
Borderline Security

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Introduction

Geo-political borders serve many functions in public consciousness, both literal and symbolic: They demarcate the nation-state's essential territoriality; they assert and exert sovereignty; and finally, their selective permeability operates as a measure of the nation-state's security against external threat, whether characterized in physical, ideological or ethno-cultural terms. The events of September 11 elicited an almost reflexive public clamour throughout Canada and the US to tighten their respective borders, followed by promotion of a fuzzily-defined 'security perimeter' that would encompass Canada and the United States and, in some versions, Mexico.

It is unsurprising that many in the US, Canada and other Western nations would telescope their anguish, anger and apprehension into a demand to exclude foreigners – was it not, after all, foreigners who committed these heinous acts? Casting the current social climate in the language of moral panic strains against this brute fact.

Yet the media response has generally failed to distinguish between problems of policy on the one hand and failures of implementation, enforcement and intelligence on the other. For instance, there seems little doubt that the utter inadequacy of security checks in airports across North America contributed to the outcome of September 11, but this is not an immigration matter. Other major lapses include the ease with which false identity documents are obtained, the apparent lack of co-ordination and sharing of information among police, immigration, and

intelligence agencies within and between states, and the inability to execute deportation orders. These are not matters of law, but of crime prevention, as well as implementation and enforcement of existing immigration powers. Nevertheless, systemic explanations cannot compete with the simplicity and emotive power of invoking the spectre of the foreigner as an intrinsic menace to national security.

By coincidence, the immigrant-as-security-threat leitmotif already figured prominently in Bill C-11, the *Immigration and Refugee Protection Act*.¹ The Bill was introduced in spring, 2001, but passed into law on November 1, 2001, in the wake of September 11. The *Immigration and Refugee Protection Act* casts a wide net over non-citizens rendered inadmissible on security grounds, expands the detention power over designated security risks, and reduces access to independent review of Ministerial security decisions.

Despite the focus on intensification of border control in light of September 11, I argue that both the event itself and Canada's legislative response, the proposed *Anti-Terrorism Act* (Bill C-36)² and the security provisions of the *Immigration and Refugee Protection Act*, reveal how the functionality of borders is simultaneously overdetermined and crucially destabilized by the quest for security. By this I mean that the only question asked about immigration policy at present is whether and how effectively it enhances the security of citizens. Yet this singular insistence upon what borders *must* do, namely, protect Us from Them, cannot but expose the limits on what borders *can* and *actually* do. This in turn returns us to the disjuncture between how we imagine the borders that circumscribe our national communities, and how we imagine those communities. By examining how the events of September 11 and the response to date complicate our tacit associations between borders and territoriality, sovereignty and security, I intend to reveal how the functionality of borders is being eroded even as – or perhaps because – the demand to fortify them is reaching new levels of fervour.

Territoriality

Every schoolchild in Canada is acquainted with the borders demarcating her country. Maps hang on classroom walls and their brightly coloured lines jauntily inform us of where our country begins and ends. The oft-repeated claim that the Canada-US border is the longest undefended border in the world only reifies the border's autonomous existence in the collective imagination, proving that no material effort is required to signify or maintain it.

How have recent events challenged assumptions about territoriality and borders? First, if one looks back from September 11 and considers other attacks on US interests, it becomes obvious that assaults on a given state do not actually require access to its territory. The United States has been attacked in its embassies in Kenya and Tanzania, in military operations in Somalia, at sea as well as on land.³ The territoriality of borders is also challenged by tactics of terror that do not rely on the corporeal presence of the perpetrators: letters with anthrax powder can be mailed from anywhere, and internet viruses launched from abroad can wreak havoc in the time it takes us to open an e-mail message.

Enemies of a state exploit the discontinuity between territorial boundaries and the nation-state, but many states do as well. I am referring here not to the obvious military, diplomatic and economic presence of states outside their borders, but rather to increasing efforts to control access to territory through extraterritorial measures. Visa requirements are the oldest and most obvious example. A more recent illustration is the US immigration and customs pre-clearance point at Toronto's Pearson Airport. Rather than wait until landing on American soil, US-bound air travelers submit to 'border' inspection before departing Canada. Expedience and convenience explain this initiative, but less benign motives animate Canada's extensive interdiction strategy.⁴ Canada routinely imposes visa requirements on countries that generate significant refugee flows in order to prevent refugee claimants from reaching the Canadian border.⁵ Canada also penalizes private carriers who transport improperly documented passengers to Canada. One consequence of this policy is the tacit conscription of private airline, transport and shipping employees as amateur immigration officers, who attempt to avoid carrier sanctions by examining travel documents and rejecting passengers with documents deemed suspicious. Much publicity accompanied the Australian government's recent interdiction of a boat carrying asylum seekers (mainly Afghan and Iraqi) en route from Indonesia. But Canada set a precedent in 1998 with the interdiction of a boat of 192 Tamil asylum seekers off the coast of Africa. The ship was escorted back to Sri Lanka, where all passengers were detained and at least one was tortured by Sri Lankan authorities.⁶

All of these interdiction techniques represent extra-territorial assertions of state coercion to facilitate more effective border control. Canada boasts of deflecting 33,000 people from reaching Canada in the past five years, and Canada's interdiction practices have been invoked to assure Canadians that the government indeed takes decisive action to protect the integrity of the border by preventing the arrival of undocumented

and improperly documented migrants.⁷ Since these same strategies also render it virtually impossible for refugees to obtain legitimate travel documents for Canada, the number of refugees caught in the interdiction net can never be known.

Terrorism may not respect borders, but neither do states in pursuit of border control. The result is a trend toward the decline of geo-political borders as the limit of state jurisdiction or assertion of power over non-citizens.

I have watched with bemusement as public debate has erected the concept of a 'security perimeter' as a means of ensuring greater protection from external threat. My first response was to wonder exactly what was meant by 'security perimeter.' When I could not discern a consistent definition for the term, my next response was to wonder what work was being done by an expression so manifestly imprecise. I have since come to view the 'security perimeter' as a discursive security blanket, one that furnishes comfort by conjuring up a visual image around which people can deposit their anxieties. From a functional perspective, the vagueness of the term is one of its virtues, for it has the capacity to mutate into whatever is required to perform its task of reassurance.

A minimalist conception of a security perimeter denotes little more than improved co-ordination in the gathering and sharing of intelligence within and between Canadian and US state agencies, such as the FBI, CIA, CSIS, Citizenship and Immigration, Immigration and Naturalization Service, and municipal, state and provincial police.⁸ Improved methods of gathering data, and technology that enables access to multiple databases of security related information play a central role in this conception of a security perimeter. Another version of the security perimeter consists of harmonization of examination and enforcement practices, including detention, border inspection, and removal.⁹

A stronger variant of a security perimeter more or less adopts the European Union as a precedent:¹⁰ Standards of entry for third country nationals are harmonized between all Member states, and once an individual passes through the external border, internal borders within the Union are erased for purposes of travel. A common EU list of visa-exempt countries is a pre-requisite to the implementation of a single external border. Pursuant to the provisions of the *Dublin Convention*,¹¹ an asylum claim must be lodged in the first EU country to which a claimant arrives, and the result is binding upon all Member states. Preliminary discussions have also been conducted on the adoption of a common interpretation of the international refugee definition.¹²

The most ambitious version of a security perimeter purports to supplant the full range of national selection, admission and enforcement policies with a binational scheme, jointly administered by Canada and the US.¹³ A momentary glance at Canada's new *Immigration and Refugee Protection Act* and its mammoth and byzantine US counterpart should satisfy any reasonable observer that such a prospect is hardly feasible. I leave for future discussion the myriad theoretical objections one might mount to a comprehensive immigration policy. However, it should be noted that consolidating criteria for immigration is not an issue in the EU because all member states understand themselves not to be countries of immigration. Therefore, none have developed schemes for the systematic, permanent admission of immigrants, apart from family reunification or asylum. There is nothing for EU Members to co-ordinate as individual states.

The idea of co-ordinating refugee admission (inspired by the European Union's Dublin Convention) was the subject of a Canada-US Memorandum in the 1990s.¹⁴ The core of the proposal required refugee claimants to lodge their claim in the first country of arrival. An unsuccessful claimant would be prohibited from filing a second claim in the other country. Negotiations around the Memorandum of Understanding lost momentum and the agreement was never finalized. Among other things, the fact that most refugee claimants arrive in Canada by transiting through the US meant that the Agreement would redound primarily to Canada's benefit and leave the US processing the vast majority of North American claims. Despite this asymmetry, the idea of a common refugee admission scheme has been revived lately under the rubric of the security perimeter.¹⁵

To the extent that a security perimeter would involve a common, standardized set of procedures governing admission of third-country nationals (non-citizens of North America), it follows logically that the border between Canada and the US should be permitted to atrophy for purposes of cross border movement. For those who identify at the border as Canadian or US citizens, the change would hardly be noticeable – until September 11, border officials exerted only nominal control over cross-border movement of most citizens anyway.¹⁶ It could, however, make a significant difference for third party nationals, since the external border examination would presumably obviate the need for a check at the Canada-US border.

The operative premise is that the security of the individual state (be it Canada or the US) would be better served through a supra-national

mechanism that conjoins the territory of the two states into one administrative unit. The assumption hitherto has been that national security is best assured by fortifying the borders that define each country as a sovereign entity. The effect of adopting a security perimeter is to decouple national security from territoriality. A certain paradox lurks here, for the concept of a US–Canada security perimeter surely subverts the function of borders as the means of securing the territory contained within them.

Sovereignty

Like a deranged man who compulsively confesses to crimes he did not commit, a coterie of Canadian media commentators and right-wing politicians have tripped over each other in the rush to blame Canada's allegedly lax refugee policies for September 11 in particular and global terrorism in general.¹⁷ Despite the dearth of evidence in support of this allegation, two cases are repeatedly cited as illustrative of the failings of Canadian refugee policy.¹⁸ The first concerns Ahmed Ressay, an Algerian national caught by US authorities in December 1999 as he tried to cross into the US border from British Columbia with a trunk full of explosives. He was apparently headed for Los Angeles, where he intended to detonate a bomb at LA International Airport. Ressay had made a refugee claim in Canada a few years earlier.

So too had Nabil al-Marabh, a Syrian national born in Kuwait who is presently detained in the US on suspicion of links to Al-Qaeda. In fact, both Ressay's and al-Marabh's refugee claims were rejected. Al-Marabh left Canada in 1995, and re-entered the US, where he apparently resided and worked prior to making his refugee claim in Canada.

In July 2000, al-Marabh was caught trying to enter the US illegally from Canada. At the time, he was wanted in Massachusetts for violation of a probation order arising out of a conviction for stabbing his roommate. He was also under suspicion by US intelligence for security related reasons. Yet US border officials were ignorant of his chequered history in the US when he was caught at the border, and simply turned Al-Marabh back over to Canada.

Ressay was not deported from Canada, and there is some indication that one reason was that deportations to Algeria were suspended due to the massive human rights violations in that country, but another reason was that CSIS wanted to keep him under surveillance in Canada. Eventually, he fraudulently obtained a Canadian passport in the name of Benni Noris and left the country on his own initiative to pursue training at an

Al-Qaeda camp in Afghanistan. Ressaym re-entered Canada on his Canadian passport and false identity, thereby eluding CSIS upon return.

While the respective cases of Ressaym and el-Marabh case reveal egregious failures of Canadian and US intelligence and enforcement, both in terms of detection and of co-ordination, in neither case was the refugee determination system the weak link. Both men's refugee claims were rejected. Nor is there evidence that any of the actual perpetrators of the September 11 hijacking/bombing entered the US as refugee claimants, much less Canada. Each apparently arrived with fixed-term visitor or student visas and then overstayed their visas, thereby joining the ranks of an estimated 6 million other migrants residing in the US without legal status.¹⁹ Despite its harsher detention policies, especially in relation to undocumented asylum seekers, the US is generally no more successful in Canada at monitoring the whereabouts, much less removing, migrants lacking legal status.²⁰ Indeed, about half of Canada-bound refugee claimants seek entry at the Canada-US border. The obvious inference is that it must be easier for many refugee claimants to enter the US than Canada.²¹ None of these facts have dispelled the notion that refugee policies are somehow responsible for rendering Canada's border dangerously porous. Why?

I believe the answer lies in the popular belief that excluding non-citizens is the ultimate prerogative of sovereignty.²² Canadians assume that the state has an unfettered right to admit or refuse any non-citizen in accordance with its own legal standards. The categories of prospective entrants (visitors, temporary workers, economic immigrants, and family class) and the criteria for entry are all creatures of Canadian immigration law. Their admission is governed by Canadian immigration law, and if Parliament wishes to change the rules, it can do so. The singular exception to this principle are refugee claimants who arrive at Canadian ports of entry seeking asylum. By virtue of Canada's international obligations under the 1951 UN *Convention Relating to the Status of Refugees*,²³ Canada is bound not to *refoule* (return)²⁴ a person who meets the international definition of a refugee. Refugee claimants are self-selected in the sense that they choose Canada; Canada does not choose them. If they reach the border and meet the refugee definition, Canada must accept them. Of course, as noted earlier, Canada expends considerable effort on preventing refugee claimants from reaching Canada. Part of that task is achieved through a chain of discursive links that discredit them upon arrival: Citizens of most countries require visas to enter Canada; Canada does not issue visas to persons deemed likely to make a refugee claim;

people without visas cannot lawfully enter Canada; Refugees often resort to smugglers who furnish false documents or otherwise circumvent border control; persons who enter Canada without the requisite documents are illegal immigrants, and illegal immigrants represent a breach of security for Canada. *Ergo*, refugees are a danger to the security of Canada.

If one takes the view that the refugee regime imperils Canadian sovereignty by foisting the uninvited upon us, how better to demonstrate the catastrophic consequences of 'losing control' than by linking the events of September 11 to refugee admission? I suggest that this visceral anxiety about sovereignty offers the best account for the demonization of refugees as the figurative culprits for September 11.

Having said that, I suggest that if there is a correlation between sovereignty, security and border control, the place to look is not the refugee regime, but to an array of neo-liberal shifts in governance. Free trade advocates often point to increased border traffic as an indicator of NAFTA's success. One need not hypothesize about the consequences of accelerated movement of capital and goods on the movement of labour to recognize that increased cross-border human movement (whether as business professionals, tourists, freight carriers, etc.) is an inevitable corollary of liberalized trade between contiguous states. A second dimension of neo-liberal governance is the downsizing of the public sector as part of an overall campaign to diminish the scale of government in absolute terms and in relation to the private sector. Budget cuts and staff reduction in the immigration bureaucracy played out in office closure, fewer resources to devote to investigation and enforcement, and overall demoralization and decline in service delivery.²⁵ A similar story could be told of CSIS and the RCMP.

Privatisation of airports relegated airport security to market discipline, where maximizing return on investment resulted in insufficient numbers of security personnel who were poorly paid, inadequately trained and unlikely to remain in the job. The tragic consequences of the privatization of airport security in the US are evident.²⁶

The upshot of freer trade and less government is the quantitative and qualitative decline in resources allocated to vetting increased numbers of border-crossers. One concrete example concerns refugee claimants. Although border officials are legally authorized to commence security inquiries at the border, lack of resources meant that refugee claimants were routinely admitted and given forms to fill out and mail back. Although immigration officials are legally entitled to photograph, fingerprint and examine refugee claimants at the port of entry, lack of personnel made it impossible for immigration officers to conduct extensive inter-

views at the port of entry. I emphasize, however, that this laxity had nothing to do with refugee policy, or a dearth of state power, but was entirely attributable to lack of staff and resources to do the job. In the wake of September 11, Minister Caplan announced a resumption of 'front-end screening' of refugee claimants, and promised an additional \$9 million for detention, screening and deportation, and \$17.3 million to expedite development of a permanent resident card to replace the notoriously flimsy 'IMM1000'.²⁷

By drawing connections between neo-liberal policies and systematic security lapses, I am not attempting to mount an anti-free trade argument based on security considerations. My claim is rather that the relationship between sovereignty, state policy, and the policing of borders cannot be reduced to a simplistic equation between a specific admission policy and security. It should not escape notice that the loudest voices expressing concern about intensified border inspection have not been refugee advocates or civil libertarians; the voices belong to owners, managers, and employees justifiably distressed about the detrimental commercial impact of increased delay at the US-Canada border.²⁸ Perhaps some Canadians would not agonize over perceived trade-offs between national security and our moral and legal obligations to refugees: They are all too willing to sacrifice the latter in the name of the former. Many Canadians would struggle, however, over actual trade-offs between security-related practices and trans-border economic activity. And that is where the real trade-offs will be.

It seems reasonable to assert that drawing a perimeter around two or more countries and erasing internal borders may confer efficiency benefits on a free trade regime by expediting cross-border movement. It is not at all apparent how it enhances security. After all, erasing the internal border only removes an additional check, and no matter how strict the scrutiny at the external border, no screen is infallible. In any event, voluntarily undertaking to provide refuge to persons fleeing persecution is no more or less a surrender of sovereignty than choosing to relinquish control over Canadian borders, whether in the name of free trade or in the name of security. Once this point is acknowledged, the talismanic power of borders as the sign of sovereignty is crucially disrupted.

Securing the Nation

Until Bill C-36, terrorism as a discrete legal category of conduct only existed within the confines of the immigration legislation. A non-citizen is inadmissible if, *inter alia*, reasonable grounds exist to believe that the

person is, was, or will be²⁹ a member of an organization that there are reasonable grounds to believe is, was, or will be engaging in terrorism, acts of espionage or subversion against a democratic government, or acts of subversion against any government. A non-citizen may also be removed if there are reasonable grounds to believe the person is, was or will be a danger to the security of Canada.

Locating terrorism exclusively in immigration legislation institutionalized in law the figure of the immigrant as archetypal menace to the cultural, social, and political vitality of the nation. The myriad tropes of the foreign Other – as vector of disease, agent of subversion, corrupter of the moral order and debaser of the national identity – all trade on the exteriorization of threat and the foreigner as the embodiment of its infiltration. Canadian immigration history is replete with examples, ranging from the exclusion of racialized groups on grounds of inferiority and degeneracy, to the deportation of foreign-born labour and social activists in the inter-war years, to the persistent stereotype of immigrants as distinctively crime-prone.³⁰ In this symbolic order, the border of the state is akin to the pores of the national corpus, and expelling the foreign body serves to restore the health of the nation.

Viewed within a historical and semiotic frame, the equation of terrorism with foreignness follows almost axiomatically. Yet, the image of terror as a foreign import, something that adheres to foreigners as part of their personal/cultural baggage, was challenged by the revelations that Ahmed Ressay was recruited in Montreal. Some of the World Trade Centre perpetrators were apparently recruited in Hamburg.³¹ The most scrupulous inspection or background check prior to admission to Canada or Germany would not have detected them as terrorists because they had yet to become terrorists.

Unlike the *Anti-Terrorism Act*, immigration legislation has consistently refused to actually define terrorism. The notorious difficulty of providing a neutral objective definition for such an inherently political concept has been thoroughly explored in the Canadian and international context by Sharryn Aiken and others.³² Despite the ambiguity and imprecision of the term, its chilling effect on lawful expression and association by non-citizens, and the particularly dire consequences of its deployment against refugees, the Federal Court of Canada resolutely refused to define it or to strike it down as unconstitutionally vague. Mr. Justice Denault's comments in *Re Ahani*³³ are particularly noteworthy for the judge's eccentric approach to statutory interpretation:

In my view, since Parliament has decided not to define these terms, it is not

incumbent upon this Court to define them ... I do not share the view that the word [member] must be narrowly interpreted. I am rather of the view that it must receive a broad and unrestricted interpretation. As to the word 'terrorism,' while I agree with counsel for the Respondent that the word is not capable of a legal definition that would be neutral and non-discriminatory in its application, I am still of the opinion that the word must receive an unrestricted interpretation.³⁴

As Sharryn Aiken comments, Denault J's ruling effectively concedes that 'terrorism' is incapable of a definition that would meet the requirements of the rule of law and the *Charter* – neutrality and non-discrimination. Nevertheless – or perhaps therefore – the term must not only be applied, but warrants 'an unrestricted interpretation.'³⁵

In the recently argued *Suresh*³⁶ and *Ahani*³⁷ appeals, the Supreme Court of Canada was called upon to find 'member' and 'terrorism' unconstitutionally vague. Whatever the Court's ruling on the terrorism issue, its impact will have been dissipated by the *Anti-Terrorism Act*, which does define terrorism. On the other hand, since membership in a terrorist organization is not criminalized in the *Anti-Terrorism Act*, the Supreme Court of Canada's ruling on this issue remains pertinent.

Why did the drafters of the *Anti-Terrorism Act* elect to exclude membership and define terrorism? I can only speculate that in the course of 'Charter proofing' Bill C-36, the government recognized that prohibiting membership would likely violate freedom of association and 'terrorism' was indeed too vague to withstand constitutional scrutiny – at least where the rights of *citizens* were ostensibly at stake.

The truth is that laws that arouse deep concern about civil liberties when applied to citizens are standard fare in the immigration context. Critics of Bill C-36 point with alarm at the imprecision of the definition of terrorism (s. 83.01(1)(b)), non-disclosure of information to an accused (s.38.06) and warrantless, preventive detention (s. 83.3(4)). I have already noted the absence of any definition whatsoever of terrorism in immigration law, although I anticipate that the definition in the *Anti-Terrorism Act* will eventually be incorporated into regulations under the *Immigration and Refugee Protection Act*. Immigration law already permits automatic, indefinite warrantless, preventive detention of a non-citizen if the Minister of Citizenship and Immigration and Solicitor General sign a certificate declaring the person concerned to be a security risk.³⁸ The certificate process contained in Bill C-36 with its non-disclosure provisions, was inspired by the existing certificate process in immigration law.³⁹ Immigration lawyers have accumulated years of experience attest-

ing to the near futility of trying to adequately represent an individual without proper access to the evidence against him or her. This certificate process, as applied against a permanent resident suspected of involvement in organized crime, survived a 1992 constitutional challenge in *Chiarelli v. Canada*.⁴⁰

Under immigration legislation, the standard of proof required to trigger inadmissibility and deportation (including *refoulement*) is nothing more than 'reasonable grounds to believe,' as applied to past, present or future membership in organizations, and to the past, present or future activities of those organizations. This standard is even lower than the civil standard of balance of probabilities, and compounded in the case of membership by its double deployment. Conversely, conviction for a criminal offence related to terrorism will require proof beyond a reasonable doubt. Only non-citizens are subject to regulation by immigration law, but the *Criminal Code* applies to all.

Contrary to the exhortations of media pundits and anti-immigrant crusaders, the Constitution has proved a fairly thin cloak protecting non-citizens. The main exception is *Singh v. MEI*,⁴¹ which guaranteed refugee claimants a right to an oral hearing in the determination of their claim. While it is technically true that most *Charter* rights apply to all persons physically in Canada,⁴² in practice the courts have sharply circumscribed the nature and extent of those rights for non-citizens faced with removal. The jurisprudential rationale for these outcomes typically partakes of three related propositions:

- 1 Non-citizens have no unqualified right to enter or remain in Canada.
- 2 Therefore, deportation outside the refugee context does not engage any life, liberty or security of the person interest (s. 7), nor is it cruel or unusual treatment or punishment (s. 12).
- 3 Even if a s. 7 interest is violated by deportation, the intensity of the violation is diminished by the feeble quality of the non-citizen's right (see 1 and 2), such that the principles of fundamental justice demand no more than whatever the state has already elected to do in the circumstances.⁴³

The fact is that immigration law has long done to non-citizens what the *Anti-Terrorism Act* proposes to do to citizens – without public outcry and with judicial blessing. Despite the demand from some quarters to invoke s. 33 of the Constitution to expel non-citizens from the shelter of the *Charter*,⁴⁴ proponents of the override are fighting a gratuitous battle.

This, of course, begs the question of what advocates of the notwithstanding clause believe its invocation would do to enhance security.

In any event, by shifting the locus of terrorism from immigration to criminal legislation, the Government has institutionally destabilized the figure of the foreigner as the paradigmatic source of danger to the security of the nation, and the border as the site for removal of the threat. Once terrorism is transposed to the criminal context, it becomes rather more difficult in principle to distinguish Timothy McVeigh the criminal from Mohammed Atta the terrorist. This transposition of terrorism to domestic criminal law arguably erodes the primacy of borders in securing the nation.

In one respect, this shift in emphasis represents a positive development for non-citizens. Where imprisonment for a criminal offence is at stake, citizenship is irrelevant to the *Charter* calculus: Non-citizens-R-Us. It is good news for non-citizens especially because, as any informed person knows, in practice the primary targets for surveillance, investigation, apprehension, detention and prosecution under the various provisions of the Anti-Terrorism Act will be persons born outside Canada, especially Arabs, Muslims and migrants from particular conflict ridden countries.⁴⁵ As one journalist commented shortly after Bill C-36 was introduced:

... most Canadians will not be terribly inconvenienced by Ms. McLellan's proposals. Instead, the costs will be borne by people who find themselves targets of police suspicion because of their ethnic background, radical political views or association with immigrant communities that have ties with groups deemed to be terrorist fronts.⁴⁶

By extension, the organizations that will attract greatest scrutiny as potential 'terrorist groups,' (financial support of which will be deemed to facilitate terrorism), and the charities most likely to be deregistered, will be those serving communities connected to regions of conflict, repression, and civil strife. As the Canadian Council for Refugees recently submitted,

groups that commit acts that may be characterized as 'terrorist' are often multi-faceted, and not necessarily limited to a single, violent purpose. People may be members of or associated with a group without being involved in or supporting 'terrorist' actions and perhaps even without knowing that they are being committed.

...

[Many immigrant communities] face the problem that the complexities of events in their home countries are little understood in Canada, with the result that support for a political option might be confused with support for violent actions.⁴⁷

The security provisions in immigration law already have a chilling effect on lawful political expression, advocacy and association by diasporic communities. The temperature will only drop further under the security gaze of the *Anti-Terrorism Act*. It is sadly ironic that refugees attract particular suspicion, for as Reg Whitaker explains:

The very nature of a Convention Refugee claim: a 'well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion' arises out of political conflicts that are unlikely to be contained within the country of origin. Spread of such conflicts is always a fear, and in the age of international terrorism and the global telepolitics of violence, this fear is not always imaginary. There is always some suspicion that attaches to anyone who has had to flee one state on political grounds, a kind of irreducible aura of political instability that could potentially threaten the order of the host country.⁴⁸

Members of diasporic communities, whatever their immigration status, will experience more than ever how boundaries demarcated by ethnicity, culture, religion and politicization emerge in sharp relief, while inclusion within the boundary defined by citizenship status recedes in import when viewed through the lens of the state's surveillance camera. Boundaries of membership and modes of exclusion can be (and regularly are) redrawn from within the nation. They trace themselves along fault lines that erupt along the surface of our pluralistic, multicultural, democratic country when stressed by real or perceived crisis.

Assuming they are prosecuted under the criminal law, non-citizens accused of terrorism-related offences can claim Charter protection *qua* accused, a status that attracts significantly greater judicial consideration than the status of non-citizen. Yet I strongly doubt that my assumption is valid. If the history of war crimes prosecutions provides any guidance, criminal prosecution for terrorism-related offences will prove difficult, if not futile, precisely because it must be done in a manner that respects fundamental rights and freedoms of accused. Wherever possible, I anticipate that the state will take advantage of the broad investigative powers conferred under the *Anti-Terrorism Act* to gather evidence to have the

person concerned declared a security risk under the *Immigration and Refugee Protection Act*. Simply put, it is easier in law to deport than to imprison. At present, this conclusion obtains even if the deportee has lived in Canada since infancy and, subject to the Supreme Court of Canada's judgment in *Suresh*, even if he or she faces torture or death upon return.⁴⁹

There is an even more cynical reason for believing that non-citizens will be the primary target and immigration law will be the instrument of choice for state authorities: Security agencies sometimes play what Reg Whitaker labels 'intelligence games' with non-citizen subjects of investigation (especially refugees), dangling before them the prospect of secure immigration status in exchange for becoming 'co-operative' intelligence sources. Whitaker effectively captures the disjuncture between what security personnel believe they are doing and what the subject experiences:

The agency sees no conflict with the official purposes of screening. This methodology simply allows them greater amplitude in carrying out their task to guard against threats to national security. From the point of view of the subject, however, the process may appear very different indeed, forcing crises of conscience and loyalty, and sometimes even involving dangerous, life threatening situations. The long-term psychological cost to someone who agrees to such an arrangement may be very debilitating, even where refuge and thus a degree of security has been purchased.⁵⁰

Refugees are probably most vulnerable to this game, but since all non-citizens are subject to a minimal 'reasonable grounds to believe' standard of proof regarding conduct that is itself indeterminate, the genuine fear of deportation by genuinely innocent people makes non-citizens susceptible to pressure in a way that citizens are not. Only in the case of an immigrant who has acquired Canadian citizenship will resort to the criminal law be necessary. In practice, I forecast that reliance on immigration law will effectively reinscribe the border dividing citizens and non-citizens that Bill C-36 effaces in theory.

Taking seriously the proposition that terrorism transcends national borders invites another perspective on the instrumental choice between deportation and prosecution. If terrorist acts can be committed beyond the territory of the target state (US embassies in Kenya and Tanzania, the *SS Cole*), if anyone armed with a computer and a modem can wreak havoc on international financial markets, if anthrax can be mailed from

anywhere, how much security can expulsion buy? It is not obvious that deporting a person who is determined to engage in acts of terror back to, say, Afghanistan, Sudan or Iraq will deny him the opportunity to pursue his objective at some later date, perhaps through other means. In other words, if the War Against Terrorism is indeed global, and the objective is to 'get the guilty "off the international streets,"'⁵¹ then deporting the 'guilty' (in immigration terms, a person who there are reasonable grounds to believe is, was, or will be a member of an organization that there are reasonable grounds to believe is, was, or will be engaging in terrorism) to another neighbourhood is a singularly parochial and ineffectual reaction. It rather resembles the Not In My Back Yard phenomenon in zoning disputes, transposed to the global realm.

If prosecution is arguably a more coherent response than deportation, important questions arise regarding the relative merits of national versus international prosecution. I do not propose to embark on that inquiry here, except to suggest that if we understand our national and/or international quest for security as predicated on concerns and entitlements that derive from our common humanity, we are compelled to acknowledge that those who stand accused of perpetrating heinous crimes against our collective security must be judged according to norms and processes that also derive from our common humanity, and not from their citizenship status *vis a vis* any particular state.

Conclusion

I am not making a categorical claim that borders no longer matter. Nor do I wish to imply that the permeability of borders is irrelevant to security.

But to the extent that the functionality of geo-political borders is waning, one observes a displacement of their functions to other socio-legal processes and phenomena. Thus, Bill C-36 enlarges the scope for state practices that marginalize and stigmatize through heightened surveillance, harassment, ethnic profiling, and the like. These in turn may reverberate in discrimination in domains such as employment, financial relations and associational life. The effect is to alienate the subject from social citizenship, even if legal citizenship is already secured. And while many look to the criminal law to protect us from the enemy within, I urge us to attend to the law's role in producing the alien within. The history of this country gives one ample reason to worry about the extent to which an abstract, collective security will be purchased through the

infliction of tangible insecurity on particular individuals and communities.

All this because of September 11. We have been told that the atrocity posed such a massive challenge to our collective security, an existential threat to our way of life, that we are virtually driven to adopt a response of the magnitude of Bill C-36. I do not agree. But rather than argue the point, I wish to recall another date, one that is perhaps less easily recognized: June 22. On that date in 1985, a flight that began in Vancouver exploded in mid-air off the coast of Ireland. Three hundred and twenty-nine people died, mostly Canadian citizens and permanent residents. The cause of the explosion was a bomb planted in luggage. Until September 11, it was the single deadliest terrorist attack in aviation history. And yet, I do not remember our elected officials denouncing the event as a fundamental assault on our nation, our values, our people. No foreign leader declared 'we are all Canadians.' I do not recall any public outcry for anti-terrorist legislation to protect us from the transnational, existential threat to our democratic polity. I am not suggesting that the correct response would have been to enact legislation of the sort before us now. But I do wonder what vision of the nation animated the drafters of Bill C-36, and whether that vision would include the passengers aboard Air India Flight 182.

Notes

* The author wishes to thank Andrew Brouwer for his excellent assistance, and Sharryn Aiken and Mariana Valverde for their comments and suggestions, and Elaine Gibson for her timely editorial assistance.

1 Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 1st Sess., 37th Parl., 2001, passed 1 November 2001.

2 Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, 1st Sess., 37th Parl., 2001.

3 United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed on August 7, 1998. [<http://www.fbi.gov/majcases/eastafrica/summary.htm>]; American soldiers were captured and killed by Somali warlords in Mogadishu in October 1993; The USS COLE (DDG 67) was attacked in the port of Aden, Yemen, on 12 October 2000. [<http://www.defenselink.mil/pubs/cole20010109.html>].

- 4 See, generally, Canadian Council for Refugees, 'Canadian Measures of Interdiction,' *CCR Task Force on Interdiction*, 1998.
- 5 C. Clark, 'Attempts to stem refugee flow bogged down – bureaucratic tensions delay imposition of visa rules for Hungarian claimants' *The Globe and Mail* (2 November 2001) at A13.
- 6 See Sharryn Aiken, 'Manufacturing Terrorists: Refugees, National Security and Canadian Law (Part 2), (2001) 19(4) *Refugee* 116 at 124. A recent government document actually proposes authorizing Canadian law enforcement officials to board ships on the high seas to deflect would-be migrants: A. Humphrey, 'Seizure of boats outside Canadian limits proposed,' *National Post*, November 2, 2001 <http://www.nationalpost.com/news/story.html?f=/stories/20011102/767096.html>
- 7 A. Thompson, 'Is Canada Really the Weak Link?,' *Toronto Star* (6 October 2001).
- 8 'When I talk about the perimeter, I'm talking about doing a better job as people come in from overseas,' he said. 'As people come in from overseas, we want to have these common security efforts, and the compatibility on security efforts would be helpful. But I don't think anyone is saying you have to have exactly the same immigration policies.' US Ambassador Paul Celluci in C. Clarke, 'Canada urged to do more about security' *The Globe and Mail* (1 November 2001) at A10.
- 9 A. Thompson, 'Canada, US edge toward joint screening,' *Toronto Star*, 31 October 2000.
- 10 'Some ministers, including John Manley, the Minister of Foreign Affairs, and Jean Chrétien, the Prime Minister, are leery of the word ["perimeter"]. They fear it implies an extraordinarily ambitious co-ordination of the two countries' security forces along the lines of the 13-nation 'Schengen Area' in Europe.' R. Fife and P. Wells, "'Perimeter" has Liberals drawing battle lines – Semantics split Cabinet' *National Post* (1 November 2001)
- 11 *Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, signed 15 June 1990, entered into force 1 September 1997, reprinted in G.S. Goodwin-Gill, *The Refugee in International Law*, 2d ed. (Oxford: Clarendon, 1996) at 454–63.
- 12 Presidency Conclusions, Tampere European Council (15 and 16 October 1999), reproduced in (1999) 11 *Int'l J of Refugee Law* 738.
- 13 'U.S. President George W. Bush took a step toward the creation of a North American security perimeter yesterday, ordering his officials to begin harmonizing customs and immigration policies with those of Canada and Mexico ... Mr. Bush ordered administration officials to work to ensure "maximum possible compatibility of immigration, customs and visa policies," according to a White House statement.' C. Clark, 'Bush aims to tighten continent's borders – U.S. bid to harmonize immigration and customs puts heat on Chretien' *The Globe and Mail* (30 October 2001) at A1. 'Paul DeVillers, chairman of the Liberal national caucus, is also on side, saying most Liberal MPs don't care whether "North American perimeter" is used when talking about common immigration and border security policies.' I think the concept that we have to have co-ordinated security measures so we have similar programs is generally acceptable within the caucus,' he said.' R. Fife and P.

- Wells, "Perimeter" has Liberals drawing battle lines – Semantics split Cabinet' *National Post* (1 November 2001)
- 14 Preliminary Draft Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in Examination of the Refugee Status Claims from Nationals of Third Countries, 24 October 1995 [unpublished]. See generally J. Hathaway and A. Neve, 'Fundamental Justice and the Deflection of Refugees from Canada,' (1996) 34 *Osgoode Hall LJ* 213.
 - 15 C. Clark, 'Bush aims to tighten continent's borders – U.S. bid to harmonize immigration and customs puts heat on Chretien' *The Globe and Mail* (30 October 2001) at A1. C. Clark, 'Canada in talks with U.S. on pact dealing with refugees, visitor visas,' *Globe and Mail*, 26 October 2001, A6 http://www.globeandmail.com/servlet/GIS.Servlets.HTMLTemplate?tf=tgam/search/tgam/SearchFullStory.html&cf=tgam/search/tgam/SearchFullStory.cfg&configFileLoc=tgam/config&encoded_keywords=immigration&option=&start_row=9¤t_row=9&start_row_offset1=&num_rows=1&search_results_start=1. I do not support a harmonization of refugee admission between Canada and the US, given that the procedural protections and substantive interpretation of the refugee definition differ between the two countries. Moreover, a recent article about the implementation of the *Dublin Convention* concludes that 'The basic problem with the Dublin Convention of 1990 is that it does not really work. Since its coming into force in September 1997 only a few states have been able to use it successfully to return asylum seekers to the first country of arrival within the European Union.' Nicholas Blake, 'The Dublin Convention and Rights of Asylum Seekers in the European Union,' in E. Guild and C. Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, (Oxford: Hart Publishing, 2001), 95.
 - 16 Indeed, I understand anecdotally that Canadian police attribute the rise in urban shooting deaths in Canada to the ease with which US citizens can import guns (legal in the US) into Canada, where they are illegal.
 - 17 See S. Bell, 'A conduit for terrorists' *National Post* (13 September 2001); Diane Francis 'Canada gets well-deserved U.S. snub – Our neighbour's upset over our loose refugee system.' *Financial Post* (22 September 2001). D. L. Brown, 'Attacks Force Canadians to Face Their Own Threat' *The Washington Post* (23 September 2001) at A36. J. Baglole et al. 'Pressure Rises on Canada to Get Tough with Foreigners Seeking Refugee Status,' *The Wall Street Journal*, September 24, 2001. Politicians on the right have also been quick to blame Canada. Since September 11, Canadian Alliance leader Stockwell Day has repeatedly argued that Canada's immigration and refugee policies are too lax. On October 26, 2001, he told the CBC: 'We've got to send a message around the world that Canada is prepared and able to screen and monitor people trying to get here ... (Criminals) say to themselves, "Where are the points of access, or where are the countries we know that aren't as tough as other countries?" And, unfortunately, Canada has some loopholes here.' [CBC News Online staff, 'Ports need more police: opposition,' http://vancouver.cbc.ca/cgi_bin/templates/view.cgi?category=Canada&story=/news/2001/10/26/ports_security011026]

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- 18 My summary of the cases of Ahmed Ressam and Nabil Al-Marabh is distilled from various media accounts. Given that the media reports are not entirely consistent, I acknowledge the possibility that elements of my composite may eventually prove inaccurate. S. Bell et. al, 'Canada let loose terrorism suspect,' *National Post*, 21 September 2001. P. Cheney et al., 'The mystery of the invisible al-Marabh Terrorist kingpin or ordinary store clerk?,' *Globe and Mail*, 27 October 2001 at A1. 'Proposed law would provide better shot at fighting terrorism, CSIS says,' *The Canadian Press*, 1 October 2001. <http://www.canoe.ca/NationalTicker/CANOE-wire.Terrorist-Cda-Immigration.html>. CBC News Online, 'Nabil al-Marabh Timeline' http://www.cbc.ca/news/indepth/background/wtc_amarabh_timeline.html. CBC News, 'Trail of a Terrorist,' broadcast 21 September 2001.
- 19 Valerie Lawton and Allan Thompson, 'Still in Canada? No One Knows,' *Toronto Star*, 7 October 2001 (internet edition).
- 20 *Id.* Both countries have about a 15% removal rate on outstanding deportation orders.
- 21 'Defenders of the Canadian system also note that some 40-50% of refugee claimants come to Canada from U.S. soil, where they had been admitted as visitors and were free to carry out acts of terrorism before even knocking on Canada's door.' L. Chwialkowska, 'Bordering on harmonization: Why Canada faces pressure,' *National Post*, 1 October 2001 <http://www.nationalpost.com/search/story.html?f=/stories/20011001/714752.html&qs=immigration>.
- 22 See R. Whitaker, 'Refugees: The Security Dimension,' (1998) 2(3) *Citizenship Studies* 413, 414-417.
- 23 Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 2545 (entered into force 22 April 1954), supplemented by the Protocol relating to the Status of Refugees, 606 U.N.T.S. 8791 (entered into force 4 October 1967) [hereinafter Refugee Convention].
- 24 Article XX of the Refugee Convention prohibits states party from returning an asylum seeker to their country of origin if they have a well founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion.
- 25 In its review of The Economic Component of the Canadian Immigration Program in its 2000 Annual Report, the Auditor General of Canada reported on the impact of cutbacks on service delivery:

In the meantime, the federal government began its Program Review, resulting in large cuts to the budgets of several departments and agencies. Citizenship and Immigration was no exception; its operating budget was cut by \$54 million, almost 20 percent, between 1996 and 1998. To be able to continue delivering its Immigration Program with fewer resources, the Department had to review several of its procedures, adopt new ways of doing business and make significant organizational changes ...

- Auditor General of Canada, 2000 Report (<http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0003ce.html>).
- 26 See P. Cheney, “‘Never mix security and profit’ – Passenger screening at airports is in chaos, leading to calls for Ottawa to take charge’ *The Globe and Mail* (3 November 2001).
 - 27 Citizenship and Immigration Canada, ‘Strengthened Immigration Measures to Counter Terrorism’ (News Release), 12 October 2001. G. Smith, ‘Canada locks out hundreds of refugees,’ *Globe and Mail*, 27 September 2001. <http://www.globeandmail.com/servlet/ArticleNews/printarticle/gam/20010927/UREFUM>
 - 28 See K. Lunman, ‘Waits at U.S. border hurting economy, B.C. Premier says – He urges PM to push for North American security perimeter’ *The Globe and Mail* (17 October 2001); P. Kuitenbrouwer, ‘Perimeter will save trade: CEOs – 74% say we need common security rules as worries mount over access to key market’ *National Post* (29 October 2001).
 - 29 *Immigration Act*, RSC 1985 c. 31, s. 19; *Immigration and Refugee Protection Act*, ss. 33,34. The interaction of s. 33 and s. 34(1)(f) of the *Immigration and Refugee Protection Act* create an ambiguity regarding whether past and future membership fall within the parameters of exclusion.
 - 30 See, generally, M. Trebilcock and N. Kelley, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: U of T Press 1998).
 - 31 S. Komarow, ‘Hijacking plan may have been bred in Hamburg’ *USA Today* (18 September 2001).
 - 32 Sharryn Aiken, ‘Manufacturing “Terrorists”: Refugees, National Security, and Canadian Law,’ (2001) 19(3) *Refuge* 54.
 - 33 [1998] F.C.J. No. 507 (T.D.).
 - 34 *Id.*
 - 35 Aiken, ‘Manufacturing Terrorists’ (Part 2) at 122. In a remark reminiscent of the US Supreme Court’s notorious definition of obscenity, Teitelbaum J. stated in the Federal Court (Trial Division) decision in *Suresh* that there is no need to define terrorism because ‘when one sees a ‘terrorist act,’ one is able to define the word.’ For an exploration of the relationship between emergency powers and the rule of law, see Dyzenhaus, this volume.
 - 36 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 FC 592 (CA), appeal to Supreme Court of Canada heard 22 May 2001 (judgment reserved).
 - 37 *Ahani v. R.* (1996) 37 CRR (2d) 181 (FCA), appeal to Supreme Court of Canada heard 22 May 2001 (judgment reserved).
 - 38 *Immigration and Refugee Protection Act*, ss. 77, 83.
 - 39 *Immigration and Refugee Protection Act*, s. 77.
 - 40 [1992] 1 SCR 711.
 - 41 [1985] 1 SCR 177.
 - 42 Mobility rights extend only to citizens and permanent residents, and voting rights are guaranteed only to citizens.
 - 43 *Chiarelli, supra.*

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- 44 See, for example, T. Kent, 'Immigration Now: How to Regain Control and Use it Well,' *Policy Insights* (Kingston, ON: School of Policy Studies, Queen's University, October 2001) available online <http://policy.queensu.ca/spspi/docs/tk1001.shtml>
- 45 The same conclusion applies perforce to the other provisions of the *Anti-Terrorism Act* that deal with money laundering and charities registration.
- 46 Shawn McCarthy, 'Sweeping curbs on freedom in antiterrorism legislation likely to go to top court,' *Globe and Mail* (16 October 2001), A5.
- 47 Canadian Council for Refugees, 'Comments of the Canadian Council for Refugees on Bill C-36, *Anti-Terrorism Act*,' 5 November 2001.
- 48 Whitaker, *supra* at 416.
- 49 Article 3(1) of the *Convention Against Torture* (CAT) prohibits return of a person to another state where there are substantial grounds for believing the person will be tortured. Canada signed CAT in 1984 and ratified it in 1987. One of the issues in Suresh is whether Canada may *refouler* Mr. Suresh to Sri Lanka on grounds that he is a member of a terrorist organization. The evidence tendered by the appellant is that he faces a substantial risk of torture if returned to Sri Lanka.
- 50 Whitaker, *supra*, at 427-28.
- 51 Mark A. Drumbl, 'Terrorist Crime, Taliban Guilt, Retaliatory Strikes and Western Innocence,' *Washington & Lee Public Law and Legal Theory Research Paper Series*, Working Paper No. 01-13, September 2001 at 16.
- 52 See M. Valverde, 'Governing Security – Governing through Security' (this volume).