and when it is more likely to be irrelevant or overtaken by other factors. It is the place of migration law within the liberal nation that makes it an important site for locating images of national identification and value. Nonetheless, this law is most important for those crossing or attempting to cross the national boundary it erects. For many who are already members of the nation, the content and meaning of migration law can be safely ignored. The importance and unimportance of the law as a social phenomenon is tied to perspectives in the analysis and to the way the social sphere is constituted at a given moment. If the community is assumed, as is most often the case in liberal theory, then migration law fades into the

¹ See Chapter Two at p.21.

background, into an axiom of an already constituted social sphere. Linking migration law to national identity provides a way of assessing its importance.

I earlier asserted that law and identity scholars tend towards the constructivist side of the on-going debate about whether identity is constructed or essential and did not engage directly in this debate, despite its vitality for many others who use identity as an analytic tool. The reasons for this emerge through the application of an identity based framework. In making identity a central focus of legal analysis, scholars necessarily assume a constructivist analysis. That is, they assume that identity is constructed, or at least partially constructed, in and through the law functioning as a social ordering system. In considering how the construction of legal categories such as refugee, humanitarian migrant, or rights holders are identified in the law, the assumptions of an identity based approach to law become clearer. One of these assumptions is that law is a powerful enough social discourse to construct identities that matter, and that there is no need to look outside the law and see where the identities it moulds, constrains or ignores may exist elsewhere. Law and identity theory provides the insights and analytic potential I have drawn on here without addressing the essentialist – constructivist tension overtly because it presumes the importance of the law. To this end, it takes a position in the dichotomy that Hunt describes. Ignoring the essentialist – constructivist tension is defensible because resolving it is not crucial to using its insights. Nonetheless, it is vital to consider how legal scholarship only partially engages with this tension in broader social theory and to reveal the story of self-importance that underlies this position.

The position of law and identity theory in this debate establishes a parallel with the intermediate position of law and identity theory generally as both constitutive and constituting. Or, as I have argued here, that migration law is both affected by our perceptions of national identity while at other moments it influences those perceptions. Sometimes the most important insight gained by examining identity in migration law is that it is responding to a shift in the nation's view of its priorities and values – as in the recent shift to preferring economic migrants. At other times, however, the perspicacity of the theory is in demonstrating that the view of the nation written into the law constrains the law's application – as when humanitarian discretion is used to approve economic independence. The key to appropriate use of this type of intermediate theorisation is to consider what is gained from the insights it generates and thereby avoid leading only to the rather vacuous conclusion that law both constitutes and is constituting. In this study, the chapter by chapter conclusions have therefore addressed how a focus on identity in migration law identifies strengths and weaknesses in the refugee hearing process, how an understanding of the role and limits of humanitarianism as both jurisprudence and rhetoric can be built into law reform strategies, and how detailed analysis of rights discourses contributes to predicting successes in the courtroom and to developing successful arguments for that setting.

The insights of law and identity scholarship can also be pushed further here to give an account of slippage between legal and popular discourse which is crucial in the realm of migration law because, in the absence of a liberal justice standard, the parameters for debate are purely political, above and beyond the way this is true for law generally. Previous work in law and

identity scholarship draws our attention to the importance of who is constructing the legally positioned identity and for what purpose. This is central to the account of the negotiated and flexible quality of identity. In the realm of migration law, the malleability of identity is evident, and indeed forms a vital reason for using identity-based analyses in this setting. The dissonance between legal and popular or political discourses on questions such as the meaning of refugee, the rights of citizens, or the identity of the nation is facilitated by the malleability of legally constructed identity. The identities that appear in legal discourses are linked to the purposes for which they are elaborated. This is no different in popular discourse. The slippages are explained by considering the purpose at issue. In legal discourse, refugee is defined primarily in order to limit access to the nation and to contain the responsibilities of the nation. In popular discourse, refugee is understood in a much broader way. The use of the legal label outside the law is a telling signifier of the hegemony of legal discourses in social and political arenas. The slippage in meaning points to the ends that are served by discursive transformations. These ends in turn lead us to an enhanced analysis of the ways migration law serves the needs of the nation. It becomes another dimension in the capacity of identity analysis to draw our attention to hidden dimensions of legal categories.

The use of this framework for analysing migration law also highlights the relationship between identity as an individual phenomenon and as a group phenomenon, which is in turn important for using identity-based analyses in a liberal legal paradigm. Important parts of the analysis of refugee determination, of humanitarian acts of grace and of rights allotments are focused on individuals specifically. Nonetheless, by its categorising nature, the law creates group

identities. This is a critical part of understanding how migration law affects the individuals who pass through it to join the nation. They become members of the social group of “immigrants,” as “refugees,” “dependant spouses,” “temporary workers.” These labels affect their legal entitlements, but go beyond that as well. Membership in these groups also affects how the community perceives them and how they form attachments with the nation. Identity is about individuals and groups at the same time. Both are relevant simultaneously, in a relationship which Turner’s work provides a matrix for understanding.² The individual and group relevance of identity is important for having a full picture of the function of the law, and also for grasping the notion of national identity. The nation has an identity even when it does not have a collective mind or function as an agent. To understand this identity, an appreciation of how individuals participate in the mythic constitution of the nation is essential. National identity is by definition a group identity, but is located in the individuals who experience it.

Minow’s important observation that some individuals choose identities and others are consigned to them is a power analysis. Using identity to evaluate migration law, the power dynamic of identity becomes obvious. Not only do some choose their identities, but some have a wider range of choices. Further, the consequences of one’s choices also leave an imprint of how powerful or powerless that person is in a given setting. For many, fitting into the narrow strictures of a refugee identity or a deserving recipient of humanitarian consideration is the best outcome of their situation. That such a narrow identity is constraining and will texture their experience of a host country is a luxury

² See Chapter Two at pp. 45-55.

they cannot afford to consider. For a tribunal member there are also consequences of choosing how to position oneself within the parameters of that identity – but the consequences attached to the choice are different. You may feel better or worse about the job you are doing, and your prospects for continuing it may be altered, but your location as a privileged member of a prosperous nation is not affected. You have an enormous freedom in how you identify yourself as a Tribunal member, or even if you do so at all. Power is embedded in the identities located in the law. It becomes visible when we focus on how choices are made and how identities are negotiated.

Power is especially significant in considering the rights discourses of migration law. The discourse of rights does more than establish a simple binary code between rights holders and non-rights holders. Rights are hierarchically arranged. Those with more power have greater rights and a greater potential for accommodating the diversity of their identity within the discourse of rights. Examining the deployment of rights in migration law complicates our understanding of the relationship of rights and identities. Even being at the bottom of the hierarchy of rights is still to have some access to those “islands of empowerment” and to have an identity which is discernible by the law. The importance of dissecting rights discourses in this way is strategic. While much may be traded away to fit oneself or one’s group into a narrow box at the bottom of the hierarchy, the trade-off may be worth it if the legal outcome is the best, or the only, outcome that is sought. Migration law provides stark evidence of the power of rights discourse to obscure the relationship between those on either side of the principal rights–nonrights boundary: the border of the nation. The line between members and others is about rights. The power that attaches

to rights varies in the hierarchy of rights and helps us to understand that rights discourses are only perceived as monolithic when viewed at a great distance.

In these various ways, this analysis contributes to refining our understanding of the analytic capacity of identity in examining legal provisions. This was one of the goals of constructing and testing the Chapter Two framework. The second principal aim was to provide an evaluation of the place of migration law in the liberal nation generally and to evaluate some particular provisions of Australian and Canadian migration law. As is apparent throughout the empirical work in this thesis, in many cases the assessment of Australian and Canadian provisions runs parallel. The legal provisions for migration in these two middle-sized nations of immigration are very similar. The framework is not calibrated to tell us that one law is better than another. Indeed, it takes as axiomatic that such conclusions are not only outside this framework but are generally unsound because of the place of migration law in liberal nations. Liberal justice standards operate within societies, not between them.

Instead of a morally grounded comparison that one migration law scheme is better than the other, the examinations here generate pictures of the laws in each place which tell us something about the way these nations understand themselves. Against these understandings, particular alternations in the law can then be evaluated by whether they are in harmony with the nation's own internal values. The Australian law enshrines an ideology of control, with mechanisms such as application detention, inflexible target numbers, executive decision making, high level location of discretionary decision-making, and a progressive narrowing of rights for intending migrants. These factors combine with

language in Ministerial statements, in policy guidelines, in discretionary decisions, and in judicial statements to present an image of Australia as a nation which guards its generosity closely, which picks migrants carefully, which feels vulnerable and needs to protect itself, which feels isolated on its island continent. Australian migration law sends the message that this nation is distant from those migrants it has most affinity with and is surrounded by those whose values may threaten its control over its membership. Australia is more concerned with controlling its population than with humanitarian gestures, more concerned with efficiency than with the rights of outsiders. Similar elements appear in the Canadian law, but in a different mixture. Canada's law is filled with humanitarianism and with discretion. The impulse to control is weaker: targets are more flexible, discretion is more openly used, judicial decision-making is given a wider scope. The law is constructed in such a way that more divergent meanings are generated. The balance in the refugee program is towards inland processing rather than the more easily controlled overseas cases. The jurisprudence of humanitarianism is revealingly counter-intuitive, demonstrating both that the nation values economic self-sufficiency, social success and small independent families and also that being perceived as humanitarian is vital. Canadian law and rhetoric displays more pride in the generosity of the nation, and therefore constructs a more generous nation.³

For many concerned about people whose homelands are poor or dangerous or do not respect human rights, this makes the Canadian law and

³ On 3 December 1999 the Honourable Eleanor Caplan stated:

I mention this target [1% of population as total migrant intake each year] again because I consider it to be about more than just planning. I consider it to be about core Canadian values, and an awareness of where we, as a country, came from...

policy at least potentially better. But the hegemonic liberal theory which provides the standard for relationships between nations does not provide a way of defending this statement, or a vantage point from which to assert it. All it provides is a notion of humanitarianism that is vague enough that all nations can aspire to it, while taking very different actions. It is, thus, a perfect fit with the political position of migration law. Humanitarianism runs into liberalism's threshold of heroism, and the principle that heroism is not required for moral action. The growing international commitment to human rights has likewise not generated a standard to assess the behaviour of nations which refugees seek to resettle in, especially when those nations are far from the states refugees are fleeing. The discourse of fundamental human rights has made some inroads into influencing how we interpret what other countries do to refugees but does not establish either an interpretation of humanitarianism or a right to enter another nation. In both liberal discourse and the discourse of fundamental human rights, those who argue that admitting refugees threatens the nation's self-interest, economic prosperity, job markets and cultural protection can also find support.

When the influence of economic and family migration is also considered, the differences between the two nations in these humanitarian areas start to disappear. Here we see both nations presenting a model of an independent, able-bodied nuclear family. Economic success is presently the most sought after value of each nation, whether in the form of skills which are easily transferable into the job market, including established fluency in English, or whether in the form of sufficient money to purchase a niche in the economy.

Now if immigration has been a vital part of Canada's social, economic and cultural success, our refugee system has earned us our reputation as a humanitarian leader in the world" Address to Canadian Council for Refugees, Niagara Falls.

These values are masked in the area of humanitarian admissions, but as my discussions of the deserving humanitarian migrant and the overseas refugee indicate, they are present nonetheless. These values too exclude and silence certain identities. The high values placed on market worth, independence, a narrowly defined family, and an ability to adapt quickly to the host society show that while the racist face of migration law has been disguised by the “neutral” terms of the point system and the market economy, the biases of what success means in Australia or Canada, of the identity politics within the nation, are strongly present. Admissions in the economic, family, and humanitarian categories are, for example, all highly gendered.⁴

Migration law continues to be very much on the public and political agenda in both Canada and Australia. The negotiation about the border of the nation, the line between us and them, is on-going. Since 1994, Canada has undergone an almost unceasing process of public consultation about potential changes to its immigration law. In 1994 consultations across the country were held which were later incorporated into the extended version of the 1995 Immigration Plan entitled *Into the 21st Century: A Strategy for Immigration and Citizenship*⁵ released in late 1994. These plans generated further public discussion, and were followed in late 1996 with the appointment of a three member Legislative Review panel which again conducted country-wide consultations with a mandate to propose a major overhaul for the immigration legislation. These proposals were presented late in 1997 under the title *Not Just*

⁴ See my paper “Women at the Border: Gendering Permanent Residency Applications,” presently under revision.

⁵ Minister of Supply and Services, Hull, Canada, 1994.

Numbers: A Canadian Framework for Future Immigration.⁶ The government then conducted further consultations about the recommendations, and issued a response entitled *Building a Strong Foundation for the 21st Century*⁷ in early 1999. Further consultations on this report were initiated at that time.

The extent of public consultation signifies the importance of migration issues to the public agenda. Public consultation assists the government in asserting that changes in either policy (e.g. the *Into the 21st Century* documents) or law (as proposed in *Not Just Numbers*) respond to what the nation, as constituted by individual voices, wants. National interest is crucial to the law, and therefore no changes will be made without extensive high profile attention to it. The devotion of such intense resources to these public processes also signifies the intertwining of public, political and legal discourses of migration. While consultation functions to gather public information, it also promotes the government's view and the government's ability to form the agenda. It fosters overlap between public and legal discourse, and can also serve to point up when the dissonance between those two is used by governments in meeting their goals. Interestingly, the government was quick to reject the *Not Just Numbers* recommendation that migration issues be divided into two pieces of legislation, one dealing with immigrants and the other with those whom the nation seeks to protect. The logic of this recommendation is compelling, but following through on it would reduce the potential for the government to harness humanitarian admissions, as well as economic and family admissions, to the needs and priorities of the nation.

⁶ Minister of Supply and Services, Hull, Canada, 1997.

⁷ Minister of Supply and Services, Hull, Canada, 1999.

In Australia in November 1999 the newspapers were carrying almost daily stories about the unprecedented number of boat arrivals over the past few months and the government's response to them.⁸ The nation is verging on a moral panic over the issue, the seeds of which were clearly visible in earlier responses to boat arrivals. As of 18 November 1999, 1671 people had arrived in Australia in 1999 by boat. This number is approximately half the previously recorded total number of boat arrivals, and is approximately two percent of the annual total targeted migrant intake. Detention centres are being hastily completely to accommodate the influx. Early indications are that many of these people will be found to be "genuine refugees." The government's response has been to limit the access of refugees arriving by boat to state support, to introduce temporary visas for people arriving by boat, to deprive them of the potential of family reunion provisions available to other refugees.⁹ Legislation heightening powers to warn off boats before they enter territorial waters and to penalise people smugglers more severely has been introduced.¹⁰ Given that the major opposition party has decided to support these initiatives, they are likely to become law in the near future. The result is a shift in Australia's refugee regime, but not one that is out of line with the dominance of its control ideology

⁸ Examples include:

Toohey P, "A Roo Shooter and His Ute Hold the Line Against Illegals" *Australian*, 13-14 November 1999 at 1, Saunders M, "Refugees Coming on Flood Tide" *Australian*, 13-14 November at 2; "Vidnieks M and Saunders M," Ruddock Rejects Court Call on Illegals" *Australian* 3 November 1999 at 3; Saunders Metal, "Action Urged on Wave of Illegals" *Australian*, 10 November 1999 at 5, Toohey P and Saunders M, "Human Cargo, Return to Sender" *Australian* 12 November 1999 at 1. Media coverage has been intense throughout 1999 including articles such as O'Donnell L, "When the Boat Comes In" *Australian* 17-18 April 1999 at 19 and O'Brien N and Green P, "Boat People Influx a Matter of Crime" *Australian* 17 August 1999 at 4.

⁹ New visa subclass 785.

¹⁰ *Border Protection Legislation Amendment Bill 1999* (Cth) has now been passed by both Houses. The *Crimes At Sea Bill 1999* (Cth) is before the Senate as of 7 December 1999.

documented in this thesis. Australia is yet again constructing itself as isolated and vulnerable, in need of the strongest protection it can muster as it is besieged by a handful of desperate people. The Minister of Immigration has argued that the new laws are necessary to ensure that Australia is “sending the right message.”¹¹

As I have argued, it is impossible to find a broadly acceptable basis in Australian, or Canadian, society from which to contest this view of the “right message.” The strength of both support and opposition for the measures reflects and reaffirms this. Whatever else can be said, however, the message Australia is sending about itself, as a nation, is loud and clear. The national panic, and the bipartisan political response demonstrate again the role of migration law in defining the limits of the liberal nation. Like the incessant public consultation in Canada, the Minister’s strategic use of inflammatory language – like the assertion that 10, 000 people and entire Middle Eastern villages are packing up and coming to Australia¹² – cements the use of migration law to meet the nation agenda, and underscores the flexibility of migration law to make quick responses to adjustments of the national need. In the absence of a justice standard to anchor the public discourse of migration law, politics becomes its essence and the public discourse of migration becomes vital to fuelling the process.

¹¹ This has become a government catch phrase. One example is provided by the Australian Broadcasting Corporation’s television program *7:30 Report* on 15 November 1999.

¹² This statement was widely reported. See for example McGregor R, “10, 000 Illegals on Way Says Ruddock” *Australian* 16 November 1999 at 1; McGregor R, “Labour in Two Minds on Boatpeople Law” *Australian*, 17 November 1999 at 5; Saunders M, “Ruddock ‘Hysteria’ Makes Waves: Beazley” *Australian*, 7 December 1999 at 4.

Appendix A

Immigration Statistics

Australia

Migration Target Numbers for the Three Most Recent Years

This table is compiled from information available on DIMA's webpage. It reflects the targets which were first published for each year in question.

	1999-2000	1998-99	1997-98
Economic	35, 000	35, 000	35, 260
Family	32, 000	30, 500	32, 000
Humanitarian	12, 000	12, 000	12, 000
Total (includes "special eligibility" category)	82,000	80, 000	80, 000

Canada

Immigration Target Numbers for the Three Most Recent Years

This table is compiled based on Canada's Annual Immigration Plan, tabled each year in Parliament as required under section 7 of the *Immigration Act*.

	2000	1999	1998
Economic	120,900-134,700	124,400-137,400	122,400-134,400
Family	57,000-61,000	53,500-58,300	53,500-58,300
Humanitarian	22,100-29,300	22,100-29,300	24,100-32,300
Total	200,000-225,000	200,000-225,000	200,000-225,000

United States

Immigrants Admitted in the Three Most Recent Years

This table is provided for the contrast it presents. The statistics are drawn from the document entitled *Legal Immigration: Fiscal Year 1998*, available on the Immigration and Naturalization Service Website (www.ins.usdoj.gov).

	1998	1997	1996
Economic	77,517	90,607	117,499
Family	475,750	535,771	596,264
Humanitarian	67,280	114,740	131,790
Total (includes diversity programs not counted above)	660,477	798,378	915,900

Appendix B

Court Hierarchies in Australia and Canada

Australia

High Court of Australia

Full Court - Federal Court of Australia

Federal Court of Australia

Migration Review Tribunal

Refugee Review Tribunal

Canada

Supreme Court of Canada

Federal Court of Appeal

Federal Court

Immigration and Refugee Board
Convention Refugee Determination Division
Immigration Appeal Division
Adjudication Division

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